



Statement of Issues

26 May 2016

Proposed acquisition of Asciano by a consortium comprising Brookfield, Qube & Others

Purpose

1. This Statement of Issues relates to the proposed acquisition of Asciano Limited (**Asciano**) by a consortium comprising Brookfield Infrastructure Partners L.P. (and certain of its affiliates) (**Brookfield**), Qube Holdings Limited (**Qube**), Global Infrastructure Management, LLC (on behalf of itself and its managed funds and clients) (**GIP**), Canada Pension Plan Investment Board (**CPPIB**), CIC Capital Corporation (**CIC Capital**), British Columbia Investment Management Corporation (**bclIMC**), GIC Private Limited (**GIC**) and Qatar Investment Authority (**QIA**) (collectively, the **Consortium**).
2. The Australian Competition and Consumer Commission (**ACCC**) commenced its consideration of the proposed acquisition on 30 March 2016.
3. This Statement of issues aims to:
 - give the ACCC's preliminary views on competition issues arising from the proposed acquisition
 - identify areas of further inquiry
 - give all interested parties an opportunity to comment
 - invite interested parties to submit information to assist the ACCC in its assessment of the issues.
4. A Statement of Issues published by the ACCC is not a final decision about a proposed acquisition, but provides the ACCC's preliminary views, drawing attention to particular issues of varying degrees of competition concern. It provides an opportunity for all interested parties (including customers, competitors, shareholders and other stakeholders) to ascertain and consider the issues identified by the ACCC.

Overview of ACCC's preliminary views

5. The legal test which the ACCC applies in considering the proposed acquisition is in section 50 of the *Competition and Consumer Act 2010* (the **Act**). Section 50

prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.

6. The ACCC divides its preliminary views into three categories, 'issues of concern', 'issues that may raise concerns' and 'issues unlikely to raise concerns'. For this matter, the ACCC has three issues that may raise concerns.

Issues that may raise concerns

The ability and incentive to discriminate against rival rail providers that transport containers from regional NSW to Port Botany for export

7. The ACCC's preliminary view is that the proposed acquisition, through the vertical integration of the Port Botany Patrick container terminal with Qube's rail container transport operations, may result in a substantial lessening of competition in the market for regional rail services to Port Botany.
8. The ACCC is considering the extent to which Qube, through its 50 per cent interest in the Port Botany Patrick container terminal, would have the ability and incentive to discriminate against Qube's rail competitors that require access to the container terminal.

Increased incentive to discriminate against rival landside logistics businesses

9. The ACCC's preliminary view is that the alignment of Patrick container terminals with both Qube and ACFS (the two largest providers of landside export-import container logistics in Australia) may result in a substantial lessening of competition in the markets for landside logistics at the Ports of Botany, Brisbane, Fremantle and Melbourne.
10. The ACCC is considering the extent to which Qube, Brookfield, GIC, bclMC and QIA, through their ownership of the Patrick container terminals, would have the ability and parallel incentive to provide preferential access to Qube and ACFS and raise the costs of rival providers of landside logistics.

Foreclosure of rival stevedores

11. The ACCC is also concerned that the alignment of the landside logistics operations of both Qube and ACFS with Patrick container terminals may substantially lessen competition in the market for container stevedoring at each relevant port.
12. The ACCC is considering whether this alignment would give Qube and ACFS the ability and incentive to provide preferential treatment to importers and exporters who use the shipping lines calling at Patrick container terminals. Qube and ACFS may have the ability to offer a level of service that rivals cannot match because Qube and ACFS would have preferential access at Patrick container terminals. The ACCC is also considering the extent to which Qube and ACFS could offer a bundle of stevedoring and empty container park services to shipping lines. Taken together, the ACCC is concerned that, over time, the proposed acquisition may result in the foreclosure of non-Patrick stevedores.

Issues unlikely to raise concerns

Cross-shareholdings

13. The proposed acquisition gives rise to a number of cross-shareholdings between members of the Consortium and other relevant businesses.
14. Having regard to the concerns raised to date by industry participants on this issue and the ACCC's consideration of the transaction documents provided by the parties, the ACCC's preliminary view is that the cross-shareholdings are unlikely to materially influence or facilitate behaviour by the Consortium parties that would be likely to result in a substantial lessening of competition in any relevant market.

Acquisition of Pacific National

15. The ACCC has considered whether the proposed acquisition of Pacific National by GIP, CPPIB, CIC Capital, GIC and bclMC (the **Rail Consortium**), has the potential to raise competition issues by:
 - combining Asciano's Pacific National business with any relevant GIP, CPPIB, CIC Capital, GIC and bclMC investment or operations
 - the common financial interests between consortium members created by the transaction structure
 - facilitating the transfer of commercially sensitive information between competitors.
16. The ACCC has considered submissions on this issue and the various interests of all of the Rail Consortium parties, and its preliminary view is that none of the competitive overlaps or commercial relationships are likely to give rise to competition concerns in any relevant markets.

Acquisition of Patrick Bulk and Automotive Port Services

17. With the exception of the acquisition of Asciano's 50 per cent interest in ACFS, which is considered separately, the ACCC's preliminary view is that the acquisition of Asciano's Patrick Bulk and Automotive Port Services (**BAPS**) business by Brookfield, GIC, bclMC and QIA (the **Brookfield parties**) is unlikely to raise competition concerns.

Future potential acquisitions

18. Whilst the ACCC is aware of Qube's proposal to acquire the remaining 50 per cent interest in Australian Amalgamated Terminals (**AAT**), and CPPIB's proposed acquisition of 40 per cent of Glencore Agriculture,¹ the ACCC will separately review these transactions as they will occur at a later date and the

¹ For further information see:

<http://www.glencore.com/assets/media/doc/news/2016/20160406-Sale-of-40-percent-stake-in-Glencore-Agricultural-Products-and-creation-of-long-term-partnership-with-CPPIB.pdf>.

proposed acquisition under consideration is not conditional on their successful completion.

Making a submission

19. Interested parties should provide submissions by no later than 5pm on 10 June 2016. Responses may be emailed to mergers@accc.gov.au with the title: "Submission re: Acquisition of Asciano by Qube, Brookfield & others - attention Nick Cooke/Rebecca Holland". If you would like to discuss the matter with ACCC officers over the telephone or in person, or have any questions about this Statement of Issues, please contact Nick Cooke on (03) 9290 6987 or Rebecca Holland on (03) 9658 6467.
20. The ACCC anticipates making a final decision on 21 July 2016, however, this timeline can change. To keep abreast of possible changes in relation to timing and to find relevant documents, interested parties should visit the Mergers Register on the ACCC's website at www.accc.gov.au/mergersregister.

Confidentiality of submissions

21. The ACCC will not publish submissions regarding the proposed acquisition. We will not disclose submissions to third parties (except our advisors/consultants) unless compelled by law (for example, under freedom of information legislation or during court proceedings) or in accordance with s155AAA of the Act. Where the ACCC is required to disclose confidential information, the ACCC will notify you in advance where possible so that you may have an opportunity to be heard. Therefore, if the information provided to the ACCC is of a confidential nature, please indicate as such. Our [Informal Merger Review Process Guidelines](#) contain more information on confidentiality.

Timeline

Date	Event
30 March 2016	ACCC commenced review of the proposed acquisition
26 May 2016	ACCC publication of statement of issues
10 June 2016	Deadline for submissions from interested parties in response to the statement of issues
21 July 2016	Anticipated date for ACCC final decision

The parties

22. This section provides an overview of the parties to the proposed acquisition. Further detail on the parties is set out in Attachment A to the ACCC's market inquiries letter. This market inquiries letter is available on the Mergers Register on the ACCC's website at www.accc.gov.au/mergersregister.

The Consortium

23. Qube is listed on the Australian Securities Exchange. It focuses on import and export logistics services throughout Australia, operating at a number of levels in the supply chain. Qube's logistics business (**Qube Logistics**) supplies road and rail transport services, warehousing and distribution services, container park and related services and freight forwarding services. Qube Logistics also operates intermodal terminals² and is developing the Moorebank Intermodal Terminal (**Moorebank**) which is scheduled to open in 2017 and will be the largest intermodal terminal in the Sydney metropolitan area.³ Qube does not currently have any container stevedoring interests. Qube operates the majority of trains carrying containers into Port Botany. Qube also owns 50 per cent of AAT, an automotive and general freight terminal operator at the Port of Brisbane, Port of Melbourne, Port of Adelaide and Port Kembla.
24. Brookfield is a global asset manager with interests in property, renewable power and infrastructure assets. Brookfield's principal Australian businesses are the Dalrymple Bay Coal Terminal (**DBCT**) and Brookfield Rail. The DBCT business comprises a port facility that exports coal mined in the central Bowen Basin region of Queensland. Brookfield Rail is a below rail access provider which operates over 5,100 kilometres of track and related infrastructure in the southwest region of Western Australia.
25. GIP is a global, independent infrastructure investor, which targets investments in infrastructure. GIP manages QSuper's 15 per cent equity interest in NSW Ports and, as part of these management rights, GIP appoints a board representative to NSW Ports on behalf of Q Super. GIP also has an interest in Terminal Investment Limited SA (**TIL**), which was established by Mediterranean Shipping Company, the world's second largest container shipping line. TIL is the world's sixth largest global container terminal operator but does not operate any terminals in Australia.
26. CPPIB is a professional investment management organisation that invests funds not needed by the Canada Pension Plan to pay current benefits. CPPIB's Australian investments include toll roads and real estate investments, including interests in joint ventures with the Goodman Group that focus on industrial properties (including logistics and business park assets).
27. bcIMC is one of Canada's largest institutional investors, investing on behalf of public sector clients in British Columbia. Its activities help finance workers' retirement benefits. Among its investments, bcIMC has a 9 per cent interest in DBCT Management, the long term lease holder of the DBCT.
28. QIA is a sovereign wealth fund based in Qatar. The purpose of QIA is to develop, invest and manage reserve funds and other assets assigned to it by the State of Qatar. QIA has a minority shareholding of less than 9 per cent in Glencore Plc.

² For further detail see the Qube Logistics website: <http://www.qube.com.au/logistics>.

³ For further detail see the Moorebank Intermodal Company Limited website: <http://www.micl.com.au/>.

29. CIC Capital is a subsidiary of China Investment Corporation. The overseas investment and management activities of China Investment Corporation are undertaken by CIC International Co., Ltd. (**CIC International**) and CIC Capital. The ACCC has not identified any Australian assets held by CIC International or CIC Capital that are relevant to its competition assessment.
30. GIC is incorporated in Singapore and invests for the Government of Singapore. The ACCC has not identified any Australian assets held by GIC that are relevant to its competition assessment.

Asciano

31. Asciano's business has several elements:

- Pacific National
 - Pacific National is one of the largest providers of above rail freight haulage services in Australia. It provides a range of services in the containerised, break bulk and bulk markets. It is a leading provider of inter-state containerised rail haulage and operates intermodal terminals. Pacific National also hauls a range of bulk goods for domestic and export consumption including coal and grain.
- Patrick Terminals and Logistics
 - Patrick Terminals and Logistics is a major terminal operator in Australia and one of two container terminal operators providing container stevedoring services at each of the four largest container ports in Australia: Swanson Dock in Melbourne, Port Botany in Sydney, Fisherman Islands in Brisbane and Port of Fremantle in Western Australia. These stevedoring services and related container terminal operations constitute Patrick container terminals.
 - Patrick Terminals and Logistics also operates a rail haulage business (**Patrick Rail**) and has a 50 per cent interest in ACFS which provides landside logistics services, including empty container park services and container transport services.

ACFS is one of the two largest national landside container logistics operators focusing on import-export services such as road transport services, container park and related services and warehousing and distribution services. ACFS competes directly with Qube Logistics at each major container port. The remaining 50 per cent interest in ACFS is held by TZI 1 Pty Ltd (formerly Australian Container Freight Services Pty Ltd) and related entities.
- Patrick BAPS
 - BAPS specialises 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. BAPS includes the automotive and general stevedoring business. The BAPS division also includes Asciano's 80 per cent interest in Patrick Autocare, which is a supplier of pre-delivery inspection motor vehicle services. In addition, BAPS operates an integrated

service for the transportation, processing and storage of motor vehicles from the port to the beneficial freight owner.

- AAT
 - Asciano owns 50 per cent of AAT, with Qube holding the remaining 50 per cent. As noted earlier, AAT is an automotive and general freight terminal operator at the Port of Brisbane, Port of Melbourne, Port of Adelaide and Port Kembla.

Earlier Asciano acquisition proposals

32. On 6 August 2015, the ACCC commenced a review into the proposed acquisition of Asciano by Brookfield, GIC, bclMC and Nitro Corporation Pty Limited (the **Brookfield Consortium**). The ACCC published a statement of issues on 15 October 2015.
33. On 13 November 2015, the ACCC commenced a review into the proposed acquisition of Asciano by Qube, GIP, CPPIB and CIC (the **Qube Consortium**).
34. On 23 February 2016, the Consortium announced that it had been in discussions regarding a joint acquisition of Asciano and the ACCC suspended its reviews of the above two proposed acquisitions. The Consortium announced the new joint binding proposal to acquire Asciano (the proposed acquisition which is the subject of this Statement of Issues). Following this announcement the ACCC discontinued the earlier separate reviews. The acquisitions proposed by the Brookfield Consortium and the Qube Consortium were substantially different to the joint binding proposal and give rise to significantly different competition issues.
35. The ACCC commenced a public review of the proposed acquisition on 30 March 2016 after receiving a submission from the Consortium.

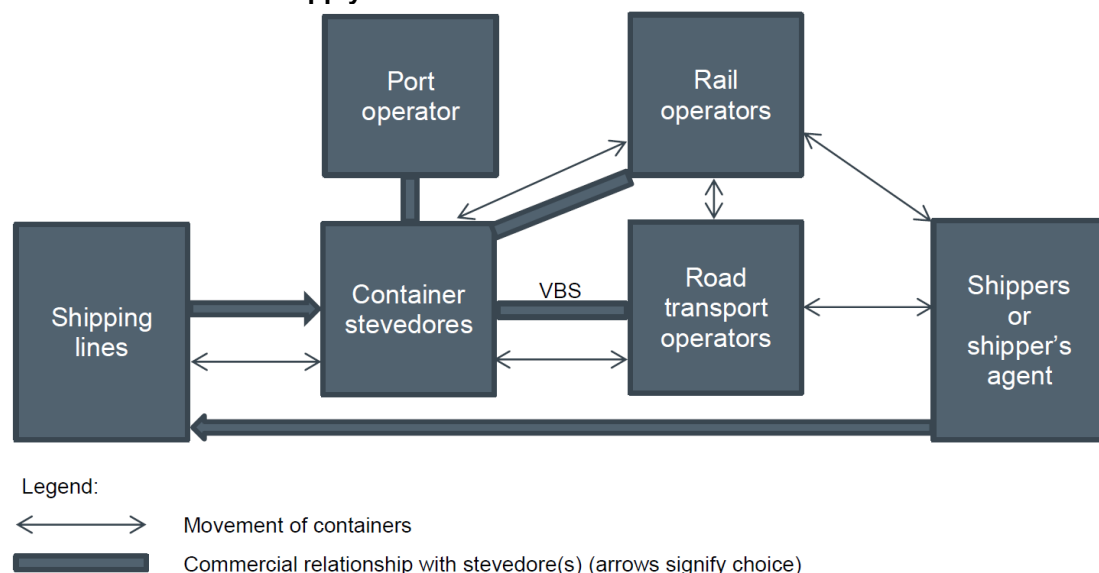
Industry background

36. Many parties play a role in the import/export container supply chain. These parties include importers/exporters, stevedores, shipping lines, road and rail container transport operators, intermodal terminal operators, port authorities, empty container park operators and governments.
37. There are a number of typical contractual agreements between different tiers of the supply chain:
 - Importers and exporters (or freight forwarders/shipping agents that act on their behalf) commonly have contracts with:
 - shipping lines
 - rail and/or road transport operators to transport containers to and from the port
 - other logistics service providers for ancillary services such as distribution and warehousing services and container packing/unpacking.

- Shipping lines own the containers, and have contracts with:
 - importers/exporters (or freight forwarders/shipping agents that act on their behalf)
 - container stevedores
 - empty container park operators.
- Road/rail transport operators have contracts with the importer or exporter (or freight forwarder), and in addition:
 - pay fees to the stevedore, in order to access the container terminal, often through a vehicle booking system (**VBS**)
 - pay fees to empty container park operators, in order to access empty container parks
 - pay fees to intermodal terminal operators, in order to access intermodal terminals.
 - if they are a rail provider, have rail access arrangements with stevedores and the owners of tracks leading to the port.
- Stevedores enter into leases with the relevant Port Authority.
- Empty container park operators enter into leases with the relevant Port Authority, if the parks are located within the port precinct.

38. Below is a simplified diagram summarising the movement of containers along the supply chain and indicates where there are typically commercial relationships between container stevedores and other key parties.

Diagram 1: Commercial relationships between stevedores and other key parties in the container supply chain



Source: ACCC Container stevedoring monitoring report no.17, 6 November 2015⁴

⁴ <https://www.accc.gov.au/regulated-infrastructure/waterfront-shipping/monitoring-reporting-for-container-stevedoring>.

39. As set out above, the importer or exporter (or freight forwarder) chooses the shipping line and this shipping line chooses the stevedore/container terminal.
40. Market participants have submitted to the ACCC that transport operators currently have limited, or no, influence over the container terminal where they collect/drop-off containers and in most cases they collect/drop-off containers at all terminals at each port. As all landside logistics providers generally have to access every container terminal and have to deal with the relevant stevedore, the ACCC considers that each stevedore is in a position to materially influence the operations of, and competition between, landside container logistics operators.
41. Contracts between shipping lines and stevedores are generally between 3 and 5 years and there is generally limited ability for shipping lines to change stevedores during the contract period. While some landside logistics operators can and do voice concern to shipping lines about access and landside efficiency at container terminals, given that the contract is between the shipping line and the stevedores, this may not effectively constrain the behaviour of the stevedore.

The proposed transaction

42. There are three components to the proposed acquisition:
 - **Rail acquisition:** the Rail Consortium proposes to acquire the Pacific National rail business and certain intermodal terminal operations. The percentage ownership stakes in the business will be:
 - CPPIB – 33 per cent
 - GIP – 27 per cent
 - CIC Capital – 16 per cent
 - GIC – 12 per cent
 - bclMC – 12 per cent.
 - **BAPS acquisition:** the Brookfield parties propose to acquire:
 - Asciano's BAPS division
 - Asciano's 50 per cent interest in ACFS
 - Asciano's 50 per cent interest in AAT(collectively referred to as the **BAPS businesses**).

The percentage ownership stakes in the business will be:

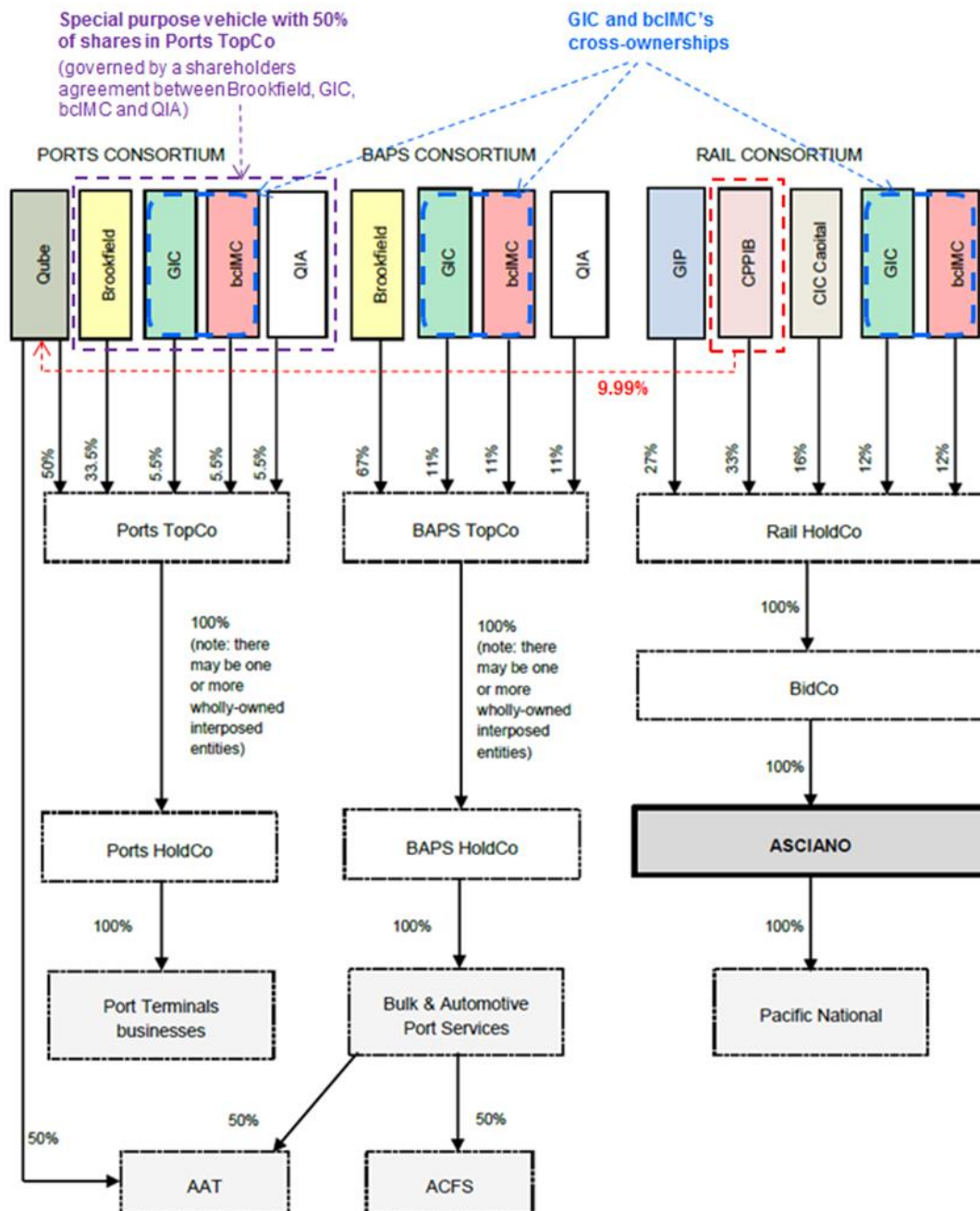
- Brookfield – 67 per cent
- GIC – 11 per cent
- bclMC – 11 per cent
- QIA – 11 per cent.

- **Ports acquisition:** Qube and the Brookfield parties propose to acquire Asciano's Patrick container terminal business, excluding Asciano's 50 per cent interest in ACFS and Asciano's 50 per cent interest in AAT. The percentage ownership stakes in the business will be:
 - Qube – 50 per cent
 - Brookfield – 33.5 per cent
 - GIC – 5.5 per cent
 - bcIMC – 5.5 per cent
 - QIA – 5.5 per cent.

The Brookfield parties will participate in the ports acquisition through a special purpose vehicle. This special purpose vehicle will hold the Brookfield parties' collective 50 per cent interest in the Port Terminals businesses in accordance with the terms of a shareholders' agreement between the Brookfield parties.

43. Further detail on the proposed acquisition is set out in the ACCC's market inquiries letter for this review (available on the [ACCC's Mergers Register](#)). Attachment C to the market inquiries letter details the Asciano assets and operations to be acquired under each component of the proposed acquisition. Aerial photographs of the Asciano container and logistics assets at each port are at Attachment D to the market inquiries letter.
44. Diagram 2 (below) summarises the transaction structure, including the relationships between each of the parties.

Diagram 2: overview of proposed acquisition



45. As illustrated in Diagram 2 above, a number of commercial relationships exist between the Consortium parties:

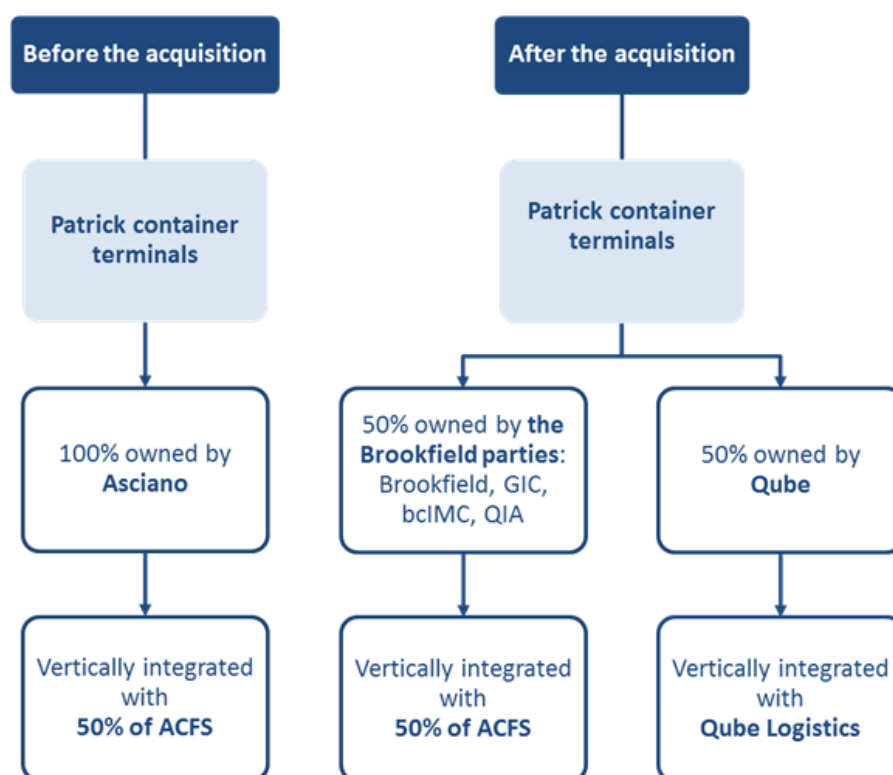
- The Brookfield parties will participate in the ports acquisition through a special purpose vehicle (as indicated by the purple dashed lines in the diagram above).
- CPPIB intends to acquire a 9.99 per cent shareholding in Qube (as indicated by the red dashed lines in the diagram above)

- GIC and bclMC will each hold 12 per cent of Rail HoldCo, 5.5 per cent of Ports TopCo and 11 per cent of BAPS TopCo (as indicated by the blue dashed lines in the diagram above)
- Brookfield and QIA will each hold ownership interests in both Ports TopCo and BAPS TopCo.

Vertical integration under the proposed acquisition

46. Patrick container terminals is currently vertically integrated with ACFS, through Asciano's 50 per cent interest in ACFS. Following the proposed acquisition, Patrick container terminals will be owned and operated through a joint venture that is 50 per cent owned by the Brookfield parties, who will also acquire Asciano's interest in ACFS.
47. Qube will acquire the remaining 50 per cent of Patrick container terminals, vertically integrating Patrick container terminals with Qube Logistics. Diagram 3 highlights this additional vertical integration that arises from the proposed transaction.

Diagram 3: extent of vertical integration before and after the proposed acquisition



48. The proposed acquisition would therefore result in Patrick container terminals being vertically integrated with both of the largest landside container import-export logistics providers in Australia and the only two with nation-wide operations. The ACCC considers this to be a significantly larger degree of vertical integration than under the status quo where Patrick container terminals is only vertically integrated with ACFS.
49. As noted above, it is intended that Asciano's current 50 per cent interest in ACFS is to be transferred to the Brookfield parties. The ACCC is aware that

there is some uncertainty regarding the transfer of ownership of Asciano's 50 per cent interest in ACFS to the Brookfield parties.⁵ In the event that Asciano's interest were not transferred to the Brookfield parties (and instead a structure arose whereby ACFS was not vertically linked to Patrick container terminals) then Patrick container terminals would only be vertically linked with Qube's landside container logistics.

Future with and without the acquisition

50. Section 50 of the Act prohibits mergers or acquisitions that would have the effect or be likely to have the effect of substantially lessening competition in a market. In assessing a proposed acquisition pursuant to section 50 of the Act, the ACCC considers the effects of the acquisition by comparing the likely future competitive environment post-acquisition if the acquisition proceeds (the "with" position) to the likely future competitive environment if the acquisition does not proceed (the "without" position) to determine whether the proposed acquisition is likely to substantially lessen competition in any relevant market.
51. On the basis of the information currently available, the ACCC considers that the status quo would apply if the transaction does not proceed (the "without" position).

Issue that may raise concerns: reduced competition for rail container transport from regional NSW to Port Botany

52. The ACCC is concerned that the proposed acquisition may substantially lessen competition in the provision of regional container rail services to Port Botany by giving Patrick container terminals the ability and incentive to discriminate in favour of Qube trains. This discrimination may take place by restricting rivals' access to the Patrick container terminal rail siding at Port Botany or by raising rival rail operators' costs.
53. Should Patrick container terminals engage in such conduct, the discrimination may raise barriers to entry/expansion for competing rail providers which may lead to an increase in prices or reduction in service quality for rail container transportation between regional NSW and Port Botany.

⁵ Asciano's Scheme Booklet states that:

Asciano must use best endeavours to procure that the shares in ACFS Port Logistics are transferred to the BAPS Business prior to completion of the Sale Agreements, but may consult with other parties to the Sale Agreements regarding other transfer options. Subject to the transfer option ultimately pursued, it is possible that the other shareholders in ACFS Port Logistics may have pre-emptive rights to acquire the interest in ACFS Port Logistics.

For further detail see the Asciano Scheme Booklet:

https://asciano.com.au/system/ckeditor_assets/attachments/426/asciano_scheme_booklet_registered_with_asic_210416.pdf.

54. Exports from regional NSW make up a relatively small proportion of overall container exports at Port Botany. However, this proportion is still significant and the ACCC has concerns regarding rail competition for these regional exporters.

Whether road transportation is a constraint

55. Market inquiries indicate that for a substantial proportion of containerised freight exports from regional NSW, road transport is not a substitute for rail container transport, due to:
- the cost of transport by road being significantly more expensive than by rail
 - weight restrictions on containers being carried by road.
56. The ACCC's preliminary view is that for these regional export customers, road transport is not a constraint on rail transport.

Ability and incentive to discriminate against Qube's rail rivals

57. The ACCC understands that regional trains carrying export containers to Port Botany must be able to access the Patrick container terminal and other container terminals at the port. This is because trains will be carrying containers that need to be delivered to a mixture of stevedores, and it would not generally be possible to operate a train with containers that will only be exported through non-Patrick container terminals. This gives Patrick container terminals market power that it can use to influence competition in the regional rail container export market.
58. Market participants identified a number of strategies that Patrick container terminals could engage in post-acquisition to discriminate against Qube's rivals, including:
- specifying a minimum number of lifts per rail window for ad hoc rail windows that only Qube is able to meet, reducing the ability of rivals to access ad hoc windows
 - slower servicing of Qube's rivals' trains at the Patrick container terminal rail siding, making their operations inefficient or less competitive than Qube's
 - giving Qube's rail operations first choice of additional rail windows or redistributing existing rail windows so that rival rail operators no longer have rail windows that line up with windows at other container terminals (thereby increasing rail rivals' costs)
 - requiring rival rail providers to utilise other Qube facilities, such as Moorebank, in order to obtain appropriate access at the Patrick container terminal
 - increasing the costs of rail windows and other fees associated with handling trains, and thereby implementing a price squeeze.
59. Market participants also considered that the ability to discriminate can manifest in many other ways. The ACCC recognises that vertical integration can lead to many forms of subtle discrimination that are difficult to detect.

60. Under the proposed acquisition, Qube will only have a 50 per cent interest in Patrick container terminals. However this may not be sufficient to prevent discriminatory behaviour in favour of Qube's regional rail services as:
- Qube's executives have extensive experience with the Patrick container terminals assets and are likely to exert a significant level of control and influence. Further, the initial CEO of the Patrick container terminals business post acquisition will be appointed by Qube
 - discriminatory conduct may be framed as efficiency enhancing for Patrick container terminals and therefore the Brookfield parties will not necessarily object. For example, market participants submit that limiting access to the Port Botany rail siding to Qube trains could be presented as a method of better coordinating rail windows and train schedules.
61. A degree of vertical integration already exists in the current market structure, where Patrick container terminals is vertically aligned with Asciano's rail haulage businesses (Pacific National and Patrick Rail). The ACCC notes that this vertical integration has not prevented the entry and expansion of non-vertically integrated rail operators such as Qube.
62. However, post-acquisition Patrick container terminals may have an incentive to discriminate in favour of Qube as Qube is the largest provider of rail services into Port Botany. In terms of *regional* rail services to Port Botany, the ACCC estimates Qube's market share to be between 35 and 45 per cent, compared to Asciano's estimated market share of less than 30 percent. Qube also provides the vast majority of *metropolitan* rail services to and from Port Botany. Taken together, Qube has a high demand for rail windows at Port Botany and the ACCC understands that Qube currently already uses the majority of rail windows at the Port Botany Patrick container terminal. As such, the ACCC considers that Asciano's current ability and incentive to favour its Pacific National/Patrick Rail trains is not as strong as the post-acquisition ability and incentive to discriminate to favour Qube's trains.
63. Patrick container terminals' ability and incentive to discriminate in favour of Qube's rail operations would be heightened by Qube's role in operating the Moorebank Intermodal Terminal.
64. Moorebank is scheduled to commence operations in 2017 and as Qube will be operating metropolitan rail services from Moorebank to Port Botany, it is likely to increase Qube's demand for rail windows. Market participants consider that Moorebank will have a throughput capacity approximately three times greater than the intermodal terminal with the next highest capacity. Given Moorebank's size, market participants consider that there will be significant increased demand for rail port services and therefore increased demand for rail siding access at Port Botany. Market participants consider that this will increase Patrick container terminals' opportunity to limit access to rail windows for Qube's competitors.
65. If access to rail windows at Port Botany were restricted, it may force competing regional rail operators to deliver containers to Moorebank so that the containers can be delivered to Port Botany via a Qube port shuttle service. Market participants consider that over time this will reduce competition for the rail transportation of containers from regional NSW as:

- using an intermodal terminal may increase the price that rival rail operators can offer customers
- re-routing containers through Moorebank would give Qube greater control and influence over the import-export container supply chain and restrict the options for competitors.

66. The ACCC understands that there may be scope for the NSW government, though Transport NSW, to regulate the Port Botany rail sidings, in a fashion similar to how the Port Botany Landside Improvement Scheme (**PBLIS**) oversees road access. While the ACCC considers that such oversight and regulation may have the potential to limit competition concerns relating to rail access, the ACCC considers that the mere potential for regulation may not be sufficient to constrain Patrick container terminals from discrimination in favour of Qube's rail operations.

ACCC's preliminary views

67. The ACCC's preliminary view is that the proposed acquisition may substantially lessen competition in the provision of regional container rail services to Port Botany by giving Patrick container terminals the ability and incentive to discriminate in favour of Qube trains.
68. Rival rail operators may not be able to compete effectively, and the presence of a vertically integrated entity and the likelihood of discrimination may create a strong deterrent effect on potential rail entrants. This may lead to an increase in barriers to entry and expansion.
69. The ACCC is concerned that the lessening of competition may lead to increased prices (or a decrease in quality of services) for regional NSW exporters that rely on rail to export their containers.

The ACCC invites comments from market participants on the concerns in relation to rail competition for regional container exports in NSW. Market participants are asked to address the following questions, and in each instance provide specific practical examples to support any response or concerns identified:

- Are there exporters in regional NSW for which road transport is not substitutable for rail container transport? Please provide practical examples of the extra costs incurred in transporting containers from regional NSW to Port Botany by road. To what extent is it economically feasible to move freight from regional NSW in bulk trucks and repack it into containers near Port Botany?
- To what extent do you consider that Qube only having a 50 per cent interest in Patrick container terminals will prevent it from engaging in discriminatory conduct in favour of Qube's rail services? In particular, if such discriminatory conduct would be likely to have a detrimental impact on the profitability of Patrick container terminals stevedoring, why would the Brookfield parties (owners of the other 50 per cent of Patrick container terminals) let it occur?

- To what extent is the possibility of regulation by Transport NSW likely to constrain the behaviour of Patrick container terminals? In particular, would it constrain the manner in which rail siding windows are allocated by the Patrick container terminal and prevent or limit competition concerns?
- What is the likely impact of Moorebank on the ability and incentive for Qube to engage in the behaviour outlined by the ACCC? In providing a response, identify where and how discrimination between different rail providers could occur and how this would likely impact on competition.
- Has Asciano discriminated against its rail rivals in its operation of Patrick container terminals? Why would the ability and incentive to discriminate be different post-acquisition?
- How did Qube's regional rail operations in NSW grow so significantly when it wasn't vertically integrated with a container stevedore?
- What is the impact of policy and infrastructure changes which are encouraging more containers to be delivered to Port Botany on rail on your assessment of the issues identified by the ACCC? For example, the NSW Freight and Ports Strategy aims to improve the productivity of the rail freight network.¹
- Please provide specific examples of how, post-acquisition, Patrick container terminals could engage in discriminatory conduct that would benefit Qube's regional container rail services.

Issue that may raise concerns: reduced competition in landside logistics

70. As noted above, the proposed acquisition results in the vertical integration of Patrick container terminals with Australia's two largest import-export landside container logistics operators, Qube and ACFS.⁶
71. Based upon its inquiries to date, the ACCC is concerned that the proposed acquisition may substantially lessen competition in landside container logistics by giving Patrick container terminals the ability and incentive to discriminate in favour of Qube and ACFS. Qube and Brookfield, through control of Patrick container terminals, could provide preferential access to Qube and ACFS at the terminals and increase their rivals' costs. This may lessen the ability of rivals to compete effectively, raise barriers to entry and expansion, and lead to an increase in prices for container landside logistics.
72. Market participants have expressed concern about discrimination at each relevant port in Australia (Botany, Melbourne, Brisbane and Fremantle), but noted that at Port Botany, the level of control a stevedore is able to exert is limited to some extent by the PBLIS.

⁶ Assuming Asciano's 50 per cent interest in ACFS is transferred to the Brookfield parties.

Ability and incentive to discriminate against rivals of Qube and ACFS

73. As noted above, landside container logistics operators generally have limited or no influence over which container terminal they need to access to pick-up or drop-off containers. Qube and ACFS's rivals are not able to choose not to deal with Patrick container terminals. Therefore, although Patrick container terminals competes with other stevedores, it is in a position to influence the operations of, and competition between, landside container logistics operators.
74. Market participants identified a number of strategies that Patrick container terminals could engage in post-acquisition to discriminate against Qube and ACFS's rivals, including:
- offering preferential access to Qube and ACFS trucks ahead of rivals, leading to delays, inefficiencies and increased costs for rivals. For example, Qube and ACFS could obtain extra slots at peak times or the most convenient bulk/stack runs⁷
 - giving Qube and ACFS priority access to the 1-Stop vehicle booking system, reducing the ability of rivals to access the Patrick container terminals at convenient times
 - facilitating combined export drop-off and import pick-up runs (i.e. the truck arrives and leaves with containers) more easily for Qube and ACFS
 - charging transport operators carrying empty containers stored at Qube and ACFS empty container parks lower prices, or giving them better services
 - increasing the costs of booking slots/windows, and other fees, for all landside logistics companies, and thereby implementing a vertical price squeeze.
75. It is clear to the ACCC from market inquiries that there is an *ability* to discriminate against rivals (although the ability appears less clear at Port Botany). The issue then is whether there is an *incentive* to discriminate and whether such discrimination is likely to substantially lessen competition.
76. It has been put to the ACCC that there is no incentive to discriminate against rivals, as any such strategy would lower the efficiency of the container stevedoring operations, which would in turn impact on profitability of the stevedoring operations and the likelihood of shipping lines using the terminal. The stevedoring operations have high fixed costs and the ACCC considers that there is likely to be a strong incentive to maximise throughput.
77. On the other hand, many market participants have suggested that discrimination will make rival logistics providers less efficient, preventing them from competing effectively with Qube and ACFS, and thereby making such a strategy profitable for Qube and Brookfield as they will achieve higher returns on landside logistics. Market inquiries have indicated that the landside efficiency and equal treatment

⁷ A bulk or stack run allows a road carrier to transport a number of empty container terminals to and/or from the port without making bookings through the VBS.

of logistics providers is, at least currently, only a secondary factor in the shipping lines' choice of stevedore behind pricing, berthing window availability and port-side (as opposed to landside) efficiency. Therefore, if discrimination was to occur, it may not discourage shipping lines from continuing to use Patrick container terminals.

Difference between Asciano's current vertical integration and the situation post-acquisition

78. Market participants have stated that there is a significant difference in the level of vertical integration that exists currently and the level of vertical integration post-acquisition.
79. Patrick container terminals is currently vertically aligned with ACFS, in which it holds a 50 per cent stake. However, industry participants consider that the situation post-acquisition gives rise to vertical integration on a much larger scale. It is intended that the Brookfield parties, who will have 50 per cent stake in Patrick container terminals, will also own a 50 per cent stake in ACFS. Qube, with a significant import/export logistics business, will own the other 50 per cent of Patrick container terminals.
80. Together, Qube and ACFS have a significant share of landside import-export container logistics services in Sydney, Melbourne, Fremantle and Brisbane. In particular, Qube and ACFS are two of the largest suppliers of container transport services and empty container park services and wharf cartage services.
81. The ACCC considers that Qube and the Brookfield parties will have a parallel incentive to operate Patrick container terminals in a way that favours their respective downstream logistics businesses. The large scale of ACFS's and Qube's combined landside logistics interests could increase the incentive to discriminate against rival landside competitors. Further, the *impact* of such discrimination is likely to be greater given Qube and ACFS are already significant players.
82. In the event that Patrick container terminals was vertically linked with only one of these landside container logistics providers, the ACCC considers that the degree of vertical integration following the transaction would be comparable to the current extent of vertical integration and that competition concerns would be less likely to arise.

If Brookfield does not control 50 per cent of ACFS

83. As was noted earlier, there is uncertainty regarding whether the Brookfield parties will acquire Asciano's 50 per cent stake in ACFS. If the Brookfield parties do not acquire the interest in ACFS, then a separate potential competition issue arises.
84. Market inquiries suggest Qube and ACFS are currently strong competitors in many aspects of the import-export supply chain. After the transaction, Qube will own 50 per cent of Patrick container terminals. A number of ACFS's key sites are subleased to it by Patrick container terminals (which holds the head leases for those sites).
85. Feedback to the ACCC suggests that Qube will have the ability and incentive to restrict ACFS from fully exercising its rights under existing subleases, reducing

the competitive constraint provided by ACFS. In particular, market participants are concerned that as a 50 per cent owner of the landlord to ACFS, Qube would:

- limit ACFS's ability to operate effectively throughout the term of existing subleases (i.e. limiting their ability to invest in sites)
- restrict ACFS from renewing subleases.

86. The ACCC is continuing to consider issues regarding the future viability of ACFS as a competitive constraint on Qube if it is not vertically integrated with Patrick container ports.

ACCC preliminary views

87. The ACCC's preliminary view is that the proposed acquisition may substantially lessen competition in the provision of landside logistics because it will result in Patrick container terminals having an increased incentive to discriminate against Qube's and ACFS's rival landside logistics service providers. Such discrimination could lead to a substantial lessening of competition in markets for the provision of landside container logistics services at the Ports of Botany, Brisbane, Fremantle and Melbourne.

The ACCC invites comments from market participants on the issues identified above. Market participants are asked to address the following questions, and in each instance provide specific practical examples to support any response or concerns identified:

- Does a vertically integrated stevedore have an incentive to discriminate against rival landside logistics operators? If so:
 - Has such discrimination been seen in the past?
 - If it hasn't occurred in the past, why not?
 - Why might the situation after this proposed acquisition be different?
- To what extent would Qube and Brookfield's incentive to maximise container throughput at Patrick container terminals be greater than its incentive to discriminate against rival logistics service providers?
- If vertical integration between stevedoring and landside logistics is strategically advantageous because it may be used to foreclose rivals:
 - why did Asciano put its landside logistics business into a joint venture with ACFS?
 - why did DP World Australia (DP World) sell its landside logistics operations?

- Is it likely or practical for a shipping line to switch stevedores based on discriminatory conduct by a terminal operator against landside logistics service providers? Please comment on the costs and timeframe required for shipping lines to switch stevedores, and any examples of shipping lines switching stevedores in response to complaints from landside logistics service operators about access to container terminals and/or other container terminal service issues.
- To what extent would Brookfield's incentives via its interest in ACFS be aligned with (or contrary to) Qube's?
- To what extent would Patrick container terminals under the ownership of Qube and the Brookfield parties have a different incentive to discriminate against rival landside logistics providers, compared to under Asciano ownership given that Asciano is already vertically integrated with ACFS?
- To what extent do you consider that ACFS would be a viable competitor to Qube post-acquisition if it remains independent from Brookfield? Specifically, would any restrictions on, or failure to renew, the land subleased by ACFS from Patrick container terminals, materially lessen ACFS's ability to compete as effectively with Qube in the future, particularly at Port Melbourne and Port Botany.

Issue that may raise concerns: reduced competition in stevedoring

88. As has been discussed, the proposed acquisition will result in vertical integration of Patrick container terminals with both Qube Logistics and ACFS, currently the two largest national landside import-export container logistics operators in Australia.
89. Based on its inquiries to date, the ACCC's preliminary view is that the alignment of Patrick container terminals with both Qube and ACFS may substantially lessen competition in the market for the supply of container stevedore services, as Patrick may be able to use Qube and ACFS to favour Patrick container terminals over other stevedores.
90. The ACCC is also concerned that the proposed acquisition may result in Patrick container terminals being able to bundle empty container park services with stevedoring services in such a manner and on such a scale that alternative stevedores such as DP World and Hutchison Ports Australia (**Hutchison**) would not be able to compete as effectively as they do now.

Foreclosing rival stevedores

91. The foreclosure of rival stevedores may occur by:
 - Patrick container terminals offering preferential treatment to ACFS and the landside logistics operations of Qube (as outlined in the section above), which would give ACFS and Qube combined a degree of market power in landside logistics, as competitors cannot match their offering

- which may in turn facilitate Qube and ACFS offering superior services to importers and exporters on the condition that they use shipping lines calling at Patrick container terminals
 - which will shift volumes to shipping lines using Patrick container terminals and encourage shipping lines to use Patrick container terminals, as they will achieve greater volumes
 - which will lessen competition and raise barriers to entry or expansion for competing container stevedores.
92. The superior services that Qube and ACFS may be able to offer could include, for example, a higher level of service for rail services for exports from regional NSW or timing of truck slots at the terminal which other logistics providers who are not aligned with Patrick would not be able to match. Patrick container terminals could also restrict the ability of Qube and ACFS's competitors to use bulk runs.
93. These strategies could be implemented such that major import and export customers may shift their volumes to shipping lines that use Patrick container terminals or influence shipping lines transporting their containers to use Patrick container terminals over competing terminals. Over time, shipping lines may be influenced to switch their stevedore to Patrick container terminals rather than basing their choice of stevedore on the competitiveness of Patrick container terminals' offering relative to the rival stevedores, DP World and Hutchison.
94. Against this argument, it was noted earlier that market inquiries have indicated that the landside efficiency of logistics providers is considered only a secondary factor in the shipping lines' choice of stevedore behind pricing, berthing window availability and port-side (as opposed to landside) efficiency. Therefore, it may not be possible for Brookfield and Qube to use their landside logistics operations to influence shipping lines.

Bundling with empty container parks

95. Post-acquisition, Patrick container terminals will be aligned with Qube and ACFS's empty container parks. Qube and ACFS are both significant providers of empty container parks.
96. In particular, the ACCC has focused on the vertical integration that will arise at Port of Fremantle. Qube Logistics controls a significant majority of the on-port and off-port empty container parks. A competing empty container park at the Port of Fremantle is expected to open this year, however this container park will be operated by ACFS which will also be vertically integrated with the Patrick container terminal. In addition, Patrick container terminals also has a much larger market share of container stevedoring services than DP World, its sole competitor at the Port of Fremantle.
97. As the majority of containers are exported from Australia empty, access to empty container parks is essential for shipping lines.
98. Market participants are therefore concerned that combining Patrick container terminals with Qube's substantial empty container park facilities, and ACFS's

expected new empty container park facilities, may allow Qube and the Brookfield parties to:

- charge higher prices or offer lower quality service for shipping lines not using Qube's and ACFS's empty container parks at Fremantle
- provide a bundle of stevedoring and empty container park services at Fremantle
- refuse shipping lines' access to Qube's and ACFS's empty container parks if they are not using Patrick container terminals
- offer a *national* bundle of stevedoring services and empty container park services, that shipping lines have little choice but to accept, as there are limited alternatives in Fremantle.

99. The ACCC is concerned that a bundling strategy may decrease the ability of rival container stevedores to compete effectively with Patrick container terminals, leading to higher prices or lower quality of container stevedoring services.
100. Fremantle Ports currently oversees the non-discriminatory provision of services at on-port facilities, including container terminals and empty container parks. Such oversight may constrain discriminatory behaviour. The proposed privatisation of the Port of Fremantle may impact these regulatory restraints.

ACCC's preliminary views

101. In summary, the ACCC is concerned that the vertical integration between Patrick container terminals with ACFS and Qube's landside logistics operations, may result in a substantial lessening of competition in the market for container stevedoring services at each relevant port (but in particular the Port of Fremantle).
102. In the event that Patrick container terminals was vertically linked with only one of the landside container logistics providers, the ACCC considers that the degree of vertical integration following the transaction would be more comparable to the current extent of vertical integration and that competition concerns in stevedoring would be less likely to arise.

The ACCC invites comments from market participants on the issues identified above. Market participants are asked to address the following questions, and in each instance provide specific practical examples to support any response or concerns identified:

- What will be the response of rival stevedores to the possible foreclosure/bundling strategies identified by the ACCC?
- Does Qube or ACFS have market power in any element of landside logistics? In providing a response, comment on whether vertically integrating both Qube and ACFS with Patrick container terminals would be likely to provide Qube and ACFS with increased market power in any element of landside logistics services.

- If an exporter or importer obtains a favourable logistics offer, but only if their containers pass through a certain stevedore, what is their ability to influence the shipping lines' choice of stevedore so as to obtain that offer?
- Explain the barriers to a shipping line shifting volumes between container terminals at the request of a customer?
- What are the barriers to entry or expansion in empty container parks on or near the relevant ports? In Fremantle are there any specific barriers to entry or expansion for empty container parks?
- Could a new entrant into empty container parks, or expanded existing player, competitively constrain Qube and ACFS in the provision of empty container parks?
- To what extent do off-port empty container parks constrain empty container parks located at or very close to the port?

Issues unlikely to raise concerns

Acquisition of Pacific National

103. The ACCC's preliminary view is that the proposed acquisition of Pacific National by GIP, CPPIB, CIC Capital, GIC or bclMC (the **Rail Consortium**) is unlikely to result in a substantial lessening of competition in any relevant market.
104. The ACCC considered whether the proposed acquisition of Pacific National by the Rail Consortium, had the potential to raise competition issues by:
- combining Asciano's Pacific National business with any relevant GIP, CPPIB, CIC Capital, GIC and bclMC investment or operations
 - the common financial interests between the Consortium parties created by the transaction structure
 - facilitating the transfer of commercially sensitive information between competitors.
105. Some industry participants raised concerns in relation to bclMC acquiring a 12 per cent interest in Pacific National as bclMC currently has a 9 per cent interest in DBCT Management (the long term lease holder of the Dalrymple Bay Coal Terminal). The ACCC's preliminary view is that these minority shareholdings are unlikely to provide bclMC with the ability to control or materially influence the operation of DBCT Management and that preferential treatment of Pacific National trains and customers at the DBCT is unlikely.
106. The ACCC also considers that these shareholdings held by bclMC are unlikely to result in the sharing of commercially sensitive information that would be likely to substantially lessen competition in any relevant market.
107. The ACCC has considered the various interests of all of the Rail Consortium parties and does not consider that there are any other competitive overlaps or

relationships with Pacific National that are likely to give rise to potential competition concerns in any relevant markets.

Acquisition of BAPS

108. With the exception of the acquisition of Asciano's 50 per cent interest in ACFS, which is considered above, the ACCC's preliminary view is that the acquisition of Asciano's BAPS businesses by the Brookfield parties is unlikely to raise competition concerns.
109. Based on the information available to the ACCC, this acquisition does not result in any horizontal aggregation or vertical integration which would have the potential to lead to competition concerns in any relevant markets. Industry participants have not raised significant concerns about this aspect of the proposed acquisition.

Other cross shareholdings

110. The ACCC notes that the proposed acquisition would result in a number of cross shareholdings:
- GIC and bcIMC would each have 12 per cent interests in Pacific National, 11 per cent interests in BAPS and 5.5 per cent interests in the Port Terminals business
 - CPPIB would have a 33 per cent interest in Pacific National and a 9.99 per cent interest in Qube
 - QIA and Brookfield would both have interests in BAPS and the Port Terminals Business.
111. A number of industry participants have raised concerns about the cross shareholdings on the basis that they would lead to close-knit relationships between the Consortium parties which would lead to co-ordinated conduct and lessen competition between Pacific National and Qube or create vertical links between Brookfield's WA below rail network and Pacific National. For example, industry participants are concerned that given CPPIB's interest in Qube, it would be likely to influence the operation of Pacific National so that it did not seek to win customers from Qube.
112. The ACCC has closely considered the concerns raised to date by industry participants on these issues and has carefully considered the transaction documents and shareholder agreements provided to it by the Consortium parties in the context of these concerns. The ACCC does not consider that it is likely that any of the cross-shareholdings set out in paragraph 110 above will give any member of the Consortium the ability to favour another member.
113. The ACCC acknowledges the concerns of interested parties. However, following consideration of these concerns, along with consideration of the transaction documents and shareholder agreements, the ACCC's preliminary view is that none of these cross shareholdings are likely to lead to a substantial lessening of competition in any relevant market. The ACCC notes that Asciano currently owns 100 per cent of Pacific National, the BAPS businesses and the Patrick port terminals business and as such the cross ownerships listed in paragraph 110

above are materially less than the integration that would exist absent the acquisition.

114. The ACCC further considers that CPPIB's proposed 9.99 per cent of Qube and 33 per cent interest in Pacific National:
- would not change Qube's incentives to compete with Pacific National in any relevant markets
 - is unlikely to provide CPPIB with sufficient incentive to seek to influence the operations of Pacific National to favour Qube or refrain from competing with Qube (even if it was able to do so); and
 - is not likely to result in the flow of commercially sensitive information that would be likely to lead to a substantial lessening of competition in any relevant market.
115. On this basis the ACCC's preliminary view is that the various cross shareholdings listed above are unlikely to substantially lessen competition in any relevant market. The ACCC will closely consider any further related acquisitions by any of the Consortium parties including any changes in these minority shareholdings as and when they arise in the future.

The ACCC invites comments from market participants in relation to the cross-shareholdings between the parties, the acquisition of Pacific National and the acquisition of Patrick BAPS.

ACCC's next steps

116. As noted above, the ACCC seeks submissions from market participants on each of the issues identified in this Statement of Issues and on any other issue that may be relevant to the ACCC's assessment of this matter. Submissions are to be received by the ACCC no later than 10 June 2016 and should be emailed to mergers@accc.gov.au.
117. The ACCC will then finalise its view on this matter after it considers submissions.
118. The ACCC intends to publicly announce its final view by 21 July 2016. However the anticipated timeline may change in line with the Merger Review Process Guidelines. A Public Competition Assessment that will explain the ACCC's final view will be published following the ACCC's public announcement.