



Public Competition Assessment

21 July 2016

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

The ACCC's decision

1. On 21 July 2016 the Australian Competition and Consumer Commission announced its decision not to oppose 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 (**bcIMC**), GIC Private Limited (**GIC**) and Qatar Investment Authority (**QIA**) (collectively, the **Consortium**).
2. The ACCC considered that the proposed acquisition of Asciano (the **proposed acquisition**) would not be likely to contravene section 50 of the *Competition and Consumer Act 2010* (the **Act**).
3. Section 50 prohibits acquisitions that would have the effect, or be likely to have the effect, of substantially lessening competition in any market.
4. This Public Competition Assessment outlines reasons for the decision by the ACCC not to oppose the Consortium's proposed acquisition of Asciano.
5. The proposed acquisition involved a complicated transaction structure where various business segments of Asciano, that is Pacific National, Patrick Container Terminals and Patrick Bulk and Automotive Port Services, were to be divided between various members of the Consortium in order to minimise competition issues. More detail on the transaction structure is provided below. On 27 June 2016 Asciano announced a variation to the transaction whereby Asciano's 50 per cent interest in the ACFS Joint Venture (**ACFS**) would no longer be acquired by Brookfield, GIC, bcIMC and QIA (together, the **Brookfield parties**) but would instead be transferred to TZI 1 Pty Ltd, Arthur Tzaneros, Terry Tzaneros and ZED Group Australia Pty Ltd (together, the **Tzaneros interests**), the owners of the other 50 per cent of ACFS.
6. A key issue for the ACCC was whether the proposed acquisition would enable the Consortium members to discriminate in favour of their own operations in a relevant market. There is currently some degree of vertical integration throughout the containerised import-export (**IMEX**) supply chain. Notably, Asciano is a vertically integrated stevedore (through ownership of Patrick

Container Terminals), rail and road container transport logistics operator, and empty container park operator.

7. The proposed acquisition would result in Patrick Container Terminals being 50 per cent owned by the Brookfield parties, who would not have any interest in road container transport logistics or empty container park operations. The ACCC considered the Brookfield parties would not consent to any discriminatory conduct by Patrick Container Terminals if it would potentially lead to a loss of stevedoring revenue. Further, with the exception of containers being transported by rail to and from Port Botany, the sizes of the upstream and downstream businesses are similar pre and post-acquisition (i.e. the scale of vertical integration does not change with the acquisition). The ACCC therefore concluded there was not likely to be a substantial lessening of competition in any of the relevant markets.
8. For containers that are transported from regional NSW to Port Botany for export, the ACCC concluded that while there would be a material change in the nature of vertical integration between stevedoring services at Port Botany and rail-based container transport services to Port Botany, this was not likely to substantially lessen competition. In forming this view, the ACCC had regard to the potential avenues of discrimination available to the Patrick Container Terminal as well as the scope and extent of constraints and conflicting incentives which would deter such conduct.
9. The ACCC also concluded that the following aspects of the proposed acquisition were not likely to substantially lessen competition in any market:
 - the acquisition of Pacific National
 - the acquisition of Patrick Bulk and Automotive Port Services (**BAPS**)
 - various cross shareholdings between the Consortium members that would arise as a result of the proposed acquisition.
10. Please note that this and other public competition assessments are subject to the following qualifications:
 - the ACCC considers each transaction on a case-by-case basis and so the analysis and decision outlined in one assessment will not necessarily reflect the ACCC's view of another transaction, even where that other transaction may involve the same or a related market; and
 - as assessments are brief and also do not refer to confidential information provided by the parties or other market participants, assessments do not set out all of the issues and information considered by the ACCC, nor all of the analysis and reasons of the ACCC.

The parties and the transaction

The acquirer: the Consortium members

11. 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 does not currently have any container stevedoring interests. Qube's logistics business (**Qube Logistics**) supplies road and rail transport services, warehousing and distribution services, empty container park and related services and freight forwarding services. Qube also operates intermodal terminals¹ and is developing the Moorebank Intermodal Terminal (**Moorebank**). Moorebank is scheduled to open in 2017 and will be the largest intermodal terminal in the Sydney metropolitan area.² 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. Asciano owns the other 50 per cent of AAT, as discussed further below.
12. 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 Bowen Basin region of central 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 WA.
13. GIP is a global, independent infrastructure investor, which targets investments in infrastructure. GIP manages QSuper's 15 per cent equity interest in NSW Ports (the long term leaseholder of Port Botany) 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 stevedore but does not operate in Australia.
14. 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).
15. 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 lessor of the DBCT.
16. 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.

¹ For further detail see the Qube Logistics website: <http://www.qube.com.au/logistics>.

² For further detail see the Moorebank Intermodal Company Limited website: <http://www.micl.com.au/>.

17. 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.
18. 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.

The target: Asciano

19. Asciano is listed on the Australian Securities Exchange. Asciano's business has several elements:

Pacific National

20. 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, bulk and break-bulk³ markets. It is a leading provider of interstate containerised rail transport services and operates intermodal terminals. Pacific National also hauls a range of bulk goods for domestic use and export including coal and grain. Pacific National competes with Qube Logistics for the provision of rail container IMEX logistics services, notably from regional NSW to Port Botany.

Patrick Terminals and Logistics

21. Patrick Terminals and Logistics is a major terminal operator in Australia and one of two container stevedores present at each of the four largest container ports in Australia: the Port of Melbourne, Port Botany in Sydney, the Port of Brisbane and the Port of Fremantle. These stevedoring and related container terminal operations constitute Patrick Container Terminals.
22. Patrick Terminals and Logistics also has a 50 per cent interest in ACFS. ACFS is one of Australia's two largest national landside container logistics operators focusing on IMEX services such as road transport services, empty container park and related services and warehousing and distribution services. ACFS competes directly with Qube Logistics at each major container port.
23. The remaining 50 per cent interest in ACFS is held by TZI 1 Pty Ltd and its related entities. Asciano's interest in ACFS will be transferred to the Tzaneros interests when the scheme of arrangement is implemented (see below for further detail).

³ Break-bulk cargo, or 'general' cargo, are goods that must be loaded and transported individually, and not in intermodal containers nor in bulk as with oil or grain.

Patrick BAPS

24. 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 also includes:
- Asciano's automotive and general stevedoring business
 - Asciano's 80 per cent interest in Patrick Autocare, which is a supplier of pre-delivery inspection motor vehicle services
 - integrated services for the transportation, processing and storage of motor vehicles from the port to the beneficial freight owner.

AAT

25. 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 stevedore at the Port of Brisbane, Port of Melbourne, Port of Adelaide and Port Kembla.

The transaction

26. The proposed acquisition will occur through a scheme of arrangement. On 3 June 2016, Asciano shareholders voted in favour of the scheme of arrangement.
27. There are three main components to the proposed acquisition: the Rail acquisition, the BAPS acquisition and the Ports acquisition.

Rail acquisition

28. The Rail Consortium (comprising CPPIB, GIP, CIC Capital, GIC and bcIMC) proposes to acquire the Pacific National rail business and certain intermodal terminal operations (together, the **Rail business**). Their percentage ownership stakes in the Rail business will be:
- CPPIB – 33 per cent
 - GIP – 27 per cent
 - CIC Capital – 16 per cent
 - GIC – 12 per cent
 - bcIMC – 12 per cent

BAPS acquisition

29. The Brookfield parties propose to acquire Asciano's BAPS division and Asciano's 50 per cent interest in AAT (together, the **BAPS businesses**). Their percentage ownership stakes in the BAPS businesses will be:
- Brookfield – 67 per cent
 - GIC – 11 per cent
 - bcIMC – 11 per cent
 - QIA – 11 per cent

Ports acquisition

30. Qube and the Brookfield parties propose to acquire Asciano's Patrick Container Terminal business. For clarity, Asciano's 50 per cent interest in ACFS and Asciano's 50 per cent interest in AAT will not form part of the Ports acquisition. Qube and the Brookfield parties' percentage ownership stakes in Patrick Container Terminals 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
31. 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 Patrick Container Terminals in accordance with the terms of a shareholders' agreement between the Brookfield parties.

Additional transaction information

32. The Consortium initially advised that the Brookfield parties would acquire Asciano's interest in ACFS. However, on 27 June 2016, Asciano announced that it had agreed to transfer its 50 per cent interest in ACFS to the Tzaneros interests conditional upon the scheme of arrangement being implemented (the **ACFS acquisition**). Asciano also agreed to transfer certain port head leases to the Tzaneros interests. Following this transfer, the Tzaneros interests will own 100 per cent of ACFS.⁴
33. The Rail, BAPS, Ports and ACFS acquisitions will all occur around the same time or immediately before the implementation of the scheme.

⁴ <https://asciano.com.au/investors/announcements/1229/download>.

34. The ACCC notes Qube's proposal to acquire Asciano's (subsequently the Brookfield parties') 50 per cent interest in AAT and CPPIB's proposed acquisition of 40 per cent of Glencore Agriculture. These are separate proposed acquisitions which will be subject to separate ACCC reviews.
35. The ACCC will consider any further related acquisitions by any of the Consortium parties including any changes in the minority shareholdings as and when they arise in the future.

Earlier Asciano matters

36. The ACCC had earlier considered two separate proposals, one by a consortium led by Qube and another by a consortium led by Brookfield. The ACCC's consideration of those two earlier proposals ceased when the new joint proposal to acquire Asciano was announced.
37. The ACCC released a Statement of Issues in relation to the Brookfield-led consortium's proposal in October 2015, outlining concerns that the transaction could lead to a substantial lessening of competition in markets for the supply of above rail haulage services in WA and Queensland. The joint proposal restructured the acquisition to address the competition concerns previously raised by the ACCC.

Review timeline

38. The following table outlines the timeline of key events for the ACCC in this matter.

Date	Event
30 March 2016	ACCC commenced review under the Merger Process Guidelines.
18 April 2016	Initial market inquiries closed.
26 May 2016	ACCC published a statement of issues.
10 June 2016	Closing date for submissions in response to the statement of issues.
21 July 2016	ACCC decision not to oppose.

39. The total review period, net of time taken by the parties to submit information or documents, was 79 business days.

Market inquiries

40. The ACCC conducted extensive market inquiries with a range of industry participants, including stevedores, port authorities, container logistics operators, shipping lines, importers and exporters, industry bodies, other regulatory agencies and other interested parties. Submissions were sought in relation to the substantive competition issues.
41. Given the complicated nature of the transaction structure, the cross shareholdings between consortium members, and various different relationships in the IMEX container supply chain, the proposed acquisition involved complex vertical integration issues. Market participants expressed a broad and differing range of views regarding the likely effect of the proposed acquisition on the IMEX container supply chain.

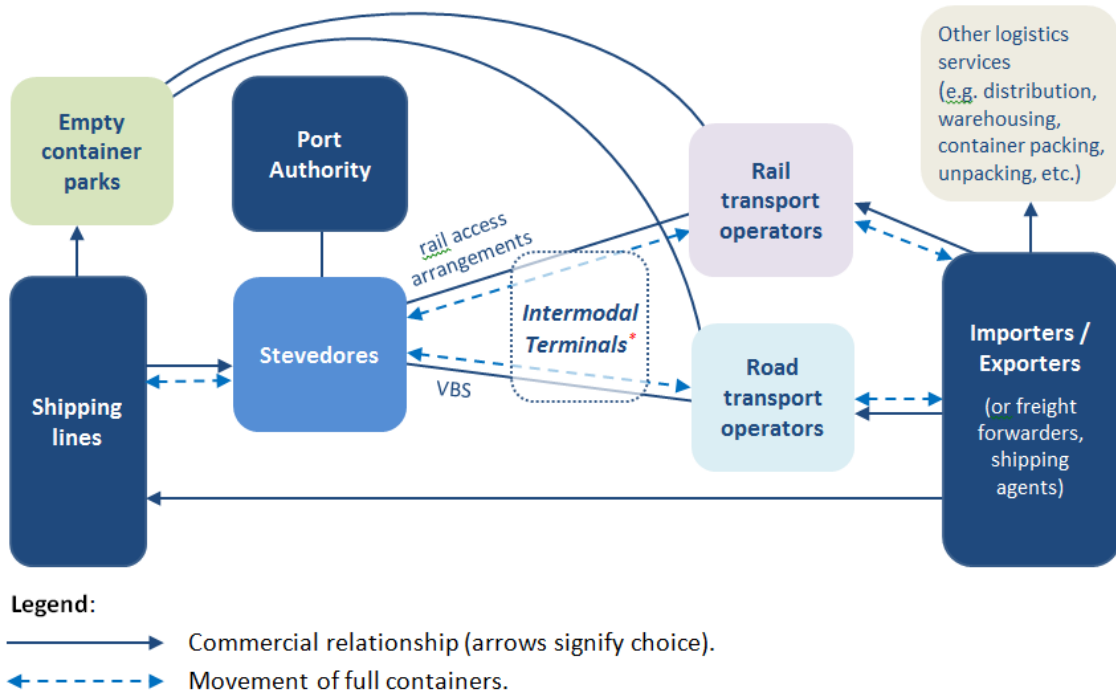
Statement of Issues

42. On 26 May 2016, the ACCC published a Statement of Issues on the proposed acquisition identifying a number of potential competition issues. In the Statement of Issues, the ACCC stated its preliminary view that the proposed acquisition may reduce competition for:
 - rail-based container transport services from regional NSW to Port Botany
 - landside IMEX container logistics services to and from the Ports of Botany, Brisbane, Fremantle and Melbourne
 - stevedoring services at the Ports of Botany, Brisbane, Fremantle and Melbourne.
43. At the time of publishing the Statement of Issues, the proposed acquisition involved the transfer of Asciano's 50 per cent interest in ACFS to the Brookfield parties.
44. In the Statement of Issues, the ACCC also stated its preliminary view that the following issues were unlikely to raise competition concerns:
 - the cross-shareholdings between members of the Consortium
 - the Rail Consortium's acquisition of Pacific National
 - the Brookfield parties' acquisition of the BAPS businesses.

Industry background

45. Many parties play a role in the IMEX container supply chain. These parties include importers/exporters, stevedores, shipping lines, road and rail container transport operators, freight forwarders, intermodal terminal operators, port authorities, below rail operators, empty container park operators and government bodies.
46. 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 (to transport empty containers).*
 - 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 operators 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.
47. Below is a simplified diagram that summarises the movement of full 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



* *Intermodal terminals are sometimes used to change between modes of container transport, e.g. to change from rail transport to road transport or from regional rail trains to port shuttle trains*

48. As set out above, the importer/exporter or freight forwarder chooses the shipping line and this shipping line chooses the stevedore/container terminal.
49. Market participants submitted to the ACCC that transport operators currently have limited, or no, influence over the stevedore that they must call at to collect/drop-off containers and in most cases they collect/drop-off containers at each of the container terminals. As all landside logistics transport operators generally have to access every container terminal and have to deal with each stevedore, the ACCC considered that the stevedore is in a position to materially influence the operations of, and competition between, landside container logistics transport operators.
50. Contracts between shipping lines and stevedores are typically between three and five years and there is generally limited ability for shipping lines to change stevedores during the contract period. Landside container logistics transport operators and importers/exporters can and do voice concern to shipping lines about access and landside efficiency at container terminals. However, the main factors which influence a shipping line's choice of stevedore are stevedoring fees, berthing window scheduling and availability, and quayside efficiency. However, all else being equal, the landside access and efficiency of a stevedore can influence the shipping lines' choice of stevedore.

Market definition

51. The ACCC considered the competitive effects of the proposed acquisition in the following markets:
- IMEX landside container transport services
 - *IMEX landside container transport services to and from each of the Ports of Brisbane, Fremantle and Melbourne (including transport by road, rail or a combination of both)*
 - *IMEX landside container transport services to and from metropolitan areas in Greater Sydney to Port Botany (including transport by road, rail or a combination of both)*
 - *rail-based container transport services from regional NSW to Port Botany for export*
 - empty container park services at or near each of the Ports of Botany, Brisbane, Fremantle and Melbourne
 - container stevedoring services at each of the Ports of Botany, Brisbane, Fremantle and Melbourne.

IMEX landside container transport services

52. The ACCC considered the extent to which the landside transportation of IMEX containers by rail is constrained by road transportation. For the Ports of Brisbane and Fremantle, there are no rail sidings controlled by Patrick Container Terminals and as such all containerised freight must be transported into the terminal via truck.
53. While there is a rail siding within the Patrick Container Terminal at Port of Melbourne, it is not currently open for access by third-parties. A small proportion of containers exported through the Port of Melbourne are transported via rail directly to the DP World container terminal. However, the ACCC's market inquiries indicated that the cost of transporting containers to Port of Melbourne via rail is closely constrained by road transportation.
54. At Port Botany, the rail sidings inside the three containers terminals are relatively well utilised. However, the vast majority of containers to and from Port Botany are currently transported by road. The ACCC noted the recent significant investment in metropolitan intermodal rail terminals in Sydney which is likely to increase the volumes of containers transported to and from Port Botany via rail. However, on the basis of the information available, the ACCC concluded that the transportation of IMEX containers between metropolitan areas in Greater Sydney and Port Botany by rail is closely constrained by road transportation and is likely to continue to be in the foreseeable future.
55. In contrast, the weight restrictions imposed on containers transported on road through parts of regional NSW along with the distance and terrain between regional NSW and Port Botany mean that road transport is significantly more expensive than rail transport for a significant segment of exporters located in regional NSW. Accordingly, the ACCC considered that for these regional export customers, road transport is not a constraint on rail transport.

Empty container park services

56. A shipping line's choice of empty container park can depend on a number of factors including:
- the price charged for storing containers
 - the cost of transporting containers between the container park and the port (which is closely correlated to the proximity of the container park to the container terminal)
 - the proximity of the container park to the warehouses or distribution centres of the shipping line's major customers, the importers and exporters
 - whether the shipping line requires access to a container park with a rail siding.
57. The ACCC considered the ability of shipping lines and container logistics operators to switch between empty container parks located within the port precinct (on-port empty container parks) and outside the port precinct (off-port empty container parks). However, the ACCC did not consider it necessary to form a concluded view as to whether the supply of on-port and off-port empty container park services may be more appropriately considered separate markets as it did not materially affect the ACCC's competition assessment.
58. For the purpose of this review, the ACCC considered it sufficient to consider the proposed acquisition in the context of empty container parks at or near each of the Ports of Botany, Brisbane, Fremantle and Melbourne.

Container stevedoring services

59. The ACCC considered the proposed acquisition in the context of container stevedoring markets in each of the Ports of Botany, Brisbane, Fremantle and Melbourne. However, the ACCC did not consider it necessary to form a concluded view as to the specific scope of the container stevedoring market as the ACCC's competition assessment did not hinge on the precise definition of this market.

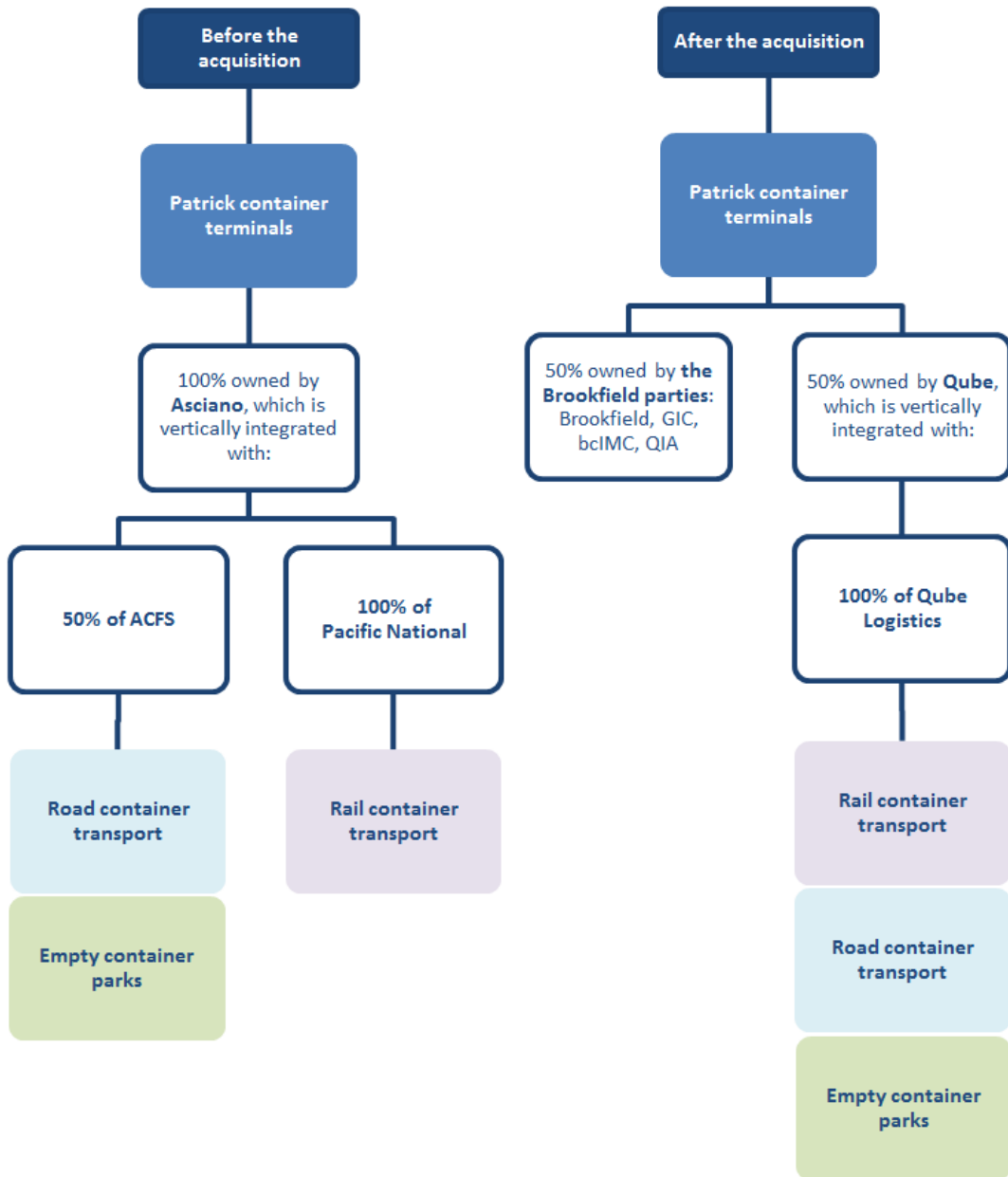
Future with and without the acquisition

60. 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.
61. While there was some uncertainty as to whether another party would acquire Asciano in the absence of the proposed acquisition, and some speculation regarding whether the transaction may be restructured by some or all members of the Consortium to address potential competition issues identified in the ACCC's Statement of Issues, information available to the ACCC did not establish that the future without the proposed acquisition was likely to involve a significantly different industry or Asciano structure than the status quo.
62. Accordingly, on the basis of the information available, the ACCC considered that the status quo would apply if the transaction does not proceed (the "without" position).

Vertical integration under the proposed acquisition

63. Patrick Container Terminals is currently wholly owned by Asciano and is vertically integrated with two landside container logistics service providers: ACFS, in which Asciano has a 50 per cent interest, and Pacific National which is 100 per cent owned by Asciano.
64. Under the proposed acquisition, Patrick Container Terminals will be owned and operated as a joint venture where one joint venture party (Qube) wholly owns a landside container logistics operator (Qube Logistics). Qube Logistics competes closely with both ACFS (primarily for metropolitan container transport and empty container park services) and Pacific National (primarily for regional rail-based container transport services).
65. Diagram 2 highlights the change in vertical integration that results from the proposed acquisition.

Diagram 2: extent of vertical integration before and after the proposed acquisition



66. The ACCC notes that the road container transport and empty container park operations of Qube and ACFS are of a similar size. This is relevant to assessing the likely competitive effects from the proposed acquisition. An important distinction however, is that pre-acquisition a 100 per cent owner of Patrick Container Terminals has a 50 per cent interest in a downstream container transport and empty container park operator, while post acquisition a 50 per cent owner of Patrick Container Terminals has a 100 per cent interest in a downstream container transport and empty container park operator.
67. Qube's logistics operations include its interest in Moorebank and its metropolitan rail container transport services to Port Botany. Although Asciano currently owns Pacific National, Pacific National's IMEX-focussed container operations in NSW are limited. Therefore, the proposed acquisition would increase the extent of

vertical integration between the Patrick Container Terminal in Port Botany and NSW IMEX-focussed rail-based container logistics.

68. The ACCC therefore considered that while the vertical integration in the IMEX container supply chain with and without the acquisition was similar in many respects, there were material changes which required close consideration.

Competition analysis – rail-based container transport from regional NSW to Port Botany

69. A key issue for the ACCC was whether the vertical integration of the Port Botany Patrick Container Terminal with Qube's rail container transport operations would be likely to result in a substantial lessening of competition in the market for regional rail container transport services to Port Botany.
70. This was an issue specific to exports from *regional* NSW through Port Botany as:
- rail transportation of IMEX containers between metropolitan NSW and Port Botany appear to be closely constrained by road transportation
 - at the Ports of Brisbane and Fremantle there is no rail siding at the Patrick Container Terminal so there is no scope for discrimination between different rail operators
 - at the Port of Melbourne, the Patrick Container Terminal does not currently provide access to third party rail operators and the rail transportation of containers to Port Melbourne appears to be constrained by road transportation in any event.
71. The Patrick Container Terminal at Port Botany is already vertically integrated with an IMEX container rail service provider in Pacific National, which was at one stage the largest rail service provider for containers to Port Botany. The ACCC noted that the presence of such vertical integration had not prevented Qube from entering into the market for rail-based container transport services, and growing to become the largest rail service provider to Port Botany.
72. However, industry participants cited Qube's operation of Moorebank as a reason why the proposed acquisition would give rise to a different, larger degree of vertical integration than currently exists or has previously existed between Patrick and Pacific National. Market participants noted that Moorebank will be the largest intermodal terminal in the Sydney metropolitan area and will be significantly bigger than other intermodal terminals. Market participants also considered that after Moorebank commences operations, Qube will start operating a number of train services between Moorebank and Port Botany which will reduce the spare capacity at the Patrick Container Terminal rail siding.

Ability and incentive for Patrick to discriminate in favour of Qube

73. The ACCC considered whether Qube's operation of Moorebank, and the consequent potential reduction in spare capacity at the Patrick Container Terminal rail siding, would be likely to increase the ability and incentive of the

Patrick Container Terminal to discriminate in favour of Qube's trains. Potential methods of discrimination are discussed below.

74. The provision of stevedoring services at container terminals achieves significantly higher marginal revenues relative to the provision of IMEX container rail transportation, with the latter being characterised by relatively high variable costs of operation. In terms of revenue, the size of the rail-based container transport services market from regional NSW to Port Botany is also relatively small when compared to the revenue for stevedoring services at Port Botany.
75. Given the above, the ACCC considered that Patrick would not discriminate in favour of Qube's rail services, if such discriminatory conduct would reduce or pose significant risk to the profitability of the Patrick Container Terminal operations. The profitability of a container terminal is primarily driven by its shipping line customers, container throughput and efficiencies of operation. The ACCC therefore considered that if discrimination between rail operators would risk losing a shipping line customer or reducing container throughput, there would be very little incentive to engage in such discrimination.
76. In addition, in assessing the ability and incentive for Patrick to discriminate in favour of Qube's rail transport operations, the ACCC had regard to the Brookfield parties' 50 per cent ownership of Patrick Container Terminals. The Brookfield parties will have no economic interest in Qube's downstream rail operations and will not have any incentive to discriminate between rail operators accessing Port Botany. The ACCC also noted that the Brookfield parties will have an active role in the management and operation of the Patrick Container Terminals and that Brookfield has ongoing experience in managing container terminals internationally. The ACCC therefore considered that the Brookfield parties' 50 per cent interest in the Patrick Container Terminals business would restrict Qube in operating the container terminal in any way which would reduce the profitability of the Patrick business.
77. The ACCC therefore considered whether it may be possible for Patrick Container Terminals to leverage its position to distort the competitive process between rail operators transporting containers from regional NSW to Port Botany for export **without** risking the profitability of the Patrick Container Terminal operations.

Potential methods of discrimination between rail operators

Price

78. The ACCC considered that there was limited scope for a stevedore to discriminate between rail operators on the basis of price as:
 - prices are capped by the NSW government and the stevedores charge at the price cap; and
 - the Brookfield parties would not likely consent to charging Qube a lower price as this would reduce their share of the Patrick Container Terminal's revenue.

Servicing of trains

79. The ACCC considered whether the Patrick Container Terminal could prioritise the servicing of Qube trains over competing operators. Examples raised by market participants included Patrick accepting Qube trains that are late or arrive outside of their allocated window. This could cause delays, increasing the costs of competing rail operators and making them less efficient and less competitive against Qube. Market participants expressed concern that Patrick could ensure that Qube trains would always have all containers lifted from the train, even if the train arrived late to its window and irrespective of whether the stevedore is able to lift all of the containers within the scheduled window. Market participants considered that Patrick would not be likely to give rival rail operators the same service.
80. Such discrimination could result in delays for rival rail operators who would not be able to access the Patrick Container Terminal at their scheduled times and who would not be afforded the same guarantee of having the full load of containers lifted. Rival rail operators would then be required to go to an intermodal terminal and have the remaining containers transported to Port Botany by road, or port shuttle, at significant additional cost.

Allocation of windows at the container terminal rail siding

81. The ACCC considered there would be limited scope for Patrick to deny or withdraw a regional rail operator's access to a pre-existing window to favour Qube as:
- each regional service has rail siding windows allocated for both the Patrick and DP World container terminals and require aligned rail path allocations by the track operator, the Australian Rail Track Corporation (**ARTC**)
 - on this basis, without the co-operation of both DP World and ARTC, Patrick would not be able to take away an existing rail window from an operator for the purpose of re-allocating the window to a Qube service from regional NSW
 - such conduct would be an overt and visible act of preferential treatment which would likely be observed by industry participants including Transport for NSW (**TFNSW**), NSW Ports (the long term leaseholder of Port Botany) and shipping line customers.
82. However, there may be scope for Patrick to preferentially allocate new windows at the Patrick Container Terminal where both Qube and a competitor are requesting a window at a similar time. Market participants considered this to be of particular concern for new port shuttle services from metropolitan intermodal terminals. As noted above, the ACCC considered, on the basis of the information available, that port shuttle rail services from metropolitan intermodal terminals are likely to be closely constrained by road services in the foreseeable future. The ACCC therefore considered that this form of potential discrimination provided little scope for Qube to be able to increase prices or lower the quality of its rail service offerings.

Potential constraints on discrimination by the Patrick Container Terminal

Risk of losing volumes or shipping line customers

83. The ACCC considered that even the subtle forms of discrimination outlined above would risk importers/exporters switching volumes away from shipping lines stopping at the Patrick terminal to shipping lines calling at other container terminals such as DP World. Many IMEX customers appear capable of switching at least some volumes between shipping lines.
84. Discrimination between rail operators, if detected, would also risk concerns and complaints being raised by importers/exporters and competing rail operators with Patrick's shipping line customers. While the likelihood of a shipping line switching stevedores based on allegations of discrimination against landside logistics operators may not be high, the financial detriment that would be incurred by the stevedore, if switching did occur, would be significant.
85. The ACCC further considered that even if Patrick Container Terminals were to engage in the subtle forms of discrimination noted above, it is not clear that such conduct would necessarily lead to Qube being able to attract or retain a significant number of customers and be able to increase prices or reduce the quality of its offering. Therefore, discrimination between rail operators may have the potential to provide a relatively small financial reward at the risk of significantly greater financial detriment through less stevedoring revenue.

Rail performance monitoring and potential regulation

86. Rail access and performance at Port Botany, including the rail service performance of the stevedores, is currently monitored by TFNSW. The data that TFNSW collects and monitors means that it is well placed to detect discrimination by a stevedore between rail operators.
87. The discriminatory conduct outlined above would have the potential to cause greater inefficiencies in rail access to the port and cause more containers to be transported by road. Such an outcome would be contrary to TFNSW's objective to promote a modal shift to rail. TFNSW has established the Port Botany Rail Optimisation Group to consider and provide advice to government on ways to improve efficiency and performance of rail services at Port Botany. Part of the reason for establishing the Port Botany Rail Optimisation Group was to avoid additional regulation and to attempt to improve efficiency through voluntary standards and protocols. However, the ACCC noted that the relevant NSW Minister has the ability to expand TFNSW's regulatory role, under existing legislation, if the Patrick Container Terminal were to engage in discriminatory conduct.⁵
88. The ACCC considered that the threat of regulation by TFNSW may constrain Patrick from discriminating in favour of Qube's rail services to some extent. However the ACCC did not place significant reliance on the potential for regulation in reaching its decision.

⁵ *Ports and Maritime Administration Act 1995* (NSW), s. 10B, sch. 4.

Non-discrimination provisions in Patrick Container Terminal Port Botany lease

89. The ACCC noted that NSW Ports is the landlord at Port Botany, as well as at the Enfield and Cooks River intermodal terminals. Rail-based port shuttles currently run between Cooks River and Port Botany and both Aurizon and NSW Ports have stated that the commencement of intermodal operations at Enfield will pave the way for port shuttles between Enfield and Port Botany.⁶ The ACCC therefore considered that NSW Ports will have a significant incentive to try to prevent discriminatory access to rail transport operators, as otherwise the profitability of the Enfield and Cooks River intermodal terminals would be at risk.
90. The ACCC has reviewed the lease agreement between Patrick Container Terminals and NSW Ports, in particular the non-discrimination clauses and dispute resolution mechanisms specifically directed at ensuring open and equal access for rail operators to the Patrick rail siding.
91. The ACCC considered these non-discrimination provisions to be relatively light-handed and there was some uncertainty as to whether NSW Ports would have sufficient oversight and enforcement mechanisms under the lease to detect and prevent Patrick from discriminating in favour of Qube.
92. However the ACCC considered that the incentive of NSW Ports to ensure that rail transport services from Enfield and Cooks River intermodal terminals could access the Patrick rail siding, along with the lease clauses, may provide some form of deterrent to the Patrick Container Terminal from discriminating against rival regional rail operators. However, the ACCC did not place significant reliance on the lease clauses in reaching its conclusion.

Conclusion

93. The ACCC concluded that the Patrick Container Terminal at Port Botany would have limited ability and incentive to discriminate against Qube's rival rail operators and that it was not likely that Qube would be able to charge higher prices or offer a lower quality service. In reaching this view, the ACCC had regard to the following factors:
- there is minimal scope for a stevedore to discriminate between rail operators on a price-basis at Port Botany as service prices are capped by the NSW Government
 - there is limited scope for a stevedore to prevent operators with existing rail windows from accessing the stevedore's rail siding in order to favour its own rail operator
 - the Patrick Container Terminal would continue to face competition from DP World and Hutchison for stevedoring services in the foreseeable future. Discrimination between rail providers at the Patrick Container Terminal rail siding would risk losing shipping line customers or container volumes

⁶ <https://www.aurizon.com.au/news/news/aurizon-eyes-intermodal-growth-with-enfield-opening>
<http://www.nswports.com.au/assets/Media-Releases/NSW-Ports-Media-Release-Commencement-of-Aurizon-operations-at-Enfield-May-2016.pdf>.

- there is little incentive for a vertically integrated stevedore to discriminate against competing downstream rail operators if such discrimination would risk losing throughput or shipping customers at the container terminal which earn significantly higher marginal revenues relative to rail operations
- the Brookfield parties, as 50 per cent owner of Patrick, would not consent to any discriminatory conduct if it would potentially lead to a loss of stevedoring revenue
- to a lesser extent, the monitoring role of TFNSW and threat of further regulation by the NSW Government, as well as non-discrimination provisions in the Patrick Container Terminal lease, may provide some constraint.

Competition analysis – landside container transport services

94. In the Statement of Issues published on 26 May 2016, the ACCC stated that as the proposed acquisition would result in Patrick Container Terminals being aligned with both Qube Logistics and ACFS, Patrick Container Terminals may have an increased incentive to discriminate against Qube's and ACFS's rival landside logistics service providers. The ACCC expressed a preliminary view that this increased incentive to discriminate may lead to a substantial lessening of competition in the markets for the supply of landside container transport services at each of the Ports of Brisbane, Botany, Fremantle and Melbourne.
95. Subsequent to the release of the Statement of Issues, Asciano announced on 27 June 2016 that Asciano's 50 per cent interest in ACFS would be sold to the Tzaneros interests rather than the Brookfield parties. The agreement with the Tzaneros interests also involves Asciano assigning certain port head leases (predominantly those that ACFS currently sub-leases from Asciano) to the Tzaneros interests. Accordingly, under the proposed acquisition, Patrick Container Terminals will continue to be aligned with only one container logistics operator, Qube Logistics.
96. On the basis that Qube and ACFS have similar market shares for IMEX road container transport operations, the ACCC considered that (in respect of road container transport operations) the vertical integration between Patrick Container Terminals and Qube Logistics is comparable to the current vertical integration between Patrick Container Terminals and ACFS. However the respective ownership interests in the relevant upstream and downstream operations will be materially different as:
 - pre-acquisition, Asciano owns 100 per cent of Patrick Container Terminals and only 50 per cent of ACFS which limits its *incentive* to discriminate in favour of ACFS (as it would only capture 50 per cent of any increase in ACFS revenues)
 - post-acquisition, Qube will continue to own 100 per cent of Qube Logistics but only 50 per cent of Patrick Container Terminals which limits Qube's *ability* to discriminate in favour of its downstream operations as the Brookfield parties (as 50 per cent owners of Patrick Container Terminals)

would not consent to any discriminatory conduct that would risk lessening container terminal revenues.

97. The ACCC concluded that the different nature of the vertical integration, whereby post-acquisition the *ability* to discriminate is likely to be less but the *incentive* is likely to be stronger, is unlikely to give rise to a lessening of competition in the markets for the supply of IMEX landside container transport services at each of the Ports of Botany, Brisbane, Fremantle and Melbourne. Further, the ACCC took into consideration the history of vertical integration between the major stevedores and IMEX landside container logistic service providers. Such vertical integration in the past does not appear to have given rise to discriminatory conduct that has damaged the viability of competitors.

Future viability of ACFS

98. The ACCC also considered whether ACFS would continue to be viable if it were no longer aligned with Patrick Container Terminals. As noted in the ACCC's Statement of Issues, market participants raised particular concerns that a number of ACFS's key sites are subleased to it by Patrick Container Terminals (which holds the head leases for those sites).
99. As stated above, under the agreement between Asciano and the Tzaneros interests, Asciano will assign a number of the head leases to the Tzaneros interests. The ACCC considers that ACFS will likely continue to be a competitive constraint on Qube Logistics and other logistics providers.

Competition analysis – empty container parks and container stevedoring

100. In the Statement of Issues, the ACCC expressed the preliminary view that the alignment of Patrick Container Terminals with both Qube and ACFS may substantially lessen competition in the market for the supply of container stevedoring services, as Patrick Container Terminals may be able to use Qube and ACFS to favour Patrick Container Terminals over other stevedores.
101. As noted above, the ACCC understands that, on average, Qube and ACFS have similar market shares for road container transport between each port and metropolitan areas and also for empty container park services.
102. Given that Asciano's interest in ACFS will be transferred to the Tzaneros interests, the ACCC considered that the size of the downstream landside container transport service provider vertically integrated with Patrick Container Terminals does not change with the acquisition.
103. Accordingly, the ACCC did not consider that the proposed acquisition would lead to an increased ability for Patrick Container Terminals to use a related container logistics operator to favour Patrick Container Terminals over other stevedores.
104. The ACCC also expressed the preliminary view in the Statement of Issues that the alignment of Patrick Container Terminals with Qube's significant empty container park interests at or near the Port of Fremantle could enable Patrick to bundle empty container park services with stevedoring services in a way that DP World could not compete with.

105. During post-Statement of Issues market inquiries, market participants advised that while Qube currently operates the majority of container parks at or near the Port of Fremantle, an empty container park is currently being developed by ACFS and Tyne Container Services Pty Ltd which is expected to open shortly.⁷
106. The ACCC considered that this independent container park would be likely to constrain the Patrick Container Terminal's ability to bundle stevedoring and empty container park services in such a way that could lessen competition in stevedoring services in Fremantle. The ACCC therefore considers that this aspect of the proposed acquisition is not likely to have the effect of substantially lessening competition in any relevant markets.

Competition analysis – cross shareholdings and future acquisitions

107. Throughout its review, the ACCC considered the following aspects of the transaction but, based on market feedback and other information the ACCC had before it, considered that they would not be likely to result in competition issues.

Acquisition of Pacific National

108. 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 bcIMC investment or operations
 - through the common financial interests between the Consortium parties created by the transaction structure
 - by facilitating the transfer of commercially sensitive information between competitors.
109. Some industry participants raised concerns in relation to bcIMC acquiring a 12 per cent interest in Pacific National as bcIMC has a 9 per cent interest in DBCT Management (the long term lease holder of the Dalrymple Bay Coal Terminal). The ACCC concluded that these minority shareholdings were not likely to provide bcIMC 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 was not likely.
110. The ACCC also considered that these shareholdings held by bcIMC would not be likely to result in the sharing of commercially sensitive information that would be likely to substantially lessen competition in any relevant market.
111. The ACCC considered the various interests of all of the Rail Consortium parties and did not consider that there were any other competitive overlaps or

⁷ <http://www.fremantleports.com.au/News/News/Pages/News-Item.aspx?item=745&returnurl=http://www.fremantleports.com.au/News/Newsletters/Pages/Port-News-2015.aspx>.

relationships with Pacific National that would be likely to give rise to potential competition concerns in any relevant market.

Acquisition of BAPS

112. With the Asciano 50 per cent interest in ACFS being acquired by the Tzaneros interests and therefore being severed from the BAPS business, the ACCC's view was that the acquisition of Asciano's BAPS businesses by the Brookfield parties was not likely to raise competition concerns.
113. Based on the information available to the ACCC, this aspect of the proposed acquisition would not result in any horizontal aggregation or increase in vertical integration which would have the potential to lead to competition concerns in any relevant market. Industry participants did not raise significant concerns about this issue.

Other cross shareholdings

114. The ACCC noted that the proposed acquisition will result in a number of cross shareholdings:
 - GIC and bclMC will each have 12 per cent interests in Pacific National, 11 per cent interests in BAPS and 5.5 per cent interests in Patrick Container Terminals
 - 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 Patrick Container Terminals.
115. A number of industry participants raised concerns about the cross shareholdings on the basis that they would lead to close-knit relationships between the Consortium parties. Industry participants considered that this would lead to co-ordinated conduct and lessen competition between Pacific National and Qube or create vertical links between Brookfield's WA rail network and/or DBCT and Pacific National. For example, industry participants expressed concerns that given its interest in Qube, CPPIB would be likely to influence the operation of Pacific National so that it did not seek to win rail transport customers from Qube.
116. The ACCC closely considered the concerns raised by industry participants on these issues and reviewed the transaction documents and shareholder agreements provided to it by the Consortium parties in the context of these concerns. Following this analysis, the ACCC does not consider that it is likely that any of the cross shareholdings set out in paragraph 114 above will give any member of the Consortium the incentive to favour another member. In addition, the ACCC notes that Asciano currently owns 100 per cent of Pacific National, the BAPS businesses and Patrick Container Terminals and as such the cross shareholdings listed in paragraph 114 above are materially less than the integration that would exist absent the acquisition.

117. The ACCC further considered that CPPIB's proposed 9.99 per cent of Qube and 33 per cent interest in Pacific National:

- are not likely to change Qube's incentives to compete with Pacific National in any relevant market
- are not likely 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)
- will not result in the flow of commercially sensitive information that would be likely to lead to a substantial lessening of competition in any relevant market.

118. On this basis, the ACCC concluded that the various cross shareholdings listed above were not likely to substantially lessen competition in any relevant market. The ACCC will 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.

Conclusion

119. Based on the above analysis, the ACCC concluded that the proposed acquisition of Asciano by the Consortium would not be likely to have the effect of substantially lessening competition in any market. On this basis, the ACCC decided not to oppose the proposed acquisition.