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Director Economic Regulation
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Draft Decision on 2015 Dalrymple Bay Coal Terminal Draft Access Undertaking

8 July 2016

Dear Charles,

Aurizon Operations welcomes the opportunity to respond to the Queensland Competition Authority's (QCA) draft decision on the 2015 Dalrymple Bay Coal Terminal draft access undertaking (2015DAU).

As a rail operator, Aurizon Operations is not a user of the terminal and therefore is not an access seeker for the purpose of the 2015DAU. However, as a rail operator it does rely on the fair and equitable provision of terminal services, including train unloading, in order to ensure its customers are not unfairly disadvantaged through their choice of service provider in the competitive rail haulage markets.

Aurizon Operation's prior submissions to the QCA were primarily concerned with this objective following the announcement by Brookfield Infrastructure Partners of their intentions to acquire the interests in Asciano, including the rail operations of Pacific National.

In order to address the potential competition issues of DBCT Management's prospective vertical integration into the upstream rail haulage market DBCT Management proposed a number of amendments to the 2010 DBCT Access Undertaking, include ring-fencing. These were included in the October 2015 and the subsequent November 2015 draft amending access undertakings.

The QCA released a draft decision on the November 2015 ring-fencing draft amending access undertaking (Ring-fencing DAAU) in February 2016. The draft decision refused to approve the Ring-fencing DAAU and proposed a number of changes to improve the effectiveness of the relevant controls.

Subsequent to the release of the draft decision on the Ring-fencing DAAU, the Australian Competition and Consumer Commission (ACCC) commenced an inquiry on the alternate proposal for the acquisition of interests in Asciano. This alternate proposal would not involve the direct vertical integration of DBCT Management with the rail operations of Pacific National. As a result of the change in circumstances, DBCT Management withdrew the Ring-fencing DAAU and requested that:

the QCA take into account our preference to no longer include the November 2015 DAAU changes as part of the 2015 DAU, for the purpose of the QCA's assessment of the 2015 DAU.

The QCA's draft decision on the 2015 DAU with respect to ring-fencing provisions discusses three possible approaches in response to these change in circumstances, including the:

1. removal of any changes introduced as part of the Ring-fencing DAAU and reinstate the old clause 9 provisions from the 2010 DBCT Access Undertaking (2010AU);
2. retention of the full ring-fencing provisions as outlined in the Ring-fencing DAAU draft decision but render them inoperative until such time as vertical integration occurs; or
3. retention of a limited number of the ring-fencing changes that may be appropriate even without vertical integration or be relevant to other activities in relevant markets.

As a principle, Aurizon Operations considers that access undertakings should avoid unnecessary complexity and the inclusion of provisions which are not related to addressing a clearly identifiable issue. The retention of the full ring-fencing provisions would not be consistent with this principle.

The relevant approach also requires consideration of the potential cross-ownership of the interests of bcIMC in both Pacific National and DBCT Management. However, in this regard the ACCC Statement of Issues (SOI) notes:

Some industry participants raised concerns in relation to bcIMC acquiring a 12 per cent interest in Pacific National as bcIMC 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 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 is unlikely.

This perspective is consistent with the minority shareholdings having an 'investment only' interest and that it will not actively engage in the business decisions of the company¹. This would also require that the shareholdings do not exceed a level which would allow the minority shareholder to exercise rights of veto on reserve matters.

Furthermore the ACCC's SOI also notes that:

The ACCC also considers that these shareholdings held by bcIMC are unlikely to result in the sharing of commercially sensitive information that would be likely to substantially lessen competition in any relevant market.

This also contemplates that no officer of bcIMC will hold a senior executive role or Directorship role with DBCT Management and therefore bcIMC will only receive information commensurate with an 'investment-only' interest.

¹ For example, the US Department of Justice has initiated a suit against ValueAct for wrongly claiming it had no intent of using its minority interests to influence the Companies' business decisions. According to the complaint ValueAct purchased these shares with the intent to influence the companies' business decisions as the merger unfolded and therefore could not rely on the limited "investment-only" exemption to HSR notification requirements. The complaint details how ValueAct used its access to senior executives of both Halliburton and Baker Hughes to formulate merger and other business strategies with the companies. See <https://www.justice.gov/opa/pr/justice-department-sues-valueact-violating-premerger-notification-requirements>

Having regard to these matters the removal of the ring-fencing provisions would be reasonable subject to the inclusion in the 2015 DBCT Access Undertaking of the following conditions:

- Directors of DBCT Management are independent of upstream or downstream interests; and
- Shareholders in DBCT Management which hold a financial interest in upstream or downstream markets will not be able to exercise a right to veto over any decision relating to the provision of the declared service.

Any change in these conditions should require a review of the ring-fencing arrangements as per the current clause 9 provisions in the 2010AU.

If these conditions are not satisfied then appropriate controls may be required to avoid the transfer of protected information or influencing business strategy and direction. This may include requirements that where:

- an officer of bclMC is a director or senior executive of DBCT Management then bclMC is required to give an appropriately constructed confidentiality deed (the template of which is attached to the 2015 DAU); and
- the same officer is also a director or senior executive of a supply chain business then the undertaking will need to include provisions regarding the management of protected information including a register of information and compliance auditing provisions.

In relation to other matters addressed in the draft decision on the Ring-fencing DAAU, Aurizon Operations supports the inclusion of the changes relating to:

- the provisions which ensure DBCT Management is responsible for the provision of the declared service, including any activities which it contracts to third parties. These provisions ensure consistency with Part 5 of the QCA Act;
- the retention of appropriate provisions relating to the non-discriminatory provision of the terminal services which are not included in the 2010AU. This is consistent with the requirements of section 100(2) which applies to all providers of declared services; and
- the requirement to consult with rail operators on proposed changes to the terminal regulations. This ensures that rail operators retain the ability to identify where a proposed change may have adverse or unintended competition or efficiency consequences in the rail haulage market.

Aurizon Operations does not consider the proposed changes to the reporting requirements to prepare separate disaggregated reports by rail operator volumes to be necessary. The minority shareholding held by bclMC is not sufficient to influence the terminal operations or the terminal regulations. This additional reporting requirement would represent an unnecessary regulatory burden.

All other matters included in the draft decision on the Ring-fencing DAAU should be influenced by the views of current and future users of the terminal.

Aurizon Operations also considers that in light of the change in circumstances, DBCT Management should be afforded the opportunity to draft any revised ring-fencing provisions as it deems necessary. As the 2016 DAU has been submitted in response to an initial undertaking notice any preferred drafting of the access provider will need to be submitted in response to the draft decision. In the event this drafting differs substantially from either the 2010AU or from the draft decision on the Ring-fencing DAAU then Aurizon requests that the QCA seek further stakeholder comments on the proposed drafting.

Should you have any questions in relation to the matters discussed in this submission please contact Dean Gannaway, Principal Regulatory Economist, by phone on (07) 3019 2055 or via email at dean.gannaway@gmail.com.

Kind regards,



John Short
Vice President National Policy