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By E-mail

Mr Matthew Schroder
General Manager
Infrastructure and Transport – Access and Pricing
Branch
Australian Competition and Consumer Commission
GPO Box 3131
Canberra ACT 2601

transport@accc.gov.au

Your Ref

File No. 021926255

Contact

[REDACTED]
[REDACTED]
[REDACTED]

Partner

[REDACTED]
[REDACTED]
[REDACTED]

Dear Mr Schroder

Submission to ACCC on ARTC's 2024 Access Undertaking Consultation Paper

- 1 We act for Port of Portland Pty Limited (**POPL**).
- 2 We refer to the consultation paper on Australian Rail Track Corporation's (**ARTC**) proposed 2024 Interstate Rail Network Access Undertaking (**Undertaking**) published by the Australian Competition and Consumer Commission (**ACCC**) on 20 December 2023 (**Consultation Paper**).
- 3 We are instructed to make the following submission in response to the Consultation Paper. The section highlighted grey in paragraph 33 below is **confidential**.

Summary

- 4 The Port of Portland (**Port**) is a Victorian seaport which is connected to ARTC's national rail network by the Maroona to Portland rail line (**Line**).
- 5 The Port plays an important role in regional supply chains, including for Mallee and Wimmera growers, croppers, mineral sands miners and sustainable forestry operators, as well as other regional importers and exporters.
- 6 The Port competes with other seaports that are also connected to ARTC's national rail network. In particular, the terms of ARTC's lease of the Line reflect an acknowledgement of the competition between the Port and the Port of Geelong.
- 7 Over the past years, the track condition of the Line has significantly deteriorated to the extent that it is essentially unserviceable. The deterioration of the Line:
 - (a) has taken place despite ARTC's obligation under its lease to maintain the Line, and despite public representations made by ARTC regarding how it would maintain the Line;
 - (b) has the effect of distorting competition – in particular, between the Port and the Port of Geelong; and
 - (c) is harming regional primary producers, miners and other businesses that would otherwise have the option of using the Port, and the benefit of competition between the Port and the Port of Geelong.
- 8 ARTC's lease shows that it was intended that the Line would be subject to an access undertaking or access code requested by the ACCC. The Undertaking (and the current ARTC undertaking) does require ARTC to maintain the "Network". However, while the terms of the Undertaking apply to the part of ARTC's rail network that leads to the Port of Geelong, it appears to us that those terms do not adequately cover the Line.

- 9 In our submission, the condition of the Line demonstrates that the terms of the Undertaking (and the current ARTC undertaking) do not operate effectively and result in a distortion of competition.
- 10 In considering the Undertaking, the ACCC should ensure that the Line is clearly covered. The ACCC should also take action to ensure that ARTC meets its obligations under the Undertaking and properly maintains the Line – including by taking action under section 44ZZJ(2)(b) of the *Competition and Consumer Act 2010* (Cth) (CCA) if required.

The Port of Portland

- 11 The Port is a deep-sea port situated in western Victoria, offering connectivity to national road and rail networks. Strategically located between Melbourne and Adelaide, it is one of Australia’s busiest regional ports.
- 12 The Port offers import and export customers flexible, multi-use and efficient berths and a gateway to international markets in China, Japan, Korea, Indonesia and Taiwan as well as other Australian regions.
- 13 The Port specialises in the export of bulk commodity products. It services the thriving agriculture, sustainable forestry and mining industries across the Wimmera-Mallee, Green Triangle and Murray Basin regions which extend from northern and western Victoria to south-east South Australia.
- 14 The Port is the largest sustainable hardwood chip export port in the world. With throughput volumes of 6.1 million tonnes in 2022-23, the Port is a major economic contributor to both Victorian and South Australian regional communities.
- 15 The Port also currently handles commodities such as sustainable forestry products, livestock, grain, mineral sands, fertiliser, smelter products and wind turbines.

The Maroona to Portland rail line

- 16 The Line runs between Portland and Maroona, where it joins other parts of ARTC’s rail network. It is a 173.3 km standard gauge, timber sleepereid rail line that connects western Victoria and the Port to the national rail network.
- 17 It is a designated freight line, used by rail operators such as Pacific National to provide freight services for freight owners such as GrainCorp and Iluka Resources.
- 18 In 2008, under a deal between ARTC and the Victorian Government, ARTC signed a 50-year lease to manage the Line. In an ABC article dated 16 July 2008, the Victorian Government stated that the deal to lease the Line to ARTC included a \$15 million upgrade of the Line, so that “trains will be able to travel at up to 80 kilometres an hour between the two points and more freight will move through the Port of Portland”. The Public Transport Minister at that time, Ms Lynne Kosky, added there is significant economic growth in the region and that more freight needs to be carried on the Line.¹
- 19 In a media release issued by ARTC on 16 July 2008,² ARTC promised that the performance of the Line would be “significantly improved” under the long-term lease. ARTC explained that ARTC was leasing the Line “as part of its overall lease of the Victorian Interstate Standard Gauge Network”, which would allow ARTC to “deliver significant infrastructure improvements to the line”. The media release further stated:

ARTC will invest in the Portland-Maroona line to manage, upgrade and maintain it, with the overall aim of ensuring the line capacity is able to meet demand and be more attractive for future growth.

The clearest example of this is that by upgrading the line, trains will be able to travel consistently at 80 kilometres an hour ...

¹ <https://www.abc.net.au/news/2008-07-16/rail-track-upgrade-announced-for-portland/440954>

² <https://www.artc.com.au/2008/07/10/2008-07-17-154037/>

- 20 The “Maroona to Portland Rail Line Business Case” prepared by ARTC in December 2022 (**Business Case**), acknowledges that the Line is “a vital component of the regional supply chain that enables the export of timber, grains, and minerals to domestic and international markets through the Port of Portland”.³
- 21 Annexure A to this submission contains a map, excerpted from page 8 of the Business Case, depicting rail lines in western Victoria and South Australia, including the Line. The map also indicates the tonnage axle load (**TAL**) for each rail line.
- 22 Annexure B to this submission contains a further map, excerpted from ARTC’s website⁴, which shows how the Line connects to ARTC’s rail network.

Deterioration of the Line

- 23 Despite the importance of the Line and the promises to upgrade and maintain it, the Line has significantly deteriorated. This has reached the point where in some cases there have been train derailments.⁵
- 24 In a Stock & Land article dated 6 June 2023, POPL’s chief executive Mr Greg Burgoyne warned the Line might have to be closed if it continued to deteriorate.⁶ The article also quoted a spokesperson for the Victorian Government, who stated that the government had been “advocating for much-needed improvements to the line, to restore rail speeds and improve reliability along this important freight corridor between Portland and Maroona”.
- 25 In March 2022, the Federal Government announced it had allocated \$2.2 million to fund a business case to evaluate the upgrade of the Line.⁷ This resulted in the preparation of the Business Case by ARTC. However, despite the findings in the Business Case, we are instructed that the condition of the Line has continued to deteriorate.
- 26 As noted in the Business Case, the deterioration of the condition of the Line has resulted in the maximum operating speed on large parts of the Line having reduced from 80 km/h to 40 km/h.⁸ In some areas, speed limits have been reduced to as low as 10 km/h. As a consequence, the 173 km rail journey between Maroona and Portland has become highly inefficient. It currently takes nearly seven hours for a train to travel one way between Maroona and Portland.
- 27 The impact of the poor condition of the Line was highlighted by GrainCorp in an August 2021 submission in response to an ACCC issues paper on the regulatory framework for ARTC’s interstate network. In that submission, GrainCorp made the following observations in response to a question about where ARTC is able to exercise its market power:⁹

An example is on the Maroona to Portland rail line in Victoria, which is leased and managed by ARTC. Since 2019, ARTC has imposed speed restrictions on this line to minimise the risk of train derailment rather than undertaking the necessary track maintenance to allow the line to operate at normal capacity.

Longer operating times has led to higher crewing costs per train cycle and lower above-rail asset utilisation. It has added significant cost for rail users while also reducing efficiencies, and this has been detrimental to industry participants

³ Business Case page 8

⁴ <https://www.artc.com.au/customers/standards/route/access/defined-interstate/>

⁵ <https://www.stockandland.com.au/story/8223648/maroona-portland-rail-line-maintenance-details-should-be-released-says-britnell/>

⁶ <https://www.stockandland.com.au/story/8223648/maroona-portland-rail-line-maintenance-details-should-be-released-says-britnell/> See also a further article dated 20 April 2023:

<https://www.stockandland.com.au/story/8164857/federal-budget-maroona-portland-rail-funding-is-now-urgent-say-proponents/>

⁷ <https://dantehan.com.au/2022/03/29/2-2-million-to-investigate-maroona-to-portland-rail-upgrade/>

⁸ Business Case page 21

⁹ <https://www.accc.gov.au/system/files/GrainCorp%20submission%20-%20The%20regulatory%20framework%20for%20ARTC%27s%20Interstate%20network.pdf>

exporting grain from GrainCorp's Portland Terminal. ARTC has failed to compensate rail users or discount the relevant access charges to offset the impact. As of December 2021, the speed restrictions have been in place for more than a year, and this is expected to continue indefinitely. There is no competitive alternative for a rail user exporting grain out of Portland – the cost impost of these inefficiency decisions flows directly to grain value, which is borne by the grain grower. The additional supply chain costs ultimately lower the competitiveness of Victorian grain in inter-state and international markets.

- 28 In an ABC article dated 29 March 2022, Mr John Hearsch, President of the Rail Futures Institute, noted the Line had not been substantially upgraded since being leased to ARTC. Mr Hearsch explained that “trains now take twice as long to get there, and on many occasions they have had to put a third locomotive on because the two locomotives on the lower speeds can't use sufficient momentum to get over the hilly gradients”.¹⁰
- 29 We are instructed that the Line's deterioration means it is now effectively unserviceable. If port users such as miners, primary producers and forestry companies wish to use rail in western and northern Victoria, those businesses are forced to use the Port of Geelong given its comparatively efficient and well maintained rail line (rated at 23 TAL and allowing operating speeds of up to 80 km/h).
- 30 This gives the Port of Geelong a substantial unfair competitive advantage over POPL, distorting competition. We are instructed that the Port of Geelong now effectively has a monopoly over port services accessed by rail freight in western Victoria.
- 31 The impact of the condition of the Line, including on competition and the environment, was acknowledged in the Business Case:
- (a) *“Degraded access to the Port of Portland undermines the national supply chain resilience and the regional investment attractiveness of Australia's priority industries.”* (page 5).
 - (b) *“Freight rail infrastructure in Western Victoria is not being fully utilised by regional exporters, which is driving up supply chain costs and reducing the competitiveness in export markets.”* (page 19).
 - (c) *“Continued shift of the freight task from rail to road is increasingly impacting the regional road infrastructure, community safety and environmental outcomes.”* (page 19).
 - (d) *“Poor asset condition and operating restrictions on the Portland Line and other regional branch lines further increase the time, cost and risk associated with exporters utilising the rail network to transport primary commodities. They have directly impacted competitiveness of rail ...”* (page 22).
 - (e) *“A comparison of the relative rail mode shares for grain exports through the Ports of Portland and Geelong suggest the increasing cost of moving goods on the Portland Line is leading to a higher reliance on transport by road. For example, the Port of Geelong, which benefits from a 23 TAL connection to the main interstate rail line and therefore lower rail transport costs, sees 70 per cent of grain exports arrive by rail. By comparison, the Port of Portland – which has an axle load limit of 19 TAL as well as other operating restrictions previously identified – sees only 30 per cent of grain exports arrive by rail.”* (page 23).
 - (f) *“In Western Victoria, industry development and growth are heavily dependent on efficient and reliable freight connections to the Port of Portland, which provides an international gateway for export and import of bulk commodity products. The capacity and efficiency of rail freight lines is a key driver of industry investment decisions and can stimulate the growth of existing and new industries such as mineral sands, opening up access to new markets for those*

¹⁰ <https://www.abc.net.au/news/2022-03-29/portland-maroonra-rail-freight-line-business-case-funding/100948164>

industries. The current low performance level and utilisation of the regional rail network by exporters in Western Victoria therefore poses a risk to the financial feasibility of investment projects and future investments in key industries such as mineral sands.” (page 25)

32 As a consequence of these issues, POPL’s business has been adversely affected, including in relation to trade volumes and throughput.

33 In addition, the uneven playing field between the ports affects the level of investment in the Port and by extension its local community. [CONFIDENTIAL] [REDACTED]

34 The distortion of competition also harms regional growers and operators by reducing efficiency and increasing their supply chain costs. In a Stock & Land article dated 6 April 2022, a GrainCorp representative explained that despite rail freight being the most cost effective means of transporting grain to port in an export year, the degraded condition of the Line has forced longer cycle times and more grain to be transported by road.¹¹ Other bulk commodities, such as mineral sands, are also more suited to rail haulage.¹²

The Lease

35 The Line is leased to ARTC pursuant to a lease, titled “Interstate Infrastructure Lease”, between Public Transport Victoria (PTV) and ARTC (Lease). The current version of the Lease is dated 20 October 2000, but was amended and restated on 29 May 2008 and further amended and restated on or about 2 April 2012.

36 The Recitals to the Lease state that the Line is owned by VicTrack, which leases the land to PTV, and that PTV in turn sub-leases the land to ARTC to enable ARTC to manage Victoria’s interstate track and related assets.

37 The Lease makes it clear that ARTC must maintain the Line. In particular, clause 12 specifically requires ARTC to maintain the Line at all times so that it can be safely used for its intended purpose, and to a standard which enables (as a minimum) 19 TAL to traverse the Line at 80 km/h. As noted above, that standard is not being met.

38 The Lease also records the parties’ intention that the Line be subject to an access undertaking or access code approved by the ACCC under Part IIIA of the CCA. In clause 20.3, ARTC agreed that it intends to comply with such an access undertaking or access code.

39 ARTC is also required under clause 20.4 of the Lease not to impose access charges for services operated on the Line which exceed those imposed for comparable services on the Port of Geelong - North Geelong - Wolsley line (**Wolsley-Geelong Line**). This requirement reflects an understanding and acknowledgement of the competition between the Port and the Port of Geelong, and that the Port may suffer if it does not have the benefit of a similar rail service to the Port of Geelong.

The Undertaking

40 Under clause 8.1 of the Undertaking, ARTC is in broad terms required to maintain the “Network” in a condition which is fit for use, having regard to the terms of the access agreements.

41 That obligation applies to the Wolsley-Geelong Line, to the benefit of the Port of Geelong. However, while not entirely clear, it appears the Line may not be properly covered by the Undertaking as part of the “Network”.

¹¹ <https://www.stockandland.com.au/story/7684934/graincorp-backing-for-maroon-rail-line-upgrade/>

¹² <https://www.stockandland.com.au/story/7681590/port-set-to-spend-if-rail-line-is-upgraded/>

42 The term “Network” is defined in Part 9 of the Undertaking as “*the network of railway lines delineated or defined in Schedule E, excluding the annexures to Schedule E*”. Part 1 of the “*Victorian Lease*” section of Schedule E, describes a “*boundary*” at Maroona as the “*last long timber to Portland branch line*”. Despite this reference to the Line in the definition of the “Network”, we understand this “boundary” may, in fact, mean that the Line is excluded from the Network and therefore ARTC’s maintenance obligation under clause 8.1.

Conclusion

43 Under section 44AA of the CCA, the objects of Part IIIA of the CCA are to:

- (a) promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

44 The Undertaking is not consistent with those objects in that it would continue to discriminate unfairly against the Port in favour of the Port of Geelong. That distortion of competition harms the growers, croppers, mineral sands miners and sustainable forestry operators who would otherwise seek to use the Port.

45 The Undertaking is not appropriate under section 44ZZA for this reason (see section 44ZZA(3)(aa)) and on account of the public interest including the public interest in competition (section 44ZZA(3)(b)) and the interests of persons who might want access to the service (section 44ZZA(3)(c)).

46 In our submission, if maintenance of the Line is not required by the Undertaking, it should be. We note that the Undertaking would amend the definition of the “Network” to add additional parts of ARTC’s network that are not part of the current undertaking. If necessary, those changes should ensure that the Line is also covered by ARTC’s maintenance obligation under clause 8.1. That result would promote competition and be consistent with ARTC’s obligations under the Lease.

47 The ACCC should also take action to ensure that ARTC fulfils its obligation under the Undertaking in relation to the maintenance of the Line.

48 We are instructed that POPL has not previously been consulted regarding ARTC’s undertaking to the ACCC, and only became aware of the consultation process recently. We would welcome the opportunity to discuss this submission with the ACCC and provide further information in support of this submission, if that would assist.

49 Please do not hesitate to contact us if you have any queries.

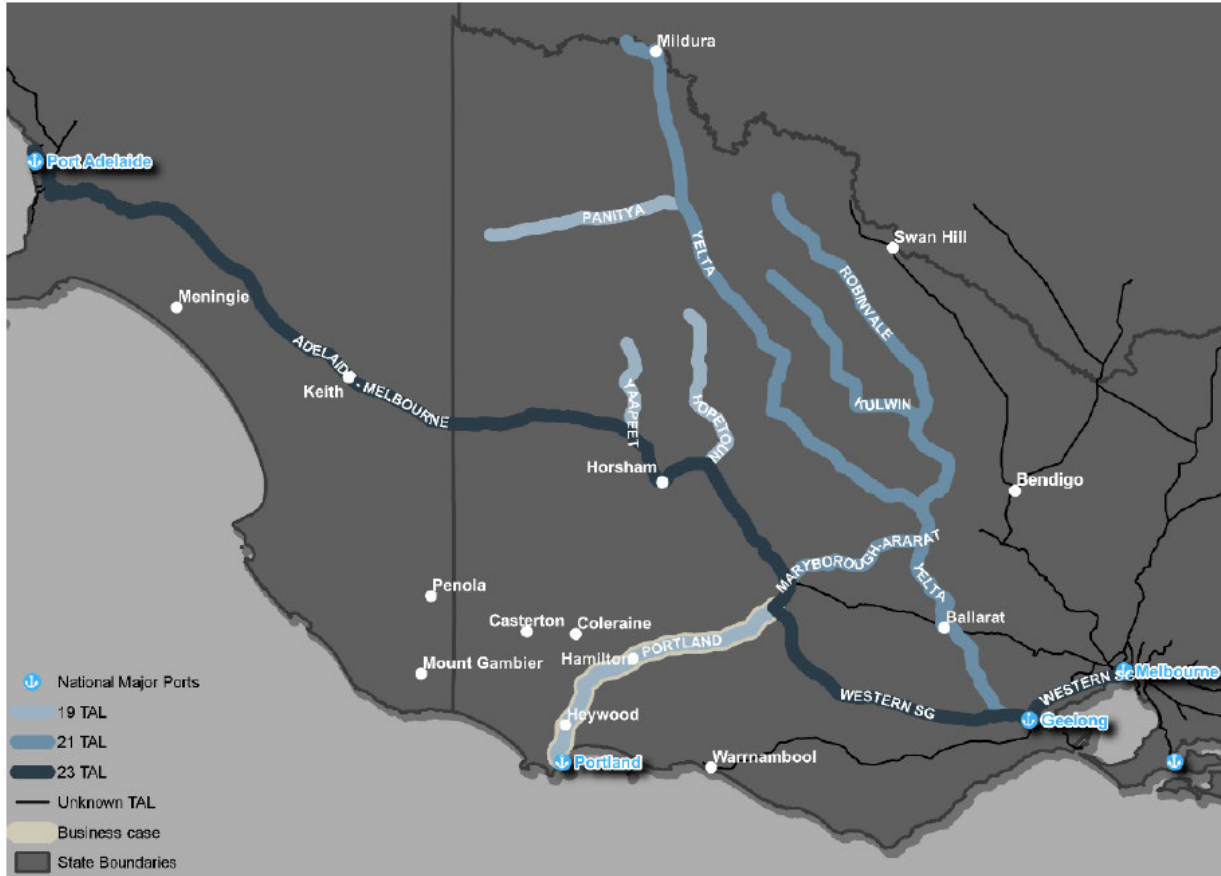
Yours sincerely
Arnold Bloch Leibler

Matthew Lees
Partner

Annexure A

Map from page 8 of Business Case

Figure 1: Maroona to Portland Rail Line



Source: Geoscience Australia, Foundation Rail Infrastructure, 2022; Geoscience Australia, Populated Places, 2006; Australian Bureau of Statistics, State Boundaries, 2021

Annexure B
Map of “Defined Interstate Rail Network”



Source: <https://www.artc.com.au/customers/standards/route/access/defined-interstate/>