



Draft Determination

Application for revocation of AA1000425 and the substitution of
authorisation AA1000644

lodged by

One Rail Australia, Manildra Group, Pacific National, Qube, Southern
Shorthaul Railroad, Sydney Rail Services, Linx Rail Pty Ltd and Aurizon
in respect of

Collective negotiations with Rail Network Owners

Authorisation number: AA1000644

22 November 2023

Commissioners: Keogh
Lowe
Brakey
Carver

Summary

The ACCC proposes to grant authorisation to enable One Rail Australia, Manildra Group, Pacific National, Qube, Southern Shorthaul Railroad, Sydney Rail Services, Linx and Aurizon (the Applicants) to collectively negotiate with Transport for New South Wales, the Transport Asset Holding Entity of New South Wales, Arc Infrastructure Pty Ltd, Victorian Rail Track, Metro Trains Melbourne Pty Ltd, V/Line Pty Ltd, the Victorian Department of Transport, Queensland Rail Ltd, Australian Rail Track Corporation and Aurizon in relation to the terms and conditions on which they acquire below rail access to each of the counterparties' respective below rail networks.

The ACCC proposes to grant authorisation with conditions for 10 years.

The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- improved outcomes and competition in rail haulage
- reduced transaction costs.

The ACCC considers that, with the conditions, the Proposed Conduct is likely to result in minimal, if any, public detriment.

The ACCC previously granted interim authorisation with a condition to enable collective negotiation with only Transport for New South Wales, the Transport Asset Holding Entity of New South Wales and the Australian Rail Track Corporation in relation to the terms and conditions on which above rail operators acquire below rail access to certain rail networks. This interim authorisation remains in place.

The ACCC invites submissions in relation to this draft determination before making its final decision.

The application for authorisation revocation and substitution

- 1.1. On 16 June 2023, One Rail Australia, Manildra Group, Pacific National, Qube, Southern Shorthaul Railroad, Sydney Rail Services, Linx and Aurizon (together, the **Applicants**) lodged an application to revoke authorisation AA1000425 and substitute authorisation AA1000644 for the one revoked with the Australian Competition and Consumer Commission (the **ACCC**). The Applicants are seeking authorisation for certain rail operators and suppliers of rail freight services (sometimes referred to as 'above rail' operators) to collectively bargain with an expanded number of rail network owners (sometimes referred to as 'below rail' owners or operators) for approximately 10 years until 31 October 2033.
- 1.2. This application for revocation and substitution was made under subsection 91C(1) of the *Competition and Consumer Act 2010* (Cth) (the **Act**). If granted, an authorisation provides the relevant parties with protection from legal action under the specified provisions in Part IV of the Act in respect of the specified conduct. The ACCC has a discretion to grant authorisation, but must not do so unless it is satisfied in all the circumstances that the conduct would or is likely to result in benefit to the public that would outweigh any likely public detriment (ss 90(7) and 90(8) of the Act (the **authorisation test**)).
- 1.3. The Applicants also requested interim authorisation to enable them, and other current and future rail operators using the relevant rail networks, to collectively negotiate with Transport for New South Wales, the Transport Asset Holding Entity of New South Wales and the Australian Rail Track Corporation Ltd in relation to the terms and conditions on which they acquire below rail access to certain parts of the Rail Network

Owners' respective networks while the ACCC is considering the substantive application. On 12 October 2023, the ACCC granted interim authorisation with a condition in accordance with subsection 91(2) of the Act. The interim authorisation remains in place until it is revoked, the application for revocation and substitution is withdrawn, or the date the ACCC's final determination comes into effect.

Background

1.4. On 16 June 2023, the following rail operators and suppliers of rail freight services on various rail networks across Australia lodged application for revocation of authorisation AA1000425 and substitution of authorisation AA1000644 (the **Application**) with the ACCC:

- One Rail Australia (FLA) Pty Ltd (**One Rail Australia**)
- Manildra Flour Mills Pty Ltd (**Manildra Group**)
- Pacific National Pty Ltd (**Pacific National**)
- Qube Logistics (Rail) Pty Ltd (**Qube**)
- Holdco Holdings Pty Ltd trading as Southern Shorthaul Railroad (**Southern Shorthaul Railroad**)
- Sydney Rail Services Pty Ltd (**Sydney Rail Services**)
- LINX Rail Pty Ltd (**Linx**)
- Aurizon Operations Limited (**Aurizon**)

(together, the **Applicants**).

1.5. The Applicants offer a variety of rail freight and logistics services for a range of products including food and bulk commodities such as coal, grain, steel and minerals.

1.6. Under authorisation AA1000425, the Applicants formed the Rail Operators Group and obtained authorisation from the ACCC to collectively negotiate with Transport for New South Wales (**Transport for NSW**) in relation to the non-price terms and conditions on which they acquire below rail access to parts of Transport for NSW's Sydney Metropolitan Passenger Network and Country Regional Network. That authorisation did not extend to engaging in collective boycott activity, or sharing information regarding pricing or individual performance measures. The ACCC granted authorisation AA1000425 for a period of 5 years from 13 October 2018 to 13 October 2023.

1.7. The Applicants now seek to collectively negotiate with an expanded number of below rail owners and operators:

- Transport for NSW and the Transport Asset Holding Entity of New South Wales (**TAHE**) in relation to the Sydney Metropolitan Passenger Network and Country Regional Network
- the Public Transport Authority of Western Australia (**PTA**) and Arc Infrastructure Pty Ltd (**Arc Infrastructure**) in Western Australia
- Victorian Rail Track (**VicTrack**), Metro Trains Melbourne and V/Line in Victoria
- Queensland Rail in Queensland
- Australian Rail Track Corporation Ltd (**ARTC**) in relation to its interstate and inland rail networks

- Aurizon in the Northern Territory and South Australia in relation to its Darwin to Tarcoola network.
- 1.8. The Applicants submit that negotiations between access seekers and Rail Network Owners currently take place against the backdrop of a range of regulatory regimes, involving different Federal and State regulators and different regulatory processes and levels of regulatory oversight. The Applicants submit that there is a spectrum of oversight across jurisdictions, from “lighter handed” negotiate-arbitrate models,¹ to the relevant regulator approving a rail access undertaking² (including standard prices, price ranges and/or ‘floor and ceiling’ returns).
- 1.9. The Applicants submit that the main reasons for the Proposed Conduct are to:
- ensure a Standard Track Access Agreement and equivalent track access agreements can be negotiated with Transport for NSW and other Rail Network Owners which appropriately reflect the requirements of the rail freight industry to remain competitive and to enable state (including any IPART Review recommendations), territory and Commonwealth government policy objectives to be met
 - facilitate and achieve efficient and fair common terms and conditions of access for the same types of service which will promote competition in the rail haulage segment of the broader freight transport market
 - provide the Applicants with increased bargaining power in negotiations with the monopoly infrastructure owners for the relevant services
 - achieve a significant reduction in negotiation and transaction costs
 - reduce the (already extended) negotiation period with Transport for NSW and reduce the potential negotiation periods with other Rail Network Owners
 - allow longer term contracts to be concluded sooner than would otherwise be the case and, as a result, provide greater commercial certainty and facilitate continued investment by the industry.
- 1.10. The Applicants submit that collective negotiation for below rail access is common in Australia and has been the subject of authorisations in the past.

The Application and Proposed Conduct

- 1.11. The Applicants seek authorisation of the Proposed Conduct on their own behalf,³ and on behalf of current and future rail operators using the New South Wales, Victoria, Western Australia, Queensland, ARTC and Aurizon networks who will similarly need to negotiate track access agreements. This would cover members of the Rail Operators Group (which is the collective bargaining group formed by the Applicants in 2018) who collectively bargain with the Rail Network Owners, such as SCT Logistics, which is not an Applicant but is a member of the Rail Operators Group.

¹ This includes the Australasia Railway Access Regime (which applies to the Darwin to Tarcoola network), the South Australian Rail Access Regime and the Western Australian Rail Access Regime.

² This includes the federal and Queensland rail access regimes.

³ This includes the successors, assigns, related bodies corporate, associated entities, joint venture partners and equity partners of each Applicant: see Application [2.1].

1.12. They also seek authorisation on behalf of other parties who are named in the Application as persons who will engage in the Proposed Conduct:⁴

- Transport for NSW
- Transport Asset Holding Entity (**TAHE**)
- VicTrack
- Freight Victoria
- V/Line Pty Ltd
- Metro Trains Melbourne Pty Ltd (**Metro Trains Melbourne**)
- Public Transport Authority of Western Australia (**PTA**)
- Queensland Rail
- Arc Infrastructure
- ARTC
- Aurizon Bulk Central Pty Ltd.

1.13. The Applicants also request that authorisation be expressed to apply to the following particular persons or classes of person:

- rail network owners and such entities that own or operate the relevant network (in the event that a state government should re-structure ownership in future)
- the Victorian Department of Transport, given its key role in relation to the Victorian rail access regime and the likely collective engagement by the Applicants with the Victorian Department of Transport in relation to these issues.⁵

1.14. The below rail persons or classes of persons described in paragraphs 1.12-1.13 above will be collectively referred to as ‘the **Rail Network Owners**’.

1.15. The Applicants are seeking authorisation to:

- a) continue to discuss and negotiate the non-price terms and conditions on which they will acquire track access from Transport for NSW for the Country Regional Network in regional NSW and the Sydney Metropolitan Passenger Network
- b) discuss and negotiate the non-price terms and conditions on which some or all of the Applicants will acquire track access from the following Rail Network Owners:
 - i. Arc Infrastructure in Western Australia
 - ii. VicTrack, Metro Trains Melbourne and V/Line in Victoria
 - iii. Queensland Rail in Queensland
 - iv. ARTC in relation to its interstate and inland rail networks

⁴ This includes the successors, assigns, related bodies corporate, associated entities, agencies and joint venture partners and equity partners of each listed person in paragraph 1.12: see Application [2.2].

⁵ A copy of this clarification is available on the ACCC’s [public register](#).

- v. Aurizon in the Northern Territory and South Australia in relation to its Darwin to Tarcoola network

when access agreements or rail access undertakings are re-negotiated

- c) discuss and negotiate with each of the Rail Network Owners set out in paragraphs 1.15(a) and 1.15(b) above the broad pricing principles (including methodologies, inputs and assumptions) that will apply for access to, and use of, their respective networks, but not the actual prices that will apply as between Rail Network Owners and individual Applicants
- d) enter into and give effect to bilateral contracts, arrangements or understandings between Applicants and Rail Network Owners which contain common terms and conditions relating to the track access arrangements set out in paragraphs 1.15(a), (b) and (c) above

(the **Proposed Conduct**).

1.16. The Applicants submit that the Proposed Conduct will enable them to discuss and collectively negotiate with Rail Network Owners in relation to the following types of rail access issues:

- a) insurance terms and level of coverage required
- b) security arrangements to be held over access agreement accounts (e.g. bank guarantees)
- c) general performance criteria and general range of performance-related penalties and circumstances in which they may apply (but noting that any performance penalty imposed would be operator-specific)
- d) capacity management approaches, including possession planning
- e) opportunities to address interoperability concerns across multiple rail networks, including standardisation or consistency of operator access conditions such as driver and crew training and qualification requirements, adoption of communication and other technology that interfaces between the operator and network, and the establishment of 'through running train paths' for major interjurisdictional haulage routes
- f) the pricing principles (including methodologies such as 'unders and overs' accounting, inputs and assumptions) that will apply for access to and use of their respective networks, but not the actual prices that will apply as between Rail Network Owners and individual Applicants.

1.17. The Applicants seek authorisation for the Proposed Conduct until 31 October 2033 (which is approximately 10 years after the expiry of authorisation AA1000425 which was previously granted by the ACCC). The Applicants submit that this timeframe will enable them:

- to conclude negotiations with Transport for NSW, which the Applicants submit have taken longer than the parties initially anticipated and remain ongoing
- to re-negotiate track access arrangements with the other Rail Network Owners set out in paragraph 1.15(a) above as those individual negotiation processes arise at different times over the next 5 years. The Applicants submit that each of these negotiations is likely to take several years to reach a concluded agreement.

- 1.18. The Applicants submit that Proposed Conduct is voluntary, and each Applicant will determine independently whether to accept the negotiated terms and conditions offered by the Rail Network Owners following the collective negotiations. Each Applicant may also freely and independently negotiate with the Rail Network Owners on any matter. In addition, the Rail Network Owners are not required to collectively negotiate with the Applicants. However, the Proposed Conduct for which authorisation is sought provides the opportunity to do so.
- 1.19. The Applicants submit that dealing with Transport for NSW as a collective has led to more efficient and consultative negotiations than would have otherwise been the case. The Applicants submit that the same public benefits are also likely to arise if they are able to negotiate collectively with these other Rail Network Owners.

2. Consultation

- 2.1. The ACCC invited submissions from a range of potentially interested parties, including the counterparties to the proposed collective bargaining and customers of the Applicants. The ACCC received 5 submissions from interested parties in relation to the application.
- 2.2. TAHE made a submission supporting the Application. TAHE is a state-owned corporation of the New South Wales Government in New South Wales, Australia, established under the Transport Administration Act 1988. It was converted and renamed from RailCorp on 1 July 2020. TAHE owns the rail networks in NSW and is a counterparty to the proposed collective bargaining for which authorisation is sought.
- 2.3. TAHE submits that the previous authorisation has enabled a valuable forum for engaging with and listening to a significant group of access seekers, facilitating cost effective negotiations for all parties. TAHE's support for the application is subject to clarifying:
 - that TAHE is a counterparty to the proposed negotiations in relation to the New South Wales rail networks alongside Transport for NSW
 - what would be included as an 'actual price' to avoid potential for misunderstanding, noting there may be benefit for collective discussions on price structures or appropriate price transition pathways within the New South Wales Standard Track Access Agreement.
- 2.4. Transport for NSW submits that it has no objection to the Application. Transport for NSW is engaged by TAHE to administer Access Agreements on the Country Regional Network and Metropolitan Rail Network. Transport for NSW concurs with the Applicants that there are advantages to collective bargaining, including cost and time delay savings. In its submission, Transport for NSW noted it would welcome further detail in relation to how new access seekers may become members of the Rail Operators Group under the revised authorisation.
- 2.5. ARTC made a submission that it does not have any concerns with the Application. ARTC operates Australia's largest standard-gauge rail network, and the Applicants represent most, but not all, of ARTC's customers that operate services on that network. ARTC works closely with other Rail Network Owners including Arc Infrastructure, Aurizon, Queensland Rail and TAHE to facilitate rail movements across their respective networks.
- 2.6. ARTC submits that the efficiency of negotiations is maximised when there is alignment amongst the joint parties on issues. Where there is not alignment, the process creates inefficiencies by requiring multiple interactions with individual companies as well as the

joint engagement. ARTC submits that because the efficiency of the joint engagement is so circumstance specific, it is not possible to define every specific circumstance where the negotiation process will benefit from joint engagement and those where it will not. Therefore, ARTC submits that the voluntary nature of the Proposed Conduct is critical because this provides ARTC with the ability to determine if the collective bargaining process will assist or hinder based on the proposal at that time. Given the efficiencies that collective negotiation can deliver and that ARTC maintains the right to engage in joint or separate negotiations at its sole discretion, ARTC does not have any concerns with the Application.

2.7. Arc Infrastructure made a submission that it has no objections to the Application. Arc Infrastructure is a transport infrastructure owner and access provider in Western Australia with a long-term lease on the network from the Government of Western Australia. It operates approximately 5,500 km of standard, narrow and dual gauge rail infrastructure in the southern half of the state. The Arc Infrastructure network connects to:

- ports at Kwinana, Fremantle, Bunbury, Geraldton, Albany and Esperance
- interstate freight terminals including the Forrestfield/Kewdale freight terminal, Kalgoorlie, Picton and Avon Yard
- the ARTC interstate network, providing a rail connection between Western Australia and the eastern states.

2.8. Arc Infrastructure submits that collective bargaining may bring efficiencies in negotiating terms for access in circumstances where there are commonalities in the access being sought by the Applicants. However, the circumstances in which above rail operators seek to access Arc Infrastructure’s network are diverse, which may limit the efficacy of collective bargaining in the context of its network, and the interstate network more broadly. Given these complexities, it is Arc Infrastructure’s view that the voluntary nature of participation in the Proposed Conduct is critical, as it provides each party with the ability to determine if collective bargaining will assist or hinder the negotiation process and outcomes in the given circumstances. On this basis, Arc Infrastructure has no objections to the Application.

2.9. The Applicants made a submission responding to interested party submissions and a request for information from the ACCC. In response to TAHE’s submission, the Applicants submit:

- the benefit of any ACCC authorisation is intended to extend to TAHE to the extent it engages in or is involved in the Proposed Conduct
- for the avoidance of doubt, the benefit of any ACCC authorisation should also extend to the Victorian Department of Transport, given its key role in relation to the Victorian rail access regime (including the development of guidelines) and the likely collective engagement by the collective with the Victorian Department of Transport in relation to these issues.

2.10. The Applicants have provided the below table setting out examples of the types of pricing information that will and will not form part of any collective negotiation process for which authorisation is sought:

POTENTIALLY WILL DISCUSS	WILL NOT DISCUSS
Key inputs and assumptions in pricing models, including reference services and non-reference services	Outcomes of model for individual access seekers, or individually negotiated prices with access seekers

Pricing bands (e.g. types of pricing bands and metrics for determining those bands)	The pricing bands made available to individual users
Form of and metrics for charging (e.g. dollars per kilometre, dollars per gross tonne kilometre, dollars per net tonne kilometre, fixed charge components, other metrics etc.)	The actual prices to be charged to individual access seekers
Metrics for potential efficiency incentives	Actual incentives or discounts provided to individual access seekers
Types of discounts that may be available	Actual incentives or discounts provided to individual access seekers
Charging or reconciliation methodologies (e.g. “unders and overs” accounting)	Amounts to be charged to individual users

- 2.11. In response to Transport for NSW’s request for further detail on how new access seekers may become members of the Rail Operators Group under the revised authorisation, the Applicants submit that membership of the Rail Operators Group is open to any rail operator. The only requirement is that they agree to pay their respective share of the Rail Operators Group’s costs. Any rail operator that wishes to become a member can contact John McArthur, Chief Executive and Managing Director at One Rail Australia (FLA) Pty Ltd. The Applicants submit that the only costs paid by the Rail Operators Group members over the past 5 years have been their respective share of external legal costs – which are scaled to reflect each member’s relative size.
- 2.12. As part of its consultation process, the ACCC engaged with the relevant regulatory bodies in each of the jurisdictions that the Applicants seek to collectively bargain. The relevant regulators did not raise any concerns with the Proposed Conduct. The ACCC also met with some of the Rail Operators’ customers. The customers the ACCC met with did not raise any concerns with the Proposed Conduct, and saw potential benefits from the Proposed Conduct, which they thought would directly flow through to them.
- 2.13. The ACCC also received a submission from Linfox supporting the Proposed Conduct. Linfox is an Australian transport and logistics and supply chain business. Linfox operates an intermodal business which includes rail, road, and some coastal shipping transport. They own rolling stock and offer a range of services, including pick-up and delivery services. Linfox has contracts with Aurizon and Queensland Rail.
- 2.14. Linfox considers the Proposed Conduct would result in benefits such as:
- improving the bargaining power of the collective bargaining group against monopoly providers
 - increasing transparency about access to below rail networks
 - increasing accountability regarding what networks are being invested in and how service disruptions affect business
 - ensuring logistical issues are more likely to be investigated and resolved in a timely manner.
- 2.15. Linfox expects that any benefits that may arise from collective bargaining would be passed through to it.
- 2.16. Linfox considers above rail competitors to be fairly competitive with each other, and notes that above rail also competes with road transport. In Linfox’s opinion, increased investment in road infrastructure compared to rail has made rail a less competitive

option over time, so any improvements to rail network infrastructure that may arise due to collective bargaining would also increase the ability of rail to compete with road.

- 2.17. Linfox does not have concerns about the proposed collective bargaining for which authorisation is sought. Linfox would have concerns about the collective bargaining if the information to be shared related to specific customers or volumes. However, Linfox does not anticipate that the above rail providers would share information about volumes or customers, as it would be disadvantageous to their business interests.
- 2.18. Public submissions by the Applicants and interested parties are on the [Public Register](#) for this matter.

3. ACCC assessment

- 3.1. The Applicants have sought authorisation for Proposed Conduct that would or might constitute a cartel provision within the meaning of Division 1 of Part IV of the Act and may substantially lessen competition within the meaning of section 45 of the Act.
- 3.2. Consistent with subsections 90(7) and 90(8) of the Act,⁶ the ACCC must not grant authorisation unless it is satisfied, in all the circumstances, that the conduct would be likely to result in a benefit to the public, and the benefit would outweigh the detriment to the public that would be likely to result from the conduct.

Relevant areas of Competition

- 3.3. To assess the likely effect of the Proposed Conduct, the ACCC identifies the relevant areas of competition likely to be impacted.
- 3.4. The Applicants submit that the relevant services for the purpose of assessing the Proposed Conduct are:
 - a) in New South Wales:
 - the supply of below rail track access on the TAHE Sydney Metropolitan Passenger Network and the Country Regional Network, of which Transport for NSW (as agent for TAHE) is the sole provider, to above rail operators
 - the supply and acquisition of freight transport services in and out of Sydney, rail transport being one of several modes of freight transport available for this purpose
 - the supply and acquisition of freight transport services in regional New South Wales, rail transport being one of several modes of freight transport available for this purpose
 - b) in Victoria:
 - the supply of below rail track access on the VicTrack network of which VicTrack is the sole provider, to above rail operators
 - the supply and acquisition of rail freight transport services in and out of Melbourne, rail transport being one of several modes of freight transport available for this purpose

6 See subsection 91C(7).

- the supply and acquisition of rail freight transport services in regional Victoria, rail transport being one of several modes of freight transport available for this purpose
- c) in Western Australia:
- the supply of below rail track access on the network of which PTA is the sole provider, and operated by Arc Infrastructure and ARTC, to above rail operators
 - the supply and acquisition of freight transport services in and out of Perth, rail transport being one of several modes of freight transport available for this purpose
 - the supply and acquisition of freight transport services in regional WA, rail transport being one of several modes of freight transport available for this purpose
- d) in Queensland:
- the supply of below rail track access on the Queensland Rail network of which Queensland Rail is the sole provider, to above rail operators
 - the supply and acquisition of freight transport services in and out of Brisbane, rail transport being one of several modes of freight transport available for this purpose
 - the supply and acquisition of freight transport services in regional Queensland, rail transport being one of several modes of freight transport available for this purpose
- e) in South Australia and the Northern Territory:
- the supply of below rail track access on the Tarcoola to Darwin network of which Aurizon is the sole provider, to above rail operators
 - the supply and acquisition of freight transport services between Tarcoola and Darwin, rail transport being one of several modes of freight transport available for this purpose
- f) the Interstate Rail Network owned and operated by ARTC:
- the supply of below rail track access to above rail operators and interoperability between other rail networks using or connecting to the Interstate network of which ARTC is the sole provider
 - the supply and acquisition of freight transport services across other rail networks across Australia, rail transport being one of several modes of freight transport available for this purpose
- g) the Inland Rail Network currently being built, and to be operated, by ARTC:
- the supply of below rail track access to above rail operators and interoperability between other rail networks using or connecting to the Interstate network of which ARTC is the sole provider
 - the supply and acquisition of freight transport services across other rail networks across Australia, rail transport being one of several modes of freight transport available for this purpose.

- 3.5. When assessing competition in the rail freight industry, the ACCC has generally identified areas of competition that are principally state-based and with separate product/service markets for coal haulage, bulk rail haulage and intermodal (containerised) freight.⁷ However, for the purpose of the assessment of likely public benefits and detriments from the Proposed Conduct, the ACCC does not consider it necessary to precisely define the relevant areas of competition as this is unlikely to change the ACCC's assessment.

Future with and without the Proposed Conduct

- 3.6. In applying the authorisation test, the ACCC compares the likely future with the Proposed Conduct that is the subject of the authorisation to the likely future in which the Proposed Conduct does not occur.
- 3.7. The ACCC considers that, in the future without the Proposed Conduct, the Applicants would each individually negotiate the terms and conditions on which they acquire below rail access to parts of the relevant Rail Network Owners' rail network.

Public benefits

- 3.8. The Act does not define what constitutes a public benefit. The ACCC adopts a broad approach. This is consistent with the Australian Competition Tribunal (the **Tribunal**) which has stated that in considering public benefits:

*...we would not wish to rule out of consideration any argument coming within the widest possible conception of public benefit. This we see as anything of value to the community generally, any contribution to the aims pursued by society including as one of its principal elements ... the achievement of the economic goals of efficiency and progress.*⁸

- 3.9. The Applicants submit that the Proposed Conduct is likely to result in substantial public benefits. They submit that the Proposed Conduct has delivered and is likely to continue to deliver benefits to each of the Applicants, and potentially other access seekers, Rail Network Owners, and downstream customers of rail freight transport services. These public benefits include:
- improved outcomes and competition in rail haulage
 - reduced transaction costs
 - promoting rail freight haulage and competition with road freight.
- 3.10. The ACCC has considered these claimed public benefits in detail below.

Improved outcomes and competition in rail haulage

- 3.11. The Applicants submit that the Proposed Conduct is likely to improve the bargaining power of the Rail Operators Group relative to the Rail Network Owners, and is likely to lead to:
- more efficient outcomes for standard track access arrangements and therefore rail operations

⁷ For example, see the [ACCC's Public Competition Assessment](#) with respect to Aurizon Holdings Ltd – proposed acquisition of One Rail Australia Holdings LP dated 25 August 2022.

⁸ Queensland Co-operative Milling Association Ltd (1976) ATPR 40-012 at 17,242; cited with approval in Re 7-Eleven Stores (1994) ATPR 41-357 at 42,677.

- improved competition by facilitating consistent terms and conditions for the same monopoly inputs, allowing rail operators to focus more on fairly and vigorously competing with each other on other aspects of their offerings.

3.12. In support of this, the Applicants submit that the collective negotiations in respect of the NSW rail networks improved the bargaining position of the Applicants relative to Transport for NSW, and are likely to lead to better industry and commercial outcomes when the Standard Track Access Agreement is eventually finalised. The Applicants submit that these benefits are already being demonstrated in relation to the NSW rail system with collective negotiation promoting greater clarity of roles and responsibilities, development of a proposed industry performance monitoring regime, and inclusive discussions to ensure all operators have a “voice”. The Applicants provided the ACCC with the following examples:

- the Rail Operators Group has actively pushed for clarity on the roles of the various government bodies involved in delivering rail access under the Standard Track Access Agreement, and the NSW Government has acknowledged that there is misalignment in the operating model for the Metropolitan Rail Network, and functional misalignment with regulatory and legislative responsibilities. This has led to a fundamental review by Transport for NSW which will improve the framework for the new Standard Track Access Agreement. The Applicants submit that this improved baseline would not have been achieved by any rail operator individually, but was a result of the Rail Operators Group’s improved negotiating position facilitated by the Current Authorisation
- developing an effective performance monitoring regime. A single rail operator could not “speak” for the industry in developing a process for Rail Network Owners to monitor, report and manage poor operator performance in a way that is fair and equitable for all rail operators. Following collective negotiation with the Rail Operators Group, Transport for NSW has agreed (in principle) that it has:
 - reduced the negotiation costs and complexity
 - resulted in an agreed position of non-price terms between Transport for NSW and all rail operators without requiring Transport for NSW to negotiate with individual rail operators
- collective negotiations relating to when rail operators are notified of delays or cancellations caused by the Rail Network Owners, and how this fits into and impacts the performance monitoring and billing cycle. The Applicants submit that it is critical to ensure that rail operators are treated equitably, particularly when the delay or cancellation is not their fault, and collective negotiation ensures that all rail operators have a voice, and no operator’s concerns are dismissed or overlooked
- the NSW Independent Pricing and Regulatory Tribunal’s recommendation that the NSW rail access framework is amended to enable collective negotiation on the basis that there are likely to be a number of benefits associated with collective negotiations, including improving the efficiency of commercial outcomes.

3.13. Consistent with the Applicants’ stated experience in relation to the NSW rail networks over the past 5 years, the Applicants submit that in each regulatory regime, the Proposed Conduct will promote better, more efficient, and more equitable outcomes. In particular, the Applicants submit that the Proposed Conduct will:

- assist regulators in obtaining timely and accurate information about issues of importance to a wide range of access seekers

- enable smaller rail operators to participate in any regulatory process more actively, at lower cost and with less individual investment in time through membership in the Rail Operators Group. The Applicants note that negotiations between the rail operators and Rail Network Owners currently take place against the backdrop of a range of regulatory processes, including significant differences across jurisdictions and levels of regulatory oversight, which creates material challenges and potential barriers for operators.⁹

3.14. The Applicants submit that the collective negotiation process will enable all rail operators to obtain the benefit of improved terms:

“... most rail operators do not have the resources needed to engage individually with [Rail Network Owners] on the wide range of issues raised in any access negotiation. Most likely, smaller and less well-resourced operators would “settle” for the position put forward by the [Rail Network Owner]. Based on past experience, this position would then be used by the [Rail Network Owner] as a template for future negotiations, citing the need for consistency across all operators. The result is that all rail operators would likely need to settle for sub-optimal commercial agreements with no impetus for [Rail Network Owners] to focus on delivering improvements and greater operational efficiencies. This is a material public benefit.”¹⁰

3.15. The Applicants submit that collective bargaining will result in material efficiencies and cost savings for the owner/operators of the relevant rail networks if they choose to participate. This is consistent with the stated experience of both Transport for NSW and TAHE over the past 5 years.¹¹

3.16. The Applicants submit that, for networks where there is greater regulatory oversight (e.g. the Queensland Rail network and ARTC interstate network), the initial price and non-price terms offered are likely to be more reasonable when compared with the terms offered on networks where there is less regulatory oversight. However, the Applicants submit that even where there is a higher degree of regulatory oversight, the collective bargaining process is likely to result in:

- better and more focused information being provided to both the Rail Network Owner and regulator (as the Rail Operators Group members will be able to workshop key issues and potential solutions)
- a more efficient process for access seekers, the Rail Network Owner and the regulator (with the Rail Operators Group Committee prioritising key issues, and the Rail Network Owner and regulator being able to focus discussions with a single industry point of contact, rather than multiple individual access seekers).

3.17. The ACCC notes Linfox’s submission that the Proposed Conduct would result in increased transparency about access to below rail networks, increased accountability about investment and service disruptions, and ensure that logistical issues are more likely to be investigated and resolved in a timely manner. The ACCC accepts Linfox’s submission that any such benefits would be likely to be passed through to it.

⁹ Applicants’ submission, 7 August 2023, p 1-2.

¹⁰ Applicants’ submission, 26 October 2023, pp 4-5.

¹¹ Applicants’ submission, 26 October 2023, p.5.

- 3.18. The ACCC also acknowledges Arc Infrastructure's submission that collective bargaining may bring efficiencies in negotiating terms for access in circumstances where there are commonalities in the access being sought by the Applicants, but that in general the circumstances in which above rail operators seek access to the Arc network are diverse, which may limit the potential efficacy of collective bargaining in the context of the Arc network and the interstate network more broadly. The ACCC also notes ARTC's similar submission that the efficiency of negotiations is maximised when there is alignment amongst the joint parties, and that where there is not alignment, the process creates inefficiencies. The ACCC considers that, to the extent there is not alignment between the parties on the relevant issues, this could limit the potential for collective bargaining to achieve improved outcomes and competition in rail haulage in the manner submitted by the Applicants.
- 3.19. However, the ACCC nonetheless considers that collective bargaining is likely to lead to improved outcomes because it allows mutually beneficial changes to initial terms and conditions offerings to be identified and agreed between the parties. For example, there may be a more efficient way for the Rail Network Owner to conduct its business, but the cost and complexity of negotiating a change with each customer in a series of bilateral negotiations makes it prohibitive to pursue. By enabling a single negotiation process, collective bargaining can allow a network owner to agree a change with all of its customers that lowers its operating costs without a reduction in quality.
- 3.20. Similarly, access seekers can propose changes that advantage them that the Rail Network Owner is unaffected by, or willing to accept, by negotiating other changes. Such changes are much harder to negotiate and agree in sequential, bilateral negotiations as opposed to having all parties participating in a single process.
- 3.21. The ACCC understands that the experience in New South Wales over the last 5 years has been that both sides have benefited from collective bargaining. The ACCC considers it significant that Transport for NSW and TAHE have provided submissions that the Proposed Conduct (as previously authorised by the ACCC) was beneficial in respect of the NSW rail system.
- 3.22. Further, the ACCC considers that the Proposed Conduct is likely to allow the Rail Operators Group to have greater input into access agreements than would otherwise be the case. Participating collectively enables the parties to bring a more informed and compelling view to negotiations of standard terms (for example by being able to afford better expert advice by sharing the costs of obtaining it). Rail Network Owners are more likely to accept (or at least move towards) these positions, knowing that a better argued and supported view by access seekers is more likely to be accepted by a regulator or arbitrator if they do not. As a result, the Proposed Conduct is likely to result in negotiated outcomes which better reflect the cost of providing the services, which constitutes a public benefit. This is because profit maximising firms with market power will likely set initial terms and conditions at levels above the cost of providing the services.
- 3.23. The ACCC understands that the Applicants typically have rail access charges as a pass through in contracts with customers. This means that any reductions in access charges that result from the Proposed Conduct are likely to be passed through to customers.
- 3.24. The ACCC accepts that smaller access seekers are unlikely to engage in extensive negotiations with Rail Network Owners over access terms and conditions due to the relatively high transaction costs they face (discussed below). By participating in the Proposed Conduct, these parties are likely to be able to obtain access at more competitive terms than they otherwise would. This is likely to result in benefits because these smaller entities are then better able to compete in the provision of rail freight services.

3.25. The ACCC considers that the Proposed Conduct is likely to result in a public benefit in the form of improved outcomes through allowing the parties to negotiate through a streamlined negotiation process. This means mutually beneficial changes to terms and conditions for standard track access arrangements can be more easily negotiated and accepted. The ACCC considers that through accessing better terms and conditions for standard track access, smaller access seekers are likely to obtain access at more competitive terms than they otherwise would, leading to a public benefit through their increased ability to compete in the provision of rail freight services.

Reduced transaction costs

3.26. The Applicants submit that the Proposed Conduct is likely to achieve significant transaction cost savings and efficiencies for all parties to the collective bargaining negotiations, including the Applicants, Rail Network Owners and other access seekers.

3.27. The Applicants submit that the Proposed Conduct has already realised savings relative to undertaking individual negotiations with Transport for NSW. The collective negotiations have already provided a significant reduction in legal expenses, commercial and management time of the Applicants and has led to a more efficient process where the Applicants can identify and provide synthesised positions on the key issues. This has allowed Transport for NSW to respond knowing that it is considering a collectively considered industry position.

3.28. In the future with the Proposed Conduct, the Applicants expect that similar transaction costs savings will likely apply to future negotiations with other Rail Network Owners particularly as the Rail Operators Group will be able to take the benefit of its experience with Transport for NSW into those processes which may lead to more efficient outcomes.

3.29. The Applicants submit that the previously authorised collective bargaining has likely led to material cost savings in the negotiation of the Standard Track Access Agreement in New South Wales through:

- the Rail Operators Group Committee working collectively to identify key issues and potential solutions
- the Rail Operators Group Committee providing a significant majority of feedback and undertaking the vast majority of detailed review
- the Rail Operators Group Committee engaging in tasks necessary to the negotiation (for example, preparing for and attending meetings with Transport for NSW, engaging in internal discussions to determine next steps after each meeting with Transport for NSW, and reporting back to members), preventing other members from having to incur that time. the Rail Operators Group Committee did not seek to recover the costs associated with this time commitment from other Rail Operators Group members
- Transport for NSW and TAHE engaging with the Rail Operators Group, rather than engaging separately with all rail operators
- sharing legal costs across the Rail Operators Group, in proportions reflecting whether the group member is a large, medium or small operator.

3.30. The Applicants submit that the previously authorised collective bargaining, is likely to have involved material cost savings for Rail Operators Group members who are not represented on the Rail Operators Group Committee (e.g. Manildra Flour Mills, SCT Logistics, Southern Shorthaul Railroad, Sydney Rail Services and Swift Logistics). The

Rail Operators Group Committee comprises representatives from One Rail, Pacific National, Aurizon and Qube. The Applicants submit that the vast majority of the work undertaken in reviewing the Standard Track Access Agreement has been, and continues to be, undertaken by the members of the Rail Operators Group Committee. As a result, other Rail Operators Group members do not need to invest the same level of time and internal management resources to engage in detail on all of the issues raised by the draft Standard Track Access Agreement.

- 3.31. The ACCC again acknowledges Arc Infrastructure's submissions in respect of the general diversity in the circumstances in which above rail operators seek access to the Arc network, which may limit the potential efficacy of collective bargaining in the context of the Arc network and the interstate network more broadly, and ARTC's submission that where there is not alignment, the process creates inefficiencies. The ACCC considers that, to the extent there is not alignment between the parties on the relevant issues, this would likely create inefficiencies that may reduce any anticipated transaction cost savings. However, the ACCC notes that both Arc Infrastructure and ARTC have submitted that the voluntary nature of the Proposed Conduct is critical as it will allow them to opt out of the collective bargaining process where it would not assist negotiations.
- 3.32. In response to a request for information from the ACCC, the Applicants provided some information as to the anticipated value of the transaction cost savings that they expect that the Proposed Conduct will realise. However, the Applicants have also submitted that they are not able to provide accurate figures for the costs incurred and time spent in relation to, and the relevant cost savings that have occurred as a result of, the collective bargaining process the subject of the previous authorisation.¹² The Applicants submit that, while it is not possible for them to accurately estimate the likely cost savings that will be achieved by collectively bargaining with each of the rail operators, the Proposed Conduct is likely to result in similar cost savings as outlined at paragraphs 3.29-3.30 above.¹³
- 3.33. The ACCC notes that the quantification of public benefits and detriments is not essential for the ACCC's assessment under section 90 of the Act, and accepts that the Proposed Conduct is likely to result in some public benefit. However, the ACCC also considers that the Applicant has provided limited information to substantiate its submission that the transaction cost savings are likely to be material in scale. The ACCC therefore invites the Applicants to provide more evidence or further details, and/or quantification to the extent possible, regarding the size of this claimed public benefit in order to further substantiate its submission as to the extent of the benefit.
- 3.34. The ACCC considers that the Applicants' submissions as to cost savings are consistent with TAHE's submission that the collective negotiations have enabled a valuable forum for engaging with, and listening to, a significant group of access seekers, facilitating cost effective negotiations for all parties, and Transport for NSW's submission that there are advantages to collective bargaining, including cost and time savings.
- 3.35. Based on the information currently before it, the ACCC considers that the Proposed Conduct is likely to result in a small public benefit in the form of some transaction cost savings and efficiencies for all parties to the collective negotiations, including the Applicants, Rail Network Owners and other access seekers. This is because the Proposed Conduct allows the parties to engage in a single, or fewer, negotiations for

¹² See the Applicants' submission dated 26 October 2023.

¹³ See the Applicants' full submissions in relation to cost savings at Applicants' submission, 26 October 2023. pgs. 1-5.

standard track access arrangements, as well as potentially reducing the length of negotiations, reducing administrative and legal costs for all parties.

Promoting rail freight haulage and competition with road freight

3.36. The Applicants submit that the Proposed Conduct is likely to result in public benefits in the form of:

- promoting competition among the Applicants and other rail freight providers by facilitating consistent terms and conditions for the same monopoly inputs, and allowing them to compete fairly and vigorously on other aspects of their service, and enabling rail to better compete with road freight alternatives
- achieving government targets for the growth of rail freight to reduce road costs and congestion and ensuring that regional Australia in particular has efficient access to international markets via rail.

3.37. The Applicants submit that collective negotiations under the previous authorisation have improved the Rail Operators Group's prospects of obtaining changes which will ensure the viability of the industry and certainty and fairness of access. The Applicants submit that this is vital for operators to continue to make the investments required to achieve government objectives.

3.38. The Applicants submit that to meet the government's objectives for the industry, it is necessary for rail operators to continue investing in capacity and productivity improvements in rail operations. This investment is underpinned by standard track access agreements, which help achieve efficient outcomes for the whole of industry. It is therefore necessary for rail operators to engage in discussions with Transport for NSW and other Rail Network Owners to help resolve issues of industry-wide concerns and to achieve the most efficient non-price terms and conditions to enable rail to better compete with road freight alternatives.

3.39. The Applicants further submit that, as previously acknowledged by the ACCC, collective bargaining can also better enable rail operators to present, as a united voice, a clearer position and seek contractual terms that, where possible, deliver efficiencies, savings and increased rail use. This can, in turn, capture flow-on public benefits of lower emissions and reduced road congestion.

3.40. The ACCC notes Linfox's submission that, in their opinion, increased investment in road infrastructure compared to rail has made rail a less competitive option over time, so any improvements to rail network infrastructure that may arise due to collective bargaining would also increase the ability of rail to compete with road.

3.41. The ACCC considers that, to the extent the Proposed Conduct results in increased use of rail freight over road freight due to the transaction cost savings and more efficient outcomes identified above, it would result in some benefits in the form of lower emissions, and reduced road congestion, fatalities, and maintenance. However, it is not clear that the Proposed Conduct, in itself, is likely to lead to a significant shift from road to rail.

ACCC conclusion on public benefit

3.42. The ACCC considers that the Proposed Conduct is likely to result in public benefits from:

- improved outcomes and competition in rail haulage as a result of the Applicants having greater input into the terms and conditions of standard access arrangements

- some transaction cost savings and efficiencies for all parties to the collective negotiations.

3.43. The ACCC notes that the Proposed Conduct would take place across several rail networks across Australia, with a range of regulatory processes and levels of regulatory oversight. The ACCC considers that where there is less regulatory oversight (for example, negotiate-arbitrate models) the Proposed Conduct would be likely to generate greater public benefits.

Public detriments

3.44. The Act does not define what constitutes a public detriment. The ACCC adopts a broad approach. This is consistent with the Tribunal which has defined it as:

*...any impairment to the community generally, any harm or damage to the aims pursued by the society including as one of its principal elements the achievement of the goal of economic efficiency.*¹⁴

3.45. The Applicants submit that the previous authorisation¹⁵ has not resulted in any public detriment, and that the Proposed Conduct (including extension to negotiations with other Rail Network Owners and clarification in relation to pricing principles and parameters), will not give rise to any discernible public detriments.

3.46. The Applicants submit that any public detriments resulting from the Proposed Conduct are limited by the following factors:

- participation in the Proposed Conduct is entirely voluntary for all parties, including above rail operators and Rail Network Owners
- the Applicants are not proposing to engage in any collective boycott activity
- the Proposed Conduct will not involve collective negotiations in relation to the actual prices, volume discounts or other price terms available to individual Applicants. This will remain the subject of separate negotiations and agreement between the relevant Rail Network Owners and each individual Applicant. However, the Proposed Conduct will enable discussions and collective negotiation in relation to broader pricing principles and parameters, which will enable greater efficiency, transparency and consistency for rail operators. This information is frequently addressed publicly in regulatory processes for access to infrastructure assets and is not confidential or competitively sensitive
- only those Applicants that require or seek access to a particular Rail Network Owner's network will be involved in collective negotiations with that Rail Network Owner. This may involve establishing sub-groups within the Rail Operators Group. The Rail Operators Group would establish a sub-group of interested operators for each network and elect a chair for each sub-group from its members
- the Applicants have established a Competition Law Protocol¹⁶ to ensure that information sharing is restricted to what is necessary to engage in the Proposed Conduct in relation to a particular rail network. This is adapted from the protocol the Rail Operators Group applied during the previous period of authorisation, and

¹⁴ Re 7-Eleven Stores (1994) ATPR 41-357 at 42,683.

¹⁵ See authorisation AA1000425 on the ACCC's [public register](#).

¹⁶ See Schedule 5 of the Application for revocation and substitution of Authorisation AA1000425-1 dated 16 June 2023.

the Applicants submit that, over the past 5 years, there have been no reported breaches of the Protocol and no enforcement action taken in relation to any breach.

3.47. The Competition Law Protocol outlines the guidelines that meetings will follow, as well as explicitly outlining that the Applicants must not:

- discuss or collectively negotiate the actual prices, discounts, or other price terms that will apply as between Rail Network Owners and individual participants
- discuss participants' individual costs, margins or revenues
- discuss boycotting, or otherwise not collectively contracting with any Rail Network Owner in relation to obtaining rail access
- share competitively sensitive information or non-public pricing or strategic information
- breach confidentiality obligations that each participant owes to the relevant Rail Network Owner.

3.48. The ACCC considers that the Proposed Conduct may result in some public detriments. On the one hand, the ACCC notes that participation is voluntary for all parties and that the Applicants have not sought authorisation for any collective boycott activity. Both Arc Infrastructure and ARTC have submitted that they have no concerns with the Proposed Conduct on the basis that participation is voluntary, and the ACCC has placed weight on these submissions. If the Applicants, any other current and future members of the Rail Operators Group and/or current and future Rail Network Owners were to engage in collective negotiation on an involuntary basis where any of the parties could not opt out of that negotiation and negotiate individually, this will likely amount to a material change in circumstances such that it would be grounds for the ACCC to review the proposed authorisation and consider revocation.

3.49. However, the ACCC also considers that there is some risk that competitively sensitive information may be shared in any collective negotiation despite the operation of the Competition Law Protocol. The sharing of sensitive commercial information such as actual individual pricing would be likely to be anticompetitive, but the ACCC considers that the Proposed Conduct does not include such information sharing and any such conduct would be subject to the operation of the Act. The ACCC notes Linfox's submission that it would not anticipate the members of the Rail Operators Group sharing information about volumes or customers, as this would be disadvantageous to their commercial interests. None of the other customers that the ACCC consulted with about the Application raised any concerns about this information sharing risk. Further, the Applicants have not sought authorisation in relation to sharing competitively sensitive operational information or individual performance measures. The sharing of such information would not be protected by authorisation.

3.50. The ACCC considers that there is a potential conflict of interest that may also result from the Proposed Conduct due to Aurizon's role as both a member of the Rail Operators Group, and a target of the collective negotiations in its role as a Rail Network Owner in South Australia and for the Tarcoola to Darwin network. Because Aurizon will be a part of the Rail Operators Group, it may gain information that advantages it in its role as Rail Network Owner to the disadvantage of other members of the Rail Operators Group, resulting in less efficient outcomes.

3.51. To address these concerns, the Applicants submit that Aurizon has implemented ring-fencing arrangements which apply in circumstances where it is both an "above rail" operator and "below rail" track manager (i.e. in South Australia and in respect of the

Tarcoola-Darwin network). In particular, the Applicants submit that Section 4 of the Competition Law Protocol commits Aurizon to absenting itself from any negotiations undertaken by the Rail Operators Group, or a sub-group within the Rail Operators Group, with Aurizon as Rail Network Owner of the Tarcoola to Darwin rail network while the management of the Tarcoola to Darwin rail network is vertically integrated. The Applicants submit that these ring-fencing arrangements are consistent with the relevant legislative requirements, in particular in relation to the protection and treatment of confidential information.¹⁷

3.52. Section 4 of the Competition Law Protocol states that:

“Aurizon has implemented ring-fencing arrangements which ensure that confidential information about, or provided by, above rail operators that seek access to or use of track owned or operated by Aurizon is not shared with a competitive above rail business. However, currently the management of the Tarcoola to Darwin rail network is vertically integrated.

While this structure remains in place Aurizon will absent itself from any negotiations undertaken by the [Rail Operators Group], or a sub-group within the [Rail Operators Group], with Aurizon as [Rail Network Owner] of the Tarcoola to Darwin rail network.”

3.53. As part of its assessment, the ACCC requested information from the Applicants about the circumstances in which Aurizon’s management structure could change and, in that event, how Aurizon would then participate in negotiations in accordance with the Competition Law Protocol. The Applicants did not provide further information from Aurizon in relation to the circumstances in which its management structure may change in the future. However, the Applicants noted that Section 4 of the Competition Law Protocol is intended to reflect that, for so long as Aurizon owns the Tarcoola to Darwin rail network (or is vertically integrated in respect of any other rail network), it will:

- implement appropriate ring-fencing arrangements
- absent itself from any participation in the Rail Operators Group or any Rail Operators Group Committee in respect of negotiations concerning that network.

3.54. Notwithstanding these submissions, based on current information, the ACCC is concerned about the potential for confidential and competitively sensitive information to be shared during collective negotiation as a result of the Proposed Conduct. The ACCC notes that the Applicants have submitted that monitoring individual compliance with the Competition Law Protocol is the responsibility of each member of the Rail Operators Group, but notes that there are no processes for reporting breaches or enforcement mechanisms specified in the current version of the Competition Law Protocol. Without oversight and enforcement mechanisms, the ACCC is concerned that the protocol may not be effective in addressing the risk of anti-competitive information sharing occurring in breach of the Competition Law Protocol. The ACCC also notes that the requirements on Aurizon in the protocol to address the potential for a conflict of interest are not expressed in clear and absolute terms. In addition, the current version of the Competition Law Protocol contains no mechanism by which the ACCC would become aware of non-compliance with the Competition Law Protocol

¹⁷ Being Clause 12A(5) of the schedules to the AustralAsia Railway (Third Party Access) Act 1999 (SA) and AustralAsia Railway (Third Party Act 1999 (NT), which sets out obligations in relation to the protection and treatment of confidential information, including an obligation to maintain a policy to ensure confidential information is not used for an unauthorised purpose or by an unauthorised person, and Section 33A(7) of the Railways (Operations and Access) Act 1997 (SA), which requires an operator to develop and maintain a policy to ensure that confidential information obtained by the operator is not disclosed or used except as authorised by this section.

and/or a change in circumstances which would result in Aurizon no longer being obliged to absent itself from Rail Operator Group negotiations regarding the Tarcoola to Darwin rail network in accordance with Section 4 of the Competition Law Protocol.

3.55. In view of this concern, the ACCC proposes to grant authorisation with the following reporting conditions that require the Applicants to:

- a) Provide the ACCC with written notice within 5 business days (or another period agreed in writing by the ACCC) of any change to Aurizon's structure or management such that it would cease implementing ring-fencing arrangements or would no longer absent itself from any negotiations undertaken by the Rail Operators Group, or a sub-group within the Rail Operators Group, with Aurizon as Rail Network Owner of the Tarcoola to Darwin rail network
- b) Provide the ACCC with written notice within 5 business days (or another period agreed in writing by the ACCC) of becoming aware of any conduct in breach of the Competition Law Protocol.

3.56. The ACCC notes that if it received a notification from the Applicants in accordance with paragraph 3.55(a), indicating that Aurizon did propose to be involved in the collective bargaining in respect of the Tarcoola to Darwin network, it will likely consider such notification a material change in circumstances that would provide grounds for the ACCC to review the authorisation and consider revocation.

3.57. The ACCC invites submissions in respect of the proposed conditions.

ACCC conclusion on public detriment

3.58. The ACCC considers that the Proposed Conduct may result in some public detriment in the form of confidential and competitively sensitive information being shared in any collective negotiation as a result of the Proposed Conduct, and the potential for a conflict of interest to arise in respect of Aurizon's role as both an above rail operator and a Rail Network Owner in South Australia and the Northern Territory.

3.59. The ACCC is concerned about the potential for confidential and competitively sensitive information to be shared in any collective negotiation as a result of the Proposed Conduct that may lessen competition in downstream markets. The ACCC is also aware of the potential for a conflict of interest in relation to Aurizon's vertically integrated structure. In light of these concerns, the ACCC proposes to specify reporting conditions, set out in paragraph 3.55 of this draft determination.

3.60. With such proposed conditions, the ACCC considers that the Proposed Conduct would be unlikely to result in significant public detriments.

Balance of public benefit and detriment

3.61. The ACCC's assessment of whether it is satisfied that the likely public benefits of the Conduct would outweigh the likely public detriments requires a balancing exercise.¹⁸

3.62. The ACCC considers that the Proposed Conduct is likely to result in public benefits in the form of:

- improved outcomes and competition in rail haulage

¹⁸ *Australian Competition and Consumer Commission v Australian Competition Tribunal* (2017) 254 FCR 341, at [7] (Besanko, Perram and Robertson JJ).

- some transaction cost savings and efficiencies for all parties to the collective negotiations.

3.63. The ACCC also considers that there may be some public detriment, but with the conditions referred to above it considers that there is unlikely to be significant public detriment.

3.64. Therefore, for the reasons outlined in this draft determination, the ACCC is currently satisfied that the Proposed Conduct, with the proposed conditions set out at paragraph 3.55, is likely to result in a public benefit and that this public benefit would outweigh any likely detriment to the public from the Proposed Conduct.

Length of authorisation

3.65. The Act allows the ACCC to grant authorisation for a limited period of time.¹⁹ This enables the ACCC to be in a position to be satisfied that the likely public benefits will outweigh the detriment for the period of authorisation. It also enables the ACCC to review the authorisation, and the public benefits and detriments that have resulted, after an appropriate period.

3.66. In this instance, the Applicants seek authorisation for 10 years.

3.67. Given the various processes in which the Applicants seek to collectively negotiate, and the time periods over which those collective negotiations are likely to occur, the ACCC considers that the time period sought is appropriate.

4. Draft determination

The application

4.1. On 16 June 2023, the Applicants lodged an application to revoke authorisation AA1000425 and substitute authorisation AA1000644 for the one revoked. This application for authorisation AA1000644 was made under subsection 91C(1) of the Act.

4.2. The Applicants seek the protection of the proposed authorisation AA1000644 for the Applicants²⁰ and:

- a) current and future rail operators using the New South Wales, Victoria, Western Australia, Queensland, ARTC and Aurizon networks
- b) the following persons who are named or referred to in the Application as persons who will engage in the Proposed Conduct:²¹
 - i. Transport for NSW
 - ii. Transport Asset Holding Entity
 - iii. VicTrack
 - iv. Freight Victoria

¹⁹ Subsection 91(1)

²⁰ As listed in paragraph 1.4, and including the successors, assigns, related bodies corporate, associated entities, agencies and joint venture partners and equity partners of each listed applicant: see Application [2.1].

²¹ This includes the successors, assigns, related bodies corporate, associated entities, agencies and joint venture partners and equity partners of each listed person in paragraph 4.2(a): see Application [2.2].

- v. V/Line Pty Ltd
 - vi. Metro Trains Melbourne Pty Ltd
 - vii. Public Transport Authority of Western Australia
 - viii. Queensland Rail
 - ix. Arc Infrastructure
 - x. ARTC
 - xi. Aurizon Bulk Central Pty Ltd
- c) the following particular persons or classes of persons, as specified in the authorisation, who become engaged in the Proposed Conduct:
- i. current and future Rail Network Owners and such entities that own or operate the relevant New South Wales, Victoria, Western Australia, Queensland, ARTC and Aurizon networks
 - ii. the Victorian Department of Transport.²²
- 4.3. The persons and classes of persons referred to in paragraphs 4.2(b) and (c) are collectively referred to as the **Rail Network Owners**. The Applicants, the other persons and classes of persons referred to in paragraph 4.2(a), and the Rail Network Owners are collectively referred to as the **Authorised Parties**.
- 4.4. The Applicants are seeking authorisation to:
- a) continue to discuss and negotiate the non-price terms and conditions on which they will acquire track access from Transport for NSW for the Country Regional Network in regional NSW and the Sydney Metropolitan Passenger Network
 - b) discuss and negotiate the non-price terms and conditions on which some or all of the Applicants will acquire track access from the following Rail Network Owners:
 - i. Arc Infrastructure in Western Australia
 - ii. VicTrack, Metro Trains Melbourne and V/Line in Victoria
 - iii. Queensland Rail in Queensland
 - iv. ARTC in relation to its interstate and inland rail networks
 - v. Aurizon in the Northern Territory and South Australia in relation to its Darwin to Tarcoola network

when access agreements or rail access undertakings are re-negotiated
 - c) discuss and negotiate with each of the Rail Network Owners set out in paragraphs 4.4(a) and 4.4(b) above the broad pricing principles (including methodologies, inputs and assumptions) that will apply for access to, and use of, their respective networks, but not the actual prices that will apply as between Rail Network Owners and individual Applicants
 - d) enter into and give effect to bilateral contracts, arrangements or understandings between Applicants and Rail Network Owners which contain common terms and

²² A copy of this clarification is available on the ACCC's [public register](#).

conditions relating to the track access arrangements set out in paragraphs 4.4(a), (b) and (c) above.

(the **Proposed Conduct**).

- 4.5. Subsection 90A(1) of the Act requires that before determining an application for authorisation, the ACCC shall prepare a draft determination.

The authorisation test

- 4.6. Under subsections 90(7) and 90(8) of the Act, the ACCC must not grant authorisation unless it is satisfied in all the circumstances that the Proposed Conduct is likely to result in a benefit to the public and the benefit would outweigh the detriment to the public that would be likely to result from the Proposed Conduct.
- 4.7. The Act permits the ACCC to specify conditions in an authorisation.²³ The ACCC determines the nature, form and scope of any conditions imposed and, while there is no express limit on the types of conditions which may be imposed on the grant of an authorisation, the power to impose conditions is constrained by the subject matter, scope and purposes of the Act.²⁴
- 4.8. The legal protection provided by the authorisation does not apply if any of the conditions are not complied with.²⁵
- 4.9. For the reasons outlined in this draft determination, the ACCC considers is currently satisfied, in all the circumstances, that the Proposed Conduct, with the conditions at paragraph 4.13, would be likely to result in a benefit to the public and the benefit to the public would outweigh the detriment to the public that would result or be likely to result from the Proposed Conduct, including any lessening of competition.
- 4.10. Accordingly, the ACCC proposes to grant authorisation with the conditions at paragraph 4.13 to this draft determination.

Conduct which the ACCC proposes to authorise

- 4.11. The ACCC proposes to revoke authorisation AA1000425 and grant authorisation AA1000644 in substitution, with the conditions at paragraph 4.13, to the Authorised Parties to:
- a) discuss and negotiate the non-price terms and conditions on which they will acquire track access from Transport for NSW and/or TAHE for the Country Regional Network in regional New South Wales and the Sydney Metropolitan Passenger Network
 - b) discuss and negotiate the non-price terms and conditions on which some or all of the Applicants will acquire track access from the following Rail Network Owners:
 - i. Arc Infrastructure in Western Australia
 - ii. VicTrack, Metro Trains Melbourne and V/Line in Victoria

²³ Section 88(3) of the Act.

²⁴ See *Re Medicines Australia Inc* [2007] ACompT 4 at [131].

²⁵ Section 88(3) of the Act.

- iii. Queensland Rail in Queensland
- iv. ARTC in relation to its interstate and inland rail networks
- v. Aurizon in the Northern Territory and South Australia in relation to its Darwin to Tarcoola network

when access agreements or rail access undertakings are re-negotiated

- c) discuss and negotiate with each of the Rail Network Owners set out in paragraphs 4.11(a) and 4.11(b) above the broad pricing principles (including methodologies, inputs and assumptions) that will apply for access to, and use of, their respective networks, but not the actual prices that will apply as between Rail Network Owners and individual Applicants
- d) enter into and give effect to bilateral contracts, arrangements or understandings between Applicants and Rail Network Owners which contain common terms and conditions relating to the track access arrangements set out in paragraphs 4.11 (a), (b) and (c) above.

4.12. For the avoidance of doubt, the Proposed Conduct does not include, and authorisation AA1000644 does not extend to, the following:

- a) any collective boycott activity
- b) the Authorised Parties sharing information, discussing or negotiating in relation to any past, current, forecast or proposed:
 - i. individual performance measures as between each individual Applicant and/or any other person identified in paragraph 4.11(a) and the respective Rail Network Owner, including individual performance targets, assessments or penalties
 - ii. individual pricing for the acquisition of below rail access, including:
 - A. outcomes of pricing models for individual access seekers, or individually negotiated prices with Applicants and/or other persons identified in paragraph 4.11(a)
 - B. pricing bands made available to individual Applicants and/or other persons identified in paragraph 4.11(a)
 - C. actual prices to be charged to individual Applicants and/or other persons identified in paragraph 4.11(a)
 - D. actual incentives or discounts provided to individual Applicants and/or other persons identified in paragraph 4.11(a)
 - E. amounts charged to individual Applicants and/or other persons identified in paragraph 4.11(a) as an outcome of charging or reconciliation methodologies
 - iii. prices, volumes or costs relating to the provision of rail freight services to the customers of the Applicants' and/or other persons identified in paragraph 4.11(a).

4.13. The ACCC proposes to grant authorisation with the following conditions:

- a) Provide the ACCC with written notice within 5 business days (or another period agreed in writing by the ACCC) of any change to Aurizon's structure or management such that it would cease implementing ring-fencing arrangements or would no longer absent itself from any negotiations undertaken by the Rail

Operators Group, or a sub-group within the Rail Operators Group, with Aurizon as Rail Network Owner of the Tarcoola to Darwin rail network

- b) Provide the ACCC with written notice within 5 business days (or another period agreed in writing by the ACCC) of becoming aware of any conduct in breach of the Competition Law Protocol.
- 4.14. The ACCC may authorise a Committee or Division of the ACCC, a member of the ACCC or a member of the ACCC staff, to exercise a decision making function under the conditions of authorisation on its behalf.
- 4.15. The ACCC proposes to grant authorisation AA1000644, with the conditions at paragraph 4.13, in relation to Division 1 of Part IV of the Act and section 45 of the Act for a period for 10 years.
- 4.16. This draft determination is made on 22 November 2023.

5. Next steps

- 5.1. The ACCC now invites submissions in response to this draft determination. In addition, consistent with section 90A of the Act, the Applicants or an interested party may request that the ACCC hold a conference to discuss the draft determination.