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By E-mail

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MELBOURNE
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Dear Mr Schroder

Submission to ACCC: Draft Decision on ARTC's 2024 proposed IAU

- 1 As you know, we act for Port of Portland Pty Limited (**POPL**).
- 2 We are instructed to make the following submission in response to the Australian Competition and Consumer Commission's (**ACCC**) draft decision on Australian Rail Track Corporation's (**ARTC**) proposed 2024 Interstate Access Undertaking (**Proposed Undertaking**), published on 26 July 2024 (**Draft Decision**).
- 3 In response to POPL's submissions that the Maroona to Portland rail line (**Line**) should be included within the scope of the Proposed Undertaking, the Draft Decision (page 36) sets out the following "draft view" (**Draft View**):

The ACCC considers the proposed components of the Network and Segments set out in the Proposed Undertaking are appropriate.

After the Maroona to Portland line is upgraded to an appropriate standard, ARTC should consider its inclusion, either by variation to an undertaking on foot, or inclusion in a future undertaking.

- 4 For the reasons set out in this submission, the Draft View:
 - (a) is based on misunderstandings or errors in reasoning regarding the traversal of the Port of Geelong – North Geelong – Wolseley line (**GW Line**), clause 20.4 of ARTC's lease from Public Transport Victoria (**Lease**), the Federal Government's commitment to fund the upgrade of the Line and the level of traffic on the Line;
 - (b) fails to consider matters required to be considered under the *Competition and Consumer Act 2010* (Cth) (**Act**), including the interests of access seekers, the promotion of competition and the efficient use of and investment in infrastructure; and
 - (c) fails to address many of the matters raised in POPL's previous submissions.
- 5 In POPL's respectful submission, the Line should be included in the Proposed Undertaking from the commencement of the Proposed Undertaking. Alternatively, if the ACCC is not prepared to require the inclusion of the Line now, it should be a condition of the ACCC's acceptance of the Proposed Undertaking that the inclusion of the Line is

properly considered, according to the process set out in paragraph 51 below, within a reasonable timeframe after completion of the upgrade to the Line.

Section 1: Errors in reasoning

- 6 Page 36 of the Draft Decision, which contains the ACCC's reasoning for the Draft View under the heading "Discussion", states (emphasis added):

We note ARTC's commitment in its response to our Information Request to limit prices charged for the Maroona to Portland line to no higher than those charged for comparable services on the Port of Geelong – North Geelong – Wolseley line. The latter section has to be traversed by users of the Maroona to Portland line and is covered by the terms and conditions as well as pricing of the Proposed Undertaking or Track Access Agreement. We therefore consider that users of the Maroona to Portland line are unlikely to be disadvantaged by its exclusion from the Proposed Undertaking at this time.

The Port of Portland's main concerns may be alleviated if the track is upgraded with the new government funding, regardless of whether the line is included in an access undertaking. The line has been used recently only for seasonal grain traffic to the port but proposed mineral sands projects could create larger and more consistent volumes of freight.

- 7 This passage indicates that the Draft View was reached based on the following contentions:
- (a) users of the Line will receive the benefit of the Proposed Undertaking because:
 - (i) of the operation of clause 20.4 of the Lease; and
 - (ii) those rail users must also traverse the GW Line;
 - (b) the issues caused by the exclusion of the Line from the Proposed Undertaking will be resolved by the Federal Government's commitment to fund the upgrade of the Line; and
 - (c) the current level of traffic on the Line makes it unnecessary or not worthwhile to include the Line in the Proposed Undertaking at this point in time.

- 8 For the reasons set out below, each of those contentions is incorrect.

Clause 20.4 of the Lease

- 9 As explained in POPL's submission dated 9 July 2024, ARTC's obligation under clause 20.4 of the Lease (to ensure the charges imposed on the Line do not exceed those imposed for comparable services on the GW Line) does not afford users of the Line the "benefits of regulation" under the IAU. This is for a number of reasons that were not considered in the Draft Decision.
- 10 First, price regulation is merely one benefit to access seekers of regulation under an access undertaking. As we noted in POPL's submission dated 9 July 2024, users of the Line are denied numerous other protections and benefits by the exclusion of the Line from the IAU. Those other protections and benefits are discussed in further detail in section 2 below.
- 11 Second, clause 20.4 of the Lease is not enforceable by access seekers (who are not parties to the Lease), and it cannot be assumed that ARTC will comply with that clause. As noted in POPL's submission dated 9 July 2024, ARTC also has a clear obligation

under clause 12.3(b) of the Lease to maintain the Line to a specified minimum standard, but has not done so for many years.

- 12 Third, clause 20.4 of the Lease is only of limited benefit to users of the Line. The clause creates a price ceiling tied to charges imposed for “comparable services” on the GW Line. As explained in our letter to the ACCC dated 2 May 2024, even if the Line is upgraded to ARTC’s “preferred option” under its 2022 Business Case of 23 TAL at 60 km/h (or similar), this will still be significantly less than the route capacity of the GW Line, which by comparison for wagons is 25 TAL at 80 km/h, 23 TAL at 100 km/h, 21 TAL at 110 km/h and 20 TAL at 115 km/h.¹ Accordingly, if clause 20.4 applies, it merely requires ARTC not to charge users of the Line more than the amount ARTC charges on a rail line with a significantly higher standard of service.

Traversal of the GW Line

- 13 The contention in the Draft Decision that users of the Line must also traverse the GW Line is not factually correct. It appears to be a modification of a previous argument by ARTC. Page 11 of ARTC’s response to the ACCC’s Information Request 2 states that given “*all trains [that use the Line] do require [sic] to use a portion of the ARTC network which is covered by the IAU*”, any potential users of the Line “*must also seek pathing on other segments of the network, which are covered by the IAU*”.
- 14 ARTC’s argument is also factually incorrect. While some users of the Line may traverse the GW Line or another section of ARTC’s rail network before or after using the Line, that is not required. Rail users are able to travel solely along the Line. For example, in the past a mineral sands company (which has since ceased operations) routinely delivered its product by road to the Hamilton station on the Line, following which the products were transported by rail solely along the Line to the Port of Portland, without using the GW Line or any other part of ARTC’s rail network.
- 15 In any event, to the extent that rail users of the Line also traverse the GW Line, they are not protected by and do not receive the benefits of the Proposed Undertaking in respect of their use of the Line. Clause 2.1 of the Proposed Undertaking states that the IAU “*provides for the negotiations of Access required for the operation of Train Services by Operators on the Network*” and “*does not extend to ... the track and infrastructure not part of the Network that may connect to the Network*”. Under the current form of the Proposed Undertaking, the Line is not captured by the definition of “Network”.

The planned upgrade of the Line

- 16 As explained in POPL’s submissions dated 22 May 2024 and 9 July 2024, there are a number of reasons why the planned upgrade of the Line does not make it unnecessary for the Line to be included in the Proposed Undertaking. Those reasons, which were not taken into account in reaching the Draft View, include:
- (a) so that users of the Line enjoy the same protections and benefits as the users of other ARTC rail lines that are covered by the IAU. Those protections and benefits are discussed further in section 2 below;
 - (b) so that the Line is covered by an appropriate regulatory regime, as it should be under clause 20.3 of the Lease. This term of the Lease is acknowledged by the ACCC in general terms on pages 9 and 23 of the Draft Decision, but is not discussed in relation to the Draft View;
 - (c) so that ARTC is required, under the IAU, to maintain the Line properly and prevent the Line from deteriorating again to its present poor condition;

¹ See page 4 of ARTC’s RAS document: <https://www.artc.com.au/uploads/RAS-Section-Page-D2.pdf>

- (d) to put the Line on equal footing with the GW Line, to avoid a distortion of competition between the Port of Portland and the Port of Geelong resulting from the GW Line being treated preferentially to the Line. This is discussed further in section 2 below; and
 - (e) to help address issues relating to the fragmentation and inefficiency of the rail network, which was raised by a number of stakeholders in their submissions on the Proposed Undertaking. This is also discussed further in section 2 below.
- 17 Further, as mentioned above, although the planned upgrade will improve the performance of the Line from its current significantly deteriorated state, the expected standard of the Line after the completion of the upgrade is still significantly lower than other sections of the ARTC rail network, including the GW Line, that are covered by the Proposed Undertaking. The upgrade of the Line provides no justification for adversely discriminating against the Line compared to those other sections of the ARTC rail network.

The current level of traffic on the Line

- 18 In our letter to the ACCC dated 2 May 2024 and in POPL's submission dated 9 July 2024, we explained that the reduced traffic on the Line is due to ARTC's failure to maintain the Line, causing the Line to become essentially unserviceable. Accordingly, the current level of traffic on the Line is not a proper basis to determine whether the Line should be included in the Proposed Undertaking.
- 19 Despite the Line's current poor condition and low traffic levels, by allocating to the Line \$150 million of the total \$540 million committed by the Federal Government to the ARTC interstate rail network, the Federal Government has emphatically demonstrated that the Line is a vital part of that network.² In May 2024, the Minister for Infrastructure the Honourable Catherine King MP explained that in some areas the rail sleepers on the Line are "*just absolute dust*" and that given the Port of Portland is "*such a big deep-water port, it's a really important part of infrastructure and...providing that rail connectivity (has) been called for for a long time*".³
- 20 The Government's views are shared by other regional stakeholders:
- (a) As referred to on page 36 of the Draft Decision, GrainCorp's submission to the ACCC dated 2 April 2024 discussed the "*pivotal role*" of the Line and the severe consequences of its poor condition.
 - (b) In a media release published on 16 May 2024, the Mayor of the Horsham Rural City Council described the Line as a historically "*busy corridor for the movement of Wimmera grain to the Port of Portland*" and referred to the upgrade of the Line as "*crucial*" for the Wimmera region, including because it will create "*more competitive freight options for grain and mineral sands*".⁴
 - (c) In a media release published on 17 May 2024, the Southern Grampians Shire Council described the Line as "*connect[ing] the western half of Victoria to the national grid and the Port of Portland*" and noted the "*growing demand for mineral sands to be brought from the Horsham and Wimmera area towards the Port of Portland*".⁵

² <https://minister.infrastructure.gov.au/brown/media-release/investment-deliver-future-made-australia>

³ <https://www.graincentral.com/logistics/maroona-portland-rail-line-a-winner-in-federal-budget/>

⁴ <https://www.hrcc.vic.gov.au/Our-Council/News-and-Media/Latest-News/Maroona-Portland-rail-funding-a-boost-for-Wimmera-roads>

⁵ <https://www.sthgrampians.vic.gov.au/Home/Latest-News/Media-Releases/Council-welcomes-Federal-Funding-Announcement-for-Maroona-to-Portland-Rail-Line>

- (d) In a media release published on 28 June 2024, the Rail Freight Alliance welcomed the Federal Government's "*imperative*" investment in the Line and referred to the Port of Portland as "*Western Victoria's best deep-sea port*".⁶

Section 2: Matters not considered

Statutory framework

- 21 As the Draft Decision (page 11) notes, section 44ZZA(3) of the Act sets out the matters the ACCC must consider when deciding whether to accept an access undertaking. Those matters include:
- (a) the object of Part IIIA of the Act to "*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*";
 - (b) "*the public interest, including the public interest in having competition in markets (whether or not in Australia)*"; and
 - (c) "*the interests of persons who might want access to the service*" (ARTC's interstate rail network).
- 22 However, for the reasons set out below, in forming the Draft View the ACCC has not considered these statutory matters in relation to the inclusion of the Line in the Proposed Undertaking.
- 23 The Draft Decision (page 12) also acknowledges that section 44ZZBD(3) of the Act requires the ACCC, in deciding whether to accept the Proposed Undertaking, to have regard to any submission made during the consultation process. Despite this, many of the points raised by POPL during the consultation process for the Proposed Undertaking, including in POPL's submission dated 9 July 2024, are not addressed by the Draft Decision.

Benefits to users

- 24 The Draft Decision does not consider the crucial benefits to rail users of including the Line in the Proposed Undertaking.
- 25 As outlined above, the Line should be included in the Proposed Undertaking so that users can enjoy the same protections and benefits as the users of other ARTC rail lines that are covered by the Proposed Undertaking. Those protections and benefits are numerous and substantial and, for the reasons discussed above, their denial to users of the Line is not justified by the operation of clause 20.4 of the Lease, the traversal by some users of the Line and the GW Line, the planned upgrade of the Line, or the current level of utilisation of the Line.
- 26 The Draft Decision discusses numerous benefits to rail users from accessing rail lines covered by the IAU. The Draft Decision notes that the Proposed Undertaking:
- (a) addresses ARTC's "*natural monopoly over the below-rail operation of the network, which comprises the track and related infrastructure*", which "*creates a need for a regulatory regime relating to terms and conditions of access, dispute resolution processes and prices*" (page 9);
 - (b) promotes effective competition and "*encourage[s] a consistent approach to access regulation to help ensure access seekers and ARTC can engage on reasonable terms*" (page 17);

⁶ <https://railfreightalliance.com/wp-content/uploads/2024/06/RFA-Maroon-to-Portland-Media-Release.pdf>

- (c) provides “*a regime that creates incentives for ARTC to reduce costs and improve productivity*” (page 20);
 - (d) offers greater transparency, which “*should aid access seekers in their negotiations with ARTC regarding path availability, network performance, service standards and prices, and assist users and the ACCC to identify where services are deteriorating*” (page 107);
 - (e) provides stakeholders access to the yearly Interstate Network Rail Access Forum, “*at which stakeholders could discuss general access issues and the operation of the Proposed Undertaking, with the ACCC in attendance*” (page 22); and
 - (f) provides “*regulatory certainty*” which in turn “*provides reduced risks for both ARTC and stakeholders when making business plans and investments, thus reducing costs for individual investments*” (page 19).
- 27 Each of those matters provides a compelling reason why the Line should be included in the Proposed Undertaking. They were not, however, considered in the Draft Decision in relation to the Line. They directly contradict the conclusion in the Draft Decision that users of the Line are “*unlikely to be disadvantaged*” by the Line’s exclusion.
- 28 The Draft Decision (page 22) notes that the two new sections to be added to the “Network” in the Proposed Undertaking are “*appropriate*”, given those sections are “*important parts of the Interstate network and warrant the same protection for users as the existing parts*”. Again, given the importance of the Line as part of ARTC’s rail network (as noted above), the same reasoning should have been applied to the Draft Decision’s consideration of the inclusion of the Line in the Proposed Undertaking.
- 29 The “Discussion” on page 36 of the Draft Decision closely mirrors ARTC’s response to the ACCC’s Information Request 2, in which ARTC claimed that users of the Line already “*receive the benefits of regulation*” by clause 20.4 of the Lease and that including the Line in the Proposed Undertaking is of “*no benefit to Access Seekers*”. Both claims are incorrect for the reasons explained above.
- 30 Further, POPL’s submission dated 9 July 2024 explained that:
- ... users of the Line do not enjoy the same protections and benefits as the users of other ARTC rail lines that are covered by the IAU. It would be of substantial benefit to users of the Line if ARTC were required to maintain the Line under clause 8.1 of the IAU, which is subject to enforcement by the ACCC including under section 44ZZJ(2)(b) of the Competition and Consumer Act 2010 (Cth).*
- 31 As explained above, given ARTC’s neglect of the Line to date, it is not reasonable to assume that clause 20.4 of the Lease provides sufficient incentive to ARTC to maintain the Line.
- 32 In addition, as noted in paragraph 26(f) above, the Draft Decision acknowledges the importance of “regulatory certainty” in reducing risks for potential rail users when making business plans and investments. This applies with great force to the Line, where prospective mineral sands businesses and wheat businesses will be considering potential investments to take advantage of the Federal Government’s \$150 million investment in the Line. This issue is addressed further below.

Interoperability and harmonisation

- 33 One particular issue affecting the interests of users of the ARTC rail network is that of “interoperability and harmonisation”.

- 34 The Draft Decision (page 26) acknowledges that “*interoperability and harmonisation across rail networks were raised in many submissions by rail operators as a key issue that affects the efficient use of rail infrastructure*”. On page 24, the Draft Decision refers to submissions on this issue by Aurizon, the NSW Transport Asset Holding Entity and Pacific National, including Aurizon’s proposal that the Proposed Undertaking “*be amended to improve national consistency and harmonisation*”.
- 35 The common ground among stakeholders on this issue, which was also raised by POPL in a meeting with the ACCC on 4 April 2024, supports the position that the Line should be covered by the Proposed Undertaking for consistency with the intersecting rail line to the Port of Geelong.
- 36 The Draft Decision (pages 26-27) concludes that “*ARTC’s role as a national rail network is key in furthering interoperability and harmonisation*” and that ARTC should recognise this role by making amendments to the Preamble to the Proposed Undertaking.
- 37 The Draft Decision’s approach to this issue on pages 26-27 is inconsistent with the Draft View. Despite proposing the amendments to the Preamble, the Draft Decision does not consider the issue of interoperability and harmonisation as it relates to the inclusion of the Line in the Proposed Undertaking, despite the Line’s inclusion being an obvious and simple step towards addressing the widely-held concern of users of the ARTC rail network.

Efficient use of and investment in infrastructure

- 38 In considering the Proposed Undertaking the ACCC is required to have regard to the objects of Part IIIA of the Act, which include to “*promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided*”.
- 39 In addition to the benefits to access seekers discussed above, it is important that a proper regulatory framework is in place over the Line to ensure the Federal Government’s \$150 million investment in the Line results in the Line being utilised to the full extent that is “*economically efficient*” and to promote further, economically efficient maintenance and investment in the Line in the future.
- 40 As briefly noted on page 36 of the Draft Decision, POPL’s submission dated 9 July 2024 stated that the Line should be covered by the Proposed Undertaking for the full benefit of the Federal Government’s investment to be realised. The Draft Decision does not, however, engage any further with this point.
- 41 As is typically the case with infrastructure, the Federal Government’s investment in the Line has a long-term investment horizon. Including the Line under the Proposed Undertaking is critical to ensure that over time the Line is properly maintained, rail users can use the Line appropriately and new users are attracted to the infrastructure. Potential rail users will be less inclined to use the Line if they have fewer rights than they would with other rail lines, and where there is a lack of “*regulatory certainty*”, as explained above, and potential concerns that ARTC will not maintain the Line adequately after the upgrade.
- 42 The Federal Government’s sizeable investment in the Line demands that an appropriate regulatory framework is put in place.

Promoting competition

- 43 The ACCC is required to have regard to the promotion of “*effective competition in upstream and downstream markets*” and “*the public interest, including the public interest in having competition in markets (whether or not in Australia)*”. However, the Draft Decision did not consider these matters in reaching the Draft View.

- 44 POPL's previous submissions raised the distortion of competition between the Port of Portland and the Port of Geelong caused by the deterioration of the Line while the Line was excluded from the IAU. There is substantial public interest in robust competition between these ports. That public interest includes the benefits of choice and efficiency for local growers, producers and the regional economy.

Section 3: the proposed deferral

- 45 The Draft View proposes that, after the completion of the upgrade of the Line, ARTC "*should consider*" the Line's inclusion in the IAU. In our respectful submission, that proposal is based on the errors identified above, and does not give proper regard to the matters referred to above, including the interests of potential users of the Line, as required under Part IIIA.

- 46 The proposal is also plainly inadequate because it:

- (a) delays a decision regarding the inclusion of the Line to an unspecified time at ARTC's discretion (at some stage after the upgrade of the Line);
- (b) leaves the decision to ARTC, makes the decision entirely at ARTC's discretion, and provides no guidance as to how ARTC should make the decision; and
- (c) contains no consequences for ARTC if ARTC fails to even consider the issue, or considers the issue only in an entirely unsatisfactory way.

- 47 Those matters are particularly concerning when ARTC has:

- (a) already indicated opposition to the inclusion of the Line in the Proposed Undertaking, and the reasons for its opposition do not withstand scrutiny, as explained in this submission;
- (b) a history of failing to properly maintain the Line, despite its obligation under clause 12.3(b) of the Lease, with the result that other ARTC rail lines, including the GW Line, have received preferential treatment; and
- (c) commercial incentives not to include the Line, including to avoid the obligation under a future IAU to maintain the Line properly.

- 48 Business owners need "regulatory certainty" about the Line now to make decisions about investments, so that those investments are in place and ready to take advantage of the upgrade as soon as it is completed.

- 49 In its response to the ACCC's Information Request 2, ARTC proposed the decision be delayed due to a "*significant regulatory cost burden*" associated with including the Line in the Proposed Undertaking, given it would require ARTC to bear the "*significant cost of a DORC valuation as well as the legal costs of developing the submission and managing the variation process*".⁷ However, as explained in POPL's submission dated 9 July 2024, the express inclusion of the Line in the Proposed Undertaking would be a simple amendment. Further:

- (a) Both ARTC and the ACCC are already proposing several amendments to the Proposed Undertaking in response to stakeholder concerns. Those amendments include, as discussed above, adding two new sections to the "Network" covered by the Proposed Undertaking. The concerns raised by ARTC with including the Line have evidently been overcome in relation to the

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https://www.accc.gov.au/system/files/ARTC%20response%20to%20information%20request%202_public%20version_final.pdf?ref=0&download=y

two new sections. There is no explanation why they cannot also be overcome in relation to the Line.

- (b) We understand that there would be no need for “significant regulatory costs” associated with any required “DORC valuation”, because the Draft Decision explains that the pricing under the Proposed Undertaking will be determined by price caps for regulated services (adjusted yearly in line with the Consumer Price Index), rather than the regulatory asset base.
 - (c) In any event, in our submission, any regulatory costs should be weighed against the substantial public benefits, as outlined in this submission, from including the Line in the Proposed Undertaking.
- 50 The Draft View appears to have been reached by adopting ARTC’s position and accepting ARTC’s vague promise to consider including the Line in the future, without scrutinising ARTC’s justifications or addressing POPL’s submissions regarding those matters. In our respectful submission, having regard to the requirements of Part IIIA, the Draft Decision should have considered whether there was in fact any “*significant regulatory cost burden*” associated with the inclusion of the Line in the Proposed Undertaking as contended and, if so, whether that burden is outweighed by the substantial public benefits of including the Line in the Proposed Undertaking.
- 51 If, despite these submissions, the ACCC will not require the inclusion of the Line in the Proposed Undertaking from the commencement of the Proposed Undertaking, we respectfully submit that, at minimum, the ACCC should make it a condition of its acceptance of the Proposed Undertaking that ARTC must comply with the following process for the inclusion of the Line to be properly considered:
- (a) within 3 months after completion of the upgrade of the Line, ARTC must submit a report to the ACCC containing ARTC’s view and reasons regarding whether the Line should be included in the IAU;
 - (b) stakeholders, including POPL and potential users of the Line, be then given an opportunity to make submissions to the ACCC in response to ARTC’s report;
 - (c) following those submissions, the ACCC consider the issue and publish a report containing the ACCC’s draft decision on the issue;
 - (d) following any further submissions on the ACCC’s draft decision, the ACCC issue a final decision on the inclusion of the Line in the IAU; and
 - (e) if the ACCC decides that the Line should be included in the IAU, ARTC must submit a variation to the IAU to that effect within a period specified by the ACCC.

Conclusion

- 52 For the reasons set out in this submission, POPL respectfully submits that the Line should be included in the Proposed Undertaking from the commencement of the Proposed Undertaking.
- 53 Alternatively, if the ACCC will not accept that submission, POPL respectfully submits that, at minimum, the ACCC should make it a condition of accepting the Proposed Undertaking that ARTC comply with the process set out in paragraph 51 so that the inclusion of the Line in the IAU is properly considered following the upgrade to the Line.

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

Yours sincerely
Arnold Bloch Leibler

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Partner