Arnold Bloch Leibler
Lawyers and Advisers

Level 21
333 Collins Street
Melbourne VIC 3000
Wurundjeri Country
www.abl.com.au

9 July 2024

By-Email

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

transport@accc.gov.au

Your Ref

File No. 021926255

Contact
[redacted]

Partner
[redacted]

Dear Mr Schroder

ARTC's 2024 proposed Interstate Access Undertaking

As you know, we act for Port of Portland Pty Limited, which has made submissions dated 23 February 2024 and 22 May 2024 regarding the proposed 2024 Interstate Access Undertaking (**IAU**) by the Australian Rail Track Corporation (**ARTC**).

We refer to the following documents recently provided to us by the Australian Competition and Consumer Commission (**ACCC**):

- the ACCC's Information Request 2 dated 17 May 2024; and
- ARTC's response dated 7 June 2024.

Question 10 of the ACCC's Information Request 2 refers to our client's submission and asks why the Maroona to Portland rail line (**Line**) is not included as a segment in the IAU, "*given the original intention and noting that the Port Augusta to Whyalla line is included and appears to have similar characteristics as a branch line to a port*".

In its response, ARTC offers several reasons for not including the Line in the IAU. Our client makes the following short points in response:

- As identified in our client's submission dated 22 May 2024, ARTC's view is that the Line is not currently covered by any regulatory regime. This is contrary to clause 20.3 of ARTC's lease of the Line from Public Transport Victoria (**Lease**), which recorded the parties' intentions that the Line would be subject to an access undertaking or access code. It is not relevant whether this obligation is "specific" to the Line. Clause 20.3 is set out in full in Schedule 1 to this letter.
- It is correct that clause 20.4 of the Lease requires that the access charges imposed by ARTC on the Line do not exceed those imposed for comparable services on the Geelong - North Geelong - Wolseley line. However, that is not the only specific obligation in relation to the Line contained in the Lease. Clause 12.3(b) of the Lease requires ARTC to maintain the Line at all times to a standard which enables (as a minimum) 19 TAL to traverse the Line at 80 km/h. As we have previously noted, that standard is not being met. Clauses 12.2, 12.3 and 20.4 of the Lease are set out in full in Schedule 1 to this letter.
- Our client does not agree that amending the proposed 2024 IAU to include the Line is of "*no benefit to Access Seekers*", that users of the Line already "*receive the benefits of regulation*" due to the operation of clause 20.4 of the Lease and because users of the Line must also seek access to other lines that are regulated by the IAU, or that "*customers are best served by the status quo*". As noted in our client's submission dated

22 May 2024, 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).

- This is evidenced by the submission to the ACCC made by GrainCorp dated 2 April 2024. In that submission, GrainCorp discusses the "pivotal role" of the Line and the consequences of its poor condition which, it explains, "*not only impact rail capacity to deliver into the export market but also … the value and competitiveness of local grain in the upstream market*".
- As previously explained, the express inclusion of the Line in the proposed 2024 IAU would be a simple amendment. Further, ARTC is already proposing to make several amendments to the proposed 2024 IAU in response to stakeholder concerns. It is therefore not clear, and ARTC does not explain, what the "*significant regulatory cost burden*" is of including the Line in the proposed 2024 IAU.
- Further, if there are any significant regulatory costs, they should be weighed against the substantial public detriment from the ongoing exclusion of the Line from the IAU, including the distortion of competition between the ports of Portland and Geelong and harms to regional growers and operators.
- The Line is "very lightly" trafficked because it has not been properly maintained. ARTC's December 2022 Business Case showed that the volume of freight carried on the Line has declined dramatically over the past decade due to the Line's poor condition, and that ARTC's "preferred" investment option would dramatically increase demand for rail freight services to the Port of Portland across a number of commodities (giving a six-fold increase in rail freight by 2035). The fact that the Line has fallen into significant disrepair, despite ARTC's maintenance obligations under the Lease, is precisely why the Line should be regulated by the IAU. It also means that it is not appropriate for ARTC to simply compare current maintenance costs against revenue as an argument for continuing to exclude the Line from the IAU, given those figures will reflect the severely degraded condition of the line.
- ARTC states that it would be happy to reassess the inclusion of the Line in the IAU after the completion of the planned upgrade of the Line. However, we note the federal government has committed $150 million to upgrade the Line, and the Line should be covered by the IAU, the appropriate regulatory regime, for the full benefit of that investment to be realised.

Having regard to the above, and for the reasons discussed in our client's previous submissions, our client maintains that the Line should be covered by the proposed 2024 IAU.

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

Yours sincerely
Arnold Bloch Leibler

Matthew Lees
Partner

Schedule 1 – Lease extracts

12. General Maintenance and Renewal Obligations

12.2 General obligations

ARTC must:

(a) except as provided in clause 12.3, maintain the Infrastructure in a condition no worse than the condition as at the Commencement Date;

(b) ensure that the Infrastructure is always in a condition which enables ARTC to comply with its obligations under this Lease;

(c) ensure that the Infrastructure is maintained in a condition which enables it to be safely used for its intended purpose; and

(d) maintain, at a minimum, the operational functionality and capacity of the Infrastructure;

12.3 Specific obligations

(a) Without limiting clause 12.2, ARTC must ensure that the Infrastructure (excluding the Infrastructure on the Maroona–Portland line and the Albion-Jacana line) is maintained at all times during the Term to a standard which enables as a minimum traffic to traverse at the following standards:

Traffic Class Capability	***Melbourne - Albury***	***Melbourne – Wolseley***
XPT / DMU	*130 kph*	*130 kph*
Loco hauled passenger	*130 kph*	*115 kph*

(b) Without limiting clause 12.2, ARTC must ensure that the Infrastructure situated on the Maroona-Portland line is maintained at all times during the Term to a standard which enables (as a minimum) 19 TAL to traverse that line at 80 kph.

(c) The only exception to the standards in paragraphs (a) and (b) will be where:

(i) physical infrastructure constraints such as curves limited in speed due to their geometry and points and crossings that have a lower design maximum speed; and

(ii) in the case of the Maroona-Portland line, if the Infrastructure situated on that line is not at a standard as at 29 May 2008 which enables 19 TAL to traverse the line at 80kph, in which case ARTC must at its own cost undertake all necessary upgrade works to the Infrastructure on that line to enable 19 TAL to traverse the line at 80kph by no later than 29 May 2013.

(d) Temporary reductions to the standards in paragraphs (a) and (b) will be measured and monitored in accordance with the KPIs, and in any case must be kept to a minimum in both physical length and time of application.

(e) ARTC must, in relation to the Albion-Jacana line:

(i) maintain the Infrastructure on that line in no worse condition than the condition which that Infrastructure was in as at 29 May 2008 (ie, 23TAL at 20kph); and

(ii) upgrade the Infrastructure on that line if ARTC considers there is a reasonable business case to do so.

20. Access Agreements

20.3 Open Access Regime

The parties acknowledge and agree that it is their respective intentions that:

(a) ARTC will use all reasonable endeavours to ensure that at all times during the term there is an access undertaking or access code in force that has been requested by the ACCC under Part 3A of the Competition and Consumer Act 2010 (Cth) that sets out the terms and conditions on which rail operators can obtain access to the Infrastructure for the purpose of operating passenger and/or freight trains on the Infrastructure;

(b) the access undertaking or access code will govern exclusively the basis on which rail operators can obtain access to the Infrastructure, to the exclusion of:

(i) Part 3A of the Competition and Consumer Act 2010 (Cth); and

(ii) Part 2A of the Rail Management Act 1996 (Vic);

(c) ARTC will comply with the terms and conditions of the access undertaking or access code; and

(d) the provisions of Part 2A of the Rail Management Act 1996 (Vic) will only apply to those parts of the Infrastructure which are declared to be declared rail transport services pursuant to section 38C of the Act if there is not in force an access undertaking or access code that has been accepted by the ACCC under Part 3A of the Competition and Consumer Act 2010 (Cth).

20.4 Maroona–Portland line

ARTC acknowledges that it will not impose access charges for services operated on the Maroona - Portland line which are in excess of the access charges imposed for comparable services on the Port of Geelong – North Geelong - Wolseley line.