

21 June 2018

To Mr David Jones  
General Manager, Adjudication Branch  
Australian Competition and Consumer Commission  
23 Marcus Clarke Street  
Canberra ACT 2601  
By email: [david.jones@accc.gov.au](mailto:david.jones@accc.gov.au);  
[adjudication@accc.gov.au](mailto:adjudication@accc.gov.au)

Dear Mr Jones

**Application for authorisation – rail haulage services providers – proposed collective negotiation of non-price terms and conditions of standard track access with TfNSW**

We have been engaged by Genesee & Wyoming Australia, Linx Rail, Qube, Manildra Group, Pacific National, Southern Shorthaul Railroad, Sydney Rail Services, SCT Logistics and Aurizon (together, the **Applicants**). The Applicants wish to collectively negotiate with Transport for NSW (**TfNSW**) the non-price terms and conditions on which they acquire below rail access to parts of TfNSW's Sydney rail network under Standard Track Access Agreements (**STAAs**) with TfNSW.

The Applicants seek authorisation from the Commission to the extent that that proposed conduct described in the enclosed application may constitute a breach of the provision relating to cartel conduct (s 45AD) and/or the anti-competitive agreements provision (s 45) of the *Competition and Consumer Act 2010* (Cth) (**CCA**) on the grounds there will be a net public benefit and/or there will be no substantial lessening of competition.

We attach the entire application for authorisation, which comprises:

- the application which can be placed on the ACCC's public register; and
- a declaration signed on behalf of the Applicants.

**Interim Authorisation**

The Applicants also wish to apply for urgent interim authorisation, commencing as soon as possible and continuing until the date the ACCC makes a decision in respect of the Applicants' application for authorisation. The Applicants consider that the following matters are relevant to the ACCC's decision in respect of whether to grant interim authorisation:

- All the Applicants (except Linx Rail) have contracts with TfNSW which expire on 30 June 2018.
- The Applicants have, on an individual basis, provided significant comments to TfNSW on the new STAA but no meaningful negotiation has occurred and TfNSW is requiring rail operators to enter into the new STAA as prepared by TfNSW by 1 July 2018.

- The Applicants have sought an extension to the existing STAAs from TfNSW to maintain the status quo but have not yet received a response.
- The Applicants must secure new contractual arrangements or extensions to existing contracts prior to 30 June 2018 to ensure continued access rights and the ability to maintain services to their customers, and to avoid exposure to economic loss.
- If interim authorisation is not received by 30 June 2018, the Applicants will have to consider their individual positions and determine individually whether, and on what basis, to roll over the existing arrangements. This would substantially weaken the Applicants' bargaining positions vis a vis TfNSW in the negotiations of the new STAAs.
- The proposed conduct is likely to have minimal impact on competition given the voluntary nature of the arrangements and the limited scope of the conduct (as described in the enclosed application).
- The Applicants are unwilling to commence negotiations in the absence of an authorisation or interim authorisation, due to the uncertainty associated with the risk of potential breach of the CCA.
- It has been common industry practice rail freight providers to negotiate the commercial terms of track access contracts with rail track owners, and similar authorisations of collective negotiations have been authorised by the Commission in recent years (e.g. Aurizon and SCT Logistics application which the Commission granted in 2015 (A91512) and Dudgeon Point Project Management's application which the Commission granted in 2011 (A91277)).

#### **Confidentiality**

The Applicants acknowledge that the application will be made public and placed on the Commission's authorisation register.

#### **Lodgement fee**

The Applicants have paid the \$7500 lodgement fee via EFT on 20 June 2016.

Please do not hesitate to contact me or Jessica Waters if you have any queries about the application.

Yours sincerely



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# Application for authorisation

## Standard Track Access Agreements with Transport for NSW

**Lodged by:**

**Genesee & Wyoming Australia (GWA)**  
**Manildra Group**  
**Pacific National**  
**Qube**  
**SCT Logistics**  
**Southern Shorthaul Railroad (SSR)**  
**Sydney Rail Services (SRS)**  
**Linx Rail Pty Ltd (Linx)**  
**Aurizon**

**PUBLIC VERSION**

21 June 2018

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# Standard Track Access Agreements with Transport for NSW

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# 1 Executive Summary

## 1.1 Background

The Applicants are rail operators and providers of rail freight services in Sydney and regional New South Wales (each described in Schedule 1).

The Applicants require access to the following below rail track networks:

- the Sydney Metropolitan Passenger Network in the Sydney Basin which is managed by Sydney Trains and owned by Rail Corporation New South Wales (**RailCorp**), a statutory corporation constituted under the Transport Administration Act 1988, an entity controlled by Transport for NSW (**TfNSW**).
- the Country Regional Network (**CRN**) in regional New South Wales which is owned by TfNSW and operated by John Holland Rail.

The Applicants wish to collectively negotiate the non-price terms and conditions on which they acquire below rail access to these parts of TfNSW's rail networks under Standard Track Access Agreements (**STAAs**) with TfNSW.

The Applicants, with the exception of Linx<sup>1</sup>, currently have STAAs with TfNSW for these rail networks which expire on 30 June 2018. TfNSW has recently proposed a new standard form STAA which is significantly more onerous than the previous version and which, on its current terms, will have a significant impact on the competitiveness of rail freight in and out of Sydney and within regional NSW.

The Applicants propose, and seek authorisation, to collectively:

- discuss, negotiate, enter into and give effect to extensions of their existing STAAs with TfNSW which are due to expire on 30 June 2018 (to enable negotiations without cessation of services from TfNSW);
- discuss and negotiate the non-price terms and conditions on which they will acquire track access from TfNSW for these rail networks; and
- enter into and give effect to contracts, arrangements or understandings containing common terms and conditions relating to those access arrangements (as described in Section 3).

The Applicants also seek interim authorisation to enable negotiations to start as soon as possible.

## 1.2 The Commission should allow the application

The Applicants submit that the Commission should allow its application for authorisation, including the request for interim authorisation on the basis that:

- the proposed conduct will likely result in substantial public benefits as described briefly below, and in further detail in Section 6;

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<sup>1</sup> In the case of Linx, its services are currently operated by SRS under SRS's access agreement with TfNSW. However, Linx is planning to operate services from August and is therefore also seeking to negotiate an STAA with TfNSW.

- the proposed conduct will have minimal (if any) detrimental impact in the relevant markets as described briefly below, and in further detail in Section 7; and
- in the counterfactual scenario, where each Applicant independently and bilaterally negotiates access with TfNSW, there will be increased costs for all parties, a high likelihood of time delay, the potential for unfair differentiation between access seekers which may have a material adverse impact on their ability to compete and most importantly a potentially sub-optimal outcome for rail freight generally as a result of a standard form agreement which does not appropriately address the needs of the industry and is inconsistent with Government policy.

The Applicants are seeking interim authorisation to allow negotiations to commence as soon as possible, and authorisation for a period of 5 years.

### **1.3 Likely public benefits**

The proposed conduct is likely to result in substantial public benefits and enable the Applicants and TfNSW to ensure that common terms and conditions work for the whole of industry, as described in section 6. In particular:

- improving efficiencies in rail freight transport through greater certainty of pathing, common service standards, and common terms and conditions for the same monopoly input;
- improving commercial outcomes by improving the Applicants bargaining power in the negotiation of access with the monopoly service provider;
- in turn, promoting competition among the Applicants and other rail freight providers by facilitating consistent terms and conditions for the same services, and allowing them to fairly and vigorously compete on other aspects of their service offerings;
- promoting the competitiveness of rail as against other modes of transport by improving the prospects of efficient access terms and conditions for rail access;
- significant transaction cost savings and efficiencies for the Applicants and TfNSW; and
- achieving Government policy and targets for the growth of rail freight to reduce road costs and congestion, and ensuring that regional NSW has efficient access to international markets via rail.

### **1.4 No substantial lessening of competition or other public detriment**

The proposed conduct is likely to result in minimal (if any) public detriment, as described in section 7. Any potential detriment is minimised by:

- the voluntary nature of the proposed conduct;
- the Applicants are not proposing or engaging in any collective boycott activity;
- the proposed conduct is limited to a narrowly defined set of services in that it only relates to the NSW part of the Australian rail freight network;
- there being no discussion of prices; and

- information sharing will be restricted to the proposed conduct with information protocols and governance arrangements implemented to avoid the discussion of commercially sensitive information.

## 1.5 Interim authorisation

The Applicants are seeking interim authorisation as soon as possible and before 30 June 2018:

- The existing agreements are due to expire on 30 June 2018.
- The Applicants have, on an individual basis, provided significant comments to TfNSW on the new STAA and received only a high level summary from TfNSW of the comments from the rail operators but no meaningful negotiation has occurred and TfNSW is requiring rail operators to enter into the new STAA as prepared by TfNSW by 1 July 2018.
- The Applicants<sup>2</sup> have sought an extension to the existing STAAs from TfNSW to maintain the status quo but have not yet received a response.
- If interim authorisation is not received by 30 June 2018, the Applicants will have to consider their individual positions and determine individually whether, and on what basis, to roll over the existing STAAs. This would substantially weaken the Applicants' bargaining positions vis a vis TfNSW in the negotiation of the new STAAs.
- The proposed conduct is likely to have minimal impact on competition given the voluntary nature of the arrangements and the limited scope of the conduct.

## 1.6 Notice details

The address in Australia for service of documents on the Applicants is:

**c/- Vishal Ahuja**  
**King & Wood Mallesons**  
 Level 61  
 Governor Phillip Tower  
 1 Farrer Place  
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## 2 Background information

### 2.1 Australian rail freight network

In Australia rail freight operations move:

- ~1.3 billion tonnes per annum of bulk freight, primarily coal and iron ore; and
- ~25 million tonnes per annum of non-bulk freight, primarily containers.

This freight task is moved over a network consisting of approximately 33,000 kilometres of track nationally. Freight is hauled between regions and major cities, facilitating interstate and international trade and commerce. Rail freight primarily moves large quantities of heavy products over long distances. Bulk

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<sup>2</sup> Except Linx, for the reasons above. Aurizon sought an extension from TfNSW individually.

freight services usually transport homogeneous products such as coal, iron ore or grain. The industry also carries non-bulk freight, such as containerised goods, although this segment faces strong competition from road freight operators.<sup>3</sup>

[Transport NSW](#) estimates that the total value of products moved by freight in NSW alone equals \$200 billion per annum, with it contributing \$66 billion to the NSW economy each year. Further, the [NSW government expects freight volume to increase dramatically in the coming decades](#), expecting it to double in the Greater Sydney area and increase by 25% in regional NSW over the next 40 years.

Rail freight revenue in Australia is estimated to be ~\$8.4 billion in 2017-18, with expected annual growth of ~2.8% in 2018-2023.<sup>4</sup> Privatisation and commercialisation initiatives over the past decade have increased industry competition. At the same time, federal and state governments have invested in rail infrastructure designed to improve transit times and axle-loading capabilities. This investment has significantly improved the efficiency and competitiveness of rail freight against other modes of transport, particularly in transporting large loads over long distances. However, rail is subject to intense competition from road freight transport, as described in more detail in section 2.4 below.

Whilst road is the predominant mode of transport for the majority of commodity groups, there are increasingly greater opportunities for rail to supplement or provide these freight services at decreased cost. For further information, see <https://future.transport.nsw.gov.au/sites/default/files/media/documents/2018/Draft-NSW-Freight-and-Ports-Plan.pdf>.

## 2.2 TfNSW, RailCorp and TfNSW networks

### *TfNSW and RailCorp*

TfNSW (ABN 18 804 239 602) is the NSW Government department responsible for planning, program administration, policy, regulation, procuring transport services, infrastructure and freight. TfNSW oversees the procurement, contracts, accreditation and regulation of its operators.

Further information is available at: [www.transport.nsw.gov.au](http://www.transport.nsw.gov.au).

RailCorp (ABN 59 325 778 353) is a statutory corporation constituted under the *Transport Administration Act 1988*. RailCorp is a NSW Government agency that holds rail property assets, rolling stock and rail infrastructure in the Sydney metropolitan area and limited country locations in the State of NSW. RailCorp makes these assets available to Sydney Trains and NSW Trains for their operations. It also manages the NSW Government's contract with the Airport Link Company. From 2013 RailCorp's operation and maintenance functions were transferred to Sydney Trains and NSW Trains, leaving RailCorp as an asset owner.

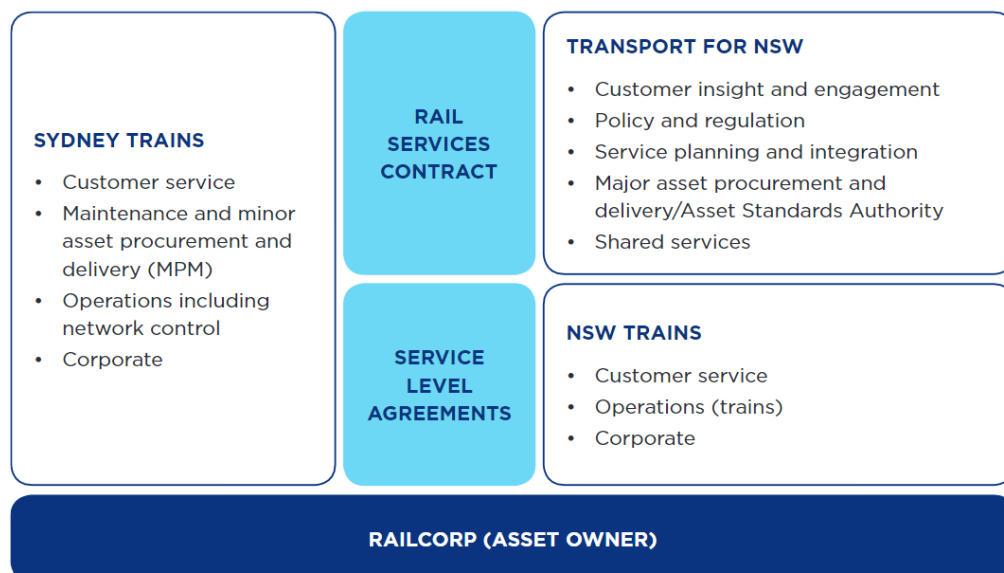
This relationship, including with TfNSW, is illustrated below in the diagram below.

Further information is available at: [www.transport.nsw.gov.au/about-us/who-we-are/railcorp](http://www.transport.nsw.gov.au/about-us/who-we-are/railcorp) and in the [2017 Annual Report](#).

<sup>3</sup> IBISWorld "Rail Freight Transport in Australia" Industry Report, p.5

<sup>4</sup> Id, p.3





### ***TfNSW Rail Networks***

In NSW, the various rail track networks are owned and operated by several different entities, notably:

- the Australian Rail Track Corporation (**ARTC**) which operates the NSW interstate network, parts of the metropolitan freight network, Southern Sydney Freight Lines, and the Hunter Valley coal network (all owned by TfNSW);
- Sydney Trains, which operates the Sydney Metropolitan Passenger Network (under 1000 kilometres) (owned by RailCorp); and
- John Holland Rail, which operates numerous regional rail lines in NSW comprising the Country Regional Network (**CRN**) (approximately 2700 kilometres) (owned by TfNSW).

The Applicants are seeking authorisation only in relation to the second and third rail networks, being the Sydney Metropolitan Passenger Network and CRN, as shown on the maps set out in Schedule 2.

Access to Sydney metro passenger network and CRN is regulated by means of the NSW Rail Access Undertaking pursuant to Schedule 6AA of the NSW Transport Administration Act 1988.

Further information about the Sydney Metropolitan Passenger Network is available at: [transportnsw.info](http://transportnsw.info).

Further information about CRN is available at:  
[www.transport.nsw.gov.au/projects/current-projects/country-regional-network-crn](http://www.transport.nsw.gov.au/projects/current-projects/country-regional-network-crn)  
 and <http://www.jhrcrn.com.au/>.

## **2.3 Competition between Rail and Road freight**

Road and rail (and to a lesser extent, coastal sea freight) compete for many of the same freight tasks, nationally and in NSW, and in particular for interstate and intercity freight tasks and non-bulk services.

Road freight revenue in Australia is estimated to be ~\$45.4 billion in 2017-18, with annual growth of ~1.7%.<sup>5</sup> Industry revenue is projected to grow at an annualised 1.7% over the five years through 2022-23, to \$49.4 billion.

Rail freight competes directly with road freight, particularly in relation to non-bulk freight. Rail's main competitive advantage over road transport is its efficiency in moving large loads over long distances. However, rail freight is not as competitive when speed of delivery is required.<sup>6</sup> Rail is a capital intensive industry with high fixed costs, multi-party supply chains and limited flexibility. Rail involves large scale operations, which typically ship higher volumes of freight over set periods of time. This limits the appeal of these services to smaller customers who may be limited to shipping smaller quantities of goods, or customers who require time-sensitive services.

These issues may be further compounded by bottlenecks at key points in the supply chain which can further delay the speed at which rail freight can reach its intended destination and can add complexity and cost for customers who may have to deal with multiple parties in the supply chain.

In contrast, road has numerous advantages in competing for these freight tasks including low capital costs for entry, clear connections between service provision and customers and flexibility. Non-bulk freight services are particularly dominated by road freight providers, leveraging advantages in price, speed, convenience and reliability. Lower costs and faster delivery times to customers provide the industry with a competitive edge over rail. Further, given the relatively fragmented nature of the industry, customers can often deal directly with road freight operators, streamlining the entire process.

This means that in many circumstances road freight transport is preferred over rail by freight customers.

## 2.4 Government policy and objectives for rail freight

### *NSW Government's Future Transport Strategy*

Prioritising and stimulating the growth of rail freight has long been a priority of the NSW Government. For example, in its [2011-2012 budget](#), the NSW Government expressly targeted doubling the proportion of container freight movement by rail ([from 14% to 28%](#)) through NSW ports (particularly Port Botany) by 2021 to maximise the operational capacity of NSW ports and ease road congestion.

TfNSW has also committed [\\$400 million to fixing Country Rail](#) in order to "shift more bulk freight on to railway lines to ensure we get produce from paddocks to ports as quickly and efficiently as possible". [TfNSW notes](#) that regional NSW produced an estimated 216 million tonnes of freight in 2016, and this is expected to increase by 13% to 245 million tonnes by 2036. Since March 2011, the NSW Government has invested more than \$1 billion in the operation, maintenance and upgrading of the CRN.

Investing in rail freight infrastructure and improving efficiencies, including to improve competitiveness with road freight (and reduce the burdens on road freight) continues to be a clear priority, and part of TfNSW's [Future Transport Strategy 2056](#), which establishes NSW's long term transport master plan.

A key part of the Strategy is the [Draft Freight and Ports Plan](#), which recently estimated that freight volume in the Greater Sydney area as doubling, and that of regional NSW as growing by 25%, over the next 40 years. The Plan identified opportunities and challenges for freight in NSW, with increased use of rail freight

<sup>5</sup> IBISWorld "Road Freight Transport in Australia" Industry Report, p.3

<sup>6</sup> IBISWorld "Rail Freight Transport in Australia" Industry Report, p.19,

reducing customer costs and easing road congestion in urban areas. As a result, the most recent draft Plan identified the following [priority action areas](#), most relevantly:

- **Strengthening freight industry and government partnerships:** the plan states that TfNSW will “*collaborate with our industry partners for their valuable input and expertise to deliver our transport initiatives as efficiently as possible. Working together means that we can increase our capability and deliver the most effective solutions to the challenges we face*”.
- **Facilitating greater access to shared rail networks:** including by TfNSW increasing access on the shared network, and providing dedicated freight priority on selected sections of network. In particular TfNSW states it will pursue opportunities to provide dedicated rail networks for passengers and freight, to reduce sharing of busy rail corridors which reduces the ability to deliver increased off-peak passenger frequencies and increased freight capacity to support long-term needs.
- **Reducing the regulatory burden on industry:** to minimise the costs of moving goods, noting that disparate regulations and excessive red tape for the freight industry increases the costs and often adds to the complexity of moving goods across NSW. TfNSW states it will work with industry to identify where specific regulations can be eased without impacting on safety or amenity, reducing the cost of moving goods in NSW. It will also pursue harmonisation of access arrangements across state borders to make transportation easier, and reduce the regulatory burden on industry.

Rail operators consider the new STAA is not consistent with goals of the NSW Future Transport Strategy and, indeed, will hinder their achievement.

### ***Federal Government priorities***

The Bureau of Infrastructure, Transport and Regional Economics projects that Australia’s freight task will almost double by 2030. Governments have been moving to address congestion issues, with several state Governments indicating their preference for transferring container traffic from congested urban roads to rail.<sup>7</sup>

At the federal level, the Department of Infrastructure, Regional Development and Cities’ [Inquiry into National Freight and Supply Chain Priorities](#) (March 2018) identified 5 critical action areas. Amongst these critical action areas, the third (Planning for current and future needs) and fourth (Act to deliver the priorities) stressed the need to ensure that regional and remote areas had the opportunity to benefit from increased access to rail freight services and that land, maritime and air connections remained accessible for the purposes of trade, respectively.

The Federal Government has made several rail infrastructure investments over the past decade, focusing on interstate and non-bulk rail infrastructure. For example, the Federal Government pledged approximately \$20 billion for rail investment in the 2017-18 Federal Budget. Of this, \$10 billion National Rail Program to fund regional and urban rail networks over 10 years. This also included an additional \$8.4 billion dedicated to the Melbourne to Brisbane Inland Rail project.<sup>8</sup>

<sup>7</sup> IBISWorld “Rail, Air and Sea Freight Forwarding in Australia” Industry Report, p.8.

<sup>8</sup> IBISWorld “Rail Freight Transport in Australia” Industry Report, p.8,

These Government priorities at a state and federal level underscore the importance of rail freight to the industries that rely on it and to the broader economy. Accordingly, it is critical that rail operators are able to constructively work and negotiate with TfNSW track access arrangements which are consistent with NSW Government's priority action areas and thereby facilitate achieving the Future Transport Strategy and targets for the growth of rail freight.

## **2.5 Role of and development of the STAA by TfNSW**

The STAA is a document of critical importance for rail operators in NSW. It sets out the rights of rail operators to access the tracks owned by RailCorp and is the document which underpins rail freight movements in the Sydney Basin. In particular, the STAA sets out rail operator obligations, access rights, charges and payment mechanisms, train path management and other critical operational provisions.

TfNSW has been developing the STAA internally for a number of years. While the STAA has been under development, the terms of the previous Track Access Agreement were rolled over on a yearly basis, with the current agreements due to expire on 30 June 2018.

TfNSW has held industry briefings and individual meetings with operators in 2017 and early 2018 advising of the proposed new STAA (including operational protocol) and its intention to negotiate the new STAA with rail operators rather than roll forward existing agreements. On that basis, the Applicants expected a meaningful and two way consultation with TfNSW on the new arrangements. Unfortunately, the Applicants have had very little time to consider the STAA and very little discussion or feedback from TfNSW on the myriad of issues that have been raised:

- on 21 March 2018, rail operators received the first draft of the STAA;
- Applicants responded with detailed concerns regarding the STAA;
- Applicants subsequently received the pricing schedule and were advised the STAA would only have a one-year term (compared to the 3-year term in the existing Track Access Agreement);
- Applicants recently received TfNSW's feedback on its consideration of the issues raised by the Applicants but in many cases, on important issues, there has been no response other than to advise the comment has been noted {REDACTED - CONFIDENTIAL};
- after close of business on 8 June 2018, TfNSW issued the Applicants with a deadline of 1 July 2018 for operators to sign the STAA; and
- on 12 June 2018, the Applicants advised TfNSW in a letter of their intention to apply for authorisation (including interim authorisation) to jointly enter discussions with TfNSW, and seeking TfNSW's support. The applicants also sought an extension of the existing STAAs until 1 July 2019. {REDACTED - CONFIDENTIAL}The Applicants have not received a response from TfNSW to date.

From an initial review, the STAA is a step change in the contractual arrangements and risk allocation for freight in the Sydney Basin. It will have long term ramifications for the industry. The Applicants have broadly similar concerns to the impact the STAA would have on the rail freight industry. These concerns go beyond individual company issues and to the heart of rail freight competitiveness vis a vis road.

The Applicants consider the proposed STAA contract settings are a disincentive to rail freight in the Sydney Basin and in country NSW and would require a reconsideration by rail operators of further investment in rail capability.

On the basis of the points discussed above, the Applicants consider it will not be possible to review and agree the STAA and obtain internal approvals by the proposed deadline of 1 July 2018, and that the most efficient approach is make this authorisation application to collectively discuss and negotiate the STAA with TfNSW (as has occurred with the owners of the ARTC, Aurizon and Queensland Rail networks regarding a standard form access agreement).

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## **3 Proposed conduct**

### **3.1 Scope of proposed conduct**

The Applicants propose, and seek authorisation, to:

- (a) collectively discuss and negotiate the non-price terms and conditions of access to the TfNSW Sydney Metropolitan Passenger Network and the CRN with TfNSW for the purpose of freight transportation by rail;
- (b) enter into and give effect to contracts, arrangements or understandings regarding the access arrangements to the TfNSW Metropolitan Passenger Sydney Network and the CRN with TfNSW, in the form of the STAAs and associated documents; and
- (c) discuss among themselves matters relating to the above,  
(the **proposed conduct**).

Importantly, the proposed conduct will not involve negotiating the price at which the Applicants acquire track access as under the regime in NSW.

The proposed conduct is voluntary, and each Applicant will determine independently whether to accept the negotiated terms and conditions offered by TfNSW following the collective negotiations. Each Applicant may also freely and independently negotiate with TfNSW on any matter.

TfNSW is not required to collectively negotiate with the Applicants but the authorisation provides the opportunity to do so and provides, in the Applicants' view, the most efficient process.

### **3.2 Extended meaning of Applicants**

In this Application, "Applicants" includes successors, assigns, related bodies corporate, associated entities, joint venture partners and equity partners of each Applicant. This will ensure that the authorisation properly provides statutory immunity for all relevant parties.

Similarly, in this Application "TfNSW" and "RailCorp" includes successors, assigns, related bodies corporate, associated entities, agencies and joint venture partners, or whichever entity owns the network the subject of the relevant STAA.

Pursuant to section 88(1) of the *Competition and Consumer Act 2010* (Cth) (**CCA**), the Applicants request that any authorisation granted by the ACCC be expressed to apply to future rail operators using the TfNSW Sydney Metropolitan Passenger Network and CRN who will similarly need to negotiate a STAA, and to apply to TfNSW / RailCorp or such entity that owns the relevant network (in the event that the NSW Government should re-structure ownership in future).

### 3.3 Duration

The Applicants are seeking authorisation for a period of 5 years, which they consider appropriate given:

- negotiations are expected to take 12 months, and noting that TfNSW has taken several years to develop the new STAA but has provided limited consultation on the document;
- this provides sufficient time should arbitration of certain terms and conditions be required with IPART; and
- the long term nature of the access arrangements which are typically 5 years, although TfNSW is currently proposing a shorter term.

A period of 5 years is consistent with previous authorisations granted by the Commission in relation to below rail track access, including its determination relating to Aurizon and SCT Logistics in 2016 which was for a period of approximately 5 years. The ACCC considered that this was an appropriate period to grant authorisation given the likely length of the agreements involved (which were for a prospective term of 5 years). In earlier authorisations relating to Dudgeon Point Coal terminal (A91278), Abbott Point Coal Terminal (A91275), Wiggins Island Coal terminal (A91241) and the North West Iron Ore Alliance (A91212), the applicants sought, and the ACCC granted authorisations for, periods of 15 years (consistent with the likely length of the access agreements).

As a result, the Applicants consider that a period of 5 years is appropriate in all the circumstances.

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## 4 Rationale for proposed conduct

The main reasons for the proposed conduct are to:

- ensure an STAA which appropriately reflects the requirements of the rail freight industry to remain competitive and to enable 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 some countervailing market power in negotiations with the monopoly infrastructure owner, TfNSW, for the relevant services;
- achieve a significant reduction in the negotiation and transaction costs; and
- reduce the negotiation period and obtain appropriate longer term contracts to be concluded sooner than would otherwise be the case and thus allow continued investment by the industry.

The Applicants note that collective negotiation for below rail access is common in Australia and has been the subject of authorisations in the past, including the Commission:

- in February 2016, granting Aurizon and SCT Logistics authorisation to collectively negotiate with Brookfield Rail in relation to the interstate rail freight network controlled by ARTC (**Aurizon Determination**);

- in February 2012, granting authorisation to various Queensland coal producers to negotiate with Aurizon Network the terms upon which access to below rail infrastructure will be required to use the Dudgeon Point Project Management's proposed coal terminal at Dudgeon Point (**DP Determination**);
- in February 2012, granting authorisation to various Queensland coal producers to negotiate with Aurizon Network the terms on which access to below rail infrastructure will be required to transport coal to the applicant's proposed coal terminal development at Abbot Point (**AP Determination**);
- in December 2010, granting conditional authorisation to various Wiggins Island Coal Export Terminal producers to collectively bargain with Aurizon Network in relation to below rail access to transport coal to the terminal (**WICET Determination**); and
- in April 2010, granting conditional authorisation to the North West Iron Ore Alliance to engage in collective negotiations with the providers of rail infrastructure in the Pilbara region of Western Australia (**NWIOA Determination**).

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## 5 Test for authorisation

### 5.1 Public benefits outweigh detriments

In simple terms, to grant authorisation, the Commission must be satisfied that the public benefits of the proposed conduct (which might otherwise breach the CCA) outweigh the public detriments, including any adverse impacts on competition in relevant markets.

### 5.2 Relevant Markets

The Applicants consider that the relevant markets for assessing the proposed conduct are:

- the supply of below rail track access on the TfNSW Sydney Metropolitan Passenger Network and the CRN, of which TfNSW is the sole provider, to above rail operators;
- the supply and acquisition of freight transport services in and out of Sydney, rail haulage services being one of several modes of freight transport available for this purpose; and
- the supply and acquisition of freight transport services in regional NSW, rail haulage services being one of several modes of freight transport available for this purpose.

### 5.3 Relevant CCA provisions

The relevant provisions of the CCA to which the proposed conduct would or might apply include:

- Making a contract or arrangement, or arriving at an understanding that contains a cartel provision (s45AF) or giving effect to such a cartel provision (s45AG);
- Giving effect to a contract or arrangement or understanding that contains a cartel provision (s45AG);

- Making a contract or arrangement, or arriving at an understanding, a provision of which has the purpose, or would have or be likely to have the effect of substantially lessening competition in a relevant market (s45(1)(a));
- Giving effecting to a contract or arrangement, or arriving at an understanding, a provision of which has the purpose, or would have or be likely to have the effect of substantially lessening competition in a relevant market (s45(1)(b)); and
- Engaging with one or more persons in a concerted practice that has the purpose, or has or is likely to have the effect of substantially lessening competition (s45(1)(c)).

## 5.4 The counterfactual

To assess the relative benefits and detriments, the Commission must undertake a future “with and without” test, being a comparison of the likely future if authorisation was granted (the factual) and the likely future without the authorisation (the counterfactual).

The most likely counterfactual scenario to an authorisation would involve each Applicant independently and bilaterally negotiating access with TfNSW.

Separate negotiations are unlikely to provide the most efficient outcomes of obtaining appropriate, fair and timely common access terms.

Without authorisation, there is also the potential for unfair differentiation between access seekers which may have a material adverse impact on their ability to compete, particularly if smaller players do not have the negotiating power of larger players.

The public benefits and detriments are discussed in more detail below. However, the Applicants note that this is a negotiation with a monopoly service provider and that the proposed conduct is unlikely to breach the CCA or, if it does so, it is in the nature of a technical breach.

The Applicants seek certainty that the proposed conduct does not contravene the CCA. It is not possible to rely on the collective acquisition exception under the CCA as the proposed conduct does not involve the negotiation of price, which is partly regulated by IPART. The Applicants are also unable to rely on the collective bargaining exemption under the CCA because the nature of long term access arrangements likely to be sought is such that the \$3 million threshold will inevitably be exceeded.

While it may be possible for the Applicants to share information in relation to establishing common terms and conditions for the same service in the same market, there is considerable commercial and regulatory uncertainty with undertaking those negotiations without the authorisation.

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## 6 Significant public benefits

### 6.1 Overview of public benefits

The proposed conduct is likely to result in benefits to each of the Applicants, other access seekers, TfNSW and downstream customers of rail freight transport services.



## 6.2 Improved outcomes and competition in rail haulage

As acknowledged by the Commission in the Aurizon Determination, collective negotiation is likely to result in some public benefits by “*leading to more efficient outcomes from negotiation by improving the Applicants’ ability to input into the negotiations (whether in individual or joint negotiations)*”.<sup>9</sup>

As discussed above, the new STAA is being imposed on the industry with little meaningful negotiation and in circumstances where rail operators are being given little time to have their issues addressed with the impending expiry of their current agreements.

More fundamentally, the new STAA has unfair and unacceptable provisions which will materially impact on rail freight, including uncertainty as to timing and availability of access, increased administrative costs and increased risks for operators.

Collective negotiations can improve the relative strength of the bargaining position of the Applicants relative to TfNSW and lead to better industry and commercial outcomes. This in turn will likely promote the competitiveness of rail as against other modes of transport, by allowing them to focus more on fairly and vigorously competing with each other on other aspects of their service offerings. There are a number of factors on which rail operators can, and do, compete. For example, rail operators compete on price (of which below track access prices are only one part), reliability, innovation of rolling stock, customer service, and their range of services.

Further, the collective negotiation of the standard form agreement reduces the risk that the terms and condition of access agreements for the same services operating in the same market will adversely affect an individual rail operator’s ability to compete in the rail haulage market. This can occur because the term or condition may:

- be different between access seekers for like services which has an impact on their ability to compete directly against other access seekers who have contracted on different terms; or
- be the same between access seekers but may have significant different effect on their ability to compete due to scale efficiencies.

Changes in non-price terms can have discriminatory impacts affecting an operator’s ability to compete efficiently, especially where larger operators are better able to absorb the increase in cost or risk.

The Applicants submit that collective negotiations are likely to facilitate efficient and fair terms and conditions of access which will promote competition in the provision of rail haulage services to the benefit of consumers in those markets.

## 6.3 Promoting rail freight haulage and competition with road freight

Rail freight is subject to direct competitive pressure from modal substitutes, particularly road. Most of Australia’s non-bulk freight is transported by road, which generally has strong cost advantages over rail. The strength of road freight means that this modal form of transport effectively sets the price for non-bulk freight over most major routes.<sup>10</sup>

However, the advantages of rail freight in terms of lower carbon emissions, lower fuel costs, reduced congestion and reduced fatalities relative to road transport

<sup>9</sup> [www.accc.gov.au/system/files/public-registers/documents/D16%2B17503.pdf](http://www.accc.gov.au/system/files/public-registers/documents/D16%2B17503.pdf) at page 6.

<sup>10</sup> IBISWorld “Rail Freight in Australia” Industry Report, p.6.

are widely documented in the economic literature including the Productivity Commission's review into Road and Rail Freight Infrastructure Pricing (see chapter 7).<sup>11</sup>

Increased rail transport from modal substitution from road also leads to further direct benefits of reduced road wear and lower Government expenditure on road maintenance. As noted in the IBISWorld Industry Report on Road Freight, the state of the road network will likely be a concern for industry operators over the next five years, as congestion in cities increasingly limits road freight productivity, especially in port areas. Road quality will continue to determine how efficiently industry participants can travel between destinations on interstate and intrastate routes.<sup>12</sup>

It is for these various reasons that Governments are seeking to significantly increase the share of rail freight in Sydney and the broader freight market as noted above. As noted in the IBISWorld Industry Report on Rail Freight:

*“Australia’s existing transport infrastructure, particularly road infrastructure, will be pushed to its limits as the non-bulk freight market continues to grow. Rising congestion is projected to limit productivity and provide incentives to invest in infrastructure. Due to road freight’s contribution to noise, pollution, accidents and congestion, many governments are attempting to increase the share of non-bulk freight transported by rail. For example, a further \$20 billion was pledged to rail infrastructure in the 2017-18 Federal Budget*

....

*To reduce congestion, the Victorian and NSW governments have already set ambitious targets to increase the volume of port freight carried by rail. These targets are shaping landside investment at ports, although road freight transport remains dominant.*

...

*The investment required to meet growing freight demand over the next decade will be a challenge for the industry and governments alike, particularly as state governments and the Federal Government face budgetary pressures.”<sup>13</sup>*

To meet the Governments' objectives for the industry, it is necessary for rail operators to continue investing in capacity and productivity improvements in rail operations. Such investment is underpinned by STAA's which help achieve efficient outcomes for the whole of industry. It is therefore necessary for rail operators to engage in robust negotiations with TfNSW to help resolve issues in the STAA of industry-wide concerns and to achieve the most efficient non-price terms and conditions so as to enable rail to better compete with road freight alternatives.

However to date, in the limited interactions with TfNSW, individual operators have had little success in achieving changes to the STAA notwithstanding the commonality of issues raised. Collective negotiations will improve the prospect of obtaining changes which will ensure the viability of the industry and certainty and fairness of access. This is vital for operators to continue to make the investments required to achieve Government objectives.

<sup>11</sup> As noted in the Aurizon Determination, p. 24, and available at: <https://www.pc.gov.au/inquiries/completed/freight/report>

<sup>12</sup> IBISWorld Road Freight Transport Industry Report, p.8

<sup>13</sup> IBISWorld "Rail Freight in Australia" Industry Report, p.8.

## 6.4 Reduced transaction costs

As acknowledged by the Commission in the Aurizon Determination, the proposed conduct is likely to result in some public benefits by “*providing transaction cost savings in reducing the length of negotiations, the sharing of legal and other costs and/or removing the necessity to engage in an arbitration process.*”<sup>14</sup>

The Applicants submit that the proposed conduct would also realise transaction costs savings relative to undertaking individual negotiations. It will provide a significant reduction in legal expenses and management time of the Applicants and should lead to a more efficient process where the Applicants can identify and provide synthesised positions on the key issues.

TfNSW will also benefit from a more streamlined process and a reduction in the scope of matters required to be agreed amongst multiple operators and to ensure that it is not unfairly differentiating between operators.

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## 7 Minimal public detriments

### 7.1 Overview of public detriments

The Applicants submit that the proposed conduct is likely to result in minimal (if any) public detriment. As acknowledged by the Commission in the Aurizon Determination, the proposed conduct would be likely to result in minimal detriment since:

- participation is to be voluntary for all parties and no collective boycott activity is proposed;
- the objectives of the bargaining are consistent with regulation of below rail services in other markets (i.e. to establish consistent terms and conditions for a benchmark service offering);
- the conduct is limited to access to below rail services on the TfNSW Sydney Metropolitan Passenger Network and the CRN; and
- the Applicants are subject to competition from alternative forms of transport.

### 7.2 Voluntary participation and not collective boycott activity

Engaging in the proposed conduct is entirely voluntary. An Applicant or any other access seeker for the relevant services is free to engage with TfNSW directly to negotiate terms and conditions of access or in relation to any matter.

Likewise, TfNSW is not bound to negotiate collectively with an Applicant.

### 7.3 Consistent objectives with below rail regulation in other markets

The objective of the Applicants is to establish consistent terms and conditions of access for the same benchmark service offering. This is consistent with the arrangements which prevail in the regulated access arrangements in jurisdictions across Australia where access is subject to:

- an access undertaking;
- a standard track access agreement;

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<sup>14</sup> Ibid.

- a benchmark tariff (with differentiation for cost and risk); and
- relevant master planning and capital investment consultation.

The scope of the proposed conduct does not extend to coordination in the provision of services or the day-to-day of operations planning. Hence there is no prospect of coordinated cartel effects against competitors.

#### **7.4 Information sharing protocols and appropriate governance**

Information sharing among the Applicants, and between the Applicant and TfNSW, will only relate to the proposed conduct. The Applicants have established a competition protocol to ensure that information is shared only to the extent that it is reasonably necessary for, and related to, legitimate purposes. Further, an appropriate governance charter will be put in place to ensure appropriate oversight throughout the process of collective discussions and negotiations.

The Applicants do not propose to engage in cartel behaviour in relation to the provision of rail transportation services and will not share commercially sensitive information which might relate to downstream pricing, customers, costs of operations, volume and capacity projections.

The Applicants will continue to compete vigorously against each other, other rail providers and rail substitutes in relation to the intrastate transportation of freight.

#### **7.5 Proposed conduct is limited to a narrow range of services**

The proposed conduct is limited to collective negotiations and/or the discussion and sharing of information relating to the non-price terms and conditions of below rail access to the TfNSW Metropolitan Passenger Network and CRN.

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## **8 Conclusion**

Based on a counterfactual where each Applicant independently and bilaterally negotiates access with TfNSW, the Applicants consider that there are substantial public benefits arising from the proposed conduct which will outweigh the possible impact of the minimal, if any, public detriments from the proposed conduct (as set out above).

The assessment of these factors equally applies to the Applicants' request for interim authorisation, which will allow negotiations with TfNSW to start as soon as possible with the aim of concluding STAAs within 12 months.

The Applicants are unwilling to commence negotiations in the absence of an authorisation or interim authorisation, due to the uncertainty associated with the risk of potential breach of the CCA. Consequently, the Commission should grant interim authorisation, and authorisation of the proposed conduct for a period of 5 years.

# Schedule 1 Applicants

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## 1 Genesee & Wyoming Australia (GWA)

GWA is an Australian rail freight operator company. It is a subsidiary of Genesee & Wyoming and Macquarie Infrastructure & Real Assets. GWA operates in New South Wales, including in the Hunter Valley coal supply chain, the Northern Territory and South Australia. An accredited rail-service provider in six Australian states (all but Tasmania), GWA provides intermodal service six days per week on the Adelaide-to-Darwin corridor as well as intrastate haulage of bulk commodities including grain, steel and minerals, and provides a coal haulage service in New South Wales transporting approximately 40 million tonnes annually.

GWA acquired Freightliner in 2015. Freightliner is a rail freight provider and logistic company with a fleet of locomotives, rolling stock and lorries, providing rail freight solutions throughout the UK, Continental Europe, Australia and the Middle East.

The entities contracting with TfNSW under the STAAs will be Genesee & Wyoming Australia Pty Ltd (ABN 17 079 444 296) and Freightliner Australia Pty Ltd (ABN 51 122 522 123). Further information is available at: [www.gwrr.com/railroads/australia/genesee\\_wyoming\\_australia#m\\_tab-one-panel](http://www.gwrr.com/railroads/australia/genesee_wyoming_australia#m_tab-one-panel) and <https://www.freightliner.co.uk/group/>

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## 2 Manildra Group

Manildra Group is an Australian agribusiness based in Sydney. While its key facilities and products relate to bakery, food, industrial products, beverages, pet food, pharmacy, retail, fuel, stockfeed, and meat, it also has key facilities in flour milling, starts, sugars, meats and transport. Its transport operations include:

- Rail – hauling flour, wheat, grain and export containers. It owns more than 150 wagons and shunt locomotives at loading sites at Manildra, Gunnedah, Nowra, Harwood, Narrandera, Bomaderry, Grafton, Clyde and Port Botany in NSW, and Kensington in Melbourne, Victoria.
- Road – delivering its bakery ingredients and oils. It is one of the largest suppliers of packaged retail flour to the Australian grocery market.

The Manildra entity that will be contracting with TfNSW under the STAA will be Manildra Flour Mills Pty Ltd (ABN 80 000 217 523).

Further information is available at: <http://www.manildra.com.au>

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## 3 Pacific National

Pacific National is one of Australia's largest rail freight businesses. It provides:

- bulk haulage for a range of industries including coal, grain, bulk liquids, industrial products, non-ferrous ores, stone aggregate, and cement products;

- rail freight services for coal haulage;
- intermodal services including interstate container freight, interstate break bulk freight (steel), and hook and pull services for passenger trains; and
- steel freight including distribution services, specialist steel coil containers and regular linehaul for clients.

The Pacific National entity that will be contracting with TfNSW under the STAA will be Pacific National Pty Ltd (ACN 098 060 550).

Further information is available at: [pacificnational.com.au](http://pacificnational.com.au)

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## 4 Qube

Qube is one of Australia's largest integrated, national providers of import and export logistics services. Qube's range of services relate to:

- Ports – wharf-side port logistics and port management services including port and facility development, vessel management, warehouse and distribution, stevedoring services, and cargo handling for general cargo and dry bulk commodities for both import and export supply chains;
- Bulk commodity handling – covering all aspects of bulk logistics including mine, road, rail, storage, port and ship services. Qube Bulk handles various bulk ores, concentrates, mineral sands, salt, coal and dangerous goods. It owns and operates strategic infrastructure throughout the supply chain;
- Logistics – operations include supply chain logistics, transport (containers, bulk, linehaul, palletised freight), rail services, intermodal rail terminals, warehousing and distribution, freight depots and yards, project logistics, container parks and handling, specialised logistics, container hire and sales, customs and quarantine clearance and international freight forwarding.
- Infrastructure and Property – Qube holds interests in strategically located properties suitable for development into logistics infrastructure and operations.

Qube has invested heavily in rail equipment and rail infrastructure. Qube now has intermodal terminals across NSW, Victoria and South Australia including most recently its significant investment at Moorebank in Sydney. Qube provides a rail alternative to road by operating short haul and regional rail services into and out of ports in these three states.

The Qube entity that will be contracting with TfNSW under the STAA will be Qube Logistics (Rail) Pty Ltd (ABN 18 012 313 415). Further information is available at: [www.qube.com.au](http://www.qube.com.au)

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## 5 SCT Logistics

SCT Logistics is an Australian interstate transport company operating rail and road haulage, with facilities in Brisbane, Sydney, Parkes, Melbourne, Adelaide and Perth. SCT Logistics offers a full complement of transport and logistics services including: rail and road linehaul services, refrigerated transport services, contract management, warehousing with bonded and refrigerated facilities,

distribution centre – design and development, and tailored rail solutions including bulk haulage.

The SCT Logistics entity that will be contracting with TfNSW under the STAA will be Twentieth Super Pace Nominees Pty Ltd (ACN 005 855 327) as trustee for Burns Smith Unit Trust (ABN 37 757 194 158) trading as SCT Logistics (SCT) ABN 37 757 194 158).

Further information is available at: <https://www.sctlogistics.com.au/>

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## **6 Southern Shorthaul Railroad (SSR)**

SSR is an Australian rail freight services operator in New South Wales and Victoria. SSR provides full rail freight services as well as workshop services. SSR's rail services include coal haulage, grain haulage, infrastructure work trains, intermodal freight, testing and commissioning and rollingstock transfers. SSR operates two workshops (in Bendigo, Victoria and in Lithgow, NSW) providing workshop services such as rollingstock manufacturing and wagon and locomotive maintenance.

The contracting entity with TfNSW under the STAA will be Holdco Holdings Pty Ltd, t/a Southern Shorthaul Railroad (ABN 77 065 295 016).

Further information is available at: <https://ssrail.com.au/about-us/>

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## **7 Sydney Rail Services (SRS)**

SRS specialises in rail freight operations including intermodal traffic, import and export freight, testing and commissioning, bulk rail services, rail management, train crewing solutions, up-skilling drivers plus training and assessing of those drivers. SRS offers end-to-end solutions for rail freight customers.

The SRS entity that will be contracting with TfNSW under the STAA will be Sydney Rail Services Pty Ltd (ABN 27127027758).

Further information is available at: <https://www.sydneyrailservices.com.au/>

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## **8 Linx Rail**

Linx Rail is part of Linx Cargo Care Group, which comprises LINX, Autocare, C3 and GeelongPort. Linx Cargo Care Group provides services and integrated logistics solutions to customers from a diverse range of industries across Australia and New Zealand from agriculture, aluminium, automotive, forestry, food and beverage, mining, marine, oil and gas, major retail and resources.

Linx operates the Enfield Intermodal Terminal and offers a dedicated port shuttle service to Port Botany, a freight hub to connect regional trains to Sydney Metro and a dedicated empty container park service.

The Linx entity contracting with TfNSW under the STAA will be Linx Rail Pty Ltd (ABN 24 623 522 430).

Further information is available at: <https://www.linxcc.com.au/>

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## 9 Aurizon

Aurizon is an Australian based rail freight operator that transports more than 250 million tonnes of Australian commodities each year. Aurizon also owns and operates the Central Queensland Coal Network.

Aurizon has four major product lines for customers, specifically providing:

- Ownership and management of 2,275km rail network linking more than 40 coal mines and three major ports in Queensland
- Coal haulage services transporting approximately 200 million tonnes of coal annually across Queensland and New South Wales
- Bulk haulage services transporting approximately 60 million tonnes of iron ore and other bulk commodities (base metals, minerals, grains and livestock) across seven different rail corridors across Australia
- Intermodal services providing containerised transport services nationally. This business will be exited by Aurizon through a sale and closure process during FY2018.

The Aurizon entity contracting with TfNSW under the STAA is Aurizon Operations Limited (ACN 124 649 967).

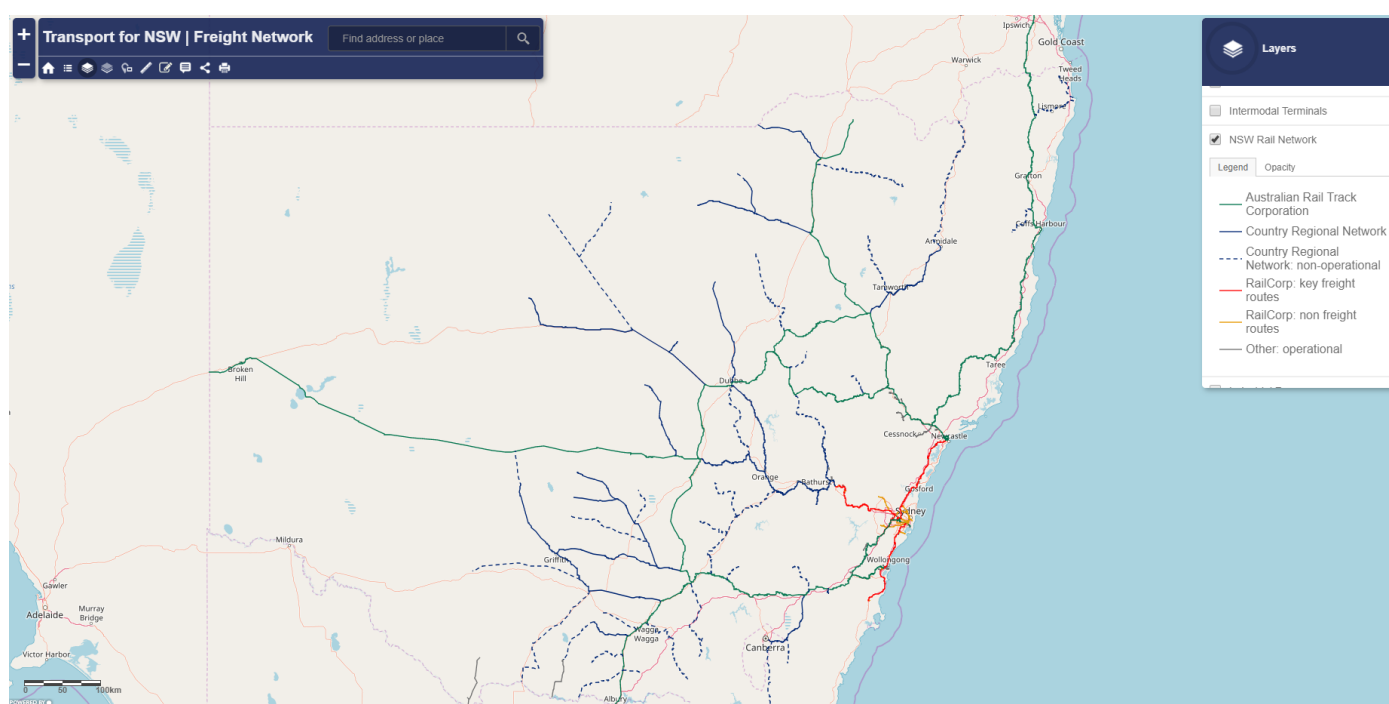
Further information is available at: [www.aurizon.com.au](http://www.aurizon.com.au)



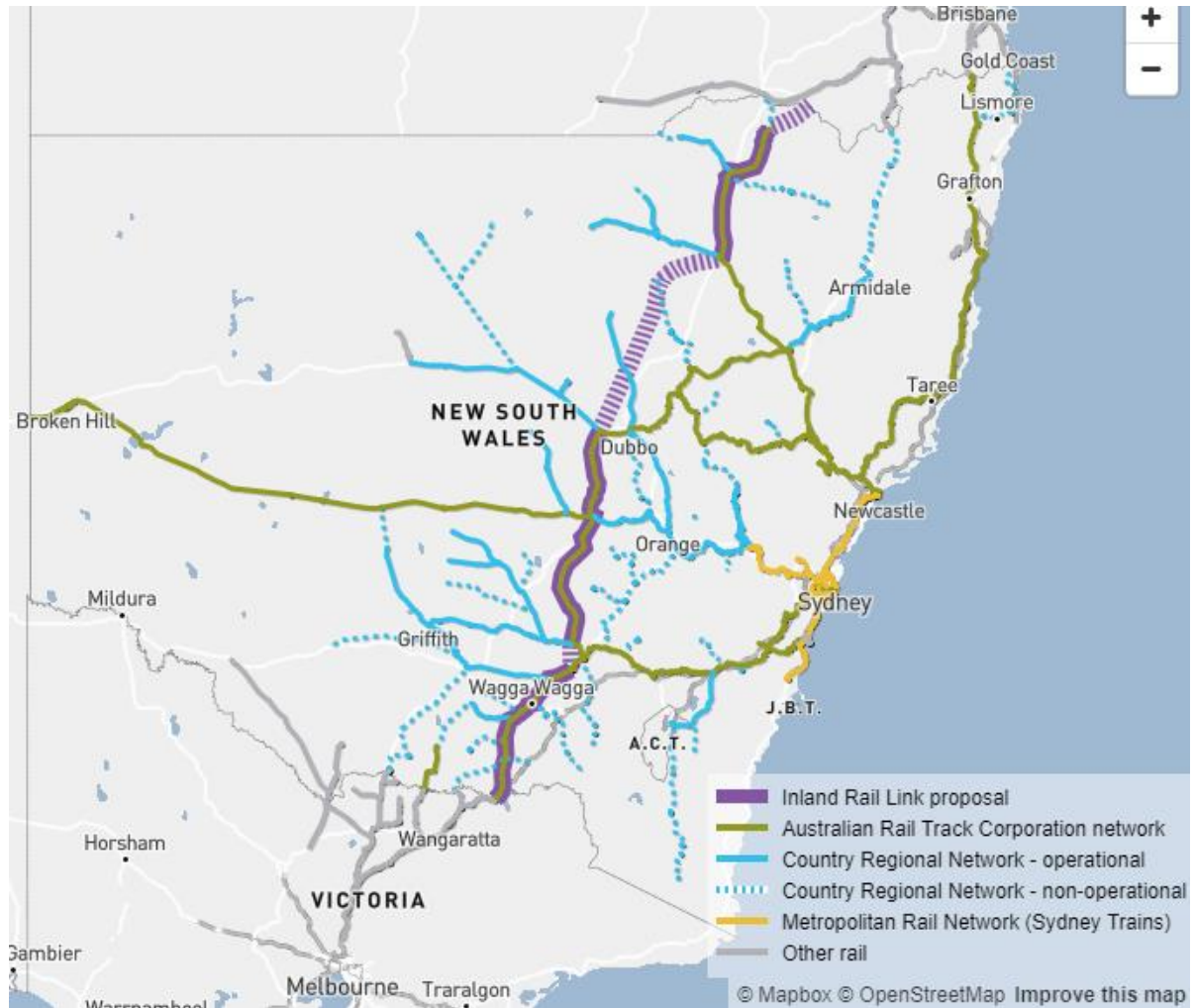
Schedule 2 TfNSW rail networks to which the Applicants seek access

## 1 Network maps

The Applicants seek access to the CRN shown in blue, and the RailCorp key freight routes in red.



The following map is a more detailed illustration of the CRN network (in blue).

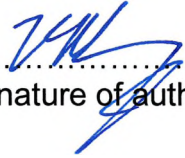


## Declaration by Applicants

The undersigned declare that, to the best of their knowledge and belief, the information given in response to questions in this form is true, correct and complete, that complete copies of documents required by this form have been supplied, that all estimates are identified as such and are their best estimates of the underlying facts, and that all the opinions expressed are sincere.


The undersigned undertake(s) to advise the ACCC immediately of any material change in circumstances relating to the application.

The undersigned are aware of the provisions of sections 137.1 and 149.1 of the *Criminal Code* (Cth).

  
.....  
Signature of authorised person

Partner, King & Wood Mallesons  
(solicitors authorised to make this declaration and submit the application on behalf of the Applicants)  
Office held

Vishal Ahuja  
(Print) Name of authorised person

  
.....  
This 21<sup>st</sup> day of June 2018

*Note: If the Applicant is a corporation, state the position occupied in the corporation by the person signing. If signed by a solicitor on behalf of the Applicant, this fact must be stated.*