Office of the Director of Public Transport

Ms Margaret Arblaster
General Manager - Transport and Prices Oversight
Regulatory Affairs Division
Australia Competition and Consumer Council
GPO Box 520J
MELBOURNE VIC 3001

Dear Ms Arblaster

ARTC ACCESS - DRAFT UNDERTAKING TO THE ACCC

I refer to the 30 January 2002 version of the ARTC Draft Access Undertaking, and attached indicative Track Access Agreement.

In its draft decision on the ARTC Access Undertaking the ACCC stated:

> *Should it however be the case that ARTC could be required by law to discriminate in favour of passenger services in Victoria, then the Commission considers that ARTC should expressly provide for this in its undertaking.*

The ARTC has responded to this by including clause 2.1(b)(vi) in the indicative Track Access Agreement:

> 2.1(b) … the availability of a Scheduled Train Path is subject to:
>
> (vi) without limiting any other clause of this Agreement, any lawful direction given to ARTC by the Director of Public Transport under Section 10 of the Transport Act, 1983 (Vic).

This inclusion in the Track Access Agreement is supported. However, I note that a corresponding clause is not included in the draft undertaking itself.

The draft Undertaking now states that:

> **6.3 Transport Act 1983 (Vic)**
>
> If:
>
> (a) the Operator is or becomes a train operator for the purposes of section 10 of the Transport Act 1983 (VIC); and
>
> (b) the Director of Public Transport gives a lawful direction to ARTC under section 10 of the Act requiring or approving a timetable change; and
>
> (c) the effect of the direction by the Director of Public Transport is to interfere with any existing train paths granted by ARTC to other rail operators; and
>
> (d) in order to minimise or prevent any interference to such existing train paths, ARTC, acting reasonably, chooses to effect improvements or extensions to the Network or Associated Facilities,

the reasonable costs incurred by ARTC in effecting such improvements or extensions shall be payable by the Operator.

An identical provision is also included at 4.5 in the draft indicative Track Access Agreement.

The references give ARTC the right to demand from an operator that it meet any costs incurred by ARTC in complying with its already existing obligations under Victorian law.

It is understood that the exercise by the Director of his powers under Section 10 may impose some costs on ARTC if impacts on other operators are to be avoided. However, this was the case when ARTC entered into its lease with Victoria.

The undertaking process should not be used to attempt to weaken or modify the impact of relevant State laws. The apparent intended effect of the currently proposed wording is to achieve an open ended funding commitment from Victoria and/or passenger operators to which neither Victoria nor the operators would be likely to commit if it was sought directly. While it is questionable whether the wording of the undertaking and indicative access agreement are enforceable in regard to Section 10 the draft undertaking could be read as an attempt by the ARTC to effectively pre-empt the operation of Section 10.

Victoria's opposition to this clause should not be understood as indicating that Victoria intends to mis-use its powers in regard to passenger priority, or to disregard the interests of freight trains. In fact Victoria is committed to growing rail's share of the freight task and to this end leased its interstate track to the ARTC.

Nor should it be understood that Victoria would not be prepared to consider the financial impact on ARTC of meeting its Section 10 obligations. However, Section 10 does not oblige it to, and it is inappropriate to use the access undertaking process to pre-empt negotiations on this matter on a case-by –case basis.

I therefore request that these provisions be deleted from both the Undertaking and the indicative Track Access Agreement.

Yours sincerely

JOHN McMILLAN
Deputy Director of Public Transport

/ /2002

Copy to: Denise McMillan, ARTC