27 April 2001

Margaret Arblaster
General manager – Transport
Regulatory Affairs Division
ACCC
GPO Box 520J
Melbourne VIC

Dear Ms Arblaster

This letter is forwarded to you in response to the draft ARTC Access Undertaking and the Issues Paper circulated by the ACCC.

Freight Australia is in the relatively unique position of being both an access provider and an access seeker and accordingly we offer our thoughts and concerns to the ACCC.

In general, we support the overall thrust and strategic direction of the undertaking and its attempt to put certainty into access to the Interstate Mainline. However, there are some areas where we believe that the undertaking is deficient and where changes would be required before it should be accepted by the ACCC. Our more detailed comments on each of these have been set out below under the appropriate headings.

It should be noted that in making our comments we are particularly concerned that, once accepted, the Access Undertaking would be equally binding on any future purchaser of the ARTC as it would be on present management. A new owner may be "hostile" to third-part access and accordingly, it is most important that the Undertaking would be acceptable even in the hands of a hostile new owner or (and we have not canvassed this) that the Undertaking only remains alive whilst the ARTC is 100% under Federal Government ownership and does not have any competing above-rail activities. Much of the success of open access across the ARTC network to date has been achieved because of the relative impartiality of Government ownership. A hostile owner would be less likely to be impartial.

The Access Undertaking has been drafted allowing a large amount of discretion in the hands of the ARTC management (eg specifying maximum prices and then allowing determination at (reasonable) lower levels). This may be acceptable with the present ARTC but would be able to be abused by alternative, hostile (new) owners.

Accordingly, it is necessary for the undertaking to be assessed under consideration of ownership by the Federal government **and also under consideration of ownership be a hostile owner**.

As an overriding comment, we believe that in most areas the draft strikes somewhat of a balance between the interests of access seekers and the interests of infrastructure owners/managers. We also recognise that the ARTC aims (correctly we believe) to take the lead in advancing rail operations throughout Australia. Accordingly, we are interested in using the draft Access Undertaking (as and when approved) as a template for our own arrangements in allowing access to our rail infrastructure.

In summary, our principal concerns with the draft are as follows.

(a) The draft undertaking does not adequately recognise the present intrastate contractual arrangements with Freight Australia. There is already a regime in operation as defined by the so-called "Intrastate Access Agreement" which is significantly different to the generic access agreement included as part of the draft undertaking. The existence of this regime and its implications need to be recognised by the ACCC in its assessment;

(b) The draft undertaking unduly emphasises the access requirements for long-distance, scheduled trains rather than providing a balanced position allowing appropriate terms and conditions for other types of access which are more relevant in other situations. For example, the seasonality of grain and the differences in volumes from one season to another, means that the concept of scheduled paths and take-or-pay obligations is just not appropriate in Victorian intrastate rail freight yet the total intrastate tonnage is of the same order of magnitude as the interstate tonnage.

(c) The draft undertaking is really only relevant to the present ARTC activities (South Australia and Victoria). The ARTC was established to ultimately manage the whole of the so-called "interstate network" including Western Australia and New South Wales as well (and the minor component in Queensland). The traffic demands in these other states are different from SA and Victoria and the SA/Victoria solution is unlikely to be appropriate.

(In this context, it is appropriate to consider the different train protocols that were adopted in different states prior to the Competition Principles Agreement when each was its own "island". The protocols were quite different and this was because there were different requirements. The model being proposed by the ARTC is essentially the earlier South Australian model. This is based on scheduled train paths with healthy trains having utmost priority. Alternatively, Victoria with a preponderence of grain traffic used a "common good" approach and NSW with its high utilisation and coal traffic used "conditional pathing" where the actual presentation of a train triggered the scheduling.

Firstly, it must be recognised that the draft ARTC undertaking must be restricted to present activities and track. Any future track additions that are put under the wing of the ARTC must not automatically be swept into the present draft.

Secondly, it would be desirable if it the draft were assessed against the likely future operations for future consistency.

(d) The draft undertaking does not adequately preserve some of the entitlements presently available to an access seeker under Part IIIA of the Trade Practices Act.

(e) The draft undertaking does not limit access charges to those related to "the owner's investment" as required under Part IIIA. "Depreciated optimised replacement cost" (DORC) is not the same as the investment made by the owner; it is an inflated valuation today. Any consideration of investment in determining access charges should be restricted to the actual dollars invested by the owner. Alternatively, any increase in value arising as a result of the DORC revaluation should be considered as part of the earnings of the access provider; and

(f) the draft undertaking is not transparent as claimed in the ARTC submission. Transparency means that the costs of providing the access can be seen by an access seeker. There is no provision in the undertaking for an access seeker to be advised of actual costs nor of access fees to change as costs change. Rather, the undertaking proposes an "open" regime with some consistency between access fees for different users.

It should be a requirement that the undertaking be truly "transarent".

Competitive neutrality versus road

One of the disturbing industry issues inherent in the Access Undertaking is that the ARTC, as the manager of the interstate rail highway, is compelled by its shareholders to act in a commercial manner and to consider access charges in relation to its investment in the infrastructure.

There is no similar obligation for access to rail's competition – road.

There is obviously a flawed competitive neutrality model when rail access is based on a return on the investment in that section of the track over which access is sought whereas road has no such requirement.

We accept that such an issue is a bigger one than merely a role in the proposed Access. However, given the pre-eminent role of the ARTC it would seem to be appropriate for one of the objectives in the draft Access Undertaking to be "establishing future rail access charges that are competitively-neutral with road access charges for similar journeys".

Without such an objective, the single driving force in the future could be profit maximisation and that is not the reason for the creation of the ARTC.

Access for Intrastate traffic

Freight Australia :-

(a) is the predominant user of the Interstate Mainline for intrastate freight;

(b) has its own network that interfaces with the Interstate Mainline;

(c) has a large proportion of its traffic traverses both its own network and the Interstate Mainline; and

(d) operates interstate services.

We do not believe that the proposed Access Undertaking adequately addresses the requirements that arise from these issues.

The present arrangements between the ARTC and Freight Australia are primarily contained in two documents. Intrastate arrangements are detailed primarily in a so-called "Intrastate Access Agreement". Interstate arrangements are detailed primarily in a so-called "Interstate Access Agreement". This latter agreement is similar to the generic access agreement included with the draft access undertaking. However, the Intrastate arrangements are substantially different and this is because access requirements for an effective and efficient above rail service are substantially different from the interstate requirements.

The proposed Access Undertaking relies on the generic Interstate Access Agreement attached to it. This, in turn, is built on the typical requirements of scheduled interstate trains running between Perth and the Eastern states. Such access requirements would be typified by scheduled paths, planned well in advance of the run dates and used almost every week of the year. In such a situation, flagfall take or pay obligations, "healthy" trains having utmost priority and availability of access being predominantly based on path availability (with minimum risk of disrupting "healthy" trains) are appropriate. However, each is inappropriate for typical Freight Australia access to the Interstate Mainline.

As a minimum, the draft Access Undertaking should acknowledge the terms and conditions in the Intrastate Agreement but it would be preferable for a more integrated approach between the ARTC network and the Freight Australia network and operations to be developed. We understand that one of the aims of the ARTC is to also control and/or administer the Interstate Mainline in NSW. The coal traffic in NSW on this line somewhat mirrors Freight Australia's intrastate requirements. It would be preferable if the Access Undertaking could also recognise the NSW needs right from the start; otherwise the undertaking may make it more difficult for the NSW section of the Interstate Mainline to be absorbed into the ARTC network. We believe that in addressing the future needs

of the NSW coal industry that the Victorian needs of Freight Australia will also be covered.

Consistency with existing Part IIIA rights

Once accepted, the proposed Access Undertaking would replace access entitlements that presently exist under Part IIIA of the Trade Practices Act. There should not be any reductions in present entitlements.

Some of the issues identified to date are as follows.

(a) "Owner's investment" under the TPA is not the same as "Depreciated Optimised Replacement Cost". Any pricing by the ARTC should only include the actual cost to the ARTC. (Alternatively, if a DORC valuation is used as the basis for the pricing for a limited period of time, then any revaluations from an old DORC to a later DORC should form part of the return to the owner).

(b) The draft Access Undertaking appears to limit any contractual arrangement to be within five years of the Access Undertaking being approved. Longer access is (potentially) available under the TPA and a similar possibility needs to be recognised in the Undertaking.

Further, it would appear that (say) three years into the approved Undertaking, access would be offered for only the remaining two years. This is perhaps an unintended consequence from the specific wording but needs to be addressed.

(c) Despite claims in the Draft Access Undertaking to the contrary, access is not being offered on a "transparent" basis. Our understanding of "transparency" is that an access seeker can see through offered access prices to the underlying costs and basis for calculation. This is different from "open" arrangements where access seekers are aware of what others have been offered.

The ARTC is to be commended for its past approach of open access pricing and we would trust that this would continue to apply. It should be included as a stronger commitment under the undertaking. Our belief is that the draft Access Undertaking meant to refer to "open" rather than "transparent".

Further, access applications under the TPA would ultimately have transparency, at the minimum, to the ACCC or the NCC who would have access to all access calculations and contracts. This protection for an access seeker should not be lost with the Undertaking.

(e) Many of the undertaking statements provide the ARTC with the right to vary certain aspects at its discretion and others allow for variations with the agreement of an individual access seeker. Such flexibility, without check,

makes many of the original principles and undertakings virtually meaningless. Some check and balance or external judgements and approval will be necessary.

(f) Access under Part IIIA includes consideration of the Competition Principles Agreement clause 6(4)(i) and (j) requirements. However, it is unclear in the draft Access Undertaking how such issues would be taken into account by an arbitrator and the wording of the Undertaking probably excludes realistic consideration. Much of the Undertaking seeks to be specific on the terms and conditions of the access that the ARTC would undertake to offer. Once approved, such terms and conditions would be binding and would preclude the ability of arbitration to reopen them if (eg) circumstances would have lead to a different application of the CPA clause 6(4) issues in the first place.

We would be pleased to develop the above issues further should the ACCC so wish and are available for discussions.

In the meantime, we support the ACCC in its evaluation of the access undertaking. It is to be hoped that the final product will provide a solid reference for all rail access throughout Australia.

Yours sincerely

Michael Houston
General Manager, Access