ATTACHMENT "A"

PROPOSED ARTC TRACK ACCESS AGREEMENT – OUTSTANDING ISSUES

1. Term and Warranty of Entitlement to Grant Access

We understand that if SCT agrees to take a train path for a specific term, the price for that train path will, subject to the variation of charges clause, remain fixed. Is our understanding correct? Is there any limit on the term to be granted?

We ask these questions because in the past, it has not been clear as to whether ARTC may enter into long term agreements in respect to both the granting of a train path and the price for that train path. In fact, on a number of occasions, it has been stated that ARTC is not in a position to enter into a long term agreement on price.

In the Inter-Governmental Agreement (IGA) dated 14 November 1997, clause 11.7 provides as follows:-

> *"The Company shall not enter into any new access contracts extending beyond 30 June 2003 without the agreement of the relevant minister (s). The renegotiating of existing contracts which have a term extending beyond 30 June 2003 will also require the agreement of the relevant minister (s). Those ministers will develop a simple process of ensuring this clearance process functions effectively and does not impede operations of the company".*

ARTC has advised that its articles provide for access beyond 2003. Does this mean that the parties can agree on a price for a particular train path which price would remain fixed (subject to the variation of charges clause) beyond 2003.

2. Discrimination between Operators

Whilst, at our request, sub-clause 5.6 has been amended and sub-clause 5.7 has been included, we remain concerned that the draft agreement may be used so as to discriminate between operators with Like Train Paths.

Our concern arises because of the following:-

(a) In sub-clause 5.6 (b), it is provided that the pricing principles may be applied differently between operators by reason of a number of matters including the nature of the Train service and the longevity of access agreements;

(b) Sub-clauses 5.7 (c) and (d) provides a level of comfort to operators that Like Train Paths will attract the same price. However, it is of concern that these clauses are to

be read "without limiting clause 5.6 (b)" which is the very clause that states that the pricing principles may be applied differently between operators by reason of a number of matters including the nature of the train services and the longevity of access agreements";

(c) Sub-clause 5.6 (d) provides that the operator must have evidence that a third party has been sold a Like Train Path for a lower price. Our concern here is that we will not have such evidence unless these special prices are published. Is this to be the case? If so, then clause 5.7 should be amended to reflect this;

(d) In the event it is shown that the other operator has been operating on a Like Train Path at a lower price, then it is only reasonable that this reduction in price is retrospectively applied to SCT's train path back to the time when the other operator was offered the lower price; and

(e) In the draft agreement, there is presently no transparency or openness in respect to both price and non-price conditions. In the absence of transparency, an operator is not in a position to know whether it is being discriminated against.

We note ARTC's previous advice to us was that this was a "grey" issue but that ARTC was not prepared to change this clause further because sub-clause 5.6 (f) provided for any disagreement to be resolved pursuant to the dispute resolution procedures. Our concern here is that the resolution of any dispute would proceed subject to sub-clause 5.6 (b).

3. Notification of Environmental Conditions

In relation to sub-clause 13.5, we reiterate our earlier concern that an operator should not be required to accept a direction by an environmental authority in circumstances where that operator is legally entitled to challenge that direction.

Presently, pursuant to sub-clause 13.5 (b), if ARTC is given a direction by a competent authority, then the operator is obliged to implement whatever action ARTC considers reasonable in order to prevent, mitigate or remedy the situation. It would only be reasonable that the operator be allowed an opportunity to challenge the direction by the competent authority before being required to follow ARTC's requirements (albeit reasonable requirements).

4. Indemnities

Our concern in relation to the indemnity provisions are as follows:-

(a) As part of the change from the previous AN indemnity clause to a "causal" based indemnity clause, ARTC has required that the operator indemnify it not only in regards to claims against it, but also in regard to claims by it. This is not fair or reasonable;

(b) The present "causal" based indemnity clauses are not satisfactory because:-

(i) This clause requires operators to contract into a liability that operators are finding uninsurable; and

(ii) This clause has been inappropriately drafted as an umbrella liability clause that would expose operators to liabilities that would otherwise be dealt with elsewhere in the agreement or at common law;

(c) In relation to damage to the network arising out of the use by the operator, we do not believe the operator should be liable unless it is negligent. The clause needs to reflect this;

(d) Under the clause as currently drafted, there could be circumstances where the condition of the track causes or contributes to a derailment yet ARTC escapes liability because of the inappropriate standards referred to in sub-clause 6.1 which we deal with separately below;

(e) In sub-clause 15.2 (a) (iv), the reference to "ARTC" should in fact be a reference to "the Operator". If SCT is required to indemnify ARTC for SCT's employees not being lawfully on the track, it makes sense that ARTC indemnify SCT when SCT's employees are lawfully on the track; and

(f) Sub-clause 15.2 (a) contains no sub-clause (v) found in sub-clause 15.1 (a). We consider sub-clause 15.2 (a) should be amended to include a reciprocal sub-clause. If ARTC becomes aware of for example that children have been repeatedly putting boulders, rocks or other obstructions on tracks at a certain location but takes not action to prevent further occurrence or to police the situation then clearly ARTC would be negligent if a derailment occurred and in those circumstances, SCT should not be liable just because track damage was caused by its train due to the acts of a third party.

5. <u>ARTC's Obligation to Repair and Maintain the Network</u>

Sub-clause 6.1 provides that ARTC agrees to maintain the Network to the higher of:-

(a) The standard existing at the Commencement Date;

(b) If ARTC is required to be an accredited owner, the minimum standard required to maintain its accreditation as a track owner; and

(c) Such other standards as the other parties may agree.

The obligation to maintain the Network to a standard existing at the Commencement Date is not appropriate particularly in view of the fact that operators are required to maintain rolling stock to a "sufficient standard of safety and to a sufficient level of operational efficiency".

The obligation for ARTC to maintain the Network to the minimum standard required to maintain ARTC's accreditation is also not appropriate. Operators are not in a position to be aware of what minimum standard is required in order for ARTC to maintain its accreditation as a track owner.

In the absence of the agreement setting out the standards to which the track should be maintained, operators are not able to conduct a risk based assessment prior to accessing the track.

There should be an obligation on ARTC to maintain the track in accordance with the appropriate standards and codes and at least to a "sufficient standard of safety and to a sufficient level of operational efficiency" and best practices.

6. Termination

Clause 14 provides that ARTC may issue an operator with a Rectification Notice which may address such issues as safety. If an operator does not provide a satisfactory response to the Rectification Notice, then the ARTC may suspend the rights of the operator. If, following suspension, the operator still does not cure the default, ARTC may terminate the agreement if, in its sole opinion, it forms the view, without any reference to independent standards (for example AS4292) that the default has not been cured.

We are concerned as to the operation of this clause because:-

1. It allows the ARTC to make decisions in relation to issues which would otherwise be the subject of an operator's accreditation. An operator's accreditation is overseen by the various regulatory authorities and not the ARTC;

2. This clause would add another layer to SCT's accreditation requirements and would lead to increased costs and possibly different decisions by both the regulator and the ARTC in relation to the same accreditation issues; and

3. Circumstances could arise where the agreement places ARTC in a position where it could terminate an operator's access arrangement by reason of a matter which would otherwise be the subject of audits forming part of an operator's continuing accreditation.

If an operator has maintained its accreditation (which is regularly monitored by internal and external audits), then that operator should not be in jeopardy of having its access agreement terminated by reason of matters which are the subject of an operator's accreditation.

If ARTC reasonably believes that a particular train service should not be operating because of a safety issue etc, then the ARTC should be allowed to stop that particular train service and report

the particular issue to the accreditation authorities. Thereafter, an operator's rights under an access agreement must not be affected whilst that operator continues to maintain its accreditation.

7. Operator's Obligations not to Materially Change the Network

Sub-clause 5.5 (g) provides that the operator agrees not to materially change, alter, repair, deface, damage or otherwise affect any part of the Network.

The word "materially" should be replaced with the word "willfully". As noted above, operators should only be liable for damage to the Network where that operator is negligent.

8. Operator's Obligation to Upgrade Equipment

Sub-clause 5.5 (h) provides that the operator shall be required to upgrade its communication equipment after receiving reasonable notice (following consultation) from ARTC.

As noted previously, it is only fair that there be a requirement for ARTC to act reasonably when requiring operators to upgrade communications equipment.

9. Re-Negotiation of Long-Term Contracted Path

Sub-clause 2.8 (e) provides that if ARTC has not submitted an undertaking to the ACCC, then the terms and conditions of a new access agreement (including charges) shall be determined by ARTC acting reasonably.

Sub-clause 2.8 (d) provides that where ARTC has submitted an Access Undertaking to the ACCC, then the terms and conditions of the new track access agreement (including charges) shall be determined by the Access Undertaking.

You have previously advised us that you are not prepared to amend this clause so that ARTC is required to act reasonably in the event the Access Undertaking has not been accepted.

We do not understand your objection to our request particularly given that until an Access Undertaking has been accepted by the ACCC, the parties are in the same position as if no Access Undertaking had been submitted.

It is not acceptable that operators who have built there business around their train paths face such uncertainty following the expiration of those long-term paths. At the very least, those operators require a continuation of the then current terms and conditions whilst the parties negotiate in good faith on new terms and conditions if that is reasonably required.

10. Variation of Charges

You will recall that we had earlier submitted to you that any increase in the charges, pursuant to the variation of charges clause (sub-clause 4.5) should be subject to an independent review. At

the very least, the escalation formula provided should be used as a guide with ARTC being required to take into account relevant issues (that are expressly referred to in the agreement) such as whether the increase will cause a shift of freight from rail to another mode or whether it will hinder the promotion of rail growth.

We note that ARTC's position at the time was to not accept an independent review.

For the purpose of SCT's submissions to the ACCC concerning the ARTC Undertaking, SCT will continue to press for this clause to be amended.

11. New Charges

Sub-clause 4.5 (d) provides that the ARTC will immediately pass onto the operator any net effect of any imposition of new charges or increases or decreases in new charges.

As noted previously, we consider that the clause is too wide and too ambiguous. ARTC should set out clearly and concisely what it proposes in regard to exactly which charges. The clause is all encompassing as it stands and despite ARTC's advice to the contrary the clause could enable ARTC to pass onto operators any increase in charges ARTC was required to pay to other track access providers/owners pursuant to existing or proposed contracts.

12. Obligation to Grant Security

Sub-clause 4.8(b) provides for security to be given if the operator defaults in the payment of monies and does not remedy that default within 7 days. As previously requested, it is reasonable to expect that an operator would be given written notice of a default prior to security being required.

Further, sub-clause 4.8 (e) provides that if security is required, it will be reviewed every 12 months from the Commencement Date with the results of the review not subject to the dispute resolution clauses. It is not clear what a *'review'* means. Could the amount of security required be increased?

It is only reasonable for this review to be subject to the dispute resolution clause.

13. Right to Uninterrupted Access

We believe that ARTC should provide a warranty to the effect that the operators will have uninterrupted access which will be subject only to the application of the Network Management Principles.

This way, if access is interrupted by non-operators, then operators would have the right of recourse against ARTC which in turn will have an avenue of redress against those third parties.

14. Removal of Train Path for Under-Utilization

We remain concerned that the Under-Utilization clause, as presently drafted, does not take into account certain seasonal business that would otherwise bring growth to this market.

In respect to sub-clause 9.4, we remain concerned that an operator's train may, through no fault of that operator, enter the ARTC network late. In those circumstances, the path in which that train operates would, pursuant to this sub-clause, be classified as an under-utilized path. This is not fair or reasonable.

15. Cancellation of Scheduled Train Paths

As previously pointed out, we oppose the imposition of cancellation fees as we are of the view that these fees are penalties which will hinder the promotion of rail growth. Further, ARTC's interests are protected by the under-utilization provisions.

In relation to sub-clause 9.8 (b), we note your previous advice that, for the purpose of this clause, SCT's train paths on Tuesday and Friday are like train paths and as such, we would be permitted to transfer the allowable cancellations between those train paths pursuant to this clause.

As pointed out to you during previous meetings, our concern is that sub-clause 5.6 (c) could be read such that these train paths, because they have different arrival and departure times, are not like train paths and on this basis, we would not be permitted to transfer the allowable cancellations between these two train paths pursuant to sub-clause 9.8 (b).

In relation to sub-clause 9.8 (j), we are of the view that if ARTC is able to sell to another operator the scheduled train path which is a similar train path in terms of revenue, then, depending upon that revenue, there should be a refund or partial refund of the cancellation charge. Further, we do not believe it is necessary that the train path be sold within three months from the date of cancellation. What should be relevant is the amount of revenue ARTC receives at any time during the original term of the cancelled train path. The clause should be amended in any event to provide certainty and so as to read "ARTC shall refund …".

We understand that operators have an option to contract a particular train path and specify the days on which those paths would be used. It seems to us that the agreement is silent on this issue and we would appreciate you providing us with further details in this regard. In particular, we would like to know whether there will be any penalty free cancellations in the event we contract the path for, say 48 weeks in a year.

16. Monitoring Equipment

We believe that clause 10.5 should provide for the release of collected data and information to an operator where that data and information concerns that operator.

Further, this clause must provide that if ARTC approves for another person to collect the data or the information, then that person must not be an operator.

17. Insurances

We remain concerned that the main insurance cover of $200,000,000 is excessive, particularly where an operator does not carry hazardous goods. We are concerned that there has been no analysis provided to us supporting this requirement for increased insurance cover.

In relation to sub-clause 16.2 (d), any reduction in the amounts paid by way of premiums should be directly applied to reduce ongoing track access charges.

18. Sub-Clause 22.2 Change of Circumstances

This clause is not necessary and should be deleted.