LOGISTICS ON THE RIGHT TRACK

Friday, 14 September 2007

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Dear Margaret,

RE: Australian Rail Track Corporation Limited (ARTC)

I refer to the meeting held with officers of the Commission and our Peter Mason and Noel Ramsey on the 31st of August 2007.

Whilst I accept that there would have been compelling reasons for your not being able to attend the meeting at the last moment, I have to express SCT Logistics' disappointment and frustration at your not being present.

As I understand it, with respect to those Commission representatives who were present, it was clear that the Commission representatives were not "across" the issues to the extent we believe is necessary and accordingly Peter and Noel we do not believe their submissions were as well received or understood as they may otherwise have been.

Accordingly, I would be grateful if another meeting could be arranged, at which you are present, before any decision is made on ARTC's application.

Further, I have just become aware of two other issues, of grave significance and importance to SCT which forms part of ARTC's application and relates to a provision in the Indicative Access Agreement (IAA), which is new and has potentially dramatic effects on rail operators. As often, the devil is in the detail – and it takes considerable effort and time to fully comprehend the implications in what is a new and operator-antagonistic document.

Firstly, I refer to clause 15 of the IAA in general and clause 15.7 in particular.

The clause negates the common law principle that an "injured" party is entitled to be compensated for the value of the relevant asset at the time of its destruction and it obliges rail operators to meet, if necessary, the full cost of replacing the (old) destroyed asset with a brand new one.

That the common law principle should be applied was recently reaffirmed in the strenuously contested Victorian Supreme Court case between SCT and ARTC. References to this judgement were included in our earlier submission of 20 July 2007.

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In the context of the rail industry this means;

- Large parts of the rail infrastructure have an estimated of fifty years or more.
- Assets, mainly rail track and sleepers may be twenty years or more old at the time of their destruction.
- To replace old with new, at the cost of the rail operator, would put ARTC in a far better position than it would be at common law, or under its existing Access Agreements, at great cost to rail operators, who may or may not be in business for the full life of the "new" assets.

Secondly, clause 15.8 requires a "Responsible Party" to reimburse the "Indemnified Party" all costs and expenses incurred as a result of any incident, as they are incurred, before liability is unequivocally established, solely on the basis of one party giving written notice to the other claiming a right of indemnity.

The provision has potentially far reaching cash flow implications for rail operators.

I respectfully submit that the imposition of this new clause 15 on SCT and other rail operators is oppressive, an abuse of ARTC's monopolistic market power and is unconscionable.

I am happy to meet with you to discuss any aspect of this letter and submission at your convenience.

Yours faithfully,

Geoffrey P Smith
Chief Executive Officer