20th November 2008

Mr David Salisbury
General Manager – Transport
Regulatory Affairs Division
ACCC
GPO Box 520
Melbourne VIC 3001

Via Fax:- (03) 9663 3699

Re:- **ARTC application for variation of the ARTC Interstate Access Undertaking**

Dear Mr Salisbury,

Thank you for the opportunity to comment on the variation proposed by the ARTC to its Interstate Access Undertaking. SCT opposes the variation as we believe it to be an invalid application, to be an unreasonable variation and to discriminate against SCT.

This submission is in two parts.

The first deals with the issues as to whether the ARTC is entitled to seek a variation to the present, approved Undertaking. We believe it is not.

(i) There are no changed circumstances. The ARTC would reasonably be expected to be aware of the industry practice with respect to freight forwarders accepting responsibility from time to time for goods in their possession. This is widespread and has existed for some considerable time. Thus the provision for a review under Clause 2.4(a) is not triggered;

(ii) The ARTC has, for at least twelve months prior to the approval by the ACCC of the present Undertaking and prior even to its lodging of the Undertaking with the ACCC, been aware of the specific contractual details of how SCT accepts liability for goods in its possession and has acknowledged such awareness. Again, given such knowledge, it is not reasonable for the ARTC to argue that there are changed circumstances (since approval of the Undertaking by the ACCC) or that they were not aware of such circumstances. Again, the provision for a review is not triggered under Clause 2.4(a);

(iii) It seems ludicrous that the variation can move the present Undertaking from being commercially viable to being "*no longer commercially viable*". Any risk or accountability that the ARTC is now seeking to shed has always been borne in the past by the ARTC and no quantification of the "viability" now or the change in economic value arising from the "new" perception has been provided. Thus, further, the trigger provision of Clause 2.4(a) is not met;

(iv) The ARTC has not consulted with SCT regarding the proposed variation. The only correspondence or communication we have received from the ARTC regarding this matter is a letter advising, after

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the event, that the variation had been submitted to the ACCC. Thus, the ARTC has not met its obligation under Clause 2.4(b) of the Undertaking and is thus not entitled to submit the variation to the ACCC.

The second part deals with the merits (or lack thereof) of the variation.

(i) The variation sought is inconsistent with the ARTC's publicly-stated objectives that each party should be responsible to the other for the cost of damage that it causes.

(ii) The variation is inconsistent with clause 15.1(c)(i) of the approved Undertaking which states that it is the intention that "each *party should bear responsibility ... to the extent of* (its) *cause or contribution*".

(iii) The variation acts only against SCT and is thus discriminatory.

(iv) The variation runs contrary to common sense, fairness and common law where an entity that causes damage or loss is responsible to the "injured" party for the cost of that damage.

(v) SCT has some contracts in place where it assumes the product responsibility. It protects itself with marine insurance. If the variation were to take effect, then SCT would not be able to cover itself against such risk yet would be bound by the contracts in place. Accordingly, such a change is not consistent with the contractual arrangements in the industry and their duration.

We would also note that our experience to date with the approved Undertaking is that the ARTC has refused to negotiate any variation to the Indicative Access Agreement contained as part of the approved Undertaking, has not offered SCT the opportunity to sign/negotiate that agreement but has attempted to force SCT to sign an amended contract including the variation which is the subject of the present application. Thus the ARTC has not acted in accordance with its Undertaking nor with the ACCC indication as to how the ACCC believes the Undertaking should be administered in practice.

Finally, we would request that SCT's submissions dated 20th July 2008 and 14th Sep 2008 be included as part of the ACCC formal record of submissions regarding the approved Undertaking as detailed on its website. The former seems to have fallen off the website and the latter has never been included. Both remain relevant to the present process.

Yours faithfully,

Peter Mason
Director

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SCT submission

re

Application for variation of ARTC Interstate Access Undertaking

20 November 2008

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Outline

1. The ARTC has applied to vary the Undertaking that was approved by the ACCC. The import of the change is to allow the ARTC to deny having to reimburse SCT for any payment that SCT might have to make to a customer for goods damaged in an accident even when the ARTC is at fault. This runs contrary to past practice in the rail industry and to the practice with all other forms of transport.

2. SCT does cover some, but not all, of its clients against damage to their goods whilst in SCT's care. SCT in turn covers itself by what is termed Marine Insurance. If, for example, the ARTC were responsible for an accident that caused damage to such client's goods, then (i) SCT would pay the cost of that damage to its client; (b) SCT would then claim on its Marine Insurance policy; and (c) the insurer would then be entitled to stand in SCT's shoes and claim against the ARTC. Thus, the end result would be that where the ARTC was at fault, then it would pay for the damage. However, the proposed amendment changes this. Because the effect of the amendment is to prevent SCT from claiming against the ARTC, then the insurance company also loses its rights. We have passed the amendment past our insurance brokers and they have indicated that, as a result, it is probable that SCT would be denied Marine Insurance.

3. It should be noted that, because of its integrated model, SCT is the only freight forwarder to contract directly with the ARTC. Thus it is the only freight forwarder that can be contractually be bound by the ARTC. All other freight forwarders will remain free to cover a client's goods whilst in its possession and to cover this risk with Marine Insurance. The Indicative Access Agreement therefore discriminates against SCT.

4. This submission is in two parts. The first part (paras 5-12) deals with issues as to whether the ARTC is entitled to seek a variation to the present approved Undertaking. It is not. The second part (pars 13-16) deals with the merits (or lack thereof) of the variation.

Issue - No entitlement to seek a variation

5. Clause 2.4(a) of the undertaking allows the ARTC to seek the approval of the ACCC to a variation if "...it is of the opinion that circumstances have changed such that this Undertaking is no longer commercially viable for the ARTC or becomes inconsistent with the objectives prescribed at clause 1.2.

   SCT submits:-
   (a) that circumstances have not changed;
   (b) that a reasonably-aware ARTC would be expected to be aware of the industry practices;
   (c) that SCT has at several times prior to the approval by the ACCC of the present Undertaking, specifically advised the ARTC of its coverage of goods whilst in SCT's possession and that the ARTC has formally acknowledged its understanding of such arrangements;
   (d) that the present Undertaking is not commercially "unviable";

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(e) that the proposed variation cannot move the Undertaking from commercially "unviable" to commercially "viable".

6. The practice of carriers accepting responsibility for goods in their possession is probably hundreds of years old – back at least to the Phoenicians some 1000 years BC. Marine insurance (hence the term) has been specially developed for and exists for such arrangements. I have not researched the earliest such arrangement by SCT but it is believed to go back to the company's inception. It is also understood that all major and competing freight forwarders also offer such protection in selected instances.

7. It is unreasonable for the ARTC to claim that they were not aware of such general industry practices until after the ACCC approved the Undertaking.

   Firstly, the Board of the ARTC includes members who claim to have experience in the transport industry including senior advisory roles. The staffing of the ARTC includes many senior personnel who have general freight experience and the company also employs and commissions consultants offering expertise in that area. For example, before increasing access charges immediately upon the ending of its previous Undertaking, the ARTC claimed to have studied in detail (including the use of consultants) the relative economics and practices in the rail, road and sea freight markets. It is inconceivable that these teams were not aware of the not-uncommon industry practice whereby freight forwarders do and have always covered the risk of some client's goods whilst in their possession.

8. The ARTC submission claims that it only became aware of the risk issues **after the approval by the ACCC** of the present Undertaking. This is not correct. Summarised below are some examples of where SCT had formally advised the ARTC of the SCT position prior to approval of the Undertaking by the ACCC and in some instances prior even to the ARTC submitting the Undertaking to the ACCC. We can provide copies of file notes, emails and letters on each on a confidential basis should the ACCC so wish.

   a. Noel Ramsey (SCT's National Manager, Rail) advised Simon Gray (ARTC company secretary and legal officer) that some of SCT's contracts required us to cover client's goods whilst in transit in a telephone discussion on 21 August 2007.
   b. SCT reiterated its practice at a meeting in Adelaide between Noel Ramsey (SCT), Don Axup (SCT In-house counsel), Simon Gray (ARTC) and Gavin Carney (ARTC) on 6 September 2007.
   c. ARTC's insurers (Griffin & Hilditch) acknowledged by letter of 29 Feb 2008 the existence of SCT's claim in respect of customers' goods.
   d. ARTC's insurer's solicitors, Wallmans, stated in a letter to SCT's solicitors dated 7 May 2008 "*Our clients experience is that operators such as SCT do have formal agreements with significant customers such as (large multinational whose name can be provided under confidence) and (also a large multinational whose name can be provided under confidence)* and requested copies of these agreements.

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e. Noel Ramsey (SCT), Charles Mobrici (SCT), Don Axup (SCT), Simon Gray (ARTC), Gavin Carney (ARTC) met at Altona on 9th July. It was agreed that the meeting was without prejudice for the purposes of the Barton derailment. The matter of SCT's claim against the ARTC in respect of customer's goods was discussed at length. SCT agreed to provide copies of agreements with customers where it had assumed liability for goods.
f. Copies of representative agreements with customers, and instances where SCT had recompensed customers, were provided to the ARTC on a confidential basis, by letter of 7 August 2008.

9. The ARTC claims in its application that it now sees the absence of the proposed variation as making the Undertaking commercially unviable. It is necessary for it to make this claim as unless it can get such claim accepted by the ACCC, there is no trigger for a variation or acceptance of that variation by the ACCC under clause 2.4(a).

It should be noted that whether the ARTC is liable directly to a third party (as would be the case with clients of freight forwarders other than SCT) or whether it accepts liability to SCT, the cost to the ARTC is the same. The proposal has the effect of improving the ARTC's position vis a vis SCT by removing (only) SCT from the list of parties to whom the ARTC would be liable if at fault. This is an improvement in ARTC's commercial position from where it is at present and where it always was, not a restoration of its commercial position.

There can be no doubt that the ARTC previously saw the Undertaking as being viable, otherwise it would not have volunteered such Undertaking. Yet, there is little if any difference between what it saw as its exposure previously (without the claimed "new" understanding) and its "new" understanding. Previously it recognised that it was exposed directly to third party claims through common law; now it believes it is exposed to claims (for the same damage) through contractual arrangements. Ultimately, there is little difference to its exposure at present; in both the old and new "understandings" it remains responsible for the costs of the product damage if it is at fault; in both the old and the new "understandings" it is not responsible for any cost if it is not at fault. In summary then, the ARTC claim that the "new understanding" moves the Undertaking from being commercially viable to not commercially viable should be rejected by the ACCC and accordingly the application for the variation should fail.

10. The ARTC has not provided any quantification as to what it sees as the economic effect of the change in its perception. If it believes that there is an additional cost that it did not foresee then it should provide some quantification to substantiate its request. SCT believes that at best, such additional cost would be negligible and trivial and would serve to quash any argument that the changed perception moves the Undertaking from economically viable to not economically viable.

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11. Clause 2.4(a) provides inter alia for a review trigger if "... the Undertaking ... becomes inconsistent with the objectives prescribed at Clause 1.2". The ARTC has not submitted which objective in Clause 1.2 it believes that the Undertaking has now become inconsistent with. SCT would suggest that no such inconsistency can be identified and accordingly that trigger has not been activated.

12. Before submitting any variation to the ACCC for approval, the ARTC is required under clause 2.4(b) of the Undertaking to first consult with Operators regarding the proposed variation. The ARTC has not consulted with SCT. The only correspondence or communication we have received from the ARTC regarding this matter is a letter advising, after the event, that the variation had been submitted to the ACCC. Thus, the ARTC has not met its obligation under Clause 2.4(b) of the Undertaking and is thus not entitled to submit the variation to the ACCC.

Issue - The merit (or lack thereof) of the proposed variation

13. We have attached a copy of the cover page and extract from the public presentation given by Mr David Marchant, CEO of the ARTC and signatory to the variation application letter. This was the formal presentation to the industry on its proposed Undertaking. In this (page 18) he states simply and clearly that with respect to indemnities and insurance one of the ARTC principles behind the Undertaking is that a party in breach "fully indemnifies the other party". This principle is repeated in clause 15.1 of the Indicative Access Agreement included as part of the Undertaking approved by the ACCC. The variation now proposed by the ARTC walks away from this principle. Accordingly, the variation proposed contradicts a basic principle advised to the industry and subsequently embodied in the Undertaking. The proposed variation should therefore be rejected by the ACCC.

14. SCT's operational model differs from all others in both the freight forwarding industry and as a train operator. Whereas, for all practical purposes all other freight forwarders do not operate trains and whereas all other rail operators do not substantively act as a freight forwarder but rather contract with freight forwarders for general freight, SCT is the only freight forwarder to contract directly with the ARTC and is thus the only company that can be bound contractually by the ARTC. It matters little to other rail operators if they accept the proposed variation. They do not generally underwrite product risk for the goods carried. Rather, it is the freight forwarders who underwrite the risk which they then can and do cover through Marine insurance or similar. Such arrangements would continue unimpeded whether the variation is approved or not.

    SCT does cover some, but not all, of its clients against damage to their goods whilst in SCT's care. SCT in turn covers itself by what is termed Marine Insurance. If, for example, the ARTC were responsible for an accident that caused damage to such client's goods, then (a) SCT would pay cost of the damage to its client; (b) SCT would then claim on its Marine Insurance policy; (c) the insurer would then be entitled to stand in SCT's shoes and claim against the ARTC. Thus, the end result would be that where the ARTC was at fault, then it would pay for the damage. However, the proposed amendment changes this. Because the effect of the amendment is to prevent SCT from claiming against the ARTC, then the insurance company also loses its rights.

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The ARTC has claimed that the variation would not prevent SCT's clients from suing the ARTC directly for negligence and product loss. Such a claim is disingenuous and misleading. SCT, consistent with industry practice, offers some clients coverage akin to "all risks". Any client with such coverage would then sensibly and logically claim directly against the SCT's cover rather than going through the more tortuous route of a legal claim against the ARTC with the possible associated burden of apportioning blame.

SCT has passed the amendment past our insurance brokers and they have indicated that with the inclusion of the variation clause in the access agreement, it is probable that SCT would be denied Marine Insurance.

Accordingly, the proposed variation acts selectively and discriminately against only SCT.

15. It is generally accepted that if a person causes loss or damage to another, then the first person is responsible to the second for the cost of that damage. It matters little whether the cost is high or whether it is low. Such an approach only seems fair to the lay observer and has also been rigorously supported legally in common law. The proposed amendment seeks to walk away from such established practice. Under the proposed variation, the ARTC would not be responsible to SCT for any cost incurred by SCT for product damage even in situations where the ARTC was demonstrably and totally at fault.

    Accordingly, the ACCC should reject the variation on the basis that it seeks to overturn accepted practice.

16. The Undertaking was approved by the ACCC at the end of July. It was approved as a ten-year Undertaking. Now, some three months later the ARTC is changing its mind. Contracts in the freight industry generally last for several years. There needs to be some stable framework in which they are set – both for the comfort of SCT and for the comfort of its customers. Without such stability, rail suffers in competition with road and sea and exposes SCT to unacceptable risk. SCT submits that the ACCC should consider whether it should accept such changes of mind within such a short duration and/or whether the original application was not thought through adequately and also reject the application on this basis.

SCT Logistics

Melbourne

21 November 2008

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Australian Rail Track Corporation

2007 Draft Interstate Rail Access Undertaking

Industry Information Session
Adelaide
26 February 2007

Indicative Access Agreement - Indemnity and Insurance ...

- Clause 15 (indemnities) has been redrafted to simplify the previous clause 15, and to provide clarity. The interpretation of previous clause 15 has been the subject of argument in Court, most notably in Twentieth Super Pace Nominees Pty Ltd v ARTC (2006). It is hoped that new clause 15 will decrease the need for argument over interpretation.

- New clause 15 reflects the following 3 principles:

  1. Where ARTC or the Operator breach the agreement and that breach is the sole cause of the Incident, then the party in breach is responsible for its own loss and fully indemnifies the other party.

  2. Where ARTC or the Operator breach the agreement and the breach is not the sole cause of the Incident, but contributes to the Incident, then the party in breach indemnifies the other party to the extent that the breach contributed to the Incident, and each party is otherwise responsible for its own loss.

  3. Where both parties breach the agreement, and the breaches both contribute to the Incident, the parties end up bearing their loss and the loss of the other party in the proportions that their breach has been a contributing factor.