Our ref: 994418
Direct telephone: 08 8205 0868
Direct facsimile 08 8205 0905
Mobile. 0412 626 801

Email: pgriscfi@kellyco.com.au
kellyco@kellyco.com.au

Level 17 Sunrise House
91 King William Street
Adelaide SA 5000
Telephone 08 8205 0800
Facsimile 08 8205 0805
kellyco@kellyco.com.au

26 October 2001

Mr David Marchant
Chief Executive Officer
Australian Rail Track Corporation Ltd
PO Box 10343
Gouger Street
ADELAIDE SA 5000

Dear David

Access Undertaking - Opinion of Michael Colbran QC ("Opinion")

I refer to the above-mentioned Opinion and recent correspondence and take this opportunity to make some comments.

In my view, the basic issue underpinning the Opinion is more an issue of policy rather than law. That is, it is unfair and unreasonable for ARTC, as the owner of the Network to which operators are requesting access, to seek to have reciprocal causal based indemnities.

To my understanding, the policy position from ARTC has always been that both ARTC and the Operator will indemnify (both each other, and in respect of third party claims) in respect of claims caused (and to the extent of contribution) contributed by the other. That is, there was to be no requirement to prove negligence on the part of the Operator or ARTC before a claim could be made.

The Opinion has construed the words "caused or contributed" extremely narrowly. That is, they capture instances where neither party is in any way at fault. In our view, better interpretation is that the words "caused or contributed" would be read down to require an analysis of fault to determine as a matter of fact which party caused the incident in question (or at least contributed to it). In the example provided in the Opinion, in my view it would be unlikely that ARTC could escape liability where it was aware of the danger on the Network and did nothing to warn operators. Surely, in this instance, ARTC has contributed to the damage by its omissions? If, as a matter of fact, there were nothing the operator could do to avoid the incident occurring, it would have a strong case to argue that it did not cause or contribute to the damage.

To my understanding, SCT has requested ARTC to amend the indemnity provisions further to preclude ARTC from being able to make any claim (whether under the indemnity provisions or otherwise) unless and until ARTC could prove that the damage to the Network was due to SCTs negligence. (similar to the exclusion in the AN indemnity). This is also a question of policy, which ARTC has, for some time now, rejected as being unfair and unreasonable. The exclusion in the previous AN indemnity (which I have not seen in any other access contract)

created an unfair risk allocation as far as ARTC was concerned. If an operator's train damaged the track, the operator could defend the indemnity claim by ARTC on the basis that it has exercised all due care in outsourcing maintenance obligations in respect of its rolling stock (for example) and therefore had discharged its duty of care and was not negligent. Whilst I appreciate not all duties of care are delegable, it nonetheless created the potential for an unfair exposure to ARTC to repair damage caused to the Network caused by the operator where, strictly speaking, ARTC was unable to prove the operator was negligent. It is of little assistance to ARTC that the maintenance provider of the operator was negligent, as ARTC's contractual relationship is with the operator. In ARTC's view, to the extent that the operator was found to be liable under the indemnity by reason of the maintenance provider's actions or omissions, the operator should then seek indemnification from its maintenance providers in the usual course.

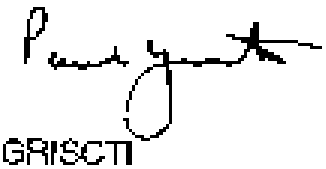
The use of the words "by ARTC or "by the Operator" in the indemnities has been adopted to make the indemnity apply inter parties and in respect of third party claims. That is, the indemnities deal with issues relating to consequential loss and limitations through the indemnity provisions. An alternative could be for the words to be deleted and separate clauses inserted in respect of consequential loss and limitation of liability. To my mind, this is a drafting issue which does not impact of the issues of policy discussed above.

The Opinion states, without reason, that the exclusion for consequential loss is not fair and reasonable. To my understanding, such exclusions have become more common, particularly in above and below rail contracts. The standard access agreement for Rail Infrastructure Corporation being a good example.

I trust this is of assistance.

Yours faithfully

Yours faithfully
KELLY & CO

per 

PAUL GRISCTI
Partner