LOGISTICS

Adelaide, SA | Brisbane, QLD | Broadwater, NSW | Cobram, VIC | Parkes, NSW | Perth, WA | Shepparton, VIC | Sydney, NSW

23 May 2008

Ms Margaret Arblaster
General Manager – Transport and Prices oversight (TPO)
ACCC
GPO Box 520
Melbourne VIC 3001

Email:- transport.prices-oversight@accc.gov.au
dominic.l'huillier@accc.gov.au

Dear Ms Arblaster,

Thank you for the opportunity to comment on the Draft Decision by the ACCC on ARTC's Access Undertaking.

SCT supports each of the improvements to the Undertaking suggested by the ACCC and trusts that these will be accepted by the ARTC.

We do, however believe that the ACCC has not considered some of the implications arising from our earlier submissions of 20 Jul 2007, 21 Jan 2008, 11 Feb 2008 and 21 Feb 2008 and we would ask that these be revisited. In addition, we submit the following.

1. We are concerned that the ACCC and the approval process may be being gamed by the ARTC. Already we have seen, for example, that by withdrawing its original Undertaking the ARTC has been free to lift prices above that which would have been possible under the original and also the latest versions of the Undertaking (eg an annualised increase in access charges of ~16%pa as per our letter of 11 Feb 2008). In addition, the ARTC has been lifting its effective access rates further with the offer of access to loops and sidings in NSW (previously included in the basic access charges) for additional charges.

   In the meantime, of course, whilst the Undertaking approval process is running, the ARTC is effectively defending itself against any consideration of Declaration of its track under the Trade Practices Act which, in turn, would lead to a consequent ability of the ACCC to establish the terms and conditions of access (i.e. taking it outside the control of the ARTC).

2. We do not think that the ACCC has considered adequately the contribution that has been made by the above rail operators in lowering the real cost of East West freight and a consideration as to who should then be entitled to claim the value of that reduction. The ARTC has sought to take that benefit through increased real access rates (particularly its Jan/Feb 2008 increases.) The overall real cost reduction has been almost solely due to the actions and investments by the above-rail operators. It is this decrease which has opened the gap perceived by the ARTC between road and rail freight and allowed the ARTC to increase access charges. SCT believes that it and its customers should be entitled to retain that cost decrease (which has already been passed to its customers through lower freight charges.) The ARTC has made little contribution to the lowering of the above-rail costs but has benefited from the increased volumes from the increased market share.

   We submit that the East/West access pricing should be based on the real prices existing at the end of the 2002 Undertaking.

3. We ask that the ACCC consider the Public Interest to a greater degree. The Draft Decision appears to take the line that the ARTC is an "ordinary" company accessing commercial funding and entitled to adopt strategies that maximise its own economic return – even if it damages its own environment and market. However, this is not true of the ARTC. It is a Government body, funded by the Government and controlling Australia's essential rail infrastructure. Its actions impact significantly on the environment and road congestion. Increased use of rail will lower Australia's greenhouse emissions dramatically (Surely this is in the "public interest"). Increased use of rail will reduce road congestion and road trauma. (Surely this is in the "public interest"). Accordingly, the application of a public interest test should be to encourage use of rail – yet the draft Undertaking (even with the amendments proposed by the ACCC) drives towards greater ARTC profitability at the expense of less rail market share. In particular, we refer to allowing full CPI price increases (after a 16%pa price increase) and the reduction in flexible pathing for bulk, seasonal traffic.

   By the ARTC's own arguments, it is seeking to recover the perceived cost difference between road transport and rail transport. Yet it was SCT, with the introduction of longer and heavier trains in 1996 that lowered rail freight rates. Competition ensured that this benefit was passed to customers. Further, any future application of carbon taxes (with rail's lower specific fuel consumption) is likely to increase any (or open a) cost difference between road and rail. The ARTC's stated strategy would allow it to claim this increased gap – somewhat defeating the aim of carbon taxes.

4. The ACCC reasoning for accepting many of the conditions (or lack of them) in the Undertaking rests on its stated supposition that the ACCC can arbitrate on disputes (with which we agree) and that it can then use its judgement as to "reasonable" behaviour by the ARTC (with which we disagree). We believe that any arbitration by the ACCC would be on the basis of what the ARTC was entitled to do and that comments like "consider", "refer to" and "consistent with" would have little weight – particularly if challenged through the courts. By way of example, the ACCC Draft Decision uses the word "link". However, the Undertaking only requires "consideration of". We submit that there is in fact no link and that "consideration of" can be satisfied by reasoned exclusion. We would ask that the ACCC obtain (and/or confirm that it has) high-level legal opinions as to the limits that it would be able to impose on those aspects of the ARTC behaviour not specifically limited in the Undertaking.

   Further, "characteristics" and "service" are not defined terms although differences in characteristics is important to administration of the Undertaking. Does service refer to the "service" provided by access seekers or does it refer to the "service" provided to access seekers by the ARTC? - or is it a combination of both? On the one hand, the ACCC (p132) considers that intermodal freight, bulk freight and passenger services are different services. The ACCC view would therefore seem to be that the distinguishing feature of different services relates primarily to the end market for the freight. However, within intermodal freight, the ARTC has different access prices for intermodal freight travelling at different maximum speeds. The present wording allows the ARTC too much leniency to determine that a service is a different service; therefore placing it generally outside the limits of the Undertaking and allowing for it to be charged differently and excessively. We do not believe that the ACCC simplistic position would prevail in a challenge to discriminate pricing. Again, we would suggest that this problem can be resolved by including all services within the Undertaking and requiring the access pricing of any non-indicative (or otherwise specified) service to be priced relative to nominated access prices on a cost-to-ARTC difference.

We would also note that relying on the uncertainty and cost of an ACCC arbitration will unreasonably move the balance of power towards the ARTC – particularly as it is always an ARTC position (often already carried out) that access seekers will need to challenge, not the other way around.

5. The ACCC conclusion with respect to financial adequacy accepts the Undertaking position "that an access seeker must be able to demonstrate a legal ownership structure with a sufficient capital base to meet the actual or potential liabilities under an access agreement." The draft decision then goes on to relate this to meeting only "timely payment of access charges and payment of insurance premiums and deductibles". We continue to assert that such a binding requirement is unreasonable and can be exercised by the ARTC well above the limits envisaged by the ACCC in its Draft Decision.
   Rather, we would suggest that if an access seeker can demonstrate that it can provide security for outstanding access charges, demonstrate that it has the appropriate insurance and demonstrate that it can meet deductibles, then the legal ownership structure and the capital base is irrelevant. Yet the wording in the Undertaking makes it mandatory upon the ARTC to only look at the ownership structure. We would suggest that the Undertaking should merely require an access seeker to be able to demonstrate that it can cover access charges and insurance obligations.

6. The ACCC has not addressed SCT's submissions with regard to betterment (Please refer to our letter of 28 Jan 2008.) Clause 15.7 in the Indicative Access Agreement seeks to run contrary to established Common Law in that, under the IAA, the injured party can benefit from the injury rather than only have its original position reinstated.

7. The ACCC has adopted a position with respect to the Indicative Access Agreement that the "ARTC and operators seek to remedy any remaining concerns (in the IAA) directly by access negotiations." To the extent that the IAA merely repeats the Undertaking, then this is OK. However, when the IAA introduces new issues then these need to be assessed as to whether they are acceptable under the TPA as, once the IAA is approved by the ACCC, then this sets the upper boundary for ARTC behaviour. Further, as has been noted by the ACCC, a negotiated arrangement with aspects outside the Undertaking (eg higher access fees provided the total ROI cap is not breached) is acceptable. Thus any unreasonable aspect of the IAA allows the ARTC to negotiate from a position of (monopoly) strength.

We would also record that we support the submission being made by the FROG group.

For your consideration.

Kind regards,

Peter Mason
Director