8 October 2001

Ms Margaret Arblaster
General Manager – Transport and Prices Oversight
Regulatory Affairs Division
Australian Competition & Consumer Commission
GPO Box 520J
MELBOURNE VIC 3001

Also By Email:- renato.viglianti@accc.gov.au
Also By Courier

Dear Ms Arblaster

Australian Rail Track Corporation (ARTC) – Access Undertaking

Further to the email from Bretta Merifield received on 17 September 2001, we have reviewed the recent amendments to the Access Undertaking (Version 3) proposed by the ARTC and note the following:-

1. Access Undertaking (Version 3) Amendments

We set out below our comments in relation to each amendment.

Clause No.	Issue	SCT's Comments
1.1 (e)	Introduction	Agreed
1.2 (c) (ii) (C)	Objectives	Agreed
2.1 (d)	Scope	Agreed
2.6 (b) (viii)-(xi)	Contact Details	➢ In respect to inclusion of a graphical representation of Committed Capacity on the Network, it is not clear whether such representation would show spare capacity. We need to understand what is proposed by ARTC in this regard before we are able to provide our comments. ➢ In respect to the inclusion of *"route standards by corridor"*, once again, we need to understand what information ARTC proposes to include on its website in this regard before we are able to provide our comments. ➢ In respect to the publishing of *"the Performance Indicators"*, we agree with this publication provided individual operators are not identified. Please refer to our further comments below in relation to certain performance measures.

3.1	Introduction	Agreed
3.2 (f)	Framework	Agreed
3.7 (c) (iii)	Indicative Access Proposal	Agreed
3.11	Dispute Resolution	Agreed
4.6 (a)	Indicative Access Charge	Noted, but we do not agree with the review mechanism. Refer to SCT's earlier submissions.
6.2 (a) (iii)	Additional Capacity	Agreed
8	Performance Indicators	➢ In relation to the *"fit for purpose condition"*, there has been no corresponding amendment to the Indicative Access Agreement which is of concern to SCT. It is important to know how ARTC propose to amend clause 6.1 of the Indicative Access Agreement; ➢ Periodical reporting of ARTC's infrastructure maintenance cost is not an appropriate measure as to whether ARTC is efficiently providing the required infrastructure; ➢ Further, there is no provision in the Access Undertaking (Version 3) as to what the consequences would be if an Applicant demonstrated that ARTC's infrastructure and maintenance costs are too high. Would these costs still be taken into account when determining the access charges or Revenue Limits?
9.1	Definitions and Interpretations	Agreed
Clause 17 (Indicative Access Agreement)	Resolution of Disputes	➢ We note that the arbitrator must <u>only</u> take into account the provisions set out in a negotiated Access Agreement <u>unless</u> the negotiated Access Agreement is ambiguous. It is only in the case of an ambiguous provision that the arbitrator may take into account, for example, the objectives and principles enunciated in the Competition Principles Agreement. ➢ ARTC proposed this amendment following concerns expressed by SCT at the Workshop on 16 August 2001 that the Indicative Access Agreement does not give operators certainty in knowing that ARTC will not offer more favourable

		access terms to another operator with a *"like"* train path. ➢ Clauses 5.6 (b) & (c) of the Indicative Access Agreement still permits ARTC to offer different price and non-price terms to two operators because, for example, they have train paths with different expiry dates which paths are otherwise similar in nature. These provisions are not ambiguous. The arbitrator would need to make his / her determination after only taking into account these provisions. ➢ It is important that the actual provisions within the Indicative Access Agreement be amended now to address any uncertainty. The arbitration process will not afford operators any protection in these circumstances. ➢ In clause 17.4 (b) (vi) (B), it is not clear as to the circumstances in which the matters (set out in this clause) would be considered during an arbitration concerning a negotiated Access Agreement. ➢ Further, in clause 17.4 (b) (vi) (B), we believe that the Operator's legitimate business interest and investment needs to be taken into account just as ARTC's legitimate business interest and investment in the Network is taken into account in clause 17.4 (b) (vi) (B) (II); ➢ We also believe there should be an avenue of appeal to the courts on any questions of law arising in the course of an arbitration or out of an arbitration award.

We are disappointed that the recent amendments proposed by ARTC do not address the many concerns raised by operators in previous written submissions and at the Workshop held on 16 August 2001.

We are also disappointed that the Indicative Access Agreement has not been amended to reflect the new clause 8.1 of the Access Undertaking requiring the ARTC to maintain the Network in a fit for purpose condition.

By including this "fit for purpose condition" in the Undertaking, ARTC is seeking to address one of the main concerns raised by operators, that is, the lack of certainty within the Indicative Access Agreement as to what standard the track must be maintained to.

Clause 3.10 of the Undertaking provides as follows:-

"The Access Agreement must, unless otherwise agreed between ARTC and the Applicant, be consistent with the principles outlined in the Indicative Access Agreement and must address at least the matters set out in Schedule C".

In view of clause 3.10 of the Undertaking and the fact that clause 6.1 of the Indicative Access Agreement has not been amended, the new clause 8.1 of the Undertaking does not address the operators' concerns.

2. Outstanding Issues

We enclose two (2) documents setting out what we believe to be the important outstanding issues in the Undertaking (following the amendments set out in Version 3) and the Indicative Access Agreement.

3. Liabilities and Indemnities

In light of the recent amendment to Part 8 of the Undertaking (requiring ARTC to maintain the Network in a fit for purpose condition), SCT sought legal advice in relation to the issue of liabilities and indemnities.

Mr Michael Colbran of Queens Counsel has provided a written opinion that confirms our concerns as raised in our earlier written submission and during the course of submissions at the Workshop on 16 August 2001.

Mr Colbran QC has advised, inter alia, that:-

(a) The addition to clause 5.5 (g) in the Indicative Access Agreement of the word "damage" is "inappropriate" as each of the other prescribed activities is one involving intent. The word damage is equivocal.

(b) Clause 15.1 of the Indicative Access Agreement seeks to establish liability for damage to property including track arising out of the use by the Operator of the Network. This clause suffers from the following defects:-

(i) The indemnities generally are drafted on the basis that one party will indemnify the other party not only from and against all claims on or against the other party but also requires one party to indemnify the other party against all claims "by" the other party. **"This would not appear to be a reasonable requirement to expect in a commercial agreement"**. It purports to indemnify ARTC, inter alia, from claims by ARTC. **"This seems to [Mr Colbran QC] to be a nonsense"**.

(ii) The word "and" appears at the end of clause 15.1 (b) (iii) when plainly the intended word must be "or"; and

(iii) Most significantly, the exclusion in clause 15.1 (b) (iii) arises only where the relevant loss was not caused or contributed to (in any way) by the act or omission of the Operator. **"The touchstone of liability, whether to indemnify in respect of a claim or as a primary contractual liability should in [the opinion of Mr Colbran QC] be a breach of a substantial provision of the agreement or some negligence or recklessness. [Mr Colbran QC] can see no basis in principle to justify an extension of liability beyond that to which the law would make the Operator liable".**

(c) There are also problems with the indemnities given by ARTC in clause 15.2. Clause 15.2 (b) (iii) will prevent any obligation to indemnify SCT arising wherever "the claim" (sic) was caused or contributed to by the Operator, even though the Operator may not have been at fault at all.

(d) The formulation in the proposed ARTC Agreement **"is not satisfactory, or fair or reasonable".** There are many situations where loss or damage arises in conjunction with the use by the Operator

of the network and where, for that reason, the use of the Network is causally related to the loss but where that use has not been in any way negligent or blameworthy.

(e) Another important effect of the drafting should be noted. The source of primary liability to SCT for any contravention by ARTC of its obligations may well be found in these provisions. The provisions of clause 15 go on to deal with limitation of liability in a way consistent with that understanding. On this assumption, the exclusion of the "indemnity" wherever there is a causal link between the loss of SCT and any act or omission of SCT is of great significance. **"The implications of this provision are hard to define with certainty but undoubtedly extend beyond the well understood (and [Mr Colbran QC] would have thought perfectly appropriate) concept of contributory negligence or breach of agreement".**

To assist the Commission, we enclose a copy of the Advice provided by Mr Colbran QC.

We again point out that there are no matters raised in the Advice provided by Mr Colbran QC that have not previously been raised by SCT in its earlier submissions to the Commission. Further, all matters have been raised with the ARTC in the course of the unsuccessful negotiations during the last two years.

4. The Queensland Competition Authority's Final Decision

It is important to point out that many of the provisions proposed by ARTC are the same or similar to certain provisions in the Queensland Rail (*"QR"*) voluntary Undertaking which have been refused by the Queensland Competition Authority (*"QCA"*) in its Final Decision concerning QR's Undertaking.

It is also important to note that the QCA's Final Decision was published in July of this year. Interested parties (like SCT) did not have the benefit of considering the Final Decision when preparing earlier submissions to the ACCC.

In preparing the enclosed documents, we have, where time permitted, made reference to the relevant rulings by the QCA.

We also refer to, in the table below, a number of the provisions proposed by ARTC which are the same or similar to provisions in QR's undertaking which have been refused by the QCA.

PROVISIONS REFUSED BY THE QCA	
ARTC Provisions	**QCA Final Decision (FD) - Annotated Undertaking**
Clause 3.3 (c)	QCA F.D. Page 44
Clause 3.3 (d) (ii)	QCA F.D. Page 45
Clause 3.3 (e)	QCA F.D. Page 45
Clause 3.4 (a)	QCA F.D. Page 46
Clause 3.4	QCA response to QR clause 4.2 (c) (iv) pages 47 – 48
Clause 3.4	QCA proposed new provision page 48
Clause 3.4	QCA proposed new provision pages 49-50
Clause 5.1	QCA proposed new provision pages 86 – 87
Clause 5.2 (a) & (b)	QCA F.D. page 88
Clause 5.3 (a)	QCA F.D. page 89
Clause 3.8 (b)	QCA F.D. page 54
Clause 3.8 (c)	QCA F.D. Page 54
Clause 3.9 (iii)	QCA F.D. Page 56

In our view, it is not open to argument that the provisions in the above table have been refused because QR's structure (as a vertically integrated organisation) is different to ARTC.

As noted in our earlier submissions, the issues raised above must be addressed:-

(a) in the interests of persons who might want access to the service; and

(b) in the public interest, including the public interest in having competition.

Should you have any queries, please do not hesitate to contact the writer.

Yours faithfully

Mark McAvoy
General Manager, Group Development

-ARTC ACCESS UNDERTAKING

OUTSTANDING ISSUES

1. Term

The term of the ARTC Access Undertaking ("Undertaking"), presently drafted as five years, is a separate issue to the term of the Access Agreement.

Whilst there may be reasons as to why the term of the Undertaking should be five years (and SCT does not necessarily disagree with those reasons), applicants and operators are mainly concerned with the term of the Access Agreement offered to them.

A period of 15 years generally coincides with the above rail investment cycle.

The National Competition Council in its Reasons for Decision in respect to an Application by SCT for a declaration of a rail service provided by Rail Access Corporation (as it was then known), considered that a period of 15 years *"provides an appropriate level of certainty to industry"* in the rail sector.

Further, there must be certainty in terms of both the price and non-price conditions.

The Undertaking does not presently provide this certainty.

ARTC, in its submission, stated that supply agreements generally do not appear to exceed 3 years. This is simply not correct. Rail terminals (which generally have limited use other than for rail purposes) would not be constructed or financed unless there were firm commitments or business plans in the order of 10 years or more. Further, rail supply agreements (such as hook and pull agreements) usually require longer terms given the investment required in equipment such as locomotives etc.

The level of business certainty will also impact on the finance terms available to that business.

ARTC should undertake to provide applicants with a term (to be stated in the Access Agreement) of at least 15 years (or a lesser period if agreed to by the applicant) during which period there is certainty in terms of both price and non-price conditions.

2. Price

The following price issues need to be addressed:-

(a) Certainty

The Undertaking should provide that the price will remain certain for the term of the Access Agreement.

On 10 August 2001, ARTC advised SCT as follows:-

> *"ARTC pricing is settled on the terms it has offered for the five years (as outlined in the draft undertaking) and would enter a contract for a longer period, however, it would seek to review the price base at the conclusion or before the conclusion of the five years"*

The fact that ARTC is now advising us that it may *"seek to review the price base… before the conclusion of the five years"* clearly shows that the Undertaking, as presently drafted, does not give operators the certainty we require.

(b) Clause 4.6, Indicative Access Charge

SCT is of the view that the two-part tariff structure is appropriate.

SCT is also of the view that the current weighting on the flagfall in ARTC's reference tariffs is appropriate having regard to the important objective of ARTC that operators run more efficient, longer trains.

However, as noted below, the review mechanism proposed for the Indicative Access Charge is not appropriate.

The Indicative Access Charge referred to in clause 4.6 is not acceptable whilst ARTC may review these charges either as a consequence of:-

(i) the implementation of the review conducted on 1 July 2001; or

(ii) otherwise as a consequence of the review mechanism set out in clause 4.6(c).

During the workshop on 16 August 2001, ARTC submitted that, notwithstanding the Revenue Limits, the Undertaking provides sufficient certainty for Operators because of the provision of the Indicative Access Charge in the Undertaking.

We submit that the Commission still needs to carefully consider the Revenue limits because:-

(i) Certain operations may fall outside clause 4.6 (a); and

(ii) There is no evidence to suggest that an appropriately determined Ceiling Limit will not be less than the Indicative Access Charge.
In this regard, we are referring to a Ceiling Limit based on the principles set out below (including the principle that ARTC should only be entitled to a return on actual investment as opposed to Government granted assets).

The Undertaking should provide that, at all times, the Indicative Access Charge offered to applicants must be less than the Ceiling Limit.

(c) The Revenue Limits

SCT questions whether the floor and ceiling limit model is the most appropriate pricing model given the large variance between the floor and ceiling limits as advised by ARTC.

To adopt a pricing model where there is a large variance between the floor and ceiling limits is to create uncertainty for applicants and operators which is not conducive to promoting a competitive environment and therefore is not in the public interest.

If the large variance between the floor and ceiling limits remains, then SCT submits that the pricing model needs to be reviewed.

It may be the case that the variance is large because the present ARTC calculations are not based on the following appropriate principles.

The Undertaking should set out the following principles to be followed in determining the Revenue Limits:-

(i) Efficient Provision of Infrastructure

The costs must reflect the cost of the efficient provision of infrastructure. ARTC's maintenance costs must be "efficient" with ARTC introducing market based efficiency measures and regularly reporting the results of actual performance compared to targets. There must also be a requirement for ARTC to ensure all maintenance and investments are undertaken pursuant to a competitive tender process.

We note that the Queensland Competition Authority ("QCA") in its Final Decision concerning Queensland Rail's ("QR") Undertaking determined that QR's revenue adequacy must be considered in the context of efficient operations and the efficient level of assets (refer Annotated Undertaking at page 63).

The periodic reporting of Infrastructure Maintenance costs (recently provided for in Part 8) is not sufficient. The measure of costs is not a true indication as to the efficient provision of infrastructure.

It is not sufficient that the Undertaking Preambles refer to a competitive tender process. The Undertaking must include this as a requirement before costs are taken into account in the revenue limit calculations.

Further, the Undertaking does not preclude the inclusion of costs that are unacceptably high. The Undertaking as presently drafted only refers to periodic reporting and does not provide for what ARTC must do in the event the costs are too high.

(ii) ARTC's costs must not reflect the cost of maintaining sub-standard infrastructure.

The Undertaking should provide that any additional component of current maintenance costs that arise from past decisions to reduce maintenance resources should not be borne by parties presently granted access.

(iii) Actual Investment

In calculating the depreciated optimised replacement cost, it is not appropriate to attribute a replacement value to an asset for which the ARTC incurred no cost in acquiring or constructing. Similarly, where assets have been constructed as a result of Government grants, there should be no costs attributable to these assets.

The asset base should be the actual investment, depreciated over the life of each asset.

In relation to track leased by ARTC, the ceiling price should be determined by ARTC only including the lease cost as a valid expense and should specifically exclude any asset (re) valuation of the track not owned.

The Network and Associated facilities should not be revalued annually by CPI.

(iv) Economic Costs

In the definition of Economic Cost in sub-clause 4.4 (d), *"non-segment specific costs"* (referred to in sub-clauses 4.4 (d) (v)) could include costs which are not in any way related to the segment(s) used by operators. For example, it could include the cost of investigating a new rail corridor. It would not be acceptable for such a cost to be taken into account.

If these costs or returns on non-segment specific assets were to be included, we would have cross-subsidization of other rail segments. There is no cross-subsidization by road competitors and therefore, cross-subsidization is not in the public interest as it would adversely affect competition in the segments because of higher costs as a result of this cross-subsidization.

Clause 4.4 (e) provides that *"Where possible, costs will be directly attributable to a segment"*. The words *"Where possible"* gives rise to uncertainty.

In determining the Economic Cost, any costs not directly related to the segment are to be excluded.

Further, clause 4.4 (e) provides *"[all] costs shall comprise ARTC's reasonably anticipated costs over a reasonable future timeframe"*. A timeframe needs to be determined now.

(v) Benefits to ARTC from Increased Rail Usage

The Access Undertaking needs to recognize that the rail market in certain segments has been continually growing since 1995. There has been no significant reduction in the access price as a consequence of this increased usage. The proposed pricing model does not recognize the past benefits of increased rail usage or address, in terms of pricing principles, how these benefits will be passed on to operators in the future.

In the absence of a requirement for profits (arising as a consequence of increased rail usage) from a particular segment to be returned to operators, we risk replicating the New Zealand model. Anecdotal evidence suggests that the New Zealand model, which has been in place for some time, is not working to match the outcomes expected by the New Zealand Government.

We submit that the floor and ceiling limit pricing model is not an appropriate pricing model in circumstances where it does not take into account any benefits ARTC receives from increased rail usage.

(vi) Return on Assets

There is a negligible risk of certain Segment specific assets being duplicated.

The rate of return needs to reflect the fact that there is a negligible risk of certain Segment specific assets being duplicated and therefore, a negligible risk of ARTC facing competition from another access provider in respect to those Segment specific assets.

(vii) Revenue limit calculations

The revenue limit calculations should be provided to applicants even in circumstances where ARTC advise that the indicative access charge is applicable and is below the Ceiling Limit.

The Undertaking should provide for ARTC to submit to an applicant detailed calculations as to how the Revenue Limits have been calculated.

(d) Variation of Charges Clause

When considering the appropriateness of the variation of charges clause, it is important for the Commission to take into account the fact that general freight prices are not keeping pace with the CPI linked price escalation proposed by ARTC.

Any variation of charges clause should provide for:-

- **Less than inflation escalation because prices generally rise at less than inflation;**
- **The appropriate price adjustment indices. The index should be related to interstate general road freight pricing. Failing that, a combination of labour and material indices may be appropriate given that track maintenance also involves materials;**
- **In determining the new access charges, the ARTC should be required to take into account any increase in rail usage;**
- **In determining whether to increase the charges, the ARTC should be required to consider the effect of any increase on competition and demonstrate there will be no modal shift as a consequence of the increase;**
- **An independent review of ARTC's decision to increase the charges;**
- **There shall be no other change to the charges unless agreed to between the parties**

Clause 4.5 (d) of the draft ARTC Agreement provides that ARTC will pass onto the operator any net effect of any imposition of new charges or decreases in new charges. There must be certainty in respect to the price. This clause gives little certainty to operators.

(e) Government Financial Support

The Undertaking should provide that if the Government financial support in a particular rail segment increases, this increase should be immediately passed on to operators by way of lower charges.

This should occur even in circumstances where an operator has a long term Access Agreement with the price locked in.

(f) Cancellation Penalties

Clause 4.5 (b) provides that the flagfall component will be levied irrespective of whether a train path is utilised.

The Undertaking should provide that the flagfall component will only be payable if the train paths are utilised.

The train path under-utilisation provisions are sufficient to protect an access provider.

Further, cancellation fees are not appropriate given that:-

- A cancellation fee is a penalty;
- If an operator does not use a train path, ARTC will not incur certain costs;

- If an operator does not use a particular train path, it will most likely be the case that the freight will still travel on the ARTC network giving ARTC its revenue;

- Commercially, operators are not in a position to impose such penalties on their customers;

- These fees will hinder the attempts by companies to promote rail growth and consequently will adversely impact on competition.

3. Capacity Analysis

The ARTC should advise applicants of spare capacity.

It is not clear whether a graphical representation of Committed Capacity (recently provided for in the Undertaking) would show spare capacity.

The Undertaking provides no detail on how ARTC proposes to assess capacity.

The basis of the Capacity Analysis (which must show, inter alia, spare capacity) should be made public together with sufficient information to enable an Applicant to undertake its own analysis. Refer QCA Final Decision, Annotated Undertaking, Proposed New Provision Pgs 86 to 87.

4. Interface with other Access Regimes

Where an applicant wishes to operate a train between Melbourne and Perth, the Undertaking does not appear to cover all of the Network on which that train will operate.

The Undertaking needs to appropriately deal with the interface with other access regimes.

5. Review of Undertaking

Clause 2.4 should be deleted as section 44ZZA(7) allows the ARTC to withdraw or vary the Undertaking with the consent of the Commission.

6. Access Agreement

During the workshop on 16 August 2001, ARTC advised that the Indicative Access Agreement was part of the Undertaking. However, there is still a concern, not only with the terms and conditions of the presently drafted Indicative Access Agreement, but also with the fact that ARTC may seek to include additional provisions in an Access Agreement without the agreement of the Applicant.

Clause 3.10(b) still provides that the "*details of Schedule C do not provide an exhaustive list of the issues that may be included in an Access Agreement*". Does this mean that ARTC may include other provisions (that are not inconsistent with the Indicative Access Agreement or the Schedule C issues) in an Access Agreement without the agreement of the Applicant?

The Undertaking should provide that the Indicative Access Agreement must not be amended unless otherwise agreed to between ARTC and the Applicant.

7. The reasonable expectations of existing users

Sub-clause 3.9 (d) (ii) of the Undertaking allows ARTC to grant access to an applicant who accepts an Access Agreement (with ARTC) which, in the opinion of the ARTC, is most favourable to it. There is no requirement for ARTC to have regard to the reasonable expectations of existing users.

It is not acceptable that operators who have built their business around their train paths face such uncertainty. 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 reasonably required.

Section 44ZZA (3) (b) of the TPA provides that the Commission may have regard to the public interest, including the public interest in having competition in markets when deciding whether to accept an Undertaking. Competition will be adversely affected if SCT's reasonable expectations are disregarded by ARTC (when considering applications by others for access) whether or not SCT has an existing executed agreement.

The Undertaking should provide that ARTC must have regard to the reasonable expectations of existing users (whether or not they have an executed Access Agreement) when considering applications for access.

Section 44ZZA (3) (e) also provides that the ACCC may have regard to any other matters that the ACCC thinks are relevant.
It is important to consider the effect on existing users of ARTC selling competing train paths.

The Undertaking should require ARTC to investigate the likely impact on existing users prior to selling further train paths.

8. Competitive Neutrality

The Undertaking needs to address the following issues:-

(a) Discrimination between Applicants and Existing Users

The Undertaking should prohibit the ARTC from granting to applicants access terms that are more favourable than the terms of access enjoyed by existing users.

The QCA in its Final Decision concerning the QR Undertaking considered it appropriate that *"rail operators be given the option of rate review provisions in access agreements if an operator is able to demonstrate that QR has sold a like train path to another operator for a lower price than applies to that operator"* (refer Annotated Undertaking, Page 64, Point 1).

(b) Like Train Paths

Clause 4.2 allows charge differentiation having regard to:-

Train length	How will this be determined?
Origin & destination (including number & length of intermediate stops)	How will this be determined?
Departure & arrival times	How will this be determined?
Days of the week	How will this be determined?
The term of the Agreement	This is not appropriate

The potential for growth of the business	What is meant by this?
The opportunity costs to ARTC	What is meant by this?
The consumption of ARTC's resources	What is meant by this?
The credit risk associated with the business	What is meant by this?
The market value of the train path sought	How will this be determined?
The segments of the Network relevant to the Access being sought	What is meant by this?
Logistical impacts on ARTC's business which without limitation include the impact on other services and the risk of failure of the Operator to perform and the reduced capacity and system flexibility.	What is meant by this?

Clause 4.2 permits price differentiation based on ability to pay. This will result in more uncertainty in terms of pricing outcomes. This will adversely affect competition.

ARTC must offer the same price and non-price terms for train paths that are "like" train paths.

Clause 4.3 provides that the charges may be different if two services are not alike. It further provides that ARTC in determining whether two services are alike, may have regard to the longevity of the access and the arrival and departure times.

Clause 4.3 is not in the public interest as it will give rise to uncertainty and adversely affect competition.

The Undertaking should provide that all train paths in a particular rail segment will be deemed "like" train paths unless the ARTC has, prior to the making of an Indicative Access Proposal:-

- **Nominated which train paths will not be regarded as a "like" train path or alternatively ARTC has, acting reasonably, given sufficient written advice to the Applicant to allow the Applicant to know what type of train path will not be regarded as a "like" train path;**
- **ARTC has published the price and non-price terms and conditions that ARTC has offered, or may in the future offer to other applicants and operators; and**
- **The Applicant has, at the time, an opportunity to dispute ARTC's decision.**

An applicant should also have a right to, at any time, dispute whether any two train paths are not alike (having regard to advice received from ARTC at the time of the access application).

ARTC should undertake that a dispute resolution body will have the unfettered power to determine whether any two train paths are not alike.

The QCA determined that *"price differentiation should not distort competition in an above–rail or end user market or hinder access within a market"* (refer QCA Final Decision, Annotated Undertaking, Page 64, Point 3)

The Undertaking should provide that price differentiation should not distort competition in an above–rail or end user market or hinder access within a market.

Business certainty will only be achieved if applicants and operators are able to determine the charges of other operators.

It is therefore important that all price and non-price conditions in Access Agreements be published.

The Undertaking should provide that all price and non-price conditions in all Access Agreements are to be published.

(c) Capacity Allocation - Auctioning

Clause 3.9 (d) (ii) and clauses 5.2 (a) and (b) provide that ARTC may grant access to an Applicant who accepts an Access Agreement with ARTC that, in the opinion of the ARTC, is most favourable to it.

These clauses would allow ARTC to auction train paths.

By definition, an auctioned train path would go to the highest bidder. This will favour larger companies, reduce the number of smaller companies wishing to enter this sector and consequently reduce competition.

There is also insufficient transparency in this process and the method of granting access on the basis of "highest present value of future returns" is also not appropriate for this reason.

Existing operators have, for a considerable period of time, opposed ARTC auctioning train paths in this manner. ARTC had removed from an earlier draft access agreement an auction clause.

We note that the QCA required, inter alia, the deletion of the reference to *"the most favourable commercial outcome for the below-rail service provider"* in a similar provision in the QR Undertaking (refer QCA Final Decision, Annotated Undertaking page 88).

The Undertaking should prohibit the auctioning of train paths.

It is also not clear whether these provisions would be read subject to the all important requirement that "like" train paths (whether committed to or not) should attract the same price and non-price terms of access.

(d) Previous Breaches

Clause 3.3 (d) (ii) provides that an Applicant must not be currently or have been in the previous two years in material default of a track access agreement.

The Undertaking should provide that the onus is on ARTC to justify its refusal to enter into an Access Agreement by demonstrating there was no reasonable likelihood of the Applicant meeting the terms and conditions specified in the proposed Access Agreement in a material way. (Refer to QCA Final Decision Page 45 of the Annotated Undertaking).

(e) Public Reporting of ARTC's Compliance

The Undertaking should give the Commission the power to request information from ARTC after the Undertaking is approved (refer QCA Final Decision Page 31 of the Annotated Undertaking).

9. Dispute Resolution

(a) ARTC's Costs

Clause 3.11.4 (b) (vi) (D) provides that in deciding a dispute, the Arbitrator must take into account *"all costs that ARTC incurs in providing Access, including any costs of extending the Network…"*..

There is an issue as to what this is intended to relate to.

In deciding a dispute, the Arbitrator should only be entitled to take into account ARTC's costs referred to in the Pricing Principles.

(b) The legitimate Interest of the Applicant

The Arbitrator should take into account the legitimate business interests of the Applicant.

(c) The reasonable expectations of existing users

Clause 3.11.4 (b) (vi) (D) provides that the arbitrator must take into account the *"firm and binding contractual obligations of ARTC or other persons (or both) already using the Network"*.

What is meant by "firm"? Who are the "other persons"?

The Arbitrator should take into account the binding contractual obligations of ARTC and the reasonable expectations of existing users.

10. Network Connections

Having regard to ss44ZZA (3) (a), (b) and (c) of the TPA, we submit that the Commission should not accept the undertaking because sub-clause 6.1 is not satisfactory. In particular, we note the following:-

(i) A connection will, by virtue of its existence, reduce capacity. Capacity cannot be used as a measure to determine whether of not a connection should be allowed. Capacity is a matter that will properly be taken into account when considering train path management under an access agreement;

(ii) In relation to sub-clause 6.1 (c), there is no requirement for ARTC's existing interface arrangements to be reasonable;

(iii) In sub-clause 6.1 (e), there is no requirement for ARTC's engineering and operational standards to be reasonable;

(iv) In relation to sub-clause 6.1 (f), there is no requirement for the initial and continued cost associated with constructing and maintaining the connection to be reasonable;

(v) To allow ARTC to improperly hinder a company's ability to connect to a network would be to reduce the number of operators connecting to a network and consequently reduce competition.

The Undertaking should provide that ARTC shall, where reasonably practicable, allow Applicants to connect their facilities to the Network.

11. Additional Capacity

Clause 6.2 is not acceptable as it does not take account of any benefits delivered to the ARTC or other Operators.

The Additional Capacity provisions should take account of any benefits delivered to other operators or to the ARTC when determining the costs to be recovered.

12. Network Transit Management

Clause 7 is not acceptable when drafted as an objective.

Clause 7 should be redrafted not as an objective but as a legally binding commitment subject to the Network Management Principles and ARTC's Instructions (as that term is defined in the Access Agreement).

8 October 2001

INDICATIVE ACCESS AGREEMENT

OUTSTANDING ISSUES

1. Term

A period of 15 years generally coincides with the above rail investment cycle.

The Access Agreement needs to provide for a term of access up to 15 years giving the operator certainty in relation to price (whether it be a specified price or a formula or mechanism for determining price) and non-price conditions.

The Queensland Competition Authority ("QCA") during its consideration of the Queensland Rail ("QR") Access Undertaking expressed the view that an Access Agreement should *"be for a specified term and include a good faith negotiation process for renewal"* (refer Final Decision, Schedule E at page 126).

Clause 2.8 provides for the extension of the term of an Access Agreement insofar as it relates to Long-Term Contracted paths.

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 Undertaking to the ACCC, then the terms and conditions of the new Access Agreement (including charges) shall be "determined by the Access Undertaking".

Our concern here is 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. The terms and conditions of a new Access Agreement should not be determined by the draft Undertaking.

In view of the fact that operators may have built their businesses around their train paths, it would not be acceptable for those operators to face such uncertainty following the expiration of those long-term paths.

The Access Agreement should provide for an option (to be exercised by the Operator) to renew the term provided the operator is not in breach of the Agreement.

2. Price

There must be certainty in relation to the price for the term of the Access Agreement.

The price or price determination formula should be set out.

The variation of charge formula should be set out.

In relation to the appropriateness or otherwise of the Variation of Charges clause, we refer to our comments concerning the ARTC Access Undertaking.

3. Payment

(a) Payment Terms.

The Agreement should provide that both the fixed and variable (and any other charges) are to be paid by the last day of the calendar month following the month in which the Operator received the invoice.

The Agreement provides for this in the case of the variable charges, but not so for the fixed charges.

Clause 4.1 (b) is <u>not</u> acceptable as it provides for the flagfall charges to be paid at the end of the <u>same month</u> the invoice is received.

(b) <u>Cancellation Penalties.</u>

Clause 4.1 (a) provides that the Operator must pay all flagfall charges irrespective of whether or not the Operator uses all or any such train paths. This is not appropriate because:-

(i) It may <u>not</u> be read subject to clause 9.8 setting out the permissible penalty free cancellations; and

(ii) We oppose the imposition of cancellation penalties because the provisions allowing the removal of train paths by reason of under-utilisation are sufficient to protect ARTC's interests.

Clause 4.1 (a) is not appropriate as it provides that the Operator must pay all flagfall charges irrespective of whether or not the Operator uses all or any such train paths. Cancellation penalties are not appropriate and clause 9.8 should be deleted.

In considering the clause 9.8 cancellation penalty provisions (which we oppose for the above reasons), we note that:-

- Clause 9.8 (j) is not acceptable because this clause is based on whether a train path sold by ARTC is a "like" train path to the cancelled train path having regard to clause 5.6 (c) which may not be the case if for example, the paths have different arrival and departure times; and

- Clause 9.8 (j) provides that ARTC *"may"* refund the cancellation charge as opposed to requiring ARTC to refund the charges.

(c) <u>Security</u>

We accept that the Access Agreement may provide for the provision of security, equivalent to 4 weeks access charges, in circumstances where the operator defaults in paying undisputed access charges and fails to remedy that default within 14 days after receiving written notice requiring it to do so.

Clause 4.8 is not acceptable because:-

(i) In the Indicative Access Agreement attached to the Undertaking, the operator is not afforded an opportunity to remedy the default after receiving <u>written notice</u> of the default. (SCT draft 1 has been amended so as to require written notice of the default although Draft No. 6 received more recently has not been so amended);

(ii) It provides that the security may be reviewed every 12 months but does not state what is meant by the term "review"?

(iii) The results of the "review" are not subject to the dispute resolution procedures.

4. <u>Competitive Neutrality</u>

Schedule 3 is set out on the basis that there will be different charges depending on whether the path is:-

(i) a long-term contracted path or a medium-term contracted path;

(ii) a short-term contracted path; or

(iii) an ad-hoc entitlement.

The charge for a train path needs to be the same notwithstanding the term of the contracted path.

Clause 5.6 (c) is not acceptable. Whilst clause 5.6 (c) provides that ARTC shall treat all operators in a like manner in respect of like services purchased by them, this is only if they are alike in terms of, for example, longevity of access, times of departure and arrival and other matters.

Clause 5.6 (d) gives the Operator a right to "argue" (and no more) that two train paths are "like" train paths. This clause, like the dispute resolution provisions, is of little assistance given clauses 5.6 (b) and (c).

Clause 5.6 creates uncertainty for Operators which is not conducive to promoting a competitive environment and therefore is not in the public interest.

Clause 5.6 is not acceptable as it provides that the pricing principles and non-price terms may be applied differently between operators by reason of the location, duration and quality of train paths, nature of the train service and the longevity of the access agreement.

All train paths in a particular rail segment should be deemed "like" train paths unless the ARTC has, prior to the execution of the Access Agreement:-

(i) **nominated which train paths will not be regarded as "like" train paths or alternatively, ARTC has, acting reasonably, given sufficient written advice to the Operator to allow the Operator to know what type of train path will not be regarded as a "like" train path;**

(ii) **published the price and non-price terms and conditions that ARTC has offered or may in the future offer to others; and**

(iii) **given operators an opportunity, at the time, to dispute its decision.**

The dispute resolution provisions should be available to the Operator at any time.

Further, all prices must be published otherwise an Operator will not have evidence of the charge paid by a third party.

Clause 5.7 (recently included in draft no.6) only provides for the publishing of the standard terms and conditions.

The Indicative Access Agreement attached to Undertaking Version 2 (dated 19 September 2001) does not appear to contain clause 5.7.

Business certainty will only be achieved if an Operator is in a position to know whether it is being discriminated against. The Operator will only know this if it is able to determine the charges of existing operators and applicants (who may be negotiating with ARTC following a request for a train path).

It is also important to note that non-price conditions of access may be just as important as price conditions when considering an operator's total cost of access.

The price and non- price conditions of all Access Agreements must be published. In the absence of such transparency, an Operator will not be in a position to know whether it is being discriminated against.

Should the Operator be successful in arguing that two train paths are alike, then that Operator should not in anyway be disadvantaged.

Any price reduction must be retrospectively applied.

5. Repair and Maintenance of the Network

Whilst Part 8 of the Undertaking requires ARTC to maintain the Network in a fit for purpose condition, clause 6.1 of the Access Agreement has not been amended.

The Access Agreement should specify the actual standards to which the track must be repaired and maintained with an overriding provision that the track must always be repaired and maintained to at least the higher of the following standards:-

- **a fit for purpose standard such that the Operator can operate train services in accordance with its train path entitlements (refer QCA Final Decision, Annotated Schedule E, Page 132, Pt 2);**
- **a sufficient standard of safety; and**
- **a sufficient level of operational efficiency.**

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

(i) the standard existing at the Commencement Date – this is clearly not acceptable as the standard may not be known and if known, it may be too low;

(ii) the minimum standard required to maintain ARTC's accreditation – this is not known. Accreditation does not preclude significant faults, therefore it is not a standard.

Clause 6.2 allows for ARTC to notify an Operator of speed and weight restrictions (when required by the condition of the Network) and for the Operator to so comply. However, it is not clear as to whether ARTC must use its reasonable endeavours to minimise disruption to train services and to compensate an Operator in circumstances where ARTC has failed to maintain the Network as required (refer QCA Final Decision, Annotated Schedule E, Pages 132 to 133).

It may be the case that a speed or weight restriction could be such that it would not be commercial for the Operator to operate a train using the restricted train path.

The Access Agreement should provide for the ARTC to:-

- **Use its reasonable endeavours to minimise disruption to train services; and**
- **To be liable for claims of compensation by an Operator in circumstances where ARTC has failed to maintain the Network as required.**

6. Rolling Stock Standards

The Operator should be under an obligation to maintain each Train operated by the Operator On the Network at all times in a good safe operational condition.

Draft No.6 of the Track Access Agreement has now been amended to incorporate the above obligation.

However, the Indicative Track Access Agreement has not been so amended and still refers to a draft code that may not have been endorsed for national implementation on the Network.

Clause 5.4 of the Indicative Access Agreement should be amended in accordance with Draft No.6 of the Track Access Agreement.

7. ARTC to control the Network

In relation to clause 5.1, control of the Network should be subject to this Agreement. This clause, as presently drafted, could be interpreted to mean that only "management of access" is subject to this Agreement.

The Access Agreement should provide that "Control of the Network" (by ARTC) is also subject to this Agreement.

8. ARTC's obligation to grant access

Clause 2.1 (b) provides that the availability of a Scheduled Train Path is subject to, inter alia:-

(i) emergencies or genuine material safety considerations;

(ii) matters outside the reasonable control of ARTC (except for matters which arise due to ARTC's negligence or breach of the track access agreement.

In light of clause 2.1 (b), as presently drafted, an Operator cannot know with sufficient certainty as to when a Scheduled Train Path will be available.

ARTC should be under an obligation to provide uninterrupted access subject only to the agreed Network Management Principles.

Further, clause 2.3 provides that the ARTC will not be responsible for any loss or costs suffered by an operator by reason of the matters described in Sub-clause 2.1(b).

Mr Michael Colbran of Queens Counsel has advised that these provisions give to ARTC very considerable latitude with respect to the scope of its obligations. Mr Colbran QC has advised that:-

(a) it is the breach of these obligations which give rise to any damages claim and accordingly the scope for a damages claim will be limited;

(b) the entitlement of SCT to recover damages for breach by ARTC is also confined by the "indemnity" provisions. These are quite restrictive in circumstances where it might be thought that SCT by any act or omission has been involved in the loss. This will be generally the case; and

(c) furthermore, the indemnity provisions seem to operate to exclude liability in ARTC for "indirect or consequential loss". See clause 15.2 (b) (iv). The clause seems to exclude any liability for economic loss suffered by SCT including, specifically, loss of profits. If this is the effect of the provision Mr Michael Colbran QC does not consider it to be at all **"fair and reasonable".**

Clause 2.3 is not acceptable. In the event access is interrupted by third parties (who are not operators), operators should have a contractual right of recourse against ARTC for loss of profits etc. ARTC would in turn have an avenue of redress against those third parties.

We do not believe it is appropriate for the Access Agreement to give to operators a right of action against the ARTC in circumstances where ARTC's failure to provide access has been caused by other operators. This is because:-

(a) It would be unacceptably costly to permit claims for loss of business profits between operators and ARTC every time an operator's train caused an interruption to the Network;

(b) Operators are already subject to penalties (in the form of loss of customers and higher labour costs) for "unhealthy" train performance; and

(c) The existence of these penalties allow other operators to operate their businesses knowing with certainty that other operators will be penalised for "unhealthy" train performance.

Clause 5.2 provides that ARTC warrants that it is entitled to grant to the Operator rights of access but only in the case of that part of the Network owned or managed by ARTC. In the case of other parts of the Network, access is granted subject to terms by which the other owner permits access. This is very unsatisfactory particularly if the terms of access for the other parts of the Network are not known.

There must be a requirement on ARTC to not only clearly state which parts of the Network will not benefit from an unqualified warranty, but to also provide the Operator with all applicable terms of access.

9. Operator's Other Obligations

We comment below on a number of the operator's obligations.

(a) To conduct itself in accordance with the Network Management Principles.

Clause 5.5 (b) provides that the Operator is to comply with the Code of Practice which is defined to mean the document produced by AN entitled "Code of Practice Commonwealth Network Operations".

Clause 5.5(b) should only require the Operator to comply with the agreed Network Management Principles.

(b) To comply with all Instructions issued by the ARTC.

The operator should be required to comply with all instructions issued by the ARTC which:-

(i) are made in circumstances where ARTC reasonably believes, upon the exercise of reasonable care, are consistent with the Network Management Principles; and

(ii) which are given with a view to reasonably minimising the disruption.

The provisions concerning the issuance of Instructions need to be amended to reflect the above principle.

Further, clause 8.1 (d) is not acceptable. This clause needs to provide that if a train path is varied by reason of an Instruction, then the Operator's normal use of the Network must resume upon the grounds for the making of an Instruction being resolved or satisfied to ARTC's reasonable satisfaction.

(c) To minimise obstruction of the Network

Clause 5.5 (e) is not required if there is already an obligation for the Operator to comply with the Network Management Principles. ARTC has already sought to rely on clause 5.5 (e) as a "back door" way to pursue operators for track damage claims. This is not the purpose of this clause.

Clause 5.5(e) should be deleted.

(d) Not to willfully alter any part of the Network.

We accept that an operator should not willfully alter any part of the Network.

Clause 5.5 (g) is the old AN clause but amended so as to include the word "damage" in the old AN clause. The clause now provides for the Operator *"not to materially change, alter, repair, deface, damage or otherwise affect any part of the Network"*.

Mr Colbran QC is of the opinion that the addition of the word *"damage"* is **"inappropriate"** as each of the other prescribed activities is one involving intent. He is of the view that the word "damage" is equivocal.

Once again, ARTC has already sought to rely on clause 5.5 (g) as a "back door" way to pursue operators for track damage claims. This is not the purpose of this clause. This clause should be amended to prevent this from occurring.

(e) To provide and maintain communications equipment.

We accept that there should be an obligation on operators to provide and maintain communications equipment which is compatible with the equipment used in the Train Control Centre as at the Commencement Date and to use such equipment to communicate with the Train Control Centre.

Clause 5.5 (h) is acceptable except where it concerns a change to communications equipment.

When changing equipment, ARTC must not expose Operators to additional costs involved with equipment changes.

(f) To provide to ARTC such information reasonably required by ARTC

Clause 5.5(i) requires the Operator to provide to ARTC such information reasonably required by ARTC. However, this clause does not provide that ARTC must first request such information.

This clause needs to be amended to provide that ARTC must request this information.

11. Removal of Train Path for Under-Utilisation

The Access Agreement gives ARTC the right, in certain circumstances, to remove from an Operator an under-utilised train path.

Clause 9.4 (b) of the draft Track Access Agreement provides that a service will be deemed not to have been operated if the Operator has failed:-

(i) to present a Train at the scheduled entry point onto the Network; or

(ii) to operate the Train so that it completes its full journey,

in conformance with the locations, days and times set out in the Scheduled Train paths applicable to such Service.

Clause 9.4 (b) is not acceptable.

The following words should be added at the end of Clause 9.4 (b):-

"other than where the failure is due to matters outside the reasonable control of the Operator".

This is particularly important in view of the fact that ARTC does not control the whole Network.

The above amendment would also appropriately address the occurrence of a force majeure event (refer to the QCA Final Decision, Annotated Undertaking at page 89).

The Agreement, and in particular the under-utilisation clause, needs to take into account certain seasonal business that would otherwise bring growth to the market.

In our view, the appropriate way to address this is to adopt the QCA approach (refer to the QCA Final Decision, Annotated Undertaking at page 89) and to provide that a resumption of access rights will only occur once the threshold trigger has been satisfied and provided:-

- **The operator is not able to demonstrate, to ARTC's reasonable satisfaction, a sustained requirement for the access rights; and**
- **ARTC is satisfied that it can demonstrate that it has a reasonable expectation of alternative demand to justify a resumption of capacity.**

Further, ARTC should not implement the reduction unless and until the dispute resolution has been exhausted in favour of its decision.

We submit that resumption disputes should be dealt with in the manner proposed by the QCA in its Final Decision on the QR Undertaking (refer to the Annotated undertaking at pages 90 to 91).

If the cancellation penalty clause is to remain (and we strongly oppose this for the reasons noted above), then the permissible number of cancellations should not count towards the number of train paths deemed not to be operated under this clause.

12. Liabilities and Indemnities

We accept that the Track Access Agreement should provide that a party is to be liable for the loss suffered by another party in circumstances where it is in breach of the track access agreement or is negligent.

Clause 15.1 provides that the Operator shall indemnify ARTC from and against all Claims on, against or by ARTC except where, inter alia, the claim **was not caused or contributed to by the Operator.**

This 'causal based clause' is not acceptable as there may be circumstances where an Operator causes loss or damage in circumstances where the Operator is neither in breach of the agreement (excluding the operation of the amended sub-clause 5.5 (g)) or negligent.

Mr Michael Colbran QC is of the opinion that clause 15.1 suffers from the following defects:-

(i) First, the indemnities generally are drafted on the basis that one party will indemnify the other party not only from and against all claims made against the other party but also requires one party to indemnify the other party against all claims "by" the other party. **"This would not appear to be a reasonable requirement to expect in a commercial agreement"**. Clause 15.1 purports to indemnify ARTC, inter alia, from claims by ARTC. **"This seems to [Mr Colbran QC] to be a nonsense"**

The indemnities should be amended so that a party is not required to indemnify the other party against all claims "by" that other party.

(iii) Secondly, the word "and" appears at the end of clause 15.1 (b) (iii) when plainly the intended word must be "or". If the word "and" is intended then the clause becomes internally inconsistent

and would purport to make the Operator liable in some circumstances where the relevant damage was not to any degree caused or contributed to by any action or inaction of the Operator.

Clause 15.1 (b) (iii) needs to be amended so that the word "and" at the end of this clause is replaced with the word "or".

(iii) Thirdly, and most significantly, the exclusion in clause 15.1 (b) (iii) arises only where the relevant loss was not caused or contributed to by the act or omission of the Operator. The touchstone of liability, whether to indemnify in respect of a claim or as a primary contractual liability, should be a breach of a substantial provision of the agreement or some negligence or recklessness. Mr Michael Colbran QC can see no basis in principle to justify an extension of liability beyond that which the law would make the Operator liable. Mr Colbran QC notes that this seems also to be the view of the Queensland Competition Authority.

We submit that the most appropriate approach to this issue of indemnities and liabilities is that proposed by the QCA in its Final Decision on the QR Undertaking (refer to the Annotated Schedule E at page 139). The QCA proposed that each party be liable for, and be required to release and indemnify each other for, all claims in respect of personal injury, death or property damage caused or contributed to – to the extent of the contribution – *by the wilful default or negligent act or omission of that party or its staff*.

Clause 15.1 dealing with the indemnity to be given by the Operator is also not acceptable because of sub-clause 15.1 (b). Clause 15.1 (b) sets out the circumstances in which the Operator will not be required to indemnify ARTC. Sub-clause 15.1 (b) (ii) has been amended (since the AN Agreement) to the effect that when one is considering whether a claim has been caused or contributed to by ARTC, it is questionable whether a claim that arises out of the Operator properly complying with obligations set out in this Agreement including properly complying with any Instructions, would be a claim caused or contributed to by ARTC. This is because the reference to the Operator properly complying with any obligations and Instructions has been deleted.

Sub-clause 15.2 (a) contains no sub-clause (v) found in sub-clause 15.1 (a). 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 no 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 because track damage was caused by its train due to the acts of a third party.

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.

The indemnity clauses should be amended to also address the above issues.

Mr Colbran QC is of the opinion that there are also problems with the indemnities given by ARTC in clause 15.2.

Mr Colbran QC believes that clause 15.2 (b) (iii) will prevent any obligation to indemnify the Operator arising wherever "the claim" (sic) was caused or contributed to by the Operator, even though the Operator may not have been at fault at all. Mr Colbran QC believes this to be a **"quite unjustified limitation of the obligation to indemnify where loss is caused by the [wrongful] act or omission of ARTC"**.

Mr Colbran QC is of the opinion that the formulation in the proposed ARTC Agreement is **"not satisfactory, or fair or reasonable".** He believes there are many situations where loss and damage arises in conjunction with the use by the Operator of the network and where, for that reason, the use of the Network is causally related to the loss but where that use has not been in any way negligent or blameworthy.

Mr Colbran QC has advised that another important effect of the drafting should be noted. The source of primary liability to SCT for any contravention by ARTC of its obligations may well be found in these provisions. The provisions of clause 15 go on to deal with limitation of liability in a way consistent with that understanding (see clause 15.6). On this assumption, the exclusion of the "indemnity" wherever there is a causal link between\en the loss of SCT and any act or omission of SCT is of great significance. **"The implications of this provision are hard to define with certainty but undoubtedly extend beyond the well understood (and [Mr Colbran QC] would have though perfectly appropriate) concept of contributory negligence or breach of agreement".**

Clause 15.2 needs to be amended so that the ARTC indemnity is not excluded except where there is a breach by the Operator of a substantial provision of the Access Agreement or some negligence or a recklessness on the part of the Operator.

A copy of Mr Colbran QC's Advice is attached.

13. <u>Termination</u>

We accept that there should be a standard termination clause providing that if either party defaults in the performance of any of its material obligations under the Agreement and fails to remedy that default within a specified period of time (which is reasonable having regard to the default) after receiving written notice from the aggrieved party, then the aggrieved party may elect to terminate the Agreement.

However, our concern is that ARTC has a conflict in the roles of profit maker, access provider and to some degree as a regulator. There are many non-price issues that can be used as barriers to the optimal use of the Network by operators.

Clause 14.1 is not acceptable as it allows the ARTC to terminate the agreement on account of an accreditation related issue in circumstances where the Operator has maintained its accreditation.

The Indicative Access Agreement should be amended to incorporate the following principles:-

If the non-compliance concerns a matter that would otherwise be considered by the relevant accreditation authority when deciding whether or not to renew the Operator's accreditation and ARTC, acting reasonably, believes that such non-compliance has safety implications, ARTC may suspend the operation of the Operator's Train until either:-

- **The non-compliance is rectified to the reasonable satisfaction of ARTC; or**
- **The Operator reasonably demonstrates that the relevant accreditation authority does not regard that the circumstance (giving rise to ARTC's suspension notice) constitutes a non-compliance of the Operator's accreditation.**

If the source of the non-compliance does not have safety implications, then ARTC may, by written notice, require rectification of the non-compliance within a specified period of time (which is reasonable having regard to the non-compliance), but may not suspend the Train in the meantime.

In either case, ARTC may not terminate the Agreement unless the Operator has not within a reasonable period of time:-

- **Rectified the non-compliance to the reasonable satisfaction of ARTC; or**

- **Reasonably demonstrated that the relevant accreditation authority does not regard that the circumstance (giving rise to ARTC's suspension notice) constitutes a non-compliance of the Operator's accreditation.**

In the event a Train is suspended without reasonable justification, the Agreement should provide for ARTC to be liable for any loss caused as a consequence. (Refer QCA Final Decision, Annotated Schedule E, Page 131, Pt 10)

On termination, ARTC (if it is the aggrieved party) should not be entitled to recover any flagfall charge for the balance of the term following termination.

Clause 14.5 is acceptable provided that this clause is amended so as not to allow recovery by the ARTC of flagfall charges for the period following the date of termination.

14. Key Performance Indicators

In relation to the issue of reward and penalty for complying with the KPI's, it is noted that operators are already subject to rewards and penalties giving those operators sufficient incentive to comply with the KPI's.

The incentive for operators to comply exists because Operators will retain and grow their customer bases with "healthy" train performance and gain from efficient operations. The incentive against non-compliance exists because operators will be penalised for "unhealthy" train performance with those penalties being in the form of loss of customers, higher labour costs or wagon damage.

There needs to be a system of reward and penalty imposed on ARTC in relation to KPI's dealing with track performance because presently no such rewards or penalties exists.

Clause 2.9 is not acceptable because:-

(i) There is no system of reward or penalty to apply in the case of KPI's dealing with document provision;

(ii) There is no system of reward or penalty to apply in the case of KPI's dealing with track performance; and

(iii) The dispute resolution provisions do not apply.

15. Track Extensions

In the event a Scheduled Train Path must be varied because of a track extension, and use of the extension results in higher costs for the Operator, (as a consequence of, for example, a greater distance to travel), ARTC must compensate the Operator for these increased costs.

Clause 4.6 (b) needs to provide for ARTC to compensate operators if a track extension results in a Scheduled Train Path variation and higher costs for that operator.

Further, the dispute resolution procedures must be applicable in the event there is a dispute as to:-

(i) Whether a Scheduled Train Path must be varied; and

(ii) Whether the Operator is entitled to compensation because of its increased costs.

It needs to be made clear that the Dispute Resolution Procedures apply to sub-clause 4.6 (b).

16. Inspection and Audit by Access Provider

Clause 10.1 is deficient in that it does not require ARTC to act reasonably when deciding whether to require the Operator to undergo an audit.

Prior to ARTC having a right to conduct an audit pursuant to clause 10.1, ARTC must demonstrate a reasonable apprehension of non-compliance and notify the Operator. ARTC must, at all times, act reasonably which includes not collecting any information other than that required for the specific purposes of the audit, ensuring all equipment used is appropriately certified as accurate, making available to the Operator this certification and providing to the Operator all information obtained by ARTC during the audit.

There must be appropriate safeguards to protect the confidentiality of the information produced by the audits including:-

(a) The Operator being informed of all ARTC staff engaged in the audit process; and

(b) All ARTC staff engaged in the audit process signing appropriate confidentiality agreements.

The provision dealing with the monitoring equipment (clause 10.5) provides that information must not be disclosed to another party without the consent of the Operator, but arguably this may not extend to the whole audit process (i.e. clauses 10.1, 10.3 and 10.4)

In relation to clauses 10.1, 10.3 and 10.4, there needs to be appropriate safeguards to protect the confidentiality of the information produced by the audits.

Clause 10.5 allows ARTC to install monitoring equipment which will take readings or measurements for the purpose of:-

- Monitoring the operation of rolling stock; and
- Assessing "the Operator's compliance with clause 10.1" (which we presume is intended to mean compliance with the matters set out in clause 10.1.)

It is the case that the ARTC and operators have had discussions concerning the type of information (produced by this equipment) that operators would benefit from. However, Clause 10.5 should still provide that ARTC is not to, without the prior written permission of the Operator, to collect any information other than for the purposes of assessing the Operator's compliance with the Access Agreement.

This would give operators some control over the information collected by ARTC where that information is not otherwise required in order to allow ARTC to assess the Operator's compliance under this Access Agreement.

Clause 10.5 should provide that ARTC must not, without the prior written permission of the Operator, collect any information other than for the purposes of assessing the Operator's compliance with the Access Agreement.

Further, clause 10.5 does not address the Operator's rights to the information collected.

Clause 10.5 should be amended so as to address the Operator's rights to the information collected. Further, the issues of confidentiality raised above should be addressed in clause 10.5.

Clause 10.2 deals with monetary penalties for understating loads and overloading which are new charges.

ARTC should be required to explain how these charges were arrived at. To date, there has been no discussion as to whether these charges are excessive or appropriate.

Clause 10.6 is acceptable but should extend to all of the ARTC's obligations under the Agreement including the confidentiality obligations etc.

17 Permanent Variations to Scheduled Train Paths

Where a train path is required to be permanently varied for reasons relating to safety, repairs, maintenance and upgrading of the Network, ARTC must not only take all reasonable steps to minimise any disruption to the Scheduled train paths, but must also:-

- use its best endeavours to provide a suitable alternative train path; and
- compensate the Operator for any losses it incurs because of the variation.

Clauses 9.2 and 9.3 are not acceptable because where safety, maintenance, repairs or upgrade are an issue, there must be an obligation on ARTC to consult, to use best endeavours to provide a suitable alternative path and to pay compensation.

Clause 9.6 dealing with the cost of a variation is not acceptable because it essentially provides that unless the parties agree (based on negotiations in good faith) the party incurring the cost will bear the cost.

Clause 9.6 should be amended to address the issue of compensation in the manner suggested above.

18 Review of Scheduled Train Paths

In the event that the actual train arrival and departure times materially differ from the stated scheduled train arrival and departure times over a three month period, the parties should be required to negotiate in good faith to review those train paths subject to:-

(i) contractual obligations owed to third parties; and

(ii) a new train path not having a material adverse impact on the ARTC's ability to efficiently and safely manage the Network or the Operator's ability to efficiently and manage its business.

Clause 9.5 is deficient because it is not stated that an Operator should not be compelled to adopt a new train path in circumstances where to do so would materially adversely impact on the Operator's ability to efficiently and safely manage its business (similar to the clause 9.5 (d) (ii) included for the benefit of ARTC).

19. Resolution of Disputes

In relation to the dispute resolution provisions in the recently amended Indicative Access Agreement, we note the following:-

(a) What the Arbitrator must take into account

The Arbitrator must take into account the provisions set out in the negotiated Access Agreement and not take into account, for example, the objectives and principles enunciated in the Competition Principles Agreement unless the negotiated Access Agreement is ambiguous.

ARTC proposed this amendment following concerns expressed at the Workshop on 16 August, 2001 that the Indicative Access Agreement does not give operators certainty in knowing that the ARTC will not offer more favourable access terms to another operator with a "like" train path.

As noted above, clauses 5.6 (b) and (c) of the Indicative Access Agreement permits the ARTC to offer different price and non-price terms to two operators who may have train paths with, for example, different expiry dates. These provisions are not ambiguous. The Arbitrator would need to make his/her determination after only taking into account these provisions.

It is important that the actual provisions within the Indicative Access Agreement be amended now to address any uncertainty. The arbitration process will not assist in all circumstances.

(b) Additional Disputes

An Arbitrator should have the power under Section 25 of the Commercial Arbitration Act 1986 to deal with a second dispute which arises before a final award is made in relation to the first dispute.

(c) ARTC's Costs

Clause 3.11.4 (b) (vi) (D) provides that in deciding a dispute, the Arbitrator must take into account *"all costs that ARTC incurs in providing Access, including any costs of extending the Network…"*..

There is an issue as to what this is intended to relate to in terms of a dispute concerning a provision of a negotiated Access Agreement.

The arbitration provisions should set out the circumstances in which this and other provisions in clause 17.4 (b) (vi) (B) would apply.

(d) The legitimate Interest of the Operator

The Arbitrator should take into account the legitimate business interests of the Operator.

(e) Court Appeals

In amending the arbitration provisions, it appears that ARTC has deleted the right of both parties to appeal to the Courts on any questions of law arising in the course of the arbitration or out of the arbitration award. We believe that this avenue of appeal should still exist.

The dispute resolution provisions should be amended to incorporate this appeal right.

20 Other Matters

The following matters need to be addressed:-

(a) Definition of Access Undertaking

The definition is not appropriate as it gives rise to uncertainty as to how variations may be effected.

On 14 August, 2001, ARTC offered to remove this definition, yet it still appears in the Indicative Access Agreement.

This definition should be removed.

(b) Definition of Parking Surcharge

Further information is required as to what constitutes parking for these purposes.

(c) Definition of Safeworking Rules

There is no certainty as to what these rules are.

This definition needs to refer to the legal requirements which must form the basis of ARTC's "policies and notices". At the very least, the Safeworking Rules (including any variations) must be reasonable and proportionate and for the purpose of ensuring the safe conduct of rail operations.

(d) Definition of Scheduled Train Paths

There is a lack of certainty as to how the Scheduled Train Paths may be varied.

We comment below on Clauses 9 and 22.

(e) Clause 16, Insurance

This clause requires the parties to effect a policy of insurance for an amount of $200,000,000. There has never been any discussion as to whether the sum of $200,000,000 is appropriate other than this level of cover is required by the Lessor of the Victorian Network.

The Agreement should provide for insurances to be effected by the parties to appropriately provide for *the relevant insurance risks* (refer QCA Final Decision, Annotated Schedule E at page 138)

Further, clause 16.2 inappropriately provides that any savings in ARTC's insurance prem0iums may be applied towards repairs, maintenance or upgrading of the Network or as otherwise agreed.

Clause 16.2(d) should provide that any reduction in the amounts paid by way of premiums should be directly applied to reduce ongoing track access charges.

(f) Clause 22.2 Change of Circumstances

Our concern with this clause is the uncertainty it creates.

In view of the large investment (in both equipment and terminal infrastructure) required of an Operator, this Agreement needs to be certain in all respects.

Clause 22.2 should be deleted.

8 October 2001

SPECIALISED CONTAINER TRANSPORT

ADVICE CONCERNING
DRAFT TRACK ACCESS AGREEMENT

1. I have been asked to consider and advise as to:

(a) The extent of SCT's liability under the draft ARTC Agreement in circumstances where SCT causes damage to any property or person.

(b) Whether the draft ARTC Agreement affords adequate protection to SCT or gives SCT adequate rights of redress against ARTC where SCT suffers property damage or is exposed to claims by other persons as a consequence of acts or omissions by ARTC or other persons.

(c) Whether the clauses proposed by ARTC relevant to these issues are fair and reasonable; and

(d) Whether SCT has a right to claim against ARTC for loss of business profits/etc in circumstances where SCT has been denied access other than/because of the actions of another operator.

I will deal with the first 3 of these issues first.

2. Both the AN and ARTC Agreements contain provisions which give rise to liability in the event that SCT causes damage to property, person or track. In the ARTC Agreement the principal relevant provisions are to be found in the extensive indemnity clause, which I will discuss below.

3. The Operators Obligation Provisions in clause 5.5 does contain the covenant:

> *"(g) not to materially change, alter, repair, deface, damage or otherwise affect any part of the Network."*

This clause corresponds to clause 5.3(i) of the AN Agreement which provides that the Operator agrees not to materially change, alter, repair, deface or otherwise affect any part of the network.

4. The addition to the clause of the word "damage" is, in my opinion, inappropriate. Each of the other proscribed activities is one involving intent. The word damage is equivocal as damage can

occur without any intent, or even knowledge. The introduction of the word into this clause gives rise in effect to a strict liability rather than an obligation of performance.

5. SCT objected to this amendment. ARTC has responded as follows:

> *"ARTC cannot accept that an owner of property who grants access to that property to another party, cannot recover damages for damage to that property by the other party unless he can prove that party was negligent. We suggest that at common law, this would not be the case."*

This response, which is in any event based on a false premise, does not justify the amendment. If this outcome is intended, and agreed, then it should (in my view) be dealt with squarely in a provision establishing liability.

6. Indeed this explanation seems inconsistent with what I am instructed ARTC have said in relation to the liability issues generally:

> *'Although presented differently, the [indemnity] clause reflects the same level of obligation as the previous AN Indemnity. Under the AN Agreement, an action with regard to SCT damaging ARTC's track or ARTC damaging SCT property was dealt with as a breach of Operators contractual operations.' (sic).*

While it is clear enough that ARTC's intends to place issues of primary liability into the indemnity clause and it is quite unclear how this answer explains the drafting of clause 5.5(g). It is not correct to say that the level of obligation is the same in the draft agreement as the indemnity provisions of the AN Agreement.

7. Clause 15 of the ARTC draft provides:

15.1 "Indemnity by Operator

(a) Subject to clause 15.1(b), (c) and 15.6, the Operator shall indemnify and keep indemnified ARTC from and against all Claims on, against or by ARTC in respect of:

(i) the death of or injury to any person; or

(ii) any loss of, damage to or destruction of any property of ARTC (including, without limitation, the Network and Associated Facilities), the Operator or any other person;

in each case arising in connection with or out of:

(iii) the use by the Operator of the Network and Associated Facilities;

(iv) the presence, otherwise than in accordance with this Agreement, of any property or personnel of the Operator or its contractors upon the Network; or

(v) the acts or omissions of a third party (other than employees, agents or contractors of ARTC) arising in connection with the use by the Operator of the Network and Associated Facilities.

(b) The indemnity in clause 15.1(a) does not apply to the extent that any Claim:

(i) arises in connection with or out of the use by another person of the Network and Associated Facilities, including another operator of train services (but only if the Operator did not cause or (to the extent of the contribution) contribute to the loss or damage the subject of the Claim);

(ii) arises from a breach of this Agreement by RTC (which breach must be relevant to the incident under consideration) or is caused or (to the extent of the contribution) contributed to by ARTC;

(iii) is in respect of:

A. the death of or injury to any person; and

B. any loss of damages to or destruction of any property of the Operator, ARTC or any other person,

where the same was not caused nor (to the extent of such contribution) contributed to by any act or omission of the Operator; and

(iv) is in respect of indirect or consequential loss.

(c) ARTC releases the Operator from any liability to ARTC under the indemnity in clause 15.1(a) in the circumstances described in clause 15.1(b)(i) to (iv)."

8. This clause, which clearly seeks to establish liability for damage to property including track arising out of the use by the Operator of the network, suffers from four principal defects:

(a) First, it purports to indemnify ARTC, inter alia, *from claims "by" ARTC. This seems to me to be a nonsense;*

(b) Secondly, the word "and" appears at the end of subclause 15.1(b)(iii) when plainly the intended word must be "or". If the word "and" is intended then the clause becomes internally inconsistent and would purport to make the Operator liable in some circumstances where the relevant damage was not at any degree caused or contributed to by any action or inaction of the Operator.

(c) Thirdly, as my Instructing Solicitor points out the indemnities are drafted on the basis that one party will indemnify the other party not only from and against all claims made against the other party (which is similar to the AN Agreement) but also requires one party to indemnify the other party against all claims "by" the other party (which is not the case

in the AN Agreement). As I have noted above this is most unusual use of a concept of "indemnity". It may be meant to define circumstances in which a contractual liability will arise. If that is so then the clause seems far too wide.

(d) Finally, the exclusion in (b)(iii) arises only where the relevant loss was not caused or contributed to (in any way) by the act or omission of the Operator. The touchstone of liability, whether to indemnify in respect of a claim or, as suggested in subparagraph 7(c) above, as a primary contractual liability should be the breach of a substantive provision of the agreement or some negligence or recklessness. I can see no basis in principle to justify an extension of liability beyond that which the general law would require. I note that this seems also to be the view of the Queensland Competition Authority.

9. By reason of these exclusions from the indemnity, the provision is materially different in effect from the corresponding provision of the AN Agreement and the change does not seem to me to be justified. The AN Agreement provides for the relevant exemptions in clause 17(f) to (i) as follows:

> *"…..other than to the extent that any claim:*
> *(f) arises in connection with or out of the use by another person of the Network, including another operator of train services (but only if the Operator is, on the balance of probabilities, able to demonstrate to the Network Access Provider that it did not cause the loss or damage the subject of the Claim);*
> *(g) arises from a breach of this Agreement by the Network Access Provider or is willfully or negligently caused or contributed to by the Network Access Provider including where a Claim arise out of the Operator properly complying with its obligations set out in this Agreement including properly complying with any Instructions; or*
> *(h) is in respect of damage to or destruction of the Network and Associated Facilities (except to the extent that the Claim in respect of the Network and Associated Facilities was willfully or negligently caused or contributed to by the Operator), or*
> *(i) is in respect of economic loss."*

The form of the AN Agreement is certainly clumsy but amendment to improve its style can be made without distorting the scope of the "indemnity provision".

10. There are also problems with the indemnities given by ARTC in clause 15.2. That clause provides:

> *"15.2 Indemnity by ARTC*
> *(a) Subject to clause 15.2(b), (c) and 15.6, ARTC shall indemnify and keep indemnified the Operator from and against all Claims on, against or by the Operator in respect of:*
> *(i) the death of or injury to any person;*
> *(ii) any loss or damage to or destruction of any property of the Operator, ARTC or any other person,*
> *in each case arising in connection with or out of:*
> *(iii) the use by the Operator of the Network or Associated Facilities; or*
> *(iv) the presence, in accordance with this Agreement, of any property or personnel of ARTC or its contractors on the Network.*
> *(b) The indemnity in clause 15.2(a) does not apply to the extent that any Claim:*
> (i) arises in connection with or out of use by another person of the Network or Associated Facilities, including another operator of train services (but only if ARTC did not cause or (to the extent of the contribution) contribute to the loss or damage the subject of the Claim);
> *(ii) arises from a breach of this Agreement by the Operator (which breach must be relevant to the incident under consideration) or was caused or (to the extent of the contribution) contributed to by the Operator; or*
> *(iii) is in respect of:*
> *(A) the death of or injury to any person; and*
> *(B) any loss of, damage to or destruction of any property of the Operator or any other person;*
> *where the same was not caused nor (to the extent of such contribution) contributed to by any act or omission of ARTC; and*
> *(iv) is in respect of indirect or consequential loss.*
> *(c) The Operator releases ARTC from any liability to the Operator under the indemnity in clause 15.2(a) in the circumstances described in clause 15.2(b)(i) to (iv)."*

Subclause (b)(ii) will prevent any obligation to indemnify SCT arising wherever "the Claim" (sic) was caused or contributed to by the Operator, even though the Operator may not have been at fault at all. This seems to be a quite unjustified limitation of the obligation to indemnify where loss is caused by the [wrongful] act or omission of ARTC.

12. Again this clause represents a significant departure from the AN Agreement which provides that the Network Access Provider will indemnify the operator against all claims on or against the

Operator except where the claim arises from a breach of the Agreement by the Operator or **is willfully or negligently caused or contributed to by the Operator.**

13. In my opinion the formulation in the proposed ARTC Agreement is not satisfactory, or fair or reasonable in relation to either of clauses 15.1 or 15.2. There may be many situations where loss and damage arises in conjunction with the use by the Operator of the network and where, for that reason, the use of the network is causally related to the loss but where the Operator has not been in any way negligent or blameworthy. A couple of examples will suffice of situations where, under the terms of the draft, liability may well fall upon SCT - or at least where no ability to recover loss from ARTC would arise. Say, for example, a third party were to compromise the safety of the network by placing obstructions on the track leading to a derailment. Let it be assumed that ARTC was aware of the danger but said nothing. The consequent derailment damages both the train and the track. Undoubtedly the damage to the track arises from or in relation to the use by the Operator of the network. but the Operator would seem to be blameless. Why should it be exposed to the risk of a claim and why should its prospects of recovering its own loss be diminished. Another example might be where a level crossing incident occurs through the sole fault of an uninsured motor car driver. The use by the SCT train of the track might well enliven the operation of the indemnity under the ARTC draft but not the AN agreement. How is the change justified and how is the reallocation of risk paid for.

14. Another important effect of the drafting should be noted. The source of primary liability to SCT for any contravention by ARTC of its obligations may well be found in these provisions (see paragraph 7(c) above). Certainly the provisions of clause 15 go on to deal with limitation of liability in a way consistent with that understanding (see clause 15.6). On this assumption the exclusion of the "indemnity" wherever there is a causal link between the loss of SCT and any act or omission of SCT is of great significance. The implications of this provision are hard to define with certainty but undoubtedly extend beyond the well understood (and I would have thought perfectly appropriate) concept of contributory negligence or breach of agreement.

15. ARTC recently proposed certain amendments to the draft for the indemnity provision (see pages 131 to 134 of the brief). While the proposal does tidy up some matters of detail in the draft[1], it does not address the fundamental issue of whether the obligation to indemnify SCT or ARTC (and the existence of a contractual liability to the other party and limitations upon it) are to be analyzed independently of any default. For the reasons given above I do not think that this new proposal is any better.

16. I should also note clause 6. Clause 6 deals with repairs and maintenance of the network and provides:-

> *"6.1 ARTC to Repair and Maintain the Network*
> *Despite clause 6.2 ARTC agrees at all times during the term of this Agreement to maintain the Network (but only in so far as the Network is relevant to the Operator's Scheduled Train Paths) to the higher of:*
> *(a) the standard existing as 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 parties may agree.*
>
> *6.2 Operating Restrictions*
> *When required by the condition of the Network or any part of the Network, ARTC may (to the extent of such requirement only) give notice of speed and weight restrictions and the Operator must comply with such a notice."*

17. I respectfully agree with my Instructor Solicitor that the obligation to maintain the Network to a standard existing at the Commencement Date is bound to lead to disputation which is not helpful. It distracts from the true purpose of the clause and gives rise to an unacceptable level of uncertainty. I am instructed that recently, in response to SCT's concerns, ARTC proposed that clause 6.1 be amended to reflect a requirement to maintain the Network in a "good and safe operational condition". This seems a satisfactory provision.

18. In relation to the last question, the rights of SCT to claim against ARTC for loss of business profits etc, depend upon the extent of the obligations of ARTC and any exclusions from the

[1] The text for subclauses 15.1(a)(i) is better as is the wording in clause 15.1(b)(iii) and, the word "or" appears at the end of subclause 15.1(b)(iii) as I think it should.

consequence of a breach of those obligations. Under the draft ARTC Agreement the primary obligations of the Network Access Provider are dealt with in clause 5.3. This provides:

> *"5.3 Network Access Provider's Obligations*
> *ARTC agrees at all times during the term of this Agreement:*
> *(a) to undertake the function of Train Control over the Network;*
> *(b) to comply with the Network Management Principles;*
> *(c) to safely and efficiently operate the Network so that any permitted use of the Network by the Operator is facilitated and promptly and effectively and in accordance with this Agreement;*
> *(d) to have Associated Facilities in place to enable ARTC to grant to the Operator the Scheduled Train Paths on the terms of this Agreement;*
> *(e) to receive, record and collate information from the Operator and the other users of the Network for the purposes of generating the invoices referred to in clause 4.2 and more effectively exercising the functions referred to in clauses 5.3(a) and (b);*
> *(f) to maintain and operate the Train Control Centre and a communication system for the purpose of communication with the Operator and other users of the Network, and to facilitate the Operator's access to that communication system;*
> *(g) to use its best endeavours to provide the Operator with details, as soon as reasonably practicable of all operating incidents (including an Incident) which has affected or could potentially affect the ability of any Train to retain its Train Path, or else affect its security or safety or the security and safety of the freight or passengers;*
> *(h) to comply with all applicable Acts of the Commonwealth and State Parliaments, subordinate legislation, municipal by-laws and other laws in any way applicable to ARTC's management, control and ownership of the Network."*

In order to fully understand each of these obligations attention must be paid to the definition sections and in particular the network management principles being the principles regulating train movements on the network that are set out in Schedule 5.

19. Clause 2.1 provides for the grant to the operator of the use of the network and train path entitlements. An important limitation on the fundamental grant to the Operator of the right to use and the availability of the train paths is in clause 2.1(b) which provides that these rights are subject to:

"2.1 Grant to Operator of Train Paths

(i) presentation by the Operator to Train Control of a Train which is ready in all things for departure within 15 minutes of the scheduled time for departure of that Train according to the relevant Scheduled Train Path;

(ii) emergencies or genuine and material safety considerations;

(iii) matters outside of the reasonable control of ARTC (except for matters which arise due to ARTC's negligence or breach of its obligations under this Agreement);

(iv) material failure of the Operator's Service; and

(v) the Network Management Principles."

See also clause 2.2.

"2.2 Use of a Train Path is not Exclusive

Subject to clause 2.1(a) the Operator's rights to the Train Paths do not give the Operator an exclusive right to any Train Path. Notwithstanding the foregoing, no two Trains (whether the Operator's Trains or the Trains of another user of the Network) will be allotted scheduled arrival or departure times such that there are conflicts in arrival or departure times having regard to the Safeworking Rules."

20. These provisions give to ARTC considerable latitude with respect to the scope of its obligations. It is the breach of these obligations which give rise to any damages claim and accordingly the scope for a damages claim will be limited.

The entitlement of SCT to recover damages for breach by ARTC is also confined by the "indemnity" provisions. As noted above these are quite restrictive in circumstances where it might be thought that SCT has been involved in the loss. This will be generally the case.

21. Finally, I note that the provisions operate to exclude liability in ARTC for "indirect or consequential loss". See clause 15.2(b)(iv). This is defined as follows:

15.5 "Indirect or Consequential Loss

For the purposes of this clause, "indirect or consequential loss" does not include:

(a) property damage or losses arising from third party claims in respect of property damage, personal injury, nervous shock or death;

but does include:

(b) consequential loss, economic loss, loss of profits, loss of business opportunity, payment of liquidated sums, penalties or damages under any agreement (other than this Agreement).”

The clause therefore seeks to exclude any liability for economic loss suffered by SCT including, specifically, loss of profits. If this is the effect of the provision I do not consider it to be at all “fair and reasonable”.

MICHAEL COLBRAN QC

Owen Dixon Chambers
8 October 2001