SPECIALIZED CONTAINER TRANSPORT

31 January 2002

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

Also By Email No:- renato.viglianti@accc.gov.au

Dear Ms Arblaster

ARTC - ACCESS UNDERTAKING

Please find enclosed a copy of SCT's submission concerning the Commission's Draft Decision in respect to the above Undertaking.

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

Yours faithfully

Mark McAvoy
General Manager, Group Development

Submission by Specialized Container Transport concerning the Australian Competition and Consumer Commission's Draft Decision in respect of the Australian Rail Track Corporation Access Undertaking.

January 2002

1. Summary

The Australian Competition and Consumer Commission (the Commission) has sought submissions on its Draft Decision in respect of the Australian Rail Track Corporation (ARTC) Access Undertaking.

Specialized Container Transport (SCT) made a number of written submissions to the Commission prior to the release of the Draft Decision. SCT also participated in the two public forums hosted by the Commission.

SCT is of the view that the Commission has not given proper consideration to the issues raised by SCT and other operators.

SCT is of the view that the Draft Decision has been made without the Commission properly having regard to the following:-

(a) The legitimate business interests of ARTC;

(b) The public interest; and

(c) The interests of access seekers.

SCT does not propose to restate in this document all issues that have been raised by it previously. Rather, in this document SCT will comment on some of those fundamental issues which the Commission has not given proper consideration to when making its Draft Decision.

In particular, SCT comments on the following:-

(i) The nature of the market;

(ii) The negotiation process;

(iii) The pricing principles;

(iv) The liability and indemnity clauses;

(v) The service standards;

(vi) The term of an access agreement; and

(vii) Capacity issues.

In relation to these and other issues, SCT also relies upon and refers the Commission to its earlier submissions.

2. The Nature of the Markets

The Draft Decision is based on a number of assumptions concerning the nature of the markets in which ARTC's customers operate. In particular, the Commission assumed that the nature of the markets was such as to limit ARTC from being able to take advantage of its market power.

The Commission has relied upon these assumptions when making its decision regarding the pricing principles and when deciding to adopt a non-prescriptive approach to negotiations between ARTC and access seekers.

An example of this reliance is noted when the Commission reports (quite correctly) that some of ARTC's customers have significant sunk investments in infrastructure associated with the ARTC network, which could potentially provide ARTC with leverage in commercial negotiations.[1] The Commission proceeds on the basis that the nature of the markets in which ARTC's customers operate may be such as to limit ARTC from being able to take advantage of any consequent market power.[2]

In other words, the Commission has adopted a "hands off" approach to this entire Access Undertaking on the basis that the nature of the markets is such as to limit ARTC from being able to take advantage of its market power.

SCT submits that :-

1. The nature of the markets is not such that it would adequately limit ARTC from being able to take advantage of its market power; and

2. Even if the nature of the markets was such as to so limit ARTC's power, it is not appropriate for the Commission to adopt a "hands off" approach because this approach would not give operators and access seekers the certainty they require for access.

We deal with these two submissions below.

First, the Commission assumes that the 'threat' of inter-modal competition will effectively constrain ARTC's monopolistic behavior.[3]

The Commission has not taken into account the fact that:-

(a) While some market segments (involving shorter rail movements) presently face inter-modal competition, other segments (eg, east-west movements) are suited to rail due to their length;

(b) The 'threat' of inter-modal competition cannot be used by existing operators with sunk investments;

(c) This 'threat' has not aided negotiations between ARTC and any of the substantial operators during the last two to three years; and

(d) In June 2000, ARTC sought to unilaterally impose on existing operators in the east-west corridor terms of access less favourable to those they were presently operating under. Operators were not offered any compensation in return. This behaviour would not occur if it was the case that inter-modal competition effectively constrained ARTC's monopolistic behaviour in this corridor.

The Commission also assumes that because ARTC is vertically separated, this, with other factors, will act as an effective restraint on ARTC from seeking to frustrate the negotiation process.

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[1].Draft Decision, p.iii.
[2] *Ibid,* p.iii.
[3] The Commission notes that inter-modal competition exits because ARTC is recovering revenues well below the economic costs of providing services (Draft Decision p.97). SCT does not agree that the economic costs in the east west corridor have been calculated correctly and relies on our earlier submissions in this regard.

Once again, the Commission has not taken into account the fact that vertical separation has not aided negotiations during the last two to three years.

Even if the nature of the market was such as to limit ARTC from being able to take advantage of its market power, it is not appropriate for the Commission to use this as a reason for adopting a "hands off" approach.

The present non-prescriptive approach does not provide operators and access seekers with the certainty they require for access. Certainty of access will promote intra-modal competition.[4] Uncertainty will adversely affect intra-modal competition.

If existing operators are experiencing difficulties in securing reasonable terms of access, then new entrants will not even contemplate embarking on such an exercise.

The nature of the markets and ARTC's structure do not adequately limit ARTC from being able to take advantage of its market power.

The Commission should adopt a prescriptive approach in relation to important issues such as those involving liability and indemnity similar to the approach adopted by the Queensland Competition Authority.

3. The Negotiation Process

The Commission also assumes that ARTC will not frustrate the negotiation process if it is under an obligation to negotiate in good faith.[5]

Our concern is that ARTC could be held to have negotiated in good faith in circumstances where it refuses to negotiate in respect to the terms and conditions in the Indicative Access Agreement.

Clause 3.10(b) of the Access Undertaking provides that:-

> *"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. The details of Schedule C do not provide an exhaustive list of the issues that may be included in an Access Agreement."*

We raised at the public forum in December 2001 our concern that clause 3.10(b) of the Access Undertaking could be interpreted as meaning that the terms of the Indicative Access Agreement are not negotiable. If this is the proper interpretation, then ARTC would arguably not be in breach of its obligation to negotiate in good faith if it refused to negotiate certain terms already prescribed within the Indicative Access Agreement.

At the public forum, the Commission did not appear to have a clear position on this issue. The Commission initially stated that all terms in the Indicative Access Agreement were open to negotiation, however appeared to retract from this position later during the session.

[4] The Commission appropriately recognizes the benefits of increased intra-modal competition and notes that intra-modal competition can be facilitated by reducing barriers to new entry in the market with barriers including startup costs and the costs associated with uncertainty (Draft Decision p.99).
[5] Draft Decision, p.41.

The Access Undertaking needs to expressly provide that all terms in the Indicative Access Agreement are open for negotiation.

Further, it is not acceptable that ARTC is not required to negotiate with an existing user who is or has been in "Material Default" of an access agreement.[6] Existing operators could be precluded from negotiating with ARTC reasonable terms of access under the Access Undertaking.

ARTC should be required to demonstrate that there is no reasonable likelihood of the applicant meeting the terms and conditions specified in the proposed access agreement in a material way before refusing to negotiate.

4. The Pricing Principles

(a) The Indicative Access Charge

The pricing principles are not appropriate in circumstances where there is a large variance between the floor and ceiling limits. The ceiling limit is not an effective limit in circumstances where the current indicative access charge could almost double whilst still remaining within the revenue limits.

In these circumstances, an access seeker is not able to determine the appropriateness or otherwise of the indicative access charge and other charges.

Further, SCT remains concerned that access seekers are not, on the material submitted, in a position to determine ARTC's actual revenue limits for any particular segment. We note the Commission has sought further comments in relation to this issue.[7]

When this matter was previously raised as an issue by SCT, ARTC's response was that detailed modeling had been provided to the Commission in this regard.[8] This is not a satisfactory resolution of this outstanding issue.

(b) The Ceiling Limit

In considering the ceiling limit, the Commission has not provided any sound reason for allowing ARTC to include, as part of its Economic Cost, a return on infrastructure that has already been financed by Commonwealth grants. Rather, the Commission seems to avoid this issue on the basis that the consideration of past Commonwealth grants will involve a "very difficult measurement process".[9]

Further, it is not clear what the Commission's position is in respect to the treatment of ongoing Commonwealth grants. To date, the Commission has only recommended that ARTC set out how it intends to allow for the value of expenditure on infrastructure which is refunded by the Government.[10] Consequently, SCT is unable to comment on the Commission's position in this regard.

The ARTC in its response to the Draft Decision stated that "*[where] ARTC receives a "Gift", then the value of[this] Gift shall not be included in DORC"*.[11] This statement is ambiguous and in any event, does not address the Commission's recommendation.

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[6] ARTC has alleged that existing operators are in default of existing terms of access following derailments.
[7] Draft Decision p.122, 144.
[8] ARTC Response to SCT, p.13.
[9] Draft Decision, p.126.
[10] Draft Decision, p.127.
[11] ARTC Response to Draft Decision, p.4.

In considering the legitimate business interests of the access provider, the Commission should only take into account the actual investment by the ARTC.

The Commission needs to revisit the pricing principles. As presently drafted, these principles are of no benefit to access seekers.

(c) Annual Review of Indicative Access Charge

The Commission appears to have accepted the price cap approach proposed by ARTC on the basis that full cost recovery is unlikely to be achieved over the five year term of the undertaking.[12]

Our concern, as noted earlier, is that the full Economic Cost of ARTC's business has not been correctly calculated.

In these circumstances, it is not appropriate for the Commission to adopt a price cap approach where this approach would allow ARTC to increase its price without any regard to:-

(a) cost savings that have been achieved by ARTC in the preceding year or should have been achieved during that year; and

(b) an increase in ARTC's profits caused by an increase in volume hauled on its Network.

The Commission needs to reconsider the price cap approach so as to take into account the interests of access seekers.

(d) Two-Part Tariff Structure

The Commission sought comments as to the appropriateness of the two-part tariff structure.[13]

SCT supports the two-part tariff structure proposed by the ARTC, and in particular, the weighting given to the flagfall component. The present weighting produces the most efficient outcomes by increasing path availability.[14]

The Draft Decision states that SCT has argued that the fixed charge should be zero.[15] This is not correct. SCT did not argue that the fixed charge should be zero when a train path is used. Rather, SCT argued that the fixed component should not be charged in circumstances where a train path is not used.[16]

5. Liabilities and Indemnities

In previous submissions, SCT raised its concerns in respect to the following two related issues:-

(a) The obligation on ARTC to maintain the network; and

[12] Draft Decision, p.113
[13] Draft Decision, p.110.
[14] SCT notes that ARTC has stated that the high fixed cost nature of rail infrastructure would suggest a flagfall component of pricing around 70% compared to the present level of 30%.
[15] Draft Decision, p.109.
[16] SCT Submission (Access Undertaking) dated 21.09.01 p.6. That is, there should be no cancellation penalties given that ARTC will be protected by the under-utilisation provision. Cancellation penalties will hinder attempts by companies to promote rail growth and consequently adversely affect intra-modal competition.

(b) The indemnities.

We deal with these two issues below.

(a) The obligation on ARTC to maintain the network.

The undertaking was amended to include a commitment by ARTC to maintain the Network in a fit for purpose condition. The Commission has since recommended that the Undertaking be further amended to define "fit for purpose" condition.

SCT was encouraged by ARTC's amendment to the Undertaking and the further amendment requested by the Commission.

This 'fit for purpose' condition is not only important as a safe guard against provision of inadequate services by ARTC (as correctly pointed out by the Commission and referred to in part 6 of this paper), but is also critically important when determining liability issues between ARTC and operators.

SCT has two main concerns with the manner in which ARTC has responded to the Commission's recommendation in relation to this issue.

First, we are concerned that ARTC now propose to amend clause 8.1 of the Undertaking to read "in a good and safe condition".[17] This obligation is still too broad as to be unenforceable. This does not address the Commission's recommendation.

There must be a clear obligation on ARTC to provide track in a condition which will allow the Operator to operate its trains in accordance with its train path entitlements and in circumstances where the track does not cause damage to any train operating on that track or any other loss or damage.

Our second concern centers around SCT's previous submission that there should be a corresponding "fit for purpose" clause in the Indicative Access Agreement. We are concerned that clause 6.1 of the Indicative Access Agreement as it is presently drafted is not consistent with this "fit for purpose" condition and is bound to lead to disputation unless it is amended. Our concern is based on advice SCT received from Mr. Michael Colbran of Queens Counsel.[18]

It is difficult to understand why ARTC did not address this inconsistency when it recently made other amendments to the Indicative Access Agreement. The question must be asked why ARTC did not amend clause 6.1 given the inconsistency.

As noted earlier, SCT'S concern is that because clause 3.10(b) of the Undertaking is ambiguous, ARTC may not, as part of its commitment to negotiate in good faith, be required to enter into negotiations on terms different to those set out in the Indicative Access Agreement.

Whilst the Commission has stated that ARTC would be obliged (as part of its commitment to conduct its negotiations in good faith) to give due consideration to each request that an operator makes to include in the Access Agreement a term that differs to that contained in the Indicative Access Agreement[19], this does not appropriately address the present ambiguity in clause 3.10(b) of the Access Undertaking.

[17] ARTC response to the Draft Decision p.5.
[18] Advice by Mr Michael Colbran Q.C. p.8 paragraph 17.
[19] ACCC Draft Decision p.168

In any event, it is important to note that when SCT requested the incorporation of the "fit for purpose" condition in the Indicative Access Agreement[20], ARTC responded by stating the following:-

"The requisite level of maintenance and track quality is inherent in the Agreement". [21]

It appears that ARTC's position is that clauses 6.1(a) and (b) in the Indicative Access Agreement as presently drafted already satisfies the "fit for purpose" commitment to be given in the Undertaking. If this is ARTC's position, then it is clearly the case that ARTC would take the view that it would be negotiating in good faith by refusing to amend clause 6.1 of the Indicative Access Agreement.

This issue, like the issue of insurance,[22] is a substantive issue that may have a bearing on the decision to seek access. As such, it should be addressed now.

SCT is concerned that the Commission may accept the Undertaking in circumstances where ARTC's conduct shows that it does not accept this commitment.

In the absence of the Commission being satisfied that ARTC will incorporate the 'fit for purpose' condition (in the form required by the Commission) in all future access agreements, the Commission should require this condition to be incorporated into the Indicative Access Agreement.

(b) The Indemnities

In a previous submission to the Commission, SCT relied upon the Advice provided by Mr Colbran Q.C. that stated, inter alia, the following:-

(i) The effect of certain amendments made by ARTC to the access agreement is that operators will have a strict liability rather than an obligation of performance;[23]

(ii) The indemnity provided by the operator suffers from four principal defects;[24] and

(iii) The operation of the indemnities may give rise to claims against an operator for loss and damage even in circumstances where the operator has not been in any way negligent or blameworthy.[25]

There were other aspects of the liability and indemnity clauses that Mr Colbran QC considered not to be at all "fair and reasonable".

The Commission correctly referred to one of the main concerns, being that the terms of the Indicative Access Agreement could attribute to operators responsibility for some injury or damage that would not be attributed to them at law in the absence of those terms. [26] This is one of the principle defects referred to above.

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[20] SCT Submission dated 8 October 2001
[21] ARTC Response to SCT submission dated 8 October 2001 Indicative Access Agreement, Outstanding Issues, p29
[22] In relation to the issue of insurance, the Commission recommended an amendment to the Indicative Access Agreement to require ARTC to expressly undertake to maintain the level of insurance referred to in the Indicative Access Agreement (refer ACCC Draft Decision p.173)
[23] M. Colbran Q.C. *op.cit* p.2 paragraph 4
[24] M. Colbran Q.C. *op.cit* p.3 paragraph 8
[25] M. Colbran Q.C. *op.cit* p.6 paragraph 13
[26] ACCC Draft Decision, p.171

However, the Commission did not require amendment to the Indicative Access Agreement because:-

(i) These clauses would not lead to a dispute about who is responsible for compensation for injuries or who is responsible for repair to damaged property; and

(ii) Any additional cost of access would not be so substantial as to make the proposed clauses unreasonable (given that the direct costs of access to the network are not excessive).[27]

In relation to the first test as to whether the agreement will lead to a dispute about who is responsible for compensation or damages, SCT respectfully submits that the likelihood of disputation is high.

We refer the Commission to Mr Colbran QC's Advice, and in particular, his advice concerning the important clause 5.5(g) that:-

> *"The word damage is equivocal as damage can occur without any intent or even knowledge".* (Underlining added) [28]

We also refer the Commission to the letter provided by the ARTC's solicitors, Kelly & Co in response to Mr Colbran QC's advice. Kelly & Co state the following:-

"The Opinion has construed the words 'caused or contributed' extremely narrowly. That is, they capture instances where neither party is in any way at fault. In our view, [the] better interpretation is that the words "caused or contributed" would be read down to require an analysis of fault to determine as a matter of fact which party caused the incident in question (or at least contributed to it)"[29]

In our submission, these comments by Kelly & Co considered in conjunction with Mr Colbran QC's advice [30] could only lead the Commission to the conclusion that the likelihood of disputation will be high.

This high probability of disputation would not only be contrary to the public interest, but give rise to such uncertainty as to have a bearing on the decision to seek access.

In our submission, this issue is no less a substantive issue than the issue of insurance where the Commission did, as noted above, require an amendment to the Indicative Access Agreement.[31]

The liability and indemnity clauses are likely to lead to disputes about who is responsible for compensation or damages. This is neither in the public interest or in the interests of access seekers. The Commission should require amendment.

The Commission has also considered that any additional costs (primarily in the form of insurance premiums) that may fall on an operator (because of additional responsibility) would not be so substantial as to make the proposed clauses unreasonable.

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[27] *ibid* p.172
[28] M. Colbran QC *op.cit* p.2 para 4
[29] Letter from Kelly & Co to ARTC dated 26 October 2001
[30] M. Colbran QC *op.cit* Particularly, Mr Colbran QC's advice concerning strict liability (p.2 para 4), the breadth of the indemnities (p.4 para 8(c)), and the obligations of ARTC (p.8 para 17)
[31] ACCC Draft Decision p.173

We note that the Commission did not have available to it any estimates of what effect these clauses would have on an operator's costs. We submit that existing operators and ARTC are in a position to provide this information to the ARTC and we comment on this further below.

First, it is important to understand the circumstances in which these additional costs could arise. These costs arise because an operator would be liable under a strict liability clause (relating to damages) in circumstances where it not negligent or otherwise in breach of the agreement.

Put another way, SCT accepts that operators should be liable where they are negligent or in breach of reasonable provisions in the access agreement but not otherwise.

This issue centers around clause 5.5(g) which provides that the operator agrees as follows:-

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

The word 'damage' did not appear in previous access agreements submitted by ARTC's predecessor. It was added by the ARTC.

As noted above, Mr Colbran QC has advised that the word damage is equivocal as damage can occur without any intent, or even knowledge. As Mr Colbran QC pointed out, the introduction of the word damage gives rise in effect to a strict liability rather than an obligation of performance. This means that an operator could be in breach of the access agreement in circumstances where it has not been in any way negligent or blameworthy.

In these circumstances, the operator could be liable under the agreement and not have the benefit of the ARTC indemnity by reason that the operator is strictly in breach of the agreement. This is one of the main problems with the liability and indemnity clauses.

We now turn to the question as to what additional costs could fall on the operator. It is necessary to consider the liability that could flow from such a breach. As noted above, the ARTC is able to advise the Commission of the costs of each derailment or other incident that has occurred in the past or the average costs of these previous derailments or incidents.

We recommend that the Commission request the ARTC to provide such information to allow the Commission to assess the possible effect of these clauses on an operator's cost. If this information is not forthcoming, SCT would be prepared to advise the Commission of the average claim arising in respect to incidents that SCT has been involved in. We await to hear further from the Commission in this regard.

The losses arising from past incidents should only be used as a guide as to the quantum of loss that may arise from similar incidents in the future. Of course, the unacceptable shift of liability referred to above could involve more serious incidents in which case the exposure to operators would be higher.

Further, it would not be appropriate for the Commission to discount, in anyway, the cost of this additional liability on the basis that it is an insurable risk. The cost of insurance will, over time, reflect the losses to which an insurer would be exposed.

In our submission, the costs of a "strict liability" claim is a significant additional cost on operators that the Commission needs to take into account.

This cost would have a bearing on the decision to seek access.

The additional costs that will fall on operators because of the unreasonable liability and indemnity clauses is substantial so as to have a bearing on the decision to seek access.

In considering what amendment is required to the indemnity clauses, we draw the attention of the Commission to the fact that operators have, for many years, operated under the indemnity provisions agreed to with ARTC's predecessor, Australian National Railways Commission. ("AN").

Operators agreed to the AN indemnity clauses on the basis of the price of access then offered by AN.

The current price for access is not significantly different to the price for access agreed to with AN. The access rates offered by ARTC have not been reduced to justify this shift in risk.

In these circumstances, where the price for access has not been reduced, it is not reasonable for Operators to accept any more risk or additional costs associated with that risk.

Mr. Colbran Q.C. has advised that whilst the form of the AN Agreement is certainly clumsy, amendment to its style can be made without distorting the scope of the "indemnity provision".[32]

The Commission should require the Indicative Access Agreement to be amended to reflect the same liability and indemnity clauses previously offered by AN.

6. The Service Standards

As noted above, the issue of track condition has not been resolved. The Commission has recommended that the "fit for purpose" condition be defined. The ARTC has advised that the relevant commitment in the Undertaking will be amended to read "in a good and safe condition". This does not address the Commission's recommendation.

Further, clause 6.1 of the Indicative Access Agreement as presently drafted adds to the uncertainty.

SCT submitted at the most recent public forum that the standard to which the Network is maintained is relevant for the purposes of the pricing principles. If access seekers do not know with certainty that the Network will be maintained to an appropriate standard, the price of access must reflect this uncertainty.

Further, it is important that ARTC's performance be measured in terms of both:-

(a) A Track Quality Index (TQI); and

(b) A measurement comprising minutes delayed caused by temporary speed restrictions.

We also believe that these key performance indicators should be independently reviewed and the results of that review be made available not only to the Commission, but to all operators.

7. The Term of the Agreement

Operators who have made or propose to make substantial investments in infrastructure require certainty in terms of both price and non-price conditions for a term greater than five years.

[32] M. Colben Q.C. *op.cit,* p.5 para 9

Terminal investment or leases usually involve periods of ten years or more.

Whilst the Commission has noted that the Undertaking should not act as a deterrent on ARTC and operators entering access agreements of a longer duration,[33] we remain concerned that the ARTC has not, during the last two to three years, indicated a willingness to enter a long term contract specifying a firm price beyond the five year term.

SCT will support the five year term of the Undertaking on the basis that it does not affect the ability of ARTC to offer long term contracts.

The Undertaking needs to be amended so as to make it clear as to whether an access seeker may request an Access Agreement for a term greater than five years with certainty during that period in terms of both price and non-price conditions.

8. Capacity Issues

(a) Spare capacity

ARTC's commitment to provide a graphical representation of committed entitlements, section running time information and route standards would not be sufficient to allow operators to assess availability of spare capacity.[34]

There are modeling tools available to show spare capacity.

(b) Highest Present Value Criteria)

At the most recent public forum, the ARTC indicated that the price of a train path covered by the Indicative Access Charge provisions may be higher than the Indicative Access Charge in circumstances where two or more access seekers have requested access to that train path.

The application of the "highest present value" criteria would allow the ARTC to auction train paths covered by the Indicative Access Charge. In these circumstances, we are concerned that the Indicative Access Charge affords little protection to access seekers.

We refer the Commission to our previous submissions setting out our concerns as to the auctioning of train paths.

The Commission has noted that when ARTC is allocating spare capacity, it would constrained by certain clauses in the undertaking including clause 4.3 (dealing with the "like for like" provision).[35] This is not correct because, as previously submitted, clause 4.3 presents no effective constraints on ARTC.

The Undertaking should provide that clause 5.2(b) of the Undertaking will not apply to those train paths referred to in clause 4.6 of the Undertaking.

(b) Network Connections

[33] Draft Decision, p.36.
[34] The Commission requested comments as to whether this information showed space capacity as opposed to utilization (Draft Decision, p.150).
[35] Draft Decision, p.116.

As previously submitted, the undertaking is deficient in that it provides that a connection must not, by virtue of its existence, reduce capacity. A connection will, by definition, reduce capacity.

The Commission has recommended that ARTC be required to provide reasons why a connection reduces capacity.[36] This is step in the right direction. However, it does not address the issue raised.

The Commission states that operators should be comforted by the fact that ARTC is required to negotiate in good faith which should be sufficient to prevent an abuse of discretion. However, as noted earlier, our concern is that ARTC may be held to be acting in good faith by diligently complying with an Undertaking which has been poorly drafted.

SCT in its submission [37] has requested that the Undertaking be amended to the effect that ARTC shall, where reasonably practicable, allow applicants to connect their facilities to the network on reasonable terms. This introduces some objectivity into these uncertain issues.

[36] Draft Decision, p.154.
[37] SCT Submission date 8 October 2001 p.12.