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Your ref:

Our ref:
fA29366-00006:

Date:
16 July 2009

Dear Dr Hawkins

A90 ABERDEEN WESTERN PERIPHERAL ROUTE COMPLAINT ALLEGING BREACH OF AARHUS CONVENTION

I refer you to your email dated 28 May 2009 which contained a complaint to the Scottish Government alleging failure to comply with the Aarhus Convention in relation to the proposed A90 Aberdeen Western Peripheral Route (AWPR). As outlined in my confirmation of receipt letter of 5 June, your email has been passed to me for reply.

Overview of Complaint

The complaint submitted to the Scottish Government on behalf of RoadSense concerns an alleged failure to comply with its obligations under the United Nations Economic Commission for Europe (UNECE) Convention on Access to Information, Public Participation in Decision Making and Access to Justice in Environmental Matters ("the Aarhus Convention") in the context of the procedures adopted in the promotion of the proposed AWPR.

The complaint alleges that the Scottish Government has failed to meet the requirements of the preamble, and has breached Articles 1, 3, 4, 5, 6, 7 and 9 of the Aarhus Convention. More broadly, it is alleged that there has been a failure by the Scottish Government to provide access to environmental justice.

The complaint has been submitted to the Scottish Government. The UK, and therefore Scotland, is a party to the Aarhus Convention. Transport is a devolved competence of the Scottish Government in terms of section 54 of the Scotland Act 1998. Transport Scotland is an executive agency of the Scottish Government. Accordingly, Transport Scotland is the appropriate body to respond to the substantive issues raised in your complaint.

Background

As you will be aware the proposed AWPR involves the construction of some 46km of offline dual-carriageway, typically of two lane standard, with junctions at key locations to allow the

AWPR to connect to the existing network of trunk and non-trunk roads around Aberdeen. The proposed AWPR is one of a range of measures originally proposed in the Modern Transport System (MTS) for the North East of Scotland developed in 2002 by the North East of Scotland Transport Partnership (Nestrans), the Regional Transport Partnership.

The general effect of the AWPR is to provide a new route to the west of Aberdeen to reduce congestion within the city, remove traffic from unsuitable rural and urban routes, improve safety, reduce journey times and improve journey time reliability. The AWPR is designed to function within the overall Regional Transport Strategy (the successor to the MTS) by facilitating the implementation of a range of public and other sustainable transport measures which would otherwise be compromised. The AWPR has been brought forward in accordance with the policies and objectives of the Scottish Ministers, and conforms with national, regional and local planning policy.

The AWPR is being promoted by Transport Scotland together with Aberdeen City Council and Aberdeenshire Council as project partners.

The AWPR is being promoted under the Roads (Scotland) Act 1984 which sets out the requirements for publication of draft road orders, receipt of objections and consideration of these in the forum of a public local inquiry. A complete set of draft road orders, Environmental Statement and draft Compulsory Purchase Order was published in September 2007. A second draft Compulsory Purchase Order was published in May 2008 principally to underpin the environmental commitments made in the Environmental Statement.

The draft Scheme Orders were promoted in accordance with the procedure set out in the Roads (Scotland) Act 1984. Objections were received to the draft Scheme Orders.

Paragraph 5 of Schedule 1 to the Roads (Scotland) Act 1984 provides that if an objection is received by the Secretary of State (now the Scottish Ministers by virtue of section 53 of the Scotland Act 1998) from any person on whom copies of the draft Orders required to be served, or from any other person appearing to be affected, then a local inquiry is to be held.

A public local inquiry (PLI) into the proposed AWPR was held between 9 September 2008 and 16 February 2009 during which independent Reporters appointed by the Scottish Ministers heard evidence in relation to outstanding objections to the proposed scheme. Oral evidence was heard at the inquiry between 9 September and 10 December 2008.

The public local inquiry considered evidence in relation to the technical and environmental aspects of the proposed AWPR, including evidence in relation to matters included in the Environmental Statement produced in accordance with the Environmental Impact Assessment (Scotland) Regulations 1999, as amended. The public local inquiry also considered alternative route alignments which were put forward by objectors to the proposed AWPR.

As you will be aware RoadSense participated in the public local inquiry and presented evidence to the Reporters on a range of matters.

Following consideration of the evidence heard at public local inquiry, the Reporters will report to the Scottish Ministers in relation to outstanding objections which were the subject of evidence at the public local inquiry. In doing so, the Reporters will make findings in fact on the contentious issues debated in evidence at the public local inquiry and will make recommendations to the Scottish Ministers in relation to the outstanding objections. Following consideration of the Reporters' report, the Scottish Ministers may approve the draft Orders as promoted, with

modifications which they see fit to impose, or may refuse to confirm the Orders to enable the AWPR scheme to proceed. In the event that the Scottish Ministers decide to confirm the Orders, the Orders will be subject to the affirmative order procedure. This means that the Orders cannot come into force unless the Scottish Parliament approves the Orders by resolution.

The first stage of the consenting process, being consideration of evidence by an independently appointed Reporter as required under the Roads (Scotland) Act 1984, is not yet complete, as recommendations based on evidence heard at PLI have yet to be submitted by the Reporters to the Scottish Ministers for consideration.

It should be noted that no decision has yet been taken by the Scottish Ministers on whether the AWPR should proceed.

Aarhus Convention - Legislative Framework

The objective of the Aarhus Convention is to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being. To achieve that objective, each party to the Convention is to guarantee the rights to the three broad principles which underpin the Convention; access to information, public participation in decision making and access to justice in environmental matters.

The Aarhus Convention was adopted by UNECE on 25 June 1998 and entered into force on 30 October 2001.

The United Kingdom of Great Britain and Northern Ireland signed the Aarhus Convention on 25 June 1998, with ratification on 23 February 2005. The following declaration was made upon signature and confirmed upon ratification of the Aarhus Convention:

"The United Kingdom understands the references in article 1 and the seventh preambular paragraph of this Convention to the 'right' of every person 'to live in an environment adequate to his or her health and well-being' to express an aspiration which motivated the negotiation of this Convention and which is shared fully by the United Kingdom. The legal rights which each Party undertakes to guarantee under article 1 are limited to the rights of access to information, public participation in decision-making and access to justice in environmental matters in accordance with the provisions of this Convention."

The Aarhus Convention was approved on behalf of the European Commission (EC) on 17 February 2005. The EC has been a party to the Aarhus Convention since May 2005. Directives concerning the key themes of the Aarhus Convention which have been adopted include:

- Directive 2003/4/EC of the European Parliament and of the Council of 28 January 2003 on public access to environmental information and repealing Council Directive 90/313/EEC addresses public access to environmental information;
- Directive 2003/35/EC of the European Parliament and of the Council of 26 May 2003 providing for public participation in respect of the drawing up of certain plans and programmes relating to the environment and amending with regard to public participation and access to justice Council Directives 85/337/EEC and 96/61/EC, addresses public participation in respect of the drawing up of certain plans and programmes relating to the environment.

Both Directives address access to justice.

Directive 2003/4/EC was transposed into Scots law by the Environmental Information (Scotland) Regulations 2004.

Directive 2003/35/EC was transposed into Scots law by the requirements of a number of statutes and statutory instruments including; the Environmental Assessment (Scotland) Act 2005, the Environmental Impact Assessment (Scotland) Amendment Regulations 2006 (amending the Environmental Impact Assessment (Scotland) Regulations 1999), the Environmental Assessment of Plans and Programmes (Scotland) Regulations 2004, the Town and Country Planning (Scotland) Act 1997 as amended, Parts 1 and 2 of, and Schedule 8 to the Planning and Compulsory Purchase Act 2004 and the Transport and Works (Scotland) Act 2007.

Preamble to the Aarhus Convention

The RoadSense complaint alleges that the Scottish Government and its agents have failed to meet the requirements of the preamble to the Aarhus Convention by failing to ensure that the environmental information contained in the Environmental Statement for the proposed AWPR and the Report to Inform an Appropriate Assessment for the crossing of the River De SAC was fit for purpose.

The preamble to the Aarhus Convention sets the context within which the need for the Convention was identified, the reasons for entering into a Convention in the manner drafted, and the aspirations of the Convention.

It is a general principle of interpretation that the preamble to any Convention, contract or other legal document does not represent the binding or operative provisions of that legal document. Rather, the preamble is intended to act as an aid to interpretation of the operative provisions of the document.

The RoadSense allegation that the Scottish Government has failed to observe the preamble to the Aarhus Convention will be addressed under reference to the operative provisions of the Convention where specific breaches are alleged. In demonstrating compliance with each of the Articles of the Convention in relation to which there is an alleged breach, it will be shown that the broad interpretative principles contained in the preamble have been observed.

The substantive issue of whether the environmental information contained in the Environmental Statement for the proposed AWPR and the Report to Inform an Appropriate Assessment for the crossing of the River Dee SAC is fit for purpose is a matter of fact, in relation to which evidence was led on behalf of RoadSense at the public local inquiry.

An Environmental Statement, comprising some 14 volumes and a non-technical summary, was published in September 2007. The approach taken to completion of the Environmental Impact Assessment reported in the Environmental Statement was set out in consultation with Scottish Natural Heritage (SNH), the statutory nature conservation advisor to the Scottish Government. The Environmental Impact Assessment identified the anticipated environmental impacts of the proposed AWPR, assessed the magnitude of those impacts and identified mitigation measures where appropriate. SNH raised no concern in relation to the adequacy or accuracy of information contained in the published Environmental Statement.

Transport Scotland's consultants have prepared a Report to Inform the Appropriate Assessment ("RIAA") of the impacts of the AWPR on the River Dee SAC, dated April 2008. The RIAA reports upon work undertaken to inform the competent authority at the date on which the appropriate assessment is undertaken. No appropriate assessment in relation to the proposed AWPR and its impacts upon the River Dee SAC has yet been undertaken. The approach taken to completion of the RIAA was set out in consultation with SNH. The RIAA concluded that, subject to appropriate mitigation, the construction and operation of the AWPR will not have an adverse impact on the conservation objectives for the qualifying species: freshwater pearl mussel, Atlantic salmon and otter, and that there will be no adverse effects on the integrity of the River Dee SAC. By letter dated 8 August 2008, Scottish Natural Heritage advised Transport Scotland and subsequently the Scottish Ministers, that it had formed the view, on the basis of the information provided by Transport Scotland and the appraisal carried out to date, that provided the proposals are undertaken in accordance with the proposed conditions/legal modifications, then the proposed AWPR would not adversely affect the integrity of the River Dee SAC. It is clear from the terms of SNH's letter that their appraisal included consideration of the RIAA of the River Dee SAC prepared on behalf of Transport Scotland in relation to both individual qualifying interests and the conservation objectives for the site. SNH raised no concern in relation to the adequacy or accuracy of information contained in the RIAA. RoadSense were provided a copy of SNH's letter which was lodged as an inquiry document at the recent PLI.

RoadSense made submissions to the public local inquiry which challenged the conclusion of the Environmental Statement, the RIAA, Transport Scotland's independent ecological advisors and SNH in relation to the adequacy of mitigation measures identified in the Environmental Statement and RIAA. The Reporters will make a finding in fact in relation to the adequacy of those mitigation measures. The Reporters have yet to report their recommendations following the public local inquiry. The Scottish Ministers have yet to undertake an appropriate assessment of the proposed AWPR. It is therefore our view that the complaint which has been made on behalf of RoadSense in relation to the information in the Environmental Statement and RIAA being unfit for purpose is premature.

Article 1 - Objective

The RoadSense complaint alleges that there has been a breach of Article 1 of the Aarhus Convention by the Scottish Government and its agents, by failing to provide information on the state of the environment and the status of protected species which would be impacted upon by the proposed AWPR.

Article 1 sets out the objective of the Aarhus Convention. It provides that "In order to contribute to the protection of the right of every person of present and future generations to live in an environment adequate to his or her health and well-being, each Party shall guarantee the rights of access to information, public participation in decision making, and access to justice in environmental matters in accordance with the provisions of the Convention." This should be read in the context of the declaration made by the UK Government upon signing and ratification of the signature to the Aarhus Convention.

The broad objective set out in Article 1 is with reference to the specific requirements of the remaining provisions of the Aarhus Convention. The RoadSense allegation that the Scottish Government is in breach of its obligations under Article 1 will be addressed under reference to the operative provisions of the Convention under which specific breaches are alleged. In demonstrating compliance with each of the Articles of the Convention in relation to which there

is an alleged breach, it will be shown that there is compliance with the broad objective outlined in Article 1.

Article 3 – General Provisions

The RoadSense complaint alleges that there has been a breach of Article 3 of the Aarhus Convention by the Scottish Government and its agents, by failing to provide information on the state of the environment and the status of protected species which would be impacted upon by the proposed AWPR.

Article 3 of the Aarhus Convention contains general provisions in relation to the measures to be taken in implementation of the Convention. It provides direction on the legislative and regulatory measures to be taken by contracting parties, the provision of guidance to the public seeking information, promotion of education and environmental awareness, provision of appropriate support to groups promoting environmental protection, application of the Convention without discrimination on the grounds of nationality or domicile, and other general matters in relation to the application of the Convention.

As outlined above, the UK Government as contracting party to the Aarhus Convention and Scottish Government in relation to its devolved competencies, have undertaken the necessary legislative and regulatory measures required to implement the various obligations imposed by the Aarhus Convention. The relevant legislative and regulatory measures are addressed below, in the context of specific Articles of the Convention.

Article 3 contains no substantive obligation in relation to the provision of information on the state of the environment and the status of protected species as described in the RoadSense complaint. It is assumed that the criticism made by RoadSense is intended to be a criticism that the measures taken by the Scottish Government to implement the obligations within the Aarhus Convention in relation to the provision of information are inadequate. This is addressed in the context of the alleged failure to comply with Article 4 of the Aarhus Convention.

Article 4 – Access to Environmental Information

The RoadSense complaint alleges that there has been a breach of Article 4 of the Aarhus Convention by the Scottish Government and its agents, by failing to provide information on the state of the environment and the status of protected species which would be impacted upon by the proposed AWPR. No examples are provided in the RoadSense complaint of the Scottish Government having failed to provide such information.

Article 4 requires contracting parties to the Aarhus Convention to ensure that public authorities, in response to requests for environmental information, make that information available to the public, within the framework of national legislation, subject to certain conditions and exceptions as set out in the Convention. Articles 4(3) and 4(4) of the Aarhus Convention prescribe those circumstances in which a request for environmental information may be refused. These include circumstances in which the disclosure of information would be prejudicial to the environment to which the information relates, such as (Article 4(4)(h)) the breeding sites of rare species.

The Scottish Government has been proactive in the publication of information in relation to the environmental effects of the proposed AWPR, including information on the status of protected species. An Environmental Statement, comprising some 14 volumes and a non-technical summary, was published in September 2007 as required by section 20A of the Roads (Scotland)

Act 1984 (inserted by the Environmental Impact Assessment (Scotland) Regulations 1999), which provides *inter alia* that;

"The Scottish Ministers shall publish notice of the environmental statement so as to ensure that members of the public who are likely to be concerned are given a reasonable opportunity to express an opinion before they decide whether to proceed with the project, and they shall not make any such decision without taking into consideration any opinion so expressed to them within a period of 6 weeks from the date of publication of the notice of the environmental statement."

The environmental statement was made available free of charge on-line on the AWPR project website (www.awpr.co.uk). Hard copies were deposited at the Managing Agent's office in Aberdeen for public inspection free of charge. Hard copies were available for purchase at a price to reflect the costs of printing, copying and distribution of additional copies, in terms of Section 20(5C) of the Roads (Scotland) Act 1984. Two hard copies of the Environmental Statement were provided to RoadSense free of charge in preparation for the public local inquiry into objections to the proposed AWPR.

Additional environmental and technical information on the proposed AWPR was made available free of charge on line at www.awpr.co.uk, to which RoadSense and any other member of the public could take access.

Further technical and environmental information, including information on the status of protected species, was lodged with the Scottish Government Directorate of Planning and Environmental Appeals in relation to the public local inquiry. Two hard copies of each document lodged by Transport Scotland were made available to RoadSense at no cost. Copies of each of the documents lodged by Transport Scotland were deposited at four libraries in the vicinity of the proposed AWPR (Central, Dyce, Culter and Stonehaven Libraries) for public inspection free of charge. In addition, Transport Scotland created a website at its own cost to allow public access to all information referred to throughout the inquiry process (www.awpr-pli.org).

Under the Freedom of Information (Scotland) Act 2002, any person who requests information from a Scottish public authority is entitled to be given a copy by the authority. This entitles RoadSense to access any information held by Transport Scotland in relation to the proposed AWPR, including information in relation to the impact of the proposed road on the environment or protected species, where that information had not already been made publicly available by Transport Scotland or other executive agencies of the Scottish Government. There are a number of exempt categories of information, to which the general entitlement under the Freedom of Information (Scotland) Act 2002 does not apply. These include a prohibition on disclosure by the Scottish Government where such disclosure is prohibited by another enactment, or would be incompatible with a Community obligation.

RoadSense and its members have made use of their rights under the Freedom of Information (Scotland) Act 2002 on a number of occasions to request and obtain access to information which had not otherwise been made publicly available. Transport Scotland has responded to all requests for information made by RoadSense and has in each case either provided the information or explained the reasons for that information being withheld, in the context of the statutory exemptions. If RoadSense is not content with the response which it has received, either because the information provided is thought to be inadequate or because the reasons for withholding information in the context of the statutory exemptions have felt to have been inadequate, RoadSense is entitled to appeal to the Information Commissioner for a review of that decision.

The requirements of Article 4 of the Aarhus Convention have been imported into domestic law through the provisions of the Roads (Scotland) Act 1984, the Environmental Impact Assessment (Scotland) Regulations 1999 as amended, the Freedom of Information (Scotland) Act 2002, and the Environmental Information (Scotland) Regulations 2004. Transport Scotland has complied with the relevant legislative provisions in promoting the proposed AWPR. Transport Scotland has provided information on the impact of the proposed AWPR on the environment and on protected species. Accordingly, it is our view that the allegation by RoadSense that there has been a breach of Article 4 of the Aarhus Convention by the Scottish Government and its agents, by failing to provide information on the state of the environment and the status of protected species which would be impacted upon by the proposed AWPR, is unfounded.

Article 5 – Collection and Dissemination of Environmental Information

The RoadSense complaint alleges that there has been a breach of Article 5 of the Aarhus Convention by the Scottish Government and its agents, by not providing information which could enable the public to take measures to prevent or mitigate harm arising from a threat to protected species. No examples are provided in the RoadSense complaint of the Scottish Government having failed to provide such information.

Article 5 requires contracting parties to the Aarhus Convention to ensure that public authorities take appropriate steps in relation to the collection and dissemination of environmental information.

Article 5(1)(c) provides that:

"In the event of any imminent threat to human health or the environment, whether caused by human activities or due to natural causes, all information which could enable the public to take measures to prevent or mitigate harm arising from the threat and is held by a public authority is disseminated immediately and without delay to members of the public who may be affected."

These provisions relate to situations in which there is an imminent or immediate threat to the environment and are not applicable to the proposed AWPR. However, the environmental impacts of the proposed AWPR, including its impact on protected species, have been assessed and reported in the Environmental Statement, as described above in relation to Article 4 obligations.

Transport Scotland has provided information on the impact of the proposed AWPR on the environment and on protected species. RoadSense has provided no examples of the Scottish Government having failed to provide information which could enable the public to take measures to prevent or mitigate harm arising from a threat to protected species within the meaning of Article 5 of the Aarhus Convention, to explain the basis upon which it asserts that it has failed to comply with those obligations. It is Transport Scotland's view that the alleged breach of Article 5 of the Aarhus Convention is unfounded.

Article 6 – Public Participation in Decisions on Specific Activities

The RoadSense complaint alleges that there has been a breach of Article 6 of the Aarhus Convention by the Scottish Government and its agents, by failing to seek public comment on a particular route proposal for the proposed AWPR in an open way, failing to provide information on new objectives for the proposal and not inviting the public to submit, either in writing at a

public hearing or inquiry, any comments, information, analyses or opinions on the route proposal.

Article 6 of the Aarhus Convention provides for public participation in decisions on an exhaustive list of specific activities listed in Annex 1 to the Convention, which includes the construction of motorways and express roads, or other EIA development. Article 6 is engaged by the proposed AWPR.

Public comment on particular route proposals

Throughout the development of the proposed AWPR leading up to the publication of draft Orders, numerous public consultations and exhibitions were held. These consultations, along with the consideration of other information in relation to the environmental and technical aspects of the proposed road, have led to changes to preferred route corridor at specific points in time during the proposed scheme's development.

One example is a major informal public consultation exercise in Spring 2005 to seek views on five alternative route corridor alignments which were proposed at that stage. This exercise gave residents, business and other interested parties the opportunity to comment on the alternative route corridors. The consultation took the form of a series of public exhibitions in communities situated close to the potential route corridors and across the wider North East of Scotland area. The exhibitions took place during March and April 2005, and more than 7,600 responses were received to the informal consultation. A Public Consultation Spring 2005 – Consultation Pack was prepared and made available to the public at each of the exhibitions. A report entitled 'Report on Public Consultation (March – April 2005)' summarising the public consultation exercise was published in November 2005 and made available to the public.

Following the broad corridor selection process, the development of scheme proposals and specific route alignment, which was undertaken to improve the standard of alignment, reduce environmental impacts and accommodate anticipated traffic flows, included extensive landowner consultations. The public have been given the opportunity to comment on the route of the proposed AWPR promoted through the draft Orders under the statutory process set out in the Roads (Scotland) Act 1984, which includes the opportunity to express objections and other comments in writing or to participate in the public local inquiry. Formal public exhibitions were also held at specific locations along the route to coincide with the publication of draft Orders.

It is Transport Scotland's view that RoadSense is incorrect in alleging that the Scottish Government has failed to seek public comment on a particular route proposal for the proposed AWPR in an open way.

Objectives

The six specific objectives for the proposed AWPR reflect the Scottish Government's five key transport headings of Environment, Safety, Economy, Integration and Accessibility, and are:

- Improve access to and around Aberdeen to improve transport efficiency and support the industrial areas in the City and the area to the north and west of Aberdeen (Economy and Employment);
- Provide traffic relief (including the removal of long distance heavy goods vehicle traffic) on the existing congested A90 route through and to the south of Aberdeen (Environment and Accessibility);
- Reduce traffic on urban radial routes reducing noise and air pollution and creating opportunities for pedestrianisation in the City Centre (Environment and Accessibility);

- Provide access to existing and planned park and ride and rail facilities around the outskirts of the City encouraging modal shift (Integration);
- Increase opportunities to maximise bus lanes and other public transport priority measures (Integration); and
- Improve road safety over a wide area through the reduction of traffic on local roads (Safety).

The proposed AWPR has a long and detailed history as a project. It was initially promoted by the local roads authority in the 1970s. The project has evolved since the 1970s, becoming in 2003 a trunk road project identified as being of regional and national importance. The objectives of the scheme have changed throughout that period, to reflect the changing nature and status of the project.

Scheme objectives for the proposed AWPR were first determined in the 1990s by Grampian Regional Council (predecessor to Aberdeen City Council and Aberdeenshire Council). In 2001, work began on a Modern Transport Strategy (MTS) to allow assessment of the transportation strategies which were to be considered to help resolve the north east of Scotland's transportation problems. New objectives were identified for the proposed AWPR at that stage. The MTS was issued for public consultation and comments invited on all aspects of the MTS, including the objectives for the proposed AWPR. When the Scottish Executive (now Scottish Government) became involved in the proposed AWPR project in its capacity as trunk roads authority, the objectives were reviewed in 2005 to reflect the role of the Scottish Executive (now Scottish Government) as trunk roads authority in the proposed scheme. The specific commitment to the AWPR project in the National Planning Framework for Scotland confirms the National level support for the principle of the project. There was a public consultation exercise inviting comments on the content of the National Planning Framework before its publication. Mr William Walton, on behalf of RoadSense, provided comment on the draft National Planning Framework 2 during the consultation period.

It is Transport Scotland's view that RoadSense is incorrect in alleging that the Scottish Government has failed to provide information on new objectives for the AWPR proposal.

Public comments, information, analyses or opinions

The draft Scheme Orders for the proposed AWPR were promoted in accordance with the procedure set out in the Roads (Scotland) Act 1984. Objections were received to the draft Scheme Orders from *inter alia* affected landowners and members of the public. Paragraph 5 of Schedule 1 to the Roads (Scotland) Act 1984 provides that if an objection is received by the Secretary of State (now the Scottish Ministers by virtue of section 53 of the Scotland Act 1998) from any person on whom copies of the draft Orders required to be served, or from any other person appearing to be affected, then a local inquiry is to be held.

A public local inquiry into the proposed AWPR was held between 9 September 2008 and 16 February 2009 during which independent Reporters appointed by the Scottish Ministers heard evidence in relation to outstanding objections to the proposed scheme. Oral evidence was heard at inquiry between 9 September and 10 December 2008. The public local inquiry considered evidence in relation to the technical and environmental aspects of the proposed AWPR, including evidence in relation to matters included in the Environmental Statement produced in accordance with the Environmental Impact Assessment (Scotland) Regulations 1999, as amended. The public local inquiry also considered alternative route alignments which were put forward by objectors to the proposed AWPR. RoadSense participated in the public local inquiry and presented evidence to the Reporters on a range of matters.

RoadSense is incorrect in alleging that the Scottish Government has failed to invite the public to submit, either in writing at a public hearing or inquiry, any comments, information, analyses or opinions on the route proposal.

Transport Scotland has engaged the public in a series of consultation exercises, to actively invite comment on proposed routes for the AWPR. Transport Scotland has acted transparently in establishing objectives for roads within the trunk road network and the proposed AWPR. The specific commitment to the objective of creating an AWPR in the National Planning Framework for Scotland confirms the National level support for the principle of the project. Transport Scotland invited comments on the published draft Orders and Environmental Statement, and Scottish Ministers called a public local inquiry to be held into the proposed AWPR in terms of the Roads (Scotland) Act 1984, which allowed the public to submit any comments, information, analyses or opinions on the route proposal.

RoadSense has provided no examples of the Scottish Government having failed to seek public comment on a particular route proposal for the proposed AWPR in an open way, failing to provide information on new objectives for the proposal or not inviting the public to submit, either in writing at a public hearing or inquiry, any comments, information, analyses or opinions on the route proposal contrary to the obligations imposed by Article 6 of the Aarhus Convention, to explain the basis upon which it asserts that it has failed to comply with those obligations. It is Transport Scotland's view that the alleged breach of Article 6 of the Aarhus Convention is unfounded.

Article 7 – Public Participation Concerning Plans, Programmes and Policies Relating to the Environment

The RoadSense complaint alleges that there has been a breach of Article 7 of the Aarhus Convention by the Scottish Government through its agents, by introducing a new objective for the strategic transport plan for the region without any public presentation or discussion.

The RoadSense complaint further alleges that there has been a breach of Article 7 by the Scottish Government by restricting the scope of the public local inquiry into objections to the proposed AWPR. RoadSense argues that the public local inquiry, with its scope restricted by Scottish Ministers to suit own interests, conducted by employees of the same Ministers and advising the Minister sponsoring the programme creating the environmental damage cannot be deemed to be a transparent or fair framework in terms of Article 7.

Article 7 obliges contracting parties to take appropriate practical and/ or other provisions for the public to participate during the preparation of plans and programmes relating to the environment, with a transparent and fair framework, having provided the necessary information to the public. To the extent appropriate, each contracting party may provide opportunities for public participation in the preparation of policies relating to the environment.

The AWPR is a project identified in the MTS and Regional Transport Strategy (RTS). The MTS, endorsed by the Scottish Executive in January 2003, provided the transport strategy for North East Scotland up to 2011.

The RTS was subject to a Strategic Environmental Assessment (SEA) as required by the Environmental Assessment (Scotland) Act 2005. Both the RTS and SEA were published in consultative draft form to allow the public to participate in the preparation of the policies contained in the RTS. The specific commitment to the objective of creating an AWPR in the National Planning Framework (NPF) and National Planning Framework 2 (NPF2) confirms the

National level support for the principle of the project. Both the NPF and NPF2 were subject to Strategic Environmental Assessment as required by the Environmental Assessment (Scotland) Act 2005. Both the NPF and NPF2 were published in consultative draft form, to provide information on the objective of providing an AWPR and to allow the public to participate in the preparation of the policies contained therein.

By letters dated 18 June 2008, the Scottish Ministers appointed Mr D N Gordon BSc (Hons) MSc MRTPI, Mr S Ferrie MSc MRTPI and Mr M Cunliffe BSc(Hons) MSc MCIWEM, independent Reporters from the Directorate of Planning and Environmental Appeals, to hold a public local inquiry into objections to the draft Schemes and Orders for the proposed AWPR which had not been withdrawn. The Scottish Ministers, having taken a policy decision to construct a Special Road to the west of Aberdeen, including a new dual carriageway link to Stonehaven (known as Fastlink) and having accepted the need in principle for the road, advised that they did not wish to be advised on the justification for the principle of the Special Road Scheme in economic, policy or strategy terms. The Scottish Ministers considered that strategies and policies referring to the Special Road Scheme would only be relevant to the inquiry insofar as they set the context for the AWPR and Fastlink. Scottish Ministers therefore only wished to be advised on the technical aspects of the route choice including the Environmental Statement published in connection with the Special Road Scheme and any opinions expressed thereon. Given the assessment approach taken in the Environmental Statement, Scottish Ministers wished to be advised on the technical and environmental issues associated with the individual components of the Northern Leg, Southern Leg and Fastlink as well as the entirety of the Special Road Scheme.

Schedule 1 to the Roads (Scotland) Act 1984 sets out the procedure for making or confirming certain orders and schemes, such as the AWPR Special Road Scheme and associated compulsory purchase orders. Paragraph 5 and 6 of Schedule 1 relate to draft orders and provide that if any person on whom a copy of the draft order is required to be served object and do not withdraw their objection, then the Secretary of State (now devolved to the Scottish Ministers by virtue of section 53 of the Scotland Act 1998) shall cause a local inquiry to be held. However, the Scottish Ministers may, if satisfied that in the circumstances of the case that the holding of an inquiry is not necessary, dispense with the inquiry. The equivalent provision in relation to draft Schemes is found at paragraphs 11 and 12 of Schedule 1 to the 1984 Act. These statutory provisions confer authority upon the Scottish Ministers to determine the scope of the inquiry.

Paragraph 1 of the Fourth Schedule to the Acquisition of Land (Authorisation Procedure) (Scotland) Act 1947 provides that the Ministers shall appoint a person to hold the inquiry and report thereon to him. This is the statutory authority which confers power upon the Scottish Ministers to draft a letter of appointment, appointing Reporters to hold the PLI. The relevant statutory provisions are in compliance with Article 7 of the Aarhus Convention.

The Scottish Government has a transparent and fair framework in place to provide sufficient information to enable the public to participate in the formation of policies in relation to the AWPR, including its specific commitment to the AWPR in the NPF and NPF2, which confirm the National level support for the principle of the project. The appointment of independent Reporters to hold an inquiry and the ability of the Scottish Ministers to determine the scope of that inquiry, having regard to the merits and circumstances of a particular case, is a practice regulated by statutory provisions which are in compliance with Article 7 of the Aarhus Convention. It is Transport Scotland's view that the alleged breach of Article 7 of the Aarhus Convention by the Scottish Government by introducing a new objective for the strategic transport plans for the

region without any public presentation or discussion, or holding an inquiry which cannot be deemed to represent a transparent or fair framework is unfounded.

Article 9 – Access to Justice

The RoadSense complaint contends that there has been a breach of Article 9(3) by the Scottish Government arising from there allegedly being effectively no access for the public in Scotland to an open and inexpensive review procedure before a court of law and/ or another independent and impartial body established by law, to challenge the substantive and procedural legality of the proposed AWPR.

RoadSense further allege that the public local inquiry into the proposed AWPR cannot be considered to provide an independent and impartial body through which to challenge the legality of the decision to construct the AWPR, having regard to its scope and the "acquiescence of the Reporters with the instructions of a Scottish Minister regarding the scope of [the] Inquiry", contrary to Article 9(2).

Article 9 of the Aarhus Convention contains various provisions in relation to access to justice. Article 9(3) imposes an obligation on contracting parties to ensure that, where they meet the criteria set down in national law, members of the public have access to administrative or judicial procedures to challenge acts and omissions by public authorities which contravene provisions of its national law relating to the environment. Article 9(2) imposes an obligation on contracting parties to ensure that members of the public who satisfy requirements of title and interest have access to a review procedure before a court of law and/ or another independent and impartial body established by law, to challenge the substantive and procedural legality of any decision which is subject to the provisions of Article 6 (i.e. including motorways or express roads or other EIA development). While certain remedies under Article 9 expressly mandate an inexpensive procedure to be available, Articles 9(2) and 9(3) impose no requirement that the administrative or judicial procedure be inexpensive.

The public local inquiry into the proposed AWPR is not intended to represent the independent and impartial body through which RoadSense are entitled to challenge the legality of the decision to construct the AWPR, as required by Article 9. The local inquiry process is one which is designed to lead to a report being prepared on the merits of outstanding objections to the proposed AWPR. Following consideration of the evidence heard at public local inquiry, the Reporters will report to the Scottish Ministers in relation to outstanding objections which were the subject of evidence at the public local inquiry. In doing so, the Reporters will make findings in fact on the contentious issues debated in evidence at the public local inquiry and will make recommendations to the Scottish Ministers in relation to the outstanding objections. Following consideration of the Reporters' report, the Scottish Ministers may approve the draft Orders as promoted, with modifications which they see fit to impose, or may refuse to confirm the Orders to enable the AWPR scheme to proceed. In the event that the Scottish Ministers decide to confirm the Orders, the Orders will be subject to an affirmative order procedure before the Scottish Parliament.

The first stage of the consenting process, being consideration of evidence by an independently appointed Reporter as required under the Roads (Scotland) Act 1984, is not yet complete, as recommendations based on evidence heard at PLI have yet to be submitted by the Reporters to the Scottish Ministers for consideration. No decision has yet been taken on whether the proposed AWPR will proceed. There is a lack of logical reasoning in RoadSense's contention that the public local inquiry, which is designed to inform a decision which has not yet been taken,

is inadequate as an independent and impartial body through which to challenge the legality of the decision to construct the AWPR.

There is a statutory remedy of judicial review available under the Roads (Scotland) Act 1984 which is available to RoadSense to challenge the decision to proceed/ not to proceed with the proposed AWPR as the case may be. While the principle function of judicial review is to examine the procedural and legal propriety of a decision, rather than to reconsider the substantive question in relation to which discretion has been conferred by statute on the Scottish Ministers, a petition for judicial review can call into question the proportionality or irrationality of a decision or examine any question of error in relation to that decision.

It is Transport Scotland's view that the alleged breach of Article 9 of the Aarhus Convention is unfounded.

Additional Comments by RoadSense - Access to Environmental Justice

The RoadSense complaint alleges that there has been a failure by the Scottish Government to provide access to environmental justice, in two respects;

- The procedure for reviewing the impact of the proposed AWPR on the environment has not been in accordance with the principles of the Aarhus Convention.
 - (i) The scope of the public local inquiry is contrary to Articles 7, 9(2) and 9(3);
 - (ii) RoadSense doubts whether the Ministers can be impartial with respect to the merits of a scheme which they are themselves promoting;
 - (iii) RoadSense has doubts whether the inquiry should have been conducted by Reporters 'working closely to the instructions of the Scottish Government'. In other words, RoadSense doubts the impartiality of the Reporters appointed to hear the inquiry;
 - (iv) The inquiry could not possibly be regarded as independent, or fair to the interests of the public and those affected by the proposal.

- There is restricted ability to seek justice through the Scottish Judicial Review system.
 - (i) Judicial Review does not consider the merits of a decision.
 - (ii) Judicial Review is prohibitively expensive, contrary to Article 9(2).
 - (iii) The time limit for appealing a Ministerial decision in relation to Road Orders is insufficient.

Each of these matters has been addressed above in response to specific allegations of breaches of specific obligations under the Aarhus Convention.

Summary

RoadSense alleges that the Scottish Government has failed to meet the requirements of the preamble, and has breached Articles 1, 3, 4, 5, 6, 7 and 9 of the Aarhus Convention. More broadly, RoadSense alleges that there has been a failure by the Scottish Government to provide access to environmental justice.

As outlined in our response above it is Transport Scotland's view that RoadSense's allegation of breach of the requirements of the preamble and various Articles of the Aarhus Convention are unfounded.

I hope the above addresses the concerns that you have raised in the complaint you submitted on behalf of RoadSense. Should you require any further information please do not hesitate to contact me at the above address.

Yours sincerely

Alasdair Graham

Alasdair Graham
Project Manager

