IPART Independent Pricing and Regulatory Tribunal | NSW

Review of the NSW Rail Access Undertaking

Draft Report

October 2022

Transport »

Tribunal Members

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Invitation for submissions

IPART invites comment on this document and encourages all interested parties to provide submissions addressing the matters discussed.

Submissions are due by Friday, 16 December 2022

We prefer to receive them electronically via our online submission form.

You can also send comments by mail to:

Review of the NSW Rail Access Undertaking
Independent Pricing and Regulatory Tribunal
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If you require assistance to make a submission (for example, if you would like to make a verbal submission) please contact one of the staff members listed above.

Late submissions may not be accepted at the discretion of the Tribunal. Our normal practice is to make submissions publicly available on our website as soon as possible after the closing date for submissions. If you wish to view copies of submissions but do not have access to the website, you can make alternative arrangements by telephoning one of the staff members listed above.

We may decide not to publish a submission, for example, if we consider it contains offensive or potentially defamatory information. We generally do not publish sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please let us know when you make the submission. However, it could be disclosed under the *Government Information (Public Access) Act 2009* (NSW) or the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW), or where otherwise required by law.

If you would like further information on making a submission, IPART's submission policy is available on our website.

The Independent Pricing and Regulatory Tribunal

IPART's independence is underpinned by an Act of Parliament. Further information on IPART can be obtained from IPART's website.

Acknowledgment of Country

IPART acknowledges the Traditional Custodians of the lands where we work and live. We pay respect to Elders, past, present and emerging.

We recognise the unique cultural and spiritual relationship and celebrate the contributions of First Nations peoples.

Executive Summary

The NSW Rail Access framework was put in place in 1999 to govern third party access to the NSW rail network. In the last two decades, there have been changes to the regulatory practice, ownership, scope, and complexity of the networks covered under the *Transport Administration Act 1988* (Transport Administration Act) and NSW Rail Access Undertaking (NSW Undertaking), which make up the framework.

The NSW Undertaking has largely served its purpose in providing a basic set of terms that allow coal, grain, general freight, passenger, and heritage services ("access seekers") to use rail networks. However, protracted commercial negotiations have presented a barrier to entry and expansion, and the NSW Undertaking does not adequately curtail market power.

Over the last decade, the access provider for the Hunter Valley Coal Network sectors under the NSW Undertaking - Railcorp (now the Transport Asset Holding Entity (TAHE)) - consistently exceeded the maximum revenue allowed, and the over-recovery has not yet been returned to access seekers as required by the NSW Undertaking. Across all networks, it can be difficult for access seekers to negotiate non-price terms of access. Rail access providers provide limited transparency and exercise discretion about available capacity and how they allocate it, and it can take a long time to approve rolling stock.

In addition, some parts of the NSW rail network are currently regulated under voluntary undertakings made under the *Competition and Consumer Act 2010* (Cth) (Competition and Consumer Act). Because there is scope for access providers to come back to the NSW Undertaking, they are able to switch between regimes and exploit the regulatory uncertainty to make deals to their advantage.[1]

All of these factors discourage access seekers from entering or expanding their operations in the NSW market, including investing in newer and more efficient technology.

Some of these issues were identified by the NSW Productivity Commission in its 2021 White Paper. It recommended that the NSW Government ask IPART to review the NSW Undertaking including its interaction with the national rail access regime.

We commenced our review of the NSW Rail Access Undertaking in August 2021. This Draft Report presents our draft recommendations for consultation. These are intended to address the NSW rail access framework's shortcomings. They aim to improve:

As a package, our draft recommendations would improve stakeholders' confidence and certainty in the NSW rail access framework.

Improving the negotiate-arbitrate form of regulation, with enhanced oversight

We are making draft recommendations to maintain the 'negotiate-arbitrate' model of seeking access, but with new requirements to ensure:

- timely negotiations and effective dispute resolution processes
- bargaining power imbalances are addressed through information disclosure requirements, clear and transparent non-pricing terms and conditions, pricing terms, and obligations to consult with access seekers.

A negotiate-arbitrate model recognises that the parties to a commercial transaction are better informed than the regulator about costs and service requirements. It allows parties the flexibility to negotiate an agreement that reflects their commercial interests and react more promptly to emerging commercial opportunities. However, it is less effective where the access provider does not provide access seekers with enough relevant information and takes too long to respond to inquiries and offers. Our draft recommendations are intended to increase the efficiency and effectiveness of negotiated outcomes.

We are recommending that the same rail access framework would apply across the whole of NSW (except where an access provider has a voluntary undertaking under the Competition and Consumer Act). However, we recognise that there are significant variations between networks, both in terms of market power, and other characteristics such as utilisation, customer types, and geography. Therefore, we are recommending a framework that is largely principles based. Individual access providers would be required to offer an undertaking that is tailored to their particular network, but consistent with legislatively prescribed principles according to their own network characteristics. We are proposing that:

- Obligations that apply to all access providers and access seekers should be contained in the Transport Administration Act and its regulations.
- Terms and conditions of access specific to individual access providers are contained in separate undertakings. These would replace the existing NSW Undertaking. Access providers would be required to include the details of how they would implement the non-pricing principles, pricing principles, investment consultation principles, and the unders and overs account and loss capitalisation account (where relevant).

Under our draft recommendations, each rail access provider would be required to submit a proposed undertaking to IPART for approval. IPART would determine whether an undertaking complies with the requirements set out in the Transport Administration Act. Where an undertaking does not meet the requirements in the Act or an access provider fails to submit an Undertaking, IPART would be able to develop a default undertaking for that access provider.

Statutory timeframes and more guidance for negotiation and arbitration

We are recommending new statutory timeframes for key steps in the negotiation process to facilitate more balanced, timely and efficient negotiations between parties. We have also made a draft recommendation that the framework should provide for collective negotiations where lawful and there is sufficient common interest.

If the parties don't reach a negotiated agreement within 3 months or a later date agreed by all parties, it would trigger the dispute resolution mechanism. This would reduce an access provider's ability to exercise market power to deter access seekers from seeking dispute resolution voluntarily.

We also considered how to reduce costs, risks and uncertainties associated with disputes. Our draft recommendations include offering access seekers the choice of using conciliation as another lower cost form of dispute resolution, clarifying that related proceedings that affect multiple access seekers may be consolidated and heard at the same time, and providing more guidance on the arbitration process.

These draft recommendations would help ensure that dispute resolution is a credible threat of intervention. This should provide a stronger incentive for all parties to reach mutually agreeable negotiated outcomes.

Improved information disclosure

Under our draft recommendations, access providers would be required to disclose more information on services, costs, prices, network development and performance, including a default price for standard services, and all negotiated prices that access seekers pay. Access providers would be required to publish this information, improving accessibility for access seekers. The information would need to comply with a new information standard developed by IPART.

Access providers would also be required to set out in their undertakings transparent and enforceable provisions detailing how they make decisions around allocating, managing and transferring capacity, and permitting rail operators to access the network.

The Rail Safety National Law, which the Office of the National Rail Safety Regulator (ONRSR) administers, applies to all railway operations in Australia. Reviewing these arrangements is outside the scope of our review. Our draft recommendations are consistent with the Rail Safety National Law and would have no impact on its operation.

Clearer pricing provisions and greater investment consultation

Even with the enhanced information disclosure requirements, access seekers may still not be able to negotiate efficient prices due to the market power of a monopoly access provider. We are making the draft recommendation that the NSW access framework includes the following set of price principles to protect against the exercise of market power:

Existing provisions to be maintained

1. The combined revenue from access prices cannot be more than the full economic cost of providing access (current ceiling test).
2. Access prices cannot be less than the direct costs of using the network (access seeker specific part of current floor test).
3. Shared revenue from access prices should recover the incremental costs of providing access (sector specific part of current floor test).

New provisions:

4. Changes in an access seeker's access price should reflect commercial requirements, such as an increase in the cost of providing access.
5. Access seekers competing in the same downstream market should pay the same access price for the same service except if there is a cost difference.

We have made draft recommendations to improve and clarify the application of the ceiling test.

For new investment, we are making a draft recommendation to introduce new consultation provisions into the Transport Administration Act. These would establish clear requirements on access providers to provide access seekers with greater input into capital expenditure and network planning that they fund either directly or indirectly.

An effective access regime must be enforceable

The current Undertaking confers several compliance functions on IPART as rail access regulator. However, it does not give IPART any express powers to enforce these requirements (or deter non-compliance), except where access seekers seek arbitration. Consistent with other access regimes, our draft recommendation is that IPART, as access regulator, should have the ability to use a range of express enforcement mechanisms, depending on the breach. These would include giving directions, seeking monetary penalties and other court orders. Combined with the other mechanisms, being able to compel access providers to return excess revenue would curtail the exercise of market power which has persisted over the last decade.

The access provider should continue to be a single entity

We are making a draft recommendation that the NSW rail access framework continues to hold a single entity accountable for providing third party access to their sector(s) of the NSW rail network. Currently this is the rail infrastructure owners (TAHE for most networks, and the Australian Rail Track Corporation (ARTC) for the others). However, we consider that the entity that is held accountable does not necessarily need to be the rail owner. This is because it does not always undertake the functions that provide effective access – particularly the "above rail" functions such as allocating capacity. On TAHE's network, Transport for NSW (TfNSW) and the rail infrastructure managers provide many of these functions, and in some cases, TAHE has limited influence. For the rail networks owned by TAHE, the NSW Government should review which entity should be accountable for providing third party access.

The NSW framework has limited ability to solve coordination issues between jurisdictions

Network fragmentation nationally and poor harmonisation of operating rules, standards, processes and regulation between jurisdictions are causing operating constraints and inefficiencies. The NSW rail access framework also allows access providers to offer access either on the terms of the NSW Undertaking or a voluntary undertaking made under the Competition

and Consumer Act. Access providers have used the differences between these regimes to enhance their bargaining power when negotiating with access seekers.

Most of these harmonisation problems cannot be addressed through the NSW rail access framework unilaterally. However, where there are benefits to doing so, some of our draft recommendations would introduce greater regulatory consistency with other regimes and therefore reduce access providers' abilities to use these differences as leverage in negotiations.

We have also made draft recommendations that would protect against a gap in non-pricing terms and conditions when a voluntary undertaking made to the ACCC expires or is withdrawn, including allowing IPART, as rail access regulator, to put in place a default undertaking.

We seek your feedback on our draft recommendations

We invite all interested parties to make submissions on our Draft Report by 16 December 2022. We will hold a public hearing in November 2022 and consider all submissions, before submitting our Final Report to the Minister for Transport and Minister for Customer Service by May 2023.

Seek Comment

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Draft Recommendations

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Chapter 1

Our approach and what we heard from stakeholders

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The NSW Government has asked us to review whether the NSW Rail Access Undertaking (the NSW Undertaking) and its surrounding regulatory framework remain fit-for-purpose, considering changes in the ownership, scope and complexity of the networks covered by the NSW rail access framework. The terms of the NSW Undertaking remain largely unchanged since they first came into effect under the NSW Rail Access Regime in 1999. The NSW Undertaking provides for third party access to certain NSW rail network sectors owned by the Transport Asset Holding Entity (TAHE) (formerly RailCorp) and leased by the Australian Rail Track Corporation (ARTC). The third parties are called "access seekers", and can include freight and passenger train operators, or businesses transporting their products using their own trains or contracting to train operators.

This Draft Report outlines our draft recommendations to improve the NSW rail access framework and explains how we reached these draft decisions.

1.1 Our approach to this review

In July 2021, we consulted on a draft terms of reference to ensure that our review focused on the key issues that are important to stakeholders. In November 2021, we published an Issues Paper, which set out the context, our approach, our preliminary views on the key issues for the review, and sought stakeholder feedback.

In our Issues Paper, we proposed 5 principles about what an effective third party access regime should look like to guide our approach to the review.

Proportional
Constrains use of market power, without unnecessary regulation

Efficient
Facilitates efficient use of, and investment in, the rail network

Flexible
Responsive to changing market and environmental circumstances

Regulatory certainty
For rail owners, access seekers and end customers

Enforceable
Effective in protecting rail owners and access seekers' rights

We have used these criteria to identify where the NSW framework is not working well and to make appropriate draft recommendations to improve it.

Following the Issues Paper, we held a series of bilateral meetings with stakeholders including access providers, rail operators, freight customers, government agencies and other access regulators. Through these meetings we sought to better understand stakeholders' concerns, and sought feedback on our preliminary views to refine our draft recommendations.

We undertook our own research and analysis. We sought expert advice from Synergies Economic Consulting to inform our understanding of rail operations, non-price access conditions and inter-jurisdictional complexities, and Axiom Economics on the negotiation and dispute resolution processes.

1.2 What we heard from stakeholders

Our stakeholders for this review have mainly included:

- rail access providers
- rail operators that hold access rights
- customers that use rail to transport freight and passengers
- government agencies responsible for rail and freight policy and rail operations
- other rail access regime regulators.

In response to our Issues Paper, most stakeholders generally supported maintaining the 'negotiate-arbitrate' framework for negotiating price and conditions of third party access. For example, Aurizon submitted that:

> …the outcomes from negotiated settlements provide a more constructive basis to regulate infrastructure compared to direct regulatory control and prescription.[2]

The ARTC stated that optimal outcomes are achieved where:

> …negotiation [is] based on individual (or collective in some instances) valuation of risks and assessment of the service offering by each side.[3]

They considered that there isn't a role for the regulator in negotiations before agreement is reached or a dispute is triggered. Aurizon stated that:

> …interposing IPART during the negotiation phase has the potential to fundamentally alter the incentives and dynamics of negotiation…. This in turn could be seen as either pre-empting (or effectively replicating) the outcome that might arise from arbitration…[4]

Although the Hunter Rail Access Taskforce (HRATF) stated that:

> …a stronger form of regulatory oversight would need to apply to parts of the network where there is a greater risk of market power (or monopoly power) being exercised. This would include the [Hunter Valley Coal Network], given the absence of any real competitive alternatives available to Hunter Valley coal producers.[5]

However, most stakeholders pointed out various shortcomings of the NSW rail access framework that they consider limit its effectiveness.

1.2.1 Lack of certainty and transparency is a barrier to entry and expansion

Access seekers lack certainty and transparency about prices and availability of train paths and so are reluctant to make investments that would facilitate entry or expansion. Qube stated that:

> This imbalance in price-related market power, and real time control in the day-to-day management of rail freight operations on the network actively deters the use of rail and new capital investment in sidings, terminals and rolling stock.[6]

In particular, some stakeholders raised concerns about the lack of transparency and rigidity around passenger priority and the onerous processes for approving new rolling stock. Qube stated that:

> …rail freight operators incur significant cost from the unvetted interpretation of passenger priority and unable to access its network for approximately one-third of each week day.[7]

Pacific National suggested that:

> …it is appropriate to consider whether passenger priority in rural or regional areas with low passenger train utilization is economically efficient… this issue should be examined closely because the economic costs to freight operators can be significant.[8]

Pacific National suggested further that transparency and certainty about how capacity will be allocated could be improved by setting the timing and location of planned maintenance before any passenger or freight paths are allocated.[9]

Qube also stated that:

> A lack of willingness from Transport for NSW or the TAHE to include an obligation to review and approve new rolling stock represents a deterrent to investment and places the risk on rail operators that new rolling stock will be unable operate as designed in the network.[10]

1.2.2 A market power imbalance between access providers and seekers increases costs and leads to inefficient pricing outcomes

Some stakeholders told us that negotiations take an excessively long time and access seekers perceive an imbalance of market power between themselves and the access provider. Aurizon stated that:

> This imbalance in negotiating power can see the network owner taking more of a 'take it or leave it' approach based on boilerplate agreements, rather than being willing to negotiate around non-standard terms and alternative approaches to the allocation of risk.[11]

Some stakeholders suggested that this imbalance largely results from lack of information disclosure, particularly on the costs of providing the service. Aurizon stated that information asymmetry:

> …can exacerbate the imbalance in negotiating power between the network owner and access seekers and makes it difficult to determine if the proposed access charges are fair and reasonable. This could also lead to inefficient pricing outcomes, including price discrimination that distorts competition in one or more downstream markets.[12]

Some stakeholders claimed that access providers have also expressed reluctance to invest in capacity or consult stakeholders on investment decisions. Qube stated:

> Since the commencement of the undertaking, investment in the infrastructure has been driven by government (i.e. the network owner), often without engaging with network users.[13]

Pacific National stated:

> Genuine consultation between rail networks and rail operators to target investment of the right amount in the correct locations and to improve process efficiencies is likely to result in better outcomes to freight customers.[14]

1.2.3 Current industry structures mean the rail owner has limited incentives to invest in and operate rail assets efficiently

Some stakeholders have told us that the rail owner doesn't hold the safety accreditation to carry out and approve maintenance and outsources all maintenance, path allocation, access negotiations, etc. leading to accountability problems. Qube stated that:

> …the multiple government agencies and complex regulatory arrangements add cost, discourage investment, blur accountabilities and hide inefficiencies.[15]

It further stated:

> …the current industry arrangements also fail to provide an incentive for rail operators to invest in new rolling stock and terminals. This disincentive is driven by a misalignment of economic, environmental and safety regulation.[16]

1.2.4 Pricing provisions are unclear and not responsive to changing market circumstances

Some stakeholders have told us that pricing provisions are not responsive to changing policy and market circumstances increasing the risk to owners of asset stranding. The ARTC stated that:

> The regulatory framework needs to… allow for the reality that demand uncertainty is increasing at an increasing rate due to global responses to the risks of climate change. The principle of flexibility therefore requires a framework that allows for the appropriate allocation of stranding risks driven by changing risks rising from climate change and the policy market and policy responses that arise from it.[17]

1.2.5 Lack of enforcement mechanisms means the regulator is unable to prevent monopoly pricing

IPART has no express enforcement functions under the NSW rail access framework. It cannot enforce breaches of the pricing provisions unless the parties trigger an arbitration. Access seeker-led arbitration is often not an appropriate mechanism to enforce requirements that are common across many parties. To date, access seekers have not used arbitration to seek refunds they may be entitled to as a result of a breach of the ceiling test. Hence, these pricing requirements are not enforced in practice. The Hunter Rail Access Taskforce noted that:

> Where IPART detects non-compliance, there also appears to be little that it can do to enforce the obligations of rail network operators.[18]

Qube stated that:

> Without legislative obligations and accountability to an independent party, network managers have little incentive to facilitate the movement of freight by rail.[19]

1.2.6 Access providers can use the option of switching regulatory regimes to further their commercial objectives

The NSW framework is the default regime for parties who have voluntary access undertakings with the ACCC. The ARTC currently has 2 voluntary undertakings – one for the Hunter Valley, and the other for the Interstate network. The ARTC can return to the NSW framework in certain circumstances. The Hunter Rail Access Taskforce stated that:

> …if regulation of the [Hunter Valley Coal Network] reverted to the state regime, many of the operational, governance and process elements that have been developed in the [Hunter Valley Access Undertaking] over the last decade would be lost. These include sophisticated mechanisms for capacity management, supply chain coordination (including with coal terminals at the Port of Newcastle) and user consultation around capacity investment, as well as a set of minimum terms and performance standards.[20]

1.2.7 Regulatory and operational inconsistencies between networks increases rail operators' costs

Rail operators incur additional costs and inefficiencies when running trains across multiple networks. Each network's rail infrastructure manager sets different standards, operating codes, and procedures for the network they manage, which operators must comply with.

Many stakeholders expressed concern that the NSW rail access framework doesn't consider the interoperability of different rail networks to offer a seamless end-to-end service and reviewing the Undertaking in isolation is unlikely to deliver greater alignment.

Aurizon stated:

> The fragmented nature of rail access regulation in Australia creates uncertainties and inconsistencies in the terms and conditions of access across regimes – this risk is highlighted in NSW. This ultimately undermines productivity, efficiency and investment incentives, to the detriment of end customers.[21]

Qube stated:

> …operators have incurred further cost from the inability of network owners to align on operational and safety issues…
>
> …each of the three mainline network owners in NSW deliver separate and, largely, nonaligned maintenance strategies which directly affect freight operations.[22]

GrainCorp stated:

> More coordinated regulation, addressing end-to-end freight movement across different networks and access undertakings, would drive productivity gains and reduce costs for users. It would also provide rail access seekers with confidence to make long-term planning decisions, including in rail infrastructure investment and innovation.[23]

1.3 What else we considered in making our draft recommendations

The rail access framework exists within a broader legislative and policy environment that applies to rail infrastructure and freight movements (see Chapter 2). While not directly part of the NSW rail access framework, government policies on rail, road and port infrastructure, freight and passenger operations, and the environment both influence and are influenced by the framework. For example:

- the government's statutory and policy instruments to prioritise passenger services on the rail network
- climate change mitigation policies that reduce demand for and/or supply of fossil fuels such as coal, which leads to a change in the use of rail infrastructure
- the Future Transport 2056 strategy's findings that freight volumes in metropolitan NSW will likely double by 2056 and that the amount of freight transported by rail will need to increase to accommodate this.

We have consulted with Transport for NSW (TfNSW) throughout our review to ensure that our draft recommendations on the NSW rail access framework consider the impacts on and of relevant Government policies.

In line with our terms of reference, throughout this review we've also considered:

- opportunities to harmonise a rail operator's experience across different networks where it would be beneficial to do so.
- the impact of our draft recommendations and how to reduce unnecessary regulatory or administrative burdens on access providers, rail operators and their customers.

Rail operators often cross multiple networks, within and beyond NSW, to reach their end destination. Along the way, they must comply with the requirements and protocols of each network and may be required to negotiate access under different undertakings. In forming our draft recommendations, we have considered the outcomes of the ACCC's review of the regulatory framework for ARTC's Interstate network.[24] We also note the ongoing work of the National Transport Commission and other national agencies on the National Rail Action Plan to improve harmonisation and standards across rail networks.

The Rail Safety National Law, which the Office of the National Rail Safety Regulator (ONRSR) administers, applies to all railway operations in Australia.[25] Reviewing these arrangements is outside the scope of our review. Our draft recommendations are consistent with the Rail Safety National Law and would have no impact on its operation.

1.4 Structure of this Draft Report

The following chapters explain the context of our review and discuss these issues and the rationale for our draft recommendations in more detail.

- Chapter 2 explains how the NSW third party access framework was designed and functions currently, including the regulatory instruments, coverage, participants and IPART's role
- Chapter 3 discusses our conclusions on the appropriate form of regulation and how our draft recommendations would be implemented
- Chapter 4 discusses our draft recommendations on who should be the accountable parties under the framework
- Chapters 5 and 6 discuss our draft recommendations to improve the effectiveness of the access negotiation and dispute resolution processes
- Chapter 7 discusses our draft recommendations to improve information disclosure
- Chapter 8 discusses our draft recommendations on the minimum non-price terms and conditions of access
- Chapters 9 to 12 discuss our draft recommendations on pricing provisions, including how the ceiling test should be applied, function of the unders and overs account, and how access providers should consult on capital expenditure and capitalise losses
- Chapters 13 and 14 discuss our draft recommendations to ensure access providers comply with the framework's requirements and that they are enforceable
- Chapter 15 discusses our draft recommendations to ensure that the framework provides certainty and stability if access providers transition from the national rail access regime to the NSW framework.

Chapter 2

The NSW third party rail access framework

02

The 1995 Competition Principles Agreement recommended that all states and territories establish third-party access regimes for significant infrastructure facilities where:

- it would not be economically feasible to duplicate the facility
- access is necessary to permit effective competition in an upstream or downstream market
- safe use of the facility can be ensured at an economically feasible cost.[26]

The NSW Government developed the NSW rail access framework to implement its obligations under this agreement (Box 2.1). It provides a framework for access seekers to negotiate price and non-price terms and conditions of access to monopoly rail infrastructure. It aims to encourage the efficient use of, operation, and investment in rail infrastructure and promote competition in upstream and downstream markets (i.e. markets that produce products that need transport by rail and those that sell or use those products as an input).

This chapter sets out:

- who are the access providers, access agreement holders and key customers in NSW
- the legislation and regulatory instruments that comprise the NSW rail access framework
- the parts of the NSW rail network subject to each regulatory instrument
- IPART's roles under the NSW rail access framework.

Box 2.1 Competition Principles Agreement for state access regimes

Among other things, the Competition Principles Agreement recommends an access regime include the following principles:

- where possible, access should be based on terms and conditions agreed between the facility owner and access seeker
- where agreement can't be reached, the owner and access seeker should fund an independent body, whose decisions are binding, to resolve the dispute
- the facility owner should use all reasonable endeavours to accommodate the access seeker's requirements
- any right to negotiate access should provide for an enforcement process
- access rights should be time-limited and reviewable
- access need not be on the same terms and conditions for all access seekers
- access prices should:
  - be set at a level to generate revenue that meets at least the efficient costs of providing access, and includes a return on investment
  - allow for multi-part pricing and price discrimination where it is efficient
  - provide incentives to reduce costs and improve productivity
- decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

Source: Competition Principles Agreement - 11 April 1995 (As amended to 13 April 2007), cl 6(4) to 6(5).

2.1 Access providers in NSW

There are 2 access providers in NSW: TAHE and ARTC. TAHE is a State-Owned Corporation (SOC) that holds rail property assets, rolling stock and rail infrastructure in metropolitan and regional NSW. It owns the following networks:

- Metropolitan Rail Network
- 21 km of the Hunter Valley Coal Network from Woodville Junction to Newstan Junction
- Country Regional Network.

The NSW Government established TAHE on 1 July 2020. Prior to this, the rail sectors owned by TAHE were owned and operated by Rail Corporation NSW (RailCorp), an agency of the NSW Government.[a] We refer to TAHE when discussing the rail assets formerly held by RailCorp and the Rail Infrastructure Corporation (subsequently the Country Rail Infrastructure Authority).

[a] Sydney Trains operated the Metropolitan Rail Network under a contractual arrangement with RailCorp from 2012 to 2020.

ARTC is a public company incorporated under the Corporations Act 2001, wholly owned by the Commonwealth Government. It leases the following networks from the NSW Government:

- Metropolitan Freight Network
- Non-Hunter Valley sectors of Turrawan to Boggabilla, Goobang Junction to Merrygoen, Merrygoen to Gap and Merrygoen to Ulan
- Inland Rail North West Link (commissioned September 2020)
- Hunter Valley Coal Rail Network (except the 21 km owned by TAHE)
- Interstate Network.

Figure 2.1 shows the main lines that make up the NSW rail networks.

Figure 2.1 NSW rail networks

Source: Transport for NSW, *Review of NSW Rail Access Regime*, November 2012, p 24.

2.2 NSW access seekers and end use customers

The rail network is made available for use to "access seekers" under the terms of commercial track access agreements. Access seekers in NSW are predominately train operators. Train services operating on the NSW rail network include:

- **Passenger services**: Sydney Trains and NSW Trains operate passenger services on the Metropolitan Rail Network and Country Regional Network. Great Southern Rail's Indian Pacific passenger services also operate in NSW.
- **Freight services**: there are several rail freight operators using the NSW rail network to transport grain, coal and general freight. These include Pacific National, Aurizon Operations, Freightliner Australia, Genessee & Wyoming Australia, Manildra Flour Mills, Qube Logistics, Southern Shorthaul Railroad, Specialised Container Transport and Sydney Rail Services.
- **Heritage operators:** several heritage operators use the NSW rail network to run passenger services, including 3801 Limited, Transport Heritage NSW, the Rail Motor Society and the Lachlan Valley Rail Society.

The end use customers that contract with these train operators include coal mines, grain producers and other large industrial customers. Coal mines in the Hunter Valley rely on the rail network to transport coal, primarily to Port Waratah, but also Port Kembla and large customers. There are two coal-fired power stations – Eraring and Vales Point – that operate in the Hunter Valley. Bluescope Steel in the Illawarra region may also source coal from the Hunter Valley periodically.

Grain producers in the North-West, Central-West and South-West of NSW use the Country Regional Network to transport grain to port, end users (such as flour or cotton facilities) or storage facilities.

2.3 Legislation and regulatory instruments that comprise the NSW rail access framework

The Transport Administration Act is the primary piece of legislation that gives effect to the NSW rail access framework. Schedule 6AA allows a rail infrastructure owner (which we refer to as an 'access provider') to submit an undertaking to provide third party access to its rail network(s) to the Minister for approval (however it is not mandatory that they do so). The access provider must consult on the draft undertaking, and it must be approved by the Minister before it can take effect.[27] Alternatively, section 99C allows an access provider to submit a voluntary undertaking to the ACCC for approval under section 44ZZA of the Commonwealth Competition and Consumer Act.

There is currently one undertaking in place under Schedule 6AA - the NSW Rail Access Undertaking (the NSW Undertaking). It sets out the terms and conditions on which the access provider negotiates to provide access to TAHE's network.[b] Its terms have remained largely unchanged first coming into effect under the NSW Rail Access Regime in 1999.

[b] The parties to the NSW Undertaking were Rail Infrastructure Corporation (RIC) and RailCorp at the time it was put in place. These organisations are now TAHE.

The NSW Undertaking also applies to ARTC, which is deemed to be a party to the NSW Undertaking by the Transport Administration Act.[28] ARTC is required to act in accordance with the NSW Undertaking when exercising their functions.[c, 29]

The current NSW Undertaking sets out the minimum terms and conditions and pricing principles related to an agreement for access in the relevant networks, including:

- the rights of third parties to access the rail network
- guidance for access negotiations and dispute resolution between access providers and access seekers
- obligations of parties to an access agreement
- information that access providers must disclose to prospective access seekers
- minimum terms and conditions that access agreements must include
- pricing principles to guide access price negotiation and set limits on the amount of access revenue access providers can recover.

Access providers make separate agreements with individual access seekers for access in accordance with the undertakings.

There are 2 voluntary undertakings in place for NSW rail networks that the ACCC has approved – the ARTC's Hunter Valley Access Undertaking (HVAU) and Interstate Access Undertaking (IAU).[30] While our review excludes the regulatory framework that applies under the Competition and Consumer Act, we have considered the relationships between these regimes and the transitional arrangements that should apply when a voluntary undertaking expires or is withdrawn.

The *Independent Pricing and Regulatory Tribunal Act 1992* (IPART Act) places certain obligations on access providers and IPART in relation to the rail access framework. Under Part 4A of the IPART Act, IPART (or a person appointed by IPART) acts as arbitrator to hear and determine disputes in relation to third party access if requested by any party. The *Commercial Arbitration Act 2010* applies to such arbitrations, subject to Part 4A and the regulations.

In addition, Division 3 of Part 3 of the IPART Act includes provisions that apply to TAHE as a NSW government agency (these do not apply to ARTC). It requires:

- government agencies that are subject to a third party access regime to provide IPART with notice of their proposed access agreements
- IPART, at its discretion, to provide advice on proposed agreements to the agency and to the Minister
- IPART to keep a public register of such agreements.

[c] In addition, the NSW Undertaking also applies to rail authorities, defined as TAHE, TfNSW, Sydney Metro, NSW Trains, Sydney Trains, Residual Transport Corporation or any other person or body prescribed by the regulations (*Transport Administration Act 1988*, s 89). TfNSW may provide persons with access under the Undertaking to the parts of the NSW rail network it owns (although TfNSW currently leases these parts to the ARTC).

IPART also publishes several guidance documents to assist access providers and seekers understand their obligations and IPART's role under the NSW Undertaking, including:

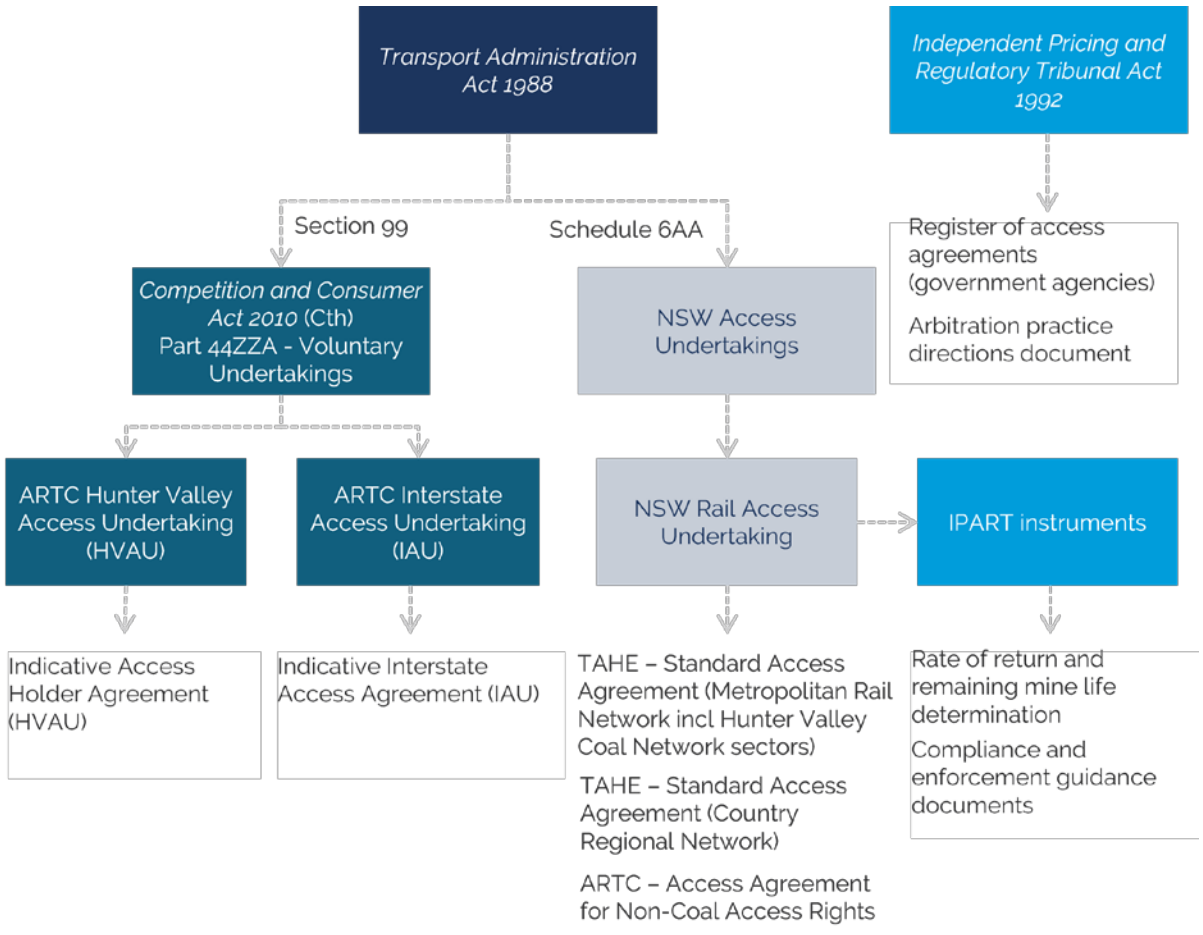
- Compliance and Enforcement Policy
- Rail Access Annual Compliance Reviews Guideline
- Arbitration Practice Directions.

IPART has other roles under the NSW Undertaking:

- assessing the annual compliance of access providers with the pricing principles
- every 5 years, determining the rate of return for all networks and remaining mine life for the Hunter Valley Coal Network, that access providers must apply when setting maximum prices.

Figure 2.2 illustrates the legislative and regulatory framework that underpins the NSW third party rail access framework.

Figure 2.2 Current NSW third party rail access regulatory framework



Source: IPART.

Chapter 3

Form of regulation

03

Rail infrastructure has natural monopoly characteristics, where the market can be served at a lower cost by having only one provider. Rail is a key input for other markets and may also form a bottleneck for firms operating in upstream or downstream markets. This gives the rail owner a level of market power.

The rail owner's market power depends partly on the competitive constraint of alternative transport modes. In areas where road competes with rail, the rail owner has limited ability to exercise market power. In areas where road is less competitive (e.g. bulk commodities or long-haul routes), or freight can't be transported by road (e.g. coal in the Hunter Valley) the rail owner may be able to exercise market power.

This could result in access seekers paying more than the efficient cost-based price for services. Access seekers may also face terms and conditions for services that do not reflect an efficient allocation of risks between the parties.

This chapter sets out our draft recommendations on the appropriate form of regulation to address this market power.

It also sets out our proposal for how our draft recommendations be implemented, including:

- which instruments should contain the requirements that make up the framework
- who should develop them
- the oversight that is required
- how often they should be reviewed.

3.1 Overview of our draft recommendations

We are making draft recommendations to retain the negotiate-arbitrate model of regulation. We are recommending that the shortcomings in the current framework are addressed to ensure that it imposes a sufficient constraint on market powers and leads to efficient outcomes. The following chapters explain our recommendations to ensure:

- timely negotiations and effective dispute resolution processes
- bargaining power imbalances are addressed through information disclosure requirements, clear and transparent non-pricing terms and conditions, pricing provisions, and obligations to consult with access seekers
- that the framework is enforceable.

We are making a draft recommendation that the same rail access framework would apply across the whole of NSW (except where an access provider has a voluntary undertaking under the Competition and Consumer Act). However, we recognise that there are significant variations between networks, both in terms of market power and other characteristics such as utilisation, customer types, and geography. Therefore, we are recommending a framework that is largely principles based, with outcomes-based compliance requirements that may be tailored to the individual characteristics of the network.

A principles-based framework means that individual access providers would be required to set out the implementation details consistent with these according to their own network characteristics. We are proposing that:

- Requirements that are common to all access providers and access seekers should be contained in the Transport Administration Act and its regulations.
- Implementation details that are specific to individual access providers or networks are contained in separate undertakings. These would replace the existing NSW Undertaking.

We are proposing that the Transport Administration Act be amended to require access providers to set out certain terms and conditions in their undertakings. These would include how they implement provisions for non-pricing terms and conditions, pricing, investment consultation, and the unders and overs account and loss capitalisation account (where relevant).

Under our draft recommendations, access providers would be required to submit undertakings to IPART for approval. IPART would determine whether an undertaking complies with the requirements of the Act. Where an undertaking does not meet the requirements or the access provider fails to submit an Undertaking, IPART would be able to develop a default undertaking for that access provider. The undertakings would need to be reviewed at least every 10 years.

We are proposing that the NSW Rail Access framework remain uncertified, which would allow access providers to continue to submit a voluntary undertaking to the ACCC under the Competition and Consumer Act.

3.2 The existing form of regulation

The existing regulatory framework is based on the negotiate-arbitrate approach. This model provides for:

- access seekers to negotiate with rail access providers to determine the price and conditions of access, supported by information disclosure requirements, negotiation process, and pricing principles
- access seekers and rail access providers to have recourse to arbitration if negotiations break down, with IPART (or an alternative arbitrator appointed by IPART) acting as arbitrator
- IPART as the regulator to assess compliance with pricing provisions.

This is a reasonably commercially driven approach with a safety net that protects the rights of weaker parties to a negotiation.

There are alternatives to the negotiate-arbitrate model that involve either more or less involvement from the regulator. In a well-functioning regulatory framework, the regulator's involvement should be proportional to the risk of using market power.

On one end of the spectrum, regulators determine the maximum prices and access conditions that can be charged by the rail owners.[a] This may provide better protection against the use of market power but suffer from the fact that regulators lack some of the key information held by each of the parties. This form of direct regulation is more costly and may not be necessary for all networks as most don't come close to recovering their full economic costs.

On the other end of the spectrum, the regulator's role can be limited to monitoring prices agreed between the parties.

3.3 Retaining the existing form of regulation

We consider that the broad negotiate-arbitrate framework should be retained. This is a well-established model of providing for third-party access to natural monopoly facilities. It is the model advocated in the Competition Principles Agreement, and used by other third-party access regimes. It recognises that the parties to a commercial transaction are better informed than the regulator about costs and service requirements. Placing primary emphasis on negotiation permits greater flexibility, which should result in all parties being able to react more promptly to emerging commercial opportunities. It also avoids imposing unnecessary costs on parties of full regulation.

As set out in Chapter 1, stakeholders generally supported retaining the negotiate-arbitrate model. However, they identified a number of deficiencies in the existing negotiation framework and dispute resolution mechanism.

Our own examination of the NSW Undertaking confirms that there are shortcomings in the existing arrangements that could be impeding efficient access to the rail networks, by:

- hindering the timeliness and effectiveness of negotiations between access seekers and rail access providers
- failing to address the information asymmetries and imbalance in bargaining power that access seekers can face and, in so doing, impeding their ability to effectively negotiate and to make informed and efficient decisions
- imposing an insufficient constraint on exercises of market power by rail access providers.

The following chapters set out our draft recommendations on how to address these issues. We are proposing changes to the negotiation and dispute resolution process and information disclosure requirements. In addition, we are proposing new provisions covering non-pricing terms and conditions, pricing, consulting on new investments, and enforcement powers.

[a] Over-recoveries could still occur due to volume risk. However, the regulator could factor in any over-recovery or under-recovery in one year to prices in subsequent years.

3.4 Applying a principles-based approach

We are proposing that the negotiate-arbitrate model applies to the whole NSW network even though there is a wide variety of circumstances and degrees of market power and profitability.

In most parts of the NSW rail network, businesses can choose whether to use road or rail, so rail prices are limited by what it would cost to transport freight by road. In addition, the Country Regional Network has a lot of spare capacity, so the access provider has an incentive to price access and set reasonable terms and conditions to attract more freight and maximise revenue.

As a result, the Country Regional Network and the ARTC's non-Hunter sectors recoup access revenue that is well below the costs of providing the service. For example, in 2012, we found that TAHE (then the Country Rail Infrastructure Authority) recovered about 2.3% of operating and maintenance costs for the grain lines in the Country Regional Network.[31] It is unlikely that cost recovery would have changed significantly during this time, and many of these rural lines require government subsidies to remain open.

In contrast, coal is prohibited from being transported by road. Without competition from road, the strong demand for coal transportation means rail owners can charge relatively high prices to use the Hunter Valley Coal network. While the metropolitan rail network does not recover all of its costs, it has limited capacity as it is largely used to transport passengers. This limits access to other access seekers, with freight transported mostly in off-peak times.

We are proposing that the NSW rail access framework should be largely principles-based to accommodate the variations between networks. This means that individual access providers would be required to set out the implementation details consistent with the broad requirements according to their own network characteristics.

We are also proposing outcomes-based compliance and enforcement requirements. This would allow access providers flexibility in how they demonstrate compliance to the satisfaction of the regulator to reflect their network. For example, where an access provider is recovering less than its operating costs, it would not need to supply detailed information about its capital costs to demonstrate compliance with the ceiling test. Similarly, IPART's enforcement policy allows IPART to consider a range of factors, such as the impact of a breach and history of non-compliance, when deciding on a suitable enforcement action.

3.5 How our approach would be implemented

As set out in the previous chapter, the NSW rail access framework is currently almost entirely contained within the NSW Undertaking. The legislation currently has very few requirements for what must be contained in an undertaking.

On the other hand, other Australian rail access regimes include key aspects of the regulatory framework in the enabling legislation. For example, in South Australia, the *Railways (Operations and Access) Act 1997* (SA) empowers the regulator to establish pricing principles for fixing a floor and ceiling price for the provision of railway services and explains what each price should reflect.[32] There is no similar guidance in the current NSW Framework with the floor test and ceiling test only forming part of the NSW Undertaking, and would not necessarily apply to a new access provider.

Similarly, the Victorian rail access legislation provides a detailed list of what must be included in a rail access arrangement (similar to an undertaking).[33] In NSW, the *Transport Administration Act 1988* (NSW) provides comparatively little detail on what must be included in an undertaking. Instead, the NSW Undertaking:

- makes up almost all of the NSW rail access framework, including provisions outlining the role of the regulator (for example, assessing compliance), and regulatory requirements on the access seekers (such as the requirement for the rail owner to submit an unders and overs account policy to the regulator).
- was historically drafted to apply to all rail owners as defined in the Transport Administration Act – it is not currently tailored to the requirements of the relevant rail owners.

We propose to recommend that:

- requirements that are common to all access providers and access seekers should be contained in the Transport Administration Act and its regulations.
- implementation details that are specific to individual access providers or networks are contained in separate undertakings. These would replace the existing NSW Undertaking.

Under our draft recommendations, the Act would require all access providers to have in place one or more undertakings (one for all of their network areas, or different undertakings for different networks that they own). The access provider will continue to have the option to put in place an undertaking under either the Transport Administration Act or the Competition and Consumer Act.

The Transport Administration Act would require undertakings made under that Act to include certain provisions, including how they apply the non-pricing provisions. As explained further in the next section, IPART would review the Undertaking to ensure they comply with the requirements.

The Transport Administration Act would also contain the other changes that we are recommending, including:

- new requirements on access seekers, for example, access seekers would be required to negotiate in good faith (Chapter 5).
- information disclosure requirements on the access provider (Chapter 7)
- the regulator's investigative and enforcement powers, including issuing monetary penalties and investigating potential non-compliance (Chapter 14).

We have summarised our proposed framework in Figure 3.1.

Figure 3.1 Proposed Regulatory Framework for schedule 6AA undertakings

Legislation and regulations

Key requirements for NSW rail access framework, including:

- Negotiation and dispute resolution process
- Compliance and enforcement provisions, including investigative powers
- Pricing provisions
- Non-pricing provisions
- Investment consultation requirements
- Requirements on access seekers
- Information disclosure requirements on access providers
- Mandatory requirements for access providers to have undertakings in place, including the matters that must be included
- Arbitration process for access disputes

IPART binding guidelines

- Information disclosure guidelines including an information standard
- Procedure for arbitration
- Technical guidance for rail access undertakings, e.g. minimum criteria for meeting non-price terms and conditions
- Compliance and enforcement guidelines

Rail Access Undertakings

- Outlines how access provider will engage with access seeker
- Must be consistent with legislative requirements
- Should align with IPART guidance
- Contains standard terms and conditions for access

Access Agreements

- Provide contractual terms and prices access (these can be negotiated away from the standard terms and conditions in the undertaking)

Source: IPART analysis.

Draft recommendation

1. The Transport Administration Act be amended to require access providers to put in place an access undertaking/s for their sections of the NSW rail network either under the Transport Administration Act or the Competition and Consumer Act.

3.6 IPART to approve undertakings

Under our proposed rail access framework, the NSW Government would specify in legislation the minimum required contents for an undertaking under Schedule 6AA of the Transport Administration Act.

Currently the Minister is responsible for approving undertakings. However, we are making a draft recommendation that IPART carry out this approval role. We currently have a similar function under the *Water Industry Competition Act 2006.*[34]

This proposal would be consistent with the role of access regulators in other rail access regimes. In these regimes, the regulator approves the undertaking in accordance with the legislated decision-making criteria.[35] This limits the regulator's discretion.

As discussed in the next chapter, many of the rail access functions are provided by Transport for NSW and Sydney and NSW Trains which are part of the NSW Government. In particular, these agencies are responsible for determining the 'above rail' non-price terms and conditions such as capacity allocation, that would need to be included in TAHE's undertaking/s. Our proposal for IPART to approve undertakings would provide independent assurance that the undertakings meet the requirements in the legislation.

We considered what should happen if a rail access provider does not submit an undertaking, or it submits an undertaking that does not meet all the requirements of the legislation.

The Queensland regime allows the regulator to refuse to approve a draft undertaking and require a rail owner or operator to amend the draft in order for it to be approved.[36] The regulator may also prepare and approve an access undertaking for declared access providers if they refuse or fail to prepare an undertaking.[37] There are no such powers currently in the Transport Administration Act.

Consistent with the Queensland regime, we are proposing that IPART would prepare and approve an undertaking should an access provider fail to prepare one that meets the legislative requirements. This should incentivise access providers to prepare an undertaking themselves that meets the legislative requirements and is tailored to the needs of their networks.

3.6.1 Decision-making criteria for approving an undertaking

The Transport Administration Act does not currently provide much guidance on what matters should be taken into account when assessing an undertaking - only the:

- public benefits arising from the undertaking or variation (including non-commercial benefits)
- submissions made in relation to the undertaking and the access provider's comments on those.[38]

By contrast, in other regimes where the regulator has a role approving undertakings, there is a set of criteria that the regulator must consider. Box 3.1 sets out the criteria that apply to the ACCC for approving voluntary undertaking under Part IIIA of the Competition and Consumer Act, and also for the QCA in respect of the Queensland access regime.

We consider that introducing a similar, objective set of criteria would give access providers and seekers greater certainty and transparency about what to expect from IPART's assessment process. This should include:

- the economically efficient operation, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
- the legitimate business interests of the access provider
- the legitimate interests of the persons who might want to access the service
- the pricing provisions
- any other issues IPART considers relevant.

The Government should also maintain the current requirement that the rail access provider consult publicly on a proposed undertaking.

Where necessary, IPART would provide additional guidance material on technical and process matters to help access providers understand if their proposed undertaking is likely to meet the requirements for an undertaking. For example, the minimum criteria we expect the access provider to consider when incorporating the non-price provisions in their undertaking. The ACCC currently issues similar guidance material in respect of voluntary undertakings.[39]

Box 3.1 Criteria for approving undertakings in other rail access regimes

The Competition and Consumer Act requires the ACCC to consider the following matters when approving a voluntary undertaking[a]:

- the objects of Part IIIA, which are to promote:
  - the economically efficient operation, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets
  - a framework and guiding principles to encourage a consistent approach to access regulation in each industry
- the pricing principles
- the legitimate business interests of the provider
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- interests of the persons who might want to access the service
- whether the undertaking is in accordance with an access code that applies to the service
- any other matters the ACCC thinks are relevant.

Under the Queensland Competition Authority Act, when deciding whether to approve a draft access undertaking, the QCA must have regard to:

- the object of Part 5 of the Queensland Competition Authority Act, which is to promote the economically efficient operation, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.
- the legitimate business interests of the owner or operator of the service
- if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected
- the public interest, including the public interest in having competition in markets (whether or not in Australia)
- the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected
- the effect of excluding existing assets for pricing purposes
- the pricing principles in the QCA Act
- any other issues the authority considers relevant.[b]

a. *Competition and Consumer Act 2010*, Part IIIA, s 44ZZA.
b. *Queensland Competition Authority Act 1997*, s 138.

3.6.2 IPART's assessment should be subject to timeframes

There are currently no time requirements for the Minister to approve an undertaking made under Schedule 6AA of the Transport Administration Act. Consistent with other access regimes, we are proposing that IPART would be required to assess proposed undertakings within specified timeframes, with certain 'stop the clock' provisions. For example:

- the Queensland Competition Authority Act requires the QCA to use best endeavours to decide whether to approve an undertaking within 6 months.[40] This does not include any period during which the authority requires further information or has invited submissions on a draft undertaking, or where the access provider agrees to stop the clock.[41]
- the Competition and Consumer Act requires the ACCC to decide whether to approve an undertaking within 180 days.[42] Similarly, this excludes any period during which the ACCC requests information about the application or has invited public submissions, or where the access provider agrees to stop the clock. Further, the Commission can stop the clock if it defers consideration of the access undertaking while it arbitrates an access dispute.[43]

We recommend that IPART be required to use its best endeavours to finalise its assessment and recommendation within 6 months, subject to stop the clock provisions. For example, these may apply where we require further information or by agreement between the parties.

3.6.3 Undertakings to be subject to periodic review

The Transport Administration Act does not require undertakings to have an expiry date or to be renewed on a regular basis. This provides regulatory certainty for access providers and access seekers. However, it also means that undertakings are not regularly reviewed unless an access provider proposes a new undertaking is put into place. For example, the NSW Undertaking has continued to operate for around 20 years without substantial alteration or review.

Undertakings should be the subject of regular review by the access provider and regulator to ensure they continue to be fit for purpose as circumstances change. For example, if there are extensive changes to the network or improved technology results in changes to service standards. Reviews will also ensure an undertaking remains aligned with the legislative framework when it is amended. It is consistent with the Competition Principles Agreement which requires a right to negotiate access to lapse unless reviewed and subsequently extended.[44]

Draft Recommendation

2. The Transport Administration Act be amended so that undertakings under Schedule 6AA be:
   a. Required to include details on how the rail access provider would apply the non-price provisions, the price provisions, the investment consultation provisions, and the unders and overs account and loss capitalisation accounts (where relevant).
   b. Assessed and approved by IPART, according to criteria set out in the Act, and within specified timeframes. Where the requirements for an undertaking are not met, IPART would prepare and approve an undertaking.
   c. Reviewed at least every 10 years.

3.7 The NSW rail access framework should not be certified

The Competition and Consumer Act provides a mechanism for state access regimes to be certified as effective. This is a certification that the state regime aligns with the relevant principles in the Competition Principles Agreement.

Certification prevents the regulated service from being subject to an undertaking or being declared under the National Access Regime (and therefore being subjected to the Commonwealth negotiate-arbitrate framework). Certification gives access providers and seekers then have regulatory certainty as a single access regime (i.e. that state-based regime) applies.

The current NSW rail access framework is not certified as an effective access regime under the Competition and Consumer Act. As a result, ARTC has been able to put in place 2 voluntary undertakings under the Competition and Consumer Act:

- The Hunter Valley Access Undertaking was developed through close consultation with stakeholders.
- The Interstate Network Access Undertaking allows access seekers to negotiate access to the entire Interstate Network under a single regime.

We recommend the amended rail access framework remain uncertified so ARTC can maintain its voluntary undertakings under the national framework.

Draft Recommendation

3. The NSW rail access framework remain uncertified under the Competition and Consumer Act, to allow access providers the flexibility to offer undertakings under the national access regime.

3.8 The NSW rail access framework should be reviewed 10 years after it is amended

We recommend the NSW rail access framework be reviewed 10 years after amendments are implemented. While principle 7 of the NSW Guide to Better Regulation states reviews should generally be conducted after 5 years,[45] we consider that for rail it would take 10 years for the amendments to take effect and form part of industry practice. This would allow enough time for any issues to emerge.

Draft Recommendation

4. The new regulatory arrangements should be reviewed 10 years after being introduced.

Chapter 4

Accountabilities under the NSW rail access framework

04

The terms of reference for this review asked IPART to consider access providers' and access seekers' incentives to make efficient use of, and investment in, the rail network.

Access providers' and access seekers' incentives are influenced by multiple factors, including the NSW rail access framework. The NSW rail access framework may incentivise investment if it aligns with the commercial interests of the parties. This can only occur if the party that is responsible for providing access:

- receives access fees and earn a return on investment under the framework, or
- has appropriate contractual arrangements in place to ensure interests are aligned between the relevant parties providing these services.

This chapter considers which entities should be held accountable for delivering access under the NSW rail access framework to maximise the impact of these incentives.

4.1 Overview of our draft recommendations

We recommend the NSW rail access framework continues to hold a single entity accountable for providing third party access to their sector(s) of the NSW rail network. Currently this is the rail infrastructure owners (TAHE for most networks, and the ARTC for the others). However, we consider that the entity that is held accountable does not necessarily need to be the rail owner, because it does not always undertake the functions that provide effective access.

Holding a single entity accountable facilitates more efficient and effective negotiations and dispute resolution because the access seeker can readily identify the relevant counterparty and negotiate the terms of an access agreement with only one party. This is important because the prices and terms of an access contract are inextricably linked.

Under the current NSW rail network operating model, TAHE does not carry out all the functions for providing third party access to its network, even though it is the only party to the NSW Undertaking. In practice, TfNSW and the rail infrastructure managers negotiate with access seekers on behalf of TAHE.

For the rail networks owned by TAHE, the NSW Government should review which entity should be accountable for providing third party access and consider how to ensure the operating arrangements provide accountability. We are seeking stakeholder views on which transport entity should be the one party accountable for negotiating and providing access.

4.2 Currently access seekers must negotiate with many parties

Currently, the NSW Undertaking holds TAHE and the ARTC accountable for providing third party access to their sectors of the NSW rail network. Intuitively, this approach makes sense because the owner or lessee of a property has the authority to grant other parties access to it. However, simply providing access to the 'below rail' track is not sufficient for third party access seekers to operate their train services. Operators all need train paths and operational rules.

For the networks owned by TAHE, TAHE as the rail infrastructure owner, is responsible for promoting and facilitating access to its network, but it does not deliver transport services or carry out railway operations (i.e. above rail services), in accordance with its operating licence. Transport for NSW and the rail infrastructure managers (RIMs) carry out above rail functions, as set out in the Transport Administration Act, and summarised in Figure 4.1 below.[46] Government agencies Transport for NSW, Sydney Trains and NSW Trains, have a high level of involvement because most of TAHE's network is primarily used to provide public transport, which is a matter of government policy.

Figure 4.1 Agencies responsible for rail access to TAHE-owned networks

TAHE

- NSW Rail Network Owner (has property rights over the rail network)
- Right to negotiate access agreements
- Right to set access prices
- Funds capital investment
- Endorse/acknowledge asset management plans

TfNSW

- Sets overall capacity for the existing network via standard working timetable
- Determines daily timetable/capacity with rail infrastructure manager
- Approves rail infrastructure manager's maintenance plan
- Undertakes capital planning
- Prepares Strategic Asset and Management Plan and Asset Management Plan

Sydney Trains
NSW Trains
UGL

- Determines daily timetable/capacity with TfNSW
- Manages real time capacity
- Develops maintenance plan for network
- Input into TfNSW capital planning
- Input into TfNSW Asset Management Plan

Source: IPART.

While TAHE is responsible for negotiating access, Transport for NSW undertakes this function on TAHE's behalf under an agency agreement.[47] In practice access seekers also negotiate with multiple rail infrastructure managers to access the network, but not TAHE, as the counterparty to the access agreement. Stakeholders submitted that these arrangements are complicated and may create conflicts of interest for Transport for NSW in regard to obligations or standards, which may potentially be applied to its own performance.[48]

Rail operators then find it difficult to hold TAHE accountable, as it does not provide above rail access services. For example, Qube Logistics Rail Services stated:

> The proliferation of NSW Government-owned entities has added cost and red tape for those accessing the network, and hidden the legislative obligation to promote access for third party operators with an organisation (TAHE) which does not hold any rail safety accreditation and does not actively engage with rail freight operators or in the provision of rail services. Meanwhile, Sydney Trains and the contractor for the Country Regional Network [UGL] have no clear obligation to support or enable rail freight operations and are not party to TAHE's undertaking.
>
> Rather than supporting rail freight … the multiple government agencies and complex regulatory arrangements add cost, discourage investment, blur accountabilities and hide inefficiencies. As a result, the industry's reputation is one of under investment, poor reliability and lower environmental commitment …[49]

TAHE has emphasised that its licence prevents it from carrying out the railway operations that give effect to access agreements. It submitted that the current NSW Undertaking requires greater flexibility to meet the requirements of contemporary operating models and structure. It noted:

> The current regulatory framework was designed to reflect traditional railway ownership structures where the [rail infrastructure owner] has control of the assets and the network expenditure including maintenance and capital investment requirements.[50]

4.2.1 We considered whether the NSW Undertaking could hold multiple parties responsible for providing access

The rail access framework should be sustainable and resilient to changes in operating models over time. Therefore, it should not be tailored to fit the current network operating model as it is not pragmatic to amend the framework each time the operating model evolves. It would also create regulatory uncertainty for access seekers, disincentivising use of the NSW rail network.

We considered whether changes could be made to the NSW rail access framework to accommodate a range of operating models, including where multiple parties could be responsible for providing access. In particular, we investigated whether:

- parties should be held jointly responsible for access
- different parties could be held accountable depending on their functions.

In our view, holding parties jointly responsible would further dilute accountability, which would not improve third party access to the network or address stakeholders' concerns.

Holding different parties accountable depending on their functions is unlikely to work in practice because these functions are fundamentally interrelated. For example, the price for access depends on the non-price terms such as the size of the train and when it can use the track. It is not practical for access seekers to negotiate price and non-price terms separately with TAHE, Transport for NSW and the relevant rail infrastructure manager.

Holding multiple parties accountable would also complicate access to arbitration. Under the IPART Act, the parties to a dispute are the third party and the service provider, which is the government agency that owns, controls or operates the infrastructure.[51] The access seeker would need to determine which provider their dispute is with and may need to refer multiple disputes against multiple 'providers'. This would add time and complexity to any hearing, particularly if the access seeker initially refers a dispute against the wrong party.

4.2.2 The NSW rail access framework should continue to hold a single entity accountable for providing access

We consider that an effective customer-centric solution would need to hold a single entity accountable for providing access. This approach provides one point of contact for negotiation and dispute resolution. This is consistent with rail access regimes in other jurisdictions. In other regimes, the single entity may be an entity that is not the network owner, such as the rail infrastructure manager.

The Queensland rail access regime holds a single entity accountable and allows either the owner or the operator to offer an undertaking. It also has criteria to assist the regulator to determine which entity is best placed to offer an undertaking for declared services. The criteria cover matters such as the contract terms and the extent to which each entity can provide access. There are currently 2 undertakings in place for parts of the Queensland network: one for Queensland Rail Limited and one for Aurizon Network.[a] These entities are vertically integrated network owners, and infrastructure managers and operators.[52]

The Victorian rail access regime also holds a single entity accountable for providing access. It has a similar ownership structure for its rail network to NSW, where the owner is not also the rail infrastructure manager). Figure 4.2 shows that in the Victorian model:

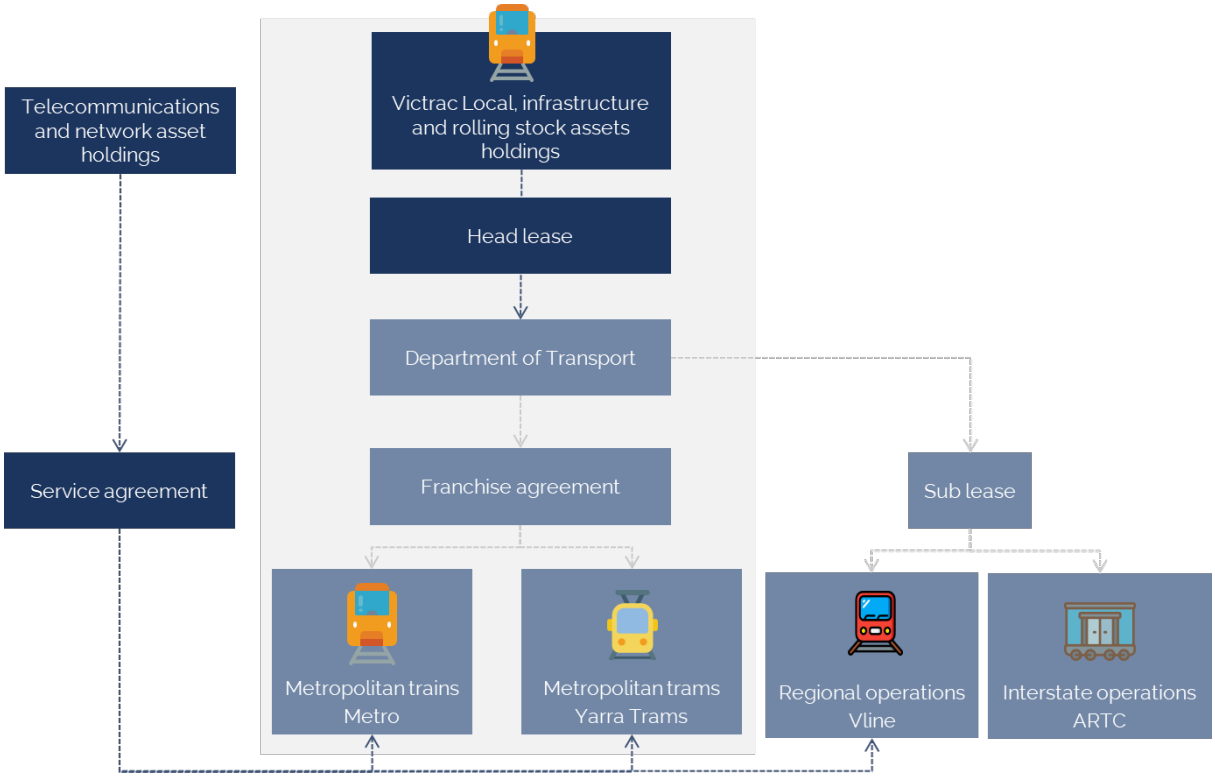
- The rail infrastructure owner, VicTrack (TAHE equivalent), leases segments of its network to the Victorian Department of Transport.
- The Department has arrangements (either franchise or sublease agreements) with rail operators to deliver rail services on the leased network and to maintain their own networks.
- Each rail operator has an access arrangement (similar to an undertaking) to provide access to the part of the network they manage to third parties – these are primarily freight operators. However this also includes Metropolitan Trains Metro providing access to Vline on its network and vice versa.
- Access prices and the guidelines for access agreements with third parties are set through a process led by the Department of Transport.
- VicTrack also has an access arrangement, but this only applies to the residual parts of the network it manages (e.g. rail terminals in particular such as the Dynon rail precinct).

[a] Queensland Rail Limited is a network operator and subsidiary of Queensland Rail, a statutory authority and owner of the Queensland state rail network. Aurizon Network is also a network operator and subsidiary of the Aurizon Group that owns the Central Queensland Coal Network.

- The Department retains control of the master timetable and other factors important for directing the provision of public transport by Metropolitan Trains Metro and Vline.[b]

The Victorian model makes it clear which rail operator provides access for each network segment. Access seekers can identify the agency they need to negotiate with and hold them accountable for the terms of their access agreement. The Victorian Government also retains control of important elements necessary for setting the service standards for public transport.

Figure 4.2 Overview of VicTrack's core agreements



Source: IPART diagram adapted from VicTrack, About our organisation.

In the case of TAHE's network, the access provider could be either TAHE, the relevant rail infrastructure manager, or Transport for NSW. Given TAHE has limited responsibility for providing access-related functions, it may not be the most suitable party. Transport for NSW and the rail infrastructure managers undertake key functions for providing access (such as capacity allocation). Holding one of these parties accountable instead of TAHE may require legislative change.

We have not made a draft recommendation on which single entity should be held accountable. We are interested in stakeholders' views on whether the rail infrastructure managers, Transport for NSW or TAHE are best placed to be held accountable as the access provider for TAHE's networks. We ask stakeholders to draw on their experience with other jurisdictions when considering this issue.

[b] Further information on the division of responsibilities is available on the Public Transport Victoria website: Public transport partnership agreements - Public Transport Victoria (ptv.vic.gov.au) and standard franchise agreements.

Regardless of the outcome of which entity is best placed to provide access, each will continue to have a role in providing rail access services. They need to establish clear contractual obligations between themselves so that there is genuine accountability for providing third party access to TAHE's network.

Draft Recommendations

5. The NSW rail access framework continue to hold a single entity accountable for providing third party access in each sector of the NSW rail network. This could be either the rail owner, the rail infrastructure manager, or the NSW transport department.

6. The NSW Government review which single entity is best placed to be the access provider for TAHE's network, and how this should be reflected in the operating arrangements to ensure accountability.

Seek Comment

1. Which transport entity should be the single entity accountable for providing third party access to the network?

Chapter 5

Negotiation framework

05

An effective negotiate-arbitrate framework gives parties the opportunity to co-design an agreement which reflects their commercial interests. The negotiation framework supports this process by providing a structure to guide parties negotiating in good faith to reach a mutually satisfactory outcome.

We've found that the current requirements provide limited detail and don't provide parties with a strong incentive to reach a negotiated outcome in a timely and efficient manner.

This chapter considers how the NSW Undertaking currently supports negotiations, what problems stakeholders have experienced and our draft recommendations for improvements.

5.1 Overview of our draft recommendations

We are making draft recommendations that the access framework should:

- specify the actions and timeframes that apply to each stage of the negotiation process to provide greater structure and incentives for parties to respond to each other in a timely manner
- provide for collective negotiations, where lawful, and where there is a sufficiently common interest amongst the group of access seekers in relation to the matters being negotiated
- require access seekers and access providers to negotiate in good faith.

These actions would reduce the transaction costs of negotiations for all parties and facilitate more timely and efficient commercial outcomes. They would reduce the imbalance in bargaining power that access seekers may face in negotiations by imposing actions and timeframes rather than leaving them up to parties' discretion.

5.2 What does the NSW Undertaking currently provide for?

The NSW Undertaking currently requires rail access providers to:

- negotiate in good faith for the purposes of entering agreements and in relation to new investment[53]
- promote and provide access consistent with the NSW Undertaking
- use all reasonable endeavours to accommodate access and new investment requirements
- maintain reasonable priority and certainty of access for passenger services in accordance with the Transport Administration Act[54]
- except as required by law, only permit access through an agreement that complies with the NSW Undertaking, covers all the terms of agreement in Schedule 2 of the NSW Undertaking and conforms with the pricing principles.[55]

The NSW Undertaking also requires:

- rail access providers, on request from an access seeker, to provide an initial indication of the availability and price of access within 28 days if there is more than one rail operator with similar operational specifications on that route, or later if agreed to by the parties[56]

- rail access providers to commence negotiations once the access seeker:
  - provides operational specifications that comply with the available capacity and route, and
  - agrees that if a dispute arises, the Tribunal (or a Tribunal-appointed alternative arbitrator) will act as arbitrator and Part 4A of the IPART Act will govern the arbitration[57]
- rail access providers and access seekers to agree upon a time by which negotiations will be completed[58]
- rail access providers to inform the Minister if agreement is not reached in 3 months.[59]

Under the current framework, TAHE and ARTC are responsible for providing access to their respective networks (that are subject to the NSW undertaking) according to the terms of the undertaking.

The principal concern that rail operators have raised about the current negotiation process in submissions and bilateral discussions is that they do not negotiate with TAHE.[60] Instead, they must negotiate with other parties, such as TAHE's agents, that are not parties to the NSW Undertaking.

Qube noted that the challenges posed by these arrangements had prompted some operators to seek authorisation to collectively negotiate non-price terms with Transport for NSW.[61] Pacific National noted that the authorisation highlights the market power that rail access providers and their agents exercise in negotiations.[62] While rail operators and ARTC pointed to the benefits associated with collective negotiations,[63] TAHE claimed that this form of negotiation had not been effective in balancing market power between the parties.[64]

The accountability issue identified by rail operators, stems, in part, from the fact that the NSW Undertaking and its obligations only apply to TAHE and the ARTC. This issue is discussed in Chapter 4. Under the current framework, TAHE and the ARTC are ultimately responsible for ensuring compliance with the NSW Undertaking. Accordingly, TAHE and the ARTC must ensure that anyone acting on their behalf complies with the NSW Undertaking.

5.3 How can the negotiation process be improved?

Our examination of other access regimes has revealed the following deficiencies in the NSW Undertaking's negotiation process, which may be contributing to the delays in negotiations reported by rail operators and impeding efficient access to the rail network:

- it only prescribes minimum obligations for the actions to be taken and the timeframes applicable to each stage of the negotiation process
- it does not currently provide any guidance on when a rail access provider should be required to engage in collective negotiations and how such negotiations should be accommodated in the negotiation process
- the duty to negotiate in good faith is currently one-sided, with rail access providers subject to this duty, while access seekers are not.

The sections below outline our draft recommendations to address these shortcomings.

5.3.1 The framework should provide more guidance on key actions and timeframes

We are making a draft recommendation that the NSW rail access framework be amended to:

- set out the key actions which the access seeker and/or rail access provider must take in each stage of the negotiation process (i.e. the access request, initial response, indicative offer, response to indicative offer and negotiation of agreement stages)
- specify the timeframes within which those key actions must be taken by the access seeker and rail access provider, while also providing the parties with flexibility to agree to amend the timeframes where appropriate
- require negotiations to be completed within three months, unless otherwise agreed by the parties.

This would be consistent with most of the other regimes we looked at that also specify the actions to be taken as part of the negotiation and the timeframes applicable to each stage of the negotiation process.[65]

Table 5.1 describes the key steps in the negotiation process. Figure 5.1 illustrates the timeframes that would apply.

We are making a draft recommendation that negotiations the parties be required to complete negotiations within 3 months to impose more discipline on the parties, while also providing flexibility to amend the timeframes if mutually agreed. The 3-month period is consistent with the time allowed in other access regimes.[66] It is also consistent with clause 3.5 of the current NSW Undertaking, which requires rail access providers to advise the Minister if no agreement has been reached in 3 months.[a]

To encourage rail access providers to comply with the three-month negotiation timeframe (or such other time agreed to by the parties), we also propose that the dispute resolution trigger be aligned with this timeframe (see Chapter 6).

[a] This section of the Undertaking states that the Minister should be advised if no agreement has been concluded within 3 months.

Table 5.1 Recommended negotiation process – key actions and timeframes

Negotiation stage	Process
Access request	**Key action:** The access seeker(s) submit(s) an access request in writing to the access provider, addressing the terms and conditions required by the access provider in its undertaking. To provide some additional flexibility in the process, the NSW rail access framework should permit a potential access seeker(s) to make a preliminary enquiry about access prior to submitting an access request.
Initial response	**Key action**: The access provider acknowledges receipt of the request and informs that access seeker(s) whether: • they require any additional information in relation to the access request, which is necessary to prepare an offer • the access provider needs to undertake further investigations because new investment is required, which should only occur to the extent reasonably necessary and where it is required. If further investigations are required, the access provider must carry them out expeditiously and may recover the costs from the access seeker(s).
Provision of an indicative offer	**Key action:** The access provider provides the access seeker(s) with an indicative (non-binding) offer, along with any required information.
Response to indicative offer	**Key action:** The access seeker(s) must respond in writing to the indicative offer and inform the access provider if they want to progress the access request and enter into negotiations.
Negotiations on agreement	**Key action:** The access seeker(s) and access provider commence negotiations once the access seeker(s) indicate in writing their intent to proceed. To provide a more defined end point for negotiations, the NSW rail access framework should require negotiations to end at the earlier of: • the execution of an access agreement • the access seeker(s) notifying the access provider that they no longer wish to proceed, or • 3 months[b] (or as otherwise agreed by all parties).

Figure 5.1 Proposed negotiation process

a. Or 60 business days if the access provider must undertake further investigations.
b. Or later if all parties agree to an extended timeframe.

Source: IPART.

[b] This timing is consistent with cl. 3.5 of the NSW Undertaking, which states that the Minister should be advised if no agreement has been concluded within 3 months. It is also consistent with the timing assumed in the ARTC undertakings, the WA rail access regime and the Dalrymple Bay Coal Terminal undertaking.

5.3.2 Access seekers should be able to negotiate collectively where lawful

Where a group of access seekers has obtained authorisation from the ACCC to engage in collective negotiations and there is a sufficiently common interest among the group on the matter to be negotiated, there are likely to be a number of benefits associated with collective negotiations. These benefits include:

- reducing the imbalance in bargaining power that individual access seekers can face
- reducing transaction costs for:
  - those access seekers that form part of the group, by enabling them to pool resources and share the costs
  - the rail access provider who only needs to engage in one negotiation rather than multiple negotiations
- improving the efficiency of commercial outcomes.

Other regimes take more active steps to expressly facilitate collective negotiations. For example, the Queensland Competition Authority (QCA) recently included collective negotiation provisions in the Dalrymple Bay Coal Terminal undertaking. In doing so, the QCA noted that collective negotiations would "promote genuine negotiated outcomes" and "avoid the unnecessary duplication of costs involved in negotiations".[67]

To accommodate collective negotiations in the negotiation framework, we are making a draft recommendation to require rail access providers to engage in collective negotiations with a group of access seekers, where:

- the group of access seekers is lawfully permitted to engage in collective bargaining on the matters they are seeking to negotiate[c]
- there is sufficient commonality among members in relation to the matters to be collectively negotiated.

In practice, this would involve the following steps:

1. Before commencing collective negotiations, the group would be required to notify the rail access provider of the matters that they want to collectively negotiate and demonstrate to the rail access provider's satisfaction the criteria above are met.
2. The rail access provider would have 10 business days to consider the notification and, if it concludes the criteria are not met, it would be required to notify the group of its refusal to collectively negotiate.
3. The group of access seekers would have the ability to trigger a dispute and refer the access provider's refusal to collectively negotiate to IPART for arbitration.
4. Collective negotiations would commence using the same negotiation process that applies to single access seekers with all of the requirements applying to individual access seekers, applying to members of the group.

[c] For example, if the group of access seekers has only obtained authorisation to collectively bargain on non-price terms and conditions, and they wanted to negotiate prices, then the rail access provider would not be required to do so.

If collective bargaining is to be recognised in the negotiation framework, then it should also be recognised in the dispute resolution mechanism (see Chapter 6).

5.3.3 All parties should be required to negotiate in good faith

In the context of the NSW Undertaking, we consider that the obligation to act in 'good faith' requires parties to an agreement to exercise their powers reasonably and not arbitrarily or for some irrelevant purpose. This obligation is currently one-sided, with rail access providers currently the only ones subject to this obligation. Other regimes also impose this duty on access seekers.[68]

We consider that extending the duty to negotiate in good faith to access seekers, so that all parties are subject to this duty, could improve negotiation outcomes. However, this would require legislative change as set out in Chapter 3.

Draft recommendations

7. The NSW rail access framework be amended to:
   a. specify the actions to be taken and the timeframes applicable to each stage of the negotiation process, which must be concluded within three months, unless otherwise agreed by all parties
   b. provide for collective negotiations, where they are lawful and there is a sufficiently common interest among access seekers
   c. extend the duty to negotiate in good faith to all negotiating parties.

Chapter 6

Dispute resolution

06

Under the existing negotiate-arbitrate framework, an access seeker or the rail access provider can trigger an arbitration as a last resort if negotiations break down completely and a negotiated outcome is not reached. If this occurs, then the dispute will be arbitrated by the Tribunal (or the Tribunal will appoint an arbitrator) in accordance with Part 4A of the IPART Act and the *Commercial Arbitration Act 2010* (NSW).[a]

Stakeholders expressed concerns that the relatively high costs and risks associated with accessing arbitration mean that it doesn't impose a sufficient constraint on the exercise of market power by access providers. Barriers that prevent or discourage parties from triggering a dispute undermine the credibility of the threat that arbitration is intended to pose and impede efficient access to the rail network.

This chapter sets out our draft recommendations on changes to the dispute resolution mechanism to reduce the costs, risks and uncertainties, and incentivise more efficient access to rail networks.

6.1 Overview of our draft recommendations

We are making draft recommendations to:

- introduce **conciliation** as another lower cost form of dispute resolution that is available to access seekers
- introduce an **automatic dispute trigger** linked to the expiration of the maximum negotiation time period without prior agreement by all parties.

We are also making draft recommendations that IPART should update its access arbitration practice directions to provide greater clarity and guidance on matters, including:

- that the arbitrator may make an **interim access determination**
- that **related arbitral proceedings may be consolidated and heard at the same time** (for example, a dispute between an access provider and multiple access seekers)
- when IPART will **exercise its discretion to appoint an alternative arbitrator** from a Minister approved panel
- that the arbitrator can exercise its discretion to **allow access seekers to decide if they will take up access** on the basis of the determination[b]
- setting a **cap on the time that arbitrators have to make a determination.**

Our draft recommendations would result in dispute resolution mechanisms posing a more credible threat of intervention if market power is being exercised and incentivising parties to reach a commercial agreement in the first instance.

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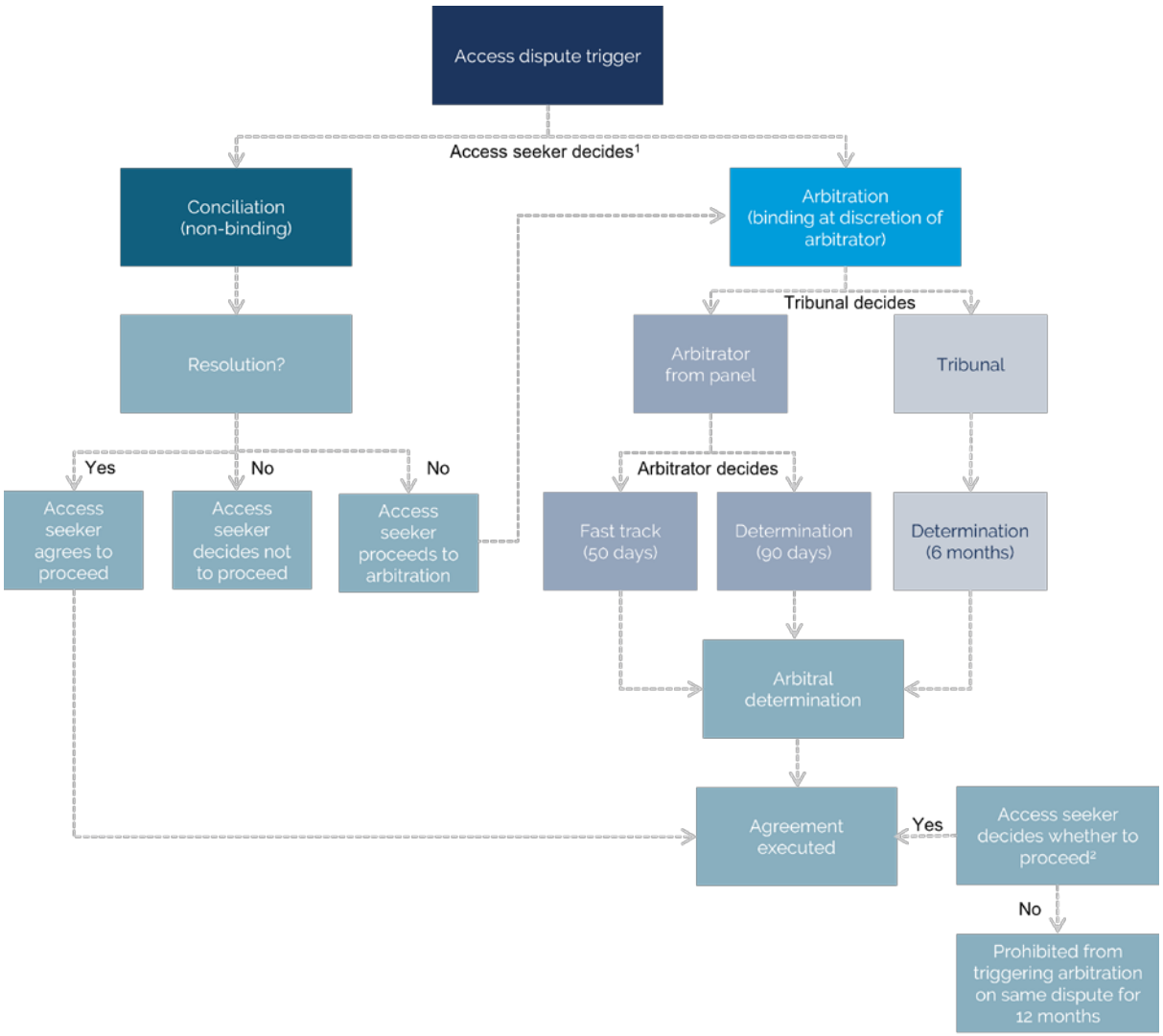
[a] Part 4A of the IPART Act allows the Tribunal to appoint an arbitrator for an access dispute. The Tribunal may select the arbitrator from a Panel that has been approved by the Minister.

[b] Section 24C(2) provides that an arbitral determination may 'require the third part to accept, and pay for, access to the service'. Our practice directions may provide guidance on the circumstances in which such an order is likely to be made.

Figure 6.1 provides an overview of how the proposed improvements to the dispute resolution mechanism would operate in practice if a dispute resolution was triggered as a last resort.

Figure 6.1 Proposed dispute resolution mechanism



1. If the access seeker triggers the arbitration or it is automatically triggered after 3 months (or a date otherwise agreed by all parties), the access seeker can decide to go to conciliation. If the access provider triggers an arbitration, it could choose to go directly to arbitration, which would bind the access seeker(s) (unless the access seeker(s) withdrew their request for access.
2. The arbitrator has discretion about whether it requires a third party to access and pay for access to the service. In the instance that the arbitral determination is non-binding on the access seeker (s), the access seeker(s) may decide whether or not to take up access based on the determination. If they decide not to, they would be prohibited from triggering an arbitration on the same dispute for 12 months.
Source: IPART.

6.2 What does the NSW Undertaking currently provide for?

Section 6 of the NSW Undertaking currently requires Part 4A of the IPART Act (Act) to apply to any access disputes. Part 4A of this Act allows a dispute to be triggered by either party, with the dispute trigger defined as follows:

> A dispute is taken to exist with respect to such an access regime if a person (the third party) who wants access to a service, or wants a change to some aspect of the person's existing access to a service, under the access regime is unable to agree with the provider of the service on one or more aspects of access to the service.[69]

Part 4A of the IPART Act provides for the *Commercial Arbitration Act 2010* (subject to modification by the IPART Regulation 2017[c]) to apply to any arbitration[70] and accords the Tribunal the choice of hearing and determining disputes itself, or appointing one or more persons from a Minister-approved panel to do so.[71] It also sets out:

- the functions and powers of the arbitrator
- the matters the arbitrator is required to consider when making its determination
- the scope of matters that can be dealt with in a determination, which include requiring the service provider to provide access and the access seeker to accept and pay for the service
- the requirement for parties to give effect to the determination
- the circumstances in which an arbitration can be terminated.

In addition, the *Commercial Arbitration Act 2010* allows the arbitrator to order interim measures.[72] Access determinations may be reviewed by a court on a question of law.

Generally, in an arbitration, timing of certain things it to be agreed by the parties or determined by the arbitrator.

IPART has issued practice directions for access disputes, including rail access disputes.[73] The practice directions set out the process for:

- referring a dispute, including how to withdraw a referral, and required forms
- appointing an arbitrator, including timelines for the appointment and how to raise objections
- conducting an arbitration, such as preliminary meetings and associated timelines, hearings and the use of expert witnesses
- notifying third parties of a dispute, including the process for joining potentially impeded parties to the dispute
- making a determination, including making a direction on costs and the timeframes for publishing the determination.

[c] IPART has reviewed the Independent Pricing and Regulatory Tribunal Regulation 2017 and recommended it be remade without substantive modification.

The practice directions also set out the arbitrator's decision-making powers. Separately, the practice directions explain that the arbitrator may set a timetable for completing the preparatory steps (e.g. preliminary meetings) and fixing a date for any hearing. The arbitrator may also determine a timetable to facilitate an expedited hearing if a dispute requires urgent resolution.

The practice directions stipulate that the arbitrator may make any direction as to the payment of the costs of an Arbitration (including the arbitrator's costs; and the costs of the Parties) as they consider appropriate, taking into a number of factors outlined in the guide.

6.3 What are the problems with the current dispute resolution mechanism?

While the NSW Undertaking has been in place for over 20 years, access seekers have only sought arbitration on one occasion to resolve an access dispute (but the dispute was ultimately settled between the parties).

While the absence of arbitrations could be an indicator that the current arrangements are working effectively (because the threat of arbitration is encouraging effective commercial negotiations), it could also be an indicator of more fundamental problems.

The feedback provided by stakeholders suggest that the current arbitration mechanism is in the latter of these categories. Rail operators have told us in bilateral discussions that they have been reluctant to trigger a dispute because of the costs (both direct and indirect), time and risks associated with doing so. The key risks that they identified were:

- delayed access to services and/or the disruption of access to existing services
- the arbitrated outcome resulting in prices in excess of what is economically viable for the access seeker.

A similar observation was made by Qube in its submission:

> The high cost of a dispute and the extended period for resolution actively deter an operator triggering … a dispute. Furthermore, for most operators, the disproportionate resources available to a government-owned entity make an operator reluctant to [initiate] a dispute.[74]

Rail operators have also expressed concerns about the potential for access providers to engage in 'retribution'. Qube also noted that the ability of other rail operators to 'free ride' on an arbitrated outcome could discourage individual operators from triggering a dispute.[75]

TAHE expressed concerns about the existing arbitration mechanism and suggested we should consider providing for mediation to "improve the timeliness and effectiveness of negotiations" and enable "contractual outcomes to be reached expeditiously and to avoid formal arbitration".[76] TAHE also suggested the NSW framework include a right of review of the arbitrator's decision.[77]

6.4 How could the dispute resolution mechanism be improved?

While there will always be some costs and risks associated with dispute resolution, we have found that the current arbitration mechanism appears to expose parties to a range of unnecessary costs, risks, and uncertainties. This is because, in contrast to other access regimes, the NSW Undertaking does not currently:

- offer any lower cost alternatives for dispute resolution, such as mediation or conciliation
- provide certainty about how long the arbitration process will take or include any other measures to facilitate the timely resolution of disputes
- provide access seekers with confidence that:
  - access to services would not be delayed or access to existing services disrupted
  - the arbitrated price determination would not affect the economic viability of the access seeker.

We have considered improvements that could be made to the dispute resolution mechanism so that it poses a more credible threat of intervention, while also encouraging the parties to reach commercially negotiated outcomes. Our draft recommendations are explained below.

6.4.1 Access seekers should be able to seek conciliation as a lower cost alternative to arbitration

Arbitration can be an effective way to resolve disputes. However, as a number of stakeholders observed, the costs associated with arbitration may be seen as prohibitive by some access seekers, discouraging them from triggering a dispute.

In other access regimes, this risk has been dealt with by providing for other lower cost forms of dispute resolution to sit alongside arbitration. These include conciliation, mediation, and other alternative dispute resolution mechanisms to be used at the direction of the regulator, or on agreement of the parties.[78]

Consistent with this approach, we are making a draft recommendation that the dispute resolution mechanism be amended to include conciliation as another lower-cost form of dispute resolution in the NSW rail access framework.

Conciliation is a non-binding form of dispute resolution. It involves an independent party working with the disputing parties to identify the disputed issues and to encourage the parties to reach a workable agreement. In contrast to mediation, the conciliator's role tends to be more directive and advisory, with the conciliator usually having specialist knowledge in the area. It is therefore expected to result in a timelier resolution of a dispute than mediation.

Rather than requiring all disputes to proceed to conciliation, we have included in our draft recommendation that the access seeker should decide whether they want to try conciliation, or to proceed directly to arbitration. Allowing the access seeker to decide recognises that they are better placed than the regulator to determine whether a lower cost dispute resolution mechanism is likely to work, or if they would prefer to proceed straight to arbitration. Excluding the rail access provider from this decision also limits the opportunities it may otherwise have to try to delay providing access, or to impose additional costs on the access seeker.

Draft recommendation

8. That the NSW rail access framework provide for the use of conciliation as a new, lower cost form of dispute resolution that access seekers can choose before, or instead of, arbitration.

6.4.2 An automatic dispute resolution trigger should apply at the end of the statutory negotiation period

We are making a draft recommendation to introduce an automatic dispute trigger into the NSW rail access framework. Other regimes also have an objective, time-based access dispute trigger.[79]

We are proposing that parties would proceed to dispute resolution if they do not reach a negotiated outcome within the statutory 3-month negotiation period (or such other time as mutually agreed by the parties).

The introduction of an automatic trigger is intended to provide for the more rapid resolution of disputes by requiring parties that are unable to reach commercial agreement within the defined period to proceed to dispute resolution. This may be either conciliation or arbitration, as determined by the access seeker.

The other benefit of this draft recommendation is that it would relieve access seekers of the responsibility and burden of requesting dispute resolution directly and reduce the perceived risk of some sort of future retribution by the access provider.[d]

Draft recommendation

9. That an automatic dispute resolution trigger should be introduced into the NSW rail access framework that would require the parties to proceed to dispute resolution if agreement is not reached within the statutory 3-month negotiation period (or as otherwise agreed by the parties).

[d] An access seeker would still be able to trigger a dispute if it disagrees with any of the responses provided by the access provider (including a refusal to provide a service). Similarly, the access provider would still be able to trigger a dispute if an access seeker is refusing to negotiate reasonable terms, such as demanding a price below the floor test.

6.4.3 IPART should update its arbitration practice directions guideline

A key problem with the current arbitration process is that access seekers face substantial uncertainty about the timing, process and outcome of the arbitrator's decisions. While IPART currently has a public arbitration practice directions guideline[80], we have identified areas where more procedural guidance could reduce the perceived risks (and costs) if the dispute resolution mechanism is triggered. We are making a draft recommendation that IPART should update its arbitration practice directions guideline to provide more clarity in these areas. This would align it more closely to those that have been developed by the QCA, the ACCC and the Australian Energy Regulator (AER).[81]

The arbitrator can make an interim determination

A key concern for access seekers in triggering an arbitration is that their access to the rail network could be delayed for a prolonged period, or their access to an existing service could be disrupted. To address this risk, other regimes include a power for the arbitrator to make an interim access determination.[82]

Similarly, we propose to clarify in our arbitration practice directions:

- that an arbitrator may order interim measures that sets out the terms and conditions on which the access seeker can use the service until a final determination is made
- how the arbitrator may account for differences between the interim and final determination prices in its final award.

While the arbitrator can already order interim measures, stakeholders would benefit from greater clarity about the circumstances in which and how the arbitrator would make this decision.

Access seekers can access joint arbitration

Under the existing arrangements, access seekers engaged in collective negotiations or other interested parties that have sufficient interest in the matter can be joined to an arbitration.[83] This allows the costs and risks associated with arbitration to be shared among parties. It would allow parties to match the resources that a government-owned access provider may have available to it to dispute the matter.

Other regimes also allow for collective arbitrations, joint arbitrations or the joining of parties that have a sufficient interest in the matter.[84]

While the access framework already allows for related arbitrations to be consolidated or heard at the same time under certain circumstances, there would be benefit in IPART updating its access arbitration practice directions to clarify when IPART might order those related proceedings be consolidated or heard at the same time.

IPART should provide more clarity on how it would make its decision to appoint an alternative arbitrator

It is up to IPART to determine whether it will hear and determine disputes itself, or if it will appoint one or more persons from a Minister-approved panel to do so.

The matters that are likely to be of greatest relevance to the choice are the degree of market power held by the rail access provider and the number of parties potentially affected by the outcome of the dispute. For example, if the dispute involves a rail access provider with limited market power and/or the outcome only affects the access seeker, then the members of the panel are likely to be better placed to resolve the dispute and should be able to do so in a timelier manner. This would leave IPART to focus on the more substantive disputes involving access providers with substantial market power and/or disputes where the outcome would affect other access seekers or users of the network.

IPART should provide more clarity on the time limits that apply to arbitration decisions

We are making a recommendation that IPART update its access arbitration practice directions to incorporate the following indicative time limits for an arbitrator to make a determination:

- Disputes heard by IPART to be resolved within 6-months with some limited 'stop-the-clock' provisions to accommodate procedural aspects of the arbitration.
- Disputes by members of the Minister-approved panel to be resolved within 50 business days (or 90 business days if all parties agree).

The different times allowed for disputes heard by IPART and members of the Minister-approved panel recognises the differences in workloads faced by IPART and members of the panel and the complexities of the issues likely to be considered.

These decision-making timeframes are intended to provide access seekers and access providers with greater certainty as to the timing of any arbitration determination and to provide for the more rapid resolution of disputes heard by members of the Minister-approved panel.

This is consistent with other regimes that have a cap on the amount of time that the arbitrator has to make a decision[85] and/or the inclusion of a 'fast track' arbitration option for less complex disputes.[86]

Access seekers can decide not to take up access based on the determined price and conditions

Another concern that access seekers have under the current arbitration mechanism is that they could be required to pay a price that is not economically viable if the arbitrator makes a determination.

Under section 24C(2)(b) of the IPART Act, a determination *may* "require the third party to accept, and pay for, access to the service." Other access regimes allow access seekers to decide whether to take up access on the basis of the arbitrator's determination.[87]

We are making a draft recommendation that IPART update its access arbitration practice directions to provide more guidance about how and when IPART would exercise its discretion to allow access seekers to decide if they will take up access on the basis of the determination. For example,

1 setting out the factors IPART would take into account in exercising its judgement on this matter

2 specifying a number of days of the access determination being made (e.g. within 10 business days) that the access seeker has to decide whether it will take up the service on the basis provided for in the arbitrator's determination

3 preventing an access seeker that decides not to take up the service from triggering the dispute resolution provisions for the same, or a substantially similar service, for 12 months.

The last condition intends to counter the incentive an access seeker may otherwise have to trigger arbitration if it considers that it will not be bound by the outcome.

Draft recommendations

10. That IPART should update its access arbitration practice directions to provide greater clarity and guidance on matters including:
    a. that the arbitrator may make an interim access determination
    b. that related arbitral proceedings may be consolidated and heard at the same time (for example, a dispute between an access provider and multiple access seekers)
    c. when IPART will exercise its discretion to appoint an alternative arbitrator from a Minister approved panel
    d. under what circumstances the arbitrator will exercise its discretion to allow access seekers to decide if they will take up access on the basis of the determination
    e. setting an indicative cap on the time that arbitrators have to make a determination.

6.5 The current review mechanism for arbitration decisions is appropriate

Another potential risk to the timely resolution of disputes is that arbitral awards can, in some circumstances, be subject to appeal.

In its submission, TAHE stated:

> Under the Undertaking, RIOs only have the right to challenge the regulator/arbitrator's decisions if there is evidence of a procedural error in the application of the decision. Decisions made by other regulatory authorities such as the ACCC offer the proponents a right of review of the outcome of a decision. There would be benefit for all parties to be provided a right of review of the regulator/arbitrator's final decision.[88]

This form of review could introduce greater uncertainty, delay and costs to the process. This could further discourage the use of the dispute resolution process and reduce its effectiveness as an incentive to reach a negotiated outcome. The arbitration process is already a 'last resort' mechanism for reaching an access decision.

As such, we do not propose any change to the current appeal mechanism for arbitration decisions under the rail access framework.

Chapter 7

Information disclosure

07

The existing 'negotiate-arbitrate' model provides for access seekers to negotiate the price and conditions of their access with the access provider. The regulatory framework supports this process by requiring access providers to disclose certain information to access seekers, including price and cost inputs and non-price access conditions.

Stakeholders expressed concerns about the current NSW Undertaking's ability to address information asymmetries and imbalance in bargaining power that access seekers can face and, in so doing, impeding their ability to effectively negotiate and to make informed decisions.

This chapter sets out our draft recommendations on improvements to the information disclosure provisions to support more efficient and informed negotiations.

7.1 Overview of our draft recommendations

An access regime's information disclosure requirements should reduce the information asymmetries that access seekers can face in negotiations by ensuring that access seekers:

- have sufficient access to relevant information to determine whether to seek access and to engage in informed negotiations
- have confidence in the quality and accuracy of the information so that they can rely on it in negotiations.

We are making draft recommendations that access providers should be required to:

- publish further information on services, costs, prices, network development and performance on their websites, in addition to what the NSW Undertaking currently requires
- provide, with an indicative offer, information directly relevant to that offer
- respond within a specified time to any further information requests from access seekers.

We are making a draft recommendation that IPART, as rail access regulator, should provide access seekers with greater confidence in the quality and reliability of the information by developing and publishing an enforceable disclosure guideline. The disclosure guideline would include a new information standard.

These draft recommendations would improve the amount and accessibility of information available to access seekers to inform their negotiations, reducing the information asymmetries that access seekers can face when negotiating access with rail access providers.

7.2 What does the NSW Undertaking currently provide for?

Section 8 of the NSW Undertaking currently requires rail access providers to provide, at the request of an access seeker, an information package to access seekers within 28 days where the access seeker can demonstrate the capability necessary to become an access seeker.

This section of the NSW Undertaking also sets out what should be in the information package, including information on:

- the rail network's configuration and its technical, physical and operational characteristics

- the availability and current use of the rail network
- the rail access provider's pricing policy
- the network's recurrent and capital costs
- the rail access provider's standard access agreement and access request procedures
- a copy of any prior published arbitration determinations.

Clause 8.8 of the NSW Undertaking allows access seekers to request further information from the rail access provider that directly relates to its request for specific train path(s), which the rail access provider must not unreasonably refuse. However, it does not specify the timeframe within which rail access providers must respond to such a request.[89]

7.3 What are the problems with the current requirements?

In response to our Issues Paper, stakeholders told us that information asymmetry is a key impediment to effective negotiations that should be addressed through improvements to the information disclosure requirements in the NSW Undertaking.[90] They noted that there is currently insufficient information available on the efficient cost of providing services.[91] Other stakeholders pointed to the benefits of greater transparency on prices[92] and network performance.[93]

Stakeholders also raised concerns about the accessibility of information, with access seekers currently having to request basic access information, rather than being able to access the information on the rail access provider's website.[94] Some stakeholders also noted the need for greater regulatory oversight in this area.[95]

Our own examination, which has been informed by a review of other access regimes, indicates that while the NSW Undertaking provides for a large amount of information to be disclosed, there are inadequacies in this information and its accessibility.

For instance, in contrast to other access regimes, the NSW Undertaking does not currently require:

- the publication of basic information that access seekers can have recourse to when deciding whether or not to seek access, such as information on:
  - the services offered by the rail network
  - the standing prices and non-price terms and conditions applicable to services that are likely to be sought by most access seekers
  - the prices paid by other users of the infrastructure
  - the rail access provider's network development plan
  - network performance
- the provision of information that access seekers can use to engage in more informed negotiations with rail access providers, such as information on:
  - the method and inputs used by the rail access provider to develop the offer
  - the cost of providing access to the services they are seeking.

The NSW Undertaking does not specify standards for the quality or reliability of information to be provided to access seekers and imposes a number of hurdles to access seekers obtaining the information.

As a number of stakeholders have observed, these deficiencies in disclosure requirements:

- hinder access seekers' ability to effectively negotiate with rail access providers
- give rise to unnecessary search and transaction costs
- result in inefficient decision-making about access to the rail networks
- make access seekers more susceptible to exercises of market power.

While it has not been possible to quantify these effects, we expect that they are likely to have a detrimental effect on economic efficiency and consumers, more generally.

7.4 What do other access regimes require?

The information disclosure requirements in other access regimes are intended to provide access seekers with sufficient information to inform their decision on whether or not to seek access and to engage in more informed negotiations with the service provider.

While the objectives of the disclosure requirements are broadly the same across the rail, port and energy access regimes, they provide for varying levels of information to be provided to access seekers. In general, the regimes developed in the last five years tend to provide for:

- a more comprehensive set of information to be made available to access seekers
- the publication of basic access information on the service provider's website, with additional information available on request
- the application of an information standard to the information provided to access seekers and assurance requirements to cost and price information
- regulatory oversight of compliance with the disclosure requirements.[96]

7.5 How can information disclosure in the NSW framework be improved?

Access seekers need more detailed and accessible information to help them make more informed decisions about whether to seek access and on what terms.

7.5.1 Access providers should be required to publish more information upfront on prices, services, network development and performance

We are making a draft recommendation that access provides should be required to publish the following basic access information on their website, in addition to the information currently specified in section 8 of the NSW Undertaking:

- a list of the **services offered** by the rail network and details of any limitations on availability

- the following information for services that are likely to be sought by most access seekers (standard services):
  - **standing offer prices**, including information on how the prices have been calculated (including key inputs to the calculation) and comply with the pricing provisions
  - **standard access agreement,** including the default terms and conditions of access for standard services and comply with the non-price provisions in Chapter 8
- information on the **individual prices paid** by rail users, including information on the services to which the prices relate
- the rail access provider's **network development plan**, including information on planned network investments and capital works programs
- the rail access provider's performance against a set of **key performance indicators**
- any other information required by IPART, as the regulator.

Table 7.1 shows how this information could be used to inform an access seeker's decision on whether or not to seek access.

Table 7.1 How the additional information would help inform access seekers

Information	How information could be used by access seekers
Services offered	Access seekers could use this information to determine whether the service they are seeking is available and, if so, whether there are any constraints on its availability.
Standard services: • Standing offer prices • Standard access agreement	Access seekers could use this information to get an initial indication of the price and non-price terms and conditions of access that are likely to be offered by the rail access provider.
Individual prices paid	Access seekers that do not have the capacity to interrogate cost information could use this information to quickly assess the reasonableness of the standing prices and any offer that they receive. Transparency of these prices should also pose a constraint on the prices offered by rail access providers and provide more insight into whether price discrimination is occurring.
Network development plan	Access seekers could use this information to determine whether more capacity may become available over time, or if their use of the network may be affected by planned capital works.
Key performance indicators	Access seekers could use this information to get a better understanding of the service they are likely to receive, which could then be factored into the price they are willing to pay.

7.5.2 Access providers should disclose cost information underpinning indicative offers in a timely manner

To help those access seekers that decide to seek access engage in more effective negotiations, we are making draft recommendations that:

- rail access providers should be required to provide the following information when they make an **indicative offer** to an access seeker:
  - the **method** and **inputs** used to determine the indicative offer price
  - the **direct costs** associated with providing the service sought by the access seeker
- the existing right that access seekers have under section 8 of the NSW Undertaking to request further information be amended to require access providers to **respond to the request within 20 business days**, unless otherwise agreed by the parties (there is currently no time limit for a response).

7.5.3 IPART should publish an information disclosure guidance document

Our draft recommendation is that IPART would then publish an information disclosure guideline for access providers that explain these requirements further, such as:

- the information that is to be provided to access seekers
- the information standard that is to apply to all the information provided to access seekers, which in keeping with the standards used in other access regimes should prohibit the provision of false or misleading information and require:
  - information to be developed in keeping with what would be expected of a competent person acting with due skill, diligence, prudence and foresight
  - forecasts or estimates, to represent the best estimate arrived at on a reasonable basis
- the assurance requirements to be applied to cost and price information
- when information is to be made available and updated by the rail access provider.

This document could be regularly updated in response to changes in the industry, feedback, or experience with compliance. It would then provide access seekers with greater confidence in the quality and reliability of the information that is reported.

Draft recommendations

11. That, in addition to the current information disclosure requirements in the NSW Undertaking, the rail access provider be required to publish:
    a. **standard services** offered by the rail network and details of any limitations on availability
    b. **standing offer prices**, including information on how the prices have been calculated (including key inputs to the calculation) and comply with the pricing provisions
    c. **standard access agreement/s**, including the default terms and conditions of access for standard services that comply with the required non-price provisions
    d. **individual prices** paid by all customers and the services to which they relate
    e. **network development plan/s,** including information on planned network investments and capital works programs
    f. **key performance indicators** that access seekers could assess the rail access provider's performance against.

12. When providing an indicative offer to an access seeker, that the existing information disclosure requirements be expanded to require rail access providers to include the following information:
    a. the method and inputs used to determine the price in the indicative offer
    b. the avoidable costs associated with the service sought by the access seeker
    c. other information as set out in IPART's information disclosure document.

13. That the access provider be required to respond to any access seeker request for further information within **20 business days** (unless otherwise agreed by the parties).

14. That IPART should publish an **enforceable disclosure guideline** to provide further detail on what information rail access providers must publish, including:
    a. the information standard that is to apply to all the information provided to access seekers
    b. the assurance requirements to be applied to cost and price information
    c. when information is to be made available and updated by the rail access provider.

Chapter 8

Non-pricing provisions

Schedule 2 of the NSW Undertaking sets out the minimum terms and conditions that must be included in an access agreement. The Government has asked us to review these.

In response to our Issues Paper, stakeholders told us that they have found it difficult to negotiate non-price terms and conditions with access providers.[97] This restricts and delays their ability to transport the amount of freight on the network that they would like. In particular, the current arrangements lack transparency around how the access provider allocates available capacity, coordinates track possessions, and makes decisions on rolling stock.

The NSW Undertaking also lacks a framework for access seekers to hold the access provider accountable for performance by, for example, negotiating KPIs to be included in an access agreement, guided by a set of provisions.

This chapter discusses the problems we have identified in the NSW Undertaking's guidance and access provider's incentives for:

- allocating capacity on the shared network
- managing capacity to maximise use of access rights and efficiency of cross-network journeys
- trading capacity rights
- investing in new capacity
- assessing operator qualifications to permit access to train paths
- ensuring train paths and movements are fit for purpose.

It discusses our draft recommendations to improve the NSW framework's operations in these areas, how the access provider should be held accountable and what the regulator's role should be.

8.1 Capacity allocation

The access provider's incentives and processes for allocating capacity on the rail network are fundamental to ensuring efficient negotiated outcomes. It is particularly important on networks where capacity is often scarce and subject to passenger priority requirements.

Section 99D(5) of the Transport Administration Act provides that:

> A body responsible for network control must—
>
> (a) give reasonable priority to rail passenger services, and
>
> (b) subject to giving reasonable priority to those services, promote and facilitate access to the part of the NSW rail network for which it is responsible in accordance with the current NSW rail access undertaking, and
>
> (c) allocate priority between rail passenger services and freight services consistently with the requirements of any agreement between the Commonwealth and the State or Transport for NSW for the funding of railway infrastructure that is part of the NSW rail network.

8.1.1 The NSW Undertaking does not provide enough guidance on how capacity is allocated

The NSW Undertaking doesn't specify what capacity allocation, service planning and train control the access provider must provide to access seekers. However, the 'Information Pack' that TAHE provides to access seekers on request includes its internally developed Operations Protocol[98] (which also forms an appendix to its standard access agreement). The Operations Protocol addresses:

- development of a new standard working timetable (SWTT)[99]
- temporary modifications to the SWTT for special events and track possessions[100]
- daily train planning[101]
- real time train control, including the description and application of train decision factors.[102]

The NSW Undertaking only defines the access provider's requirements on giving passenger trains priority in broad terms. Clause 7.1(c) requires that:

> The Rail Infrastructure Owner must maintain reasonable priority and certainty of access for railway passenger services in accordance with its obligations under the Transport Administration Act.

The result is that access providers have significant discretion in deciding how they allocate capacity.

8.1.2 Access providers have limited incentives to maximise freight access

Access providers may not always have a natural commercial incentive to maximise freight access to the network. For example:

- **Metropolitan Rail Network (MRN):** Sydney Trains is the rail infrastructure manager responsible for allocating capacity and scheduling maintenance. Sydney Trains' highest priority is the success of its vertically integrated commuter passenger services, which attract a high level of Government funding support. Sydney Trains achieves its objectives by minimising any potential impact of freight services on passenger trains. As a result, Sydney Trains has low incentives to facilitate additional freight access, and has a very low risk tolerance for any potential network disruption that may be caused by freight trains.
- **Hunter Valley Coal Network (HVCN):** This is also managed by Sydney Trains as part of the Metropolitan Rail Network. This is the only network that recovers its full economic costs on a stand-alone basis from freight users. The access provider has limited incentives to negotiate with new freight entrants and stronger incentives to earn more revenue from passenger trains.
- **Country Regional Network (CRN):** UGL manages the capacity and maintenance of the Country Regional Network on behalf of TAHE under a franchise agreement. The Country Regional Network is largely funded by the NSW Government, with access charges only recovering a small proportion of the total network costs. For UGL, additional revenue from freight is unlikely to recover the costs of providing services due to competing with road freight services.

- **Non-Hunter Valley Coal Networks:** The ARTC leases and operates these, none of which recover full economic costs. However, as a Government Business Enterprise, the ARTC has a stronger commercial incentive to increase freight traffic on these networks to recover more of its shared network costs and earn a commercial rate of return. The Metropolitan Freight Network is a dedicated freight network, while the other sectors are in regional areas, where freight operations are only minimally impacted by passenger services.

8.1.3 Discretionary application of passenger priority may lead to economically inefficient outcomes

The current passenger priority provision and lack of transparent processes give the access provider a lot of discretion around allocating capacity to freight on the shared network. This is particularly relevant on TAHE's Hunter Valley Coal Network and Metropolitan Rail Network, which are constrained shared networks where freight competes with passenger services for scarce capacity.

Neither TAHE's Operations Protocol nor any other documents referencing passenger priority provide specific detail around how TAHE allocates reasonable priority to rail passenger services. Stakeholders have told us that some rail infrastructure managers have a strict interpretation of passenger priority[103], which may not be economically efficient in regional areas with low passenger train utilisation.[104] They have also told us that network managers are not willing to make small changes to passenger timetables to create additional capacity for freight.[105]

8.1.4 Other rail access regimes include provisions for allocating capacity and determining passenger priority

Passenger priority is common in other jurisdictions and subject to government policy. For example:

- In Queensland, the *Transport Infrastructure Act 1994* (Qld) is quite specific about the circumstances in which passenger services are to be granted priority over other services.
- The ARTC's network management principles (which reflect its interpretation of reasonable passenger priority) prioritise some freight services (e.g. freight services likely to affect commuter peak services or express freight services or express freight services) over frequent-stopping passenger services that are not peak services.[106]
- The *Rail Management Act 1996* (Vic) in Victoria allows for all passenger services to be prioritised over all freight services.[107]

Most rail access regimes require transparent processes and decision-making for allocating capacity at the access negotiation and service planning stages (including possession planning[a]). In many cases, these processes are subject to the regulator's review and approval.[108]

The regulatory instruments in these regimes do not include a lot of detail about what the capacity management policy must include. However, they may provide guidance on what the regulator will approve. For example, ESCOSA's guideline for the Tarcoola-Darwin Railway:

- specifies that the policy must be designed and maintained to:
  - ensure allocation and reallocation of train paths is undertaken in a non-discriminatory way between all operators, acknowledging contractual rights
  - encourage the maximum use of the railway
- specifies in some detail the content that must be included in the policy.[109]

8.2 Our draft recommendation to promote efficient capacity allocation

We have made draft recommendations that the rail access framework should require access providers to allocate scarce capacity (at the negotiation stage) according to well-defined steps that meet competitive neutrality and efficiency tests.

Consistent with other regimes, the access provider should retain responsibility for setting out a process in its undertaking to suit its network conditions. This would:

- increase transparency and provide greater certainty about how access providers make capacity decisions, including how it would implement passenger priority in most foreseeable circumstances

[a] When a section of track is required to undergo maintenance, it is handed over by the operators to the engineers who take 'possession'.

- incentivise access providers to allocate capacity on the basis of economic value and not discriminate against operators competing in the same end markets
- provide a means of holding the access provider accountable to their overarching allocation mechanism when negotiating paths at the service planning stage if a matter was brought to arbitration.

However, these would not affect the train controller's real time decisions if there is a force majeure event or when trains go off timetable and need to catch up.

8.3 Capacity management

An ongoing source of frustration for stakeholders is how rail infrastructure managers coordinate their capacity management and maintenance between networks. GrainCorp submitted that:

> Currently, there is a lack of coordination between rail networks and inconsistent end-to-end arrangements for access, which creates complexity and increases costs. These network inefficiencies and higher costs are ultimately borne by grain growers, who receive a lower price at the farm gate and are subsequently less competitive in international markets.[110]

In particular, stakeholders have also told us that rail infrastructure managers in NSW do not coordinate their maintenance activities that affect freight operations.[111] Maintenance is delivered through separate outsourcing strategies, drawing on a small pool of contractors, which results in an excessive number of track possessions.

For example, it would minimise the disruption to train operations if track possessions for maintenance could be synchronised between adjacent networks. Network A could close a section on Monday, interrupting train paths in both networks. If Network B closes a section on Friday, then trains will be disrupted for two days. In contrast, if both networks had their closures on the same day, then trains would be disrupted for only one day.

Pacific National suggested that the timing and location of planned maintenance should be set before passenger or freight paths are allocated to provide greater transparency and certainty for operators.[112]

8.4 Our draft recommendation to promote efficient capacity management

The current NSW rail access framework does not consider the interoperability of different rail networks. While we acknowledge that cross-border rail journeys are a source of frustration for rail operators, we've found that there is limited scope to address these coordination problems unilaterally through the NSW rail access framework.

We have made the draft recommendation that the rail access provider should consult adjoining network rail infrastructure owners when developing a network maintenance plan, to maximise available capacity at the service planning stage. This could provide for more seamless train movements and assist access holders to increase use of their existing capacity rights by minimising disruptions from track possessions.

8.5 Path resumption and long-term exclusive rights

Scarce capacity can be further limited by access holders keeping the rights to unutilised or underutilised paths, or holding long-term, exclusive rights for the purpose of limiting competitors from accessing them.

The fact that an access holder has paid for an unused path should not necessarily entitle that holder to prevent other train operators from using it in future. It would be inefficient and anticompetitive to prevent competitors or other operators with a higher economic value cargo from transporting their goods along that path.

In addition, long-term exclusive access rights may be inefficient where other users or new types of traffic could potentially use those rights more profitably.

8.5.1 Other rail access regimes allow for the access provider to resume underutilised paths

The Aurizon Network Undertaking allows Aurizon Network to resume underutilised timetabled paths in whole or part under certain circumstances. For example, if the access holder:

- doesn't operate at least 85% of train services allowed under its entitlement over a period of 4 consecutive quarters, or
- doesn't operate on a scheduled path for 7 or more times out of any 12 consecutive occasions

then the access provider may resume the path within 40 business days if:

- it gives the access holder reasonable notice and opportunity to respond, and
- the access holder doesn't demonstrate to Aurizon Network's reasonable satisfaction that it has a sustained requirement for the path, and
- Aurizon can demonstrate that it has a reasonable expectation of sustained alternative demand for the path.[113]

Queensland Rail's undertaking includes a similar provision[114] and the ARTC's Hunter Valley Access Undertaking also allows it to reduce capacity entitlements where it is under-utilised, but doesn't specify how it makes that decision.[115]

8.6 Our draft recommendation to limit operators' abilities to hold access rights where it may not be efficient

Our draft recommendation is that access providers should:

- revoke or curtail access rights if access holders persistently fail to use contracted train paths, even if take-or-pay arrangements are in place
- grant new long-term exclusive access rights only where there is a compelling case based on efficiency[b] or avoidance of wealth transfer.[c]

While grandfathering or granting new long-term rights may be efficient in some circumstances (e.g. where the rail infrastructure manager can demonstrate net economic benefits), new long-term exclusive access rights should be discouraged where other users could potentially use those rights more efficiently.

8.7 Capacity rights trading

Access rights or entitlements are granted by way of a bilateral access agreement between the access provider and access holder. A rail access right is for a path for a particular type of train to operate from a defined origin to a defined destination at a defined time. The train type specified in the access right will often specifically reference the rail operator's rolling stock, and the product being transported. The origin and destination will generally be the loading and unloading terminal for a specific product.

The NSW Undertaking doesn't permit capacity trading. Clause 2.2 states:

> The Rail Infrastructure Owner will only permit Access to Access Seekers, other than the National Rail Track Corporation, where in the opinion of the Rail Infrastructure Owner, Access is not intended for the purposes of trading in Access rights.

Where a rail operator takes over from a competitor for an existing rail task, the ability to trade access rights could improve efficiency and reduce barriers to entry. However, access providers have not supported a secondary market in access rights, citing concerns that it may introduce safety and reliability risks.[116]

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[b] It may be efficient to grant long-term access rights if these are necessary to induce investments in assets like terminal facilities or even train sets.

[c] Some access holders have built substantial businesses and made substantial investments that are predicated on the availability of certain premium paths. Any decision to transfer the right to those paths to another party could effectively strand those investments and transfer wealth from the stranded investor to the new access holder. If the net effect of this path transfer is simply to transfer wealth from one firm to another, then there is no efficiency justification for doing it.

8.7.1 Other rail access regimes allow trading under certain circumstances

In other regimes, access entitlement trading may be allowed:

- when an access holder allows another party to operate train services over its access entitlement, with no change to the access holder's requirements to the access provider, including service operation or access charges, and/or
- through varying agreements, whereby the path is removed from the first access holder's access agreement and incorporated a new access holder's agreement. This may happen as a result of negotiation between 2 operators, or where an end user requests a transfer of its freight task to another operator.

Negotiated transfer of *identical* access entitlements

Several access frameworks provide for transfers of identical access entitlements. For example, the ARTC Interstate Access Undertaking permits transfers subject to the ARTC's approval that the transferee is accredited, accepts all obligations of the existing operator (including operational, safety and contractual conditions) and indemnifies ARTC for any loss or damage.[117]

The Aurizon Network and Queensland Regional network allow transfers conditional upon the access provider's approval, which may not be unreasonably withheld.[118]

Negotiated transfer of *similar* access entitlements

The ARTC's Hunter Valley Indicative Access Agreement provides a structured process for trading similar access entitlements. There is significant homogeneity of train services, with many end producers, and multiple rail operators, using similar trains to transport coal to port. Differences between access entitlements primarily relate to the loading point.[119]

The Aurizon Undertaking provides options for short-term trades (where the access agreements do not change, but another party is able to utilise the paths on a short-term basis) and long-term trades (which are reflected in changed access agreements). Trades are permitted provided they meet specified conditions, such as capacity sufficiency, no financial consequence to the access provider and that the transferee has a legitimate demand for the capacity. The latter condition relates to specific provisions in the coal network undertakings that are designed to ensure that capacity is allocated consistently across the coal supply chain.[120]

Queensland Rail's access undertaking addresses similar access entitlement trading. It allows for transfers via 'relinquishment' of access under one agreement and the relinquished capacity being included in a new agreement. This ensures that any new arrangement is fully compliant with access undertaking requirements, including capacity assessment and access charge arrangements. Queensland Rail is obliged to not unreasonably delay the process for negotiating and executing the new access agreement.[121]

'Tap on the shoulder' transfer of access entitlement for the same traffic task

Under both the ARTC and Aurizon Network access undertakings, there is either a requirement or an option for the end user to contract access, with trains operated under an operational agreement between the access provider and the rail operator.[122]

This form of agreement was developed to allow the end customer to have greater direct control over the capacity it requires for its traffic task. The end customer holds the access entitlement, and there is no need for it to transfer the entitlement in order to change operator.

Similarly, Queensland Rail's access undertaking and standard access agreement provide for a tripartite agreement involving the end customer as well as the rail operator and the access provider.[123] Again, this structure of agreement enables the end customer to change rail operator without transferring the access entitlement.

Under the Aurizon Network undertaking, there is an option for the railway operator to hold the access entitlement, allowing a simpler contracting arrangement between the end customer and the railway operator. In this case, the Aurizon Network undertaking provides for a 'tap on the shoulder', where Aurizon Network will transfer the capacity from the current operator to a new operator at the request of the end user. Aurizon Network must include provisions to facilitate this in the rail operator access agreement.[d]

8.8 Our draft recommendations to increase access and network utilisation through capacity trading

Our draft recommendation is that access providers must allow the transfer, or sub-licence of the use of train paths by another operator if requested by the operator or end use customer, provided that the operator meets certain minimum conditions set out by the access provider and assessed by IPART.

To accommodate the legitimate concerns of access providers about the risks of transferring non-identical paths, our draft recommendation would require the access provider must set out in an undertaking how it would manage such trades, including any conditions that the transferee must meet. For example. that:

- the transferee is accredited for safety
- the transferee continues to operate under the same terms and conditions as the transferor, including the same safety and operational arrangements or the transferee has an existing access agreement in place that addresses the access provider's contracting and safety requirements
- the transferee uses the path to serve the same end market as the transferee (i.e. same commodity)

[d] Clause 7.4.7 of Aurizon Network's Undertaking states that 'Where an Access Holder holds any of its Access Rights for the purpose of providing Train Services for a Customer, that Customer may seek to transfer those Access Rights to itself or to another Railway Operator so that the Customer or, if relevant, another Railway Operator, becomes the Access Holder in respect of those Access Rights provided that the Customer is not seeking any change to the origin and destination of, or the commodity for, the Access Rights (Customer Initiated Transfer).

- the transferee meets the access provider's creditworthiness, insurance and historical performance requirements, either by allowing the transfer to be conditional upon a credit review (and with security potentially being required) or by requiring the transferor indemnify the access provider for any loss or damage due to the transfer
- the transferee's rolling stock and freight task are suitable for the dynamic envelope[e] and geographic conditions of the path.

The transferee or end use customer should also demonstrate that they have an agreement in place to transport the freight task, subject to transfer of access rights, to avoid vexatious claims to a path.

This would also allow end use customers to initiate a 'tap on the shoulder' transfer of access rights used to transport their freight task from the existing operator to a new operator. This would reduce an operator's ability to use its contractual entitlement to the train paths to stifle competition in the provision of rail haulage services to the end customer.

8.9 Capacity investment

Under-investment in the network can lead to reduced capacity and performance, which increases rail operators' costs. Stakeholders claim that it is difficult to negotiate with access providers on investment and process improvements.[124]

The existing NSW Undertaking includes high level obligations for access providers to consult on capital expenditure in relation to the maintenance of a regulatory asset base (RAB).[125] However, in practice, a record of the RAB is only maintained for minor sections of the networks associated with the Hunter Valley Coal Network.

We have made a draft recommendation that where access seekers request investment in expanded capacity, the access provider should proceed if it can recover costs from access seekers.

An important element of capacity investment is effective customer involvement to ensure that the investments made by access providers are the most efficient ones and that they provide outcomes that customers want and are willing to pay for. Chapter 12 consider what changes to the NSW rail access framework would be required to provide an effective capacity consultation framework.

8.10 Operator qualifications

Rail operators must meet certain standards for safety, rolling stock, creditworthiness and insurance before the access provider will grant them access. Other issues, such as the train's dynamic envelope (i.e. whether it will actually fit through tunnels, etc) may also be the subject of requirements.

[e] The dynamic envelope is the outline generated by a moving vehicle, taking into account vehicle and track tolerances and the lateral movement of the vehicle.

Rolling stock standards are governed by the Rail Industry Safety and Standards Board (RISSB). The RISSB sets national standards, but each access provider or rail infrastructure manager interprets the standards differently and is under no obligation to adopt them. The model also allows for each rail network's unique operating environment to be taken into account. This results in different standards being adopted and implemented across rail networks. The access provider has discretion to set creditworthiness and insurance conditions to suit its needs.

The NSW Undertaking does not specifically address these qualifications, but leaves them to be addressed through negotiation in the access agreement. Access providers then apply rolling stock and other approval processes (which may not be specified in the access agreement) in order to confirm that the operator complies with those standards.

In particular, rolling stock must pass through multiple railway operator authorisation processes prior to being adopted by an access provider or manager regardless of whether the technology has been approved elsewhere. Approval with one rail manager does not necessarily serve as a 'trust marker' to another rail operator.

8.10.1 Lack of timely rolling stock approvals is a barrier to entry and investment

Rolling stock approval processes are inefficient where they result in additional costs or time to establish rail service. Multiple and disparate accreditation processes could lead to the use of inefficient technologies.

Stakeholders have told us that, in particular, cumbersome rolling stock approval processes are a barrier to future investment and innovation, because it takes longer to get new models approved. Rail operators have a disincentive to invest in new, high-tech locomotives, because approval takes too long, restricting access.

8.10.2 Other rail access regimes don't address rolling stock approvals

Most rail access regimes don't directly address rolling stock standards or other operator qualification approval processes. In the Aurizon Network and Queensland Rail regimes, the standard access agreements must set out an approval process. In both cases, the agreements simply set out a process that requires the access seeker to submit an authorisation request, a certifier is required to confirm that the rolling stock complies with the standards (which may require reports on trials/commissioning tests), and the rail manager provides authorisation.

However, earlier iterations of the Queensland Rail access undertaking (which formed the basis of both the Aurizon Network and Queensland Rail access undertakings when the businesses separated in 2010) did incorporate provisions to address dispute resolution around rolling stock standards. In the Queensland Rail's 2001 Access Undertaking:

- there were provisions for the access seeker/holder and the access provider to jointly develop and agree an 'Interface Risk Management Plan' (IRMP), which detailed the controls agreed by the parties to address safety and operational risks, including rolling stock standards

- the Access Undertaking provided a dispute resolution framework whereby either party could notify the other party of a dispute (a 'IRMP Dispute Notice') in which the issue would be referred for expert resolution. If the matters were solely of a safety nature, they could be referred to the safety regulator; if the matter was not referred to an expert, or the safety regulator, then either party could refer the matter to the QCA for resolution.[126]

However, these provisions no longer feature in either the Aurizon Network or Queensland Rail access undertakings. There is little discussion on this issue in the QCA's consideration of the access undertakings in which the provisions were removed. However, we understand that the removal was, at least in part, driven by the introduction of the national rail safety law, which did not provide for the national rail safety regulator to play a dispute resolution role.

8.11 Our draft recommendation to increase transparency and accountability around rolling stock approvals

Our draft recommendation is that the access provider must not refuse permission to operate trains to any qualified operator that is, one who meets objective standards as assessed by IPART. These may include things like safety, rolling stock suitability for the dynamic envelope and geographic conditions of the track, creditworthiness and insurance cover, to ensure that artificial barriers to entry are not created.

Further, we consider that there would be value in requiring the access provider to publish their rolling stock approval process and associated timeframes and reporting against their performance in facilitating new rolling stock approvals. This would:

- improve the transparency of the access provider's rolling stock approval processes
- apply some structure (including timeframes) around the processes
- through public reporting of performance against the process, create increased accountability on access providers to follow the process in a timely way.

It would not require any change to the safety management regulatory framework. Safety is critically important, and we do not propose that any of draft recommendations on the NSW rail access framework would override the safety regime.

8.12 Performance measurement

Ensuring train paths and train movements are fit for purpose can be managed through a performance measurement and incentive framework. Regular KPI reporting is an effective and transparent way to monitor an access provider's commitment to users that it will maintain the service to a fit-for-purpose condition. It assists users (and potentially the regulator/arbitrator) to identify whether access providers are complying with their statutory requirements under the NSW rail access framework. It also helps potential access seekers in their negotiations, by providing a means of gauging reasonable expectations of service standards, which can be weighed against proposed access charges.

The NSW Undertaking doesn't require the access provider to report on their quality of service. Performance monitoring is left to parties to negotiate in individual agreements. The NSW Auditor General previously identified that the access arrangements between TAHE (which is managed by Transport for NSW on behalf of TAHE), and rail freight operators do not include any key performance indicators for either rail freight operators or the transport agencies.[127]

We understand that TAHE and Transport for NSW are currently developing a new standard access agreement, which will include performance measures with each individual rail freight operator.

8.12.1 Other rail access regimes provide for performance accountability

Several rail access regimes around Australia already recognise the need to hold parties accountable for achieving minimum performance standards and require access providers to report against KPIs. Table 8.1 shows some examples of KPI reporting in other regimes.

Table 8.1 KPI reporting in other rail access regimes

Regime	Public / private	Performance category	Aggregation	Frequency
ARTC HVAU	Public	Network performance, system performance (including transit time, planned v actual maintenance requirements)	Pricing zone	Quarterly
	Public	System performance (including coal chain losses), throughput, track condition index	Network wide	Quarterly
	Public	Unit cost for infrastructure maintenance per GTK[1], network control and operations cost per train km, operating cost per GTK, fixed capital cost per train km, incremental capital cost per GTK	Network wide	Annual
	Access Agreement	Negotiated	Service level	Negotiated
ARTC IAU	Public	Reliability, network availability, transit time, temporary speed restrictions and track condition	Geographic zone	Quarterly
	Public	Unit costs for infrastructure maintenance, train control and operations	Network wide	Annual
	Access Agreement	Reliability, speed restriction impact, availability, safety, train/rolling stock quality, and track quality	Service level	Monthly
Aurizon Network	Public	Data is both diverse and granular, including indicators like average delay minutes and reason, the exact hours scheduled and actually spent on disruptive maintenance works, track quality, speed limits, variations made to the daily train plan (DTP), reported safety incidents, and more	Geographic zone	Quarterly
	Access Agreement	Below rail transit time	Service level	Monthly
	Access Agreement	Negotiated	Service level	Monthly
Queensland Rail	Public	Delays/cancellations by cause, number of written complaints, speed restrictions, safety incidents, track closures and track quality amongst others	Geographic zone	Quarterly

Regime	Public / private	Performance category	Aggregation	Frequency
	Public	Time taken to answer capacity information requests, various responses to access proposals, number of disputes, maintenance/operating costs and capital investment, etc	Network wide	Annual
	Access Agreement	Train service consumption, planned and unplanned track maintenance/closures, cancellations, speed restrictions, and others	Service level	Monthly

1.Gross tonne kilometre.
Source: IPART.

8.13 IPART's role in holding the rail access provider accountable

We have made a draft recommendation that IPART may publish a binding instrument (such as a guideline) which sets out minimum criteria and other matters that the access provider must consider in addressing the non-price provisions in its undertaking.

This would allow IPART to specify more detailed matters that the access provider should address in its Undertaking. IPART would refer to it in its assessment of the access provider's Undertaking and it could also be referred to by an arbitrator in the event of an arbitration.

As an example, the guidance document may specify that the access provider must address:

1. Train control procedures including:
    a. train prioritisation hierarchy - specifying the priority train controllers apply for different types of train services (including both passenger and freight train services)
    b. decision making matrix, specifying the principles upon which train controllers will deliver train control directions to resolve potential train conflicts.
2. Allocation of capacity where access requests from more than one access seeker are unable to be satisfied:
    a. the criteria upon which the capacity will be allocated
    b. defining the circumstances in which passenger services may be prioritised over freight services.
3. Allocation of long-term exclusive access rights:
    a. defining the circumstances in which long-term access rights could be efficient
    b. the process the Rail Infrastructure Manager will follow to determine whether or not to grant long-term exclusive access rights.
4. Service planning, including procedures for:
    a. preparing master and daily train plans, including the information to be provided to rail operators and minimum notice periods
    b. short term variations to scheduled train paths, including any circumstances where such variations can be required by the access provider or manager without the operator's consent
    c. permanent or long-term variations to scheduled train paths, including any circumstances where such variations can be required by the rail infrastructure manager without the operator's consent.

5. Resumption of unutilised train paths, including:
    a. the circumstances in which the access provider or manager can resume unutilised train paths
    b. the procedures that must be followed.
6. Possession planning, including:
    a. the consultative procedures that the access provider or manager will follow before taking possession of the railway (i.e. with adjoining rail owners or managers and access seekers)
    b. the reasonable steps the access provider or manager will take to minimise disruption to scheduled train paths, and in what circumstances avoiding disruption to passenger services can be prioritised over avoiding disruption to freight services.
7. Rolling stock approvals, including:
    a. ensure that the rolling stock requests are assessed and approved in a non-discriminatory way between all operators using the railway
    b. achieve a timely and efficient process for the assessment and approval of rolling stock.

IPART could also provide guidance on what matters the KPIs could address in access agreements (see Table 8.2).

Table 8.2 Examples of matters that KPIs may address

Category	Matters that KPIs may address
Reliability	Measures related to the number and percentage of services performing according to schedule (e.g. healthy/unhealthy, entering/exiting the network on-time with a certain tolerance, etc) Cancellations
Transit times	Measures related to the number and percentage of services that transit the network in scheduled time Minutes of delays and cause Number and percentage of services delayed
Speed restriction	Length and prevalence of temporary speed restrictions (i.e. number of kilometres and percentage of track under restriction)
Axle load	Axle load limits
Track condition	'Track quality' index Planned and unplanned track maintenance/closures
Other	For high volume bulk systems, such as the Hunter Valley Coal Network, additional indicators relating to coal chain losses and total throughput may also be appropriate.

8.14 Our draft recommendations to ensure train paths and movements are fit for purpose

Our draft recommendation is that the access provider be required to establish service level KPIs to measure performance, and outline the consequences of failure to meet KPIs, in its access agreements to ensure that:

- the access provider provides train paths and infrastructure that are fit for purpose, and
- access holders ensure each train movement is fit for purpose.

Reporting against KPIs agreed in an access agreement allows flexibility to tailor the reporting to the specific requirements of the agreement. Operators using multiple networks will have a consistent measure of performance for their whole supply chain. KPIs would be negotiated between access provider and access holder to promote ownership and accountability.

Draft recommendations

15. The NSW rail access framework be amended to require access providers to incorporate the following non-price provisions in an undertaking to be assessed by IPART:
    a. That the access provider allocate capacity according to well-defined steps that meet competitive neutrality and efficiency tests.
    b. That the access provider may revoke or curtail access rights if access holders persistently fail to use contracted train paths, even if take-or-pay arrangements are in place.
    c. That the access provider only grants new long-term exclusive access rights where there is a compelling case based on efficiency or avoidance of wealth transfer.
    d. That the access provider consults adjoining network rail infrastructure owners and access holders in developing a network maintenance plan with the objective of maximising the available capacity of the network for access holders.
    e. Access rights be transferable at the election of the access holder or end use customer, subject to the transferee meeting objective standards as assessed by IPART for access of the access provider.
    f. Where access seekers request investment in expanded capacity, the access provider proceeds if it can recover costs from access seekers.
    g. That the access provider does not refuse permission to operate trains to any qualified operator, that is, one who meets objective standards as assessed by IPART such as for safety, rolling stock suitability, creditworthiness and insurance cover.
    h. That the access provider establish service level KPIs to measure performance, and outline the consequences of failure to meet KPIs, in its access agreements to ensure that:
        - the access provider provides train paths and infrastructure that are fit for purpose, and
        - access holders ensure each train movement is fit for purpose.

16. That IPART publish a guidance document that set out the minimum criteria and other matters that the access provider must have regard to when incorporating the non-price provisions in an undertaking.

Chapter 9

Setting access prices

Access prices are a central part of negotiations between access providers and access seekers. The current NSW Undertaking sets out several principles to help mitigate the use of market power by access providers.

Our terms of reference asked us to investigate appropriate pricing principles to apply to the calculation of access prices. As part of our analysis on the pricing principles, we have considered, among other things:

- which elements of the current NSW Undertaking are working well and should continue
- the impacts of our draft recommendations on rail infrastructure owners and access seekers, as well as competition in upstream and downstream markets.

9.1 Overview of draft recommendations

As discussed in Chapter 3, we are proposing that the NSW rail access framework continues to operate as a negotiate-arbitrate model. Under this model, access providers and access seekers voluntarily negotiate the terms of access, including pricing. These parties are better informed than the regulator about conditions in their markets that impact prices, such as demand and cost. They are in a position to use that information to negotiate efficient prices — prices that promote use of the NSW network while allowing the access provider to earn an economic return.

However, the access provider and access seeker may not always negotiate an efficient price due to an imbalance of market power or information asymmetry. We recommend the NSW rail access framework include the following set of price provisions (new and existing) to protect against this:

1. Shared revenue from access prices cannot be more than the full economic cost of providing access (current ceiling test).
2. Access prices cannot be less than the direct costs of using the network (access seeker specific part of current floor test).
3. Shared revenue from access prices should recover the incremental costs of providing access (sector specific part of current floor test).
4. Changes in an access seeker's access price should reflect commercial requirements, such as an increase in the cost of providing access.
5. Access seekers competing in the same downstream market should pay the same access price for the same service except if there is a cost difference.

9.2 Existing principles in the NSW Undertaking

The NSW Undertaking currently sets out 3 pricing principles:

1. The ceiling test – the access provider must not earn more than their full economic cost from access charges paid by access seekers.

2. The floor test – access charges paid by access seekers must at least meet the direct costs they impose on the NSW network (access seeker specific). Access charges, and any government subsidy, for a section of the network must cover the section's full incremental costs (section specific).
3. An access provider's total access revenue (including any government subsidies) must not exceed their full economic costs.[128]

The first 2 principles effectively set a minimum (floor test) and maximum (ceiling test) price for access. The minimum price requires access seekers to at least pay the direct costs their access imposes on the network to the access provider, and that incremental costs are recovered from shared revenue. Prices at the floor ensure the access provider will recover the day-to-day costs of providing access (but they will not earn an economic return on investment). Requiring each access seeker to pay for the costs they impose protects other access seekers from cross-subsidising them.

The maximum price is intended to protect access seekers from access providers using their market power to earn an excessive rate of return. That is, the ceiling test prevents the access provider from recovering more than the full cost (direct costs, capital costs and a return on investment) of providing access. A price above this level would mean the access provider is likely engaging in monopoly pricing.

The third principle acts as a revenue cap for the access provider. It looks at the access provider's total revenue from providing access against their total economic costs. The access provider is considered to be running an efficient business if their revenue offsets their full economic cost (including a reasonable rate of return commensurate to the risk of operating the business). They are considered to be acting as a monopoly if their revenue exceeds their costs (i.e. they have earned more than a reasonable rate of return).

9.2.1 We are making draft recommendations to retain the ceiling and floor tests

We consider that a floor and ceiling test remain appropriate and provide an effective means of regulating prices to constrain access provider's market power. Access providers may exercise market power when there is less competition from alternative transport modes such as road. For example, in areas where road is less competitive (e.g. bulk commodities) or freight cannot be transport by road (e.g. coal in the Hunter Valley). Retaining the floor and ceiling test allows access providers and access seekers to voluntarily negotiate a price for their commercial situation. At the same time, the provisions ensure the negotiated price is economically efficient, acting as a restraint on access providers' market power.

The provisions are consistent with the approach taken in other access regimes as well as with the Competition Principles Agreement. For example, the *Railways (Operations and Access) Act 1997* (SA) allows the Essential Services Commission of South Australia to establish a ceiling and floor for rail access prices.[129] The ceiling and floor then act as the minimum and maximum price for arbitration.[130] Similarly, the Competition Principles Agreement states regulated prices should be set to generate expected revenue for a regulated service to meet the efficient costs of providing access.[131]

Stakeholder submissions have highlighted the ongoing need to regulate access prices. They submitted that some access seekers may be price takers and unable to negotiate the terms of access. For example, Qube Logistics Rail Services submitted:

> In regards to the balance of market power, rail operators can only accept the price and train paths offered by the network owner and any variation in price directly affects rail contestability.[132]

Stakeholders also raised the importance of having a sound pricing methodology and the impact of prices on end customers. TAHE supports the price principles, though it did raise some concerns with their practical application, such as calculating a regulatory asset base for the ceiling test (Chapter 6).[133] Pacific National submitted that:

> … a sound pricing methodology should underpin the Undertaking and, to better empower consumers to make informed decisions, also include requirements to ensure that rail owner and operator prices are transparent.[134]

Similarly, ARTC submitted:

> an optimal regulatory framework should support commercial access price negotiations or reflect the ability to negotiate elements of that economic ceiling in the exchange of service and risk, depending on the relevant commercial framework.[135]

Retaining the floor and ceiling test would provide smaller access seekers protection against the access provider using their market power. They can be more confident that, even with limited negotiation, the price they are paying for access will still be efficient. At the same time, the floor and ceiling support commercial negotiations and allow the access provider to generate revenue that covers the efficient costs of providing access.

The ACCC has recently considered whether a ceiling test should be maintained as part of their review of the regulatory framework for ARTC's Interstate Network. They found that a cost-based ceiling was so far above current charges that it did not pose an effective constraint.[136]

In NSW, the access charges do recover the full economic costs in the Hunter Valley Coal Network. We conduct an annual compliance exercise for the ceiling test and have previously identified that RailCorp was over-recovering in some sections.[137] For other networks, access revenues are far below the ceiling. We provide further discussion on this in the next chapter. However, we consider in these circumstances additional protections are also required, which is why we are making draft recommendations for several new provisions, outlined below.

Currently, we only assess the ceiling test as part of our compliance process. We are making a draft recommendation that we should also assess whether access fees are recovering the direct costs (Chapter 13). Our draft recommendation would improve transparency about where access seekers are being subsidised by taxpayers or other access seekers. This provides information to the NSW Government to help ensure that taxpayers are receiving value for money.

IPART does not currently have a role assessing whether floor prices are met, so we are not aware whether all access prices currently recover the direct costs of providing access. We are interested to understand if access providers or access seekers are aware of instances where access has been sought at a price below the direct cost. We are also interested in whether access was still granted or if it was refused – as intended by the floor test.

We are not proposing to assess compliance to determine whether incremental costs are being recovered through access fees and government subsidies. This is because by nature of the service being provided, they are being funded in this way (even if the subsidies are implicit, rather than explicitly community service obligations (CSOs)). However, this principle is required to allow access providers to refuse access where they cannot recover their full operating and maintenance costs. Access seekers can seek arbitration if they believe they have been unjustifiably refused access.

9.2.2 A network-wide revenue cap is not required

We do not consider the third price principle is required for the NSW rail access framework. The ceiling test already limits the revenue that an access provider can earn from access charges. A breach of the ceiling test would also mean a breach of the network-wide revenue cap; therefore the revenue cap does not place any additional requirements on the access provider. Unlike the ceiling test, the current NSW Undertaking does not require us to enforce the revenue cap.

Seek Comment

2. Are access providers or access seekers aware of instances where access has been sought at a price below the direct cost? Did the access provider agree to grant access or did they refuse?

Draft recommendations

17. The NSW rail access framework retain the ceiling and floor test pricing provisions. The third price provision – a network-wide revenue cap – is duplicative and can be removed from the NSW rail access framework.

9.3 Protection against hold-up strategies

The existing pricing principles are intended to stop the access provider from acting as a monopoly during negotiations. However, stakeholders have expressed concern that the current framework does not provide protection against the access provider suddenly raising prices after a customer has made sunk investments in train sets or terminal facilities. For example, Aurizon submitted that:

> The [access provider] could also use that market power to expropriate a higher share of available rents, even in circumstances where it continues to set prices below the ceiling, including where there is competition from alternative transport modes… Indeed, if it is unable to price at or near the ceiling, it not only may perceive that it has a greater ability to exercise market power given the flexibility it has in setting prices within the floor and ceiling limits, but it also potentially has a stronger incentive to do so to ensure that it can maximise returns to its shareholders. In reducing the rents that can be captured by above-rail operators, this could make sunk investments uneconomic.[138]

Other submissions considered that the rail access framework should encourage user investment. Pacific National submitted that a sound pricing methodology should be considered against a series of objectives including using a pricing model that facilitates incentives for user investment.[139] Qube Logistics Rail Services also submitted that:

> … some end customers have little choice in the use of rail as developments may be constrained by planning consent or previous investment decisions. [This] represents a significant investment in rolling stock and infrastructure, which a network owner has the ability to exploit. [140]

We consider that there is a real risk access providers could use an access seeker's existing investments to obtain a higher access price that was not reasonably anticipated during negotiations for a new access agreement (i.e. using a "hold-up" strategy for "captive" access seekers). This kind of price 'hold-up' can cause inefficient outcomes. For example, decades-old investments in grain silos on lightly used branch lines could be stranded by sudden access price hikes. The risk of being subject to hold-up strategies can also discourage access seekers from investing, lowering the overall efficiency of rail freight in NSW.

In some cases, it may be possible to manage any prospective hold-up risk by writing better access contracts. However, the conditions necessary for a contracting solution do not appear to be present in the NSW rail industry. The types of long-term access contracts that would be needed to underpin complementary investments by access customers are not offered by the rail access providers.

Establishing a new price principle would help prevent access providers adopting a hold-up strategy. The new price principle would require price increases to reflect the costs to the owner of providing access. The principle would be used to guide arbitration if an access seeker triggered a dispute, but would not be enforced directly by the rail access regulator. Access prices reflect a specific service provided by the access provider to an access seeker. An arbitrator can consider the specific circumstances to determine whether hold-up is occurring, and the response to this strategy.

The ACCC considered the issues of hold-up strategies and captive customers in their review of the regulatory framework for ARTC's Interstate Network. They also considered that captive customers may be subjected to hold-up strategies by ARTC. They noted in their guidance paper that:

> …we [the ACCC] accept that ARTC has a degree of market power in some areas, including over a range of customers who would find it costly or are unable to switch to other transport modes. We consider that this warrants some protection in negotiation for rail access, including regarding pricing and terms and conditions of access.[141]

The ACCC has not put forward a final position as their paper is intended to guide the development of the next Interstate Access Undertaking.[142] However, they have proposed price controls that are limits on price changes as a means of preventing sharp price increases that may result in under-use of the network or disadvantage users who have made substantial investments.[143]

We consider that our approach is broadly consistent with the ACCC's guidance. Our principle will protect access seekers from unjustified price increases during negotiation and arbitration, if needed. An access provider could also proactively commit to the principle by introducing price controls in their undertaking.

9.4 Protecting against creating inefficiencies in downstream markets

We are recommending a new price principle be adopted to prevent access prices distorting competition in downstream markets. Distortion in downstream markets may occur when competing access seekers pay different prices for access for reasons other than cost. For example, it would be distortionary if one access seeker was able to obtain a preferable access price simply due to a long-standing relationship with the access provider. The access seeker with the lower access price may be able to undercut their competitor and improve their market position.

Where access seekers operate in the same downstream market, our proposed principle will support an outcome under which access seekers typically pay the same price for the same service except if there is a cost difference.

There is some precedent for a regulatory pricing rule against anti-competitive price discrimination in downstream markets. This is normally focused on vertically integrated access providers, such as in the National Access Regime as outlined below. However, we consider a similar principle applies here. The Competition and Consumer Act sets out:

- criteria for the declaration of a service under the National Access Regime. The first of these criteria is that access to the service as a result of declaration would promote competition in another market[144]
- pricing principles that the ACCC must take into account in certain circumstances including when deciding whether to accept an access undertaking. One of these principles that: [the access price structures should] not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher.[145]

Our price disclosure draft recommendations outlined in Chapter 7 would support the application of this principle. Access seekers would be able to see other access prices and negotiate the same price for those services, or, if needed, apply for arbitration. Arbitrators would be required to consider the principle as part of an arbitration.

We recognise that there are multiple characteristics of a service, such as:

- the commodity being transported
- extent of competing demands for paths from passenger services
- axle load and speed of the train
- time of the service
- any other relevant factors.

Arbitrators would need to consider all the different characteristics that make up a service when determining if two access seekers are paying the same price for the same service. We have reflected this in our draft principle and have sought comment on what service characteristics rail providers take into account when setting different prices for different services.

Draft recommendations

18. That 2 additional pricing provisions be included in the NSW rail access framework:
    a. To protect access seekers against "hold-up" strategies, changes in an access seeker's access price should reflect commercial requirements, such as an increase in the cost of access
    b. To prevent distortion of downstream competition, access seekers competing in the same downstream market should pay the same access price for the same service except if there is a cost difference.

Seek Comment

3. What characteristics distinguish one type of rail service from another, which could lead to different prices?

Chapter 10 »

Applying the ceiling test

10

As explained in the previous chapter, we are recommending retaining the ceiling test in the NSW rail access framework. This is the requirement that the revenue from an access seeker, or combination of access seekers, earned from negotiated access prices must not exceed the full economic costs of providing the service to that access seeker or combination of access seekers.

This chapter considers how the cost of providing services should be measured for the purpose of the ceiling test, including the following inputs:

- the regulatory asset base
- the rate of return
- inputs into the depreciation allowance.

10.1 Overview of our draft recommendations

Our draft recommendations on measuring costs for the purpose of the ceiling test broadly maintain the status quo:

- Rail assets should be valued based on a depreciated optimised replacement cost (DORC) methodology.
- The hypothetical network that is costed should be optimised for a customer or combination of customers (i.e. a 'stand-alone network').
- IPART should have a role setting the rate of return, as well as the key input into the depreciation allowance.

However, we are proposing to recommend some amendments. For the depreciation allowance, IPART would set asset lives, instead of mine lives. We are also proposing that IPART has more flexibility to determine the rate of return and asset lives, to:

- ensure that these inputs are able to capture improvements to methodologies reflecting changes to broader regulatory practices
- more effectively respond to changing circumstances such as climate change (for example, significant changes to power station closure dates).

We are also proposing to clarify some of the terminology contained in the NSW Undertaking. We have found in our previous compliance assessments that some terminology has been interpreted differently by different parties. Our proposed updates will help provide certainty for all parties.

The following sections explain:

- why the DORC method remains fit for purpose, even in parts of the network where it is not likely to constrain prices
- our proposed changes to how IPART calculates the rate of return and depreciation
- the clarifications we are recommending be made to the terminology.

10.2 Full economic costs

The ceiling test requires that the total revenue from the negotiated access price(s) paid by an access seeker, or group of access seekers, using the same sector(s) does not exceed the access provider's total costs of providing access ('full economic costs'), including an appropriate return on investment.

The NSW Undertaking defines full economic costs as sector specific costs that are to be assessed on a stand-alone basis, including:

- a permitted rate of return
- depreciation
- an allocation of non-sector specific costs (e.g. train control and overheads, and any associated rate of return and depreciation for these costs).[146]

The current definition of full economic costs captures capital costs (i.e. return on assets and return of assets). However, it does not explicitly include (or exclude) operating costs (i.e. direct costs and incremental costs). We are making a draft recommendation that the definition of full economic costs should be amended to clearly include operating costs.

To calculate capital allowances each year, the rate of return and depreciation are applied to the regulatory asset base (RAB). For the Hunter Valley network, the current NSW Undertaking requires an initial RAB valuation, which is then updated or "rolled forward" each year.[147] The RAB is rolled forward by indexing it by CPI, adding any capital expenditure, and subtracting depreciation and any asset disposals.[148]

The following sections explain our draft recommendations to clarify the treatment of major period maintenance (MPM) for the purposes of capital expenditure and depreciation.

10.2.1 Amend the definition of 'capital expenditure'

The undertaking currently defines capital expenditure as:

> expenditure undertaken in order to increase the capacity, service quality or useful life of an asset but not including maintenance or operating expenditure.[149]

We propose to amend this definition to exclude expenditure undertaken for the purpose of increasing the useful life of an asset, to make clear that it does not include asset replacement costs.

As explained in the previous chapter, we are recommending that the floor test is maintained. This requires access seekers to pay prices that cover the costs of the wear and tear they impose on the network, called "direct costs." The current NSW Undertaking specifies that:

> **Direct Costs** means efficient, forward-looking costs which vary with the usage of a single operator within a 12 month period, plus a levellised charge for variable major periodic maintenance costs, but excluding Depreciation.[150]

Because major period maintenance (MPM) includes asset replacement costs, in other contexts major periodic maintenance is included in the capital expenditure costs. However, because in the NSW rail access framework it is captured in the direct costs as a levellised charge, we do not want it to be also factored into capital expenditure (which would lead to double counting).

10.2.2 Update the definition of 'depreciation' so it only applies to assets that become obsolete

Depreciation is included in the full economic costs for a sector or a group of sectors because it reflects the owner's return of the capital invested there. Normally, the full investment cost would be recouped through depreciation charges over the economic life of the asset.

However, the economic life of a rail infrastructure asset is dependent on two effects:

- physical wear and tear through use or the passage of time, and
- the loss of economic value because demand has reduced (i.e. obsolescence). For example, the loss of value of a rail line to a mine as the mineral reserves become depleted or exhausted, or there is no longer demand for the coal. At this point in time, the line has no economic value, whatever physical condition it is in.

For rail lines that serve non-exhaustible traffic, including agricultural produce (grain), containerised imports or exports, or even passengers, there will be no obsolescence-related depreciation. For these lines, the only depreciation will be through wear and tear.

As explained in the section above, these costs are captured in the direct cost component, as an annuity representing variable MPM costs for all long-term renewals. Therefore, there is no need to include MPM in the depreciation calculation. As a result, for lines serving non-exhaustible traffic, there is effectively a depreciation charge of zero in the building block calculation of full economic cost.

We are making a draft recommendation to clarify that only obsolescence-related depreciation is captured in the depreciation allowance. For example, we could clarify that:

> **Depreciation** – means recovery of the initial investment in those parts of the regulatory asset base that are not replaced after their useful life, over the useful life of the Regulatory Assets calculated on a straight-line basis.

Draft recommendations

19. That the following terms relating to how costs are calculated are amended to clarify that:
    a. **Full economic costs** includes operating costs (i.e. the costs currently included in the definition of direct costs and incremental costs), in addition to the costs currently listed.
    b. **Capital expenditure** only includes capital expenditure that is undertaken for the purpose of increasing capacity or service quality (and not for the purpose of extending the useful life of an asset, i.e. asset replacement costs).
    c. **Depreciation** only applies to assets that will foreseeably become obsolete (i.e. assets that will be replaced should not be included in the depreciation allowance).

10.3 The regulatory asset base should be valued using the DORC methodology

The current NSW Undertaking requires that the Regulatory Asset Base (RAB) value is based on an initial valuation of the RAB calculated using the DORC methodology.[151] Under this approach, regulated assets are valued by calculating the replacement cost of an 'optimised' network. This is the cost of constructing the network at the time it is optimised using current technology and assuming the same service capability to supply a particular access seeker or group of access seekers. The cost of the optimised network is then reduced to account for accumulated depreciation.

The use of a DORC value ensures that access seekers pay no more than they would face if they were building their own rail network to meet their needs. If revenue could exceed this level, it would be more cost effective for an access seeker or combination of access seekers to build their own network and bypass the existing infrastructure. This type of bypass would be inefficient because it would strand the original asset.

Common alternative methods of valuing assets include discounted cashflow and book value. Each of these alternatives has serious shortcomings for the purpose of conducting a regulatory ceiling test.

Discounted cashflow methods are commonly used in corporate finance. A future stream of earnings is capitalised using an accepted discount rate (which would be the regulatory WACC in this case) to obtain a business valuation. However, the problem with using this method to set a regulatory asset base is that it is fundamentally circular. The future earnings that are used to determine the regulatory asset base are essentially determined by the regulatory asset base, because the regulatory asset base caps earnings. This circularity problem is not resolvable, and it means that this method is not capable of determining a unique valuation.

Unlike the discounted cashflow method, book asset values contain some relevant cost information, so they overcome the circularity problem. However, book values are derived according to accounting measures which may be inconsistent with the economic principles underpinning the DORC valuation. For example, book values will be reduced each year according to tax depreciation measures, which will almost certainly differ from the regulatory depreciation. More fundamentally, book valuations will be influenced by historical capital investment amounts which may differ substantially from efficient costs.

10.3.1 The DORC valuation does not necessarily constrain prices

Using DORC to calculate the ceiling test does not constrain prices in any parts of NSW except the Hunter Valley. In these other parts of the network, market prices fail to earn enough revenue to cover operating costs and achieve a market rate of return on the DORC valuation of assets. Instead, prices are constrained by market forces in the transport and end-product markets, for example the price of substitute road transport.

This is also the case for the ARTC's Interstate Network. As explained in the previous chapter, the ACCC commenced a review to examine the specific need for regulation on the Interstate Network given that the DORC valuation does not constrain prices. In its August 2021 Issues Paper, it considered an option that would allow ARTC to continue to use a ceiling test as the primary protection for customers – but including a downwards adjustment to the asset base through a "line-in-the-sand" approach, instead of using a DORC valuation. This could reduce the scope of future price increases (Box 10.1).[152]

We do not consider that it is a problem for the regulatory framework to set a non-binding price constraint. Unlike other industries where we regulate prices, IPART does not determine the actual prices that must be paid by access seekers[a] – therefore we do not need to ensure that there will be demand for the service at the ceiling level. If there is insufficient demand at the ceiling level, then access providers and access seekers can negotiate prices that produce revenue below the ceiling.

While we consider that a DORC valuation is appropriate for setting a maximum revenue cap, we agree with the ACCC that it is not a sufficient protection for access seekers. As discussed in the previous chapter, we are recommending that the NSW rail access framework should combine the ceiling test with an additional mechanism to protect access seekers from large price increases or "hold-up" pricing strategies that would make previous investment uneconomic, even if revenue remains below the ceiling.

Given that most networks in NSW do not come close to recovering their costs, we are recommending that we would take a proportionate approach to assessing compliance with the ceiling test. For example, access providers would not be required to lock in an initial DORC valuation and maintain a RAB for each network unless they consistently obtain revenues close to the ceiling. We discuss our recommended compliance approach in detail in Chapter 13.

[a] For example, IPART typically sets the water price exactly at the ceiling. Water utilities can only charge less than the price determined by IPART with the written consent of the Treasurer.

Box 10.1 Asset valuation for the Interstate Network

On 6 March 2018, ARTC submitted its proposed 2018 Interstate Access Undertaking to the ACCC for assessment under Part IIIA of the Competition and Consumer Act. The 2018 Undertaking was intended to replace the 2008 Undertaking. The ACCC did not accept it. A key reason for this is that ACCC had concerns with the methodology underpinning the high opening regulatory asset base (RAB) value (which could be perpetually increasing).

ARTC submitted that between 2006–07 and 2017–18, the RAB increased from $3.7 billion to $10 billion for the Interstate Network.[153] Among other concerns, the ACCC considered there were issues around the RAB of new segments, including the prudency of the proposed capital expenditure, inclusion of replacement expenditure on track assets, and assets funded by government grants.[154]

In April 2020, the ACCC engaged GHD Advisory to conduct a DORC revaluation of the Interstate Network to determine the RAB value. It advised that the DORC valuation was roughly in line with what ARTC had proposed in 2018.

The ACCC found that this value was high compared to the revenue ARTC is likely to earn. It considered that this is because it is likely to have included historical non-commercial assets (assets that an efficient commercial operator would not have invested in). It said that:

> Inefficiently high ceiling limits could increase the potential for ARTC to earn a return on non-commercial assets included in the valuation and allow ARTC to significantly increase prices in the future.[155]

In August 2021, the ACCC published an issues paper seeking stakeholders' views on the specific need for regulation on the Interstate Network (given its current and future competitive environment) and, where it is required, the most appropriate regulatory approach. The ACCC considered an option that would allow ARTC to continue to use a ceiling test as the primary protection for customers – but including a downwards adjustment to the asset base through a "line-in-the-sand" approach. This could reduce the scope of future price increases.

In July 2022, the ACCC published a guidance paper on the Interstate Undertaking.[156] It indicated that it would allow the ARTC to set out limits on price changes in a new undertaking as the key mechanism to protect customers, rather than an overall revenue cap. However, it remains open to a return to cost-based pricing approaches in the future once there is greater clarity around future investment, and it has investigated mechanisms for addressing cost recovery of inefficient capital expenditure.

Source: ACCC, *Issues Paper, The regulatory framework for ARTC's Interstate Network*, August 2021.

Draft recommendations

20. That a rail network's regulatory asset base continues to be valued based on a depreciated optimised replacement costs (DORC) methodology for an access seeker or combination of access seekers (i.e. 'stand-alone' costs).

10.4 Costs are calculated on a stand-alone basis

The ceiling test currently requires that for any access seeker, or group of access seekers, access revenue must not exceed the full economic costs of providing access on a stand-alone basis.[157] In this context, 'stand-alone' requires the assessment of costs to be calculated based on the optimal configuration of rail infrastructure in order to service all access seekers operating in a common end market.

This means that the actual costs of the existing infrastructure are not relevant unless they are efficient for a group of access seekers. For example, when assessing the stand-alone costs of the Hunter Valley coal network for coal and freight customers, any extra costs that are driven by passenger trains must be excluded.

Consistent with this requirement, in its 2019-20 and 2020-21 compliance submissions for the Hunter Valley network, TAHE removed the costs of some assets not needed by a freight-only network. For example, it:

- retained only assets that are required for a stand-alone freight network e.g. track, civil and signalling
- removed the costs of electric traction, passenger facilities, stations and rolling stock
- reduced the costs of signalling assets by 50% to reflect the requirements of a stand-alone freight network.[158]

However, for maintenance costs, TAHE used the average costs across the entire Sydney Trains network, arguing it was more equitable and transparent.[159] As this is predominantly a passenger network, these rates include certain costs that a freight-only network would not incur. For example, on a busy passenger network, maintenance work must be undertaken at night and on weekends, increasing labour costs.

We maintain our position that stand-alone costs should be used for all cost components, otherwise it would be more cost effective for the access seeker or group of access seekers to build their own network.

Using stand-alone costs does not prevent access providers from recovering the efficient costs of maintaining the network for all customers. Access providers can charge higher prices to higher cost access seekers to recover their costs.

We also note that a 'group' of access seekers referred to in the NSW Undertaking refers to any possible combination of access seekers – not just broad groups of access seekers such as coal customers or freight customers.

To provide clarification, we propose replacing the terminology "stand-alone", and "group" along the following lines:

> **The ceiling** requires that for any access seeker, or combination of access seekers, access revenue must not exceed the full economic costs of providing access to this access seeker, or combination of access seekers.
>
> **Full Economic Costs** are Sector specific costs of providing access to an access seeker or combination of access seekers including a permitted Rate of Return and Depreciation and an allocation of non-Sector specific costs such as train control and overheads including a Rate of Return and Depreciation on non-Sector specific assets. Costs incurred because of access seekers not included in the specific combination of access seekers must be excluded.

10.5 IPART should continue to determine key inputs to the ceiling test

Under the existing NSW Undertaking, IPART sets key inputs to the ceiling test, including:

- the rate of return, and
- the remaining mine life used in the calculation of depreciation on the Hunter Valley Network.

The existing NSW Undertaking specifies that IPART determine these values every 5 years.

In other undertakings, including the Hunter Valley Undertaking, the inputs to the ceiling are negotiated by the parties. ARTC argued that the NSW Undertaking should allow for these values to be negotiated within a range set by IPART:

> There is a range of rates of return deemed efficient by economic regulators. This suggests a degree of subjectivity, which should be reflected in the regulatory framework. i.e. negotiations should be within a range rather than a specific outcome.[160]

Similarly, TAHE argued that:

> The impact of climate change creates demand uncertainty for energy networks. This is best recovered through depreciation rate agreed between parties based on their risk appetites.[161]

We disagree that these inputs should be negotiated between parties. Small movements in these inputs can have a significant impact on prices, and so these values can be difficult to negotiate between parties. In some circumstances, access providers may be able to exercise market power to negotiate inputs that result in a higher ceiling.

As a result, it is likely to be more efficient for IPART to determine these values than allow for these to be negotiated. IPART also has expertise and a standard methodology to calculate the rate of return.

Draft recommendations

21. That IPART continues to set key inputs to the ceiling test:
    a. the asset lives used to calculate the rate of depreciation
    b. the rate of return.

10.6 Inputs to the deprecation allowance

The NSW Undertaking stipulates that:

> **Full Economic Costs** are Sector specific costs including a permitted Rate of Return and Depreciation and an allocation of non-Sector specific costs such as train control and overheads including a Rate of Return and Depreciation on non-Sector specific assets. All included items are to be assessed on a stand-alone basis.
>
> **Depreciation** means depreciation of the Regulatory Asset Base, over the useful life of the Regulatory Assets calculated on a straight-line basis.[162]

Under clause 3.2(c) of Schedule 3, for the Hunter Valley Coal Network:

i Depreciation is to be calculated at the beginning of each financial year, using a straight-line methodology and the estimate of the remaining useful life of the assets.

ii The useful life of a Sector or group of Sectors is to be determined by reference to the remaining mine life of Hunter Valley coal mines utilising that Sector or those Sectors. The initial estimate of remaining mine life is 40 years from 1 July 1999.

iv The estimate of remaining mine life will be reviewed and if necessary revised every five years from and including 1 July 2004 by IPART or an independent consultant appointed by IPART.

v Ongoing depreciation for future capital investment should be made based on the unexpired portion of the most recently estimated remaining mine life at the time the asset becomes operational.

The following sections explain our draft recommendations:

- that IPART should set useful asset lives, rather than mine lives
- to allow for more frequent updates to asset lives in certain circumstances
- clarify that IPART can determine different asset lives for different line sectors (rather than a network as a whole).

We also consulted in the Issues Paper on an option of estimating a depreciation rate per tonne of coal shipped, rather than having a fixed dollar value of depreciation per year. While we consider the per-tonne method has merit, it was not supported by stakeholders. Therefore, we are proposing to retain a linear depreciation schedule in our ceiling test.

10.6.1 IPART should set useful asset lives, rather than mine lives

Currently the NSW Undertaking states that for the Hunter Valley rail network, the useful life of a Sector or group of Sectors is to be determined by reference to the remaining mine life of Hunter Valley coal mines utilising that Sector or those Sectors.[163]

In recent years, we have found that on some lines, whether it will still be in use in the future is more likely to depend on whether a power station will still be operational than the life of the mines supplying them. Some coal mines may still have sufficient reserves to continue producing coal, but the use of the line would be discontinued if it is no longer being transported on this line to a power station.

To ensure that IPART can take into account the range of factors that affect the likely time that a line will remain in use, we propose that IPART set the asset lives directly.

In response to our Issues Paper, TAHE submitted that:

> Depreciation should consider asset life of all corridors and various categories of access seekers, not just coal.[164]

As explained in the previous section, depreciation is only relevant for networks where there is obsolescence related depreciation. In addition, if access providers are not recovering their operating costs, then it is not necessary to determine depreciation costs to satisfy the ceiling tests. Currently, the Hunter Valley network is the only network where these conditions apply. However, to "future-proof" the NSW rail access framework, we are proposing that IPART would set asset lives according to rule-based criteria – rather than for a designated network.

10.6.2 Allow for more frequent updates to asset life review

In response to our Issues Paper, stakeholders highlighted a need for the depreciation building block to be more responsive to changes brought by climate change and the transition of the energy sector to renewables. For example, TAHE submitted that:

> Climate change has led to the transition of energy away from coal and gas and towards renewable sources, which has accelerated closure of power stations and reduced mine life. This requires greater flexibility for regular reviews proportional to market changes and environmental impacts.[165]

We agree that greater flexibility is becoming increasingly important, given the dynamic nature of coal-generated electricity. We consider that the need to continually update asset lives needs to be balanced with the need for certainty and proportionality.

We are proposing to modify the requirement for IPART to review the asset lives (strictly) every 5 years, to conduct the review **at least** every 5 years. This would provide IPART with discretion to conduct an earlier review if it considered that it would be in the public interest to do so. We are also proposing that IPART would be required to conduct an earlier review if an application is made to IPART by 30 March to bring forward a review by any party to an access agreement in a network where IPART sets asset lives, and they are able to demonstrate that:

- asset lives are likely to be different to IPART's determined asset lives, **and**
- there would be a substantial impact on the ceiling test as a result **and**
- the information being relied upon is new information or reflects a change in circumstances that has not been considered by IPART in a previous review of asset lives.

If a review is brought forward, IPART would not be required to conduct another review for 5 years.

10.6.3 Clarify that IPART can determine asset lives for different line sectors

In response to our Issues Paper, the Hunter Rail Access Taskforce commented on how asset lives should be calculated. It submitted that:

> Using a weighted average mine life would allocate depreciation more proportionate to costs and is likely to be more sustainable. However, the method should be consistent with the approach to estimating the rate of return.[166]

The current NSW Undertaking only refers to a single mine life estimate. We agree that the requirement to have a single terminal date for the entire Hunter Valley coal network is becoming increasingly impractical as stark differences emerge between the likely remaining lives of different lines. Therefore, we propose that the NSW rail access framework is clarified to allow IPART to set different asset lives for different lines. For example, depreciation could be calculated at the beginning of each financial year, using a straight-line methodology and the estimate or estimates of the remaining useful life of the assets.

In deciding to set different asset lives, IPART would have regard to whether these differences materially impact asset prices.

Using different asset life estimates for different lines would mean that regulatory asset base for the Hunter Valley would need to be divided into its different lines. We consider that this would not be too difficult, given that the regulatory asset base was initially set from the bottom up according to each line. Therefore, we consider that setting different asset lives for different lines remains proportionate.

Draft recommendations

22. That the provisions for how IPART sets the inputs to depreciation are updated to:
    a. Specify that IPART would set the asset life, rather than the mine life.
    b. Amend the provisions so that IPART would set asset lives for any network where depreciation is applied (i.e. where the assets are likely to become obsolete) **and** operating costs are being recovered.
    c. Clarify that IPART can determine different asset lives for different line sectors within a network.
    d. Require that IPART determine asset lives at least every 5 years, with discretion to review asset lives more frequently. IPART would be **required** be a to review asset lives where:
        - any party to an access agreement in a network where IPART sets asset lives demonstrates to IPART by 30 June each year that asset lives are likely to be different to IPART's determined asset lives, **and**
        - there would be a substantial impact on the ceiling test, **and**
        - the information being relied upon is new information or reflects a change in circumstances that has not been considered by IPART in a previous review of asset lives.

10.7 Return on assets

The return on assets building block used in the ceiling test is estimated each year by multiplying the regulatory asset base value by the permitted rate of return. The NSW Undertaking specifies that:

> **Rate of Return** means a rate of return in percentage terms approved by IPART for a period of five years to be applied to the average of the Opening and Closing Regulatory Asset Base.[167]

10.7.1 IPART able to set network-specific rates of return

Stakeholder submissions focused on the issue of whether the same weighted average cost of capital (WACC) value should be applied across the NSW networks. Two stakeholders suggested that different WACC values be applied to parts of the network that have different types of traffic, and hence different systematic risk profiles:

> IPART should apply a differentiated WACC that reflects the different risk profile of the NSW network. The WACC for the [Hunter Valley Coal Network] should reflect the risk profile of a coal network. It should also be similar to the WACC applied to the ARTC portion of the [Hunter Valley Coal Network] as underlying risk profiles are similar.[168]

> The [WACC] should reflect the relative volatility of underlying commodities used in each network, not just coal.[169]

In previous WACC reviews, we set the WACC using a set of firms that were similar to both TAHE's and ARTC's regulated businesses. Those firms were mainly US and Canadian Class 1 railroad operators. We considered that the Country Regional Network and metropolitan freight networks would face similar risks to these operators. However, they may overstate the risk associated with the coal network in NSW, because it does not face competition from road.[170]

For networks that are not even recovering their operational costs, the access provider will pass the ceiling test regardless of which rate of return is used (i.e. they have a negative rate of return). Because the rate of return is only relevant to the assessment of the ceiling test where prices are close to or reaching the ceiling test, IPART should set rates of return based on the risk profiles of these networks. At present prices are only set at the ceiling in the Hunter Valley, and so we would set a rate of return based on the coal industry's systematic risk profile.

If in the future, prices in other networks are constrained by the ceiling test at the time or prior to the 5-yearly major review, the NSW rail access framework should allow for IPART to set a different WACC for that network. Other networks would likely have higher systematic risks profiles to coal (because they face competition from road), which would result in a higher WACC.

To provide this certainty, we are making a draft recommendation for the NSW rail access framework to clarify that IPART can set network-specific rates of return.

10.7.2 Greater flexibility on the timing of WACC updates

The NSW Undertaking specifies that the rate of return is a percentage approved by IPART for a period of five years.[171]

TAHE submitted that there should be more frequent reviews that the access providers should have the opportunity to comment on.[172]

To provide for regulatory certainty we are not proposing that we update the equity beta and gearing more frequently than every five years. However, we consider that we should be able to update the cost of debt annually to reflect IPART's standard rate of return approach.[173] IPART's standard approach uses a trailing average cost of debt to allow an investor to construct a borrowing strategy that is capable of delivering the same WACC as allowed by the NSW rail access framework, reducing unnecessary regulatory risk.

Because the NSW Undertaking does not currently allow us to update the rate of return more frequently than once every 5 years, we have not been able to apply a trailing average to date. This means that the WACC used for rail access is not consistent with our standard approach.

Therefore we are making a draft recommendation to introduce additional flexibility to the rate of return definition, so that a value is not locked in for five years.

Such a change would also allow us to align the rail access rate of return with our standard approach if we make further changes to our standard approach in the future. To provide regulatory certainty, we would provide additional guidance to stakeholders about how we would calculate rate of return through our WACC determinations, and/or a stand-alone guide.

Our preliminary view is that for our next review, we would:

- apply our standard WACC methodology

- use the risk profile of the Hunter Valley Rail network to set the equity beta
- continue reviewing the rate of return every 5 years, which would lock in equity beta and gearing for the forward period
- update the cost of debt annually to reflect our standard approach. This would be an automatic update that reflects changes to interest rates. This would result in a new WACC each year when assessing compliance with the ceiling. We would not seek stakeholder comments as part of these reviews.

Draft recommendations

23. That the provisions around how IPART sets the rate of return are updated to:
    a. clarify that IPART can set a different rate of return for different networks
    b. remove the requirement for the rate of return value to be locked in for five years.

Chapter 11

Unders and overs account

11

As explained in the previous chapter, the ceiling test restricts the access revenue that an access provider can earn from access seekers or groups of access seekers. The ceiling test can only be accurately assessed at the end of the financial year once the actual access revenue is known. Any under or over recovery can then be reconciled between the access provider and access seekers.

The NSW Undertaking requires access providers to establish an unders and overs account policy that sets out how they will manage the reconciliation of any under or over recovery. This chapter examines if the current unders and overs account framework is effectively managing any variations in access revenue around the ceiling.

11.1 Overview of our draft recommendations

The NSW Undertaking's unders and overs account framework has not been working effectively. As mentioned in previous chapters, RailCorp (now TAHE) exceeded the ceiling test for many years and did not return the over-recovery. The cumulative over-recovery peaked at $11 million for its part of the Hunter Valley coal network in 2019-20.[174] In 2020-21 TAHE recovered less revenue than the ceiling test, reducing the cumulative over-recovery to $8.8 million.[a] [175]

We are making draft recommendations to provide IPART with enforcement powers to help ensure that access providers comply with the framework. These are set out in Chapter 14.

We are also making draft recommendations to clarify the requirements to facilitate their enforcement. We are proposing to clarify that the unders and overs account would commence when revenues exceed the ceiling for the first time. We are proposing a separate account to allow for loss capitalisation, which is discussed in the next chapter.

Where negotiated prices are set to recover the ceiling revenue and an unders and overs account has commenced, we are proposing that there would be a strict requirement to return any over-recovery each year, via a lump-sum payment.

11.2 Current unders and overs account requirements

The NSW Undertaking currently requires access providers to establish an unders and overs account to manage deviations around the maximum rate of return. It sets out several requirements that are primarily focused on managing the balance of unders and overs accounts.

The NSW Undertaking provides the access provider with the flexibility to establish an unders and overs policy that suits their business. The consultation requirement gives access seekers a chance to provide their views on the accounts policy. IPART then considers these views when deciding to approve the access provider's policy (Box 11.1). We could use this approval process to

[a] TAHE stated that it would return the balance of the over-recovery over four years by holding access fees constant below the ceiling. Because there is a possibility that the current NSW Undertaking could allow for higher access charges to be negotiated in the future, we considered that TAHE's approach had some merit until IPART's review of the Undertaking is finalised, and the impact on the ceiling as a result of the recent changes in the coal industry is better understood. TAHE's proposed approach may lead to less price volatility for access seekers and reduce the financial risk of asset stranding, compared to returning the over-recovery within 12 months.

ensure that access providers do not use this flexibility to incorporate terms that would favour them and disadvantage access seekers.

Box 11.1 Current unders and overs account requirements

Schedule 3 cl 4 of the NSW Rail Access Undertaking provides that:

a. The Rail Infrastructure Owner will establish an Unders and Overs Account to manage average deviations around the maximum rate of return.
b. The Rail Infrastructure Owner will keep an account for Access Seekers and groups of Access Seekers who could potentially breach the Ceiling Test.
c. The Rail Infrastructure Owner will provide an annual reconciliation of each account to the applicable Access Seekers.
d. The Rail Infrastructure Owner will attempt to return the account balance to zero each year.
e. The Unders and Overs Account balance should not exceed +/-5percent of forecast access revenue.
f. The Rail Infrastructure Owner will develop and publish a policy for the operation of the Unders and Overs Account in consultation with Access Seekers and submit to IPART for approval.

11.3 Clarifying the unders and overs account requirements

We consider that the main reason for this non-compliance is because IPART does not have express enforcement powers to direct access providers to comply with the unders and overs account requirements. Chapter 14 discusses our draft recommendations on new enforcement powers that should ensure that access providers:

- have in place an unders and overs account policy that provides a method for returning the unders and overs account balance to zero.[b] [176]
- refund any over-recovery each year.

To help facilitate the enforcement of the unders and overs account policy, we are proposing that the existing requirements be clarified. These clarifications are set out below.

[b] IPART last approved an unders and overs account policy for RailCorp in 2007. IPART has previously recommended that Railcorp revise its policy to ensure it is fit for purpose, and that TAHE (as RailCorp's successor) establish a new policy.

11.3.1 The account to commence when revenue exceeds the ceiling

The NSW Undertaking currently requires access providers to keep an account for access seekers and groups of access seekers who could potentially breach the ceiling test.

This requirement means that for most networks, access providers are not required to keep an unders and overs account, because they negotiate access fees that produce significantly less revenue than the ceiling. In their submission to this review, TAHE submitted that the regime could provide guidance on carrying forward under recoveries to offset future over recoveries.[177] There have been questions raised in the past about whether an access provider could start an account where revenue is far below the ceiling, allowing them to accumulate these under-recoveries and re-coup them in the future.

This would not be consistent with the existing unders and overs requirements that are intended to manage revenue deviations around the ceiling, including that:

- the access provider should attempt to return the balance to zero each year,
- the balance should not exceed +/-5percent of forecast access revenue.

The negotiation framework allows for parties to agree to access fees below the ceiling. This does not create a future liability for these access seekers to make up the difference between their fees and prices set at the ceiling.

We consider that there is a case for allowing access providers to capitalise losses in some circumstances. However, we consider that these accumulations should be managed separately via a loss capitalisation account. The purpose of both accounts is help ensure that access providers are able to recover the efficient costs of the infrastructure, however, they would apply to access seekers differently:

- the unders and overs account applies to existing access seekers to reconcile their access fees with the ceiling for their past use of the network.
- the balance of a loss capitalisation account would be recovered from future access seekers of the network.

To clarify the purpose and application of the unders and overs account, we are proposing that the requirement for access providers to maintain an account would commence from the time that revenue exceeds the ceiling. This would provide a clear and objective starting point, modifying the current requirement of Schedule 3, clause 4b of the NSW Undertaking.

We discuss our proposal to introduce a loss capitalisation account in the next chapter.

11.3.2 Over-recoveries to be refunded through a lump sum payment

As outlined above, the Undertaking currently requires access providers to attempt to return the balance to zero each year. However, it does not include requirements for how it should do this. We would expect these details to be include in an access providers' unders and overs account policy.

In its submission to our 2021-21 draft compliance report, TAHE has proposed two possible methods for returning its account balance to zero after its predecessor Railcorp accumulated these over-recoveries over around a decade:

- maintaining access fees at current levels below the ceiling over four years
- not levying access fees for 12 months and providing a further rebate of approximately $4 million to be made to the same access seekers.[178]

However, TAHE further submitted that:

> Both alternatives involve equity and practicality issues given the … rail operators and end customers have changed. Further it is not clear that in returning the over recovery balances to current rail operators, it would benefit the end customers … who would have incurred the original transportation costs.[179]

We agree with TAHE that there are equity issues involved with returning the balance to zero by reducing future access charges. The operators and end users that may benefit from lower fees in a future year may not be the same as the parties that overpaid them. Access seekers and end users may be disincentivised from using the NSW rail network or investing in rail assets if they are not assured that any over recovered funds will be returned to them, or if they are paying higher fees because different access seekers were undercharged in the past.

TAHE is supportive of there being more explicit guidance on the operations of the unders and overs account to provide a transparent method for access providers to return accounts to a zero balance.[180]

We are making a draft recommendation that a written reconciliation of the unders and overs account balance to each of the access seekers is submitted to IPART within 4 months of publication of a compliance report. This would help ensure that that the same access seekers who over or underpaid would receive a refund or pay the owed revenue.

In addition, to improve the enforceability of the ceiling test, we are recommending that an over-recovery would be required to be paid back to access seekers within 6 months via a lump sum payment. This would enable compliance to be clearly established. Also, refunds could then be passed onto end-users according to their contractual arrangements with the access provider.

We are not proposing the requirement to return the balance to zero is symmetrical. An under-recovery would likely happen in years where there is lower use of the network due to low activity (e.g. bad harvest, reduction in trade volumes). Financial difficulties experienced by access seekers may be exacerbated if the unders and overs account was balanced immediately after the tax year hardship. We consider that access providers and access seekers are best placed to negotiate the terms of the unders and overs account policy which set out how access seekers would pay an under-recovery.

To allow for this flexibility, we a proposing to remove the requirement an access provider to return the account balance to zero each year where there is an under-recovery, and similarly, that the balance should not exceed +/-5percent of forecast access revenue.

Draft recommendations

24. The unders and overs accounts provisions be amended to:
    a. specify that the account is only established once access revenues exceed the ceiling test
    b. require that access providers submit an annual reconciliation of the unders and overs account to IPART within 4 months of the publication of a compliance determination
    c. require access providers to return an over-recovery to zero via lump sum payments within 6 months of publication of the compliance determination. This would replace the requirements that:
        - the access provider attempt to return the account balance to zero each year
        - the unders and overs account balance should not exceed +/- 5 percent of forecast access revenue.

Chapter 12

Capital expenditure and loss capitalisation

12

Access providers undertake periodic capital expenditure and new investment to maintain, or expand, the capacity of their rail network. As part of our review, we are required to consider the incentives for access providers and access seekers to make efficient investment in rail assets.[181]

In NSW, new investment is primarily funded by governments to achieve their policy objectives. The exception is the Hunter Valley coal network, where capital expenditure is primarily funded by access seekers who benefit from the investment. Changes to an access providers rail network may have implications for adjoining rail networks.

This chapter considers how the NSW rail access framework may incentivise efficient investment in the NSW rail network. This includes:

- The consultation framework that would allow access providers to comprehensively evaluate their network and capital expenditure plans.
- The avenues for funding capital investment.

12.1 Overview of our draft recommendations

We have found that the NSW Undertaking does not ensure access providers effectively consult with stakeholders when undertaking new investment.

We are making a draft recommendation to replace the current investment consultation framework with a principles-based framework that would establish clear requirements on access providers while retaining flexibility to develop a consultation policy tailored to individual networks. Our proposed approach would provide access seekers with greater input into capital expenditure and network planning that they fund either through upfront contributions or through access charges.

We are also proposing to recommend that access providers be permitted to capitalise losses for future investment in the NSW rail network. This would provide an additional mechanism for recovering prudent capital expenditure. Access providers would then have greater incentive to undertake efficient investment in the network.

Efficient investment that meets the needs of its users should help facilitate appropriate modal choices by creating more opportunities for freight operators to use rail in NSW.

12.2 The current investment framework

The NSW Undertaking directly addresses new investment and capital expenditure in Schedule 3 – Pricing Principles (Figure 12.1). It states that access providers may carry out new investment, including at the request of an access seeker.[182] Access providers are only required to undertake any requested new investment if it is fully funded by the access seeker.[183] New investment may be funded either through a capital contribution or access fees or a combination of both, provided costs are only recovered once, as determined by the access provider.[184]

Access providers are also required to negotiate with access seekers in good faith if negotiations are necessary to achieve certain outcomes.[185] For example, if negotiations are necessary to ensure new investment requested by an access seeker is technically and economically feasible.

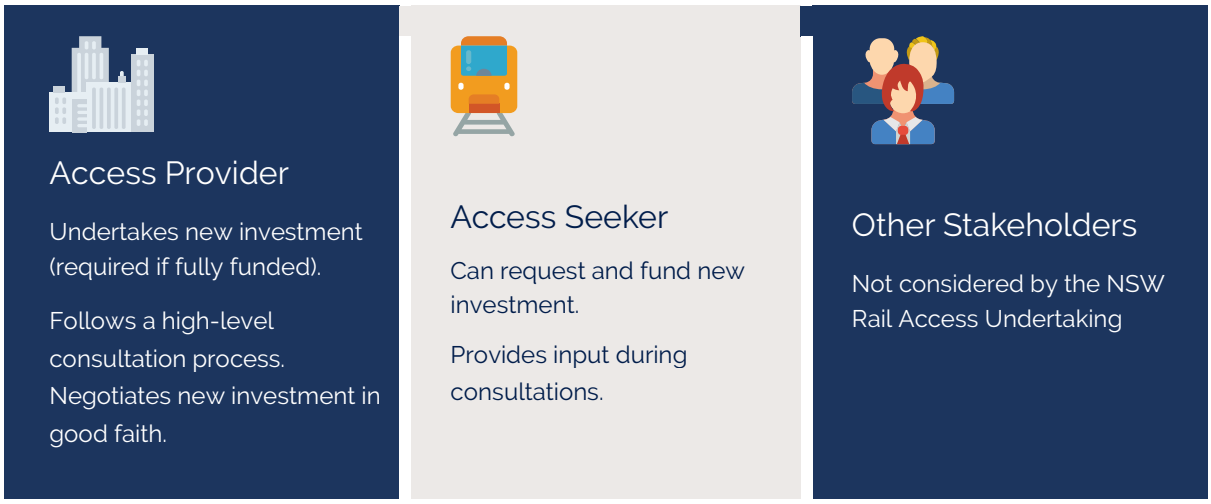
There is also a high-level consultation process for access providers to follow when undertaking capital expenditure or new investment.[186] The consultation process is intended to help the access provider determine if their investment is prudent for meeting future demand. However, the framework allows access providers to determine how they will conduct consultations. It is up to access providers to:

- set the timeframes and frequency of consultation, including the points at which consultation occurs (e.g. project initiation phase)
- determine how access seekers will contribute to funding the investment (i.e. through access charges, or capital contributions).

Access seekers do not have any formal powers to object to a project that they do not consider prudent for meeting future demand (e.g. through a majority vote requirement). Access providers are only required to consult with access seekers under the existing framework - they are not required to consult with adjoining infrastructure owners. For example, this may be relevant to align expanding rail freight capacity with port terminal expansions.

Access providers can include the capital expenditure in the regulatory asset base if the consultation process has been followed and it is prudent.[a] [187] The access provider is required to take into account the level of support from access seekers when determining whether it is prudent. In practice this only provides an incentive for consultation in TAHE's Hunter Valley network, because this is the only network where capital costs are being recovered through access charges.

Figure 12.1 Summary of NSW Undertaking investment framework



Schedule 3, cl 3.3 to 3.4.
Source: NSW Rail Access Undertaking

[a] The NSW rail access framework also allows capital expenditure to be included in the regulatory asset base in two other circumstances: where access seekers agree to it being included; or where conditions have changed so that the expenditure is now required to meet future demand.

12.3 Expanding the consultation requirements

We examined other rail access regimes during this review, particularly ARTC's Hunter Valley Access Undertaking. The Hunter Valley Access Undertaking includes a detailed consultation framework for capital expenditure.[188] It has clear consultation requirements that includes the establishment of a consultation group for access seekers and other users of the rail network.[189] The Hunter Valley Undertaking sets out:

- how frequently consultation will occur between ARTC and relevant stakeholders
- the points when consultation must occur (e.g. at each stage of a capital expenditure project)
- the voting rights of access seekers and other stakeholders for key decision points, such as if a project should proceed (noting that there are mechanisms for ARTC to proceed with a project even if access seekers vote against it).

The submission from the Hunter Rail Access Taskforce outlined the value of the Hunter Valley Undertaking's consultation framework to users of the Hunter Valley coal network. It has been developed over time between ARTC and the industry to suit their specific requirements.[190]

We consider that adopting elements similar to the Hunter Valley Access Undertaking's consultation framework would make the NSW Undertaking's investment framework more comprehensive. It would also provide regulatory certainty for users of the ARTC's Hunter Valley coal network should it revert to the NSW Undertaking (see Chapter 15). However, we consider that adopting the Hunter Valley Undertaking's consultation in its entirety would be onerous for other access providers and access seekers outside of ARTC's Hunter Valley coal network.

We are instead proposing to adopt a principles-based framework, which would place clearer requirements on access providers than the existing framework. Our proposed consultation provisions (Box 12.1) would require access providers to:

- consult with access seekers through every stage of a capital expenditure project (currently the access provider is only required to consult at the planning stage)
- stipulate the rights of access seekers to endorse or object to a project, noting that projects could proceed even where they are not supported (this is not currently part of the NSW Undertaking – currently access providers are only required to consult)
- work with access seekers to determine the source of funding for each project (i.e. access charges or a capital contribution) (not clearly required by the NSW Undertaking)
- develop a capacity plan for applicable segments of the network in consultation with access seekers and all relevant stakeholders, which may include operators and end users of the relevant corridor, and managers of adjoining infrastructure (currently access providers are only required to consult with access seekers and explain their planning approach)
- consult and consider all views provided in good faith (not currently required by the NSW Undertaking).

The access provider would be required to incorporate a consultation policy that addressed these provisions in their undertaking. This approach would allow the access provider to develop a policy that suited their business.

The access provider would only be required to apply this policy where capital expenditure or new investment is partly or fully funded by access seekers. Where the investment is fully funded by Government, access providers would not be required to apply this policy. However it would be good practice for some consultation to occur. This would ensure the consultation framework only applies where it is needed.

We are also proposing to allow access providers to proceed with a project and include capital expenditure in the RAB when it has been objected to by access seekers. This exception would apply in limited circumstances, primarily when the capital expenditure is needed to meet forecast demand for the network. The access provider will be required to demonstrate to IPART that the capital expenditure is prudent in these circumstances, for it to be incorporated into the RAB, consistent with the existing RAB compliance process.

Draft Recommendation

25. That access providers be required to include a consultation policy in their undertaking for IPART's approval that sets out:
    a. how the access provider will consult with access seekers through every stage of a capital expenditure project (either initiated by the owner or an access seeker)
    b. how the access provider will work with access seekers to determine the source of funding for each capital expenditure project
    c. how the access provider will work with access seekers and all relevant stakeholders to develop a capacity plan for the network, such as a corridor capacity plan.

Box 12.1 Proposed investment consultation provisions

The access provider will include a consultation policy as part of their undertaking for capital expenditure that is funded by access seekers (either through access charges or a capital contribution). The consultation policy will outline:

1. How the access provider will consult with access seekers through every stage of a capital expenditure project (either initiated by the owner or an access seeker). This will include:
    a. the method for consultation (such as an access seeker consultation forum)
    b. the rights of access seekers to endorse or object to a project at each stage (noting that in certain circumstances the project could still proceed even if it is not endorsed)
    c. how any rights are allocated (e.g. if every access seeker has a single vote or if they have weighted votes based on their usage of the network)
    d. the frequency of consultation for each project stage (e.g. only at each milestone such as the completion).
2. How the access provider will work with access seekers to determine the source of funding for each capital expenditure project.
3. How the access provider will work with access seekers and all relevant stakeholders to develop a capacity plan for the network, such as a corridor capacity plan. This will include consultation on the impact of the capacity plan on adjoining networks and related infrastructure.
4. Relevant stakeholders are industry parties that are impacted by the outcomes of the access provider's investment. They may include:
    a. all operators and end users of the relevant corridor
    b. access providers for adjoining networks
    c. managers of adjoining infrastructure, where the changes may also have consequences for their operations (e.g. ports and airports).
5. A requirement for the access provider to consult and consider all views provided in good faith.

12.4 Allowing access providers to capitalise losses

A related issue for new investment is how the capital expenditure is funded. As noted above, new investment can be funded through an access charge and/or a capital contribution. Capital contributions can be made over a number of years. Assets funded through a contribution cannot be added to the regulatory asset base.[b]

TAHE and Transport for NSW have advised that capital contributions have been rarely used in the past. New investments are therefore primarily funded through access charges.

These funding mechanisms may disincentivise efficient investment by the access provider. This may occur on new lines when access seekers require time to establish and scale-up operations. In these cases, access fees in the first years of the line's life may be negotiated at a level below the ceiling. As explained in the previous chapter, we consider that it unlikely that the current NSW rail access framework would allow the difference between the revenue and the ceiling test in these early years being recouped in future,[c] which would mean that the total cost of the investment is not able to be recovered over the life of the asset.

The Issues Paper proposed addressing this issue by allowing access providers to capitalise losses by recovering any initial under-recovery in future years, over and above the annual ceiling limit that would otherwise apply. This is allowed by other rail access regimes:

- The Hunter Valley Access Undertaking allows ARTC to recover capitalised losses through higher access charges in the relevant pricing zone until the losses have reached zero.[191]
- The Queensland Rail Access Undertaking allows Queensland Rail to establish a capitalised loss account.[192] This is so they can recover losses from providing affordable access to coal carrying access seekers (i.e. where access charges do not provide a commensurate rate of return for the risks or cover efficient costs). The account framework will be reviewed if it seems charges will not be sufficient in the medium term.

Stakeholders provided limited feedback on our proposal. TAHE supported IPART further investigating loss capitalisation.[193] The Hunter Valley Rail Access Taskforce did not consider underinvestment to be a significant issue in its submission, largely reflecting the extent of coordination between ARTC and access seekers in the Hunter Valley.[194] Access providers are also not limited to funding new investment through access charges.

[b] The NSW regime currently provides the access provider with discretion to determine whether new investment shall be funded via an access charge or capital contribution.

[c] The access provider will only keep an unders and overs account for access seekers and groups of access seekers who could potentially breach the ceiling test. This is unlikely to occur in these early years. Furthermore, the requirement to attempt to return the account balance to zero each year indicates that the current NSW undertaking does not contemplate an unders and overs account during the early years of under-recovery.

We are proposing to recommend allowing access providers to capitalise losses for the relevant line segment. This would provide greater flexibility for funding new investments and may reduce any disincentive to invest in the NSW network. Access providers would be required to consult with access seekers about how this would be recovered and include a policy in its undertaking for IPART approval. For example, in the Hunter Valley, the ARTC must finish recovering capitalised losses through access charges in pricing zone 3 by 31 December 2022 (i.e. for the capitalised losses balance to be zero).

In practice, there may be limited use of this mechanism, as most investment in the NSW network is driven by government funding, with limited sections funded by access seekers.

Draft Recommendation

26. The NSW rail access framework allow access providers to capitalise losses incurred on new investment. Access providers would be required to include a policy in their undertaking for IPART approval for how they would recover these losses over time.

Chapter 13

Compliance

13

Our draft recommendations propose new requirements for:

- **pricing provisions**, including new protections against pricing 'hold up' and distorting competition in downstream markets by charging different prices to competing operators offering the same service
- **information disclosure**, including publishing a standard access agreement with standing offers for standard services, individual prices, a network development plan, and key performance metrics
- **non-pricing provisions**, that cover matters such as capacity allocation, management, and trading; rolling stock approvals; and service level performance measures.

For the rail access framework to be effective, access providers need to comply with the requirements. Under our draft recommendations, access providers must develop network specific undertakings that set out the terms and conditions of its offer to access seekers, consistent with the NSW rail access framework's requirements. They must submit undertakings for IPART's approval (Chapter 3).

In line with our terms of reference, this chapter considers:

- whether the current compliance framework is fit for purpose, including whether it achieves the framework's objectives at least cost to the access provider
- how access providers should demonstrate compliance with the new requirements we have proposed
- whether parties have sufficient right of review of our decisions.

13.1 Overview of our draft recommendations

We propose to maintain the current requirement for access providers to submit an annual compliance proposal for IPART's approval each year. Access providers should demonstrate that they comply with the ceiling test and asset valuation roll forward principles. However, we are making draft recommendations that access providers should also:

- demonstrate that prices recover access seekers' direct costs
- declare that they have complied with all requirements of the NSW rail access framework, including publishing all required information within required timeframes and consistent with IPART's information standard (see Chapter 7)
- self-report any instances of non-compliance.

As discussed in Chapter 3, access providers should demonstrate compliance to the satisfaction of the regulator to reflect their network characteristics. This would allow IPART, as rail access regulator, to employ:

- a higher standard of oversight to any constrained network (i.e. networks that are able to recover capital costs), not just those in the Hunter Valley
- a more pragmatic approach where networks don't even recover their operating costs.

13.2 Existing compliance requirements

Each year, each access provider must submit a compliance proposal by 31 October for the preceding financial year that demonstrates to IPART that it has complied with:

- the Asset Valuation Roll Forward Principles - if it hasn't complied then IPART determines what Closing Regulatory Asset Base would comply with those principles
- the ceiling test, having regard to the operation of the unders and overs account.

While the NSW Undertaking also requires access providers to recover the direct costs and, as an objective, the full incremental costs of providing access, they do not need to demonstrate their compliance with this requirement to IPART.

The NSW rail access framework also provides an exception for an annual compliance assessment where the access provider can demonstrate to IPART's reasonable satisfaction that its access revenue is no more than 80% of the access revenue likely to be derived by application of the ceiling test. This only applies outside of the Hunter Valley Coal Network.

Where the exception applies, IPART requires the access provider to submit detailed ceiling test information every 5 years only. The access provider must notify IPART every year that there has been no material change to the sectors' revenue and cost base that would cause revenue to approach the 80% threshold.

The access provider must develop and publish an unders and overs account policy and submit it to IPART for approval.

In addition to the NSW Undertaking's requirements, Part 3, Division 3 of the IPART Act requires access providers to:

- notify IPART 30 days prior to entering into an access agreement and once the agreement has commenced
- provide a copy of the proposed agreement and any other details if IPART requests it.

IPART must report non-compliance with the notification requirements to the Minister responsible for administering the IPART Act.

13.3 Compliance with the pricing provisions

As discussed in Chapter 9, our draft recommendation is to maintain the requirement that the access provider set prices above the direct cost of an access seeker using the network and below the full economic cost of providing access. Overall, we consider that the current compliance framework provides a suitable mechanism for assessing an access provider's compliance. However, we've identified some areas for improvement below.

We propose to maintain our current requirement for rail access providers to submit a compliance proposal to IPART by 31 October each year, but with some flexibility for the rail access provider to negotiate a later date with IPART's approval.

IPART currently publishes a Rail Access Annual Compliance Reviews Guideline, which explains how we assess compliance and what information access providers must provide in their proposals. We propose to update this guideline to take account of the new requirements, including how much information or what is required to report compliance against each requirement.

13.3.1 IPART should assess whether access charges recover direct costs

While the floor test is an existing requirement, the NSW Undertaking does not require us to assess the access provider's compliance with it.

As explained in Chapter 9, there are 2 parts to the existing floor test. We propose that IPART assess compliance against one part of the floor test – whether prices for individual access seekers recover their direct costs of using the network. We consider that this would increase transparency to:

- help protect access providers from opportunistic sub-cost price offers from access seekers
- help protect access seekers from discriminatory pricing that is based on cross-subsidies from one group of customers to another.

We would seek information from access providers and publish our findings in our annual compliance report. However, we are not proposing to take further action if the floor test is not met (for example, access seekers would not be compelled to pay the difference in revenue, or alternatively, access providers would not be compelled to refuse future service).

13.3.2 We recommend removing the requirement for access providers to provide an indicative RAB

We propose to provide more flexibility in assessing compliance with the ceiling test by:

- requiring that the access provider demonstrate compliance with the ceiling test to IPART's reasonable satisfaction
- removing the requirement for access providers to provide an indicative RAB based on a DORC valuation and demonstrate compliance with the asset roll forward principles.

As outlined above, for the Hunter Valley Coal Network, access providers must demonstrate compliance with the asset roll forward principles. The opening RAB value for the Hunter Valley Coal Network was established in 2001. It is rolled forward by indexing it by CPI, adding any capital expenditure, and subtracting depreciation and any asset disposals. We consider that the access provider should continue to use the current roll forward method and value.

For networks where access revenue is less than 80% of the ceiling test, access providers do not have to demonstrate compliance with the asset roll forward principles. For the purposes of applying this requirement under the current NSW Undertaking, IPART must have regard to an indicative RAB, based on the DORC methodology, as provided by the access provider.

No networks outside of the Hunter Valley exceed the 80% threshold. Because IPART is only required to have regard to an *indicative* RAB, access providers have not established initial RABs for any other network. In practice, the access providers have not provided indicative RABs because they have demonstrated to IPART that they do not even recover their operating and maintenance costs, which means that the value of the RAB is irrelevant.

We consider that this approach is proportional given the low level of cost recovery. It can be a very costly engineering task to value the network – and this value would not constrain prices. The ARTC submitted to the ACCC's 2018 Draft decision on ARTC's Interstate Access, that it:

> does not earn the full economic cost of the segment. The process to provide a DORC valuation imposes substantial costs on ARTC, including external expert consultant costs to assist in developing the valuation. As noted above, given the lack of full recovery of economic costs on the Interstate Network, these regulatory costs are directly borne by ARTC.[195]

We propose removing the requirement for access providers to provide an indicative RAB to IPART. Instead, we recommend that access providers must demonstrate to IPART's r*easonable satisfaction* that its revenue is below the ceiling. For example, where access providers can demonstrate that they do not recover their operating costs.

Where access providers do recover more than their operating and maintenance costs, they would need to provide an evidence-based indicative DORC value to IPART. However, they would not be required to lock in an initial DORC value and maintain a RAB, unless they consistently set prices close to the ceiling.

IPART would update its compliance policy to provide further guidance on the type and level of detail that the access provider should provide, to demonstrate compliance with the ceiling test.

13.3.3 Other price provisions would be enforceable through the dispute resolution mechanism

Our draft recommendation is that IPART would not assess the access provider's compliance with other proposed pricing provisions (that the same price is charged for the same service where providers compete in the same downstream market and protection against 'hold up' strategies). These are intended to provide greater transparency and guidance for access seekers when negotiating prices with the access provider. However, it would be a costly exercise for the access provider to demonstrate compliance with those principles for each access seeker.

Instead, the pricing principles would be enforceable by access seekers through the dispute resolution mechanism and would provide guidance to the arbitrator in the event of a dispute. We provide more information on this in Chapter 6.

Draft Recommendation

27. The NSW rail access framework continues to require access providers to submit an annual compliance proposal to IPART by 31 October (or a date agreed by IPART) each year that demonstrates that they comply with:
    a. the ceiling test
    b. the asset valuation roll forward principles
    c. the floor test (this is a new requirement).

28. That access providers be required to demonstrate compliance with the ceiling test to IPART's reasonable satisfaction, removing the requirement to demonstrate that their revenue is below 80% of that derived under the ceiling test.

13.4 Compliance with information disclosure requirements

We are making draft recommendations to increase information disclosure and quality to inform better negotiations. It would be an unnecessarily onerous process for IPART to assess access providers' compliance with each requirement. This would require actively monitoring that access providers have published all required documents that meet the information standard. While this would encourage compliance, it would disproportionately increase regulatory costs.

Instead, we propose a pragmatic, risk-based approach where:

- as part of its annual compliance proposal, the access provider is required to either:
  - provide assurance that it has met all information disclosure and quality requirements set out in the NSW rail access framework, or
  - self-report any instances of non-compliance
- IPART would have discretion to investigate compliance (and potentially take enforcement action as proposed in Chapter 14) in response to a complaint from an interested party or based on our own inquiries.

Ultimately, the purpose of this requirement is to increase transparency for access seekers. They are in the best position to know whether the information is adequate and available, because they rely on it to make decisions.

Draft recommendation

29. That rail access providers be required to make a declaration in their annual compliance proposal that they have complied with all the requirements of the NSW rail access framework, including publishing all required information within the required timeframes and consistent with IPART's information standard, or self-report any instances of non-compliance.

13.5 Compliance with notification requirements in the IPART Act

Under the IPART Act, government agencies under a public infrastructure access regime must notify us 30 days before entering into an agreement for granting of access to services to its infrastructure.[196] This allows us to request a copy of the agreement and provide advice to the government agency and to the Minister[a] before it is in place. If access providers do not comply with this requirement, we must report non-compliances to the Minister.[b]

These requirements apply generally to public infrastructure access regimes in NSW. In addition to TAHE's obligations under the rail access framework, is also applies to Essential Energy for access to its electricity networks.

In the context of rail, there have been some instances where it is unclear if this requirement applies, for example, where price schedules in an existing agreement are amended or existing access agreements are extended.

As explained in Chapter 2 we are introducing new price disclosure requirements that would require access providers to publish default prices for standard services, and individual prices that each customer actually pays. These new requirements would mean that we would not have to rely on the notice provisions in the IPART Act in order to provide relevant price advice to the Minister. To streamline our compliance role and enhance transparency around this requirement, we propose to report on any non-compliances in our annual compliance report.

We would require the rail access provider to report:

- any instances where it did not meet the notification requirements in the IPART Act
- an explanation for any non-compliances reported.

We would provide a copy of our compliance report to the Minister. We would also maintain our discretion to report high-impact breaches to the Minister at the time they occur.

[a] This is the Minister for Customer Service.
[b] The relevant Minister is the Minister for Customer Service, who has responsibility for matters under the IPART Act.

Chapter 14

Enforcement

14

An effective regulatory regime requires adequate enforcement mechanisms to ensure parties meet their obligations. Our terms of reference ask us to investigate whether current enforcement provisions adequately protect rail infrastructure owners and access seekers' rights to access facilities on fair and reasonable terms.

This chapter discusses our draft recommendations on the powers required to enforce compliance with the rail access framework effectively, and how they would operate.

14.1 Overview of our draft recommendations

We are making a draft recommendation that IPART, in its capacity as NSW rail access regulator, be granted new enforcement powers under the NSW rail access framework. This would be broadly consistent with other Australian rail access regimes, which include express enforcement powers.

The new enforcement powers are intended to deter non-compliance and reduce reliance on dispute resolution as the only means of enforcement. They would allow IPART to:

- accept court-enforceable undertakings from access providers to remedy non-compliance
- direct an access provider to remedy non-compliance
- seek a court order to:
  - require compliance with our directions or an enforceable undertaking
  - impose civil pecuniary penalties for continuing non-compliance or egregious breaches.

We are also making a draft recommendation that IPART be granted new investigative powers to investigate instances of suspected non-compliance, including being able to require an access provider to give IPART information.

14.2 Existing ways of enforcing compliance are inadequate

The NSW rail access framework currently confers several compliance functions on IPART, as set out in Chapter 13. However, unlike rail access regimes in other states, IPART has no express powers to enforce compliance with the NSW Undertaking.

The current arrangements place the burden of enforcement on access seekers rather than IPART. Access seekers may refer a dispute to IPART for arbitration to resolve some issues of non-compliance. Alternatively, access agreements may contain enforcement mechanisms, which access seekers may pursue.

This approach to enforcement has not been effective in encouraging compliance. For example, for many years RailCorp (now TAHE) has not complied with the NSW Undertaking's requirements to:

- return over-recovered revenue in their unders and overs account to access seekers each year
- provide access seekers with an annual reconciliation of their under and overs account[197]
- submit a compliance proposal annually.

We are not aware of access seekers seeking a refund from either RailCorp or TAHE for overpayments.

There has only been one access dispute referred to IPART for arbitration (but the dispute was ultimately settled between the parties). Arbitration and court proceedings brought by a single access seeker are inefficient where a breach impacts multiple parties, as the parties would either need to coordinate their disputes (e.g. seek to have related arbitral proceedings consolidated or heard together) or risk different determinations. It would be more effective and efficient if IPART, as the access regulator, had enforcement powers to deal with non-compliance effecting multiple parties (such as failing to return over-recovered revenue to multiple affected access seekers).

14.3 Enforcement provisions in other Australian states

Other rail access regimes, such as those in Queensland, South Australia and Western Australia give regulators a range of enforcement powers. Table 14.1 below provides a summary of relevant enforcement powers.

Table 14.1 Enforcement powers in other Australian jurisdictions

Jurisdiction	Queensland	South Australia	Western Australia
Legislation	*Queensland Competition Authority Act 1997* (Qld) Part 5, Division 8.	*Railways (Operations and Access) Act 1997* (SA) Part 8.	*Railway (Access) Act 1998* (WA) Part 5 and *Railway (Access) Code 2000* (WA).
Regulator	Queensland Competition Authority	Essential Services Commission	Economic Regulation Authority
Injunctions	The Regulator may apply to the court for an order directing the service provider to comply with a term of an approved access undertaking.[a]	The Regulator may apply to the court for an injunction: • restraining a person from contravening the rail access regime; or • requiring person to comply with the rail access regime.[b]	The Regulator may apply to the court for an injunction. The court may grant an injunction in such terms as the court thinks fit if it satisfied that a person: • has engaged in conduct that amounts to a breach of the code; or • is proposed to engage in conduct that would amount to such a breach.[c]
Compensation	The Regulator may apply to the court for an order directing the service provider to compensate anyone who has suffered loss or damage because of the breach.[d]	The Regulator may apply to the court for an order directing the service provider to compensate anyone who has suffered loss or damage as a result of a contravention.[e]	N/A
Other enforcement options	The court can also make any other order it considers appropriate.[f] There are also penalties for specific offences. For example, failure to comply with a written notice to give the regulator a copy of an access agreement attracts a maximum penalty of 500 penalty units (currently $71,875) or 6 months imprisonment.[g]	There are penalties for certain offences. For example: • $15,000 for failing to give information or produce relevant documents to an arbitrator[h] • $20,000 for failing to comply with the information brochure requirements[i] • $60,000 for failure to comply with a notice to provide information relevant to monitoring the costs of railway services[j]	There are penalties for certain offences. For example, failure to comply with an information gathering notice may attract a penalty of $100,000.[k]

a. *Queensland Competition Authority Act 1997* (Qld) s 158A(3)(a).
b. *Railways (Operations and Access) Act 1997* (SA) s 65.
c. *Railway (Access) Act 1998* (WA) s 37.
d. *Queensland Competition Authority Act 1997* (Qld) (Qld) s 158A(3)(b).
e. *Railways (Operations and Access) Act 1997* (SA) s 66.
f. *Queensland Competition Authority Act 1997* (Qld) s 158A(3)(b).
g. *Queensland Competition Authority Act 1997* (Qld) ss 103, 105.
h. *Railways (Operations and Access) Act 1997* (SA) s 47.
i. *Railways (Operations and Access) Act 1997* (SA) s 28.
j. *Railways (Operations and Access) Act 1997* (SA) s 60.
k. *Railway (Access) Act 1998* (WA) s 21.

14.4 IPART should have investigative powers

We are making a draft recommendation that the NSW Government amends the Transport Administration Act to grant IPART investigation powers for monitoring and gathering information to determine whether an access provider has complied with the NSW rail access framework.

IPART could use these powers where we become aware of a potential instance of non-compliance, for example, following a complaint from an access seeker.

Our proposed investigative powers would be similar to the powers IPART has under Part 3, Division 7 of the IPART Act to conduct investigations and require an agency to tender information, documents and evidence. Under Division 7, it is an offence for an agency to refuse or fail to comply with these directions and penalties apply.

These investigative powers in the IPART Act do not apply to our rail access compliance functions—they only apply to investigations under the IPART Act or where they have been specifically applied to other investigations. We recommend that the Government introduces similar powers into the Transport Administration Act to allow IPART to investigate suspected non-compliance with the rail access framework.

Draft recommendation

30. That the Transport Administration Act include new powers for IPART, as NSW rail access regulator, to investigate potential instances of non-compliance with the rail access framework.

14.5 IPART should have powers to enforce the framework's requirements

Enforcement powers would enable us to compel compliance and deter future non-compliance. We are making a draft recommendation that the NSW Government amend the Transport Administration Act to allow IPART to:

- accept enforceable undertakings from access providers to remedy non-compliance
- issue a direction to an access provider requiring them to remedy non-compliance
- seek a court order to require compliance with our directions or an enforceable undertaking
- seek the imposition of civil pecuniary penalties for serious breaches, including failure to:
  - comply with the information disclosure requirements
  - submit an annual compliance statement
  - return overpayments to access seekers
  - comply with a direction to remedy non-compliance.

In addition to applying our proposed legislated enforcement provisions, we would also report publicly on non-compliance and our enforcement actions.

Including a wide range of enforcement powers would allow us to take a proportionate approach to non-compliance. Consistent with our general compliance and enforcement policy that applies to our compliance functions across a range of regimes, we would take into account a range of factors when determining our response to a breach:

- our regulatory objectives (i.e. those set out in the relevant regime)
- the materiality of the non-compliance, including likely consequences
- conduct and culpability of the regulated entity including its compliance history, intent of its non-compliance and stakeholder feedback or complaints
- other considerations, such as whether action has already been taken by the Minister or another entity.

Box 14.1 provides some examples of how we might use our proposed enforcement powers for breaches under the rail access framework.

We would update our general compliance and enforcement policy to take into account any new enforcement powers related to rail access.

Box 14.1 Examples of how we would use the enforcement powers

IPART finds that the ceiling test has been breached and the funds have not been returned to access seekers in a lump sum within 6 months

IPART could:

1. direct the access provider to refund the over-recovery according to its unders and overs account policy by a specified date
2. accept a court-enforceable undertaking under which the access provider undertakes to refund the over-recovery and take other specified steps such as reviewing and updating its internal compliance framework or providing training to staff to avoid repeat non-compliance
3. if the access provider still does not comply with (1) and/or (2) above, then we would seek a court order to enforce the direction or undertaking and/or impose a civil pecuniary penalty.

An access seeker makes a complaint that an access provider is not disclosing the required information

IPART could:

1. investigate the complaint to determine whether it has merit
2. direct the access provider to publish the required information that meets the standard by a specified date
3. if the access provider does not comply with (2), we seek a court order to enforce the direction and/or impose a civil pecuniary penalty.

For civil pecuniary penalties to be effective to deter non-compliance, they need to be sufficiently large so as not to be seen as a cost of doing business. In the other rail access regimes listed in Table 14.1 the maximum penalties range from $15,000 to $100,000 depending on the offence committed (some of these are criminal penalties as opposed to civil pecuniary penalties). These amounts may not be high enough given that TAHE's 2020-21 revenue from access fees was $58,572,000. [c 198]

In the regulatory sphere, the decision to make a contravention of a legislative requirement punishable by a criminal rather than civil penalty may be based on a range of factors. These factors may include:

- the inherent nature of the contravention: acts which cause significant harm to people or society at large are typically viewed as suited for criminal treatment
- a desire to attach greater public censure to the contravening act in order to deter it more effectively
- the differences in civil and criminal procedure. Criminal offences, which typically require a higher standard of proof and the proof of intent on the part of the accused, are generally more difficult to prove
- the availability of different penalties under civil and criminal regimes (e.g. sentences of imprisonment are only available for criminal offences)
- the policy impacts of the decision.

At this stage, we consider civil enforcement mechanisms would be appropriate for most contraventions of our draft recommended rail access framework. However, serious matters that impact the ability of the regulator to perform its role, such as failing to comply with an information gathering notice, or hindering or obstructing an investigation, should be accompanied by criminal penalties (consistent with other NSW regulatory regimes).

Draft recommendation

31. That the Transport Administration Act provide IPART, as NSW rail access regulator, new powers to enforce compliance with the requirements in the rail access framework by:
    - accepting enforceable undertakings
    - issuing written directions
    - seeking court orders
    - seeking pecuniary penalties.

[c] ARTC's 2020-21 Annual Report states their consolidated access revenue for their Hunter Valley network was $478,226,000 in the 2021 financial year (see page 71).

Chapter 15

Transitional arrangements between the Commonwealth and NSW access regimes

15

As explained in Chapter 2, section 99C of the Transport Administration Act allows access providers to submit a voluntary undertaking to the ACCC, and be regulated under the Competition and Consumer Act rather than the NSW Rail Access Undertaking. If an access provider withdraws a voluntary undertaking from the ACCC (or allows it to lapse), they return to the NSW Undertaking, which is the default regulatory instrument.

The arrangements for switching between a Commonwealth and NSW undertaking vary somewhat across access providers:

- TAHE must obtain the Minister's and Premier's approvals to submit, vary, or withdraw a voluntary undertaking to the ACCC (although it could allow a voluntary undertaking to expire without seeking approval).[199]
- In contrast, the ARTC does not have to seek approvals to transfer between regimes.[200]

The ARTC has 2 voluntary undertakings in NSW –the Hunter Valley Access Undertaking, and the Interstate Access Undertaking. It can withdraw an undertaking (with the ACCC's consent) or let it expire and return to the NSW Undertaking. The current Hunter Valley Access Undertaking is due to expire in 2026.

This flexibility for access providers to 'choose' their regulatory framework creates uncertainty for access seekers and can be used as a bargaining tool in negotiations. The terms of reference for this review directed IPART to investigate the transitional arrangements that should apply when access providers submit a voluntary undertaking to the ACCC and when a voluntary undertaking lapses.

This chapter discusses the problems stakeholders experience under the current arrangements and our draft recommendations to increase regulatory certainty.

15.1 Problems with the current arrangements

The current arrangements are unsatisfactory for 2 main reasons. First, there are significant differences between the NSW and ACCC access undertakings. This is particularly the case for the Hunter Valley network, where the voluntary undertaking has evolved to meet the needs of industry over time.

The Hunter Valley Access Undertaking includes operational, governance and process elements, including sophisticated mechanisms for capacity management, supply chain coordination (including with coal terminals at the Port of Newcastle) and user consultation around capacity investment. It also contains a set of minimum terms and performance standards.

Further, the Hunter Valley Access Undertaking is subject to greater regulatory oversight:

- The ACCC is responsible for approving the Hunter Valley Access Undertaking each time it comes up for renewal.
- The ACCC has clear enforcement powers under the Competition and Consumer Act.[201]

Access seekers are concerned these provisions will be lost if access regulation of the Hunter Valley Coal Network reverted to the NSW rail access framework.

Second, the lack of transitional arrangements between the 2 regimes creates uncertainty. Currently, there is no guidance about when access providers are likely to revert to the NSW rail access framework, nor arrangements for doing so. For example, there are no provisions for maintaining the terms and conditions of access for a period to give access holders time to renegotiate under the new regulatory regime.

Stakeholders have told us that access providers can use this regulatory uncertainty as a bargaining tool in negotiations to get access seekers to trade off terms and conditions for regulatory certainty. For example, in its submission to our 2019 review of the rate of return and remaining mine life, the ACCC stated:

> This possibility was faced by industry in mid-2017, following lengthy negotiations to replace the 2011 [Hunter Valley Access Undertaking]. ARTC and coal miners ultimately came to a commercial agreement which was reflected in a variation to the 2011 [Hunter Valley Access Undertaking] that ARTC submitted, and the ACCC consented to on 29 June 2017. While the variation was supported by the majority of industry, submissions to the ACCC's assessment set out that industry did not consider the proposal had been effectively consulted on, and did not consider the proposed financial parameters to be appropriate. Notwithstanding, industry preferred this outcome to the alternative of allowing the [Hunter Valley Access Undertaking] to expire.[202]

The Hunter Rail Access Taskforce submission to this review made this point as well:

> The threat of reversion to the [NSW Undertaking] was explicitly made by ARTC as a negotiating tactic with [Hunter Rail Access Taskforce] and the ACCC during the [Hunter Valley Access Undertaking] renewal process in 2016-17. In that case, ARTC used the threat as a means of extracting commercial outcomes (such as a higher cost of capital allowance) that went beyond what was proposed by the ACCC in its draft regulatory determination.[203]

The Hunter Rail Access Taskforce stated that a sudden shift back to the state rail access framework could substantially undermine certainty and investor confidence in the Hunter Valley.[204] The ARTC could exercise monopoly power under the NSW rail access framework, because IPART does not have the same enforcement powers as the ACCC.[205]

However, this negotiating advantage is partially offset by clauses in existing access agreements that keep agreed access arrangements in place until they expire, regardless of whether there is a change in regimes. This requirement applies to the Hunter Valley Access Undertaking and agreements made under the Transport Administration Act (Box 15.1).

Because of these requirements, prices agreed under a voluntary undertaking made to the ACCC may exceed the revenue allowed in the NSW rail access framework. If this occurs, the NSW rail access framework would apply, which means the access provider must keep an unders and overs account and attempt to return the account balance to zero each year.

Box 15.1 Agreements typically remain on foot even for regime changes

Existing agreements typically apply for their term ('grandfathering') where there is a change in the regulatory regime.

For example, clause 7 of Schedule 6AA of the Transport Administration Act provides:

> The commencement of an access undertaking or variation under this Schedule does not affect any access agreements in relation to the part of the NSW rail network for which it is the rail infrastructure owner that have been entered into between a rail infrastructure owner and any other person before that commencement.

Similarly, clause 2.4 of the Hunter Valley Access Undertaking states:

> This undertaking applies only to the negotiation of new Access Agreements and the negotiation of Access Rights in addition to those already the subject of an Access Agreement. Subject to an Access Agreement being required to incorporate those clauses from the Indicative Access Holder Agreement… nothing in this undertaking can require a party to an existing Access Agreement to vary a term or provision of that agreement.

15.2 Improving consistency in access arrangements

The differences between the Commonwealth regime and NSW rail access framework create uncertainty for access seekers and give access providers leverage during negotiations. Our draft recommendations aim to create certainty for all parties by reducing these differences between the regimes. For example:

- introducing an investment consultation framework
- requiring access providers to have in place an undertaking, which sets out their non-price terms and conditions, including how they propose to undertake capacity allocation, management and capacity trading, and a framework for negotiating key performance indicators
- providing IPART with greater enforcement powers, including powers to direct access providers to refund over-recoveries
- giving IPART regulatory oversight of an access provider's undertaking (and ability to recommend default provisions where they are not provided or inconsistent with the NSW rail access framework's provisions).

This approach reduces the impact of regime switching and reduces opportunities to use the differences between regimes as leverage.

15.3 Transitional arrangements for switching between regimes

When a voluntary undertaking expires or is withdrawn, it will take time for access providers to implement the new terms and conditions under the NSW rail access framework. To avoid a gap in non-pricing provisions, we recommend that at least 12 months before returning to the NSW rail access framework, an access provider must:

- notify IPART of their intention to withdraw a voluntary agreement, or to not replace a voluntary agreement when it expires
- submit its undertaking for IPART's review and recommendation.

This timeframe gives the regulator sufficient time to consult on the undertaking and have it approved by IPART before the transition date, taking into account potential stop the clock events.

If IPART has not finalised its assessment of the undertaking before the network switches to the NSW rail access framework (either because the undertaking has not been submitted, or does not meet the requirements under the NSW rail access framework) then IPART could impose a default undertaking.

Because our draft recommendations reduce some of the key differences between the ACCC's regime and our proposed NSW rail access framework, we could use the existing voluntary undertaking as the basis for the default undertaking, at least for a period following the regime change. This approach minimises the impact of a regime change in the short term.

Draft Recommendation

32. That an access provider must:
    a. notify IPART at least 12 months prior of their intention to withdraw a voluntary agreement, or not replace a voluntary agreement, upon its expiry
    b. submit an undertaking which meets the requirements of the NSW rail access framework for IPART's approval at least 12 months prior to returning to the NSW rail access framework.

15.3.1 We do not recommend changing the Act to restrict access providers from changing regimes

The Hunter Rail Access Taskforce proposed amending the Transport Administration Act to prevent voluntary undertakings from expiring without approval from the Minister. However, we do not consider this option will work in practice as an extension to an existing voluntary undertaking would require a decision by the ACCC.

[1] NSW Productivity Commission, *White Paper 2021 Rebooting the Economy*, 2021, p 167.
[2] Aurizon submission to IPART Issues Paper, January 2022, p 6.
[3] ARTC submission to IPART Issues Paper, December 2021, p 4.
[4] Aurizon submission to IPART Issues Paper, January 2022, p 8.
[5] Hunter Rail Access Taskforce submission to IPART Issues Paper, December 2021, p 3.
[6] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 7.
[7] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 4.
[8] Pacific National submission to IPART Issues Paper, December 2021, p 5.
[9] Pacific National submission to IPART Issues Paper, December 2021, p 5.
[10] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 9.
[11] Aurizon submission to IPART Issues Paper, January 2022, p 5.
[12] Aurizon submission to IPART Issues Paper, January 2022, p 8.
[13] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 14.
[14] Pacific National submission to IPART Issues Paper, December 2021, p 2.
[15] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 2.
[16] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 14.
[17] ARTC submission to IPART Issues Paper, December 2021, p 7.
[18] Hunter Rail Access Taskforce submission to IPART Issues Paper, December 2021, p 2.
[19] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 12.
[20] Hunter Rail Access Taskforce submission to IPART Issues Paper, December 2021, p 2.
[21] Aurizon submission to IPART Issues Paper, January 2022, p 2.
[22] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 1.
[23] GrainCorp submission to IPART Issues Paper, December 2021, p 1.
[24] ACCC, The regulatory framework for ARTC's Interstate network, accessed 13 October 2022.
[25] ONRSR, What we do, October 2021, accessed 12 October 2022.
[26] Competition Principles Agreement - 11 April 1995 (As amended to 13 April 2007), section 6(3).
[27] *Transport Administration Act 1988* Schedule 6AA cl 1(2)(a)-(c), 5 and 6.
[28] *Transport Administration Act 1988* Schedule 7, s 142.
[29] *Transport Administration Act 1988* s 99C.
[30] ACCC, Rail network access regulation, accessed 12 October 2022.
[31] IPART, *Review of access pricing on the NSW grain line network*, April 2012, p 5.
[32] *Railways (Operations and Access) Act 1997* (SA) s 27.
[33] *Rail Management Act 1996* (Vic) s 38U.
[34] *Water Industry Competition Act 2006* s 38.
[35] For example, *Queensland Competition Authority Act 1997* (Qld) s 136 and *Competition and Consumer Act 2010* (Cth) s 44ZZA.
[36] *Queensland Competition Authority Act 1997* (Qld) s 134.
[37] *Queensland Competition Authority Act 1997* (Qld) s 135.
[38] *Transport Administration Act 1988* Sch 6AA cl 5.
[39] ACCC, *Guidance paper ARTC's Interstate network access undertaking 2023*, July 2022.
[40] *Queensland Competition Authority Act 1997* (Qld) s 147A(2).
[41] *Queensland Competition Authority Act 1997* (Qld) s 147A(3).
[42] *Competition and Consumer Act 2010* (Cth) s 44ZZBC(1).
[43] *Competition and Consumer Act 2010* (Cth) s 44ZZBC(2)-(4).
[44] Competition Principles Agreement - 11 April 1995 (As amended to 13 April 2007), cl 6(4)(d).
[45] Productivity Commission, NSW Guide to Better Regulation NSW.
[46] *Transport Administration Act 1988* s 11, s 13-14, s 99D and Sch 1 Functions of Transport for NSW.
[47] TAHE submission to IPART Issues Paper, December 2021, p 7.
[48] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 9.
[49] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 2.
[50] TAHE submission to IPART Issues Paper, December 2021, p 7.
[51] *Independent Pricing and Regulatory Tribunal Act 1992*, s 24A(4).
[52] Aurizon Network Pty Ltd, Standard Rail Connection Agreement, 2017, p 1; Queensland Rail, Enforceable Voluntary Undertaking, October 2021, p 2; QCA, Queensland Rail, accessed 13 October 2022.
[53] NSW Rail Access Undertaking, cl 3.1 and 3.6.
[54] NSW Rail Access Undertaking, cl 7.1.
[55] NSW Rail Access Undertaking, cl 4.1 and 4.2.
[56] NSW Rail Access Undertaking, cl 3.2 to 3.5.
[57] NSW Rail Access Undertaking, cl 3.3 and 6.2.
[58] NSW Rail Access Undertaking, cl 3.4.
[59] NSW Rail Access Undertaking, cl 3.5.
[60] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 10.
[61] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 10.
[62] Pacific National submission to IPART Issues Paper, January 2022, p. 1.

[63] For example, Aurizon submission to IPART Issues Paper, January 2022, p. 6 and ARTC submission to IPART Issues Paper, December 2021, p. 5.
[64] TAHE submission to IPART Issues Paper, December 2021, p. 13.
[65] For example, ARTC Hunter Valley Access Undertaking, Version 8, s 3; ARTC Interstate Access Undertaking, s 3; Queensland Rail Access Undertaking 2, s 2; Aurizon Network 2017 Access Undertaking (UT5), Part 4; *Railways (Access) Code 2000* (WA), s 9; National Gas Rules, Division 3; and Pilbara Networks Access Code, Version 1, s 42.
[66] For example, the ARTC Hunter Valley Access Undertaking, Version 8, cl 3.12(b)(iii); ARTC Interstate Access Undertaking, cl 3.10(b)(iii); the *Railways (Access) Code 2000* (WA), Division 2 cl 20(3); and Dalrymple Bay Coal Terminal 2021 Access Undertaking, cl 5.4(e)(5).
[67] Queensland Competition Authority, *Final decision: DBCT 2019 draft access undertaking*, March 2021, p. vii.
[68] For example, the Dalrymple Bay Coal Terminal Access Undertaking 2021; National Gas Law, s 216G; Pilbara Networks Access Code, Version 1, s 15(3)(b); and ARTC Hunter Valley Access Undertaking, Version 8, s 3.1(a).
[69] *Independent Pricing and Regulatory Tribunal Act 1992*, s 24A(3).
[70] *Independent Pricing and Regulatory Tribunal Act 1992*, s 24A(2).
[71] *Independent Pricing and Regulatory Tribunal Act 1992*, s 24B(1).
[72] *Commercial Arbitration Act 2010* s 17.
[73] IPART, *Arbitration under Part 4A of the Independent Pricing and Regulatory Tribunal Act 1992 (NSW), Practice Directions*, May 2012.
[74] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 14.
[75] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 4.
[76] TAHE submission to IPART Issues Paper, December 2021, p. 2.
[77] TAHE submission to IPART Issues Paper, December 2021, p. 9.
[78] For example, the *Railways (Operations and Access) Act 1997* (SA), Division 2; *Maritime Services (Access) Act 2000* (SA), Division 4, *National Electricity (NSW) Law No 20a of 1997*, cl 129; Access Policy of Darwin Port Operations Pty Ltd, cl 7.3 and Energy Ministers', *Options to improve gas pipeline regulation: Regulation Impact Statement for Decision*, p xviii.
[79] For example, the *Railways (Operations and Access) Act 1997* (SA), s 34; *AustralAsia Railway (Third Party Access) Act 1999* (SA) Division 2, cl 13(a), and Access Policy of Darwin Port Operations Pty Ltd, cl 7.1(e)(x).
[80] IPART, *Arbitration under Part 4A of the Independent Pricing and Regulatory Tribunal Act 1992 (NSW): Practice Directions*, May 2012.
[81] For example, QCA, *Arbitration of disputes in relation to the DBCT service*, Version 3, December 2021; ACCC, *Arbitrations: A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*, April 2006; AER, *Non-scheme Pipeline Arbitration Guide: National Gas Law and Rules,* Version 1, September 2017.
[82] For example, the National Gas Rules. The WA Treasury and Essential Services Commission of South Australia have also recently recommended providing for this power in the WA and SA rail access regimes. See WA Treasury, *Review of the Western Australian Rail Access Regime, Final Decision Paper*, February 2020, p. 62 and ESCOSA, *2020 SA Rail Access Regime Review*, August 2020, p. 35.
[83] *Commercial Arbitration Act 2010*, s 27C.
[84] For example, the Pilbara electricity access regime and the Queensland and NT port access regimes.
[85] For example, the National Gas Rules, cl 572(1), the Pilbara Networks Access Code s 120, *Queensland Competition Authority Act 1997* (Qld) s 117(A); *Railways (Operations and Access) Act 1997* (SA) cl 42; *Maritime Services (Access) Act 2000* (SA) cl 23.
[86] For example, the Energy Ministers', *Options to improve gas pipeline regulation: Regulation Impact Statement for Decision*, p 103; and Pilbara Networks Access Code s 86.
[87] For example, the National Gas Rules, *Railways (Access) Code 2000 (WA)*, *Railways (Operations and Access) Act 1997* (SA); *AustralAsia Railway (Third Party Access) Act 1999* (SA).
[88] TAHE submission to IPART Issues Paper, December 2021, p 9.
[89] NSW Rail Access Undertaking, s 8 and Sch 5.
[90] Aurizon submission to IPART Issues Paper, January 2022, p. 8; Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 10.
[91] Aurizon submission to IPART Issues Paper, January 2022, p. 9; Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 10.
[92] ARTC submission to IPART Issues Paper, December 2021, p. 3; NSW Government submission to IPART Issues Paper, January 2022, p. 6.
[93] Aurizon submission to IPART Issues Paper, January 2022, p. 9; Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 11, ARTC submission to IPART Issues Paper, December 2021, p. 3; TAHE submission to IPART Issues Paper, December 2021, p. 5.
[94] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p. 10.
[95] For example, NSW Government submission to IPART Issues Paper, January 2022, p. 6; Aurizon submission to IPART Issues Paper, January 2022, p. 8.
[96] For example, the National Gas Rules.
[97] Pacific National submission to IPART Issues Paper, December 2021, p 3; Aurizon submission to IPART Issues Paper, January 2022, p 5.
[98] See TAHE Operations Protocol, Version 4.0, accessed 7 October 2022.
[99] TAHE Operations Protocol, Version 4.0, s 2.
[100] TAHE Operations Protocol, Version 4.0, s 3.
[101] TAHE Operations Protocol, Version 4.0, s 4.
[102] TAHE Operations Protocol, Version 4.0, s 5 and s 6.
[103] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 14.
[104] Pacific National submission to IPART Issues Paper, December 2021, p 5.

[105] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 13.
[106] ARTC, *Network Management Principles*, Sch F, p 3.
[107] *Rail Management Act 1996* (Vic) cl 38G.
[108] For example, ARTC Hunter Valley Access Undertaking, Version 8; Queensland Rail Access Undertaking 2; Aurizon Network 2017 Access Undertaking (UT5); Essential Services Commission Victorian Rail Access Regime Capacity Use Rules; Arc Infrastructure, *Train Management Guidelines: Part Five Instruments*, September 2017.
[109] Essential Services Commission of South Australia, *Rail Industry (Tarcoola-Darwin) Guideline No 1 - Access Provider Reference Pricing and Service Policies*, Version RI(T-D)G 1/2, October 2019, s 3.1.
[110] GrainCorp submission to IPART Issues Paper, December 2021, p 4.
[111] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 2.
[112] Pacific National submission to IPART Issues Paper, December 2021, p 5.
[113] Aurizon Network 2017 Access Undertaking (UT5), cl 7.6.
[114] Queensland Rail Access Undertaking 2, Sch H, s 21.
[115] ARTC Hunter Valley Access Undertaking, Version 8, cl 5.7.
[116] TAHE submission to IPART Issues Paper, December 2021, p 6; NSW Government submission to IPART Issues Paper, January 2022, p 7.
[117] ARTC Interstate Access Undertaking, cl 5.3.
[118] Queensland Rail Access Undertaking 2, Sch H, s 22; Aurizon Network's 2017 Access Undertaking, cl 7.4.
[119] ARTC indicative access holder agreement, s 16.
[120] Aurizon Network 2017 Access Undertaking (UT5), cl 7.4.
[121] Queensland Rail Access Undertaking 2 Sch B, s 7.
[122] ARTC Hunter Valley Access Undertaking, Version 8, cl 3.4(b); Aurizon Network's 2017 Access Undertaking, cl 7.4.7.
[123] Queensland Rail Access Undertaking 2, Sch H, s 22.
[124] Pacific National submission to IPART Issues Paper, December 2021, pp 2-3.
[125] NSW Rail Access Undertaking Sch 3, s 3.
[126] Queensland Rail Access Undertaking 2, cl 8.1.3.
[127] NSW Auditor General, *Performance Audit, Rail freight and Greater Sydney*, October 2021, p.3.
[128] NSW Rail Access Undertaking Sch 3, cl 1.
[129] *Railways (Operations and Access) Act 1997* (SA) s 27 (Pricing Principles).
[130] *Railways (Operations and Access) Act 1997* (SA) s 27 (Pricing Principles) and s 38 (Principles to be taken into account [for arbitration]).
[131] Competition Principles Agreement - 11 April 1995 (As amended to 13 April 2007), cl 6(5)(b)(i).
[132] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 7.
[133] TAHE submission to IPART Issues Paper, December 2021, pp 6-8.
[134] Pacific National submission to IPART Issues Paper, December 2021, p 6.
[135] ARTC submission to IPART Issues Paper, December 2021, p 8.
[136] ACCC, *Guidance Paper, ARTC's Interstate Network access undertaking 2023*, July 2022, p 15.
[137] IPART, *Final decision, TAHE's compliance for its Hunter Valley Coal Network 2020-21*, May 2022.
[138] Aurizon submission to IPART Issues Paper, January 2022, p 3.
[139] Pacific National submission to IPART Issues Paper, December 2021, p 6.
[140] Qube Rail Logistics submission to IPART Issues Paper, December 2021, p 7.
[141] ACCC, *Guidance Paper, ARTC's Interstate Network access undertaking 2023*, July 2022, p 11.
[142] ACCC, *Guidance Paper, ARTC's Interstate Network access undertaking 2023*, July 2022, p 15.
[143] ACCC, *Guidance Paper, ARTC's Interstate Network access undertaking 2023*, July 2022, p 15.
[144] *Competition and Consumer Act 2010*, s 44CA.
[145] *Competition and Consumer Act 2010*, s 44ZZCA(b)(ii).
[146] NSW Rail Access Undertaking Sch 3, cl 2 (Definitions).
[147] NSW Rail Access Undertaking Sch 3, cl 3 (Regulatory Asset Base).
[148] NSW Rail Access Undertaking Sch 3, cl 3 (Regulatory Asset Base).
[149] NSW Rail Access Undertaking Sch 3 cl 2 (Definitions).
[150] NSW Rail Access Undertaking Sch 3 cl 2 (Definitions).
[151] NSW Rail Access Undertaking Sch 3, cl 2 (Definitions).
[152] ACCC, *Issues Paper, The regulatory framework for ARTC's Interstate Network*, August 2021, p 9.
[153] ACCC, *Draft Decision, Interstate Rail Access Undertaking 2018*, p ix.
[154] ACCC, *Draft Decision, Interstate Rail Access Undertaking 2018*, p viii-ix.
[155] ACCC, *Issues Paper, The regulatory framework for ARTC's Interstate Network*, August 2021, p 9.
[156] ACCC, *Guidance Paper, ARTC's Interstate Network access undertaking 2023*, July 2022.
[157] NSW Rail Access Undertaking Sch 3 1(l).
[158] TAHE, *TAHE Response to IPART Report on TAHE Compliance Hunter Valley Coal Network 2018-29 to 2019-20*, October 2021, p 4.
[159] TAHE, *TAHE Response to IPART Report on TAHE Compliance Hunter Valley Coal Network 2018-29 to 2019-20*, October 2021, p 5.
[160] ARTC submission to IPART Issues Paper, December 2021, p 6.
[161] TAHE submission to IPART Issues Paper, December 2021, p 9.
[162] NSW Rail Access Undertaking Sch 3 cl 2 (Definitions).
[163] NSW Rail Access Undertaking Sch 3 cl 3 (Regulatory Asset Base).
[164] TAHE submission to IPART Issues Paper, December 2021, p 8.
[165] TAHE submission to IPART Issues Paper, December 2021, p 9.
[166] Hunter Rail Access Taskforce submission to IPART Issues Paper, December 2021, p 24.

[167] NSW Rail Access Undertaking Sch 3, cl 2 (Definitions).
[168] Hunter Rail Access Taskforce submission to IPART Issues Paper, December 2021, p 25.
[169] TAHE submission to IPART Issues Paper, December 2021, p 7.
[170] IPART, Rate of return and remaining mine life from 1 July 2019, July 2019, p 9.
[171] NSW Rail Access Undertaking, Schedule 3, cl 2 (Definitions).
[172] TAHE submission to IPART Issues Paper, December 2021, p 7.
[173] IPART, *Review of our WACC method, Final Report*, February 2018.
[174] IPART, *TAHE's compliance for its Hunter Valley Coal Network, 2020-21 Final Decision*, May 2022, p 2.
[175] IPART, *TAHE's compliance for its Hunter Valley Coal Network, 2020-21 Final Decision*, May 2022, p 2.
[176] IPART, *Rail Access: Compliance statement Hunter Valley Coal Network 2015-16 to 2017-18*, September 2019, p 16, IPART, *TAHE's compliance for its Hunter Valley Coal Network, 2020-21 Final Decision*, May 2022, p 3.
[177] TAHE submission to IPART Issues Paper, p 8.
[178] TAHE, *TAHE Response to IPART's Draft Decision on the Hunter Valley Coal Network Compliance 2020-21*, March 2022, p 4.
[179] TAHE, *TAHE Response to IPART's Draft Decision on the Hunter Valley Coal Network Compliance 2020-21*, March 2022, p 4.
[180] TAHE submission to IPART Issues Paper, December 2021, p 8.
[181] Review of the NSW Rail Access Undertaking - terms of reference, August 2021.
[182] NSW Rail Access Undertaking Sch 3, cl 3.3.
[183] NSW Rail Access Undertaking Sch 3, cl 3.3.
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[185] NSW Rail Access Undertaking Sch 3, cl 3.6.
[186] NSW Rail Access Undertaking Sch 3, cl 3.4.
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[189] ARTC Hunter Valley Access Undertaking, Version 8, s 9.
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[193] TAHE submission to IPART Issues Paper, December 2021, p 8.
[194] Hunter Rail Access Taskforce submission to IPART Issues Paper, December 2021, p 26.
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[197] NSW Rail Access Undertaking Sch 3, cl 4(c).
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[201] *Competition and Consumer Act 2010*, s 44ZZJ.
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