



Review of the NSW Rail Access Undertaking

NSW Government submission to the Independent
Pricing and Regulatory Tribunal of NSW

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1. Introduction

The NSW Government welcomes the opportunity to contribute to the *Review of third-party access to Rail infrastructure in NSW* being carried out by the Independent Pricing and Regulatory Tribunal of NSW (IPART). As part of the review, IPART has released an Issues Paper which reviews the existing arrangements governing third-party access to rail tracks in NSW and sets out a proposed approach to the review and issues it has identified with the current regulatory framework.

As part of the review, we understand that IPART will investigate and make recommendations on a number of key matters including:

- the form of access and method of negotiation
- minimum conditions that should be included in access agreements
- appropriate pricing principles to apply in calculating access prices
- whether rail owners and access seekers' rights to access facilities on fair and reasonable terms are adequately protected
- improving the transition between the NSW regime and the Commonwealth Government's access regime under Part IIIA of the *Competition and Consumer Commission Act 2010* (Competition and Consumer Act)
- whether the Undertaking facilitates appropriate modal choice for freight.

This submission outlines the NSW Government's responses to key questions in Review of the NSW Rail Access Undertaking Issues Paper.

2. The NSW Rail Access Undertaking

The NSW Rail Access Undertaking was established in 1999 under Schedule 6AA and section 99C(5) of the *Transport Administration Act 1988*. It sets out minimum terms and conditions, and pricing principles which rail owners must apply to third-party access to rail networks covered by the Undertaking.

Specifically, the Undertaking provides for third party access to certain parts of the NSW rail network owned by the Transport Asset Holding Entity (TAHE) (formerly Rail Corp) and the Australian Rail Track Corporation (ARTC).

The undertaking requires rail owners to:

- charge no more than the full economic costs of providing access
- charge at least the direct costs caused by trains using the rail line.

The rail owners and the access seekers negotiate on prices and other conditions in accordance with the Undertaking.

The Undertaking currently applies to the:

- Country Regional Network owned and operated by TAHE
- 21 kilometres of the Hunter Valley Coal Network from Woodville Junction to Newstan Junction, owned and operated by TAHE
- Inland Rail North West Link (commissioned September 2020), leased from the NSW Government and operated by the ARTC
- Metropolitan Rail Network owned and operated by TAHE
- Metropolitan Freight Network leased from the NSW Government and operated by the ARTC
- Non-Hunter Valley sectors of Turrawan to Boggabilla, Goobang Junction to Merrygoen, Merrygoen to Gap and Merrygoen to Ulan leased from the NSW Government and operated by the ARTC.

The NSW Government developed the Undertaking to implement its competition policy and third-party access to significant infrastructure facilities reform obligations under the Competition Principles Agreement (1995).

The Undertaking 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).

The Undertaking also includes a number of provisions for rail owners and access seekers.

3. Responses to questions in Issues Paper

3.1 *IPART is reviewing the NSW Rail Access Undertaking*

The NSW Government supports the proposed approach and principles outlined by IPART, and acknowledges they are consistent with the Terms of Reference for the review.

The NSW Government also supports IPART's approach to proportionality. It also supports IPART's assessment that the degree of economic regulation should be matched to the degree to which market power needs to be constrained.

3.2 *Overview of the NSW rail access regime*

Since the NSW Rail Access Undertaking was established in 1999, there have been substantial changes in the ownership, scope and complexity of the networks covered by the regime.

The NSW Government acknowledges the Undertaking's current form is still largely reflective of the primary purpose for which it was developed at that time – to provide regulated access to the Hunter Valley Coal Network (HVCN).

The HVCN is not typical amongst NSW's rail networks as it operates on a commercial basis (i.e. it is not dependent on Government subsidies to cover operating and capacity enhancement investments).

However, key sections of the HVCN are no longer under NSW Government control and are covered by voluntary undertakings between the Australian Rail Track Corporation (ARTC) and the Australian Competition and Consumer Commission (ACCC). Therefore, a key rationale for the current form and purpose of the Undertaking has been significantly reduced.

The key areas of current application of the Undertaking are the shared (passenger and freight) sections of the Metropolitan Rail Network (MRN), the Country Regional Network (CRN), and a residual component of the HVCN which sits within the MRN.

The NSW Government notes the current Undertaking has not been updated to reflect the changes which have occurred since 1999, and suggests there is a need to refocus the Undertaking to its primary regulatory functions (MRN and CRN access), rather than the current peripheral and legacy focus on the HVCN.

3.3 *Form of regulation*

The NSW Government recommends the form of regulation should be fit for purpose.

In 2012, Transport for NSW (TfNSW) carried out a review of the current Undertaking and though responses at the time confirmed the key provisions of the Undertaking remained sound, there have been considerable structural and ownership changes since the review was carried out.

As noted in section 3.1 of this submission, the current Undertaking, including the form of regulation and pricing principles, was drafted to address the specific issues and network characteristics of the HVCN. The primary purpose of the HVCN is to transport coal from mines in the Hunter Valley to the Port of Newcastle, with the primary users being coal access seekers. However, sections of the HVCN are no longer covered by the Undertaking.

The networks which remain covered by the Undertaking are generally mixed-use, with Government-owned passenger train operators the primary users. While the CRN is used to transport grain and other freight, it should be noted it faces competition from road-based transport and recovers a small percentage of its costs via access charges.

The NSW Government notes the current negotiate-arbitrate approach but seeks further views of stakeholders and operators on the current effectiveness of the approach, and the possible alternatives IPART has outlined.

The NSW Government also notes IPART's observation that it has never made an arbitration under the NSW Rail Access Undertaking, as well as its additional observation that this could mean either the threat of arbitration is working as intended or the trigger for arbitration is not appropriate.

The NSW Government provides in-principle support to IPART's proposed concept that different forms of regulation could apply to different parts of the NSW network. While regulatory consistency is often good practice, there are also economic benefits from calibrating the economic regulatory approaches more closely to varying market dynamics which occur across NSW's networks.

As IPART has noted in its Issues Paper, the level of regulatory oversight required for the Hunter Valley Coal Network may not be required for the CRN. The NSW Government notes the case study presented in Box 3.2 in the Issues Paper which outlines how the regulation of gas pipelines occurs in Australia, with varied tiers of regulation applying to pipelines based on competition and significance criteria.

The NSW Government notes information provided by network owners around compliance obligations and current proportionality will play a role in potentially amending the existing form of regulation.

3.4 Negotiation process

The NSW Government notes the existing negotiation process and acknowledges further views of access seekers around current experiences with negotiating access to networks covered by the Undertaking will inform the development of recommendations.

Similarly, access seeker views around whether IPART should have a greater advisory role to the NSW Government, prior to the execution of access agreements, will form a key part of the NSW Government's consideration of recommendations in this area.

3.5 Terms of access and information disclosure

When reviewing information access provisions of the Undertaking, consideration should be given to ensuring they are consistent with the *Government Information (Public Access) GIPA Act 2009* (GIPA Act) and aligned to the Statement of Principles¹ to support proactive disclosure of government information.

The NSW Government notes under the GIPA Act, there is a general presumption in favour of the disclosure of Government information unless there is an overriding public interest against disclosure (sections 5, 13 and 14 of the GIPA Act). Further, the Statement of Principles recognises and reinforces the need for the proactive disclosure of Government information as it assists to ensure transparency, enhance service provision and delivery. This includes valuable information to the public about the existence and management of public assets such as transport infrastructure.

It is important IPART has sufficient regulatory powers and tools in place to effectively ensure compliance with any requirements of the Undertaking and respond to any instances of non-compliance by rail owners.

Information provided by the network owner around the terms and conditions of access to the HCVN, and the publishing of pricing information and indicative access agreements will be key to formulating draft recommendations.

¹ Statement of Principles to support proactive disclosure of government-held information – developed by all Australian Information Commissioners and Ombudsmen - <https://www.ipc.nsw.gov.au/information-access/open-government-open-data-public-participation/statement-of-principles>

Though the current information disclosure provisions of the Undertaking are noted, the NSW Government acknowledges the importance of further views of access seekers around whether these provisions should be retained or amended.

Similarly, further views from other key stakeholders around the possible inclusion of performance indicators in the Undertaking will play an important role in drafting recommendations. The NSW Government notes difficulties may arise in developing “standard” performance indicators for the Undertaking as there is variability in the tasks carried out by the networks it covers.

It is strongly recommended IPART focuses on ensuring the safety of the rail network when considering any changes to trading access rights. A thorough risk assessment would need to precede any such considerations.

The NSW Government also notes trading rights for unused paths have the potential to maximise freight opportunities but effective governance would be required for any such arrangement.

3.6 Access pricing principles

In line with comments provided in section 3.3 of this submission, the NSW Government recommends the pricing principles should be fit for purpose, and reflect the structural and ownership changes since the Undertaking was drafted in 2009.

It also notes a “one size fits all” approach may not be appropriate given the different network characteristics. The NSW Government recommends the pricing principles should also reflect the different users (freight versus passenger) and regulatory approaches which are appropriate.

The NSW Government notes information provided by network owners around access pricing principles will be key to formulating draft recommendations.

3.7 Compliance and enforcement

In line with comments provided in section 3.3 and 3.6 of this submission, the NSW Government recommends the approach to compliance and enforcement should be fit for purpose. For example, for those parts of the network where access pricing and revenues are considerably less than the full economic costs, the compliance and enforcement approach should reflect this.

The NSW Government supports the regulator being able to ensure compliance and notes the mechanisms suggested by IPART which are enabled by TAHE being a state-owned corporation.

The NSW Government notes the potential options outlined by IPART to improve rail owners’ compliance with the Undertaking but seeks further views of operators and end users around:

- whether there is a preference to contract with rail operators rather than network owners
- whether the current arbitration provision is adequate (noting IPART’s comment it has never made an arbitration determination to date).

Further views from access seekers around whether adequate rights of review exist are also sought.

The NSW Government also notes information provided by network owners around compliance and enforcement will be key to formulating draft recommendations.

3.8 Facilitating appropriate modal choice

The NSW Government notes capacity constraint is largely an issue which is experienced on the MRN. As the MRN is a densely trafficked network, not all requests for train paths are, and will

be able to be, satisfied but the NSW Government notes not satisfying requests for paths does not mean access seekers are being “unreasonably constrained”².

In dealing with competing claims for limited capacity, the NSW Government also notes statutory and policy instruments are intended to ensure passenger services are prioritised on the network. Specifically, this reflects that the primary purpose of the MRN is to provide passenger services which is both a transparent and clear expression of how capacity is, and will be, allocated.

Within these clear legislative and operational requirements, the NSW Government does seek to ensure policy and regulatory frameworks are in place to ensure this prioritisation is transparent and efficient, and demonstrably so to non-passenger access seekers.

New arrangements put into place with the formation of TAHE will improve this transparency, including a series of agreements between TfNSW, TAHE, Sydney Trains and NSW Trains. It should also be noted, TfNSW has also started developing a Freight Level of Service requirement which will be included in the agreement between TfNSW and Sydney Trains. This requirement will provide clearer direction to Sydney Trains on the service levels TfNSW expects to be provided to freight operators.

The NSW Government also notes the current Undertaking has not been certified by National Competition Authorities as being compliant with National Competition Policy principles. It is suggested seeking certification could provide another level of transparency and confidence to access seekers that current approaches to identifying and allocating capacity are appropriate and reasonable.

Further views from key stakeholders and IPART around the possible certification of a NSW rail access instrument would be welcomed. The NSW Government notes the possible certification could be carried out by lodging a draft undertaking with the ACCC or through seeking certification of a state-based rail access regime by the National Competition Council (NCC).

The NSW Government again notes the case study presented in Box 3.2 in the Issues Paper, particularly the role the NCC plays in regulating access to gas pipelines, including deciding the form of regulation to apply to particular pipelines (from light or full regulation). It is acknowledged this case study could provide a possible model which could be further considered by the NSW Government.

3.9 Relationship with other regimes

The NSW Government acknowledges the importance of the National Rail Action Plan (the Plan)³, commissioned by the National Transport Commission, and the various actions outlined in the Plan to improve harmonisation and standards across rail networks.

Though work is already being carried out between the Commonwealth, state and territory governments and key members of the rail industry as part of the Plan, the NSW Government would welcome further views from key stakeholders, including other network owners and access seekers, around the potential causes of the “biggest problems between networks”⁴ to further understand the issue and inform possible solutions.

² IPART, Review of the NSW Rail Access Undertaking Issues Paper, Page 38, https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Issues-Paper-Review-of-the-NSW-Rail-Access-Undertaking-November-2021.PDF

³National Transport Commission, National Rail Action Plan, <https://www.ntc.gov.au/sites/default/files/assets/files/National-Rail-Action-Plan.pdf>

⁴ IPART, Review of the NSW Rail Access Undertaking Issues Paper, Page 42, https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Issues-Paper-Review-of-the-NSW-Rail-Access-Undertaking-November-2021.PDF

The NSW Government notes IPART is seeking views on possible changes to the *Transport Administration Act 1988* which may restrict or remove the ARTC's ability to move between regulatory access regimes.

The NSW Government also notes the harmonisation and interoperability of safe systems of work, and processes for consistent distribution of safety critical information to rail operators is paramount.

3.10 General comments

The NSW Government notes there are a number of procedural and general updates required to the Undertaking, and understands there is an intention to address these in the short to medium term.

During the review of the Undertaking, it is recommended IPART considers the below potential changes which will require further consultation by Transport for NSW with access seekers and other key stakeholders:

1. References to be updated:
 - a) Rail Safety Act to be replaced with Rail Safety National Law (RSNL) and Regulations
 - b) Rail Infrastructure Corporation (RIC) to be replaced with TAHE
 - c) Rail Corporation New South Wales (RailCorp) to be replaced with TAHE.
2. Further clarification to be considered in relation to clause 4.5.1 of the Undertaking. Clause 4.5.1 could be clarified to exclude those parts of the NSW Rail Network which are not required for maintaining continuity of the rail line (i.e. sidings and yards).
3. Closer alignment of definitions (in full or part, where appropriate) with the Rail Safety National Law definitions could occur in areas, including:
 - a) Rolling stock: the current definition (a vehicle that operates on or uses a railway track and that is used or proposed to be used to transport passengers or freight (or both) on a railway track) does not capture track machines, which may be traversing through the network and not working on behalf of the network. Consideration should be given to using the RSNL definition⁵ as an alternative
 - b) Rail operator: Consideration should be given to using the RSNL definition⁶ as an alternative.
4. Consider including a definition for 'running line'. The RSNL includes a definition, being "a railway track used primarily for the through movement of trains."

As pricing for access was a major consideration for rail infrastructure operators during the negotiations around the new rail licences for rolling stock operators, the NSW Government also recommends consideration is given to the inclusion of environmental issues in future pricing models for the Undertaking, which in turn may be able to be reflected in the NSW Environmental Protection Agency's licensing framework.

A transparent and agreed structure for costs and contributions across the industry which is embedded within the Undertaking framework could assist in the ready acceptance and equal distribution of costs. This structure would assist with the implementation of reliable long-term

⁵ *Rail Safety National Law (NSW) No 82a of 2012*, s. 4, <https://legislation.nsw.gov.au/view/html/inforce/current/act-2012-82a#sec.4>

⁶ *Rail Safety National Law (NSW) No 82a of 2012*, s. 4, <https://legislation.nsw.gov.au/view/html/inforce/current/act-2012-82a#sec.4>

solutions to mitigate rail network impacts for the environment and community which would maintain or improve the social licence and level of acceptance for rail operations.

Additionally, the costs of environmental compliance, in particular environmental monitoring projects which are led by the infrastructure operators, could also be considered as part of the review.