

**SUBMISSION TO**  
**THE NEW SOUTH WALES**  
**INDEPENDENT PRICING AND REGULATORY TRIBUNAL**

**REVIEW OF THIRD-PARTY RAIL ACCESS TO RAIL INFRASTRUCTURE**  
**IN NEW SOUTH WALES**

**DRAFT REPORT – OCTOBER 2022**

Qube welcomes the opportunity to provide further feedback on the Independent Pricing and Regulatory Tribunal's (IPART) review of the third-party access to rail infrastructure in New South Wales draft report (*Review of the NSW Rail Access Undertaking, Draft Report, 18 October 2022*).

This submission sets out some general comments on the draft report findings, followed by responses to the specific discussions points and recommendations set out in the report. These comments are further to the points raised at the IPART public hearing in November 2022.

The comments in this submission do diminish Qube's position that a nationally consistent approach to providing rail network access should be a priority for the Commonwealth and State Governments.

**General comments**

Qube generally supports the findings of IPART's review of the NSW Rail Access Undertaking and agrees that the current framework is not fit-for-purpose.

The NSW Rail Access Undertaking currently provides the framework for three of Qube's track access agreements in New South Wales, covering use of:

- the Sydney Trains-managed Transport Asset Holding Entity (TAHE) network;
- the UGL Regional Linx-managed Country Regional Network; and
- parts of the Australian Rail Track Corporation (ARTC) managed, leased network.

In responding to the recommendations proposed by IPART, Qube has considered how the recommendations apply to each of the access agreements while noting that some recommendations appear to only relate to those portions of the network where Sydney Trains is the Rail Infrastructure Manager and others only to those within the five Hunter Valley sectors. There also appears to be consideration of the potential for other network sectors to move from ACCC undertakings to the NSW Rail Access Undertaking.

As noted at the IPART public hearing in November 2022, the complexity of existing arrangements in New South Wales is evidenced by the number of access undertakings and access agreements which cover a single train path. This is demonstrated in Qube's initial submission to IPART's review.

The key challenges to developing an efficient regulatory framework for the NSW rail network include:

- the complexity of the NSW Government agency structures.
- the conflicting legislative objectives and functions of the NSW Government agencies.
- train paths and access agreements covering multiple rail networks, including:
  - shared passenger and freight networks;
  - the Hunter Valley coal network;
  - networks supported by Community Service Obligations, which may or may not have funding allocated on a sector-by-sector basis; and
  - corridors which support only seasonal traffic and may have extended periods of non-use.
- network investment which is driven by the needs of passenger services, political commitments and timetable structures which may not have any benefit to freight operators.
- network investment being driven by organisations which are not party to access undertakings or agreements (e.g. Commonwealth Government investment in Inland Rail, and the NSW Government in More Trains More Services projects) for broader economic outcomes.
- numerous investment streams, including grants, Community Service Obligation payments, equity injections in 'non-commercial' infrastructure and other funding sources.
- the potential for networks currently covered by other access undertakings to revert to the NSW Rail Access Undertaking.

Qube is concerned that the current NSW Government structure adds transactional costs, complicates accountability and results in higher costs than other delivery models. Of concern to all operators is that during this undertaking review process, Sydney Trains and Transport for NSW developed a proposal to restructure the development of the Standard Working Timetable (which specifies a rail operator's contracted access rights) in a manner which adds cost and places greater responsibility with Sydney Trains, an organisation which has a legislated primary objective which requires "to deliver safe and reliable railway passenger services". This conflicts with IPART's recommendation 15(a) which promotes the need for competitive neutrality and greater transparency.

The IPART review also discusses network investment, which can be sourced through a range of funding streams. Given the range of funding organisations, many of which are not party to access undertakings or access agreements, IPART should assure itself that the rights of third-party access seekers are protected under all investment models, including grants, equity injections, third party contributions and other streams. Each of the recommendations in the draft report relating to investment and pricing, should consider the impact to existing capacity allocation of each funding option.

In many instances on the Sydney Trains-managed network and the Country Regional Network, Governments have invested to enable broader economic outcomes, meaning that the benefits often accruing to others, rather than the rail freight operator, access provider or the freight forwarder. In some cases the investments may have a negative impact to freight access seekers as the investment may include non-commercial assets or reduce available freight capacity

It is also noted that IPART has reviewed other access frameworks in assessing alternative models to the NSW Rail Access Undertaking. Qube would like to draw IPART's attention to some systemic issues associated with

the Victorian model which provides little incentive for rail freight investment and has seen a reduction in freight operations. IPART should also be aware that the Queensland model has sought to provide cross-network alignment for trains moving between the Queensland Rail and Aurizon networks within ring-fenced corporate structures.

### **IPART Discussion points for comment**

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

Qube supports making a single party accountable for the provision of access on each network covered by the NSW Rail Undertaking.

The current NSW Government agency structure does not allow for one party to be responsible for access to the Sydney Trains-managed network given the conflicting legislative arrangements. Legislative change is required to deliver accountability for access to the network and ensure compliance with the undertaking for the Sydney Trains-managed network and the Country Regional Network.

For access to the ARTC-managed network, Qube supports ARTC remaining the responsible party but would support greater clarity in the framework for train paths (the access right) which cross multiple undertakings and network managers.

Qube suggests that all agency arrangements, leases and contracts which support provision of access rights need to be supported by publicly available agreements. This transparency would provide greater accountability. A consequence of a lack of visibility is demonstrated in the current lease arrangements between the NSW Government and ARTC for the Hunter Valley and interstate networks, where ARTC has continually failed to meet network condition and performance outcomes which are set out in the *Annual Lease Condition Report* but ARTC can only be held to account by Transport for NSW.

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?*

Qube has not sought specific advice from a network owner on infrastructure costs (actual or efficient).

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

There are a number of different characteristics which could provide service differentiation.

The current timetable development process for the Sydney Trains network allocates passenger capacity before identifying potential freight capacity. This approach minimises the ability for freight operators to gain access to or develop premium services.

Regardless of the access charge levied on different services, pricing does not necessarily assure priority or services levels in a live environment due to passenger priority and the Operations Protocol. Access pricing models are complicated by the different commercial drivers for access providers and access seekers. An access seeker may attach greater value to short-haul service for a niche market, while the access provider may see greater value in prioritising revenue from a freight service which travels a long distance on its network and is under threat from road-based competition.

## IPART recommendation comments

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.*

As noted in the response to discussion point 1, while supporting the principle of the recommendation, Qube strongly recommends an outcome which reduces regulatory complexity. Qube does not support a model which results in additional track access agreements or adds complexity to the definition and provision of access rights. As stated above, most Qube train paths cross at least one network and/or access undertaking boundaries, resulting in increased operational and transaction costs compared to those incurred when the current NSW Rail Access Undertaking was implemented in 1999.

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.*

Qube supports the recommendation, but proposes that IPART consider:

- the potential for review triggers under exceptional or prescribed circumstances;
- that reviews be undertaken by or meet the defined requirements of IPART, noting that Transport for NSW's review of the NSW Rail Access Undertaking (as identified in the NSW Freight and Ports Strategy, 2013) did not identify any need to update the undertaking;
- that regulatory establishment and compliance costs should not be onerous, given that the rail operators compete with road freight companies which do not carry comparable regulatory costs; and
- the increased costs for operators of 'doing business' on the NSW rail network since the existing NSW Rail Access Undertaking was implemented. IPART should place greater onus on streamlining access arrangements and reducing regulatory costs.

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.*

Noted.

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

As noted above, Qube agrees with the recommendation, but proposes that IPART consider:

- the potential for review triggers under exceptional circumstances;
- that reviews meet the requirements of IPART; and
- the objective of access frameworks should be to deliver greater efficiency.

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.*

As noted in discussion point 1, Qube supports this proposal provided the appropriate supporting legislative, regulatory and contractual arrangements are put in place to enable the single, accountable entity to be able to deliver all its obligations. Access should also be through a single access agreement per network.

For access to the ARTC-leased network, Qube supports ARTC remaining the responsible party.

Further clarity is required in regard to the application of different regulatory arrangements where a train path (or access right) traverses multiple networks and/or undertakings.

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.*

Noted.

As an access seeker, Qube suggests that IPART consider testing whether the nominated agency has the legislative powers and ability to be fully accountability for the delivery of all obligations under the NSW Rail Access Undertaking and the track access agreement.

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.*

Supported.

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.*

Supported, noting the potential for multiple parties to joined as per recommendation 10.

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).*

Supported, noting the potential for multiple parties to joined as per recommendation 10.

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.*

Supported.

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.*

Supported.

As noted in the introductory comments, network investment can be triggered through a number of sources. While network investment may trigger an increase in network value, investment which is for the benefit of passenger operations, may have an adverse impact on the freight capacity as vertically integrated operators seek to align changes in service frequencies and balance rolling stock fleet size with infrastructure assets.

Network investment and changes in the Standard Working Timetable should also factor in any additional maintenance requirements and costs. Recent increased passenger service frequencies implemented through the NSW Government-funded More Trains More Services initiative have resulted in a double impact for freight operators with the additional timetabled passenger services constraining freight and the consequential need for increased infrastructure maintenance being scheduled during traditional periods of peak freight demand.

To support the development of network KPIs, Qube suggests that an industry workshop be held to enable access seekers and providers to develop meaningful measures which align with end-to-end train paths, rather than network specific KPIs.

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.*

Supported.

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).*

Supported.

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.

Supported.

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.

Supported.

An objective and transparent framework needs to be established to identify how capacity is allocated for *passenger and freight* operations. The need to provide a clear model for capacity allocation is highlighted by the current proposal from Transport for NSW seeking to give Sydney Trains greater control of the Standard Working Timetable despite TAHE having an a requirement to 'promote and facilitate access' to its network. This proposal was developed without consideration of IPART draft report and is contrary to the competitive neutrality principle of this recommendation.

In regards to the other points in this recommendation, Qube makes the following comments:

- Most train paths cross network boundaries (access provider and/or undertaking defined boundaries) and access frameworks need to consider the end-to-end nature of train paths.
- Access providers need to work with adjoining networks to harmonise whole-of-network productivity.
- Capacity allocation should reflect the varying nature of different commodities which are reliant upon rail. For example, agricultural commodities are seasonal with year-on-year variations in demand, while some other commodities need to be responsive to shipping requirements or economic cycles.
- Some trains are customer or commodity-specific, while other services operate to serve the needs of multiple customers.

- Where the network manager is a vertically integrated operator, Qube supports a model which provides for an independent party controlling any unallocated or surplus network capacity, subject to the policy proposed in recommendation 15(a).
- The development of KPIs and measures should be undertaken with representatives from across industry. This process has the potential to deliver greater cross-network alignment and is supported by the proposed recommendation to enable multi-operator negotiations.

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.*

Supported.

Further to this point, alignment of non-price aspects has the potential to improve inter-operability.

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.*

Noted.

18. *That 2 additional pricing provisions be included in the NSW rail access framework:*
- 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*
  - 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.*

Supported.

19. *That the following terms relating to how costs are calculated are amended to clarify that:*
- 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.*
  - 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).*
  - 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).*

Supported.

IPART should adopt a specific policy position on how Government contributions and investment through Community Service Obligations, equity injections, grants or other funding arrangements is managed.



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).*

Noted.

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.*

Noted.

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 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.*

Noted.

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.*

Noted

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.*

Noted.

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.*

Supported.

IPART should adopt a specific policy position on how Government contributions and investments through Community Service Obligations, equity injections, grants or other funding arrangements are managed.

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.*

IPART should adopt a specific policy position on how Government contributions and investments through Community Service Obligations, equity injections, grants or other funding arrangements are managed.

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).*

Noted.

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.*

Noted.

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.*

Noted.

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.*

Supported.

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.*

Supported.

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.*

Supported.