

# NSW Rail Undertaking- Compliance Guideline

5 December 2016



## WHAT

IPART is reviewing its Guideline for Rail Access Compliance under the NSW Rail Access Undertaking (the Undertaking).

The purpose of the Guideline is to provide information to Rail Infrastructure Owners (RIOs), Access Seekers and interested parties in relation to IPART's compliance role under the Undertaking.



## WHY

Our current Guideline was completed in 2006. We consider it is a good practice to review guidelines periodically.



## WHO

The Guideline assists RIOs and access users of the NSW rail networks covered by the Undertaking.



## WHAT NEXT

We will consider all stakeholder comments before we finalise and release a revised Guideline in March 2017.

Comments on the Guideline are due by **3 February 2017**.

We prefer receiving comments online or alternatively via email or post.

Rail Access IPART  
PO BOX K35  
Haymarket Post Shop NSW 1240  
[www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au)



Independent Pricing and Regulatory Tribunal

# **Guideline – Annual Compliance Reviews**

## **NSW Rail Access Undertaking**

**Draft Guideline**  
December 2016

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The Tribunal members for this review are:

Ms Catherine Jones

Mr Ed Willett

Inquiries regarding this document should be directed to a staff member:

Mr Patrick Lam                      (02) 9290 8448

Independent Pricing and Regulatory Tribunal of New South Wales

PO Box K35, Haymarket Post Shop NSW 1240

Level 15, 2-24 Rawson Place, Sydney NSW 2000

T (02) 9290 8400 F (02) 9290 2061

[www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au)

## Invitation for submissions

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

**Submissions are due by 3 February 2017.**

We would prefer to receive them electronically via our online submission form <[www.ipart.nsw.gov.au/Home/Consumer\\_Information/Lodge\\_a\\_submission](http://www.ipart.nsw.gov.au/Home/Consumer_Information/Lodge_a_submission)>.

You can also send comments by mail to:

**Rail Access – Draft Guidelines for Annual Compliance Reviews**  
Independent Pricing and Regulatory Tribunal  
PO Box K35  
Haymarket Post Shop NSW 1240

Late submissions may not be accepted at the discretion of the Tribunal. Our normal practice is to make submissions publicly available on our website <[www.ipart.nsw.gov.au](http://www.ipart.nsw.gov.au)> 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 on the previous page.

We may choose not to publish a submission—for example, if it contains confidential or commercially sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please indicate this clearly at the time of making the submission. IPART will then make every effort to protect that information, but 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.

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# 1 Introduction

The *New South Wales Rail Access Undertaking* (the **Undertaking**) makes provision for third party access to certain parts of the NSW rail network.<sup>1</sup> The Undertaking requires IPART to determine whether rail infrastructure owners have complied with specific requirements of the Undertaking each year.

These Guidelines are designed to provide information and guidance in relation to IPART's annual reviews of rail infrastructure owners' compliance with the Undertaking. The Guidelines may be revised from time to time to ensure their ongoing relevance and to reflect important industry and other developments.

These Guidelines are structured as follows:

- ▼ Section 2 discusses the scope of IPART's reviews of compliance with the Undertaking, and
- ▼ Section 3 discusses the procedure for IPART's reviews of compliance with the Undertaking.

## 2 IPART's compliance reviews under the Undertaking

### 2.1 NSW rail network subject to the Undertaking

The Undertaking applies to those parts of the NSW rail network:

- ▼ that are owned and operated by Rail Corporation New South Wales (**RailCorp**), Australian Rail Track Corporation (**ARTC**) or Transport for NSW (**TfNSW**) (each a **Rail Infrastructure Owner**, or **RIO**), and
- ▼ that are not covered by an undertaking given by the relevant RIO to the ACCC under section 44ZZA of the *Competition and Consumer Act 2010* (Cth).<sup>2</sup>

Currently, this means that the Undertaking governs third party access to the following parts of the NSW rail network:

- ▼ the Metropolitan Rail Network (MRN) owned and operated by RailCorp,
- ▼ the Country Regional Network (CRN) owned by TfNSW and operated by John Holland,
- ▼ the five sectors of the Hunter Valley Coal Network between Newstan Junction and Woodville Junction owned and operated by RailCorp,

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<sup>1</sup> The Undertaking has effect under section 99C(5) and Schedule 6AA of the *Transport Administration Act 1988* (NSW). These Guidelines do not have the force of law.

<sup>2</sup> See section 99C of the *Transport Administration Act 1988* (NSW).

- ▼ parts of the Sydney Metropolitan Freight Network (MFN)<sup>3</sup> leased to and operated by ARTC, and
- ▼ the Turrawan to Boggabilla, Goobang Junction to Merrygoen, Merrygoen to Gap and Merrygoen to Ulan sectors leased to and operated by ARTC.

## 2.2 IPART's compliance review role

IPART must determine whether RIOs have complied with certain requirements in Schedule 3 (Pricing Principles) of the Undertaking each year.<sup>4</sup>

Specifically, clause 5(b) of Schedule 3 provides as follows:

IPART shall determine whether:

- (i) the Rail Infrastructure Owner has complied with the Asset Valuation Roll Forward Principles and, in the event that IPART determines that the Rail Infrastructure Owner has not complied with the Asset Valuation Roll Forward Principles, it shall determine what Closing Regulatory Asset Base would comply with those principles.
- (ii) the Rail Infrastructure Owner has complied with the ceiling test, having regard to the operation of its Unders and Overs Account.

Compliance assessments under clause 5(b) of Schedule 3 are discussed in more detail in section 2.3 below.

Clause 5(f) of Schedule 3 provides for an exception to the requirement for an annual compliance review where IPART is reasonably satisfied that Access revenue is no more than 80% of the Access revenue likely to be derived by application of the Ceiling Test. This exception, which applies only outside of the Hunter Valley Coal Network, is discussed in section 2.4 below.

## 2.3 Compliance assessment under clause 5(b)

### 2.3.1 Compliance with the Asset Valuation Roll Forward Principles

The Asset Valuation Roll Forward Principles (AVRFP) are the principles by which the opening regulatory asset base in any year is adjusted to derive the closing regulatory asset base in that year.<sup>5</sup> These principles require the

<sup>3</sup> The leased network starts from Sefton Park Junction/Flemington South to Port Botany Yard.

<sup>4</sup> The Undertaking also confers other functions on IPART, including an arbitration role (see clause 6) and five-yearly reviews of the rate of return to be applied to the regulatory asset base, and the remaining mine life to be used for the purposes of calculating the depreciation allowance for the Hunter Valley Coal Network (see Schedule 3). IPART's most recent decision on these parameters took effect on 1 July 2014.

<sup>5</sup> See Undertaking, Schedule 3, clause 3. Currently, it is only that part of the NSW rail network known as the Hunter Valley Coal Network (defined in Schedules 3 & 6 of the Undertaking) for which a Regulatory Asset Base value has been established under the Undertaking.

regulatory asset base to be calculated in accordance with a specific formula, with detailed criteria for the inclusion of capital expenditure, depreciation, disposals and new investment.<sup>6</sup>

RIOs are required to undertake a “capital expenditure consultation process” under clause 3.4 of Schedule 3 to the Undertaking. In determining whether a RIO has complied with the AVRFP, IPART may have regard to the submissions of users<sup>7</sup> to that capital expenditure consultation process.<sup>8</sup>

If IPART finds that the RIO has not complied with the AVRFP, IPART will determine a closing regulatory asset base that would comply with those principles.<sup>9</sup>

### 2.3.2 Compliance with the ceiling test

The ceiling test requires that “for any Access Seeker, or group of Access Seekers, Access revenue must not exceed the Full Economic Costs of the Sectors which are required on a stand alone basis for the Access Seeker or group of Access Seekers”.<sup>10</sup>

IPART is required to determine whether each RIO has complied with the ceiling test, having regard to the operation of that RIO’s Unders and Overs Account. Relevantly, the Undertaking requires each RIO to keep an account for Access Seekers and groups of Access Seekers who could potentially breach the ceiling test.<sup>11</sup>

The Undertaking provides that each RIO shall manage its Unders and Overs Account in accordance with any determination made by IPART under clause 5(b) of Schedule 3.<sup>12</sup> Each RIO must develop and publish a policy for the operation of the Unders and Overs Account in consultation with Access Seekers and submit it to IPART for approval.<sup>13</sup>

The Undertaking also sets out certain requirements for management of the Unders and Overs Account, including that:

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<sup>6</sup> Undertaking, Schedule 3, clauses 3.1.1, 3.2(b), 3.2(c) and 3.3.

<sup>7</sup> The term ‘users’ is referred to under Schedule 3, clause 5(c) but is not defined in the Undertaking. In the context of Schedule 3 to the Undertaking, we take it to include Access Seekers.

<sup>8</sup> Undertaking, Schedule 3, clause 5(c). IPART may not have regard to the submissions of users which are inconsistent with their submissions to the capital expenditure consultation process. That is, if a user makes a submission to the RIO’s capital expenditure consultation process, it cannot later change its position in a submission to IPART.

<sup>9</sup> Undertaking, Schedule 3, clause 5(b)(i).

<sup>10</sup> Undertaking, Schedule 3, clause 1(l).

<sup>11</sup> Undertaking, Schedule 3, clause 4(b).

<sup>12</sup> Undertaking, Schedule 3, clause 5(e).

<sup>13</sup> IPART is not required to review and approve the policy document as part of the annual compliance exercise.



- ▼ the Unders and Overs Account balance should not exceed  $\pm 5\%$  of forecast Access revenue;<sup>14</sup> and
- ▼ RIOs will attempt to return the Unders and Overs Account balance to zero each year.<sup>15</sup>

## 2.4 Compliance reviews where Access revenue is less than 80% of ceiling revenue

Clause 5(f) of Schedule 3 to the Undertaking provides for an exemption to the full compliance reporting process set out in clauses 5(a) to (e):

This subclause 5 does not apply where the Rail Infrastructure Owner can demonstrate to the reasonable satisfaction of IPART that Access revenue is no more than 80% of the Access revenue likely to be derived by application of the Ceiling Test. For the purposes of this clause, IPART must have regard to an indicative Regulatory Assets valuation, based on Depreciated Optimised Replacement Cost (DORC) methodology, as provided by the Rail Infrastructure Owner.

This exception does not apply in respect of the Hunter Valley Coal Network.<sup>16</sup>

For sectors outside the Hunter Valley Coal Network where Access revenue is well below the 80% threshold, IPART may require RIOs to submit detailed ceiling test information every five years. Where IPART's review of this detailed information has confirmed that Access revenue is below the 80% threshold, IPART will require RIOs to confirm annually that there is no material change to the sectors' revenue and cost base that would cause revenue to approach the 80% threshold.

If the 80% threshold is exceeded, the RIO must submit documentation demonstrating its compliance with the AFRVP and ceiling test, as discussed in section 2.3 above.

## 3 Annual review procedure

### 3.1 Annual submission

For an annual compliance review under clause 5(b) of Schedule 3, each RIO is required to submit to IPART by 31 October each year in respect of the financial year completed on 30 June that year:

- ▼ documentation demonstrating its compliance with the Asset Valuation Roll Forward Principles, and

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<sup>14</sup> See clause 4(e) of Schedule 3.

<sup>15</sup> See clause 4(d) of Schedule 3.

<sup>16</sup> The "Hunter Valley Coal Network" is defined in Schedules 3 and 6 to the Undertaking.

- ▼ details as to the compliance with the Ceiling Test, including the operation of its Unders and Overs Account.

This requirement does not apply where IPART is reasonably satisfied that the exception in clause 5(f) applies. In those cases, IPART may require RIOs to provide detailed ceiling test information every five years, and further information by 31 October each year to confirm that there has been no material change to the sectors’ revenue and cost base that would cause revenue to approach the 80% threshold.

### 3.2 Information to be provided by RIOs

#### Reviews under clause 5(b) of Schedule 3

In order to assist us in assessing compliance and making determinations, and taking into account the level of information provided for past reviews, RIOs should provide IPART with the information listed in Table 1 (as a minimum) by 31 October each year.

Where a RIO’s submission is incomplete, we will notify the RIO to provide, within a specified timeframe, the documents or information we need to make a determination.

**Table 1 Information requirements for annual compliance review under clause 5(b)**

Information required
A covering letter from the CEO or equivalent of the RIO stating that it submits documentation on its compliance with the Undertaking and the relevant year to which it relates.
1. documentation demonstrating the RIO’s compliance with the Asset Valuation Roll Forward Principles, including the following:
a) an explanation of how each component of the regulatory asset base has been calculated in accordance with the formula in the Undertaking, and any assumptions used
b) a breakdown of values for each broad asset types of the regulatory asset base, (where applicable including a split into constrained and unconstrained networks) and, for capital expenditure, values to sector and asset (project) level (where values are zero, this should be stated) <sup>17</sup>
c) details of capital expenditure incurred during the compliance year
d) a table summarising the values for each component of the regulatory asset base and the outcome of the calculations, including an average of the opening and closing value for the regulatory asset base

<sup>17</sup> ‘Constrained’ and ‘unconstrained’ networks are not defined in the Undertaking, but are an industry convention used to distinguish those sectors of the Hunter Valley Coal Network, where Access revenue approaches or exceeds the Full Economic Costs of those sectors on a stand-alone basis (‘constrained’), from those sectors where Access revenue does not do so (‘unconstrained’).

e) evidence of disposals value including any Access Seekers' endorsement of any proposed disposals where applicable, and the calculation of the written down value (WDA) of the disposed assets <sup>18</sup>
f) detailed calculations of indexation, depreciation rate and depreciation amount for the compliance year, written down value of rail assets disposed and closing RAB for each sector of the regulated network
g) any consultation process undertaken during the review period and explanation of how it met the requirements of the Undertaking
h) evidence of any Access Seekers' endorsement of any proposed capital expenditure, where relevant
i) to facilitate stakeholder consultation to be undertaken by IPART regarding compliance matters, the name, address, contact details (including email address) of stakeholders and other relevant stakeholders. This is to include a contact at CEO/Executive level and an operational contact. Where a stakeholder is not an Access Seeker, their relationship to the RIO should be noted, for instance, end user, industry advocate, etc (not for publication).
2. details as to the compliance with the Ceiling Test, including the operation of the RIO's Unders and Overs Account, including:
a) a table setting out the Ceiling Test (for the sector or group of sectors) indicating the over or under recovery of access revenue including:
b) Access revenue and GTK (coal and non-coal freight traffic) for the compliance year
c) Full Economic Costs for the compliance year, with a breakdown into standard operating cost line items (fixed maintenance, variable maintenance (split by coal and non-coal traffic), shared maintenance overheads, network control, corporate overheads), rate of return, depreciation and profit and loss on disposal of assets
d) any direct cost relating to non-coal freight traffic
e) comparative values from the previous review period
f) an explanation of any assumptions and methodologies (eg cost allocation of joint and common costs) used to derive the above values, and any changes made since the previous review period
g) calculations associated with the Ceiling Test and if applicable, indicate which line sectors formed part of the constrained network for the compliance year (not for publication)
h) any unders or overs balance, and the proposed allocation of the balance to Access Seekers
i) evidence of any Access Seekers' endorsement of the values in the Unders and Overs Account, if applicable
j) if relevant, the name, title and contact details of the person or persons authorised by the RIO to provide more information in relation to the submission.

### Reviews under clause 5(f) of Schedule 3

Where a RIO is seeking to demonstrate compliance with clause 5(f), it should submit a sector-based test that compares access revenue of the sector with the costs of operating the rail assets, as presented in **Table 2**.

<sup>18</sup> For the HVCN assets the written down value should be based on the Booz-Allen and Hamilton report, *Valuation of Certain Assets of the Rail Access Corporation*, 14 May 2001, which was the basis for the Tribunal's June 2001 recommendation (accepted by the Minister for Transport in December 2001) of the network's depreciated optimised replacement cost.

**Table 2 Comparison of Access Revenue with Full Economic Cost**

Sector revenue and costs	\$000
Revenue	
GTK (000's)	
<b>Operating and maintenance costs:</b>	
-Maintenance – fixed	
-Maintenance - variable	
-Maintenance overheads	
<b>Total maintenance</b>	
-Network control	
-System and corporate overheads	
<b>Total operating and maintenance cost</b>	
Depreciation	
Return on RAB (at the rate of return determined by IPART)	
<b>Full Economic Cost</b>	
Under-recovery (\$'000)	
% recovery of Full Economic Cost	

The Undertaking does not set a deadline for provision of this information. However, IPART will generally require it by the 31 October (or as agreed with IPART) after the end of the relevant compliance year.

### 3.3 Information to be provided by Access Seekers

We will invite submissions from Access Seekers<sup>19</sup> on the capital expenditure consultation process undertaken by RIOs to inform our decision on the compliance with the AVRFP. We will also seek submissions where relevant from Access Seekers with a direct financial interest in the management of the Unders and Overs account to inform our decision on the compliance with the ceiling test.

Submissions should address specific requirements in the Undertaking and other matters raised by IPART. IPART will generally provide four weeks for Access Seekers to provide submissions.

### 3.4 Further information requests by IPART

There may be circumstances under which IPART may request further information from RIOs and Access Seekers to assist with its annual review.

<sup>19</sup> "Access Seekers" can include Rail Operators, prospective Rail Operators, Access Purchasers, and prospective Access Purchasers: see Undertaking, Schedule 7.

If we receive submissions from Access Seekers which indicate non-compliance by the RIO, we will provide the RIO with a reasonable opportunity to respond to such comments.

If we find that the RIO has not complied with the AVRFP or the ceiling test, there may be reasonable grounds to further consult with Access Seekers in order to determine a complying value for the regulatory asset base, Access revenue or Full Economic Costs.

Further, if IPART decides to engage an expert consultant to assist with certain aspects of its review, it may be necessary to request additional information from the RIO or Access Seekers.

### **3.5 Confidentiality of information provided to IPART**

In the interests of a transparent process and to facilitate informed submissions from stakeholders, IPART intends to publish on its website any submissions made by RIOs, Access Seekers or other interested parties, relevant to the annual review.

We may choose not to publish a submission—for example, if it contains confidential or commercially sensitive information. If your submission contains information that you do not wish to be publicly disclosed, please indicate this clearly at the time of making the submission. If we are satisfied that the information is confidential, we will make every effort to protect that information, but 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.

### **3.6 Notification of IPART's decision**

IPART will advise the RIO in writing of its decisions and its reasons for them. It will also publish its findings on its website as required by the Undertaking.

The RIO shall revise its Closing Regulatory Asset Base and manage its Unders and Overs Account in accordance with any determination made by IPART.

### **3.7 Timeframe for annual review**

IPART considers that, ideally, the annual review should be completed within the financial year following the compliance year. An indicative timetable is set out in Table 3 below. However, IPART recognises that, under some circumstances, compliance with this timetable will not be possible. IPART encourages the parties to raise any circumstances that they believe may cause delays.

Where the RIO is able to provide conclusive evidence to IPART’s satisfaction that:

- ▼ relevant Access Seekers have endorsed the values contained in the RIO’s submission for the Closing Regulatory Asset Base and the Unders and Overs Account, and
  - ▼ the RIO has complied in full with the AVRFP and ceiling test,
- this may shorten the review process for that RIO.

**Table 3      Indicative timetable for annual compliance review under clause 5(b)**

<b>Date</b>	<b>Action</b>	<b>Who</b>
End October	Submission of documents demonstrating compliance under clause 5(b) in accordance with information requirements in clause 5(a))	RIO
End November	Publish complete, non-confidential submission on IPART website or request further information and invite comments from Access Seekers on adequacy of capital consultation process and management of the Unders and Overs Account	IPART
End November	Any further information to be provided	RIO
End January	Comments from Access Seekers due	Access Seekers
End January	Publish non-confidential comments from Access Seekers on IPART website	IPART
Mid February	Invite comments from RIO in relation to Access Seeker comments	IPART
Mid March	Comments from RIO due	RIO
By End May	Determinations made (Schedule 3, clause 5(b))	IPART
By End May	Publish findings on IPART website (Schedule 3, clause 5(d)) and advise RIOs	IPART