



Dr Paul Paterson
Chair
Independent Pricing and Remuneration Tribunal
Level 15, 2-24 Rawson Pl
Sydney NSW 2000

Reviewing the NSW Rail Access Regime

28 May 2019

Dear Dr Paterson,

Aurizon welcomes the opportunity to respond to the Independent Pricing and Regulatory Tribunal's (**IPART**) draft report on the Review of the Rate of the Return and Remaining Mine Life under the NSW Rail Access Undertaking (**the Draft Report**).

Across NSW, Aurizon currently operates train services over the ARTC Hunter Valley Coal Network, the ARTC Interstate Rail Network, the Country Rail Network, the Sydney Metropolitan Freight Network and numerous unregulated private sidings and rail infrastructure at ports. Services are regulated across three access regimes managed by two different regulatory authorities and in accordance with access agreements contracted with ■ different entities. Some of these train services will traverse across multiple network interfaces in one origin to destination train movement.

Aurizon's comments are limited to IPART's recommendation that:

it would be timely for IPART to undertake an independent review of the NSW Rail Access Undertaking. An independent review would ensure that access charges reflect the full economic cost of providing access (but not more), simplify the relationship between the NSW and national access regimes and better meet the needs of access seekers¹.

Aurizon strongly supports this recommendation. As noted in the Draft Report the NSW Rail Access Undertaking was initially drafted in 1999 and there have been profound changes in the rail industry since the NSW Rail Access Regime commenced in 1996.

The NSW Rail Access Regime is not a certified access regime under section 44N of the *Competition and Consumer Act 2010 (Cwth)*. While the access regime was initially certified in 1999 an application to renew certification was not made when certification lapsed in December

¹ IPART (2019) Draft Report: NSW Rail Access Undertaking – Review of the rate of return and remaining mine life, April, p. 7

2000. Transport for NSW initiated a review of the NSW Rail Access Regime with the release of an Issues Paper in November 2012². The Issues Paper recognised the commitments made in clause 2.9 of the *2006 Competition and Infrastructure Reform Agreement (CIRA)* that third party access regimes for services provided by means of significant infrastructure facilities would be submitted for certification.

The Issues Paper also noted that NSW “intends to seek certification of the rail access regime developed following this review”³. However, the outcomes from the review were not communicated to stakeholders who made submissions and nor was an application made to seek certification of the NSW Rail Access Regime. In this regard the NSW Rail Access Regime has not been subject to a substantive review of its performance and objectives since its commencement.

Since the introduction of State Based Access Regimes and the National Access Regime the rail industry has become increasingly vertically separated either in terms of ownership and through the direct contracting of access rights by end-users of below rail services. However, the original policy objectives of these regimes were primarily focused on promoting competition within the functionally distinct rail haulage market. This objective is of little practical guidance in terms of the operation of access regimes as:

- there is limited guidance to arbitrators on the objectives relevant to arbitrating an access price between broad floor and ceiling concepts. The underlying economic characteristics of the sector and the absence of arbitration guidelines diminishes the efficacy of the negotiate-arbitrate model;
- they are not effective in addressing issues regarding network interface risks, standards and performance. For example, Access Seekers should not incur performance liabilities operating on one network which arise from the performance of the operator of the adjoining network with no capacity to influence the network interface agreements;
- they are not effective in promoting balanced commercial outcomes. For example, performance obligations which involve one sided effects or consequences without reciprocity are not uncommon; and
- rail operators continue to face constraints or difficulties in modifying their operations, improving their productivity and innovating.

The lack of alignment of access regulation with the original competition policy objectives is evident in the Commonwealth Department of Infrastructure and Transport (**DOIT**) submission to Productivity Commission’s National Access Regime Inquiry which stated:

The Department’s interest is to achieve effective regulation in this area, which balances the need for the Government to capture a return on its investment in the rail network, while ensuring that pricing does not act as barrier to access the rail network or growth in rail freight volume⁴.

In this regard, DOIT makes no reference to competition and the objective of access regulation is expressed as maximising industry output with broader economic benefits to the economy as

² Transport for NSW (2012) Issues Paper: Review of NSW Rail Access Regime, November.

³ Ibid, p. 12

⁴ Department of Infrastructure and Transport (2013) Submission to the Productivity Commission’s National Access Regime Inquiry, March, p. 7

a whole. Consistent with DOIT's statement the focus of any review should be to improve the operation and performance of regulation (its effectiveness), not expand the role of regulation in determining the reasonable terms and conditions of access.

The scope of any review should not be limited to simplifying the relationship between the NSW Rail Access Regime and the National Access Regime. Rather a broader review is necessary to determine the role of access regulation in promoting growth and productivity in the rail sector. This requires a fundamental re-specification of the objectives of access regulation in order to improve the clarity of the regulator's role and the public interest outcomes regulation is seeking to promote.

The Draft Report also identifies issues with the relationship between the NSW and federal regimes. The key principle of CIRA in respect of railways was the establishment of a simpler and consistent national approach to regulation of significant infrastructure. Furthermore clause 2.8 of the agreement also contemplated that Commonwealth and State officials may develop further proposals for the adoption of appropriate additional regulatory principles that may contribute to a simpler and consistent national approach to regulation and avoid the issues identified by IPART. However, there appears little progress on implementing or evaluating these principles with the Productivity Commission (PC) noting:

the Commission is not in a position to undertake a quantitative evaluation of the effectiveness of the reforms outlined in the CIRA, or of the actions and reforms undertaken by governments to give effect to those reforms⁵.

Aurizon considers those issues identified in clause 2.4 of the Draft Report are largely a function of inconsistency between regulatory models. Harmonisation of access regulation would promote the consistency objectives articulated in the CIRA principles and result in ex-ante comparable outcomes independent of the jurisdiction in which the regulatory decisions are made. This substantially reduces incentives for a network operator to opt in or out of a particular regulatory model.

While Aurizon would welcome an independent review of the NSW Rail Access Regime as recommended by IPART, the issues relevant to this review are broader than those identified by IPART. Nor are they specific or unique to the NSW Rail Access Regime. Therefore, Aurizon recommends that IPART give further consideration to making an appropriate submission to the PC's Inquiry into Transport Regulation with respect to the productivity and consistency benefits that could be released from harmonisation and consistency in rail access regulation.

Should you have any questions in relation to this submission please contact, Mariese Murphy on [REDACTED] or via email at Mariese.Murphy@aurizon.com.au.

Kind regards,

[REDACTED]

Mariese Murphy
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⁵ Productivity Commission (2013) *National Access Regime*, Inquiry Report no. 66, Canberra p. 328