

**NSW Rail Access Undertaking
Annual Review of Compliance**

IPART Guidelines

November 2006

**INDEPENDENT PRICING AND REGULATORY TRIBUNAL
OF NEW SOUTH WALES**

1. INTRODUCTION

- 1.1 These Guidelines have been prepared by the Independent Pricing and Regulatory Tribunal of New South Wales (the **Tribunal**). They are designed to provide information and guidance to Rail Infrastructure Owners, Access Seekers and interested parties in relation to the Tribunal's annual review of compliance under the *NSW Rail Access Undertaking* (the **Undertaking**).¹
- 1.2 The Undertaking makes provision for third party access to the rail network in NSW for which Rail Infrastructure Corporation (**RIC**),² Rail Corporation New South Wales (**RailCorp**) or Australian Rail Track Corporation (**ARTC**) is the Rail Infrastructure Owner (each an **Owner**).
- 1.3 Given recent industry reform which has increased the number of parties subject to the Undertaking, including Owners and Access Seekers, the Tribunal considers that these Guidelines will streamline the process for the annual review of compliance.
- 1.4 In drafting these Guidelines, the Tribunal has adopted aspects of the process from past reviews where this has worked well and it has tried to improve the process in recognition of recent industry reform. These Guidelines may be revised from time to time to ensure their ongoing relevance and to reflect important industry and other developments.

2. THE ROLE OF THE TRIBUNAL

- 2.1 The Tribunal is required to determine the compliance of the Owners with specific requirements in Schedule 3 (Pricing Principles) of the Undertaking. Specifically, clause 5(b) provides that the Tribunal shall determine whether:
- (i) the Owner has complied with the Asset Valuation Roll Forward Principles and, in the event that the Tribunal determines that the 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 Owner has complied with the ceiling test, having regard to the operation of its Unders and Overs Account.
- 2.2 Where there is more than one Owner, the Tribunal will make separate determinations for each Owner in relation to the rail sectors that each owns.

¹ The Undertaking is enacted in accordance with Schedule 6A of the *Transport Administration Act 1988* (NSW). These Guidelines do not have the force of law.

² During 2004/05, RIC ceased to be an Owner of rail infrastructure in the Hunter Valley Coal Network following the lease of infrastructure it owned to ARTC.

Compliance with the Asset Valuation Roll Forward Principles

- 2.3 The Asset Valuation Roll Forward Principles (AVRFP) refer to the provisions in Schedule 3 by which the opening regulatory asset base in any year is adjusted to derive the closing regulatory asset base in that year.³ These provisions require the regulatory asset base to be calculated in accordance with a specific formula, with detailed criteria for the inclusion of capital expenditure, depreciation and new investment.
- 2.4 In determining whether the Owner has complied with the AVRFP, the Tribunal may have regard to the submissions of users⁴ to the capital expenditure consultation process that the Owners are obliged to undertake in accordance with clause 3.4 of Schedule 3 of the Undertaking. For past reviews, the Tribunal has taken the view that it must be satisfied that the Owner's capital consultation process satisfied the requirements of the Undertaking before it could make a finding of compliance with the AVRFP.

Compliance with the ceiling test

- 2.5 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'*. Relevantly, Schedule 3, clause 4 of the Undertaking requires the Owner to keep an account for Access Seekers and groups of Access Seekers who could potentially breach the ceiling test.
- 2.6 The Owner is also required to develop and publish a policy for the operation of the Unders and Overs Account in consultation with Access Seekers and submit it to the Tribunal for approval.⁵ In the event that an Owner has not complied with this requirement, the Tribunal will assess compliance with the ceiling test taking into account the compliance of the Owner with the specific requirements under Schedule 3, clause 4 for the operation of an Unders and Overs Account.⁶

Who is an 'Access Seeker'?

- 2.7 Identifying who is an Access Seeker is important to the Tribunal's role in determining compliance with the Undertaking because:
- (a) the Tribunal may have regard to the submissions of Access Seekers to the capital expenditure consultation process that Owners are obliged to undertake in determining compliance with the AVRFP, and
 - (b) Access Seekers may have a financial interest in the outcome of the ceiling test and the management of the Unders and Overs Account.

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.

⁴ 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 of the Undertaking it is taken to include Access Seekers.

⁵ The Tribunal is not required to review and approve the policy document as part of the annual compliance exercise.

⁶ With the exception of sub-clause 4(f) which the Owner will not have met.

- 2.8 Schedule 7 of the Undertaking sets out the definition of an 'Access Seeker' as:
- (a) 'a Rail Operator; or
 - (b) a prospective Rail Operator who, in the opinion of the Rail Infrastructure Owner, has the capacity to provide the rail services of the type for which Access is sought; or
 - (c) an Access Purchaser; or
 - (d) a prospective Access Purchaser who, in the opinion of the Rail Infrastructure Owner, has the capacity to secure and properly manage the services of a Rail Operator; or
 - (e) the National Rail Track Corporation.'
- 2.9 A 'Rail Operator' is defined as a person who is responsible for the operation or moving, by any means, of any Rolling Stock on the NSW Rail Network. An 'Access Purchaser' means a person who has contracted with a Rail Operator in respect of the operation or movement of Rolling Stock.
- 2.10 The Tribunal notes that there are persons that clearly fit within the definition of Access Seeker, such as an actual Rail Operator and Access Purchaser. In the case of a 'prospective' Rail Operator or Access Purchaser, the Tribunal will necessarily be guided by the views of the Owner.
- 2.11 The Tribunal acknowledges that opinions of stakeholders in the rail industry remain divided on what persons constitute an Access Seeker, and more to the point, who should have the right to be consulted as part of the capital expenditure consultation process, and in relation to the management of the unders and overs account. For instance:
- Companies, such as Rail Operators, which hold access agreements with the Owner and pay access charges directly to that Owner (a subset of Access Seekers referred to as Access Holders in these Guidelines) arguably have a significant financial interest in the capital expenditure consultation process conducted by the Owner and the outcome of the management of the unders and overs account.
 - Coal mining companies do not purchase access directly from the Owner, but enter into a commercial agreement with a Rail Operator for their freight needs. While it would appear to be a reasonable expectation of those companies that they be consulted on proposed capital expenditure which will affect capacity available to them and at what price, an Owner would have limited knowledge about how the Rail Operator passes through access charges to the end users or the detail of the commercial agreement between Rail Operator and end user and hence what impact any allocation of unders or overs would have on a coal mining company.

- A peak industry body such as the NSW Minerals Council does not purchase access in its own right; however, it represents coal mining companies that could do so. Such representative bodies may provide comments on behalf of their member companies and indeed the members might refrain from making individual comments based on this expectation.

2.12 Based on the above observations, the Tribunal considers that an 'Access Seeker' could include a coal mining company and that it would be appropriate to consider the views of certain representative bodies. The Tribunal also intends to take into account the commercial relationship of parties to one another, including whether an Access Seeker is also an Access Holder, in considering the comments by stakeholders.

3. ANNUAL OBLIGATIONS OF OWNERS

3.1 The Owner is required to submit to the Tribunal by 31 October each year in respect of the financial year completed on 30 June that year:

- (i) documentation demonstrating its compliance with the Asset Valuation Roll Forward Principles
- (ii) details as to the compliance with the ceiling test, including the operation of its Unders and Overs Account.

4. INFORMATION TO BE PROVIDED BY OWNERS

4.1 In order to assist the Tribunal in making its determinations, and taking into account the level of information provided for past reviews, Owners should provide the Tribunal with the following information, *at a minimum*, by 31 October each year:

- a covering letter from the Owner stating that it submits documentation on its compliance with the Undertaking and the relevant year to which it relates
- **documentation demonstrating the Owner's compliance with the Asset Valuation Roll Forward Principles, including:**
 - an explanation of how each component⁷ of the regulatory asset base has been calculated in accordance with the formula in the Undertaking, and any assumptions used
 - a breakdown of values for each component of the regulatory asset base, including a split into constrained and unconstrained networks⁸ and, for capital expenditure, values to sector and asset (project) level (where values are zero, this should be stated)

⁷ This refers to the components used to calculate the Regulatory Asset Base as set out in the formula in Schedule 3, clause 3.1.1 of the Undertaking.

⁸ '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').

- a table summarising the values for each component of the regulatory asset base and the outcome of the calculations, including the average closing value for the regulatory asset base
- evidence of any Access Seekers' endorsement of any proposed capital expenditure, where relevant
- evidence of disposals value including any Access Seekers' endorsement of any proposed disposals, and where possible, appropriate references to the Booz Allen Hamilton DORC database which established the regulatory asset base value as at 1 July 1999⁹, and demonstrating adjustments to derive the current value of disposals
- the spreadsheet or other models underlying calculations (not for publication)
- a detailed description of the capital expenditure consultation process undertaken during the review period and explanation of how it met the requirements of the Undertaking
- the name, address, contact details (including email address) of stakeholders considered by Owners to be Access Seekers (noting which of those are Access Holders) and other parties consulted regarding compliance matters. This is to include a contact at CEO/Executive level for the purpose of a Tribunal letter and a regular operational contact for email notification. Where a stakeholder is not an Access Seeker, their relationship to the Owner should be noted, for instance, end user, industry advocate, etc (not for publication)
- **details as to the compliance with the ceiling test, including the operation of the Owner's Unders and Overs Account, including:**
 - a table indicating the values for the Unders and Overs Account for the review period including:
 - Access revenue
 - Full Economic Costs for the review period, with a detailed breakdown into standard operating cost line items, rate of return, depreciation
 - any unders or overs balance, and the proposed allocation of the balance to Access Seekers
 - comparative values from the previous review period
 - an explanation of the assumptions and methodology used to derive the above values, and any changes made since the previous review period
 - the spreadsheet or other models underlying calculations (not for publication) which should clearly indicate which line sectors formed part of the constrained network for the review period

⁹ The Booz-Allen and Hamilton report, *Valuation of Certain Assets of the Rail Access Corporation*, 14 May 2001, was the basis for the Tribunal's June 2001 recommendation (accepted by the Minister for Transport in December 2001) which established the depreciated optimised replacement cost (DORC) value for rail assets in the Hunter Valley coal network.

- evidence of any Access Holders' endorsement of the values in the Unders and Overs Account
 - the name, title and contact details of the person or persons authorised by the Owner to provide more information in relation to the submission.
- 4.2 Where the Tribunal considers that an Owner has not provided a complete submission, it will indicate to the Owner what further documents and information are required by the Tribunal to enable it to make a determination.

5. INFORMATION TO BE PROVIDED BY ACCESS SEEKERS

- 5.1 The Tribunal will invite submissions from Access Seekers on the capital expenditure consultation process undertaken by Owners to inform its decision on the compliance with the Asset Valuation Roll Forward Principles. It will also seek submissions from Access Holders with a direct financial interest in the management of the Unders and Overs account to inform its decision on the compliance with the ceiling test.
- 5.2 Submissions should address specific requirements in the Undertaking or other matters raised in the Tribunal's invitation. The Tribunal will endeavour to provide four (4) weeks for Access Seekers and Access Holders to provide submissions.

6. FURTHER INFORMATION REQUESTS BY THE TRIBUNAL

- 6.1 There may be circumstances under which the Tribunal may request further information from Owners and Access Seekers to assist with its annual review.
- 6.2 If the Tribunal receives submissions from Access Seekers which indicate non-compliance by the Owner, the Tribunal will provide the Owner with a reasonable opportunity to respond to such comments.
- 6.3 If the Tribunal finds that the Owner had not complied with the AVRFP or the ceiling test, there may be reasonable grounds to further consult with Access Seekers in order for the Tribunal to determine a complying value for the regulatory asset base, Access revenue or Full Economic Costs.
- 6.4 Further, if the Tribunal decides to engage an expert consultant to assist with certain aspects of its review, it may be necessary to request additional information from the Owner or Access Seekers.

7. CONFIDENTIALITY OF MATERIAL PROVIDED TO THE TRIBUNAL

- 7.1 In the interests of a transparent process and to facilitate informed submissions from stakeholders, the Tribunal intends to publish on its website any submissions made by Owners, Access Seekers or other interested parties, relevant to the annual review.
- 7.2 Where the person providing a submission considers that any documents or information provided to the Tribunal is confidential or commercially sensitive, this must be clearly stated in writing at the time that it is provided, accompanied by reasons for this claim. In this event, the Tribunal requests that, in addition to the submission containing confidential or commercially sensitive information, the person also provide a version of the submission omitting such information that would be suitable for wider publication.

8. NOTIFICATION OF THE TRIBUNAL'S DECISION

- 8.1 The Tribunal will advise the Owner in writing of its determinations. It will also publish its findings on its website as required by the Undertaking. Where the Tribunal makes a determination of non-compliance, it will provide reasons for its decision.
- 8.2 The Owner shall revise its Closing Regulatory Asset Base and manage its Unders and Overs Account in accordance with any determination made by the Tribunal.¹⁰

9. INDICATIVE TIMETABLE FOR ANNUAL REVIEW

- 9.1 The Tribunal considers that, ideally, the annual review should be completed within the financial year following the year which is the subject of the review. **Table 1** below is an indicative timetable that sets out the key steps in the annual review and assigns a timeframe which the Tribunal, Owners, Access Seekers and other interested parties will endeavour to adhere to.
- 9.2 The Tribunal recognises that, under some circumstances, adherence to the timetable will not be possible. For instance, it may be necessary to engage the assistance of independent experts to assist the Tribunal in making its determinations. If such circumstances arise, the Tribunal will advise Owners, Access Seekers and other interested parties. The Tribunal encourages the parties to raise any circumstances that they believe may affect adherence in order to minimise any delays.
- 9.3 Where the Owner is able to provide conclusive evidence to the satisfaction of the Tribunal that relevant Access Seekers have endorsed the values contained in the Owner's submission to the Tribunal for the Closing Regulatory Asset Base and the Unders and Overs Account, and that the Owner has complied in full with the AVRFP and ceiling test, this may obviate the need for the Tribunal to conduct its own consultation and may shorten the actual length of the review process for that Owner.

¹⁰ Schedule 3, clause 5(e) of the Undertaking.

Table 1: Indicative timetable for annual review of compliance

Date	Action (and any relevant provision of the Undertaking)	Who
End October	Submission of documents demonstrating compliance (Schedule 3, clause 5(a)) and information outlined under Section 4 of Guidelines	Owner
Mid November	Publish complete, non-confidential submission on Tribunal website or request further information	Tribunal
End November	Any further information to be provided	Owner
Early December	Invite comments from Access Seekers on adequacy of capital consultation process Invite comments from Access Holders on the management of the Unders and Overs Account	Tribunal
Mid February	Comments from Access Seekers and Access Holders due	Access Seekers and Access Holders
Mid February	Publish non-confidential comments from Access Seekers on Tribunal website	Tribunal
Mid February	Invite comments from Owner in relation to Access Seeker comments	Tribunal
Mid March	Comments from Owner due	Owner
End May	Determinations made (Schedule 3, clause 5(b))	Tribunal
End May	Publish findings on Tribunal website (Schedule 3, clause 5(d)) and advise Owners	Tribunal