

Dear Melanie Mitchell and Joyce Tapper

Independent Pricing and Regulatory Tribunal
PO Box K35, Haymarket Post Shop
Sydney NSW 1240

Executive Summary

Pacific National (**PN**) welcomes the opportunity to engage with the Independent Pricing and Regulatory Tribunal (**IPART**) and provide a submission on the Issues Paper concerning the NSW Rail Access Undertaking (**Undertaking**).

In PN's view, the following objectives should provide the foundation for the Undertaking:

- The Undertaking should be consistent with the objectives of economically efficient operation, use of, and investment in, infrastructure. This should promote competition in upstream and downstream markets, and the promotion of above and below rail investment. PN also considers that the role of passenger priority, in particular in rural and regional areas should be considered in this context.
- Terms and conditions of access should be fair and reasonable.
- A sound pricing methodology should underpin the regulatory framework.
- To the extent practicable, there should be consistency of approach across networks and where possible, potential conflicts of priorities should be avoided.
- The Undertaking should facilitate appropriate modal choice and it is PN's position that the combination of these objectives and sound pricing methodology should deliver increased conversion of freight to rail.
- The regulatory framework should be optimised for safety and sustainability. IPART should also take into consideration the objectives of safety and sustainability and ensure that the undertaking is optimised for sustainable economic, safety and environmental outcomes for all Australians.

PN considers that these objectives, as the foundation of the Undertaking, should deliver improved investment, sustainability and throughput, which will lead to better service outcomes for rail freight customers.

The Undertaking should be consistent with the promotion of competition

The Undertaking was put in place in response to competition policy reform and third party access to infrastructure obligations under the Competition Principles Agreement in 1995.

The underlying natural monopoly characteristics of the NSW rail network supports its economic regulation and PN welcomes IPART's review of the Undertaking to ensure that it is fit for purpose.

Indeed the fact that the Australian Competition and Consumer Commission (**ACCC**) authorised a group of rail operators (including PN) to collectively negotiate with Transport for NSW (**TfNSW**) in respect of parts of NSW's Sydney Metropolitan Passenger Network and Country Regional Network demonstrates that below rail track owners do have and can exercise market power in relation to the monopoly track infrastructure they own/operate.

The Undertaking should be consistent with the objectives of economically efficient operation, use and investment in infrastructure which should promote competition in upstream and downstream markets and the promotion of above and below rail investment.

As set out in IPART's Issues Paper, the NSW Government's Future Transport 2056 strategy projects that freight volumes in metropolitan NSW will likely double by 2056.¹ Road is the predominant transport mode for the majority of commodity freight groups. Sustainably increasing the volume of freight transported by rail will be an important component of ensuring safety, sustainability and positive environmental outcomes for NSW.

PN considers that this outcome can be achieved when the regulatory settings seek to:

- incentivise investment in rail freight infrastructure and improvements in efficiencies that encourage modal shift from road to rail;
- facilitate access for freight to shared rail networks as well as incentives to invest in dedicated rail freight networks;
- reduce the regulatory burden on rail market participants including in connection with access to rail infrastructure on fair and reasonable terms; and
- include obligations on below rail networks to genuinely consult with rail operators on investments, access terms and conditions, and process improvements. Genuine consultation between rail networks and rail operators to target investment of the right amount in the correct locations and to improve process efficiencies is likely to result in better outcomes to freight customers.

An example of successful consultation between the Transport Asset Holding Entity of NSW (TAHE) and rail operators is the "Gold Train" concept. This concept allows rail operators to qualify to operate a priority service using premium rolling stock near passenger peak times in order to meet customers' requirement to have perishable goods on supermarket shelves. It also satisfies the NSW rail network's mandate to not delay passenger services.

PN suggests that an obligation for network owners and rail operators to genuinely consult be included in the Undertaking

PN considers that efficient operation and use of, and investment in infrastructure (both above rail and below rail) is facilitated by genuine consultation between the network owner and rail operators.

Unfortunately, neither the Undertaking nor the Access Agreement imposes an obligation on the network owner and rail operators to consult in good faith with regard to investment and process improvement. While PN recognises that some investment decisions may be confidential between the network owner and individual rail operators, there are other investment decisions that would be

¹ See: <https://future.transport.nsw.gov.au/>

improved where there is consultation between access providers and access seekers. Moreover, genuine process improvements to enhance efficiency can be facilitated by consultation between rail operators, TfNSW, Sydney Trains and the CRN Rail Infrastructure Manager.

PN suggests that an obligation for the network owner and rail operators to genuinely consult be included in the Undertaking.

PN would also welcome a permanent forum to be set up for access seekers to jointly discuss matters relating to rail Access Agreements. This should assist in providing a balance of negotiating power between the Australian Rail Track Corporation (**ARTC**), TAHE, TfNSW, and access seekers. Such a forum could be facilitated by IPART and would require ACCC authorisation pursuant to the *Competition and Consumer Act 2010* (Cth) (**CCA**).

Terms and conditions of access should be fair and reasonable

IPART has invited submissions about the problems that access seekers have experienced in negotiating access and what changes would help them to negotiate access on fair and reasonable terms.

As PN explained in connection with the terms of reference for IPART's Undertaking review, in early 2018, TfNSW (as RailCorp's agent) provided a copy of a draft standard track access agreement, containing non-price terms significantly more onerous than the previous version and which, as set out in the parties' application for authorisation, constituted a step change in the contractual arrangements and risk allocation between the parties which would likely have had a significant impact on the competitiveness of rail freight in and out of Sydney and within regional NSW.²

In response, these access seekers formed the Rail Operators' Group (**ROG**), which sought and obtained, a five-year, ACCC Authorisation³ to collectively bargain with TfNSW, the non-price terms of the Standard Track Access Agreement (**STAA**). After three-years, the ROG and TAHE are approaching mutually acceptable terms for the STAA. Without this ACCC Authorisation, it is unlikely rail operators would have been able to achieve this.

Terms and conditions should be fair and reasonable. In addition, they should provide reasonable certainty of access, and stability of conditions to the access seeker (with a minimum of a five-year term) and should include mechanisms appropriate for consultation on investment decisions and should be guided by principles that encourage a consistent approach to access regulation. Stability of pricing, and terms and conditions, allows rail operators to provide customers with greater certainty that their requirements can be met over reasonable timeframes.

² See: <https://www.accc.gov.au/system/files/public-registers/documents/AA1000425%20-%20NSW%20Track%20Access%20Collective%20Bargaining%20-%20Application%20Received%20-%202021.06.18%20-%20PR%20VERSION.pdf>

³ ACCC Authorisation number AA1000425.

Consistency of approach across networks

Consistency of approach, particularly in terms of the underlying and fundamental objectives of the undertakings would benefit National Rail operators and their customers who have national operations. This is particularly important in the context of the proposed transition to inland rail.

IPART has invited comment on which operating procedures, systems, technologies or environmental requirements cause the biggest problems between networks and which elements of other networks or regimes should we consider adopting in the Undertaking.

IPART's review of the Undertaking comes at a time when the ACCC is also considering the regulatory framework that underpins the interstate network operated by the ARTC.

Harmonised national rail network

PN considers consistency of approach, particularly in terms of the underlying and fundamental objectives of the Undertaking would benefit rail operators and their customers who have national operations. Rail networks do not operate in isolation and IPART acknowledges in the Issues Paper that in a single journey, trains may travel across many rail sectors.

The business case for investment in any network infrastructure presupposes an underlying customer use case for rail. Inconsistencies in the regulation of the NSW rail network and other networks, such as the ARTC's interstate network, is likely to lead to customers shifting away from rail due to the practical difficulties and complexities of operating across networks which have their own form of regulation. PN considers that such difficulties, and associated costs, should not be underestimated even in circumstances where interconnected networks are currently operating with different forms of regulation.

Customers themselves need to invest in their own infrastructure sensible for their own logistics requirements. PN is concerned that increased differences in regulatory approach across networks going forward may result in customers switching away from rail, and then not switching back, given the infrastructure investments required to comply with various regulatory regimes. As such, PN considers that it is critical to ensure that, where possible, the NSW rail network is regulated consistently with other networks, particularly the ARTC's interstate network.

Move towards the standardisation of rail operating rules and systems

As set out in the Issues Paper, rail operators must also navigate different operating rules and systems, including of qualifications and rolling stock standards.

By way of example, PN estimates that there are approximately 11 different Safeworking systems for rail in Australia. Train crew are required to be competent in Safeworking systems before they can operate in each relevant sector. Therefore, train-crew who operate Australia-wide may be required to be aware of, and comply with, each of the 11 systems. In contrast, there is only one set of Safeworking rules that applies to the road freight industry, which means, for example, that a road transport driver with a NSW truck licence and a NSW licenced truck may drive anywhere in Australia if they comply with standard rules. PN considers this to be a much more favourable arrangement and is strongly in favour of standardisation of rail operating rules and systems going forward.

Further, despite the Rail Industry Safety and Standards Board (**RISSB**) being the national body that sets rolling stock standards, each network currently requires that it type-approves rolling stock before it can be used on its network. However PN considers that this is another example of an

unnecessary regulatory burden for rail operators that could be reduced by standardising requirements.

PN strongly believes that a transition to harmonised Safeworking, licencing and rolling stock conditions, amongst others, would significantly add to the efficiency of rail freight and reduce barriers to investment. This in turn will lead to improved services to customers. PN recommends that since the ARTC network connects with most of the other networks, the standards adopted by ARTC should be a reasonable model to start with when considering harmonisation of these matters.

PN recommends that the Undertaking includes an obligation on the rail owner to consult with other rail owners and with rail operators, with the intention of harmonising Safeworking systems, technology and processes across Australia.

Avoiding potential conflicts of priority

Avoiding potential conflicts of priority would assist in achieving objectives

IPART has invited comment on whether access seekers are unreasonably constrained from accessing train paths and how could the Undertaking provide more transparency and certainty about how rail owners allocate capacity.

Given the increasing load on current networks (for both freight and passenger cargo) and increased reliance on rail, it is crucial that resources are used efficiently, and operational costs are reduced. This can be achieved through effective planning and scheduling.

Passenger priority

PN and other freight operators lose capacity due to passenger priority. Passenger services use more network capacity than freight services and take more paths because they have more services and PN understands that in capital city and metropolitan areas, certain passenger priority conventions are necessary. However, PN submits that it is appropriate to consider whether passenger priority in rural or regional areas with low passenger train utilization is economically efficient and submits that this issue should be examined closely because the economic costs to freight operators can be significant.

Scheduling of passenger and freight paths

Currently, in NSW, maintenance is planned, and carried out, after passenger paths and freight paths have been allocated. Passenger paths are the first to be scheduled on the network, followed by freight paths several weeks later. Maintenance is scheduled last. Planned maintenance is generally performed during night-time when freight operates. In PN's experience, this has led, and continues to lead, to the cancellation of freight paths or changes to freight paths. This has flow on effects for other parts of the network and for national freight operators and customers.

PN considers that the Undertaking could provide greater transparency and certainty about how capacity will be allocated by setting the timing and location of planned maintenance before any passenger or freight paths are allocated. PN accepts that due to volume it is useful to set passenger lines on the network prior to setting freight lines but considers that maintenance should be scheduled first, not last. This is what currently happens in Queensland.

In Queensland, maintenance is scheduled first and passenger and freight paths are then set around times that have been blocked out for scheduled maintenance. This approach minimises the rework of freight paths and increases efficiency and certainty for customers and rail operators.

Managing freight traffic

As set out above and in IPART's Issues Paper, the NSW Government's Future Transport 2056 strategy projects that freight volumes in metropolitan NSW will likely double by 2056. Therefore, continued focus is required on the freight sector. This increase in freight task is being driven by the increase in Sydney's population and the interconnectedness between Australian cities. PN considers that increased demand for freight and freight services will lead to greater competition for existing network capacity by passengers and freight operators. However, current infrastructure is under pressure as urban encroachment on the rail corridor creates difficulties for increasing available capacity and services. To effectively service a growing population going forward, PN considers that there is a need to not only increase passenger traffic but also implement a dedicated freight corridor as a matter of priority before the land required is occupied.

PN also considers that there is likely to be a role for technology to safely increase the amount of traffic on the network. PN understands that TfNSW and Sydney Trains are investigating the implementation of automatic train management systems. PN supports the implementation of such systems but is of the view that whatever system is adopted it should be consistent with the technology used in adjoining networks, for the reasons discussed above.

As stated in the Issues Paper, the Undertaking should facilitate the efficient use of rail as a mode of transport particularly in circumstances where there is pressure on current infrastructure.

Sound pricing methodology

Sound pricing methodology should underpin the Undertaking

PN considers that a sound pricing methodology should underpin the Undertaking and, to better empower consumers to make informed decisions, also include requirements to ensure that rail owner and operator prices are transparent.

PN considers that it is appropriate to consider those pricing models not in a vacuum but against the following key objectives:

- maximising network utilisation and volume;
- providing certainty for participants;
- minimising the extent to which the pricing model imposes administrative burdens on participants;
- using a pricing model that facilitates incentives for user investment;
- promoting network resilience and performance; and
- encouraging harmonisation across the national network.

IPART's Issues Paper notes that the ACCC is currently reviewing how the interstate network should be regulated including whether a DORC value should continue to be used to set the RAB, or whether other approaches should be used. IPART will consider the ACCC's findings. As part of that review, the ACCC is considering both cost-based and not cost-based models, and the various valuation methodologies that sit behind them. PN recognises that there are challenges with

regulating the price of freight when there is competition between modes of transport. PN considers that IPART should have regard to the ACCC's work on pricing regulation for the interstate network and requests an opportunity to comment on the appropriate form of access pricing in the Undertaking once the ACCC's position has progressed.

Safety and sustainability

The regulatory framework should be optimised for safety and sustainability. IPART should also take into consideration the objectives of safety and sustainability and ensure that the undertaking is optimised for sustainable economic, safety and environmental outcomes for all Australians.

IPART has invited comment on whether the Undertaking facilitates efficient investment decisions.

IPART should also take into consideration the objectives of safety and sustainability when reviewing the Undertaking which should be optimised for sustainable economic, safety and environmental outcomes for all users.

A particular focus on these objectives will ensure that all participants in the industry plan for the long term and make investment decisions accordingly.

The transportation of freight by rail gives rise to a number of positive externalities including:

- **Safety** – Rail is a far safer way to transport freight resulting in fewer accidents and resulting deaths or significant injuries to people. Rail reduces the economic costs associated with traffic accidents;⁴
- **Less congestion** – Rail results in less congestion on major highways as each additional rail service removes the equivalent of 110 trucks from the road for each standard train;⁵ and
- **Better environmental outcomes** – Rail is far better for the environment, in terms of reducing carbon emissions and pollution more generally than the transportation of freight by road, and is also more fuel efficient, resulting in the consumption of less fossil fuels.⁶

Safety

The inclusion of safety as a relevant consideration in the economic regulation of infrastructure is not new. The original access criteria included in Part IIIA of the then *Trade Practices Act 1974* (TPA) included safety as a relevant criterion. That is, a relevant service could only be declared under Part IIIA of the TPA/CCA if it was safe to provide third party access to the relevant service.

Safety is also a central feature in the regulation of the following economic sectors:

- town planning and zoning, especially as it relates to the availability and sale of alcohol in the community. Such regulations control the sale of alcohol, limit the trading hours of

⁴ Deloitte Access Economics, Value of Rail: The contribution of rail in Australia (2017), p iv.

⁵ Ibid.

⁶ Ibid.

outlets, the type of outlets that may sell alcohol and the number of outlets permitted in the community;

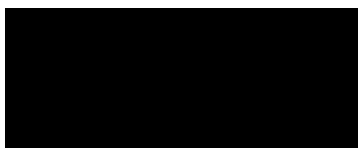
- the supply of consumer goods (under the Australian Consumer Law);
- the supply of pharmaceutical drugs to consumers;
- workplaces;
- passenger and freight transport, by all transport modes; and
- the manufacture and supply of motor vehicles.

Environmental outcomes

Similarly, the inclusion of environmental factors or outcomes in a regulatory scheme is not uncommon.

The whole scheme of State and Commonwealth laws and regulations concerning environmental protection have at their heart the need for residential, commercial and industrial developments to have as minimal an adverse impact on the natural environment as possible and to require the abatement of any adverse impacts in appropriate circumstances.

Kind regards



Jade Hooper
Head of Strategic Access Regulation and Policy
Pacific National