

16 December 2022

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

Submission via online submission form at:

https://www.ipart.nsw.gov.au/Home/Reviews/Have-Your-Say-Open-Consultations?review_status=911

Dear Melanie Mitchell

Re: Review of the NSW Rail Access Undertaking Draft Report October 2022

Executive Summary

Pacific National (**PN**) welcomes the opportunity to provide a further submission to the Independent Pricing and Regulatory Tribunal (**IPART**) and to comment on IPART's Draft Report on the NSW Rail Access Undertaking (**Undertaking**) and Draft Recommendations.

From PN's perspective it is timely to consider an overhaul of the Undertaking to ensure that it is fit for purpose given the changes over time in the ownership, scope and complexity of the networks covered.

PN agrees with IPART's overall objectives however PN is concerned that IPART's Draft Recommendations do not go far enough towards making these improvements, as set out below:

- **the efficient use of and investment in rail infrastructure.** To this end, PN considers that further improvements can be made to the NSW Rail regime to provide for transparency and certainty over rail standards and regulations so that users can invest with confidence; it is important that policy and regulatory settings incentivise prudent investment that supports access providers and access seekers, and fosters resilience of the network;
- **the experience of access seekers.** PN is a strong advocate for rebalancing of bargaining power between access providers and access seekers to ensure fair negotiating positions;
- **regulatory certainty.** PN consider that this is a key and important principle. In particular PN encourages a consistent approach to access regulation. 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, improve operational certainty and reduce barriers to investment. PN also believes that further improvements can be made to the NSW Rail regime to provide for transparency and certainty over rail standards and regulations so that users can invest with confidence; and
- **responsiveness to changing market and environmental circumstances.** 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. None of IPART's Draft Recommendations address how these objectives will be taken into account in the regulatory framework. A particular focus on these objectives will ensure that all participants in the industry plan for the long term and are able to make informed operational and investment decisions.

Attached to this submission at Appendix A is a summary of IPART's Draft Recommendations together with PN's position in response to each of these. A high-level view is provided in Table 1:

Table 1: PN's position on each of the IPART recommendations

PN welcomes and supports recommendations	Recommendation 2(a), 2(b); 7; 8; 9; 10; 11; 12; 13; 14; 15(a), 15(d), 15(e), 15(g), 15(h); 16; 20; 21; 22(c); 23(a); 24; 25; 27(a), 27(b); 29; 32
PN is supportive of recommendations provided safeguards are in place	Recommendation 6; 15(b); 17; 22(d); 23(b); 26
PN seeks further clarification in connection with recommendations ¹	Recommendation 1; 3; 5; 15(c), 15(f); 18; 19; 22(a), 22(b); 24(a); 27(c); 28; 30; 31
PN opposes recommendations	Recommendation 2(c); 4

Set out below are PN's comments on IPART's consultation.

Harmonisation across networks

PN supports a consistent approach across networks nationally. This is particularly important for national operators and customers. Rail networks do not operate in isolation and in a single journey, trains may travel across many rail jurisdictions.

PN supports IPART's recommendations which aim to improve certainty for all parties by reducing differences between the Commonwealth regime and the NSW rail access framework to ensure consistency of approach across networks. However, in PN's view, the importance of harmonisation extends beyond creating certainty in network approach and to driving efficiency and facilitating an improved environment for investment.

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 operational complexity and support future opportunities for investment. This in turn will lead to

¹ From PN's perspective, there is not sufficient detail or clarity around these recommendations such that PN is not in a position to support these at this stage. For these recommendations PN has provided some further information about how those recommendations might impact PN in order for IPART to consider further its positions on those recommendations and how they might operate in practice.

improved services to freight 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.

Single point of contact

PN supports a single point of accountability but submits that it is appropriate for there to be a different entity accountable for providing access to different parts of the network.

PN agrees with IPART's findings that "an effective customer-centric solution would need to hold a single entity accountable for providing access" and that this would provide one point of contact for negotiations and dispute resolution and understands the efficiency in holding one entity accountable for access. Establishing a single point of accountability will simplify the number of engagement points for access seekers (e.g. the same entity may be responsible for negotiating contractual arrangements and the implementation of the terms of any agreement on a day-to-day basis). However, where that accountability does not extend to other issues, for example where something goes wrong or there is a network failure, then the problem remains and access seekers will still be left to negotiate with infrastructure owners and other bodies.

Additionally, PN submits that it is appropriate for there to be a different entity accountable for providing access to different parts of the network (e.g. there may be a different entity accountable for the Country Regional Network and the NSW interstate network). This is because there are complexities in operating different parts of the network and there are variations between networks, including in terms of characteristics such as utilisation, customer types and geography, which would be best addressed by having different entities with accountability. PN's view is that in practice there would likely only be a small number of entities with accountability and the scope of that accountability would be defined, such that this will not impact, from a customer experience perspective, the benefits to access seekers of having the ability to negotiate an access agreement and the actual implementation of the terms of any agreement for part of the network with a single entity.

Undertakings and regulatory arrangements should be reviewed every five years

Regulation should be periodically reviewed to ensure its continued efficiency and effectiveness. For the NSW rail access framework the review period should be five years rather than ten years. The undertaking amendments being proposed are significant and ten years is too long to tolerate the unintended consequences of any changes.

IPART states in the Draft Report that undertakings would need to be reviewed at least every 10 years and that while Principle 7 of the NSW Guide to Better Regulation states reviews should generally be conducted after five years, IPART considers that for rail it would take 10 years for the amendments to take effect and form part of industry practice.

PN submits that it is important to build into the regime a review mechanism. However, PN disagrees with IPART's view that enough time should be allowed for issues to emerge and that amendments to regulatory arrangements will take 10 years to take effect. Existing regulatory arrangements have been in place for 23 years and the proposed amendments are significant. PN considers that ten years is too long a period to operate without a review. The regulatory arrangements for NSW rail are not so different from other regulatory arrangements that the NSW Guide to Better Regulation should not apply. PN submits that the regulatory arrangements should be reviewed every five years, consistent with other regulated assets.

Capacity utilisation, passenger priority and the avoidance of potential conflicts of priorities

Increased transparency about how access providers make capacity decisions, including how they implement passenger priority, is required. Capacity should be allocated to access seekers on an efficient, reasonable and non-discriminatory basis.

The process by which capacity is allocated should be clear, especially where there are capacity constraint issues, and infrastructure owners should consider the best capacity allocation methodology that would suit the needs and demands of their industry.²

Capacity considerations must recognise the significance of rail freight. With the freight movements in metropolitan NSW set to double over the next 30 years,³ it is critical that NSW has a rail access framework that appropriately allows both passenger and freight train operators to use the rail network and supports improved rail freight productivity.

Capacity utilisation

IPART notes in the Draft Report that several access frameworks provide for transfers of identical access entitlements and similar access entitlements. PN supports such a mechanism being implemented for the NSW rail network. PN considers that there are circumstances where a customer may decide they want to use one operator over another and a mechanism that allows for the temporary repurposing of paths may improve operational efficiency. A capacity transfer mechanism would support capacity utilisation and management for seasonal or uneven demand profiles to drive the efficient utilisation of train paths where appropriate. PN notes that the inclusion of a "tap on the shoulder" mechanism to facilitate the transition of capacity from one operator to another, where there is a suitable commercial arrangement supporting the freight task, may be beneficial in ensuring paths are able to be assigned effectively.

² Part IIIA access undertaking guidelines: Submitting, varying or withdrawing an access undertaking pursuant to Part IIIA of the Competition and Consumer Act 2010, August 2016.

³ See: <https://www.ipart.nsw.gov.au/Home/Industries/Transport/Reviews/Rail-Access/Review-of-third-party-access-to-Rail-infrastructure-in-NSW>.

Passenger priority and the avoidance of potential conflicts of priorities

PN supports IPART's recommendation that IPART may publish a binding instrument which sets out minimum criteria and other matters that an access provider must consider in addressing the non-price provisions in its undertaking as this will improve certainty for access seekers. As an example of what the instrument may specify, IPART states that it may include train control procedures such as a train prioritisation hierarchy. PN is concerned that this Draft Recommendation does not go far enough towards establishing a train prioritisation hierarchy.

As set out in PN's response to IPART's Issues Paper, given the increasing load on current networks (for both freight and passengers) and an 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 submits that it is appropriate to consider whether passenger priority in rural or regional areas with low passenger train utilisation is economically and operationally efficient and submits that this issue should be examined closely because the economic costs to freight operators and the impact on on-time running (and hence end user trust in the rail services) can be significant.

Scheduling of passenger and freight paths

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.

Under this arrangement, maintenance would be scheduled first and passenger and freight paths would then be 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

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 Transport for NSW (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.

Terms and conditions of access should be fair and reasonable

Terms and conditions of access should support fair negotiating positions, freight volume growth and reflect Part IIIA (s 44AA) of the *Competition and Consumer Act 2010 (Cth)* and:

- (a) promote the economically efficient operation of, use of, and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
- (b) provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.

IPART states in the Draft Report its proposal that the NSW rail access framework be largely principles-based to accommodate variations between networks. IPART does not articulate in the Draft Report what principles will apply.

As PN submitted in response to IPART's Issues Paper in December 2021, terms and conditions of access should be fair and reasonable. Any framework proposed by IPART should recommend that legislation prescribe this as a principle.

In addition, any terms and conditions of access 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, with predictable and transparent pricing.

Safety and sustainability of regulatory framework

Without improved safety and a rail network that is fit for purpose and sustainable into the future, freight will shift to road and increase NSW's transport emissions. Road fatalities, crashes and traffic congestion will worsen, as more trucks share the roads with passenger vehicles.

As set out in PN's response to IPART's Issues Paper, 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. None of IPART's proposed recommendations address how these objectives will be taken into account in the regulatory framework.

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 safer way to transport freight, resulting in fewer incidents and fewer deaths and injuries to people. Rail reduces the economic costs associated with traffic accidents. 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;
- **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; 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 (by, and is also more fuel efficient, resulting in the consumption of less fossil fuels. The inclusion of environmental factors or outcomes in a regulatory scheme is not uncommon.
- **Reduced costs** – The use of truck transport for line haul services (as opposed to pick up and delivery services) adds costs across the national supply chain.

If you wish to discuss the contents further of this submission please contact PN's Head of Strategic Access, [REDACTED], on [REDACTED].

Kind regards,

[REDACTED]

[REDACTED]
Chief Commercial Officer
Pacific National

APPENDIX A

#	IPART Recommendation	PN Position	Comments
<i>Draft recommendations on the form of regulation</i>			
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.	Clarification required	PN supports the requirement that access providers put in place an access undertaking for their sections of the NSW rail network. PN understands that the proposed recommendation will retain the status quo such that NSW state legislative requirements concerning safety and other matters will continue to apply even if an access provider puts in place an undertaking under the CCA.
2.	<p>The Transport Administration Act be amended so that undertakings under Schedule 6AA be:</p> <ul style="list-style-type: none"> (a) Required to include details on how the rail access provider would apply the nonprice 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. 	<p>Support 2(a) 2(b)</p> <p>Oppose 2(c)</p>	<p><u>Draft recommendation 2(a)</u> PN supports this recommendation. PN considers that the inclusion of principles such as the efficient operation and use of infrastructure, as well as pricing provisions, would provide access seekers with greater certainty and transparency about what to expect from IPART's assessment process.</p> <p><u>Draft recommendation 2(b)</u> PN supports this recommendation as it is consistent with the process in other jurisdictions and has been used successfully in the energy industry. Having IPART provide the assessment and approval of undertakings provides independent assurance that an undertaking meets principles that promote positive economic outcomes.</p> <p><u>Draft recommendation 2(c)</u> PN submits that undertakings should be reviewed every five years, rather than 10 years. This is consistent with the approach in other regulatory contexts (for example, regulated electricity network businesses must periodically apply to</p>

#	IPART Recommendation	PN Position	Comments
			the Australian Energy Regulator (AER) to assess their revenue requirements, typically every five years) and will ensure that an Undertaking remains fit for purpose.
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.	Clarification required	PN considers that this draft recommendation is intended to maintain as far as possible the status quo in terms of the access undertakings currently in operation. PN understands that some uncertainty will remain for access seekers if access providers can switch between regulatory regimes and exploit the regulatory uncertainty to gain an unfair advantage. PN seeks further clarity from IPART on how IPART proposes to address this concern.
4.	The new regulatory arrangements should be reviewed 10 years after being introduced.	Oppose	<p>Regulation should be periodically reviewed to ensure its continued efficiency and effectiveness. PN considers that the NSW rail access framework should be reviewed five years after amendments are implemented, rather than 10 years.</p> <p>The existing regulatory arrangements have been in place for 23 years, so the proposed amendments are likely to have a significant impact and there is some uncertainty about how they will operate in practice. Waiting ten years for a review is too long to tolerate the unintended consequences of any changes. A five-year review period is consistent with other regulated assets and consistent with principle 7 of the NSW Guide to Better Regulation, that states reviews should generally be conducted after five years.</p>
Draft recommendations on the roles and responsibilities under the regulatory framework			
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	Clarification required	Currently the rail infrastructure owners Transport Asset Holding Entity (TAHE) for most networks, and the Australian Rail Track Corporation (ARTC) for the

#	IPART Recommendation	PN Position	Comments
	owner, the rail infrastructure manager, or the NSW transport department.		<p>others) are accountable for providing third party access to their sectors of the NSW rail network.</p> <p>PN understands the efficiency in holding one entity accountable for negotiating access, however where that accountability does not extend to other issues, for example where something goes wrong or there is a failure, then the problem remains and access seekers will still be left to negotiate with infrastructure owners and other bodies.</p> <p>PN would like to ensure that holding one entity accountable for access ensures that all essential functions are carried out effectively. PN considers it appropriate that for different parts of the network the relevant responsible entity has accountability for access.</p> <p>PN considers that it is important for IPART to clarify what legislative and/or contractual changes would be required to ensure that a single entity is effectively held accountable, this includes what factors in practice would need to be taken into account when holding a single entity accountable.</p> <p>PN submits that there is an inherent conflict of interest for Sydney Trains to manage passenger services and freight services in its control centre function. Section 36A(1) of the <i>Transport Administration Act 1988 (NSW)</i> obliges Sydney Trains to deliver safe and reliable passenger services; there is no mention of freight services and PN considers that it is important for there to be an appropriate obligation on Sydney Trains to manage freight services safely and reliably.</p> <p>PN therefore submits that it is appropriate for:</p> <ol style="list-style-type: none"> 1. The Transport Administration Act or the associated regulations be amended as follows; <p><i>s. 36A(1) The principal objective of Sydney Trains is to <u>manage</u> deliver safe and reliable railway passenger services in an efficient, effective and financially responsible manner.</i></p>

#	IPART Recommendation	PN Position	Comments
			<p>2. The Undertaking specify:</p> <ul style="list-style-type: none"> • that an access agreement be between Access Seekers and the responsible entity; • that liability and indemnity provisions are included in an access agreement along with dispute resolution provisions; • that the terms and conditions of an access agreement are commercially fair and reasonable; and • that the terms of an access agreement are approved by IPART once IPART is satisfied that the terms meet the provisions of the Undertaking. <p>These changes ensure that the single responsible entity is effectively held responsible, and that legal recourse is available.</p>
6.	<p>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.</p> <p>Chapter 4 – IPART seeks comment on:</p> <ul style="list-style-type: none"> • Which transport entity should be the single entity accountable for providing third party access to the network? 	Conditional support	<p>TAHE in the case of the Metropolitan Rail Network (MRN) and Country Regional Network (CRN) and where an entity provides access and leases a section of track from a track owner (such as ARTC), the leasing entity should be the single accountable entity.</p>
7.	<p>The NSW rail access framework be amended to:</p> <p>(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</p>	Support	<p><u>Draft recommendation 7(a)</u></p> <p>PN anticipates this will facilitate more balanced, timely and efficient negotiations between parties and lead to better service outcomes for rail freight customers. It should support the ability of access seekers to provide customers with greater certainty that their requirements can be met over reasonable timeframes.</p>

#	IPART Recommendation	PN Position	Comments
	<p>(b) provide for collective negotiations, where they are lawful and there is a sufficiently common interest among access seekers</p> <p>(c) extend the duty to negotiate in good faith to all negotiating parties</p>		<p>Where feasible, PN supports consistency of approach across all networks nationally. This is particularly important for national operators and customers. Rail networks do not operate in isolation and in a single journey, trains may travel across many rail sectors. The requirement to complete negotiations within three months, while also providing flexibility to amend the timeframes if mutually agreed, is consistent with the time allowed in other access regimes.</p> <p><u>Draft recommendation 7(b)</u></p> <p>There should be an obligation for access providers and access seekers to genuinely consult. To support this, PN would welcome the establishment of a permanent forum for access seekers to collectively negotiate and raise matters relating to rail access agreements. This should assist in providing an improved negotiating balance between ARTC, TAHE, Transport for NSW (TfNSW), and access seekers. By way of example, the Rail Operators Group (ROG) has proven successful in clearly and cohesively articulating industry concerns to TfNSW and TAHE and allowed access seekers to effectively represent customers.⁴ It has reduced the bargaining power imbalance that individual access seekers can otherwise face.</p> <p>PN had previously asked for a permanent forum be set up for access seekers to jointly discuss matters relating to rail access agreements and is pleased this was included in IPART's draft recommendations.</p> <p><u>Draft recommendation 7(c)</u></p>

⁴ In 2018 access seekers formed the Rail Operators' Group (ROG), which sought and obtained, a five-year, ACCC Authorisation to collectively bargain with TfNSW, the non-price terms of the Standard Track Access Agreement (STAA).

#	IPART Recommendation	PN Position	Comments
			PN agrees there should be an obligation for all parties to genuinely consult in good faith. This should improve negotiation outcomes and facilitate genuine process improvements that enhance efficiency.
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.	Support	This recommendation provides a more consistent approach and aligns with processes in other jurisdictions that offer conciliation or mediation. Working through the process, however, requires consideration of cost allocation and payment guidelines. PN suggests the conciliator be given authority to nominate who pays the cost, based on the specific circumstances. The consequence of paying costs will provide a mechanism to discourage vexatious claims.
9.	An automatic dispute resolution trigger should be introduced requiring 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).	Support	<p>PN's view is that this will aid efficiency and timeliness and as IPART notes the automatic dispute trigger is consistent with other regimes such as the <i>Railways (Operations and Access) Act 1997</i> (SA), <i>AustralAsia Railway (Third Party Access) Act 1999</i> (SA), and Access Policy of Darwin Port Operations Pty Ltd.</p> <p>An automatic trigger that fast-tracks resolution of disputes and requires parties to proceed to conciliation or arbitration (as determined by the access seeker) should lead to better service outcomes for rail freight customers. It will reduce the ability for negotiating parties to delay their response to information or service requests.</p>
10.	That IPART should update its access arbitration practice directions to provide greater clarity and guidance on matters including: <ul style="list-style-type: none"> (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 	Support	PN supports the recommendation for IPART to update its access arbitration practice directions so as to provide greater clarity and guidance on an arbitration of an access dispute.

#	IPART Recommendation	PN Position	Comments
	<p>example, a dispute between an access provider and multiple access seekers);</p> <p>(c) when IPART will exercise its discretion to appoint an alternative arbitrator from a Minister approved panel;</p> <p>(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; and</p> <p>(e) setting an indicative cap on the time that arbitrators have to make a determination.</p>		
11.	<p>That, in addition to the current information disclosure requirements in the NSW Undertaking, the rail access provider be required to publish:</p> <p>(a) standard services offered by the rail network and details of any limitations on availability;</p> <p>(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;</p> <p>(c) standard access agreement/s, including the default terms and conditions of access for standard services that comply with the required non-price provisions;</p> <p>(d) individual prices paid by all customers and the services to which they relate;</p> <p>(e) network development plan/s, including information on planned network investments and capital works programs; and</p> <p>(f) key performance indicators that access providers could assess the rail access provider's performance against.</p>	Support	<p>PN supports standing offer pricing and price escalation provisions being published across all statutory frameworks. This improves transparency and certainty.</p> <p><u>Draft recommendation 11(f)</u></p> <p>PN considers that it is important for IPART to clarify the “key performance indicators” that IPART considers access providers should be required to publish, including:</p> <ul style="list-style-type: none"> • the nature of these indicators; • whether IPART will review and change these indicators; • the period of time to which these indicators will relate. <p>PN submits that in addition to the publication of key performance indicators, access providers should also be required to publish the underlying data and their method for calculating the key performance indicators to ensure transparency and that an appropriate methodology is used.</p>

#	IPART Recommendation	PN Position	Comments
			PN considers that the key performance indicators should, at a minimum, conform with the performance indicators set out at Part 8 and Schedule G of the ARTC Interstate Access Undertaking. ⁵
12.	<p>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:</p> <ul style="list-style-type: none"> (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. 	Support	<p><u>Draft recommendation 12(a)</u></p> <p>PN considers that a sound pricing methodology should underpin access agreements and include requirements to ensure that access provider prices are transparent. This will reduce information asymmetry and empower access seekers and customers to make informed decisions. Having visible methods, inputs and pricing improves certainty for access seekers and supports longer-term planning.</p> <p>PN had previously asked that frameworks be established to ensure that access provider and access seeker prices are transparent and is pleased to see it included in IPART's draft recommendations.</p> <p><u>Draft recommendation 12(b)</u></p> <p>PN agrees that rail access providers should be required to provide the avoidable / direct costs associated with providing the service. This would make it easier to determine whether proposed access charges are reasonable and reduce information asymmetry. Ultimately it should help re-balance negotiating power between the access provider and access seeker, and lead to more efficient pricing outcomes.</p>

⁵ See: <https://www.artc.com.au/uploads/ARTC-Interstate-Access-Undertaking-2007.pdf>.

#	IPART Recommendation	PN Position	Comments
			<p><u>Draft recommendation 12(c)</u></p> <p>PN supports the information provisions in IPART's disclosure document. This will reduce information asymmetry, improve transparency, and support effective negotiations and network performance.</p>
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).	Support	There is currently no time limit for a response so PN supports this amendment. It will allow access seekers to make more timely and informed decisions, and improve service outcomes for customers.
14.	<p>That IPART should publish an enforceable disclosure guideline to provide further detail on what information rail access providers must publish, including:</p> <ul style="list-style-type: none"> (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. 	Support	<p>PN supports draft recommendations 14(a), 14(b) and 14(c) as a way to reduce information asymmetry, improve the efficiency of negotiations, and promote a customer-centric approach. These draft recommendations would improve the quality, completeness and timeliness of information available to access seekers. They will also move the disclosure requirements closer to that of other access regimes that provide for a higher information standard.</p> <p>As IPART noted, the NSW Undertaking does not specify standards for the quality or reliability of information to be provided to access seekers and imposes several hurdles to access seekers obtaining the information. This creates avoidable search and transaction costs.</p>
<i>Draft recommendations on the non-price provisions</i>			
15.	<p>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:</p> <ul style="list-style-type: none"> (a) That the access provider allocate capacity according to well-defined steps that meet competitive neutrality and efficiency tests. 	<p>Support 15(a) 15(d), 15(e), 15(g), 15(h)</p> <p>Conditional support 15(b)</p>	<p><u>Draft recommendation 15(a)</u></p> <p>PN considers this will increase transparency and provide greater certainty about how access providers make capacity decisions, including how they implement passenger priority.</p>

#	IPART Recommendation	PN Position	Comments
	<ul style="list-style-type: none"> (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. 	Clarification required 15(c), 15(f)	<p>Capacity should be allocated to access seekers or access holders on an efficient, reasonable and non-discriminatory basis. The process by which capacity is allocated should be clear, especially where there are capacity constraint issues, and infrastructure owners should consider the best capacity allocation methodology that would suit the needs and demands of their industry.⁶</p> <p>PN and other access seekers / access holders lose capacity due to passenger priority. Passenger services use more network capacity than freight services and take more paths because they have more services. Freight transport and passenger movements need to be able to operate cohesively and optimally together. PN understands that in capital city and metropolitan areas certain passenger priority conventions are necessary, but the current system where Sydney Trains and TfNSW develop a passenger timetable in isolation, with freight left to fill in gaps as an afterthought, does not promote economic nor operational efficiency.</p> <p>In PN's response to IPART's Issues Paper in December 2021, PN recommended that passenger priority over freight in rural and regional areas with low passenger utilisation be examined given the significant economic costs to freight operators. PN suggests that the Undertaking could set the timing and location of planned maintenance before any passenger or freight paths are allocated.</p>

⁶ Part IIIA access undertaking guidelines: Submitting, varying or withdrawing an access undertaking pursuant to Part IIIA of the Competition and Consumer Act 2010, August 2016.

#	IPART Recommendation	PN Position	Comments
	<p>(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:</p> <ul style="list-style-type: none"> the access provider provides train paths and infrastructure that are fit for purpose, and access holders ensure each train movement is fit for purpose. 		<p><u>Draft recommendation 15(b)</u> PN provides in-principle support but suggests that additional considerations and exclusions are required, including for Force Majeure and recognition of unique operational behaviours of seasonal and campaign services.</p> <p>When considering the hand back of paths or revoked access rights, consideration must be given to seasonal and campaign services. Seasonal and campaign services may not be running at their expected capacity at all times during the year(s) and the customer may not be ordering the train paths. To solve for seasonal services a mechanism should be established to efficiently move rail paths between access seekers / access holders.</p> <p>Regardless of take-or-pay arrangements being in place or not, a short-term capacity transfer process could facilitate pathing being moved between end-users or access seekers / access holders. In periods where seasonal or campaign traffic is not running, paths could be repurposed to promote flexibility, maximise network utilisation and encourage downstream competition. This would have minimal revenue impact for the access provider.</p> <p><u>Draft recommendation 15(c)</u> As outlined in our response to 15(b), to improve operational efficiency a mechanism is needed that allows paths to be transferred efficiently. However, PN considers that it is important for IPART to clarify the detail on what guidelines around this might look like.</p> <p><u>Draft recommendation 15(d)</u> PN supports this recommendation as a way to maximise available capacity, minimise disruptions from track possessions, and drive a whole-of-network outcome. Consideration should be given to the ability to operate services through closures where appropriate to do so.</p> <p>IPART note that an ongoing source of frustration in submissions received is how rail infrastructure managers coordinate their capacity management and maintenance between networks. In PN's response to IPART's Issues Paper,</p>

#	IPART Recommendation	PN Position	Comments
			<p>PN maintained there should be an obligation on all network operators that they consult adjoining networks.</p> <p><u>Draft recommendation 15(e)</u> There are circumstances where a customer may decide they want to want to use one operator or access seeker / access holder over another. In these instances, there needs to be the ability for operators to swap among themselves and for capacity to be smoothly transitioned to a different operator. This should be a reasonable and balanced mechanism that provides an incentive for access seekers and access holders not to hold on to paths.</p> <p><u>Draft recommendation 15(f)</u> There needs to be certainty that access seekers and access holders can pay for capacity, however PN considers that it is important for IPART to clarify how this recommendation would work in practice. For example:</p> <ul style="list-style-type: none"> • how existing and potential access seekers / access holders would benefit from the investment in expanded capacity; • how the additional investment in expanded capacity will be treated in any RAB calculation; and • how State Government or Federal Government grants to support expanded capacity would be treated. <p><u>Draft recommendation 15(g)</u> PN supports this recommendation and note that 'creditworthiness' should include an access seekers / access holders payment record and confirm they are an on-time, reliable payer. Without this, there may be a situation where vendors that pay within the payment terms are subsidizing those vendors with overdue accounts.</p>

#	IPART Recommendation	PN Position	Comments
			<p><u>Draft recommendation 15(h)</u> PN supports recommendation 15(h) as a way to drive network performance and efficiency and ensure that a high quality of reliable data is provided.⁷ To improve whole-of-network outcomes where feasible KPIs should be aligned across the networks.</p> <p>There is a need for definitions such as “on time arrival” to be consistent between adjacent networks to drive efficient operations and utilisation of paths as scheduled.</p> <p>In addition to operational KPIs, PN suggests the inclusion of:</p> <ul style="list-style-type: none"> • financial KPIs that measure outstanding payments and bad debt; and • confidentiality measures and confidentiality breaches.⁸
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 nonprice provisions in an undertaking.	Support	<p>PN supports this recommendation as it will allow IPART to specify detailed matters that the access provider should address in its Undertaking and improve certainty for access seekers. In addition to the guidance document specifications provided in the Draft Report, the guidance document should also:</p> <ul style="list-style-type: none"> • Support harmonisation and include an obligation to consult and report on harmonisation across networks (particularly to adjoining networks like ARTC). • Include minimum track standards and aspirational goals for axle weights and speeds. For access seekers to invest in rolling stock they

⁷ Any non-compliance with KPIs should be non-pecuniary.

⁸ With the recent spate of cyber security breaches, measuring and ensuring confidentiality is important.

#	IPART Recommendation	PN Position	Comments
			need confidence that the track can support rolling stock and that they're likely to get a return on their investment.
<i>Draft recommendations on the pricing provisions</i>			
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.	Conditional support	<p>PN agrees that the access framework should retain ceiling and floor pricing provisions.</p> <p>PN suggests that the network-wide revenue cap be retained as a secondary check.⁹ PN's request to retain it as an extra safeguard is grounded in previous revenue issues. For example, NSW Undertaking's unders and overs account, whereby RailCorp (now TAHE) exceeded the ceiling test for many years and did not return the over-recovery.</p>
18.	<p>That 2 additional pricing provisions be included in the NSW rail access framework:</p> <p>(a) 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.</p>	Clarification required	<p>PN supports the principle of including a non-discrimination pricing provision in the NSW rail access framework.</p> <p><u>Draft recommendation 18(a)</u></p>

⁹ The network-wide revenue cap mandates that an access provider's total access revenue (including any government subsidies) must not exceed their full economic costs. It looks at the access provider's total revenue from providing access against their total economic costs and the access provider is considered to be running an efficient business if their revenue offsets their full economic cost (including a reasonable rate of return commensurate to the risk of operating the business). They are considered to be acting as a monopoly if their revenue exceeds their costs (i.e. they have earned more than a reasonable rate of return).

#	IPART Recommendation	PN Position	Comments
	(b) 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.		<p>PN supports this recommendation which will reduce the risk of access providers arbitrarily increasing prices but seeks clarity on what is meant by the phrase “an increase in the cost of access”.</p> <p><u>Draft recommendation 18(b)</u></p> <p>PN considers that it is important for IPART to clarify how “cost differences” will be calculated and what relevant factors are and are not to be taken into account. Efficiency considerations should also be taken into account.</p>
19.	<p>That the following terms relating to how costs are calculated are amended to clarify that:</p> <p>(a) 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.</p> <p>(b) 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).</p> <p>(c) 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).</p>	Clarification required	<p><u>Draft recommendation 19(a)</u></p> <p>PN supports having certainty and clarity on how costs are calculated and amended. However, PN submits that this recommendation does not promote cost transparency, including providing assurance that costs are prudent, or visibility as to whether there is cross-subsidisation in the form of higher charges being applied on the paths that are used the most, in order to offset some branch line work.</p> <p>The Undertaking defines full economic costs as sector specific costs that are to be assessed on a stand-alone basis. PN considers that it is important for IPART to clarify the meaning of sector specific costs in this context.</p> <p><u>Draft recommendation 19(b)</u></p> <p>PN submits that if a ‘re-opener’ clause is to be included it must be tightly defined.</p> <p><u>Draft recommendation 19(c)</u></p> <p>PN agrees that depreciation should only apply to assets that will likely become obsolete and not include depreciation through wear and tear (since these costs are already captured in the direct cost component as maintenance cost). However, PN considers it important for IPART to clarify the detail on what guidelines around defining obsolescence might look like.</p>

#	IPART Recommendation	PN Position	Comments
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).	Support	PN supports continuing to value a rail network's regulatory asset base based on a DORC methodology as the preferred valuation method. The DORC methodology is widely used in other asset classes, and it is reasonable for rail to aim to harmonise with other regulated classes.
21.	That IPART continues to set key inputs to the ceiling test: (a) the asset lives used to calculate the rate of depreciation; and (b) the rate of return.	Support	PN supports IPART's recommendation in the Draft Report, which represents a continuation of the current framework.
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 be a to review asset lives where: <ul style="list-style-type: none"> 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 	Clarification required 22(a) 22(b) Support 22(c) Conditional support 22(d)	<p>PN supports using asset life as an input to depreciation. PN submits that using mine life rather than asset life will result in operating costs being recovered over a shorter period of time, which in turn may result in higher access charges for access seekers such as PN. PN considers that any process for setting or adjusting asset lives should be designed to minimise the risk of price shocks.</p> <p>PN seeks clarity on what IPART's view is on asset owners charging a premium for uncertainty.</p> <p><u>Draft recommendation 22(c)</u> PN supports this recommendation. There are precedents for this approach including Jemena Gas Network and the Metro Rail Network, that contain a varying schedule of charges.</p> <p><u>Draft recommendation 22(d)</u> PN supports recommendation 22(d) but suggests there should be guidelines and a prima-facie material change trigger to review asset lives if it is going to be done more than every five years. Performing the review is resource intensive in terms of access provider and access seekers' time, effort and</p>

#	IPART Recommendation	PN Position	Comments
	<ul style="list-style-type: none"> 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. 		investment. Establishing guidelines that would trigger a review would ensure there was a strong rationale for undertaking the work.
23.	<p>That the provisions around how IPART sets the rate of return are updated to:</p> <ul style="list-style-type: none"> (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. 	<p>Support 23(a)</p> <p>Conditional support 23(b)</p>	<p><u>Draft recommendation 23(a)</u> PN supports this recommendation. It is useful to set a different rate of return where there are different risk profiles associated with networks and the market they service, particularly coal and the Hunter Valley network.</p> <p><u>Draft recommendation 23(b)</u> PN is supportive of the recommendation, provided that guardrails are included to balance flexibility for access providers with certainty for access seekers.</p> <p>Given the economic variability, unprecedented coal prices, high cost of borrowing, and energy transition to renewables PN understands the need for greater flexibility. However, flexibility must be combined with price certainty. End users and customers require price certainty and access seekers need investment certainty to invest in rollingstock. A mechanism that allowed for a smoothed rate of return over five years would be required, along with the ability for access seekers to pass through the cost to customers.</p> <p>The rate of return should be reflective of prudent costs, to ensure that access seekers are not being charged a risk premium to cover additional access provider risk.</p>
24.	<p>The unders and overs accounts provisions be amended to:</p> <ul style="list-style-type: none"> (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 	Support	<p><u>Draft recommendations 24(a) and 24(b)</u> PN understands that the unders and overs accounts provisions only apply to the Hunter Valley Coal Network. PN supports these recommendations.</p> <p><u>Draft recommendation 24(c)</u></p>

#	IPART Recommendation	PN Position	Comments
	<p>IPART within 4 months of the publication of a compliance determination</p> <p>(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:</p> <ul style="list-style-type: none"> 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. 		<p>PN submits that the unders and overs accounts provisions should incentivise access providers not to over-recover. There is a cost to the access seeker to reimburse. PN supports returning funds to access seekers, but submits that access providers need to be provided with granular supporting data that will allow access providers to pass funds back to customers</p>
25.	<p>That access providers be required to include a consultation policy in their undertaking for IPART's approval that sets out:</p> <p>(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)</p> <p>(b) how the access provider will work with access seekers to determine the source of funding for each capital expenditure project</p> <p>(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.</p>	Support	<p>PN supports these recommendations. An improved consultation process to target investment of the right amount in the correct locations is likely to result in better outcomes to freight customers and provide surety that capital expenditure is prudent.</p> <p>It would be more economically efficient to include multiple parties and all access seekers in any discussion with an access provider. This would also guard against probity issues. As a process, PN suggests that access providers could release a consultation paper that articulates the project policy objective and provides options to meet the policy objective and allocate funding. This would then trigger a public consultation.</p> <p>The process could be strengthened by introducing a requirement to conduct a high-level cost benefit analysis or ex-ante and ex-post project review, to consider economic outcomes from the investment.</p>
26.	<p>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</p>	Conditional support	<p>PN supports a framework which allows for new investment in network infrastructure where the business case for that investment presupposes an underlying customer use case for rail. It is therefore important that the</p>

#	IPART Recommendation	PN Position	Comments
	undertaking for IPART approval for how they would recover these losses over time.		approach to capitalising losses be specifically reviewed and approved by IPART.
27.	<p>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:</p> <ul style="list-style-type: none"> (a) the ceiling test; (b) the asset valuation roll forward principles; and (c) the floor test (this is a new requirement). 	<p>Support 27(a) 27(b) Clarification required 27(c)</p>	<p><u>Draft recommendation 27(a) and (b)</u> PN supports recommendations (a) and (b).</p> <p><u>Draft recommendations 27(c)</u></p> <p>During the Hearing on 29 November 2022, IPART noted that it is not proposing an enforcement role if prices don't meet the floor test and that "<i>in the event of arbitration the floor test would guide an arbitration decision so that prices aren't set below the direct and incremental costs of providing a service</i>" (transcript p. 34).</p> <p>PN considers that this is an unnecessary additional regulatory mechanism which is not required and imposes an unnecessary burden on access providers and access seekers. As noted in the Hearing, IPART is not intending to take an enforcement role, rather this information is being gathered in case it may be useful in an arbitration. It is preferable for the floor in a specific dispute to be examined at that time.</p> <p>It is important for IPART to clarify:</p> <ul style="list-style-type: none"> • its intention and reasoning for imposing a floor test as part of an annual compliance proposal submitted by an access provider; • how IPART proposes to calculate the 'floor'. For example, will the 'floor' be calculated based on sections of a network, on a regional basis or by network; • how it will respond in the case of non-compliance generally; and • to what use, if any IPART proposes to make of the compliance information regarding the floor test.

#	IPART Recommendation	PN Position	Comments
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.	Clarification required	As above
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.	Support	PN supports recommendation 29 but submits that all costs must be prudent and that there should be mechanisms to ensure that access providers have effective debtor management processes to maintain cashflow. This will ensure that access seekers that pay on time don't subsidise overdue debtors.
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.	Clarification required	PN supports as a general principle a light-handed approach to regulation. However, PN seeks further information on how this recommendation would work in practice, including the nature of the powers to be provided to IPART, to form a view on this recommendation.
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: <ul style="list-style-type: none"> • accepting enforceable undertakings • issuing written directions • seeking court orders • seeking pecuniary penalties. 	Clarification required	PN supports as a general principle a light-handed approach to regulation. However, PN considers that it is important for IPART to clarify how this recommendation would work in practice, including the nature of the powers to be provided to IPART, to form a view on this recommendation.
32.	That an access provider must:	Support	<u>Draft recommendation 32(a)</u>

#	IPART Recommendation	PN Position	Comments
	<ul style="list-style-type: none"> (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. 		<p>This builds in an appropriate timeframe to allow for a transition. Requiring a 12-month notification period may reduce the incentive for access providers to switch between regulatory regimes and exploit regulatory uncertainty to make deals to their advantage.</p> <p><u>Draft recommendation 32(b)</u></p> <p>PN supports this recommendation noting that the undertaking must include reasonable terms and conditions on which the service provider will offer access, the price for the service, and dispute resolution processes in the event the parties cannot agree.</p>