



10 February 2023

Ms Carmel Donnelly  
Independent Pricing and Regulatory Tribunal  
PO Box K35  
Haymarket Post Shop  
Sydney NSW 1240

Dear Ms Donnelly

**Review of the NSW Rail Access Undertaking**

Transport Asset Holding Entity NSW (TAHE) welcomes the opportunity to make this submission in response to the Independent Pricing and Regulatory Tribunal's (IPART's) Review of the NSW Rail Access Undertaking draft report.

As a State-Owned Corporation with an independent Board, TAHE is well placed to contribute to improved outcomes for rail infrastructure users. Our key objective is to undertake our activities in a safe and reliable manner while maximising the value of the State's investment in rail infrastructure. This provides incentive to ensure our rail access offering is attractive both to current and potential rail operators and to ensure our collective customers, who have an alternative, choose rail.

TAHE acknowledges the need to reform the NSW rail infrastructure third-party access framework to address concerns identified by stakeholders on the lack of transparency and accountability within current regulatory arrangements.

Our enclosed submission supports the need for a single accountable entity for each network, discusses how to better incorporate and consider customers, and provides our view on where the outcomes IPART and industry are seeking may be delivered at lower cost. We also respond to each of IPART's 32 draft recommendations.

Should you have any questions regarding this submission, please contact [REDACTED], Head of Regulatory & Pricing at [REDACTED] or on [REDACTED].

Yours sincerely

[REDACTED]

Chief Executive Officer

[REDACTED]

# Enhancing the NSW rail access regulatory framework to deliver customer value



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## About the Transport Asset Holding Entity

The Transport Asset Holding Entity of NSW (TAHE) was established as a statutory State-Owned Corporation (SOC) on 1 July 2020 under Part 3 of the *State-Owned Corporation Act 1989 (NSW)*, to own and hold railway network assets used by the NSW transport cluster. These railway network assets include rail embankments, cuttings and tunnels, track, signals, power systems, rolling stock, stations and significant land holdings around stations within metropolitan and regional NSW.

TAHE was formed from its predecessor RailCorp, which owned railway network assets. RailCorp's rail operations and maintenance functions were transferred to Sydney Trains and NSW Trains in 2013 and they continue to be responsible for rail operations and maintenance functions across the NSW rail network.

As the asset owner, TAHE's remit is to enable a more effective, efficient and commercial approach in the management and investment of transport assets, including infrastructure, land and property. To this end, TAHE's principal objectives are:

- to undertake its activities in a safe and reliable manner to be a successful business and, to this end:
  - to operate at least as efficiently as any comparable businesses; and
  - to maximise the net worth of the State's investment in TAHE;
- exhibit a sense of social responsibility by having regard to the interests of the community in which it operates;
- to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6(2) of the Protection of the Environment Administration Act 1991 (NSW) where its activities affect the environment; and
- to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates.

In pursuing these objectives, TAHE is responsible for several critical functions within the transport cluster of entities:

- to hold and manage transport assets vested in or owned by it, or to be vested in or owned by it;
- to establish, finance, acquire, construct and develop transport assets to be vested in or owned by it;
- to promote and facilitate access to the part of the NSW rail network vested in or owned by TAHE in accordance with any current NSW rail access undertaking or otherwise lease or make available transport assets vested in or owned by TAHE to other persons or bodies; and
- to acquire and develop land for the purpose of enabling TAHE to carry out its other functions (including the acquisition of land).

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# Executive summary

## Key points

- TAHE acknowledges the need to reform the regulatory framework applying to third-party access to rail infrastructure in NSW, to address concerns identified by stakeholders on the lack of transparency and accountability within current regulatory arrangements.
- As an independent State-Owned Corporation and owner of many of the rail networks in NSW, TAHE is well placed to contribute to improved rail access outcomes for all rail infrastructure users, both for freight and passenger services. A new rail access framework will be important for improving rail access outcomes.
- TAHE agrees with the Independent Pricing and Regulatory Tribunal (**IPART**) that there is a need to have a single entity held accountable for providing third party access to their sector(s) of the NSW rail network.
- There is a need for the NSW government to consider how best to support a single accountable entity to deliver on the intent of IPART's recommendations. TAHE considers that it is possible to provide accountability for the agreement, while having functional operational responsibility across multiple entities.
- To support accountability TAHE considers there is a role for a customer forum, convened with representatives from all those responsible for functional operations of rail infrastructure as well as rail operators and logistics supply chain operators (eg, ports, intermodal terminals, etc).
- The customer forum would improve transparency and accountability within the access framework, through regular reporting of operational performance, identification of strategic matters affecting the value of rail infrastructure, and engagement on planning and capital investment needs and interoperability.
- TAHE supports many of IPART's recommendations, particularly those relating to bolstering the dispute resolution, compliance and enforcement mechanisms within the access framework. That said, there is a need to refine IPART's proposals to ensure the framework balances the regulatory compliance costs with the risks and consequences of poor rail infrastructure access outcomes. This will ensure that regulatory compliance activity is focused on the most material matters for improving rail access in NSW.
- TAHE acknowledges that the proposed changes will require coordination within government to progress implementation. While legislative and regulatory changes are being considered, progress on implementing the improved outcomes from the proposed regulatory changes should be made through existing policy instruments.



- Overall, TAHE considers that with the enhancements set out in our submission, this will deliver improved customer value from NSW's rail infrastructure.

Rail infrastructure is critically important for the transport of passengers and goods within New South Wales. Passenger patronage in the metropolitan rail network reached a pre-pandemic peak of over 377 million journeys in 2018-19,<sup>1</sup> and over 440,000 twenty-foot equivalent units (TEUs) of containerised freight is transported each year by rail into and out of Port Botany. These rail journeys make an important contribution to the liveability of Sydney, relieving pressure on congested roads and contributing to the effective functioning of the city.

The Transport Asset Holding Entity (TAHE) was established as a State-Owned Corporation on 1 July 2020, to own and hold railway network assets used by the NSW rail cluster. These railway network assets include rail embankments, cuttings and tunnels, track, signals, power systems, rolling stock, stations and significant land holdings around stations within metropolitan and regional NSW.

TAHE has a critically important objective – to undertake its activities in a safe and reliable manner while maximising the value of the State's investment in rail infrastructure. This objective incentivises TAHE to ensure its rail access offering is attractive to both current and potential rail operators, many of whom compete against alternative modes of transport.

It aims to achieve this by working closely with stakeholders to maximise the effective and efficient use of and investment in rail infrastructure assets, for the benefit of rail operators and the wider passenger and freight supply chain communities. As a corporation with an independent Board, TAHE is well placed to contribute to improved outcomes for rail infrastructure users, both for the provision of freight and passenger services.

TAHE welcomes the opportunity to comment on the draft report from the Independent Pricing and Regulatory Tribunal's (IPART) Review of the NSW Rail Access Undertaking (IPART Review). The review is occurring at a critical time for TAHE and the community, as NSW plans to meet the needs of the community in a post pandemic world with increasing attention on the importance of lowering transport emissions and providing effective and efficient rail services. Within this context, rail is expected to have an increasingly important role in our transport system well into the future.

## **NSW's third-party rail access regulatory framework is out-of-date and needs to be refocused to deliver customer value**

The IPART Review highlights the need to refresh the regulatory framework applying to third-party access to rail infrastructure in NSW. It identifies several problems with the existing regulatory framework including a lack of transparency and accountability particularly in delivering on non-price terms and conditions of access, and a lack of sufficient compliance and enforcement mechanisms to deliver on access agreement commitments.

TAHE welcomes recommendations for an updated access framework with:

- clearly set guiding principles and legislative roles and responsibilities; and

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<sup>1</sup> Source: <https://www.transport.nsw.gov.au/data-and-research/data-and-insights/train-patronage>, accessed 30 November 2022.

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- guidelines that set out how the principles are to be implemented.

TAHE considers that access providers should develop access undertakings and agreements, with Minister approvals in line with current legislative arrangements.

Further consideration should be given to which entities are best placed to develop the relevant technical guidelines. As a matter of principle, TAHE considers that the guidelines should be developed by the entity with the statutory accountability and clear expertise in the relevant matter. The approval process may be guided and supported by IPART in ensuring that the guidelines are consistent with any legislative or regulation requirements.

## **Enshrining a single accountable entity in the regulatory framework as the counterparty to an access agreement**

TAHE recognises that inefficiencies arise from the absence of a single entity accountable as the counterparty to an access agreement. The choice of which entity is best placed to be the single accountable entity across TAHE's rail network is a matter for the NSW government to determine, given current and possible future operating models.

However, it is clear that:

- the single accountable entity can differ from the entities responsible for delivering on elements of the access service;
- there is a need in the context of TAHE's rail networks to consider how a single accountable entity would practically fulfil its role, when other entities have functional responsibilities for rail access; and
- there can be a distinction between a single entity accountable for third party access services, and the entity that is responsible for day-to-day delivery of operational outcomes under the agreement.

Working through how best to implement a single accountability entity within the access framework will be an important next step for rail access reform, following IPART's review. Improving clarity about the functional responsibilities and accountabilities will also be important for delivering on the intent underpinning IPART's proposed reforms.

Importantly, in developing the arrangements for a single accountable entity, the objective should be on maximising freight and passenger customer value from the rail network. Practical solutions that provide incentives to improve rail access outcomes should be the focus of the arrangements.

## **Improving transparency and accountability through a customer forum**

TAHE considers that many of the concerns raised by stakeholders on the current undertaking stem in part from the lack of effective engagement between access providers and rail operators, particularly on investment decisions and delivery on non-price terms and conditions of access.

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It follows that TAHE suggests that there is significant merit in establishing an all-of-system access customer forum. Such a customer forum could be established under existing instruments and organisational structures. The forum's role could include:

- providing a forum to review rail infrastructure service performance;
- reviewing the performance of all entities involved in the implementation of access agreements;
- providing input into rail infrastructure investment needs and planning, and interoperability requirements; and
- reviewing the establishment and implementation of an access compliance and assurance framework.

Ideally such a customer forum would include senior representatives of rail operators (both passenger and freight), logistics supply chain users (such as ports, intermodal terminals), the access provider, rail infrastructure managers, and operational managers. Such a forum would provide the opportunity for engagement on strategic matters of relevance to the effective and efficient investment in and use of rail infrastructure.

Access issues arising from day-to-day operational matters would be addressed through an assurance framework put in place by the access provider. In TAHE's networks, as per statutory requirements, Sydney Trains and Transport for NSW would continue to manage day-to-day operations, including the standard working timetable, and several operational standards. However, any systemic access operational problems could be raised with the customer forum for both discussion and track resolution through agreed internal mechanisms.

The specific mechanisms for this internal accountability framework will be an important focus for implementation of a new rail access framework.

TAHE considers that this approach to customer engagement can be a practical and effective part of the access framework, delivering improved outcomes for all rail operators. Relevantly, it goes further than simply improving consultation arrangements, to providing a forum for engaging on the operation of rail access in NSW.

Such a customer forum could be established at short notice, trialled for a period, and also act as an industry reference group during the review of the NSW Rail Access Undertaking. Consideration could then be given to whether there is merit in such a forum being given a more formalised standing as part of a revised access framework.

## **Improving dispute resolution and enforcement**

A key area of reform to the existing arrangements relates to IPART's proposals to improve dispute resolution and enforcement.

TAHE recognises there could be benefits from IPART being given powers to:

- undertake investigations of compliance with undertakings or guidelines, although TAHE considers these investigations should only be undertaken in response to a self-reported potential breach or a formal complaint related to a specific non-compliance provided by any party;



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- conduct annual compliance reviews only for those networks where access revenues are likely to exceed 80 per cent of estimated full economic costs; and
  - enforce compliance with the access framework and approved undertaking created consistent with Ministerial policy directions.

TAHE supports the shift towards lower cost forms of dispute resolution including conciliation, although IPART's role should be limited to managing the process of dispute resolution and appointing an independent commercial arbiter should this be required.

TAHE acknowledges that many stakeholders have been concerned by the length of time that transpires during negotiations under the access agreement. It follows that TAHE supports an automatic trigger for conciliation should negotiations not be concluded. However, we consider this should be four months of commencing negotiations unless the parties mutually agree to either cease negotiations or an extension of the negotiation timetable. Four months recognises the timeframes of some access seekers internal approval processes.

## **Refining IPART's proposed regulatory framework to deliver better outcomes for rail infrastructure users**

It is important for the regulatory arrangements to be effective and proportionate to the concerns and risks of all rail stakeholders, and also for all rail networks across NSW including those used for passenger and/or freight services.

TAHE considers that there are several refinements to IPART's proposed regulatory framework that strikes a better balance in terms of regulatory compliance obligations and delivering improved regulatory outcomes. These refinements include:

- access providers convening a customer forum, as part of its engagement processes within the access framework;
- refining IPART's role in the access framework to focus on the extent to which it undertakes dispute resolution, compliance, enforcement of the access framework and providing support to the Minister as sought from time to time;
- investigation of non-compliances being limited to when a party self-reports it or triggered by a complaint from any party relating to a specific non-compliance;
- investigations determining whether the parties comply with the undertakings and guidelines;
- IPART only conducting formal annual compliance reviews each year in circumstances where total access revenue for a network exceeds 80 per cent of the full economic costs. Access seekers would be required to publish information on compliance annually for all other networks;
- IPART being responsible for several guidelines including on arbitration procedures, and compliance and enforcement; and
- access providers being responsible for coordinating the development of guidance on technical matters (eg, criteria for meeting non-price terms and conditions), and a methodology for setting access prices.

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TAHE's considers that this approach to IPART's role is more proportionate to the concerns of stakeholders with current arrangements, while retaining strong incentives for compliance with the reformed access framework, that may be set out in legislation and regulations.

TAHE's responses to each of the draft recommendations made by IPART are set out in Appendix A.

## **Implementation of the proposed regulatory framework**

TAHE considers that a number of the customer engagement, non-price and pricing elements of a new access framework could be implemented administratively through existing policy instruments within 12 months of government's consideration of, and decision on, IPART's recommendations.

TAHE acknowledges that the remaining initiatives will require coordination within government to consider and progress implementation. However, these should occur simultaneously with these immediate administrative reforms.

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# Introduction

The Transport Asset Holding Entity (TAHE) is pleased to provide this submission in response to the Independent Pricing and Regulatory Tribunal's (IPART) Draft Report for its Review of the NSW Rail Access Undertaking (the Review).

The Review is being undertaken at a critical time for the rail sector in New South Wales. Following significant changes to the ownership and operating model for rail infrastructure in NSW, which led to the establishment of TAHE in 2020, it is timely to re-examine and develop an access framework that addresses the key challenges and provides a regime that promotes customer value for NSW's rail network.

The existing rail access framework has been in place for 20 years. With the freight movements in metropolitan NSW set to double over the next 30 years, it is important that NSW has the right rail access framework for allowing third-party train operators to use the rail network.

This is consistent with TAHE's objective to maximise the net worth of the State's investment in the rail network, through the promotion of access to efficiently provided rail infrastructure. TAHE aims to improve efficient use of existing rail infrastructure, to deliver greater connectivity and access along key freight routes.

Central to TAHE's role is its independence, as a state-owned corporation, with a Board that is focused on achieving its corporate objectives. This allows it to make infrastructure investment decisions that are consistent with its infrastructure users' needs over the medium to long term.

TAHE appreciates the engagement that it has had with IPART in the development of the draft report. In particular, TAHE acknowledges IPART's recognition of the importance of:

- updating the access framework to be principles-based embedded in an access framework to provide transparency and accountability;
- flexibility in the arrangements to accommodate the current rail infrastructure governance and operating model for rail infrastructure; and
- access prices changing over time as the underlying costs of infrastructure services evolve.

We are available to discuss this response further as IPART develops its final report.

The remainder of this submission focuses on:

- describing how the proposed access framework could be refined to maximise customer value and improve customer outcomes;
- the approach to accountability within the access framework, and how this can be improved;
- proposed refinements to IPART's recommendations on the pricing principles in the framework;

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- suggested refinements to the dispute resolution framework; and
  - the compliance and enforcement mechanisms, and how these can be tailored for the framework.

Appendix A provides TAHE's response to each of the recommendations made in IPART's draft report.

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# Improving the access framework for NSW rail infrastructure

## IPART identifies several shortcomings with current arrangements that need to be addressed

IPART's review has revealed several shortcomings with current arrangements. At a high-level these can be categorised into three main areas of concern, namely:

- concern about day-to-day management of freight operations, rail infrastructure capacity allocation between passenger and freight rail operators, and interoperability between networks (**non-price terms and conditions of access**);
- concern about engagement between rail operators and rail infrastructure providers as part of negotiating access agreements, and on investment decision making (**customer engagement**); and
- a lack of accountability for adherence to the regulatory framework and associated access agreements (**accountability**).

TAHE agrees that these three areas warrant specific focus as part of the review, and any new arrangements need to ensure that they address these broad concerns to promote improved outcomes for users of rail infrastructure, and the wider NSW community.

We acknowledge that freight access holders and seekers have raised most of the concerns about the current access arrangements through the IPART Review. It follows that consideration needs to be given to how best to address freight rail operators concerns, while also providing an access framework that is proportional to the challenges arising for passenger and freight rail operators.

## Guiding principles for the new access framework arrangements

As a starting point to responding to IPART's draft recommendations, TAHE developed a set of guiding principles to evaluate the proposed regulatory arrangements for access to rail infrastructure in NSW. The starting point was the principles used by IPART, namely:<sup>2</sup>

- **proportional** – we consider that a new access framework should be proportional to the nature and materiality of the problems it is seeking to address to ensure that the benefits from any regulatory arrangements outweigh the costs;
- **efficient** – facilitates efficient use of and investment in above and below rail infrastructure;

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<sup>2</sup> IPART, *Review of the NSW Rail Access Undertaking*, Draft Report, October 2022, p 2.

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- **flexible** – responsive to changing market and environmental circumstances, as well as changes to the operating model applying in NSW;
  - **regulatory certainty** – provide rail owners, access seekers and end customers with predictable outcomes; and
  - **enforceable** – effective in protecting rail owners and access seekers' rights.

TAHE agrees that these are important principles to guide the development of a new access framework for rail access in NSW. However, in addition to these principles, TAHE's response to IPART's draft report has been guided by several additional principles, namely:

- **consistency** – the access framework needs to promote efficient regulatory outcomes while being consistent with current and future rail access governance and operating models;
- **customer engagement** – the access framework should promote customer engagement to deliver customer value to both passenger and freight operators using rail infrastructure; and
- **accountability** – should provide transparency and accountability for regulatory and customer outcomes.

TAHE's submission in response to IPART's recommendations have been particularly influenced by a recognition of the need to be proportional in access arrangements to the materiality of stakeholder concerns, while promoting customer engagement and accountability.

## **TAHE considers that IPART's role in the proposed access framework can be refined to address rail infrastructure user concerns more effectively**

IPART's draft recommendations propose a significant change to the regulatory arrangements applying to rail access in NSW. Specifically, it proposes that the regulatory principles be set out in legislation and regulations, with access providers being required to develop undertakings that are consistent with those legislated principles.

Under IPART's framework, it would be responsible for developing binding guidelines on several matters including:

- information disclosure requirements, including an information standard;
- procedure for arbitration;
- technical guidance for rail access undertakings (eg, minimum criteria for meeting non-price terms and conditions); and
- compliance and enforcement guidelines.

TAHE considers it is important to:

- engender an access framework that promotes direct engagement between access seekers and access providers to resolve matters of contention associated with access agreements. This is best achieved through guidance mechanisms with the responsibility for development of this guidance



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allocated to relevant parties with appropriate expertise, combined with review mechanisms if concerns arise to provide strong incentives for compliance;

- be proportionate in the regulatory arrangements, to ensure that the new framework does not create additional compliance, review or approval requirements that are disproportionate to the materiality of the problems with current arrangements; and
- provide appropriate incentives for addressing the key matters of concern with the access framework arrangements, particularly as it relates to non-price terms and conditions of access.

Therefore, TAHE:

- does not consider that IPART should be responsible for approving binding technical guidance for rail access undertakings. The concern arises from the complexity of the technical matters involved, and the potential adversarial nature of these being approved through an IPART process. TAHE considers that current processes for developing technical guidance, combined with improved customer engagement and involvement in the process, would present a better approach for developing this guidance; and
- suggests IPART should consider the role of an undertaking within the proposed legal structure for the access framework. We recognise that regulatory reforms in other industries (for example in electricity and gas) have resulted in principles being held in legislation with more detailed guidance set out in regulations. Access providers in those industries are required to ensure that any access agreements are consistent with the legislative and regulation requirements. An equivalent regime for NSW rail infrastructure could be complemented by enabling any party to request IPART investigate compliance of an agreed or proposed access agreement with the legislative and regulatory requirements. This would avoid the need for IPART to proactively approve each access undertaking and access agreement. This approach would reduce the administrative costs involved in developing access agreements while retaining strong incentives for agreements to comply with the requirements of the regulatory framework.

## **An access framework with a single accountable entity will need to be supported by appropriate governance and operating models**

TAHE recognises inefficiencies arise from the absence of a single entity being held accountable for complying with the requirements of the access framework and the agreed terms and conditions of access.

As the rail infrastructure asset owner and investor in the network, TAHE is a candidate for being the single accountable entity for its networks (ie, the Metropolitan Rail Network (**MRN**), the Country Regional Network (**CRN**), the TAHE component of the Hunter Valley Coal Network (**TAHE HVCN**), and the northern rail corridor). This is enhanced through it being a state-owned corporation, with a Board that is independent of government, and with clear corporate objectives. That said, TAHE recommends that the choice of the single accountable entity is a matter for the NSW government to decide.

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***IPART consultation question 1: Which transport entity should be the single entity accountable for providing third party access to the network?***

*As a state-owned corporation with a clear objective to maximise value in the network through maximising use of the existing network and investing to maximise customer value, TAHE is an appropriate candidate for the single accountable entity for each of its rail networks.*

*That said, TAHE acknowledges that the decision on single accountable entity is a matter for government, taking into account its preferred governance and operating model for rail access in NSW.*

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## **Rail infrastructure customers should be a central part of the access framework to deliver better outcomes**

To improve accountability and outcomes for rail infrastructure customers, TAHE considers that the access framework should better incorporate customer engagement, potentially through the establishment of a customer forum to support each access in each network. This would embed a process for customer engagement on all aspects of the provision of rail infrastructure access for each network, while also providing a forum for engagement on common matters of concern that might arise in the operation of the network.

Importantly, such a forum would not have explicit decision-making powers. Ultimately, it is intended to be a mechanism for promoting engagement to facilitate effective planning and operation of rail infrastructure. The access provider would remain responsible for satisfying its requirements within the access framework, access agreements and performance outcomes agreed with infrastructure users.

It follows that the role of the customer forum will need to be further developed, but would likely include:

- providing a forum to review rail infrastructure service performance;
- reviewing the performance of all entities involved in the implementation of access agreements;
- providing input into rail infrastructure investment needs and planning, and interoperability considerations; and
- reviewing the establishment and implementation of an access compliance and assurance framework.

A customer forum would be convened by an access provider, with the intention that it meets periodically. The participants in the forum would ideally be senior executives of those involved in the use or provision of rail infrastructure. In the case of TAHE's networks this could include:

- rail operators, including both freight and passenger rail operators;
- logistics supply chain users (eg, ports, intermodal terminals, rail user groups, etc);
- TAHE as the rail infrastructure owner and investor;

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- rail infrastructure managers, responsible for operations and maintenance of the network, including Sydney Trains (as rail infrastructure manager (RIM)) for the MRN and UGL for the CRN; and
  - operational managers, including Transport for NSW (TfNSW), with responsibility for capacity allocation and timetabling.

TAHE considers that a customer forum would improve engagement, consultation and transparency around the critical operational matters associated with rail infrastructure access provision in NSW. Indeed, this approach is likely to lead to more effective and collaborative outcomes, compared to a more traditional regulatory approach involving IPART acting as an independent party establishing binding technical guidelines and approving access undertakings.

Including a formal customer forum would address many of the concerns that have been identified through the review about the need for information disclosure and improved consultation about investment needs. That said, there will need to be further consideration about the need for specific information disclosure to support new access seekers wishing to use rail infrastructure.

## **IPART's role under the enhanced access framework**

TAHE considers there is an important role for IPART in an enhanced access framework. This should focus on maximising the opportunity for access seekers and access providers to interact collaboratively to facilitate efficient and effective access to rail infrastructure.

We consider that IPART should:

- at the request of the Minister, provide review and recommendations in relation to revised undertakings by access providers and guidelines established by the appropriate entities;
- be available to undertake appropriate reviews of compliance of access agreements with price and non-price requirements set out in the access framework;
- be able to undertake an ad-hoc investigation of compliance with the access requirements, at the request of any person or entity or as the result of a self-reported non-compliance. In undertaking this role, IPART should consider the materiality of the potential non-compliance, and so whether conducting an investigation is in the public interest. Importantly, IPART would not have the power to self-initiate a review. This approach provides strong incentives for compliance but without the regulatory burden of compliance approvals of elements of the access framework;
- be responsible for developing guidelines for arbitration and enforcement procedures where these powers have been established;
- use any enforcement powers granted to seek remedies resulting from an investigation; and
- IPART should conduct a review of implementation of the access framework within three years of its commencement, and a detailed review of the effectiveness of the framework within ten years.

For the avoidance of doubt, TAHE considers that:

- IPART should not be responsible for developing or approving technical guidelines to support the access framework, as these can be more effectively developed by TAHE, TfNSW and Sydney Trains,

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where relevant through direct engagement with stakeholders and the customer forum. Such guidelines could then be issued by the Minister;

- the establishment of a customer forum means that IPART would not be required to approve an access provider's consultation policy (ie, recommendation 25); and
- IPART should not have an ex-ante role in approving an access undertaking or access agreement, but rather have a role to review compliance of an access undertaking upon request of any person or entity, subject to a materiality threshold. This approach provides strong incentives for compliance while balancing the regulatory costs involved with reviewing compliance of access undertakings and agreements.

TAHE's considers that this approach to IPART's role is:

- more proportionate to the concerns of stakeholders with current arrangements, while retaining strong incentives for compliance with the new access framework;
- consistent with a preferred negotiate/arbitrate model; and
- proportionate to the dynamics within the provision of rail access.

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# Improving accountability within the access framework

## What are the key accountability challenges with the current regulatory arrangements?

A key concern raised by stakeholders during the IPART Review, has been with the current rail infrastructure operating model not providing sufficient clarity as to the entities accountable for each aspect of infrastructure service provision. This reflects the decentralised provision of rail infrastructure whereby:

- TAHE is the rail infrastructure owner, responsible for investment in rail infrastructure;
- TfNSW has responsibility for:
  - setting rail policy and strategy;
  - the standard working timetable;
  - setting asset standards for rolling stock and rail infrastructure standards; and
  - practically negotiating access agreements on the behalf of TAHE; and
- rail infrastructure management and train control are undertaken by Sydney Trains for the MRN, and URL for the CRN.

As IPART identifies, stakeholders have raised concerns with this arrangement due to:

- a lack of unified management over these functions, imposing costs and inefficiencies on rail operators;
- a lack of capacity allocation transparency and certainty, with unclear capacity allocation prioritisation guidelines;
- difficulties negotiating on infrastructure investment needs and process improvements;
- protracted commercial negotiations, such as for the standard track access agreement; and
- delays when registering and integrating rolling stock.

An enhanced access framework should create coherent incentives and requirements to reduce operational frictions that arise from responsibilities that are currently diffused among different parties.

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## **Ensuring clear and transparent accountability for rail access is an important part of a revised access framework.**

TAHE supports a clear single point of accountability for access provision for each network as part of an enhanced access framework. Importantly, this should be an integral part of the access framework with clearly defined organisational responsibilities. By providing clear and transparent accountability systems, processes and responsibility, access seekers can be assured that the rules governing rail access are being appropriately complied with. In turn, customer value from the use of rail infrastructure will be maximised.

TAHE considers that the access framework should embed an effective assurance function that is:

- independent, and incentivises the use of an objective evaluation framework;
- proportional, to the level of complexity and risk associated with non-compliance;
- targeted towards those areas that will produce outcomes consistent with stakeholders needs; and
- transparent, well planned and effectively coordinated.

Providing independent compliance assurance is important for delivering improved outcomes under an enhanced access framework. The single accountable entity should be responsible for the assurance function within an enhanced access framework.

The customer forum would also provide the mechanism for direct engagement with rail infrastructure users on the matters of critical importance, within a framework that can facilitate resolution and non-compliance remediation, but with a backstop of IPART involvement if required.

## **Information disclosure should be focused on performance monitoring**

IPART's draft report recommends an extensive information disclosure framework, including services offered, standard offer prices and access agreements, individual prices paid, a network development plan and key performance indicators.

This focus on access agreement information might be important in some instances (eg, freight users seeking access on specific corridors or origin destination combinations). However, it is likely to be less important for passenger networks, particularly the metropolitan network.

TAHE considers that performance monitoring of non-price terms, publicly disclosed to allow for review by stakeholders and a customer forum, could alleviate information asymmetry concerns. In practice this performance monitoring might involve:

- requirements for appropriate information disclosure included within the access framework
- regulations to provide guidance on what information must be disclosed and the frequency of disclosure;
- access providers putting in place appropriate and effective systems and processes to deliver the required information;



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- reporting on all performance and compliance matters, including KPI's, reliability, adherence to timeframes to the customer forum;
  - publishing performance information on an access provider's website; and
  - the customer forum serving as a route for stakeholders to seek additional voluntary information disclosures that support effective negotiation and efficient decision-making to reduce unnecessary search and transaction costs.

We do not consider publishing individual prices paid in confidential agreements with access seekers<sup>3</sup> would be possible without counter-party consent. We expect they may have valid commercial reasons to keep these confidential including harm that might arise from having these disclosed to freight competitors.

We also question whether there would be sufficient additional benefit to warrant requiring standard access agreements for all networks given the effort required to provide these weighted against the small number of current and potential access seekers. The development of standard access agreements should be undertaken where there are commercial benefits from doing so (eg, the current development of the standard track access agreement).

## **Why do we prefer this approach to accountability?**

We consider that this approach is preferred to the approach set out in IPART's draft report because:

- it facilitates direct engagement in the development of guidelines (which are of a technical basis and so IPART is unlikely to be best placed to develop and approve these) while retaining IPART's role overseeing compliance with the economic regulatory arrangements;
- the two triggers for an investigation of compliance with the access framework, being through the request of any party or through a self-reported breach, best targets IPART's oversight function to instances of specific concern within the regulatory arrangements. This is more proportionate compared to IPART having an ex-ante role approving guidelines, access undertakings and access agreements; and
- commercial conciliation and binding arbitration to resolve disputes about access agreements is consistent with good commercial practice and ensures that the parties to the access arrangement approach disputes from a commercial perspective.

TAHE would welcome the opportunity to work closely across the transport cluster, and with access seekers on how best to deliver on an effective assurance framework that is focused on, and can deliver, customer value.

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<sup>3</sup> As IPART includes in draft recommendation 11(d).

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# Access pricing principles need to be clarified and simplified

## IPART has made several important recommendations relating to access pricing

IPART has set out several important recommendations in its draft report that would materially change how the upper and lower bounds (ie price ceiling and price floor) for access prices are determined.

IPART's draft report recommends:

- requiring access prices to reflect commercial requirements, such as an increase in the cost of access (Recommendation 18(a));<sup>4</sup>
- requiring access seekers competing in the same downstream market to pay the same access price for the same service (recommendation 18(b));<sup>5</sup>clarifying that full economic costs includes operating costs (which is consistent with current practice) (Recommendation 19(a));<sup>6</sup>
- capital expenditure to only include capital expenditures undertaken for the purpose of increasing capacity or service quality (and not for the purpose of extending the useful life of an asset) (Recommendation 19(b));<sup>7</sup>
- allowing depreciation only to assets that will foreseeably become obsolete (ie, assets that will be replaced should not be included in the depreciation allowance (Recommendation 19(c));<sup>8</sup>
- modifying IPART's role on depreciation in the TAHE HVCN from assessing mine life to assessing asset lives directly (and subsequent recommendations about how this is set (Recommendation 22));<sup>9</sup> and
- continuing the practice of IPART determining the rate of return but clarifying that IPART can set different rates of return for different networks, with the possibility for more frequent rate of return determinations (Recommendation 23).<sup>10</sup>

The remainder of this section provides TAHE's comments on each of these recommendations.

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<sup>4</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 85.

<sup>5</sup> Ibid, p 85.

<sup>6</sup> Ibid, p 90.

<sup>7</sup> Ibid, p 90.

<sup>8</sup> Ibid, p 90.

<sup>9</sup> Ibid, p 98.

<sup>10</sup> Ibid, p 100.

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## **It is important to clarify further IPART's role in setting asset lives, rather than the mine life**

IPART has a role under the current Undertaking to determine the remaining mine life for the TAHE HVCN, which access providers like TAHE are required to apply when determining the ceiling price for access charges. The mine life decision determines how depreciation of rail assets are allocated across time and allows for depreciation to be accelerated if the remaining mine life is less than the asset life.

However, the driver for transporting coal by rail in the Hunter Valley is decoupling from coal mine operations and moving toward other developments including the closure of coal fired power stations and the energy transition toward renewable generation. It is therefore appropriate to question whether determining mine life is the most appropriate approach to determine the depreciation allowance used in setting the ceiling price for access charges.

IPART is proposing several changes to its role in setting asset lives:

- instead of determining mine life, IPART would set asset lives according to rule-based criteria;<sup>11</sup>
- updates to the asset life would be more frequent than the current approach to mine life to respond more flexibly to developments as the energy transition continues.<sup>12</sup> The proposed change also allows for requests by parties to an access agreement to undertake a review of asset lives;<sup>13</sup> and
- allow for IPART to set different asset lives for different rail networks lines.

We welcome IPART's proposal to shift from determining mine life to asset lives for the TAHE HVCN and allowing for asset lives to be reviewed more frequently. Determining asset lives, instead of mine life, will allow for a broader set of factors affecting usage of rail infrastructure assets to be considered, which will increase in importance as the energy transition changes how rail infrastructure assets are used. That said, mine life might still be an important driver of asset stranding, and so could remain an important input for considering an appropriate asset life.

Importantly, for other TAHE networks, asset stranding risks are unlikely to be a relevant driver for determining depreciation.

However, in light of these proposed changes, there is a need to provide regulatory certainty for both access seekers and providers around how the proposed changes will operate. We recommend IPART provide greater clarity relating to:

- details of the 'rule-based criteria' and factors that IPART would need to take into consideration when determining asset lives;
- the circumstances that would trigger IPART determination of asset lives for a rail network; and
- the flexibility that IPART would have in modifying how it will determine asset lives.

Clarifying these matters will assist IPART in providing stakeholders with regulatory certainty, as well as preserving flexibility to consider accelerating depreciation in circumstances where rail infrastructure

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<sup>11</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 96.

<sup>12</sup> Ibid, p 96.

<sup>13</sup> Ibid, p 96.

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assets might otherwise become stranded. However, it will also ensure that IPART does not inappropriately extend its analysis to other parts of the network.

## **There is value in IPART continuing to set a rate of return for networks outside of the TAHE Hunter Valley Coal Network, even if access prices are not approaching the ceiling test**

The Undertaking requires IPART to approve a rate of return in percentage terms to be applied for a period of five years to the opening and closing regulated asset base.<sup>14</sup> However, current arrangements apply the same rate of return value across all NSW rail networks.

IPART is proposing to clarify its role in approving or setting the rate of return to allow it to set different network specific rates of return. This reflects an observation that each rail network can face different systemic risk profiles. Specifically, the HVCN might be considered as having lower systemic risks compared to other rail networks as the HVCN does not face competition from road in the transport of coal.<sup>15</sup>

Reflecting TAHE's submission, IPART has also proposed to introduce flexibility to the rate of return definition so that a value for the rate of return is not locked in for five years. Added flexibility in determining the rate of return allowing for annual updates to the cost of debt would allow IPART to apply its standard rate of return approach involving a trailing average cost of debt.<sup>16</sup>

We welcome IPART's proposed changes in determining the rate of return to allow different rates of return for each rail network that is more appropriate for their individual risk profiles. In choosing to set different rates of return, IPART implies that it intends to only set a rate of return based on the risk profiles of those networks where access prices are close to the ceiling test. However, there is merit in IPART continuing to set a rate of return for other networks as this provides a useful benchmark for access providers like TAHE that is seeking to align access prices more closely to commercial rate of return benchmarks.

We also welcome IPART's proposal to introduce flexibility in determining the rate of return to enable more timely adjustments to reflect changes in the financing and risk environment, the importance of which has been illustrated in recent months.

## **Major periodic maintenance capital expenditure and replacement capital expenditure should not be excluded from the definition of capital expenditure**

IPART makes a draft recommendation about the treatment of major periodic maintenance (MPM) capital expenditure, for the purposes of estimating the full economic costs. Specifically:<sup>17</sup>

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<sup>14</sup> NSW Rail Access Undertaking, 1999, Schedule 3, p 2.

<sup>15</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 99.

<sup>16</sup> Ibid, p 99.

<sup>17</sup> Ibid, p 90.

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19. That the following terms relating to how costs are calculated are amended to clarify that:

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, ie, asset replacement costs).

c. Depreciation only applies to assets that will foreseeably become obsolete (ie, assets that will be replaced should not be included in the depreciation allowance).

The practical effect of this recommendation is the exclusion of MPM capital expenditure and replacement capital expenditure from the asset roll forward methodology, and by implication an inability for this expenditure to be recovered through the allowance for a return on assets invested, and depreciation. Instead, these costs would be part of maintenance expenditure and so included in the definition of direct costs recovered from access seekers.

IPART explains that the intent of the recommendation is to exclude asset replacement costs from capital expenditure used in the asset roll forward methodology, specifically:<sup>18</sup>

We propose to amend this definition to exclude expenditure undertaken for the purpose of increasing the useful life of an asset, to make clear that it does not include asset replacement costs.

We understand that there are two motivations for IPART in excluding asset replacement costs from capital expenditure:

- IPART seems concerned about the potential for double counting of asset replacement costs (ie, MPM capex) because it considers that it is included in the definition of direct costs.<sup>19</sup>

**Direct Costs** means efficient, forward-looking costs which vary with the usage of a single operator within a 12 month period, plus a levelised charge for variable major periodic maintenance costs, but excluding depreciation.

Because MPM includes asset replacement costs, in other contexts MPM is included in the capital expenditure costs. However, because in the NSW rail access framework it is captured in the direct costs as a levelised charge, we do not want it to be also factored into capital expenditure (which would lead to double counting).

- IPART considers that MPM capex (or replacement capex) can be directly attributable to usage of the network and so should be included in the direct costs used in the floor test. When combined with the recommendation that the floor test be maintained, this would have a practical effect of increasing the lower bound of the pricing test.

Our detailed concerns arising from IPART recommendation are set out below.

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<sup>18</sup> Ibid, p 88.

<sup>19</sup> NSW Rail Access Undertaking 1999. Schedule 2, clause 2.1. IPART, *Review of the NSW Rail Access Undertaking – Draft Report*, October 2022, p 89.

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## There is no double counting of MPM in the definition of full economic costs

At a high-level, IPART's recommendation appears to be based on an assumption that the current definition of direct costs may result in the double counting of MPM costs.

TAHE can confirm that it accounts for MPM in the definition of full economic costs in two ways, namely:

- as operating MPM expenditure for which it is allocated between:
  - variable MPM expenditure, which varies with usage of the rail network by access seekers. This expenditure is levelised and included in the estimate of direct costs for each access seeker consistent with the definition set out in the Undertaking;
  - fixed MPM, which does not vary with usage of the rail network. This expenditure is not included in the estimate of direct costs, but is included in the definition of full incremental costs for all access seekers; and
- capital MPM expenditure, which is included in total capital expenditure and rolled into the regulatory asset base. MPM capital expenditure does not vary with usage of the network but involves the replacement of existing assets with modern equivalents, providing improved and additional functionality, reliability, safety and performance. It is recovered through the allowance for depreciation and a return on assets.

The operating MPM expenditure does not extend the asset life, whereas MPM capital expenditure (essentially replacement expenditure) does.

The exclusion of MPM capex from the definition of capital expenditure departs from generally accepted economic and accounting treatment of capital assets resulting from capital expenditure. Capital assets are generally recognised where it is probable that future economic benefits associated with that asset flow to the entity.<sup>20</sup> This includes subsequent costs such as replacement parts and enhancements for capital assets. In contrast, day-to-day, repairs and maintenance costs are not considered capital assets as they do not embody future economic benefits.<sup>21</sup>

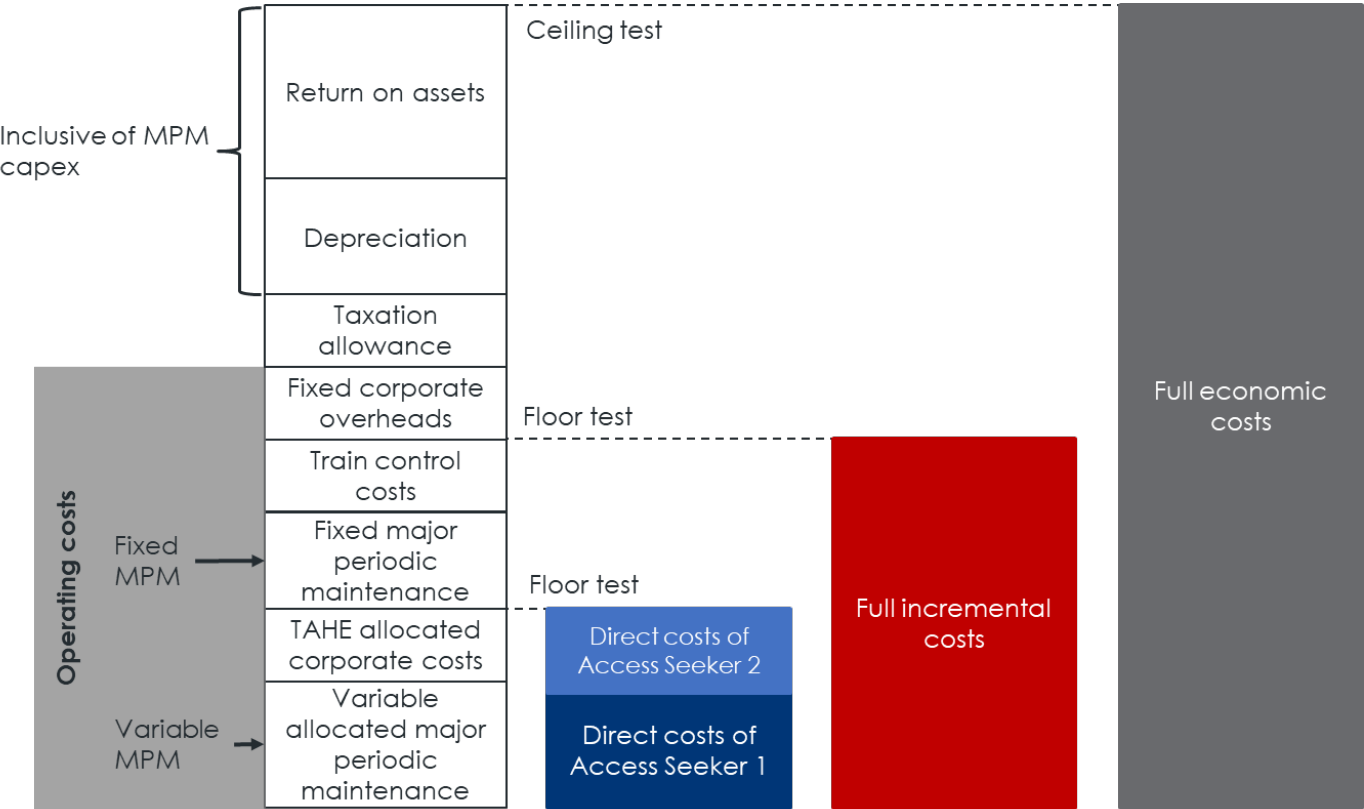
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<sup>20</sup> AASB, AASB 116 – Property, Plant and Equipment, December 2021, para 7 and 12-14.

<sup>21</sup> AASB, AASB 116 – Property, Plant and Equipment, December 2021, para 12.



Figure 1 Cost categories within each of the floor and ceiling tests for transport cluster costs



Importantly, these definitions and associated allocation of MPM between operating and capital expenditure reflect industry norms, and so reflect best practices in the rail industry. Further, TAHE and Sydney Trains as the Rail Infrastructure Manager applies accounting principles to allocate MPM costs between operating and capital expenditure. This is consistent with approaches used in other regulated network infrastructure businesses. It follows that there is no practical, financial or economic basis for excluding replacement capex (ie MPM capex) from the asset roll forward methodology.

It further follows that TAHE considers that concerns about double counting of MPM expenditure is not a ground for excluding MPM capex (or replacement expenditure) from the definition of capex used in the roll forward methodology. Following the recommendation would be a departure from a generally accepted understanding of what constitutes capital expenditure.

## MPM capex is unrelated to usage of the network

We do not consider MPM capex should be included in the definition of direct costs for the purpose of the efficient pricing bounds. IPART’s proposition that MPM capex is related to usage of the network is not consistent with the nature of the replacement expenditure that is included in MPM capex.

Typically, this expenditure relates to end-of-life track and turnout reconstruction and renewals, substation replacements, and replacement of control systems, amongst other things. It follows that this expenditure is more appropriately recovered through a return of and on the expenditure, through its inclusion in the regulatory asset base.

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## There is a need to clarify and simplify the access pricing principles

As the owner of significant rail infrastructure and assets in NSW, TAHE is cognisant of the inherent market power conferred by the ownership of monopoly rail network assets. However, that market power is constrained for most of TAHE's rail networks because:

- there is competition with road infrastructure for the provision of freight services; and
- passenger services are provided by government-owned rail providers.

The history of access prices in NSW, which have never been close to full economic costs except for in the TAHE HVCN highlights that the exercise of market power in the setting of access prices should be of little concern as part of the regulatory framework for much of the rail network in NSW.

It follows that we consider there is a need to clarify and simplify access pricing principles, so as to recognise the relatively low risk of access providers exercising market power when there are opportunities for competition in the provision of rail infrastructure services. In these instances, simplification can lead to compliance cost savings for stakeholders.

The exception is for the TAHE HVCN. That said, TAHE has put in place processes to ensure that access prices reflect full economic costs taking into account the prevailing unders and overs account balance.

TAHE considers that there would be merit in clarifying and simplifying the access pricing principles, as part of the development of the legislative principles and regulations, following IPART's review.

Developing clear and simple pricing principles improves regulatory certainty and reduces costs for access seekers and providers alike who must engage with each other under the access regime. Clear and simple pricing principles can also reduce demand on IPART (and costs to the public) that would otherwise be required under an unnecessarily complex access regime.

Given the minimal risk and the potential benefits that can be realised, we encourage IPART to consider how the pricing principles could be simplified and brought into line with those applying to other infrastructure sectors. The development of such principles can take place alongside the consideration of proposed legislation to reform the rail access regime.

## Has access been provided at a price below the direct costs?

In general, TAHE aims to provide rail infrastructure access at a price sufficient to recover at least the direct costs of access. This applies to access provided on the MRN-Passenger, MRN-Freight, HVCN and NSRC rail networks where access revenues are larger than direct costs or maintenance costs.<sup>22</sup>

However, there are two exceptions where it is unknown whether direct costs are fully recovered, or where access is known to have been provided below direct costs. These two exceptions reflect special circumstances where access on a cost recovery basis would not be appropriate:

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<sup>22</sup> Maintenance costs considered here as a proxy for direct costs for those networks where direct costs have not been calculated. Direct costs mainly relate to direct maintenance costs but will also include direct operation costs. Where access revenue is higher than maintenance costs, then it is highly likely access revenues will exceed direct costs.

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- **CRN:** access fees received for the CRN are less than direct cost, which reflects a policy of the NSW government to promote and underwrite rail transport connections to country NSW. Losses incurred by TAHE from providing access to the CRN is covered by the NSW government by way of a transparent community service obligation grant. These grants allow TAHE to maintain CRN rail access services and fund the direct costs notwithstanding access fees being less than direct costs.
  - **MRN-Heritage:** TAHE provides access to four heritage rail operators on limited parts of the MRN. The heritage rail operators are not-for-profit organisations that maintain heritage assets and have limited operations on TAHE's rail networks that have an immaterial effect on network costs or on other access seekers. TAHE has therefore approached access for heritage operators proportionately to their impact with consideration to the nature of their heritage operations. Consequently, TAHE have only charged a total of approximately \$80,000 in 2021/22 from access fees from heritage operators, that contributes to direct costs but without reference to its recovery.

TAHE does not consider there are any material concerns with the current approach to setting access fees, and the recovery of direct costs. That said, it supports the general principle that access fees should be set to recover at least the direct costs, and if not, a transparent community service obligation payment is provided to the access provider.

## **What characteristics distinguish one type of rail service from another, which could lead to different prices?**

IPART is proposing a new pricing principle be adopted to prevent access prices distorting competition in downstream markets,<sup>23</sup> citing precedents for regulatory pricing rules against anti-competitive price discrimination.

TAHE does not agree with introducing a new pricing principle that prohibits efficient price discrimination. As IPART noted, regulatory pricing rules against anti-competitive price discrimination are normally focused on vertically integrated access providers to prevent them from setting terms and conditions that discriminate in favour of its own downstream operations.<sup>24</sup>

Both TAHE and ARTC are not vertically integrated access providers and do not have commercial or operational interests in downstream markets. It follows that TAHE has no incentive to discriminate in favour of its own downstream operations as it does not have downstream operations.

Justification for introducing regulatory pricing rules against anti-competitive price discrimination must therefore be based on promoting efficiency in another market.

Price discrimination between different access seekers may have a distortive effect if access seekers are identical, in that their revenue and cost structures are the same. Under such conditions, cost savings granted by the access provider would provide an access seeker an advantage relative to its competitors. However, access seekers on our networks have different non-price requirements that reflect the operational circumstances, which translates to different costs that are incurred by TAHE in

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<sup>23</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 85.

<sup>24</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 84.

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providing access. The characteristics that distinguish rail services that could lead to different prices include:

- different impacts on the costs of providing infrastructure services, due to rail loads;
- the number and frequency of access to rail sectors;
- the responsiveness of an access seeker to changes in prices (ie, it is efficient to charge a higher price to a rail access seeker who is less responsive to price changes, than one that is more responsive even if they are competing in a downstream market).

We consider that allowing commercial negotiations for both price and non-price conditions will enable access that is more flexible, targeted and customised to access seekers' requirements. In economic terms, allowing price discrimination would expand supply (in terms of quantity and/or quality) that would have the effect of promoting economic welfare.

Practically, TAHE is concerned that the rule may have implications for how TAHE determines fixed access prices between NSW Trains and Sydney Trains for the use of the MRN.

It follows that TAHE would advise against IPART introducing regulatory pricing rules against anti-competitive price discrimination.

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# Dispute resolution under an enhanced NSW rail access framework

## IPART's proposed dispute resolution mechanisms

Dispute resolution mechanisms are important for the process of negotiating an access agreement between access seekers and access providers. It provides incentives for the parties to negotiate the agreement in good faith and in a manner consistent with the access framework. It also provides the mechanism for parties to seek recourse in circumstances where one party is not complying with the specific terms of the access agreement.

IPART highlighted concerns that the high costs and risks of accessing arbitration meant that it acted as a poor constraint on access seekers exercising market power.

IPART's solution to this involved draft recommendations to:<sup>25</sup>

- introduce conciliation as another lower cost form of dispute resolution that is available to access seekers; and
- introduce an automatic dispute trigger linked to the expiration of the maximum negotiation time period (unless there is prior agreement by all parties).

The remainder of this section sets out TAHE's responses to each of these recommendations and makes a further recommendation about the role of IPART in the arbitration process.

## TAHE supports the shift to greater use of lower cost forms of dispute resolution including conciliation

Conciliation, mediation and other lower cost forms of dispute resolution are increasingly part of the mix of approaches to resolve disagreements in commercial contracts. They provide a structure to cost-effectively resolve disputes, through direct engagement, working with an independent third party.

TAHE supports IPART's recommendation to provide access seekers with the option to use conciliation.

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<sup>25</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 44, Draft recommendation 8.

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## **TAHE supports an automatic trigger for disputes arising from failure to reach agreement on the terms of an access agreement negotiation**

IPART's proposal provides for an automatic dispute resolution trigger if the parties fail to reach agreement within a 3-month negotiation period.

TAHE is supportive of such a trigger, as it promotes good faith negotiation by the parties to reach agreement to avoid dispute resolution. However, we consider a 4-month trigger is more appropriate to ensure time for both access seeker and access provider internal processes.

As part of IPART's guidance on dispute resolution, TAHE considers that there is merit in assessing whether the failure to reach agreement is due to material concerns with the proposed agreement, to avoid frivolous dispute resolution processes. In addition, a party that fails to accept an access agreement following dispute resolution, should be prevented from being involved in a subsequent access dispute on the same network for a period of 12 months.

## **Commercial arbitration is preferred for access agreement disputes**

Recognising that IPART's core activities do not involve hearing access disputes, TAHE considers that any disputes arising from an access agreement negotiation or access agreement would be most appropriately conducted by a commercial arbitrator.

For disputes associated with the negotiation of access, a complainant should be able to raise concerns with IPART, who would then appoint a commercial arbitrator through an approved panel, to hear and resolve the dispute.

This approach is consistent with both the current and planned new arrangements for non-scheme gas pipelines regulated under Part 23 of the National Gas Rules. These rules limit the role of the Australian Energy Regulator to a scheme administrator, supporting (with a non-binding guideline) the selection of the arbitrator. Like the National Gas Rules, IPART could administer the arbitration process, supported by non-binding guidance to provide pool arbitrators, prospective network users and service providers with guidance about the process for requesting access and the determination of access disputes.

For disputes arising over the course of an access agreement, the dispute resolution mechanism within the agreement should be the basis for resolving disputes. TAHE expects that this would also involve conciliation and commercial arbitration, with the arbiter to be appointed by the parties. This is consistent with good commercial practice and would also ensure that the arbitration is conducted by an experienced arbiter that can appropriately resolve the issues at hand.



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# Compliance and enforcement mechanisms under an enhanced NSW rail access framework

The NSW rail access regulatory framework is intended to provide incentives to promote efficient use of and investment in rail infrastructure to promote customer value. The compliance and enforcement mechanisms within the framework are an important contributor to those incentives.

In this section, we set out TAHE's response to IPART's proposals on compliance and enforcement.

## IPART's proposed compliance and enforcement mechanisms

IPART's draft recommendations if implemented, would represent an expansion of compliance and enforcement mechanisms compared to the current Undertaking, with the intention to provide enhanced incentives for achievement of regulatory objectives.

In summary, the compliance framework involves:

- IPART developing binding guidelines on information disclosure, the procedure for arbitration, and compliance and enforcement guidelines;
- IPART approving binding technical guidelines that have been developed by appropriate experts on price and non-price terms and conditions of access;
- IPART approving proposed undertakings to ensure compliance with the regulatory framework requirements;
- annual compliance checking of rail access outcomes;
- obligations on access providers to declare that they have complied with all requirements of the NSW rail access framework; and
- self-reporting obligations of any instances of non-compliance.

This approach provides IPART with several proactive opportunities to ensure that the access agreements comply with regulatory requirements.

IPART is also proposing to include express investigative and enforcement powers within the NSW rail access framework. Specifically, IPART is recommending that it be given powers to:

- self-initiate an investigation of suspected non-compliance, with powers to compel the provision of information as part of the investigation;
- accept court-enforceable undertakings from access providers to remedy non-compliance;

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- direct an access provider to remedy non-compliance; and
  - seek a court order to:
    - require compliance with our directions or an enforceable undertaking; and
    - impose civil pecuniary penalties for continuing non-compliance or egregious breaches.

IPART suggests these investigation and enforcement powers would bring the NSW rail access framework into line with similar provisions in the rail access frameworks in Queensland, South Australia and Western Australia.

## **Opportunity to refine annual compliance process**

TAHE supports compliance processes that provide effective incentives for achieving the access framework objectives, while being proportionate to the regulatory risks involved.

As indicated earlier, we consider that IPART need not have a role in developing binding guidelines for information disclosure and technical matters, as these are likely best developed by access providers through new engagement processes as part of the access framework. As with current guidelines, these could be issued by the Minister. The Minister could seek review and recommendations from IPART that the guidelines are consistent with any principles established.

In addition, we consider that there is a need to refine the IPART annual compliance process, to ensure that it is fit-for-purpose while providing transparency on compliance.

Specifically, TAHE proposes that:

- access providers submit an annual compliance statement and declaration, consistent with IPART's recommendations, in circumstances where total access price revenue has exceeded or is expected to exceed 80 per cent of estimated full economic costs; and
- for all other networks, an access provider be required to annually publish information on access fee revenue, its full economic costs and associated cost components, and a declaration on compliance. For these networks, there would be no formal annual compliance review conducted by IPART; and
- IPART conduct a compliance review every five years for those networks where total access price revenue is below 80 per cent of estimated full economic costs.

For TAHE this approach would practically result in an annual compliance statement for the TAHE HVCN, with the remaining networks (ie, the Metropolitan Rail Network and Country Regional Network, etc) undertaking an IPART compliance review every five years.

In addition, TAHE is supportive of IPART's proposal for self-reporting by access seekers and access providers to IPART of instances of non-compliance with the access framework.

TAHE considers that this approach to compliance is proportionate to the risks of non-compliance and the materiality of consequences of non-compliance on the regulatory objectives.

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## **IPART's proposed investigative powers should be limited to self-reported non-compliances or circumstances where it receives a complaint**

IPART is recommending the NSW government grant it investigative powers for monitoring and gathering information to determine whether an access provider has complied with the NSW rail access framework.<sup>26</sup> These investigative powers would allow IPART to conduct investigations and require any relevant entity to provide information, documents and evidence.<sup>27</sup>

While we agree investigative powers would be useful for IPART in its role of ensuring compliance, it would be best if those investigative powers were triggered by a self-reported material breach or complaint in relation to a specific non-compliance.

This is because an IPART investigation will impose costs on access seekers and providers to comply with IPART requirements. We acknowledge that these costs are sometimes justified where benefits of an investigation exceed its costs. It is not immediately clear that IPART is in the most advantageous position to judge whether an investigation would yield net benefits or just impose costs. In the worst-case scenario, IPART investigations initiated on an incorrect belief of the existence of compliance breaches would impose compliance costs on access seekers and providers without the prospect of providing any tangible benefits. In contrast, if IPART investigations are instigated by complaints from access seekers, then it can have some comfort that the access seeker has deemed that the benefits from an investigation are likely to exceed its costs.

Finally, TAHE is confident that to the extent that access seekers are concerned about compliance, complaints will be made to IPART requesting an investigation. It follows that this approach would reduce the regulatory compliance costs, while focusing efforts on those issues that a complainant considers is of critical importance, as evidenced through a request for IPART to investigate.

## **Proposed enforcement powers should be targeted**

IPART has proposed to introduce enforcement powers that would allow it to:

- accept enforceable undertakings from access providers to remedy non-compliance;
- issue a direction to an access provider requiring them to remedy non-compliance;
- seek a court order to require compliance with IPART's directions or an enforceable undertaking; and
- seek the imposition of civil pecuniary penalties for serious breaches, including failure to comply with the information disclosure requirement, submit an annual compliance statement, return overpayments to access seekers, and comply with a direction to remedy non-compliance.

IPART's proposed introduction of enforcement powers seeks to address the perceived lack of ability for the regulator to prevent monopoly pricing and enforce compliance outside of arbitration.<sup>28</sup>

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<sup>26</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 126.

<sup>27</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 126.

<sup>28</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p 6 and 123-124.

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We recognise the potential benefits of an IPART enforcement mechanism and note that the motivation for the exercise of enforcement powers must be clear and precise to prevent regulatory overreach that could otherwise harm legitimate commercial interests of access seekers and providers under the negotiate-arbitrate form of regulation.

Enforcement actions should only be undertaken in circumstances where:

- other avenues to remedy a perceived non-compliance has been exhausted, including arbitration; and
- it is likely that enforcement actions would contribute to an overarching objective of the access regime, which is to promote the efficient use of, and investment in, rail infrastructure.

Outside of these conditions, IPART, as an enforcement agency, risks intervening in commercial matters between access seekers and access providers that substantially increases regulatory compliance costs and disrupts commercial arrangements formed under a negotiate-arbitrate model, from a less than ideal position. As IPART notes:<sup>29</sup>

negotiate-arbitrate model recognises that the parties to a commercial transaction are better informed than the regulator about costs and service requirements

It follows that we recommend IPART set out clear and precise conditions for when any enforcement powers would be used, including limiting enforcement action to IPART's role as part of its investigation function, to avoid enforcement overreach and promote regulatory certainty within the negotiate-arbitrate form of regulation.

## **An effective approach to compliance and enforcement**

TAHE's envisages the use of active customer engagement, performance monitoring and assurance as being key to developing a culture of compliance with access framework requirements and associated access agreements.

However, should any party (ie access seekers or the access provider) be concerned about compliance, the framework should:

- provide for commercial conciliation or arbitration between access provider (or other party responsible for providing an access function) and an access seeker;
- allow any party to ask IPART to investigate compliance of the access agreement or guidelines with the requirements of the legislation and regulations; and
- provide IPART with enforcement powers to compel compliance with its decisions arising from a review of compliance of an access agreement or guideline.

We consider this approach:

- retains strong compliance and enforcement incentives to all parties involved in the provision of rail infrastructure services; and

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<sup>29</sup> IPART, Review of the NSW Rail Access Undertaking – Draft Report, October 2022, p iv.

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- focuses compliance and enforcement effort on those matters of most concern and significance of access seekers.

# Attachment A – Detailed responses to IPART’s recommendations

Draft recommendation	TAHE Response
<p>1 The <i>Transport Administration Act</i> 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.</p>	<p>TAHE supports having flexibility to have a different undertaking for different networks.</p> <p>Additionally, we consider that IPART might want to consider the role of an undertaking within the proposed legal structure for the regulatory framework. We recognise that regulatory reforms in other industries (for example in electricity and gas) have resulted in principles being set out in legislation with more detailed guidance set out in regulations.</p>
<p>2 The <i>Transport Administration Act</i> be amended so that undertakings under Schedule 6AA be:</p>	
<p>a) Required to include details on how the rail access provider would apply the non-price provisions, the price provisions, the investment consultation provisions, and the unders and overs account and loss capitalisation accounts (where relevant).</p>	<p>To accelerate the pace of change, TAHE supports progressing as a matter of priority any elements of the proposed reforms that can be implemented administratively within existing mechanisms to deliver improved outcomes.</p> <p>This would allow tangible benefits to commence concurrently with consideration of requirements for further regulatory reform, and so be implemented in a staged way. Such a staged approach would also enable a period of review, to consider and address unintended consequences.</p>
<p>b) Assessed and approved by IPART, according to criteria set out in the Act, and within specified timeframes. Where the requirements for an</p>	<p>We agree that any approval should be granted in accordance with legislated decision-making criteria. The undertaking should provide for effective commercial negotiations between access seekers and access</p>

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undertaking are not met, IPART would prepare and approve an undertaking.	<p>providers. Accordingly, the approval process should afford an access provider the opportunity to amend its draft undertaking if approval is not granted.</p> <p>TAHE supports undertakings (if required) being approved by the Minister. IPART could provide a review role and make recommendations to the Minister.</p> <p>A default undertaking should only be prepared where the access provider has demonstrated an inability or unwillingness to prepare draft undertakings.</p>
c) Reviewed at least every 10 years.	We agree with the practice to review regulatory arrangements at least every 10 years.
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.	We consider that it is important for the framework applying to TAHE to be capable of being certified to provide regulatory certainty in relation to potential declarations under <i>Part IIIA of the Competition and Consumer Act</i> that could otherwise have a material effect on TAHE and its stakeholders. That said, we do not consider that the framework needs to be certified.
4 The new regulatory arrangements should be reviewed 10 years after being introduced.	Agree. Refer to comment on recommendation 2(c).
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 owner, the rail infrastructure manager, or the NSW transport department.	<p>We understand that having multiple parties responsible for different elements of access leads to frustration for some access seekers and needs to be better addressed to increase efficiency. We acknowledge and support in principle the need for a single point of accountability.</p> <p>When the NSW government considers the merits of a single accountable entity it should include whether it is most administratively simple for the same single entity to be accountable for each of TAHE's networks.</p>
6 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.	TAHE support the NSW Government reviewing and recommending which entity would be best placed to be the single accountable entity for each rail network, and considers it is well placed to undertake that role for its own networks.
7 The NSW rail access framework be amended to:	



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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	We consider a four-month period would be more appropriate, especially to recognise the timeframes of some access seekers internal approval processes.
b) provide for collective negotiations, where they are lawful and there is a sufficiently common interest among access seekers	We support the principle of providing for collective negotiation by rail operators that have been authorised by the Australian Competition and Consumer Commission ( <b>ACCC</b> ) or an appropriate body.
c) extend the duty to negotiate in good faith to all negotiating parties.	We recognise the benefit in a requirement for all parties negotiating in good faith.
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.	We agree that introducing a conciliation mechanism could reduce the barriers to dispute resolution and provide for improved outcomes from the framework. We consider that both access seekers and access providers should be able to seek conciliation as the first step of a dispute resolution process.
9 That an automatic dispute resolution trigger should be introduced into the NSW rail access framework that would require the 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).	<p>We agree that an auto trigger could reduce the barriers to dispute resolution. We suggest the trigger should reflect an extended four-month time period provided for negotiations suggested in our response to recommendation 7.</p> <p>We consider the auto-trigger approach would need to be consistent with the IPART view that access seekers who refuse to take up access under the dispute determination outcome would be prevented from triggering a new dispute within 12 months.</p>
10 That IPART should update its access arbitration practice directions to provide greater clarity and guidance on matters including:	<p>TAHE considers that a regulatory dispute resolution mechanism that may ultimately lead to arbitration should first provide for mediation (that can be requested by either party) with arbitration undertaken by a suitable professional body.</p> <p>Recognising that IPART's core activities do not involve hearing access disputes, we support an outcome where commercial arbitration, when required, is undertaken through an approved panel only. This would be consistent with both current and the planned new arrangements for non-scheme gas pipelines regulated under Part 23 of the National Gas Rules. These rules limit the role for the Australian Energy Regulator (<b>AER</b>) to a scheme administrator, supporting (with an AER non-binding guideline) the</p>

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	<p>selection of the arbitrator. Similar to the National Gas Rules, this could be supported by non-binding guidance to provide pool arbitrators, prospective users and service providers guidance about the process for requesting access and the determination of access disputes.</p> <p>For clarity, regulatory disputes regarding obtaining access should be kept separate from any dispute resolution mechanism contained in individual access agreements.</p>
a) that the arbitrator may make an interim access determination	Agree, noting TAHE's first preference is for a commercial arbitrator model and IPART's role is limited to scheme administrator.
b) that related arbitral proceedings may be consolidated and heard at the same time (for example, a dispute between an access provider and multiple access seekers)	Agree, noting TAHE's first preference is for a commercial arbitrator model and IPART's role is limited to scheme administrator.
c) when IPART will exercise its discretion to appoint an alternative arbitrator from a Minister approved panel	Agree, noting TAHE's first preference is for a commercial arbitrator model and IPART's role is limited to scheme administrator.
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	Agree, noting TAHE's first preference is for a commercial arbitrator model and IPART's role is limited to scheme administrator.
e) setting an indicative cap on the time that arbitrators have to make a determination.	Agree, noting TAHE's first preference is for a commercial arbitrator model and IPART's role is limited to scheme administrator.
11 That, in addition to the current information disclosure requirements in the NSW Undertaking, the rail access provider be required to publish:	<p>The additional disclosure requirements are only beneficial when access revenue approaches the full economic cost of the provision of that access, such as for the Hunter Valley Coal Network. We support a trigger being applied for this information to be made available. For example, when access revenue exceeds 80 per cent of the full economic cost.</p> <p>Requiring this information disclosure in other circumstances increases administrative burden for no additional benefit.</p>
a) standard services offered by the rail network and details of any limitations on availability	Agree on the basis this has been triggered by revenue exceeding a threshold of the full economic test.

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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	Agree on the basis this has been triggered by revenue exceeding a threshold of the full economic test.
c)	standard access agreement/s, including the default terms and conditions of access for standard services that comply with the required non-price provisions	We consider this would provide limited additional benefit given the small number of access seekers.
d)	individual prices paid by all customers and the services to which they relate	This needs additional consideration given publishing individual prices paid would need to comply with confidentiality requirements and may require counter-party agreement to disclose. Discrete access seeker cost negotiations and terms and conditions should be protected and not disclosed to third parties.
e)	network development plan/s, including information on planned network investments and capital works programs	<p>We agree with providing summary network development plans as part of information disclosures. However, detailed network development plans that affect operational decision making requires consultation with access seekers.</p> <p>More detailed consultation on the network development plans and capital programs should take place with all rail operators. However, the degree of consultation should be directly related to the level of usage and that operator's willingness to fund or identify funding to meet the full cost of the program.</p>
f)	key performance indicators that access providers could assess the rail access provider's performance against.	Agree.
12	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:	These information requirements are overly onerous in the context of rail access in NSW. They are intended to address market power concerns, but those are best dealt with by the pricing bounds, which makes this additional information redundant.
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	

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c) other information as set out in IPART's information disclosure document.	
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).	We agree this is a reasonable timeframe to respond.
14 That IPART should publish an enforceable disclosure guideline to provide further detail on what information rail access providers must publish, including:	<p>The information disclosure requirements should be proportional to the issues being addressed. A broad requirement for the same level of information disclosure for all networks or classes of access seekers may only impose compliance costs on access providers without conferring any additional benefits.</p> <p>Each element of information disclosure should be based on an assessment of the problem/need it is seeking to address, and the relative costs and benefits.</p>
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.	
15 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>We understand that the key non-price provisions deemed as problematic by freight access seekers are the standard working timetable, daily working timetable, real time capacity allocations, and rolling stock approvals &amp; waivers.</p> <p>Given the technical nature of these non-price provisions, IPART should consider whether the undertaking is the most appropriate location for these requirements. The responsibility to develop the detailed guidelines and procedures should be placed on the organisation with the corresponding delivery responsibility. Rather than an assessment by IPART, the process of assurance could involve monitoring, reporting and publishing compliance and performance (potentially by the single accountable entity).</p> <p>TAHE supports the inclusion of service level KPIs within access agreements.</p>
a) That the access provider allocate capacity according to well-defined steps that meet competitive neutrality and efficiency tests.	
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.	

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<p>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.</p> <p>f) Where access seekers request investment in expanded capacity, the access provider proceeds if it can recover costs from access seekers.</p> <p>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.</p> <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"> <li>– the access provider provides train paths and infrastructure that are fit for purpose, and</li> <li>– access holders ensure each train movement is fit for purpose.</li> </ul>	
<p>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 non-price provisions in an undertaking.</p>	<p>A guidance document on minimum criteria relating to non-price provisions necessarily relates to the operations of the rail network, including but not limited to:</p> <ul style="list-style-type: none"> <li>– capacity allocation</li> <li>– removing access rights</li> <li>– long term use based on efficiency</li> <li>– adjoining network consultation in maintenance planning</li> <li>– investment provision</li> <li>– suitability of an operator to operate trains/KPI.</li> </ul> <p>We do not agree that IPART as an economic regulator is appropriately placed to provide criteria on operational aspects of rail network operations. However, at the request of the Minister, it may be able to provide review and recommendations on how guidelines are consistent with legislation and regulations.</p> <p>These guidelines should be issued by the Minister.</p>

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<p>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.</p>	<p>We agree with retaining the ceiling and floor tests. However, we consider the revenue cap should also be retained.</p> <p>The pricing principles state that the ceiling test can be applied “for any access seeker or group of access seekers”. Therefore, when applying this on individual access seeker basis there may not be a breach of the ceiling test. However, in combination the sum of revenue from these access seekers may exceed the full economic cost without the revenue cap requirement.</p>
<p>18 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>	<p>While we do not consider that there is evidence of hold up strategies on TAHE’s networks being applied, we agree that prices should adjust over time to reflect appropriate cost changes.</p>
<p>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>	<p>We disagree that there needs to be a requirement for access prices to be the same where access seekers participate in the same downstream markets because:</p> <ul style="list-style-type: none"> <li>– TAHE is not vertically integrated into downstream markets, and therefore does not have incentives to price discriminate to advantage its own downstream operations’ and</li> <li>– price discrimination of access seekers that have different responsiveness to prices allows for better utilisation of rail infrastructure and provide more services, which promotes the efficient use of rail infrastructure.</li> </ul>
<p>19 That the following terms relating to how costs are calculated are amended to clarify that:</p>	
<p>a) Full economic costs include 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>Agree. This is a minor clarification of existing practice.</p>
<p>b) Capital expenditure only includes capital expenditure that is undertaken for the purpose of increasing capacity or service quality</p>	<p>As discussed in the body of our response, TAHE considers that this recommendation is flawed and should be excluded from IPART’s final report.</p>

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(and not for the purpose of extending the useful life of an asset, i.e. asset replacement costs).	
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).	As discussed in the body of our response, TAHE considers that this recommendation is flawed and should be excluded from IPART's final report.
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).	TAHE agrees that the regulatory asset base should continue to be valued using the DORC methodology for the purpose of the regulatory pricing bounds.
21 That IPART continues to set key inputs to the ceiling test:	
a) the asset lives used to calculate the rate of depreciation	Agree that IPART should continue to determine key inputs into the ceiling test and that asset lives should be used to calculate the rate of depreciation for the TAHE HVCN. Critical to this will be the development of the appropriate methodology.
b) the rate of return.	Agree that IPART should continue to determine the rate of return.
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.	We support the move from mine life to asset life when determining inputs for depreciation. Asset life allows for broader consideration of likely use of rail infrastructure and the risk of stranding more broadly than just mine life. However, it is important to recognise that use of the HVCN will likely continue to be associated with the transport of coal, and therefore the determination of asset life for HVCN assets will likely to be predominantly influenced by the life of coal related activities in the Hunter Valley.
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.	In general, we agree that IPART should set asset lives for any network where assets are likely to become obsolete. Each network should be considered individually.



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<p>c) Clarify that IPART can determine different asset lives for different line sectors within a network.</p>	<p>However, for TAHE HVCN asset life is most appropriately reflective of usage of the network derived from coal transport, including mine and coal fired power plant operations, despite the presence of some passenger and freight services.</p> <p>This is because usage of the network derived from coal transport represents the majority of usage on TAHE HVCN. Discontinuing coal related access on the network would effectively be stranding the TAHE HVCN. It follows that accelerated depreciation based on an asset life that is reflective of coal transport activities would be appropriate.</p> <p>An asset life for TAHE HVCN reflective of coal transport activities is consistent with IPART's past benchmarking of TAHE HVCN where it was assumed that the network only provided coal related access.</p>
<p>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:</p> <ul style="list-style-type: none"> <li>– 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</li> <li>– there would be a substantial impact on the ceiling test, and</li> <li>– 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.</li> </ul>	<p>We agree with IPART that there should be the option of determining asset lives more frequently such that it allows incorporation of future developments in how rail networks are being used.</p> <p>We support the recommendation that stakeholders would be able to request IPART to determine asset lives where there is likely to be a material change to asset lives. We note there might be some ambiguity in how a 'substantial' impact is interpreted and the concept of a 'material' impact is more widely used in regulation and may be more appropriate.</p>
<p>23 That the provisions around how IPART sets the rate of return are updated to:</p>	
<p>a) clarify that IPART can set a different rate of return for different networks</p>	<p>We agree. We also consider it would be beneficial for IPART to set a benchmark rate of return for all TAHE networks.</p>
<p>b) remove the requirement for the rate of return value to be locked in for five years.</p>	<p>We agree that there should be flexibility for the rate or return to align to IPART's standard rate or return approach. Consideration should be given to the timing of the updates and how this would interact with the calculation of the ceiling tests.</p>

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24 The unders and overs accounts provisions be amended to:	
a) specify that the account is only established once access revenues exceed the ceiling test	Agree as this is consistent with existing practice. Consideration should also be given to what criteria might be applied for when the requirement for keeping an unders and overs account falls away.
b) require that access providers submit an annual reconciliation of the unders and overs account to IPART within 4 months of the publication of a compliance determination	Agree.
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:	We support the concept of returning any future over recoveries within a reasonable timeframe. However, to avoid unnecessary access price fluctuations arising, over-recovery balances should be dealt with separately. Options should also be explored where over-recoveries are returned through future price adjustments rather than lump sum approaches as these can be formulaic and less administratively burdensome.
– the access provider attempt to return the account balance to zero each year	We consider the final principles and requirements should be consistent with the option developed to return over-recoveries.
– the unders and overs account balance should not exceed +/- 5 percent of forecast access revenue.	We consider the final principles and requirements should be consistent with the option developed to return over-recoveries.
25 That access providers be required to include a consultation policy in their undertaking for IPART's approval that sets out:	Having a consultation policy is good regulatory practice. Consideration should be given to whether this best sits within legislation, regulations or an undertaking. It is unclear what benefit there is for IPART to approve the policy. Compliance incentives can be achieved through any party requesting IPART to investigate non-compliance if compliance with the requirements of the regulatory framework is of concern.
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)	This should only be a requirement to the extent that the capital expenditure is to be funded by access seekers.
b) how the access provider will work with access seekers to determine the source of funding for each capital expenditure project	This should only be a requirement to the extent that the capital expenditure is to be funded by access seekers.

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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.	This should only be a requirement to the extent that the capital expenditure is to be funded by access seekers.
26 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 undertaking for IPART approval for how they would recover these losses over time.	We agree that losses should be recovered consistent with the over-recovery framework.
27 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>TAHE supports compliance processes that provide effective incentives for achieving the regulatory framework objectives, while being proportionate to the risks involved.</p> <p>The value in compliance reporting is where a reasonable risk of breaching the ceiling test arises. We therefore consider that IPART's proposed annual compliance process should be limited to circumstances where access revenues are near to (such as 80% of) estimates of the full economic cost.</p> <p>To address any further concerns, the access provider should be required to publish information on its access price revenue compared to an estimate of the full economic cost (ie the ceiling test), annually, but there be no requirement for IPART to review this annually.</p>
a) the ceiling test	Agree, for those networks where access revenues are near to estimates of the full economic costs.
b) the asset valuation roll forward principles	Agree, for those networks where access revenues are near to estimates of the full economic costs.
c) the floor test (this is a new requirement).	Agree for all networks, to improve transparency about access prices and community service obligation payments where relevant.
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.	Agree that there should not be a requirement to demonstrate revenue is below 80% of the ceiling test. As noted in the responses above, the 80% test should be a trigger for when annual compliance reporting is triggered for a particular network.
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	Agree that this is good regulatory practice.

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all required information within the required timeframes and consistent with IPART's information standard, or self-report any instances of non-compliance.	
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.	We recognise that IPART may need appropriate powers to investigate non-compliance. However, these should not be self-initiated and should only be in response to complaints made or self-reported non-compliances.
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:	We recognise enforcement powers provide potential benefits to access seekers by providing them with assurance that the access providers have the incentive and motivation to identify, remediate and resolve issues.
– accepting enforceable undertakings	However, the exercise of enforcement (and investigative) powers need to be careful and focused such that:
– issuing written directions	
– seeking court orders	<ul style="list-style-type: none"> <li>– commercial processes between access seekers and access providers are respected and provided with the best chance of success;</li> <li>– the exercise of investigative and enforcement powers by IPART is likely to promote the efficient and sustainable use and investment in rail infrastructure; and</li> <li>– they are proportionate to the issue at hand without imposing undue compliance costs or regulatory uncertainty.</li> </ul>
– seeking pecuniary penalties.	Pecuniary penalties should only be sought where other enforcement powers have not produced desirable outcomes.
32 That an access provider must:	
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	Agree.
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.	Agree.