

Review of the NSW Rail Access Undertaking

Transport for NSW submission to the Independent Pricing and Regulatory Tribunal of NSW

February 2023

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Introduction

Transport for NSW (TfNSW) welcomes IPART's review and Draft Report concerning third-party access to rail infrastructure in NSW, commissioned by the Minister for Customer Service. TfNSW supports IPART's objectives and recognises the need for meaningful change to the current NSW rail access framework.

TfNSW acknowledges that the NSW rail access framework has not been substantially reviewed or updated in over 20 years, despite significant changes occurring during that period. TfNSW understands that IPART is continuing to engage with stakeholders in preparing its final report.

TfNSW supports a principles-based approach to access arrangements, as proposed by IPART. However, it is suggested that this should include considerations as to whether:

1. regulated access is needed for the rail networks to which the current NSW Rail Access Undertaking (**Undertaking**) now applies, chiefly the Metropolitan Rail Network (**MRN**) and the Country Regional Network (**CRN**); or
2. an alternative approach based on policy instruments would be a more appropriate and effective response.

The need to examine these threshold issues arises because the current Undertaking remains largely shaped by the historical need for strong regulation of the Hunter Valley Coal Network (**HVCN**). The HVCN is a fully commercial network, meaning that it receives no public funding (whether directly or indirectly) and all costs, including capital costs, are sourced from the private sector. For this network, the high value task (coal) was, and is, the only rail traffic that is priced at the regulated ceiling. Legislative restrictions that mandated the use of rail also meant an increased risk of abuse of market power by the then track owner, Rail Access Corporation (RAC), as its customers were “captive”. The regulatory access arrangements put in place at that time, and for that situation, remain embedded in the current, and largely unchanged, Undertaking.

However, both the HVCN and the interstate rail network, being the other network in NSW that most approaches the risk of monopoly rent (i.e. access prices exceeding economic/societal value), are now regulated by ACCC-approved access undertakings, developed by the Australian Rail Track Corporation (**ARTC**). This regulatory approach is intended to provide a proportionate constraint on the ARTC’s ability to exercise market power on these networks. The approach therefore remains aligned with the National Competition Policy as expressed in Part IIIA of the *Competition and Consumer Act 2010* (Cth).

The original rationale for formalised access regulation in NSW (preventing the exercise of market power in the absence of competition) maps awkwardly onto the networks to which the Undertaking now applies. Both of the major remaining networks, the MRN and CRN, receive substantial investment by the NSW Government (directly and/or indirectly) largely on the basis of public benefit, and rail access now needs to address market failure challenges other than market power.

For example, in relation to the CRN, IPART noted in its Issues Paper that:

In most parts of the NSW rail network, businesses can choose whether to use road or rail, so rail prices are limited by what it would cost to transport freight by road. In addition, the [CRN] has a lot of spare capacity, so the rail owner has an incentive to price access and set reasonable terms and conditions to attract more freight.

As a result, the [CRN] and the ARTC’s non-Hunter sectors recoup access revenue that is well below the costs of providing

the service. For example, in 2012, we found that TAHE (then the Country Rail Infrastructure Authority) recovered about 2.3% of operating and maintenance costs for the grain lines in the [CRN]. It is unlikely that cost recovery would have changed significantly during this time, and many of these rural lines require government subsidies to remain open.

The MRN meets the demand for high-frequency commuter services and the ensuing maintenance requirements. There is little risk of monopoly pricing being incurred by third-party operators (with the exception of the limited line sections of the MRN used for coal freight, which operate as an extension of the HVCN). Instead, the main non-price issue on the MRN is capacity allocation. However, this is principally administered by TfNSW as a public policy process, via its determination of the Standard Working Timetable (**SWTT**) for public transport services in the metropolitan rail area. It therefore involves balancing competing public, economic and commercial imperatives rather than being based only on commercial considerations. Issues of traditional market power, and resolving its adverse impacts through access regulation, do not readily apply in this context.

The potential economic benefits of access regulation for these networks are therefore less apparent and need to be balanced against the costs associated with formalised access regulation, and its contextual effectiveness. This is particularly the case where other avenues for reform may provide better solutions or achieve similar outcomes at a lower cost to both government and industry.

For these residual networks, rather than referencing National Competition Policy as a conceptual template, a more useful analytical framework is the NSW Government Guide to Better Regulation, which sets out the following principles:

Principle 1: The need for government action should be established. Government action should only occur where it is in the public interest, that is, where the benefits outweigh the costs.

Principle 2: The objective of government action should be clear.

Principle 3: The impact of government action should be properly understood, by considering the costs and benefits (using all available data) of a range of options, including non-regulatory options.

Principle 4: Government action should be effective and proportional.

Principle 5: Consultation with business, and the community, should inform regulatory development.

Principle 6: The simplification, repeal, reform, modernisation or consolidation of existing regulation should be considered.

Principle 7: Regulation should be periodically reviewed, and if necessary reformed, to ensure its continued efficiency and effectiveness.

For the residual NSW rail networks, an alternative approach that meets these principles can be achieved through improved policy and governance, rather than additional economic

regulatory requirements. This approach would include clearly and transparently expressed access principles, protocols, specified service level and standard access agreements, developed with appropriate stakeholder consultation. Such a policy-based approach has the advantage of not just allowing a more immediate means of responding to industry concerns, but would also, once evaluated for its effectiveness, provide the NSW Government with an important additional contribution to the evidence base upon which to make its decisions on the ongoing scope of formal access regulation.

However, it should be noted that in developing new policy instruments, TfNSW recognises that this needs to include a replacement for the current Undertaking. Therefore, concurrently with developing and consulting on the proposed new policy instruments, a review of the current Undertaking that meets the consultation requirements under the *Transport Administration Act 1988* (NSW) (**TAA**) (see section 2 below) would also occur. This would allow a full engagement process with industry and stakeholders on what shape the revised policy framework should take, and whether it should be an interim or permanent part of the access framework.

Ultimately, a decision by the NSW Government to move to either a heavier regulatory or alternative approach may require legislation to implement. However, it is suggested that an initial process of:

1. developing and consulting on the new policy instruments;
2. reviewing the Undertaking, inclusive of a compliance assessment with the Better Regulation principles;
3. implementing the new policy-based instruments; and
4. completing an evaluation of the effectiveness of the new/enhanced arrangements

could be done within a shorter time frame than a legislative review and parliamentary process could be completed.

Should the evaluation indicate that a case for legislative change remains, then that legislative process could be expedited, having had the additional advantage of a clear evidence base and consultation from the policy implementation and evaluation.

The overall time frame would remain largely comparable for both processes, that is:

1. implementing and evaluating the policy-based framework plus an ensuing and expedited legislative process (if deemed required), or
2. commencing a full legislative change process.

A high-level project plan/timeline for such a process has been developed by TfNSW and is appended to this submission (**Appendix A**).

As a precursor, therefore, to considering the need for legislative change, TfNSW suggests there is merit in implementing and evaluating an approach based on new policy and governance instruments, inclusive of a revised or replaced access undertaking.

In developing these new policy instruments, TfNSW recognises that any evaluation of the effectiveness of the proposed policy-based “change” instruments needs to include their ability to address stakeholder concerns.

An appropriate approach for evaluating the policy-based framework is an important part of the consultation process, and would potentially proceed as a participatory evaluation process (i.e. stakeholders would be directly involved in the impact evaluation process).¹

TfNSW therefore suggests IPART consider, for its final report, if:

1. for the residual networks, the assumed benefits of access regulation are appropriately balanced against the significant costs of that regulation; and
2. the extent to which IPART’s recommendations can be addressed through non-legislative (governance and policy-based) mechanisms.

¹ See - <https://www.betterevaluation.org/methods-approaches/approaches/participatory-evaluation>



2

Observations under the existing legislative framework

2.1 The Transport Administration Act (TAA)

The TAA is the primary legislation that gives effect to the NSW rail access framework. Under section 99C and Schedule 6AA, the TAA allows a “rail infrastructure owner” to prepare or vary an access undertaking setting out the terms and conditions that must be included in a rail access agreement.

An access undertaking or variation can either be submitted to the Minister for approval pursuant to Schedule 6AA, or to the ACCC pursuant to section 99C.

The TAA provides that a “rail infrastructure owner” for the purposes of the access undertaking provisions can relevantly mean TfNSW, TAHE² and/or ARTC.³

2.2 Access undertaking provisions

There are a number of requirements rail infrastructure owners must meet when preparing or varying an access undertaking pursuant to Schedule 6AA. This includes:

- preparing such an undertaking for the purposes of implementing the Competition Principles Agreement;
- undertaking a range of publication, notice and consultation steps, including providing for public submissions and consideration of those submissions; and
- making provision with respect to the application of Part 4A of the *Independent Pricing and Regulatory Tribunal Act 1992* (NSW) to a dispute with respect to third-party access.

2.3 The Minister plays a central role

The Minister for Transport as well as the portfolio Minister for TAHE (currently the Minister for Infrastructure, Cities & Active Transport) have a central role under the current legislative framework. An access undertaking or variation prepared pursuant to Schedule 6AA must be submitted to the relevant Minister for approval. An infrastructure owner can also choose to consult with IPART when formulating an access undertaking, however, the Minister is the approving authority.

The access undertaking or variation must also be submitted together with a summary of the submissions made in relation to the proposed undertaking or variation and the rail infrastructure owner’s comments on those submissions.

When considering the access undertaking or variation, the Minister is to take into consideration all of the public benefits arising from the access undertaking or variation (including those that do not have a direct commercial value).⁴ Without the concurrence of the Premier, approval by the Minister will not be given.⁵

² TAHE is the “rail infrastructure owner” in the case of any rail infrastructure facilities owned by TAHE or vested in TAHE by or under the TAA or any other Act.

³ Although section 3 of the TAA defines a “rail infrastructure owner” to include Sydney Trains and NSW Trains, clause 214 in Schedule 7 clarifies that for the purposes of the access undertaking provisions (section 99C and Schedule 6AA), NSW Trains and Sydney Trains are not rail infrastructure owners.

⁴ Clause 5 of Schedule 6AA, TAA.

⁵ Section 99C(2), TAA.

3

The NSW Rail Access Undertaking

TfNSW recognises that the current undertaking is no longer fit for purpose

The NSW Rail Access Undertaking is the only undertaking in place under Schedule 6AA. The Undertaking was established in 1999 and provides third party access to certain parts of the NSW rail network owned by TAHE.

The Undertaking currently applies to the following networks:

OWNED BY TAHE	LEASED TO & MANAGED BY ARTC
Country Regional Network (managed by UGL Regional Linx)	Inland Rail North West Link (commissioned September 2020)
Metropolitan Rail Network (managed by Sydney Trains)	Metropolitan Freight Network (apart from the Southern Sydney Freight Line – SSFL which is subject to ARTC’s Interstate Undertaking)
21 kilometres of the Hunter Valley Coal Network from Woodville Junction to Newstan Junction (managed by Sydney Trains)	Non-Hunter Valley sectors of Turravan to Boggabilla, Goobang Junction to Merrygoen, Merrygoen to Gap and Merrygoen to Ulan leased from the NSW Government

TfNSW recognises that key factors which shaped the approach to rail access regulation over 20 years ago are now much diminished. There have also been substantial changes in the ownership, scope and complexity of the networks covered by the Undertaking.

Consequently, TfNSW acknowledges that the current Undertaking may no longer be meeting the needs of stakeholders.

The NSW Government developed the Undertaking to implement its obligations under the Competition Principles Agreement (1995) to establish third-party access regimes for significant infrastructure facilities.

The content of the Undertaking still largely reflects a primary purpose for which it was initially developed – namely to provide regulated access to the HVCN. The HVCN operates on a fully commercial basis and is primarily used to transport coal from mines in the Hunter Valley to the Port of Newcastle. The Undertaking was originally developed to address the specific issues and network characteristics of the HVCN, where there was a risk of monopoly pricing by the then infrastructure owner.

However, most sections of the HVCN are no longer under NSW Government control and are instead covered by undertakings between ARTC and the ACCC. These undertakings cover not only the HVCN, but also the interstate network which is the other part of the NSW rail network that most approaches a commercial operating model (i.e. where access charging approaches the regulated ceiling).

The main areas where the Undertaking currently applies are the shared (passenger and freight) sections of the MRN, the CRN and a residual component of the HVCN which sits within the MRN.

The primary user of the heavily trafficked, mixed-use MRN is the government owned and operated rail passenger service provider Sydney Trains. While the CRN is primarily used for freight, it also accommodates regional and interstate passenger services operated by NSW Trains. Access to the MRN and CRN by freight operators is subject to a statutory requirement to give reasonable priority to passenger services.

Heavier access regulation approaches are usually correlated with a higher risk of monopoly pricing. The risk of monopoly pricing is not evident for most of the MRN and likely all of the CRN. The networks are also funded and invested in substantially for public policy purposes. Such factors should inform and shape the approach to access arrangements.

This does not suggest that either the MRN or CRN are free from the potential for market failure type issues to occur. Effective access arrangements remain essential, and TfNSW recognises that improved accountability, transparency, and enforceability need to be demonstrably and measurably achieved by any enhancements it proposes to the current framework. Further observations on these important requirements are provided in section 4 below.

3.1 The Undertaking does not reflect the distributed responsibility across NSW rail networks

As well as the Undertaking being developed largely on the basis of the need to regulate a fully commercial network, since the introduction of the Undertaking there have also been significant changes to the ownership, scope and complexity of the networks covered by the regime. The key roles and responsibilities relating to third-party access and control of the networks are spread across multiple parties, including TAHE and TfNSW, Sydney Trains (rail infrastructure manager of the MRN), and UGL Regional Linx (UGL) (rail infrastructure manager of the CRN under contract with TAHE/TfNSW).

As a result, the roles and responsibilities for third-party access are distributed as follows:

- TAHE grants the rights of access under the Undertaking and enters into agreements with access seekers. TAHE is ultimately responsible for the grant of a right to access the rail network;
- TfNSW allocates overall capacity on the MRN via its statutory function to determine the SWTT for public transport services in the metropolitan area. UGL determines the SWTT for the CRN subject to TfNSW’s approval. TfNSW also negotiates third-party access agreements for the MRN and CRN as TAHE’s agent (under an agency agreement); and
- Sydney Trains and UGL are responsible for network control of the MRN and CRN respectively, including daily service planning and other day-to-day operational decisions affecting third-party access to those networks.

Accordingly, TfNSW considers that the current Undertaking does not fully reflect the significant changes to the roles and responsibilities relating to third-party access that have occurred.

4

Response to the Draft Report

Optimising rail operations is critical to support the safe, productive and sustainable movement of people and goods across NSW. TfNSW welcomes the opportunity to update the access framework to ensure the policy settings are right to support third-party train operators to use the rail network.

4.1 Identified concerns

The Draft Report has identified a number of areas where greater certainty, transparency and accountability would benefit both access seekers and access providers and encourage growth in the rail freight market. At a high level, the key areas of reform identified by IPART include:

- **Pricing:** Although the risk is constrained on most parts of the network to which the Undertaking applies, access seekers would benefit from greater transparency around access prices;
- **Customer engagement:** Access seekers face an imbalance in bargaining power and are impeded in their ability to effectively negotiate and make informed decisions;
- **Non-price terms of access:** It is difficult for access seekers to negotiate non-price terms of access due to a lack of clear principles underpinning how capacity is to be allocated, limited transparency around available capacity and day-to-day management of rail freight operations, and a lack of interoperability between networks;
- **Underinvestment:** As a result of the above, freight industry access seekers are discouraged from entering the market or expanding their operations and are deterred from new capital investment in infrastructure and rolling stock.

For its final report, TfNSW requests IPART consider whether the issues raised in the Draft Report can be addressed under the existing legislative framework, with revised and new policy instruments.

The request is based on the observations that, for most parts of the network to which the Undertaking applies:

1. non-price issues are likely to dominate the concerns of access seekers; and
2. the networks have historically been largely publicly funded for public benefit purposes.

In such circumstances policy-based instruments and approaches may address stakeholder concerns more appropriately, quickly, and effectively than heavier regulatory approaches. This is because, while the risk of exploitative pricing may be more constrained, the risk of low service quality remains possible and needs to be addressed.

New and/or improved policy instruments potentially offer a non-legislative pathway that addresses many of IPART's draft recommendations and improves the service level offering to the rail freight industry.

The policy instruments will be based on:

- clearly stated principles and expectations from the NSW Government/Ministers;
- clear service level specifications against those principles and expectations;
- transparent measures of performance against that specification; and
- improved means of taking remedial action against non-performance.

The policy-based enhancements to the current access framework would include, subject to further stakeholder consultation:

- A set of access principles issued formally by the Minister for Transport (following appropriate consultation). These would cover a number of the areas where IPART has indicated the need for greater clarity and elaboration, and could be enforced via existing statutory mechanisms, for example:
 - the Transport Minister's power to control and direct the Secretary of TfNSW, and the Chief Executives of Sydney Trains and NSW Trains in relation to the exercise of their functions;
 - TfNSW's power to give directions to Sydney Trains and NSW Trains in relation to the exercise of their functions; and
 - the power of the portfolio Minister for TAHE to impose terms and conditions on TAHE's operating license with respect to pricing and access arrangements.

The principles to provide clearer policy direction to relevant NSW Government organisations in the areas of:

- pricing principles (see TAA section 14(2)(b));
 - non-price provisions, including capacity allocation (e.g. how passenger priority is to be operationalised);
 - information disclosure requirements;
 - dispute resolution;
 - performance indicators;
 - consultation requirements;
 - capital contributions; and
 - compliance and enforcement.
- A revised access undertaking (see next section –4.2).

Two reform processes that are currently underway, and aimed at improving the service offering to the rail freight industry, would be informed by, and aligned with, this principles-based approach. These are:

- the **Freight Level of Service specification (FLOS)** project. In its response to the 2021 NSW Audit Office Report, Rail Freight and Greater Sydney, TfNSW committed to developing a defined level of service for freight that Sydney Trains would be expected to meet. The FLOS will also help structure the discretionary application of "passenger priority" by access providers, which IPART has suggested may be leading to inefficient economic outcomes (see section 4.8 below for further discussion on capacity allocation).
- a **Revised Standard Track Access Agreement**. This project is focused on identifying the various roles and responsibilities required to deliver quality customer service for third-party rail operators. The project will help address concerns raised by IPART and stakeholders that the complex regulatory arrangements hinder easy identification by access seekers of where accountabilities sit.

A policy-based approach can also be better aligned with national reform processes currently underway, offering greater consistency in application across networks. This includes the National Rail Action Plan, which was recently elevated to the National Cabinet level. These policy-based enhancements offer new mechanisms for aligning NSW's practices within the new national agenda thereby addressing IPART's concerns that the current access framework has limited scope to manage cross-border coordination issues.

4.2 Many of IPART's recommendations could be addressed with a revised or replaced undertaking

The policy-based enhancements outlined above would also include a replaced access undertaking.

The Draft Report envisions an overall shift towards a more regulated access model. This includes mandating access providers to have an access undertaking in place and implementing requirements common to all access providers and access seekers within the TAA and its regulations.

However, the move to a more prescriptive statutory regime would require significant legislative change and an extended length of time to implement. As also outlined above, for the networks to which the Undertaking currently applies, many of the preconditions for a regulated access approach may now be absent, or only partially present.

These issues will be tested with key stakeholders and industry through the consultation process required under the TAA, for amending or changing the Undertaking.

The Undertaking could be required to be reviewed in conjunction with the issuing of Ministerial access principles and directions, which could address, among others, the following matters:

- a requirement for TfNSW and TAHE to consult with a range of parties, to determine whether an undertaking remains the preferred approach to facilitating access to the networks covered by the access framework;
- a requirement for that consultation to cover matters such as:
 - division of responsibilities between TAHE and TfNSW at a practical level, including legal access to the rail network/s;
 - operational control of the network;
 - allocation of capacity;
 - compliance with the regulatory framework;
 - appropriate pricing principles;
 - if a single new access undertaking should be considered, or should separate undertakings be developed for MRN, CRN and HVCN;
 - improved processes for rolling stock approvals;
 - improving seamless train movements; and
 - interoperability across networks;

- a requirement for TfNSW and TAHE to consider relevant NSW Government policies, including the principles issued by the Minister; and
- a requirement for TfNSW and TAHE to consider any relevant recommendations made by IPART in its final report.

4.3 A consultative process on revising the undertaking could provide greater clarity on the distribution of responsibilities

TfNSW recognises that consulting, implementing and managing what would replace the current Undertaking would help stakeholders understand and engage with the distribution of responsibilities between agencies and entities.

This is because the consultation process for reviewing the Undertaking would not only assist greater stakeholder familiarisation with the current framework, but also allow further examination of the challenge of having responsibility for different aspects of access provision disaggregated across multiple agencies and entities. It would also therefore allow a collaborative examination of different models for a customer-facing, single point of interface for access-related issues.

It is inevitable that a complex rail network will involve a distributed range of legal and practical roles and responsibilities, but this does not preclude as a matter of practice a single interface for access seekers in relation to the provision of access. It is noted that TfNSW currently performs a range of access responsibilities, some in its own right and some as agent for TAHE.

As part of the process of reviewing the current Undertaking, the NSW Government expects there would be substantial stakeholder consultation on the merits of differing "single points of accountability" for differing parts of the network. Although IPART has raised the potential benefits of such an approach it is appropriate that further discussion with stakeholders occurs, including on the impacts of any changes on the current distribution of Rail Safety National Law obligations among the entities involved with the rail network. As well as potentially requiring legislative change to implement, the issue raises trade-offs between having more flexible access arrangements for differing parts of the network that have differing regulatory needs, and the challenge of increasing the complexity of the regulatory framework in NSW.

4.4 There should be increased transparency and accountability for stakeholders and operators

It will be important that the suite of new policy instruments outlined above is supported by appropriate governance forums and that clear and mutual performance requirements are transparently developed and publicly reported on, by both access providers and operators.

The Minister's access principles could include a clear direction for the development of a public reporting framework, with appropriate data identification and analysis requirements, to allow rigorous and transparent reporting against both consistency with the access principles and compliance with the supporting service specification agreements.

Further stakeholder consultation on developing these improved governance processes would be essential. TfNSW envisions a greater advisory voice for industry participants. This could initially take the form of an Industry Reference Group during the development and implementation of the new access instruments. The Industry Reference Group would then potentially transition to a standing "All-of System" advisory forum that will continue to provide feedback not only on the new access framework, but also provide a needed forum through which cross-network issues, such as state-wide possession and maintenance planning, can be developed. The advisory group would be intended to provide regular government and industry consultation on rail access matters and include a clear escalation pathway to the appropriate Minister for resolution of key issues.

4.5 Consideration required on the role of a regulator to approve access undertakings

TfNSW supports IPART having an active role in advising the Ministers on access arrangements. However, the final approval process for access arrangements should remain with the Ministers.

While the rationale for an approval role for IPART may be stronger when a network has market power, the case may be weaker when the network is largely funded and operated on public interest grounds.

While IPART has noted that access regulators in some other jurisdictions do have this type of approval role, it is more difficult to find a comparable situation where this type of approach has been applied to a mixed-use densely trafficked urban network. On such a network, freight and passenger performance can impact on each other significantly. In such a complex environment, overall accountability for network service performance is unavoidably directed by the public to Ministers. Ministers should appropriately retain control over instruments to which they will continue to be held accountable for by the public.

TfNSW also notes that, while the Essential Services Commission in Victoria did previously have a role in approving and issuing rail access arrangements, since 2018, this function has been undertaken by the Minister for Transport in that state, and the Victorian Department of Transport.

4.6 Negotiation-arbitration framework

The Draft Report identifies a number of deficiencies in the Undertaking's negotiation-arbitration framework that may be contributing to delays in negotiations and impeding efficient access to the rail network. Stakeholders report a reluctance to seek arbitration due to costs, time and risks associated with doing so.

IPART's recommendations to address the issues identified include:

- changes to improve negotiations including timeliness, collective negotiations and the extension of the duty to negotiate in good faith;
- introducing a conciliation process as an alternative dispute resolution mechanism for access seekers; and
- an automatic dispute resolution trigger.

TfNSW suggests IPART consider whether these recommendations could be addressed through the proposed access principles to be issued by the appropriate Minister.

The enduring merits of the negotiate-arbitrate approach and the role of IPART in access disputes can be more closely examined and tested through the consultation process on a revised access undertaking. Under the existing legislation, it is an access undertaking that may confer or impose functions on IPART, for matters connected to the undertaking.

TfNSW supports a continuing role for IPART in the resolution, oversight and monitoring of access disputes, including arbitration/conciliation of disputes by IPART.

4.7 Information disclosure

The Draft Report considers that the current information disclosure process is inadequate, impeding an access seeker's ability to effectively negotiate and make informed decisions. In summary, the Draft Report recommends:

- access providers be required to publish a range of information to access seekers in addition to what is required in the Undertaking;
- access providers be required to disclose certain cost information when they make an indicative offer to an access seeker;
- the above be achieved through an enforceable disclosure guideline published by IPART; and
- section 8 of the Undertaking be amended to require access providers to respond to further information requests within 20 days (unless otherwise agreed by the parties).

The Undertaking currently requires rail access providers to provide information at the request of an access seeker. However, noting the issues flagged by IPART and stakeholders, TfNSW acknowledges there could be improvements to the amount and accessibility of information to inform access seeker's negotiations.

To implement these changes in a timely manner, TfNSW suggests to IPART that it consider whether these recommendations could also be addressed in a set of access principles issued by the appropriate Minister. These recommendations could further be consulted on through the process of formulating a new access undertaking.

4.8 Non-pricing provisions

TfNSW acknowledges stakeholders' concerns that the current arrangements lack transparency around how access providers allocate available capacity, coordinate track possessions and make decisions on rolling stock. TfNSW also acknowledges stakeholders' concerns that the Undertaking lacks a clear framework for access seekers to hold an access provider accountable for performance.

In response to these concerns, the Draft Report recommends the NSW rail access framework incorporate a range of non-price provisions. These include requirements that access providers:

- allocate capacity according to well-defined steps;
- revoke or curtail access rights if access holders persistently fail to use contract train paths;
- only grant new long-term exclusive access rights if there is a compelling case;
- consult adjoining network rail infrastructure owners and access holders in developing a network maintenance plan;
- proceed with investment in expanded capacity when requested by the access seeker and the access provider can recover costs from the access seeker;
- do not refuse permission to operate trains to any qualified operator; and
- establish service level KPIs to measure performance and outline the consequences of failure to meet KPIs, in its access agreements.

The Draft Report also recommends IPART publish a guidance document that sets out the minimum criteria and other matters that access providers must have regard to when incorporating the non-price provisions in an undertaking.

TfNSW is continuing to consider the issues identified.

However, a relevant question is whether a guidance document of this nature should be a matter of policy for the Minister, and the extent to which the issues would be dealt with by the Minister as part of the issuing of access principles.

Capacity allocation

As noted earlier in this submission, capacity allocation is a significant non-price issue for access seekers.

TfNSW agrees that transparency of capacity allocation could be enhanced and has proposed that this can be achieved through the issuing of principles by the Minister.

Processes suitable for implementing such principles, in ways that are both transparent and more accountable, are also being developed in consultation with stakeholders. This includes a major change intended to improve outcomes for all rail network users.

TfNSW is currently engaging with rail operators on an enhanced SWTT development model which is designed to:

1. improve customer (passenger and non-passenger service) outcome articulation and understanding of rail operator requirements as the foundation for SWTT development;
2. improve engagement with all rail operators throughout the SWTT development lifecycle, from phase 0 (pre-strategic business case) to phase 6 (business as usual delivery and performance evaluation);
3. improve assessment and transparency of SWTT options through the introduction of a balanced scorecard and external assurance to inform prioritisation and decision-making; and
4. improve SWTT reliability and repeatability to deliver greater consistency in the delivery of services and provision of pathing allocations.

Implementation of an enhanced SWTT service model is anticipated for SWTTs commencing at phase 0 from 2023. As part of SWTT development, TfNSW will develop an outcomes-based timetable Design Specification for the SWTT, consistent with any capacity allocation principles issued by the Minister. These are the first steps towards a fully integrated state-wide Timetable Development Group which will facilitate the coordinated development of service timetables and network maintenance plans by adjoining network owners.

The Design Specification for the SWTT will include a clear set of requirements for rail freight, with early output from the Freight Level of Service (FLOS) project being a freight specification for the Sydney Trains' managed network. The process will therefore provide a preliminary shaping of the discretionary application of "passenger priority" that IPART has recommended in the Draft Report. The FLOS requirements will also flow through to the service agreement between TfNSW and Sydney Trains, the Rail Operations Agreement (ROA), and include KPIs that will require remedial action from Sydney Trains if they are not met.

It is also intended that the above service level for rail freight will be reflected in commercially enforceable access agreements. For this, in consultation with third party operators, TfNSW and TAHE are developing a revised standard track access agreement. The project will improve transparency on where functional accountabilities for rail access lie, and ensure robust internal processes and a defined governance structure support the agreements.

4.9 Pricing provisions

The Draft Report identifies that access providers and access seekers may not always negotiate an efficient price due to an imbalance of market power or information asymmetry. IPART makes a number of recommendations, including the following:

- access providers be required to provide greater transparency around costs, prices and set a default price for services which must fall within a mandated “floor and ceiling” test; and
- access seekers should pay the same access price for the same service unless there is a cost difference.

TfNSW notes that particular approaches to pricing are matters to be discussed between TAHE and IPART. However, if public policy guidance through the development of pricing principles is required, this can occur now through the portfolio Minister for TAHE including pricing principles in TAHE’s operating licence (as provided for by section 14 of the TAA). It also anticipated that pricing would be a matter to be consulted on with stakeholders by TAHE, through the process of formulating a new or varied access undertaking.

TfNSW notes that transparency in relation to the calculation of access pricing is also something which could be addressed through a set of access principles issued by the Minister.

4.10 Capital expenditure and loss capitalisation

TfNSW notes IPART’s draft recommendations on capital expenditure. It also notes that IPART’s Draft Report recognises that in NSW, new investment is primarily funded by government to achieve its policy objectives, with the exception of the HVCN.

It is therefore prudent that IPART has indicated that its suggested need for access providers to have a consultation policy for capital expenditure is limited to where capital expenditure or new investment is partly or fully funded by access seekers.

Given the infrequency with which this is likely to occur, TfNSW suggests that IPART consider if this issue can also be adequately covered in the proposed principles to be issued by the Minister. The adequacy of this approach could also be the subject of the process of formulating and consulting on a new or varied access undertaking and the subsequent evaluation process.

The Draft Report recommends access providers be permitted to capitalise losses incurred on new investment. As IPART has noted there may be limited use of such a mechanism by access seekers/network users on the MRN/CRN.

4.11 Compliance

The Draft Report makes a number of recommendations to ensure access providers comply with the proposed new requirements around pricing provisions, information disclosure and non-pricing provisions. The NSW rail access framework currently requires access providers to submit an annual compliance proposal for IPART’s approval each year. In addition to this, the Draft Report recommends access providers also:

- demonstrate that prices recover access seekers’ direct costs;
- declare that they have complied with all requirements of the NSW rail access framework, including publishing all required information within required time frames and consistent with IPART’s information standard; and
- self-report any instances of non-compliance.

TfNSW suggests IPART consider whether these recommendations could be addressed in a set of access principles issued by the Minister which are required to be implemented in any new or varied access undertaking. These recommendations could further be consulted on through the process of formulating and consulting on a new or varied access undertaking.

4.12 Enforcement

The Draft Report recommends IPART be granted with powers to investigate and enforce non-compliance under the NSW rail access framework to deter non-compliance and reduce reliance on dispute resolution as the only means of enforcement.

TfNSW agrees that greater enforcement needs to be available to third-party network users. The form which this should take would be initially consulted upon as part of developing the access principles to be issued by the appropriate Minister. Further examination would occur as part of the evaluation process for the principles, and then as part of the formulating and consultation processes for a new or varied access undertaking.

Appendix A – Indicative Reform Timeline



