

28 May 2019

NSW Rail Access Undertaking – Review of the rate of return and remaining mine life  
Independent Pricing and Regulatory Tribunal  
PO Box K35  
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*Submitted via IPART online portal*

Dear Sir/Madam

## **NSW Rail Access Undertaking – Review of the rate of return and remaining mine life**

### Introduction

Pacific National (PN) welcomes the opportunity to comment on the Independent Pricing and Regulatory Tribunal (IPART) review of the rate of return and remaining mine life – NSW Rail Access Undertaking (NSW RAU). PN is a freight rail operator in NSW and is a major user of the monopoly rail infrastructure covered by the NSW RAU.

PN supports the IPART recommendation to review the NSW RAU, noting:

- Access charges have exceeded full economic cost for several years.
- The current regulatory regime has not proved effective in protecting access seekers from being overcharged.
- Access seekers have sought authorisation from the Australian Competition and Consumer Commission (ACCC) to negotiate access with Railcorp because negotiations failed.
- Rail networks can choose which regime to be regulated under and to select regulatory outcomes that maximise their returns.
- In turn, access seekers manage the inefficiencies of dealing with multiple regimes.

### The NSW RAU is not effective in constraining monopoly behaviour

We note in previous decisions, IPART determined RailCorp had not complied with the Ceiling Test in the NSW RAU as claimed operating costs were higher than the efficient costs based on an optimal configuration of a freight network. This implies Railcorp's access charges are above efficient cost and are excessive – characteristics of monopolist behaviour.

In addition to being above efficient cost, in the Sydney Trains network, rail freight operators pay 100% of their access charges regardless of whether or not their trains run. This 100% fixed cost charging structure is at odds with all other rail networks in Australia. It is a significant cost impediment to growing freight volumes on rail in Sydney.

PN's concerns with the NSW RAU extend also to the lack of transparency of costs and limitations on IPART's powers to monitor, audit and enforce access provisions. As a result, rail freight operators have been forced to seek ACCC authorisation to negotiate access because Railcorp's process for negotiation of the Standard Track Access Agreement (STAA) lacked necessary information and genuine consultation.

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For example, rail freight operators found that the new STAA was imposed on industry with little meaningful negotiation and in circumstances where rail freight operators were given little time to have their issues addressed with the impending expiry of their current agreements.

More fundamentally, the new STAA contained unfair and unacceptable provisions which would have materially impacted on rail freight, including uncertainty as to timing and availability of access, increased administrative costs and risks for operators. The STAA included provisions to reserve the right to provide no certainty of train path provision, imposed one-sided and unfair punitive measures for non-compliance, and allowed cancellation of access with absolute discretion of the rail network operator.

Monopoly behaviour is especially disappointing given RailCorp is a government owned entity while the long-stated priority of the NSW Government is to increase and stimulate the growth of rail freight. For example, in its 2011-2012 budget, the NSW Government expressly targeted doubling the proportion of container freight movement by rail (from 14% to 28%) through NSW ports (particularly Port Botany) by 2021 to maximise the operational capacity of NSW ports and ease road congestion. More recently it cemented these plans as part its 2018 Future Transport Strategy.

The successful application for authorisation from the ACCC means collective negotiations can improve the relative strength of the bargaining position of the rail freight operators but it does not ensure that the NSW RAU will be improved to the extent needed. An extensive regulatory review is therefore required.

#### The rate of return is likely to be excessive

IPART selected a 5.8% per annum, real post-tax based on its WACC method, which implies a higher equity beta than the ACCC/Queensland Competition Authority (QCA) allowed. Railcorp is owned by the NSW Government (which has access to Government bond level financing) which likely impacts the riskiness of its returns and overall financial leverage relative to its private sector peers.

In line with IPART's concerns and recommendations about the NSW RAU, PN submits it is prudent to conduct a re-valuation of the regulatory asset base and assess the rate of return against metrics used by the ACCC/QCA. However, this might be dealt with more appropriately if the NSW RAU was regulated under the ACCC as is the case in the Hunter Valley coal network. IPART's review of the NSW RAU should consider which regime should be applied given the current limitations on IPART to effect changes on the NSW RAU.

#### Conclusion

At the current time two access regimes regulate the Hunter Valley coal network creating unnecessary duplication of regulatory effort and the potential for interface problems between the two access regimes. Given this, PN supports a move towards a single NSW access regime, with terms and conditions of access based on efficient and transparent processes.

Yours faithfully



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