# Policy SPAD update

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**On a page**

Arrangements around the NSW Transport Asset Holding entity – commuter rail assets held by a State-owned corporation that does not undertake physical rail activities - are being considered by a Parliamentary Inquiry. This follows media uproar about whether they are an accounting sham.

The scheme resembles that for NSW railways 1996-2000. The Policy SPAD article of July 2021 questioned whether lessons were learned from then – including from Commissions of Inquiry into two rail crashes. A November update suggested not. Reasons included: Government advice and decisions on the present scheme are predicated on mistakes about the Commissions. Contrary to prevailing views, the Commissions recommended against the type of scheme now in place.

This second update considers evidence provided to the Parliamentary Inquiry. Some of it was emphatic, claiming ‘false narratives’ were spread by opponents of ‘the reform’.

There has not been the slightest acknowledgement of what the crash Commissions recommended: rail infrastructure assets should be maintained by their owner. Or that the owner should be a statutory authority, not a State-owned corporation.

It was said the Entity will provide another level of safety related ‘assurance’. Yet that conflicts with the basic principle of rail safety management. Danger can already be seen in, for example: obtuse /disputed statements about decision making; inability to say where responsibility rests; misunderstandings of basic facts about other railways; uncertainties about maintenance. And, to reiterate, the evidence suggests failure to comprehend the post 1996 crash Commission reports.

A counter to the claim of ‘accounting artifice’ was an argument the present scheme is a part of micro-economic reform, building on the Hilmer report, part of national competition policy. That is rubbish. The reasons given for the present scheme are virtually identical with those for the 1996 scheme – which have been discredited for over two decades. The present scheme re-instates the aspects of the 1996 changes dismissed by the Productivity Commission and Special Commissions of Inquiry as ideological and irrelevant to reform – and that were eventually thrown-out.

Tellingly, neither the 1996 nor present scheme complied with the one actual requirement of national competition policy - a sector review prior to structural change.

There are dubious claims about other matters for example: track access; vertical integration/separation; structures/practices in other States. In conjunction with the above, it appears there is a lack of awareness of prior experience and the outside world.

In the circumstances, explanations of the Entity scheme reflecting a wish for certain accounting outcomes would be less concerning than a belief it is a genuine microeconomic reform.

However, accepting what was said to reflect honest opinion, issues extend beyond the Entity to other aspects of policy which may be similarly based on misunderstandings and bad advice. Among these is Sydney Metro whose commonalities with the scheme are not limited to same time/portfolio origins.

It is possible the Entity scheme and ensuing uproar arose from bureaucratic plays to lead future commuter rail franchising processes. What is on public display should scotch any prospect of franchising until confidence in advice and decision making is restored. Attempted defences of the situation, frankly, have been embarrassing.

A judicial style inquiry into NSW Transport policy is more than warranted. It is likely inevitable.

## 1. Introduction

The scheme surrounding the Transport Asset Holding Entity was the topic of the Policy SPAD article. That article was the basis of a submission to the current Legislative Council Committee inquiry.[[1]](#footnote-1)

Most commentary regarding the scheme concerned financial deception – that the scheme’s purpose is to effect accounting to avoid showing Government spending in the Budget. Some commentary concerned the behaviour and motivation of parties to the debate.

The Policy SPAD article was not concerned with that. Rather it was interested in whether the scheme replicated aspects of the NSW 1996 rail structure that led to rail crashes. It asked: have the lessons of the 1996 structure been forgotten? A first update of that article answered: yes.

More recently, senior officials robustly criticised ‘false narratives’ about the scheme as traducing the integrity and professionalism of staff and accounting professionals. They said accounting - Budget - factors did not drive decisions to adopt the scheme. Rather it is motivated by microeconomic reform. The accounting is a consequence, not cause, of the scheme.

Their call for truth, and focus on issues rather than scorning individuals, is welcomed. That also is the beagle’s bay. The beagle too identified false narratives - that underpin the scheme. One is gross misrepresentation of Special Commissions of Inquiry into rail crashes, claiming the scheme conformed with Commissions’ recommendations. That is not the only misapprehension.

The first update said a later article would provide some details about recent policy mistakes and offer suggestions on how to advance franchising. In this article:

* Section 2 recaps the Inquiry process;
* Section 3 looks at the micro-economic reform claim;
* Section 4 considers other misunderstandings particularly about the rail crash Commissions;
* Section 5 looks at a submission by the Independent Pricing and Regulatory Tribunal
* Section 6 looks at reports by PwC and KPMG particularly as they relate to track access;
* Section 7 considers some first-order issues around franchising;
* Section 8 draws some conclusions.

This update does not consider whether the Entity contributes to a financial mirage. It leaves the accounting experts to explain how it is possible for accounts to not fully reflect real-world controls and, if it is possible, the merit of such an approach.

This update does not address safety issues. At this time, little more can be concluded from the public evidence than the Government urgently needs to draw on expertise, independent of – and not filtered through - Transport for NSW, Treasury or the NSW transport accident investigator.

TAHE is the Governments acronym for the Transport Asset Holding Entity. This series of articles prefers to use ‘the Entity’. The issues relate not merely to the Entity, but to the scheme surrounding it including relations between the Government, departments, Transport for NSW and Sydney Trains.

As ever, comments and corrections are welcome.

## 2. The Inquiry

### 2.1 Hearings, documents

The Inquiry, established in June 2021 by the Public Accountability Committee, is looking into the Transport Asset Holding Entity.

Submissions were due mid-September. Six were received by the due date. One from this author.[[2]](#footnote-2)

First hearings were held on 1 October. Officials from the Entity, Transport for NSW and Treasury gave evidence. [[3]](#footnote-3)

Also on 1 October, Committee member the Hon. Mr Mookey MLC tabled a several documents including: what appears to be a 2016 Cabinet submission regarding establishment of the Entity; a 2020 report by KPMG for Transport for NSW on the Entity’s operating model; briefs from Departments to Ministers.[[4]](#footnote-4)

The (presumed) Cabinet submission was considered in the first update - its authenticity remains unchallenged.[[5]](#footnote-5)

On 11 October, the Independent Pricing and Regulatory Tribunal provided a submission to the Inquiry.

On 2 November, at a different Committee – Budget Estimates – Transport for NSW tabled another document relevant to the inquiry – about a safety review. It had not been referred to earlier.[[6]](#footnote-6)

In early November, further inquiry hearings were held. At the first of these, 8 November, a former KPMG partner gave evidence. The extensive coverage received is not of interest to this article.[[7]](#footnote-7)

Also at those hearings, the Chair and one Director of the Entity gave evidence. For the purposes of this article there were four relevant claims: a NSW rail crash Commission recommended asset ownership and rail operations be by a single organisation (section 4 below); about a Board sub-committee dealing with safety (section 4); the Audit Office required assets to be valued on earnings potential (section 6); a write-down of assets in the order of $20bn or 50% (section 6).[[8]](#footnote-8)

On 15 November (2021), an unsigned submission by KPMG was tabled, just prior to more hearings. It sought to refute comments by the former partner about the firm. It is not relevant to this article.[[9]](#footnote-9)

At the 15 November hearings the former Transport for NSW Secretary gave evidence. Ensuing media reports speculated his unexplained sacking a year earlier was associated with his giving cautions about the scheme. With one exception: the Australian Financial Review claimed the Secretary’s evidence was to the effect he was sacked because he did not ‘redact’ a KPMG report for his Department. That suggests the Secretary did not dispute the contents of the KPMG report.[[10]](#footnote-10)

Evidence was also given by two other KPMG partners.[[11]](#footnote-11)

Other evidence of 8 and 15 November hearings goes to the process of policy development and the administration of Departments and consulting firms. Despite considerable media interest, these topics are largely not relevant to this article.

Further documents were published by the Committee on 15 November. These included reports by PwC (2019) and KPMG (2020, 2021).

On 30 November, the Committee published a letter from the Treasury Secretary and two senior officers. It commented on the former KPMG partner’s evidence of 8 November. It also made claims about the decision-making process that led to the scheme, including advice to Cabinet.[[12]](#footnote-12)

On 8 December, Treasury and Transport provided another submission to the Inquiry. This was in preparation for an appearance at hearings on 16 December. At that appearance Treasury and Transport senior officials claimed ‘false narratives’ had been spread about the scheme and that public servants had been denigrated. The Treasury Secretary offered character assessments of some witnesses who doubted the scheme – saying one had been ‘totally discredited’.

The Treasury and Transport (December) claims of most interest here are that the Entity arose out of pursuit of micro-economic reforms based on the Hilmer (1993) report and national competition policy. Rather than a conspiracy to cook the books.[[13]](#footnote-13)

Further hearings are scheduled for February 2022.

### 2.2 Challenge to documents

On 12 November, the Committee published correspondence between its Chair and the Department of Premier and Cabinet.

The Department, on 22 October, had requested withdrawal of some documents published by the Committee, including the Cabinet submission and briefs (see above). The Chair’s response, 10 November, included:

*‘The committee has not resolved to remove the documents from the committee's public website. The committee has further resolved to prepare a Special Report on the matter to the House, recommending that the matter be referred to the Privileges Committee for inquiry and report, on the right or otherwise of the Legislative Council to examine, publish and use Cabinet documents as part of an inquiry.’[[14]](#footnote-14)*

Articles at the jadebeagle are based almost exclusively on – and referenced to - publicly available material.

The Department of Premier and Cabinet suggested (to the Committee) that Cabinet documents, by convention, are not to be published. It argued correct procedure is: the Committee should withdraw the information and not use it in deliberations. An implicit argument is the material, including the KPMG report, 20 November 2020, is not effectively public.

Nonetheless, the Committee continued to publish the material claimed to be Cabinet in confidence. The material has been quoted and subject to extensive commentary since at least June 2021. For the purposes of this article, such material that goes to the question of the real-world effects of governance is treated as public information.

## 3. Microeconomic reform

### 3.1 The claim

At hearings on 16 December, the Treasury Secretary claimed:

*‘There has been a false narrative that TAHE was created to perpetuate an accounting trickery. That is wrong. The truth is TAHE was created to pursue Government policy of micro-economic reform to bring about the most optimum structure for the management of Transport assets.’*[[15]](#footnote-15)

A technical hitch in broadcasting meant the Secretary was asked to repeat the statements. The Hon. Mr Mookey, MP, then took issue with a supposed difference between the original and repeat statement – the former had officials implementing Government policy, the latter pursuing micro-economic reform.

What Mr Mookey had in mind is not clear. Whatever it was, he missed the real point. That being: if the Entity is a result of micro-economic reform NSW faces bigger problems than if it was the product of accounting artifice.

 A late submission to the Inquiry from Treasury and Transport for NSW, published that day, gave more detail on the microeconomic reform claim:

‘*….the TAHE reforms are also consistent with micro-economic policies that have been progressively adopted by the NSW Government since the introduction of the National Competition Policy (NCP). The NSW* (policy?) *reflects a view that improved marked design can achieve many of the benefits of competition while maintaining state ownership of natural monopolies.*

*The 1993 Hilmer Report on National Competition Policy recommended Governments examine the merits of structural separation of public authorities into natural monopoly and potentially contestable activities. The report recommended there be access arrangements for strategic natural monopoly assets or ‘essential facilities’ The reportexpressely identified rail track as an example of such a natural monopoly, and a key driver for reform since the NCP has been a view that state-run monopoly railways tend to inefficiency due to a range of factors including poor incentives.*

*As such, contrary to some media speculation, TAHE was create as part of a comprehenive multi-year government policy to best optimise the use of state funds to invest in an improved transport network, as well as to implement micro-economic reform in line with the NCP and Hilmer Report.’*[[16]](#footnote-16)

Such comments are: wrong in material respects; outdated by at least two decades; have largely been rejected by the ‘high-priests’ of micro-economic reform including the Productivity Commission.

### 3.2 Micro-economic reform and competition policy - 1990s

#### 3.2.1 Introduction

Apart from among some bureaucrats and lobby groups who grandstand over pale imitations of the Hawke-Keating glory days, ‘micro-economic reform’ has not been popular since the late-1990s. Even pet shop resident galahs stopped squawking about it since the turn of the millennium.[[17]](#footnote-17)

The Treasury and Transport submission placed competition policy, and Hilmer report, at the centre of micro-economic reform. Yet the original national competition policy (1995), and Hilmer report (1993), were but part of directions set during the Hawke-Keating period.[[18]](#footnote-18)

The micro-economic policies said to be relevant to railways - competitive neutrality, access to infrastructure, structural reform of public monopolies - were in the *Competition Principles Agreement (1995)*.[[19]](#footnote-19)

#### 3.2.2 Competitive neutrality

From the outset, competitive neutrality was seen as irrelevant for commuter railways because service provision required subsidies i.e., public ownership did not provide an organisation with competitive advantage in the commuter market. Competitive neutrality was seen as an issue in and for freight.[[20]](#footnote-20)

#### 3.2.3 Access to infrastructure

Access relates to a non-owner’s use of essential facilities of national significance necessary for competition in an up/downstream market.

Rail track infrastructure was identified in the Hilmer report as an example of such a facility. However, the report related this to freight markets, in particular coal. The rail target of the Hilmer report was ‘economic rents’ of NSW and Queensland Government owned coal rail monopolies. Access of other rail freight operators to relevant lines would diminish the monopolies.[[21]](#footnote-21)

Hilmer’s report did not contemplate access to metropolitan track for the conduct of passenger operations – for the simple reason such traffic is unprofitable.[[22]](#footnote-22)

The *Competition Principles* envisaged the access process to be governed by a regime/undertaking.

States could develop their own, with the Trade Practices Act – later *Competition and Consumers Act (2010) -* providing a fallback. The approach to access involved an over-reach and an under-reach, both of which came in for strong criticism in later years.

#### 3.2.4 Access over-reach and under-reach

Not least among the results of over/under reach were intractable access disputes subject to seemingly interminable litigation.

The endless disputes can be sheeted home to the burgeoning, smug, (new) competition policy bureaucracies – known as the competition club of Australia. The bureaucracies offered no help to State Governments wanting to develop or modify transport policy. At times, they ran interference against public policy and common sense for rail, for example stalling progress on access regulation under the pre-text of waiting for the Godot of ‘national reform’.[[23]](#footnote-23)

The access over-reach was application to infrastructure irrespective of origins or ownership. In contrast, Hilmer’s report largely concerned public sector infrastructure – for example the NSW and Queensland Government owned rail lines used for coal haulage rather than the private iron-ore lines in Western Australia’s Pilbara region.

The under-reach was an economy wide ‘negotiate and arbitrate’ access model. This quickly proved so vague as to be meaningless. It led to attempts to create industry specific access regimes – which were resisted by the club as intruding on their domain. Some disputes over whether there should be an access right – not what that right should be - took nearly a decade to determine.[[24]](#footnote-24)

Interestingly, road transport and road authorities were also targets of the Hilmer report. Roads – as well as railway lines - appear in the access provisions of the *Competition and Consumers Act*. Even more interestingly, this fact has subsequently been denied by the club and ‘reform’ proponents.[[25]](#footnote-25)

#### 3.2.6 Structural reform

The structural reform elements of the *Competition Principles* did not require disaggregation of Government businesses.

Rather, if a government was to introduce competition to a market traditionally monopolised by a government organisation, it needed to remove regulatory responsibilities from that organisation. In the event, this was effected in railways via rail safety and access regulation, independently of the introduction of contemporaneous competition.

Further, if a government wanted to introduce competition – reduce monopoly - the relevant Government was to organise a review of the objectives and functions of the organisation.

Such a review was to cover eight topics, only one of which related to organisational separation of monopoly from potentially competitive functions. Governments were not required to commit to implementing review recommendations - let alone particular organisational structures.[[26]](#footnote-26)

### 3.3 Microeconomic reform and the NSW 1996 rail changes

An outline of the NSW 1996 rail structural changes, access and their results in the earlier article. That article noted the relevant Australian rail access concept stemmed from the European Union where the relevant Directives specifically excluded commuter rail, and required only a ‘book’ – accounting – rather than organisational separation of access function.[[27]](#footnote-27)

At the time, the 1996 NSW rail changes were claimed to be in response to the *Competition Principles*.

The changes went further than in any other Australian jurisdiction. Others, for example Queensland, considered changes only when benefits were proven to exceed costs – there was no a priori assumption ‘competition is good’.[[28]](#footnote-28)

NSW aspects such as vertical separation of the commuter railway, contracting out maintenance and corporatisation of the infrastructure owner were not required by the *Principles.*  Nor were they even envisaged in the Hilmer report.[[29]](#footnote-29)

Moreover, there remains no evidence that the requirement of the *Principles* – a review prior to structural changes - had been conducted.

In 1996, the NSW Opposition suggested the changes were sought by the Cabinet Office – which had carriage of competition policy - and Treasury. The suggestion was they were resisted by the Transport portfolio as inconsistent with election commitments. A previous article noted reports the Transport Minister had resigned over the changes but was coaxed back by the Premier.[[30]](#footnote-30)

In the second reading speech for the legislation, the Minister said:

‘*Our reforms are the fullest response yet by an Australian State government to the competition principles agreement between the Commonwealth and the States.*

*They deal head-on with the issue of third-party access to services provided by significant, publicly owned infrastructure.  It is clear that customer service is an essential component of any modern business, and railways are no exception.*

*Moreover, if the rail network is to make the contribution that is essential to the viability of our urban environment, we must encourage train operators to focus on serving travellers, without the complication and distraction of having to plan and execute major rail infrastructure projects.’[[31]](#footnote-31)*

If the review required by the *Competition Principles* had been conducted, it was not public. If the Transport Minister had seen it, he had disagreed. One implication is that subject matter – railway or transport – experts had not had opportunity to appraise the NSW concept. A corollary is the Government had basically decided on the changes in ignorance of subject matter expertise. Subject matter experts would be limited to trying to make the concept work.

The second reading speech, therefore, is better characterised as an ex-post excuse – rather than exposition of reasons - for the changes.

### 3.4 Productivity Commission – 1999

#### 3.4.1 Damnation

The Productivity Commission – the ‘high priest’ of microeconomic policy – was the first independent authority to review the NSW changes. It was far from impressed.

The Commission’s 1999 report, *Progress in Rail Reform*, went out of its way to criticise the disaggregation of the commuter railway. The report’s first recommendation damned the changes:

*‘Urban rail networks should be vertically integrated and horizontally separated from other rail networks.’[[32]](#footnote-32)*

The underlying reason of the Commission was: competition policy is not an end in itself. Elements of policy are relevant in some circumstances, but not others – such as where there is no potential for contemporaneous competition, or there are high co-ordination costs.[[33]](#footnote-33)

The Commission argued a ‘more commercial approach’ to railways was needed, but corporatisation to that time had failed. It argued for privatisation. For passenger tasks – e.g., commuter rail - it argued for franchising and contracting-out.

However, those arguments were soon exposed as simplistic. Three factors discredited the Commission’s views on commercialisation of commuter rail: naivety; crashes; the nature of commercial activity.

#### 3.4.2 Naivety

The Commission’s views on franchising were not properly informed.

Among other things, franchising in commuter rail differs from elsewhere by involving network effects and stewardship of infrastructure. Economic and financial gains are generally one-off.

Contrary to what the Commission claimed to be usual practice for franchising, commuter rail revenue risk can’t be transferred. Ridership depends on economic conditions – e.g., CBD employment – and expectations of relative to road travel times - outside franchisee control. Attempts to transfer such risk, create conditions for financial failure of franchisees which lead to disruption of services, changes in industry structure and relations with Government, and greater cost to the public – as experienced in Victoria and the UK.[[34]](#footnote-34)

There is a literature on how special characteristics of commuter rail affect franchising.[[35]](#footnote-35)

While the Productivity Commission - and others – recognised (then) recent commuter rail franchising in Victoria and the UK had been difficult to introduce, it did not appreciate the causes were permanent rather than ‘implementation’ related. The relevant difficulties have not entirely resolved several decades later. Claims franchising have led to economic gains are hotly contested if not outright wrong.[[36]](#footnote-36)

#### 3.4.3 Crashes

The timing of the Commission’s report, August 1999, could not have been worse. A month later came the first of the four high-profile UK fatal rail crashes which had privatisation/franchising/ structure among contributing factors.[[37]](#footnote-37)

The Glenbrook crash, with similar structural factors, was in December 1999.[[38]](#footnote-38)

While vertical separation – track from trains - was seen among the contributors to those crashes, the separation of infrastructure maintenance from ownership became the matter of highest concern.

In the UK the galvanising event for rapid and dramatic changes in policy was a crash caused by a broken rail at Hatfield – prior disasters due to SPADs, with far greater casualties, resulted in much more considered responses.

In NSW, a track-defect caused derailment Kingsgrove - four days before (resumption of the) Glenbrook Commission hearings into railway structure - may have had a similar galvanising effect.[[39]](#footnote-39)

Both in the UK and NSW, it was held separation of infrastructure ownership from maintenance (responsibility) led to the owner being incapable of responsibly contracting-out maintenance. Moreover, there was unacceptable shortfall of skills in the workforce. Reports about deterioration in Victoria’s infrastructure are consistent with this.[[40]](#footnote-40)

An assumption made in the Competition Principles – explicit with respect to access – was that (any and all) structural and other changes could be made safely. At the time, 1995, it might have been reasonable to assume public safety risks could be held to acceptable levels under any structure of an infrastructure-based industry. Arguments for national rail safety regulation to be ‘permission’ rather than prescriptive based reflected this view.[[41]](#footnote-41)

However, by the time of the Productivity Commission’s report, 1999, it was evident that assumption was wrong. As was spectacularly shown in the next few years.

Also evident was a dichotomy regarding the purpose of rail safety regulation. Some viewed regulation as needed to mitigate risk of damage to life and property. Others viewed such regulation as needed to diminish hidden ‘barriers to entry’. Part of the latter group saw State rail safety regulation as an illegitimate way of protecting State railways from competition.[[42]](#footnote-42)

#### 3.4.4 Commercial behaviour

The Commission’s analysis missed the key point about the ‘commercial approach’ – it cannot occur in dealings among Government agencies.[[43]](#footnote-43)

Government entities that deal with each other do so primarily via political and bureaucratic manoeuvring rather than common law, court enforceable, contracts.

While the Commission’s competition/market analysis may underpin views about sector structure, such analysis is valid only for private firms.

The Productivity Commission claimed the commercial approach had not been properly applied. That was misleading. With separate Government organisations it could not be properly applied.

The Commission also failed to appreciate that the fully commercial approach and corporatisation would have seen large increases in Budget outlays for commuter rail to provide for a return on capital.[[44]](#footnote-44)

#### 3.4.5 Combination of deficiencies

Combining the above, the Commission’s faith in commercial behaviour was dangerously naive.

The commercial approach in a publicly funded railway has incentives for asset stripping – degradation, via under-maintenance, of long-life infrastructure assets which can be hidden (for some time) from ‘commercial’ monitoring. Franchising and vertical separation exacerbates the effect.[[45]](#footnote-45)

That was appreciated in the UK structural changes. There privatisation involved a specialist regulator for the level and use of aggregate infrastructure (access) charges. UK rail privatisation also involved ‘grossing-up’ subsidies - and access charges - such that deterioration in the condition of infrastructure assets would appear in published accounts as reduced asset values and losses. The hope was this would encourage action by shareholders of infrastructure stock.

However, even with these hopes and protections – which did not and do not exist in NSW - within two years of the Productivity Commission’s report, the UK’s track owner RailTrack had been found to have some responsibility for major crashes.

An interesting fact about the ‘commercial approach’ noted in the Policy SPAD article was RailTrack behaved more ‘commercially’ than many expected. In the year after the Hatfield crash, when it made a loss of $980m, it issued a $250m dividend to shareholders. This was just *after* it had gained an early advance of $2,750m from the Government and when it was seeking $3,660m more from the same source. This is consistent with the point made in the Special Commission of Inquiry into Sydney Ferries that organisations providing essential services via the Government take more notice of their shareholders than customers – if the customers can’t or won’t sue.[[46]](#footnote-46)

Indications are Rail Access would have financially failed in the same timeframe - if it had been subject to properly commercial access contracts - without major injection of Government funds to restore the metropolitan and regional rail networks. The Glenbrook Commission’s sector structure recommendations helped to avert this situation.[[47]](#footnote-47)

### 3.5 Post *Progress in Rail Reform* to road reform

#### 3.5.1 Glenbrook Commission

The Glenbrook Commission 2nd interim report (2000) noted the Productivity Commission’s recommendation of vertical integration for commuter railways.

While, the Glenbrook Commission it did not endorse the recommendation, it observed other States had not disaggregated their railways to the extent of NSW. It commented the NSW rail changes were the product of ideology.[[48]](#footnote-48)

#### 3.5.2 Productivity Commission review of competition policy

In February 2005, the Productivity Commission published a review of the national competition policy. It found national economic gains had been made and further gains were in prospect if ‘reform’ continued.[[49]](#footnote-49)

For transport, it considered the top priorities were greater national consistency in freight. It was less certain about passenger transport. It recommended separate reviews for each, with a priority for freight ‘infrastructure pricing’.

The review purported to give examples of changes in governance for rail:

*‘Substantial structural reform in the rail sector occurred during the 1990s, especially in Victoria and New South Wales. Structural separation of the formerly vertically integrated public monopolies has occurred in both States, with Victoria opting to privatise freight services and franchise its passenger services. In contrast, New South Wales has adopted a corporatisation model for all its separated government business units.’ [[50]](#footnote-50)*

That was close to disingenuous. The defining characteristic of NSW rail at that time – just after the release of the Waterfall Commission final report – was backtracking the structural changes made to commuter rail in 1996. It was the reintegration of separated government business units.

Among the many ‘lessons’ drawn by the review extraordinarily there was no mention of rail crashes or findings of Special Commissions into structural matters.[[51]](#footnote-51)

While the Productivity Commission review commented extensively on road transport, utilities and the national access regime it had virtually nothing to say about commuter rail.

#### 3.5.3 Competition and infrastructure reform agreement

A further review of competition policy for the Council of Australian Governments was completed in 2006. It was conducted by officials and the National Competition Council.[[52]](#footnote-52)

It led to another intergovernmental agreement - *Competition and Infrastructure Reform Agreement*.

For transport this said, and did, little apart from asking for a review of efficient pricing of road and rail infrastructure.

The *Agreement* made by then ritual recitals about growth in freight and some perceived need to deal with national rail safety regulation. It ritually forgot to mention standardisation of the rail infrastructure which is necessary for practical uniform rail safety regulation.

The report and *Agreement* appeared to be a make-work activity by central agencies. The call for harmonisation of road and rail regulation was ignorant and stupid. They raised the topic of urban congestion which has little if any connection with competition policy. They asked Governments to adopt project guidelines they had already agreed.[[53]](#footnote-53)

They omitted reference to obvious problems with the application of competition policy to the sector. Those problems included interminable delays in third party access, prevarication by the competition club in approving access regimes, endless litigation etc.

Most tellingly, they made no reference to the critiques or failure of the 1996 NSW rail structure. Nor was there reference to problems with the Melbourne – or UK - rail franchising.

Equally, there was no encouragement for Governments to embark on further structural reform in railways. Structural reform was seen as a matter for utilities but not railways.[[54]](#footnote-54)

#### 3.5.6 Road and rail infrastructure pricing

The Productivity Commission undertook the inquiry into road and rail infrastructure pricing (2007). The request for an inquiry reflected a view that road (policy) had an impact on rail. Simple analysis would reveal the view was based on an assumption rail was competitively disadvantaged by road transport subsidies on the few roads that compete with railways e.g., national highways.

The Commission’s report should be regarded as a debacle. Its basic thrust was that infrastructure prices are best set within each mode, without reference to each other, because on average – in aggregate - roads were not subsidised. This failed to recognise that rail potentially competes on only a very few road tasks e.g., in freight long distance line haul rather than urban distribution. Averages are irrelevant, and the Commission’s report was grossly deficient. [[55]](#footnote-55)

The analytical failure led to a Council of Australian Governments Road Reform Program. In turn, it failed much for the same reason – attempting to treat all roads, and all road use, as equal. To this could be added ‘road reform’ was seen by Treasury and road bureaucracies as a way to secure more revenues and funding – via direct payments rather than taxes. Attempts to give road users, especially the trucking sector, some say in return for direct payments, i.e., Hilmer’s access concept, were vigorously rebuffed. Little or no progress has been made in the subsequent 14 years, although the bureaucratic architecture remains in place. Further details on road charging are at the jadebeagle.[[56]](#footnote-56)

These failures mean the principal micro-economic reform / competition task in transport remains to place road and rail on neutral footings. That will require road reform which gives major road users a direct – ‘commercial’ - influence over the standards, construction and maintenance of the most important public roads.

### 3.6 Independent Pricing and Regulatory Tribunal, incentives and corporatisation 2007-09

#### 3.6.1 At the Tribunal

In 2007, the Government asked the Independent Pricing and Regulatory Tribunal to advise on incentives for Sydney’s commuter railway – CityRail - to better provide cost efficient services.[[57]](#footnote-57)

The Tribunal followed its usual inquiry process by publishing a discussion paper, consulting the public, issuing a draft paper. The process concluded in December 2008 with a final paper recommending ‘an effective service contract’ between the Government and RailCorp.[[58]](#footnote-58)

At the time, CityRail was a part of RailCorp, and RailCorp was a state-owned corporation. However, the Tribunal acknowledged recently passed legislative amendments to de-corporatise RailCorp.

The Tribunal did not comment on the merit of (de)corporatisation but said a service contract, as required by the amendments, was consistent with its draft recommendations and proposed governance model. It considered the arrangements had the potential for effective incentives:

*‘…..the service contract model has the potential to strengthen the economic regulatory framework for CityRail, and provide effective incentives to improve CityRail’s financial performance without decreasing its service performance.’*[[59]](#footnote-59)

The Tribunal did not contemplate structural separation of the railway.

#### 3.6.2 Outside the Tribunal

The Tribunal took a more sanguine view of incentives than a (then) recently completed Commission of Inquiry into Sydney Ferries – outlined in section 4.5.6 below.

That Commission, by Mr Walker SC, October 2007, highlighted problems of attempting to apply the NSW State-owned corporation model to highly subsidised activities related to public transport.[[60]](#footnote-60)

These arise from the State-owned corporation framework ignoring the principal value of public transport. Incentives and rewards for ‘commercial performance’ may distract the organisation from its underlying purpose – the risk being greater the greater the subsidy requirement.

The Tribunal (previous section) had agreed with the Ferries Commission on the fact that the value of public transport services far exceeded commercial metrics. This is the premise for its argument about fares being set to recover only a low percentage of CityRail costs. However, it simply assumed a State-owned corporation would be more influenced by a service contract than by shareholder wishes.[[61]](#footnote-61)

The Ferries Commission disagreed with that assumption. It argued a transport State-owned corporation involved in public transport cannot be subject to commercial pressures because, as a matter of law and practice, a service contract is ultimately unenforceable.

The issue is discussed further in section 4.5 which deals with the corporatisation/ decorporatisation/ recorporatisation of NSW commuter rail.

Between 1995 and establishment of the Entity, the ‘corporate’ status of NSW commuter rail was in flux. At least five changes were made. Four in the period 1996-2004 were gradually towards corporatisation – none of these was properly explained. In 2009 these were entirely reversed. Corporatisation of assets – first attempted in 1996 – was reintroduced via the Entity in 2020.

The fact of NSW switching commuter rail’s organisational form among statutory authority and State-owned corporation demonstrates there has not been a long-term strategy for application of micro-economic reform to that sector.

### 3.7 Independent review of competition policy 2014-15

A second independent review of competition policy was conducted in 2014-15 – the Harper review.[[62]](#footnote-62)

That review said the rail concern of Hilmer’s report was freight networks. It also said the original competition policy objectives for rail had been achieved.

In effect, it chided Governments for taking competition policy too far, at least in railways. While recognising there had been extensive structural separation of railway organisations, it argued for greater pragmatism where there is no prospect for contemporaneous competition among rail (freight) operators.

In its view, national infrastructure access arrangements had extended beyond reasonable intentions to the point they may damage economic efficiency, for example by application to single use, privately funded infrastructure:

*‘the National Access Regime is likely to generate net benefits to the community, but its scope should be confined to ensure its use is limited to the exceptional cases where the benefits arising from increased competition in where the benefits arising from increased competition in dependent markets are likely to outweigh the costs of regulated third-party access.’[[63]](#footnote-63)*

The Harper review differentiated commuter rail from other parts of the rail industry, viewing the sector to be part of public transport. It suggested lessons from other sectors – and Victoria – could be applied to public transport franchising.

The review was silent about structural separation of, and infrastructure access, to commuter railways.

### 3.8 Summary of microeconomic reform

#### 3.8.1 Overview

The time of the Glenbrook Commission (2000) can be seen as the watershed in ‘microeconomic reform’ of commuter rail. Its conclusions that the rail infrastructure owner should maintain the assets and that network control remain with the commuter train operator remain unchallenged.

Even without the Glenbrook Commission, experience in the UK and Victoria would likely have led to the same conclusions.

Since then, there has not been any official suggestion – including in the several reviews of competition, rail or infrastructure policy - that ‘reform’ or ‘competition policy’ should be advanced by structural division of a commuter railway. It is as if this is not a matter fit for discussion.

Similarly, since – and even before – then, there has not been publication of any Government review of the structure or governance of NSW rail. National competition policy requires such a review prior to Governments considering structural change.

The only process approaching a review of the micro-economic issues of Sydney commuter rail, by the Independent Pricing and Regulatory Tribunal, presumed the sector should be served by a vertically integrated statutory authority – rather than a vertically (severally) separated state-owned corporation. It did not consider that organisational form to be an impediment to efficiency.

However, a Commission of Inquiry - into Sydney Ferries - did say that the State-owned corporation organisational form is an impediment to efficiency and effectiveness in that sector due to its public purpose and benefit of providing services that require substantial subsidy.

That provides context for considering the accuracy of the Treasury and Transport ‘narrative’.

The narrative is almost a replica of the 1995 second reading speech (3.3 above) that led to the structure scorned by the Productivity Commission, not mentioned by the competition club, rejected by the Glenbrook Commission and thrown-out by the Government in 2000.

Until exhumed in 2017 without reference to what occurred in the interim.

Were the Treasury and Transport submission to be taken seriously, it would indicate critical research and analytical failures in advice to the NSW Government – not least of which is ‘thinking’ several decades out of date and lacking awareness of experience in NSW.

#### 3.8.2 Some further detail

Some specific remarks in the submission warrant attention.

* ‘*….the TAHE reforms are also consistent with micro-economic policies that have been progressively adopted by the NSW Government since the introduction of the National Competition Policy (NCP).*

That is false. There has not been a steady, progressive, adoption of ‘competition policies’ for commuter rail in NSW. In fact, after the initial policy - which closely resembled arrangements for the Entity -was rejected in 2000, there have been reversals and U-turns.

* *‘The 1993 Hilmer Report on National Competition Policy recommended Governments examine the merits of structural separation of public authorities into natural monopoly and potentially contestable activities. The report recommended there be access arrangements for strategic natural monopoly assets or ‘essential facilities’ The reportexpressely identified rail track as an example of such a natural monopoly…….’*

That is misleading. The Hilmer, and subsequent competition policy reports referred to freight and did not contemplate – in fact the Productivity Commission argued against – application of such a structural separation to commuter rail.

* *‘a key driver for reform since the NCP has been a view that state-run monopoly railways tend to inefficiency due to a range of factors including poor incentives.’*

That is misleading. NSW has not mitigated a ‘state-run monopoly’, but rather placed one part of the monopoly – the ‘natural’ monopoly, in a state-owned corporation. Commuter rail itself is a monopoly, even when franchised. The ‘above rail’ monopoly on services remains with a statutory authority. NSW has merely created two different monopolies that – perversely – need to deal with each other.

The matter of (in)efficiency and incentives for public sector commuter railways was dealt with by the Independent Pricing and Regulatory Tribunal 2008-09. At no time did the Tribunal suggest structural separation of the commuter railway, or its (partial) corporatisation, is either necessary or desirable.

* *As such, contrary to some media speculation, TAHE was create as part of a comprehenive multi-year government policy to best optimise the use of state funds to invest in an improved transport network, as well as to implement micro-economic reform in line with the NCP and Hilmer Report.’*[[64]](#footnote-64)

That is misleading. There is not any evidence of Government policy along those lines, let alone one consistent with the *Competition Principles* or later agreements.

The Hilmer report’s rail interest was freight – not commuter trains. Neither it nor the *Principles* required structural changes.

The requirements of the *Principles* – for a review prior to structural changes to a public monopoly - were not met in NSW for the 1996 changes. Nor have they been met for changes creating the Entity.

Aspects of the Hilmer report, and *Principles*, that would have been relevant to the Entity e.g., infrastructure access, have been exposed as naïve and are considered outdated. ‘Micro-economic reform’ notions ‘drawn from the Hilmer report’ such as expressed by Treasury and Transport have been considered obsolete for at least twenty years. The submission ignored NSW policy, and micro-economic reform efforts, in rail since the Hilmer report.

## 4. Submissions and evidence - misunderstandings

### 4.1 Introduction

There is evidence – in documents and from witnesses – the Government misunderstands important matters. Three examples are given in this section: vertical integration; safety management; recommendations of accident Commissions.

The most significant misapprehension relates to the recommendations of accident Commissions. This is reflected in misunderstandings about vertical integration and safety management.

If the Government had comprehended those recommendations – or read the Executive Summary of the Commission reports – it would likely not have established the Entity.

To explain the sources and persistence of the misunderstandings, some historical context of the accident Commissions is provided.

### 4.2 Vertical integration

#### 4.2.1 Introduction

The determining structural matter for railways is vertical integration or vertical separation. Vertical integration entails one organisation controlling all aspects of a railway - infrastructure and trains.[[65]](#footnote-65)

In most cities, the commuter rail system is vertically integrated.

When asked by the Parliamentary Inquiry in October about the structural differences between commuter rail in Brisbane and arrangements in Sydney, the Chief Executive of Sydney Trains did not point to any variance. Rather, he pointed to a supposed similarity in ‘commercial assets’.[[66]](#footnote-66)

The 2016 Cabinet submission for creation of the Entity claimed arrangements in which Sydney Trains undertakes track maintenance entail vertical integration.[[67]](#footnote-67)

Both the response about Queensland Rail and the Cabinet submission may seriously mislead.

Yet the substance of these responses was repeated and amplified – by reference to Victoria – by the Secretary of Transport for NSW in December hearings. The Secretary also claimed commercial access fees were paid by Government or Government train operators to asset owning government corporations in Queensland and Victoria.

#### 4.2.2 Queensland Rail

The comments about commercial assets are irrelevant to vertical integration.

Prior to 2014 Queensland Rail was a vertically integrated railway. It essentially ran four businesses within Queensland: Brisbane commuter railway; long distance passenger trains; coal railways to ports north of Brisbane; general freight. The coal and freight train operations – but not the relevant tracks - were privatised in 2013.

Queensland Rail is now the residual of the former business. It comprises three main businesses: Brisbane commuter railway; long distance passenger trains; track.[[68]](#footnote-68)

In Brisbane, the commuter trains are the dominant track user. It is a vertically integrated commuter system. Outside of Brisbane, long distance passenger trains are very much a minor traffic – the railway there is vertically separated.

Hence, the comments are misleading in the relevant – rail structural - respects. They also are apparently inconsistent with official documents.*[[69]](#footnote-69)*

Queensland Rail Limited is the operating arm – not (just) the ‘commercial’ arm – of Queensland Rail. It holds the assets and operates trains. It is licenced under the rail safety law. Its directors are also directors of Queensland Rail. Its shareholders include the Minister for Transport. In each of these fundamentals, arrangements in Brisbane are diametrically opposite those in NSW.

Commuter rail in Brisbane is vertically integrated within a public authority – not NSW-style commercial – framework.[[70]](#footnote-70)

#### 4.2.3 Victoria

The first attempt at privatising/franchising Melbourne’s commuter rail system involved vertical separation – franchise of train operations only. It also involved horizontal separation – a split of commuter train operations into two geographic regions in Melbourne, with a third region being the remainder of Victoria. It was an echo of the UK national rail privatisation. However, the echo structurally failed.

Previous articles said potential franchisees indicated they would not bid on a vertically separated structure for Melbourne, hence the State Government offered two geographic vertically integrated franchises in the city.

A little understood consequence was that an organisation established to facilitate vertical separation – VicTrack – lost its most important function almost as soon as it started. Presumably this encouraged it to become involved in many other fields, as remains the case today.

The geographic separation also failed. After a relatively short time, one private operator surrendered its franchise which was combined with the other. It remains the case today.[[71]](#footnote-71)

The intention behind vertical integration in Melbourne was for the franchisee to perform all relevant functions. However, as in the UK, this proved problematic in relation to rail infrastructure – which has a pernicious characteristic of an onset of failure not being visible. The Government therefore retained an infrastructure oversight role.

In order to perform all relevant functions, the franchisee - who gets paid rather than pays the Government – does not make ‘commercial’ payments to the (underlying) asset owner. That is specified in the Victorian legislation. Victoria’s transport department leases assets from VicTrack and provides them to the franchisee for nominal consideration. A Government Department pays a Government corporation. It is not considered or reported as a commercial arrangement of the type found in transactions between private firms.[[72]](#footnote-72)

The NSW Government’s narrative about Queensland, Victoria and for that matter the Australian Rail Track Corporation providing some sort of valid precedent for the arrangements in NSW looks to be false.

#### 4.2.4 Sydney situation

Vertical integration in railways has one organisation controlling all aspects of the tracks on which it predominately operates trains. A vertically integrated rail operator does not access tracks, and does not use the tracks under an access agreement with another party. It decides maintenance levels and tasks. A vertically integrated operator conducts network control functions.

Sydney Trains accesses tracks, does not decide track maintenance and does not conduct all network control functions. The tracks are owned by the Entity. The Standard Working Timetable – part of network control – is developed in Transport for NSW. Location of responsibility for the safeworking rules – another element of network control – is not explicitly mentioned.

Therefore, unlike Queensland Rail in Brisbane, or the Melbourne franchisee, Sydney Trains is not a vertically integrated railway.

In fact, among vertically separated railways it has an unusually great extent of separations. Sydney is said to have a three-way split of the access function between the Entity (contracts), Transport for NSW (standard working timetable) and Sydney Trains (train control). It has a further split between maintenance tasks (Sydney Trains – at present) and improvements (the Entity).

By comparison, for the vertically separated Hunter Valley and Interstate track all access, maintenance and improvement functions are controlled by the Australian Rail Track Corporation.[[73]](#footnote-73)

#### 4.2.5 Government beliefs

The Government likely believes vertical integration is important, including for safety reasons. That is indicated by use of the term and a section of the 2016 Cabinet submission which promoted the idea that Sydney Trains should maintain the tracks on which it operates. It is confirmed by the idea becoming practice.

Yet the Government has not understood what vertical integration entails. That has led to confusion about track maintenance responsibility – about who decides maintenance. The fact Sydney Trains might maintain tracks does not mean it controls maintenance.

Moreover, while Entity directors asserted Sydney Trains et al – but not the Entity – have responsibility for maintenance, they did not say what the nature of this responsibility might be e.g., to whom it is owed.[[74]](#footnote-74)

The November 2020 KPMG report to Transport for NSW said the Entity is to ‘endorse’ maintenance levels. While the term ‘endorse’ is obtuse, if the Entity is to exercise any control over its assets the term must mean ‘determine’. That must mean Sydney Trains does not determine maintenance levels, and suggests it can only be ‘responsible’ – to the Entity – for workmanship of the maintenance tasks it undertakes, not for the adequacy of maintenance.[[75]](#footnote-75)

That KPMG report also said the Entity is to ‘endorse’ bids – presumably for Government funds – for maintenance of its assets. This indicates the Entity has a higher degree of control and influence at Government level than if it merely set maintenance levels according to its financial resources. It indicates the Entity has formal policy advisory functions. Such functions are inconsistent with it being a State-owned Corporation.[[76]](#footnote-76)

The report further indicated the split of ‘capital and recurrent maintenance’ is to be decided by Transport for NSW and Sydney Trains.

The presence of Transport for NSW in such a decision means selection of maintenance tasks is not a matter only for Sydney Trains. That also is inconsistent with vertical integration.[[77]](#footnote-77)

#### 4.2.6 Relevance of vertical integration

The importance of the definition of vertical integration arises from (avoiding) operational and planning inefficiencies arising from interfaces among several organisations.

In particular, avoiding organisational interfaces between train operator and track controller. Even were their objectives aligned, game theory points to technical inefficiencies where separate organisations are involved in a rail operation – where there is vertical separation.

To the extent objectives differ, further technical inefficiencies are likely to arise. Whether there is a net loss in economic efficiency depends on end markets and conditions for optimality in use and provision of track – whether potential gains from competition for track space outweigh technical inefficiencies.

Given the nature of urban passenger tasks, it is generally accepted potential gains from competition are far less than technical problems. Hence vertical integration – with a train operator controlling all aspects of trains and tracks - is preferred.

It is irrelevant to vertical integration that a train operator performs track maintenance tasks.

### 4.3 Safety management

#### 4.3.1 Assurance nonsense

It is claimed the Entity, and its board, provide an additional level of safety oversight – ‘assurance’ - on the rail assets – there now being at least four levels: the national regulator, Sydney Trains, Transport for NSW and the Entity.[[78]](#footnote-78)

That claim is nonsense. It may be dangerous nonsense. Not least because it introduces doubt about who is responsible to whom for what.[[79]](#footnote-79)

#### 4.3.2 Experience

The short biographies of the Entity’s directors do not show commuter railway experience. The Parliamentary Inquiry chair said this is consistent with the Government’s intent. Yet without such experience there would be a question as to what ‘assurance’ can be credibly claimed.[[80]](#footnote-80)

In evidence to the Inquiry, directors disclaimed the organisation’s responsibility for (maintenance of) its assets, yet were unable to say where (legal) responsibility lies. The lack of knowledge was sought to be explained as a matter of lack of legal training. There may be a difficulty with that: it may imply responsibility is some extra-legal concept, and the Entity’s so-called ‘assurance’ function can be undertaken while it does not know where responsibility rests, and who needs to do what.[[81]](#footnote-81)

#### 4.3.3 Sub-committee

It was claimed the Entity does not have ‘*ultimate responsibility*’ for safety yet this was prefaced by comments there is a board (sub)committee that deals with safety.

The purpose of such a sub-committee in an organisation without safety responsibilities is unclear. Given the board has only four members it may surprise it has any sub-committees. There are other surprises about the safety etc. sub-committee.[[82]](#footnote-82)

Among these: at the time of writing – December 2021 - its membership was not publicly available but apparently includes at least one person who is not a director – who is said to provide rail expertise. That suggests the board lacks an important capability.[[83]](#footnote-83)

Another surprise is the only information about the sub-committee on the Entity’s website relates to an ‘operating model’ – a stylised flow-chart on a single page - which is so vague as to be worthless. The ‘operating model’ does not refer to the sub-committee.[[84]](#footnote-84)

There is a claim the Entity conducts audits including of the work under control of one director – the Secretary of Transport for NSW. That appears to be a conflict of interest which may be irreconcilable because the Secretary’s appointment to the board is a statutory requirement.

Yet another surprise is that while such audits might be though to fall within the province of, or be of particular interest to, the national regulator the Entity may not feel a need to seek permission from the regulator to so operate. That is even more surprising given the Entity says some of its work is subject to oversight by the regulator viz:

*‘All…..maintenance decisions are subject to ……oversight from the Office of the National Rail Safety Regulator’.[[85]](#footnote-85)*

There is a question of what the Entity’s management might be doing. Typically, boards oversee but do no substitute for management. Board (sub)committees review work conducted by the organisation, rather than undertake work themselves. Yet evidence to the Inquiry did not mention what activities the Entity’s board expects management to undertake. A possible impression: the sub-committee is operating as management.

#### 4.3.4 Railways as systems

Beyond such issues, Government views about ‘asset safety’ seem to reflect a lack of knowledge of how railways operate.

In cases where a railway infrastructure asset is not in its nominally rated condition, an operating restriction may be imposed on its use to mitigate direct risk.  For example, a restriction on the speed of trains may be imposed over a track section which has a defect.  While such restrictions may reduce direct risk, other risks arise - such as trains developing a habit of not obeying restrictions.

These other risks may relate to the prevalence of restrictions.  Risk mitigation in such cases depends not only on assessing the condition of individual assets but also on the extent, imposition and observation of restrictions. In an urban railway those other risks may be particularly important because operational restrictions will make it more difficult for trains to keep to timetable. Indeed, timetables will be designed around a maximum level of operating restrictions.[[86]](#footnote-86)

Because railways operate as systems, safety is addressed through a management system which underpins all operations.  For that reason, safety is a matter for all, not – as some suggest – just the ‘safety staff’.  In such a system, assurances about asset safety are simplistic and miss the essential point.

#### 4.3.5 Layers of responsibility

The idea multiple layers of responsibility will improve safety seems to be a fundamental misunderstanding of transport safety principles. These principles are based on allocating particular responsibilities to unique – single – parties. And to avoid allocating the same responsibility to multiple parties.[[87]](#footnote-87)

The reason to avoid multiple layers of responsibility is the interface problem. The risk of allocating two parties the same task is not that it will be done twice, but it will not be done at all. As, game theory teaches, each party expects the other to do the task.

Concern about potential for such a misunderstanding should be heightened by misapprehension of participants in the present debate about the rail structural recommendation from the NSW accident inquiries (identified in the first update, and in next subsection).

The point of that recommendation – the infrastructure owner should maintain the assets – is to overcome different, unclear and possibly contrary-to-law perceptions that arise when some people employed by the owner feel it is not ultimately responsible for maintenance.

#### 4.3.6 An instructive example

The widespread misapprehension about the NSW accident Commissions is likely the result of multiple layers of responsibility for advice to Cabinet.

The Treasury Secretary defended Cabinet submissions about the Entity as ‘endorsed’ by many - senior officers, Secretaries and Ministers of both departments.

I suggest everyone named by the Secretary assumed someone else had checked the accuracy of the information relating to the accident Commissions and did not bother to check for themselves. That demonstrates the danger of a scheme of multiple responsibilities where several ‘endorse’ or ‘assure’, but nobody does – all chiefs and no indians.[[88]](#footnote-88)

The next sub-section provides more background to what the accident inquiries actually recommended.

### 4.4 Recommendations of rail crash inquiries

#### 4.4.1 The mistake

The first update identified a fundamental mistake in the 2016 Cabinet submission that led to the creation of the Entity.

The Cabinet submission assumed the Glenbrook and Waterfall Commissions had asked for maintenance and operations to be conducted by the same organisation. That resulted in the scheme of Sydney Trains conducting maintenance on the Entity’s assets.

However, the Commissions recommended infrastructure maintenance be conducted by the asset owner, and the asset owner should be a pubic authority not a State-owned corporation. The Commissions also recommended the passenger train operator be responsible for network control in the metropolitan area.

The Commissions recommended against schemes like that now in place in NSW commuter rail. *[[89]](#footnote-89)*

An identical concern – about separating infrastructure ownership and maintenance - arose in the United Kingdom following the series of rail crashes in the late 1990s and early 2000s.

In response, the UK track owner was nationalised and brought maintenance back in house rather than contracting it out.[[90]](#footnote-90)

There remains a controversy about a split of maintenance from train operations in the United Kingdom. However, that split persists.

Many rail commentators, and this author, agree maintenance – and network control - should not be split from operations in a commuter railway. They argue a commuter railway should be wholly vertically integrated. However desirable that might be, the NSW (and UK) crash Commissions did not recommend that.

True, the crash Commissions were more than fifteen years ago – more than a decade before the 2016 Cabinet submission to create the Entity. They might be regarded as ancient history whose specific recommendations can be forgotten – but for the Cabinet submission claiming the recommendations required a particular railway structure.

#### 4.4.2 The mistake continues

It is remarkable the Cabinet submission was wrong on such a fundamental point.

More remarkable is the recent defence of the Cabinet submission of it being endorsed by senior officers, Secretaries and of its contents being affirmed and later reviewed and confirmed.[[91]](#footnote-91)

The mistake has not been specifically identified. It continues to be regarded and presented as fact.

For example, the former KPMG partner’s evidence did not refer to the specific danger the recommendations (of the Commissions) sought to avert.[[92]](#footnote-92)

KPMG’s mid 2020 report – authored by the former partner - included ‘safety case studies’ from NSW and the UK. His evidence to the Parliamentary Inquiry was this infuriated NSW Treasury. The report said the Glenbrook Commission recommended a merger of Rail Access and Rail Services.[[93]](#footnote-93)

In my view it could have been more pointed. It could have said: the (present) scheme is contrary to the first recommendation of the Glenbrook Commission (2nd interim report) which was the asset owner should conduct maintenance in-house and not be a State-owned corporation. It could also have said the scheme is contrary to the third recommendation which was the operator of commuter trains in the metropolitan area should have the network control functions.

### 4.5 History – accidents and railway structure

The history provides some context.

#### 4.5.1 Glenbrook accident and recommendations

The Glenbrook crash occurred on 2 December 1999. It involved a commuter train running into the back of the Indian Pacific. Just prior to that it had passed through a red signal.

The train driver had sought permission to do so, permission being given by a signaller who believed the signal was defective - and ‘failed to red’ – as had frequently occurred.[[94]](#footnote-94)

A Special Commission of Inquiry was established. In June 2000 it produced a first report - on the immediate causes of the accident.

At the time, there was public controversy about whether the 1996 rail structure - with four NSW Government organisations - was a contributor. There was a particular focus on Rail Access - a State-owned Corporation owning the infrastructure – while a separate organisation, Rail Services, conducted maintenance on its assets.

In mid-August 2000, the Premier requested the Commission provide an interim report by end October on important measures that require legislation.

In response the Commission made a second interim report on the structure of the rail industry on 1 November. The first recommendation of that report was:

*1. That the infrastructure owner RAC and the infrastructure maintainer RSA cease to be State owned corporations and that their property and functions be merged into a single statutory authority, to be known as the Rail Infrastructure Authority, responsible to the Minister for Transport. [[95]](#footnote-95)*

The third recommendation concerned network control:

*3. That SRA be responsible for the control and management of timetabling and train movements and other functions of network control within the area of operation of the present CityRail network.[[96]](#footnote-96)*

These recommendations reflected advice from the most senior rail officials.

#### 4.5.2 Evidence at Glenbrook Commission

Prior, in early June 2000, in the lead up to the Olympic Games, the Government had appointed a Coordinator General of Rail with powers ostensibly to override the rail organisations.*[[97]](#footnote-97)*

in mid-October, after the Sydney Olympic Games the Commission held hearings into the railway structure. The rail organisations had nothing to say. The only advice came from: the Co-ordinator General, Mr Christie; former Chief Executive of State Rail, Mr Hill; Mr Robinson, Acting Director General of Transport; trade union leaders.[[98]](#footnote-98)

Mr Christie proposed merger of Rail Access (track owner) and Rail Services (track maintainer) as a statutory authority not a State-owned corporation. Neither Mr Christie nor Mr Hill urged the merger of the track authority with train operator, State Rail.

Both argued the train operator should remain a statutory authority:

*‘Mr Christie stated that SRA should remain a separate authority and should be the train operator. It was the employer of the train control and signalling, the train crews and the station staff. It was his view that by SRA remaining separate from the combined RAC and RSA (hereafter referred to as the Rail Infrastructure Authority), it could be separately monitored and held accountable for its actions. His view was that if there were only one organisation it would be more difficult to maintain accountability.’ [[99]](#footnote-99)*

Mr Hill argued the train operator should have the network control function for the metropolitan area – Mr Christie did not have an opinion on that.

The Commission accepted these views and recommended accordingly. However, it did not accept Mr Christie’s views about combining a rail safety regulator and accident investigator.[[100]](#footnote-100)

#### 4.5.3 Government response to Glenbrook Commission

In response, the Government presented legislation to merge Rail Access and Rail Services. However, contrary to the Commission’s recommendation, it was to be a State-owned corporation – Rail Infrastructure. The Minister’s second reading speech presented an ‘explanation’ of the divergence whose reference to enhanced accountability did not disguise absence of public policy reason.[[101]](#footnote-101)

The legislation passed and the new corporation commenced before the Commission’s final report of April 2001. That report observed the Government/Parliament’s wishes about infrastructure ownership, but not train operations, being corporatized – contrary to the Commission’s recommendation - resulted in tension.

*‘Rail Infrastructure Corporation, has a statutory obligation to operate along commercial lines and a duty to make money for the government. The State Rail Authority has as its primary function the provision of commuter services to the travelling public. The tension between what are in truth a state owned corporation and a public utility has contributed to the lack of co-operation which made it necessary to create the Office of the Rail Regulator to deal with the performance of the infrastructure owner and the provider of commuter services.’*[[102]](#footnote-102)

#### 4.5.4 Waterfall crash, Government response and Commission

On 31 January 2003, a commuter train derailed at Waterfall due to its speed in a curve. Immediate contributing factors were incapacitation of a driver in a way that nullified mechanisms to stop the train. A Special Commission of Inquiry was soon established and the same Commissioner appointed.

However, the Government response on rail structure was made in advance of the Commission.

It started in April 2003, a week after the Government was returned in an election, with the Minister for Transport the Hon. Carl Scully MLA, replaced by the Hon. Michael Costa MLC.

In November 2003, the Government introduced and Parliament passed legislation to merge Rail Infrastructure and the passenger rail operator in the metropolitan area as State-owned corporation RailCorp – reinstating vertical integration. Reputedly this followed pressure from within the sector including indications that key management would not work for the Government railways unless they were re-integrated.

The Commission produced its report over a year later – 17 January 2005. It neither praised nor criticised the vertical integration. It said none of the intentions behind the vertical separation and corporatisation of the 1996 changes came to fruition. Four days later, the Hon. John Watkins MLA replaced Mr Costa as Transport Minister.[[103]](#footnote-103)

While the Waterfall Commission recommendations did not refer to industry structure, the report recited the relevant recommendations of the Glenbrook Commission – merging of track ownership and maintenance in a statutory authority, metropolitan network control to be by the commuter train operator.[[104]](#footnote-104)

At the time of the Waterfall Commission report, vertical separation/integration remained controversial in the UK. However, it was no longer controversial in NSW and there was no call for the Commission to offer an opinion on it.

The Commission did offer strong opinions about safety regulation and accident investigation.

It recommended a separate accident investigator independent of the industry, regulator and Government. It was particularly exercised by the Government not adopting similar recommendations from the Glenbrook Commission. That was the reason for my surprise about the Minister asking advice on railway structure from the accident investigator.[[105]](#footnote-105)

#### 4.5.5 Corporatisation and de-corporatisation

The period since 1996 has been marked by repeated structural changes to NSW railways. These included organisational separation/integration and corporatisation - de-corporatisation - re-corporatisation of various functions. Most have been inconsistent with the Glenbrook Commission evidence and recommendations.

Table 1 shows conformance of sector structure with the Commissions’ recommendations – green shading indicates conformance; red shading indicates non-conformance.

**Table 1: Conformance of NSW sector structure with Glenbrook Commission recommendations**

|  |  |  |  |
| --- | --- | --- | --- |
| **Start** | **Infrastructure network owner: is it a statutory authority? (a)** | **R1: Network maintainer: is it the network owner? (a)** | **R3: Commuter train operator: does it perform all of network control? (b)** |
| Pre 1996 | State Rail Authority | State Rail | State Rail |
| 1996 | Rail Access Corporation  | Rail Services (c) | State Rail |
| **2000: Glenbrook Commission (2nd interim report): R1: Statutory authority infrastructure owner to maintain network; R3: Train operator performs all metropolitan network control functions.** |
| 2000 | Rail Infrastructure Corporation | Rail Infrastructure | State Rail |
| 2004 | RailCorp | RailCorp | RailCorp |
| **2005: Waterfall Commission Report: reiterated Glenbrook Commission recommendations.**  |
| 2009 | RailCorp  | RailCorp | RailCorp |
| 2013 | RailCorp | Sydney Trains | Sydney Trains/ RailCorp/ TfNSW |
| 2017 | Transport for NSW | Sydney Trains | Sydney Trains/ TfnSW |
| 2020 | Transport Asset Holding Entity | Sydney Trains  | Sydney Trains/ TfNSW |

(a) Glenbrook Commission (2nd interim report) recommendation *‘1. That the infrastructure owner RAC and the infrastructure maintainer RSA**cease to be State owned corporations and that their property and functions be merged into a single statutory authority, to be known as the Rail Infrastructure Authority, responsible to the Minister for Transport.’*

(b) Glenbrook Commission (2nd interim report) recommendation ‘*3. That SRA be responsible for the control and management of timetabling and train movements and other functions of network control within the area of operation of the present CityRail network.’*

(c) Statutory authority 1 July 1996 to 1 July 1998; State owned corporation from 1 July 1998

First, it is worth noting the table shows some misleading organisational names – RailCorp was not relevantly a corporation after 2009, and the Transport Asset Holding Entity is a corporation. This type of practice – ‘clever wording’ - is likely to cause confusion within Government, including of the type that led to the mistakes about what the crash Commissions said.

The table indicates conformance pre 1996 and between 2009 and 2013.

Between the Glenbrook crash and 2009, the non-conformance was rail infrastructure being owned by a State-owned corporation. Up until shortly after the Waterfall crash train operations were not corporatized.

Train operations – in the commuter railway - and ferries were corporatized under Minister Costa in 2003. This was prior to the report from the Waterfall Commission (2005) and prior to the final report from an inquiry into transport sustainability (December 2003) established by that Minister.[[106]](#footnote-106)

The relevant second reading speech gave no explanation for the corporatisations. It claimed vertical integration of the commuter railway would deliver single point accountability. While it referred to the Glenbrook Commission it ignored the recommendation that infrastructure should be in a statutory authority. The legislation exacerbated the inconsistency with the Commission’s report by applying corporatisation to train operations.[[107]](#footnote-107)

The later report on transport sustainability recommended corporatisation of Sydney Ferries as a means of separating the business from its parent – the bus operator State Transit. However, it was silent about corporatising the commuter rail system despite its criticising costs and management.[[108]](#footnote-108)

The transport sustainability report raised the possibility of franchising public transport services. It cited an infrastructure construction industry association, AusCID:

*‘The ownership of heavy public transport infrastructure, such as railway tracks and roads or, indeed, train and bus rolling stock, is not necessarily important to an operator of services’.*

AusCID claimed commuter rail franchising was feasible despite problems occurring in Melbourne. The report accepted this and further argued the Sydney rail network was tangled. In so doing it created policy furphies that still retain currency.

An initial attempt to franchise Melbourne’s commuter train operation notoriously failed because the infrastructure was not to be included. Serious franchise bids were made only after the Government included control of the infrastructure in the franchise.

The example of Melbourne demonstrated that effective ownership – control – of railway tracks is necessarily important to an operator of commuter rail services. It also demonstrated that franchising for commuter rail differs from aviation, shipping, other forms of public transport and indeed most other rail tasks.[[109]](#footnote-109)

While feasibility of franchising might be an open question, the claim Sydney’s rail network was tangled was not. The claim is simply wrong. The reason: a transport infrastructure network is not capable of being tangled. What can get tangled is the traffic on it. In Sydney if there was a tangle it was of trains, not tracks, and that is a consequence of operating patterns - timetabling.[[110]](#footnote-110)

The transport sustainability report welcomed corporatisation of Sydney Ferries – so as to separate it from Sydney’s buses. It was silent about corporatisation of the commuter railway.[[111]](#footnote-111)

The purpose of corporatising the commuter railway in 2003 is yet to be explained. It may have been a sop to ‘shareholder departments’, like Treasury, necessary to gain political and bureaucratic support for vertical integration of the railway by increasing their ‘role’.

At the time, the safeguarding of the public interest was to be in a performance ‘agreement’ between the Ministry of Transport and RailCorp – required by legislation. However, like its sister ‘agreement’ for Sydney Ferries, it was effectively a phantom.

Effective disregard of legislative requirements was a result of 2003 ‘reforms’ being interpreted by officials as: the Ministry of Transport would deal with buses, and rail would be dealt with by the safety and reliability regulator. That interpretation, too, was fundamentally inconsistent with the Glenbrook and Waterfall Commission reports.[[112]](#footnote-112)

RailCorp was ‘de-corporatised’ by legislation passed in 2008. Sydney Ferries was de-corporatised at the same time. The de-corporatisation bill was presented by the Hon. David Campbell MP, in October, one month after he became Transport Minister in September. This followed a Commission of Inquiry into Sydney Ferries.

#### 4.5.6 Sydney Ferries Commission of Inquiry

The report of the Commission of Inquiry into Sydney Ferries, by Mr Walker SC, October 2007, highlighted problems of attempting to apply the NSW State-owned corporation model to highly subsidised activities related to public transport. Essentially two were seen.

First the State-owned corporation framework ignores the principal value of public transport:

*‘The adoption of the SOC model encourages a conceptual framework whereby ….an organization is assessed on its measured financial performance, rather than on its overall, and real, contribution to an effective and reliable integrated public transport system’.*

Second, a transport State-owned corporation involved in public transport cannot be subject to commercial pressures. The corporation’s only real customer is the Government which, at most, has a detailed service contract. It is worth noting the Government (Department of Transport) and corporation ignored the legislative requirement for a service contract-substitute, a performance ‘agreement’, post 2003.

However, even if the legislation had been taken seriously, the agreements – like service contracts – were legal fictions. The Ferries Commission observed the Government customer cannot sue a State-owned corporation for breach of contract:

*‘the unreality of the Government enforcing the obligations imposed on a SOC by a service contract. It would be an affront to the common sense of taxpayers for the Government to incur the expense of suing a corporation for damages, or litigating to justify reduced remuneration of the corporation, were it to breach or fall short of the standards required by its service contract’.*

There is little incentive on the corporation to perform its contract obligations, and none when it is accountable to (other Government) shareholders.[[113]](#footnote-113)

The beagle has put these points as a root cause of the failure of the 1996 rail model – where contracts, especially access agreements – between the Government’s State-owned corporation Rail Access and Government owned rail operators were unenforceable and there was no bona fide dispute resolution mechanism.

Similar comments could be made about the ‘line CSO’. Instead of putting commercial pressures on the railway, corporatisation introduced hidden political and bureaucratic influences especially from Treasury.[[114]](#footnote-114)

The Ferries Commission concluded the only sensible options to deal with the issues were to make Sydney Ferries a statutory authority, or to privatise it via franchising. Its preferred option was for the Government to develop a service contract and offer it to the private market – i.e., franchise.

The then Government only partly agreed. It de-corporatised Sydney Ferries, developed a service contract and awarded most parts of it to the new authority.

For completeness, in 2010 RailCorp’s board was abolished. After the election of a new Government in 2011 it became an agency of Transport for NSW.[[115]](#footnote-115)

### 4.6 Origin of the present mistake

#### 4.6.1 2012 – change of intention conflicting with public advice

In May 2012, the Government signalled an intention to break-up RailCorp, with operations to be conducted by a new ‘specialist’ organisation. This was part of ‘fixing the trains’ announced by Transport Minister Berejiklian.

The sentiment of that announcement could have been taken from 1996 changes – to pursue *‘customer service’* it was considered necessary to *‘encourage train operators to focus on serving travellers’* and not be distracted by infrastructure.[[116]](#footnote-116)

It took effect in 2013, with the new organisation called Sydney Trains. In fact, maintenance and timetabling functions were also removed from RailCorp – the former to Sydney Trains, the latter to Transport for NSW.

The changes left RailCorp as an asset owner which did not conduct maintenance. Thus, assets were effectively split from maintenance. Network control was split, with part not conducted by the train operator.[[117]](#footnote-117)

The changes were almost diametrically opposed to Glenbrook (interim report 2) recommendations 1 and 3. The only element of those recommendations not contradicted by the changes: the organisations were not then State-owned corporations.[[118]](#footnote-118)

The changes may have been enabled by amendments to the *Transport Administration Act (1988)* in 2011, some months after Ms Berejiklian became Transport Minister.

However, in the second reading speech 23 August 2011, the Minister with carriage for the amendments, the Hon. Duncan Gay MLC, said the opposite. He said there would be no such change:

*‘The existing publicly owned transport service providers will continue to own and maintain the assets, liabilities, rights and obligations to their transport services…..’* [[119]](#footnote-119)

The May 2012 actions did not match that statement. Neither the second reading speech, nor the ‘fixing the trains’ announcement referred to the Glenbrook or Waterfall crash Commissions.

Removing assets from rail service providers owning assets was not the only radical change in rail policy between late 2011 and mid-2012 which ignored key information.

#### 4.6.2 2012 – another change of intention conflicting with public advice

Readers may recall reports Minister Berejiklian ‘confirmed’ in April 2011 that the North-West Rail Link would have ‘*standard double-decked trains*’ as ‘*a heavy rail link’.*  In December 2011, she said it would ‘*link with Sydney’s CityRail network’*.

By June 2012, this had changed with Minister Berejiklian writing the North West Rail Link would having single deck rapid transit trains. While the relevant document implied it would link to the existing rail network, in fact it was designed to permanently prevent a connection via ‘bespoke’ Sydney Metro.[[120]](#footnote-120)

Careful readers would remember Government announcements and documents about rail – particularly about Sydney Metro - failed to acknowledge a very public warning about rail planning issued in 2010 by an inquiry led by former Co-ordinator General Mr Christie.

The caution from Mr Christie was to ensure the route and dimensions of another harbour crossing-CBD line would enhance rather than permanently jeopardise the commuter rail network.

Also apparently ignored in policy making were expert reports for Transport for NSW (2011) and Infrastructure NSW (2012), and a report by Infrastructure NSW (2012). A result is the transport planning disaster centring on Sydney Metro.[[121]](#footnote-121)

#### 4.6.3 2017 legislation

Further changes to commuter rail governance saw Sydney Trains became notionally independent of RailCorp in preparation for, and under the legislation to establish, the Entity.[[122]](#footnote-122)

The 2016 Cabinet submission appears to be the first public document explicitly making the mistake – ‘don’t split maintenance from operations’ instead of ‘don’t split maintenance from assets’.

Apparently authored by Transport Minister Constance and Treasurer Berejiklian, it sought approval for the 2017 legislation.

The Policy SPAD article noted then Treasurer Perrottet’s second reading speech for that legislation explicitly mentioned the split of maintenance from assets as a way to generate profits(!):

*‘a clear delineation between a publicly owned asset holder and the State as a direct service provider.’*

Ms Berejiklian was former Transport Minister and shadow Minister in Opposition. With Mr Constance, their combined time in the transport portfolio was 9 ½ years. During the period in opposition Ms Berejiklian, as Transport spokesperson, had cited recommendations of the Glenbrook and Waterfall Commissions.[[123]](#footnote-123)

Were the 2016 Cabinet submission to properly advise what the crash Commissions actually recommended it would likely have reflected adversely on the changes that had already been made. Almost certainly, Treasurer Perrottet would not have virtually boasted of measures in conflict with the Commissions’ recommendations.

The Transport Ministers and Transport for NSW had created a situation in which ownership of assets was seen as irrelevant to operations, including – most likely – by Treasurer Perrottet.

Whatever the reason for separation of asset ownership from maintenance and operations, that reason did not require assets to be in Transport for NSW. In those circumstances, it is little wonder Treasury sought control of those assets.

## 5. Independent Pricing and Regulatory Tribunal

On 11 October, the Independent Pricing and Regulatory Tribunal provided a submission to the inquiry. This was in response to an email by the Committee, 25 September. It clarified – contradicted – aspects of submissions and evidence from the Government and the Entity.[[124]](#footnote-124)

Those submissions and evidence suggested the Tribunal determines access charges. The Tribunal said it does not do so. Rather, it is concerned with floor and ceiling prices within which charges are negotiated between track owners and access seekers.

The Tribunal’s submission implied this issue is largely confined to Hunter Valley coal rail operations.

Most Hunter Valley coal rail operations occur on track operated by the Australian Rail Track Corporation – between Newcastle (Carrington, Kooragang Island) and north-west to Werris Creek/Gulgong. They generated around $486.6m in access revenue in 2019-20.[[125]](#footnote-125)

A limited amount of coal rail operations occurs on track operated by NSW entities between Broadmeadow and Fassifern in the metropolitan electrified area. They generated $8.5m in revenue in 2019-20. The Tribunal is concerned these exceeded the ceiling limit.[[126]](#footnote-126)

No such issue arises for Sydney Trains use of the network. The Tribunal has not considered that matter.

Sydney Trains use, together with lease of fleet, generated the vast bulk - $750.0m - of Entity revenue.[[127]](#footnote-127)

The conclusion to be drawn is: officials’ comments suggesting the Tribunal is or has been involved in determining financial arrangements of the Entity have been misleading and, at best, ignorant. The Tribunal has felt the need to correct this evidence to ensure it can fulfil its legislated duties.

## 6. Consultant reports and access

### 6.1 Introduction

Some of the media controversy about the Entity centres on a report by accounting and consulting firm KPMG for Transport for NSW, November 2020. It followed previous reports for Transport by KPMG (Mid 2020) and PwC (2019). These reports, and the 2016 Cabinet submission, were predicated on ‘access’ – by which Sydney Trains effectively pays to use rail infrastructure – underpinning the financial viability of the Entity and scheme.

The firms were tasked by Transport for NSW with developing an ‘operating model’ for the Entity. In this context, an operating model entails a structure of accounts and expected financial flows. Given the nature of the Entity, any model will contain assumptions about control of assets, staff and railways. It might have implications for the State Budget.

Such a task is not new. It was performed by various accounting and consulting firms, including KPMG, for the 1996 structural changes to NSW railways. However, then the operating model was known well in advance of legislation and structural changes.

In each case, the accounting and consulting firms are reliant on Government agencies for information and interpretations of policy. Mistakes of fact and interpretation in their reports often – usually – reflect erroneous information provided by agencies, or amendments/’refinements’ suggested by agencies to address their sensitivities. The following comments, therefore, are not criticisms of the efforts, expertise or work of the authors, but reflect more on what they are likely to have been told by officials.

### 6.2 PwC

PwC’s report post-dated legislation enabling the Entity be over two years. It said the issue was: new accounting standards meant governance changes were necessary to ensure rail assets did not appear on the general government balance sheet. This implied the driving consideration for later changes – or at least the request for PwC advice! - to be government accounting. It advised most model options were infeasible or were inconsistent with objectives.[[128]](#footnote-128)

The reason:

*‘the following changes are required to ensure that assets owned by TAHE are not reflected on the TfNSW balance sheet:*

*♣ TAHE must contract directly with transport operators and have control over transport operations;*

*♣ TfNSW retains the strategic role of integrated transport planning, execution should be governed by TAHE;*

*♣ IPART continues to regulate prices while TAHE will determine pricing within the boundaries provided;*

*♣ TfNSW or another General Government Agency can retain protective safety or regulatory functions;*

 *♣ TfNSW or another General Government Agency or Department should not control or direct TAHE. TAHE should have the freedom to direct transport operations within safety or regulatory boundaries.’*

That is, PwC held the accounting objective can only be achieved by real world changes – removing the railways from the control of Government.

Several models were considered. In some, the Entity had notional but not actual control of assets. In others the Entity had actual control of assets and would (therefore) determine rail services and the organisations to conduct them i.e., be a franchisor.

The latter models would have the Entity effectively replacing Transport for NSW.

The PwC report’s preferred model was to ‘corporatise’ all of Transport for NSW, including buses, ferries and certain roads. The corporatized Transport would gain funds from road and public transport charges. The report recognised this as a radical solution, but argued other options either failed to meet fiscal objectives or led to unacceptable institutional risks to public safety.

Circumstances in which fiscal objectives would not be met were where the Entity did not have effective control of assets – if it did not control maintenance, improvement and use. In such a case, PwC argued the assets could not be put on the Entity’s accounts, and the scheme proposed first by Treasurer Berejiklian and her successor Mr Perrottet would not be acceptable to accounting authorities.

### 6.3 KPMG 2020 July

KPMG did an initial assessment of options for the Entity in mid-2020 – three years after the relevant legislation was passed.[[129]](#footnote-129)

This report posited: government rail structures changed only in response to fiscal or accident inquiry drivers. It provided a short history of commuter rail sector structure since 1996, but did not explicitly cite recommendations of the Glenbrook or Waterfall Commissions. It referred to the recommendation to merge Rail Access and Rail Services but did not mention it said the new organisation should be a statutory authority not a State-owned corporation. In that, it was consistent with Parliament’s response.

After tracing the history of re-integration and de-corporatisation since 2005, the report noted 2020 saw the return of separation and corporatisation.

It considered three models against ten criteria. The first model, ‘TAHE pure’, had segmentation of businesses according to accounting rules needed to keep assets off the general government balance sheet. It failed four criteria and could only partially satisfy four others. It would severely fragment transport and was not recommended.

The second model ‘TAHE real’ relied on bureaucratic mechanisms - coordination units for operation and capital funding with Transport for NSW. The report said the idea could satisfy the objectives; however, details were yet to be developed.

The third model, ‘TAHE for NSW’, was more likely to satisfy all objectives. However, it would involve the Entity effectively taking over Transport for NSW – i.e., corporatisation of Trasport for NSW similar to what was described by PwC.

### 6.4 KPMG November 2020

#### 6.4.1 Overview

KPMG’s second report regarding Entity-changes in November 2020 was the one creating controversy. It appeared to be based on filling out the idea of ‘TAHE pure’, and from that it can be inferred this was the Government’s preferred model.

The document was marked ‘highly confidential’. The lead author – as for the July report – was the former partner whose evidence to the Parliamentary inquiry reflected poorly on policy making.[[130]](#footnote-130)

The proposed arrangements were supposed to conform with Treasury requirements that:

*‘TAHE must have demonstrable independence and control of its assets, revenues, investments and costs’[[131]](#footnote-131)*

The Entity would take over Transport for NSW functions: pricing and terms of track access; level and terms of rail investment; *‘endorsement’* of maintenance levels; assurance maintenance has been *‘appropriately performed’.[[132]](#footnote-132)*

However, the Entity would not, among other things*:*

*’develop, monitor and enforce compliance with access agreements’; ‘manage the SWTT or DWTT’; ‘have accountability for procurement and delivery of operational capital projects’; ‘directly deliver maintenance services, undertake asset assurance and set asset standards’; ‘determine the level of maintenance expenditure of* (sic?) *funding’.[[133]](#footnote-133)*

The report’s discussion about NSW’s proposed rail arrangements was charitable. Nonetheless, it demonstrated the proposed arrangements to be artificial and confused. [[134]](#footnote-134)

The report did not draw what seems to me the obvious conclusion about this mess: it likely creates risk to the public from NSW rail.

However, the report could be interpreted as effectively advising against the Entity model. It provided an assessment of proposed arrangements against ten stated Government objectives. Even its lenient view held the arrangements would meet only three objectives. The proposed arrangements would prevent achievement of two Government objectives.[[135]](#footnote-135)

Despite this assessment, the bureaucratic and media controversy was about another aspect of the report – implications of the Entity for presentation of the State Budget.

#### 6.4.2 Budget controversy source

This controversy is recorded in the report via separate scenarios – one preferred by NSW Treasury and the other by KPMG. The consequence of the difference between the scenarios is a substantial variation in estimates presented in the NSW Budget.

Of more interest here are the sources of that difference. There were two sources stemming from arrangements assumed by KPMG: control of NSW railways; access charges. The extent to which the arrangements assumed by the report have/had been implemented is unknown. Nonetheless, the report is suggestive of a dreadful tangle in policy.

Unfortunately, the copy of the report at the Inquiry’s website is in parts illegible and does not include calculations. The following is based on what might be understood from that copy.[[136]](#footnote-136)

#### 6.4.3 Control of NSW railways

KPMG offered some explanation of the proposed operation of the Entity and control of NSW railways. The report suggested the operational arrangements include:

* Sydney Trains conducts maintenance including of track;
* the level of maintenance spending is determined – ‘endorsed’ – by the Entity;
* Transport for NSW pays Sydney Trains for maintenance of the Entity’s assets;
* the split between types of maintenance works is determined by Transport for NSW;
* scheduling - the Standard Working Timetable - is conducted by Transport for NSW;
* real time train control is performed by Sydney Trains via Ministerial direction;
* the Entity signs access agreements.

The report did not say how the Entity will be controlled such that it does not enter access agreements for which capacity is not available.[[137]](#footnote-137)

Two of the three network control functions – scheduling, train control - are organisationally separated. However, the critical third aspect of network control – the Safe Working Rules – is not mentioned.

Nor was there mention of any proper mechanism to resolve disputes among the parties. The absence of such a mechanism doomed the 1996 changes to failure. At the Parliamentary Inquiry, the Secretary of Transport for NSW did claim the ‘agreements’ among the Entity, Transport for NSW and Sydney Trains have dispute resolution mechanisms:

*‘and nominated contract managers who will facilitate the solution of these issues on behalf of their respective entities.’[[138]](#footnote-138)*

However, if that is the extent of dispute resolution processes, the mechanism is merely a watered-down version of the ineffective, probably counter-productive, dispute process of the 1996 changes – which also involved representatives of the parties and senior officials. Neither is capable of dealing with the issues identified in the Special Commission of Inquiry into Sydney Ferries.[[139]](#footnote-139)

The report explained the Entity’s role in terms such as:

*‘at its core the long term operating model seeks to allocateTAHE* (the Entity) *required control over its assets through an assurance framework that sees TAHE with the accountability to assure itself that those charged with the delegated authority to undertake maintenance activities are doing so in accordance with its objective outcomes and relevant standards*

*Through its assurance framework TAHE is required to endorse funding envelopes year to year; but sees TfNSW or the public rail operators charged with the prioritisation and delivery of maintenance activities’*[[140]](#footnote-140)

That looks strained. An ‘accountability’ to merely ‘assure’ oneself is no accountability at all. If another determines who undertakes maintenance on the Entity’s assets, the Entity’s (potential) relevant accountability is to give its opinion of the quality of maintenance work to that party. The Entity would need very substantial rail expertise to fulfil that role.

The Entity’s ‘endorsement’ of ‘funding envelopes’ is ambiguous. On one reading – the Entity must endorse whatever is put forward – the Entity has no real function and no control over its assets. An alternative reading is: the Entity may refuse to endorse a particular proposal, and decide whether to adopt the plans for prioritisation and delivery put forward by TfNSW etc – if so, whatever plan is adopted is the Entity’s (responsibility).

The report talked further about the Entity’s roles:

*‘TAHE is accountable to endorse the recommendation to be included in the funding submission relating to TAHE owned assets; where a mechanism will be developed to resolve disputes or changes that TAHE may have to the proposed funding request…..*

*Once funding is endorsed through the budget process, TAHE will again need to endorse allocation of funding that its service providers receive for the maintenance of its assets.’*[[141]](#footnote-141)

Again, there is ambiguity about the legal and operational implications of ‘endorse’. Further, it apparently suggests another party is to pay for maintenance of the Entity’s assets. If so, the relationship between the maintainer and the Entity could be vexed, and accountabilities arguable.

The appearance is what was put to KPMG for explanation and possibly ‘refinement’ was a convoluted scheme which seeks to create a vertical separation of assets from maintenance responsibility but remains deeply ambiguous. Comments by the Secretary of Transport for NSW at the Parliamentary Inquiry support such a conclusion:

*‘TAHE will not impact on our operations and maintenance activities……’.[[142]](#footnote-142)*

It is possible the design and sentiment behind those comments reflects some views about the 1996 vertical separation and what needs to be done to avoid its outcomes.

However, the discussion about structure and safety (above) means the Government and Departments learned the wrong lessons from the 1996 experience. The following discussion about access is further support of that.

### 6.5 Access charges

#### 6.5.1 Conflicting figures

KPMG (November 2020) estimated access revenue for the Entity should be between $1,410m and $4,340m for 2021.[[143]](#footnote-143)

The lower figure relates to ‘floor’, the higher ‘ceiling’, access charges permissible under the NSW rail Access Undertaking. Most – except for around $120m – would come from Sydney Trains and NSW Trains. The Sydney Trains etc. payments would need to be funded from the Government.[[144]](#footnote-144)

The 2016 Cabinet submission estimated necessary Government support of $800m to enable access and lease payments, including for buses, to the Entity.[[145]](#footnote-145)

On 5 November 2021, Treasury advised the Committee:

*‘Sydney Trains already receives $1.2b in maintenance funding which is considered part of determining the IPART floor calculation. Further access fees are negotiated between TAHE and the operators. In 2021-22 access fees was $680M…’*[[146]](#footnote-146)

The orders of magnitude difference in these figures suggest uncertainties with the understanding of access policy, regulation and financial flows. The following attempts to make some sense of the differences.

#### 6.5.2 Access and the central issue

The Policy SPAD article said a principal problem with arrangements surrounding the Entity related to Sydney Trains needing to ‘access’ rail track i.e., vertical separation. Such a need is one of the critical differences between those arrangements and the structure of urban rail in Melbourne, Brisbane, Adelaide, Perth and indeed Sydney Metro.

The other critical difference is: in NSW, access is to be provided on a ‘commercial’ basis by an organisation independent of the Transport portfolio.

The central issue arising from vertically separation – access - in a subsidised railway is the commercial incentive of the track owner to allow asset degradation. The owner has an incentive to reduce maintenance below that necessary to maintain the network at a steady state.

This incentive was explored in the previous article and graphically illustrated in the UK and NSW between 1996 and 2000. It also was demonstrated in regional Victoria.[[147]](#footnote-147)

Hence, a claim a ‘commercial’ track owner (without maintenance responsibility) provides a further level of assurance over commuter rail track assets or safety would be preposterous.

#### 6.5.3 The maintenance concept

Further issues – and confusion – arise from an apparent failure of Government to understand/ account for conceptual differences between maintenance in commuter rail – or road – networks, and maintenance of other assets. That is a matter that needs very careful and detailed explanation by rail staff and officials to external parties such as advisory firms.

For many other systems, the maintenance concept is: work necessary for assets to achieve their predetermined (economic) finite lives. This allows for gradual degradation. Degradation is reflected in accounts as depreciation – a cost. An example is Hunter Valley track used for coal haulage. For access charge purposes, its maintenance cost is based on the combination of asset components having the same predetermined economic life as coal mines.[[148]](#footnote-148)

Commuter rail – and road – networks are effectively assumed to have infinite lives. In principle, maintenance aims to prevent degradation of commuter rail networks. Maintenance activities – and costs - are more substantial than in other sectors. However, commuter rail maintenance avoids depreciation costs. Incurring depreciation would indicate maintenance failures.

For vertically separated commuter rail – which is heavily subsidised - it is critical to counteract the asset degradation incentive if the track owner has a commercial framework. It is necessary to require non-standard public reporting - financial and otherwise - by the track owner. That reporting must be based on regular and frequent physical inspection of assets by a party who is independent of the track owner. This underscores the irrelevance – if not misleading nature – of accounts that present depreciation on straight line, reducing balance etc. book keeping conventions.

A first mechanism is reporting of track condition indicators. An example, albeit inadequate, is in the lease of NSW track to the Australian Rail Track Corporation.[[149]](#footnote-149)

A second, mechanism can build on this by frequently altering the valuation of assets according to their condition. Condition is regularly assessed by inspections. Between inspections, condition indicators can be used to estimate value adjustments.[[150]](#footnote-150)

The conceptual differences between maintenance in a commuter railway and some other systems extend further.

In economic parlance, capital works increase capacity or extend the life of a system.

In many systems the capacity or life increase lifts future earning potential and therefore increases asset value. Capital works are differentiated from maintenance in a balance sheet sense, and classification of item as capital works may be influenced by tax treatments.

In commuter rail, such parlance does not apply due to its high levels of subsidisation and assumed infinite life. Terminology includes routine, cyclic or major periodic maintenance and renewals. However, the term capital works can used. Often this relates to larger projects and/or authority of particular employees to undertake or authorise works. It is used for internal budget control and allocation of machinery and skills rather than (just) for book accounting purposes.

The differences in meaning of maintenance/capital between commuter rail and other infrastructure sectors present a source of likely confusion. In relation to control of a railway, the confusion can lead to risks. One type of risk is: it is thought people outside of the railway need to direct, approve or limit particular works – or designs – which they class as capital for accounting purposes.

#### 6.5.4 The relevance of asset valuation

For this second mechanism (to counteract the asset degrading incentives of a commercial track owner be effective) it is not enough – and may not even be helpful – to just separately account for maintenance and capital works. Rather, assets must be recorded in the accounts as having significant value.

The value should exceed the costs of a multi-year maintenance cycle, such that reductions in maintenance lead to greater reductions in asset value.[[151]](#footnote-151)

In that way, maintenance reductions lead to a commercial track owner reporting (unwanted) depreciation. Reductions in maintenance depress rather than lift profits.[[152]](#footnote-152)

As outlined in the previous article, an issue with the traditional commercial framework is that asset value depends on expected net earnings – revenue less costs. That might be appropriate for assets which are capable of generating profits without subsidies.

At the time of the 1996 changes, that traditional framework was known as the RAT – the recoverable amounts test. In that, assets were valued at the greater of net income earning potential or scrap/sale revenue. It led to Rail Access Corporation writing-off the value of the infrastructure assets outside the Hunter Valley, because they were not capable of producing profits.[[153]](#footnote-153)

Evidence to the Parliamentary Inquiry suggests a similar test is now in place. The Entity’s chair advised a write down of around $20bn in the value of the Entity’s assets – around half of total value - due to application of an ‘income’ test. While the reason for the write-down was explored in depth, there was no detail about which assets were written down. Given their lack of alternative use, it is likely the write down was concentrated in infrastructure assets.[[154]](#footnote-154)

This puts in play the incentive to degrade assets. In principle, the correct application of a ‘commercial’ framework to a subsidised railway entails a very substantial increase in subsidies – access charges far in excess of annual maintenance costs. If this framework is to be applied, access charges should also include an additional component related to the present value of future maintenance. This is part of the money-go-round.[[155]](#footnote-155)

In theory, access charge revenue in a subsidised commuter rail system (that lacks explicit external assessment and reporting of asset condition) needs to be sufficient to support an asset valuation of (optimised depreciated) replacement cost. As access charge revenue is limited by the NSW Undertaking to depreciated optimised replacement cost, this means the appropriate level of access charges for the Entity - as a State-owned corporation - without independent and publicly reported monitoring of the specific condition of its assets is more likely the ‘ceiling’ than floor. An implication is: KPMG was certainly correct in drawing attention to the amount of the ceiling charge.

However, the failure of the UK system – in particular RailTrack which had such a mechanism - should be taken as a warning about faith in ‘theory’.

The matter is only relevant to vertical separation. When a subsidised railway is vertically integrated there are no access charges and performance can be reasonably assessed from train operations.[[156]](#footnote-156)

#### 6.5.5 The floor and ceiling for charges

The monopoly element in a railway is track. If there is to be open access to track – whether there is vertical separation or not - access services may need to be regulated.[[157]](#footnote-157)

In Australia, the National Competition Policy contemplated third party access to certain nationally significant infrastructure facilities such as railway track important for contemporaneous competition.

In practice, access would only be sought to very little track - for potentially profitable tasks. The potential for these tasks to make profits creates a potential for the facility owner to abuse its monopoly power.[[158]](#footnote-158)

The Policy has parties negotiating access arrangements with facility owners across all industries. In the event of deadlocked negotiations, economic regulators could determine terms and conditions of access – including charges.

Various industry and State specific regimes sought to provide more certainty about the Policy.

Among the first was the NSW rail access regime – now Undertaking - which accompanied a declaration of open access to track. However, despite the greater certainty it provided, access charges would be negotiated between the track owner and access seekers, rather than being predetermined.

The competition policy purpose of the Undertaking was directed at coal traffic. That traffic originates at specific mines with two or three destinations e.g., Kooragang. Traffic from different mines use different network segments. The Undertaking not only limits net revenues for the track owner, but net revenues per segment of its network. It is designed to regulate at a segment, rather than network, level. The principal mechanism is via limits on negotiated charges.[[159]](#footnote-159)

Charges must be within a floor-ceiling range. The floor essentially entails costs that would be avoided if access was not granted – e.g., wear on assets. The ceiling entails full economic cost.

The purpose of the floor is to avoid cross-subsidisation. Cross-subsidisation may occur if the track owner uses revenues from elsewhere to undercharge traffic from a particular coal mine using other track segments. The particular coal mine then could have an advantage over other mines in selling coal. This concept, is based on mines: with different economic lives; needing use of some different track segments; competing against each other for an end market in which there are prospects for prices well in excess of production, transport and storage costs. It is largely irrelevant to commuter rail.[[160]](#footnote-160)

One purpose of the ceiling is to prevent the track owner making economic rents – unearned income. Another purpose is to provide an incentive for the owner to increase capacity when excess demand is looming. A further purpose, if access is applied to a commuter railway, is to reduce incentives to allow infrastructure degradation.[[161]](#footnote-161)

For most practical purposes, negotiation concerns charges only in excess of the floor – floor charges are not negotiated.

Conceptually, negotiations for payments in excess of the floor would relate to preferential use of capacity – train paths at particular times, guarantees of priority in case of network delays or if aggregate capacity was less than demand.[[162]](#footnote-162)

Full economic cost is estimated by ‘building blocks’. These basically build on the floor (above) by stand-alone costs, depreciation (return of capital) and permitted profits (return on capital). Costs are estimated for each network segment.[[163]](#footnote-163)

Valuation of capital is an important factor for ceiling charges – because it affects permitted profits and depreciation. Also important is the permitted rate of return.

For these purposes, the NSW economic regulator, the Independent Pricing and Regulatory Tribunal, determined capital valuation would be based on depreciated optimised replacement costs – rather than accounting or book asset values. Permitted profit rates would be determined by the Weighted Average Cost of Capital. It may be that the track owner needs two sets of accounts – one for access regulation and one for standard accounting reporting.[[164]](#footnote-164)

The regulatory implication is: a deterioration in assets beyond that set in pre-determined depreciation schedules due to maintenance inadequacy will result in a loss of allowable profits. This is because the depreciated optimised replacement cost would fall. The fall would not be mitigated by the reduction in maintenance costs as such reduction would be matched by an equal fall in access revenue – because maintenance is allowed as an expense for access charges.

Therefore, the purpose of access price regulation is to regulate service quality, as it is the restriction in service quality or capacity than enables a monopolist to raise prices, make economic rents and reduce ‘welfare’.

The basic point, however, is that the access price regulatory scheme is not designed to apply to railways receiving subsidy or commuter trains. It is designed for highly profitable rail tasks with vastly different operating characteristics. With that background, references to access regulation, the Independent Pricing and Regulatory Tribunal and ‘building blocks’ in discussions about Sydney Trains are problematic. The references are likely to confuse such discussions. As shown in the next section.

#### 6.5.6 The numbers

In a commuter railway, vertically separated track access will not increase the transparency or control of economic costs. The reason: the advantage of trade-offs e.g., between fleet and track costs is lost.

Perhaps the only purpose of vertical separation in such a situation is to improve apparent accounting cost transparency. The diversity and possible meaning of the numbers in the present debate about the Entity suggests this purpose is being frustrated.

There are indications in the KPMG report the scheme was intended to entail:

1. Sydney Trains performing maintenance tasks, in lieu of (some) access payments to the Entity;
2. Sydney Trains making further payments, purportedly related to access, to the Entity; and
3. Sydney Trains being funded by Transport for NSW for the latter.

Terminology used in some parts of the KPMG report, and by Treasury, refer to (b) as the access charges. Indeed, this may have stemmed from the 2016 Cabinet submission:

*‘2.6…..to allow them to pay a commercial rate to TAHE* (for the use of assets)*, the Budget will need to provide an additional $800 million per annum of funding to public transport operators. In turn it is intended that TAHE should return the majority of this $800 million per annum to Government as dividends….’*

*3.9….Sydney Trains and NSW Trains currently do not pay for the use of, or access to, these assets. They will need to be funded by the Government approximately $800 million per annum to cover the costs of leasing or accessing these assets.’[[165]](#footnote-165)*

Read by itself, 3.9 in the above quote would be interpreted as the scheme involving Sydney Trains etc. paying sufficient to enable TAHE to cover train control and maintenance expenses. That is, those expenses are in the order of $800m, and previously TAHE and its predecessors gained such funds directly from Government.

However, 2.6 in the above quote reverses that normal use of language. Any amounts TAHE returned to Government as a dividend - ipso facto - could not be spent on train control or maintenance.

The paragraphs were almost certain to cause confusion, including in the railway and among officials, which is then likely to have persistent and later been relayed to advisors.

The KPMG report appears – to me – to have the 2022 access fees for public rail operators - $700m - net of maintenance and overheads. It said this needs to be grossed-up to meet the floor test. It mentioned maintenance funding for Sydney Trains of $1.2bn [[166]](#footnote-166)

Similarly, Treasury mentioned ‘*further’* access fees of $680m when referring to $1.2bn in maintenance funding for Sydney Trains (section 6.3 above). That could mean the $680m is in addition to the part of the $1.2bn used for track maintenance.[[167]](#footnote-167)

This is most unusual language. It reverses normal meanings. For example, ‘grossing up’ in rail access typically refers to adding other charges on top of maintenance costs.

Here it appears to be used as adding maintenance costs to other charges. Neither the Treasury nor the report at the Inquiry’s website identify what those other charges might be for.[[168]](#footnote-168)

The KPMG report estimate of $1.4bn access charges includes maintenance costs. Further:

*‘implicitly, Sydney Trains as the Network Controller and O&M on the MRN incurs costs which are almost identical to the floor, but NSWT does not incur these same costs nor does it pay for access’.*[[169]](#footnote-169)

That is, the $1.4bn estimate seems to comprise $700m for maintenance and network control costs, and $700m for something else. The latter is regarded as the access charge in some - but not all - places in the report, just like a similar figure was in the 2016 Cabinet submission.

The estimate appears to reflect confusion starting in the Cabinet submission. Conceptually the approach looks wrong.

The NSW Rail Access Undertaking floor test is:

*‘Access revenue from every Access Seeker must meet the Direct Cost imposed by that Access Seeker’.[[170]](#footnote-170)*

For that purpose, Direct Cost means:

‘*efficient forward looking costs that vary with the usage of a single operator within a 12 month period, plus a levellised charge for variable MPM costs, but excluding Depreciation’.*

MPM is:

*‘planned maintenance expenditure on infrastructure assets at intervals of more than one year, including activities that renovate and refurbish the assets to achieve their predetermined service life and service level.’*

The references to efficient forward-looking costs and MPM, and the exclusion of depreciation, imply the floor charges relate to train control costs and either estimates of rectification of infrastructure wear or maintenance costs.

Given the irrelevance and impossibility of determining infrastructure wear by commuter trains on each segment in the metropolitan area, the proxy for network avoidable costs is: network control and maintenance costs. Network control and maintenance costs therefore are the floor charge.

That exposes several problems.

First, in the Access Undertaking, the ‘building blocks’ approach - referred to by the KPMG report - entails building on a base of efficient maintenance costs. Not building on a base of capital charges.

Yet the Cabinet submission and Treasury’s reference to a capital charge as an access charge - ‘because’ train control and maintenance are conducted gratis by Sydney Trains – would naturally lead to a presumption by others that inverts the building blocks.

Second, by Treasury combining track and fleet maintenance and network control into a $1.2bn lump, there is less - rather than more - accounting transparency of costs and Government spending. That is anathema to the very purposes of rail access which have been consistently stated since the European Union Directives.[[171]](#footnote-171)

Third, there is no payment of monies from Sydney Trains to the Entity of the floor access charge. Rather, it is purported the charge is paid ‘in kind’. There are a number of reasons for that to be unacceptable.

Among these, from a public policy perspective, is that the charge must be based on efficient costs which is contradicted by one of the claims behind the ‘reform’ - that Sydney Trains maintenance practices/costs are not efficient.

#### 6.5.7 The $680m/$700m payment

A further problem arising from the payment in kind relates to the purpose of further payment of monies from Sydney Trains to the Entity - $700m in the report, $680m according to Treasury. That is roughly the same number. The question is: what for?

That payment is not related to – it is far above - the floor charge. Nor is it related to – it is far below - the ceiling charge.

It could not relate to a ‘negotiated’ charge between the floor and ceiling as that is a matter solely between Sydney Trains and the Entity. At the time the ‘estimates’ were made negotiations had not commenced.

The payment should not be related to depreciation because the maintenance undertaken should ensure there is no deterioration in assets i.e., there is no depreciation.

Further, there is no evident additional service provided by the Entity to Sydney Trains.

It appears to be a gift. The intention of Treasury et.al of such a gift is likely to be support a certain level of profitability of the Entity such that it appears to be a ‘commercially’ viable organisation.

Such an intention is reflected in the evidence given at the Parliamentary Inquiry, 12 December 2021. That evidence on the whole suggested Treasury, not Sydney Trains, controls the amount of access payments from Sydney Trains to the Entity. In part the evidence suggested the Entity can effectively demand higher payments from Sydney Trains, for no additional services, simply to meet rate of return targets set by Treasury. It is unclear, at best, what is being negotiated in the access agreements.[[172]](#footnote-172)

Sydney Trains may be unable to bestow such a gift. Legislation gives Sydney Trains the same type of objectives as the Entity. Like the Entity, Sydney Trains is to only look after itself. A gift of $700m conflicts with such objectives. Maintaining the profitability of the Entity, or making the Entity seem like a commercially viable organisation, is not a legitimate purpose of Sydney Trains.*[[173]](#footnote-173)*

There is considerable doubt about whether Sydney Trains could make such a payment of its own volition. If it can make such a payment, it equally has discretion to alter or refuse to give it in future. Moreover, the Entity cannot enforce a contract or agreement with Sydney Trains.[[174]](#footnote-174)

It is possible Sydney Trains has been directed to make the payment. Transport for NSW may give directions to Sydney Trains. Transport for NSW has broader system wide objectives. However, it is unclear whether such objectives could extend to simply supporting the profits of a State-owned Corporation and whether a direction along these lines would be valid.[[175]](#footnote-175)

The Government’s purpose of Sydney Trains making such a gift appears to be to support the finances of the Entity. According to KPMG, the support is less than what is required mitigate the Entity’s incentive to allow asset degradation – less than ceiling access revenues – by several billion dollars per annum.[[176]](#footnote-176)

The question then is, how did KPMG and Treasury come up with their different figures. While the matter is obscure, there are three obvious possibilities.

First, the charge might include payments for fleet lease. However, it is implied at several points the dominating matter is the access – to infrastructure – charge.

Second, is infrastructure depreciation. The KPMG report claimed the Entity traps cash via depreciation. It also said the annual flag fall will vary materially from costs. The report claimed the floor access charge is approximately twice the cost of network control and maintenance. As the floor charge does not include a return on assets, depreciation seems the likely explanation of the report’s floor estimates.[[177]](#footnote-177)

However, as indicated earlier, the purpose of maintenance in a commuter railway is elimination of depreciation. This suggests a possible misunderstanding – double counting – of access charges.

The Undertaking precludes depreciation being included in the floor charge. Given the arcane and highly technical nature of the topic, in my view it is likely KPMG was advised of these figures and intent of the Undertaking but was misled by officials on both.

Third is a return on assets. There is considerable discussion in the KPMG report about returns on assets/equity, and this appears to be a primary point of contention between KPMG and Treasury. Of itself this suggests KPMG was misled by officials whose thoughts about access are likely dominated by arguments with economic regulators over coal haulage.[[178]](#footnote-178)

In any event, returns relate only to the ceiling charge. They should not be included in the floor.

#### 6.5.8 Constructing an argument

Despite the charges including apparent gifts, it may be possible to construct an argument that it may be in Sydney Trains interests to make such payments.

The ability of Sydney Trains to meet its objectives depends on adequate maintenance of the network. Inserting the Entity into the maintenance process – to endorse the level of maintenance – creates a risk of under-maintenance. That could be mitigated were the Entity to financially suffer from maintenance cuts.[[179]](#footnote-179)

It may be in Sydney Trains’ further interest to neutralise the Entity’s incentive to write down asset values. In a purely monetary-access transaction that requires payment of the ceiling i.e., in the order of $3bn pa. The access agreement is to only deal with access.[[180]](#footnote-180)

However, the Entity’s role in ‘endorsing’ maintenance and State budget bids provides an avenue of benefit to Sydney Trains. It is in Sydney Trains interests that the Entity endorses both the maximum amount of maintenance sought to be conducted by Sydney Trains and also the maximum bid for maintenance money Sydney Trains makes in NSW budget processes.

That would suggest a further, ancillary, ‘agreement’ between Sydney Trains and the Entity: for the Entity to promise not to alter asset valuations, possibly except on change in asset condition, to endorse all Sydney Trains maintenance programs and all maintenance bids for State funding. The absence of such agreement would suggest Sydney Trains has not received ‘consideration’ for its payment of $680m (or $700m).

Unfortunately for that theory, it appears the Entity has already altered asset valuations on the basis of expected future income rather than condition.[[181]](#footnote-181)

## 7. Franchising

The Policy SPAD article suggested franchising of commuter rail to be among the initial motivations for the scheme involving the Entity.

The article referred to the origins of Transport for NSW as a ‘bus department’ and its apparent pride in the early 2000s in franchising bus areas by taking ownership of assets. To that might be added the franchising of Sydney’s ferry services, as recommended by a Special Commission of Inquiry.

Treasury’s interest in the Entity – and which Government agency owns the commuter rail assets - may be related to perceived opportunities to participate in future franchising processes. Treasury took the running on the sale of FreightCorp, a State-owned corporation, in the early 2000s. The initial Melbourne commuter rail franchising processes were run from within Victoria’s Treasury. [[182]](#footnote-182)

Treasury has not shown similar interest the Sydney Metro assets, even though those assets present larger microeconomic and fiscal issues. Among the key differences between the commuter railway and Sydney Metro is the latter effectively has been franchised already.

The Policy SPAD article referred to urgings for franchising Sydney Trains - with estimates of savings of $7.2bn in present value terms – made at around the same time Parliament was considering legislation for the Entity.[[183]](#footnote-183)

The article also noted the urgings ignored important factors and experience and were severely criticised by the relevant Australian experts. This article makes similar criticisms of the Productivity Commission’s similar earlier urgings.

The NSW scheme of removing ownership of commuter rail assets from the maintainer, the rail operator and the Department of Transport – to another statutory organisation - appears to have some similarities with Melbourne. Some may consider the Entity to be modelled on VicTrack.

However, fundamental differences have been identified in this article. Among these is the history that led to VicTrack. Another significant difference is the statutory scheme in Victoria sees VicTrack lease all assets to the transport department. There is no relevant ‘access agreement’, no access charge and no supposed ‘negotiation’.

In turn, Victoria’s transport department provides these assets to the franchisee at nominal fees. That is the only sensible approach, given the department pays the franchisee large sums to run trains etc.

The Melbourne arrangements reflect hard learned experience – and the theory – that a commuter railway works best when vertically integrated. Attempts in Melbourne to vertically and horizontally separate the commuter railway conspicuously and quickly failed.

Afterwards there remained concerns about maintenance of infrastructure assets and the lack of government control over infrastructure maintenance and renewals.[[184]](#footnote-184)

That suggests prior to considering franchising, Sydney’s commuter railway needs to be vertically integrated as a statutory authority. Even more importantly, there must be singular control of all aspects of infrastructure assets, with the controlling organisation fully responsible for maintenance – as per the Glenbrook recommendation.

Earlier sections of this article point to dreadful mistakes and confusion in NSW (commuter) rail policy since 2011. Judging from much in the public domain, the advice to and from the Government about Sydney’s railways cannot be trusted.

It would be foolhardy to contemplate franchising in such an environment, not merely because of the likelihood of the Government offering a bad structure to the market, creating high risk of failure and damage to the public. Another reason: serious potential top-class private participants would steer clear of any offering from any Government associated with such bad advice and decisions.

The idea of franchising should be put on hold until there can be public confidence in rail advice and policy. Even with substantial efforts and major changes, that will take a considerable time.

## 8. Conclusion

### 8.1 This series

This series has not been concerned with the accounting furore surrounding the Transport Asset Holding Entity. Some hold the view that accounting can - even should - be divorced from the real world. They can try to explain that. In any event, the interest here is in potential real-world effects of the scheme involving the Entity.

The Government’s support for the scheme appears based on two mutually exclusive propositions: for audit bodies - that the Entity exerts significant control over rail assets; for the public and rail regulatory bodies - that the Entity exercises no control over rail assets.

There are different opinions on the real-world effects of either proposition.

Some would hold that were a State-owned corporation to control rail assets – and therefore influence rail operations – under strictly commercial arrangements, the NSW rail sector would be more efficient, less costly and have a better ‘culture’. They would say this is because behaviour of organisations and individuals would then be subject to ‘commercial disciplines’.

As against this, there is a question whether such disciplines can ever be real when the basis of commercial processes – contracts – cannot be enforced. There also are doubts about the capability of the Entity to participate in the rail industry.

Further, practical budgetary matters lead to a basic inconsistency between corporate financial objectives and the operation of the public service like the railways. In this it is worth recalling the original objectives of the corporatisation/commercialisation agenda. One was improvement of democratic processes by making transparent the Government decisions that influence business-type activities. Another, also relied on transparency – improvement of performance of (organisations involved in) those activities with a social purpose, by the public reporting of relevant indicators, especially ‘non-financial’ ones, to facilitate ‘yardstick’ competition’.

The idea that public sector internal performance might be improved by profit seeking behaviour rather than transparency was a later embellishment unrelated to corporatisation’s original goals. Further embellishments - attempts to capture performance of organisations solely by indicators drawn from accounting rules for private listed corporations, private sector style confidentiality about e.g., internal workings and executive employment, Government community service funding at less than the arithmetic implied by the target rate of return (on optimised asset replacement cost) to stimulate ‘efficiency’ – derogated from the initial aims of the agenda.[[185]](#footnote-185)

Hence, others with less faith in how corporatisation has evolved in practice, or drawing (for example) on several NSW Special Commissions of Inquiry, might hold the Entity should have no railway function. They may think it best if the Entity did not exercise control over assets needed for commuter rail operation – rather, if it is to continue, it should be like VicTrack, with Sydney Trains taking a multi-year lease over relevant assets for a nominal fee.

Yet the critical problem at this time is not the choice between the propositions. The PwC report indicated a choice can be made, and once it is made, it may be possible to mitigate risks.

Rather, the problem now is that both propositions seem to be being made at once. That must cause confusion and derogate from democratic, organisational and personal accountability. The real-world effects of such confusion, evidenced from the 1996 changes in NSW are likely to include: antagonism within and among the Government, bureaucracy and railways; increases in financial costs; worse operational performance; introduction of systemic risk to public safety.

It may be the creation of Entity – and the disputes about it – were motivated by bureaucracies positioning to ‘lead’ potential franchising of Sydney commuter rail. Given their apparent performance in advising on commuter rail in relation to the Entity and associated scheme, it would be foolhardy to contemplate franchising at present.

The present scheme is an impediment to franchising. More significantly, the advice and decisions on public display practically preclude a satisfactory outcome of any commuter rail franchising process.

### 8.2 Policy SPAD

The initial article said a SPAD occurs when a train passes a red signal - signals at ‘stop’ or ‘danger’.

SPADs can occur due to inattention to (red) signals. In some cases, the train driver believed a signal was green (proceed) when in fact it was red. In other cases, a train was travelling too fast. Psychological factors, including driver conditioning and expectations – ‘the signal is always green’ – and pressure to conform e.g., to timetable have been in play. SPADs do not always causes wrecks. In Sydney, a train can pass a red signal without harm. But there can be a different story if it passes several in a row.[[186]](#footnote-186)

Whatever the motivations, aims and efforts of those creating the scheme surrounding the Entity, there have been successive policy SPADs.

Red signals from two rail crash Commissions are now widely misunderstood as ‘green’. Were they understood, the scheme involving the Entity – splitting asset ownership from maintenance - would likely have been abandoned.

Also apparently ignored have been: several Productivity Commission reports; a Special Commission of Inquiry into Sydney Ferries; advice from the Independent Pricing and Regulatory Tribunal. Policy precepts including about State-owned corporations and rail access have not been applied as originally intended. Rail access appears to be seen as a financial instrument in contrast to its intent, legislation and NSW access regulation.

The result: the present scheme includes a repetition of the commuter rail aspects of the 1996 changes.

The problematic decisions started with take-over of railway assets and network control by Transport for NSW. That idea, spurned in the second reading speech by the Minister who introduced the relevant Bill in mid-2011, seems to have been spawned behind closed doors between end-2011 and mid-2012. Failure of the Transport portfolio to acknowledge the idea was a mistake was always likely to lead to a scheme such as that involving the Entity.

There are obvious similarities with another policy SPAD - Sydney Metro. That idea was also spawned between end-2011 and mid-2012 in the Transport portfolio - also after Ministerial announcements in mid-2011 saying the opposite. Failure to acknowledge grave problems of Sydney Metro – like small tunnel size and CBD route sterilising other rail development - inevitably led to ever more bizarre manifestations, the latest a Metro ‘in Siberia’.[[187]](#footnote-187)

In both cases, policy has been made in secret with uncertain agendas. There is evident failure of processes to ensure Cabinet was properly advised.

The result are policy wrecks. Attempted defences of advice and decisions – especially strident claims about ‘professionalism’ – are, to my mind, embarrassing.

J Austen

14 January 2022

1. Article: <https://www.thejadebeagle.com/policy-spad.html> [↑](#footnote-ref-1)
2. <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2819#tab-submissions> [↑](#footnote-ref-2)
3. <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2819#tab-hearingsandtranscripts> [↑](#footnote-ref-3)
4. <https://www.parliament.nsw.gov.au/committees/inquiries/Pages/inquiry-details.aspx?pk=2819#tab-otherdocuments> [↑](#footnote-ref-4)
5. <https://www.thejadebeagle.com/policy-spad-update.html> [↑](#footnote-ref-5)
6. Document: <https://www.parliament.nsw.gov.au/lcdocs/other/16179/Mr%20Rob%20Sharp%20-%202%20November%202021_Redacted.pdf>;

Transcript: <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2737/Transcript%20-%20UNCORRECTED%20-%20PC%206%20-%20Transport%20and%20Roads%20-%202%20November%202021.pdf> [↑](#footnote-ref-6)
7. E.g., <https://www.themandarin.com.au/174587-brendan-lyon-exposes-the-rotten-world-of-high-stakes-consulting/> [↑](#footnote-ref-7)
8. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2768/Transcript%20-%20TAHE%20-%20Uncorrected%20-%208%20November%202021.pdf> [↑](#footnote-ref-8)
9. <https://www.parliament.nsw.gov.au/lcdocs/submissions/76497/0008%20KPMG.pdf> [↑](#footnote-ref-9)
10. E.g. <https://www.afr.com/companies/professional-services/kpmg-says-conflicting-reports-were-both-in-scope-20211115-p5990b>; <https://7news.com.au/business/tax/sacked-nsw-transport-boss-to-front-inquiry-c-4559021> [↑](#footnote-ref-10)
11. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2769/Transcript%20-%20TAHE%20-%20Uncorrected%20-%2015%20November%202021.pdf>

<https://www.smh.com.au/national/nsw/nsw-s-top-transport-chief-to-step-down-after-three-years-in-role-20201118-p56fra.html> [↑](#footnote-ref-11)
12. [https://www.parliament.nsw.gov.au/lcdocs/other/16416/Letter%20from%20NSW%20Treasury%20responding%20to%20evidence%20provided%20by%20Mr%20Brendan%20Lyon,%20Former%20Partner,%20KPMG%20Australia%20redacted.pdf](https://www.parliament.nsw.gov.au/lcdocs/other/16416/Letter%20from%20NSW%20Treasury%20responding%20to%20evidence%20provided%20by%20Mr%20Brendan%20Lyon%2C%20Former%20Partner%2C%20KPMG%20Australia%20redacted.pdf) [↑](#footnote-ref-12)
13. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2784/Transcript%20-%20Uncorrected%20-%2016%20December%202021.pdf> at p.2. [↑](#footnote-ref-13)
14. <https://www.parliament.nsw.gov.au/lcdocs/other/16306/Coorespondence%20between%20DPC%20and%20the%20Chair.pdf> [↑](#footnote-ref-14)
15. Further: *‘The false narrative that TAHE is a conspiracy concocted by all these public servants and external accounting specialists to cook the State's books, as suggested by Lyon and others, is as insulting as it is beyond belief. The truth is that Treasury and the public sector in good faith were implementing complex micro-economic reform to provide significant benefits for the New South Wales public.’* <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2784/Transcript%20-%20Uncorrected%20-%2016%20December%202021.pdf> [↑](#footnote-ref-15)
16. <https://www.parliament.nsw.gov.au/lcdocs/submissions/76629/0009%20NSW%20Treasury%20and%20Transport%20for%20NSW.pdf>

[http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf](http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report%2C%20The%20Hilmer%20Report%2C%20August%201993.pdf)

<https://www.pc.gov.au/inquiries/completed/access/files/ncpagreement.pdf>

<https://www.treasury.nsw.gov.au/sites/default/files/2017-03/IGA-productivity-reforms.pdf> [↑](#footnote-ref-16)
17. <https://slll.cass.anu.edu.au/centres/andc/pet-shop-galah> [↑](#footnote-ref-17)
18. <http://ncp.ncc.gov.au/pages/about> [↑](#footnote-ref-18)
19. [http://ncp.ncc.gov.au/docs/Competition%20Principles%20Agreement,%2011%20April%201995%20as%20amended%202007.pdf](http://ncp.ncc.gov.au/docs/Competition%20Principles%20Agreement%2C%2011%20April%201995%20as%20amended%202007.pdf) [↑](#footnote-ref-19)
20. At first the issue was whether Government rail freight operators were advantaged over private firms because of Government practices. One given reason was the practice of providing funding to Government operators for community service obligations. As against this, there were claims the funding was inadequate in not including return of and on capital components. The vexed questions arising could only really be resolved by privatisation – with most freight operations vertically separated and in private hands by the early 2000s.

This revealed a much more substantial issue of neutrality – parties using Government owned track paid direct charges, but needed to compete with road transport that appeared likely subsidised via ‘free’ capital for roads that competed with railways and cross-subsidies from roads that did not. This led to the Productivity Commission inquiry into ‘Road and Rail Infrastructure Pricing’ – which should be regarded as a failure – see section 3.5.6 below. [↑](#footnote-ref-20)
21. That coal was a target was confirmed by the ‘coal haulage moratorium’ in which NSW and Queensland could keep the Government coal haulage monopoly until 2000: <https://www.pc.gov.au/inquiries/completed/black-coal/submissions/nsw_government_/sub026.pdf> [↑](#footnote-ref-21)
22. [http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf](http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report%2C%20The%20Hilmer%20Report%2C%20August%201993.pdf) at p.195 [↑](#footnote-ref-22)
23. For example, seeking contemporaneous competition on tracks used by commuter trains. Or the passage of over three years, nit-picking and an independent review by the NSW (competition) regulator, for the NSW rail access regime to be certified as nationally ‘effective’ for just one year – starting just before the Glenbrook crash. Among the reasons for reluctance for holding it to be effective – its potential effect outside NSW! <https://ncc.gov.au/images/uploads/CERaNsDe-001.pdf>

 <https://www.ipart.nsw.gov.au/sites/default/files/documents/draft_report_-_aspects_of_the_nsw_rail_access_regime_-_february_1999.pdf>, <http://ncp.ncc.gov.au/docs/PIAn00-001.pdf> [↑](#footnote-ref-23)
24. The process for an access declaration of a Western Australian iron ore line took nearly a decade from 2004-2013, and involved the High Court. <https://www.australiancompetitionlaw.org/cases/fortescue.html>. Also noteworthy are criticisms of the NSW access regime’s floor and ceiling provisions as being too vague to be of use: [↑](#footnote-ref-24)
25. [https://www.legislation.gov.au/Details/C2018C00437 s.44B](https://www.legislation.gov.au/Details/C2018C00437%20s.44B); <https://www.thejadebeagle.com/road-reform.html>; <https://www.thejadebeagle.com/roads-3-htfu.html>; [↑](#footnote-ref-25)
26. [http://ncp.ncc.gov.au/docs/Competition%20Principles%20Agreement,%2011%20April%201995%20as%20amended%202007.pdf](http://ncp.ncc.gov.au/docs/Competition%20Principles%20Agreement%2C%2011%20April%201995%20as%20amended%202007.pdf) [↑](#footnote-ref-26)
27. <https://www.thejadebeagle.com/policy-spad.html> [↑](#footnote-ref-27)
28. E.g., <https://www.tmr.qld.gov.au/-/media/busind/Transport-sectors/Rail/Pdf_rpf_review_of_rail_safety_legislation.pdf?la=en> [↑](#footnote-ref-28)
29. Arguably corporatisation of infrastructure is anti-competitive. The corporate infrastructure owner has more incentive to pursue profits - use monopoly power against rail operators and access seekers. There are other doubts about the merit of corporatisation of rail infrastructure. Rail infrastructure is further from the market than rail operations. Corporatisation theory would have rail operations corporatized ahead of infrastructure. This was/is conspicuously not the case in NSW. Competition to railways largely comes from roads. Roads are not corporatized, and there are suspicions those that compete with railways are (cross) subsidised (see note 20 above). Such subsidisation means rail (infrastructure) is marginal. For these reasons, there are suspicions that NSW corporatisation has a different agenda – of bureaucratic control over railways by Treasury. Such suspicions are amplified by unique legislation in which the Minister for Transport is not a ‘shareholder’ and in most cases needs shareholder permission (!) to provide public interest directions. [↑](#footnote-ref-29)
30. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-12843> [↑](#footnote-ref-30)
31. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-12146> [↑](#footnote-ref-31)
32. <https://www.pc.gov.au/__data/assets/pdf_file/0020/34526/rail.pdf> [↑](#footnote-ref-32)
33. <https://www.nber.org/system/files/chapters/c10194/c10194.pdf> [↑](#footnote-ref-33)
34. The Commission claimed: *‘Franchising can generate further gains because franchisees usually bear revenue risk, so strengthening their incentives to improve service quality and expand the size of the market’.* [https://www.pc.gov.au/\_\_data/assets/pdf\_file/0020/34526/rail.pdf at p.xxviii](https://www.pc.gov.au/__data/assets/pdf_file/0020/34526/rail.pdf%20at%20p.xxviii). [↑](#footnote-ref-34)
35. [https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/A%20Review%20of%20Melbourne's%20Rail%20Franchising%20reform](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/A%20Review%20of%20Melbourne%27s%20Rail%20Franchising%20reform); <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7166032/> [↑](#footnote-ref-35)
36. [https://www.thejadebeagle.com/policy-spad.html section 4.2](https://www.thejadebeagle.com/policy-spad.html%20section%204.2) [↑](#footnote-ref-36)
37. Southall, Ladbroke Grove, Hatfield, Potters Bar discussed in <https://www.thejadebeagle.com/policy-spad.html> [↑](#footnote-ref-37)
38. The Productivity Commission’s comments on Rail Access’ contracting out:

*‘In New South Wales, a strategic review of RAC revealed that ‘substantial cost reductions could be achieved from productivity gains and other efficiencies in the Infrastructure Works and Maintenance Program’ (RAC 1997, p. 9).’*

That was particularly unfortunate, given the damning findings and recommendations of the Glenbrook Commission [↑](#footnote-ref-38)
39. <https://en-academic.com/dic.nsf/enwiki/4556735> [↑](#footnote-ref-39)
40. <https://www.theage.com.au/national/victoria/exclusive-the-six-problems-ruining-melbournes-rail-network-20150722-gii8ps.html> [↑](#footnote-ref-40)
41. Prior to changes in 2009-10 [https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/GT8T6%22](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p%3Bquery%3DId%3A%22media/pressrel/GT8T6%22); <https://www.legislation.gov.au/Details/C2018C00437> [↑](#footnote-ref-41)
42. E.g., <http://ncp.ncc.gov.au/docs/CISp00-007.pdf>; <https://www.tmr.qld.gov.au/-/media/busind/Transport-sectors/Rail/Pdf_rpf_review_of_rail_safety_legislation.pdf?la=en>

Another argument against State-based rail safety regulation and accident investigation was the industry was national. However, this related to (interstate) freight and ignored commuter railways which are specific to each major city. The issue was most vexed in NSW which, uniquely, has interstate and commuter trains sharing the same standard gauge tracks – other States had a local break-of gauge. The way the argument was put had overtones of opposing regulation, not simply State regulation.

The strongest argument against State-based regulation – and investigation - was the potential for local political interference. [↑](#footnote-ref-42)
43. <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/Sydney-Ferries-listing-440/440477d422/Report-of-the-Special-Commission-of-Inquiry-into-Sydney-Ferries.pdf> [↑](#footnote-ref-43)
44. ‘Grossing-up’. Return of capital is addressed in section 6. [↑](#footnote-ref-44)
45. See section 6. [↑](#footnote-ref-45)
46. <http://news.bbc.co.uk/2/hi/business/1348473.stm>; ferries: section 4.5.6. [↑](#footnote-ref-46)
47. : <https://www.thejadebeagle.com/policy-spad.html> section 4.5. After the Olympic Games, the Government provided additional funds – over several years - for restoration of the metropolitan and regional rail networks. There was a concern the proceeds from the sale of FreightCorp (2000-01) would be jeopardised by Rail Infrastructure being unable to agree an access contract with appropriate guarantees as to infrastructure quality and availability. [↑](#footnote-ref-47)
48. [https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2[1].pdf](https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2%5B1%5D.pdf) p.42-43. [↑](#footnote-ref-48)
49. <https://www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf> [↑](#footnote-ref-49)
50. <https://www.pc.gov.au/inquiries/completed/national-competition-policy/report/ncp.pdf>, Box 2.3. [↑](#footnote-ref-50)
51. In addition to the NSW Special Commissions of Inquiry into the rail crashes at Glenbrook and Waterfall, there was a Special Commission into Sydney Ferries – see note 111. [↑](#footnote-ref-51)
52. By the competition club. It was most noteworthy for not having an index/directory of its 66 pages: <http://ncp.ncc.gov.au/docs/COAG%20background%20paper%20-%20COAG%20NCP%20review%2C%20Feb%202006.pdf>

 [↑](#footnote-ref-52)
53. Ignorant and stupid because, among other things, pubic road infrastructure is used as of right, with all aspects dealt with by regulation, and subject to immunities (the highway rule). Rail infrastructure is used under contract, with virtually no aspects dealt with by regulation. De-regulation of railways would have little if any effect.

 [↑](#footnote-ref-53)
54. [http://ncp.ncc.gov.au/docs/COAG%20background%20paper%20-%20COAG%20NCP%20review,%20Feb%202006.pdf](http://ncp.ncc.gov.au/docs/COAG%20background%20paper%20-%20COAG%20NCP%20review%2C%20Feb%202006.pdf) [↑](#footnote-ref-54)
55. <https://www.pc.gov.au/inquiries/completed/freight> [↑](#footnote-ref-55)
56. <https://www.thejadebeagle.com/roads.html> [↑](#footnote-ref-56)
57. <https://www.ipart.nsw.gov.au/Home/Industries/Transport/Reviews/CityRail/Review-of-CityRail-fares-from-2009-and-regulatory-framework/06-Jun-2008-Discussion-Paper/Determining-CityRails-revenue-requirement-and-how-it-should-be-funded-Discussion-Paper-6-June-2008> [↑](#footnote-ref-57)
58. <https://www.ipart.nsw.gov.au/sites/default/files/documents/final_report_-_improving_cityrails_accountability_and_incentives_though_an_effective_service_contract_-_december_2008_-_website_document.pdf> [↑](#footnote-ref-58)
59. In full:

*‘…..As part of the Government’s package of governance reforms the amendments also require RailCorp to enter into a service contract with the Government (via the Director General of the Ministry of Transport) for the provision of passenger rail services IPART considers that the service contract model has the potential to strengthen the economic regulatory framework for CityRail, and provide effective incentives to improve CityRail’s financial performance without decreasing its service performance. IPART notes the Minister’s comments that its decision to introduce the service contracting model for RailCorp is consistent with IPART’s draft recommendations. In addition, the Government’s submission in response to the draft report noted that the changes introduced to Parliament “will allow Government to move towards a governance arrangement along the lines of the … model proposed by IPART’*

<https://www.ipart.nsw.gov.au/sites/default/files/documents/final_report_-_improving_cityrails_accountability_and_incentives_though_an_effective_service_contract_-_december_2008_-_website_document.pdf>

at p.2. [↑](#footnote-ref-59)
60. <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/Sydney-Ferries-listing-440/440477d422/Report-of-the-Special-Commission-of-Inquiry-into-Sydney-Ferries.pdf> [↑](#footnote-ref-60)
61. See: <https://www.ipart.nsw.gov.au/Home/Industries/Transport/Reviews/Public-Transport-Fares/Review-of-CityRail-fares-from-2009-and-regulatory-framework> [↑](#footnote-ref-61)
62. Review other than by members of the competition club: <https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/BriefingBook46p/CompetitionPolicy#:~:text=The%20Harper%20Review%20provided%20a,and%20simplifying%20Australia's%20competition%20laws>. [↑](#footnote-ref-62)
63. <https://treasury.gov.au/sites/default/files/2019-03/Competition-policy-review-report_online.pdf> at p.73. [↑](#footnote-ref-63)
64. <https://www.parliament.nsw.gov.au/lcdocs/submissions/76629/0009%20NSW%20Treasury%20and%20Transport%20for%20NSW.pdf>

[http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report,%20The%20Hilmer%20Report,%20August%201993.pdf](http://ncp.ncc.gov.au/docs/National%20Competition%20Policy%20Review%20report%2C%20The%20Hilmer%20Report%2C%20August%201993.pdf)

<https://www.pc.gov.au/inquiries/completed/access/files/ncpagreement.pdf>

<https://www.treasury.nsw.gov.au/sites/default/files/2017-03/IGA-productivity-reforms.pdf> [↑](#footnote-ref-64)
65. E.g.: <https://www.pc.gov.au/__data/assets/pdf_file/0020/34526/rail.pdf> [↑](#footnote-ref-65)
66. ‘*Ms ABIGAIL BOYD: Thank you. Just before you leave that last document that we were looking at, which also contains a comparison of the Victorian and Queensland models….. are you able to tell the Committee the major structural difference between the Queensland Rail structure and what has been set up for TAHE?*

*Mr LONGLAND: ….. Queensland Rail managed rail assets as commercial assets. They do that through two separate companies, both Government owned. Queensland Rail is a not-for-profit government-owned company that is the deliverer of rail services. In my previous role in Transport, I was effectively the contract manager and that part of Queensland Rail was charged with delivering rail services under contract to the department. Then Queensland Rail Limited was the commercial arm that held the assets and drove a return on those assets back to government. So part of my payment to Queensland Rail included an element for return on assets to ensure that those assets were treated in the commercial way.’*

[https://www.parliament.nsw.gov.au/lcdocs/transcripts/2714/Transcript%20-%20Corrected%20-%201%20October%202021(2).pdf](https://www.parliament.nsw.gov.au/lcdocs/transcripts/2714/Transcript%20-%20Corrected%20-%201%20October%202021%282%29.pdf) [↑](#footnote-ref-66)
67. <https://www.parliament.nsw.gov.au/lcdocs/other/16111/TRANSPORT_TENDER_002.pdf> para 5.14. [↑](#footnote-ref-67)
68. <https://www.queenslandrail.com.au/ourhistory/the-queensland-rail-journey>

<https://www.queenslandrail.com.au/forbusiness/the-regional-network> [↑](#footnote-ref-68)
69. *‘Queensland Rail is a statutory authority established under the*Queensland Rail Transit Authority Act 2013 (Qld) (QRTA Act)*and is a statutory body for the purposes of the*Financial Accountability Act 2009 (Qld) *and the*Statutory Bodies Financial Arrangements Act 1982 (Qld)*. Queensland Rail discharges its statutory functions through its wholly-owned subsidiary Queensland Rail Limited (QRL). QRL does not employ any personnel, but owns all non-employee related assets and contracts. It performs the role of rail transport operator under the*Rail Safety National Law (Queensland) Act 2017*. The Board Members of Queensland Rail are also appointed as Directors of QRL.’*<https://www.queenslandrail.com.au/aboutus/governance> [↑](#footnote-ref-69)
70. If only part of a vertically separated railway is to be ‘commercialised’, it should be the ‘above-rail’ – fleet and operations – part. It should not be only the ‘below-rail’ – infrastructure - part. This is the approach taken in the leading vertically separated railway – United Kingdom national rail. Theory and UK practice at: <https://www.thejadebeagle.com/policy-spad.html> [↑](#footnote-ref-70)
71. <https://www.pc.gov.au/inquiries/completed/rail-reform>; <https://en.wikipedia.org/wiki/Rail_transport_in_Victoria>;

<https://www.econstor.eu/bitstream/10419/173919/1/868642231.pdf> [↑](#footnote-ref-71)
72. <https://www.legislation.vic.gov.au/in-force/acts/transport-integration-act-2010/078> [↑](#footnote-ref-72)
73. <https://johnmenadue.com/policy-wreck-were-being-told-two-contradictory-stories-about-nsw-trains/>

<https://www.artc.com.au/about/> [↑](#footnote-ref-73)
74. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2768/Transcript%20-%20TAHE%20-%20Uncorrected%20-%208%20November%202021.pdf> at p.54. [↑](#footnote-ref-74)
75. <https://www.parliament.nsw.gov.au/lcdocs/other/16118/KPMG.pdf> e.g., p.vi, p42. [↑](#footnote-ref-75)
76. See note 20, and [https://www.thejadebeagle.com/policy-spad.html section 3](https://www.thejadebeagle.com/policy-spad.html%20section%203). [↑](#footnote-ref-76)
77. See <https://www.thejadebeagle.com/policy-spad.html>.

 [↑](#footnote-ref-77)
78. E.g., ‘*The establishment of TAHE has added another level or governance and a third line of assurance to critically assess that risk exposures are appropriately controlled and that TfNSW, Sydney Trains, NSW Trains and private operators are complying with their legislative safety obligations, technical asset standards and contractual requirements to operate a safe and reliable rail network.’*

[https://www.parliament.nsw.gov.au/lcdocs/submissions/76410/0005%20Transport%20Asset%20Holding%20Entity%20of%20New%20 outh%20Wales.pdf](https://www.parliament.nsw.gov.au/lcdocs/submissions/76410/0005%20Transport%20Asset%20Holding%20Entity%20of%20New%20%20outh%20Wales.pdf) [↑](#footnote-ref-78)
79. Actions and publications from the Entity could be interpreted as implying it is a level above the national rail safety regulator. The actions include it not be accredited under national rail safety law, and therefore not subject to the regulator. Publications include:

*‘All rail safety and maintenance decisions are subject to the same rigorous safety standards as before, including oversight from the Office of the National Rail Safety Regulator. The establishment of TAHE has further strengthened NSW’s transport safety arrangements by providing another layer of governance with legislated obligations to assure that NSW rail assets and infrastructure are safe,’*

<https://tahensw.com.au/#about-us> [↑](#footnote-ref-79)
80. Board at <https://tahensw.com.au/>. The three independent directors also are directors of State water corporations. Another director – a statutory requirement - is the Secretary of Transport for NSW whose background includes senior experience in aviation. He took up the position in March 2021. The Chief Executive, also a director, was previously chief executive of Keolis Downer which operated trams in Melbourne and on the Gold Coast.

*‘The CHAIR: You would be aware, would you not, Mr Hardwick, of the Cabinet submission that says the intent of the Government is to not have people with infrastructure and railway skills on the board but indeed to have low-profile persons—lawyers and the like—who therefore will not be able to assert the kind of independence and quality assurance you are putting forward as a benefit*,’

 <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2714/Transcript%20-%20TAHE%20-%20Uncorrected.pdf> [↑](#footnote-ref-80)
81. See <https://www.thejadebeagle.com/policy-spad.html>. Responsibility is determined by law. [↑](#footnote-ref-81)
82. Typically, committees are used when there are large boards or organisations. Committee members are drawn from the board. The work of the committee goes to the full board. <http://aicd.companydirectors.com.au/resources/all-sectors/roles-duties-and-responsibilities/role-of-board-committees?no_redirect=true>

In relation to the last of these, the board member Secretary of Transport for NSW should be recused from any deliberations due to the conflict of duty and interest. [↑](#footnote-ref-82)
83. E.g.: *‘I have no hesitation in saying to this Committee that TAHE's approach to safety is robust and builds on the pre-existing governance arrangements. All decisions around the maintenance and safety of TAHE's assets are subject to the same rigorous asset and safety standards that existed prior to July 2020. In addition to this baseline, TAHE has legislated obligations to oversee and assure itself that New South Wales rail assets and infrastructure are safe, reliable and fit for purpose to deliver safe passenger and freight services. From my experience TAHE's approach to safety is best practice and comprehensive. It includes the board's subcommittee which I chair. The subcommittee has an independent member with deep technical expertise and experience in overseeing the safe operation, maintenance and management of heavy rail assets and infrastructure. We have a program of independent safety and asset audits underway.’* <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2768/Transcript%20-%20TAHE%20-%20Uncorrected%20-%208%20November%202021.pdf> [↑](#footnote-ref-83)
84. E.g., by not showing functions or mechanisms of control, and omitting the only relevant matters: the content and duration of ‘agreements’ <https://tahensw.com.au/assets/TAHEoperatingmodel.pdf> [↑](#footnote-ref-84)
85. The Entity ‘endorses’ the level of maintenance, and thus decided at least maintenance levels. <https://tahensw.com.au/#about-us> [↑](#footnote-ref-85)
86. The Waterfall accident Commission heard evidence that the timetable in the area of the accident could not be achieved due to geography and operating restrictions – indicating that the timetable had been developed somewhat independently from operational reality.

Similar comments could be made in relation to signalling.  Although infrastructure 'fails to safe’ – red (stop) signal – a preponderance of signal failures, say due to short circuits or lightning strikes, may lead to trains mistakenly believing a particular red signal indicates a non-critical infrastructure failure when it is due to a train occupying a section of track.  That was a cause of the Glenbrook accident. [↑](#footnote-ref-86)
87. E.g., <https://www.onrsr.com.au/operator-essentials/the-onrsr-way> [↑](#footnote-ref-87)
88. [https://www.parliament.nsw.gov.au/lcdocs/other/16416/Letter%20from%20NSW%20Treasury%20responding%20to%20evidence%20provided%20by%20Mr%20Brendan%20Lyon,%20Former%20Partner,%20KPMG%20Australia%20redacted.pdf](https://www.parliament.nsw.gov.au/lcdocs/other/16416/Letter%20from%20NSW%20Treasury%20responding%20to%20evidence%20provided%20by%20Mr%20Brendan%20Lyon%2C%20Former%20Partner%2C%20KPMG%20Australia%20redacted.pdf)

Chiefs: <https://dictionary.cambridge.org/dictionary/english/too-many-chiefs-and-not-enough-indians> [↑](#footnote-ref-88)
89. [https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2[1].pdf](https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2%5B1%5D.pdf) [↑](#footnote-ref-89)
90. <https://www.thejadebeagle.com/policy-spad.html> [↑](#footnote-ref-90)
91. The contents are largely expressed in the Government’s submission to this Parliamentary Inquiry: <https://www.parliament.nsw.gov.au/lcdocs/submissions/76437/0006%20NSW%20Government.pdf>

Treasury letter: [https://www.parliament.nsw.gov.au/lcdocs/other/16416/Letter%20from%20NSW%20Treasury%20responding%20to%20evidence%20provided%20by%20Mr%20Brendan%20Lyon,%20Former%20Partner,%20KPMG%20Australia%20redacted.pdf](https://www.parliament.nsw.gov.au/lcdocs/other/16416/Letter%20from%20NSW%20Treasury%20responding%20to%20evidence%20provided%20by%20Mr%20Brendan%20Lyon%2C%20Former%20Partner%2C%20KPMG%20Australia%20redacted.pdf) [↑](#footnote-ref-91)
92. Full control: p8, and p.21-22 <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2768/Transcript%20-%20TAHE%20-%20Uncorrected%20-%208%20November%202021.pdf> [↑](#footnote-ref-92)
93. The report had: *‘2000 - 2001: Special Commission of Inquiry into the Glenbrook Rail Accident*

*• Following the Glenbrook and other rail accidents, the inquiry found fractured accountabilities had contributed to lax safety and operational performance, recommending: ­ Merge the Rail Access Corporation (RAC)) and Rail Service Authority (RSA); ­ Move responsibility for service planning and timetables from RAC to the SRA; ­ Appoint a ‘Coordinator General of Rail’ to remove interfaces between rail agencies created in 1996; ­ Appoint an independent safety regulator to make rail agencies accountable; and ­ Strengthen civil and criminal accountabilities for safety. 2001: Rail access and track maintenance re-aggregated*

*• The NSW Government announces a partial restructure of rail agencies, which sees: ­ RAC and RSA are abolished in favour of the new ‘Rail Infrastructure Corporation’ (RIC)’*

[https://www.parliament.nsw.gov.au/lcdocs/other/16324/TAHE%20Initial%20Assessment%20of%20Options\_Final%20Report%20(21072020).pdf](https://www.parliament.nsw.gov.au/lcdocs/other/16324/TAHE%20Initial%20Assessment%20of%20Options_Final%20Report%20%2821072020%29.pdf) [↑](#footnote-ref-93)
94. Note the risk associated with habits that may develop from working in an operationally degraded environments – see section 4.3.5 above. [↑](#footnote-ref-94)
95. [https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2[1].pdf](https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2%5B1%5D.pdf) [↑](#footnote-ref-95)
96. [https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2[1].pdf](https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2%5B1%5D.pdf) [↑](#footnote-ref-96)
97. <https://www.thejadebeagle.com/policy-spad.html> [↑](#footnote-ref-97)
98. This also was just days after the Kingsgrove derailment – see note 39. [↑](#footnote-ref-98)
99. The Commission did not accept Mr Christie’s view that a rail regulator should deal with the coordination function, with safety management and accident investigations. It thought these functions should be in separate organisations: [https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2[1].pdf](https://www.parliament.nsw.gov.au/tp/files/42517/GlenbrookInterim2%5B1%5D.pdf) [↑](#footnote-ref-99)
100. P.41 <https://www.parliament.nsw.gov.au/tp/files/50980/A9RB6AA.tmp.pdf> [↑](#footnote-ref-100)
101. <https://www.parliament.nsw.gov.au/hansard/Pages/home.aspx?s=1> [↑](#footnote-ref-101)
102. P.39 <https://www.parliament.nsw.gov.au/tp/files/50980/A9RB6AA.tmp.pdf> [↑](#footnote-ref-102)
103. [https://en.wikipedia.org/wiki/Minister\_for\_Transport\_and\_Roads\_(New\_South\_Wales)](https://en.wikipedia.org/wiki/Minister_for_Transport_and_Roads_%28New_South_Wales%29) [↑](#footnote-ref-103)
104. <https://nraspricms01.blob.core.windows.net/assets/documents/Waterfall-Rail-Accident/Waterfall-final-report-Volume-1.pdf> [↑](#footnote-ref-104)
105. <https://nraspricms01.blob.core.windows.net/assets/documents/Waterfall-Rail-Accident/Waterfall-final-report-Volume-1.pdf> at Pp304-341. <https://www.thejadebeagle.com/policy-spad-update.html> at section 10. [↑](#footnote-ref-105)
106. At <https://catalogue.nla.gov.au/Record/3048968> [↑](#footnote-ref-106)
107. *‘A statutory State-owned corporation will deliver improved management and the merger will provide single-point accountability for the metropolitan rail network. Experience with vertical separation of agencies both in New South Wales and internationally is that the splitting of functions across separate organisations reduces communication, spreads scarce technical expertise and leads to ambiguities in accountabilities and responsibilities. That point was also highlighted by Justice McInerney in his report into the Glenbrook accident.’* <https://www.parliament.nsw.gov.au/bill/files/1499/A9603.pdf> [↑](#footnote-ref-107)
108. <https://catalogue.nla.gov.au/Record/3262656> [↑](#footnote-ref-108)
109. See e.g. <https://www.bitre.gov.au/sites/default/files/sp_002_pittfalls_in_competitve_tendering.pdf>; Preston <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7166032/>; Currie <https://www.econstor.eu/bitstream/10419/173919/1/868642231.pdf> [↑](#footnote-ref-109)
110. <https://www.thejadebeagle.com/dogs-breakfast-for-all.html> [↑](#footnote-ref-110)
111. <https://catalogue.nla.gov.au/Record/3048968> at p. xviii. [↑](#footnote-ref-111)
112. <https://www.thejadebeagle.com/policy-spad.html> at note cxi and section 6. [↑](#footnote-ref-112)
113. <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/Sydney-Ferries-listing-440/440477d422/Report-of-the-Special-Commission-of-Inquiry-into-Sydney-Ferries.pdf>

 [↑](#footnote-ref-113)
114. [https://www.thejadebeagle.com/policy-spad.html at section 5.5](https://www.thejadebeagle.com/policy-spad.html%20at%20section%205.5). [↑](#footnote-ref-114)
115. Second reading: <https://www.parliament.nsw.gov.au/bill/files/1540/LA%209808.pdf>

Commission of inquiry: <https://www.dpc.nsw.gov.au/assets/dpc-nsw-gov-au/publications/Sydney-Ferries-listing-440/440477d422/Report-of-the-Special-Commission-of-Inquiry-into-Sydney-Ferries.pdf> [↑](#footnote-ref-115)
116. Compare note 31 (above) with <https://www.transport.nsw.gov.au/newsroom-and-events/media-releases/fixing-trains> [↑](#footnote-ref-116)
117. While Sydney Trains was formally a subsidiary of RailCorp, it was controlled by Transport for NSW.

<https://www.transport.nsw.gov.au/sites/default/files/media/documents/2017/railcorp-annual-report-2013-14.pdf>, <https://www.transport.nsw.gov.au/system/files/media/documents/2018/TfNSW-Annual-Report-2017%E2%80%9318-Volume-1.pdf> [↑](#footnote-ref-117)
118. RailCorp at the time was a statutory authority under the direction and control of the Transport for NSW and the Minister. [↑](#footnote-ref-118)
119. <https://www.parliament.nsw.gov.au/bill/files/657/Transport%20Amdt%20Bill%20-%20LC%202nd%20Reading.pdf> [↑](#footnote-ref-119)
120. <https://www.thejadebeagle.com/dogs-breakfast-for-all.html> notes liv, lxi. [↑](#footnote-ref-120)
121. <https://www.thejadebeagle.com/dogs-breakfast-for-all.html> [↑](#footnote-ref-121)
122. <https://www.thejadebeagle.com/policy-spad.html> [↑](#footnote-ref-122)
123. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-79364/link/21> [↑](#footnote-ref-123)
124. <https://www.parliament.nsw.gov.au/lcdocs/submissions/76459/0007%20Independent%20Pricing%20and%20Regulatory%20Tribunal%20NSW.pdf> [↑](#footnote-ref-124)
125. <https://www.artc.com.au/uploads/ARTCS3090007_HV.pdf>

 <https://www.artc.com.au/uploads/Annual-Report-2019-20_final_191020.pdf> [↑](#footnote-ref-125)
126. <https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/Draft-Report-TAHE-compliance-Hunter-Valley-Coal-Network-September-2021.PDF> [↑](#footnote-ref-126)
127. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2714/Transcript%20-%20TAHE%20-%20Uncorrected.pdf> [↑](#footnote-ref-127)
128. <https://www.parliament.nsw.gov.au/lcdocs/other/16320/11.%20PWC%20report%20dated%20December%202019.pdf> [↑](#footnote-ref-128)
129. [https://www.parliament.nsw.gov.au/lcdocs/other/16324/TAHE%20Initial%20Assessment%20of%20Options\_Final%20Report%20(21072020).pdf](https://www.parliament.nsw.gov.au/lcdocs/other/16324/TAHE%20Initial%20Assessment%20of%20Options_Final%20Report%20%2821072020%29.pdf) [↑](#footnote-ref-129)
130. The reason for it being so considered is unclear. By virtue of NSW legislation and accounting standards, its subject matter would inevitably become a matter of public record. The Committee published the report. [↑](#footnote-ref-130)
131. KPMG report at p.iii. [↑](#footnote-ref-131)
132. KPMG report at p.ii. [↑](#footnote-ref-132)
133. KPMG report at p.x. SWTT and DWTT are the Standard and Daily Working Time Tables, from which the potential for access to track can be derived. [↑](#footnote-ref-133)
134. See access at section 6.5 below. [↑](#footnote-ref-134)
135. KPMG report at p.87 and following. [↑](#footnote-ref-135)
136. The copy does not include Appendices which may show calculations. [↑](#footnote-ref-136)
137. Available capacity is determined in the Standard Working Timetable process, under the control of Transport for NSW. The Entity, as recipient of access charges, has an incentive to oversell capacity. Transport for NSW, which does not receive access revenue but is responsible for the overall transport system, has an incentive to underestimate capacity. Their incentives are in conflict. [↑](#footnote-ref-137)
138. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2784/Transcript%20-%20Uncorrected%20-%2016%20December%202021.pdf> at p.5. [↑](#footnote-ref-138)
139. <https://www.thejadebeagle.com/policy-spad.html> section 4.3.3; section 4.5.6 above. [↑](#footnote-ref-139)
140. KPMG report at p.44. [↑](#footnote-ref-140)
141. KPMG report at p.57. [↑](#footnote-ref-141)
142. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2784/Transcript%20-%20Uncorrected%20-%2016%20December%202021.pdf> p.5 [↑](#footnote-ref-142)
143. KPMG report at p.vii.

 [↑](#footnote-ref-143)
144. KPMG’s report had $120m from other operations. [↑](#footnote-ref-144)
145. <https://www.parliament.nsw.gov.au/lcdocs/other/16111/TRANSPORT_TENDER_002.pdf> [↑](#footnote-ref-145)
146. <https://www.parliament.nsw.gov.au/lcdocs/other/16246/AQONS%20-%20Treasury%20NSW%20-%20received%205%20November%202021.pdf> [↑](#footnote-ref-146)
147. <https://www.vgls.vic.gov.au/client/en_AU/search/asset/1145203/0> [↑](#footnote-ref-147)
148. <https://www.ipart.nsw.gov.au/Home/Industries/Transport/Reviews/Rail-Access/Rate-of-return-and-remaining-mine-life-from-1-July-2019> [↑](#footnote-ref-148)
149. <https://www.artc.com.au/uploads/NSW-Lease-Annual-Condition-Report-20-21_FINAL.pdf> [↑](#footnote-ref-149)
150. It is possible to allow depreciation between inspection periods, and re-value (upwards) the assets if the inspection shows the assets have not degraded at the rate of the depreciation schedule. However, the accounts would not provide an accurate snapshot of the business in any particular year. For example, if asset value inspections were conducted every fifth year, reported profits would be depressed for four years and artificially boosted in the fifth – financial performance of the business could only be reasonably assessed by aggregating five years of data. [↑](#footnote-ref-150)
151. The arithmetic is: maintenance (timing) is optimised when the combined cost of restoration and interruption from deferral exceeds the cost of present work. [↑](#footnote-ref-151)
152. Asset valuation based on capital asset pricing model, would be a multiple (inverse) of the weighted average cost of capital. If cost of capital was say 5%, the multiple would be 20. If net revenue – after maintenance etc. costs – was $100m, the asset value would be $2.0bn. Taking this in reverse, sustaining an asset value of $2.0bn would require revenue of $100m more than costs of maintenance etc. needed to prevent degradation. If maintenance costs were $500m, revenue would need to be $600m. Applying the traditional model to such a subsidised commuter railway would require an increase in outlays of $100m, however, this would be reflected in profits of the same amount – provided maintenance was adequate to prevent depreciation. For this framework to have any prospect of being effective in commuter rail, asset value would need to exceed $12bn, the additional $10bn resulting from the multiple applied to maintenance.

KPMG reported network values to be $26.3bn. [↑](#footnote-ref-152)
153. E.g., <https://www.aasb.gov.au/admin/file/content105/c9/AASB136_07-04_COMPapr07_07-07.pdf> [↑](#footnote-ref-153)
154. Entity write down: <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2769/Transcript%20-%20TAHE%20-%20Uncorrected%20-%2015%20November%202021.pdf> at e.g., p.11. But see note 185 below for how such an approach was reversed by NSW Treasury after its contribution to the failure of the 1996 structure. [↑](#footnote-ref-154)
155. <https://www.thejadebeagle.com/policy-spad.html> at section 2.8.4. [↑](#footnote-ref-155)
156. Subject to a thorough and observed safety management system. For example, deferred maintenance or reduced inspections should lead to slower running of trains because of the imposition of speed etc restrictions. [↑](#footnote-ref-156)
157. Open access allows a party other than the owner of the track access, whether or the owner is vertically integrated or separated. [↑](#footnote-ref-157)
158. As noted earlier, the monopolist constrains supply to ‘increase’ price. Hence merely limiting prices is an inadequate regulatory response to monopoly. The monopolist’s output must be reported. For a rail network this output includes future asset condition. Hence, the suggested regulatory response is to have profits limited by reference to condition. A deterioration in condition will lead to a decrease in permitted profits. This further emphasises the need to monitor and report the physical – rather than accounting assumptions for – degradation of assets. [↑](#footnote-ref-158)
159. Recognised by KPMG in its discussion of an annual flag fall charge – report p.17. [↑](#footnote-ref-159)
160. Commuter rail does not compete for track space because of the passenger priority provisions, and issues associated with scheduling and train control. [↑](#footnote-ref-160)
161. See section 8.1 and note 185 below. [↑](#footnote-ref-161)
162. Negotiation can also be in relation to vehicle interactions with infrastructure – the physical dimensions of trains with alterations in charges due to train lengths, weights, wheel profiles etc. [↑](#footnote-ref-162)
163. Permitted profits relate to depreciated optimised replacement cost (DORC). This is estimated first by establishing what infrastructure is hypothetically needed for the traffic task of the asset seeker – ‘optimised’ network e.g., overhead wiring is not needed for diesel locomotives and would be excluded from the relevant asset base. Next is an assessment of the replacement cost of this infrastructure. Next is an assessment of the expected life of asset components e.g., rail 500 million gross tons, tunnels 100 years. Finally, there is a field assessment of the remaining life of the assets e.g., rail 200 mgt (40%), tunnels 50 years (50%). The percentages are applied to replacement cost, to generate DORC. [↑](#footnote-ref-163)
164. <https://www.transport.nsw.gov.au/sites/default/files/media/documents/2017/nsw-rail-access-undertaking.pdf> [↑](#footnote-ref-164)
165. [https://www.parliament.nsw.gov.au/lcdocs/other/16115/TREASURY\_TENDER\_003.pdf](https://www.parliament.nsw.gov.au/lcdocs/other/16115/TREASURY_TENDER_003.pdf%20)  [↑](#footnote-ref-165)
166. KPMG report at p.73, 76. [↑](#footnote-ref-166)
167. Given that track maintenance in the early 2000s was around $500m for a steady state of asset condition, presumably the $1.2bn also relates to other maintenance e.g., fleet, stations, yards. [↑](#footnote-ref-167)
168. This may be a fault in the copy of the KPMG report at the site – note. See also report p.73. [↑](#footnote-ref-168)
169. Assuming O&M is operations and maintenance, MRN is the metropolitan rail network, NSWT is Transport for NSW. KPMG report at p.14, p.v, note 2. [↑](#footnote-ref-169)
170. <https://www.transport.nsw.gov.au/sites/default/files/media/documents/2017/nsw-rail-access-undertaking.pdf> schedule 3 [↑](#footnote-ref-170)
171. <https://www.thejadebeagle.com/policy-spad.html> section 4.1. [↑](#footnote-ref-171)
172. <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2784/Transcript%20-%20Uncorrected%20-%2016%20December%202021.pdf> [↑](#footnote-ref-172)
173. *36A   Objectives of Sydney Trains*

*(1)  The principal objective of Sydney Trains is to deliver safe and reliable railway passenger services in an efficient, effective and financially responsible manner.*

*(2)  The other objectives of Sydney Trains are as follows—*

*(a)  to be a successful business and, to that end—*

*(i)  to operate at least as efficiently as any comparable business, and*

*(ii)  to maximise the net worth of the State’s investment in Sydney Trains* <https://legislation.nsw.gov.au/view/html/inforce/current/act-1988-109#sec.36A> [↑](#footnote-ref-173)
174. See note 52. [↑](#footnote-ref-174)
175. Note 44 at s.3G [↑](#footnote-ref-175)
176. Asset value at say TfNSW books at $44.8bn. If ceiling rate of return was 5%, necessary profit is $2.4bn pa. To this add efficient costs of maintenance and train control, say $600m, necessary access charges are $3.0bn pa. There is no depreciation as there is infinite system life and no degradation. [↑](#footnote-ref-176)
177. KPMG report p.18, 66-67. [↑](#footnote-ref-177)
178. KPMG report at p.27. [↑](#footnote-ref-178)
179. See note 33. [↑](#footnote-ref-179)
180. <https://www.ipart.nsw.gov.au/sites/default/files/cm9_documents/NSW-Rail-Access-Undertaking-%28original%29.PDF> at clause 4.d [↑](#footnote-ref-180)
181. See noted 152 and <https://www.parliament.nsw.gov.au/lcdocs/transcripts/2768/Transcript%20-%20TAHE%20-%20Uncorrected%20-%208%20November%202021.pdf> at e.g., p.39 [↑](#footnote-ref-181)
182. <https://www.bitre.gov.au/sites/default/files/sp_002_pittfalls_in_competitve_tendering.pdf>

The failure of the Treasury franchising model is outlined by Mees at e.g. <https://apo.org.au/sites/default/files/resource-files/apo-nid309595.pdf> and the Audit Office: <https://www.parliament.vic.gov.au/papers/govpub/VPARL2003-06No154.pdf> [↑](#footnote-ref-182)
183. [https://www.thejadebeagle.com/policy-spad.html at section 6](https://www.thejadebeagle.com/policy-spad.html%20at%20section%206). [↑](#footnote-ref-183)
184. <https://sustainable.unimelb.edu.au/__data/assets/pdf_file/0010/2756872/MSSI-IssuesPaper-8_StoneAshmoreKirk_2017.pdf> [↑](#footnote-ref-184)
185. See e.g. <https://www.pc.gov.au/research/completed/government-trading-enterprises/perf9697/perf9697.pdf> and the measured economic rate of return generally exceeding the accounting rate of return, with both below satisfactory levels for many government trading enterprises, in part due to Government not properly funding community services e.g. not including payment for an adequate return on assets needed for community services <https://www.pc.gov.au/research/completed/gte0607/gte-2006-07.pdf>: *‘• Inadequate funding for provision of CSOs affects a GTE’s financial performance and can result in inadequate or misallocated investment, price increases for non-CSO services, and/or lower quality service provision. • Poor profitability can lead to inadequate investment and asset maintenance, which can in turn reduce the future profitability of GTEs. Without a return to commercially sustainable operations, this cycle can persist.’*

Also of interest is [https://www.pc.gov.au/research/completed/government-trading-enterprises/gte0304/gte0304.pdf p.249](https://www.pc.gov.au/research/completed/government-trading-enterprises/gte0304/gte0304.pdf%20p.249) – variation in measured performance, increase in Government funding for regional infrastructure and Treasury accounting and valuation policy to be applied by the NSW rail State-owned corporations after (during?) correction of the 1996 rail policy SPAD. [↑](#footnote-ref-185)
186. See e.g., accident at Beresfield 1997 <https://www.atsb.gov.au/publications/investigation_reports/1998/rair/rair1998001/> [↑](#footnote-ref-186)
187. <https://johnmenadue.com/the-curious-case-of-the-new-airports-metro/>

Siberia: <https://www.youtube.com/watch?v=bhYGwPBY3eU&ab_channel=PowerPlayChess> [↑](#footnote-ref-187)