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‘They had learned nothing and forgotten nothing’***[[1]](#endnote-1)***

## 1. Introduction

SPAD is a railway acronym for ‘signal passed at danger’ – for a train running through a red (stop) light without authority.

There was a spate of SPADs in several railways in the 1990s, some leading to major accidents. Among the more notable were late 1999 collisions at Ladbroke Grove (London, UK) and Glenbrook (NSW, Australia). Both occurred after controversial changes to the organisation of railways - the UK fragmentation/privatisation 1993, and the break-up of the State Rail Authority NSW 1996.

The changes involved organisational separations: ‘horizontal’ - different trains operated by different organisations; ‘vertical’ - trains and infrastructure (track) controlled by different organisations with trains using track under access contracts. The changes also had the new organisations operating ‘commercially’ – in the UK by privatisation, in NSW by ‘corporatisation’.

Among stated aims of the changes was on-rail – train v. train - competition. However, a more plausible motive was: reducing subsidies and accommodating the decline of the mode – given the sluggishness of passenger rail demand. The assumption of a mode in continued decline proved false and was partly responsible for disappointment in expectations of reduced government rail outlays.

Some of the 1996 changes in NSW were so controversial they were colloquially called ‘policy SPADs’ – ideas that ignored transport and public policy cautions. The riskiest elements were eventually reversed after: repeated stern warnings from eminent experts; they were seen to pose a threat to the Olympic Games; several major accidents; financial costs spiralled; they threatened State and national policies such as promoting rail freight competition.

A present-day initiative, the creation of the NSW Transport Asset Holding Entity, involves separation of urban railway assets from operations, with the assets now ‘held’ by a state-owned corporation. There are similarities of this with the 1996 NSW rail changes. This article revisits events of the late 1990s to question whether the lessons of that prior experience have been applied.

Section 2 outlines the present-day issue – media reports about the corporatisation of railway assets via the Transport Asset Holding Entity and State Budget accounting.

Section 3 looks at some intentions and principles behind organisational separations which formed the basis of the 1996 NSW changes.

Section 4 considers how those principles were applied in the UK and in NSW, and how the 1990s changes were reversed after conspicuous failure. Uniquely, for beagle articles, it goes beyond publicly available sources to draw on some recollections of the author.

Section 5 identifies areas of policy SPADs in the UK and 1996 NSW changes.

Section 6 considers explanations of the present-day Entity issues to identify potential policy SPADs.

Section 7 draws some conclusions and makes some recommendations.[[2]](#endnote-2)

As ever, corrections and comments are most welcome.

## 2. The issue

### 2.1 Media reports

On 2 June 2021, an article in the Sydney Morning Herald claimed:

*‘The NSW government has attempted to cover up how it artificially inflated the state’s budgets by tens of billions of dollars after it shifted the rail network’s costs onto a corporation that still hasn’t been able to properly operate six years after it was launched.’[[3]](#endnote-3)*

On 3 June there followed:

*‘The NSW government’s upcoming budget deficit would be $2.7 billion worse than forecast – or almost 50 per cent bigger than expected – without a controversial rail entity propping it up, with a further $1.3 billion benefit the following year.*’[[4]](#endnote-4)

and

*‘… NSW Treasury pressured accounting giant KPMG to delete or amend aspects of a report commissioned by Transport for NSW that found TAHE could end up costing the state’s coffers more than it saved. The report also highlighted safety issues.’*

The articles carried significant adverse comments, including ‘whistleblowers’ calling the arrangements a *‘public sector Enron’*. Enron was among the largest and most notorious corporate frauds in history, which led not merely to the collapse of the company, but criminal charges against - and cessation of the US accounting practice of - the 90-year-old Arthur Andersen firm.[[5]](#endnote-5)

The media reports are at Appendix 1.

### 2.2 Background referred to in the reports

The media reports drew attention to failure to settle financial arrangements of a government organisation – the Transport Asset Holding Entity (TAHE). The reports said the Entity was to:

*‘control $40 billion of the state’s rail assets, including trains, tracks and stations after they were shifted from the transport agency….*

*Treasury said there was nothing unusual in governments setting up vehicles to manage public assets such as Sydney Water with their own separate boards.’*

The reports provided links to snippets of Departmental and consultant advice on related issues – advice claimed to be ‘Cabinet in Confidence’. These are at Appendix 2.

The snippets show a bureaucratic dispute about the Entity, including the extent to which – indeed whether – its arrangements would ‘improve’ the State Budget. In late 2020, the dispute escalated into a question of whether the Entity should be dissolved.

Escalation of the dispute is likely related to adverse comments by the NSW Audit Office. Its 2020 report on transport agencies expressed concerns about failure to finalise financial matters associated with the Entity. The report noted NSW Treasury had made a plan for the Entity’s creation – transition from RailCorp – as a for-profit organisation 2015-19. However, much of the plan had not been completed by July 2020 – a matter identified as a high risk by the Office.[[6]](#endnote-6)

According to the Office, in the interim the Entity had been:

*‘continuing to operate in accordance with the asset and safety management plans of RailCorp’.*

NSW Treasury was relying on the Australian Bureau of Statistics to recognise the Entity in a certain way to validate removal of several billions of dollars from reported Budget outlays.

Treasury implied government rail operators – Sydney Trains and NSW Trains – would have ‘commercial arrangements’ with the Entity, leading to the Entity reporting profits.

However, the Audit Office’s report said such arrangements had not been demonstrated:

*‘In the absence of commercial arrangements with the public rail operators, there is a lack of evidence to demonstrate TAHE’s ability to create a commercial return in the long term, which was the original intent and led to the changes in the Budget’s accounting treatment from being an expense in the budget to an equity injection.’*

The likelihood is a draft of the Audit Office’s report spurred Treasury and Transport for NSW into action.

One snippet referred to in the Herald’s report shows part of a Treasury presentation, presumably for Cabinet, advising that under pre-Entity arrangements the railways had:

*‘a volatile spend…..Government could not deliver its record infrastructure spending….This had to change’.*

The presentation indicated a (supposed) Budget benefit from expenses to date being ‘*recognised’* as equity ($8.5bn 2015-20) and from 2020 a ‘*further benefit of at least $7billion*’. It claimed a 10-year adverse impact of $14.6bn were the Entity dissolved.[[7]](#endnote-7)

Transport for NSW was advised on an ‘*operating and financial model*’ for the Entity by accounting firm KPMG. KPMG advised that the Entity arrangements would result in a net Budget presentation (?) cost of $5.3bn over 10 years, a turnaround from Treasury’s asserted net Budget presentation benefit of $4.7bn. KPMG assumed access charges would start from 2022 – implying that was also the start of commercial arrangements. It further said Treasury assumed the charges will ‘*ramp up to a commercial level from FY 25’*. [[8]](#endnote-8)

The comments about access charges point to a critical issue. Access charges are – or should be - already collected from rail operators not owned by the NSW government under access contracts. The implication of the KPMG comment is: from 2022 NSW government operators will be paying access charges – if only because there is no practical room for access charges from other operators to ‘ramp up’.

The Sydney Morning Herald article said Treasury had requested another report from another part of KPMG. That report, said to be heavily qualified, was held by Treasury to come to the opposite conclusion – that the Entity would provide net Budget benefits.

On 11 November, Treasury wrote to wrote to the Transport for NSW Secretary, chiding about ‘*persistent errors*’ (presumably) in a draft of the KPMG report for Transport for NSW. It asserted:

*‘advice to Cabinet on how* (the Entity) *meets the government’s fiscal objectives is the responsibility and prerogative of NSW Treasury’ ….‘will provide fiscal advice to accompany the Submission that supports our forward estimates’.*

The Transport Secretary sought KPMGs advice on how the two (draft?) reports could be reconciled. The 15 November response, from KPMG’s National Managing Partner, was to the effect: the report for Treasury could not be used for forecasts; Treasury had not raised errors in the model underlying the draft report to Transport; KPMG stood by the latter – with its estimates - as fulfilling the request made by Cabinet.[[9]](#endnote-9)

The Herald article noted the Transport Secretary was sacked, without stated reason, two days later -- on 17 November.

Nonetheless, KPMG issued its final report – interpreted by the Herald as (consistent with) its advice to Transport for NSW – on 20 November.[[10]](#endnote-10)

### 2.3 Treasury rebuttal

On 2 July, Treasury issued a rebuttal – it is at Appendix 3. It claimed:

*‘to suggest that TAHE represents a mirage or the Government has hidden state costs is completely incorrect.’*[[11]](#endnote-11)

The rebuttal referred to the Entity being classified by the Australia Bureau of Statistics as a Public Non-Financial Corporation with that status similar to public transport bodies in other jurisdictions.

Indeed – but not mentioned – that status is also held by Sydney Trains, the State Transit Authority and Sydney Ferries. It was not necessary to create the Entity to ensure assets are held in a Public Non-Financial Corporation.

However, unlike those organisations, the Entity is a state-owned corporation under Treasury stewardship.[[12]](#endnote-12)

### 2.4 Scale of issue

The scale of the issue extends beyond the reclassification of amounts cited above. It also involves subsidies to transport and the amount of maintenance undertaken. For 2019-20 these were $1.6bn and $1.2bn respectively for Sydney Trains.[[13]](#endnote-13)

### 2.5 Transport Asset Holding Entity - establishment

At the start of July 2021, the Transport Asset Holding Entity described itself on the Transport for NSW website:

*‘a statutory State Owned Corporation that holds rail property assets, rolling stock and rail infrastructure in the Sydney metropolitan area and limited country locations in the State of NSW…. makes these assets available to Sydney Trains and NSW Trains for their operations. It also provides rail infrastructure to other operators under the terms of track access agreements.’[[14]](#endnote-14)*

It described its history:

*‘From 1 January 2004 until 30 June 2013, Rail Corporation New South Wales (RailCorp) provided metropolitan passenger rail services via CityRail and long distance services via CountryLink. RailCorp also owned and maintained the metropolitan rail network and provided access to freight and third-party operators in the metropolitan area.*

*From 2013 until 30 June 2020, RailCorp’s operation and maintenance functions were transferred to Sydney Trains and NSW Trains, leaving RailCorp as an asset owner.*

*From 1 July 2020, RailCorp was converted into TAHE and established as a statutory State Owned Corporation. The TAHE asset base is comprised of heavy rail rolling stock, property, land, plant, machinery, trackwork and infrastructure.’[[15]](#endnote-15)*

The idea of the Entity first came to prominence in the 2015 NSW Budget when former transport Minister, now Premier, Ms Berejiklian was Treasurer.

Budget papers had its intention being:

*‘… procure and sell assets consistent with Government requirements and lease those assets to the operators (both Government and non-Government) under negotiated leases and other contracts….*

*Until now, the Government has paid recurrent grants to Rail Corporation to deliver its capital program. From 1 July 2015, new funding for capital projects will be provided by equity injections, as TAHE will over time provide a commercial return. TAHE will use these funds to purchase services from TfNSW and this will result in the recognition of increased revenue in the General Government Sector (GGS) and a reduction in GGS capital expenditure.’[[16]](#endnote-16)*

An accompanying table demonstrated that could mislead the audience. That year’s Budget further claimed the new arrangements would:

 *‘…..increase the efficiency and reliability of rail delivery in New South Wales’*.

Yet, efficiency and reliability in urban railways is not increased by operators needing to enter contracts to use what once was their own equipment and tracks. Moreover, the gist was:

*‘rail assets being funded through equity injections rather than grants, as has occurred up to 30 June 2015’.*

Legislation to establish the Entity was first introduced by Treasurer Perrottet in March 2017. His second reading speech indicated an intention for the Entity to be ‘*commercial*’ which, at first, he equated with best practice. From there, the explanation was confused and self-contradictory.

He claimed:

*‘being commercial in the management of public transport assets means being more transparent about the way the State funds and accounts for these activities. It means having greater clarity, for taxpayers and for the State, over what is being paid for and what the cost is.’* [[17]](#endnote-17)

Yet ‘commercial’ was then claimed to mean something else - providing ‘returns’:

*‘Commerciality means having a structure in place that …… provides an identifiable return to the taxpayers…’*

As provision of returns requires profits, that implied the Treasurer expected the Entity to be profitable. Such profits were said to require:

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

Why such a delineation is related to profitability is unclear, at best. In fact, such delineation via creation of another organisation works against transparency of government funds. The more organisations funds flow through, the less certain it is where they stop – a well-known problem with shell companies. That is likely a significant cause of the dispute reported in the media.

Nonetheless, the Treasurer argued even such a delineation would be insufficient. The Entity needed to be (somewhat) independent of Government control:

*‘The proposed State owned corporation [SOC] status of TAHE will provide the necessary distance from day-to-day central government control to demonstrate its assets are being managed commercially.’*

The implication is: to the Government, the term ‘commercial’ means an organisation – and its assets - are both profitable and not under government control.

To achieve this in relation to rail assets a necessary condition is a fundamental change of control – a departure from previous arrangements under which assets were held by organisations which were both unprofitable – subsidised – and under the direction and control of the Minister for Transport. Despite the radical change needed, the Treasurer said the Entity would:

*‘simply continue the separation between service and asset‑owning entities that was commenced in 2012’.*

However, that is not a sufficient condition. Another necessary condition is that the assets generate a profit. A very tall order in an industry with a long history of cost recovery less than 30 percent.

That year, 2012, was also the commencement of the Sydney Metro idea – a subject of other articles.[[18]](#endnote-18)

That idea of simple continuation was held by the Treasurer to relate to safety concerns:

*‘Sydney Trains and NSW Trains will continue to take responsibility for safety relating to the core operational assets’.*

While that comment asserted train operators would take ‘responsibility’, it is unclear how this could occur – if the assets are outside Government control and are managed ‘commercially’. Further, the Treasurer did not differentiate between authority and duty – between being able and being required to do something:

*‘Sydney Trains and NSW Trains are authorised under the bill to maintain rail infrastructure, carriages, engines, plant machinery or equipment. This makes it clear that even where assets are owned by TAHE, Sydney Trains and NSW Trains as asset custodians and operators assume responsibility for safely maintaining assets.’[[19]](#endnote-19)*

The Treasurer did not seem to recognise the ability of Sydney Trains to maintain assets of another organisation does not require it to do so. If it does not do so, it cannot be ‘responsible’ – at law and in practice – to anyone for maintenance or condition of the assets. And the fact that it does not have to do so means responsibility to the public for the condition of the asset lies elsewhere.

In that respect, the Audit Office’s comment that the Entity had been continuing the safety and asset management plans of RailCorp is significant. That RailCorp had such plans means it was doing more than merely ‘holding’ assets – to some extent it was managing or controlling rail related activities.

The NSW Opposition’s reaction to the draft focussed on its inconsistency with Ms Berejiklian’s ‘*spruiking’* an integrated transport agency – the Entity can buy or sell assets without discussion with Transport for NSW or Parliament.

The Opposition believed the purpose of the Entity was to allow for privatisation. The Opposition also referred to the Glenbrook rail accident, the inquiry into which was critical of the 1996 disaggregation of NSW rail organisations. [[20]](#endnote-20)

At time of writing, 14 July 2021, the Entity had just established its own website.[[21]](#endnote-21)

The website confirmed:

*‘assets are made available to Sydney Trains and NSW Trains for their operations. We also provide rail infrastructure to third party operators under the terms of track access agreements.’*

From that it could be inferred Sydney Trains and NSW Trains do not have track access agreements. Yet. That tallies with the Audit Office’s comment about the absence of commercial arrangements with public rail operators.

However, 2.2 (above) noted an implication of comments relating to the operating model, and ‘ramping up’ is: from 2022 government operators will be paying access charges. Which would mean the government operators are to have track access contracts from at least that time. The scale of revenue from any such charges is likely to be orders of magnitude greater than revenue from other rail operators, and far greater than the Entity’s current reported revenue. And it may need to be for the Entity to break even.[[22]](#endnote-22)

A central issue is whether the ‘operating model’ - the options for which, let alone the selected option, are yet to be disclosed – assumes ‘commercial’ access contracts between the Entity and the government rail operators. Alternatively: whether government rail operators – or others - are providing the bulk of funds needed for the Entity to make profits - under some other arrangement.

The conclusion to be drawn is: at the outset the purpose of the Entity was surrounded by confusion and questions about some basic operational, legal and governance principles. Treasury’s rebuttal does not address those issues. Therefore, it is necessary to look beyond statements at the legislation, Audit Office views etc. to try to discern current and likely future circumstances.

### 2.6 Transport Asset Holding Entity - legislation

The Transport Asset Holding Entity is enacted in Part 2 of the *Transport Administration Act (1988)*. Despite its name, it is a statutory state-owned corporation, first appearing in the Part on 1 July 2020.[[23]](#endnote-23)

Prior to this, it was established via a schedule to an amendment of the *Act*, 11 April 2017.[[24]](#endnote-24)

As is the case for other state-owned corporations, the governing legislation sets general objectives. Among these are: to operate safely and reliably; to maximise the State’s investment in the organisation. All are of equal importance.

A critical point, for at least the rail industry, is legislation requires state owned corporations to act in their own interests – not in the interests of their industry or the wider community. To that extent comments such corporations must maximise state investments are materially wrong – the corporations are limited by statute to maximising the state’s investment in themselves, even if that involves reducing the business or value of other government organisations, and even if officials do not think that appropriate.[[25]](#endnote-25)

Also, as is the case for other state-owned corporations, while the legislation sets out the Entity’s intended functions – which are to hold and manage assets - it permits the Entity to:

*‘conduct any business or activity (whether or not related to its listed functions) that it considers will further its objectives.’*[[26]](#endnote-26)

Unlike some state-owned corporations, the Entity is to be subject to an operating licence issued by the Minister (for Transport). A failure to abide by the licence may result in a fine or the Minister removing the relevant functions from the Entity. In the latter case, the Minister may ask another organisation to perform those functions. That would seem to have most relevance to a situation where the Entity allowed assets to deteriorate – implying a model in which the Entity effectively controls asset condition and provides government operators with access to track.[[27]](#endnote-27)

The Entity is controlled by a Board of directors appointed by ‘shareholder’ Ministers, except for one director – the Secretary of the Transport for NSW. The chief executive is appointed by the Board. The Board has the standard NSW state owned corporation requirements to report to shareholder Ministers via a statement of corporate intent, annual report etc.[[28]](#endnote-28)

To understand the scheme, it is useful to compare it with the prior situation for control of rail assets - by RailCorp. An important starting point is to note that NSW legislation has statutory organisations focussing on internal goals. There is no responsibility for sector, industry or community matters. There is no duty to cooperate with other NSW organisations for common goals.

While RailCorp was called a corporation, immediately prior to formation of the Entity it was not. It was a statutory authority not expected to make a profit. It was under the direction and control of – and with a chief executive appointed by - the Minister for Transport. It was not subject to an operating licence. In these respects, it was similar to (present day) Sydney Metro.[[29]](#endnote-29)

RailCorp’s principal objectives were to: deliver safe and reliable passenger services; ensure the rail network enabled safe and reliable rail services (including freight). These were more important than other objectives which included reasonable priority of access for passenger trains. Table 1 provides a summary comparison of RailCorp and the Entity. [[30]](#endnote-30)

**Table 1: Comparison – legislation for RailCorp and Transport Asset Holding Entity**

|  |  |  |
| --- | --- | --- |
|  | **RailCorp** | **Transport Asset Holding Entity** |
| Objective | Safe and reliable Passenger servicesNetwork enables rail services | Operate safely and reliablyMaximise State investment in Entity |
| Function | Conduct passenger servicesEnable access to networkPassenger train priority | Manage and maintain assetsEnable access to network |
| Organisation type | Public agencyNot for profit | CorporationFor profit |
| Owner | Minister for Transport | Treasurer plus 1 Minister |
| Nature of ownership | Sole proprietor | Shareholder |
| Directional control / Chief Executive appointment | Minister for Transport | Board |
| Government control | Ministerial direction to Chief Executive | Operating licenceMinisterial direction to board if approved by Treasurer shareholder |
| Declared revenue source (other than asset sales)\* | Government subsidyPassenger faresLeasesTrack access charges | LeasesTrack access charges |

\* implied from legislation

### 2.7 Entity - attributes

Parliament has received a (undated) statement of corporate intent 2020-21, and half yearly report to 31 December 2020.

#### 2.7.1 Internal governance

Internal governance is set by the *State Owned Corporations Act (1988)* with two additions.

There is a governing Board appointed by the shareholders. At present, the Board has four members listed on its website. Biographies of the three appointed non-executive directors mention their directorships on NSW government water organisations. The website biographies do not mention rail experience. There is an interim chief executive.

One of the additions to the *Act* is: the Transport Secretary is to be a member of the Board. Given the organisation has a duty only to itself, that is a requirement creating a conflict of interest.

The previous Transport Secretary had some senior rail experience within RailCorp and Sydney Metro. He was dismissed as Secretary, without explanation, six days after Treasury sent him a curt letter regarding the Entity (2.2 above).

Despite the dismissal, the Transport Minister almost immediately implied the former Secretary would be welcomed back in some role. That role was not on the Entity’s Board although there were sufficient vacant positions for him to be reappointed.

The other addition to the *Act* is: the Entity can be subject to an operating licence. Such licence is not available at its website.

The Independent Pricing and Regulatory Tribunal provides links to operating licences for other State etc. organisations including in energy and water. But there are no links for transport. Given the nature of existing operating licences, it might be expected the Entity’s licence will attempt to deal with ‘economic’ matters, including supposed competition policy - theology - such as not permitting the organisation to operate passenger trains.[[31]](#endnote-31)

#### 2.7.2 Operating model?

The NSW Audit Office claimed the Entity, in mid-2020, was continuing the tasks undertaken by RailCorp.

However, this was expected to change at some time as a result of a new ‘operating model’ – presumably the matter in contention between Treasury and the Department.

Any operating model has implications extending beyond finance and into operations and safety. Finance, operations and safety are almost certainly linked - as the Audit Office recognised:

*‘The final operating model is expected to include considerations of safety, operational, financial and fiscal risks. This should include a consideration of the potential conflicting objectives of a commercial return, and maintenance and safety measures.’*

The relationship between the licence and the operating model is unclear.

#### 2.7.3 Statement of corporate intent 2020-21

A signed, but undated copy of a Statement of Corporate for the Entity, 2020-21, is publicly available. It is at Appendix 4. [[32]](#endnote-32)

As a description of the Entity’s business and intentions, or the operating model, it is deficient.

The Statement included a ‘strategy’ limited to a motherhood vision statement – ‘*make NSW a better place’* etc. – and recitation of the generalised statutory objectives of every NSW state owned corporation.

The description of its business listed broad asset groupings. Yet despite saying the Entity has a very specific role, did not say what it will do - especially in relation to the assets. For reasons outlined in sections 4 and 5 that is the key issue.

The description said the organisation was established on 1 July 2020 but a strategy will be developed later – i.e., the ‘specific role’ was unknown.

The Statement listed six strategic priorities. Most are problematic, being internally focussed and circular – for example, implementation of a yet to be defined ‘model’. Some appeared to reflect misunderstandings about the nature of the rail industry and the organisation – for example *‘implement an access pricing regime with Rail (sic) seekers in line with regulatory requirements’* does not understand the (existing) regime is the regulatory requirement.

Financial indicators were deficient when compared with, say, Sydney Water’s Statement of Corporate Intent. For example, revenue forecasts were not provided. Nor, very surprisingly for an organisation concerned with rail assets, was the critically important earnings after depreciation and amortisation – allowing readers to discern what amount of depreciation – degradation of assets - was ‘agreed’ with shareholders.[[33]](#endnote-33)

Some financial indicator levels did not appear to be in line underlying NSW rail economics - for example 2021-22 EBITDA (net earnings before depreciation etc) at $779.3m was around Sydney Trains’ 2019-20 total passenger revenue.[[34]](#endnote-34)

Among the financial indicators it was unclear whether equity contributions and borrowings were stock or flow figures or a mixture of both.

Equity contributions appear to be flow figures. They were to be $6m, $227m and $410m less than capital expenditure in the three presented years. However, borrowings - $2,500m – were to be far in excess of the gap whether stock or flow. This calls into question the purpose of such borrowings.

Presented non-financial indicators were vague. Some were inconsistent with other elements of the Statement and the law – for example compliance with access regulation achieved one year after access pricing is introduced.

Other indicators suggested the organisation had not been completely established – which is no fault of the Entity but rather would be impossible until the Government had ‘decided’ the operating model. For example, ‘compliance’ with relevant national rail safety law, in conjunction with development of an asset management plan, access pricing and a fit-for-purpose safety and assurance framework, suggests the organisation had been established without full cognisance of what that law implies for organisations undertaking those activities – or indeed whether the organisation should undertake certain activities.

Among the non-financial indicators was intimation of a hidden agenda – ‘*renegotiation of Rail Service Agreements’*. The Statement provided no hint of the purpose, content or parties of such ‘agreements’ – for example whether the Entity is to provide or purchase services, and what those services might be.

Possibilities include: the Entity behaving like a franchisor – effectively usurping the role of Transport for NSW; buying in maintenance i.e., specifying maintenance levels or activities – which, unless accredited, may breach national rail safety law.

#### 2.7.4 Half year report

A half year report - to end December 2020 - relating to the statement of corporate intent was provided to Parliament in January 2021.[[35]](#endnote-35)

It said progress towards statement of corporate intent indicators was on track.

It went further and reported some indicators not in that statement. For example, for the half-year: revenue from contracts $48m; asset depreciation and impairment (write-downs) $736m; loss $718m.

Unfortunately, depreciation and write-downs were not itemised. Therefore, it is not possible for readers to be certain about underlying losses – losses excluding extraordinary items. Such losses are a significant issue as they indicate the possible minimum additional quantum necessary for the Entity to achieve its purpose.

Were depreciation to occur at the same rate as Sydney Metro, the quantum might be in the order of $500m to $600m. [[36]](#endnote-36)

#### 2.7.5 Implications

The above means the most significant visible changes in governance of rail assets arising from the Entity arrangements are:

1. They are no longer in a Transport agency – the Transport Minister’s control is reduced;
2. Treasury has new, direct influence;
3. Profits are sought.

The Audit Office claimed the plan for the Entity was developed by Treasury. The Treasurer introduced the legislation giving effect to the Entity and advised Parliament of the Government’s purposes. Treasury recently attempted to publicly defend the arrangements (2.2 above).

The inference is: the primary motivations for the Entity were Treasury ideas. Former Treasurer Berejiklian put the motivation as related to presentation of the Budget – in particular removal from the Budget of certain expenditures, by their reclassification as ‘equity’. Treasury’s letter to the Transport Secretary supports this.

Audit Office comments suggested two conditions for the reclassification of expenditure as equity:

1. The Entity is not under (direct) Government control; and
2. It seeks to, and does, make a profit.

Its view that the Entity is a high risk reflected scepticism about the latter (2.2 above). One issue, therefore, is the Entity’s ability to generate profit.

### 2.8 Profit sources

Profit is revenue less costs. Sources of profit are revenues and cost reductions. Given RailCorp was not profitable, profits sources for the Entity must relate to changes in revenues and/or cost reductions not available to RailCorp. Among the implications: the Entity’s activities differ from those of the former RailCorp.

Table 1 indicated the Entity’s (disclosed) revenue sources to be leases and track access charges.

#### 2.8.1 Leases

The Entity’s assets include real estate and rail fleet. It appears the intention is to lease these to other parties. Such leases are contracts and involve temporary transfer of property for the exclusive use by the lessee. For the lease period, the asset is not within the control of the lessor. The leases may involve obligations on lessees to maintain the assets.

Railway real estate – for example shop premises at railway stations – is usually leased to private businesses. Increasing revenue from this source would require charging higher rents (with the same occupancy rates). A further source of revenue would be construction of new premises and their leasing.

Fleet is leased to Sydney and NSW Trains – government organisations. The ability of those organisations to afford leases depends on their receipt of Government subsidies.

#### 2.8.2 Or access?

Access permits another party to utilise an asset. However, it is not an exclusive right. The asset remains within the control of the access provider - a fundamental difference from a lease.

Access is legally enabled by contract. However, unlike a lease, an access contract cannot include obligations on the access seeker to maintain the asset. The reason is: there may be access contracts with numerous parties. This may explain why RailCorp had asset and safety management plans.

The access contract is between the track asset owner/controller and access seekers - ‘third party’ train operators. RailCorp had access contracts with non-government operators, but (obviously) not with itself.

The discussion above – e.g., 2.5. – said the question of whether, or not, the Entity is to have access contracts with the government rail operators is a pivotal matter.

The concept of access arises from competition policy. It is based on ‘essential facilities’ – common assets - the non-exclusive use of which are needed to compete against other users of the assets. Typically, the facilities are natural monopolies and can be subject to economic regulation which limits charges. Examples include port channels and railway tracks.[[37]](#endnote-37)

For an urban railway, the usage right comprises three components: allocation of ‘train paths’ – entry, exit and route times - on an infrastructure use schedule (standard working timetable); allowance of use of those paths via signals in real time; procedures and rights in the event the schedule is not or cannot be adhered to. Among the purposes is identification of the most important paths.

Typically, commuter rail systems are vertically integrated, with the principal train operator owning the track assets. The reason is the lack of purpose, and impracticality, of the dominant train operator contractually specifying the three usage-right components to itself.

A vertically integrated urban railway may provide access to other rail operators, as did the State Rail Authority prior to mid-1996 and RailCorp until 2012. From 2012 until recently the situation is less clear as Transport for NSW is said to have developed the standard working timetable, implying some degree of vertical separation and therefore ‘access’ for all rail operators.

Elements related to access have proven contractually vexing in vertically separated urban passenger railways. These include:

* specification of infrastructure standard, condition, capacity and ‘standard’ train paths;
* train positioning in preparation for peak hours;
* real time resolution of ‘tangle’ delays;
* attribution of delay causes and consequences;
* contractual remedies such as rectification works, preventative measures and damages;
* disputation including among train operators;
* evolution of different ‘cultures’ in asset owner and train operator.

Also significant is alignment of contractual with common law /legislated responsibility for elements of interface risk such as an operationally degraded environment, operational rules and procedures and signal visibility.[[38]](#endnote-38)

One class of access seeker - for services provided by the Entity’s track assets - are private rail operators, largely freight businesses. These operators compete against road transport. The strength of competition limits the amount of access charges they can pay.

A consequence is reported Entity revenue from contracts -$48m – being possibly a half-year revenue limit from non-Government sources, albeit Covid recession affected. Given that sum includes revenue from the airport line and property leases, the implied annual $96m is likely beyond the upper limit of freight related access revenue.

#### 2.8.3 Implications of revenue

Potential levels of depreciation – 2.7.4 (above) – imply the Entity’s profitability relies on ‘its’ rail assets:

* not being annually depreciated on its accounts because they are under the control – and therefore appear in the accounts – of Sydney Trains, or by being immediately written down; or
* giving rise to payments from Sydney Trains more than sufficient to cover depreciation via access charges, or a lease that does not transfer control; or
* attracting payments from the Government directly.

In all cases, the Entity’s profits depend on subsidies to the rail industry. Given the emphasis on commercial matters, it is likely contract payments from government operators are expected to be the dominant source of the Entity’s revenue.

These matters point to potential conflict between government rail operators and the Entity.

Prior to the Entity, most differences in opinion about infrastructure condition, services and related charges – whether lease or access - were resolved internally within the rail industry components of Transport for NSW.

Now those differences will need to be specified and resolved in a contract with a party said not ‘responsible’ for rail activities, owned by parties outside the transport portfolio.

Two observations should be made.

First, the essence of an organisation is it makes its own decisions. A model in which Sydney Trains – or Transport for NSW – makes payments to the Entity can only be validated by a decision of Sydney Trains etc. It cannot be validated by either the Entity nor Treasury. Things do not happen between organisations just because officials – or some model - says so.

Sydney Trains, will have higher -internal - priorities than making such payments. If it faces financial constraints, Sydney Trains may not willingly make all the ‘model’ payments to enable the Entity to report profits. In that event, a Ministerial order to Sydney Trains may be needed to make the model work. However, the Minister with the power to make that order has a first responsibility for Sydney Trains – not to the Entity which is outside the portfolio.

Second, the higher the model quantum, the greater the Entity’s profits or the tighter the financial constraints – the greater the risk of dispute over payments.

This indicates a flaw in arrangements – lack of an expert dispute resolution mechanism. That was also a flaw in the NSW 1996 arrangements – outlined in section 4 (below).

#### 2.8.4 Costs

The principal costs for an asset owner will be maintenance and depreciation.

As a simplification, maintenance is a substitute for depreciation – a well maintained asset will depreciate relatively slowly. For a rail network expected to operate in perpetuity, maintenance is intended to prevent depreciation.

As noted above, in accounting terms, depreciation is considered against the asset’s value. There is a difficulty for a business that does not generate profits – its assets may be valued at less than maintenance costs.

If so, the business will have a financial incentive to allow the assets to depreciate rather than fully maintain them. In that case it will be essential to continuously monitor the physical condition of the assets because of the risk that depreciation will be estimated on other accounting bases e.g., straight line, and thus be under-reported, leading to overestimation of profits and asset condition.

A potential problem for those relying on an unprofitable organisation is: depreciation, and asset condition, not adequately shown in the accounts while there is no other information on these matters. A consequence may be ‘unexpected’ service degradation and asset rectification costs.

A vertically integrated urban railway is more likely to have an accurate (internal) assessment of maintenance requirements and depreciation that a vertically separated one. An implication is: vertical separation of such a railway – where track asset values are reported outside of the rail operator’s accounts - is unlikely to be a source of efficiency or cost-reduction profits. This is discussed in more depth in sections 3 and 4.

#### 2.8.4 Profit sources – the money go round

The result of the above (2.8.1-2.8.3) is: there is little opportunity for external – non-Government source - profit to arise from creation of the Entity. There is no obvious new external revenue source, and there is no obvious source of cost reduction – indeed, at least administrative costs will increase.

Entity profits are most likely to arise from increased subsidies to NSW rail. This is similar to what was attempted in the UK 1993 privatisation – known as the ‘money-go-round’.[[39]](#endnote-39)

The money-go-round used an increase in subsidy to generate a profit and therefore a ‘commercial’ (accounting) asset value. The subsidy is increased to exceed costs including depreciation. The profit is returned to the government. The money-go-round is likely to involve new costs: the costs of a new organisation; under standard employee renumeration arrangements, higher salaries as more staff are ‘responsible’ for more money. A money-go-round requires an increase in subsidy just to maintain services and asset condition.

While theoretically elegant, when practiced – in the UK - the money-go-round gave rise to significant, latent, risks including operational and financial failure of infrastructure. The Audit Office’s comments in 2.7.2 (above) are relevant.

Yet these problems were despite the UK model including a rail regulator to set contracts and – effectively – decide disputes.

That is, the UK model addressed the flaw evident in the 1996 NSW changes and, in principle, enabled the money-go-round to work. However, in practice it did not work well.

In the UK, as in NSW 1996-2004, the attempt to make costs more ‘transparent’ by separating asset ownership from train operations failed. This is outlined in sections 4 and 5.

## 3. Corporatisation Principles

The Entity involves corporatisation of NSW government rail assets. This section explores some corporatisation concepts.[[40]](#endnote-40)

### 3.1 Corporatisation basics

Corporatisation was popularised in the late 1980s. The idea: external governance of a government organisation – its scope and means of control – would mimic that of a private corporation owned by two shareholders. It was most relevant to those organisations selling goods/services to the public – government businesses or trading enterprises.[[41]](#endnote-41)

There were two immediate aims of corporatisation. A first was to increase the efficiency of the business. This reflected belief private corporations are inherently efficient due to their external governance. The sources of supposed efficiency were greater pressure on costs and more responsiveness to market conditions – profit seeking behaviour.

The second aim was to expose political influence on the business. Most (non-corporate) government organisations are under the control of a portfolio Minister. There is a temptation for the Minister to ask the organisation to (not) undertake certain tasks - informally without the knowledge of the public or Parliament. While such requests could lower efficiency, the main problem was: the covert nature of the political influence was inimical to democracy.

NSW was among the world leaders of this agenda, writing papers and guidelines subsequently adopted in Australia and overseas.[[42]](#endnote-42)

The guidelines set a spectrum for public sector control of organisations. At one end, ‘core departments’ such as Treasury (author of the guidelines) should be wholly within the government. At the other end businesses with for-profit functions and private sector analogues should be (treated like) private businesses. Statutory authorities would be in between - Figure 1.

**Figure 1: spectrum of public sector control**

Determination of a public sector business’s place on the spectrum would depend on its potential to gain profits from the public; a highly profitable organisation ought to be a business corporation, an unprofitable one a statutory authority.

Today NSW has eight state owned corporations. This might be compared with twenty in 2000 – privatisations largely accounting for the reduction since.[[43]](#endnote-43)

### 3.2 Competition policy aspects

The spectrum of Figure 1 was echoed in the *Competition Principles Agreement*.

The Agreement asked for consideration of ‘structural separation’: that profitable businesses activities and other functions, for example administering regulation be put in different organisations. It also asked for consideration of putting monopoly and potentially contestable business activities in different organisations.

Corporatisation would be preceded by such structural separations. Where separation of a government business would be too difficult due to common costs, or because of a need for coordination or leadership, a statutory authority would be preferred over a corporation.[[44]](#endnote-44)

Consideration of structural separation was associated with other elements of the Competition Principles - ‘competitive neutrality’ and ‘access’ to essential facilities.

Competitive neutrality aimed at ensuring a business was not (dis)advantaged by government ownership. For that reason, a government corporation – selling to a contestable market – would be subject to tax equivalent payments and would remit dividends to its shareholders.

A government business monopoly would provide other parties with access – the ability to use – its nationally significant essential facilities. To limit potential abuse of market power, such access would be subject to economic regulation via the *Australian Competition and Consumers Act (2010)* or by an access regime.[[45]](#endnote-45)

Where it was not desirable for contestable and monopoly elements to be put in separate organisations, accounts for these different elements were to be separated – ‘accounting separation’.

### 3.3 Corporatisation and governance

External governance – effective exercise of lawful control - involves four mechanisms, Figure 2.

**Figure 2: governance instruments**[[46]](#endnote-46)



Departments and statutory authorities have social purposes. The government pursues these purposes via those organisations being under the direct control of a Minister.

A corporatized organisation has a profit seeking purpose. This is pursued by separation of ownership from direct control. The owners are two shareholders (Ministers) who seek profits rather than social goals. They monitor the ‘performance’ of the organisation via financial reports.

If the government wishes to pursue social goals through a corporatized organisation, these are sought by a Minister via regulation or by a department procuring outputs that would not otherwise be provided to the public. Such procurement is via a Community Service Obligation contract. Regulations and contracts replace the prerogatives a government owner giving informal direction to the organisation. The contracts provide payments to the corporation.

Given the requirement for the corporation to pay its shareholders tax equivalents and dividends, the contract payments ideally include a component for an ‘adequate’ return on capital.

This is referred to as ‘grossing-up’ Community Service Obligations - aiming to be consistent with procurement of similar services from a privately owned company. It is an aspect of the ‘money-go-round’ referred to in 2.8.4 (above).

The return component has two effects. First it provides an ‘incentive’ for the corporation to pay as much attention to services procured under the Community Service Obligation as to services provided to the public.

Second, the component supports a positive valuation of the assets needed to provide those services. A positive valuation is necessary for depreciation to appear in financial accounts, and therefore for the financial accounts to indicate to others – including the shareholder and Ministers - the condition of assets, the adequacy of maintenance. A positive valuation of a corporation’s assets is necessary for its accounts to provide some indication of the likely sustainability of the business.[[47]](#endnote-47)

If a return component is not included in a Community Service Obligation, commercially based financial accounts are unable to show the extent to which assets are depreciated, and thus true profits/losses. Then, management rewarded on the basis of reported profits have an incentive to allow deterioration of assets needed for community services, leading to deterioration in community services over time and a need for later ‘recapitalisation’. The greater the need for community services the greater the incentive for this, with detection not possible through simple financial reporting.

In such a case, of Community Service Obligations procured from a corporation not being grossed-up, those interested in continuity of services need supplementary – non-financial - reports on asset condition and associated operational performance indicators. Such non-financial reports typically do not sit within a contractual or shareholder framework because of information asymmetries and lack of skill and experience of shareholders advisers. Indeed, both the corporation and shareholder advisers may resent suggestions of the need for such reports as a slur on their motivations and capabilities.

This is not criticism of those involved. Rather, it reflects the truism that the commercial approach to a loss-making business is to progressively close it down.

The greater the absolute and proportionate value of the Community Service Obligation to the corporation, the greater the risk of shortcomings in financial monitoring. This confirms the corporatisation ‘theory’: the lower the profitability (from private sources) of a government organisation, the greater government direct control is needed.

### 3.4 Corporatisation - some practical matters

Legislation establishes public sector corporations. In NSW, the legislative basis is the *State Owned Corporations Act (1989)*.[[48]](#endnote-48)

#### 3.4.1 Shareholders and directions

Under the *Act*, two shareholder Ministers – one usually being the Treasurer - appoint a Board to control the corporation. The directors have fiduciary duties, similar to those in private corporations, to act in the best financial interests of the corporation rather than just shareholders or contracts.

This is mitigated by legislative requirements to take other factors, such as the environment and regions, ‘into account’. However, such mitigation is limited by the financial consequences of those requirements generally not being reported.[[49]](#endnote-49)

The Board is to issue a statement of corporate intent, to be approved by shareholder Ministers. The corporation is to produce an annual report. The annual report is to include normal organisational financial statements of balance sheet, profit and loss account and cash flow. The statement of corporate intent should provide indicators related to these.

The balance sheet is to record liabilities of equity and debt equal to assets. Commercial accounting standards have asset values set at the higher of scrap and future earning potential. Given debt is fixed, changes in asset values result in changes in equity and the profit and loss account. In the accounts, an injection of equity is to be balanced by an increase in asset value. As asset value reflects future net earning potential, the valuation of the equity injection will eventually be limited to the change in profits arising from the new asset. In the event the change in profit is lower than expected at the time of injection, equity will be devalued.

In principle, financial contributions of equity – including from government shareholders - are to be used at the corporation’s discretion rather than the shareholders’ direction. Similarly, while the shareholders may offer the corporation specific assets in exchange for equity, it is for the corporation to determine whether to accept them and at what value.[[50]](#endnote-50)

Shareholders are not to provide ex-legislative instruction to the Board lest they stand in the fiduciary position of directors. The Board employs a chief executive, who hires other staff.

Shareholders can request a dividend.

#### 3.4.2 Ministerial ‘control’?

There is an opportunity for limited Ministerial control of a statutory – rather than company – State Owned Corportion. The portfolio Minister may issue the Board with directions for the corporation to (not) undertake certain tasks. Directions are to be tabled in Parliament.

Section 20P of the *State Owned Corporations Act (1989)* enables directions to be made ‘in the public interest’. There are substantial difficulties with this section.

Such a direction implies Community Service contracts between the portfolio Minister and the corporation are incomplete. Unless the direction includes compensation and returns to the corporation – as should the contract - financial monitoring may mislead as to performance.

Also, a direction in the public interest implies the corporation would otherwise not operate in the public interest – it is an adverse reflection on the corporation and its ‘shareholders’.

Even ignoring those difficulties, the s.20P provisions are extraordinary and problematic. Public interest directions can only be made with the approval of the Treasurer – a half-owner of the corporation - and after the Board confirms that the direction is not in the best interest of the corporation. The latter is confirmation that the corporation’s and public interests significantly diverge.

Among the implications: the portfolio Minister is more or less impotent; the *Act* places the Treasurer in a most fundamental conflict of public duty and personal political interest; a direction is only possible if the Treasurer admits a failure of stewardship - the corporation was not acting in the public interest and the purpose of the corporation conflicts with the public interest.

Yet amazingly, *s.20P* has been invoked on several occasions, including for rail entities.[[51]](#endnote-51)

#### 3.4.3 Review

A 2000 review of the *State Owned Corporations Act* by the Parliamentary Library revealed other problems. It referred to an Inquiry into the 1998 contamination of Sydney Water’s distribution system which found despite the Act’s framework, and an operating licence:

*‘loss of public credibility in Sydney Water made it necessary for the Government…to put aside the corporate management structure and adopt the primary management role in the handling of the crisis’.* [[52]](#endnote-52)

A similar reaction occurred in the rail industry (section 4 below). The water contamination Inquiry also found the *Act*’s provisions for Sydney Water – a company state owned corporation – may have worked against the Government being properly advised.

This implied Treasury’s ‘monitoring’ framework to be inadequate and possibly a blockage to communication including about a public emergency. Further, observed was:

*‘significant difficulty in the communications between Sydney Water and the operators of the Prospect Treatment Plant, Australian Water Services, probably as a result of their competing commercial objectives’.[[53]](#endnote-53)*

Retardation of communication between organisations which were supposedly complementary but had competing statutory objectives has also been observed in the rail industry. As one example, the Commission of Inquiry into the 1989 Glenbrook rail accident found:

*‘At present RAC has responsibility for Network Control but contracts this out to SRA whose employees are restricted from discussing the work they do with other SRA employees. RAC does not have the expertise or staff to carry out network control operations.’[[54]](#endnote-54)*

More fundamentally, that accident Inquiry found critical breakdowns in communication about resource and maintenance requirements where there were contractual arrangements among rail organisations.

The *State Owned Corporations Act* review pointed to another problem: at least one state owned corporation felt it did not have the duties of other organisations because it believed it was resource constrained. The review cited a court case in which Sydney Water claimed to be unable to control resources allocated to preventative maintenance because of Treasury dividend requirements and the regulation of water charges:

*‘The defendant has presented its case on an assumption that the current level of its resources directed at prevention and maintenance is fixed and may not be increased. This situation is purportedly caused by the statutory framework within which ‘its hands are tied’ – with no means to independently control its income and expenditure..’*

The Court rejected that:

‘*Whilst it has a highly important public role, Sydney Water cannot be given special exemptions simply because its shareholder, the state government, is not private. It must be responsible for its actions or omissions, at least to the same degree as any other business’.*

NSW state owned corporations continue to operate in the utilities – water and energy - sectors. Reflecting their position as profitable monopolies, Government Community Service etc. payments are only small proportion of total income for these organisations - for example, Sydney Water six percent.[[55]](#endnote-55)

The utilities corporations are subject to licences – organisation specific regulations - issued by the portfolio Minister. The licences include price ceilings and supply sureties. The licences are monitored by the NSW economic regulator – the Independent Pricing and Regulatory Tribunal – which publishes reports it makes to the relevant Minister – section 2.7.1 (above).[[56]](#endnote-56)

## 4. 1996 changes

*Divide an elephant and you don’t get several small elephants – you get a mess.*

### 4.1 Prelude

#### 4.1.1 Origins of modern rail access

European Union Directive 91/440 aimed to reverse the declining fortunes of member railways. It comprised four elements:

* separation of the State from management of railways – ‘managerial independence’;
* separation of infrastructure management from transport operations, at least in the accounts;
* reduction of debt especially that ‘allowed’ (via debt/equity ratios) by government equity contributions;
* granting other parties access rights to infrastructure, in exchange for access charges.

The Directive permitted members to disregard the directive for urban railways or regional – presumably passenger - services.[[57]](#endnote-57)

In 1993, Australian State and Commonwealth Governments agreed to thematically similar ideas in the *Competition Principles Agreement*. The *Agreement* applied beyond railways to all industries.

Governments were to consider structural separation of government businesses into organisations conducting contestable activities and organisations conducting monopolistic activities. The latter would be required to provide other parties with access to their essential facilities of national significance. A particular focus was coal haulage by rail in the NSW Hunter Valley and central Queensland.[[58]](#endnote-58)

Between 1993 and 1995, coal miners in the Hunter Valley complained about rail haulage charges set by the State Rail Authority’s FreightRail Division. The claimed coal the charges were in excess of costs and an adequate rate of return - ‘monopoly rent’. They proposed privatisation of the Hunter Valley coal rail system. In response, Coalition Premier Fahey instead offered access to the rail lines.[[59]](#endnote-59)

The offer of access for major operations was not entirely new. In 1991 Commonwealth, NSW and Victorian Government established their National Rail Corporation. The Corporation was to take over the interstate freight functions the existing rail authorities performed under the interstate rail agreement.

To conduct these functions the authorities would hand over relevant assets nominated by the Corporation – locomotives, wagons, terminals and equipment. It could nominate assets not handed over at marginal cost, the purpose of that being to avoid incentives for the rail authorities to retain assets.[[60]](#endnote-60)

The Corporation could similarly nominate standard gauge track between Brisbane, Sydney (area), Melbourne and Perth predominately used for interstate freight. The location of the interstate terminal in Sydney – Enfield/Chullora – meant National Rail’s trains would need to traverse track not predominately interstate e.g., Macarthur-Sefton. National Rail would therefore need ‘access’ to, rather than ownership of, that track which was operated by the State Rail Authority.

A complication was a Sydney ‘freight curfew’ – hours in which freight trains were not permitted to run on lines used by passenger trains. This meant freight access rights in Sydney - in particular fixed ‘paths’ at certain times of day and surety of passage in the event of delays caused by other trains - were important for National Rail’s schedule across Australia.

An issue arose out of the State Rail Authority’s FreightRail Division. While the Division concentrated on intrastate freight – there was little overlap with National Rail – the limited availability of ‘good’ paths for freight meant there was some competition for track space. The suspicion was the Authority’s provision of access to National Rail may be adversely influenced by its ownership of FreightRail. This was the substantive reason for the Authority creating a ‘network access unit’. The argument then turned to whether the unit should be in or ‘wrenched out of’ the Authority.

An important point to note is the substance of the argument arose from co-location of a profitable freight business with network access and the passenger-necessary network control functions. A horizontal separation of that business – started in 1996 via FreightCorp from the Authority – would resolve that argument more effectively than separating network access and control from the Authority. However, the 1996 changes attempted to do both and in that were deficient because at least some network access functions were ‘corporatised’ and placed under the same owner – Treasury – as FreightCorp.

#### 4.1.2 Broader NSW changes – energy

Since 1991, NSW had embarked on ‘reform’ of the electricity sector. By 1995-96 it was the poster-child of ‘micro-economic’ reform, expected to contribute substantially to increases in State and national economic output.

In the energy sector, vertically integrated statutory authorities were split into various state-owned corporations in generation, transmission and distribution segments. There was some consolidation of pre-existing distributors. Generators would compete, with an upside they could also compete in interstate markets. The changes had been made under the auspices of the Council of Australian Governments, going beyond recommendations of a 1991 Productivity Commission Review and implementing the themes of the Hilmer Report.[[61]](#endnote-61)

When Labor took office in 1995, NSW Treasury appeared pleased with progress with the changes in the electricity sector. This was fortuitous as the new Treasurer was also the new Energy Minister.

#### 4.1.3 From energy to rail?

Since the early 1990s, the NSW generators and distributors had more than doubled productivity – and halved employment. NSW rail productivity had increased at less than half that rate, and employment had fallen by less - one third. The likely thinking in some quarters was: application of the ‘energy model’ to rail would result in it catching-up.

This was so even though on-rail competition in interstate markets would be prevented by the break-of-gauge and – unlike the electricity industry’s large contribution to State coffers – rail had for decades been a drain on the public purse.[[62]](#endnote-62)

Such thinking equated the natural monopoly rail track with the electricity industry’s natural monopoly – the transmission grid. The grid had achieved a 9.2 percent return on assets and the Energy Minister - the Treasurer - set it a cost reduction target of 25 percent over three years.

### 4.2 UK

NSW railways have long had close ties with the railways in the UK, and draw on experiences and personnel from that country. In 1993, the UK (Thatcher/Major) government started the privatisation of British Rail – the national railway, excluding London’s Tube. The intention was to reduce subsidies, which appeared reasonable given the railway’s declining importance since World War 2.[[63]](#endnote-63)

Two pieces of legislation were involved. The first gave the Minister new powers to direct British Rail to sell assets. The second, the *Railways Act* (1993), set the structure for the industry. In combination they allowed for the fragmentation and progressive privatisation of British Rail.[[64]](#endnote-64)

The Government created and sold companies owning maintenance equipment and owning rolling stock. It established a company to own the tracks, infrastructure and stations – RailTrack – which was listed on the stock exchange.

Via a franchising agency, the Government invited minimum subsidy bids from the private sector for various passenger rail service franchises. Franchises were exclusive rights for a number of years to operate trains on certain routes with specified fares.

Where the routes merged, RailTrack allocated fixed ‘train paths’ over track segments used by several operators.

Franchisees – train operators - leased stations from RailTrack, except for the central terminals in London. The operators leased fleet from the rolling stock companies and operated on RailTrack’s network under a legal framework of access contracts.

RailTrack was placed at the centre of safety administration. Train operators’ safety cases would be approved by RailTrack. RailTrack was to submit its safety case to the safety regulator – the Health and Safety Executive

An industry specific regulator determined terms and conditions – including ‘incentive’ matters such as charges and compensation for failures - in the contracts.

RailTrack worked to contract-out track maintenance.

In all, around one hundred new organisations were formed out of British Rail.[[65]](#endnote-65)

The first private trains ran in 1996. Within a year reports confirmed what many suspected - shambles. The lesson then drawn, including in NSW, was to avoid railway fragmentation.[[66]](#endnote-66)

However, further lessons could have been drawn. In 1996, the UK Health and Safety Executive audited RailTrack’s safety systems, in particular those for maintenance contracting. It found while safety incidents were not increasing, there were gaps in the systems perhaps plugged by continued (informal) cooperation between railway workers. It concluded:

*‘Weaknesses identified in this report should be addressed urgently before the often informal pattern of previous relationships decays and before any significant increase occurs in the use of contractors (whether ex-BR units or from non-railway backgrounds in areas where their staff have had little previous experience’[[67]](#endnote-67)*

In the late 1990s, rail passenger numbers began to increase in the UK and across the world – contrary to expectations. The ability to respond to increases in demand appeared difficult in vertically separated railways.[[68]](#endnote-68)

In the late 1990s, a series of major accidents – including Southall (1997), Ladbroke Grove (1999), both SPADs - led to claims the separation of track assets from train operations created new ‘interface’ risks.[[69]](#endnote-69)

In the early 2000s, further accidents at Hatfield (2000) and Potters Bar (2002) were attributed to systemic problems in maintenance contracting.

The Hatfield accident involved a fatigue induced broken rail. RailTrack had ‘divested’ the relevant engineering experience of British Rail and was unable to determine whether similar fatigue-crack risks existed across the network. One result was major rail service disruptions for over a year while thousands of miles of track were checked. Another result was a rectification/damages bill of $1.3bn, rendering RailTrack insolvent in 2001. The Minister labelled RailTrack a ‘failure’ and

*‘announced Railtrack would be replaced with a not-for-profit organisation - effectively putting the railways back under public sector control.[[70]](#endnote-70)*

RailTrack was effectively renationalised as Network Rail in 2001 – a company limited by guarantee and with members rather than shareholders, but backed by a government guarantee.

Yet the other, later, accident at Potters Bar exposed further problems in maintenance outsourcing. Network Rail was fined for safety breaches, and all track maintenance tasks were taken back in house.[[71]](#endnote-71)

Among other UK controversies were the regulator’s determinations of access charges being criticised as effectively usurping the role of Parliament. Another was the creation of an industry to allocate blame for train delays that impacted train operator costs and revenues – for which various contracts called for compensation. [[72]](#endnote-72)

In 2001, there was an attempt to improve coordination within and between the government and the industry. A Strategic Rail Authority was formed to administer the franchises and provide subsidy to infrastructure. The cascade principle had broken down, and there was a need for a new organisation to plan to enhance the network as RailTrack was unable to do so. In the event, legislation meant the authority would primarily operate by persuasion rather than power. It was seen to be ineffective and abolished in 2005.[[73]](#endnote-73)

The question whether the privatisation was worthwhile remains in dispute and appears unanswerable. It appears Government subsidies have substantially increased – but so too have passenger numbers.

**Figure 3: UK rail subsidy[[74]](#endnote-74)**



Despite several changes of government, private operations continue.

The latest plan, announced in May 2021 after a ‘root and branch’ review, recommended a continuation of private service provision, reduced government agency involvement and to ‘streamline’ and simplify arrangements by creating ‘Great British Railways’.

However, reality is somewhat different from the appearance of continuing with privatisation. The new organisation is to take over Network Rail, and offer operating concessions rather than franchises for passenger services. Under the arrangements, the train operators will be classified as public – not private – non-financial corporations as government will be taking revenue and cost risk. Their debt and employees will be counted, for statistical purposes, as public sector.[[75]](#endnote-75)

### 4.3 NSW 1996 changes

#### 4.3.1 Intentions

In 1995, NSW Labor was elected on a platform proposing an integrated public transport authority – merging State Rail and State Transit. Instead, in mid-1996, it produced draft legislation to split – structurally separate - the State Rail Authority.[[76]](#endnote-76)

The legislation – supported by both sides of politics - has been called ‘ideological’. Given rumours the Transport Minister threatened to resign over the ideas it advanced, it likely emanated from central agencies.

The supposed aim was to further competition policy including among trains on tracks in Sydney. However, there were concerns such competition could disrupt commuter services in Sydney.

The legislation passed included ‘passenger priority’ provisions and the pre-existing commuter train timetable.[[77]](#endnote-77)

The industry structure created by the legislation – and later actions by organisations - evinced further intentions: cut rail subsidies; reduce the size of the rail workforce; at least partially privatise maintenance; increase central agency control; minimise the influence of the transport portfolio.[[78]](#endnote-78)

The Treasurer claimed different intentions again:

*‘The new structure was intended, inter alia, to achieve the following:*

*• Remove many cross subsidies that existed under the previous funding regime;*

*• Require that the new corporate entities earn commercial returns and pay commercial dividends and tax equivalent payments to the Budget Sector; and*

*• Make transparent the funding of any Government requested social programs.’[[79]](#endnote-79)*

The comment about cross-subsidies implied State Rail Authority’s freight operations – especially for coal - were subsidising its passenger activities.

The thinking behind the last of the comments was that placement of different functions in separate organisations would make system costs transparent. Among other things the hope was this would enable Community Service Obligation payments – ‘social programs’ - to be more accurately estimated.

Treasury had something else in mind, at least in relation to rail track:

*‘The separation is designed to drive efficiencies in network asset management and represents a first step in progressing towards an open access policy for private train operators’.[[80]](#endnote-80)*

The implication was Treasury viewed the priority to be more efficient track asset management, with access being subsidiary and later. Its view was not primarily concerned about dealing with natural monopoly – a seller of services. Rather its priority was to create a profit-seeking natural monopsony – a sole buyer of track maintenance services – out of an organisation previously subsidised to conduct those functions.

It is difficult to credit a logical link between a disaggregated structure and urban network asset management efficiency – indeed the opposite appears to be the case. Hence the comment suggests a Treasury view that the politics of the pre-existing structure precluded efficiency. Such suggestion is supported by the 1996 changes transferring political level influence over track asset management from the transport portfolio to Treasury.

#### 4.3.2 The split

The State Rail Authority was split into four main organisations. Two – state owned corporations - were removed from transport portfolio control to central agencies. The administrative processes and tasks needed to produce train services for the public were to be replaced by contracts between the organisations. This is shown in Table 2.

The NSW owned train operators – FreightCorp and State Rail – continued to own and organise the maintenance of trains. The jointly Commonwealth-State owned National Rail Corporation did the same. The split of freight from passenger train operators was ‘horizontal’ separation.

**Table 2: NSW 1996 rail structure**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Owner** | **Function/assets** | **Contracts** |
| National Rail | Transport (20%)Commonwealth (70%)Victoria (10%) | Interstate freight /FleetTerminals, depots etc | Access contract to Rail Access |
| FreightCorp | Central agencies | NSW general freight NSW coal freightFleetTerminals, depots etc | CSO contract from DepartmentAccess Contract to Rail Access |
| State Rail | Transport | Passenger servicesNetwork control (metrop)FleetReal estate, stations | CSO contract from DepartmentNetwork control contract from Rail AccessAccess contract to Rail Access |
| Rail Access | Central agencies | TrackNetwork control (regions) | Access contract from operatorsNetwork control contract to State RailMaintenance contract to Rail Services |
| Rail Services | Transport | EquipmentDepots | Maintenance contract from Rail Access |

In addition, there was vertical separation: track from train operators.

The central organisation in the new structure – with whom all organisations would need to deal – was state owned corporation Rail Access. The second reading speech had Rail Access’ main task as providing train operators access to tracks, under a NSW access regime. The access regime aimed to preclude monopoly level charges, particularly in the Hunter Valley after a ‘moratorium’ period.[[81]](#endnote-81)

The retention of metropolitan network control by State Rail mitigated against Rail Access’ main task. Network control comprises three intertwined functions: formulation of the infrastructure schedule, real time control of the schedule via signals including resolution of delays, and instructions to train operators and maintainers on procedures especially in the event of delays or out-of-schedule running – safeworking rules for degraded operations.

Outside the metropolitan area – including in the Hunter Valley – like in the UK - there were several train operators. Moreover, those operators may want paths that varied by day and year.

However, in the metropolitan area, train paths needed to underpin the passenger timetable are the same each day, nearly all train movements are by passenger trains, most delays – and their resolution – involve commuter trains, and there was a legislated requirement for passenger priority. This implied metropolitan network control should rest with State Rail. Then, Rail Access would need to check with State Rail before it could sell Sydney train paths – until dedicated freight lines.

Another implication: competition among train operators in the metropolitan area for customers would be virtually non-existent. Businesses do not compete to engage in loss making activities. State Rail would not face any competition for passengers. The main competition among operators would be for train paths, yet most had been locked away for State Rail.

The changes did not permit passenger services to operate more ‘commercially’. Sydney rail fares continued to be ‘regulated’ as they had been since at least 1997. The Independent Pricing and Regulatory Tribunal recommended maximum fare levels. Frequently, the Government ordered the State Rail Authority – later State Rail - to offer fares below the maximum recommended by the Tribunal – even though they were making substantial losses, covered by subsidies.

The Authority’s customer-revenue cost recovery was 31.2 percent in 1995-96. Its return on assets was negative 6.1 percent. Given FreightCorp reported profits after the split, State Rail’s passenger financial performance was less than this.[[82]](#endnote-82)

#### 4.3.3 Obvious gaps in the scheme

The legislation had each organisation being interested only its contribution to the State. There was no body concerned with industry wide or long-term matters. In most respects, the organisations were set up to be in conflict.

Like the UK, the scheme involved a ‘cascade’ of subsidy from train operators to maintainers. The concept was a ‘demand pull’ of Rail Access responding to (financial) incentives offered by train operators, and enlisting Rail Services to maintain tracks to meet operator requirements. The initial intention was subsidies would be provided only to State Rail and FreightCorp – via Community Service contracts purchasing ‘outputs’.

However, unlike the UK, the NSW Community Service Obligation contracts were not to be grossed-up to arithmetically provide a return on assets. The likely motive was a view: rail costs were excessive.

Also, unlike the UK, NSW lacked a rail regulator to determine access charges. Rather the expectation was access charges and other inter-organisation contracts would be negotiated among the (few) parties involved. As there was no external oversight of access charges, there was no regulatory – or Government - oversight of track condition, just a priori views about costs.

Similarly, there was no formal dispute resolution mechanism. A Premier’s memorandum precluded NSW government owned-organisations litigating each other. Rather, the expectation was disputes among rail organisations would be resolved by a ‘Steering Committee’ including senior officials not in the rail industry.

In part, this reflected the views of central agencies across Australia that regulation should be ‘light handed’. For the national all-industry access regime, this was captured in the catchphrase ‘negotiate and arbitrate’ instead of a priori regulatory determinations. Nonetheless, in comparison to the UK, the NSW rail structure was known to be incomplete in this respect.

NSW central agencies - Treasury and Cabinet Office – doctrine emphasised avoidance of ‘conflicts of interest’ in organisational governance. This was the reason given for precluding the Transport Minister from a shareholding in FreightCorp or Rail Access.

However, the doctrine was abandoned in relation to the Steering Committee, which comprised representatives of the rail organisations and their ‘owners’.

It also was contradicted by s.20P of the *State Owned Corporations Act* (1989) applying to FreightCorp and Rail Access – outlined in 3.4.2 (above).[[83]](#endnote-83)

Treasury’s organisations – FreightCorp and Rail Access – both reported profits. FreightCorp’s profit was expected due to its coal haulage business. Rail Access’ profits could be expected to reduce over time due to the phase out of ‘monopoly rent’ during the coal haulage moratorium.

Rail Access claimed around three quarters of its gross income was subsidy dependent, implying – in the absence of the money-go-round - its profits arose from coal or reduced maintenance spending. It was claimed to have reduced real infrastructure maintenance costs by 23 percent by 1999.[[84]](#endnote-84)

An effect of corporatisation and not grossing-up subsidies was Rail Access wrote-off the value of track assets outside the Hunter Valley. One result was a relatively high rate of return on reported assets. Another was the accounts could not answer the question of whether, or the extent to which, reported profits were underwritten by deteriorating asset condition. Nonetheless, the write-off was Government policy. The asset write-off was explained by the Treasurer in 1996-97:

*‘At the time of the restructure of the rail industry, on 1 July 1996, rail infrastructure assets were transferred from the State Rail Authority (SRA) to new commercial rail entities. In the financial statements of the SRA, these assets were valued on the basis of written down replacement cost. The new commercial entities are required by accounting standards to apply the recoverable amount test to the valuation of these assets. The recoverable amount is the present value of future cash flows expected to be generated from these assets and is considerably lower than written down replacement cost. Accordingly, the rail infrastructure assets transferred were written down by approximately $6,400 million to a more commercial value.’[[85]](#endnote-85)*

The full effects of that, unanticipated in 1996, took some time to emerge. A result, immediately evident, was uncertainty about how financial results – and Budget outlays – compared with previous years. For 1996-97, the Treasurer reported:

*‘The removal of many of the cross subsidies necessitated increased funding of over $200 million in 1996-97 to cover items where cross subsidies were no longer available. The Rail Access Corporation made an operating profit before tax of $33 million and provided for dividends and tax equivalent payments of $32 million. Similarly, FreightCorp made an operating profit before tax of $106 million, and provided for dividend and tax equivalent payments of $66 million. ….. The operating profit before tax of the four rail entities combined for 1996-97 was $93 million. This compares with the $131 million loss recorded by SRA for 1995-96.’*

The comparison was unhelpful. The Treasurer’s report implied system – passenger and freight - revenues increased by $132m. Net Budget outlays to the railways increased by $102m. Total receipts increased by $234m, a figure higher than the turnaround of $224m – i.e., the real comparison is of a first-year financial loss.

Further, the report had the Treasurers’ organisations both making profits, while those within the Transport portfolio made a loss – combined – of $46m. That indicated errors in ‘compensation’ for cross-subsidies and/or failure of the cascade principle. The failures were bound to cause future disputation within the industry, and between the industry and Treasury. Beyond that they demonstrated the new structure made costs more opaque – the reverse of the intention.

A further issue appeared when Rail Access implicitly asserted ‘responsibility’ for rail safety. At common law, Rail Access had a duty to take reasonable care in allowing operators to use its tracks. However, the manner of expression of this led to the safety regulator - the Department – writing to the Corporation that it could not refuse access.[[86]](#endnote-86)

### 4.4 Evolution of the model

Given the mandates of self-interest, unsurprisingly none of the main rail operators readily agreed access charges with Rail Access.

The charges initially offered were insufficient to pay for track maintenance ordered by Rail Access and conducted by Rail Services. From the outset, operators complained to officials about track condition. Whatever the merit of those complaints, the effect was Steering Committee support was sought for ‘positions’ put by the various organisations – positions that extended beyond track and into other contract and property disputes.

National Rail, however, was not constrained by the Premier’s memorandum. It refused to pay more than its estimate of ‘marginal cost’ of access – 4.1.1 (above). It sought arbitration on the issue. The arbiter, the Independent Pricing and Regulatory Tribunal, did not make a final determination but is understood to have found in favour of National Rail.[[87]](#endnote-87)

The arbitration led to Rail Access seeking a ‘line CSO’ – $170m pa subsidy payments to it from the Transport portfolio – in rural NSW, in order to offer reduced access fees. As was the case with rail freight subsidies, the Department was required by ‘shareholders’ to make payments to their organisation.

National Rail also complained about another aspect of its access arrangements with Rail Access. The concern was treatment of its trains in the metropolitan area. It observed State Rail conducted the network control functions. National Rail sought a direct relation with it, rather than Rail Access - which it perceived as an intermediary.

Rail Access sought to make track maintenance contracts area specific – with thirteen areas in the State – and for each area’s contract to be contested. Disputes about this led to Ministerial directions – in 1998 and 2000 - to Rail Access’ Board to stall and stop ‘contestability’.[[88]](#endnote-88)

The track maintenance workforce of the former State Rail Authority had been transferred to another organisation – Rail Services Australia – in 1996.

Rail Services held the initial track maintenance contracts from Rail Access. At first it was a statutory authority, presumably in the belief the transport portfolio could protect it against the view - widely held by central agency officials at the time - that there were ‘too many’ track workers. That view saw Rail Services’ task as ‘managing down’ the size of the workforce. In 1998, Rail Services was corporatized for the ostensible of being better able compete with private firms.[[89]](#endnote-89)

Almost from the start, the arrangements – and financial opacity - created turmoil. Disputes festered, and there were break-downs in some former good relationships among railway personnel.

A series of rail industry fatalities, an accident at Glenbrook, prospects of adverse accident commission commentary on the separations, and the possibility of transport failures ruining the Olympic Games, led to a virtual reversal of the separations. This reversal was initiated under a ‘Coordinator General of Rail’ who could issue directions to the rail organisations.[[90]](#endnote-90)

### 4.5 Reversal of the model

After the 2000 Olympic Games, the Government sought advice on the structure of rail from the Glenbrook Inquiry. The Inquiry – outlined below – recommended Rail Access and Rail Services be combined as a statutory authority. However, the Government then – in 2000 - introduced and secured legislation for the two organisations to be combined as a state-owned corporation - Rail Infrastructure Corporation.[[91]](#endnote-91)

In 2001, the Commonwealth sought to privatise its majority holdings in National Rail – which by that time had acquired many new locomotives. This created the prospect of it competing strongly in the Hunter Valley against FreightCorp – an idea previously resisted by its NSW shareholder. In response, NSW decided to privatise FreightCorp along with selling its shareholding in National Rail.[[92]](#endnote-92)

A key issue for the sale was access rights to NSW track – what trains could operate, what operating restrictions would be imposed, and what compensation would be available to private buyers of the freight businesses if the track did not meet contractual standards. Rail Infrastructure did not wish to offer surety about track access. Engineering and operational restriction indicators suggested the overall condition of infrastructure was deteriorating. Nonetheless, the Government wished to assure bidders about the future of the tracks.[[93]](#endnote-93)

Two tasks were undertaken. The Coordinator General estimated track restoration requirements in the metropolitan area. The Department of Transport estimated restoration requirements in rural NSW. The estimates called for, and resulted in, Government commitments to inject large sums into the NSW tracks – to allow the sale of the freight businesses to proceed and to underpin performance of the metropolitan network.

The scale of the restoration requirement is indicated by a comment about Rail Infrastructure Corporation:

*‘the Board in 2001, expecting a budget of $800,000,000 received a budget which was approximately double that amount..’[[94]](#endnote-94)*

The FreightCorp and National Rail sale was completed in early 2002 for $1172m.[[95]](#endnote-95)

In 2003, following the Waterfall accident and a change of portfolio Minister, Rail Infrastructure was combined with State Rail in a new entity, RailCorp.

A rail regulator was established which would monitor the performance of RailCorp, including its operational outputs and the adequacy of its maintenance programs.[[96]](#endnote-96)

These developments reflected a widespread view that the separations of the urban railway failed. Intimations of the failure were included in a 1999 Productivity Commission report, and by Victoria’s privatisation eschewing both the UK and NSW approaches. Rather, in Victoria, the initial Melbourne rail franchises were vertically integrated – indeed the horizontal separation, of several franchise areas – did not survive long.[[97]](#endnote-97)

RailCorp started as a non-dividend paying state owned corporation in December 2003.[[98]](#endnote-98)

It was changed to a statutory authority under the Minister for Transport in January 2009.[[99]](#endnote-99)

Its statutory authority status continued after the change of government in 2011, with it becoming an agency of Transport for NSW. Its timetabling function was shifted to Transport for NSW.[[100]](#endnote-100)

In 2012, the operations of RailCorp were hived-off to Sydney Trains – formerly known as CityRail - and NSW Trains – formerly Countrylink. Although statutory subsidiaries of RailCorp, they were under the control of Transport for NSW.

In July 2020, RailCorp – excluding those subsidiaries - was converted into state owned corporation Transport Asset Holding Entity.

Throughout this period, fares continued to be set by the Government after ‘determinations’ by the Independent Pricing and Regulatory Tribunal. In 2008-09, the Tribunal’s review of fares considered how fares could be more efficient and provide better incentives for RailCorp and the Government.[[101]](#endnote-101)

The Tribunal reasoned that commuter train services provided benefits to passengers and also to road users - via reduced traffic congestion. The former should pay the efficient cost of their share of total benefits, and the public - through the Government - should pay the remainder of actual costs through e.g., an effective Community Service contract. The Tribunal calculated the benefit ratio to be 30 percent passengers, 70 percent public. Investment into the network would similarly be costed, meaning investments would require an increase in fare revenue. Unless projects led to a proportionate increase in passengers, fares should rise.

Tribunal estimates had the passenger: public benefit ratio to be below the ratio of infrastructure and fleet maintenance: other rail costs. Indeed, it was below the ratio of infrastructure maintenance: other rail costs. Among the implications: at that time, it was most unlikely a metropolitan area infrastructure owner could be profitable from just market sources – for 2011-12 to break even it would need to gain at least $100m in access charges from non-government operators, assuming the Tribunal’s proposal to increase fares was adopted.

The Tribunal’s figures indicated there was no prospect of infrastructure and fleet maintenance being financed from market sources – the gap was at least $485m.[[102]](#endnote-102)

In 2004, NSW leased the Hunter Valley and ex-metropolitan interstate lines to Commonwealth company Australian Rail Track Corporation. Part of the lease deal was the Corporation would construct, own and operate a Southern Sydney Freight (only) Line from the edge of the metropolitan area – Macarthur to the central terminals area at Chullora. The line was opened in 2013.

The effect of the lease was to remove substantial rail line segments from control of NSW organisations. The Australian Rail Track Corporation also oversaw construction works in northern approaches to the Sydney terminals area, in exchange for which it would on-sell new train paths in the metropolitan area to freight train operators.[[103]](#endnote-103)

The Corporation differs from NSW (rail) state owned corporations in significant respects. Most importantly, it is reportedly profitable without subsidies to it or its train operating customers – it is a going concern. This arises from its control over the highly profitable Hunter Valley and East-West (Sydney/Melbourne-Perth) lines.[[104]](#endnote-104)

### 4.6 Glenbrook Inquiry observations

The previous section noted the Government sought advice on rail structural issues from the Inquiry into the Glenbrook rail accident. The Inquiry published an interim report addressing these issues.[[105]](#endnote-105)

The Inquiry noted the rail organisations contributed nothing to the Commission’s consideration of the issue and that the sole proposals came from the Coordinator General. These were assessed in the light of some overseas experience.

The Inquiry recommended merger of Rail Access and Rail Services:

*‘As a statutory authority…….so that the infrastructure owner and the infrastructure maintainer would be part of the same organisation*.’

The reason for recommending the infrastructure owner and maintainer be in one organisation was Rail Access – the asset owner – was unable to properly inform itself, or the government, about the condition of assets and maintenance needs.

Rail Access became remote from State Rail:

*RAC assumed an owner control focus rather than an approach based upon mutual interdependence between itself and the SRA. It tended to act without consultation with, or regard to, SRA in developing the detail and the priorities for works to be carried out.*

Rail Access lacked sufficient knowledge of its assets:

*The lack of knowledge in RAC about the way in which the infrastructure operated meant that it was not fully informed about its condition at all times and about the needs and*

*requirements of the infrastructure in the future*

The State Rail access agreement did not rectify this shortcoming despite it providing half of Rail Access’ revenue, State Rail having ideas of what maintenance was necessary and provisions of the agreement requiring these to be taken into account.

The reason was Rail Access had its own priorities:

*‘Schedule N to the access agreement was a draft network assessment management plan which listed the works designed to maintain the current network in average condition and to improve it in some areas. SRA has complained that this has not occurred and that deterioration in the level of maintenance has disrupted train services…. Similar problems arose when new capital works were being considered. SRA had proposals based on its customer needs. RAC had its own priorities for capital works based on its asset management and access control functions.’*

The reason for the Inquiry recommending the infrastructure owner and maintainer be a statutory authority was:

*‘since the Government rail system is a public utility, the commercial imperatives of a State-owned corporation are inconsistent with the nature of a public utility activity. Accordingly, the merged organisation should be a statutory authority’.*

The Inquiry saw a link between Rail Access being a profit-seeking state owned corporation and it not having sufficient knowledge about maintenance needs in a highly subsidised environment:

‘*Mr Christie thought that one problem in the organisation of the rail network was that the owner, RAC, which was responsible for the maintenance of the system, did not have the necessary knowledge to maintain it. In Mr Christie’s view, this was because RAC has concentrated on its commercial results. As I have previously observed, this was because that was the way in which it had been established’*

Further, Rail Access:

*‘therefore was not in a position to make those needs known to relevant maintainers or to the Government, to whom it would have to turn for any substantial injection of capital needed for the running of the system.’*

That observation had two direct implications. First, the Inquiry regarded maintenance of the metropolitan network as inadequate since around the time of the ‘reforms’.

Second, Rail Access was unaware of the inadequacy. Which, in the context of Rail Access boasting about reductions in maintenance costs, reporting profits and providing dividends to Treasury, is just as well.

A third implication is Rail Access’ shareholders, and shareholder advisers, could not rely on Rail Access’ reporting to understand potential calls on the State Budget. The state-owned corporation’s framework, including Treasury monitoring, had completely failed.

## 5. Policy SPADs

### 5.1 Introduction

Section 2 outlined reports about the Transport Asset Holding Entity, notably it being a profit seeking state owned corporation in charge of railway assets, separated from train operators and track maintainers in a heavily subsidised environment.

Section 3 identified principles behind corporatisation.

Section 4 looked at splits of heavily subsidised urban railways and attempts to make them profit-seeking - in the UK and NSW in the late 1990s. At least in relation to infrastructure those attempts failed and were reversed.

In principle, those UK and NSW approaches were wrong. This section offers some reasons for those approaches to be considered bad external governance in practice – creating an unstable industry the effects of which eventually transmitted to rail operations, public safety, and government financial bail-outs.

### 5.2 General observations

The late 1990s railway experience in the UK and NSW supports hypotheses that instability:

1. results from not aligning responsibility with control;
2. affects industries whose arrangements are complex, incomplete or irrational;
3. has widespread effects with unpredictable real-world manifestations;
4. will eventually resolve, via improvements in governance, but after considerable costs.

#### 5.2.1 UK

Regarding (i), while the scheme largely sought to align responsibility with control among organisations, this alignment was not well understood within organisations. Examples include disputation over train delay causation, problems identified with RailTrack’s maintenance outsourcing, and RailTrack’s inability to identify locations of high risk of rail fatigue.

Regarding (ii), complexity - creation of around one hundred organisations - is the principal criticism of the privatisation. The number of organisations, an effect or purpose of which was to have a large number of different ‘cultures’, caused interface risks. While interactions between organisations may have been ‘mapped’ to some extent, it proved virtually impossible to map all, or take cultural differences into account.

Regarding (iii), the completeness of industry design – including a rail regulator and grossing-up subsidies – meant governance defects were first revealed by inquiries into (stochastic) major accidents proving widespread latent risks. A consequence was failure of RailTrack, re-nationalisation of infrastructure assets and maintenance contracting being brought back in-house.

The UK struggled with (iv). The attempt to improve co-ordination by the Strategic Rail Authority failed because the Government set it objectives that required Parliament reducing the Rail Regulator’s powers. The most glaring within-industry defect was rectified after major accidents – for-profit RailTrack was wound up. Over time, complexity reduced somewhat as a result of consolidation of firms and dissatisfaction with arcane arrangements. Now it appears the industry is to be renationalised – in all but name.[[106]](#endnote-106)

#### 5.2.2 NSW 1996

Regarding (i), large elements of the NSW changes did not conform with the most basic precept of aligning responsibility and control. This was exemplified by the amount and intractability of disputes about organisation roles, the behaviour required of state-owned corporations and, ultimately, the purposes of the ‘reforms. Even the process of unwinding the changes involved the appointment of a Coordinator General initially with legal powers less than the Premier pretended.[[107]](#endnote-107)

Also noteworthy was the hiding of bureaucratic agendas and influence via e.g., the Steering Committee, instructions to the Transport Department to provide subsidies to FreightCorp and Rail Access.

On (ii), the NSW changes were incomplete. The shareholder monitoring of Rail Access and infrastructure assets was inadequate. There was no proper dispute resolution mechanism. Later increases in rail funding indicate initial financial support was inadequate.

Subsidies were not grossed-up to support a stable industry structure. The likelihood is Treasury did not wish to gross-up subsidies as that would conflict with an objective of immediate cost reduction. When placed against ‘passenger priority’ - implying disaggregation was not intended to change outputs - this indicated: disclosed objectives were irreconcilable; major undisclosed objectives were being vigorously pursued.

There were elements of irrationality in the structure, including the idea that monopsony was the priority to advance a competition agenda.

The frequent criticism of ‘reform’ implemented too hastily is immaterial. The primary benefit available from slower ‘reform’ was exposure – and removal - of conflicting goals, and use of a different, coherent structure.

Regarding (iii), the unpredictability of the rail industry – not only its performance but identify of its senior staff - became a matter of public notoriety. As in the UK, substantive changes to the structure were initiated only after inquiries into major accidents. The Glenbrook Inquiry led to infrastructure maintenance being brought back in-house and to a firm basis for a Coordinator General. Most of the basic structure, in Sydney, was abandoned after the 2003 Waterfall accident.

Regarding (iv), the sound elements of the changes – horizontal separation of freight from passenger activities, corporatisation of freight – survived. Other elements were progressively reversed. Reversal occurred over considerable iterations, with little public consultation, and despite the sole independent review of the structure – the Glenbrook Inquiry - getting little assistance. The reluctance to help the Glenbrook Inquiry on structure issues suggests ongoing ideological support – behind closed doors - for the initial changes.

### 5.3 Theory

Theory has corporatisation considered only for those government organisations whose revenue largely comes from, and that stand to make profits from, unsubsidised private markets. Extension to other organisations can lead to degradation of long-lived assets which is not captured by simple financial monitoring.

An implication is: corporatisation is ill-suited to government organisations dependent on receiving services from or providing services to other government organisations. Corporatisation presumes any contracting-out of functions - major service contracts - is to private firms and that revenue comes from the private sector.

Provision of ‘access’ to essential facilities and vertical separation should apply only to monopoly facilities needed for access seekers to derive profits from private markets. Neither is relevant to activities that require significant subsidy.

Vertical separation of a subsidised industry may in significant losses from reductions in industry synergy, creation of organisational interfaces and substitution of managerial direction with litigation. If an industry needs subsidies, the purchaser-provider idea associated with corporatisation requires these to be paid for outputs, with contestability of the subsidy.

### 5.4 Practice - UK

The UK rail privatisation created high risks because of the number of new organisations involved. It sought to deal with that by: ‘grossing-up’ subsidies; a rail regulator to resolve disputes; placement of RailTrack at the centre of the safety management system.

However, these failed to mitigate the risks. Three reasons were mooted.

First, subsidies for the industry in the lead-up to - and after - the privatisation may have been inadequate. The effect of low subsidies prior to privatisation would have been to weaken the system via e.g., maintenance backlogs.

Second, the speed of change – organisational boundaries changing all at once – was too fast.[[108]](#endnote-108)

Third, the structure suffered latent problems arising from ‘commercial behaviour’ which for a subsidised industry extends beyond contracts and into lobbying government i.e., seeking available rents.

RailTrack provided examples. Its approval of train operator safety cases was thematically inconsistent with its receipt of access charges from them. RailTrack appeared to be at odds with the (second) rail regulator. At times it behaved more ‘commercially’ than the Government expected. It issued a $A250m dividend to shareholders the year the Hatfield crash led to its loss of $A980m - just *after* it had gained an early advance of $A2,750m from the Government. At the time, it was seeking $A3,660m more from the same source.[[109]](#endnote-109)

### 5.5 Practice NSW 1996

Compared with the UK, the NSW changes had fewer organisations. However, its structure was incomplete and irrational. A comparison with the correct 1996 NSW basic structure, according to corporatisation theory, is in Table 3.

The red shading in Table 3 illustrates fundamental departures from the corporatisation model previously propounded by NSW central agencies.

**Table 3: NSW 1996 changes v. recommended corporatisation approach**

|  |  |  |  |
| --- | --- | --- | --- |
| **Function** | **1996 changes** | **Correct approach/ reason** | **Reason** |
| Rail freight | CorporationVertically separated | CorporationVertically separated  | Profits availableCompeting operators |
| Urban passengers | Statutory authority,Metrop. monopoly Vertically separated | Statutory authority Metrop. monopolies?Vertically integrated | Profits not availableNo prospect of competing for passengers  |
| Regional passengers | Statutory authorityVertically separated | Corporation or Statutory authorityVertically separated | Profits not available. Simple operation can be franchised |
| Access management | Metrop.: Corporation Vertically separatedContract to operatorRural: CorporationVertically separated | Metrop.: Statutory authorityVertically integrated Rural: corporationVertically integrated or separated | Part of vertical integrationPart of vertical separation |
| Infrastructure maintenance | Metrop.: Corporation Vertically separatedContract to constructorRural: CorporationVertically separated  | Metrop.: Statutory authorityVertically integrated Rural: corporationVertically separated | Access manager contracting out failed in UK, NSW |
| Track etc. assets  | Metrop.: CorporationVertically separatedMaintenance contractedRural: Corporation Vertically separatedMaintenance contracted | Metrop.: Statutory authorityVertically integratedMaintenance in houseRural: Corporation/Statutory authorityVertically integrated or separatedMaintenance in house | Part of vertical integration. Traffic density implies in house maintenance.Rural choice depends on profitability, number of operators  |
| Track plant | Corporation constructor | Metrop.: Statutory authorityVertically integrated Rural: Corporation/Statutory authorityVertically separated  |  |
| Other assets – fleet, stations, terminals | Rail operators | Rail operators | Business specific assets |
| Dispute resolution | Steering committee of officials | Regulator | Disputes to be resolved within industry |
| Corporation shareholders | Premier, Treasurer | Same owner all organisationsPremier, portfolio Minister | If subsidy paid Treasurer should not be shareholder.Same owner to avoid conflicts in direction. |
| Corporation public interest direction | Portfolio Minister requires financial compensation, approval of shareholder | Portfolio Minister | Financial compensation irrational unless subsidies grossed upShareholder approval is conflict of personal and public interest |
| Corporation reporting | To Treasury, financial reports only | To shareholders and portfolio Minister. Financial reports to be supplemented by asset condition where subsidies provided | In subsidy environment commercial financial reporting does not detect asset stripping |
| Community Service procurement | Cost onlyMust be to govt. organisations | Gross costPassenger franchiseFreight tender | Necessary for competitive neutrality |

Other than the matters raised in section 4 (above), most notable is an apparent wish by central agencies to exert greater control over the industry – the diametric opposite of what corporatisation seeks to achieve. One example was creation of a Steering Committee, chaired by central agencies, to substitute for commercial-legal mechanisms – or a regulator with rail expertise – in contract establishment and dispute resolution.

While the 1996 structure of the rail industry has been criticised – deservedly so - its associated relationships with the Government also involved major errors. A grave error was to prevent the portfolio Minister providing guidance to the industry as a whole.

This was done by:

* putting organisations under different political owners;
* requiring self-interested Treasurer approvals for the Minister’s direction to the corporations;
* limiting corporations’ reporting to financial matters and to Treasury;
* corporatizing the wrong functions;
* placing the central part of the industry with the most long-lived assets under the agency with the sharpest focus on short term financial matters – Treasury.

The nature and extent of departures from a proper corporatisation approach give the appearance of bureaucratic/political objectives dominating substantive economic and social goals. Presentation – ‘looking good’ – was a motive.

Overconfidence from the (then) perceived success of electricity reforms is a likely factor. The electricity structural reforms had received detailed, national, attention since the early 1990s including via formal public inquiries. Yet the NSW rail changes were a bolt from the blue lacking inquiry, consultation or support/emulation from any other jurisdiction.

That said, the fact of the 1996 organisation changes – including vesting of assets, staff and a new flow of funds - means detailed organisational and financial modelling had occurred and had been determined.

The changes cut some previous channels of communications not only within the industry but between the Government and industry. They also cut communications within the Government.

The implicit assumption – known or not - about the industry was: previous informal communications within the integrated State Rail Authority would be replicated across the new organisational boundaries by explicit rather than cross-subsidies, contracts and formal communications. In effect the subsidy position became far more confused than prior to the changes, contracts among the organisations were unenforceable and the scheme could not have worked even in the improbable event the contracts were complete.

At least in part, the deterioration in industry performance, the ‘need’ for substantial financial injections to restore infrastructure assets and a series of accidents were due to failures in communications across the boundaries of the newly established organisations.

The assumption about internal industry communication was inconsistent with the structure adopted. Not only should communication failures have been expected from the structure, the design of the structure was virtually guaranteed to create some such failures – indeed antagonism.

Particularly noteworthy was the separation of the rail track maintenance workforce – to Rail Services – from the track asset owner, Rail Access. The second reading speech said maintenance would be contestable. (Treasury) advisers to the shareholders of the Rail Access would have been cognisant of when and how contestability would be introduced, and are likely to have formed some expectation of the results at least in terms of subsidy impacts.

In short, the scheme was: one organisation – Rail Access – with the Treasurer as shareholder was established to reduce or eliminate a separate organisation of another Minister – Rail Services. It would have been amazing if that idiotic idea - of creating conflict - did not cause major problems in the industry, in the bureaucracy and in Cabinet. Unsurprisingly, conflict occurred. Moreover, it was not all one-sided.

The Glenbrook Inquiry indicated Rail Service’s response – from the outset – was to retain the key staff, assets, depots and information in order to frustrate the scheme intended to cause its demise. To the extent network control functions remained in State rail, Rail Access would be prevented from portfolio minister doing the job its name implied, likely angering its management – and giving rise to speculation of hidden agenda of adversely affecting Rail Services. The situation went well beyond merely cutting communications between the track asset owner and its maintainer, and even beyond erecting a blockade.

The Steering Committee lacked the independence, expertise and authority to address the issues arising. The rail organisations arose from legislation - at least the corporations were legally beyond the Executive Government source of Steering Committee power. At best, only the statutory authorities – within the Transport portfolio – were within reach. Yet even that required Minister for Transport decisions rather than wishes of bureaucrats – even from central agencies.

A consequence was Rail Access could never have had an opportunity of being an ‘informed’ asset owner, and any claims otherwise betrayed ignorance. The Coordinator General’s comments to the Glenbrook Inquiry were to the effect the arrangements presented ‘grave’ threats.

Worse, the supposition about contracts replacing internal administration could not be made about communications within the Government – because there was no possibility of within-Government contracts.

It could not have been rationally supposed there would be consistent and clear communications between the several different Government organisations – Department of Transport, Treasury etc - and industry. It is highly likely the industry was receiving very different messages from different parts of the Government.

Moreover, it is extraordinarily unlikely the Government was receiving consistent messages – on key issues, including rail safety – from the organisations. For one thing, Rail Access and Rail Services would very likely lobby their *different* political supporters in the same Cabinet. The ‘commercial’ approach was almost certainly supplemented by political dealings and Cabinet conflict. That the Steering Committee lacked the legislative basis of the organisations involved, and that its officials represented the interests of their political masters – which were designed to be in direct conflict - made it incapable of dealing with substantive issues.

## 6. Policy SPAD?

### 6.1 Introduction

Not every occurrence of a train passing a red light will be a SPAD. In some cases, the signaller gives the driver authority to proceed past a red light. Moreover, a SPAD does not necessarily lead to the train wreck. However, a SPAD indicates an unsafe condition in which a wreck is possible.[[110]](#endnote-110)

The earlier sections have identified particular policy SPAD instances in the 1990s changes to UK and NSW rail governance that appear to be somewhat echoed in what has been described about arrangements around the Entity.

Rather than list those, the focus here is on generalised reasons to suspect the Entity is a policy SPAD:

1. misapplication of governance principles;
2. irrational explanations;
3. the time it has taken to be created.

### 6.2 Misapplication of governance

#### 6.2.1 Roots of the idea

The Entity is the only NSW transport related organisation – since the Rail Access/Infrastructure Corporation – that involves a vertical separation of asset ownership from railway operation in a highly subsidised environment. This is despite the conspicuous failures of such separations in UK and NSW in the 1990s.

How this came to pass is likely traceable to the roots of Transport for NSW. Its predecessors – the Department/Ministry for Transport – were more attuned to buses than to trains. For example, in 2004, post the Waterfall accident, the Ministry of Transport shed rail safety and - in all but name - rail service advisory functions to (the new) Independent Transport Safety and Reliability Regulator. The common view was the Ministry would deal with buses, while RailCorp – and the regulator - would deal with trains.[[111]](#endnote-111)

Around this time, the Ministry perceived the big policy issue to be the number and sustainability of private buses and their equal treatment with State Transit. After a review by former Premier Unsworth, the Government introduced a contestable-contract model for buses, where operators bid to supply services in franchise areas. To progress this, Transport for NSW:

*‘….buys many of the new buses entering service in private operator fleets, and enjoys step-in rights where a private operator loses a contract.’[[112]](#endnote-112)*

Transport for NSW purchase and ownership of buses in shown in its 2019-20 accounts – valued at $0.3bn. State Transit’s accounts show it uses buses owned by Transport for NSW under ‘right of use’ arrangements that appear to be some form of lease.[[113]](#endnote-113)

#### 6.2.2 The bus model

Arrangements for buses and their road infrastructure appear to have influenced a concept of governance for NSW commuter rail initiated in 2012 – separation of asset ownership from asset use and possibly in the case of track, control.

Application of bus and road asset management ideas to rail is flawed. This is recognised by the different literatures for bus franchising and urban rail organisation. [[114]](#endnote-114)

It also arises from the different concepts of access to rail tracks and public roads. The former involves private goods with legally enforceable contracts and tort liability, on guided-use infrastructure. The latter, access to public roads, is determined solely by regulation of public or club goods without contracts and with a form of non-feasance.[[115]](#endnote-115)

Further important differences include the value and nature of bus and rail fleet assets. In 2019-20, Transport for NSW’s accounts show the value of the bus fleet to be just ten percent of the rail fleet. Financial management of the bus fleet is relatively simple due to precedents elsewhere, and relatively short asset lives.

Bus fleets comprise industry-general assets - interchangeable among tasks and businesses. Procurement is easy, there is minimal risk of stranded assets, maintenance is relatively straightforward, and the interface with infrastructure – roads – is simple, uniform and well understood.

Rail fleet procurement is far more complex. Except for standard locomotives, rail fleets are business specific assets. The Sydney Trains fleet cannot be used outside Sydney – or on Sydney Metro lines. Maintenance is complex. Infrastructure interfaces are extremely complex, extending well beyond engineering into ‘human factors’ – and have been misunderstood.

A larger point relates to rail infrastructure - valued in Transport for NSW reports 2019-20 at $44.8bn – in the Entity’s 2020-21 statement of corporate intent $31.8bn. That infrastructure is notoriously difficult to manage - even by rail experts – when separated from the operation of trains. In that, in interfaces with vehicles/drivers and legal frameworks, rail infrastructure is fundamentally different from roads.

#### 6.2.3 Unique Entity

The model applied to urban rail is unique in that the Entity is a state-owned corporation. That is not the case for any other Government owned transport organisation - buses, ferries, Sydney Metro, roads etc. This is shown in Table 4.

**Table 4: Transport Administration Act operative organisations**

|  |  |  |
| --- | --- | --- |
| **Government entity** | **Public non-financial corporation – statutory authority** | **Public non-financial corporation – state owned corporation** |
| Transport for NSWSydney Metro(Roads) | Sydney TrainsNSW TrainsState TransitSydney Ferries | Transport Asset Holding Entity |

Urban commuter rail – the assets of which are owned by the Entity and ‘operated’ (track?) by Sydney Trains – has very low-cost recovery. Moreover, the Independent Pricing and Regulatory Tribunal has regarded low-cost recovery - 30 percent – as appropriate. In NSW, Sydney urban raiI is the worst possible source of candidates for corporatisation and for-profit enterprises.

The different treatment of metro, bus and commuter rail assets is striking.

Metro assets are owned by a not-for-profit government organisation within the Transport portfolio – Sydney Metro. The organisation franchises assets to a private consortium – Metro Trains Sydney.

The consortium operates and maintains a vertically integrated fleet and infrastructure railway, without access rights. Both Sydney Metro and Metro Trains Sydney are accredited under national rail safety law.[[116]](#endnote-116)

Buses are owned by Transport for NSW – the not-for-profit central entity of the Transport portfolio.

However, urban rail assets are owned by a for-profit state-owned corporation, the Entity – not within the Transport portfolio.

A number of factors point to the Entity expecting access revenue from the government operators – 2.2 and 2.5 (above). They imply only the fleet is ‘franchised’ - to Sydney Trains. This points to strong vertical separation, rather than a mere accounting separation.

The differences between urban rail, Sydney Metro and buses are yet to be explained. The scale of the urban rail capital program would not seem to be a reason – the Sydney Metro program is larger. Its 2019-20 annual report recognises infrastructure systems at $16.4bn.[[117]](#endnote-117)

Earlier sections of this article challenged the appropriateness of applying the state-owned corporation’s model to separated urban rail assets. Failed attempts led to operational problems – and severe financial consequences - in NSW in the late 1990s. Even the conceptually superior UK model failed in the same manner. The problems stemmed from ‘commercial behaviour’ in a subsidised urban railway where track assets were separated from operations.

At the very least, the public is entitled to a cogent explanation of how those shortcomings will be overcome.

### 6.3 Irrational explanations

#### 6.3.1 Government explanations

The explanation given by the present Treasurer in the relevant second reading speech was: the Entity would demonstrate its assets would be managed ‘commercially’. He then said a different organisation – Sydney Trains, which is not charged with acting ‘commercially’ - would be responsible for the safety of core assets. To the implicit assumption in that - management of assets is not related to their safety - he added several, conflicting versions of the meaning of ‘commercial’. The explanation was irrational.[[118]](#endnote-118)

The argument of the former Treasurer – former Transport Minister and now Premier – was the Entity was a Budgetary device. It would remove expenditures from the Budget by their re-classification as equity in the Entity. Such an argument is to the effect the Entity is intended to be a sort of Heath-Robinson cartoon – an over-elaborate mechanism to achieve simple results.

Rather than debate whether the scheme creates a Budgetary mirage, the issue of interest to this article is whether the Entity is indeed part of a Heath Robinson machine, or whether such a proposition is deluded. It is whether – contrary to the implicit assumption – organisational changes for accounting purposes can have real world effects.[[119]](#endnote-119)

The reversal of the NSW 1996 changes aimed to produce single-point accountability for commuter rail in Sydney, from the prior muddle involving at least three separate government organisations.

That accountability was held first by the Coordinator General of Rail and then the chief executive RailCorp. Those positions had direct, line of sight, control over all relevant rail activities by virtue of statute – ‘ownership’ and ‘regulation’ – rather than contract.

The Budgetary device claim appears to rely on the Entity having some control of at least track assets while other organisations run trains and maintain assets including track. There is no single point of accountability. Other agencies may or may not have contractual rights to use or repair the assets. But such rights are not via regulation or legislation – they are granted by the Entity – and therefore they are not basal accountability.

A practical question is: who determines what maintenance will be conducted? To say maintenance will be undertaken by Sydney Trains does not address that question. Statements of intention by Ministers are insufficient to assign ‘safety responsibility’ to Sydney Trains. Indeed, unless backed by legal mechanisms like actual or delegated legislation, such statements can create problems.[[120]](#endnote-120)

The relevance of the question is demonstrated by the 1996 NSW changes. There Rail Services undertook maintenance, but Rail Access determined what was done. The owner of the assets – the party on whose accounts the assets appeared – ultimately determined maintenance. After the 1996 changes, Rail Access was unable to properly determine maintenance requirements. Rail Access’ position as a state-owned corporation, outside the transport portfolio, tasked with effectively reducing the business of a transport statutory authority, was the root cause of this failure. That is no reflection on the Board or management of Rail Access – rather, it is an indictment of the sector’s structure.

Today, the Government has said the fleet will be leased by the Entity to Sydney Trains – apparently like buses to bus franchises. Such leases may involve exclusive possession, temporary transfer of ownership, and often responsibility - to the public, at law – for the condition and use of the assets.

Despite suggestions such as noted in section 2 (above), it is not entirely clear whether Sydney Trains will operate on the tracks under an access agreement. An access agreement differs from a lease in that it does not confer temporary, exclusive possession. The asset owner providing access to facilities continues to have common-law responsibilities during tenure, at least as occupier, to others for the state and use of those facilities. It is the fact of the asset owner’s control that allows it to determine maintenance levels. That was recognised by the Glenbrook Inquiry.

Hence a significant question is: which organisation controls the use of the tracks – via network control and expectations of maintenance budgets? A subsidiary issue relates to the organisational location(s?) of network control functions: the standard working timetable; daily train plan; real time train control; safeworking rules.[[121]](#endnote-121)

In the event the track-use arrangements between Sydney Trains and the Entity are not captured by an access contract, there are questions such as: the relevance of access charges ramping-up to ‘commercial’ levels; how the Entity gets funds.

####

#### 6.3.2 Franchising?

The NSW Opposition speculated the Entity is preparation for franchising of commuter rail services. If the thesis - arrangements were initially ‘inspired’ by Transport for NSW’s bus policy - is correct, such speculation would appear to be a better explanation of the removal of assets from Sydney Trains than Budget classification.

Whether or not commuter rail in Sydney should be franchised was raised – simplistically – by Infrastructure Australia/Infrastructure Partnerships Australia in 2017. This was shortly after the NSW Treasurer introduced draft legislation for the Entity. The claim was a present value of $7.2bn could be saved by such franchising.[[122]](#endnote-122)

The report ignored important factors and experience. Curiously, it did not cite the Australian experts who led international academic consideration of public transport franchising over several decades. Two of those experts doubted the claims generally, and considered the rail claims to be ‘*to say the least, heroic’*.[[123]](#endnote-123)

Whatever, the merit of such a policy, it cannot be assumed preparatory arrangements will not have immediate real-world effects. That is one lesson of the Rail Access-Rail Services relationship post 1996.

#### 6.3.3 Treasury’s latest

As the Government’s explanations of the Entity – that it improves efficiency but essentially does nothing etc. – have been incoherent, and the statement of corporate intent is unhelpful, any official comments about the matter warrant careful review. The most recent were by NSW Treasury, welcoming the Bureau of Statistics clarification of the media debate.[[124]](#endnote-124)

The Treasury comments disputed the claim the Entity is part of a financial mirage designed to conceal the state of the Budget. This article is not interested in that. Rather it is interested in the real-world effects of the Entity – because those effects could arise from a policy SPAD. Ignoring potential real-world effects *would* be a policy SPAD.

In that regard, the comments are questionable.

Key assertions lack support and cannot be verified. These include reliance on an unavailable review of the classification of RailCorp by the Australian Bureau of Statistics. It was claimed the review led to the Entity being a state-owned corporation.

Treasury referred to another unavailable report *‘verifying that TAHE (the Entity) could operate safely and effectively’.*  Its contents may well be pivotal to the issues in this article because ‘could operate safely’ is not ‘will operate safely’. Important questions arising include whether the report identified conditions: necessary for ensuring the Entity *will* operate safely; inconsistent with safe operation of the Entity or any other organisation. Such questions have not been publicly addressed elsewhere.

Treasury claimed the Entity is fiscally sustainable. No evidence or reference was provided for this assertion - which is challenged in the media.

Treasury said the Entity will report to Parliament. Yet so far, six years after the idea was flagged, this has not materially occurred. The ‘operating model’, the source of media contention, remains to be seen.

Some claims appear to involve misapprehensions. One was that Transport for NSW is responsible for the safety of the rail network. Apart from being ambiguous – pre or post transfer of the network to the Entity? – that claim is likely wrong.

Parties responsible (at law) for safety of railways must be accredited under national rail safety law. Only one party can be accredited – responsible – for a particular rail facility/activity. What matters are the activities of the rail organisations one of which - a state owned corporation - is intended to be outside the direct control of the Government.

Transport for NSW and Sydney Trains – but not the Entity – are on the national regulator’s latest list of accredited parties. Of these, it is almost certain Sydney Trains holds accreditation for the metropolitan network. That is consistent with the Treasurer’s second reading speech – 2.5 (above). Whether it or the Entity is responsible is a matter of law and actual control of the network.[[125]](#endnote-125)

If so, it is difficult to see how Transport for NSW could be responsible for safety of the network.[[126]](#endnote-126)

The Treasury comments claimed the Auditor Office gave unqualified opinions of the NSW Government accounts. That may be so, but the comments failed to mention the Office’s 2020 report also identified that arrangements for the Entity were a high risk – section 2.7 above.

The comments suggested reasons for the Entity to be a public non-financial corporation. However, they did not shed light on why it should be a state-owned corporation – unlike the other government organisations involved in providing public transport in NSW. Nor did the comments refer to the organisational, practical or financial consequences of it being a state-owned corporation.

Treasury did refer to other government organisations. However, its references suggest the making of the Entity a for-profit state-owned corporation involved misunderstandings about those organisations. The reasons are outlined below.

A first reference claimed other NSW state owned corporations are asset managers. Yet a different descriptor was used for the Entity. It did not refer to the Entity as an asset manager – rather it said the Entity (merely) ‘*holds’* rail assets. If the comments were precise, the Entity is unlike other state-owned corporations. If the comments were imprecise but intended to mean the Entity will manage assets – like other state-owned corporations - it may accrue responsibility for rail safety.

An illustration of the critical difference between the terms ‘manage’ and ‘hold’ arises from another Treasury reference - to the Commonwealth’s Australian Rail Track Corporation. It said the Corporation is among the *‘dedicated entities that hold their public assets’.* In the case of the Corporation, the term ‘hold’ grossly understates the situation.

The Australian Rail Track Corporation manages rail tracks owned by the Commonwealth etc including lines in NSW. It enters access agreements with rail operators and receives access revenue. It controls access to those tracks and determines and organises maintenance and construction.

The Corporation is an accredited organisation under the national rail safety law, and is an active participant in the rail industry.

The Corporation’s activities primarily relate to freight, notably coal and long-haul interstate tasks. It is not involved in urban public transport. It is profitable even though neither it, nor virtually any of its customers, receive subsidies. Its operational and economic situation is radically different from that of the owner of the NSW metropolitan network – whoever that might be.

Unlike the case for the Entity, the (Commonwealth) Minister for Infrastructure, Transport etc. is a shareholder in the Corporation.

Significantly for those interested in financial advising, the Corporation’s latest financial results, 2019-20, recorded a loss because of a write-down of assets and government equity. Net earnings, prior to the write down were $5m. The impairment was $767m – after $451m the previous year. The net loss after tax was $860m. Those results reflect the fact that assets created by Commonwealth equity funding to the Corporation were unable to generate sufficient net revenue to support initial equity values.[[127]](#endnote-127)

Arrangements for the Australian Rail Track Corporation are not relevant to urban passenger railways or their assets.

Treasury’s comments also referred to Queensland Rail. It too is quite unlike the Entity. Queensland Rail is a statutory authority, not a corporation. It is in the Transport portfolio and the Transport Minister is part owner. The Transport Minister approves appointment of its Chief Executive.[[128]](#endnote-128)

Queensland Rail is involved in urban public transport. Its metropolitan operations are vertically integrated – it controls trains and infrastructure. It owns the assets used in its operations – it does not lease or access them from another organisation.

Queensland Rail is generally not required to act in a commercial manner – a result of the combination of its legislation and Community Service Obligation payments being by far the largest source of its revenue.[[129]](#endnote-129)

Treasury also referred to VicTrack. Again, it differs from the Entity in most relevant respects. VicTrack is part of the Transport portfolio and is ‘owned’ by the Treasurer and Minister for Transport.

Its origins were preparations for the 1996-99 franchising of Melbourne’s trains and trams. VicTrack, as the name suggests, was to own the tracks and provide franchisees with ‘access’. It is understood potential metropolitan franchise bidders warned against such vertical separation – presumably citing the by-then evident fiascos in the UK and NSW. In the event, franchisees took leases and control – not access rights – over track and trains/trams. Ironically, VicTrack controlled many assets but not track.[[130]](#endnote-130)

Today VicTrack provides infrastructure assets to the Department of Transport (Transport for Victoria) rather than directly to franchisees. This is for the purpose of the Department entering franchise contracts.[[131]](#endnote-131)

The key provisions of the relevant legislation have: VicTrack providing the assets to the Department for ‘*nominal consideration*’; a primary task of dealing with non-operational assets. VicTrack is only to act for commercial gain if this will not compromise the transport system.[[132]](#endnote-132)

Neither the arrangements for Queensland Rail, nor in Victoria – including VicTrack – relevantly resemble those around the NSW Entity.

Given those facts about the Australian Rail Track Corporation, Queensland Rail and VicTrack, the NSW Treasury claim the status of NSW public transport agencies *‘is generally consistent with the classification of similar agencies in other jurisdictions’* is literally correct.

However, the claim is irrelevant and distracting from the issue at hand. The issue is the status of the Entity – as a state-owned corporation – which differs from that of (other) NSW public transport agencies. The governance of the Entity is inconsistent with that of NSW public transport agencies and the references cited by Treasury.

In that context the claim NSW Treasury is the primary adviser on budget and financial reporting matters – a somewhat weaker formulation than the Treasury ‘*responsibility and prerogative’* put to the Transport Secretary – raises some questions.

In my view it is not possible to properly advise and report on those matters without cognisance of their real-world context and effects. The Treasury comments do not inspire confidence that, for urban rail, there is such cognisance in NSW.

### 6.4 Time

A third reason to suspect the Entity involves policy SPADs is the time taken to reach the present juncture – six years.

Far more complex rail arrangements in the UK, Victoria and indeed NSW were resolved and implemented in a fraction of that time.

The fact of disputes about the nature and purpose of the Entity reaching the media - and the Audit Office’s warning - suggest what should be simple issues have not been resolved. The 2020-21 statement of corporate intent left the issues hanging. There are conflicts between statements by the Treasurer and officials. Comments suggest inadequate appreciation of railway basics and their implications for governance and practices – structure, control and accounts - of railways in other jurisdictions. Lack of refence to experience in other jurisdictions - and especially NSW - is a concern.

Against that background, it seems probable that the NSW profit-seeking state owned corporations model cannot be satisfactorily associated with public urban rail transport in NSW. And that the last six years of seeking to apply it to commuter trains – but significantly not to metro - have been a futile attempt to put a square peg into a round hole.

That failure may be fortunate. Attempted application of the present state-owned corporations model to the Entity may produce industry instability.

## 7. Conclusions

### 7.1 Conclusion

No confidence can be placed in NSW decisions affecting railways. Sydney Metro is an ongoing case of belief and prejudice substituting for fact and analysis. The public has been fed propaganda and even lies about that. It is not clear advice to the Government has been any better.

This article posits those problems are not confined to Sydney Metro but are evident in recent uncertain changes in industry structure – based on the Transport Asset Holding Entity.

The path to the Entity apparently started at around the same time, 2012, in the same Department – Transport for NSW - as the path to Sydney Metro. Like Sydney Metro, one aim appears to be to reduce Sydney Trains - another front in what has been claimed a bureaucratic war. Adding to that hypothesis of a specific siderodromophobia is another possibility also fitting known facts - Transport for NSW wish railways were just like buses and roads.[[133]](#endnote-133)

Like Sydney Metro, the Entity involves ideas that appear to have got out of hand.

In Sydney Metro’s case, there is metro starting 50km and ending 70km from the CBD, incapable of connecting with any other railway, at a cost perhaps $6billion more than a far superior well-known option. That project has been ‘savaged’ by even Infrastructure Australia – ‘justified’ by belief single and double deck trains cannot share tracks.

In the case of the Entity, an available inference is a 2012 Transport for NSW power grab paved the way for a Treasury take-over of major part of its portfolio. Whatever the reason and mechanism, the resulting industry structure is likely to cause political, bureaucratic and operational conflicts.

That appears unknown to the Government and its advisers because there is insufficient cognisance:

* of failures and reversals of similar attempts – including in NSW;
* that examples cited in support actually eschew such an approach;
* of media reports implying such conflict has been underway in the bureaucracy for years;
* that it is not possible for financial and organisational arrangements for urban railways to be independent of operational matters.

This article suggests NSW policies affecting rail entail policy SPADs. Advisers believe they are seeing green lights – which in fact are red.

### 7.2 Where to?

In the case of the Entity a policy SPAD cannot be proven simply because of the confusion and opacity surrounding it.

Some might propose the yet-to-be-seen ‘operating licence’ will cure the issues. Such thinking would be wishful. Among the potential problems identified in this article are the current process’ may be incapable of generating an operating licence that might do so. And that some operating licences have failed in the past.

Given that, the first priority is to stop whatever process is underway.

Before it could be restarted there is an urgent need for assurance that decision making is adequately informed. That requires advice to be opened up, real expertise brought in, and issues debated in public. A Legislative Council Inquiry might be a start.

Beyond just urban rail, this article demonstrated the *State Owned Corporations Act (1988)* is seriously flawed. Among the problems are it:

* places Treasury in a position of conflict of private interest and public duty;
* is based on a demonstrably false assumption that the ‘commercial’ self-interest of interacting – in fact competing - government organisations will produce acceptable outcomes;
* precludes the portfolio Minister from ownership – a practice unique to NSW and virtually guaranteed to create political, bureaucratic and operational conflict when applied to an organisation that must ‘commercially’ interact with portfolio statutory authorities.

Material in the public domain could suggest there are views that, for railways, financial /organisational matters are – or can be - independent of operational and safety issues.

Such thinking, and flaws in the *State-Owned Corporations Act (1988),* are unlikely limited to rail.

As such, advising and reporting on all state-owned corporations should be placed with a department other than Treasury. That organisation should have a range of skills and competencies relevant to the industry and business of the corporations and not merely supposed competencies in accounting standards.

The start of this article offered a quote attributed to Talleyrand – applicable to the Bourbons and from, appearances, some making decisions affecting NSW railway governance. Another Talleyrand thought might also be borne in mind by those decision makers and advisers: *‘Financiers flourish only when nations decline’.*

J Austen

15 July 2021

1. ‘*The quote is attributed to Talleyrand in speaking about the restored Bourbon dynasty after the abdication of Napoleon, and subsequently used against the French socialists and others. It comes close to Einstein’s definition of insanity as doing the same thing over and over, expecting different results, though the Talleyrand quote gives us a reason for their repeating mistakes of the past over and over……*

*Part of the problem is that when a theory seems right, when a glib and intelligent spokesman explains why the theory will work this time, we find it difficult to resist giving it another and yet another try. So many people seem to find fault, not with the theory, but with the circumstances of its use, as though it was circumstances that failed the theory, not the other way around. Sometimes the theory is then dressed up as new wine in old skins. At other times there is little in the way of cover-up, and Talleyrand really takes over.’*

<https://www.staugustine.net/blogs/rectify-names-a-blog-on-publishing/e2809cthey-had-learned-nothing-and-forgotten-nothinge2809d-march-11-2013/> [↑](#endnote-ref-1)
2. For pop culture buffs: the Entity was the name of a 1980s horror film: <https://en.wikipedia.org/wiki/The_Entity>.

The path to the Entity started the same year as the path to Sydney Metro – 2012. Supposedly the Mayan prophecy for the end of the world <https://en.wikipedia.org/wiki/2012_phenomenon> refuted by scholars - or was it? [↑](#endnote-ref-2)
3. <https://www.smh.com.au/national/nsw/the-cover-up-of-a-financial-mirage-that-has-inflated-the-nsw-budget-and-may-put-rail-safety-at-risk-20210528-p57vy0.html> [↑](#endnote-ref-3)
4. <https://www.smh.com.au/national/nsw/budget-lie-internal-forecasts-show-rail-entity-propping-up-state-s-finances-20210602-p57xfm.html>

 [↑](#endnote-ref-4)
5. Enron: e.g. <https://www.agsm.edu.au/bobm/teaching/BE/Enron/timeline.html> [↑](#endnote-ref-5)
6. <https://www.audit.nsw.gov.au/sites/default/files/documents/D2024590%20%20FINAL%20REPORT%20-%20Transport%202020.pdf> [↑](#endnote-ref-6)
7. Appendix 2a. [↑](#endnote-ref-7)
8. Appendix 2b. [↑](#endnote-ref-8)
9. Appendix 2c. [↑](#endnote-ref-9)
10. <https://www.themandarin.com.au/149042-nsw-transport-secretary-sacked/> [↑](#endnote-ref-10)
11. <https://www.treasury.nsw.gov.au/sites/default/files/2021-06/NSW%20Treasury%20med%20rel%20-%20Statement%20on%20TAHE%20from%20Secretary%20of%20NSW%20Treasury%20Michael%20Pratt%20AM.pdf> [↑](#endnote-ref-11)
12. <https://www.treasury.nsw.gov.au/information-public-entities/capital-planning/nominated-agencies-and-public-non-financial> [↑](#endnote-ref-12)
13. <https://www.transport.nsw.gov.au/news-and-events/reports-and-publications/sydney-trains-annual-reports> [↑](#endnote-ref-13)
14. The statements may not be entirely accurate and may conflict with Treasury comments. Treasury comments suggests access charges would ramp up to ‘commercial levels’. In the context of the Entity making profits, given charges for non NSW government operators are/should already be at commercial levels, this suggests access charge revenue from Sydney Trains. Access charges, and access agreements do not provide infrastructure to rail operator, but provide access to the service the infrastructure produces. The difference is significant in both regulatory and operational terms – access contracts are regulated, and provision of infrastructure implies transfer of control to the operator which does not occur under access contracts. <https://www.transport.nsw.gov.au/about-us/who-we-are/transport-asset-holding-entity-of-new-south-wales#History>

 [↑](#endnote-ref-14)
15. The statements are inaccurate in a number of respects.

RailCorp provided third parties with access to track etc. infrastructure services.

From 2013-2020 RailCorp’s operations and maintenance functions were not transferred to an independent entity, but rather were conducted by wholly owned, and therefore controlled, subsidiaries of RailCorp.

At the time, RailCorp was under the direction and control of – ‘wholly owned’ by - the Minister for Transport and was not a state owned corporation. It had specified objectives the most important of which were to provide safe and reliable passenger services, and to ensure its infrastructure network enabled safe and reliable passenger and freight services etc.

The 2020 legislation, therefore did more than merely transfer assets etc. from RailCorp.

First, it organisationally severed rail operations from asset ownership.

Second, it changed the objectives of asset ownership from the provision of safe and reliable rail services and track access to becoming a successful business – the latter a part of the *State Owned Corporations Act*.

Third, it removed asset ownership from the direct statutory control of the Minister for Transport, placing it with a state owned corporation whose Board is appointed by the Treasurer and another Minister, and subject to an ‘operating licence’ issued by the Minister for Transport. This is discussed further in the text. [↑](#endnote-ref-15)
16. It could mislead as shown in the following table from the Budget:



The impact on the Budget result is almost entirely due to reclassifying capital expenditure – as ‘equity’ rather than expense – and ‘washing’ it through the entity.

The Entity’s operating expenses equal its sale of good and services. Most of these ‘sales’ are to other government organisations e.g. Sydney Trains. Those organisations are heavily subsidised. Thus the Entity’s ability to raise revenue depends on government subsidies – which have been estimated to be in the order of 60% (opex only) to 80% of rail financial costs. <https://www.ipart.nsw.gov.au/files/sharedassets/website/shared-files/pricing-reviews-transport-services-publications-opal-public-transport-services-to-june-2024/opal-public-transport-services-to-june-2024-final-report-publications/consultant-report-cie-measuring-cost-recovery-of-nsw-public-transport-services-february-2020.pdf>

One aspect of the above table that could mislead is that it relates only to changes in – rather than absolute – revenues. Thus revenues equal capital expenditure, implying that the goods and services are in fact ‘equity’.

The significance is that for the ‘equity’ to be fairly recognised, an income stream needs to support it. Thus, for column 1, an increase in income of $1865m is needed (presumably present value). This requires increased Budget outlays – to other government organisations on whom the Entity relies for revenue – of between $1492m (80% of $1865m) and $1865m, the higher figure occurring if non-government operators are in highly competitive markets and cannot afford increases in charges. [↑](#endnote-ref-16)
17. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-96827> [↑](#endnote-ref-17)
18. <https://www.thejadebeagle.com/sydney-metro.html> [↑](#endnote-ref-18)
19. As an aside, a High Court majority recently explained – and insisted on - the distinction between authority and duty in coming to a decision on an immigration case: <https://eresources.hcourt.gov.au/showCase/2021/HCA/21> [↑](#endnote-ref-19)
20. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-97042> [↑](#endnote-ref-20)
21. [https://tahensw.com.au/#](https://tahensw.com.au/) [↑](#endnote-ref-21)
22. $47m for first half 2021-22: <https://www.parliament.nsw.gov.au/tp/files/79524/Attachment%20H%20-%20Transport%20Asset%20Holding%20Entity%20of%20NSW%20-%20Half%20Yearly%20Report%20-%202020-21.pdf>

 [↑](#endnote-ref-22)
23. <https://legislation.nsw.gov.au/view/html/inforce/2020-07-01/act-1988-109#pt.2>

<https://legislation.nsw.gov.au/view/html/inforce/current/act-1988-109#pt.2> [↑](#endnote-ref-23)
24. Another schedule to that amendment established Sydney Trains and NSW Trains as organisations separate from RailCorp:

 <https://legislation.nsw.gov.au/view/html/repealed/2017-04-11/act-2017-012#sch.2> [↑](#endnote-ref-24)
25. The principal objectives of TAHE are as follows—

*‘(a)  to undertake its activities in a safe and reliable manner,*

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

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

*(ii)  to maximise the net worth of the State’s investment in TAHE,*

*(c)  to exhibit a sense of social responsibility by having regard to the interests of the community in which it operates,*

*(d)  where its activities affect the environment, to conduct its operations in compliance with the principles of ecologically sustainable development contained in section 6 (2) of the*[*Protection of the Environment Administration Act 1991*](https://legislation.nsw.gov.au/view/html/inforce/current/act-1991-060)*,*

*(e)  to exhibit a sense of responsibility towards regional development and decentralisation in the way in which it operates.’*

Each of the principal objectives of TAHE is of equal importance. These are identical with the principal objectives of statutory State Owned Corporations: <http://classic.austlii.edu.au/au/legis/nsw/consol_act/soca1989288/s20e.html> [↑](#endnote-ref-25)
26. *Transport Administration Act* s.10 (2):  TAHE may—

*‘(a)  provide facilities or services that are necessary, ancillary or incidental to its listed functions, and*

*(b)  conduct any business or activity (whether or not related to its listed functions) that it considers will further its objectives.’* [↑](#endnote-ref-26)
27. *Transport Administration Act* s.10 (3):

*‘the listed functions of TAHE and its functions under subsection (2) may only be exercised under the authority of, and in accordance with, one or more operating licences.’*

  s.13 (1):

*‘The Minister may grant one or more operating licences to TAHE to authorise it, in accordance with this Act, to carry out the listed functions specified in the licence, and such other functions as may be conferred or imposed on it by the licence, in the circumstances (if any) specified in the licence.’*

 s.17:

*‘(1)  If, in the opinion of the Minister, TAHE contravenes an operating licence, the Minister may cause a notice to be served on TAHE requiring it to rectify the contravention within a specified period.*

*(2)  If, in the opinion of the Minister, TAHE contravenes an operating licence….. the Minister may direct that TAHE is to pay a monetary penalty of an amount to be determined, subject to the regulations, by the Minister.’*

s.18:

*‘(2)  The Minister may cancel an operating licence of TAHE if TAHE ceases for any or no reason….. to carry out the functions of TAHE to which the licence relates…..*

*(3)  The Minister may cancel any or all of the operating licences of TAHE if—*

*(a)  TAHE—*

*(i)  is, in the opinion of the Minister, in material default….*

*(ii)  has not, within the time specified by the Minister in a notice to TAHE, either rectified the default or shown cause, to the satisfaction of the Minister, why the operating licence should not be cancelled, or*

*(b)  TAHE has been convicted on more than 3 occasions within a period of 12 months of offences that are punishable by a fine of at least $10,000…..*

*(5)  If an operating licence is cancelled under this section, the Minister may, by order published in the Gazette, transfer to the State or a public or local authority …..such of the assets and rights of TAHE that are ….. necessary to enable the State or the public or local authority to exercise such of the functions exercisable (or formerly exercisable) by TAHE as appear to be necessary in the public interest.’* [↑](#endnote-ref-27)
28. The board is to consist of—

*‘(a)  no fewer than 3 and not more than 7 directors appointed by the voting shareholders, and*

*(b)  the Transport Secretary.’* [↑](#endnote-ref-28)
29. *Transport Administration Act* s. 3(B):

‘(1A)*Sydney Metro is, in the exercise of its functions, subject to the control and direction of the Minister.’* [↑](#endnote-ref-29)
30. The earlier version of the *Transport Administration Act* had:

***‘5******Objectives of RailCorp***

*(1)  The principal objectives of RailCorp are:*

*(a)  to deliver safe and reliable railway passenger services in New South Wales in an efficient, effective and financially responsible manner, and*

*(b)  to ensure that the part of the NSW rail network vested in or owned by RailCorp enables safe and reliable railway passenger and freight services to be provided in an efficient, effective and financially responsible manner.*

*(2)  The other objectives of RailCorp are as follows:*

*(a)  to maintain reasonable priority and certainty of access for railway passenger services….,*

*(3)  The other objectives of RailCorp are of equal importance, but are not as important as the principal objectives of the corporation.’*

<https://legislation.nsw.gov.au/view/html/inforce/2015-01-08/act-1988-109#sec.5> [↑](#endnote-ref-30)
31. <https://www.ipart.nsw.gov.au/Home/Industries/Energy/Energy-Networks-Safety-Reliability-and-Compliance/Electricity-networks/Licence-conditions-and-regulatory-instruments> [↑](#endnote-ref-31)
32. <https://www.parliament.nsw.gov.au/tp/files/79148/Statement%20of%20Corporate%20Intent%20of%20Transport%20Asset%20Holding%20Entity%20of%20NSW%20for%20year%20ending%2030%20June%202021%20.pdf> [↑](#endnote-ref-32)
33. <https://www.sydneywater.com.au/web/groups/publicwebcontent/documents/document/zgrf/mdq3/~edisp/dd_047407.pdf> [↑](#endnote-ref-33)
34. <https://www.transport.nsw.gov.au/news-and-events/reports-and-publications/sydney-trains-annual-reports> [↑](#endnote-ref-34)
35. <https://www.parliament.nsw.gov.au/tp/files/79524/Attachment%20H%20-%20Transport%20Asset%20Holding%20Entity%20of%20NSW%20-%20Half%20Yearly%20Report%20-%202020-21.pdf> [↑](#endnote-ref-35)
36. Sydney metro depreciation $219m on assets of $16,117m is a rate of 1.36%. Applying this to the Entity’s property, plant and equipment value of $40,917m yields $556m.

 [↑](#endnote-ref-36)
37. <https://www.infrastructure.gov.au/rail/publications/files/Review-of-Rail-Access-Regimes.pdf> [↑](#endnote-ref-37)
38. Theory of incomplete contracts: <https://scholar.harvard.edu/files/hart/files/incomplete_contracts_and_control.pdf>

Interface risk of safeworking rules was a cause of the Glenbrook (Sydney) rail accident: <https://www.parliament.nsw.gov.au/tp/files/50980/A9RB6AA.tmp.pdf>

Signal visibility was a principal cause of the Ladbroke Grove (London, UK) rail accident on the vertically separated RailTrack network – in a vertically integrated railway this is addressed by a ‘signal sighting committee’ <https://www.jesip.org.uk/uploads/media/incident_reports_and_inquiries/Ladbroke%20Grove%20Rail%20Inquiry%20Report%20Part%201.pdf> [↑](#endnote-ref-38)
39. <https://www.theguardian.com/uk/2004/jul/11/politics.transport>

An example of the principle of the money-go-round is in table a. The numbers are fictional.

**Table a: Money go-round**

|  |  |  |  |
| --- | --- | --- | --- |
|  | **Pre** | **Post** | **Difference** |
| Govt. rail operatorRevenue. farebox. subsidy. totalCosts. internal. access charges. totalProfit | 50150200160402000 | 50162212161512120 | 01212111120 |
| Govt. rail asset owner Revenue. access govt operator. access other. totalCost. maintenance. depreciation. other. totalProfitAsset baseReturn on assetsDividend  | 401050500050000%0 | 511061500151105002%10 | 110100011105002%10 |
| Government. subsidy. dividend revenue. net | 1500150 | 16210150 | 1210-2 |

The money-go-round in Table 2 seeks to produce a dividend of 10 for the Government in a vertically separated railway, like Sydney. To do so it needs to increase subsidy to the not-for profit statutory authority rail operator by 12. That organisation pays 11 to the asset owner for track access, and uses 1 for additional administrative costs. The track owner, a profit seeking state owned corporation requires 1 to cover increased administrative costs leaving 10 for dividends. The scheme is a net cost to the government of 2 – relating to increased administration.

 [↑](#endnote-ref-39)
40. Drawing on <https://www.thejadebeagle.com/governance.html> [↑](#endnote-ref-40)
41. Background paper: <https://www.parliament.nsw.gov.au/researchpapers/Documents/state-owned-corporations-a-review/11-00.pdf> [↑](#endnote-ref-41)
42. See, for example: <http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0015/357/91_gtereform.pdf> and

<http://www.treasury.nsw.gov.au/__data/assets/pdf_file/0009/4779/bp66.pdf> [↑](#endnote-ref-42)
43. <https://www.treasury.nsw.gov.au/information-public-entities/government-businesses/state-owned-corporations> [↑](#endnote-ref-43)
44. For example, *Competition Principles Agreement* clauses 3 and 4; see: <https://www.coag.gov.au/node/52> [↑](#endnote-ref-44)
45. <https://www.accc.gov.au/regulated-infrastructure/about-regulated-infrastructure/acccs-role-in-regulated-infrastructure/national-access-regime-under-part-iiia> [↑](#endnote-ref-45)
46. Given the definition of governance as the effective exercise of legal control, Figure 2 shows four types of governance instruments available to a government to control an organisation.

Ownership allows the government to directly intervene, for example by appointing management or issuing directives. This can only be used for a public sector organisation, and in some cases the government’s power is circumscribed. For example usually the government appoints a board and the board appoints management for a government trading corporation. Corporatisation is discussed in the text and later notes.

Contracts involve an exchange between parties. For governments they involve the purchase of goods or services. Contracts can include community service obligations.

Regulation can compel organisations to behave in a particular way. For example, rail safety regulation requires an organisation involved in railways to have a safety management system.

Financing and accounting standards are relevant to the charter of an organisation. A for-profit organisation will seek a return on capital; for it a community service obligation contract will need to include a rate of return component, or in the case of a public sector organisation an ‘exemption’ from a return. Accounting standards can be critical for public sector organisations undertaking community service obligations; if a profit component is not included in payments the value of assets deployed will be less than historic or replacement cost, and consequently the depreciation schedule may not depict capital replacement needs for continuity of services.

 [↑](#endnote-ref-46)
47. <https://www.aasb.gov.au/admin/file/content105/c9/AASB136_07-04_COMPapr07_07-07.pdf> [↑](#endnote-ref-47)
48. <https://www.treasury.nsw.gov.au/information-public-entities/government-businesses/state-owned-corporations> [↑](#endnote-ref-48)
49. <https://asic.gov.au/for-business/small-business/starting-a-company/small-business-company-directors/> [↑](#endnote-ref-49)
50. Otherwise the corporation would not be managed independently of shareholders. [↑](#endnote-ref-50)
51. The Directions are noted in the second interim report of the Glenbrook Commission: [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) [↑](#endnote-ref-51)
52. <https://www.parliament.nsw.gov.au/researchpapers/Documents/state-owned-corporations-a-review/11-00.pdf> [↑](#endnote-ref-52)
53. [https://web.archive.org/web/20190211192215/https://archive.dpc.nsw.gov.au/\_\_data/assets/pdf\_file/0016/15361/05\_Fifth\_Report\_-\_Final\_Report\_Volume\_2\_-\_December\_1998.pdf](https://web.archive.org/web/20190211192215/https%3A//archive.dpc.nsw.gov.au/__data/assets/pdf_file/0016/15361/05_Fifth_Report_-_Final_Report_Volume_2_-_December_1998.pdf) [↑](#endnote-ref-53)
54. [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) [↑](#endnote-ref-54)
55. An indication of the profit-making nature of such organisations is in: <https://www.pc.gov.au/research/completed/government-trading-enterprises/perf0001/perf0001.pdf> [↑](#endnote-ref-55)
56. <https://www.budget.nsw.gov.au/sites/default/files/2021-06/Appendices%20A4-BP1%20Budget%202021-22.pdf>

 <https://www.waternsw.com.au/__data/assets/pdf_file/0004/126607/July-2020-WaterNSW-Operating-Licence.pdf>

<https://www.ipart.nsw.gov.au/files/sharedassets/website/shared-files/licensing-public-water-business-licence-compliance-working-papers-2020-sydney-water-corporation-operational-audit/final-report-sydney-water-operating-licence-report-to-the-minister-2020-march-2021.pdf> [↑](#endnote-ref-56)
57. <http://aei.pitt.edu/5112/1/5112.pdf> [↑](#endnote-ref-57)
58. <https://www.accc.gov.au/system/files/Rail%20session%20-%20Fred%20Affleck.pdf> [↑](#endnote-ref-58)
59. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-13034> [↑](#endnote-ref-59)
60. <https://www.australasiantransportresearchforum.org.au/sites/default/files/2002_Affleck.pdf> [↑](#endnote-ref-60)
61. <https://www.pc.gov.au/research/completed/government-trading-enterprises/perf9697/perf9697.pdf>

<https://www.dfat.gov.au/sites/default/files/deregulation-of-the-energy-industry-australian-experience.pdf> [↑](#endnote-ref-61)
62. <https://www.treasury.nsw.gov.au/sites/default/files/pdf/TRP97-01_Performance_of_NSW_Government_Businesses_1995-96.pdf> [↑](#endnote-ref-62)
63. <https://www.independent.co.uk/news/uk/home-news/britain-s-railways-doing-well-despite-privatisation-a6843966.html> [↑](#endnote-ref-63)
64. <https://www.railwaysarchive.co.uk/docsummary.php?docID=4608>

<https://www.railwaysarchive.co.uk/docsummary.php?docID=12> [↑](#endnote-ref-64)
65. A summary is at: <https://en.wikipedia.org/wiki/Privatisation_of_British_Rail> [↑](#endnote-ref-65)
66. <https://www.railmagazine.com/news/rail-features/from-the-archives-rail-privatisation-21-years-on> [↑](#endnote-ref-66)
67. <https://www.railwaysarchive.co.uk/docsummary.php?docID=256> [↑](#endnote-ref-67)
68. <https://www.accc.gov.au/system/files/Rail%20session%20-%20Fred%20Affleck%20paper.pdf> [↑](#endnote-ref-68)
69. <https://www.railwaysarchive.co.uk/docsummary.php?docID=178>

<https://www.railwaysarchive.co.uk/docsummary.php?docID=38>

Interface risks arise from interactions among parties e.g. the operation of a train involves interaction of wheels on track, and a level crossing is an interface between road and rail systems. <https://www.onrsr.com.au/__data/assets/pdf_file/0019/3907/Using-the-Template-Interface-Agreement-for-Rail-or-Road-Crossings-Guideline-June-2019.pdf> . It is important responsibilities to conduct tasks are assigned and understood by people at the interface. Assignment of a task to both parties may lead to each expecting the other to conduct it, meaning it is not done. A statement by a person in a position of ostensible authority – as to who is responsible for what - can affect or cloud perceptions of responsibility at the interface, and can result in perceptions not aligning with legal responsibility, causing interface risk. [↑](#endnote-ref-69)
70. <http://news.bbc.co.uk/2/hi/uk_news/4216830.stm> [↑](#endnote-ref-70)
71. <http://news.bbc.co.uk/2/hi/business/3209609.stm> [↑](#endnote-ref-71)
72. <https://researchbriefings.files.parliament.uk/documents/CBP-8961/CBP-8961.pdf> [↑](#endnote-ref-72)
73. <https://researchbriefings.files.parliament.uk/documents/SN01344/SN01344.pdf> [↑](#endnote-ref-73)
74. <https://fullfact.org/economy/how-much-does-government-subsidise-railways/> [↑](#endnote-ref-74)
75. <https://www.econstor.eu/bitstream/10419/68799/1/641736991.pdf>

<https://www.orr.gov.uk/sites/default/files/2020-09/rdg-delay-attribution-review-report-2020-09-28.pdf>

<http://www.delayattributionboard.co.uk/about.htm>

<https://www.opendemocracy.net/en/opendemocracyuk/the-governments-great-british-railways-is-privatisation-rebranded/>

<https://www.theguardian.com/business/2021/may/19/uk-rail-overhaul-privatised-great-british-railways->

<https://www.transportxtra.com/publications/local-transport-today/news/66334/uk-rail-effectively-renationalised-during-pandemic/> [↑](#endnote-ref-75)
76. <https://books.google.com.au/books?id=jg-kIhwAezIC&pg=PA132&lpg=PA132&dq=1995+nsw+election+public+transport+authority&source=bl&ots=gxRs1J57DD&sig=ACfU3U1crhPgNjhuVcRdLdTG_DivT5ALkA&hl=en&sa=X&ved=2ahUKEwjIvsaYj6_xAhWZ_XMBHaTUCZkQ6AEwCXoECAQQAw#v=onepage&q=1995%20nsw%20election%20public%20transport%20authority&f=false> [↑](#endnote-ref-76)
77. [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) [↑](#endnote-ref-77)
78. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-12146> [↑](#endnote-ref-78)
79. <https://www.treasury.nsw.gov.au/sites/default/files/pdf/Consolidated_Financial_Statement_of_the_NSW_Public_Sector_1996-97.pdf> [↑](#endnote-ref-79)
80. <https://www.treasury.nsw.gov.au/sites/default/files/pdf/TRP98-01_Performance_of_NSW_Government_Business_1996-97.pdf> [↑](#endnote-ref-80)
81. *‘This will be achieved by establishing, under the State Owned Corporations Act, the Rail Access Corporation, which will be responsible for management, control and maintenance of essential rail infrastructure and will provide access to all accredited operators on equitable, commercial terms.  The Rail Access Corporation will be a small organisation with a strict focus on negotiation of access and, while it will have management responsibility for maintenance, train control, signalling, communications, and the like, it will arrange for the work to be carried out by the other rail businesses and, potentially, by  private sector organisations.  To perform its functions effectively, the Rail Access Corporation will develop and maintain an informed customer capability; it will understand and specify its needs and verify that they are being adequately provided by its suppliers, but it will not undertake such works itself - to do so would be to distract the management of the corporation from the more important task of administering the open access regime.*

*Clearly, the Government will only expect the Rail Access Corporation to break even on these non-commercial lines, and profits, if any, will only be achieved over a period of years through economies in operating costs.  On the other hand, any unsubsidised operators on such lines will pay a full commercial access charge.  It follows that the Government does not intend to provide direct financial support to the Rail Access Corporation in respect of any non-commercial services.  It will continue to support essential rail operations provided by CityRail, CountryLink and Freight Rail by means of carefully targeted community service obligation payments.  For commercial lines where train operators can fund their access requirements without government support, Rail Access will be able, and expected, to achieve an appropriate commercial return and to pay some of that to government as dividends and tax equivalent payments.*

*The State Rail Authority will depart from its role as a specialist train operator in only one respect, and that relates to train control and signalling.  The ultimate responsibility for these functions resides with the Rail Access Corporation, but since it is not to be structured for the hands-on management of the network, it is necessary to contract out train control.  The most effective way to do this is to arrange for these functions to be carried out by a specialist division of the State Rail Authority. This arrangement will be defined in a commercial contract, which will be renegotiated from time to time.  This is the only feasible approach given the extensive day-to-day interaction that goes on between CityRail drivers, train controllers and signallers in urban areas.  In rural areas, traffic is relatively thin and the train control function needs relatively few resources, which will be accommodated within the new State Rail Authority.*

[*https://books.google.com.au/books?id=kwt9AgAAQBAJ&pg=PA154&lpg=PA154&dq=TRANSPORT+ADMINISTRATION+AMENDMENT+(RAIL+CORPORATISATION+AND+RESTRUCTURING)+BILL+debates&source=bl&ots=gutdBPJEt2&sig=ACfU3U2uqJLfeKWx-\_EohFjUAyTWlzRXUQ&hl=en&sa=X&ved=2ahUKEwjrs7mTl6\_xAhXA8HMBHVCKD24Q6AEwBnoECAQQAw#v=onepage&q=TRANSPORT%20ADMINISTRATION%20AMENDMENT%20(RAIL%20CORPORATISATION%20AND%20RESTRUCTURING)%20BILL%20debates&f=false*](https://books.google.com.au/books?id=kwt9AgAAQBAJ&pg=PA154&lpg=PA154&dq=TRANSPORT+ADMINISTRATION+AMENDMENT+(RAIL+CORPORATISATION+AND+RESTRUCTURING)+BILL+debates&source=bl&ots=gutdBPJEt2&sig=ACfU3U2uqJLfeKWx-_EohFjUAyTWlzRXUQ&hl=en&sa=X&ved=2ahUKEwjrs7mTl6_xAhXA8HMBHVCKD24Q6AEwBnoECAQQAw#v=onepage&q=TRANSPORT%20ADMINISTRATION%20AMENDMENT%20(RAIL%20CORPORATISATION%20AND%20RESTRUCTURING)%20BILL%20debates&f=false)

 [↑](#endnote-ref-81)
82. <https://www.pc.gov.au/research/completed/government-trading-enterprises-1995-96/perfind9596.pdf> [↑](#endnote-ref-82)
83. <https://www.pc.gov.au/__data/assets/pdf_file/0017/35531/sub128.pdf> [↑](#endnote-ref-83)
84. FreightCorp profits are shown in the following figures:



<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2278/Committee%20Report%2021%20December%202000%20-%20Inquiry%20into%20P.pdf>

In 1996-97 payments made by Rail Access to the Government were a dividend of $19.627M and a tax-equivalent payment of $11.373M, a total of $31.000M. <https://www.pc.gov.au/__data/assets/pdf_file/0007/34999/sub039.pdf>

In 1997-98, Rail Access reported a profit of $118.3m, and claimed major reductions in maintenance costs:

*‘For example, Rail Services Australia and Rail Access Corporation have reduced annual rail maintenance costs from $640 million to $528 million. Rail Access Corporation expects further reductions and estimates accumulated savings of $296 million for the period 1 July 1996 to 1 July 1999, including infrastructure maintenance cost reductions of $219 million (23 percent in real terms). It forecasts some $164 million of this will flow to operators via reduced access charges.’*

<https://www.pc.gov.au/__data/assets/pdf_file/0017/35531/sub128.pdf>

Coal moratorium e.g. <https://www.pc.gov.au/inquiries/completed/competition-policy/submissions/nsw_minerals_council_/sub062.pdf> [↑](#endnote-ref-84)
85. <https://www.treasury.nsw.gov.au/sites/default/files/pdf/Consolidated_Financial_Statement_of_the_NSW_Public_Sector_1996-97.pdf> [↑](#endnote-ref-85)
86. [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) [↑](#endnote-ref-86)
87. Budget papers had Community Service payments to FreightCorp and Rail Access rather than for purposes such as freight services see e.g <https://www.treasury.nsw.gov.au/sites/default/files/pdf/1998-1999_Budget_Papers_BP2_Budget_Information.pdf> at 4-205

<https://www.transport.nsw.gov.au/sites/default/files/media/documents/2017/Previous_Arbitration_and_Determinations.pdf>

Line CSO: <https://www.pc.gov.au/__data/assets/pdf_file/0015/35403/sub102.pdf>. [↑](#endnote-ref-87)
88. Ministerial Directions were made to suspend contestability February 1998 (to allow for Rail Service Corporatisation), to stop contestability September 2000. See note xlvii (above). [↑](#endnote-ref-88)
89. Corporatisation of Rail Services: <https://legislation.nsw.gov.au/view/html/inforce/1998-05-12/act-1998-008>

Equal footing: <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1323879322-17016/HANSARD-1323879322-16975> [↑](#endnote-ref-89)
90. Minister Scully:

*‘The first step the Government took in relation to addressing safety and reliability of the rail network and rail services was the appointment of Mr Ron Christie as Co-ordinator General of Rail in early June 2000. The terms of reference of his appointment included: first, to manage and co-ordinate the exercise of the functions of the Rail Access Corporation [RAC], State Rail Authority [SRA] and Rail Services Australia [RSA] for the network; and, second, to review the effectiveness of existing arrangements, including contractual arrangements between RAC, SRA and RSA in achieving reliable service standards for CityRail services.*

*The Co-ordinator General of Rail was also asked by the Government to provide advice on the future structure of the rail industry. Mr Christie has provided this advice, which was also the basis of his recent evidence to the Special Commission of Inquiry into the Glenbrook Rail Accident. His principal views stated as part of the Glenbrook inquiry included: first, there was a lack of shared objectives and service standards in the rail industry. That is to say, each rail authority had different objectives which did not necessarily require them to act in the best interests of the network as a whole. Second, SRA had not performed as well as it could have. Third, there was a lack of communication between the three rail entities, including on critical safety issues. This was also highlighted in the First Report of the Special Commission of Inquiry into the Glenbrook Rail Accident.*

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-87308>

<https://www.remtribunals.nsw.gov.au/sites/default/files/2020-12/2000_special_determination-soort-coordinator_general_of_rail.pdf> [↑](#endnote-ref-90)
91. The Government’s explanation of the merger of Rail Access and Rail Services, Minister Scully:

*The bill also modifies the objectives of the Rail Infrastructure Corporation so that they are more closely aligned with, and mutually support, those of the State Rail Authority. This is intended to eliminate any concerns that these interdependent organisations may be pursuing incompatible objectives.*

*Turning to the third issue, both the Special Commission of Inquiry and Mr Christie argued for a stronger accountability framework and greater responsiveness of the rail organisations to the Government. Their recommendations included that the new rail infrastructure entity be a statutory authority under the Minister for Transport. The intent of the proposal is to ensure greater accountability and more direct responsiveness of the organisation to the Minister. This would enable the Minister to play a more effective role in guidance of the new organisation than permitted under the existing legislation in relation to Rail Access Corporation and Rail Services Australia. This intent was to be effected by changing the governance framework in which the new infrastructure organisation would operate. The Government recognises the strength of this argument. However, it proposes to address the essential accountability concerns by substantially modifying critical elements of the existing framework.*

*It is proposed that the new entity formed by the merger of Rail Access and Rail Services be a State-owned corporation—the Rail Infrastructure Corporation. It is to operate under an enhanced accountability framework. This is as announced by the Government's response to the second interim report of the Special Commission. The enhanced accountability framework for the Rail Infrastructure Corporation includes a number of elements. First and foremost among these is the redefining of the new organisation's objectives, as mentioned earlier. In relation to these new objectives, the organisation is accountable to its shareholder Ministers and, in turn, the shareholders and the portfolio Minister are accountable to the Parliament. Over and above the objectives that are given to every other State-owned corporation, the Rail Infrastructure Corporation is to ensure a safe and reliable rail network in New South Wales. This is to be its overriding priority. The Minister's power of direction over the Rail Infrastructure Corporation is to be significantly stronger than that for other State-owned corporations.*

*A new streamlined power of direction is to be available to the portfolio Minister ensuring his ability to direct the corporation including matters regarding safety, operations and reliability. The corporation is to immediately comply with such directions unless a formal review is sought. Such review, and consequent confirmation or revocation of the direction, will be speedy. Compliance will not be compensated. This will be in addition to powers of direction available under sections 20N, 20O and 20P of the State Owned Corporations Act. Reinforcing this, the Rail Infrastructure Corporation will be subject to guidance and direction from the Co-ordinator General. The Co-ordinator General will have a strong and active interest in the transport performance of this organisation. Rail Infrastructure Corporation will also have to comply with performance standards set by the Minister and enforced by the Rail Regulator. Further, the corporation will not be permitted to undertake work outside New South Wales without the express permission of the portfolio Minister, the Premier and the Treasurer. This will place beyond doubt the fact that its core mission is to maintain and improve rail infrastructure in New South Wales. However, all contracts for work outside New South Wales will continue to be honoured.*

*The bill also strengthens the accountability framework for the State Rail Authority. State Rail will now come under the direction and control of the portfolio Minister. Like the Rail Infrastructure Corporation, it will be subject to the direction of the Co-ordinator General of Rail. State Rail will also have to comply with performance standards set by the portfolio Minister and enforced by the Rail Regulator. As indicated earlier, the Government proposes in this bill the establishment of a Rail Regulator. This is a major change for the industry in New South Wales. Once again, New South Wales is taking the national lead in this area. The special commission recommended that the regulator should take over some of the functions of the Co-ordinator General after the transition to the new structure. The transition is expected to be in place by the end of 2001. The key functions of the Rail Regulator will be the development of performance standards for recommendation to the portfolio Minister and the subsequent enforcement of approved performance standards.*

*The role of the Rail Regulator will enhance, rather than supplant, the current role of the Independent Pricing and Regulatory Tribunal. The Rail Regulator will not have a role in relation to pricing issues.*

*The Rail Regulator's task will be to develop performance standards for passenger and freight services and rail infrastructure. Matters such as on time running and reliability will be addressed in the performance standards. These performance standards will be considered, and endorsed if appropriate, by the portfolio Minister and published for the community's benefit. While the performance standards will regulate passenger services and infrastructure, the bill also provides for performance standards to be set for freight services. It is not the Government's intention to regulate generally the performance of freight. This is primarily an issue for the customers of the freight services. However, the bill permits performance standards to be set for freight services to the extent that they may affect the safety or reliability of the New South Wales rail network or may affect the ability of others to comply with performance standards.*

*The Rail Regulator will have the responsibility of enforcing those standards set by the portfolio Minister. It will be able to investigate the performance of rail owners and operators, and conduct compliance audits in respect of the performance standards.*

[*https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-87308*](https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-87308) [↑](#endnote-ref-91)
92. <https://www.afr.com/politics/nsw-eyes-1-billion-rail-sale-20000608-k9j3u>

<https://www.parliament.nsw.gov.au/lcdocs/inquiries/2278/Committee%20Report%2021%20December%202000%20-%20Inquiry%20into%20P.pdf>

<https://www.afr.com/politics/nsw-eyes-1-billion-rail-sale-20000608-k9j3u> [↑](#endnote-ref-92)
93. <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1820781676-59537/link/44> [↑](#endnote-ref-93)
94. <https://pinpoint.cch.com.au/document/legauUio844677sl39230265/cowling-v-fc-of-t> [↑](#endnote-ref-94)
95. [https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/9BU56%22](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p%3Bquery%3DId%3A%22media/pressrel/9BU56%22) [↑](#endnote-ref-95)
96. The Independent Transport Safety and Reliability Regulator. It had three principal functions: regulate rail safety; advise on the performance of public transport compared with service contracts from the Ministry of Transport - as part of that advise on the performance of asset management of passenger railways; advise on specific requests regarding rail and public transport by the Minister for Transport. The latter included matters such as passenger rail and bus ‘on-time’ running, impacts of freight trains on on-time running, surveys of passenger satisfaction with public transport services <https://researchdata.edu.au/independent-transport-safety-reliability-regulator/166565> [↑](#endnote-ref-96)
97. See <https://www.pc.gov.au/inquiries/completed/rail-reform>

 <https://en.wikipedia.org/wiki/Rail_transport_in_Victoria> [↑](#endnote-ref-97)
98. Mr Tripodi:

*‘In a significant departure from existing State-owned corporations, this bill waives the need for RailCorp to deliver a share dividend. This provision recognises that the primary focus of the new organisation will be to deliver public transport, not a dividend or return to government. The primary instrument guiding the financial and management accountabilities of RailCorp will be the statement of corporate intent [SCI], as required under the SOC Act. The board must consult with the Minister about the statement and amendments to it, in addition to consulting with the voting shareholders. To reflect the fact that the organisation will be non-dividend paying, the statement of corporate intent must include rail performance benchmarks agreed by the board and the portfolio Minister. These may be modified by the board with the agreement of the portfolio Minister, after consultation with the Independent Transport Safety and Reliability Regulator’*

<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-84764> [↑](#endnote-ref-98)
99. Minister Campbell:

‘*Mr Bret Walker, SC, in his 2007 report on the Special Commission of Inquiry into Sydney Ferries, highlighted the problems of the type of governance model that is currently used in the management of Sydney Ferries services—and which, of course, is also used for RailCorp. Mr Walker drew attention to the fact that throughout Australia and internationally experience has shown that public transport systems do not operate on a commercially viable basis because they are unable to run services without significant funding contributions from government. He also commented that, while the Government is held responsible for public transport, the state-owned corporation governance model limits the Government's control over the delivery of these services.*

*Five years ago, consistent with recommendations of the Ministerial Inquiry into Sustainable Transport in New South Wales, the Government corporatised the organisations responsible for rail and ferry service delivery with the aim of improving management, increasing accountability and lifting the performance of transport services in a financially responsible way. For the past few years RailCorp and Sydney Ferries have operated as businesses and have taken direction from and reported to a commercial board of management. These agencies have not delivered the results that the Government or the people of New South Wales expect under this arrangement and it is time for us to reclaim control’*

 <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/HANSARD-1323879322-64477> [↑](#endnote-ref-99)
100. Transport for NSW has ‘responsibility’ for determining the Standard Working Timetable in the metropolitan rail area.

<https://legislation.nsw.gov.au/view/html/inforce/2011-11-02/act-2011-041> [↑](#endnote-ref-100)
101. Starting with external benefit $1.7bn 07-08: <https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/review_of_cityrail_regulatory_framework_-_summary_-_websitepdf.pdf>

The Tribunal later concluded:

*‘After considering all stakeholder comments both in submissions and at the roundtable, IPART reaffirms its preliminary view that it is appropriate for passengers to fund around 30 per cent of CityRail’s total revenue requirement, and that the remaining 70 per cent should be funded by taxpayers through government subsidies.’*

For 2011-12 this implied Government funding of $1,917m, and passenger revenue of $792m.

<https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/review_of_cityrail_fares_2009-2012_-_draft_report_and_draft_determinations_-_october_2008.pdf> [↑](#endnote-ref-101)
102. [↑](#endnote-ref-102)
103. In 2011-12, infrastructure maintenance accounted for 35% of projected actual costs and 40% of efficient costs. Fleet maintenance accounted for 14% of projected actual costs and 15% of efficient costs. Total maintenance, therefore, was expected to account for around half total costs.

The ratio of expected maintenance to other costs (50:50) was less than the ratio of Government to passenger funding (70:30) – see previous note. This implied passenger revenue would/should not cover all maintenance costs. Even were all passenger revenue devoted to infrastructure, there would be a shortfall of $92m in actual or $31m in efficient costs ($real 2008-09). If fleet maintenance was included the gap would be $449m in actual or $335m in efficient costs ($real 2008-09). After inflation, the relevant figures for 2011-12 would be $99m, $33m, $485m, $362m. Conceivably track access revenue from non-NSW government rail operators might close the gap in relation to efficient infrastructure. It is not conceivable that it could close the other gaps.

<https://www.ipart.nsw.gov.au/files/sharedassets/website/trimholdingbay/review_of_cityrail_fares_2009-2012_-_draft_report_and_draft_determinations_-_october_2008.pdf>

 <http://www.artc.com.au/library/agreement_summary.pdf>

<http://www.artc.com.au/library/agreement_summary.pdf>

<http://www.artc.com.au/library/NS_2012.pdf> [↑](#endnote-ref-103)
104. <https://www.artc.com.au/uploads/ARTC-Financial-Statements_2019-20-final-version.pdf>

The 2019-20 results are dominated by revaluation – decrement – of assets, due to a reassessment of their future earning potential (e.g. lower maximum returns for Hunter, effects of Covid), and the period of time before assets under construction can return capital: loss before tax $776m, impairment $766m.

 [↑](#endnote-ref-104)
105. [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) [↑](#endnote-ref-105)
106. <https://theconversation.com/rail-reform-why-britains-railways-are-getting-a-full-makeover-161598> [↑](#endnote-ref-106)
107. The Coordinator General initially was an Executive Government position, and thus could not itself override the statutory provisions regarding Rail Access and FreightCorp:

*‘the problems that had beset the rail industry led the Government to establish, pursuant to the Public Sector Management Act 1988, the Office of Co-ordinator General of Rail as a department of the Public Service responsible to the Minister for Transport and to appoint Mr Christie on 7 June 2000 to the position of Co-ordinator General of Rail.’*

[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) [↑](#endnote-ref-107)
108. <https://www.ejrcf.or.jp/jrtr/jrtr34/f04_mut.html> [↑](#endnote-ref-108)
109. <http://news.bbc.co.uk/2/hi/business/1348473.stm> [↑](#endnote-ref-109)
110. <https://www.onrsr.com.au/__data/assets/pdf_file/0012/3090/Managing_SPADs_info_paper.pdf> [↑](#endnote-ref-110)
111. <https://records-primo.hosted.exlibrisgroup.com/primo-explore/fulldisplay?context=L&vid=61SRA&docid=ORGANISATIONS1000658>

s.37: Transport Administration Act (1988) <https://legislation.nsw.gov.au/view/html/1988-12-21/act-1988-109>;

*‘The Secretary has such functions with respect to the licensing and regulation of public passenger vehicles or ferries as are conferred or imposed on the Secretary by or under this Act, the Transport Licensing Act 1931, the Transfer of Public Vehicles (Taxation) Act 1969 or any other Act.’*

How this came to pass is likely traceable to the roots of Transport for NSW. The predecessors of Transport for NSW – the Department/Ministry for Transport – in part developed from organisations whose unchallenged domain was taxis, hire cars and private bus services in western Sydney.

In 1988, the Greiner Government introduced legislation replacing the Urban Transit Authority with a new scheme constituting the State Rail, State Transit and Roads and Traffic Authorities and the Ministry for Transport. The new legislation provided the Ministry with the function of ensuring adequacy of passenger services, including via service contracts, after consultation with State Rail and State Transit. This gave rise to ‘turf-tensions’ with major organisations including State Rail and the Roads and Traffic Authority.

While the legislation had the flow of public funds to Government transport providers determined by the Department, central agencies and the major service providers ensured the Department had little control. These organisations sought direct contact/influence with the Government via central agencies, the Minister for Transport and other Ministers.

Various iterations of the Department in the 1980s and 1990s saw fluctuations in the attention it paid to functions other than buses and taxi regulation. These included intrastate aviation regulation, light rail planning and development, freight and commuter rail service procurement, rail policy, rail safety, major infrastructure projects and national transport policy.

The fluctuations reflected ‘turf-tensions’ with other, powerful agencies of the *Transport Administration Act (1988)* including the Roads and Traffic Authority and the State Rail Authority. However, its role in relation to buses and taxis – conferred by the *Passenger Transport Act (1990)* was uncontested.

An example of an ebb was in 2004, post the Waterfall accident, when the Department was reconstituted as a ‘Ministry’. Other than a letterhead change, the main effect was for it to shed the rail safety and - in all but name - rail service procurement functions to (the new) Independent Transport Safety and Reliability Regulator. A common view was the Ministry would deal with buses, while RailCorp – and the regulator - would deal with trains.

In short, the predecessor to Transport for NSW long had a bias towards buses as a mode and therefore roads as infrastructure.

In the 1990s, ‘education policies’ – of school students being able to pick which school to attend, rather than being assigned to the closest - led to rapid growth of the School Students Transport Scheme. The Scheme came to underpin the financial viability of some western Sydney bus firms.

By the 2004, the Ministry perceived the big policy issue to be the number and sustainability of private buses and their equal treatment with State Transit. After a review by former Premier Unsworth that year, the Government introduced wholesale changes in bus arrangements, including moving to a ‘contestable contract’ model for franchise areas. To progress contestability, Transport for NSW:

*‘….buys many of the new buses entering service in private operator fleets, and enjoys step-in rights where a private operator loses a contract.’*

Thus bus arrangements are the antecedent, and appear to form the basis, of ideas of governance for heavy rail – separation of assets used by Sydney Trains and NSW Trains to the Entity. [↑](#endnote-ref-111)
112. <https://www.wikiwand.com/en/Buses_in_Sydney> [↑](#endnote-ref-112)
113. <https://www.transport.nsw.gov.au/news-and-events/reports-and-publications/transport-for-nsw-annual-reports>

State Transit reported motor vehicle assets of $1.4m in 2019-20. Transport for NSW reported bus assets of $347.7m for that year.

An amusing mistake in State Transit’s 2019-20 Annual Report is payment of $192m to the NSW Audit Office: Vol 2 p24. [↑](#endnote-ref-113)
114. For example: <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC7166032/> [↑](#endnote-ref-114)
115. <https://myweb.fsu.edu/bbenson/HIGHWAYS.pdf>

Non feasance*:*

***‘45   Special non-feasance protection for roads authorities***

	1. *A roads authority is not liable in proceedings for civil liability to which this Part applies for harm arising from a failure of the authority to carry out road work, or to consider carrying out road work, unless at the time of the alleged failure the authority had actual knowledge of the particular risk the materialisation of which resulted in the harm.’*<https://legislation.nsw.gov.au/view/html/inforce/current/act-2002-022#sec.45>.

The NSW legislation was in response to the High Court overturning ‘the highway rule’: <http://classic.austlii.edu.au/au/journals/NSWBarAssocNews/2001/55.pdf>

 A recent case is <https://pinpoint.cch.com.au/document/legauUio3376220sl1252901803/eddy-v-goulburn-mulwaree-council-and-golden-star-import-amp-export-pty-ltd-2021-nswdc-150> [↑](#endnote-ref-115)
116. <https://www.ourmetro.com.au/> [↑](#endnote-ref-116)
117. <https://www.transport.nsw.gov.au/news-and-events/reports-and-publications/sydney-metro-annual-reports>:

For 2019-20 Sydney Metro reported profit: $2.4bn; equity $15.2bn.

*‘Sydney Metro is a not-for-profit entity for accounting purposes (as profit is not its principal objective) and it has no cash generating units………. Sydney Metro is a controlled entity of Transport for NSW. Transport for NSW is a controlled entity of the Department of Transport which is consolidated as part of the NSW Total State Sector (ultimate parent).’* [↑](#endnote-ref-117)
118. The only rational reason for establishing the Entity as a ‘commercial’ enterprise is: Sydney Trains is not.

 [↑](#endnote-ref-118)
119. E.g. <https://socks-studio.com/2016/11/07/william-heath-robinsons-wacky-inventions/> [↑](#endnote-ref-119)
120. They can be a problematic because they may confuse industry participants as to where responsibilities lie. See note lxv above. [↑](#endnote-ref-120)
121. <https://www.onrsr.com.au/__data/assets/pdf_file/0003/19155/Waterfall-final-report-Volume-1.pdf>

p.265. [↑](#endnote-ref-121)
122. <http://infrastructureaustralia.gov.au/policy-publications/publications/Improving-Public-Transport-Customer-Focused-Franchising.aspx>; <http://infrastructureaustralia.gov.au/news-media/media-releases/2017/2017_05_25.aspx> [↑](#endnote-ref-122)
123. <https://theconversation.com/why-touted-public-transport-savings-from-competitive-tendering-are-too-high-78527>

<https://www.thejadebeagle.com/weird-scenes.html> [↑](#endnote-ref-123)
124. <https://www.treasury.nsw.gov.au/sites/default/files/2021-06/NSW%20Treasury%20med%20rel%20-%20Statement%20on%20TAHE%20from%20Secretary%20of%20NSW%20Treasury%20Michael%20Pratt%20AM.pdf> [↑](#endnote-ref-124)
125. For the same reason as in note cxvi above. [↑](#endnote-ref-125)
126. <https://www.onrsr.com.au/__data/assets/pdf_file/0007/4975/National-Rail-Safety-Register-Accreditation-6-May-2021.pdf> [↑](#endnote-ref-126)
127. <https://www.artc.com.au/uploads/Annual-Report-2019-20_final_191020.pdf> [↑](#endnote-ref-127)
128. <https://www.legislation.qld.gov.au/view/whole/html/inforce/current/act-2013-019> [↑](#endnote-ref-128)
129. The relevant legislation has:

*10 (1) The Authority must carry out its functions as a commercial enterprise.*

*(2) Subsection (1) does not apply to the Authority to the extent it is required under this Act to perform a community service obligation other than as a commercial enterprise.*

Revenue: service contract $1.8bn, access $0.2bn, other $0.4bn. Infrastructure assets – Brisbane and the Queensland network, is valued at $7.0bn. <https://www.queenslandrail.com.au/about%20us/Documents/QueenslandRail_AnnualReport_2019-20.pdf> [↑](#endnote-ref-129)
130. <https://www.victrack.com.au/about/corporate-governance>

[https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/A%20Review%20of%20Melbourne's%20Rail%20Franchising%20reforms\_J09Nov-p36Currie\_RailFranchising.pdf](https://ppp.worldbank.org/public-private-partnership/sites/ppp.worldbank.org/files/documents/A%20Review%20of%20Melbourne%27s%20Rail%20Franchising%20reforms_J09Nov-p36Currie_RailFranchising.pdf) [↑](#endnote-ref-130)
131. <https://www.victrack.com.au/our-role/strengthening-the-network>

<https://www.parliament.vic.gov.au/file_uploads/VicTrack_Annual_Report_2019-20_8KC4GgbH.pdf> [↑](#endnote-ref-131)
132. VicTrack:

s.119 *must ensure that the State's transport-related land, infrastructure and assets are developed and used—*

 *(a) primarily to support the transport system;*

 *(b) for other purposes which support government policy;*

 *(c) only for commercial gain if the development or use will not compromise the current or future transport system.*

Functions are:

s.120 *(a) to release in a timely and cooperative manner to the Secretary or the Head, Transport for Victoria for nominal consideration any transport-related land, infrastructure and assets required for the transport system and related matters;*

*(b) to act as the custodian and asset manager of the non-operational transport-related land, infrastructure and assets and any other land, infrastructure and assets identified by the Minister;*

<https://www.legislation.vic.gov.au/in-force/acts/transport-integration-act-2010/078> [↑](#endnote-ref-132)
133. <https://johnmenadue.com/john-austen-sydney-metro-developments/>

<https://johnmenadue.com/john-austen-sydney-and-the-mock-metro/#_top> [↑](#endnote-ref-133)