

Brookfield Rail

Draft Determination on Proposed Revised
Train Management Guidelines

August 2012

Economic Regulation Authority

WESTERN AUSTRALIA

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Contents

DRAFT DETERMINATION	1
List of Amendments	1
INTRODUCTION AND OVERVIEW	3
Background	3
Legislative requirements	3
Public Consultation	5
Scope of matters considered in the Draft Determination	5
Discussion of Issues	5
Section 1 - Introduction	6
Section 2.1 - Use of the Network in Accordance with the Train Paths	9
Section 2.2 - Network Blockage	12
Section 2.3 - Operator's Recovery Plan	13
Section 2.4 - Operator and Brookfield Rail Consultation Protocols	14
Section 3.1 - Real Time Allocation of Train Paths (Section 3.1)	14
Section 3.2 - Resolution of Priority of Train Paths	15
Section 3.3 - General Principles for Train Management	16
Section 3.4 - Train Activities Following a Major Delay	17
Section 3.5 - Repairs, Maintenance and Upgrading of the Network	18
Section 3.6 - Management of Emergencies	20
Section 3.7 - Management of Daily Issues Related to Train Operations	20
Deleted Section - Disputes and Performance Monitoring	21
Section 4 - Compliance and Review	23
Deleted Annexure - Control and Management of Access to Network	26
Deleted Annexure - Environmental and Dangerous Goods	27
Section 5 - Definitions	28

DRAFT DETERMINATION

1. Brookfield Rail is the principal provider of “below” rail freight infrastructure, covering approximately 5,000 kilometres of track in the south-west of Western Australia.
2. On 2 May 2012, Brookfield Rail submitted a proposed revised Train Management Guidelines (**proposed TMG**) to the Economic Regulation Authority (**Authority**) for approval, in accordance with its approved Train Management Guidelines of April 2009 (**current TMG**).
3. The Authority’s approval is required, pursuant to section 43 of the *Railways (Access) Code 2000* (**Code**), before Brookfield Rail can put in place a proposed TMG.
4. The Authority has considered Brookfield Rail’s proposed TMG in conjunction with comments made in submissions to the Authority by interested parties.
5. Following consideration of the requirements set out under section 41 of the Code, the draft determination of the Authority is to approve Brookfield Rail’s proposed TMG, subject to 8 amendments. These amendments are listed below.

List of Amendments

Required Amendment 1

Section 1 of Brookfield Rail’s proposed TMG should be amended as follows:

- The word ‘only’ be removed from paragraph 1.1.3.
- Paragraph 1.1.4 be removed.
- The following text be reinstated to section 1 of the TMG:

Access Agreements are entered into with the Operator but the Access Agreements explicitly provide that an operator may engage a third party as its agent or contractor to perform the obligations of the Operator under the Access Agreement. This includes acting as an agent or contractor for the purpose of the TMG.

Required Amendment 2

Section 2.1.1 of Brookfield Rail’s proposed TMG should be amended by inclusion of the following text as a sixth sub-clause:

“provision by the Operator of a Train Manifest in a format acceptable to Brookfield Rail not less than 15 minutes prior to the scheduled departure time”

Required Amendment 3

Sections 2, 3, 4 and 5 of Brookfield Rail’s proposed TMG should be amended by removal of the term “User” and replacement of that term with the term “Operator”.

Required Amendment 4

Section 3.5 of Brookfield Rail’s proposed TMG should be amended to:

- re-instate the text contained in section 3.5 of the current (approved) TMG;
- include a statement to the effect that the Railway owner will endeavour to align possessions of the network with supply chain outages through consultation with Operators;
- include a statement to the effect that the Railway owner will endeavour to offer an Operator that is adversely affected by possession of the network a train path that is the useable by the Operator or their customer.

Required Amendment 5

Section 3.7 of Brookfield Rail's proposed TMG should be amended to re-instate the text contained in section 3.7 of the current (approved) TMG, with the exception of the words "Brookfield Rail" in place of "WestNet".

Required Amendment 6

Brookfield Rail's proposed TMG should be amended to reinstate text in section 4 of the TMG which outlines:

- that entities seeking access can refer disputes to arbitration under section 25 of the Code; and
- the three-stage process for dispute resolution to apply once access agreements are in place, as detailed in the current TMG.

Required Amendment 7

Section 4 of Brookfield Rail's proposed TMG should be amended to replace the existing text with text reflecting the following points:

- The Regulator will review the TMG, through a public consultation process, after a five year period from the current review. Brookfield Rail will submit any proposed revisions of the TMG to the Regulator by 1 October 2016 in order to facilitate this review.
- Part 5, section 43(5) of the Code enables Brookfield Rail to amend or replace the TMG at any time, with the approval of the Regulator. Section 43(3) of the Code enables the Regulator to direct Brookfield Rail to amend or replace the TMG with another TMG determined by the Regulator at any time.
- Where there are operations on the network pursuant to an access agreement, the Regulator will monitor Brookfield Rail's compliance with the TMG through an audit of Brookfield Rail's obligations under its Train Management Guidelines conducted every two years. This audit will be carried out by an independent auditor approved by the Regulator, with Brookfield Rail funding the audit. The scope of the audit will be determined by the Regulator and the Regulator will manage the audit. The Regulator will publish the final report on its website (excluding confidential information).
- The Regulator may also commission special audits at any time on any issue where additional assurance is required. Such audits may be internal audits, or may be carried out by an independent auditor approved by the Regulator, with Brookfield Rail funding the audit. The scope of the audit will be determined by the Regulator and the Regulator will manage the audit. The Regulator will publish the final report on its website (excluding confidential information).

Required Amendment 8

Section 5 of Brookfield Rail's TMG should be amended to include definitions relevant to any sections of the TMG which Brookfield Rail has proposed to delete, but which the Authority requires to be re-instated.

INTRODUCTION AND OVERVIEW

Background

6. WestNet Rail (**WNR**) was acquired in 2009 by Brookfield Infrastructure Partners L.P. as part of its investment in and subsequent merger with Prime Infrastructure. WNR announced that it would become Brookfield Rail in August 2011, aligning its name with that of its parent company.
7. Section 3 of the Act defines a "railway owner" to mean the person having the management and control of the use of the railway infrastructure. Within this context, Brookfield Rail is considered to be the railway owner for the freight rail infrastructure.
8. Brookfield Rail's rail network is subject to the *Railways (Access) Code 2000* (**Code**) and the *Railways (Access) Act 1998* (**Act**).
9. The Train Management Guidelines (**TMG**) is one of the four Part 5 Instruments set out in section 40(3) of the Code. Section 40(2) of the Code provides that Part 5 instruments are binding on the railway owner.
10. The TMG is a statement of principles, rules and practices which will be applied in the real time management of services on the network.
11. Associated with the TMG is the Train Path Policy (**TPP**). The TPP is a statement of policy relating to the allocation of train paths and the provision of access to train paths that have ceased to be used. Brookfield Rail's proposed revisions to its TPP document are the subject of a separate determination by the Authority.
12. In making this draft determination, the Authority is mindful of the legislative requirements of the *Rail Safety Act 2010* and the role of the Rail Safety Regulator in TPP related areas. The TMG will need to comply with the requirements of the *Rail Safety Act 2010*.

Legislative requirements

13. The key areas of the Code and the Act that have relevance to the formulation and application of the TMG are as follows:

Code requirements

43. Railway owner to comply with approved train management guidelines

(1) Subsection (2) applies to the railway owner in relation to a part of the railways network and associated infrastructure to which this Code applies when that owner is performing its functions in relation to that part.

(2) The railway owner is to comply with the train management guidelines for the time being approved or determined by the Regulator under this section.

(3) As soon as is practicable after the commencement of this Code the railway owner is to prepare and submit to the Regulator a statement of the principles, rules and practices (the train management guidelines) that are to be applied and followed by the railway owner -

- (a) in the performance of the functions referred to in subsection (1); but
- (b) only so far as that performance relates to requirements imposed on the railway owner by or under the Act or this Code.

(4) The Regulator may –

- (a) approve the statement submitted by the railway owner either with or without amendments; or
- (b) if he or she is not willing to do so, determine what are to constitute the train management guidelines.

(5) The train management guidelines may be amended or replaced by the railway owner with the approval of the Regulator.

(6) The Regulator may, by written notice, direct the railway owner -

- (a) to amend the train management guidelines; or
- (b) to replace them with other train management guidelines determined by the Regulator,

and the railway owner must comply with such a notice.

Act Requirements

20(4) Functions of the Regulator

In performing functions under the Act or Code, the Regulator is to take into account —

- (a) the railway owner's legitimate business interests and investment in the railway infrastructure;
- (b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
- (c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
- (d) the interests of all persons holding contracts for the use of the railway infrastructure;
- (e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
- (f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
- (g) the economically efficient use of the railway infrastructure; and
- (h) the benefits to the public from having competitive markets.

14. In exercising its decision-making power pursuant to section 43 of the Code, the Authority is required to take into account the factors listed in section 20(4) of the Act. However, the Authority may allocate such weight to each of the factors listed in section 20(4) as it considers appropriate in order to ensure a balancing of interests in relation to the railway owner, rail operators, access seekers and the public.

Public Consultation

15. Section 45 of the Code requires the Authority to undertake consultation prior to approving any TMG statement prepared by a railway owner pursuant to section 43(3) of the Code. Section 43(3) of the Code pertains to the initial TMG required to be prepared by a railway owner as soon as is practicable after the commencement of the Code.
16. Public consultation is not required in relation to revisions to the TMG initiated by either the railway owner (section 43(5)) or the Regulator (section 43(6)). Nonetheless, the Authority has chosen to consult with stakeholders in relation to the revisions proposed by Brookfield Rail under section 43(5) due to the extent of revisions proposed.
17. On 3 May 2012, the Authority issued a notice on its website calling for submissions from interested parties on Brookfield Rail's proposed TMG by 6 June 2012. Three organisations (Alcoa World Alumina Australia, BHP Billiton Worsley, and QR National) sought and were granted an extension of the timeframe for public submissions until 8 June 2012.
18. Seven public submissions were received, from:
 - Alcoa World Alumina Australia (**Alcoa**)
 - Asciano (**Asciano**)
 - BHP Billiton Worsley (**Worsley**)
 - Co-operative Bulk Handling (**CBH**)
 - Department of Agriculture and Food (**DAF**)
 - Department of Transport (**DOT**)
 - QR National (**QRN**)

These submissions are available on the Authority's website.

Scope of matters considered in the Draft Determination

19. This draft determination deals with matters to be considered in relation to the proper constitution of Brookfield Rail's TMG. Section 43 (Part 5) of the Code does not mandate specific provisions or inclusions to be made in a railway owner's TMG, and does not restrict the scope of matters to be considered.
20. There were some issues raised in submissions which address the application of the Code and other matters which are not relevant to the determination of an appropriate TMG meeting the requirements of the Code. These issues have not been addressed in this draft determination, except where they relate to the application of the TMG to out-of-Code agreements.

Discussion of Issues

21. Brookfield Rail has set out its proposed TMG in 14 sub-sections. These are:
 - 1 Introduction.
 - 2.1 Preliminary infrastructure issues: Use of the network in accordance with the train paths.

- 2.2 Preliminary infrastructure issues: Network blockage.
 - 2.3 Preliminary infrastructure issues: Operator's recovery plan.
 - 2.4 Preliminary infrastructure issues: Operator and Brookfield Rail consultation protocols.
 - 3.1 Procedures and protocols for operations: Real time allocation of train paths.
 - 3.2 Procedures and protocols for operations: Resolution of priority of train paths.
 - 3.3 Procedures and protocols for operations: General principles for train management.
 - 3.4 Procedures and protocols for operations: Train activities following a major delay.
 - 3.5 Procedures and protocols for operations: Repairs, maintenance and upgrading of the network.
 - 3.6 Procedures and protocols for operations: Management of emergencies.
 - 3.7 Procedures and protocols for operations: Management of daily issues related to train operations.
 - 4 Compliance and review.
 - 5 Definitions.
22. The numbering and objective of these sections of the proposed TMG correspond to the equivalent sections in the current approved TMG, except for sections 4 and 5, which are equivalent to sections 5 and 7 of the current TMG. The following sections of the current TMG are proposed by Brookfield Rail to be deleted:
- 4 Disputes and performance monitoring
 - 6 Annexures
23. Proposed amendments to each of these sub-sections, including the deleted sections, are discussed below. The discussion of each item under the above headings is undertaken in the following order:
- A summary of Brookfield Rail's proposals relating to that section.
 - An outline of comments received in submissions that relate to that section.
 - The Authority's assessment.
 - Any required amendments.

Section 1 - Introduction

Brookfield Rail's Proposal

24. Section 1 of Brookfield Rail's proposed TMG corresponds to sub-section 1.2 (Relevance of Train Management Guidelines) of the current TMG. Brookfield Rail has proposed to delete sub-section 1.1 (Background) of the current TMG.
25. Sub-section 1.1 of the current TMG contains:

- a statement that the Code requires certain parts of the network to be made available for access by third party rail operators; and
 - a statement that the ERA was established to oversee the economic regulation functions of rail services in Western Australia.
26. In the current TMG, WNR committed to applying the TMG to all operators, regardless of whether track access arrangements are made inside or outside the Code. The Code requires only that the TMG apply to access agreements.
27. Brookfield Rail proposes to amend the TMG to state (at item 1.1.3) that it will only apply the TMG to operations on the network that exist pursuant to an access agreement, which is given the same meaning as ‘access agreement’ in the Code, being a track access arrangement made under the Code. Item 1.1.4 states that notwithstanding item 1.1.3, Brookfield Rail may, at its absolute discretion, apply the TMG to track access arrangements other than access agreements.
28. The current TMG contains a statement to the effect that Access Agreements explicitly provide that an Operator may engage a third party as its agent or contractor to perform the obligations of the Operator under the Access Agreement, including for the purpose of the TMG. This statement has been removed from the proposed TMG.

Public Submissions

29. Alcoa, DAF, QRN and Worsley expressed concern that Brookfield Rail only intends to apply the proposed TMG to track access arrangements made outside of the Code at its own discretion.
30. DAF submitted that it would be prudent to maintain the statements in the existing TMG and TPP that state that both documents apply to ALL Operators, regardless of whether access applications are made inside or outside the Code. This would allow a transparent process for train management and allocating train paths, whether they are operating under the Code or not.
31. Alcoa submitted that it is not at all practical to have one set of rules for trains within the Code, and potentially another set for trains outside the Code. Alcoa contends that it is not logical that in an open and fair access regime, Train Paths can be managed under a different set of principles depending on whether an entity elects to seek access within or outside the Code.
32. Worsley submitted that it is not practical or consistent with an open and fair access regime to have one set of rules for entities who elect access under the Code, and potentially another set for entities who elect access outside the Code.
33. QRN submitted that, by changing their policy of applying the TPP and TMG to all agreements whether negotiated under the Code or not, Brookfield have created uncertainty as to how capacity will be allocated and managed between parties operating pursuant to agreements negotiated inside or outside of the Code.

Authority’s Assessment

34. The information appearing in sub-section 1.1 of the current TMG is background information which reflects text written in the Act and the Code, and does not impact on the application or interpretation of the TMG. As there were no public comments

received in relation to this proposed deletion, the Authority does not object to the deletion of this text.

35. The Authority accepts that it is not practical or safe, from a railway management perspective, for operators within and outside the Code to be subject to different TMGs.
36. It is clear from section 4A of the Code that the Railway owner is not obliged to extend the application of the TMG (which is a Part 5 instrument defined in section 40(3) of the Access Code) to track access arrangements negotiated outside of the Code.

4A. Parties have option to negotiate agreements outside this Code

- (1) To avoid doubt it is declared to be the case that –
 - (a) the parties concerned may choose whether negotiations for an agreement for access are carried on under this Code or otherwise; and
 - (b) if the parties choose to negotiate an agreement for access otherwise than under this Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement; and
 - (c) in particular, without limiting paragraph (b), a Part 5 instrument, as defined in section 40(3), is not to be taken into account in determining the rights, powers, duties and remedies of parties to negotiations carried on or an agreement made otherwise than under this Code, except to the extent that the parties concerned agree otherwise.
37. As it may not be practical or safe for different TMGs to apply to different operators, the Authority therefore considers Brookfield Rail's statement in paragraph 1.1.3 of its proposed TMG, to the effect that the TMG will only apply to operations on the network pursuant to an access agreement, to be inappropriate as it precludes the application of the TMG to out-of-Code arrangements.
38. The Authority considers that the proposed statement contained in paragraph 1.1.4, relating to the potential for application of the TMG to arrangements outside of the Code is irrelevant, as provisions of out-of-Code arrangements are not subject to regulatory instruments defined in Part 5 of the Code.
39. The Authority considers that the statement indicating that an operator may engage a third party as its agent or contractor to perform the obligations of the operator under the access agreement, should be retained, as this provides for the contracting of rolling stock services by an operator.
40. The Authority notes that Brookfield Rail has proposed to replace the term ERA in all cases with the term Regulator. As Brookfield Rail has appropriately defined the term Regulator in Section 5 of the proposed TMG ('Definitions'), the Authority does not object to this change.

Draft Determination

Required Amendment 1

Section 1 of Brookfield Rail's proposed TMG should be amended as follows:

- The word 'only' be removed from paragraph 1.1.3.
- Paragraph 1.1.4 be removed.
- The following text be reinstated to section 1 of the TMG:

Access Agreements are entered into with the Operator but the Access Agreements explicitly provide that an operator may engage a third party as its agent or contractor to perform the obligations of the Operator under the Access Agreement. This includes acting as an agent or contractor for the purpose of the TMG.

Section 2.1 - Use of the Network in Accordance with the Train Paths

Brookfield Rail's Proposal

41. Section 2.1 of the proposed TMG corresponds to section 2.1 of the current TMG.
42. The current TMG (at Section 2) states that an operator must meet two essential criteria before a service can operate on the network. Specifically, the operator must:
 - Have an access agreement and have fulfilled all the conditions in that agreement, especially those related to insurance and is an accredited operator;
 - Provide WNR with the information required for a Train Manifest.

The current TMG states that once these conditions are satisfied the service will be admitted to the network and managed in accordance with the principles, rules and practices of the TMG.

43. Brookfield Rail has proposed the deletion of these clauses.
44. Amongst other things, section 2.1 of the current TMG establishes that:
 - WNR will ensure that services run according to train paths so that a service that enters the network on time will exit the network on time subject to certain considerations (for example, safety, emergencies);
 - WNR will use its best endeavours to accommodate a service that is running early or late by providing a train path for that service at the first available opportunity;
 - WNR may issue instructions to the operator and the undertakings that WNR gives in these circumstances; and
 - the operator will comply with all instructions.
45. Brookfield Rail has proposed the following amendments to this section in the proposed TMG:

- to clarify that a service that is running on time is one that presents within 15 minutes of its scheduled departure time;
- to indicate that it will use 'best endeavours' to ensure that a service that enters a network on-time also exits on time;
- to delete the specific power for Brookfield Rail to issue an instruction to the operator to 'upgrade a Conditional Train Path to a Scheduled Train Path';
- to delete the statement that the duration of temporary train paths will be consistent with the duration of the Instruction issued;
- to delete text stating that:
 - the operator will comply with all Instructions and inform all train crew of those instructions;
 - Train Control Directions must be complied with immediately;
 - Operators must comply with instructions in a way to minimise disruption to any other operator's use of the Network; and
 - The operator is not responsible for any delay suffered or cost incurred by the railway owner in the operator complying with a proper instruction of the railway owner and the railway owner releases the operator from any such claim arising from such compliance.

Public Submissions

46. QRN observed that references to the Train Manifest have been deleted from the TMG.

47. QRN submitted that Brookfield Rail's proposal that it will use 'best endeavours' to ensure that services operate on time rather than simply 'ensures' results in a significantly lower obligation on Brookfield.

The conditions that the obligation is subject to, in QRN's views, sufficiently deals with circumstances that may reasonably impact on Brookfield's ability to meet the obligations without requiring the concept of best endeavours.

In addition, the TMG applies to existing contracts as well as future agreements. The proposed change therefore impacts the risk position of existing contracts. QRN believes it is inappropriate to change the terms and conditions on which access was contracted and is contrary to the intent of the WARAR that the Access Agreement once negotiated takes precedent over the WARAR.

48. QRN noted:

The proposed TMG requires the operator to notify Brookfield that a service is ready to operate 15 minutes **prior to** the scheduled departure time. In the approved TMG the notification was within 15 minutes. QRN believes this notification is separate from the provision of the Train Manifest which was required to be provided at least 15 minutes prior to scheduled departure. Reference to the Train Manifest has been removed from the TMG (section 2). QRN notes that the process leading up to the notification that a service is ready for departure is as follows:

- 1) The operator provides to the network controller a Train Manifest.
- 2) Train Manifest is checked by the network controller.
- 3) If the service as described in the Train Manifest complies with requirements no action is taken.
- 4) The train driver is then provided with, and checks the information from, the Train Manifest.

- 5) Once the checks are completed and the service is ready to operate, the train driver will present the service for departure and notification is provided by the train driver to the train controller. The network controller will confirm the train manifest with the train driver.

QRN believes that clarification is required in the TMG regarding the process for presenting a service for departure. If the notification required at least 15 minutes prior to the scheduled departure is as outlined in step 5 above, rather than the provision of the Train Manifest in step 1, the preparatory time of each service will increase. This will then have consequential impacts on resourcing and therefore the cost of operations without any justification of the benefit.

49. QRN has suggested that section 2.1.1 be amended to define the process for presenting a service for departure as described in steps 1 to 5.

Authority's Assessment

50. The Authority notes that the Train Manifest is the description of the train and is a standard requirement for admission of a train onto a network, and that once a train has been admitted onto a network the Train Manifest is not related to the application of a TMG.
51. Nonetheless, the Authority considers it useful to include the provision of a Train Manifest by an operator as a precondition enabling Brookfield Rail to ensure that a service enters and exits the network on time, in the same way that safety and force majeure clauses are included in section 2.1.1.
52. The Authority understands that WNR/Brookfield Rail has always required notice, at least 15 minutes prior to the scheduled departure time, that a train will depart on time. To this extent, the 5 step process proposed by QRN is considered not appropriate.
53. The Authority notes that section 2.1.1 of the current TMG contains both the terms 'best endeavours' and 'ensure'. The Authority considers that 'best endeavours' is a well-accepted and appropriate term in this circumstance, and does not represent a significantly lower obligation than 'ensure', due to the list of circumstances in 2.1.1 which that obligation is subject to. The Authority notes that section 2.1.1 includes a requirement for the operator to use only its 'best endeavours' in relation to departing the network on time.
54. The Authority notes the introduction of the term "user" at clause 2.1.5(b). This term also appears a number of times in section 3 and once in section 4. This term is defined in section 5 "Definitions" as:
 - (a) An Operator; or
 - (b) A Customer;with whom Brookfield Rail has entered into an Access Agreement.
55. An operator is defined in section 5 of the proposed TMG as having the same meaning assigned to "operator" in the Code, which is "an entity to which access is provided under an access agreement". There is no distinction, therefore, between the meaning of the terms "user" and "operator" in the proposed TMG.
56. The Authority understands that Brookfield Rail may have introduced the term "user" to draw a distinction between the entity with whom it enters into an access agreement, and the entity which operates the trains subject to that access agreement, if they are not the same entity.

57. The Code does not make this distinction, and there are no regulations in the Code which apply to a “user”. Therefore, the concept of a “user” as distinct from an “operator” is not appropriate in the context of a Part 5 instrument.

Draft Determination

Required Amendment 2

Section 2.1.1 of Brookfield Rail’s proposed TMG should be amended by inclusion of the following text as a sixth sub-clause:

“provision by the Operator of a Train Manifest in a format acceptable to Brookfield Rail not less than 15 minutes prior to the scheduled departure time”.

Required Amendment 3

Sections 2, 3, 4 and 5 of Brookfield Rail’s proposed TMG should be amended by removal of the term “User” and replacement of that term with the term “Operator”.

Section 2.2 - Network Blockage

Brookfield Rail’s Proposal

58. Section 2.2 of the proposed TMG corresponds to section 2.2 of the current TMG. The purpose of this section is to establish the general principles that will be applied when addressing a train failure that fouls the Network.
59. The current TMG states that operators, other than the operator whose train has failed, must provide reasonable assistance to WNR when necessary to facilitate the clearing of a blockage of the network caused by a failed train.
60. The current TMG further states that:
- An operator is not required to provide assistance if it will incur cost and risk unless agreement is reached on how the costs and risks will be shared. Agreement on the terms and conditions for providing assistance may be negotiated within the Access Agreement.
61. In the proposed TMG, Brookfield Rail has amended this latter clause to state:
- Unless agreement is reached on how the costs and risks of providing assistance will be shared, an Operator is not required to provide assistance.

Public Submissions

62. QRN submitted that the intent of this clause is to provide for cost recovery where an operator, other than the operator whose train has failed, provides assistance. QRN submitted that the rearrangement of the wording of this clause makes it less transparent.
63. QRN has proposed the following suggested rewording for section 2.2.2 of the proposed TMG:

Provided agreement is reached with Brookfield Rail on how the costs and risks of providing assistance will be shared, an Operator, other than the Operator whose Train has failed, must provide reasonable assistance to Brookfield Rail to facilitate the clearing of a blockage of the Network caused by a failed Train.

Authority's Assessment

64. The Authority considers that the three alternative versions of the wording of section 2.2 (that is, the current TMG, proposed TMG and QRN's suggested wording) have the same intent and effect.

Draft Determination

65. The Authority does not require Brookfield Rail to make any amendments to the text contained in section 2.2 of the proposed TMG.

Section 2.3 - Operator's Recovery Plan

Brookfield Rail's Proposal

66. Section 2.3 of the proposed TMG corresponds to section 2.3 of the current TMG. The purpose of this section is to establish that the railway owner will consult the operator of a failed train on alternatives for clearing the network.
67. Brookfield Rail has suggested minor text changes to section 2.3 of the current TMG.

Public Submissions

68. Asciano have suggested that clause 2.3.1 could be further clarified by including the wording underlined below:

In clearing a failed Train from the Network, the Operator of that Train will be consulted to consider alternatives to clearing the failed Train. These alternatives may include, but are not limited to:

Authority's Assessment

69. The Authority does not consider it necessary to add the words 'but are not limited to' in clause 2.3.1. It is obvious from the context that the options identified for clearing the network do not constitute an exclusive list. The options identified in the proposed TMG are identical to those previously approved by the Authority in the current TMG. The Authority notes that both the railway owner and the operator are incentivised to explore all possible avenues for clearing the network.
70. The Authority notes that section 2.3 of the current TMG does not include the words 'but are not limited to'.

Draft Determination

71. The Authority does not require Brookfield Rail to make any amendments to section 2.3 of the proposed TMG.

Section 2.4 - Operator and Brookfield Rail Consultation Protocols

Brookfield Rail's Proposal

72. Section 2.4 of the proposed TMG corresponds to section 2.4 of the current TMG. The only material change to the text of section 2.4 is the deletion of the following statement:

The timing of advice [on a Network failure or potential deviation from the Train Path] will be as agreed between the Operators and [the Railway owner], and should at least take into account the magnitude of the deviation from schedule and the duration of the remaining journey on the Network.

Public Submissions

73. No comments were made in the public submissions in relation to the deletion of this statement.

Authority's Assessment

74. The Authority recognises that the proposed text deletion in section 2.4 will not make a material difference to the way the TMG is interpreted or applied.
75. The Authority considers that the statement on the timing of advice that is contained in the current TMG is not necessary as clauses 2.4.2 and 2.4.3 of the proposed TMG detail obligations on parties to notify each other of deviations 'at the earliest possible time' or 'as soon as reasonably practicable' and to maintain a 24 hour communications link.

Draft Determination

76. The Authority does not require Brookfield Rail to make any amendments to section 2.4 of the proposed TMG.

Section 3.1 - Real Time Allocation of Train Paths

Brookfield Rail's Proposal

77. Section 3.1 of the proposed TMG corresponds to section 3.1 of the current TMG. Brookfield Rail has proposed the deletion of the statement that the Train Path Schedule will be promulgated by the issuing of a working timetable. Under the proposed TMG a Train Path Schedule will now only be promulgated by the issuing of an instruction via the Rail Access Management System.
78. Brookfield Rail has proposed that ad-hoc or alternative train paths requested by an operator, and agreed to by Brookfield Rail, will be issued via an Instruction rather than under the Authority of the Access Manager (as is the case under the current TMG).

Public Submissions

79. QRN submitted that:

The working timetables are used by operators for operational planning. As these documents relate to the network capacity and are dynamic in nature, Brookfield is best placed to maintain these in relation to the network and is considered a core function of train control.

QRN is uncertain, with the removal of the Master Control Diagram from the TPP, how the operator will be able to monitor Brookfield's compliance to the TPP and TMG.

80. QRN suggested that Brookfield Rail clarify how the issuing of an instruction via the Rail Access Management System will meet the information requirements previously provided by the Working Timetable and the Master Control Diagram.

Authority's Assessment

81. The Authority understands that Brookfield promulgates train paths by instructions issued through RAMS (Rail Access Management System), and that the 'Working Timetable' does not contain train path data and has not done so for a number of years. The working timetable contains operational data and local instructions for particular parts of the network.
82. The Authority understands that Brookfield Rail still maintains and will continue to maintain Working Timetables for the above purpose, but that these do not relate to network capacity.
83. The Authority does not consider that it is an operator's role to monitor Brookfield Rail's compliance with the TMG.

Draft Determination

84. The Authority does not require Brookfield Rail to make any amendments to section 3.1 of its proposed TMG.

Section 3.2 - Resolution of Priority of Train Paths

Brookfield Rail's Proposal

85. Section 3.2 of the proposed TMG corresponds to section 3.2 of the current TMG. The purpose of section 3.2 is to indicate that, in the event of a conflict with train paths arising from an unhealthy service, the matrix set out in section 3.3 of the TMG will be used to resolve the priority of services.

Public Submissions

86. There were no comments made by interested parties relating to this section.

Authority's Assessment

87. The Authority notes that there are no material changes to this section.

Draft Determination

88. The Authority does not require Brookfield Rail to make any amendments to section 3.2 of its proposed TMG.

Section 3.3 - General Principles for Train Management

Brookfield Rail's Proposal

89. Section 3.3 of the proposed TMG corresponds to section 3.3 of the current TMG. This section refers decisions on establishing priority between multiple services on the network to a "Traffic Management Decision Making Matrix".
90. Brookfield Rail has proposed the deletion of the following text from section 3.3 of the approved TMG:

The principle personnel concerned with the application of the matrix [General Principles for Train Management] is the Access Manager and Train Controllers who manage real time application of Train Paths.

The Access Manager is responsible for compliance with the TMG and training will be provided to Train Controllers in the application of the matrix.
91. Brookfield Rail has also proposed amending the threshold from 10 minutes to 15 minutes variation from schedule for determining whether a train service is "healthy", "unhealthy" or "running ahead".
92. There are no material changes to the Traffic Management Decision Making Matrix.

Public Submissions

93. QRN agreed with the premise included in the TMG that a healthy service should not be affected by the performance of unhealthy services. However, QRN noted that reliability is a key performance criteria in relation to the competitiveness of rail and, as such, QRN believes one of the objectives of Brookfield Rail should be to give preference to trains that are unhealthy if that is consistent with the critical objectives of the train in question and will result in less aggregated consequential delays to other trains than would otherwise be the case.
94. QRN further submitted that any train management decisions involving two conflicted trains both operated by one operator should be subject to the rail operator's preference for its own services as they are best placed to know the critical objectives of the services and the impacts of any delays.
95. QRN suggested that the general principles be amended to allow for traffic management decisions that take into consideration the critical objectives of the train, health of the wider network and rail operator's preferences.
96. QRN submitted that the operator should have the ability to request information to enable the review of traffic management decisions and, more generally, Brookfield's compliance with the TMG. Whilst acknowledging that the dispute mechanism and performance reporting requirements are detailed in the access agreement, QRN has suggested that section 3 be amended to include the ability for the operator to request information regarding the basis for traffic management decisions.

Authority's Assessment

97. The Authority accepts that it is unlikely that granting priority to a healthy service over an unhealthy service would cause greater aggregated consequential delays.

98. The Authority does not consider that the objectives of Brookfield Rail should be determined by consideration of reliability or competitiveness of a single train, but of the reliability and competitiveness of the network as a whole.
99. The Authority considers that QRN's suggestion that the general principles be amended to allow an operator to make decisions about which train takes priority where it has two conflicted trains has merit. However, the Authority considers that the railway owner would need to be able to over-rule the decision of the operator if giving one train priority over another would cause further delays to other operators.
100. The Authority considers that this issue is covered adequately at clause 3.3.2(d)(ii) of the proposed TMG which provides that no one service has priority over another except for where the two services concerned are operated by the same operator, and that operator has a priority between services, but only if it does not interfere with the train paths allocated to another operator
101. The Authority considers that performance-reporting provisions within access agreements provide sufficient scope for an operator to seek information to enable the review of traffic management decisions and Brookfield Rail's compliance with the TMG.
102. The Authority considers that the purpose of the TMG is to provide adequate information regarding the basis for traffic management decisions. The Code does not detail any further requirement allowing operators to request information enabling the review of traffic management decisions and the network owner's compliance with its TMG.

Draft Determination

103. The Authority does not require Brookfield Rail to make any amendments to section 3.3 of the proposed TMG.

Section 3.4 - Train Activities Following a Major Delay

Brookfield Rail's Proposal

104. Section 3.4 of the proposed TMG corresponds to section 3.4 of the current TMG. Brookfield Rail has suggested minor text changes to this section.

Public Submissions

105. No comments were made in the public submissions about the proposed amendments to section 3.4 of the approved TMG.

Authority's Assessment

106. The Authority does not object to the proposed amendments to section 3.4 of the approved TMG as the amendments will not make any material difference to the way the TMG is interpreted or applied.

Draft Determination

107. The Authority does not require Brookfield Rail to make any amendments to section 3.4 of the proposed TMG.

Section 3.5 - Repairs, Maintenance and Upgrading of the Network

Brookfield Rail's Proposal

108. Section 3.5 of the proposed TMG corresponds to section 3.5 of the current TMG. Brookfield Rail has proposed the deletion of text from section 3.5 of the approved TMG that sets out the policy that Brookfield Rail will apply when it intends to take possession of the network for the purposes of repairs, maintenance and upgrading of the network.
109. The current TMG sets out that WNR may take possession of the network at any time, but must take all reasonable steps to minimise any disruption to the train paths and use its best endeavours to provide an alternative train path to affected operators. The current TMG also establishes the amount of notice that the railway owner will give to operators in different circumstances.
110. In place of the policy in the current TMG, Brookfield Rail has proposed the following statement:
- To the extent that Possession of the Network impacts a User, the parameters on Brookfield Rail's ability to take Possession of the Network will be specified in the relevant Access Agreement.
111. Brookfield Rail has retained the following statement in section 3.5 of the proposed TMG.
- Brookfield Rail recognises its responsibility to treat all Operators fairly in respect of it taking Possession of the Network, and recognises the Regulator's powers under Section 34A of the Act if the Regulator believes Brookfield Rail's conduct would be construed as hindering or preventing access.

Public Submissions

112. Asciano accepted that Brookfield Rail has the right to take possession of the network. However, Asciano submitted that Brookfield Rail should, at the minimum, be required to use reasonable endeavours to consult with operators and mitigate the impact on operators.
113. QRN acknowledged the right of Brookfield Rail to take possession of the network without the consent of the operator. However, QRN submitted that there is an obligation on both the railway owner and operator to mitigate the impact of possessions. Given the railway owner's ability to control possessions of the network, their obligations to mitigate should include:
- a) Bona fide consultation, together with reasonable notification, where the circumstances warrant and allow. For instance, if an operator's services will not be impacted there is no obligation on the railway manager to consult.
 - b) Where possible, align possessions with supply chain outages. For example, mine major maintenance shutdowns or off peak/season periods.
 - c) Provide alternative paths capable of being used by the operator. For example, a path is not useable if the unloading facility is not available.
114. QRN submitted that the clauses contained in section 3.5 of the current TMG are reasonable, outline the different circumstances that may lead to a possession of a network and their associated planning horizons and provided transparency regarding the obligations on Brookfield Rail to mitigate the impact of possessions.

115. QRN suggested:

- Brookfield Rail reinstates the clauses in section 3.5 of the approved TMG;
- Section 3.5 of the approved TMG be amended to reflect the network efficiency benefits of aligning possessions with supply chain outages;
- The definition of alternative paths reflects the useability of the path by the operator or their customer.

Authority's Assessment

116. The Authority acknowledges the right of the railway owner to take possession of the network as required. However, it considers that this right needs to be appropriately balanced with the needs of operators to have consistent and predictable access to the network.

117. The Authority is concerned that section 34A of the *Railways (Access) Act 1998* may not provide sufficient protection for operators in the event that operators consider that the railway owner has unduly hindered or prevented access to the Network. For this reason, the Authority considers that some form of policy governing the power of the Railway owner to take possession of the network is required.

118. The Authority considers that the policy in the approved TMG achieved an appropriate balance between the Railway owner and the Operators as it:

- did not limit the power of the Railway owner to take possession of the network in emergencies;
- made provisions for the Railway owner to give an appropriate period of notice to Operators for planned maintenance; and
- made provisions for the Railway owner to notify Operators as soon as practical in circumstances where established notice periods could not be achieved.

119. The Authority considers that it is preferable that the policy governing the power of the railway owner to take possession of the network is set out in TMG, rather than solely in Access Agreements, as this will ensure greater transparency in the application of the policy.

120. Reflecting the above considerations, the Authority considers that Brookfield Rail should re-instate the text contained in section 3.5 of the current TMG (subject to any minor text amendments that are required).

121. The Authority supports suggestions that Section 3.5 of the approved TMG be amended to:

- state that the railway owner will endeavour to align possessions of the network with supply chain outages through consultation with operators; and
- state that the railway owner will endeavour to offer an operator that is adversely affected by possession of the network a train path that is useable by the operator or their customer.

122. The Authority considers that these suggestions are reasonable and do not constitute a regulatory burden on Brookfield Rail.

Draft Determination

Required Amendment 4

Section 3.5 of Brookfield Rail's proposed TMG should be amended to:

- re-instate the text contained in section 3.5 of the current (approved) TMG;
- include a statement to the effect that the Railway owner will endeavour to align possessions of the network with supply chain outages through consultation with Operators;
- include a statement to the effect that the Railway owner will endeavour to offer an Operator that is adversely affected by possession of the network a train path that is useable by the Operator or their customer.

Section 3.6 - Management of Emergencies

Brookfield Rail's Proposal

123. Section 3.6 of the proposed TMG corresponds to section 3.6 of the current TMG. Brookfield Rail has suggested minor editorial changes to section 3.6 of the current TMG.

Public Submissions

124. No comments were made in the public submissions about the proposed amendments to section 3.6 of the current TMG.

Authority's Assessment

125. The Authority does not object to the proposed amendments to section 3.6 of the current TMG as the amendments will not make any material difference to the way the TMG are interpreted or applied.

Draft Determination

126. The Authority does not require Brookfield Rail to make any amendments to section 3.6 of the proposed TMG.

Section 3.7 - Management of Daily Issues Related to Train Operations

Brookfield Rail's Proposal

127. Section 3.7 of the proposed TMG corresponds to section 3.7 of the current TMG. Brookfield Rail has proposed the deletion of the following clauses from section 3.7 of the current TMG.

WestNet will at all times maintain the Network (but only in so far as the Network is relevant to the Operator's Train Paths) to the highest of:

- a) the standard existing as at the commencement date of the Access Agreement; or
- b) if WestNet is required to be an Accredited Owner, the minimum standard required to maintain its Accreditation as a track owner; or
- c) any other standards as the parties may agree.

Public Submissions

128. DAF submits that the removal of train maintenance standards may have an impact on the efficiency of the grain freight task if it results in reduced speeds and loading capacities and restricted operating times due to high day time temperatures impacting on some lines. Reduced efficiency may increase the cost of grain transport to port.
129. QRN acknowledges the obligations on Brookfield Rail regarding the standard of infrastructure should be as per the access agreements. However, QRN believes that the clauses that Brookfield Rail proposes to delete provide transparency to access seekers on Brookfield's base level of obligation. QRN does not believe the inclusion of the clauses creates a material regulatory burden on Brookfield or limits Brookfield Rail's ability to negotiate different commercial positions in line with the cost and risk associated with the specific project. As such, QRN considers that the transparency benefit to access seekers outweighs the cost to Brookfield Rail, particularly where a standard access agreement is not published as is the case in other jurisdictions.

Authority's Assessment

130. The Authority considers that the clauses proposed by Brookfield Rail to be deleted from section 3.7 do not create a regulatory burden on Brookfield Rail or limits Brookfield Rail's ability to negotiate different commercial positions in line with the cost and risk associated with specific projects.

Draft Determination

Required Amendment 5

Section 3.7 of Brookfield Rail's proposed TMG should be amended to re-instate the text contained in section 3.7 of the current (approved) TMG, with the exception of the words "Brookfield Rail" in place of "WestNet".

Deleted Section - Disputes and Performance Monitoring

Brookfield Rail's Proposal

131. Brookfield Rail has proposed the deletion of the section of the current TMG (section 4) relating to disputes and performance monitoring. In the current TMG, this section sets out:
 - the process that will be applied in resolving disputes once an Access Agreement has been entered into;

- that parties to the Access Agreement will identify and agree key performance indicators for each party under the agreement, the frequency of monitoring, consequences of not meeting or exceeding key performance indicators and other related matters; and
- that agreed key performance indicators will constitute part of an Access Agreement.

Public Submissions

132. QRN acknowledged that the dispute mechanism and performance reporting sits in the access agreement. Nonetheless, QRN submitted there is a minimum requirement, not currently articulated, for the operator to have the ability to request information to enable the review of traffic management decisions and more generally Brookfield Rail's compliance with the TMG. QRN believes inclusion of this step in the dispute process may reduce the reliance on formal dispute or complaint procedures. QRN suggests that Brookfield Rail include the ability of the operator to receive information on request from Brookfield Rail regarding the basis for decisions in relation to the management of capacity.

Authority's Assessment

133. QRN's suggestion of providing the operator with the ability to request information to enable the review of traffic management decisions and the railway owner's compliance with the TMG was addressed in the section of this draft determination dealing with section 3.3 of the approved TMG.
134. The Authority notes that Schedule 3 of the Code requires that dispute resolution procedures be detailed in Access Agreements. The Authority notes that the Code (at section 25) details dispute resolution procedures such as they apply prior to an Access Agreement being signed, but not following the signing of an Access Agreement.
135. For reasons of transparency, the Authority therefore considers that Brookfield Rail should detail a dispute resolution procedure to apply once an Access Agreement has been signed, as in the current TMG.
136. The Authority notes that, pursuant to Schedule 3 of the Code, the inclusion of performance indicators specific to each access agreement are required to be detailed in the access agreement. The Authority does not consider that these should also be required to be detailed in the Train Management Guidelines.

Required Amendment 6

Brookfield Rail's proposed TMG should be amended to reinstate text in section 4 of the TMG which outlines:

- that entities seeking access can refer disputes to arbitration under section 25 of the Code; and
- the three-stage process for dispute resolution to apply once access agreements are in place, as detailed in the current TMG.

Section 4 - Compliance and Review

Brookfield Rail's Proposal

137. Section 4 of the proposed TMG corresponds to section 5 of the current TMG. Brookfield Rail has proposed to delete the following clauses from this section:
- Reviews of the TMG will commence on 1 October every five years after the initial review in 2011, with WestNet providing its proposed TMG by this date.
 - Stakeholders have the ability to express any concern to the ERA that may arise at any time and the ERA will investigate such claims;
 - The ERA has the power under the Code to amend the TMG at any time and Access Seekers and Operators can at any time requires the ERA to consider amendments;
 - The ERA will monitor WestNet's compliance with the TMG through an audit of WestNet's obligations under its TMG conducted every two years. This audit will be carried out by an Independent Auditor approved by the ERA, with WestNet managing and funding the audit. The scope of the audit will be determined by the ERA.
 - The final audit report will be provided to the ERA. The ERA will publish this report on its web site (excluding confidential information).
 - The ERA can also commission special audits at any time on any TMG issue where additional assurance is required.
138. Brookfield Rail proposes to replace section 5 of the current TMG with statements to the effect that:
- The Regulator may monitor any aspect of Brookfield Rail's compliance with the TMG, where operations on the Network exist pursuant to an Access Agreement;
 - The ERA may request an audit be conducted into Brookfield Rail's implementation of the TMG in the event that an Operator brings a potential breach of the TMG to the attention of the ERA. This audit will be conducted internally by Brookfield Rail in the first instance, with the ERA being provided the findings and associated evidence. If the ERA is not satisfied with the

internal audit, it may request that Brookfield Rail engage an independent auditor approved by the ERA, with Brookfield Rail managing and funding the audit. The independent audit will investigate the potential breach, and the final audit report will be provided to the ERA.

- The ERA may request an audit be conducted into Brookfield Rail's implementation of the TMG, where it believes there is reason to do so, and the scope of the audit will be determined by the ERA. The audit will be carried out by an independent auditor approved by the ERA, with Brookfield Rail managing and funding the audit. The final audit report will be provided to the ERA. These general audits will occur no more often than every two years.

Public Submissions

139. Alcoa submitted that a regular review of the TMG should occur irrespective of any issue being raised with the Regulator. Similarly, a regular planned audit of Brookfield Rail's compliance needs to continue and should be explicitly stated in the TMG. The proposed changes to the TMG will effectively restrict the ERA's audit rights to those circumstances when an organisation seeks access within the Code or where access is provided within the Code. This will severely restrict the ability of the ERA to carry out its intended functions.
140. Asciano submitted that the ERA should not be constrained by limiting the number of audits that may occur in a set time period. If the ERA believes an audit is required, such an audit should not be prevented by the fact that an audit has occurred in the previous two years.
141. DAF expressed concern that the proposed changes to section 5 of the current TMG will limit the ERA's ability to perform its role. DAF submitted that there is merit in the ERA being able to monitor agreements whether they were operating under the Code or not and publication of audit reports to allow transparency for the industry.
142. DOT remarked upon the removal of the following provision from the current TMG: "stakeholders to express a concern to the ERA which may arise at any time and the ERA will investigate such claims".
143. QRN noted that Brookfield is proposing an additional step prior to an independent audit (that is, an internal audit conducted by Brookfield Rail). QRN submitted that an ERA-appointed independent audit should instead be conducted every two years unless it can be justified that it is not required. QRN submitted that where Brookfield seeks to waive the requirement for the independent audit, stakeholders should be provided with an opportunity to comment on the rationale provided by Brookfield. QRN submitted that this alternative process would provide transparency around the decision making process, give stakeholders the opportunity to outline – on a collective basis – potential issues of compliance that may not be brought to the attention of the regulator on an individual basis and limit the regulatory burden.
144. QRN suggested (as a further alternative) that the obligations for the audit of performance reports contained in the ARTC Interstate Access Undertaking would provide a reasonable model for compliance and review for Brookfield. QRN submitted that under this model the audit is part of the annual internal audit process and the internal audit is conducted by an independent entity. QRN submitted that this model allows for the provision of timely compliance information with a minimal incremental cost to existing internal audit processes, whilst preserving the "independence" of the audit.

145. Worsley noted that the existing TMG allows the ERA a regular right of review of the TMG and a regular right to audit Brookfield Rail's compliance with the TMG. Worsley submitted that the proposed amendments to the TMG will remove the ERA's review rights and restrict the ERA's audit rights to circumstances when an entity seeks access inside the Code or where access is provided inside the Code. Worsley understands there are no existing or planned access arrangements inside the Code. As a result of the proposed changes, the ability of the ERA to carry out its intended functions would therefore be severely restricted. Worsley submitted that the proposed amendments should be refused by the Regulator.

Authority's Assessment

146. The Authority considers that there is a need for periodic review of the TMG (for all railway owners) to allow all parties the opportunity of providing their views on the effectiveness of the TMG. The Authority considers that a five year period to the next review is appropriate.
147. The Authority's view is that while the Act allows the Authority to look at operational performance of a railway network in the course of performing its functions, the Authority does not have a general function of monitoring the operational performance of the railway network and its monitoring functions do not extend beyond monitoring a railway owner's compliance with the Act and the Code.
148. The sole avenue available to the Authority to achieve this function is to undertake independent compliance audits of the railway owner's undertakings as outlined in its Part 5 Instruments, including the TMG.
149. In view of recent Parliamentary criticism of internally-managed performance audits undertaken by electricity and water service providers, and the likely consequent amendments to the legislation applicable to these service providers, the Authority considers that all necessary audits should be managed by the Authority, including scoping of audit requirements and appointment of the auditor.
150. In relation to the DAF concern that the ERA may not be able to audit the application of the TMG to all agreements, the Authority notes that section 4A1(c) of the Code states that Part 5 instruments need not apply to out-of-Code agreements. On this basis, the Authority considers that it would be inappropriate to require that the TMG be audited in respect of all agreements.
151. In relation to the DOT concern in relation to the removal of the clause outlining stakeholders ability to express concerns, the Authority considers that this statement is not required as the Authority will as a matter of course investigate any matter of concern raised by a stakeholder and take appropriate action.
152. The Authority considers that compliance audits of the TMG are appropriate only where there are operations on the network pursuant to an access agreement.

Required Amendment 7

Section 4 of Brookfield Rail's proposed TMG should be amended to replace the existing text with text reflecting the following points:

- The Regulator will review the TMG, through a public consultation process, after a five year period from the current review. Brookfield Rail will submit any proposed revisions of the TMG to the Regulator by 1 October 2016 in order to facilitate this review.
- Part 5, section 43(5) of the Code enables Brookfield Rail to amend or replace the TMG at any time, with the approval of the Regulator. Section 43(3) of the Code enables the Regulator to direct Brookfield Rail to amend or replace the TMG with another TMG determined by the Regulator at any time.
- Where there are operations on the network pursuant to an access agreement, the Regulator will monitor Brookfield Rail's compliance with the TMG through an audit of Brookfield Rail's obligations under its Train Management Guidelines conducted every two years. This audit will be carried out by an independent auditor approved by the Regulator, with Brookfield Rail funding the audit. The scope of the audit will be determined by the Regulator and the Regulator will manage the audit. The Regulator will publish the final report on its website (excluding confidential information).
- The Regulator may also commission special audits at any time on any issue where additional assurance is required. Such audits may be internal audits or may be carried out by an independent auditor approved by the Regulator, with Brookfield Rail funding the audit. The scope of the audit will be determined by the Regulator and the Regulator will manage the audit. The Regulator will publish the final report on its website (excluding confidential information)

Deleted Annexure - Control and Management of Access to Network

Brookfield Rail's Proposal

153. Brookfield Rail has proposed the deletion of Control and Management of Access to Network Annexure (Section 6.1 of the current TMG). This Annexure sets out:
- The obligations on the Network Access provider, including (amongst other things) to undertake the function of train control, comply with the TMG; safely and efficiently operate the Network et cetera; and
 - The warranty of the Operator in relation to rolling stock standards and train crews and the other obligations of an Operator.

Public Submissions

154. QRN noted that the current TMG requires Brookfield to give reasonable notice and consult with the operator if a proposed change to the communications equipment will result in the operator having to replace or upgrade its communications equipment. The inclusion of requirements regarding communications equipment is related to the management of capacity and should be included in the TMG for transparency.. Changes to these communication interfaces may adversely impact operators and as such should be taken into consideration when making a cost-benefit assessment of proposals. QRN submitted that Brookfield Rail should be required to conduct a consultation process for any changes to the interfaces associated with the control and management of the network.

Authority's Assessment

155. Section 6.1 of the current TMG outlines the basic legal rights and obligations of parties to access agreements. These provisions do not relate to train management but to the base-line responsibilities of both parties pursuant to an access agreement.
156. The Authority notes that the basic legal responsibilities of parties to an access agreement (such as network access providers obligations and Operator's warranty in relation to rolling stock standards) are enshrined in licensing laws and are more properly contained within an access agreement than the TMG. Schedule 3 of the Code lists these particular matters as necessary inclusions in an access agreement.
157. Similarly, the Authority does not consider that financial considerations around changes to communications interfaces should be the subject of a TMG document, but should be detailed in an access agreement.

Draft Determination

158. The Authority does not require Brookfield Rail to make any amendments to section 6.1 of the proposed TMG.

Deleted Annexure - Environmental and Dangerous Goods

Brookfield Rail's Proposal

159. Brookfield Rail has proposed the deletion of the Environmental and Dangerous Goods Annexure (Section 6.2 of the current TMG). This Annexure sets out:
- Obligations on Operators to include details of dangerous goods in Train Manifests;
 - Obligations on Operators to provide the Network Operator with details of incidents involving dangerous goods;
 - Obligations on the Network Operator to inform Operators of issues relating to environmental conditions.

Public Submissions

160. No comments were made in the public submissions about the proposed deletion of section 6.2 of the current TMG.

Authority's Assessment

161. The Authority notes that the basic safety responsibilities relevant to parties to an access agreement are outlined in section 9 of the *Rail Safety Act 2010* and are more properly contained within an access agreement than the TMG. Schedule 3 of the Code refers to compliance with the *Rail Safety Act 1998* as a necessary inclusion in an access agreement. The Authority notes the replacement of this Act with the *Rail Safety Act 2010*.

Draft Determination

162. The Authority does not require Brookfield Rail to make any amendments to section 6.2 of the approved TMG.

Section 5 - Definitions

Brookfield Rail's Proposal

163. Brookfield Rail has proposed a number of amendments to definitions applied in the TMG.

Public Submissions

164. No comments were made in the public submissions about the proposed amendments to definitions applied in the TMG.

Authority's Assessment

165. The Authority notes that Brookfield Rail has sought to align the definitions in the TMG with definitions that are contained in the Act and the Access Code.
166. The Authority will require Brookfield Rail to reinstate any definitions that are relevant to sections of the TMG that were proposed by Brookfield Rail to be deleted but which the Authority has required to be re-instated.
167. The Authority will provide a list of required amendments to Section 5 as part of its final determination on Brookfield Rail's TMG.

Draft Determination

Required Amendment 8

Section 5 of Brookfield Rail's TMG should be amended to include definitions relevant to any sections of the TMG which Brookfield Rail has proposed to delete, but which the Authority requires to be re-instated.