

Brookfield Rail

Final Determination on Proposed Revised
Train Management Guidelines

November 2012

Economic Regulation Authority

WESTERN AUSTRALIA

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FINAL 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 issued its draft determination on Brookfield Rail’s proposed TMG on 10 August 2012. This draft determination approved the proposed TMG subject to eight amendments.
5. The Authority has considered Brookfield Rail’s proposed TMG in conjunction with comments made in submissions to the Authority on Brookfield Rail’s proposal and on the draft determination.
6. The final determination of the Authority is to approve Brookfield Rail’s proposed TMG subject to eight amendments. These amendments are listed below.

List of Amendments

Required Amendment 1

- 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, with reference to “Brookfield Rail” in place of “WestNet”;

- Replace the first paragraph and first two dot points of clause 3.5 with the following text:

Brookfield Rail may perform repairs, maintenance or upgrading of the Network, or take possession of any part of the Network, at any time. Possession of the Network means closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading. Brookfield Rail need not obtain the Operator's consent to take possession of the Network. If possession of the Network is reasonably likely to materially affect the Train Paths, Brookfield Rail must, prior to commencement of the works:

- (i) take all reasonable steps to minimise any disruption to the Train Paths.
- (ii) use its best endeavours to provide alternative Train Paths which are useable in respect of other elements of the Operator's logistics chain.

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:

- 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(6) 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.
- Stakeholders have the ability to raise any concerns in relation to the TMG with the Regulator, and the Regulator may investigate such claims.
- 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 TMG 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

7. WestNet Rail was acquired in 2009 by Brookfield Infrastructure Partners L.P. as part of its investment in and subsequent merger with Prime Infrastructure. WestNet Rail announced that it would become Brookfield Rail in August 2011, aligning its name with that of its parent company.
8. 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.
9. Brookfield Rail's rail network is subject to the Code developed as a requirement of the Western Australian *Railways (Access) Act 1998 (Act)*.
10. 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.
11. The TMG is a statement of principles, rules and practices that will be applied in the real time management of services on the network.
12. 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.
13. In making this final determination, the Authority is mindful of the legislative requirements of the *Rail Safety Act 2010* and the role of the Rail Safety Regulator in TMG related areas. The TMG will need to comply with the requirements of the *Rail Safety Act 2010*.

Legislative requirements

14. 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.

15. 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

16. 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.

17. 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 due to the extent of those revisions.
18. On 10 August 2012, the Authority issued a notice on its website calling for submissions from interested parties on the Authority's draft determination on Brookfield Rail's proposed TMG by 7 September 2012.
19. Three public submissions were received, from:
 - Asciano
 - Brookfield Rail
 - QR National

These submissions are available on the Authority's website.

Scope of matters considered in the Final Determination

20. This final 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.
21. There were some issues raised in submissions that address the application of the Code and other matters that are not relevant to the determination of an appropriate TMG meeting the requirements of the Code.
22. These issues have not been addressed in this final determination, except where they relate to the application of the TMG to out-of-Code agreements. This issue is addressed briefly here, as it has been raised by Asciano in its submission, and was the only matter addressed by QR National in its submission.
23. At clause 1.1.3 of Brookfield Rail's proposed TMG, the following words were included:

Brookfield Rail will only apply the TMG to operations on the Network which exist pursuant to an Access Agreement.

The Authority has required the removal of the word "only" as part of Required Amendment 1.
24. In its submission, Asciano requested that Brookfield Rail clarify how the TMG will be applied to any access agreement outside the Code. In relation to this, the Authority notes that the Code requires, at clause 4A(c), that a Part 5 instrument:

... 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.
25. The application of the TMG to out-of-Code agreements is therefore not a consideration of this review, which is concerned with the proper constitution of the TMG as required under the Code.

26. QR National submitted that the definition of access agreement in the TMG should be amended to reflect clause 4A(c) of the Code which allows, where the parties agree, for the Part 5 instruments to apply to access agreements negotiated outside the Code. QR National addresses a range of issues in its submission related to the technical difficulties of operating a railway network in accordance with multiple management guidelines.
27. The Authority recognises the technical difficulties identified by QR National in its submission. Brookfield Rail has advised in its submission that it intends to apply the TMG to all operations on the Network, regardless of the nature of the access arrangements.
28. The ERA does not have a role in overseeing the application of the TMG for the purpose of managing capacity subject to an access agreement outside the Code. The ERA does not have a role in determining the manner in which the TPP is written to apply to out-of-Code agreements.
29. It is not possible to change the definition of “Access Agreement” in the TMG as it would then be inconsistent with the definition of access agreement in the Code. The Authority notes references to “agreement for access” in the Code. “Agreement for access” is a not term defined in the Code, although it is used in clause 4A(b) of the Code. The term “agreement for access”, used in the context of the Part 5 Instruments, is taken to mean any agreement for access, including an access agreement – that is, an agreement for access either inside or outside the Code.
30. The Authority notes that the provisions of clause 4A(c), which outline that Part 5 instruments do not apply to out-of-Code agreements, were gazetted in 2009. This review of Brookfield Rail’s TMG is the first to occur since that Code amendment.
31. The Department of Treasury is currently undertaking a Code Review process, which will invite public comment. An interested party may raise any concern that it has with the operation of section 4A of the Code with the Department of Treasury in conjunction with that review.
32. The Authority is able to notify the Minister of any concern that it has, or that has been brought to its attention, in relation to the operation of the Code, under section 49 of the Code.
33. The Authority has notified the Treasurer in writing of the concerns brought to its attention by stakeholders in respect of the limited applicability of Part 5 instruments.

Final Determination

34. The eight required amendments set out in the draft determination have been listed below. Each of these amendments is followed by:
 - An outline of the comments on the amendment in public submissions.
 - The Authority’s assessment of the public submission comments.
 - The Authority’s final determination.

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.

Public Submissions

35. Brookfield Rail supported all elements of Required Amendment 1 in its submission.
36. Asciano and QR National did not make any comment in relation to Required Amendment 1, other than those referred to in “Scope of matters referred to in the Final Determination” above.

Authority Assessment

37. The Authority confirms Required Amendment 1 of the draft determination.

Final 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.

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”.

Public Submissions

38. Brookfield Rail supported Required Amendment 2 in its submission.
39. Asciano and QR National did not make any comment in relation to Required Amendment 2.

Authority Assessment

40. The Authority confirms its position as set out in the draft determination.

Final 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".

Draft Determination – 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".

Public Submissions

41. Brookfield Rail supported Required Amendment 3 in its submission.
42. Asciano and QR National did not make any comment in relation to Required Amendment 3.

Authority Assessment

43. The Authority confirms its position as set out in the draft determination.

Final Determination

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".

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.*

Public Submissions

44. Brookfield Rail supported the first dot point element of Required Amendment 4 in its submission. Brookfield Rail did not support the second and third dot point elements of Required Amendment 4 on the basis that these elements fall within the requirement to “take all reasonable steps to minimise any disruption to the Train Paths” as outlined in section 3.5(i) of the current TMG.
45. Asciano submitted that its concerns in relation to clause 3.5.1, as outlined in its submission on Brookfield Rail’s proposed TMG, have largely been addressed by Required Amendment 4.
46. QR National did not make any comment in relation to Required Amendment 3.

Authority Assessment

47. The Authority does not accept Brookfield Rail’s contention that the provisions under clause 3.5(i) of the current TMG address the matter of providing alternative train paths that align with operators’ supply chain availability or are otherwise ‘useable’ by the operator. Clause 3.5(i) of the current TMG refers to an undertaking to minimise disruption to existing train paths, and does not refer to minimising any disruption caused by altering existing train paths.
48. The Authority nonetheless acknowledges that the provisions of clause 3.5 of the current TMG are aimed at minimising disruption to operators’ (or customers of operators) logistics chains. This is apparent in the provisions relating to notice required to be given to operators by Brookfield Rail in advance of disruptions of significant duration. These provisions provide an opportunity for operators (or their customers) to realign elements of their logistics chain to accommodate disruptions caused by possession of the network by Brookfield Rail.
49. The Authority notes that the initial submission by QR National which raised this matter suggested two examples of considerations that should be taken into account when providing alternative train paths. These were (a) mine major maintenance shutdowns and (b) unavailability of unloading facilities.
50. In view of the nature of the examples provided by QR National, the Authority considers that the second and third dot point element of draft determination Required Amendment 4 may be considered tautological, as they both refer to the useability of an alternative train path with reference to logistics chains.
51. The Authority has altered Required Amendment 4 to provide for a more general reference to the useability of alternative train paths with reference to operators’ logistics chains.

Final 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, with reference to "Brookfield Rail" in place of "WestNet";
- Replace the first paragraph and first two dot points of clause 3.5 with the following text:

Brookfield Rail may perform repairs, maintenance or upgrading of the Network, or take possession of any part of the Network, at any time. Possession of the Network means closure of the relevant part of the Network to all traffic for the purpose of effecting repairs, maintenance or upgrading. Brookfield Rail need not obtain the Operator's consent to take possession of the Network. If possession of the Network is reasonably likely to materially affect the Train Paths, Brookfield Rail must, prior to commencement of the works:

- (i) take all reasonable steps to minimise any disruption to the Train Paths.
- (ii) use its best endeavours to provide alternative Train Paths that are useable in respect of other elements of the Operator's logistics chain.

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".

Public Submissions

52. Brookfield Rail submitted that it does not consider that it is the role of the TMG to dictate the standard to which the Network must be maintained. Brookfield Rail submitted that it is subject to obligations in respect of maintenance standards under its Network Lease and its Accreditation. Brookfield Rail considers that any commitment as to the standard of the Network is a commercial issue that should be dealt with in an Access Agreement.
53. Brookfield Rail submitted that it would be impractical and inappropriate for the ERA to perform a monitoring and audit role (under section 4 of the TMG) in respect of the standard of the Network.
54. Asciano and QR National did not make any comment in relation to Required Amendment 5.

Authority Assessment

55. The Authority notes that the intention of Required Amendment 5 was not to "dictate the standard to which the Network must be maintained" but to provide an assurance to Operators that maintenance standards will either be agreed and upheld by Brookfield Rail over the course of an Access Agreement, or will be to a standard commensurate with

Brookfield Rail's accreditation as a railway owner, or sufficient to maintain the relevant parts of the network at the standard existing at the commencement of an Access Agreement.

56. The Authority notes the wording of the clause proposed by Brookfield Rail to be deleted, and required by the Authority's draft determination to be reinstated, as follows:

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:

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

57. The Authority considers that this clause provides transparency to access seekers on Brookfield Rail's base level of obligation in relation to the agreement of maintenance standards that will apply in the absence of an agreed standard being negotiated as part of an Access Agreement.

58. The Authority does not consider that the inclusion of this clause will require the ERA to audit compliance with whichever standards of network maintenance are agreed as part of an Access Agreement. A query in relation to performance standards agreed to in an Access Agreement would be resolved in respect of the Access Agreement, and not the TMG.

59. The Authority notes that the performance standards for the network, which are attached to the lease agreements between the railway owner and the WA Government, are not available publicly and are not available to the ERA. The ERA is therefore unable to audit these performance standards.

60. The leases require the network to be maintained 'Fit for Purpose', which means it must be kept in a physical condition necessary to meet the initial performance standards or any other standard agreed to by the parties to the lease. This requirement is audited by an independent engineering consultant every five years, and the audit is provided to the Minister for Transport. This audit is not publicly available.

61. The Authority does not consider that the inclusion of this clause creates a material 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 a specific project.

62. The Authority confirms its position as set out in the draft determination.

Final 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".

Draft Determination – 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.*

Public Submissions

63. Brookfield Rail supported Required Amendment 6 in its submission.
64. Asciano and QR National did not make any comment in relation to Required Amendment 6.

Authority Assessment

65. The Authority confirms its position as set out in the draft determination.

Final Determination

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.

Draft Determination – 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)*

Public Submissions

66. Brookfield Rail supported Required Amendment 7 in its submission. Brookfield Rail submitted that the words "access agreements" in this Required Amendment should be replaced by "Access Agreements".
67. Asciano and QR National did not make any comment in relation to Required Amendment 7.

Authority Assessment

68. The Authority notes Brookfield Rail's advice in relation to the capitalisation of the term "Access Agreements".
69. The Authority notes that the term "access agreement" is not capitalised in Part 1 'Definitions' in the Code. The Authority notes that Brookfield Rail has provided a definition of "Access Agreement" in section 5 of its proposed TMG, as having the meaning assigned to "access agreement" in the Code. On this basis, the Authority agrees with the position put by Brookfield Rail in its submission.
70. The Authority notes that Brookfield Rail's proposed TMG does not include provision for periodic review of the TMG. The Code requires at Part 5 (section 45) that the determination of Train Management Guidelines is required with public consultation on commencement of the application of the Code to a railway. The Code does not require periodic review of the TMG following that initial determination.
71. Sections 43(5) and (6) (Part 5) of the Code detail that the railway owner or the Regulator may amend the Train Management Guidelines at any time. The Authority has altered Required Amendment 7 to remove the requirement for periodic review,

and to capitalise the term 'Access Agreement'. A typographical error referring to section 43(4) instead of the correct reference to 43(6) has been corrected in the first dot point of Required Amendment 7 below.

Final Determination

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:

- 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(6) 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.
- Stakeholders have the ability to raise any concerns in relation to the TMG with the Regulator, and the Regulator may investigate such claims.
- 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 TMG 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).

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.

Public Submissions

72. Brookfield Rail supported Required Amendment 8 in its submission.
73. Asciano and QR National did not make any comment in relation to Required Amendment 8.

Authority Assessment

74. The Authority confirms its position as set out in the draft determination.

Final 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.