

The Pilbara Infrastructure Pty Ltd

Draft Determination on the  
Proposed Segregation Arrangements

3 December 2008

Economic Regulation Authority



WESTERN AUSTRALIA

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## DRAFT DETERMINATION

1. The Pilbara Infrastructure Pty Ltd (**TPI**), a wholly owned subsidiary of Fortescue Metals Group Ltd (**FMG**), is the owner of a recently constructed railway (**TPI Railway**) connecting FMG's Cloud Break iron ore mine in the Pilbara to TPI's port facilities at Port Hedland.
2. On 1 July 2008, the TPI Railway was included in the State's rail access regime (consisting of the *Railways (Access) Act 1998* (**Act**) and the *Railways (Access) Code 2000* (**Code**)) through the proclamation of Part 3 of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* (**Agreement Act**).
3. On 3 July 2008, TPI submitted its proposed Segregation Arrangements for the TPI Railway to the Economic Regulation Authority (**Authority**) for approval, in accordance with its obligations under Part 4, Division 3 of the Act. The Agreement Act required TPI to submit its proposed Segregation Arrangements to the Authority no later than seven days after the TPI Railway became subject to the State's rail access regime.
4. The Authority's approval is required, pursuant to section 29(1) of the Act, before TPI can put in place its proposed Segregation Arrangements.
5. The Authority has considered TPI's proposed Segregation Arrangements in conjunction with comments made in submissions to the Authority by interested parties, including a supplementary submission received from TPI addressing issues raised in interested parties' submissions.
6. The draft determination of the Authority is to not approve the proposed Segregation Arrangements on the grounds that these arrangements do not meet the segregation requirements as set out under Part 4, Division 3 of the Act.
7. The Authority directs that 22 amendments be made to TPI's proposed Segregation Arrangements. These amendments are listed below.

## LIST OF AMENDMENTS

### Required Amendment 1

TPI's proposed Segregation Arrangements should be amended by deleting all references to the term "WA Rail Access Regime" and replacing with the term "the Act and the Code", with the exception of the following:

- Part 1.1 on page 1 – no replacement required.
- Part 4.4.2 on page 19 – replace with "the Code".
- Part 7.3 on page 23 – replace with "the Act".

### Required Amendment 2

Part 1.1 of TPI's proposed Segregation Arrangements (headed 'Background') should be amended by inserting the term "(the Act)" immediately after the term "*Railways (Access) Act 1998*" and inserting the term "(the Code)" immediately after the term "*Railways (Access) Code 2000*".

### **Required Amendment 3**

Part 1.2 of TPI's proposed Segregation Arrangements (headed 'WA Rail Legislative Requirements') should be amended by including in the last paragraph in this section on page 4 the following statement: "It is noted that section 29 of the Act allows the Regulator to impose other requirements on TPI, in addition to those covered under sections 31 to 34 of the Act, to further improve the effectiveness of TPI's Segregation Arrangements if required".

### **Required Amendment 4**

Part 1.3.1 of TPI's proposed Segregation Arrangements (headed 'Corporate Structure of TPI and FMG') should be amended as follows:

- The following statement should be included in the third paragraph in this section on page 4: "TPI notes that the objective of the segregation arrangements is to ensure that it complies with the requirements of the Act to segregate its access-related functions from its other functions".
- The organisational structure outlined on page 5 of this section should be amended to provide the following additional information:
  - A detailed description of each position in the structure.
  - The classification of each position in terms of whether it performs access-related functions or other functions.
  - The direct reporting paths in relation to access-related functions, for those positions which perform these functions, to the TPI and FMG boards.
  - The physical location of each position.

### **Required Amendment 5**

TPI's proposed Segregation Arrangements should be amended to remove all references to a staged approach to the implementation of its Segregation Arrangements.

### **Required Amendment 6**

The terms used in TPI's proposed Segregation Arrangements should be amended to ensure that these terms are consistent with the terms used in the Act and the Code.

### **Required Amendment 7**

Part 1.3.2 of TPI's proposed Segregation Arrangements (headed 'Timing of Implementation') should be amended to ensure that this section is consistent with the requirements set out under sections 31, 32, 33 and 34 of the Act.

### **Required Amendment 8**

Part 2 of TPI's proposed Segregation Arrangements (headed 'Specification of Access-Related Functions') should be amended by including the words "as required under the Act and the Code" immediately following the word "matters" in the last dot point sentence on page 8.

### **Required Amendment 9**

Part 4.1 of TPI's proposed Segregation Arrangements (headed 'Definition of Confidential Information') should be amended as follows:

- Include as an addition to the dot point sentence on page 13, which states "train scheduling/planning data, to the extent it identifies specific haulage operations" the

words “including Master Train Control Diagrams and Completed Train Control Diagrams and voice logging tapes from train control”.

- Ensure that the examples of confidential information identified by TPI, under the seven dot point headings in this section (inclusive of the above inclusions), are all included under TPI's Segregation Arrangements from the time these arrangements commence.
- Include a sentence to the effect that TPI will include in its Segregation Manual a list of documents and other information, covering both input and output type information, that it would use to define how it distinguishes confidential information from information that is not specifically protected.

### **Required Amendment 10**

Part 4.2 of TPI's proposed Segregation Arrangements (headed 'Confidential Information Flows') should be amended as follows:

- Additional information should be provided comprising examples of the circumstances under which the Commercial/Compliance Officer would disclose confidential information and the specific information which would be disclosed in these circumstances.
- Clarification should be provided on the extent to which the Commercial/Compliance Officer is the sole custodian for each type of confidential information.
- Clarification should be provided on the extent to which any persons other than the Commercial/Compliance Officer will have access to confidential information.
- The persons recorded on the register should be expanded to include members of the TPI and FMG boards.
- The register should record both names and position titles for each person on the register.
- Persons recorded on the register should be required to sign confidentiality agreements with TPI, forming part of TPI's Segregation Awareness Statement.
- Control measures should be outlined in relation to managing confidential information flows within the executive and board structures of TPI and FMG. This outline should, at a minimum, be equivalent to the measures outlined under section 4 (from paragraph 11 on page 5 to the end of section 4 on page 6) of WNR's 2003 Segregation Arrangements and should include the following:
  - Description of procedures to protect confidential information that will allow the boards of TPI and FMG to carry out their statutory duties.
  - Specifying that management meetings in relation to access-related issues will not include representatives of the arm of TPI or related entities of TPI involved in operating train services.
  - Specifying the nature of the contents of management reports on access-related issues to be given to TPI and FMG management, directors and board members, in that management reports at group level should only provide aggregate financial and operating data and should not identify individual access seekers or operators.
  - Clearly defining confidential information when such information is provided to management, directors or board members.
- A statement should be added, following inclusion of the above information, to the effect that the detail of the control measures in relation to managing confidential

information flows within the executive and board structures of TPI and FMG will be included in TPI's Segregation Manual.

### **Required Amendment 11**

Part 4.2.1 of TPI's proposed segregation Arrangements (headed 'Hard Copy Access') should be amended to include the following additional measures to control access to TPI's hard copy confidential information:

- This information should be stored in a secured compactus or similar facility within the access management area of TPI's premises.
- The access management area should be locked when not attended by TPI staff.
- TPI staff involved in access-related functions within the access management area of TPI's premises should be located in a separate secured area.
- Train control centres should be secured with entry controlled by TPI.
- Entry to the access management area should only be available to TPI staff who have signed TPI's Segregation Awareness Statement.
- Entry to the access management area should only be available to TPI staff approved by TPI's General Manager, or equivalent.

### **Required Amendment 12**

Part 4.2.2 of TPI's proposed Segregation Arrangements (headed 'Electronic Access') should be amended to include the following additional measures to control access to TPI's electronic confidential information:

- The access of users, logging onto TPI/FMG's computer network, to shared files, information systems, e-mail and the ability to generate reports should be automatically restricted to information relating to that user's company, functional area and section.
- The arrangements for the generation and management of user ID's and passwords within TPI need to be detailed. The authority to allocate passwords within TPI should reside with the TPI General Manager, or equivalent.
- TPI should store its electronic confidential information on a dedicated and stand-alone computer file server, separate from both FMG and TPI's non-access related functions.
- Access to TPI's electronic confidential information system should be controlled by ensuring that access to this information can only be given by the TPI General Manager, or equivalent, and will only be given to persons who have signed TPI's Segregation Awareness Statement.
- Further restrictions, beyond those listed above for the TPI/FMG computer network, should apply to users of this computer network who require access to the TPI's electronic confidential information system. These restrictions should ensure that users accessing this electronic confidential information system are automatically restricted in the functions available to them and the information they can access and report on according to their user ID and the approval of the TPI General Manager, or equivalent, to the level of access sought.
- In regard to TPI's electronic data on rail operations (such as train movements and tonnages) as proposed to be contained in its Operations Management System, this system should have appropriate controls on the data to ensure the protection of confidential data.

- Access to TPI's electronic confidential data held in its Operations Management System should be controlled by ensuring that access to this confidential data can only be given by the TPI General Manager, or equivalent, and will only be given to persons who have signed TPI's Segregation Awareness Statement.
- Further restrictions, beyond those listed above for the TPI/FMG computer network, should apply to users of this computer network who require access to the TPI's electronic confidential data held in its Operations Management System. These restrictions should ensure that users accessing the confidential data in TPI's Operations Management System are automatically restricted in the functions available to them and the information they can access and report on according to their user ID and the approval of the TPI General Manager, or equivalent, to the level of access sought.
- The process of granting access and usage to TPI's electronic confidential information system and confidential data in its Operations Management System should be capable of being audited.

### **Required Amendment 13**

Part 4.3.1 of TPI's proposed Segregation Arrangements (headed 'Transfers') should be amended to include the following:

- TPI should preclude the ability of staff to transfer between positions involved in performing access-related functions and positions involved in performing other functions where the occupant of the access-related position concerned is required to sign TPI's Segregation Awareness Statement, except where the person transferring from that access-related position first spends at least one year undertaking other access-related functions within the Rail Infrastructure Division which do not require the signing of TPI's Segregation Awareness Statement.
- Due to the importance of ensuring the safe and reliable operation and use of its rail network, TPI may wish to consider adopting an exception to the above limitation on staff rotations between access-related functions and other functions in the case of emergencies, as set out in section 5 of WNR's 2003 Segregation Arrangements. Rotation of relevant staff under emergency conditions should only occur after TPI advises the Authority of 1) the circumstances of the emergency; 2) the expected duration of the emergency; and 3) the specific measures TPI would take to protect confidential information and to protect against conflicts of interest including those people who are proposed to be used signing TPI's Segregation Awareness Statement.

### **Required Amendment 14**

Part 4.3.2 of TPI's proposed Segregation Arrangements (headed 'Consultants') should be amended to include the sentence as follows: "Where it is necessary for TPI to disclose confidential information to a consultant, the consultant would be required to sign TPI's Segregation Awareness Statement".

### **Required Amendment 15**

Part 4.4.1 of TPI's proposed Segregation Arrangements (headed 'Segregation Awareness Statement') should be amended to include the following measures:

- The Segregation Awareness Statement should incorporate a commitment to safeguard confidential information in the form of a confidentiality agreement.

- A copy of the Segregation Awareness Statement, including the confidentiality agreement incorporated as part of this statement, should be included in TPI's Segregation Manual.

#### **Required Amendment 16**

Part 3 of TPI's proposed Segregation Arrangements (headed 'Avoidance of Conflict of Interest') should be amended to include the following additional measures:

- Insert the sentence "TPI will manage its access related functions so that, for relevant officers, no conflicts of interest exist."
- Train scheduling and train control functions are required to be undertaken by TPI staff who have signed TPI's Segregation Awareness Statement.
- Provide a statement to the effect that operators may prepare amendments to daily or weekly plans for services which experience variable demand or variable destinations provided that they do not interfere with other operators rights and subject to TPI having ultimate control of such changes and that this process will be covered by a procedure in the Segregation Manual.
- Common membership of the TPI and FMG boards should be minimised to the extent possible in order to avoid potential conflicts of interest.
- In addition to the requirements listed above, TPI should make appropriate changes to this section consistent with those other amendments in this draft determination relevant to this section.

#### **Required Amendment 17**

Part 5 of TPI's proposed segregation Arrangements (headed 'Duty of Fairness') should be amended to include the following additional measures:

- TPI should inform access seekers negotiating within the Code at the outset of negotiations of their rights to confidentiality under its Segregation Arrangements.
- If negotiations have commenced outside the Code and an access seeker subsequently chooses to continue negotiations under the Code, through the process as set out under Parts 2 to 4 of the Code, TPI and the access seeker will agree on what information previously supplied by the access seeker is subject to the confidentiality provisions of these arrangements.
- The mechanisms for ensuring TPI's Duty of Fairness should be stated, as follows:
  - Access seekers can determine the fairness of prices negotiated through an application to the Regulator pursuant to section 21(1) of the Code.
  - TPI's standard access agreement for access seekers should provide for specific consultation mechanisms, the provision of information and dispute resolution mechanisms. This should allow these access seekers to test the duty of fairness related to other than price issues in the provision of access.

#### **Required Amendment 18**

Part 6 of TPI's proposed Segregation Arrangements (headed 'Preparation of Accounts and Records') should be amended to include the following additional measures:

- TPI staff should control the information used to produce its regulatory accounts.
- TPI staff should control the data used to generate invoices for access customers.

- The collection of the payments to be performed by FMG's Finance Group should be based on information supplied by TPI staff. Detailed information supporting invoicing should be provided direct to customers by TPI.
- There should be procedures to ensure that confidential information provided by TPI to support the billing process is protected. These procedures should be detailed in TPI's Segregation Manual.
- Consistent with Required Amendment 10 of this draft determination:
  - Financial information provided by TPI to FMG's Finance Group for normal internal reporting purposes should be aggregated to prevent disclosure of confidential information.
  - FMG Finance group staff and auditors given access to confidential information should be recorded on TPI's register and should sign TPI's Segregation Awareness Statement.

### **Required Amendment 19**

Part 7.1 of TPI's proposed Segregation Arrangements (headed 'Preparation of Segregation Manual') should be amended to include the following:

- An outline of the Segregation Manual document, in terms of major headings.
- A list of the documents and processes governed by the Segregation Manual, and the relationship of those to the Segregation Manual (i.e., whether they are part of the Segregation Manual or maintained under a separate, defined process).
- A list of the information to be included in the Segregation Manual, which should be similar to the equivalent list in section 3 of WNR's 2003 Segregation Arrangements, including the following:
  - Copy of the register for recipients of confidential information.
  - Copy of the Segregation Awareness Statement including the Confidentiality Agreement.
  - A description of each position in TPI's organisational structure, the classification of these positions according to whether they perform access-related functions or other functions and the physical location of these positions.
  - The procedures to ensure that billing-related confidential information is protected.
  - The measures and commitments in relation to the protection of confidential information, the types of behaviour which breach the segregation arrangements, the appropriate corrective action for each breach and notification and reporting procedures for breaches.
  - The information required to be included in TPI's Segregation Manual as set out under Required Amendments 9,10,15,16 and 18 of this draft determination.
- Acknowledgement that TPI's Segregation Manual and Segregation Arrangements are both required to be submitted to the Regulator in order for the Regulator to assess TPI's compliance with the segregation requirements under Part 4, Division 3 of the Act.
- Acknowledgement that the Regulator will undertake public consultation on TPI's Segregation Manual prior to making a final determination pursuant to section 29(1) of the Act.

### **Required Amendment 20**

Part 7.2 of TPI's proposed segregation Arrangements (headed 'Audit and Compliance') should be amended as follows:

- The words "10 business days" in the last paragraph on page 22, should be deleted and replaced with the words " 5 business days".
- A fourth dot point should be added on page 23. The statement inserted under this dot point should be; "other KPIs, as agreed between the Regulator and TPI, which measure the effectiveness of TPI's Segregation Arrangements".

### **Required Amendment 21**

Part 7.3 of TPI's proposed segregation Arrangements (headed 'Complaints Handling') should be amended as follows:

- Delete the dot point on page 23 which states; " advise the Regulator within 30 days of any complaint it receives" and insert a new sentence stating; " TPI will advise the Regulator within 10 business days of any complaint it receives and the action it is taking to investigate the complaint".
- Add the words "and the Regulator" immediately after the word "complainant" under the second dot point on page 23.

### **Required Amendment 22**

Part 8 of TPI's proposed segregation Arrangements (headed 'Definitions') should be amended as follows:

- Include a complete list of all the terms used in TPI's proposed Segregation Arrangements which might reasonably be expected to require a definition.
- All definitions should:
  - Be consistent with the definitions in the Act and the Code.
  - If not defined in the Act and the Code, be consistent with the definitions on pages 9 and 10 of WNR's 2003 Segregation Arrangements where possible.

## REASONS FOR THE DRAFT DETERMINATION

### BACKGROUND

8. The TPI Railway was commissioned in May 2008. This railway is about 260 kilometres in length and runs from FMG's Cloud Break iron ore mine in the Chichester Ranges (East Pilbara) to TPI's port facilities at Anderson Point in Port Hedland.
9. On 1 July 2008, the TPI Railway became subject to the Act and the Code through the proclamation of Part 3 of the Agreement Act.
10. The TPI Railway is owned and will be operated by TPI. TPI will perform both access-related rail functions and functions associated with the operation of train services (rail operations).
11. As of 1 July 2008, TPI was required to comply with the legislative obligations set out for railway owners under the Act and the Code.
12. Part 4, Division 3 of the Act, sets out the segregation obligations applicable to TPI in relation to the TPI Railway. The Agreement Act required TPI to submit its proposed Segregation Arrangements to the Authority no later than seven days after the TPI Railway became subject to the State's rail access regime.
13. On 3 July 2008, TPI submitted its proposed Segregation Arrangements for the TPI Railway to the Authority for approval. This submission is available on the Authority's web site ([www.era.wa.gov.au](http://www.era.wa.gov.au)).
14. Under Part 4, Division 3 of the Act, TPI is required to obtain the Authority's approval prior to putting its Segregation Arrangements into place.

### LEGISLATIVE REQUIREMENTS

15. The legislative requirements in relation to segregation are contained under Part 4, Division 3 of the Act (Sections 28 to 34). These requirements are as follows:

#### Duty to segregate (Section 28)

- (1) A railway owner must make arrangements to segregate its access-related functions from its other functions.
- (2) A railway owner must have appropriate controls and procedures to ensure that the measures in place under subsection (1) —
  - (a) operate effectively; and
  - (b) are complied with.

#### Powers of Regulator in relation to Segregation (Section 29)

- (1) Before a railway owner puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28 it must obtain the Regulator's approval to the arrangement or variation.
- (2) In addition to subsection (1), the Regulator may confer with a railway owner on any matter which relates to the way in which the railway owner's obligations

under section 28 are to be carried out, with a view to the Regulator and the railway owner reaching agreement on the matter.

- (3) The Regulator may give directions in writing to a railway owner with respect to a matter to the extent that agreement is not reached under subsection (2), and the railway owner is to comply with any such direction.
- (4) If a railway owner fails to comply with —
  - (a) an arrangement, or varied arrangement, approved under subsection (1);
  - (b) an agreement reached under subsection (2); or
  - (c) a direction given under subsection (3),the railway owner commits an offence.

Penalty: \$100 000.

#### Matters to be covered under section 28 (Section 30)

Without limiting section 28, in carrying out its obligations under that section a railway owner must ensure that the provisions of sections 31, 32, 33 and 34 are satisfied.

#### Protection of confidential information (Section 31)

- (1) There must be an effective regime designed for the protection of confidential information relating to the affairs of persons seeking access or rail operators from —
  - (a) improper use; and
  - (b) disclosure by relevant officers, or other persons, to other officers or employees of the railway owner or other persons, except for proper purposes.
- (2) In this section —

**confidential information** means information that has not been made public and that —

  - (a) is by its nature confidential;
  - (b) was specified to be confidential by the person who supplied it; or
  - (c) is known by a person using or disclosing it to be confidential.

#### Avoidance of conflict of interest (Section 32)

The arrangements under section 28 must be such as to ensure that a relevant officer does not have a conflict between his or her duties —

- (a) as a person concerned in the performance of access-related functions, on the one hand; and
- (b) as a person involved in other business of the railway owner, on the other.

#### Duty of fairness (Section 33)

In performing their functions relevant officers must not have regard to the interests of the railway owner in a way that is unfair to persons seeking access or to other rail operators.

#### Maintenance of separate accounts and records (Section 34)

A railway owner must ensure that its accounts and records are in such form as to enable —

- (a) all income, expenditure, assets and liabilities relating to the carrying out of its access-related functions to be properly recorded and distinguished from the railway owner's other income, expenditure, assets and liabilities; and

- (b) where necessary, any item of income, expenditure, assets or liabilities which relates only in part to the carrying out of its access-related functions to be apportioned in a fair and reasonable manner.
16. Section 20(4) of the Act provides the framework within which the Authority's approval, as required under Section 29 of the Act, is to be made. Section 20(4) states:
- In performing functions under this Act or the Code, the Regulator is to take into account –
- (a) the railway owner's legitimate business interests and investment in 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 benefit to the public from having competitive markets.
17. In exercising its decision-making power pursuant to Section 29, the Authority is required to take into account all the factors listed in Section 20(4). However, the Authority may allocate such weight to each of the factors listed in Section 20(4) as the Authority considers appropriate in order to ensure a balancing of competing and sometimes conflicting interests for the railway owner, rail operators, access seekers and the public.

## PUBLIC CONSULTATION

18. The Code, under Section 42, requires the Authority to undertake public consultation prior to approving any arrangement or variation as mentioned in Section 29(1) of the Act. The consultation period specified in the Act is to be not less than 30 days.
19. On 14 July 2008, the Authority issued a notice calling for public submissions on TPI's proposed Segregation Arrangements by 26 August 2008. Five submissions were received, as follows:
- The Australian Rail Track Corporation Ltd.
  - Hancock Prospecting Pty Ltd.
  - The North West Iron Ore Alliance.
  - United Minerals Corporation NL.

- Yilgarn Infrastructure Ltd.
20. Subsequent to the above submissions being placed on the Authority's web site, TPI requested the Authority's agreement to make a supplementary submission addressing some issues raised in the public submissions. This agreement was provided and TPI's supplementary submission was received by the Authority on 15 October 2008.
  21. The public submissions and TPI's supplementary submission are available on the Authority's website ([www.era.wa.gov.au](http://www.era.wa.gov.au)).

## SCOPE OF THE MATTERS COVERED UNDER THE DRAFT DETERMINATION

22. The Draft Determination deals with the segregation requirements set out under Part 4, Division 3 of the Act. Some comments made in the public submissions are outside the scope of matters dealt with under this section of the legislation and, consequently, have not been included in the discussion of relevant issues set out in this draft determination.
23. Comments which fall into this category include comments relating to matters outside the rail access regime (such as comments on the iron ore market and the intent of the Agreement Act and comments relating to matters which are covered elsewhere in the rail access regime (such as Part 5 Instruments and Access Agreements).
24. Yilgarn Infrastructure Ltd provided, by way of a submission, a document submitted to the National Competition Council in 2005, entitled "A case for avoiding vertically integrated rail infrastructure in "greenfield" mining regions". In general, the comments contained therein were not considered to be within the scope of this determination as these comments did not specifically address the proposed Segregation Arrangements submitted to the Authority by TPI.
25. Comment has also been made on the issue of the port facilities at Port Hedland owned and operated by TPI in the context of the segregation arrangements. The Authority considers TPI's activities related to its port fall into TPI's 'other functions' under the terms of section 28 of the Act. As noted above, this section of the Act requires a railway owner to segregate its access-related functions from its other functions.

## DISCUSSION OF ISSUES

26. TPI's has set out its proposed Segregation Arrangements in eight parts. Each part of TPI's proposed Segregation Arrangements is discussed, with reference to the relevant section of the Act as appropriate, under the headings listed below, as follows:
  - Background Information and Section 28 of the Act (deals with Parts 1 and 2 of TPI's proposed Segregation Arrangements on pages 3 to 9).
  - Protection of Confidential Information under Section 31 of the Act (deals with Part 4 of TPI's proposed Segregation Arrangements on pages 12 to 19).

- Avoidance of Conflict of Interest under Section 32 of the Act (deals with Part 3 of TPI's proposed Segregation Arrangements on pages 9 to 12).
  - Duty of Fairness under Section 33 of the Act (deals with Part 5 of TPI's proposed Segregation Arrangements on pages 19 to 20).
  - Maintenance of Separate Accounts and Records under Section 34 of the Act (deals with Part 6 of TPI's proposed Segregation Arrangements on pages 20 to 21).
  - Segregation Manual and Compliance Matters (deals with Part 7 of TPI's proposed Segregation Arrangements on pages 21 to 24).
  - Definitions (deals with Part 8 of TPI's proposed Segregation Arrangements on page 24).
27. To assist the Authority in the preparation of its draft determination the Authority engaged a consultant, PricewaterhouseCoopers, to review TPI's proposed Segregation Arrangements and the public submissions and provide advice to the Authority. The PricewaterhouseCoopers draft report is available on the Authority's web site ([www.era.wa.gov.au](http://www.era.wa.gov.au)).
28. The discussion of each item under the headings above is undertaken in the following order:
- a) A summary of the TPI proposal relating to that item.
  - b) An outline of the comments received in public submissions which relate to that item. Comments provided by TPI in its supplementary submission have been included under this heading, where appropriate.
  - c) PricewaterhouseCoopers' advice in relation to TPI's proposed Segregation Arrangements and the public submission comments received.
  - d) The Authority's assessment.
  - e) Any draft amendments required.
29. It should also be noted that reference has been made in the discussion below to WestNet Rail's (**WNR**) Segregation Arrangements as approved in April 2003. Although these arrangements have since been revised, following WNR's change to a below-rail only organisation, its 2003 Segregation Arrangements are relevant as WNR was at that time part of a vertically integrated rail organisation (Australian Railroad Group (**ARG**)) involved in both below and above rail activities at that time. TPI is part of a vertically integrated rail and mining and port organisation (FMG) involved, on the rail side, in both below and above rail activities. The WNR 2003 Segregation Arrangements are available on the Authority's website ([www.era.wa.gov.au](http://www.era.wa.gov.au)).
30. In the discussion below the names of the parties who made public submissions have been abbreviated. The North West Iron Ore Alliance is **The NWIOA**. United Minerals Corporation is **UMC**. The Australian Rail Track Corporation is **The ARTC**. Yilgarn Infrastructure is **Yilgarn**. Hancock Prospecting submitted two consultants reports on its behalf, from ACIL Tasman and GHD. In the case of the ACIL Tasman report, this is referred to as **Hancock (ACIL)** and the GHD report is referred to as **Hancock (GHD)**.

## Background Information and Section 28 of the Act

31. This section of the draft determination deals with parts 1 and 2 of TPI's proposed Segregation Arrangements as set out on pages 3 to 9 of the TPI Segregation Arrangements proposal.

### Background

#### **TPI's Proposal**

32. This section identifies TPI as the owner of the TPI Railway and provides background information on this railway and the relevant legislative framework applying to the railway as set out in the Agreement Act, the Act and the Code.

#### **Public Submissions**

33. No submissions made comment on this section.

#### **PricewaterhouseCoopers' (PwC) Advice**

34. PwC noted that this section is similar to information contained under section 1 of WNR's 2003 Segregation Arrangements.

#### **Authority's Assessment**

35. The Authority considers that this section of TPI's proposed Segregation Arrangements is appropriate, apart from TPI's reference to the WA Rail Access Regime.
36. The Authority notes that in a number of places throughout its proposed Segregation Arrangements, TPI has referred to the WA Rail Access Regime rather than being more specific and referring to the Act and the Code. The Authority considers that reference to the Act and the Code is more appropriate and is also consistent with WNR's 2003 Segregation Arrangements.

#### **Draft Determination**

##### **Required Amendment 1**

TPI's proposed Segregation Arrangements should be amended by deleting all references to the term "WA Rail Access Regime" and replacing with the term "the Act and the Code", with the exception of the following:

- Part 1.1 on page 1 – no replacement required.
- Part 4.4.2 on page 19 – replace with "the Code".
- Part 7.3 on page 23 – replace with "the Act".

##### **Required Amendment 2**

Part 1.1 of TPI's proposed Segregation Arrangements (headed 'Background') should be amended by inserting the term "(the Act)" immediately after the term "*Railways (Access) Act 1998*" and inserting the term "(the Code)" immediately after the term "*Railways (Access) Code 2000*".

## WA Rail Legislative Requirements

### **TPI's Proposal**

37. This section of TPI's proposed Segregation Arrangements sets out the legislative requirements on railway owners under sections 28 and 30 to 34 of the Act by reference to the relevant section headings under the Act. A paragraph is also included outlining the powers of the Regulator under section 29 of the Act.

### **Public Submissions**

38. Hancock (ACIL) commented (pages 8 to 9) that TPI should outline the implications to the railway owner of the matters mentioned in sections 28, 31-34 of the Act.

### **PricewaterhouseCoopers' (PwC) Advice**

39. PwC advised that it does not consider it crucial for TPI's proposed Segregation Arrangements to contain a paraphrased version of the requirements of sections 31 to 34 of the Act in the manner of section 1 of WNR's 2003 Segregation Arrangements.
40. PwC recommended that this section should provide a similar comment to that contained in section 1 of WNR's 2003 Segregation Arrangements to the effect that under section 29 of the Act the Regulator may impose other segregation requirements on a railway owner in addition to those in sections 31 to 34.

### **Authority's Assessment**

41. The Authority concurs with PwC's advice that the requirements outlined in sections 28 and 31 to 34 of the Act do not need to be paraphrased or summarised in TPI's proposed Segregation Arrangements.
42. The Authority also agrees with PwC's advice on section 29 of the Act, to the effect that TPI should provide additional information noting that the Regulator has the power to impose other segregation requirements on a railway owner in addition to those set out under sections 31 to 34 of the Act.

### **Draft Determination**

#### **Required Amendment 3**

Part 1.2 of TPI's proposed Segregation Arrangements (headed 'WA Rail Legislative Requirements') should be amended by including in the last paragraph in this section on page 4 the following statement: "It is noted that section 29 of the Act allows the Regulator to impose other requirements on TPI, in addition to those covered under sections 31 to 34 of the Act, to further improve the effectiveness of the TPI Segregation Arrangements if required".

## Implementation of Segregation Arrangements

### Corporate Structure of TPI and FMG

#### **TPI's Proposal**

43. This section of TPI's proposed Segregation Arrangements provides an outline of TPI's role as a transport and logistics provider in the Pilbara region with rail and port facilities serving FMG's mining operations in the region. A broad overview of TPI's organisational structure for the TPI Railway showing key positions is also included. This section notes that TPI will perform both access-related rail functions and rail haulage functions.

#### **Public Submissions**

44. The NWIOA made a number of comments on TPI's organisational framework (page 20). The NWIOA noted that TPI should ensure that its Activities business unit does not carry out other activities and has separate staff with their own work areas from which staff of other business units are physically excluded. The NWIOA also commented that TPI should establish and maintain stringent information technology access controls between the Activities business unit and other functions.
45. Hancock (ACIL) commented that section 28 of the Act required that the railway owner must segregate its access-related functions from its other functions and that TPI's Segregation Arrangements must ensure appropriate segregation of TPI's rail infrastructure functions from both FMG and TPI rail haulage functions.

#### **PricewaterhouseCoopers' (PwC) Advice**

46. PwC noted that based on the information in this section, complemented by additional information on TPI's organisational structure elsewhere in its proposed Segregation Arrangements, there would be crossovers, multi-skilling and information sharing across TPI's access-related functions and its other functions.
47. PwC concluded that there is a lack of clear separation demonstrated in TPI's proposed Segregation Arrangements between TPI's access-related functions and its other functions, as required under section 28 of the Act.
48. Based on the above, PwC recommended that TPI should provide a more detailed description of each position in its structure, its classification according to whether it performs access-related functions or other functions and the physical location of each position.

#### **Authority's Assessment**

49. The Authority agrees with the comments in submissions to the effect that TPI needs to ensure that its access-related functions are appropriately segregated from its other functions, such as haulage-related tasks, in order to meet the requirements of section 28 of the Act.
50. The Authority considers that TPI should include a statement in this section of its proposed Segregation Arrangements noting that the objective of the Segregation Arrangements is to ensure that TPI complies with the requirements

of the Act to segregate its access-related functions from its other functions. A similar statement is included in section 1 of WNR's 2003 Segregation Arrangements.

51. In addition, the Authority concurs with PwC that TPI needs to provide more detail in its organisational structure to clearly indicate how its access-related functions will be separated from its other functions.

## Draft Determination

### Required Amendment 4

Part 1.3.1 of TPI's proposed Segregation Arrangements (headed 'Corporate Structure of TPI and FMG') should be amended as follows:

- The following statement should be included in the third paragraph in this section on page 4: "TPI notes that the objective of the segregation arrangements is to ensure that it complies with the requirements of the Act to segregate its access-related functions from its other functions".
- The organisational structure outlined on page 5 of this section should be amended to provide the following additional information:
  - A detailed description of each position in the structure.
  - The classification of each position in terms of whether it performs access-related functions or other functions.
  - The direct reporting paths in relation to access-related functions, for those positions which perform these functions, to the TPI and FMG boards.
  - The physical location of each position.

## Timing of Implementation

### TPI's Proposal

52. This section of TPI's proposed Segregation Arrangements outlines a two-stage process for implementing its segregation arrangements. TPI notes that its staged approach is aimed at ensuring effective and safe implementation of rail and haulage operations.
53. Under Stage 1 of TPI's proposal, which is intended to apply from the commencement of TPI's railway operations, there will not be complete functional separation of access-related functions and haulage functions within TPI on a day to day basis.
54. TPI proposes that Stage 2 of its segregation arrangements will be developed from the time the first access agreement is signed with a third party access seeker with these arrangements coming into force, subject to the Regulator's approval, no later than six months prior to the commencement of the access seeker's rail operations.
55. TPI offers justification of its staged approach by citing the Tarcoola to Darwin railway, regulated under the AustralAsia Railway Access Regime, as a precedent.

56. TPI also raises the need to avoid potential adverse safety issues in its early rail operations as a justification for its proposed staged approach.
57. A number of statements are made in this section in relation to which TPI employees will perform functions regarding the negotiation of access applications. The statement in the third paragraph on page 6 under the heading “Stage 1” states:
- “The entirety of the access application/negotiation process will be undertaken by a Commercial/Compliance Officer within TPI”
- and the fourth paragraph on page 7 under this heading states:
- “In terms of support services, there will be shared FMG/TPI staff in finance, IT, human resources and payroll functions.”
- The second paragraph under the heading “stage 2” in this section outlines TPI’s intention that, under “stage 2”, staff performing the access-related functions of train control and scheduling will not be involved in performing other functions.

### Public Submissions

58. Submissions were not supportive of the TPI proposed “staged” approach or the citing of the Tarcoola to Darwin railway and the AustralAsia Railway Access Regime as a relevant precedent.
59. In the case of the staged approach to segregation proposed by TPI, the main arguments put forward in submissions against the staged approach were that this approach:
- Was not consistent with the segregation requirements under the Act.
  - Did not have a material effect on safety.
  - Provided market power to FMG.
60. In terms of the first of these points, related to the requirements of the Act, paragraphs 61-63 outline the comments made by parties.
61. Hancock (ACIL) noted that TPI’s proposals to involve FMG staff in access-related functions during Stage 1 are inappropriate and that even under Stage 2 there are several aspects of TPI’s proposals which fail to provide an adequate segregation of functions. Hancock (ACIL) commented that it was made clear in submissions to the Regulator in connection with the 2002 review of segregation arrangements for WestNet Rail that access seekers regard full segregation and confidentiality for the negotiation process as essential.
62. Hancock (ACIL) also noted (page 7) that it did not believe TPI’s two stage segregation proposals to be in the public interest and hence considered that TPI’s proposed Segregation Arrangements did not comply with the Act.
63. The NWIOA disputed TPI’s assertion that “there is no legislative requirement for the access provider to separate its access-related and rail operator functions” (page 6 of TPI’s proposed Segregation Arrangements). At page 16 of its submission, The NWIOA refers to section 28 of the Act and states:
- “The proposed “stage 1” fails to meet the requirements of section 28 of the Act.
  - The Arrangements fail to constitute effective “controls and procedures” that will ensure that the measures in place ... operate effectively and are complied with.

The Alliance notes the clear intention of the Act in this regard; access functions and other functions must be segregated.”

64. In terms of the second point in paragraph 59, related to the safety issue, paragraphs 65-68 outline comments provided by parties.
65. UMC (page 8) contends that the adverse safety and operations implications which are claimed by TPI to be associated with separation are not justified:

“In the presented Segregation Arrangements TPI has not verified any case that the separation of above rail materially affects safety, operation and cost for a railway at the greenfields stage, nor have TPI presented any case that segregation of above rail and below rail will affect integration of mine, rail and port logistics in its own business. It is suggested that these statements by TPI would require clarification by the Regulator in its Draft Determination...”
66. The NWIOA (page 15) concurs with this view:

“... in the presented Segregation Arrangements TPI has not verified any case that the separation of above rail materially affects safety, operation and cost for a railway at the greenfield stage. Nor has TPI presented any case that segregation of above rail and below rail will affect integration of mine, rail and port logistics in its own business”
67. Yilgarn (page 6) of its submission to the National Competition Council on general vertically integrated rail infrastructure in greenfield mining regions stated that:

“... We consider there are legitimate safety concerns irrespective of the terms of access that may result. Those concerns arise not from the fact that the railway will be shared but from the fact that it is operated by a party whose primary interest in establishing the railway was getting its own ore to market – not the provision of optimal multi-user railway services.”
68. The ARTC stated (page 5) that:

“ARTC accepts TPI’s genuine concerns about the impact of segregation in relation to safe and efficient operations but is not aware of any detriments to these aspects of business that are exposed to complete and sometimes more heavy handed segregation arrangements.”
69. In terms of the third point in paragraph 59, related to market power, paragraphs 70-72 outline comments made by parties.
70. The NWIOA (in its covering letter) stated:

“To keep the haulage business integrated with TPI activities during Stage 1 unintentionally provides FMG market power with regard to access negotiation, and as a consequence haulage and mine gate sales. Accordingly, the Alliance would submit that the Segregation Arrangements should not be a staged process”
71. UMC (page 5) also presents the view that TPI’s proposed staged approach provides FMG with an advantage in access negotiation:

“TPI, in basing its proposal on the case that segregation of above and below rail will affect integration of mine, rail and port logistics in its own business which relates more to the efficiency of FMG’s supply chain logistics rather than the efficient use of the railway for all users, which was the intent of the Agreement Act”.

72. Hancock (ACIL) (page 8) stated:
- “FMG will be marketing iron ore in world markets in direct competition with potential Access Seekers. Information regarding future haulage volumes and time frames could easily be misused, and certainly have the potential to give rise to conflicts of interest”
73. Other comments were also made on TPI’s staged approach and these are outlined in paragraphs 74-81.
74. UMC (page 9) expressed concern over the ability of access seekers to be able to negotiate an access agreement under the staged approach, stating that:
- “Maintaining the arguably unfair Stage 1 proposal in place until six months before the first successful third party access negotiation commences appears to make the prospect of achieving such a first time access arrangement unlikely.”
75. The ARTC (page 6) considered that the staged approach did not account for access seekers wanting access to TPI’s railway in the short term, stating that:
- “ARTC expects that there is a likelihood that, in the current market climate, third parties will seek access to the TPI railway sooner rather than later. It has recently been reported that a Pilbara junior iron ore miner has signed a port access agreement with FMG, giving it access to its Port Hedland port facility. The miner was also expected to negotiate a rail haulage agreement with FMG to transport ore to the port. As such any benefits to TPI of the two stage process are likely to be limited in any event to the point where initial segregation may be more cost effective.”
76. It was noted previously that submissions were critical of the comparison drawn by TPI between its railway and the Tarcoola to Darwin railway regulated under the AustralAsia Railway Access Regime, on the basis that TPI used the Tarcoola to Darwin railway as a precedent to justify its staged approach to segregation. The comments made on this matter are outlined below.
77. The NWIOA submission (page 15) presented the view that the Tarcoola to Darwin railway does not present a relevant legal precedent for the arrangements proposed by TPI to apply to its network:
- “...the Alliance does not accept FMG’s contention that the regulatory treatment established under the AustralAsia (Third Party Access) Code is a relevant precedent from an economic or commercial perspective for the TPI segregation arrangements”
78. In addition, The NWIOA (page 15) cites critical and special features of the Tarcoola-Darwin railway that explain the light handed regulation applied to that railway, which do not apply to the TPI railway. These factors are summarised as follows:
- Highly uncertain commercial outlook due to intermodal competition (road and ship)
  - Large public subsidy on capital cost of the railway
  - Requirement to maximise track traffic from all sources
79. The ARTC (page 5) also questioned the comparison with the Tarcoola-Darwin railway drawn by TPI noting that the circumstances of the two railways were quite different.

80. Hancock (GHD) (page 6) concurred with the view that the Adelaide to Darwin railway is not an inappropriate model for regulation of the TPI network because the Adelaide Darwin railway has “other obligations that are relevant only to road competition, a factor not present in the TPI railway”.
81. UMC (page 8) focused on the retention of the rail haulage business within TPI, and its integration with the overall FMG business:
- “The Tarcoola to Darwin Railway is fundamentally different to the TPI Railway as the railway owner does not compete with the rail users in upstream or downstream markets. There are several operators utilising the Tarcoola to Darwin Railway and the railway owners revenue source is access to below rail infrastructure. Unlike the Tarcoola to Darwin Railway (and indeed other parties to the WA Access Code), TPI and other FMG entities not only provide above and below rail infrastructure and haulage services, they also compete directly for iron ore customers which access seekers are also trying to serve...”
82. TPI in its supplementary submission stated (page 3), with regard to its staged segregation approach, that:
- “nowhere do the submissions substantiate why the proposed two stage process increases exposure to conflicts of interest ... the negotiation of contracts will have the same exposure to conflicts of interest irrespective of whether or not partial or full segregation is in place during the negotiation process.”
83. In relation to safety concerns, TPI noted in its supplementary submission (page 3) that the rail network and haulage functions share a common safety system, stating that:
- “The need for very close harmonisation of safety activities is best illustrated by the close interaction between track and wheel maintenance teams. It is critical in establishing a new railway that track hardening and grinding of the rail profile be conducted in close liaison with wheel machining programs.”

#### **PricewaterhouseCoopers’ (PwC) Advice**

84. PwC advised, that in its opinion, the Act does not appear to contemplate a two-stage segregation process. PwC considered that the Act requires TPI to submit a proposed Segregation Arrangements which covers at least the matters set out in sections 31 to 34 of this Act and if these matters are not addressed in full then the Regulator could not approve the Segregation Arrangements. PwC concluded that the incomplete functional separation proposed by TPI under Stage 1 is considered to be inconsistent with the Act.
85. Aside from the issue of compliance with the Act, PwC also noted that the strongest need for segregation arrangements occurs in the access agreement negotiation phase rather than the operations phase which suggests that there is equivalent merit in full implementation of segregation arrangements from the start rather than the staged approach over time as proposed by TPI.
86. In relation to the staged approach leading to enhanced market power for FMG, as suggested in a number of the public submissions, PwC commented that implementing TPI’s Stage 2 segregation arrangements from the start, rather than the Stage 1 arrangements as proposed, would assist in safeguarding against the misuse of market power by TPI/FMG that could arise through it operating its businesses for the benefit of its own group rather than managing its access business separately from its other businesses.

87. PwC also commented on the view of TPI that its staged segregation proposal was justified by access arrangements for the Tarcoola to Darwin railway regulated under the AustralAsia Railway Access Regime. In PwC's view, the obligations under the Act are different to the obligations under the *AustralAsia Railway (Third Party Access) Act 1999* and TPI's obligations are to comply with the specific provisions of the Act.
88. In regard to TPI's view that the staged approach was required to avoid potential adverse safety issues in its early rail operations, PwC noted that rail safety issues would be managed by the Office of Rail Safety under the *Rail Safety Act 1998* and that TPI's Segregation Arrangements would not interfere with its rail safety regime.
89. Based on the above, PwC recommended that TPI should revise its proposed Segregation Arrangements so that an equivalent of its Stage 2 segregation arrangement model applies from the outset of the application of the access regime to the network. The model to be adopted should be the Stage 2 model as proposed by TPI but incorporating changes as required by the Regulator.
90. PwC also commented on terms used in this section of TPI's proposed Segregation Arrangements which are not defined in the Act or Code, such as 'haulage-related functions' and 'infrastructure and haulage operations'. PwC recommended that TPI should use terms consistent with the Act and the Code.

#### **Authority's Assessment**

91. The Authority has considered TPI's proposal to implement its Segregation Arrangements over two stages with Stage 1 being in place initially and Stage 2 coming into force when the first access agreement is signed with a third party access seeker.
92. The first consideration for the Authority is whether such an arrangement is consistent with the obligations on railway owners under Part 4, Division 3 of the Act.
93. The Authority does not consider that TPI's proposed staged segregation approach, as described under this section of its proposed Segregation Arrangements is consistent with the Act, as the Act does not contemplate a two stage process for a railway owner to meet its obligations as set out under sections 31, 32, 33 and 34 of the Act.
94. In particular, the Authority agrees with the view of PwC to the effect that the Act requires TPI to submit proposed segregation arrangements to the Regulator for its approval which cover at least the matters set out under Sections 31, 32, 33 and 34 of this Act. As TPI's proposal involves addressing these four sections of the Act over a period of time under a staged approach rather than addressing these requirements fully from the start, TPI's proposed staged approach is not consistent with the requirements of the Act.
95. The Authority agrees with the intent of the recommendation suggested by PwC but considers that there should not be any reference made to Stage 1 or Stage 2 in TPI's proposed Segregation Arrangements. In addition, the Authority considers that it is responsibility of TPI to review its segregation obligations under the Act and amend this section accordingly. Those parts of this draft

determination dealing with TPI's proposed arrangements under Sections 31 to 34 of the Act should be considered in this regard.

96. In relation to the Tarcoola to Darwin railway being a precedent justifying TPI's staged approach, the Authority agrees with the view expressed by PwC and in a number of submissions to the effect that the obligations on TPI under the Act are different from the obligations on the railway owner under the legislation applying to the Tarcoola to Darwin railway being the *AustralAsia Railway (Third Party Access) Act 1999*.
97. On the issue of safety, which TPI also raised as an issue justifying its staged approach, the Authority agrees with PwC that rail safety matters are dealt with under separate legislation (*Rail Safety Act 1998*) to the Act and that segregation arrangements would not interfere with rail safety matters. The State's third party access regime, comprising the Act and the Code, are not intended to interfere with the operation of the Rail Safety Act.
98. The Authority also agrees with PwC that TPI's use of terms such as 'haulage-related functions' and 'infrastructure and haulage operations' is not consistent with the defined terms under the Act and the Code.

### Draft Determination

#### Required Amendment 5

TPI's proposed Segregation Arrangements should be amended to remove all references to a staged approach to the implementation of its Segregation Arrangements.

#### Required Amendment 6

The terms used in TPI's proposed Segregation Arrangements should be amended to ensure that these terms are consistent with the terms used in the Act and the Code.

#### Required Amendment 7

Part 1.3.2 of TPI's proposed Segregation Arrangements (headed 'Timing of Implementation') should be amended to ensure that this section is consistent with the requirements set out under sections 31, 32, 33 and 34 of the Act.

### Specification of Access-Related Functions

#### TPI's Proposal

99. This section of TPI's proposed Segregation Arrangements outlines the access-related functions identified by TPI for the purpose of addressing the requirements of the Act.

#### Public Submissions

100. Hancock (ACIL) on (page 9) suggests that this section of TPI's proposed Segregation Arrangements should be amended to make reference to the requirements under both the Act and the Code, including the Part 5 Instruments and ensuring that suitable controls, measures and procedures are established to give effect to the segregation arrangements approved by the Regulator.

### **PricewaterhouseCooper's (PwC) Advice**

101. PwC has advised that TPI's outline of its access-related functions under this section is consistent with the equivalent section in WNR's 2003 Segregation Arrangements.
102. PwC also noted, in reference to the comment from Hancock (ACIL) regarding the inclusion of additional information, that it did not consider it essential for such information to be included in TPI's proposed Segregation Arrangements given that these matters are covered through relevant provisions of the Act and the Code.

### **Authority's Assessment**

103. The Authority agrees with PwC's assessment to the effect that this section of TPI's proposed Segregation Arrangements is largely consistent with the equivalent section (section 2) of WNR's 2003 Segregation Arrangements.
104. It is also noted, in reference to the comment from Hancock (ACIL) that this section includes (pages 8 and 9) reference to access-related legislative compliance matters under which the preparation of the Part 5 Instruments and compliance with the Segregation Arrangements are listed.
105. However, the Authority considers that TPI should include an appropriate reference to compliance with the Act and the Code, as contained in WNR's 2003 Segregation Arrangements in order to make it clear that the two items listed under TPI's "access-related legislative compliance matters" dot point on page 8 do not represent a fully inclusive list of all the legislative access-related functions.

### **Draft Determination**

#### **Required Amendment 8**

Part 2 of TPI's proposed Segregation Arrangements (headed 'Specification of Access-Related Functions') should be amended by including the words "as required under the Act and the Code" immediately following the word "matters" in the last dot point sentence on page 8.

### **Protection of Confidential Information under Section 31 of the Act**

106. This section of the draft determination deals with Part 4 of TPI's proposed Segregation Arrangements as set out on pages 12 to 19 of these arrangements.

#### *Definition of Confidential Information*

### **TPI's Proposal**

107. This section outlines TPI's understanding of the types of information which fall into the category of confidential information under Section 31 of the Act.
108. TPI has divided the types of information it would consider to be confidential into Stage 1 confidential information and Stage 2 confidential information.

109. TPI has stated in earlier sections of its proposed Segregation Arrangements that Stage 1 will apply from the commencement of its railway operations and Stage 2 will come into force no later than six months prior to the scheduled commencement of third party rail haulage operations on its railway.

### **Public Submissions**

110. The NWIOA (page 36) noted that the types of information intended by TPI to be classed as confidential under Stage 1 were more limited than defined under section 31(2) of the Act and therefore that the proposed approach was inconsistent with the requirements of the Act. The NWIOA view was that the requirements of the Act meant that there should be no difference in the types of confidential information requiring protection under these two stages.
111. Hancock (ACIL) commented (page 12) that the list of information provided by TPI for Stage 2 is consistent with the information provided in WNR's 2003 Segregation Arrangements.

### **PricewaterhouseCooper's Advice**

112. PwC agreed with The NWIOA that TPI's definition of the types of information which would be considered confidential under Stage 1 were more limited than required under section 31(2) of the Act and, as a result, inconsistent with the Act.
113. PwC also noted that the types of information which would be considered confidential under Stage 2 were broader and more closely aligned to requirements under section 31(2) of the Act.
114. However, PwC advised that two of the types of information which would be considered confidential, as listed in WNR's 2003 Segregation Arrangements, were omitted by TPI. These were Master Train Control Diagrams and Completed Train Control Diagrams.
115. PwC recommended that the Master Train Control Diagrams and Completed Train Control Diagrams should be added to TPI's list of the types of information which would be considered confidential.
116. PwC also recommended that TPI supply a list of documents and other information that it would use to define how it distinguishes confidential information from information that is not specifically protected. PwC suggested that this information could be included in TPI's Segregation Manual. PwC noted that this list should include both input and output type information.
117. A third recommendation was that the terms used in this section of TPI's proposed Segregation Arrangements should be consistent with the terms defined in the Act and the Code.

### **Authority's Assessment**

118. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.

119. The Authority notes that TPI has included four of the six types of information which would be considered confidential as listed in WNR's 2003 Segregation Arrangements under sections 4 (i) to (iv).
120. In regard to the remaining two types of confidential information listed under sections 4(v) and (vi) of WNR's 2003 Segregation Arrangements, the Authority agrees with PwC to the effect that these should be included in this section of TPI's proposed Segregation Arrangements.
121. The Authority agrees with PwC's recommendation that TPI provide a list of documents and other information that it would use to define how it distinguishes confidential information from other information which does not require specific protection. The Authority also agrees that it is appropriate for this information to be included in TPI's Segregation Manual.
122. The Authority notes that TPI has used terms in this section (such as haulage operations) which are inconsistent with the terms defined in the Act and the Code. As previously noted, a required amendment has been set out earlier in this draft determination (Amendment 6) requiring TPI to ensure that the terms used in its proposed Segregation Arrangements are consistent with the Act and the Code.

### **Draft Determination**

#### **Required Amendment 9**

Part 4.1 of TPI's proposed Segregation Arrangements (headed 'Definition of Confidential Information') should be amended as follows:

- Include as an addition to the dot point sentence on page 13, which states "train scheduling/planning data, to the extent it identifies specific haulage operations" the words "including Master Train Control Diagrams and Completed Train Control Diagrams and voice logging tapes from train control".
- Ensure that the examples of confidential information identified by TPI, under the seven dot point headings in this section (inclusive of the above inclusions), are all included under TPI's Segregation Arrangements from the time these arrangements commence.
- Include a sentence to the effect that TPI will include in its Segregation Manual a list of documents and other information, covering both input and output type information, that it would use to define how it distinguishes confidential information from information that is not specifically protected.

### Confidential Information Flows

#### **TPI's Proposal**

123. This section provides details on the manner in which TPI will manage confidential information in the context of the joint management and board structure of FMG and TPI.
124. TPI separates the processes for the management of confidential information into a Stage 1 and Stage 2 approach. This staged approach is used throughout its proposed Segregation Arrangements.

125. The primary role responsible for the management of confidential information under TPI's proposed Segregation Arrangements would be TPI's Commercial/Compliance Officer.

### Public Submissions

126. The NWIOA (page 37) commented that TPI had made several inconsistent statements relating to the role of the Commercial/Compliance Officer within TPI which led to some confusion in relation to whether this role was solely responsible for handling access-related confidential information or whether others in TPI also had a role in this area.
127. In addition, The NWIOA (page 37) also noted that it was not necessary for the identity of an access seeker to be disclosed on those occasions when TPI's Commercial/Compliance Officer needed to disclose confidential information (for example to train control and track managers) and that TPI's segregation arrangements should require this identity to be kept strictly confidential at all times.
128. The NWIOA also expressed concern (page 38) over the level of information to be provided by TPI to its board, senior executives and the FMG board noting that the reports provided to these entities should wherever possible only disclose confidential information if it is absolutely necessary and then only to the extent required to enable those senior managers and directors to fulfil their legal obligations.
129. Further comments were also provided by The NWIOA (page 38) to the effect that, at a minimum, TPI's Segregation Awareness Statement should:
- Create legally enforceable obligations between the relevant employee and TPI to comply with the arrangements including the Segregation Arrangements.
  - Make it clear that TPI requires strict compliance with those arrangements and that non-compliance will be treated as a serious disciplinary matter.
130. UMC (page 10) commented that this section of TPI's proposed Segregation Arrangements was very limited compared with the equivalent section in WNR's 2003 Segregation Arrangements. UMC made several suggestions relevant to this section, proposing that consideration be given to:
- Aggregation of financial management reporting.
  - Nomination of staff or contractors accessing confidential information and covered by a confidentiality deed.
  - The access seeker and TPI sign their own confidentiality deed as part of the negotiation process.

### PricewaterhouseCoopers' (PwC) Advice

131. With reference to the role of the Commercial/Compliance Officer, PwC identified uncertainty over the nature of this role and recommended that TPI should clarify the extent to which this position will be the sole custodian of each type of confidential information and who else would have access to the confidential information.

132. PwC also commented that TPI's statements regarding the disclosure of confidential information by the Commercial/Compliance Officer were unclear, and that TPI should provide clear examples of the circumstances under which such disclosures would occur and the specific information that would be disclosed under these circumstances.
133. With reference to the TPI's proposed register (page 14) of staff and contractors/consultants to whom confidential information of a third party access seeker is disclosed, PwC's view is that the proposed register would provide an important protection to the interests of persons seeking access to the network and operators who have signed access agreements. PwC noted that the ability of third party access seekers to view this register relating to the disclosure of its confidential information provides additional assurance that their rights would be protected under these arrangements.
134. PwC suggested that TPI's proposed register should record the position titles of the parties on the register.
135. With reference to confidential information being provided to the senior executives within TPI/FMG and the TPI and FMG boards, PwC's view is that it is unclear how confidential information will be protected in situations where, as stated (page 14) by TPI; "a level of convergence of internal confidential information is unavoidable in vertically integrated organisations". PwC considers that control measures should be put in place by TPI in relation to managing confidential information flows, including within the executive and Board structure of TPI/FMG, as follows:
- Detailing the procedures TPI will follow for the protection of confidential information that will allow the Boards of TPI and FMG to carry out their statutory duties.
  - Specifying the direct reporting paths in relation to access-related functions.
  - Specifying that management meetings in relation to access-related issues will not include representatives of the arm of TPI, or related entities of TPI, involved in operating train services.
  - Specifying the nature of the contents of management reports on access-related issues to be given to TPI and FMG management, directors and Board members, in that management reports at group level should only provide aggregate financial and operating data and should not identify individual operators or users.
  - When confidential information is provided to management, directors and Board members, it must be clearly identified as such.

PwC is of the view that the above measures could be dealt with by TPI specifying the measures in its Segregation Manual.

### **Authority's Assessment**

136. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
137. The Authority notes that TPI's proposed Segregation Awareness Statement appears to be equivalent to the Compliance Statement in WNR's 2003 Segregation Arrangements.

138. In regard to the role of TPI's Commercial/Compliance Officer in the handling of confidential information, the Authority agrees with the advice of PwC to the effect that TPI's proposed Segregation Arrangements do not make it clear as to the types of circumstances where the disclosure of confidential information by the Commercial/Compliance Officer would occur or whether this position is the sole custodian of confidential information.
139. The Authority concurs with PwC's view that TPI's proposed register of staff and contractors/consultants to whom confidential information is disclosed would provide important protection for third party access seekers and operators who have signed access agreements. However, the Authority considers that TPI should expand the list of parties recorded on this register to include board members. The Authority also agrees with PwC that the position titles of those parties on the register should be recorded on this register.
140. The Authority notes that WNR's 2003 Segregation Arrangements included a commitment to maintain a list of all positions which have or need access to confidential information, which is similar to TPI's proposed register.
141. As TPI is a vertically integrated railway owner the Authority considers that, consistent with section 31(1) of the Act, there is a requirement for appropriate control measures to be put in place to provide suitable protection for confidential information disclosed to senior management and the boards of TPI and FMG. An outline of these measures, consistent with the equivalent measures listed in WNR's 2003 Segregation Arrangements, should be included in TPI's Segregation Arrangements with the detail on these measures contained in TPI's Segregation Manual.
142. Both The NWIOA and UMC suggested that TPI's staff and contractors/consultants handling confidential information should sign legally enforceable confidentiality agreements with TPI. In addition, UMC also suggested that such deeds should be signed between access seekers and TPI.
143. The Authority considers that TPI's staff and parties assisting TPI, such as contractors/consultants, who deal with confidential information should be required to sign a confidentiality agreement with TPI. This agreement should form part of TPI's Segregation Awareness Statement which such parties are required to sign. This approach is consistent with the Compliance Statement under WNR's 2003 Segregation Arrangements which includes a confidentiality agreement as part of this document.
144. The Authority notes that TPI has used terms in this section of its proposed Segregation Arrangements (such as Access Holder) which are inconsistent with the terms defined in the Act and the Code. As previously noted, a required amendment has been set out earlier in this draft determination (Amendment 6) requiring TPI to ensure that the terms used in its proposed Segregation Arrangements are consistent with the Act and the Code.

## Draft Determination

### Required Amendment 10

Part 4.2 of TPI's proposed Segregation Arrangements (headed 'Confidential Information Flows') should be amended as follows:

- Additional information should be provided comprising examples of the circumstances under which the Commercial/Compliance Officer would disclose confidential information and the specific information which would be disclosed in these circumstances.
- Clarification should be provided on the extent to which the Commercial/Compliance Officer is the sole custodian for each type of confidential information.
- Clarification should be provided on the extent to which any persons other than the Commercial/Compliance Officer will have access to confidential information.
- The persons recorded on the register should be expanded to include members of the TPI and FMG boards.
- The register should record both names and position titles for each person on the register.
- Persons recorded on the register should be required to sign confidentiality agreements with TPI, forming part of TPI's Segregation Awareness Statement.
- Control measures should be outlined in relation to managing confidential information flows within the executive and board structures of TPI and FMG. This outline should, at a minimum, be equivalent to the measures outlined under section 4 (from paragraph 11 on page 5 to the end of section 4 on page 6) of WNR's 2003 Segregation Arrangements and should include the following:
  - Description of procedures to protect confidential information that will allow the boards of TPI and FMG to carry out their statutory duties.
  - Specifying that management meetings in relation to access-related issues will not include representatives of the arm of TPI or related entities of TPI involved in operating train services.
  - Specifying the nature of the contents of management reports on access-related issues to be given to TPI and FMG management, directors and board members, in that management reports at group level should only provide aggregate financial and operating data and should not identify individual access seekers or operators.
  - Clearly defining confidential information when such information is provided to management, directors or board members.
- A statement should be added, following inclusion of the above information, to the effect that the detail of the control measures in relation to managing confidential information flows within the executive and board structures of TPI and FMG will be included in TPI's Segregation Manual.

## Hard Copy Access

### TPI's Proposal

145. This section sets out the arrangements proposed by TPI for access to any written or hard copy electronic confidential information received by TPI.
146. TPI has proposed a staged (Stages 1 and 2) process for implementation of its arrangements for access to its hard copy confidential information, as outlined in its previous sections.

**Public Submissions**

147. UMC commented (page 10) that greater detail was required on TPI's system security for access to its hard copy confidential information.
148. Hancock (ACIL) noted (pages 12 to 13) that the details provided by TPI on how confidential information is to be protected should be strengthened considerably. Hancock (ACIL) observed that the Authority required WNR to provide quite detailed information regarding office security, firewalls and controls on administrators of system security.
149. Hancock (ACIL) considered that TPI should detail its control over access to its offices and those of the Rail Infrastructure division and suggested that TPI's Rail Infrastructure division should have a lockable office area separate from other TPI business units and that information should be provided on how confidential information is to be secured in this office area. In addition, Hancock (ACIL) considered that TPI should have office accommodation which is clearly separate from FMG and lockable.
150. The NWIOA commented (page 38) that the confidential information storage facility must be a secured compactus or equivalent facility with access being strictly limited to the TPI's Commercial/Compliance Officer. Further, The NWIOA noted that TPI should clarify how physical access will be controlled and should clearly state which categories of staff or consultants will be entitled to confidential information and on what basis.

**PricewaterhouseCoopers' (PwC) Advice**

151. PwC advised that at a very broad level this section of TPI's proposed Segregation Arrangements reflects WNR's 2003 Segregation Arrangements (section 4).
152. However, PwC noted that there were important differences in the WNR 2003 Segregation Arrangements in that the WNR arrangements provided for a clear separation of staff performing access-related functions from staff performing other functions and described processes for providing and securing access to hard copy confidential information at a more specific level.
153. PwC recommended that the access management area in which the hard copy confidential information is held must be locked when not attended by TPI access staff.
154. PwC also recommended that TPI should provide a description of the arrangements for providing and securing access to hard copy confidential information to a similar level of detail as provided in WNR's 2003 Segregation Arrangements.

**Authority's Assessment**

155. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.

156. The Authority agrees with the advice of PwC to the effect that the access management area in which the hard copy confidential information is held must be locked when not attended by TPI access staff and that TPI should provide a description of the arrangements for providing and securing access to hard copy confidential information to a similar level of detail as provided in WNR's 2003 Segregation Arrangements.
157. In particular, consistent with WNR's 2003 Segregation Arrangements, the Authority considers that TPI's proposed Segregation Arrangements should also outline commitments to ensure that staff dealing with access-related functions are separated (in a securable area) from staff dealing with other functions, that train control centres are secured and access controlled, that access to confidential information will only be available to staff who have signed TPI's Segregation Awareness Statement.
158. The Authority is also concerned that TPI's proposal that its Commercial/Compliance Officer will control access to the confidential information puts the responsibility for such access at a significantly lower level than as set out in WNR's 2003 Segregation Arrangements where the General Manager had this responsibility. The Authority considers that the arrangements in this area for TPI should be similar to those under WNR's 2003 Segregation Arrangements in that the General Manager, or equivalent, should be required to approve access to hard copy confidential information.
159. In relation to Hancock (ACIL)'s comment that TPI should have office accommodation which is separate from FMG, the Authority does not consider that section 31 of the Act provides for personnel separation measures to be put in place by a railway owner beyond that of ensuring that staff dealing with access-related functions are clearly separated (in a securable area) from staff dealing with other functions. In the context of TPI's proposed Segregation Arrangements, this does not mean that TPI staff dealing with TPI's other functions are required to be separated from FMG staff.
160. The comment from The NWIOA that TPI should clearly state which categories of staff or consultants will be entitled to confidential information and on what basis is considered by the Authority to have been covered adequately under the earlier discussion relating to Part 4.2 of TPI's proposed Segregation Arrangements.

## Draft Determination

### Required Amendment 11

Part 4.2.1 of TPI's proposed segregation Arrangements (headed 'Hard Copy Access') should be amended to include the following additional measures to control access to TPI's hard copy confidential information:

- This information should be stored in a secured compactus or similar facility within the access management area of TPI's premises.
- The access management area should be locked when not attended by TPI staff.
- TPI staff involved in access-related functions within the access management area of TPI's premises should be located in a separate secured area.
- Train control centres should be secured with entry controlled by TPI.

- Entry to the access management area should only be available to TPI staff who have signed TPI's Segregation Awareness Statement.
- Entry to the access management area should only be available to TPI staff approved by TPI's General Manager, or equivalent.

## Electronic Access

### TPI's Proposal

161. This section outlines TPI's proposed arrangements for protecting the confidential information held electronically within its computer (information technology (IT)) systems.
162. TPI has noted that it will share its computer systems with FMG and that password protection and other measures will be put in place to prevent unauthorised access to confidential information.
163. TPI has proposed a staged (Stages 1 and 2) process for implementation of its proposed arrangements for access to its electronic confidential information, as outlined in its previous sections.

### Public Submissions

164. Hancock (ACIL) noted (page 13) that TPI should detail the approach to be used to secure the electronic records of TPI's rail infrastructure division including the location of file servers, management of user ID's and restriction of access.
165. UMC suggested (page 10) that TPI should provide greater detail of the security for its IT systems.
166. The NWIOA expressed concerns over TPI sharing an information technology system with FMG and over the imprecise meaning of TPI's commitment that its confidential information held electronically will be subject to limited access. The NWIOA suggested that TPI should store electronic confidential information on a dedicated and stand-alone computer file server separate from both FMG and TPI's non-access related functions.
167. Further, The NWIOA quoted an extract from a Queensland Competition Authority draft decision in 2000 on Queensland Rail's draft undertaking in relation to the issue of electronic storage of confidential information in the United Kingdom, as follows:

"One lesson from the UK electricity regulator (OFFER) drawn from its assessment of vertically integrated public electricity suppliers is that the security of information for customers and competitors can only be achieved through the separation of data and the implementation of strict controls on the ability of internal businesses to access data. OFFER argues that allowing a largely integrated form of information system gives no incentive to the integrated business to identify clearly where data is owned, who is responsible for maintaining it or even if it is necessary for the business."

The NWIOA noted that the principle outlined above applies directly to TPI's storage of electronic confidential information.

168. The NWIOA also commented that an additional condition should be added to the access arrangements proposed by TPI for access to TPI's electronic

confidential information in that such information should only be available to people who must have access to that information to progress the access application (i.e., strictly on a needs to know basis only).

#### **PricewaterhouseCoopers' (PwC) Advice**

169. PwC advised that TPI's proposed arrangements for protection of electronic confidential information were broadly similar to those set out in WNR's 2003 Segregation Arrangements.
170. However, PwC noted that WNR's 2003 Segregation Arrangements were more detailed than those proposed by TPI in relation to computer security control measures.
171. PwC has recommended that TPI should store electronic confidential information on a dedicated and stand-alone computer file server, separate from both FMG and TPI's non-access related functions.
172. In addition, PwC recommended that TPI set out arrangements for accessing electronic confidential information to a similar level of detail to that set out in WNR's 2003 Segregation Arrangements and, in particular, prescribe that a user of the computer system is automatically restricted to information relating to that user's functional area and section within TPI.

#### **Authority's Assessment**

173. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
174. The Authority agrees with the advice of PwC to the effect that; (1) TPI should store electronic confidential information on a dedicated and stand-alone computer file server, separate from both FMG and TPI's non-access related functions and (2) TPI should set out arrangements for accessing electronic confidential information to a similar level of detail to that set out in WNR's 2003 Segregation Arrangements and, in particular, prescribe that a user of the computer system is automatically restricted to information relating to that user's functional area and section within TPI.
175. The Authority notes, that in relation to computer file servers, WNR's 2003 Segregation Arrangement (page 5) committed WNR to have separate computer file servers from others in the ARG Group. The recommendation by PwC above, in relation to a separate file server being required for TPI's electronic confidential information, is a further step beyond having separate file servers for TPI from others in the FMG Group. However, the Authority considers that the additional level of protection for confidential information provided by this measure is appropriate and is not anticipated to result in significant cost or difficulty in implementation to TPI.
176. As noted under the previous section, the Authority is also concerned that TPI's proposal that its Commercial/Compliance Officer will control access to the electronic confidential information puts the responsibility for such access at a significantly lower level than as set out in WNR's 2003 Segregation

Arrangements where the General Manager had this responsibility. The Authority considers that the arrangements in this area for TPI should be similar to those under WNR's 2003 Segregation Arrangements in that the General Manager, or equivalent, should be required to approve access to electronic confidential information.

177. The other measures which should be put in place by TPI, consistent with WNR's 2003 Segregation Arrangements, are firstly to ensure that access to both electronic confidential records and electronic confidential data require the approval of the General Manager of TPI, or equivalent, with such access only being granted to persons who have signed TPI's Segregation Awareness Statement. Secondly, measures need to be put in place to ensure that the issue of user ID's and passwords are appropriately controlled with the authority to issue passwords for TPI staff residing with the TPI General Manager or equivalent.

### Draft Determination

#### Required Amendment 12

Part 4.2.2 of TPI's proposed Segregation Arrangements (headed 'Electronic Access') should be amended to include the following additional measures to control access to TPI's electronic confidential information:

- The access of users, logging onto TPI/FMG's computer network, to shared files, information systems, e-mail and the ability to generate reports should be automatically restricted to information relating to that user's company, functional area and section.
- The arrangements for the generation and management of user ID's and passwords within TPI need to be detailed. The authority to allocate passwords within TPI should reside with the TPI General Manager, or equivalent.
- TPI should store its electronic confidential information on a dedicated and stand-alone computer file server, separate from both FMG and TPI's non-access related functions.
- Access to TPI's electronic confidential information system should be controlled by ensuring that access to this information can only be given by the TPI General Manager, or equivalent, and will only be given to persons who have signed TPI's Segregation Awareness Statement.
- Further restrictions, beyond those listed above for the TPI/FMG computer network, should apply to users of this computer network who require access to the TPI's electronic confidential information system. These restrictions should ensure that users accessing this electronic confidential information system are automatically restricted in the functions available to them and the information they can access and report on according to their user ID and the approval of the TPI General Manager, or equivalent, to the level of access sought.
- In regard to TPI's electronic data on rail operations (such as train movements and tonnages) as proposed to be contained in its Operations Management System, this system should have appropriate controls on the data to ensure the protection of confidential data.
- Access to TPI's electronic confidential data held in its Operations Management System should be controlled by ensuring that access to this confidential data can

only be given by the TPI General Manager, or equivalent, and will only be given to persons who have signed TPI's Segregation Awareness Statement.

- Further restrictions, beyond those listed above for the TPI/FMG computer network, should apply to users of this computer network who require access to the TPI's electronic confidential data held in its Operations Management System. These restrictions should ensure that users accessing the confidential data in TPI's Operations Management System are automatically restricted in the functions available to them and the information they can access and report on according to their user ID and the approval of the TPI General Manager, or equivalent, to the level of access sought.
- The process of granting access and usage to TPI's electronic confidential information system and confidential data in its Operations Management System should be capable of being audited.

## Staff Issues

### Transfers

#### **TPI's Proposal**

178. This section outlines the control measures TPI would put in place relating to the transfer of staff between access and non-access areas of TPI/FMG including the transfer of staff who have had access to TPI's confidential information.
179. Under TPI's proposed arrangements staff will not be permitted to work on matters in other areas of TPI/FMG, either on a temporary or permanent basis, where they have had access to TPI's confidential information or the activities of the area could affect an access seeker. In the case of permanent transfers, this limitation is proposed to apply for period of three months.
180. TPI has proposed a staged (Stages 1 and 2) process for implementation of its proposed arrangements for the transfer of staff.

#### **Public Submissions**

181. Hancock (ACIL) on (page 11) noted that staff should not be rotated between TPI's rail infrastructure division and related entities into positions that are covered by the Segregation Awareness Statement.
182. Hancock (ACIL) also suggested (page 11) procedures for TPI to share staff under emergency situation. These procedures were based on the emergency arrangements for staff sharing as set out under WNR's 2003 Segregation Arrangements (page 7).
183. The NWIOA commented (page 37) that in relation to staff who move from access related functions to non-access related functions, such staff should not exercise any non-access related functions for a period of at least one year after performing the access-related functions.

#### **PricewaterhouseCoopers' (PwC) Advice**

184. PwC's view is that being able to rotate staff between positions involved in performing access-related functions and other functions after a specified period of time may have efficiency benefits, particularly during the early stages of

providing access. PwC's view is that such rotation should not compromise the protection of confidential information.

185. In PwC's view, however, a three month period before such a rotation or transfer can take place is too short a time period, particularly in view of WNR's 2003 Segregation Arrangements prohibiting staff rotations between access-related positions and other positions where a person in the position concerned is required to sign WNR's Compliance Statement.
186. PwC recommended that TPI should preclude staff rotating between positions performing access-related functions and positions performing other functions for a period of at least one year, where a person in the position concerned is required to sign TPI's Segregation Awareness Statement. PwC noted that staff moving from such positions which require the signing of TPI's Segregation Awareness Statement would need to spend the one year period in roles not subject to the requirement to sign TPI's Segregation Awareness Statement within the Rail Infrastructure Division of TPI before moving on to other positions within TPI.
187. PwC also recommended that other access-related staff, not required to sign TPI's Segregation Awareness Statement, should be free to rotate between other TPI divisions.
188. PwC considered that emergencies would constitute a special case, where exceptions to the measures recommended above may be reasonable in order to ensure the safe and reliable operation and use of the network. In light of this, PwC recommended that, due to the importance of ensuring the safe and reliable operation and use of the network, TPI may wish to consider adopting the exception to the prohibition on staff rotations between access-related functions and other functions in the case emergencies, as set out in paragraph 6 of section 5 of WNR's 2003 Segregation Arrangements. Rotation of relevant staff under emergency conditions should only occur after the railway owner advises the Authority of 1) the circumstances of the emergency; 2) the expected duration of the emergency; and 3) the specific measures being taken by the railway owner to protect confidential information and to protect against conflicts of interest.

### Authority's Assessment

189. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
190. The Authority considers that TPI's proposed arrangements for staff transfers should be generally consistent with the equivalent arrangements in WNR's 2003 Segregation Arrangements.
191. WNR's 2003 Segregation Arrangements prohibited staff transfers between access-related positions and other positions in its related entities where a person in the position concerned was required to sign a Compliance Statement. PwC considers that this may adversely impact on efficiency and has suggested a modification of this restriction in the case of TPI to allow transfers to other roles within TPI provided the relevant person first spends at least one year in

TPI's Rail Infrastructure Division, immediately following the transfer, undertaking a role or roles not requiring the signing of TPI's Segregation Awareness Statement.

192. The Authority agrees with PwC that for reasons of efficiency, it is reasonable to allow staff to transfer within TPI provided that appropriate measures are in place to protect confidential information and prevent conflict of interest situations from occurring. In the case of the recommendation on this matter from PwC, it is particularly important that the one year period immediately following transfer from an access-related role requiring the signing of TPI's Segregation Awareness Statement is spent in the access-related area within TPI and excludes any involvement in the above-rail area relating to TPI's rail operations. Under TPI's corporate structure plan on page 5 of its proposed Segregation Arrangements, the access-related activities appear to be contained within the Rail Infrastructure Division with TPI's rail operations coming under the Haulage Division.
193. The Authority agrees with PwC that measures are not required to limit the transfer of staff not required to sign TPI's Segregation Awareness Statement, as such limitations were not imposed under WNR's 2003 Segregation Arrangements.
194. In relation to PwC's third recommendation concerning staff sharing under emergency arrangements, the Authority agrees with this suggestion but considers that there is a need to ensure that the requirements for information provision to the Regulator are consistent with WNR's 2003 Segregation Arrangements. In this regard, the additional commitment to ensure that the people proposed to be used in these circumstances sign TPI's Segregation Awareness Statement, should be included.

## Draft Determination

### Required Amendment 13

Part 4.3.1 of TPI's proposed segregation Arrangements (headed 'Transfers') should be amended to include the following:

- TPI should preclude the ability of staff to transfer between positions involved in performing access-related functions and positions involved in performing other functions where the occupant of the access-related position concerned is required to sign TPI's Segregation Awareness Statement, except where the person transferring from that access-related position first spends at least one year undertaking other access-related functions within the Rail Infrastructure Division which do not require the signing of TPI's Segregation Awareness Statement.
- Due to the importance of ensuring the safe and reliable operation and use of its rail network, TPI may wish to consider adopting an exception to the above limitation on staff rotations between access-related functions and other functions in the case of emergencies, as set out in section 5 of WNR's 2003 Segregation Arrangements. Rotation of relevant staff under emergency conditions should only occur after TPI advises the Authority of 1) the circumstances of the emergency; 2) the expected duration of the emergency; and 3) the specific measures TPI would take to protect confidential information and to protect against conflicts of interest including those people who are proposed to be used signing TPI's Segregation Awareness Statement.

## Consultants

### TPI's Proposal

195. This section outlines the control measures TPI would put in place relating to the situation where it is necessary to disclose confidential information to its external consultants or advisors.
196. The measures proposed by TPI involve ensuring that the consultant has obligations to only use such information for the purpose for which it was provided and not to disclose the information to other areas of TPI/FMG. In addition, the relevant access seeker's consent would be needed prior to disclosure of the confidential information to the consultant.
197. TPI has proposed a staged (Stages 1 and 2) process for implementation of its proposed arrangements for consultants.

### Public Submissions

198. No submissions were received on this section.

### PricewaterhouseCoopers' (PwC) Advice

199. PwC advised that TPI's proposed arrangements for consultants were consistent with the equivalent obligations under WNR's 2003 Segregation Arrangements and therefore were considered appropriate.

### Authority's Assessment

200. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
201. While the Authority generally agrees with the PwC advice, it notes that the relevant section of WNR's 2003 Segregation Arrangements stipulated that consultants should also sign Compliance Statements where appropriate. This element is not included in TPI's proposed arrangements.
202. The Authority considers that consultants to whom TPI discloses confidential information should be required to sign TPI's Segregation Awareness Statement, consistent with the requirements under WNR's 2003 Segregation Arrangements.

### Draft Determination

#### Required Amendment 14

Part 4.3.2 of TPI's proposed segregation Arrangements (headed 'Consultants') should be amended to include the sentence as follows: "Where it is necessary for TPI to disclose confidential information to a consultant, the consultant would be required to sign TPI's Segregation Awareness Statement".

## Documentation

### Segregation Awareness Statement

#### **TPI's Proposal**

203. This section sets out TPI's commitment to require employees who have duties involving access-related functions to sign, at the time of their temporary or permanent employment, a Segregation Awareness Statement.
204. TPI's Segregation Awareness Statement would be to the effect that parties signing the statement would acknowledge their responsibilities and obligations under the WA Rail Access Regime and specifically as it relates to confidential information.
205. TPI notes that the Segregation Manual will specify the circumstances in which a staff member must sign a Segregation Awareness Statement and comments that the Regulator will also endorse this statement.
206. TPI has proposed a staged (Stages 1 and 2) process for implementation of its proposed Segregation Awareness Statement procedures.

#### **Public Submissions**

207. The NWIOA commented (page 38) on TPI's proposed Segregation Awareness Statement, noting that it assumed that this statement would form part of TPI's Segregation Manual and therefore need to be approved by the Regulator.
208. The NWIOA also commented that as a minimum, the Segregation Awareness Statement should; 1) create legally enforceable obligations to comply with the Segregation Arrangements including the Segregation Manual and 2) make it clear that TPI requires strict compliance with those arrangements and that non-compliance would be treated as a serious matter.

#### **PricewaterhouseCoopers' (PwC) Advice**

209. PwC notes that TPI's Segregation Awareness Statement is to be developed pursuant to its Segregation Manual which appears yet to be developed.
210. The Segregation Manual would, in PwC's view, set out the policies and procedures to give effect to the Segregation Arrangements whereas the Segregation Awareness Statement would largely be a sign-off document for staff to confirm that they are aware of their responsibilities and obligations under the Act and the Code and specifically as it relates to confidential information.
211. PwC advised that TPI's Segregation Awareness Statement was equivalent to the Compliance Statement in WNR's 2003 Segregation Arrangements
212. PwC recommended that TPI's Segregation Awareness Statement incorporate a commitment to safeguard confidential information which would have the same force as a confidentiality deed.

## Authority's Assessment

213. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
214. The Authority expects that a copy of TPI's Segregation Awareness Statement would be contained in its Segregation Manual. The Segregation Manual is discussed in a subsequent section of this draft determination.
215. The Authority also agrees with PwC's view that TPI's Segregation Awareness Statement should incorporate a confidentiality agreement.

## Draft Determination

### Required Amendment 15

Part 4.4.1 of TPI's proposed Segregation Arrangements (headed 'Segregation Awareness Statement') should be amended to include the following measures:

- The Segregation Awareness Statement should incorporate a commitment to safeguard confidential information in the form of a confidentiality agreement.
- A copy of the Segregation Awareness Statement, including the confidentiality agreement incorporated as part of this statement, should be included in TPI's Segregation Manual.

## Advice Regarding Confidentiality

### TPI's Proposal

216. This section outlines TPI's commitment to advise access seekers of their rights to confidentiality and notes that TPI will agree with access seekers on what information supplied by the access seeker is confidential.
217. TPI has proposed a staged (Stages 1 and 2) process for implementation of its proposed confidentiality arrangements.

### Public Submissions

218. Hancock (ACIL) observed (page 13) that the last sentence in this section should refer to 'the Code' rather than 'the WA Rail Access Regime'.

### PricewaterhouseCoopers' (PwC) Advice

219. PwC noted that TPI's commitments under this section were similar to those contained in section 6 of WNR's 2003 Segregation Arrangements.
220. PwC also advised that, as observed by Hancock (ACIL), the word 'Code' should be used rather than 'WA Rail Access Regime' in this section.

### Authority's Assessment

221. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
222. The Authority agrees with PwC's recommendation that the Code should be referred to rather than the WA Rail Access Regime. The Authority has set out a required amendment to this effect earlier in this draft determination (Amendment 1).

### Avoidance of Conflict of Interest under Section 32 of the Act

223. This section of the draft determination deals with Part 3 of TPI's proposed Segregation Arrangements as set out on pages 9 to 12 of these arrangements.

### TPI's Proposal

224. Under this section, TPI proposes a process for the separation of its access-related functions from its rail haulage operations to assist in preventing conflicts of interest.
225. TPI has proposed a staged (Stages 1 and 2) process for implementation of its proposed commitments in relation to conflicts of interest.
226. Reporting arrangements and the protection of confidential information flows are outlined by TPI to substantial its commitment to ensure that no conflicts of interest occur.

### Public Submissions

227. Hancock (ACIL) notes (page 9) that as FMG is likely to be in competition with access seekers, in iron ore markets, information passed onto the TPI and FMG boards has the potential to create conflicts of interest for TPI. For this reason, Hancock (ACIL) suggests that the cross-board membership for the TPI and FMG boards should be minimised. Hancock (ACIL) also commented that TPI needed to have appropriate procedures in place to protect the flow of confidential information to the TPI and FMG boards.
228. Hancock (ACIL) agreed with TPI's proposal that people performing below-rail functions should not also perform above-rail functions. Hancock (ACIL) also considered that TPI needed to establish clear protocols relating to staff secondments between business units within TPI and between TPI and FMG to prevent any conflicts of interest from arising.
229. Hancock (ACIL) identified the need for TPI to detail its control procedures for the flow of confidential information through to the TPI and FMG boards and for further detail to be added to TPI's Segregation Arrangements on the content of typical management reports to these boards.
230. UMC commented (page 11) that TPI had not provided detail on the control measures it would develop to manage conflicts of interest. UMC noted that the Regulator needed to be satisfied that adequately documented protocols and

security measures were in place relating to the TPI and FMG boards to ensure that the fiduciary responsibilities of board members and executives were not compromised. UMC considered that the Regulator needed to approve TPI's Segregation Awareness Statement and its Segregation Manual.

231. UMC also suggested that TPI needed to implement appropriate procedures for briefing of the TPI and FMG boards to protect confidential information. In UMC's view, relevant parties should enter into confidentiality agreements with TPI at the negotiation stage to protect confidential information.
232. The NWIOA considered (page 40) that TPI's arrangements to deal with conflicts of interest do not specify the relevant processes and procedures to achieve this outcome. In particular, The NWIOA expressed concern with the arrangements proposed by TPI for its information flows and duties of persons carrying out access- related functions.
233. The NWIOA suggested that TPI's emphasis on 'managing' conflicts of interest should instead be on 'avoiding' conflicts of interest as per the wording under section 32 of the Act.
234. The NWIOA also mentioned (page 41) that in order to comply with section 32 of the Act, TPI should implement an organisational structure which limits the potential for conflicts of interest to occur.
235. In The NWIOA's view, TPI should also make its records available to access seekers to determine whether it has complied with its Segregation Arrangements, including conflicts of interest.
236. TPI, in its submission responding to the public submissions, considered that having more extensive segregation arrangements in place before any third party access seekers commence train services would do nothing to reduce the issues surrounding conflicts of interest.

#### **PricewaterhouseCoopers' (PwC) Advice**

237. PwC has advised that it considers there to be some uncertainties in relation to the principles for specifying whether conflicts of interest may exist and the means of managing circumstances where the potential for conflicts of interest may arise (including the precise role of the Commercial/Compliance Officer in managing such matters). PwC noted that these issues are largely considered to be matters of process which have been covered by its other recommendations.

#### **Authority's Assessment**

238. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
239. The Authority agrees with PwC to the effect that the matters covered under this conflicts of interest section, such as the protection of confidential information provided to the TPI and FMG boards (including the form of management reports to these boards), staff transfers and duties in relation to those carrying out

access- related functions and TPI's organisation structure relating to access-related functions have been covered elsewhere in this draft determination.

240. In regard to Hancock (ACIL)'s suggestion that a limit should be placed on cross board membership between TPI and FGM, the Authority considers this to be a reasonable suggestion.
241. In regard to the issue of confidentiality agreements, as mentioned by UMC, the Authority notes that this matter has been discussed previously and a recommendation included in the draft determination that such agreements should be incorporated into TPI's Segregation Awareness Statements to safeguard confidential information.
242. The Authority also notes the comment by The NWIOA that TPI should make its records available to access seekers. The Authority does not consider this to be appropriate as the Act provides the Authority with the role of ensuring that a railway owner complies with its segregation arrangements.
243. The Authority considers that there are some issues which are dealt with in WNR's 2003 Segregation Arrangements which should also be covered in this section of TPI's Segregation Arrangements. These are; 1) a clear conflict of interest commitment, 2) train scheduling and control staff to be subject to the Segregation Awareness Statement, and 3) amendment to daily and weekly train services not interfering with any operators' rights.

### Draft Determination

#### Required Amendment 16

Part 3 of TPI's proposed segregation Arrangements (headed 'Avoidance of Conflict of Interest') should be amended to include the following additional measures:

- Insert the sentence "TPI will manage its access related functions so that, for relevant officers, no conflicts of interest exist."
- Train scheduling and train control functions are required to be undertaken by TPI staff who have signed TPI's Segregation Awareness Statement.
- Provide a statement to the effect that operators may prepare amendments to daily or weekly plans for services which experience variable demand or variable destinations provided that they do not interfere with other operators rights and subject to TPI having ultimate control of such changes and that this process will be covered by a procedure in the Segregation Manual.
- Common membership of the TPI and FMG boards should be minimised to the extent possible in order to avoid potential conflicts of interest.
- In addition to the requirements listed above, TPI should make appropriate changes to this section consistent with those other amendments in this draft determination relevant to this section.

## Duty of Fairness under Section 33 of the Act

244. This section of the draft determination deals with Part 5 of TPI's proposed Segregation Arrangements as set out on pages 19 to 20 of these arrangements.

### TPI's Proposal

245. TPI has outlined, under this section, its obligation to ensure that it treats access seekers or other rail operators fairly. It has noted that to give effect to this obligation, TPI will treat access seekers fairly in relation to prices, service quality, paths and priority.
246. TPI notes that the duty of fairness extends to the application of the Regulator's determinations in relation to the Segregation Arrangements and the Part 5 Instruments.
247. TPI has proposed a staged (Stages 1 and 2) process for implementation of its proposed duty of fairness commitments.

### Public Submissions

248. The NWIOA has commented (page 41) that TPI's statement that it "will ensure that the key terms and conditions of internal access agreements will be broadly comparable to those provided or offered to third party access seekers", is too vague.
249. Hancock (ACIL) page 13, commented that TPI should inform access seekers at the outset of negotiations of their rights to confidentiality. Hancock (ACIL) also noted that it would like clarification on TPI's application of duty of fairness to access agreements negotiated outside the Code.
250. UMC (page 11) was not satisfied with TPI's statement that it "will ensure that the key terms and conditions of internal access agreements will be broadly comparable to those provided or offered to third party access seekers". UMC considered that the Regulator should ensure that there is a commitment by TPI to treat all access seekers fairly in relation to prices, service quality, train paths and priorities.
251. UMC also suggested that the Regulator in conjunction with TPI should develop key performance indicators (KPIs) to assess and monitor the effectiveness of the segregation arrangements and that external auditing of TPI's segregation arrangements should be carried out at regular intervals.
252. A further point made by UMC (page 12) was that TPI should detail a procedure for dealing with access matters and the order they are treated to ensure that access seekers do not receive inappropriate priority in dealings related to access matters.
253. TPI, in its submission responding to the public submissions, commented that in relation to TPI potentially negotiating access agreements outside the Code it was not clear why TPI needed to provide additional comfort on how duty of fairness is to be observed in this circumstance given the Code obligations/requirements are not relevant for such negotiations.

### **PricewaterhouseCoopers' (PwC) Advice**

254. PwC advises that the commitments provided by TPI under this section are similar to the equivalent commitments under section 6 of WNR's 2003 Segregation Arrangements
255. In regard to the comments from The NWIOA and UMC about the vagueness of TPI's commitment that TPI's internal access arrangements will be 'broadly comparable' with those offered to third parties, PwC noted that as this was the level of commitment provided in WNR's 2003 Segregation Arrangements, TPI's commitment was therefore considered appropriate.
256. PwC also provided comment on some further matters raised in public submissions regarding Code-related issues. These matters are outside the scope of this Draft Determination, as discussed earlier (paragraph 23).

### **Authority's Assessment**

257. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
258. The Authority agrees with PwC to the effect that where TPI has provided assurances in this section equivalent to those provided under section 6 of WNR's 2003 Segregation Arrangements these commitments are considered to be appropriate.
259. With regard to the matter of KPIs and audits on TPI's Segregation Arrangements, as raised by UMC, the Authority notes that this matter is discussed in a later section of this draft determination in regard to compliance issues.
260. The Authority agrees with Hancock (ACIL)'s comment that TPI should inform access seekers at the outset of negotiations of their rights to confidentiality. This matter is included in WNR's 2003 Segregation Arrangements but has not been mentioned by TPI.
261. The Authority notes that there are other matters contained in section 6 (Duty of Fairness) of WNR's 2003 Segregation Arrangements which have not been included in this section of TPI's proposed Segregation Arrangements. These matters relate to the mechanisms under the Code and the access agreements for ensuring fairness and the treatment of confidential information where access seekers have started negotiations outside of the Code but wish to change to continue under the Code. The Authority considers that these matters should also be included in this section of TPI's proposed Segregation Arrangements.
262. In regard to the point made by UMC that TPI should detail a procedure for dealing with access matters and the order in which such matters are treated, the Authority considers that this matter is dealt with through the assurance by TPI that all access seekers will be treated fairly in relation to service quality. The Authority considers service quality to include TPI's response to applications from access seekers and negotiations with access seekers.

## Draft Determination

### Required Amendment 17

Part 5 of TPI's proposed segregation Arrangements (headed 'Duty of Fairness') should be amended to include the following additional measures:

- TPI should inform access seekers negotiating within the Code at the outset of negotiations of their rights to confidentiality under its Segregation Arrangements.
- If negotiations have commenced outside the Code and an access seeker subsequently chooses to continue negotiations under the Code, through the process as set out under Parts 2 to 4 of the Code, TPI and the access seeker will agree on what information previously supplied by the access seeker is subject to the confidentiality provisions of these arrangements.
- The mechanisms for ensuring TPI's Duty of Fairness should be stated, as follows:
  - Access seekers can determine the fairness of prices negotiated through an application to the Regulator pursuant to section 21(1) of the Code.
  - TPI's standard access agreement for access seekers should provide for specific consultation mechanisms, the provision of information and dispute resolution mechanisms. This should allow these access seekers to test the duty of fairness related to other than price issues in the provision of access.

## Maintenance of Separate Accounts and Records under Section 34 of the Act

263. This section of the draft determination deals with Part 6 of TPI's proposed Segregation Arrangements as set out on pages 20 to 21 of these arrangements.

### TPI's Proposal

264. TPI commits, under this section, to prepare and maintain accounts and financial records for the purposes of complying with the WA Rail Access Regime or to assist the Regulator in the performance of the Regulator's duties under the regime in the manner approved by the Regulator.
265. TPI notes that it is required to prepare and maintain separate accounts and records distinguishing income, expenditure, assets and liabilities of access related functions from other TPI functions.
266. TPI has proposed a staged (Stages 1 and 2) process for implementation of its commitments related to the preparation of accounts and records.

### Public Submissions

267. The NWIOA noted (page 42) that TPI should ensure that its Segregation Arrangements are capable of being applied and are complied with in relation to FMG's finance group preparation of TPI's accounts and financial records.
268. Hancock (ACIL) on (page 14) commented that:

“In its review of WestNet Rail’s Segregation arrangements, ERA was of the view that access-related financial records should not, wherever possible, be centralised outside WNR...TPI’s proposals that Stage 1 separate accounts and financial records be prepared by FMG’s Finance Group are not acceptable...TPI’s Stage 2 proposals .. imply that the rail infrastructure division will not be self-sufficient (only TPI as a whole). Sharing of the accounting function between the above and below rail divisions does not provide adequate protection of confidential information.”

269. Hancock (ACIL) recommended (page 15) that:

- Stage 2 should apply throughout.
- Staff within TPI’s rail infrastructure division should maintain separate accounts and financial records for the purposes of complying with the Act and the Code. They should also control and manage the information used to produce the regulatory accounts and other information such as that used to calculate floor and ceiling tests.
- Detailed procedures regarding confidential information supporting the billing process should be contained in the Segregation Manual.
- Any financial information released by TPI’s rail infrastructure division for normal internal reporting purposes should be aggregated to prevent disclosure of confidential information. To the extent that TPI or FMG finance staff or auditors are given access to confidential information, they should be required to sign a Segregation Awareness Statement.

270. UMC considered (page 12) that; (1) the TPI railway infrastructure must be operated as a standalone business which is accounted for separately and transparently in order to demonstrate that there are no cross subsidies between the other entities of FMG (2) that TPI would need to ensure that reporting to FMG be only at an aggregated level and (3) that the Regulator should require that TPI’s accounts contain sufficient information and to be presented in such a manner as would enable verification by the Regulator of the calculation of the various costs.

### **PricewaterhouseCoopers’ (PwC) Advice**

271. PwC advised that, in relation to TPI’s proposal for the FMG Finance Group to develop TPI’s regulatory accounts, PwC considers that there are material efficiencies (in financial operations and management) for statutory accounting functions for the broader group being performed by FMG Finance. PwC considers that such an arrangement would reflect the subsidiary nature of TPI to FMG, and that a sound case exists for cost accounting functions to be undertaken by a central accounting group.

272. PwC noted that the above accounting arrangements proposed by TPI are safeguarded by the other segregation arrangements, in particular by the requirement for relevant staff to sign Segregation Awareness Statements and the maintenance of a register of staff who deal with confidential information.

273. PwC advised that other measures contained in the equivalent part of WNR’s 2003 Segregation Arrangements were not specified in this section of TPI’s proposed Segregation Arrangements.

274. In order to ensure that TPI’s financial information on access related functions is properly distinguished from its information on other functions, and to protect confidential information, PwC recommended that TPI adopt the following measures:

- TPI staff should control the data used to generate invoices for access customers and there should be procedures to ensure that such billing related confidential information is protected.
- The collection of the payments to be performed by FMG Finance should be based on information supplied by the Commercial/Compliance Officer. Detailed information supporting invoicing should be provided direct to customers by TPI.
- Data for reports produced by FMG Finance to be aggregated to prevent the disclosure of confidential information.
- FMG Finance and auditors given access to confidential information are to sign a Segregation Awareness Statement.

### Authority's Assessment

275. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
276. The Authority agrees with the comments by PwC in relation to the proposed use by TPI of the FMG Finance Group to assist in preparing its regulatory accounts.
277. The Authority notes that TPI has provided commitments which are similar to those contained in WNR's 2003 Segregation Arrangements but considers that, in comparison, TPI's commitments in some cases are more vague.
278. In particular, the Authority considers that the word 'control', as used in WNR's 2003 Segregation Arrangements, should be used in relation to TPI's use of information to produce the regulatory accounts.
279. The Authority also notes that a number of important commitments in WNR's previous 2003 Segregation Arrangements have not been included by TPI. These matters have been dealt with in PwC's recommendations.
280. The Authority agrees with the intent of PwC's recommendations. In the case of TPI's procedures to ensure the protection of confidential information provided by TPI to support the billing process, the Authority considers that these procedures should be detailed in TPI's Segregation Manual. This commitment was included in WNR's 2003 Segregation Arrangements.

### Draft Determination

#### Required Amendment 18

Part 6 of TPI's proposed Segregation Arrangements (headed 'Preparation of Accounts and Records') should be amended to include the following additional measures:

- TPI staff should control the information used to produce its regulatory accounts.
- TPI staff should control the data used to generate invoices for access customers.
- The collection of the payments to be performed by FMG's Finance Group should be based on information supplied by TPI staff. Detailed information supporting invoicing should be provided direct to customers by TPI.

- There should be procedures to ensure that confidential information provided by TPI to support the billing process is protected. These procedures should be detailed in TPI's Segregation Manual.
- Consistent with Required Amendment 10 of this draft determination:
  - Financial information provided by TPI to FMG's Finance Group for normal internal reporting purposes should be aggregated to prevent disclosure of confidential information.
  - FMG Finance group staff and auditors given access to confidential information should be recorded on TPI's register and should sign TPI's Segregation Awareness Statement.

## Segregation Manual and Compliance Matters

281. This section of the draft determination deals with Part 7 of TPI's proposed Segregation Arrangements as set out on pages 21 to 24 of these arrangements.

### Development of Segregation Manual

#### **TPI's Proposal**

282. Under this section, TPI commits to the development of a Segregation Manual to give effect to its segregation arrangements and to be the primary tool used to manage segregation compliance within TPI.
283. TPI also notes that it will provide the Segregation Manual to the Regulator for approval.
284. TPI has proposed a staged (Stages 1 and 2) process for implementation of its commitments related to the development of its Segregation Manual.

#### **Public Submissions**

285. United Minerals commented (page 12) that:
- The Segregation Manual be completed promptly, be available for public comment and be reviewed and approved by the Regulator,
  - Contain detailed compliance procedures and practices to ensure all TPI staff common Executives and Common Directors comply with the segregation obligations.
286. The NWIOA made similar comments (page 42) to those made by UMC.
287. Hancock (ACIL) on (page 16) set out a range of matters which should be included in TPI's Segregation Manual. These inclusions are based on equivalent provisions in section 3 of WNR's 2003 Segregation Arrangements in relation to WNR's Segregation Arrangements Management Manual.
288. TPI, in its submission responding to the public submissions, commented (page 2) that it is not clear as to whether WNR's Segregation Arrangements Management Manual has been approved by the Authority. TPI also noted that a draft of WNR's Manual had not been released by the Authority for public comment and that on equity grounds TPI would anticipate a similar process be adopted.

## PricewaterhouseCoopers' (PwC) Advice

289. PwC noted that similar to TPI's Segregation Awareness Statement, TPI's Segregation Manual is yet to be developed.
290. PwC advised that in its view, TPI's proposed Segregation Arrangements do not meet the requirements of the Act (in particular sections 28(2) and 32)) and that the additional detail, to be contained in TPI's Segregation Manual, needs to be provided by TPI in order to meet the requirements of the Act.
291. In regard to the level and type of information which TPI committed to include in its Segregation Manual under its proposed Segregation Arrangements, PwC advised that specific content including policy guidance is not clearly set out. In PwC's view, it does not consider the current level of detail provided by TPI in relation to the Segregation Manual to be consistent with the requirements of the Act (in particular, section 28(2)). PwC noted that its view also reflected the view in the public submissions to the effect that TPI's proposed Segregation Arrangements are imprecise and do not meet the requirements of the Act.
292. PwC recommended that further information defining the Segregation Manual content should be included in TPI's proposed Segregation Arrangements, comprising the following:
- an outline of the Segregation Manual document, in terms of major headings;
  - a list of the documents and processes governed by the Segregation Manual, and the relationship of those to the Segregation Manual (ie whether they are part of the Segregation Manual or maintained under a separate, defined process);
  - the form of the register of recipients of confidential information;
  - the description of each position in the organisational structure, and classification of positions according to whether they perform access-related functions or other functions, physical location of positions (from Recommendation 2);
  - the procedures to ensure that billing-related confidential information is protected; and
  - a commitment that the Segregation Manual will detail the appropriate segregation arrangements, including measures and commitments in relation to confidential information from section 3 above, types of behaviour which breach segregation requirements and the appropriate corrective action for each breach and internal notification procedures
293. PwC also recommended that, consistent with TPI's undertaking to submit the Segregation Manual to the Regulator for approval and the incomplete nature of TPI's proposed Segregation Arrangements, TPI should submit its Segregation Manual to the ERA for approval.

## Authority's Assessment

294. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
295. The Authority agrees with PwC's view that TPI's Segregation Arrangements do not contain sufficient information to meet the requirements of the Act and that TPI's Segregation Manual needs to be submitted in order for the Authority to properly assess TPI's proposed Segregation Arrangements in its entirety.

296. PwC's recommendations in relation to the further detail which TPI should include under this section, outlining the content of TPI's Segregation Manual, are considered by the Authority to be appropriate. The Authority further considers that TPI should refer to section 3 of WNR's 2003 Segregation Arrangements for guidance on the level of detail required.
297. In regard to the comments by TPI in its submission responding to the public submissions, the Authority notes that a copy of the letter from the former Office of the Rail Access Regulator to the then General Manager of WNR dated 8 April 2003 is on the Authority's web site. This letter clearly states that WNR's Rail Access Segregation Manual has been approved by the Acting Rail Access Regulator as of that date.
298. In relation to the process to be followed by the Authority in assessing TPI's Segregation Manual, the Authority notes that a public consultation process will be required on this manual. This will require TPI to provide the Authority with its proposed Segregation Manual for the purpose of public consultation. The Authority's final determination pursuant to section 29(1) of the Act will be based on consideration of TPI's Segregation Arrangements and its Segregation Manual together.

## Draft Determination

### Required Amendment 19

Part 7.1 of TPI's proposed Segregation Arrangements (headed 'Preparation of Segregation Manual') should be amended to include the following:

- An outline of the Segregation Manual document, in terms of major headings.
- A list of the documents and processes governed by the Segregation Manual, and the relationship of those to the Segregation Manual (ie whether they are part of the Segregation Manual or maintained under a separate, defined process).
- A list of the information to be included in the Segregation Manual, which should be similar to the equivalent list in section 3 of WNR's 2003 Segregation Arrangements, including the following:
  - Copy of the register for recipients of confidential information.
  - Copy of the Segregation Awareness Statement including the Confidentiality Agreement.
  - A description of each position in TPI's organisational structure, the classification of these positions according to whether they perform access-related functions or other functions and the physical location of these positions.
  - The procedures to ensure that billing-related confidential information is protected.
  - The measures and commitments in relation to the protection of confidential information, the types of behaviour which breach the segregation arrangements, the appropriate corrective action for each breach and notification and reporting procedures for breaches.
  - The information required to be included in TPI's Segregation Manual as set out under Required Amendments 9,10,15,16 and 18 of this draft determination.

- Acknowledgement that TPI's Segregation Manual and Segregation Arrangements are both required to be submitted to the Regulator in order for the Regulator to assess TPI's compliance with the segregation requirements under Part 4, Division 3 of the Act.
- Acknowledgement that the Regulator will undertake public consultation on TPI's Segregation Manual prior to making a final determination pursuant to section 29(1) of the Act.

## Audit and Compliance

### **TPI's Proposal**

299. This section sets out the arrangements proposed by TPI for undertaking external annual audits of compliance on a negative assurance basis. It also states that the Regulator is to select and manage the auditor with costs paid by the railway owner and that the Regulator's approval of the scope of the audit will be required and the final audit report will be made available to the Regulator and the public.
300. TPI has also committed to undertaking awareness training for relevant TPI staff involved in access-related functions or who are required to sign a Segregation Awareness Statement.
301. TPI also committed to providing the Regulator with a KPI report which will provide information on any breaches of TPI's Segregation Arrangements.
302. TPI has proposed a staged (Stages 1 and 2) process for implementation of its audit and compliance commitments.

### **Public Submissions**

303. UMC commented (page 12) that TPI be required to report any suspected breaches of the obligations to the Regulator and affected access seekers. UMC also considered that where the Regulator suspects or considers a breach of the obligations has occurred, TPI should be required to conduct an audit in the same manner as the annual audits.
304. The NWIOA (page 42) expressed similar comments to UMC and added that the audit reports should be made public. The NWIOA also suggested that the Regulator should be able to require TPI to undertake further audits as required.

### **PricewaterhouseCoopers' (PwC) Advice**

305. PwC recommended that TPI provide justification for adopting ten, rather than five business days, for reporting breaches of its Segregation Arrangements to the Regulator. If there is no reasonable justification for adopting a longer time period than in WNR's 2003 Segregation Arrangements then the five day time period should apply.
306. PwC advised that TPI's acknowledgement that the Regulator may undertake special audits on any issue or area where additional assurance is sought, is consistent with section 8 of WNR's 2003 Segregation Arrangements and is considered appropriate. Similarly, PwC noted that the commitment that TPI will undertake awareness training for relevant staff in relation to the obligations

under the WA Rail Access Regime is consistent with section 8 of WNR's 2003 Segregation Arrangements and is considered appropriate.

307. PwC also advised that the commitment by TPI to report key performance indicators to the Regulator in order to provide confidence in the integrity of its Segregation Arrangements, is consistent with the similar commitment under section 8 of WNR's 2003 Segregation Arrangements.
308. PwC recommended that an additional dot point should be added after the three KPIs listed by TPI under this section. This additional dot point would be that any other KPIs which indicate the effectiveness of segregation arrangements that are developed by the Regulator in consultation with TPI.

### Authority's Assessment

309. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
310. In relation to the point made by The NWIOA to the effect that the audit reports to the Regulator should be made public, the Authority notes that it would be appropriate for a public version of TPI's compliance audits to be placed on the Authority's web site as is the case for WNR.
311. The Authority notes PwC's recommendation for TPI to provide justification for adopting ten, rather than five business days, for reporting breaches of its Segregation Arrangements to the Regulator. However, the Authority sees no reason for this time period for reporting breaches to be any different to the five business day period previously approved under WNR's 2003 Segregation Arrangements.
312. The Authority agrees with PwC's recommendation in relation to further KPI's being developed to measure the effectiveness of TPI's Segregation Arrangements.

### Draft Determination

#### Required Amendment 20

Part 7.2 of TPI's proposed segregation Arrangements (headed 'Audit and Compliance') should be amended as follows:

- The words "10 business days" in the last paragraph on page 22, should be deleted and replaced with the words " 5 business days".
- A fourth dot point should be added on page 23. The statement inserted under this dot point should be; "other KPIs, as agreed between the Regulator and TPI, which measure the effectiveness of TPI's Segregation Arrangements".

## Complaints Handling

### **TPI's Proposal**

313. Under this section, TPI provides a commitment to implement a complaints handling procedure as part of its Segregation Arrangements.
314. TPI's procedure will involve an internal investigation of any complaint that it may have breached its Segregation Arrangements. The Regulator would be advised of the complaint within 30 days. The complainant would be advised of the outcome of TPI's investigation within 30 days.
315. TPI has proposed a staged (Stages 1 and 2) process for implementation of complaints handling commitments.

### **Public Submissions**

316. Hancock (ACIL) on (page 16) states that TPI should use all reasonable endeavours to advise the Regulator within 10 days of any complaint it receives.

### **PricewaterhouseCoopers' (PwC) Advice**

317. While acknowledging the process proposed by TPI to be reasonable, PwC recommends that TPI justify the basis for providing 30 days to notify the Regulator of any complaint received by TPI.

### **Authority's Assessment**

318. The Authority has previously indicated that TPI's staged approach outlined in its proposed Segregation Arrangements is inconsistent with the Act and has set out a required amendment earlier in this draft determination (Amendment 5) requiring TPI to remove all references to a staged approach to the implementation of its proposed Segregation Arrangements.
319. The Authority notes PwC's recommendation that TPI be required to justify the 30 day period to notify the Regulator of any complaint received by TPI. The Authority cannot see any reason for this period being so long and considers that a 10 business day period, as suggested by Hancock (ACIL), is reasonable. In addition, the Authority considers that this should be based on a firm commitment by TPI rather than on a 'reasonable endeavours' basis as proposed by TPI. Further, TPI should indicate that the Regulator will also be provided with the result of its investigation.

### **Draft Determination**

#### **Required Amendment 21**

Part 7.3 of TPI's proposed segregation Arrangements (headed 'Complaints Handling') should be amended as follows:

- Delete the dot point on page 23 which states; "advise the Regulator within 30 days of any complaint it receives" and insert a new sentence stating; "TPI will advise the Regulator within 10 business days of any complaint it receives and the action it is taking to investigate the complaint".

- Add the words “and the Regulator” immediately after the word “complainant” under the second dot point on page 23.

## Definitions

320. This section of the draft determination deals with Part 8 of TPI’s proposed Segregation Arrangements as set out on page 24 of these arrangements.

### TPI’s Proposal

321. Under this section, TPI has listed five terms and provided definitions for each.

### Public Submissions

322. UMC pointed out (page 10) that TPI’s definitions section should be expanded and should include access-related functions.

### PricewaterhouseCooper’s (PwC) Advice

323. PwC noted that this section contained only a limited list of defined terms.
324. PwC recommended that TPI provide a complete list of the definitions used in its document. In addition, PwC recommended that such definitions should be consistent with the definitions in the Act and the Code and with the definitions in section 9 of WNR’s 2003 Segregation Arrangements.

### Authority’s Assessment

325. The Authority agrees with PwC that TPI’s list of defined terms is too limited.
326. The Authority also agrees that TPI should provide a complete list of the definitions used in its proposed Segregation Arrangements and that these definitions should be consistent with the definitions in the Act and the Code.
327. Where terms are not defined in the Act and the Code, the Authority considers that TPI should adopt definitions consistent with those in WNR’s 2003 Segregation Arrangements where possible.

### Draft Determination

#### Required Amendment 22

Part 8 of TPI’s proposed segregation Arrangements (headed ‘Definitions’) should be amended as follows:

- Include a complete list of all the terms used in TPI’s proposed Segregation Arrangements which might reasonably be expected to require a definition.
- All definitions should:
  - Be consistent with the definitions in the Act and the Code.
  - If not defined in the Act and the Code, be consistent with the definitions on pages 9 and 10 of WNR’s 2003 Segregation Arrangements where possible.