

The Pilbara Infrastructure Pty Ltd

Draft Determination on the
Proposed (Revised) Train Path Policy

27 March 2009

Economic Regulation Authority



WESTERN AUSTRALIA

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For further information, contact:

Jeremy Threlfall
Assistant Director Rail
Economic Regulation Authority
Perth, Western Australia
Phone: (08) 9213 1900

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Contents

| | |
|---|----------|
| DRAFT DETERMINATION | 3 |
| LIST OF AMENDMENTS | 3 |
| REASONS FOR THE DRAFT DETERMINATION | 8 |
| BACKGROUND | 8 |
| LEGISLATIVE REQUIREMENTS | 8 |
| PUBLIC CONSULTATION | 10 |
| CONSULTANTS USED BY THE AUTHORITY | 10 |
| SCOPE OF MATTERS COVERED UNDER THE DRAFT DETERMINATION | 11 |
| DISCUSSION OF ISSUES | 11 |
| Introduction: Background (Section 1.1) | 12 |
| Introduction: Purpose of the TPP (Section 1.2) | 13 |
| Allocation of Capacity: Specification of Capacity (Section 2.1) | 16 |
| Allocation of Capacity: Analysis of Capacity (Section 2.2) | 19 |
| Allocation of Capacity: Capacity Allocation (Section 2.3) | 22 |
| Management of Capacity: Permanent Variations to Train Paths (Section 3.1) | 27 |
| Management of Capacity: Resumption of Capacity (Section 3.2) | 29 |
| Management of Capacity: Review of Service Entitlements (Section 3.3) | 31 |
| Other: Non-discrimination (Section 4.1) | 33 |
| Other: Dispute Resolution (Section 4.2) | 33 |
| Definitions (Appendix A) | 34 |
| ADDITIONAL ISSUES | 36 |
| Additional Issue 1: Rights of an Operator to Sell a Train Path | 36 |
| Additional Issue 2: Cancellation of Services using Train Paths | 38 |
| Additional Issue 3: Consistency between Access Agreements and the TPP | 39 |
| Additional Issue 4: Compliance and Review | 40 |
| Additional Issue 5: Operating Safety Standards | 42 |
| Additional Issue 6: Miscellaneous | 42 |

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 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 Train Path Policy (**TPP**) to the Economic Regulation Authority (**Authority**) for approval, in accordance with Part 5, section 44(2) of the Code. The Agreement Act required TPI to submit its proposed TPP to the Authority no later than seven days after the TPI Railway became subject to the State's rail access regime.
4. TPI submitted a revised proposed TPP on 27 February 2009. This revised proposed TPP is the TPP referred to in this draft determination as TPI's proposed (revised) TPP.
5. The Authority's approval is required, pursuant to section 44(1) of the Code, before TPI can put in place its TPP.
6. The Authority has considered TPI's proposed (revised) TPP 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.
7. Following consideration of the requirements set out under section 41 of the Code, the draft determination of the Authority is to approve TPI's proposed (revised) TPP, subject to fifteen amendments. These amendments are listed below.

LIST OF AMENDMENTS

Amendment 1

TPI's proposed (revised) TPP should be amended by deleting all references to TPI's port, its port access regime and its supply chain.

Amendment 2

Section 1.2 (headed 'Purpose of the TPP') of TPI's proposed (revised) TPP should be amended as follows:

- Amend the first dot point statement from "ensure that TPI's contractual obligations are fulfilled" to "ensure that TPI's contractual obligations to any operator using TPI's Railway Network are fulfilled".
- Amend the second dot point statement from "maximise the efficient utilisation of that Network, within the context of the overall supply chain" to "maximise the efficient utilisation of TPI's Railway Network".

- Add the statement “provide for the safe and reliable use of TPI’s Railway Network” as an additional dot point.

Amendment 3

Section 2.1 (headed ‘Specification of Capacity’) of TPI’s proposed (revised) TPP should be amended, as follows:

- Amend “Cyclic Traffics” to “Cyclic Traffic”.
- Delete “per week” under 2.1(b) and replace with “within a particular period of time”.
- Provide more detailed definitions of the terms “Timetabled Traffic”, “Cyclic Traffic” and “Service Entitlement”, including:
 - A detailed description of the nature of Timetabled Traffic and Cyclic Traffic.
 - A detailed description of how the two forms of train paths (for Timetabled Traffic and Cyclic Traffic) would be set out under a Service Entitlement.

Amendment 4

Section 2.2 (headed ‘Analysis of Capacity’) of TPI’s proposed (revised) TPP should be amended, as follows:

- The definitions of Master Train Plan and Master Control Diagram should be amended to more clearly set out the relationship between these instruments including the identification of any areas of overlap.
- Include in section 2.2.3, a statement to the effect that in carrying out its capacity analysis, TPI will take account of the following considerations:
 - The need to undertake, where appropriate, modelling of the effect that extra trains would have on the operation of TPI’s Railway Network.
 - The need for the capacity analysis process to be transparent to the access seeker and for TPI to maintain dialogue with the access seeker during this process, including in relation to any information provided by the access seeker to assist this process pursuant to section 15 of the Code.
- Incorporate into section 2.2.3, the process for the negotiation of new train paths prior to an access agreement, as set out under section 2.2.2 on pages 4 and 5 of WNR’s 2006 TPP.
- Amend the third paragraph under section 2.2.3 to add the words “provided the total time does not exceed the relevant timeframe prescribed under the appropriate section of the Code” immediately following the words “... to respond to the request” on the second last line of that paragraph.
- Amend the term “Indicative Access Proposal” to an appropriate term which is consistent with the terms used in the Code.

Amendment 5

Section 2.3 (headed 'Capacity Allocation') of TPI's proposed (revised) TPP should be amended, as follows:

- The arrangements set out for the allocation of train paths should be revised by:
 - Deleting references to the commercial approach for train path allocation (paragraphs two to ten) and the comments in relation to the most favourable applications to TPI in paragraph one.
 - Making it clear that the allocation of train paths will be based on an approach consistent with the requirements of the Code, along the lines outlined under section 2.2.1 of WNR's 2006 TPP (up to and including paragraph (iii) on page 4 of WNR's TPP).
- The period for which unused train paths would be reserved to an operator should be set out.
- The words " in accordance with the requirements of section 16 of the Code" should be added following the word "decision" at the end of the second last paragraph.
- Include a new paragraph within this section, with wording similar to that under section 5 of WNR's 2006 TPP, setting out the allocation arrangements in the case where there is competition for the same train path.
- Include a new paragraph at the end of this section, comprising similar wording to that under section 3 (page 10) of WNR's 2006 TPP dealing with section 10 of the Code.
- Amend the term 'Indicative Access Proposal' to be consistent with the requirements of Amendment 4.
- Amend the last paragraph by changing 'Section 25' to 'Section 26(1)'.

Amendment 6

Section 3.1 (headed 'Permanent Variations to Train Paths') of TPI's proposed (revised) TPP should be amended by the inclusion of the definition of 'reasonable grounds', as set out under section 2.4.1 of WNR's 2006 TPP (page 6, second to fourth paragraphs), in section 3.1.1.

Amendment 7

Section 3.2 (headed 'Resumption of Capacity') of TPI's proposed (revised) TPP should be amended as follows:

- Add, at the beginning of section 3.2.1, the first six paragraphs under section 2.5.1 of WNR's 2006 TPP.
- Clarify, in paragraph 12 of section 3.2.1, the words 'to TPI's reasonable satisfaction' by providing clear guidelines on how an operator will be able to demonstrate appropriate usage which, if not met, will result in the train path being withdrawn.

Amendment 8

Section 3.3 (headed 'Review of Service Entitlements') of TPI's proposed (revised) TPP should be amended by clearly setting out the circumstances which would constitute the 'regular failure of the operator's service' mentioned by TPI in the third last paragraph of this section.

Amendment 9

Section 4.2 (headed 'Dispute Resolution') of TPI's proposed (revised) TPP should be amended, as follows:

- Immediately following the first sentence, provide a description of the dispute resolution process which will apply under an access agreement. This process should be similar to that set out under section 8 of WNR's 2006 TPP.
- Delete the words 'Section 25' and replace with 'Section 26(1)'.

Amendment 10

Appendix A (headed 'Definitions') of TPI's proposed (revised) TPP should be amended as follows:

- Replace the term 'Network' with the term 'TPI's Railway Network'.
- Define 'TPI's Railway Network' based on the requirements of the Code, as being "the railway constructed pursuant to the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* excluding railway infrastructure which is not covered under the definition in section 3 of the *Railways (Access) Act 1998*."
- Include a complete list of all the terms used in the TPP, which might reasonably be expected to require a definition.
- All definitions should :
 - Be consistent with the definitions in the in the Act and the Code.
 - If not defined in the Act and the Code, be consistent with the definitions under section 10 of WNR's 2006 TPP where appropriate.

Amendment 11

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 4.3) headed 'Rights of an Operator to Sell a Train Path'.
- The first two paragraphs under section 4 in WNR's 2006 TPP should be included under this new section 4.3 (replacing 'Appendix A' with 'Appendix B').
- Include an Appendix B which sets out the criteria governing the trading of train paths by operators. This criteria should be based on similar lines to the criteria set out in Appendix A of WNR's 2006 TPP.

Amendment 12

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 3.4) headed 'Cancellation of Services using Train Paths'.
- Outline arrangements under the new section 3.4, along the lines set out in section 2.7 of WNR's 2006 TPP, which provide an operator with the right to cancel train paths without penalty.

Amendment 13

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 4.4) headed 'Consistency between Access Agreements and the TPP'.

- Outline arrangements under this new section 4.4 for ensuring consistency between access agreements under the Code and the TPP along the lines set out in section 7 of WNR's 2006 TPP.

Amendment 14

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 4.5) headed 'Compliance and Review'.
- Outline arrangements under this new section 4.5 for the manner in which TPI's compliance with its TPP will be monitored by the Authority and the review interval for TPI's TPP, along the lines set out in section 9 of WNR's 2006 TPP with the exception of the following:
 - First paragraph of WNR's section 9: Delete this paragraph and replace with 'The ERA will review the TPP, through a public consultation process, two years after the date when all the regulatory instruments required under the Act and the Code for TPI's railway have been approved by the Authority. TPI will provide the Authority with a proposed revised TPP at the time the review is required to commence the review process'.
 - Fourth paragraph of WNR's section 9: Delete this paragraph.
 - Fifth paragraph of WNR's section 9: Delete this paragraph and replace with 'The ERA will monitor TPI's compliance with the TPP through an audit of TPI's obligations under the TPP every two years. This audit will be carried out by an independent auditor approved by the ERA, with TPI managing and funding the audit. The scope of the audit will be determined by the ERA. The final audit report will be provided to the ERA. The ERA will publish this report on its web site (excluding confidential information, if any).'

Amendment 15

TPI's proposed (revised) TPP should be amended to include page numbers.

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. TPI was required, from this date, to comply with the legislative obligations set out for railway owners under the Act and the Code
10. The TPI Railway is owned and operated by TPI. TPI will perform both access-related rail functions and functions associated with the operation of train services.
11. The TPP is one of the four Part 5 Instruments set out in Section 40(3) of the Code. Section 40(2) of the Code notes that the Part 5 Instruments are binding on the railway owner.
12. Associated with the TPP is the Train Management Guidelines (**TMG**). The TMG is a statement of principles, rules and practices that will be applied in the management of train services. TPI's proposed TMG is the subject of a separate determination by the Authority.
13. In making this draft determination, the Authority is mindful of the legislative requirements of the *Rail Safety Act 1998* (**Safety Act**), with which TPI's TPP is required, under the Agreement Act, to comply. Pursuant to section 8 of the Act, TPI's TPP cannot contain any provision which is contrary to or inconsistent with the Safety Act.

LEGISLATIVE REQUIREMENTS

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

Code Requirements

41. Matters to be considered by the Regulator

For the purposes of performing his or her functions under section 29(1) of the Act or section 43 or 44 of this Code, the Regulator—

 - (a) may be informed in such manner as he or she thinks fit; but
 - (b) must have regard to---
 - (i) submissions made in accordance with a notice under section 42(1) or 45(1) as the case may be;
 - (ii) what the regulator determines to be the requirements of the public interest; and
 - (iii) any other matter that he or she considers to be relevant.

44. Certain approved statements of policy to be observed
- (1) A statement of policy for the time being approved or determined by the Regulator under this section in respect of the railway owner must be observed by the railway owner and a proponent in the negotiation and making of an access agreement.
 - (2) As soon as practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of the policy that it will apply (“a statement of policy”) in —
 - (a) the allocation of train paths; and
 - (b) the provision of access to train paths that have ceased to be used.
 - (3) The Regulator may —
 - (a) approve a statement of policy submitted by railway owner either with or without amendments; or
 - (b) if he or she is not willing to do so, determine what is to constitute the statement of policy.
 - (4) A statement of policy may be amended or replaced by the railway owner with the approval of the Regulator.
 - (5) The Regulator may, by written notice, direct the railway owner —
 - (a) to amend a statement of policy; or
 - (b) to replace a statement of policy with another statement of policy determined by the Regulator,
 and the railway owner must comply with such a notice.

Act Requirements

20(4) Functions of the Regulator

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

- (a) the railway owner’s legitimate business interests and investment in the railway infrastructure;
 - (b) the railway owner’s costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
 - (c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
 - (d) the interests of all persons holding contracts for the use of the railway infrastructure;
 - (e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
 - (f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
 - (g) the economically efficient use of the railway infrastructure; and
 - (h) the benefits to the public from having competitive markets.
15. In exercising its decision-making power pursuant to section 44 of the Code, the Authority is required to take into account the factors listed in section 20(4) of the Act. However, the Authority may allocate such weight to each of the factors listed in section 20(4) as it considers appropriate in order to ensure a balancing of interests in relation to the railway owner, rail operators, access seekers and the public.

PUBLIC CONSULTATION

16. The Code, under section 45, requires the Authority to undertake public consultation prior to approving any TPP statement prepared by a railway owner pursuant to section 44 of the Code.
17. On 14 July 2008, the Authority issued a notice on its web site and in relevant newspapers calling for submissions from interested parties on TPI's proposed TPP by 26 August 2008. Five public submissions were received from:
 - The Australian Rail Track Corporation Ltd.
 - Hancock Prospecting Pty Ltd.
 - The North West Iron Ore Alliance.
 - United Minerals Corporation NL.
 - Yilgarn Infrastructure Ltd.
18. On 19 September 2008, TPI requested the Authority's approval to make a supplementary submission addressing some issues raised in the public submissions. This approval was provided and TPI's supplementary submission was received by the Authority on 15 October 2008.
19. The five submissions from interested parties and TPI's supplementary submission are available on the Authority's web site (www.era.wa.gov.au).
20. On 27 February 2009, TPI submitted a revised proposed TPP noting that changes had been made to sections 1.2.2 and 4.2. The Authority issued a notice calling for public submissions on these changes to TPI's proposed TPP by 19 March 2009. No submissions were received.
21. This revised proposed TPP is referred to as the proposed (revised) TPP in the discussion below.
22. 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)**.

CONSULTANTS USED BY THE AUTHORITY

23. To assist the Authority in the preparation of its draft determination, the Authority engaged a consultant, Price Waterhouse Coopers (**PwC**) to review TPI's proposed TPP and the public submissions and provide advice to the Authority. The PwC draft report is available on the Authority's web site (www.era.wa.gov.au).

SCOPE OF MATTERS COVERED UNDER THE DRAFT DETERMINATION

24. The draft determination deals with the matters to be included in a railway owner's TPP as set out under Part 5, section 44(2) of the Code.
25. Some comments made in the public submissions are outside the scope of matters dealt with under the above section of the Code and, consequently, have not been included in the discussion of relevant issues set out in this draft determination.
26. Yilgarn provided, by way of a submission, a document which it had submitted to the National Competition Council in 2005, entitled "A case for avoiding vertically integrated rail infrastructure in 'greenfield' mining regions". The comments contained therein were not considered to be within the scope of this determination as these comments did not address the proposed (revised) TPP submitted to the Authority by TPI.

DISCUSSION OF ISSUES

27. TPI has set out its proposed (revised) TPP in four parts. Each of these parts is discussed under the headings listed below, which coincide with the section headings in the TPI's proposed (revised) TPP.
 - Introduction: Background (Section 1.1)
 - Introduction: Purpose of the TPP (Section 1.2)
 - Allocation of Capacity: Specification of Capacity (Section 2.1)
 - Allocation of Capacity: Analysis of Capacity (Section 2.2)
 - Allocation of Capacity: Capacity Allocation (Section 2.3)
 - Management of Capacity: Permanent Variations to Train Paths (Section 3.1).
 - Management of Capacity: Resumption of Capacity (Section 3.2)
 - Management of Capacity: Review of Service Entitlements (Section 3.3)
 - Other: Non-discrimination (Section 4.1)
 - Other: Dispute Resolution (Section 4.2)
28. The discussion of each item under the above headings is undertaken in the following order:
 - a) A summary of TPI's proposal relating to that item.
 - b) An outline of comments received in the public consultation process which relate to that item, including comments provided by TPI in its supplementary submission.
 - c) PwC's advice in relation to TPI's proposal, the public submission comments received and comments in TPI's supplementary submission.
 - d) The Authority's assessment.
 - e) Any amendments required.

29. Reference has been made in the discussion below to WestNet Rail's (**WNR**) TPP as approved by the Authority in August 2006. WNR's 2006 TPP is available on the Authority's web site (www.era.wa.gov.au).
30. It should be noted where the discussion below refers to TPI's TPP, this means TPI's proposed (revised) TPP.

Introduction: Background (Section 1.1)

TPI's Proposal

31. TPI provided relevant background information on its corporate structure and railway network.
32. TPI indicated that it has developed separate access regimes to enable third party access to the rail network and the port terminal.

Public Submissions

33. The NWIOA (page 6) commented that references to TPI's port access regime should be removed, noting that:

While the nature of the draft TMG and TPP documents expose some of the key concepts for the Rail Access Regime there is no such visibility on the Port Access Regime. The Alliance has concerns that the TMG and the TPP documents link the rail access regime to the port access regime ... all references to non-rail entities and roles, but particularly the Port, should be removed from the TPI Rail Access regime and TMG, TPP documents.

Pricewaterhouse Coopers' (PwC) Advice

34. PwC advised that railway access matters should be independent of port access matters and that the TPP should focus on the requirements of the rail access regime.
35. PwC recommended that TPI's TPP should only address the TPI Railway and make no reference to the broader TPI/FMG supply chain (which includes the port).

Authority's Assessment

36. The Authority notes, firstly, that the TPP relates only to that part of the railway owner's rail network which falls under the rail access regime as set out under Schedule 1 of the Code and, secondly, that the content of the TPP should focus on satisfying the information requirements set out under section 44(2) of the Code.
37. Based on the above, the Authority's view is similar to that expressed by the NWIOA and PwC in that matters relating to TPI's port should not be included in its TPP.
38. The Authority agrees with PwC's recommendation that TPI's TPP should only address the TPI Railway and should make no reference to other elements of the TPI/FMG supply chain, such as the port.

Draft Determination**Required Amendment 1**

TPI's proposed (revised) TPP should be amended by deleting all references to TPI's port, its port access regime and its supply chain.

Introduction: Purpose of the TPP (Section 1.2)**TPI's Proposal**

39. TPI outlined the objectives of its TPP as follows:
- ensure that TPI's contractual obligations are fulfilled;
 - maximise the efficient utilisation of that network, within the context of the overall supply chain;
 - ensure that capacity is allocated and managed in a non-discriminatory way.
40. TPI also outlined the distinction between the purposes of the TPP and the TMG. The TPP is focussed on initial allocation of capacity and the TMG is focussed on real time management issues including short term scheduling and daily operation of services.
41. In terms of the applicability of the TPP, TPI noted that its TPP will apply to all operators with whom TPI has an access agreement under the Code.

Public Submissions

42. Both the NWIOA and Hancock (GHD) submissions commented that the linking of the objectives and operations of the rail and port access regimes in TPI's TPP was not appropriate.
43. The NWIOA (page 6) commented as follows:
- The policy should be managed in such a way as to encourage maximum use of the rail Network. The TPI assertion that this occurs in the '*... context of the overall supply chain*' undermines the legitimate purpose and aims of the TPI Access Rail Access Regime.
44. The NWIOA considered (page 7) that all references to the port and the "overall supply chain" should be deleted otherwise the TPP could become unworkable with confusion between priorities related to the port and train paths.
45. Hancock (GHD) also expressed (page 9) the view that the linking of railway network objectives and port objectives is inconsistent with the requirements of the WA Rail Access Regime:
- The TPP suffers from the same problem as the TMG in that the Network is defined as 'means the track and infrastructure controlled by TPI ...including railway infrastructure at the Port'. By including infrastructure at the Port, TPI have essentially vertically integrated port operations with the railway. If a third party wishes to use another port. TPI have the ability to adversely impact the Third Party operations by using exigencies at their Port (Herb Elliott).

46. A number of submissions (NWIOA, UMC, ARTC and Hancock (ACIL)) expressed the view that the TPI's TPP should cover all operators including those who negotiate access agreements outside the Code. The reason given was to ensure fairness in the allocation and management of train paths between third party access seekers and TPI's own above rail haulage arrangements with FMG.
47. For example, the NWIOA (page 8) noted that if all operators, both in and out of the Code, are not included in TPI's TPP then the transparency and fairness of capacity and priority decisions will not be achieved.
48. ARTC also commented (page 7) that where the access provider is integrated, it would be difficult to prevent favourable treatment being given to a related entity where such elements of the TPP could be negotiated outside of the Code.
49. ARTC noted that applying the TPP to all access agreements (both in and out of the Code) resolves the issues around availability and transparency.
50. The above submissions suggested that TPI should adopt the same approach as contained in section 1.2 of WNR's 2006 TPP. Under this section, WNR notes that notwithstanding that the Code only requires it to apply its TPP to access agreements negotiated within the Code, it will apply its TPP to all access agreements whether negotiated in or outside the Code.
51. UMC (page 8) raised the issue of the inclusion of clear guidelines for the negotiation of new train paths. UMC suggested guidelines which should be included by TPI under section 1.2.2 of its TPP. These guidelines are based on the guidelines in WNR's 2006 TPP under section 2.2.1.

PricewaterhouseCoopers' (PwC) Advice

52. As noted previously, PwC advised that railway access matters should be independent of port access matters and that the TPP should focus on the requirements of the rail access regime.
53. PwC recommended that TPI's TPP should make no reference to the TPI/FMG supply chain or to joint objectives in relation to that supply chain. PwC also recommended that the following changes be made to section 1.2 of TPI's TPP:
 - Amend the purpose in the first dot point from "ensure that TPI's contractual obligations are fulfilled" to "ensure that TPI's contractual obligations to any person using the railway infrastructure are fulfilled".
 - Delete the purpose in the second dot point to "maximise the efficient utilisation of that Network, within the context of the overall supply chain".
 - Add a further dot point, being to "provide for the safe and reliable use of the railway infrastructure".
54. In relation to the issue of coverage of TPI's TPP, PwC considered that in the interests of transparency and effective management, TPI's TPP should be required to cover all operators, whether in or outside of the Code.
55. PwC recommended that:
 - A similar statement to that provided at paragraph 3 of section 1.2 of the WNR TPP should be incorporated into section 1.2.2 of the TPI TPP.

- An additional statement should be added to section 1.2.2 of the TPI TPP to clarify that the TPP applies to TPI/FMG in its role as an operator using the railway infrastructure.
56. PwC agreed with the UMC suggestion that TPI's TPP include guidelines for the negotiation of new train paths, along the same lines as WNR's 2006 TPP. PwC's view was that this would provide assurance to the railway owner of the ability of an operator to commit to a train path and would also provide useful information to the railway owner of the future demand to be placed on the railway infrastructure by the operator.

Authority's Assessment

57. The Authority agrees with PwC's view that railway access matters should be independent of port access matters and that the TPP should focus on the requirements of the rail access regime and should not contain references to the TPI supply chain or objectives in relation to the supply chain. The Authority notes that Amendment 1 includes the requirement for TPI to delete all references to its supply chain from its TPP.
58. In relation to PwC's recommendation in this regard, the Authority generally agrees with PwC's suggested changes to the objectives under section 1.2 of TPI's TPP. However, the Authority considers that the second dot point should be retained in an amended form which excludes mention of the overall supply chain.
59. On the issue of the extent of coverage of TPI's TPP, the Authority notes the comments in submissions and the advice of PwC supporting an approach similar to that of WNR, where the TPP has been applied to all access agreements whether in or outside the Code.
60. While the Authority can see that such an approach could have benefits in ensuring transparency through a uniform application of the TPP arrangements to all access agreements, the Code only imposes obligations on the railway owner in relation to applying the TPP where access agreements are negotiated under the Code. The Code does not impose any obligation on the railway owner to apply the TPP to access agreements negotiated outside of the Code.
61. The Authority therefore considers TPI's statement under section 1.2.2, to the effect that its TPP will apply to all operators with access agreements under the Code, to be appropriate. The rail access legislation allows TPI to enter into commercial access agreements outside of the Code with terms and conditions as agreed between TPI and the access seeker. TPI can in these circumstances choose to negotiate equivalent arrangements to those in its TPP or other arrangements as it considers appropriate.
62. However, the Authority notes that any access agreement negotiations carried out by the railway owner under the Code need to comply with the provisions of section 16 of the Code. This section imposes obligations on a railway owner in relation to such negotiations. Section 16(2) specifies that the railway owner must not unfairly discriminate between rail operations under the Code and the rail operations of the railway owner in relation to the allocation of train paths and other matters. Section 16(2) states:

In the negotiation of access agreements the railway owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner including, without limitation, in relation to –

- (a) the allocation of train paths;
- (b) the management of train control; and
- (c) operating standards.

63. In relation to the issue of including guidelines for the negotiation of new train paths, the Authority considers that this is better dealt with under section 2 of TPI's TPP which deals with the allocation of capacity rather than section 1.2. Accordingly, this matter is dealt with below under the discussion on section 2.3 (Capacity Allocation) of TPI's TPP.

Draft Determination

Required Amendment 2

Section 1.2 (headed 'Purpose of the TPP') of TPI's proposed (revised) TPP should be amended as follows:

- Amend the first dot point statement from "ensure that TPI's contractual obligations are fulfilled" to "ensure that TPI's contractual obligations to any operator using TPI's Railway Network are fulfilled".
- Amend the second dot point statement from "maximise the efficient utilisation of that Network, within the context of the overall supply chain" to "maximise the efficient utilisation of TPI's Railway Network".
- Add the statement "provide for the safe and reliable use of TPI's Railway Network" as an additional dot point.

Allocation of Capacity: Specification of Capacity (Section 2.1)

TPI's Proposal

64. TPI uses the concept of a Service Entitlement, which is to be prescribed in the operator's access agreement and is to be based on a prior assessment of available capacity by TPI. The use of the term "Service Entitlement" first appears in section 1.2.1 and is expanded upon in section 2.1.
65. TPI proposes to specify service entitlements in terms of timetabled traffics and cyclic traffics. For timetabled traffics, access rights would be defined in terms of the train paths that are allocated to that traffic. For cyclic traffics, access rights would be defined in terms of the number of train paths allocated to the operator per week.

Public Submissions

66. The NWIOA (page 9) and UMC (page 8) both commented that the terms "cyclic traffics" used in TPI's TPP should be replaced by "cyclic traffic" in order to avoid confusion. In addition, both these parties have noted that TPI's definition of cyclic traffics in the Definitions section of its TPP is different from its description of cyclic traffics in section 2.1, in that the definition specifies the number of train paths allocated to an operator per period whereas section 2.1 specifies the number of train paths allocated to an operator per week. Both the NWIOA and UMC consider the allocation of train paths on a per period basis to be the more appropriate definition.

67. The NWIOA (at page 9) commented that in order to provide entities seeking access with transparency on the operating regime proposed to be applied by TPI, the following information would need to be included in the description of the service entitlement:
- Train operating pattern regime e.g. Cyclic Trains are a program of four train paths to meet a ship
 - Train operating priorities regime e.g. Loaded trains have priority pathing
 - Track maintenance possession regime e.g. Track closed every second Sunday for maintenance
 - Network infrastructure constraints e.g. axle loads, train lengths.
68. The NWIOA (page 9) also noted that:
- The specification of capacity provides operational flexibility that appears to overly favour TPI. A standard measure of capacity needs to be adopted by the Authority to minimise confusion and manipulation by negotiating parties. Capacity is typically described in two ways:
- Train paths, that is the number of trains in each direction for a given time on a section of track, usually illustrated on a train graph (as described by TPI); or
 - Gross tonnes per kilometre (GTK), that is the number of tonnes that can be carried through the section of railway for a given mix of train types.
- Adopting a train path approach can be manipulated by inefficient train management and may not reflect the true capacity of the line or section.
69. The UMC (page 8) provided similar comments to those of the NWIOA outlined in the above paragraph.
70. On page 10 of its submission, the NWIOA also noted that the train path approach had limitations in that it did not properly account for the range of iron ore wagons that may be used to carry the iron ore, some of which may have a very large capacity to carry iron ore compared to others. The NWIOA recommended that capacity should be described in terms of GTK on the section of track being considered to properly reflect the capacity of that section.
71. TPI, on page 5 of its supplementary submission, made the following comment in relation to the above views on the GTK issue:
- TPI is not aware of any Australian heavy haul railway that uses GTK as a method of calculating available network access...GTK is an excellent method of determining wear rates of assets such as rail and rolling stock, and can be used in determining maintenance requirements and for other commercial purposes. However, it is highly unsuitable for capacity considerations as it very poorly accounts for train configurations and other key differences between operators.

PricewaterhouseCoopers' (PwC) Advice

72. PwC agreed that "cyclic traffics" would be more appropriately referred to as "cyclic traffic" and that the definition should be for train paths to be allocated on a per period basis rather than per week.
73. In relation to the issues raised relating to cyclic traffic and timetabled traffic, PwC does not consider the co-existence of these two forms of train paths to be inconsistent with the objectives of the rail access regime, as each form involves striking a different balance between the interests of railway owners and operators – through a balancing of fixed versus variable entitlements. PwC does consider, however, that these concepts are inadequately explained in the TPP.

74. In relation to the additions to TPI's TPP suggested by the NWIOA, in order to provide entities seeking access with transparency on the operating regime proposed to be applied by TPI, PwC considered that the last three matters are either addressed by the TMG or by the provisions of section 7 of the Code and do need to be included in the TPP. In relation to the first matter, PwC agreed that more detail is required on the cyclic traffic entitlement.
75. PwC's advice on the issue of the method of measuring capacity, whether by train paths or GTK, was that it did not consider that there was a compelling reason for TPI to change the capacity assessment arrangements in its TPP from the train path to the GTK approach. PwC noted that the train path approach is used in WNR's 2006 TPP which is likely to apply to a broader range of train characteristics than TPI's TPP.
76. PwC recommended that the TPI's TPP should provide more detailed definitions of Timetabled Traffic, Cyclic Traffic and Service Entitlement so that the attributes of Timetabled Traffic and Cyclic Traffic are set out in full, and the way in which these two forms of Train Path will be set out in a Service Entitlement is prescribed. PwC also recommended that cyclic traffic should be consistently described as an allocation 'within a period of time' rather than 'per week'.

Authority's Assessment

77. The Authority agrees with PwC that the two types of train path entitlements to be made available by TPI (for timetabled and cyclic traffics) provides operators with a degree of flexibility in relation to the manner in which they undertake their rail transport task and is not considered to be inconsistent with the objectives of the rail access regime. Further, the Authority notes that under the WNR's 2006 TPP, operators are able to obtain scheduled train paths but can also request additional 'conditional' train paths to meet seasonal or other requirements necessitating additional rail transport tonnages. These conditional train paths are similar to the cyclic traffics train paths proposed by TPI.
78. The Authority also agrees with PwC that TPI's TPP does not contain enough detail on the nature of the two types of train paths (for timetabled and cyclic traffic) offered by TPI.
79. With regard to the definition of cyclic traffics, the Authority agrees with PwC that "cyclic traffics" would be more appropriately referred to as "cyclic traffic" and that the definition should be for train paths to be allocated on a per period basis rather than per week.
80. The Authority concurs with PwC that the items suggested by NWIOA (page 9) to be included in TPI's TPP would be more properly addressed by the TMG and by the provisions of section 7 of the Code, and not by the TPP.
81. On the matter of the best means of measuring capacity on a particular section of track, the Authority agrees with PwC that there do not appear to be any compelling reasons to adopt a GTK approach compared to the train path approach, as used in WNR's 2006 TPP. The Authority is not convinced that the GTK approach would result in better use of the railway track compared with the train path approach and notes, in this regard, the comments by TPI in its supplementary submission that the GTK approach is not used on similar railways in Australia and that this approach accounts poorly for train configurations and key differences between individual operators.

82. The Authority agrees with the recommendations suggested by PwC.

Draft Determination

Required Amendment 3

Section 2.1 (headed 'Specification of Capacity') of TPI's proposed (revised) TPP should be amended, as follows:

- Amend "Cyclic Traffics" to "Cyclic Traffic".
- Delete "per week" under 2.1(b) and replace with "within a particular period of time".
- Provide more detailed definitions of the terms "Timetabled Traffic", "Cyclic Traffic" and "Service Entitlement" including:
 - A detailed description of the nature of Timetabled Traffic and Cyclic Traffic.
 - A detailed description of how the two forms of train paths (for Timetabled Traffic and Cyclic Traffic) would be set out under a Service Entitlement.

Allocation of Capacity: Analysis of Capacity (Section 2.2)

TPI's Proposal

83. In section 2.2.1, TPI states that it will maintain a Master Control Diagram for those routes under its control that are subject to the Code. TPI refers access seekers to sections 7 to 9 of the Code, and advises that it is also possible to seek access outside the Code.
84. In section 2.2.3, TPI outlines its intention to conduct a capacity analysis to determine whether there is sufficient available capacity to meet the requirements of the access seeker in order to determine a Service Entitlement, or to determine capacity enhancements if required. TPI notes that if capacity enhancements are required, the capacity analysis may need to be done in more detail which may take more time.

Public Submissions

85. Hancock (ACIL) commented (page 17) that a maximum additional time period of up to three months should be specified for the detailed capacity analysis outlined by TPI under section 2.2.3 of its TPP. In addition, Hancock (ACIL) considered that a process, with sequential steps and time limits, should be outlined by TPI in the case where an operator sought train paths which required capacity enhancement.
86. Hancock (ACIL) also suggested (page 17) that the wording in section 2.2.2 of WNR's 2006 TPP, dealing with the negotiation of new train paths, should be incorporated into section 2.2 of the TPI's TPP.
87. The NWIOA (page 11) commented that TPI's analysis of capacity needs to include consideration of:

- the effect extra trains will have operationally, which needs to be modelled based on 'reasonably practical' test, that is what can be achieved versus the effort required to achieve it;
 - that capacity analysis needs to be transparent to be fair to the access seeker;
 - that TPI undertakes to at all times maintain dialogue with the Operator to ensure all alternatives are explored.
88. UMC noted (page 9) that the extra time required by TPI to consider enhancements should be limited and that there should be an obligation to consult with the access seeker when developing enhancement proposals.

PricewaterhouseCoopers' (PwC) Advice

89. PwC advised that section 2.2.1 in TPI's TPP was similar to the equivalent section (section 2.1) in WNR's 2006 TPP.
90. However, PwC considered that the relationship between the Master Control Diagram mentioned under section 2.2.1 of TPI's TPP and the Master Train Plan mentioned in section 2.1 of TPI's TPP is not clear. PwC noted that in the case of WNR's 2006 TPP these two terms were essentially the same.
91. In light of the above, PwC recommended that TPI should amend its definitions of Master Control Diagram and Master Train Plan so that the relationship between these two instruments was clearly distinguished.
92. In regard to section 2.2.2 of TPI's TPP, PwC considered that this section was consistent with the equivalent section (paragraph one of section 2.2) in WNR's 2006 TPP.
93. In relation to section 2.2.3 of TPI's TPP, PwC generally agreed with the points raised by Hancock (ACIL), the NWIOA and UMC, as outlined above.
94. PwC recommended that section 2.2.3 of TPI's TPP should be amended as follows:
- A. List the following matters that would be addressed in a capacity analysis:
- the effect extra trains will have operationally, which needs to be modelled based on "reasonably practical" test, that is what can be achieved versus the effort required to achieve it;
 - that capacity analysis needs to be transparent to be fair to the access seeker; and
 - that TPI undertakes to at all times maintain dialogue with the operator to ensure all alternatives are explored.
- B. Incorporate the process for negotiating new train paths prior to an access agreement from section 2.2.2 of the WestNet TPP, to which a time limit should be added for TPI to explore whether there is a requirement for capacity enhancement (three months is suggested).

Authority's Assessment

95. In regard to section 2.2.1 of TPI's TPP, the Authority has noted PwC's comments. While TPI has given a reasonably clear description of the meaning of the terms Master Train Plan and Master Control Diagram in its definitions section, the Authority agrees with PwC that there is some overlap between the matters covered under each of these terms which should be clarified by TPI.

96. The Authority agrees with PwC that section 2.2.2 of TPI's TPP, which is similar to the equivalent section in WNR's 2006 TPP, is appropriate.
97. The Authority generally agrees with the broad thrust of the comments made in public submissions in relation to section 2.2.3 of TPI's TPP, which have been supported in PwC's advice. PwC has formulated recommendations based on these comments.
98. In regard to the first part of PwC's recommendations (Part A), the Authority agrees that the modelling of train movements would be a useful tool for TPI to utilise in analysing capacity. However, it is up to TPI to determine the way in which such modelling would be undertaken rather than prescribing that it be based on a 'reasonably practical' test. In terms of fairness, the Code imposes (section 16(2)) an obligation on the railway owner to not unfairly discriminate against access seekers under the Code as discussed above. On the issue of TPI maintaining dialogue during the capacity analysis process with access seekers, it should be noted that the Code requires the access seeker (section 15) when requested by the railway owner to provide information showing that the requested train paths are within the capacity of the rail network and that any enhancements required are technically and economically feasible.
99. With regard to the issue of setting a time limit on TPI's analysis of capacity in the case where enhancement of the network is required (under Part B of PwC's recommendations), the Authority notes that the Code places obligations on the railway owner to respond to an access seeker within specified timeframes. In the case of providing an initial indication of capacity (under section 7 of the Code), the timeframe is no later than 14 days. In the case of responding to a proposal requiring capacity enhancements (sections 8.4 and 9(2)(b) of the Code), the timeframe is no later than 30 days. TPI refers to the need for additional time to respond to a request and prepare an 'Indicative Access Proposal'. It would appear that TPI is referring to sections 8 and 9 of the Code where, in the case of enhancements being required, TPI has a maximum of 30 days to respond to the proponent.
100. In relation to the comment by Hancock (ACIL) that a process, with sequential steps and time limits, should be included where an operator sought train paths which required capacity enhancement, the Authority considers that the Code contains appropriate provisions in this area including setting out time limits for the railway owner to respond to inquiries and proposals for access as outlined above.

Draft Determination**Required Amendment 4**

Section 2.2 (headed 'Analysis of Capacity') of TPI's proposed (revised) TPP should be amended, as follows:

- The definitions of Master Train Plan and Master Control Diagram should be amended to more clearly set out the relationship between these instruments including the identification of any areas of overlap.
- Include in section 2.2.3, a statement to the effect that in carrying out its capacity analysis TPI will take account of the following considerations:
 - The need to undertake, where appropriate, modelling of the effect that extra trains would have on the operation of TPI's Railway Network.
 - The need for the capacity analysis process to be transparent to the access seeker and for TPI to maintain dialogue with the access seeker during this process, including in relation to any information provided by the access seeker to assist this process pursuant to section 15 of the Code.
- Incorporate into section 2.2.3, the process for the negotiation of new train paths prior to an access agreement as set out under section 2.2.2 on pages 4 and 5 of WNR's 2006 TPP.
- Amend the third paragraph under section 2.2.3 to add the words "provided the total time does not exceed the relevant timeframe prescribed under the appropriate section of the Code" immediately following the words "... to respond to the request" on the second last line of that paragraph.
- Amend the term "Indicative Access Proposal" to an appropriate term which is consistent with the terms used in the Code.

Allocation of Capacity: Capacity Allocation (Section 2.3)**TPI's Proposal**

101. TPI has proposed that capacity will be allocated to the first access seeker with whom it can negotiate and execute an access agreement subject to that access seeker's application being the most favourable to TPI.
102. TPI also commented that, where there is competition for the same access rights, the allocation of such rights may be determined 'on a reasonable commercial basis applying a market testing process, which may involve applying an allocation criteria applied in other Australian access regimes'.
103. TPI noted that any market testing process would be applied in a non-discriminatory way and would allow access seekers the opportunity to bid.
104. In addition, TPI has proposed that it would be able to prioritise negotiations with one access seeker over another on the basis of the progress of each access seeker's

application. TPI set out a number of criteria to be used in determining priority in conducting access negotiations.

105. TPI's proposal makes reference to TPI's obligations under the Code requiring that it does not unfairly discriminate between access seekers and also refers to possible dispute resolution mechanisms under the Code.

Public Submissions

106. Hancock (GHD) commented (page 9) on the lack of detail in TPI's proposal, noting that:

the TPI proposals are not materially different to those in operation in other jurisdictions except that there is a distinct lack of detail associated with the proposal. For example, the method of assessing the "reasonable commercial basis" for which access rights may be allocated where two or more access seekers are involved in vying for the same path is not detailed. The notion of "more advanced" is somewhat subjective.

107. Hancock (ACIL) remarked (page 18) that it was unable to find reference to the allocation criteria referred to by TPI in other Australian access regimes. Hancock (ACIL) also noted (page 20) that TPI's reference to 'commercial basis', 'market testing' and 'allocation criteria' requires substantial elaboration, for example, what type of testing and what allocation criteria and how would it work. Hancock (ACIL) also expressed concern that commercial processes such as bidding are problematic under vertical integration, as the operator that is related to the infrastructure owner would be paying itself.
108. A further comment by Hancock (ACIL) (page 19) was that clarification was required in regard to TPI's use of the words "in the opinion of TPI, is most favourable to it" in relation to deciding which access seeker will be allocated capacity.
109. The ARTC (page 7) commented along similar lines to Hancock (ACIL), noting that:
- The TPP states that access rights will be allocated subject to the application which, in the opinion of TPI, is 'most favourable to it'. ARTC supports a transparent process being applied in determining this outcome which should clearly outline how the allocation of train paths is to occur.
110. Hancock (ACIL) page 18, also suggested that the dispute resolution mechanisms available under the Code are much wider than Clause 25 alone, and that TPI should refer to all of clauses 24-35 (Division 3) and not just Clause 25. Hancock (ACIL) also refers to wording in WNR's 2006 TPP (in section 8) which endeavours to reduce the need for arbitration and suggests that these words be incorporated.
111. Another suggestion made by Hancock (ACIL) (page 20) was that there should be an explicit reference to all parties using every reasonable endeavour and working together to modify train path needs to avoid clashes.
112. The NWIOA commented (page 12) that the train path allocation needs to be transparent at four levels to allow TPI and the access seeker to begin a joint analysis of capacity for the access seeker's trains. These levels are:
1. The analysis that determined capacity of the railway for existing operations.
 2. The existing used capacity of the railway based on the greenfields basis of design for the TPI railway. Including information on actual utilisation – that is what trains ran including their train paths, manifest, axle loads.

3. Determine the extra capacity, included in the analysis, required for planned and committed projects.
4. Finally, the train path capacity and network operating regime and rules for the allocation to the access seeker.

PricewaterhouseCoopers' (PwC) Advice

113. PwC advised that it did not consider the process set out by TPI for the allocation of capacity to be clear, noting that TPI's allocation process is broadly based on the 'first come, first served' principle but also provides for the allocation to be made on the basis of applications which are 'most favourable' to TPI or on the basis of a 'commercial' process.
114. PwC recommended that TPI change its allocation process to reflect a similar process to that used in WNR's 2006 TPP under section 2.2.1 whereby the train path allocation is made on a 'first come, first served' basis subject to the access seeker establishing a requirement for that allocation. WNR's 2006 TPP provides guidelines for access seekers to establish such a requirement.
115. PwC also advised that TPI needed to include information on how long unused service entitlements could be retained. PwC recommended that TPI should specify the period for which an unused service entitlement would be reserved to an operator.
116. A further recommendation by PwC was that the second last paragraph of section 2.3, where TPI acknowledges its obligation not to unfairly discriminate between access seekers, should be amended to incorporate reference to the Code provision where this obligation is set out (section 16(2)).
117. PwC advised that TPI had not made mention of the requirements of section 10 of the Code which relates to the need for a railway owner to seek approval from the Authority should a request for an additional train path preclude other access seekers from gaining access to the railway. PwC noted that section 10 of the Code should not be overridden by the TPI's TPP.
118. PwC recommended that the following concluding paragraph be added to section 2.3 of TPI's TPP:

Where a request for a Train Path or Train Paths or a request for an additional Train Path may preclude other entities from gaining access to the railway infrastructure the Train Path(s) will not be assigned without the approval of the Authority in accordance with section 10 of the Code. Negotiations on the proposal must not be entered into by the railway owner without the approval of the Authority.

Authority's Assessment

119. The Authority agrees with PwC's advice to the effect that TPI's TPP is not clear in relation to how train paths will be allocated. The Authority's view is that sections 13 and 16(1) of the Code impose an obligation on the railway owner to negotiate an access agreement where an access seeker has complied with the provisions of the Code and made a proposal to the railway owner. Furthermore, section 16 requires that the railway owner cannot unfairly discriminate either between access seekers under the Code or between access seekers under the Code and the railway owner's rail operations.

120. Based on the above, the Authority considers that all access seekers under the Code are entitled to be dealt with on a 'first come, first served', subject to satisfying the relevant provisions of the Code. The Code provides for the TPP to provide further detail of the railway owner's processes for the allocation of train paths but such processes cannot be inconsistent with the Code.
121. The guidelines under section 2.2.1 in WNR's 2006 TPP provide a basis for WNR to determine whether a proponent meets the requirements of section 14 of the Code, related to managerial and financial ability. As such, these guidelines are consistent with the Code. In the case of TPI's TPP, the commercial arrangements outlined for the allocation of train paths do not appear to be consistent with the Code as they could result in a proponent who has met the requirements of the Code not being given the opportunity to negotiate an access agreement with TPI. Similarly, where TPI applies the 'first come, first served' principle, it includes the provision of the proposal having to be the 'most favourable to it'. This again appears to be inconsistent with the Code on the same basis as above.
122. The Authority's view, based on the above, is that PwC's recommendation that TPI change section 2.3 of its TPP to a 'first come, first served', approach for the allocation of train paths based on guidelines similar to those outlined under section 2.2.1 of WNR's 2006 TPP is appropriate.
123. In relation to the issue of reserving train paths, PwC recommended that TPI should specify the period for which an unused service entitlement would be reserved to an operator. The Authority agrees with the recommendation.
124. The Authority also agrees with PwC's recommendation that TPI should make reference to section 16 of the Code, relating to TPI's obligation not to unfairly discriminate between access seekers.
125. With regard to PwC's recommendations concerning section 10 of the Code, related to access to remaining capacity such that future access seekers will be precluded from accessing the railway, the Authority agrees that it is important to ensure that TPI's TPP properly reflects the requirements of this section.
126. The authority also considers that the arrangements set out under section 5 of WNR's 2006 TPP, dealing with competition for the same train path, should be included under this section of TPI's TPP.

Draft Determination**Required Amendment 5**

Section 2.3 (headed 'Capacity Allocation') of TPI's proposed (revised) TPP should be amended, as follows:

- The arrangements set out for the allocation of train paths should be revised by:
 - Deleting references to the commercial approach for train path allocation (paragraphs two to ten) and the comments in relation to the most favourable applications to TPI in paragraph one.
 - Making it clear that the allocation of train paths will be based on an approach consistent with the requirements of the Code, along the lines outlined under section 2.2.1 of WNR's 2006 TPP (up to and including paragraph (iii) on page 4 of WNR's TPP).
- The period for which unused train paths would be reserved to an operator should be set out.
- The words "in accordance with the requirements of section 16 of the Code" should be added following the word "decision" at the end of the second last paragraph.
- Include a new paragraph within this section, with wording similar to that under section 5 of WNR's 2006 TPP, setting out the allocation arrangements in the case where there is competition for the same train path.
- Include a new paragraph at the end of this section, comprising similar wording to that under section 3 (page 10) of WNR's 2006 TPP dealing with section 10 of the Code.
- Amend the term 'Indicative Access Proposal' to be consistent with the requirements of Amendment 4.
- Amend the last paragraph by changing 'Section 25' to 'Section 26(1)'.

Management of Capacity: Permanent Variations to Train Paths (Section 3.1)

TPI's Proposal

127. TPI has proposed that this section applies where consideration is being given to a permanent variation in a train path which does not involve a change in the overall number of train paths allocated to an operator under its service entitlement. This section covers only permanent variations to train paths. TPI has noted that short-term or temporary variations in train paths are provided for in the TPI's TMG.
128. In relation to a permanent variation to a train path requested by TPI (section 3.1.1), it is proposed that a service entitlement may be varied if TPI sends a notice to the operator outlining the duration of and reason for the variation with not less than 30 days notice and the operator's response consents to such a variation.
129. It is proposed that the operator must provide its response to such a notice within 28 days of receiving it and that the operator's consent may only be withheld on reasonable grounds, which must be outlined by the operator in its response.
130. In relation to a permanent variation to train paths requested by an operator (section 3.1.2), it is proposed that the information accompanying such a request should include the route, times requested and the nature of the service which will use the train path. If TPI is unable to comply with such a request, TPI will, at the request of the operator, provide a written explanation.
131. TPI has undertaken to negotiate with other operators to seek their co-operation to meet an operator's request for a train path variation. TPI noted that, in general, the consent of both TPI and the operator would be required to permanently vary a train path.

Public Submissions

132. Hancock (ACIL) commented (pages 21/22) that TPI should define the terms 'temporary', 'permanent' and 'reasonable grounds', that TPI should be required to demonstrate that there is a safety issue if this reason is used to vary a train path and that a dispute resolution mechanism should be available.
133. UMC noted (page 9) that permanent variations should have a ninety day notice period rather than the thirty day period proposed by TPI, due to the potential impact on mine economics.

PricewaterhouseCoopers' (PwC) Advice

134. PwC advised that section 3.1.1 of TPI's TPP is essentially the same as the equivalent section (section 2.4.1) in WNR's 2006 TPP except for the definition of 'reasonable grounds'. WNR's TPP contains such a definition whereas TPI's TPP does not.
135. PwC recommended that TPI's TPP should include a definition of 'reasonable grounds' consistent with that contained under section 2.4.1 (page 6) of WNR's 2006 TPP.

136. In relation to section 3.1.2 of TPI's TPP, PwC advised that this section was essentially the same as the equivalent section (section 2.4.2) in WNR's 2006 TPP. No changes to this section of TPI's TPP were recommended by PwC.
137. PwC also advised, in relation to other issues raised in submissions relating to this section of TPI's TPP, that TPI and operators are able to negotiate specific arrangements in their access agreement in relation to train path policy additional to those contained in the TPP, provided that such arrangements are not inconsistent with the TPP.

Authority's Assessment

138. The Authority notes PwC's advice that this section of TPI's TPP is essentially the same as the equivalent sections in WNR's 2006 TPP, except for the definition of reasonable grounds.
139. The Authority agrees with PwC's recommendation that TPI's TPP include a definition of 'reasonable grounds' consistent with that contained in WNR's 2006 TPP.
140. In relation to the comments by Hancock (ACIL), the Authority notes that the access agreement is required to contain a dispute resolution process and that issues such as the safety matter raised by Hancock (ACIL) would be expected to be dealt with through this mechanism. The Authority does not consider, consistent with WNR's 2006 TPP, that definitions of 'temporary' or 'permanent' are required, as has been suggested by Hancock (ACIL).
141. The Authority has considered UMC's comment on TPI's minimum notice period for a permanent train path variation being ninety days rather than thirty days as stated in TPI's TPP (and also in WNR's 2006 TPP). The Authority's view is that UMC could seek to negotiate in its access agreement with TPI to extend the period of notice for a particular train path beyond thirty days, if necessary, as this would not be inconsistent with TPI's TPP which specifies thirty days as a minimum period of notice.
142. In relation to the above, the Authority notes TPI's comments in its supplementary submission, to the effect that it will negotiate with access seekers in good faith on relevant matters relating to its train path policy.

Draft Determination

Required Amendment 6

Section 3.1 (headed 'Permanent Variations to Train Paths') of TPI's proposed (revised) TPP should be amended by the inclusion of the definition of 'reasonable grounds', as set out under section 2.4.1 of WNR's 2006 TPP (page 6, second to fourth paragraphs), in section 3.1.1.

Management of Capacity: Resumption of Capacity (Section 3.2)

TPI's Proposal

143. This section is concerned with the circumstances under which TPI will resume capacity from operators due to under-utilisation (section 3.2.1) or due to a transfer of contract between operators (section 3.2.2).
144. In relation to 'Reduction in train service entitlement due to under-utilisation' (section 3.2.1), TPI has proposed a process for assessing train paths established under the two types of service entitlement, being timetabled traffics and cyclic traffics. The criteria used to define under-utilisation is that less than 15 per cent of the service entitlement is used within a quarter (cyclic traffic) and seven or more times that an entitlement has not been used within 12 consecutive specified timetabled traffics (timetabled traffics).
145. TPI's proposal sets out a process with timeframes for withdrawal of an underutilised entitlement. This process involves; 1) TPI notifying an operator of its intention to withdraw an entitlement; 2) an operator being required to demonstrate that the entitlement has not been under-utilised; 3) TPI reaching a decision; and 4) the operator utilising, if necessary, the dispute resolution provisions of its access agreement if it does not agree with TPI's decision.
146. In relation to 'Removal of a service entitlement due to a transfer of a contract between operators' (section 3.2.2), TPI proposes to enter negotiations with the operator to reach agreement on the service entitlements to be withdrawn from the operator. If an agreement is not reached, TPI will commence the process described in 3.2.1 for the withdrawal of service entitlement due to under-utilisation.

Public Submissions

147. Hancock (ACIL) commented (page 21) that TPI should include, under section 3.2.1, the specific circumstances under which TPI would be able to consider the withdrawal of an operator's train path for under-utilisation, as set out under section 2.5.1 of WNR's 2006 TPP.
148. In relation to section 3.2.2, Hancock (GHD) expressed the view (page 9) that in the event that an operator loses a transportation contract to another operator or a mine wishes to operate its own train, the path allocation from the original operator should be 'grandfathered' to the new operator. Hancock (GHD) comments here that while the title of this section appears to address this issue, the body of the text deals only with TPI's rights.
149. Hancock (GHD) also (page 10) raises the issue of who should be permitted to enter into an access agreement. GHD notes that:

in other jurisdictions, mines or freight forwarders are able to enter into access agreements provided they show that they have an agent that is a certified/approved above rail operator. This permits single purpose operators such as mines to invest in their own rolling stock giving them added flexibility in their service provision by being able to contract with competitive suppliers of train operators. Access Agreements should be made available to a broader range of operators.

PricewaterhouseCoopers' (PwC) Advice

150. PwC advised that section 3.2.1 was, in broad terms, similar to the equivalent section (section 2.5.1) of WNR's 2006 TPP. However, PwC noted that there were differences between these sections of the WNR and TPI TPPs, including in relation to the method of determining under-utilisation.
151. PwC's view, in relation to the process for the withdrawal of an under-utilised train path, was that TPI should only withdraw a train path on a reasonable basis in line with the provisions outlined under section 2.5.1 of WNR's 2006 TPP.
152. In relation to section 3.2.2, PwC advised that this section was essentially the same as section 2.5.2 of WNR's 2006 TPP.
153. PwC also considered the comment by Hancock (GHD) in relation to the 'grandfathering' of train paths under section 3.2.2. PwC recommended that section 3.2.2 should incorporate arrangements for 'grandfathering' Train Paths where there is a substitution of operators.

Authority's Assessment

154. The Authority agrees with PwC that the processes set out under section 3.2.1 of TPI's TPP are broadly similar to those in the equivalent section (section 2.5.1) of WNR's TPP. However, the Authority considers that there are two areas where section 3.2.1 should be amended.
155. The first relates to the comment from Hancock (ACIL) that TPI should include the specific circumstances under which TPI would be able to consider the withdrawal of an operator's train path for under-utilisation. In the Authority's view, a train path allocation under an access agreement is an entitlement of an operator and the railway owner should not be able to propose a withdrawal of such an entitlement except in circumstances where there are good reasons for doing so. In this regard, the limiting of a railway owner to being able to consider the withdrawal of an operator's train path to specific circumstances, as set out under section 2.5.1 of WNR's 2006 TPP, provides an appropriate measure of protection to an operator. This view is consistent with that of PwC.
156. The second area which the Authority considers should be amended in relation to section 3.2.1 of TPI's TPP relates to the process, once notice of an intention to withdraw capacity has been issued, for TPI to determine if the train path is being properly utilised. WNR's 2006 TPP sets out clear guidelines for usage (section 2.5.1(c)(iii)) which if not met will result in the train path being withdrawn. In comparison, TPI does not specify any similar guidelines but rather notes that usage has to be demonstrated 'to TPI's reasonable satisfaction'. TPI should provide clear guidelines on how an operator will be required to demonstrate appropriate usage.
157. In regard to section 3.2.2 of TPI's TPP, the Authority notes PwC's comments that this section is essentially the same as the equivalent section (section 2.5.2) of WNR's 2006 TPP.
158. The Authority has considered the issue raised by Hancock (GHD), in relation to section 3.2.2, involving the transfer of train paths from an operator who loses a transportation contract to another operator or in the case where a mine may wish to take over the transportation task from an existing operator. As noted above, the

Authority's view is that a train path allocation under an access agreement is an entitlement of an operator. In circumstances where the operator loses part or all of its transportation contracts, it is therefore appropriate that the operator be given the opportunity to retain this entitlement through obtaining new contracts and meeting the train path usage requirements as provided for under section 3.2.2 of TPI's TPP (and section 2.5.2 of WNR's 2006 TPP). Consequently, the automatic transfer of a train path entitlement through a 'grandfathering' clause under section 3.2.2, as suggested by Hancock (GHD) and recommended by PwC, is not supported by the Authority.

159. In relation to Hancock (GHD)'s comments that access agreements should be made available to a broader range of operators, the Authority notes that the Code is not specific on who can enter into access agreements. The Code defines an operator as 'an entity to which access is provided under an access agreement' and defines an entity as 'a corporation, partnership, trustee or other person'. The Code therefore is not restrictive on who can enter into access agreements but does require that such parties negotiate access through the provisions of the Code in order to have an access agreement which is under the Code.

Draft Determination

Required Amendment 7

Section 3.2 (headed 'Resumption of Capacity') of TPI's proposed (revised) TPP should be amended as follows:

- Add, at the beginning of section 3.2.1, the first six paragraphs under section 2.5.1 of WNR's 2006 TPP.
- Clarify, in paragraph 12 of section 3.2.1, the words "to TPI's reasonable satisfaction" by providing clear guidelines on how an operator will be able to demonstrate appropriate usage which, if not met, will result in the train path being withdrawn.

Management of Capacity: Review of Service Entitlements (Section 3.3)

TPI's Proposal

160. This section of TPI's proposal outlines the pre-conditions and processes for reviewing an operator's service entitlements. For timetabled traffics, a review would be conducted by comparing the stated departure and arrival times with actual performance over a three month period. In the case of cyclic traffics, TPI and the operator would agree the basis on which performance is to be reviewed if this is not set out in the access agreement.
161. TPI has noted that following any such review, and if performance differs in material respects from the service entitlement, then TPI and the operator would negotiate in good faith to amend the service entitlement so that it reflects as closely as is reasonably practicable, the three month actual performance history.

Public Submissions

162. There were no comments in submissions on this section.

PricewaterhouseCoopers' (PwC) Advice

163. PwC noted that this section of TPI's TPP was similar to section 2.6 of WNR's 2006 TPP.
164. However, PwC advised there was a difference in some of the wording in TPI's TPP compared to that of WNR's 2006 TPP. In particular, PwC commented that TPI's TPP contained a qualification (third last paragraph) relating to a 'regular failure of the operator's service' which implies that an operator's right of access to the network is not a fully 'firm' right but is conditional on the operator satisfying certain ongoing requirements. This qualification is not contained in WNR's 2006 TPP.
165. PwC recommended that TPI defines the circumstances, and provides examples, of the events that would constitute a regular failure of an operator's service that could result in the operator having to accept a proposal to revise its service entitlement.

Authority's Assessment

166. The Authority notes PwC's advice that section 3.3 of TPI's TPP is similar to the equivalent section (section 2.6) of WNR's 2006. PwC's observation of the differences in the third last paragraph of TPI's TPP compared to WNR's 2006 TPP is also noted.
167. In regard to the differences in this section of TPI's TPP compared to section 2.6 of WNR's 2006, relating to the last three paragraphs of TPI's TPP, the Authority considers the process set out by TPI for dealing with a regular failure of an operator's service to be reasonable. This process does not force an operator to accept a revised train path as, if the other affected operator does not agree to a train path variation, the operator is required to try and renegotiate its contractual obligations on a 'best endeavours' basis.
168. However, the Authority agrees with PwC that TPI should clarify the meaning of the term 'regular failure of the operators service' as contained in the third last paragraph of section 3.3.
169. The Authority also notes that the Code requires the access agreement, under Schedule 3, to include a clause dealing with performance standards to be met by the railway owner and the operator. The access agreement would therefore be expected to cover most matters relating to an operator's performance in relation to its allocated train paths.

Draft Determination**Required Amendment 8**

Section 3.3 (headed 'Review of Service Entitlements') of TPI's proposed (revised) TPP should be amended by clearly setting out the circumstances which would constitute the 'regular failure of the operator's service' mentioned by TPI in the third last paragraph of this section.

Other: Non-discrimination (Section 4.1)**TPI's Proposal**

170. At section 4.1 of its proposed TPP, TPI states that TPI will not discriminate between Operators in the application of this TPP and the application of TPI's Network Rules.

Public Submissions

171. No comments were made in submissions on this matter.

PricewaterhouseCoopers' (PwC) Advice

172. PwC advised that this section was the same as section 6 of WNR's 2006 TPP.

173. PwC also noted that TPI has clearly stated, under section 1.2.2, that the TPP will apply to all operators with whom TPI has an access agreement under the Code.

Authority's Assessment

174. The Authority noted PwC's advice that this section of TPI's TPP was the same as the equivalent section (section 6) of WNR's 2006 TPP.

175. The Authority considers this section of TPI's TPP to be appropriate

Other: Dispute Resolution (Section 4.2)**TPI's Proposal**

176. TPI provides that disputes relating to the TPP be managed in accordance with the access agreement, and if no agreement is in place, an access seeker under the Code can have the matter arbitrated under section 25 of the Code.

Public Submissions

177. The NWIOA (page 14), UMC (page 10) and Hancock (ACIL) (page 19) all argued that TPI's TPP should incorporate the arrangements set out under section 8 of WNR's 2006 TPP relating to the resolution of disputes under an access agreement.

178. Hancock (ACIL) also commented (page 19) that TPI's reference to dispute settlement should be to all of Division 3 of the Code, not just to section 25.

PricewaterhouseCoopers' (PwC) Advice

179. PwC agreed with the views expressed in the submissions on the issue of expanding this section of TPI's TPP and recommended that in order to generally inform parties of the process to apply to the resolution of disputes under access agreements, the dispute provisions in TPI's TPP should be expanded along the lines of section 8 of WNR's 2006 TPP.

Authority's Assessment

180. The Authority agrees with the PwC view that the dispute provisions in TPI's TPP, relating to access agreements, be expanded along the lines of the equivalent section (section 8) of WNR's 2006 TPP.
181. The Authority also considers that the wording in this section should be amended to reflect the correct provision of the Code which provides for an entity in dispute with a railway owner to refer the dispute to arbitration. TPI refers to section 25 of the Code whereas the correct section is section 26(1).

Draft Determination

Required Amendment 9

Section 4.2 (headed 'Dispute Resolution') of TPI's proposed (revised) TPP should be amended, as follows:

- Immediately following the first sentence, provide a description of the dispute resolution process which will apply under an access agreement. This process should be similar to that set out under section 8 of WNR's 2006 TPP.
- Delete the words "Section 25" and replace with "Section 26(1)".

Definitions (Appendix A)

TPI's Proposal

182. TPI has outlined six pages of definitions of terms used in its TPP under Appendix A.

Public Submissions

183. Hancock (GHD) commented (page 9) that TPI's definition of 'Network' included the infrastructure at TPI's port. Hancock (GHD) does not consider that it is appropriate that port related infrastructure be included in this definition.
184. UMC noted (page 10) that TPI's definition of operator should be amended to include the word 'TPI' prior to the word 'Network'.

PricewaterhouseCoopers' (PwC) Advice

185. PwC advised that there were a number of definitional issues relating to terms used in TPI's TPP which had either not been defined in the definitions section or otherwise had not been defined correctly or adequately.

186. Some of the terms identified by PwC which fell into the above category, were: cyclic traffic, master train plan, master control diagram, network, network rules, service entitlement and timetabled traffic.
187. PwC recommended that TPI provide a complete list of the definitions used in its TPP.
188. PwC also recommended that TPI's definitions should be consistent with the Code and the Act and with the definitions in WNR's 2006 TPP, where possible.

Authority's Assessment

189. The Authority agrees with PwC's recommendations for TPI to provide a complete list of its definitions and for these to be consistent with the Code and Act and, where appropriate, WNR's 2006 TPP.
190. The Authority has identified a number of terms used in TPI's TPP, in its required amendments outlined above, which require definitions to be provided or which require more detail or amendments to the existing definitions.
191. In particular, the Authority notes the comments by Hancock (GHD) and UMC in relation to TPI's definition of 'Network'. The Authority's view is that the port and associated port infrastructure should not be included in TPI's definition as the Code relates only to TPI's railway and certain infrastructure associated with this railway. TPI should use the term "TPI's Railway Network" in place of the term "Network" and should define this term in the same manner it is described in the Code, as 'the railway constructed pursuant to the TPI Railway and Port Agreement'.
192. The Authority has also noted the use of terms by TPI which are not used in the Code, but which make use of some Code terms in a confusing manner. TPI's term 'Indicative Access Proposal' is an example. TPI defines this term as, "a non-binding written response from TPI to an Access Application". In the Code (section 8), proposal means an application for access made by an entity in writing to the railway owner.

Draft Determination**Required Amendment 10**

Appendix A (headed 'Definitions') of TPI's proposed (revised) TPP should be amended as follows:

- Replace the term "Network" with the term "TPI's Railway Network".
- Define "TPI's Railway Network" based on the requirements of the Code, as being "the railway constructed pursuant to the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* excluding railway infrastructure which is not covered under the definition in section 3 of the *Railways (Access) Act 1998*."
- Include a complete list of all the terms used in the TPP which might reasonably be expected to require a definition.
- All definitions should :
 - Be consistent with the definitions in the in the Act and the Code.
 - If not defined in the Act and the Code, be consistent with the definitions under section 10 of WNR's 2006 TPP where appropriate.

ADDITIONAL ISSUES

193. The Authority has noted that there are a number of further matters not covered in TPI's TPP which it considers should be included within this TPP. These matters are dealt with below.

Additional Issue 1: Rights of an Operator to Sell a Train Path**TPI's Proposal**

194. TPI's TPP has not included the matter of rights of an operator to sell a train path. In its supplementary submission, TPI commented that it generally supports the criteria contained in the appendix to WNR's 2006 TPP which outlines the arrangements under which an operator can on-sell its train path.
195. However, TPI notes in its supplementary submission that the circumstances of its railway are different to WNR's railway, particularly in relation to the need to undertake capacity expansions to accommodate new access seekers. TPI therefore considers that it requires an unfettered ability to withhold approval for on-selling of train paths in its TPP.

Public Submissions

196. The ARTC pointed out (page 8) that its indicative access agreement provides for an operator to on-sell a train path subject to certain criteria. The ARTC sees no reason why TPI could not provide for the selling or trading of train paths.
197. Similarly, Hancock (ACIL) (page 22) noted that WNR's 2006 TPP provided for the on-selling of train paths but that TPI's TPP did not. Hancock (ACIL) considered that TPI should include provisions in its TPP allowing for the on-selling of train paths.

PricewaterhouseCoopers' (PwC) Advice

198. PwC advised it saw no reason for TPI's TPP to exclude the right of operators to sell their train path entitlements and that this right was important in facilitating the efficient utilisation of TPI's railway network.
199. PwC considered that it may take some time for a trading regime in the rights to train paths to become effective as a market for tradeable access rights would take time to develop. On this basis, PwC did not consider that on-selling provisions need to be incorporated in TPI's TPP from the outset.
200. PwC recommended that TPI's definition of 'service entitlement' should make it clear that operators have a right to sell their entitlements and a regime to allow operators to trade such entitlements (as per Appendix A of WNR's 2006 TPP) should be incorporated into TPI's TPP and become effective 12 months after the commencement of access on the TPI network.

Authority's Assessment

201. The Authority does not consider that the arguments put forward by TPI justify the absence of an on-selling provision in its TPP along the lines of that in WNR's 2006 TPP. TPI's comments indicate that should a train path be relinquished by an operator, it is better for TPI to be able re-allocate that train path rather than the operator on-selling the path. The Authority considers that efficient utilisation of TPI's railway would be likely to be enhanced through the right of operators to on-sell their train paths and the subsequent development of a market in tradeable access rights.
202. The Authority agrees with PwC's recommendations for TPI's TPP to provide for operators to on-sell their train paths subject to appropriate criteria along the lines of Appendix A of WNR's 2006 TPP.
203. The Authority does not concur with PwC on the need to wait 12 months before such on-selling provisions come into force. The Authority sees no reason why these provisions should not become effective once TPI's TPP has been approved.

Draft Determination**Required Amendment 11**

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 4.3) headed 'Rights of an Operator to Sell a Train Path'.
- The first two paragraphs under section 4 in WNR's 2006 TPP should be included under this new section 4.3 (replacing 'Appendix A' with 'Appendix B').
- Include an Appendix B which sets out the criteria governing the trading of train paths by operators. This criteria should be based on similar lines to the criteria set out in Appendix A of WNR's 2006 TPP.

Additional Issue 2: Cancellation of Services using Train Paths**TPI's Proposal**

204. TPI's TPP has not included the matter of cancellation of services using train paths. In its supplementary submission, TPI commented that such matters, relating to operators being able to cancel train paths without penalty on certain grounds (public holidays, repairs etc), are best dealt with in the access agreement and that it will negotiate in good faith with operators on these matters.

Public Submissions

205. Hancock (ACIL) (page 22) noted that TPI's TPP did not provide for operators being able to cancel services, under certain circumstances, without penalty but WNR's 2006 TPP (section 2.7) did provide this ability. Hancock (ACIL) considered that TPI's TPP should provide a similar level of protection for cancellations by operators in appropriate circumstances.
206. Both the NWIOA (page 13) and UMC (page 10) considered that TPI should include the wording of section 2.7 of WNR's 2006 TPP in its TPP.

PricewaterhouseCoopers' (PwC) Advice

207. PwC advised that the specific provisions of the WNR policy, as agreed between the operator and TPI, could be incorporated into the operator's access agreement.
208. PwC also noted the comments by TPI to the effect that TPI would negotiate the inclusion of such matters in an operator's access agreement, in good faith.
209. Based on the above, PwC did not consider it necessary for provisions relating to the cancellation of an operator's services without penalty, to be included in TPI's TPP.

Authority's Assessment

210. The Authority's view is that while the access agreement would be expected to cover certain aspects of an operator's particular train path arrangements, the TPP should provide clear guidance on the key aspects of the railway owner's train path policy in

order to inform access seekers on these matters in a transparent fashion to facilitate an access seeker negotiating an access arrangement under the Code.

211. The Authority considers that the arrangements which would apply in circumstances where an operator reasonably cancelled its services, such as penalties, is an issue which should be included in a railway owner's TPP.
212. Therefore, the Authority does not concur with PwC's recommendation on this matter but, rather, considers that TPI should include in its TPP a provision similar to that contained in section 2.7 of WNR's 2006 TPP.

Draft Determination

Required Amendment 12

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 3.4) headed 'Cancellation of Services using Train Paths'.
- Outline arrangements under the new section 3.4, along the lines set out in section 2.7 of WNR's 2006 TPP, which provide an operator with the right to cancel train paths without penalty.

Additional Issue 3: Consistency between Access Agreements and the TPP

TPI's Proposal

213. TPI's TPP has not included the matter of consistency between access agreements and the TPP.

Public Submissions

214. Both the NWIOA (page 14) and UMC (page 11) suggested that TPI's TPP should include a section which provides for access agreements to be consistent with the TPP, in a manner similar to that of section 7 of WNR's 2006 TPP.

PricewaterhouseCoopers' (PwC) Advice

215. PwC agreed with the view of the NWIOA and UMC and recommended that TPI adopt the same wording as in section 7 of WNR's 2006 TPP.

Authority's Assessment

216. The Authority agrees with PwC's recommendation to the effect that TPI's TPP should include a section similar to that of section 7 of WNR's TPP to ensure consistency between TPI's access agreements under the Code and its TPP.

Draft Determination**Required Amendment 13**

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 4.4) headed 'Consistency between Access Agreements and the TPP'.
- Outline arrangements under this new section 4.4 for ensuring consistency between access agreements under the Code and the TPP along the lines set out in section 7 of WNR's 2006 TPP.

Additional Issue 4: Compliance and Review**TPI's Proposal**

217. TPI's TPP has not included the matter of compliance and review.

Public Submissions

218. Both the NWIOA (page 14) and UMC (page 11) suggested that TPI's TPP should include provisions for reviewing the TPP and monitoring the TPP through audits and KPIs along the lines outlined under section 9 of WNR's 2006 TPP.
219. Hancock (ACIL) noted (page 23) that an external compliance audit regime was required for TPI's TPP either annually, if required by an operator or the Authority, or otherwise on a three year basis.
220. The ARTC (page 8) commented that TPI's TPP should include the requirement for the TPP to be reviewed at periodic intervals. The ARTC also noted that it was a strong supporter of the development and publishing of KPIs.

PricewaterhouseCoopers' (PwC) Advice

221. PwC recommended that TPI's TPP should include a five year review provision and should contain similar provisions to those set out in section 9 of WNR's 2006 TPP.

Authority's Assessment

222. The Authority agrees on the need for periodic reviews of TPI's TPP to allow all parties the opportunity of providing their views on the effectiveness of the TPP.
223. However, the Authority does not concur with PwC's recommendation of a review after five years. The Authority believes that the first review of TPI's TPP should occur two years after the date when all the regulatory instruments required under the Act and the Code have been approved by the Authority. This is the same period which the Authority applied in the case of the first review of WNR's 2003 TPP.
224. In terms of a compliance regime, the Authority has recently carried out a review of the compliance requirements under the Code. As a result of this review, the Authority's view is that while the Act allows the Authority to look at operational performance of a railway network in the course of performing its functions, the

Authority does not have a general function of monitoring the operational performance of the railway network and its monitoring functions do not extend beyond monitoring a railway owner's compliance with the Act and the Code.

225. The review indicated the need for the Authority to undertake independent compliance audits of the railway owner's obligations under the Act and the Code. These audits are currently undertaken on an annual basis for WNR. As a result of this review, these audits will in future be undertaken generally on a two year basis.
226. The Authority considers that TPI's TPP should include a section outlining TPI's compliance and review arrangements along similar lines to the arrangements set out under section 9 of WNR's 2006 TPP, taking into account the changes outlined above. The Authority believes that the word 'Consultation' in WNR's section 9 heading should be amended to 'Compliance' in TPI's TPP.

Draft Determination

Required Amendment 14

TPI's proposed (revised) TPP should be amended as follows:

- Include a new section (section 4.5) headed 'Compliance and Review'.
- Outline arrangements under this new section 4.5 for the manner in which TPI's compliance with its TPP will be monitored by the Authority and the review interval for TPI's TPP, along the lines set out in section 9 of WNR's 2006 TPP with the exception of the following:
 - First paragraph of WNR's section 9: Delete this paragraph and replace with "The ERA will review the TPP, through a public consultation process, two years after the date when all the regulatory instruments required under the Act and the Code for TPI's railway have been approved by the Authority. TPI will provide the Authority with a proposed revised TPP at the time the review is required to commence the review process".
 - Fourth paragraph of WNR's section 9: Delete this paragraph.
 - Fifth paragraph of WNR's section 9: Delete this paragraph and replace with "The ERA will monitor TPI's compliance with the TPP through an audit of TPI's obligations under the TPP every two years. This audit will be carried out by an independent auditor approved by the ERA, with TPI managing and funding the audit. The scope of the audit will be determined by the ERA. The final audit report will be provided to the ERA. The ERA will publish this report on its web site (excluding confidential information, if any)."

Additional Issue 5: Operating Safety Standards

TPI's Proposal

227. TPI's TPP has not included the matter of operating safety standards. In its supplementary submission, TPI commented that it would apply a common safety standard, including safety components, across the railway and that application of this standard could be monitored during audits.

Public Submissions

228. The NWIOA (page 15) raised this issue, noting that TPI's operating safety standards were not well known by potential access seekers and it was not clear whether TPI's standards were appropriate or reasonable in regard to access seekers who are likely to have a much smaller scale of operation than TPI themselves.
229. The NWIOA considered that safety standards needed to be outlined by TPI to determine whether it was reasonable to impose those standards upon access seekers and the Authority may need to be involved outside of any arbitration process in determining the reasonableness of these standards.

PricewaterhouseCoopers' (PwC) Advice

230. PwC's advice was that it considered TPI's position, as reflected in its supplementary submission, to be reasonable.

Authority's Assessment

231. The Authority notes that section 15(2)(c) of the Agreement Act requires TPI to adhere to the requirements of the Safety Act. As outlined previously, section 8 of the Act requires that TPI's TPP cannot contain any provision which is contrary to or inconsistent with the Safety Act.
232. The Authority is not responsible for administration of the Safety Act and therefore, does not have any role in monitoring TPI's compliance with the requirements of the Safety Act through audits or other mechanisms.
233. The Authority notes that outside of any processes which may be available to an operator under the Safety Act, an operator would have available a dispute resolution process under its access agreement which may be able to be utilised where the operator considered that TPI's safety standards were inappropriate given the requirements of the Safety Act and the particular circumstances of the operator.

Additional Issue 6: Miscellaneous

Draft Determination

Required Amendment 15

TPI's proposed (revised) TPP should be amended to include page numbers.