

FINAL

**Economic Regulation Authority**

**Review of Proposed Part 5 Instrument  
of *The Pilbara Infrastructure Pty Ltd*:**

**Train Path Policy**

March 2009

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## Summary Comments

In the period between 3 July 2008 and 15 August 2008, The Pilbara Infrastructure Pty Ltd (TPI) submitted to the Economic Regulation Authority (ERA) segregation arrangements and four Part 5 instruments (Train Management Guidelines, Train Path Policy, Costing Principles and Over-payment Rules) for approval under the WA Rail Access Regime.

On 27 February 2009, TPI submitted amended versions of its Train Management Guidelines (TMG) and Train Path Policy (TPP). The amendments specify that these instruments are to apply to access agreements negotiated under the (Access) Code 2000 (the Code), so that entities to which access is provided otherwise than under the Code would not be covered. Also, the TPP contains an amendment to clarify that where an access agreement is not in place, recourse to the dispute resolution provisions of section 25 of the Code would be limited to those entities seeking access under the Code.

This report by PricewaterhouseCoopers (PwC) addresses TPI's proposed TPP. Separate PwC papers address TPI's other proposed Part 5 instruments and its proposed segregation arrangements.

The Part 5 instruments, along with the segregation arrangements, are to help provide access to monopoly infrastructure with reasonable quality of service at fair prices, and to prevent below rail infrastructure owners from extracting monopoly rents from third party above rail operators. At the same time, these arrangements are to recognise the need for infrastructure owners to achieve fair and reasonable returns on their investments.

The definition of Part 5 instrument, and the requirement for a railway owner to have in place such instruments, is set out in the Code. In broad terms, the Part 5 instruments comprise:

- the TMG, which is a statement of the principles, rules and practices that are to be applied and followed by a railway owner in relation to the real-time management of services;
- the TPP, which is closely related to the TMG, and deals with the allocation of train paths and the provision of access to train paths that have ceased to be used;
- the Costing Principles, representing principles, rules and practices that are to be applied by the railway owner to determine the floor and ceiling price tests, and to keep and present the railway owner's accounts and financial records pertaining to the determination of these costs; and
- the Over-payment Rules, which in effect, are to provide for the 'wash-up' of any over-recovery of total costs by the railway operator at the end of each successive period of 3 years from the commencement of access.

The Code also sets out the power of the regulator to approve the instruments - with or without required amendments, or to direct a railway owner to amend or replace an instrument with an instrument determined by the regulator. The ERA is the regulator in respect of the WA Rail Access Regime, which is comprised of the Railways (Access) Act 1998 (the Act) and the Code.

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The ERA has requested that PwC assess TPI's proposed Part 5 instruments from the perspectives of: the legislative requirements set out in the WA Rail Access Regime; the relevant technical and financial issues covered in TPI's documents; and the nature of the new railway, including any issues relevant to the particular circumstances relating to its operation. PwC's assessment involves considering whether the provisions of TPI's Part 5 instruments as proposed can be accepted by the ERA as complying with the legislative requirements, or whether particular changes, or further information in relation to the instrument provisions, are considered necessary in order for the ERA to be able to approve the individual instruments.

TPI's TMG and TPP were submitted to the ERA on 3 July 2008. TPI also submitted other proposed Part 5 instruments to the ERA for approval, in the form of Costing Principles (on 15 August 2008) and Overpayment Rules (24 July 2008).

On 14 July 2008, the ERA called for public submissions on the TPI Segregation Arrangements and on TPI's TMG and TPP.

Public responses to TPI's Segregation Arrangements, TMG and TPP were submitted between 26 August 2008 and 5 September 2008.

On 15 October 2008, TPI provided the ERA with responses to the public comments by stakeholders on the TMG and TPP.

As set out above, on 27 February 2009, TPI submitted amended versions of the TMG and TPP clarifying its intention that these instruments should apply only to access agreements negotiated under the Code (these amendments are to section 1.3 of the TMG and section 1.2.2 of the TPP). Additionally, section 4.2 of the TPP contains an amendment to clarify that where an access agreement is not in place, recourse to the dispute resolution provisions of section 25 of the Code would be limited to those entities seeking access under the Code.

On 5 March 2009, the ERA called for public submissions on the amendments to TPI's proposed TMG and TPP. No submissions were received. Consequently, this report has mainly evaluated TPI's proposed (revised) TPP of 27 February 2009.

This report considers TPI's proposed TPP and addresses issues raised in relation to this instrument in the public submissions received by the ERA, and in TPI's responses to the public comments by stakeholders, at the time of preparing the report. A summary of the results of our assessment is provided below and details of our approach and assessment are provided at sections 1 and 2 of this report.

Below are our key recommendations in relation to the TPP as submitted. We have not set out below all of our recommendations, in terms of suggested amendments, or further information in relation to particular provisions, that we consider would be required in order for the ERA to approve the TPP. All of our recommendations are discussed in section 2 of this paper and are listed in the Appendix.

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Our discussion of TPP provisions and our recommended TPP amendments in many cases refer to similar provisions and recommended amendments in relation to the TMG, given the close relationship in the operation of these Part 5 instruments. Our assessment of the TPI TMG is provided in a separate paper to the ERA.

### General Issues

These are common, general issues associated with TPI's proposed TPP and TMG:

- As TPI is a vertically-integrated rail freight entity (compared to WestNet, which is vertically-separated), and given that there is a sound prospect of third party interest in using the TPI network, the extent of protections to access seekers and operators in the TPI Part 5 instruments should at least equal those in the WestNet instruments.
- It appears that TPI has developed its Part 5 instruments based on an evaluation of the WestNet Part 5 instruments, as evidenced by replication in the TPI instruments of a significant number of WestNet provisions. We note however that, in a number of cases, TPI has sought to apply more light-handed approaches than in the WestNet instruments.

### Specific Issues

#### TMG Recommendation 1/TPP Recommendation 1

On the basis of our view, which is also held by stakeholders, that linking the operation of the rail access regime with the objectives and operation of the port in the TMG/TPP is inconsistent with the requirements of the WA Rail Access Regime, we suggest a number of changes to the TPI instruments to remove references to the port operator and to the broader TPI/FMG supply chain.

We recommend that the TPI instruments should only address the TPI railway network and make no reference to the broader TPI/FMG supply chain or to joint objectives in relation to that supply chain.

In relation to the Decision-Making Matrix in Appendix B of the TMG, we recommend that references to the port operator and the text "(acting to maximise the efficiency of the supply chain as a whole)" should be deleted in order to remove uncertainty arising from, and the overriding priority given to, port operations.

#### TMG Recommendation 4/TPP Recommendation 3

The amended TMG and TPP of 27 February 2009 contain drafting revisions which clarify TPI's intention that these instruments should apply only to access agreements negotiated under the Code. In contrast, the equivalent WestNet instruments apply to all operators, including entities to which access is provided otherwise than under the Code. The stakeholders generally express the view that the TPI instruments should cover all operators, including those who obtain access outside the Code.

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We concur with the views of stakeholders in relation to this issue. While we note that the TMG and TPP, as Part 5 instruments under the Code, are only required to apply to operators who negotiate inside the Code, we consider it important for the achievement of the main object of the Act that all entities seeking access, or that have attained access, to the railway infrastructure should be covered by common guidelines under the TMG/TPP.

TMG Recommendation 4/TPP Recommendation 3 suggest that the TMG/TPP should be applied to all operators, whether access has been negotiated inside or outside the Code.

### **TPP Recommendation 5**

The concepts Timetabled Traffic and Cyclic Traffic, and the manner in which these two forms of Train Paths are specified in operators' Service Entitlements, are not clearly set out in the TPP – in particular in relation to delineation between the entitlements covered by the terms Timetabled Traffic and Cyclic Traffic.

TPP Recommendation 5 suggests that the 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 so that the way in which these two forms of Train Path will be set out in a Service Entitlement is prescribed.

Section 4 and Appendix A of the WestNet TPP set out a regime for an operator to sell its Train Paths to a third party operator. The TPI TPP does not provide operators with a right to sell the Train Paths assigned to them, or set out a trading regime in relation to such rights.

While we expect that a market in access rights may take some time to develop (such that a trading regime may have limited effect at the outset of the regime), such a regime to allow operators to trade their entitlements is considered to be consistent with the economically efficient use of the railway infrastructure. A trading regime could co-exist with the TPP provisions relating to resumption of capacity (section 3.2) in facilitating efficient utilisation of the existing network. On the basis that the protections and benefits to access seekers and operators in the TPI Part 5 instruments should at least equal those in the WestNet instruments, we consider that the right for an operator to sell its entitlements, and a regime to allow operators to trade such entitlements similar to that in Appendix A of the WestNet TPP, should be incorporated into the TPI TPP.

### **TMG Recommendation 7/TPP Recommendation 10**

The requirement for regulatory approval where the railway owner considers that accepting a proposal for access would involve the provision of access to railway infrastructure to an extent that may preclude other entities from access to that infrastructure is set out in section 10 of the Code and should not be overridden by the TMG/TPP. We suggest that the TMG/TPP should make clear that in such cases Train Paths will not be assigned without the approval of the ERA in accordance with section 10 of the Code, and that negotiations on the proposal must not be entered into by the railway owner without the approval of the ERA.

**TPP Recommendation 13**

Paragraph 5 of section 3.3 of the TPI TMG provides that:

"Nothing compels an Operator to accept a proposal to revise its Service Entitlements if contractual obligations owned by that Operator to any person (including TPI) would prevent it from doing so, unless the regular failure of the Operator's Service compromises the Service Entitlement of another Operator in accordance with its Access Agreement."

We understand that, based on this provision, a operator's right of access to the network (as specified in the form of a Service Entitlement in an access agreement), is not a 'firm' right to access and that it is conditional on the operator/the operator's services satisfying certain on-going requirements (which would mostly be specified in the operator's access agreement with TPI).

The WestNet TPP (at section 2.6) sets out effectively the same statement as in paragraph 5 of section 3.3 of the TPI TPP, except that section 2.6 of the WestNet policy does not include the qualification to a operator's entitlements arising from regular failure of the operator's services.

We recommend 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 an operator having to accept a proposal to revise its Service Entitlement.

**TMG Recommendation 18/TPP Recommendation 15**

TPI provides that disputes in relation to the TMG/TPP will be managed in accordance with the access agreement. The TPI TPP also states that where an access agreement is not in place, an entity seeking access under the Code would have recourse to section 25 of the Code. The equivalent WestNet provisions, in addition to setting out that recourse to section 25 of the Code is available to entities seeking access, also outline a 3-stage process for dispute resolution to apply under the access agreements that are entered into.

In order to fully inform entities seeking access as to their current statutory rights and also to generally inform parties of the process to apply to resolve disputes under access agreements, we suggest that the dispute provisions of the TPI instruments are expanded along the lines of the dispute provisions in the WestNet TMG.

The condition in the TPI TPP, that where an access agreement is not in place, an entity seeking access under the Code would have recourse to section 25 of the Code, is not contained in the WestNet TMG/TPP. We do not consider the TPI condition to be an effective addition to the conditions in the WestNet instruments given that section 25(1)(b) of the Code requires an access seeker's proposal, and the access seeker, to comply with the Code.

**TMG Recommendation 20/TPP Recommendation 16**

The WestNet instruments provide for 5-yearly reviews of the guidelines and policy. Similar provisions are not incorporated in the TPI instruments.

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While we recognise that, at any time, the railway owner can amend or replace the guidelines/policy with the approval of the regulator, or the regulator can direct the railway owner to amend or replace the guidelines/policy, we consider that a 5-yearly review process, similar to that in the WestNet instruments, would provide a timely and systematic basis for reviewing the TPI instruments to ensure they continue to operate in accordance with the objectives.

Recommendations in relation to minor suggested amendments, or general requests for further information in relation to specific provisions (where such information is considered relevant to the ERA in deciding whether to approve a proposed provision), are not set out above. All recommendations are included in the assessment in section 2 of the report (for ease of reference, we have also set out the recommendations in the Appendix to this report).

Our general recommendations include a suggested requirement for TPI to provide a complete list of the definitions used in the TMG and TPP. Such definitions should be consistent with the definitions in the Act and the Code, and with the definitions in the equivalent WestNet instruments, where appropriate.



# 1 Background

## *The Pilbara Infrastructure Pty Ltd*

The Pilbara Infrastructure Pty Ltd (TPI) is a subsidiary of Fortescue Metals Group Ltd (FMG).

FMG is developing iron ore mining operations in the vicinity of the Chichester Range in Western Australia's eastern Pilbara (through a wholly owned subsidiary, FMG Chichester Pty Ltd). It is also establishing port facilities at Anderson Point in Port Hedland and a railway link between the port and mine via its subsidiary, TPI.

The railways network owned and operated by TPI is to operate trains between the Pilbara and Point Anderson to facilitate the export of FMG's iron ore. The network has been constructed using specially profiled concrete sleepers and a process of continually welded rail, to ensure the track is up to the task of carrying trains which will weigh some 30,000 tonnes and be in the order of 2.5 kilometres long.

## *Statutory requirements summary*

A regulatory regime to facilitate third party access to Western Australian railway infrastructure is provided under the Railways (Access) Act 1998 (the Act), the main object of which is to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations. The Act provides for the Minister to establish a code governing the use of certain facilities for rail operations by persons other than their owners. The Railways (Access) Code 2000 (the Code) made by the Minister, which represents subsidiary WA legislation, was gazetted in September 2000. The Western Australian Rail Access Regime, comprising the Act and the Code, became fully effective on 1 September 2001.

The Economic Regulation Authority (ERA) is the regulator in respect of the access regime provided by the Act and Code. The ERA is responsible for monitoring and enforcing compliance by railway owners with the Act and Code and is otherwise to perform the functions and exercise the specific powers as set out in the Act and Code.

On 1 July 2008, the Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 (the Agreement Act) amended the Act and the Code to bring TPI's railways network under the Western Australian Rail Access Regime.

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The Agreement Act required TPI to submit to the ERA segregation arrangements (in terms of Division 3, Part 3 of the Act) and the four “Part 5 Instruments” set out in section 40(3) of the Code (train management guidelines, statement of train path policy, costing principles and over-payment rules) no later than seven days after the Act and the Code applied to TPI’s railway network.

TPI’s proposed segregation arrangements and Part 5 Instruments in response to the legislative requirements were submitted to the ERA in the period from 3 July 2008 to 15 August 2008. 2008This PwC paper addresses one of TPI’s proposed Part 5 instruments, being the Train Path Policy. TPI’s proposed TPP were submitted to the ERA on 3 July 2008 and an amended version of the proposed policy was submitted on 27 February 2009. Separate PwC papers consider TPI’s proposed segregation arrangements and consider TPI’s other proposed Part 5 instruments in the form of the Train Management Guidelines, Costing Principles and Over-payment Rules. In this paper we have not addressed the issue of compliance with submission requirements under the Agreement Act.

## 2 Discussion on Statutory Compliance

### 2.1 Approach

#### Statutory Requirements – Part 5 Instruments

The Part 5 instruments and the segregation arrangements are to facilitate access to monopoly infrastructure with reasonable quality of service at fair prices, and to prevent below rail infrastructure owners from extracting monopoly rents from third party above rail operators. At the same time, these arrangements are to recognise the need for infrastructure owners to achieve fair and reasonable returns on their investments.

Section 40 of the Code sets out the Part 5 instruments that are required to be approved by the regulator. The key provisions are as follows:

#### 40. Interpretation

“(2) For the avoidance of doubt it is declared that a Part 5 instrument relating to a part of the railways network and the associated infrastructure is binding on the person who is for the time being the railway owner in respect of that part.

(3) In subsection (2)—

“Part 5 instrument” means —

- (a) the train management guidelines;
- (b) the statements of policy;
- (c) the costing principles; and
- (d) the over-payment rules,

for the time being approved or determined under sections 43, 44, 46 and 47 respectively.”

A railway owner’s Train Path Policy (TPP) deals with the allocation of train paths and the provision of access to train paths that have ceased to be used. A railway owner’s TPP is closely related to its Train Management Guidelines (TMG), which are to apply to the real-time management of services. As such, the TPP provides the framework for the access rights, while the TMG provides for real time management of train paths within that broader framework.

Section 44 of the Code provides the following in relation to the TPP:

**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 is 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.”

In addition to the TPP and TMG, a railway owner is also required to have in place (i) approved Costing Principles, representing principles, rules and practices that are to be applied by the railway owner to determine the floor and ceiling price tests, and to keep and present the railway owner’s accounts and financial records pertaining to the determination of these costs; and (ii) Over-payment Rules to provide reconciliation in respect of any over-recovery of total costs by the railway owner at the end of each successive period of three years from the commencement of access. This report considers TPI’s proposed TPP.

Sections 43, 44, 46 and 47 of the Code also set out the power of the regulator to approve the Part 5 instruments - with or without required amendments - and to direct a railway owner to amend or replace an instrument with an instrument determined by the regulator.

Under sections 41 and 44 of the Code, the ERA must undertake public consultation before approving a railway owner’s proposed TMG and TPP.

Public consultation is not required before the Costing Principles and Over-payment Rules are approved. We note that in previous assessments, the ERA has subjected all four Part 5 instruments to the same public process.

Under section 41 of the Code, in deciding whether to approve a railway owner’s proposed TMG and TPP, the regulator is to have regard to: the submissions made as part of the public consultation process; what the regulator determines to be the requirements of the public interest; and any other matters that the regulator considers relevant.

In relation to its general exercise of powers under the Act or Code, the regulator is to take into account the factors in section 20(4) of the Act. The factors in section 20(4) include the interests of the railway owner, the interests of access seekers and the benefit to the public from having competitive markets. We note that the regulator has discretion in the way in which it balances, or attaches weight to, the various matters and interests in

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section 20(4) – for example, where the different interests are in competition or where tensions exist between them.

### Stakeholder Comments

On 14 July 2008, the ERA called for public submissions on TPI's proposed Segregation Arrangements (SA) under section 28 of the Act and on its Train Management Guidelines (TMG) and Train Path Policy (TPP) under sections 43 and 44 of the Code respectively. TPI's proposed TMG and TPP were submitted by TPI on 3 July 2008.

In addition to its proposed TMG and TPP, TPI also submitted other proposed Part 5 instruments to the ERA for approval, in the form of Costing Principles (on 15 August 2008) and Overpayment Rules (24 July 2008). This paper concerns TPI's proposed TPP.

Submissions on the TPP (and TMG) were received from the following parties:

- North West Iron Ore Alliance (North West Alliance, or NW) – submission dated 5 September 2008. This submission contains separate papers on the SA, TMG and TPP;
- United Minerals Corporation (UMC) – submission dated 5 September 2008, containing separate papers on the SA, TMG and TPP;
- Hancock Prospecting Pty Ltd (Hancock Prospecting) – submission dated 2 September 2008, which comprises separate reports by ACIL Tasman (ACIL) and GHD, with each report addressing the three TPI proposals;
- Australian Rail Track Corporation (ARTC) – submission dated 26 August 2008; and
- Yilgarn Infrastructure (Yilgarn) – submission dated 26 August 2008. The Yilgarn submission is comprised of a covering letter and a copy of a submission previously provided to the National Competition Council.

On 15 October 2008, TPI provided the ERA with responses to the public comments by stakeholders on the TMG and TPP.

This report considers TPI's proposed TPP and addresses issues raised in relation to this instrument in the public submissions received by the ERA, and in TPI's responses to the public comments by stakeholders, at the time of preparing the report.

### PwC Assessment Approach

To assist in the exercise of its powers, the ERA has requested that PricewaterhouseCoopers (PwC) prepare an assessment of TPI's proposed Part 5 instruments.

PwC's assessment of TPI's proposed Part 5 instruments is from the perspectives of: the legislative requirements above; the relevant technical and financial issues covered in TPI's documents; and the nature of the new railway, including any issues relevant to the particular circumstances relating to its operation.

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In assessing these matters, PwC has been guided in part by the provisions of the WestNet Part 5 instruments as approved by the ERA. While there are differences between the practical arrangements of the different networks of TPI and WestNet, the approved instruments provide a useful starting point for assessing many of the provisions of the TPI instruments.

The WestNet instruments provide a useful starting point for assessing many of the provisions of the TPI instruments, given:

- the similarity of many of the provisions in the respective instruments; and
- that the approval of the WestNet instruments embodies the ERA's preferred balancing of the matters in section 20(4) of the Act.

However, it should be noted that as TPI is a vertically integrated rail freight entity (compared to WestNet, which is vertically separated) and given that there is a sound prospect of third party interest in using the TPI network, we consider it reasonable that the extent of the protections to access seekers and operators in the TPI Part 5 instruments should at least equal those in the WestNet instruments.

That the WestNet TMG and TPP represent an appropriate benchmark to assess the TPI instruments is also a position held by two of the stakeholders above. Both the North West Alliance and UMC, in their respective submissions on the TMG and TPP state the "Authority approved WestNetRail 2006 [TMG and TPP]" represent a "benchmark for comparison" to the TPI TMG and TPP being proposed (these statements are made in the introductions to the separate TMG and TPP submissions lodged by the North West Alliance and UMC). Other stakeholder submissions also seek amendment to the TPI instruments by incorporation of operator protections and other measures from the WestNet instruments.

Our assessment considers whether the provisions of the TPI TPP as proposed can be accepted by the ERA as complying with the legislative requirements, or whether particular changes or further information in relation to the instrument provisions are considered necessary in order for the ERA to be able to approve the TPP.

## 2.2 PwC Assessment of TPI Train Path Policy

This section 2.2 sets out our assessment of TPI's proposed TPP which deals with the allocation of train paths and the provision of access to train paths that have ceased to be used. As such, the TPP provides the framework for the access rights, and the TMG provides for real time management of train paths within that broader framework.

Our assessment of issues is in the general sequence in which the particular issues arise within TPI's TPP.

A total of 19 recommendations are made in relation to particular changes, or further information required, in relation to the instrument provisions that we consider necessary in order for the ERA to be able to approve the TPP.

For ease of reference, we have also set out our recommendations in the Appendix to this report.

Headings used in this section are as per TPI's proposed TPP.

Our discussion of TPP provisions and our recommended TPP amendments in many cases refer to similar provisions and recommended amendments in relation to the TMG, given the close relationship in the operation of these Part 5 instruments. Our assessment of the TPI TMG is provided in a separate paper to the ERA.

### 1 Introduction

#### 1.1 Background

The general background material provided by TPI in this section is considered appropriate and is generally consistent with paragraph 1 of section 1.1, Background, from the WestNet TPP of August 2006 as approved by the ERA.

The Code requirements in section 44(2) for a railway owner to prepare and submit a TPP to the regulator for approval are set out in paragraphs 3 and 4 of this section 1.1. This is consistent with the material in section 1.2 of the WestNet TPP, entitled Relevance of Train Path Policy (T.P.P.).

Similar to paragraph 2 of section 1.1 of the TMG, paragraph 2 of this section states that:

“TPI has developed separate Access Regimes (the Regimes) to enable third party access to the rail network (the Network) and the port terminal (the Port).”

In section 1.2 below, the objectives of the railway access regime and the port access regime are linked (where an objective of the TPP is to “maximise the efficient utilisation of that Network, within the context of the overall supply chain”). As per our comments in relation to the TMG, we consider linkage of the operation and objectives of railway and port access to be inconsistent with the requirements of the WA Rail Access Regime.

Linkage of port and railway infrastructure objectives occurs to a lesser degree in the TPP than in the TMG. Nevertheless, stakeholder submissions have raised similar issues regarding the need for the TPP to separate the operation of the railway and port regimes, and accordingly to remove references to the port operator and to the broader TPI/FMG supply chain

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from the TPP. Comments made by stakeholders in relation to the TPP are discussed below.

The views of the North West Alliance, which also reflect its views on the TMG, in relation to TPI's linkage of port and railway access regimes include the following:

- linking the operation of the rail access regime with the objectives and operation of the port is inappropriate (view expressed on page 6 of the NW TPP submission);
- "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" (from page 6 of the NW TPP submission); and
- given that not all potential operators will require access to the TPI port, the ability of the port operator to override the priorities otherwise provided by the TMG and TPP would cause confusion and potentially make the rail access arrangements unworkable (view expressed on page 7 of the North West Alliance TPP submission).

The North West Alliance and GHD for Hancock Prospecting also generally express the view that the linkage of railway network objectives and port objectives is inconsistent with the requirements of the WA Rail Access Regime (this view is also expressed by North West Alliance and GHD in relation to the TPI TMG). In relation to this issue NW suggests the following:

"The Alliance strongly urges the Authority not to allow the TPI Port Access Regime and the TPI Rail Access Regime to be linked. Secondly, 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.."  
(page 6 of the NW TPP submission)

TPI, on page 4 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, makes the following comments in relation to such stakeholder views expressed on this issue in the TPP:

"The ownership of TPI by Fortescue predates the time of execution and ratification of the Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004. In good faith, TPI and Fortescue negotiated and agreed the content of the State Agreement, including a requirement to fall under the jurisdiction of the Railways Access Act and Code. Subsequent debate and comments on the interaction of TPI and Fortescue are beyond the role of the Regulator, who is restricted to administering the legislation.

On a related theme, the above State Agreement has provisions to manage third party access to TPI's port facilities, which from a regulatory perspective, is clearly independent of rail access."

Our assessment of the TPP is from the perspective of the WA Rail Access Regime (under which the Part 5 instruments are to be prepared by a railway owner and approved by the ERA). We consider it a requirement that railway



access provided under the WA Regime should be independent of port access and that a railway owner's railway access arrangements should operate in terms of the objectives of the WA Rail Access Regime. Our views on this matter are similar to our views in relation to section 1.1 of the TPI TMG (which is also considered to link port and rail access objectives).

The port access regime is separate from the WA Rail Access Regime under which the Part 5 instruments are to be prepared by a railway owner and approved by the ERA.

The main object of the Act, as an element of the WA Rail Access Regime, is "to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations" and the matters to be taken into account by the ERA in performing functions under the Act are focused on the interests of the railway owners and persons holding contacts for use of the railway infrastructure; the economically efficient use of the railway infrastructure; and the public benefit from having competitive markets. The Act and the Code are thus focused on the objectives of railway access and not on joint objectives of railways networks and of other industry sectors such as ports. Our recommendation in relation to providing appropriate independence of the railway access from port access in the TPP is similar to TMG Recommendation 1, but reflects the lesser degree to which port and railway infrastructure objectives are linked in the TPP relative to the TMG.

**TPP Recommendation 1**

The TPI TPP should only address the TPI railway network and make no reference to the broader TPI/FMG supply chain or to joint objectives in relation to that supply chain. To this effect, the following changes should be made to section 1.2 Purpose of the 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"; and
- delete the purpose to "maximise the efficient utilisation of that Network, within the context of the overall supply chain".

Section 1.2 of the WestNet TPP provides that WestNet will apply its TPP to each allocated Train Path, regardless of whether access applications are made inside or outside of the Code. This commitment by WestNet is additional to the requirements of the Code (the TPP, as one of the Part 5 instruments in the Code, is only required to apply to operators who negotiate inside the Code). We discuss this issue in relation to sections 1.2.2 and 4.1 of the TPP below (and also in relation to sections 1.2 and 1.3 of the TMG).

**1.2 Purpose of the TPP**

The objective of the TPI TPP, as expressed in paragraph 1 of this section, is similar to the TPI TMG objective – differences relate to the former being focussed on Capacity allocation and the latter being focussed on real time management of services (which is consistent with the different roles of these documents under the WA Rail Access Regime).

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Suggested changes to the purposes of the TPI TPP relating to separation of railway access regime objectives and the port access regime objectives are set out at TPP Recommendation 1 above. TPP Recommendation 2 below provides for the TPP objectives to encompass service standards.

### **TPP Recommendation 2**

For completeness, we suggest that TPI considers adding the following additional dot point to this section 1.2 (ie an additional dot point to those suggested at TPP Recommendation 1):

- "provide for the safe and reliable use of the railway infrastructure."

The North West Alliance, at page 15 of its TPP submission, states as follows:

"Safety standards need to be outlined by TPI to determine whether it is reasonable to impose those safety standards upon access seekers. The Authority may need to be involved outside of any arbitration process in determining the reasonableness of the standards being applied."

TPI on page 5 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, makes the following comments in relation to feedback on the TPP:

"TPI will apply a common operating standard, including safety arrangements, across the railway. Its application of this standard can be monitored during audits."

We consider TPI's position on this issue to be reasonable.

### **1.2.1 Relationship between the TPP and TMG**

This section sets out that the principles governing initial capacity assessments are contained in the TPP and that short-term scheduling of Train Paths and daily operation of services are covered in the TMG. This section reflects the roles of these documents under the WA Rail Access Regime and is considered to be useful to entities seeking access to the railway infrastructure to understand the operation of, and relationship between, these two Part 5 instruments.

### **1.2.2 Application of the TPP**

In the initial TPP submitted by TPI on 3 July 2008, section 1.2.2 comprised the following statement:

"The TPP will apply to all Operators with whom TPI has an Access Agreement (including any third party engaged by the Operator as its agent or contractor to perform its obligations under the Access Agreement)."

The equivalent WestNet provision (paragraph 3 of section 1.2) involves an express commitment, as discussed in relation to section 1.1 above, that WestNet will apply its TPP to each allocated Train Path regardless of whether access applications are made inside or outside of the Code (that is,

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the WestNet policy applies to all operators, including entities to which access is provided otherwise than under the Code).

Similar to the TPI TMG, the definitions of Operator and Access Agreement in the TPI TPP are effectively the same as the definitions for these terms in the equivalent WestNet instruments and imply coverage of the broad class of operators. However, the absence of an express statement in the 3 July 2008 TPI TPP on coverage meant it was unclear whether the initial TPI TPP applied to the broad class of operators as per the WestNet TPP.

The amended TPP submitted by TPI on 27 February 2009 clarified TPI's intention in relation to coverage by amending section 1.2.2 as follows:

"The TPP will apply to all Operators with whom TPI has an Access Agreement under the Code (including any third party engaged by the Operator as its agent or contractor to perform its obligations under the Access Agreement)."

This amendment makes clear TPI's intention that the TPP should not apply to entities to which access is provided otherwise than under the Code.

Stakeholder submissions had highlighted the lack of clarity in the coverage of the TPI TPP (and also in the TMG) as initially submitted, but the stakeholders generally had interpreted TPI's intention to be that the TPP applies only to operators that have negotiated access agreements under the Code. The stakeholder submissions in relation to the initially submitted TPP thus effectively address the matter as clarified by TPI's amendment of 27 February 2009. A similar issue, and similar views are expressed by stakeholders, in relation to the TPI TMG.

The North West Alliance, UMC, ARTC and ACIL had interpreted TPI's definition of operator to exclude those who obtain access outside the Code (NW page 6, UMC page 10, ARTC page 7 and ACIL page 17).

Stakeholders generally expressed the view that the TPI instruments should cover all operators including those who obtain access outside the Code. The North West Alliance and UMC also propose a revised "Operator" definition to be included in Appendix A of the TPP.

TPI, on page 4 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, made the following comments in relation to feedback on the TPP:

"The legislation is quite clear in that it administers access to TPI's network pursuant to access agreements negotiated under the Code. The option of negotiating outside the Code is available to all potential operators and TPI will negotiate an access agreement, in good faith upon receipt of any such applications.

The TPP applies only to operators who have an access agreement negotiated under the Code."

As noted above, TPI further clarified its intention with the amendment to section 1.2.2 of 27 February 2009.

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While we note that the TPP, as a Part 5 instrument under the Code, is only required to apply to operators who negotiate inside the Code, we consider it important for the achievement of the main object of the Act that all entities seeking access, or that have attained access, to the railway infrastructure should be covered by common guidelines and policy under the TMG/TPP.

Coverage of the broad class of operators by the TMG/TPP would provide transparency in the priority order rules applied to the different operators. Accordingly, the priority order for rail operations, being determined under common, published policy would apply - and could be shown to apply - in a non-discriminatory manner. As such, confidence of operators in the application of consistent, transparent rules would be an important factor in facilitating a contestable market for rail operations, which is the main object of the Act.

Also, consistent with the object of encouraging efficient use and investment in the railway infrastructure, under consistent and transparent rules, the railway infrastructure could be more effectively and efficiently managed than if different guidelines and policy (or exceptions to the standard rules) applied to different entities based on whether the entities are provided with access otherwise than under the Code.

We also consider that the application of different guidelines and policy to different entities using the railway infrastructure - given the potential for inefficiency and conflict – to be unlikely to provide an operational and technical environment necessary for the safe and reliable use of the railway infrastructure.

In relation to this issue we note that the ERA considered that confirmation of the intent of broad coverage of the guidelines and policy to be important in the case of WestNet. We consider that similar to the coverage provided by the WestNet instruments, all operators should be covered by the TPI TMG and TPP and we regard such broad coverage to be consistent with facilitating a contestable market for rail operations.

Our view that the TPP should be required to cover all operators is on the same basis as our view that the TMG should similarly apply to all operators (TMG Recommendation 4).

### **TPP Recommendation 3**

We suggest that the TMG/TPP should be applied to all operators, whether access has been negotiated inside or outside the Code. To this effect, we suggest that:

- a similar statement to that provided at paragraph 3 of section 1.2 of the WestNet TMG/TPP and should be incorporated into section 1.3 of the TPI TMG and section 1.2.2 of the TPI TPP; and
- an additional statement should be added to section 1.3/1.2.2 of the TPI TMG/TPP to clarify that the TMG/TPP apply to TPI/FMG in its role as an operator using the railway infrastructure.

The above issue of coverage also arises in relation to sections 1.2 and 1.3 of the TPI TMG and section 4.1 of the TPI TPP below. TMG Recommendation 4 is the same as TPP Recommendation 3 above.

At page 8 of its submission on the TPP, UMC suggests, in effect, that the same provisions as set out in paragraph 3 of section 2.2.1 (Guidelines for assessing whether a request is warranted for a Train Path) of the WestNet TPP should be incorporated into the TPI TPP. The WestNet provisions set out the matters that an operator must demonstrate to the railway owner in requesting a new Train Path – either prior to, or after commencement of, an access agreement. The matters as set out in section 2.2.1 of the WestNet document 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.

**TPP Recommendation 4**

We suggest that the provisions from paragraph 3 of section 2.2.1 of the WestNet TPP setting out the matters that an operator must demonstrate to the railway owner in requesting a new Train Path should be incorporated in to the TPI TPP as follows:

“TPI will negotiate to provide new Train Paths where the Operator meets the following criteria:

(i) the Operator can demonstrate an intention to enter into arrangements for the operation of services, to the satisfaction of TPI, and

(ii) the Operator provides details of anticipated increased demand because of:

(a) an upgrade or expansion of production capacity with confirmation that it will progress (e.g. Funding approved, public announcements etc), or

(b) market growth based on trend data; or

(iii) the Operator can demonstrate a committed new project with agreed funding.”

As a general point, consistent with its comments on the TMG, the North West Alliance, at page 3 of its TPP submission presents that the ERA should set parameters and models for the information to be given to entities seeking access to the network in order to facilitate effective access negotiations. We do not consider this to be a matter to be prescribed in the TPP.

**2 Allocation of capacity**

**2.1 Specification of Capacity**

This section sets out a basic difference between the nature of an operator's right of access to the network (which is ultimately to be specified in the access agreement entered into by the operator and the railway owner):

- TPI uses concept of a Service Entitlement, which is to be prescribed in the operator's access agreement and is to be based a prior assessment of available Capacity by TPI. TPI applies a separate process for dealing with two distinct types of Train Paths that may be specified in an operator's access agreement, being Scheduled Train Paths/Timetabled Traffics and Cyclic Traffic (TPI's TPP and TMG both use this distinction); while

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- WestNet provides that access agreements are to specify entitlements in terms of Train Paths. The broader concept of a Service Entitlement is not used in the WestNet instruments. The WestNet instruments have additional subcategories of Train Paths to the TPI instruments (eg separate forms of Scheduled Train Path for passenger vs freight services), but deal largely with Train Paths (to define the service 'envelope') and Scheduled Train Paths (to define the effective entitlement).

The North West Alliance at page 11 of its TPP submission comments on the basic access rights provided by TPI's Timetabled Traffic and Cyclic Traffic concepts as follows:

"TPI have proposed to specify Service Entitlements upon a basis of Timetable and Cyclic Train Paths. When determining the capacity of a section of railway the operating regime being applied and the mix of traffic patterns have a large influence on network capacity.

.....

Uniform train paths allow the highest levels of capacity and efficiency of the network because it maximises track usage. On the other hand cyclic pathing, or surge capacity, represents a much lesser capacity and less efficient operating regime for the railway. Both are used in mining operations but surge capacity is generally preferred because it minimizes ore handling onto the ship – in effect the ship pulls the ore from the mine. This together with a proposed regime of giving priority to the needs of the Port in the TPP and TMG documents has the potential to undermine the capacity and efficiency of the TPI railway if not checked by the Authority."

The above material provided by the North West Alliance highlights important issues concerning the flexible entitlement provided by Cyclic Traffic concept relative to the more fixed entitlements embodied in Timetabled Traffic. It is recognised that fixed demand can lead to efficient infrastructure planning (where the capacity requirement can be set to the maximum fixed demand) whereas there may be capital inefficiencies associated with flexible entitlements (where the capacity requirement is less certain, planning for such demand may result in inefficient excess capacity).

It would however appear to be in the interests of operators for flexible entitlements to exist in order to accommodate their demand for access to the railway network that cannot be accurately forecast. Accordingly, we do not consider the existence of these two basic forms of Train Paths to be inconsistent with the objectives of the WA Rail Access Regime (in that each form involves striking a different balance between the interests of railway owners and operators - through a balancing of fixed versus variable entitlements). However, the concepts Timetabled Traffic and Cyclic Traffic, and the manner in which these two forms of Train Paths are specified in operators' Service Entitlements, are not clearly set out in the TPI TPP.

The North West Alliance, at page 9 of its TPP submission, comments that to provide entities seeking access with transparency on the operating regime being applied by TPI, the following information should 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

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- 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”

While not all of the above suggestions by North West Alliance relate to clearly distinguishing between Timetabled Traffic and Cyclic Traffic, they suggest attributes that could be included in the definitions of such terms to prescribe an operator’s service entitlement (eg an attribute of Cyclic Traffic is suggested at the first dot point above).

We consider the second and third dot points suggested by the North West Alliance above to be addressed by the TPI TMG (as amended by the recommended changes) and the fourth dot point to relate to information that railway owners are required to provide entities seeking access under section 7 of the Code and therefore we do not consider this to be a matter to be prescribed in TPP.

The delineation between Timetabled Traffic and Cyclic Traffic is, however, an issue that should be subject to review, given that, over time, initial definitions may prove to result in an inefficient emphasis on Cyclic Traffic, or conversely, may be overly focussed on Timetabled Traffic to the detriment of operators’ requirements for more flexible entitlements. In this regard, in addition to the regulator’s general power to direct the railway owner to amend or replace a statement of policy at any time, the delineation between Timetabled Traffic and Cyclic Traffic could be made subject to the regular reviews of the TPP (TPP Recommendation 16 below).

The concern expressed by the North West Alliance - at page 11 of its TPP submission as quoted above - that the proposed regime would operate to the benefit of the overall TPI/TMG supply chain, is addressed by the proposed changes to the TMG and TPP at TMG Recommendation 1 and TPP Recommendation 1.

In relation to the term Cyclic Traffic, the North West Alliance also provides the following comments (similar to comments provided in its TMG submission) that:

- due to confusion in the statement in relation to use of the terms “Traffic” and “Traffics”, the term “Cyclic Traffic” should be used in place of “Cyclic Traffics” (page 9 of the NW TPP submission); and
- the description of “Cyclic Traffic” in the body of the TPP is different from the definition of “Cyclic Traffic” in Appendix A. The North West Alliance recommends that the description in the body of the TPP, similar to the definition in Appendix A, should describe “Cyclic Traffic” as an allocation “within a period of time”, rather than “per week” (page 9 of the NW submission. This point is also made by UMC at page 8 of its TPP submission).

We concur with the clarifications suggested by the North West Alliance above in relation to Cyclic Traffic.

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The North West Alliance and UMC, at pages 9 and 8 of their respective submissions, make the following comments:

“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.”

(the same wording is used by the North West Alliance and UMC, although the North West Alliance includes additional comment between the two paragraphs quoted above).

In addition, the North West Alliance, on page 10 of its TPP submission, makes the following comments on this issue:

“A train path approach is the one most often used by train controllers as it is the most common means of managing corridors. The limitations of this approach are that it does not adequately consider the variation in train performance and train loading. That is, it does 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 Alliance recommends capacity should be described in terms of GTK on the section of track being considered.”

TPI on page 5 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, makes the following comments in relation to the above views on the GTK measure:

“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.”

In relation to the points made by the parties above, we note that there are contrasting strengths and weaknesses between the two conceptual bases to describing capacity in the form of a Train Path approach versus a GTK approach. However, we do not consider there to be compelling reasons for TPI to change the arrangements in its TPP from the Train Path approach to a GTK approach. The Train Path approach is applied by the WestNet TPP against which the TPI TPP is being benchmarked and which could be expected to apply to a broader range of train characteristics than the TPI TPP. Stakeholders however express general concern regarding the lack of



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specificity of the TPI Train Path-based capacity measures in the TPP. For example, this issue is commented on by GHD for Hancock Prospecting at page 9 of its submission as follows:

“... 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.”

The issue of the lack of specificity of the TPI TPP would be addressed by TPI adopting measures consistent with the recommendations in this paper, and particularly Recommendation 5 below.

Section 4 and Appendix A of the WestNet TPP set out a regime for an operator to sell its Train Paths to a third party operator. The TPI TPP does not provide operators with a right to sell the Train Paths assigned to them, or set out a trading regime in relation to such rights.

At page 8 of its submission, ARTC states:

“ARTC sees no reason why TPI could not provide for the selling or trading of paths. This should be an option particularly in the case of take or pay contracts where operators should have the opportunity to sell a train path subject to provisions that satisfy TPI that the risk is no greater in terms of track deterioration or capacity, or financially.”

Similarly, ACIL for Hancock Prospecting, at page 22 of its submission, notes that unlike the WestNet TPP, the TPI TPP does not have provisions for on-selling Train Paths and recommends that such provisions are incorporated in to the TPI TPP.

In relation to this issue, TPI, on page 4 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, makes the following comments in relation to the above feedback on the TPP:

“Commentators have suggested an ability for train paths to be on-sold by operators.”

“TPI notes that Appendix 1 of WestNet’s approved TPP (August 2006) provides criteria against which WestNet may withhold its consent for on-selling of train paths. As a general comment, TPI supports the criteria. However, the circumstances of TPI’s railway are so very different to the WestNet system that the automatic copying of such provisions into the TPP requires considerable thought.

...

TPI would seek an unfettered ability to withdraw approval for on-selling train paths in its TPP.”

While we expect that a market in access rights may take some time to develop (such that a trading regime may have limited effect at the outset of the regime), such a regime to allow operators to trade their entitlements is considered to be consistent with the economically efficient use of the railway infrastructure. A trading regime could co-exist with the TPP provisions

relating to resumption of capacity (section 3.2) in facilitating efficient utilisation of the existing network. On the basis that the protections and benefits to access seekers and operators in the TPI Part 5 instruments should at least equal those in the WestNet instruments, we consider that the right for an operator to sell its entitlements, and a regime to allow operators to trade such entitlements similar to that in Appendix A of the WestNet TPP, should be incorporated into the TPI TPP.

Because we expect that it would take time for a trading regime to become effective, and that a market for tradeable access rights would take time to develop, we would not suggest that a trading regime needs to be in place at the outset of providing access to the railway infrastructure. In this context, we suggest that trading provisions incorporated into the TPI TPP could become effective after a period of 12 months. Providing TPI with an unfettered ability to withdraw approval for on-selling train paths would discourage development of a trading market. Withdrawal of approval to trading should instead be on prescribed terms.

**TPP Recommendation 5**

The 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 so that the way in which these two forms of Train Path will set out in a Service Entitlement is prescribed.

Cyclic Traffic should be consistently described as an allocation “within a period of time”, rather than “per week”.

The definition of Service Entitlement should make clear that operators have a right to sell their entitlements and a regime to allow operators to trade such entitlements similar to that in Appendix A of the WestNet TPP should be incorporated into the TPI TPP and become effective 12 months after the commencement of access on the TPI network.

The sections of an access agreement containing the terms, Timetabled Traffic and Cyclic Traffic, should incorporate any changes to those terms arising from any ERA review of those terms (this could be done by cross-referencing the TPP). (this could be achieved by complying with TPP Recommendation 18)

**2.2 Analysis of Capacity**

**2.2.1 Master Control Diagram**

This section 2.2.1 is, in principle, the same as section 2.1 of the WestNet TPP, entitled Master Train Plan.

WestNet uses the term Master Train Plan only as a heading in its TPP: effectively, the WestNet MTP comprises the Master Control Diagram. The TPI definition of MCD appears to be a summarised version of the WestNet definition of MCD. This term is used in TPI's TMG, which also uses the term MTP. The MTP definition in the TPI TPP and TMG covers similar matters to the MCD, so that the relationships between the MCD and MTP are unclear.

**TPP Recommendation 6**

We suggest that TPI amends its definitions of MTP (in the TMG and TPP) and MCD (TPP) so that the relationship between these instruments is clearly distinguished (this minor issue is discussed in relation to the TPI TMG).

## 2.2.2 Access Applications

This section 2.2.2 sets out basic information for persons seeking access to the network and is consistent with similar information set out in paragraph 1 of section 2.2 of the WestNet TPP (Allocation of Train Paths).

## 2.2.3 Capacity Analysis

This section 2.2.3 sets out that TPI will conduct a capacity analysis to determine whether there is sufficient network capacity to meet the request of an entity seeking access to the network in order to finalise the Service Entitlement for that entity.

The North West Alliance, at page 11 of its TPP submission, proposes that the 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”

We consider the suggestions made by the North West Alliance to usefully expand on the material in section 2.2.3 by listing matters that would be assessed in a capacity analysis.

ACIL for Hancock Prospecting, at page 19 of its submission, suggests that the wording of section 2.2.2 of the WestNet TPP, Process for negotiating new Train Paths prior to an access agreement, should be incorporated into section 2.2.3 of the TPI TPP. Section 2.2.2 of the WestNet TPP sets out a general process for the railway owner to determine the availability of capacity in response to a operator’s request, to seek to accommodate the operator’s requirements using available capacity, and to maintain a dialogue with the operator to ensure all alternatives are explored.

ACIL also suggests that:

“There should be a maximum time period for examination of whether there was a need for capacity enhancement ( e.g. three months to cover assessment of the increased demand, train path modelling, and determination of what extra capacity was needed).”

### **TPP Recommendation 7**

We suggest that section 2.2.3 of the TPP should:

A. List the following matters that would be assessed 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).

### 2.3 Capacity Allocation

The equivalent provisions in the WestNet TPP are contained in section 5, Competition for the Same Train Path, and section 2.2.1 Guidelines for assessing whether a request is warranted for a Train Path. The WestNet process is on a 'first-come, first served' basis and that the operator/prospective operator can: demonstrate an intention to operate the services to the satisfaction of WestNet; provide details of forecast demand; and commitment to the new project with agreed funding.

The TPI process is broadly based on the 'first-come, first-served' principle, but also provides that the allocation is to be made to the access rights sought that, in the opinion of TPI, are "most favourable to it".

In relation to section 2.3, ARTC makes similar comments to the above at page 7 of its submission, as follows:

"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."

TPI also provides that allocation of 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", and that its market testing process would be applied in a non-discriminatory way and would allow access seekers the opportunity to bid. The TPI allocation process is less clear than the process in the WestNet TPP, given that, in individual cases, allocation may be on a 'first-come, first served' basis, but may also be on a commercial basis, via process that is not fully specified.

GHD for Hancock Prospecting, at page 5 of its submission (commenting on the TMG), presents the view that it is usual amongst access agreements between operators and railway owners to provide the first operator a right of access, within certain timeframes and commercial provisions, to the capacity of the railway. Thus, under a general 'first come, first served' principle, an initial operator has a right to reserve Train Paths, even if they are not used, for a defined and limited period of time. On the basis of our observations above in relation to section 2.3 of the TPI TPP, we consider that TPI should clarify that the fundamental capacity allocation basis is the 'first come, first served' principle as contained in the WestNet TPP. The period for which an unused Service Entitlement would be reserved to an operator should be

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specified by TPI – either as an attribute of the service entitlements in response to TPP Recommendation 5, or as an inclusion to this section 2.3.

### **TPP Recommendation 8**

We do not consider the TPI allocation process to comprise a sufficiently clear specification of policy in relation to the allocation of train paths. We suggest that the arrangements in section 2.3 are recast along the lines of the allocation process in the WestNet TPP, to effect that allocation will be made to the operator/prospective operator who first requested the train path and can establish a requirement for that train path (based on the operator being able to demonstrate operational intentions, effective future demand and funding commitment). In addition, TPI should specify the period that an unused Service Entitlement would be reserved to an operator.

ACIL for Hancock Prospecting, at page 19 of its submission, in addition to expressing similar concerns as expressed by ATRC above, states that:

“The reference to a commercial basis, market testing and allocation criteria from other access regimes, requires substantial elaboration – what type of testing, what allocation criteria and how would it work. Once elaborated, Hancock would require the chance to comment.”

We consider that all parties would have opportunity to comment on ERA’s recommendations at the draft determination stage of ERA’s approval process.

The North West Alliance, at page 12 of its TPP submission, highlights TPI’s statement in the TPI Costing Principles that “TPI considers that the network as constructed can meet current and reasonably projected demand”. The North West Alliance also sets out four process levels in Train Path capacity allocation where transparency is required. We consider that adoption of TPP Recommendation 8 above would, by removing discretionary criteria (such as allocation of access rights should be made on the basis of the allocation that is “most favourable” to TPI) result in appropriate clarity and transparency in the TPI Train Path allocation process. The North West Alliance, at page 12 of its TPP submission (and also UMC at page 9 of its submission), also states that it will make further comment on the issue of the capacity of the TPI infrastructure in its separate submission on the TPI Costing Principles.

UMC, at page 8 of its submission, requests the addition of the following text to section 2 of the TPP:

“In negotiation of an Access Agreement the issue of allocation of Train Paths will be dealt with in accordance with the TPP and the requirements of the Code and specifically Section 16 (2) of the Code.

In the event that TPI has not provided the Operators with suitable Train Paths and the Operator believes that TPI has not complied with the TPP or provisions of the Code related to negotiation of Access Agreements they may seek to have the matter arbitrated as a dispute in accordance with Section 25 of the Code.”

The text suggested above by UMC is consistent with paragraphs 2 and 3 of section 2.2 (Allocation of Train Paths) of the WestNet TPP. The first

sentence suggested above is broadly covered by the second last paragraph of section 2.3 of the TPI TPP, whereas the second sentence above is already contained in the TPI TPP at the final paragraph of section 2.3. Although the issues raised by UMC in this case are covered by the TPI TPP, for completeness, we suggest 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 include reference to the Code provision where this obligation is set out.

**TPP Recommendation 9**

We suggest that the second last paragraph of section 2.3 should include reference to section 16(2) of the Code.

The North West Alliance and UMC, at page 13 and 11 of their respective TPP submissions, suggest the following in relation to resolving conflicting requirements for Train Paths (this issue is also raised by UMC in relation to the TPI TMG):

“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 that infrastructure the Train Path(s) will not be granted without the approval of the Authority in accordance with Section 10 of the Code. If the Authority grants approval then TPI will commence negotiations.”

The requirement for regulatory approval where the railway owner considers that accepting a proposal for access would involve the provision of access to railway infrastructure to an extent that may preclude other entities from access to that infrastructure is set out in section 10 of the Code and should not be overridden by the TPP.

**TPP Recommendation 10**

We recommend that the following concluding paragraph is added to section 2.3 of the 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.”

**3 Management of capacity**

**3.1 Permanent variations to Train Paths**

This section 3.1 covers only permanent variations to Train Paths. Short-term or temporary variations to Train Paths are provided for in the TPI TMG rather than in the TPP. This section 3.1 is similar to section 2.4 of the WestNet TPP. Although section 2.4 of the WestNet TPP is entitled Permanent Variations to Scheduled Train Paths by Agreement, in effect, both that section and this section 3.1 of the TPI TPP provide for permanent variations to be made unilaterally by the railway owner.

### 3.1.1 Permanent variations to Train Path requested by TPI

This section 3.1.1 is, in effect, the same as section 2.4.1 in the WestNet TPP, entitled Permanent variation to Scheduled Train Paths requested by WestNet.

Section 2.4.1 of the WestNet TPP incorporates an additional provision (at paragraph 3) whereby the "reasonable grounds" are defined upon which an operator may withhold its consent for a Train Path variation proposed by the railway owner. In the WestNet TPP, reasonable grounds are defined on the following basis:

- the Train Path proposed not being available because it is already allocated to another Operator in accordance with the TPP; or
- that with the variation, the service cannot be operated safely or effectively.

Paragraph 3 of section 2.4.1 of the WestNet TPP provides a clear, workable definition of "reasonable grounds" in this context. We consider that adoption of such a definition would facilitate the efficient application of the TPP (and thus would be consistent with economically efficient use of the railway infrastructure). ACIL for Hancock Prospecting, at page 22 of its submission, also seeks elaboration on the term "reasonable grounds".

#### **TPP Recommendation 11**

In order to provide greater clarity in relation to the procedures in this section, we suggest that a definition of "reasonable grounds" should be adopted that is consistent with the reasonable grounds in paragraph 3 of section 2.4.1 of the WestNet TPP.

### 3.1.2 Permanent variations to Train Path requested by Operator

This section 3.1.2 is, in effect, the same as section 2.4.2 in the WestNet TPP, entitled Permanent variation to Scheduled Train Paths requested by Operator.

Sentence 2 of paragraph 3 of section 3.1.2, which is the same as paragraph 4 of section 2.4.2 of the WestNet TPP, states as follows:

"However, as a general principle, once an Operator is given a Train Path and the Operator is subsequently meeting its obligations and requirements under the Code and Access Agreement, that Train Path would not be permanently varied without the consent of both parties."

The above provision evidences a similar basic right to access provided by the TPPs of both TPI and WestNet. However, as discussed in relation to section 2.1 above, unlike the WestNet TPP, the TPI TPP does not specify a right for an operator to sell its Train Path(s), nor does it set out a regime to facilitate the trading of Train Paths between operators. At TPP Recommendation 5, we suggest that in order for the TPI TPP to provide at least equivalent operator protections and rights as in the WestNet TPP, the right for an operator to sell its Train Paths, and a trading regime in relation to such rights, should be provided in the TPI TPP similar to that in Appendix A of the WestNet TPP.

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The North West Alliance and UMC, at pages 13 and 10 of their respective TPP submissions, request that TPI adds undertakings in relation to providing operators with a conditional right to cancel Train Paths without penalty. The undertakings suggested by North West Alliance and UMC reflect those as set out in section 2.7 of the WestNet TPP. ACIL for Hancock Prospecting (page 23 of its submission) also seeks similar provisions to those in section 2.7 of the WestNet document to be added to the TPI policy.

In relation to this issue, TPI, on page 3 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, makes the following comments in relation to the above comments on the TPP:

“Comments have requested an ability for operators to cancel train paths without penalty on certain grounds including, public holidays, mechanical difficulties with rolling stock, repairs and maintenance.

Such matters are best dealt with in the Access Agreement. At first glance, some circumstances do seem to be capable on being managed by the operator and would not normally be included in Force Majeure events (eg public holidays).

TPI will negotiate with access seekers in good faith on such matters.”

We note that the specific provisions of the WestNet policy proposed by the stakeholders would be as agreed between TPI and the operator and would be contained in the operator's access agreement. As emphasised in TPI's response, an operator and TPI would be free to agree such a policy for inclusion in their access agreement (subject to the terms of the agreed policy not being inconsistent with the TPP). Accordingly, we do not consider it necessary for the policy suggestion by stakeholders to be incorporated into the TPP.

### 3.2 Resumption of Capacity

#### 3.2.1 Reduction to Train Service Entitlements due to Under-utilisation

This section is similar to section 2.5.1 of the WestNet TPP, entitled Removal of a Train Path due to under-utilisation.

Section 3.2.1 provides processes for assessing and dealing with the categories of Train Paths covered by the Service Entitlement, being Scheduled Train Paths/Timetabled Traffics versus Cyclic Traffic.

The criteria used to deem under-utilisation of an entitlement differs between the two railway operators' TPPs' are:

- WestNet applies no usage within three weeks, combined with more than six weeks (in aggregate) of no usage within a six month period; while
- TPI applies less than 15% of the Service Entitlement used within a quarter (Cyclic Traffic), and in the case of Timetabled Traffics, seven or more times that an entitlement has not been used within 12 consecutive specified Timetabled Traffics.



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Accordingly, the TPI criteria to deem under-utilisation of an entitlement are materially different from the criteria used in the WestNet instruments. In the absence of operating data in relation to the TPI network, it is not possible to determine the equivalence or otherwise of applying the WestNet criteria versus the TPI criteria to the TPI network. We suggest that the TPI criteria are accepted by the ERA on an interim basis but, in addition to the ERA's general power to direct the railway owner to amend or replace a statement of policy at any time, these criteria should be made subject to the regular reviews of the TPP (TPP Recommendation 16 below).

ACIL for Hancock Prospecting at page 21 of its submission points out that section 2.5.1 of the WestNet TPP sets out preconditions for the withdrawal of a Train Path, being:

- (a) there has been a request for use of the path from another Operator; or
- (b) it would allow better management of other Train Paths and encourages efficient use of the network; or
- (c) the Operator agrees to its withdrawal.

ACIL notes that such provisions relating to the railway owner's entitlement to cancel a Train Path reflect the regulator's view, in the 2002 review of the WestNet TPP, that the entitlement should be made effective only if there is a reasonable indication that the Train Path is sought by, and would be allocated to, another operator. We consider it appropriate for the same principle to be reflected in the TPI TPP.

### **TPP Recommendation 12**

In order that TPI resumption of a Train Path would apply where there is a reasonable indication that the Train Path is sought by, and would be allocated to, another operator, the following additional conditions should apply before TPI could reduce an operators service entitlements due to under-utilisation:

- there has been a request for use of the path from another operator; or
- it would allow better management of other train paths and encourages efficient use of the network; or
- the operator agrees to its withdrawal.

We suggest that section 3.2.2 should make clear arrangements for 'grandfathering' Train Paths when there is a substitution of operators.

The TPI TPP does however set out a process: for TPI to notify an operator of its intention to withdraw an entitlement; for an operator to demonstrate that the entitlement has not been under-utilised; for TPI to reach a decision after that process; and for the operator to use the dispute resolution provisions of its access agreement if it does not agree with TPI's decision. These steps are given clear timeframes and are considered to embody due process.

### 3.2.2 Removal of a Service Entitlement due to a transfer of a contract between Operators

This section is, in effect, the same as section 2.5.2 of the WestNet TPP, which has the same title as this section 3.2.2.

GHD for Hancock Prospecting at page 9 of its submission comments that while the general approach to capacity management in the TPP is sound, it lacks some detail and raises the issue of substitutional task as a matter to be clarified in section 3.2.2 - that is, where an operator loses a transportation contract to another operator, whether the existing operator's Train Paths are 'grandfathered' to the new operator. See TPP Recommendation 12 above.

### 3.3 Review of Service Entitlements

Paragraphs 1-4 of paragraph 5 of this section 3.3 are, in effect, the same as section 2.6 of the WestNet TPP, entitled Review of Train Paths.

Paragraph 5 of section 3.3 of the TPI TMG provides as follows:

"Nothing compels an Operator to accept a proposal to revise its Service Entitlements if contractual obligations owned by that Operator to any person (including TPI) would prevent it from doing so, unless the regular failure of the Operator's Service compromises the Service Entitlement of another Operator in accordance with its Access Agreement."

We understand that, based on this provision, a operator's right of access to the network (as specified in the form of a Service Entitlement in an access agreement), is not a 'firm' right to access and that it is conditional on the operator/the operator's services satisfying certain on-going requirements (where, mostly, these requirements are to be specified in the operator's access agreement with TPI).

The WestNet TPP (at section 2.6) sets out effectively the same statement as in paragraph 5 of section 3.3 of the TPI TPP, except that section 2.6 of the WestNet policy does not include the qualification to a operator's entitlements arising from regular failure of the operator's services.

#### **TPP Recommendation 13**

Notwithstanding the similarities between operators' entitlements as discussed in relation to this section 3.3 and 3.1.2 of the TPI document, TPI includes an additional qualification to operators' entitlements, in terms of conditionality of access rights arising from "regular failure" of an operator/the operator's services. We recommend 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.

## **4 Other**

### **4.1 Non discrimination**

This section 4.1 states as follows:

"TPI will not discriminate between Operators in the application of this TPP and the application of TPI's Network Rules."

The wording of section 4.1 is, in effect, the same as section 6 of the WestNet TPP, entitled Non Discrimination.

The definition of Operator in the TPI TPP is the same as that used in the WestNet TPP. That definition uses terms consistent with the definition of Operator in the Code (to effect that an operator is an entity to which access is provided under an access agreement). As discussed in relation to section 1.2.2 above, the revised drafting of the TPI TPP makes it clear that TPI's intention is to apply the TPP only to operators that have negotiated access agreements under the Code (as such, coverage of the TPP would not extend to entities to which access is provided otherwise than under the Code). TPI also clarified the intention behind the drafting of the TPP in its response of 15 October 2008 to the public comments by stakeholders. At TPP Recommendation 3 above, we suggest that the TMG/TPP should be applied to all operators, whether access has been negotiated inside or outside the Code.

The effect of adopting TPP Recommendation 3 above is that the statement in section 4.1 would extend to all operators, being (1) operators that have entered access agreements under the Code and (2) other entities to whom access is provided otherwise than under the Code. To make this matter clear in the context of section 4.1, we suggest that a clarifying sentence is added to the existing text of section 4.1. Our views of the appropriateness of the TPP applying to the broad class of operators are set out in the discussion above of section 1.2.2 of the TPP.

#### **TPP Recommendation 14**

We suggest that the commitment given by TPI in section 4.1 of the TPP is clarified by the addition of a further sentence as follows:

"This commitment extends to all operators, whether access has been negotiated inside or outside the Code."

We note that the existing text of section 4.1 incorporates the term "TPI's Network Rules". This term is not defined in the TPP. A requirement to define this term is included in TPP Recommendation 17 below.

### **4.2 Dispute resolution**

TPI provides that disputes in relation to the TPP will be managed in accordance with the access agreement and if no access agreement is in place, under section 25 of the Code. The equivalent WestNet TPP provision, section 8, sets out, in addition to available recourse to section 25 of the Code, a 3-stage process for dispute resolution to apply under the access agreements that are entered into.

The North West Alliance, UMC and ACIL present that the avenues of arbitration and negotiation contained in the WestNet TPP are not fully

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reflected in the arrangements in the TPI TPP. The North West Alliance and UMC suggest, in effect, that the text of section 8 of the WestNet TPP should be incorporated into the TPI TPP on that basis. Similar issues are identified by NW, UMC and ACIL in relation to the TPI TMG.

In order to generally inform parties of the process to apply to resolve disputes under access agreements, we suggest that the dispute provisions of the TPI TPP are expanded along the lines as suggested by North West Alliance and UMC, which are consistent with the provisions in the WestNet TPP.

In its revised TPP of 27 February 2009, TPI amended section 4.2 by adding the following underlined text:

“Any disputes arising in relation to any aspect of these guidelines will be managed in accordance with the Access Agreement. If no Access Agreement is yet in place, an Access Seeker, seeking access under the Code, may seek to have the matter arbitrated as a dispute in accordance with Section 25 of the Code.”

This additional condition to the TPP, that only an entity seeking access under the Code would have recourse to section 25 of the Code, is not contained in the WestNet TMG/TPP. We do not consider TPI’s additional condition to be an effective addition to the conditions in the WestNet instruments given that section 25(1)(b) of the Code requires an access seeker’s proposal, and the access seeker, to comply with the Code.

### **TPP Recommendation 15**

The WestNet TPP information of its 3-stage process for dispute resolution is informative of operators/other entities basic rights under access agreements. We recommend that similar information to that in section 8 of the WestNet TPP is incorporated into the TPI TPP.

TPP Recommendation 15 is similar to TMG Recommendation 18.

ACIL for Hancock Prospecting comments, at page 19 of its submission, that a reference to dispute settlement should be to all of Division 3 of the Code, not just to section 25. Appropriate reference to Division 3 of the Code is incorporated into the text of section 8 of the WestNet TPP, which is to be incorporated into the TPI TPP under TPP Recommendation 15.

WestNet also provides a process for parties to agree to Key Performance Indicators. A similar process is not set out in the TPI TPP. UMC supports inclusion in the TPI TPP of a process for agreeing Key Performance Indicators. Stakeholders generally also present a similar position in relation to the TPI TMG.

UMC, at page 11 of its TPP submission suggests, in effect, that the same provisions as set out in paragraphs 4 to 7 of section 4 of the WestNet TMG should be incorporated into the TPI TPP. This issue is considered in our paper in relation to the TPI TMG and our TMG Recommendation 19 provides, in effect, for equivalent provisions to paragraphs 4 to 7 of section 4 of the WestNet TMG to be included in the TPI TMG. As this process would be incorporated into the TPI TMG pursuant to TMG Recommendation 19, we do not consider that it needs to be incorporated into the TPI TPP.

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At page 9 of its submission, ARTC states as follows:

“ARTC is also a strong supporter of the development and publishing of key performance indicators to enable individual parties to have confidence that all parties are treated the same regardless of if they are related or unrelated to TPI.”

We concur with ARTC’s views on this issue, but note that under CP Recommendation 31 (in relation to the TPI Costing Principles) it is suggested that TPI reports against KPIs to the ERA. We do not consider it necessary that a similar commitment needs to be set out in the TPP.

Section 9 of the WestNet TPP provides for 5-yearly reviews of the policy. A similar provision is not incorporated in the TPI TPP. The North West Alliance and UMC seek a new section to be added to the TPI TPP to provide for 5-yearly reviews and suggest, in effect, that adapted text from section 9 of the WestNet TPP should be incorporated into the TPI TPP on that basis. ARTC also states that feels it appropriate that the TPP include a requirement for TPI to review the TPP at periodic intervals, through a consultation process to enable input from stakeholders and to take into account any changes to the industry. The North West Alliance, UMC and ARTC also raise the same issues in relation to TPI’s TMG.

Although, at any time, the railway owner can amend or replace the guidelines with the approval of the regulator, or the regulator can direct the railway owner to amend or replace the guidelines, we consider that a 5-yearly review process, similar to that in the WestNet TPP, would provide a timely and systematic basis for reviewing the TPP to ensure the policy continues to operate in accordance with the objectives.

### **TPP Recommendation 16**

We suggest that a 5-yearly review provision should be set out in the TPI TPP and should contain similar provisions to those set out in section 9 of the WestNet TPP.

TPP Recommendation 18 is effectively the same as TMG Recommendation 20.

## **A Definitions**

### **TPP Recommendation 17**

It is suggested that TPI provide a complete list of the definitions used in the document. Such definitions should be consistent with the definitions in the Code and the Act, and with the definitions in the WestNet TPP, where appropriate. Below are definitional issues that should be addressed:

“Cyclic Traffic” – to be further defined (see TPP Recommendation 5);  
“Master Train Plan”/“Master Control Diagram” – we suggest that TPI amends its definitions of MTP (in the TMG and TPP) and MCD (TPP) so that the relationship between these instruments is clearly distinguished;  
“Network” – we suggest this is defined as “the railway constructed pursuant to the TPI Railway and Port Agreement”;  
“Network Rules” - used at section 4.1 but is not defined;  
“regular failure” - used at section 3.3 but is not defined;  
“Service Entitlement” – to be further defined (see TPP Recommendation 5);  
“Timetabled Traffic” – to be further defined (see TPP Recommendation 5).

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The change to the definition of Network above is in response to comments by GHD for Hancock Prospecting, at page 9 of its submission, that in effect, the existing definition incorporates infrastructure at the port and as such would have vertically integrated port operations with the railway.

### Other Issues

The North West Alliance and UMC, at pages 14 and 11 their respective TPP submissions, suggest the following in relation to the consistency of access agreements and the Part 5 instruments (the same suggestion is made by UMC regarding the TPI TMG):

“TPI will ensure where possible, that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.”

The text quoted above is adapted from section 7 of the WestNet TPP (the text in that section, as above, provides a commitment in respect of both the TPP and TMG).

We consider that this issue would be dealt with by TPI as a matter of course in developing the access agreements. However, the above text from the WestNet TPP provides a useful reference during access negotiations and would provide a safeguard in the access agreements to ensure that any future changes in basic rights and obligations conferred by the TMG/TPP would pass through to operators.

#### **TPP Recommendation 18**

We suggest that the following text adapted from section 7 of the WestNet TPP is incorporated into the WestNet TMG/TPP:

“TPI will ensure where possible, that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.”

TPP Recommendation 18 is the same as TMG Recommendation 23.

## Appendix: List of Recommendations

### TPP Recommendation 1

The TPI TPP should only address the TPI railway network and make no reference to the broader TPI/FMG supply chain or to joint objectives in relation to that supply chain. To this effect, the following changes should be made to section 1.2 Purpose of the 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”; and
- delete the purpose to “maximise the efficient utilisation of that Network, within the context of the overall supply chain”.

### TPP Recommendation 2

For completeness, we suggest that TPI considers adding the following additional dot point to this section 1.2 (ie an additional dot point to those suggested at TPP Recommendation 1):

- "provide for the safe and reliable use of the railway infrastructure."

### TPP Recommendation 3

We suggest that the TMG/TPP should be applied to all operators, whether access has been negotiated inside or outside the Code. To this effect, we suggest that:

- a similar statement to that provided at paragraph 3 of section 1.2 of the WestNet TMG/TPP and should be incorporated into section 1.3 of the TPI TMG and section 1.2.2 of the TPI TPP; and
- an additional statement should added to section 1.3/1.2.2 of the TPI TMG/TPP to clarify that the TMG/TPP apply to TPI/FMG in its role as an operator using the railway infrastructure.

### TPP Recommendation 4

We suggest that the provisions from paragraph 3 of section 2.2.1 of the WestNet TPP setting out the matters that an operator must demonstrate to the railway owner in requesting a new Train Path should be incorporated in to the TPI TPP as follows:

“TPI will negotiate to provide new Train Paths where the Operator meets the following criteria:

- (i) the Operator can demonstrate an intention to enter into arrangements for the operation of services, to the satisfaction of TPI, and
- (ii) the Operator provides details of anticipated increased demand because of:

- (a) an upgrade or expansion of production capacity with confirmation that it will progress (e.g. Funding approved, public announcements etc), or
- (b) market growth based on trend data; or
- (iii) the Operator can demonstrate a committed new project with agreed funding.”

**TPP Recommendation 5**

The 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 so that the way in which these two forms of Train Path will set out in a Service Entitlement is prescribed.

Cyclic Traffic should be consistently described as an allocation “within a period of time”, rather than “per week”.

The definition of Service Entitlement should make clear that operators have a right to sell their entitlements and a regime to allow operators to trade such entitlements similar to that in Appendix A of the WestNet TPP should be incorporated into the TPI TPP and become effective 12 months after the commencement of access on the TPI network.

The sections of an access agreement containing the terms, Timetabled Traffic and Cyclic Traffic, should incorporate any changes to those terms arising from any ERA review of those terms (this could be done by cross-referencing the TPP). (this could be achieved by complying with TPP Recommendation 18)

**TPP Recommendation 6**

We suggest that TPI amends its definitions of MTP (in the TMG and TPP) and MCD (TPP) so that the relationship between these instruments is clearly distinguished (this minor issue is discussed in relation to the TPI TMG).

**TPP Recommendation 7**

We suggest that section 2.2.3 of the TPP should:

A. List the following matters that would be assessed 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).



**TPP Recommendation 8**

We do not consider the TPI allocation process to comprise a sufficiently clear specification of policy in relation to the allocation of train paths. We suggest that the arrangements in section 2.3 are recast along the lines of the allocation process in the WestNet TPP, to effect that allocation will be made to the operator/prospective operator who first requested the train path and can establish a requirement for that train path (based on the operator being able to demonstrate operational intentions, effective future demand and funding commitment). In addition, TPI should specify the period that an unused Service Entitlement would be reserved to an operator.

**TPP Recommendation 9**

We suggest that the second last paragraph of section 2.3 should include reference to section 16(2) of the Code.

**TPP Recommendation 10**

We recommend that the following concluding paragraph is added to section 2.3 of the 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.”

**TPP Recommendation 11**

In order to provide greater clarity in relation to the procedures in this section, we suggest that a definition of "reasonable grounds" should be adopted that is consistent with the reasonable grounds in paragraph 3 of section 2.4.1 of the WestNet TPP.

**TPP Recommendation 12**

In order that TPI resumption of a Train Path would apply where there is a reasonable indication that the Train Path is sought by, and would be allocated to, another operator, the following additional conditions should apply before TPI could reduce an operators service entitlements due to under-utilisation:

- there has been a request for use of the path from another operator; or
- it would allow better management of other train paths and encourages efficient use of the network; or
- the operator agrees to its withdrawal.

We suggest that section 3.2.2 should make clear arrangements for 'grandfathering' Train Paths when there is a substitution of operators.

**TPP Recommendation 13**

Notwithstanding the similarities between operators' entitlements as discussed in relation to this section 3.3 and 3.1.2 of the TPI document, TPI includes an additional qualification to operators' entitlements, in terms of conditionality of access rights arising from "regular failure" of an operator/the operator's services. We recommend 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.

**TPP Recommendation 14**

We suggest that the commitment given by TPI in section 4.1 of the TPP is clarified by the addition of a further sentence as follows:

“This commitment extends to all operators, whether access has been negotiated inside or outside the Code.”

**TPP Recommendation 15**

The WestNet TPP information of its 3-stage process for dispute resolution is informative of operators/other entities basic rights under access agreements. We recommend that similar information to that in section 8 of the WestNet TPP is incorporated into the TPI TPP.

**TPP Recommendation 16**

We suggest that a 5-yearly review provision should be set out in the TPI TPP and should contain similar provisions to those set out in section 9 of the WestNet TPP.

**TPP Recommendation 17**

It is suggested that TPI provide a complete list of the definitions used in the document. Such definitions should be consistent with the definitions in the Code and the Act, and with the definitions in the WestNet TPP, where appropriate. Below are some definitional issues:

“Cyclic Traffic” – to be further defined (see TPP Recommendation 5);  
“Master Train Plan”/“Master Control Diagram” – we suggest that TPI amends its definitions of MTP (in the TMG and TPP) and MCD (TPP) so that the relationship between these instruments is clearly distinguished;  
“Network” – we suggest this is defined as “the railway constructed pursuant to the TPI Railway and Port Agreement”;  
“Network Rules” - used at section 4.1 but is not defined;  
“regular failure” - used at section 3.3 but is not defined;  
“Service Entitlement” – to be further defined (see TPP Recommendation 5);  
“Timetabled Traffic” – to be further defined (see TPP Recommendation 5).

**TPP Recommendation 18**

We suggest that the following text adapted from section 7 of the WestNet TPP is incorporated into the WestNet TMG/TPP:

“TPI will ensure where possible, that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.”