

**DRAFT REPORT**

**Economic Regulation Authority**

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

**Train Management Guidelines**

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 Overpayment 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.

This paper by PricewaterhouseCoopers (PwC) addresses TPI's proposed TMG. 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 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.

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.

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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 apply to section 1.3 of the TMG).

On 5 March 2009, the ERA called for public submissions on the amendments to TPI's proposed TMG and TPP.

This report considers TPI's proposed TMG 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 TMG 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 TMG. All of our recommendations are discussed in section 2 of this paper and are listed in the Appendix.

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

### **General Issues**

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

- 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**

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.

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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**

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.

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.

### **TMG Recommendation 7**

The wording in section 2.3 of the TMG relating to allocation of contested Train Paths should be amended in order to enable third parties to understand the specific process and criteria to be applied by the Manager, Train Control and Scheduling in determining a Train Path allocation. Because section 2.3 of the TMG relates to real-time management of the services, it is not considered practicable for the procedures in relation to section 10 of the Code to apply to allocations under section 2.3 of the TMG.

### **TMG Recommendations 8 and 7**

We recommend that the commitments given by TPI to accommodate services presented early or late should more closely align with commitments given by WestNet in respect of such services (where the WestNet TMG involves “best endeavours” commitments while, in a number of circumstances, TPI provides a “reasonable endeavours” commitment).

### **TMG Recommendation 12**

Section 3.2 of the TPI TMG relating to instructions issued by TPI provides for TPI to be released from liability for delay or cost to an operator as a result of the operator complying with instructions issued by TPI.

Section 2.1 of the WestNet TMG sets out a reciprocal release of operators from liability as a result of complying with a proper instruction issued by WestNet. This reciprocal release of operators from liability is not replicated in section 3.2 of the TPI TMG. We suggest that section 3.2 of the TPI TMG incorporates a similar reciprocal release of operators from liability as provided by section 2.1 of the WestNet TMG.

**TMG Recommendation 17**

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 19**

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

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 Management Guidelines. TPI’s proposed TMG were submitted to the ERA on 3 July 2008 and an amended version of these proposed guidelines 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 Path Policy, 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 Management Guidelines (TMG) are to apply to the real-time management of services. Section 43 of the Code provides the following in relation to the TMG:

#### 43. Railway owner to comply with approved train management guidelines

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

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

(a) in the performance of the functions referred to in subsection (1); but

(b) only so far as that performance relates to requirements imposed on the railway owner by or under the Act or this Code.”

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

Public consultation is not required before the Costing Principles and Overpayment 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, 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 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 Train Management Guidelines (TMG) under section 43 of the Code. TPI’s proposed TMG was submitted by TPI on 3 July 2008.

Submissions on the 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

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- 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.

This report considers TPI's proposed TMG 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.

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 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 state the "Authority approved WestNetRail 2006 [TMG]" represent a "benchmark for comparison" to the TPI TMG being proposed (these statements are made in the introductions to the separate TMG 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 TMG as proposed can be accepted by the ERA as complying with the legislative requirements, or whether particular changes or further information in relation

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to the instrument provisions are considered necessary in order for the ERA to be able to approve the TMG.

## **2.2 PwC Assessment of TPI Train Management Guidelines**

This section 2.2 sets out our assessment of TPI's proposed TMG, which are to apply to the real-time management of services.

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

A total of 22 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 TMG.

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 TMG.

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

### **1 Introduction**

#### **1.1 Background**

The corresponding section in the WestNet TMG of August 2006 as approved by the ERA is section 1.1, Background.

The general background material set out by TPI in section 1.1 is considered appropriate, in that it reflects the requirements of section 43 of the Code.

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 other places in the TMG (eg section 2.2) the objectives of the railway access regime and the port access regime are linked. Linkage of the operation and objectives of these regimes is not, in our view, consistent with the requirements for developing and complying with approved TMG under section 43 of the Code. This issue is commented on by stakeholder submissions and is discussed below.

The views of the North West Alliance on the arrangements in the TPI linking port and rail operations 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 3 of the NW TMG submission);
- the port operator can override priorities otherwise provided by the TMG, eg as in the Decision-Making Matrix (view expressed on page 7 of the NW TMG submission);

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- as 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 could disadvantage non-TPI trains (view expressed on page 7 of the NW TMG submission); and
- the power of the port operator - a TPI/FMG related entity - to set priorities may be inconsistent with facilitating a contestable market for rail operations (reflecting the view expressed by NW on page 7 of its TMG submission),

Both the North West Alliance and GHD for Hancock Prospecting also express the view that linking railway network objectives and port objectives is inconsistent with the requirements of the WA Rail Access Regime. The issues raised by these stakeholders, and their concluding views on these issues, are set out below:

“TPI by providing over-arching decision making power on train paths to the TPI Port have indicated, indirectly, **the objective is to maximise the effectiveness of the Port.**”  
(view expressed on page 9 of the NW TMG submission. Bolding is by North West Alliance).

“... the railway is proposed to be managed by maximizing the operation of the trains that use the railway AND the port in order to maximise the efficiency of the FMG supply chain as a whole”  
(from page 3 of the GHD submission)

The concluding views of the North West Alliance and GHD on these issues are as follows:

“The TMG & TPP should only address the TPI railway and make no reference to the TPI supply chain. It is outside of the scope of the Authority and the Access Regime under consideration. Or if it is to remain then the Port Regime should be made available for consideration at the same time as the Rail Regime.”  
(page 7 of the NW TMG submission)

“In order to provide true open access to the railway TPI must decouple the Port from the railway”  
(page 3 of the GHD submission)

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.

That the Code TMG provisions are focussed on the objectives of railway access is evidenced by the following:

- under section 43(1), the requirement for a railway owner to comply with its approved TMG “applies to the railway owner in relation to a part of the railways network and associated infrastructure to which this Code applies when that owner is performing its functions in relation to that part.”
- under section 43(3)(b), the TMG are to be applied and followed by the railway owner “only so far as that performance relates to requirements imposed on the railway owner by or under the Act or this Code.”

On the basis of our view that linking the operation of the rail access regime with the objectives and operation of the port is inconsistent with the requirements of the WA Rail Access Regime, we suggest a number of changes to the TPI TMG to remove references to the port operator and to the broader TPI/FMG supply chain. A similar issue arises in relation to the TPI TPP. Our TPP Recommendation 1 is similar to TMG Recommendation 1 below.

**TMG Recommendation 1**

The TPI TMG 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.

The purpose of the TMG in section 1.2 to “maximise the efficient utilisation of that Network, within the context of the overall supply chain” should be deleted.

The involvement of the port operator in the preparation of the Weekly Train Plan (WTP) (section 2.2 of the TMG) should be transparent; the preparation of the WTP should also involve the railway operators; and section 2.2 should not link port objectives with railway network objectives.

Paragraph (a) of section 2.3 which assigns priority to allocation of a Contested Train Path to an operator in response to a request from the port operator should be deleted.

In the Decision-Making Matrix in Appendix B, 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 2**

We suggest, for completeness, that the second dot point of paragraph 3 of section 1.1 is amended as follows:

"the requirements imposed on the railway owner by or under the Railways (Access) Act 1998 (the Act) or the Code."

## 1.2 Purpose of the TMG

The objective of the TPI TMG is broadly consistent with section 1.2 of the WestNet TMG entitled, Relevance of Train Management Guidelines (T.M.G.). The objective set out in this section is similar to that in section 1.2 of TPI's TPP.

The purpose to “maximise the efficient utilisation of that Network, within the context of the overall supply chain” however links port operations and port objectives with the operations and objectives of the railways network and should be deleted (from TMG Recommendation 1 above).

Both the North West Alliance and UMC suggest that the purpose of the TMG should be extended as follows:

“with reference to the Rail Safety Act and associated standards and guidelines and as notes as a principle in the WestNetRail TMG we would add:

- To ensure operational safety is maintained through compliance with Safeworking rules, regulations and procedures.
- To ensure the integrity of the track and other infrastructure so that the train plan be met.
- To ensure operating integrity, including train crewing, locomotives, wagons and loading so that the train plan can be met.
- To manage the Network based on agreed entry/exit times.”  
(NW page 7, UMC page 8)

We consider that the suggested purposes proposed by the North West Alliance and UMC usefully expand on the purposes of the TMG as set out in section 1.2. These additional purposes (ie in addition to the existing purposes of fulfilling contractual obligations and ensuring services are operated in a non-discriminatory way) are considered to be consistent with:

- the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure (from section 20(4)(f) of the Act); and
- the economically efficient use of the railway infrastructure (from section 20(4)(g) of the Act)

### **TMG Recommendation 3**

We suggest that the purposes of the TMG as set out in the dot points in section 1.2 are amended by:

A. Incorporating the following additional points as suggested in the stakeholder submissions:

- “To ensure operational safety is maintained through compliance with Safeworking rules, regulations and procedures.



- To ensure the integrity of the track and other infrastructure so that the train plan be met.
- To ensure operating integrity, including train crewing, locomotives, wagons and loading so that the train plan can be met.
- To manage the Network based on agreed entry/exit times.”

B. Amending the text 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”.

### 1.3 Pre-conditions

In the initial TMG submitted by TPI on 3 July 2008, sentence 1 of section 1.3 comprised the following statement:

“The TMG 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 provision of the WestNet TMG, paragraph 3 of section 1.2, however, provides an express statement to the effect that the WestNet TMG applies to all operators, including entities to which access is provided otherwise than under the Code. The relevant WestNet provision is as follows:

“The Code only requires the T.M.G. to apply to access arrangements negotiated within the Code. WestNet, nevertheless, will apply the T.M.G to all Operators regardless of whether access applications are made inside or outside of the Code.”

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

The amended TMG submitted by TPI on 27 February 2009 clarified TPI’s intention in relation to coverage by amending sentence 1 of section 1.3 as follows:

“The TMG 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 TMG 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 TMG (and also in the TPP) as initially submitted, but stakeholders generally had interpreted TPI’s intention to be that the TMG applies only to operators that have negotiated access agreements under the Code. The

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stakeholder submissions in relation to the initially submitted TMG 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 TPP.

The North West Alliance, UMC and ARTC interpret TPI's definition of operator to exclude those with access outside the Code (NW page 8, UMC page 8, ARTC page 9). In the light of this, the North West Alliance and UMC proposed a revised "Operator" definition for inclusion in Appendix A of the TMG.

ACIL for Hancock Prospecting considered the issue of whether the TMG applies to all operators, including entities that have negotiated access outside the Code, to be unclear in the 3 July 2008 TMG and that the issue should be clarified on a consistent basis to the WestNet TMG. ACIL's views are as follows:

"TPI states that the TMG applies to all operators. It implies that the guidelines apply whether or not the Access Agreement was negotiated within the Code, which provides greater clarity regarding the operation of the railway. However TPI should be asked to state explicitly that the guidelines cover agreements negotiated outside the Code. The Regulator considered that confirmation of this intent was important in the case of WestNet."

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 (but did not provide comment on this matter in relation to the TMG):

"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."

While we note that the TMG, 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 guidelines 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.

**TMG Recommendation 4**

We suggest that the TMG 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 should be incorporated into section 1.3 of the TPI TMG and section 1.2.2 of the TPI; and
- additional text should be added to section 1.3/1.2.2 of the TPI TMG to clarify that the TMG 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 1.2.2 and 4.1 of the TPI TPP. TPP Recommendation 3 is the same as TMG Recommendation 4 above.

The North West Alliance, at page 8 of its TMG submission, presents the view that references in the TMG to conditions in access agreements disadvantages third parties/entities seeking access given that no standard access agreement is provided by TPI. The North West Alliance also comments at page 3 of its submission 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.

The suggestions by the North West Alliance above are considered to be reasonable. However, the WA Railway Access Regime requires standard access agreements to be published under a separate process (under section 6 of the Code) and, as such, it is not necessary for the TMG to specify that standard access agreements must be published. Information on the terms and conditions of access would also be part of the information that railway owners are required to provide to entities seeking access (under section 7 of the Code). In relation to templates or models for the information to be given to entities seeking access, we do not consider this to be a matter to be prescribed in the TMG.

## **2 Scheduling Principles**

The scheduling principles in this section 2 differ from those in the WestNet TMG. The WestNet TMG provides for Scheduled Train Paths, as established under access agreements, to be promulgated by:

- (i) issuing of Working Timetables; and
- (ii) issuing of Instructions

The TPI TMG provides for:

- an access agreement to specify an operator's right to a Service Entitlement, which can be characterised as comprising Scheduled Train Paths or Cyclic Traffic (the former being a fixed entitlement and the latter being a general entitlement to be realised through week-ahead nomination of services under section 2.2); and
- the establishment of a Master Train Plan (section 2.1) to specify medium term management of services; a Weekly Train Plan (section 2.2) to specify weekly management of services; and Contested Train Path provisions (section 2.3) to deal with circumstances where more than one operator seeks access to the same Train Path (in terms of the Weekly Train Plan).

The broad principles of section 2 of the TPI TMG, whereby the Master Train Plan provides a register of Service Entitlements, while the Weekly Train Plan provides for the real time management of services, are considered to be consistent with the efficient operation of the network.

Issues in this section 2 concerning the linkage of the railway access regime with the port access regime are discussed in relation to TMG Recommendation 1 above.

An apparent greater level of flexibility provided by the TPI scheduling principles, relative to those in the WestNet TMG, is considered reasonable given the freight-only operations of the TPI network (where passenger operations on the WestNet network may be better managed through the issuing of train timetables).

Section 2.1 provides for TPI to develop and maintain a Master Train Plan (MTP). In general terms, the MTP is defined as a document that registers Service Entitlements of each operator, the capacity required by each operator and periods of time allocated to planned possessions. WestNet uses the term MTP in its TPP, but only as a heading - effectively, the WestNet MTP comprises the Master Control Diagram (MCD). The WestNet MCD is similar to the TPI MTP, except that it is "a diagrammatic or electronic record" and, unlike the TPI MTP, would not appear to contain information on the capacity required to provide each operator's access entitlement. TPI in its TPP also uses the term MCD, which appears to be a summarised version of the MCD definition in the WestNet TPP.

**TMG Recommendation 5**

We suggest that the time period covered by the Master Train Plan (in terms of whether it covers 12 months, or some other period) is specified and that TPI otherwise amends the definitions of MTP (in the TMG) and MCD in a way that clearly describes these instruments and the relationship between them.

**2.1 Master Train Plan**

This section 2.1 sets out the matters to be registered by a Master Train Plan and the procedures and requirements for modifying a Master Train Plan.

Aside from comments provided by the North West Alliance, this section was not generally commented upon by the stakeholder submissions. In relation to this section, the North West Alliance presents that:

- due to confusion in the guidelines in relation to use of the terms “Traffic” and “Traffics”, the term “Cyclic Traffic” should be used in place of “Cyclic Traffics” (page 10 of the NW TMG submission);
- the description of “Cyclic Traffic” in section 2.1(a)(ii) is different from the definition of “Cyclic Traffic” in Appendix A. The North West Alliance recommends that the description section 2.1(a)(ii), similar to the definition in Appendix A, should describe “Cyclic Traffic” as an allocation “within a period of time”, rather than “per week” (page 10 of the NW TMG submission);
- a statement of Master Train Plan Scheduling Principles in section 2 should be expanded to cover matters such as network infrastructure constraints (eg axle loads) and network operating constraints (eg train lengths) (page 10 of the NW TMG submission);
- Ad Hoc Services as covered in section 2.1 Master Train Plan should be instead covered in section 2.2 Weekly Train Plan (page 10 of the NW TMG submission); and
- in respect of TPI taking possession of the network to undertake necessary work, the commitment that it will “use its best endeavours to consult with Operators” should be replaced by “.. a regime whereby Operators are continuously updated on the competing needs to access the Network” (the North West Alliance suggests elements of such a regime at page 10 of its TMG submission).

We concur with the clarifications suggested by the North West Alliance above in relation to Cyclic Traffic and agree with North West Alliance that Ad Hoc Services should be accommodated within the Weekly Train Plan rather than the Master Train Plan, given that the former provides for the real time management of services whereas the latter is more in the nature of a register of Service Entitlements.

In relation to the North West Alliance suggestion that particular additional Master Train Plan Scheduling Principles should be incorporated into the TMG, we note that similar principles are not incorporated into the WestNet TMG and that the principal elements suggested by North West Alliance, to a large extent, could be expected to be covered by the information that a

railway owner must provide an entity seeking access under section 7 of the Code. Similarly, the arrangements in the TPI TMG for taking possession of the network to undertake necessary work are broadly similar to the arrangements in the WestNet TMG (subject to the issue addressed at TMG Recommendation 10 below). We consider the current TPI commitment, as varied by TMG Recommendation 11, to be reasonable for the commencement of access to the network, but we suggest that this issue could be made subject to review. In this regard, in addition to the regulator's general power to direct the railway owner to amend or replace the guidelines at any time, the issue of specification of Master Train Plan Scheduling Principles in the TMG could be made subject to the regular reviews of the TMG (TMG Recommendation 19 below).

**TMG Recommendation 6**

Based on the information provided by stakeholders we suggest that:

- the term "Cyclic Traffic" should be used in place of "Cyclic Traffics";
- the description of Cyclic Traffic in section 2.1(a)(ii), should describe Cyclic Traffic as being an allocation "within a period of time", rather than "per week"; and
- Ad Hoc Services as covered in section 2.1 Master Train Plan should be instead covered in section 2.2 Weekly Train Plan.

UMC at page 6 of its TMG submission suggests the following in relation to resolving conflicting requirements for Train Paths (this issue is also raised by both UMC and the North West Alliance in relation to the TPI 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 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."

In relation to the above view, Section 10 of the Code applies where a proposal is before the owner and not in cases where an access agreement is already in place.

## **2.2 Weekly Train Plan**

This section 2.2 clearly sets out the matters to be covered by a Weekly Train Plan and the procedures and requirements for modifying a Weekly Train Plan.

Paragraph 1 of this section sets out a role for the port operator and a linking of railway and port objectives. This is considered by stakeholders to be inconsistent with the required focus of the TMG on access to the railway infrastructure. Issues concerning the linkage of the railway access regime with the port access regime are discussed in relation to TMG Recommendation 1 above. Under TMG Recommendation 1 we suggest that the involvement of the port operator in the preparation of the WTP should be transparent; that preparation of the WTP should also involve the railway operators; and that this paragraph 1 should not link port objectives with railway network objectives.

Paragraph 2 of this section 2.2 sets out the requirement for an operator of Cyclic Traffic to submit Train Requests on a 'week-before' basis on an "advised time on an advised day of each week". While the specific timing details for 'week-before' notification should specified, we do not consider it necessary for this to be done within the TMG.

Aside from comments provided by the North West Alliance, this section was not generally commented upon by the stakeholder submissions. In addition to its comments on the role of the port operator as discussed in relation to TMG Recommendation 1, North West Alliance presents that:

- the Weekly Train Plan should be prepared and published within the same period that notification of a shipping schedule is known (page 11 of the NW TMG submission); and
- a longer planning period should be prescribed for the TMG eg 3 months, to allow operators to adjust their requirements (but need not be in the form of a Train Path) (page 11 of the NW TMG submission).

In relation to the North West Alliance issues above, we do not consider such changes to the TMG to be necessary for the commencement of access to the network. We suggest that these matters are made subject to review and, as such, whether amendments to the TMG as suggested by North West Alliance above are necessary should be determined by the ERA once third party rail operations have commenced on the network.

### 2.3 Contested Train Path

This section 2.3 sets out a process to deal with circumstances where more than one operator seeks access to the same Train Path (in terms of the Weekly Train Plan).

The proposal in paragraph (a) to give the requests from the Port Operator priority in determining the allocation of a Contested Train Path is inconsistent with the scope of the WA Rail Access Regime. Issues concerning the linkage of the railway access regime with the port access regime are discussed in relation to TMG Recommendation 1 above. Under TMG Recommendation 1 we suggest that paragraph (a) of section 2.3 should be deleted on the grounds that it is inconsistent with the required focus of the TMG on the rights and obligations of railway owners and operators in relation to access to the railway infrastructure.

TPI, on page 2 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, makes the following comments in relation to views expressed on this issue in the TMG:

“Comments have been submitted on priorities to apply in the event of a contested train path, including reference to port operators.

...

TPI rejects the assertion that the port operator can change path priorities without reference or regard to the Rail Access Arrangements in place. The specific provision in the guidelines refers to contested train paths, which by definition relates to a path that that more than one operator would like to run a train on. It would seem to be self evident that port delivery requirements should be a determinant of priorities in the event of a contested train path.”

We accept that port delivery requirements should be a determinant of priorities in the event of a contested train path. Our issue in relation to paragraph (a) of section 2.3 is that port delivery requirements would appear to be given absolute priority in such cases. The matters that the port operator may reference, or have regard to, in requesting a train path allocation are not set out in the TMG. Consistent with our comments in relation to section 1.1 above – in terms of the port access regime being 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) – priority given to the port operator to, in effect, determine the allocation of contested train paths is considered to be inconsistent with the independent operation of the railway access regime from port access. TMG Recommendation 1 seeks to reinforce the independence of railway access from port access.

Paragraph (d) provides priority to operators that are most behind in realising their Service Entitlements. The North West Alliance comments that similar provisions are used by others; that the application of the principles in paragraph (d) is administratively very demanding; and accordingly, that TPI should be required to explain how it would administer the proposal in practice to provide a fair and transparent process (from page 11 of the NW TMG submission). We also note that the wording used by TPI in paragraph (d) is imprecise (eg “...TPI will **give consideration to** the number of services



per week that each Operator is contractually entitled to ..." (bolding added by PwC)). We consider that such wording should be amended in order to enable third parties to understand the manner in which the principles in that paragraph would be applied.

The hierarchy of priorities in section 2.3 (after removal of paragraph (a) giving priority to allocations based on requests from the port operator) is considered to be reasonable. However, imprecision in the terms used in this section, and the absence of a process for operators to agree a Contested Train Path amongst themselves, may mean in cases where a Contested Train Path arises, that the process in section 2.3 would default to allocation of the Contested Train Path by determination of the Manager, Train Control and Scheduling (under paragraph (e)).

The ability of the Manager, Train Control and Scheduling to unilaterally determine an allocation (where the allocation is not otherwise resolved by application of the process in section 2.3) is considered appropriate in order efficiently deal promptly with real time issues. However, the issues as noted above may result in such unilateral determinations being the standard means of the dealing with Contested Train Paths.

The criteria that the Manager, Train Control and Scheduling is to apply in making a determination are vague ("In deciding which Service is allocated the path the Manager, Train Control and Scheduling **will have regard to the objectives** of these Guidelines." (bolding added by PwC)).

The wording of paragraph (e) should be amended in order to enable third parties to understand the specific process and criteria to be applied by the Manager, Train Control and Scheduling in making a determination in terms of section 2.3.

We note that the term "Manager, Train Control and Scheduling" is not defined in the TMG.

**TMG Recommendation 7**

We suggest the following changes to section 2.3 of the TMG:

- the wording in paragraphs (d) and (e) should be amended in order to enable third parties to understand the precise manner in which those paragraphs would be applied;
- paragraph (e) should specify the process and criteria to be applied by the Manager, Train Control and Scheduling in making a determination in terms of section 2.3;
- records of each determination (including a statement of reasons) of the Manager, Train Control and Scheduling should be made available, on request, to operators/ entities seeking access and to the regulator; and
- the term "Manager, Train Control and Scheduling" should be defined.

### **3 Real-time Management of Services**

#### **3.1 Services presented on time, late or early**

##### **3.1.1 Services presented on time**

This section 3.1.1 is consistent with paragraphs 1 to 4 (page 4) of section 2.1 of the WestNet TMG, entitled Use of the Network in Accordance with the Train Paths, except that the WestNet document requires an operator to advise the railway owner within 15 minutes of the scheduled departure time that the service will be ready for departure on time, whereas the TPI TMG requires 30 minutes notice. We do not consider the TPI provision to be unreasonable.

##### **3.1.2 Services presented early**

Similar to section 3.1.1 above, this section 3.1.2 is broadly consistent with paragraphs 1 to 4 (page 4) of section 2.1 of the WestNet TMG. Section 3.1.2 of the TPI TMG differs from the relevant paragraphs of section 2.1 of the WestNet TMG on the bases that:

- in allocating priorities to services, TPI states that "reference may be made to the Decision-Making Matrix" (the equivalent reference in the WestNet TMG is more definite, in that allocation of Train Paths to early or late services shall be "in accordance with the general principles of train management in Section 3.3" (where section 3.3 is the equivalent section in the WestNet TMG to TPI's proposed Decision-Making Matrix));
- section 3.1.2 includes the requirement for an operator giving at least 30 minutes notice of a service being more than 15 minutes early in presenting at its point of entry to the network (rather than 15 minutes notice in the WestNet TMG); and
- section 3.1.2 provides a "reasonable endeavours" commitment of the railway owner to ensure that a service which enters the network early holds the gain, and a "best endeavours" commitment of the operator to ensure that such a service holds the gain between entry and exit points. While we consider these commitments to be reasonable, TPI will use only "reasonable endeavours" to provide a Train Path at the next available opportunity whereas WestNet uses "best endeavours" in this case.

Similar observations regarding the differences between the TPI TMG provisions and those in the WestNet TMG are commented upon by ACIL for Hancock Prospecting, at page 24 of its submission. ACIL comments in relation to the real time management of services that "...there are a number of places where TPI has relaxed the railway owner's obligations or increased those of operators".

TPI, on page 1 of its 15 October 2008 response to the public comments by stakeholders on the TMG/TPP, provides the following in relation to comments such as those above on the TMG:

"It is not reasonable to assume that the networks managed by TPI and WestNet are sufficiently similar that equivalent processes should apply.

...

All factors combine to create a very different environment for the respective rail systems and therefore it is necessary that greater time and operating allowances are in place for TPI's railway, than exist for WestNet.

Further; and for the above reasons, TPI uses the term reasonable endeavours regularly in the proposal guidelines given the uncertainties inherent with a greenfields railway in the Pilbara."

We have taken differences between the railway networks into account in our assessment. Our suggestions that, in a number of places in the guidelines, TPI adopts a "best endeavours" commitment consistent with the WestNet arrangements in place of a "reasonable endeavours" commitment is not intended to mean that the two networks should operate to the same standards, but that the commitments of the railway owners to accommodate the needs of operators should be similar.

**TMG Recommendation 8**

We consider that the commitments given by TPI to accommodate services presented early should more closely align with commitments given by WestNet. TPI should consider adopting the following commitments adapted from paragraphs 2 and 3 of section 2.1 of the WestNet TMG:

"TPI will use its best endeavours to accommodate a service which is running early or which is or is presented at the point of entry to the Network more than 15 minutes early by providing a Train Path for that Service at TPI's first available opportunity in accordance with the general principles of train management in the Decision-Making Matrix."

"TPI and the operator will use their best endeavours to ensure that such services which are presented more than 15 minutes early depart the network no later than the scheduled time"

We note that the Decision-Making Matrix at Appendix B of the TPI TMG is to apply in the event of a conflict with between services on different Train Paths arising from a late or early service. The Decision-Making Matrix is discussed at heading B below.

**3.1.3 Services presented late**

This section 3.1.3 includes the 30 minutes notice requirement which is not specified in paragraphs 1 to 4 (page 4) of section 2.1 of the WestNet TMG. It differs from the relevant paragraphs of section 2.1 on the following bases:

- that in respect of a service which is presented at the point of entry to the Network after its scheduled departure time, TPI will use its reasonable endeavours to accommodate the service by providing a Train Path at the next available opportunity; and
- that in allocating priorities to services, TPI states that "reference may be made to the Decision-Making Matrix" (as noted in relation to section 3.1.2 above, the equivalent reference in the WestNet TMG provides more definite application of the WestNet decision matrix).

**TMG Recommendation 9**

In the interests of providing greater certainty in relation to the application of the Decision-Making Matrix, and to align with the WestNet commitments to accommodate services presented late, we recommend that the following commitment (adapted from paragraphs 2 and 3 of section 2.1 the WestNet TMG) is incorporated into section 3.1.3 of the TPI TMG:

"TPI will use its best endeavours to accommodate a service which is running late or which is or is presented at the point of entry to the Network late by providing a Train Path for that Service at TPI's first available opportunity in accordance with the general principles of train management in the Decision-Making Matrix."

**3.2 Instructions**

This section 3.2 is generally consistent with pages 5 and 6 of section 2.1 of the WestNet TMG, entitled Use of the Network in Accordance with the Train Paths.

A key difference is that this section incorporates the commitment by TPI that it will "b) endeavour to give the Operator reasonable notice in order for it to be able to comply with the Instruction."

The commitment above is a lesser commitment to that effectively given in the WestNet TMG (paragraph 3, page 5, and section 2.1), which is as follows:

"Unless the Train Control Centre gives an Instruction that is a Train Control Direction, the Operator need only comply with an Instruction if it was given a reasonable time before the required time for compliance."

The lesser commitment given in the TPI TMG relative to the WestNet TMG is also observed by ACIL for Hancock Prospecting, at page 25 of its submission.

**TMG Recommendation 10**

We suggest that the TPI TMG includes a commitment consistent with that in paragraph 3, page 5, and section 2.1 of the WestNet TMG that "unless the Train Control Centre gives an Instruction that is a Train Control Direction, the Operator need only comply with an Instruction if it was given a reasonable time before the required time for compliance." This additional commitment is considered to be consistent with the effective and efficient real time management of services.

The North West Alliance and UMC seek an additional principle to be incorporated into section 3.2 as follows:

"Where that instruction is unreasonable or impractical for operating and cost reasons the Operator may decline to run the service without penalty to it's Service Level performance record."

(page 12 of the NW TMG submission and page 9 of the UMC TMG submission. The same suggested wording is used by both of these stakeholders)

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We consider it reasonable that, in complying with an instruction from TPI, an operator should not face a penalty in terms of its Service Level performance record.

### **TMG Recommendation 11**

We suggest that an additional principle is incorporated into section 3.2 to provide that, in complying with an instruction from TPI, an operator would not face a penalty in terms of its Service Level performance record.

The final paragraph of section 3.2 of the TPI TMG provides for TPI to be released from liability for delay or cost to an operator as a result of the operator complying with an instruction issued by TPI. The text of the final paragraph is as follows:

“TPI is not responsible for any delay suffered or cost incurred by the Operator in complying with an Instruction and the Operator releases TPI from any claim arising from such compliance.”

Paragraph 2 on page 6 (in section 2.1) of the WestNet TMG however sets out a reciprocal release of operators from liability as a result of complying with a proper instruction issued by WestNet. This reciprocal release of operators from liability is not replicated in section 3.2 of the TPI TMG. The reciprocal clause in the WestNet TMG is as follows:

"The Operator is not responsible for any delay suffered or cost incurred by WestNet in the Operator complying with a proper Instruction of WestNet, and WestNet releases the Operator from any such claim arising from such compliance."

This issue is also identified by ARTC and ACIL for Hancock Prospecting in their submissions to the ERA. ARTC, at page 9 of its submission, and ACIL, at page 25 of its submission, present that TPI's proposals should contain a similar clause to that contained in the WestNet TMG.

### **TMG Recommendation 12**

We suggest that section 3.2 of the TPI TMG incorporates the following text adapted from section 2.1 of the WestNet TMG:

"The Operator is not responsible for any delay suffered or cost incurred by TPI in the Operator complying with a proper Instruction of TPI, and TPI releases the Operator from any such claim arising from such compliance."

In addition, in the final paragraph of section 3.2, the words "an Instruction" should be replaced by "a proper Instruction".

This section 3.2 contains reference to "Network Rules" which is not a defined term in these TMG.

#### **4 Managing infrastructure issues**

The North West Alliance and UMC both seek publication by TPI of a 12 month possession plan. This proposed requirement is specified by North West Alliance and UMC (at pages 12 and 9 of their TMG submissions respectively) as follows:

“The Alliance has a preference for TPI to publish a twelve month network possession plan for planned maintenance, enhancements and expansion work together with the MTP so that they can reasonably anticipate planned closures, their duration and location. In this way the Mine will be able to mirror the availability of the railway optimizing mine maintenance and production to everyone’s benefit.”

(Text from the NW TMG submission shown. The text in the UMC TMG submission is in effect identical)

Publication of a 12 period plan is considered to be desirable. However, under TMG Recommendation 14 below, we propose that TPI provides at least 6 months notice of maintenance activities for periods beyond 48 hours (increased from TPI’s proposal of at least 3 months notice). We consider that the extended notice period under TMG Recommendation 14 would, in large part, address the underlying concerns as expressed by North West Alliance and UMC above. This matter could, however, represent a subject for future review by the ERA. That is, in addition to this matter being covered by the ERA’s general power to direct a railway owner to amend or replace the guidelines at any time, the requirement for the TMG to set out that TPI will issue a 12 month possession plan could be a subject to be addressed during the regular reviews of the TMG (TMG Recommendation 19 below).

#### **4.1 Network repairs, maintenance and upgrades**

##### **4.1.1 Possessions**

This section 4.1.1 is consistent with paragraphs 1 to 3 of section 3.5 the WestNet TMG, entitled Repairs, Maintenance and Upgrading of the Network, with the following key differences:

- the commitment of TPI to use "reasonable endeavours" to consult with affected Operators at paragraph 1(b) is a lesser commitment than the commitment of WestNet at paragraph 2 of section 3.5 of its TMG (where WestNet states that it "will at all times, consult with operators"); and
- the commitment of TPI to use "reasonable endeavours" to provide an alternative Train Path at paragraph 1(c) is not consistent with the commitment of WestNet at paragraph 1(ii) of section 3.5 of its TMG, which is to use "best endeavours".

Similar observations to the above are made by ACIL for Hancock Prospecting at page 25 of its submission.

**TMG Recommendation 13**

We recommend that the following amendments, consistent with the provisions in the WestNet TMG, should be made to section 4.1.1 of the TPI TMG in order to facilitate effective real time management of services:

A. in relation to paragraph 1(b), it is suggested that the following text (adapted from paragraph 2 of section 3.5 of the WestNet TMG) is used:

"TPI will at all times, consult with Operators whose Train Paths may be affected by a possession of the Network for repairs, maintenance, and will notify Operators when possession of the Network is required for emergency or Force Majeure events."

B. in relation to paragraph 1(c), replace "reasonable endeavours" with "best endeavours".

**4.1.2 Consultation re Possessions**

This section 4.1.2 is consistent with paragraphs 4 of section 3.5 of the WestNet TMG (paragraph 2 of page 11 of the WestNet document), entitled Repairs, Maintenance and Upgrading of the Network, with the following key differences:

- Under section 4.1.2(d)(ii), where TPI is to take possession for maintenance activities for periods between 6 and 48 hours (and where service entitlements are affected), no prior notice condition is specified. The WestNet TMG, at paragraph 4(iv) of section 3.5, however, specifies that the railway owner is to provide the operator with a minimum of 2 weeks notice.
- Under section 4.1.2(e), where TPI is to take possession for maintenance activities for periods beyond 48 hours (and where service entitlements are affected), the notice condition specified is that TPI will give "as much notice as is reasonably practicable and in so doing will endeavour to provide at least three months notice of the works.". The WestNet TMG, at paragraph 4(v) of section 3.5, however, specifies that in these circumstances, the railway owner is to provide the operator with at least six months notice of the works.

Similar observations to those above are made by ACIL for Hancock Prospecting at page 26 of its submission. In addition, both the North West Alliance and UMC seek detailed changes to this section 4.1.2. The changes, as set out at pages 12 and 9 of the North West Alliance and UMC TMG submissions respectively, are that:

- all possessions should be published;
- notice of possessions for maintenance activities should be to all operators (not just operators considered by TPI to be affected by the possession);
- there should be a rolling 3 monthly review of possessions by a consultative committee to be headed by the TPI Head of Rail; and

- TPI should provide a revised Daily-Weekly Train Timetable (DWTT) so that operators can review the impact on their services.

In assessing these issues, we firstly considered the WestNet notification requirements to provide more definite and timely commitments of the railway owner to notify the operator of possessions. The changes proposed by the North West Alliance and UMC would expand on the measures contained in the WestNet TMG. While some of those changes may be desirable, we suggest that ERA obtains further information from the proponents of the changes so that the costs and benefits of incorporating them into the TPI TMG can be properly assessed. The suggested change to provide notification of possessions to all operators (not just to affected operators) would, however, seem to represent a simple change that could be implemented at negligible cost and could produce potential benefits to all operators in contingency planning.

**TMG Recommendation 14**

We recommend that sections 4.1.2(d) and 4.1.2(e) of the TPI TMG should be amended to adopt the provisions from section 3.5 of the WestNet guidelines (in terms of notice periods and other commitments as discussed above) in order to facilitate effective and efficient real time management of services. We also recommend that notices of possessions should be provided to all operators.

Section 3.5 of the WestNet TMG (paragraph 4(vi)) sets out the matters that notices of possessions should describe. We do not consider it essential that such matters should be prescribed in the TPI TMG.

**4.2 Management of emergencies or other incidents**

This section 4.2 is effectively the same as section 3.6 of the WestNet TMG, entitled Management of Emergencies.

**4.2.1 Network blockages**

This section 4.2.1 is, in broad principle, consistent with section 2.2 of the WestNet TMG, entitled Network Blockage.

In this section, TPI expands on strategies that may be considered in order to recover a Failed Train and clear a blockage on the network.

Paragraph 2 of this section provides that TPI may request another operator to assist in clearing a blockage and that such an operator "will not unreasonably withhold its consent".

The equivalent provisions in the WestNet TMG are at paragraphs 2 and 3 of section 2.2 as follows:

"Operators, other than the Operator whose train has failed, must provide reasonable assistance to [the railway owner] when necessary to facilitate the clearing of a blockage of the network caused by a failed train.

An operator is not required to provide assistance if it will incur cost and risk unless agreement is reached on how the costs and risks will



be shared. Agreement on the terms and conditions for providing assistance may be negotiated within the Access Agreement."

The North West Alliance and UMC, at pages 13 and 9 of their respective TMG submissions, seek the text of paragraph 3 of section 2.2 of the WestNet TMG to be included in the TPI TMG. ACIL for Hancock Prospecting, at page 26 of its submission, seeks a similar inclusion.

In relation to this issue, TPI, on page 2 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 of stakeholders on this aspect of section 4.2.1 of the TPP:

"Comments indicate a possible resistance of operators to assisting with clearing blockages on the network.

...

TPI rejects any suggestion that an operator does not need to provide any assistance when a train is failed/disabled in the section. In a multiple operator rail environment, it is contingent upon all users to take the necessary actions to reduce operational downtime on the network.

Once a failed train is cleared, it is then the responsibility of the operator of the failed train to make all necessary arrangements to get that service operating again. Any further assistance that one operator provides to another would come under commercial arrangements."

We do not interpret the stakeholder inputs on this issue to indicate a possible resistance of operators to assisting with clearing blockages. We agree with TPI's comments in general, that the TMG should provide operators with an obligation to assist with clearing blockages. However, these obligations should be reasonable. The provisions at paragraphs 2 and 3 of section 2.2 of the WestNet TMG set out the obligation of an operator to assist with blockages subject to, if the operator will incur cost and risk in providing assistance, agreement being reached on how the costs and risks will be shared (such agreement could be given within the access agreement). We consider the provisions of the WestNet TMG to set out clearer, and potentially more reasonable and balanced obligations on operators to clear blockages than paragraph 2 of section 4.2.1 of the proposed TPI guidelines.

**TMG Recommendation 15**

We recommend that the provisions of paragraphs 2 and 3 of section 2.2 of the WestNet TMG are adopted at paragraph 2 of section 4.2.1 of the TPI guidelines.

### 4.3 Train activities following an incident or an emergency

This section 4.3 is, in broad principle, consistent with section 3.4 of the WestNet TMG, entitled Train Activities Following a Major Delay (both documents provide that, if practical, trains should resume service in the order that they were scheduled to run prior to the even causing the delay).

Section 3.4 of the WestNet TMG, at paragraph 1(ii), provides that "passenger trains will be given priority if passengers are stranded en-route." This WestNet condition is not considered necessary for the TPI TMG.

The North West Alliance and UMC seek the following text to be included in sections 4.3 and 4.4 of the TMG (UMC also seeks the same text to be included in sections 2.1, 2.2 and 2.3):

"To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed.

All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements."

The text proposed by the North West Alliance and UMC appear to be minor adaptations of standard provisions from the WestNet TMG. In order for the TPI TMG to provide the same level of protection to operators as under the WestNet TMG, the text proposed by the North West Alliance and UMC above should be incorporated in the TPI TMG.

#### **TMG Recommendation 16**

It is recommended that the following statements are included in the TMG:

- "To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed."
- "All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements."

### 4.4 Management of issues affecting daily operations

This section 4.4 is generally consistent with section 3.7 of the WestNet TMG, entitled Management of Daily Issues Related to Train Operations.

The key difference is that the WestNet TMG sets out a requirement for WestNet to maintain its network to the highest of: 1) the standards existing at commencement of the access agreement; 2) the standards required for accreditation (should WestNet become an accredited operator); and 3) other standard as agreed between the parties. The TPI TMG requires the network to be maintained in accordance with the obligations in the access agreements. We consider that a reasonable level of equivalence between the TPI and WestNet arrangements will be achieved by TPI adopting TMG Recommendation 17 below, which would apply a process for operators and TPI to agree key performance indicators to be included in their access agreements and which must be complied with during the term of the access agreements.

#### 4.5 Disputes

TPI provides that disputes in relation to the TMG will be managed under the dispute process set out in an access agreement. The equivalent WestNet provision, section 4, sets out that recourse to section 25 of the Code is available to entities seeking access, and also outlines a 3-stage process for dispute resolution to apply under the access agreements that are entered into.

The North West Alliance, UMC and ACIL for Hancock Prospecting present that the avenues of arbitration and negotiation contained in the WestNet TMG are absent from the TPI TMG and should be incorporated into the TPI guidelines. The North West Alliance and UMC suggest, in effect, that the text of paragraphs 1 to 3 of section 4 of the WestNet TMG should be incorporated into the TPI TMG on that basis. The same issues are identified by the North West Alliance, UMC and ACIL in relation to the TPI TPP.

It is an issue that section 4.5 of the TPI TMG does not provide information on the dispute process available to entities seeking access under section 25(2) of the Code, or on the general process to be adopted to resolve disputes under access agreements. To provide information to entities seeking access on their statutory rights and to generally inform parties of the process to apply to resolve disputes under access agreements, we suggest that the dispute provisions of the TPI TMG are expanded along the lines as suggested by the North West Alliance and UMC. The suggestions by the North West Alliance and UMC are consistent with the provisions in the WestNet TMG. TPP Recommendation 14 is effectively the same as TMG Recommendation 17 below.

##### **TMG Recommendation 17**

We suggest that the text of section 4.5 of the TPI TMG is replaced by the following:

“Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.

Once an Access Agreement has been entered into disputes will be resolved by a three stage process as follows:

- (a) firstly, negotiation of the dispute between the parties within a 7 day time limit and using reasonable endeavours;
- (b) secondly, by mediation between the equivalent Chief Executive Officers and after if no agreement has been reached 14 days by expert mediation; and
- (c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.”

WestNet also provides a process for parties to agree to Key Performance Indicators. A similar process is not set out in the TPI TMG. The North West Alliance, UMC, ARTC and ACIL support inclusion in the TPI TMG of a process for agreeing Key Performance Indicators. The North West Alliance and UMC suggest, 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 TMG. We consider it important that the TMG provides for the maintenance of the railway infrastructure to the standard(s) required by operators and accordingly we regard the inclusion of a process for agreeing Key Performance Indicators to be a key element for ensuring that this aspect of the regime is consistent with the interests and requirements of operators.

**TMG Recommendation 18**

We suggest that a process for the parties to an access agreement to agree to Key Performance Indicators should be set out in the TPI TMG, and to that effect, we suggest that this is done by adopting similar provisions as those set out in paragraphs 4 to 7 of section 4 of the WestNet TMG.

Section 5 of the WestNet TMG provides for 5-yearly reviews of the guidelines. A similar provision is not incorporated in the TPI TMG. The North West Alliance and UMC seek a new section to be added to the TPI TMG to provide for 5-yearly reviews and suggest, in effect, that adapted text from section 5 of the WestNet TMG should be incorporated into the TPI TMG on that basis. ARTC also states that the TMG should be reviewed at periodic intervals. The North West Alliance, UMC and ARTC also raise the same issues in relation to TPI's TPP.

While we recognise that, 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 TMG, would provide a timely and systematic basis for reviewing the TMG to ensure the guidelines continue to operate in accordance with the objectives.

**TMG Recommendation 19**

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

The policies and procedures in the annexures at section 6 of the WestNet guidelines are not incorporated into the TPI TMG. Section 6.1 of the WestNet document, Control and Management of access to Network, sets out key obligations, and warranties to be provided by, the parties to an access agreement. As such, it provides important information to entities seeking access in relation to the terms and conditions of access to be provided in the access agreements and in relation to the basic legal rights and obligations of parties to the access agreements. In relation to matters covered under section 6.1 of the WestNet document, ARTC comments at page 9 of its submission that there appears to be no TPI obligation requiring operator compliance with the Code of Practice, and that it is not clear why TPI have omitted this provision.

**TMG Recommendation 20**

We suggest that similar procedures for Control and Management of access to Network as those set out in section 6.1 of the WestNet TMG should be incorporated into the TPI TMG.

Section 6.2 of the WestNet TMG deals with Environmental and Dangerous Goods. We do not consider it necessary for such matters to be included in

the TPI TMG prior to the commencement date and note that these issues are covered by other legislation and regulation.

## **A Definitions**

### **TMG Recommendation 21**

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 the WestNet TMG, where appropriate. Below are definitional issues that should be addressed:

"Manager, Train Control and Scheduling" - used at section 2.3 but is not defined;

"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 sections 3.2 and 4.4 but is not defined.

## **B Decision-Making Matrix**

The Decision-Making Matrix at Appendix B of the TPI TMG (which applies in the event of a conflict with between services on different Train Paths arising from a late or early service) is generally the same as that at Table 1 - General Principles for Train Management contained in section 3.3 of the approved WestNet TMG, with the exception of priorities given to port operations.

We note that Table 1 from section 3.3 of the WestNet TMG incorporates required amendments from the ERA in relation to WestNet's initially proposed TMG. The rules in WestNet's Table 1 are considered to also be appropriate to deal with such service conflicts on the TPI network.

TMG Recommendation 1 above suggests that references to the port operator and the text "(acting to maximise the efficiency of the supply chain as a whole)" should be deleted from Appendix B in order remove uncertainty arising from, and the overriding priority given to, port operations

## **Other Issues**

GHD for Hancock Prospecting, at page 3 of its submission, comments that the addition of the TPI railway as a single joint entity at Item 52 of Schedule 1 of the Code "precludes the operation of a part of the railway where for example a Third Party operator may wish to join or leave the railway part way along." This issue, which relates to the definition of the routes comprising the TPI railway network, is discussed in relation to the TPI Costing Principles, which contains TPI's proposed definition of "route section".

UMC at page 6 of its TMG submission suggests the following in relation to the consistency of access agreements and the Part 5 instruments (this issue is also raised by both UMC and North West Alliance in relation to the TPI 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.”

The text quoted above by UMC 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.

**TMG Recommendation 22**

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.”

TMG Recommendation 22 is the same as TPP Recommendation 17.

## Appendix: List of Recommendations

### **TMG Recommendation 1**

The TPI TMG 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.

The purpose of the TMG in section 1.2 to “maximise the efficient utilisation of that Network, within the context of the overall supply chain” should be deleted.

The involvement of the port operator in the preparation of the Weekly Train Plan (WTP) (section 2.2 of the TMG) should be transparent; the preparation of the WTP should also involve the railway operators; and section 2.2 should not link port objectives with railway network objectives.

Paragraph (a) of section 2.3 which assigns priority to allocation of a Contested Train Path to an operator in response to a request from the port operator should be deleted.

In the Decision-Making Matrix in Appendix B, 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 2**

We suggest, for completeness, that the second dot point of paragraph 3 of section 1.1 is amended as follows:

"the requirements imposed on the railway owner by or under the Railways (Access) Act 1998 (the Act) or the Code."

### **TMG Recommendation 3**

We suggest that the purposes of the TMG as set out in the dot points in section 1.2 are amended by:

A. Incorporating the following additional points as suggested in the stakeholder submissions:

- “To ensure operational safety is maintained through compliance with Safeworking rules, regulations and procedures.
- To ensure the integrity of the track and other infrastructure so that the train plan be met.
- To ensure operating integrity, including train crewing, locomotives, wagons and loading so that the train plan can be met.
- To manage the Network based on agreed entry/exit times.”

B. Amending the text 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”.

**TMG Recommendation 4**

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 should be incorporated into section 1.3 of the TPI TMG and section 1.2.2 of the TPI TPP; and
- additional text 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.

**TMG Recommendation 5**

We suggest that the time period covered by the Master Train Plan (in terms of whether it covers 12 months, or some other period) is specified and that TPI otherwise amends the definitions of MTP (in the TMG and TPP) and MCD (TPP) in a way that clearly describes these instruments and the relationship between them.

**TMG Recommendation 6**

Based on the information provided by stakeholders we suggest that:

- the term “Cyclic Traffic” should be used in place of “Cyclic Traffics”;
- the description of Cyclic Traffic in section 2.1(a)(ii), should describe Cyclic Traffic as being an allocation “within a period of time”, rather than “per week”; and
- Ad Hoc Services as covered in section 2.1 Master Train Plan should be instead covered in section 2.2 Weekly Train Plan.

**TMG Recommendation 7**

We recommend that the following concluding paragraph is added to section 2.1 of the 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 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.”

**TMG Recommendation 8**

We suggest the following changes to section 2.3 of the TMG:

- the wording in paragraphs (d) and (e) should be amended in order to enable third parties to understand the precise manner in which those paragraphs would be applied;



- paragraph (e) should specify the process and criteria to be applied by the Manager, Train Control and Scheduling in making a determination in terms of section 2.3;
- records of each determination (including a statement of reasons) of the Manager, Train Control and Scheduling should be made available, on request, to operators/ entities seeking access and to the regulator; and
- the term “Manager, Train Control and Scheduling” should be defined.

**TMG Recommendation 9**

We consider that the commitments given by TPI to accommodate services presented early should more closely align with commitments given by WestNet. TPI should consider adopting the following commitments adapted from paragraphs 2 and 3 of section 2.1 of the WestNet TMG:

"TPI will use its best endeavours to accommodate a service which is running early or which is or is presented at the point of entry to the Network more than 15 minutes early by providing a Train Path for that Service at TPI's first available opportunity in accordance with the general principles of train management in the Decision-Making Matrix."

"TPI and the operator will use their best endeavours to ensure that such services which are presented more than 15 minutes early depart the network no later than the scheduled time"

**TMG Recommendation 10**

In the interests of providing greater certainty in relation to the application of the Decision-Making Matrix, and to align with the WestNet commitments to accommodate services presented late, we recommend that the following commitment (adapted from paragraphs 2 and 3 of section 2.1 the WestNet TMG) is incorporated into section 3.1.3 of the TPI TMG:

"TPI will use its best endeavours to accommodate a service which is running late or which is or is presented at the point of entry to the Network late by providing a Train Path for that Service at TPI's first available opportunity in accordance with the general principles of train management in the Decision-Making Matrix."

**TMG Recommendation 11**

We suggest that the TPI TMG includes a commitment consistent with that in paragraph 3, page 5, and section 2.1 of the WestNet TMG that "unless the Train Control Centre gives an Instruction that is a Train Control Direction, the Operator need only comply with an Instruction if it was given a reasonable time before the required time for compliance." This additional commitment is considered to be consistent with the effective and efficient real time management of services.

**TMG Recommendation 12**

We suggest that an additional principle is incorporated into section 3.2 to provide that, in complying with an instruction from TPI, an operator would not face a penalty in terms of its Service Level performance record.

**TMG Recommendation 13**

We suggest that section 3.2 of the TPI TMG incorporates the following text adapted from section 2.1 of the WestNet TMG:

"The Operator is not responsible for any delay suffered or cost incurred by TPI in the Operator complying with a proper Instruction of TPI, and TPI releases the Operator from any such claim arising from such compliance."

In addition, in the final paragraph of section 3.2, the words "an Instruction" should be replaced by "a proper Instruction".

**TMG Recommendation 14**

We recommend that the following amendments, consistent with the provisions in the WestNet TMG, should be made to section 4.1.1 of the TPI TMG in order to facilitate effective real time management of services:

A. in relation to paragraph 1(b), it is suggested that the following text (adapted from paragraph 2 of section 3.5 of the WestNet TMG) is used:

"TPI will at all times, consult with Operators whose Train Paths may be affected by a possession of the Network for repairs, maintenance, and will notify Operators when possession of the Network is required for emergency or Force Majeure events."

B. in relation to paragraph 1(c), replace "reasonable endeavours" with "best endeavours".

**TMG Recommendation 15**

We recommend that sections 4.1.2(d) and 4.1.2(e) of the TPI TMG should be amended to adopt the provisions from section 3.5 of the WestNet guidelines (in terms of notice periods and other commitments as discussed above) in order to facilitate effective and efficient real time management of services. We also recommend that notices of possessions should be provided to all operators.

**TMG Recommendation 16**

We recommend that the provisions of paragraphs 2 and 3 of section 2.2 of the WestNet TMG are adopted at paragraph 2 of section 4.2.1 of the TPI guidelines.

**TMG Recommendation 17**

It is recommended that the following statements are included in the TMG:

- "To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed."
- "All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements."

**TMG Recommendation 18**

We suggest that the text of section 4.5 of the TPI TMG is replaced by the following:

“Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.

Once an Access Agreement has been entered into disputes will be resolved by a three stage process as follows:

- (a) firstly, negotiation of the dispute between the parties within a 7 day time limit and using reasonable endeavours;
- (b) secondly, by mediation between the equivalent Chief Executive Officers and after if no agreement has been reached 14 days by expert mediation; and
- (c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.”

**TMG Recommendation 19**

We suggest that a process for the parties to an access agreement to agree to Key Performance Indicators should be set out in the TPI TMG, and to that effect, we suggest that this is done by adopting similar provisions as those set out in paragraphs 4 to 7 of section 4 of the WestNet TMG.

**TMG Recommendation 20**

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

**TMG Recommendation 21**

We suggest that similar procedures for Control and Management of access to Network as those set out in section 6.1 of the WestNet TMG should be incorporated into the TPI TMG.

**TMG Recommendation 22**

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 the WestNet TMG, where appropriate. Below are definitional issues that should be addressed:

- "Manager, Train Control and Scheduling" - used at section 2.3 but is not defined;
- "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 sections 3.2 and 4.4 but is not defined.

**TMG Recommendation 23**

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.”