

The Pilbara Infrastructure Pty Ltd (TPI)

Final Determination on TPI's  
Proposed (Revised) Train Path Policy

18 August 2009

Economic Regulation Authority



WESTERN AUSTRALIA

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## FINAL DETERMINATION

1. The Pilbara Infrastructure Pty Ltd (**TPI**), a wholly owned subsidiary of Fortescue Metals Group Ltd (**FMG**) is the owner of a recently constructed railway (**TPI Railway**) connecting FMG's Cloud Break iron ore mine in the Pilbara to TPI's port facilities at Port Hedland.
2. On 1 July 2008, the TPI Railway was included in the State's rail access regime (consisting of the *Railways (Access) Act 1998 (Act)* and the *Railways (Access) Code 2000 (Code)*) through proclamation of Part 3 of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 (Agreement Act)*.
3. On 3 July 2008, TPI submitted its proposed Train Path Policy (**TPP**) to the Economic Regulation Authority (**Authority**) for approval, in accordance with Part 5, section 44(2) of the Code. The Agreement Act required TPI to submit its proposed TPP to the Authority no later than seven days after the TPI Railway became subject to the State's rail access regime.
4. The Authority's approval is required, pursuant to section 44(1) of the Code, before TPI can put in place its TPP.
5. TPI submitted a revised TPP proposal on 27 February 2009. This TPP proposal is the TPP referred to in this final determination as TPI's proposed (revised) TPP.
6. The Authority issued its draft determination on TPI's proposed (revised) TPP on 27 March 2009. The draft determination listed fifteen amendments which were required to be made to TPI's proposal before the Authority could approve this proposal.
7. The Authority has considered TPI's proposed (revised) TPP in conjunction with comments made in submissions to the Authority on TPI's proposal and on the draft determination.
8. Following consideration of the requirements set out under section 41 of the Code, the final determination of the Authority is to approve TPI's proposed (revised) TPP subject to fifteen amendments as listed below.

## LIST OF AMENDMENTS

### Amendment 1

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

### Amendment 2

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

- Amend the first dot point statement from "ensure that TPI's contractual obligations are fulfilled" to "ensure that TPI's contractual obligations to any person using TPI's Railway Network are fulfilled".

- Amend the second dot point statement from “maximise the efficient utilisation of that Network, within the context of the overall supply chain” to “maximise the efficient utilisation of TPI’s Railway Network”.
- Add the statement “provide for the safe and reliable use of TPI’s Railway Network” as an additional dot point.

### **Amendment 3**

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

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

### **Amendment 4**

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

- The definitions of Master Train Plan and Master Control Diagram should be amended to more clearly set out the relationship between these instruments including the identification of any areas of overlap.
- Include in section 2.2.3, a statement to the effect that in carrying out its capacity analysis TPI will take account of the following considerations:
  - The need to undertake, where appropriate, modelling of the effect that extra trains would have on the operation of TPI’s Railway Network.
  - The need for the capacity analysis process to be transparent to the access seeker and for TPI to maintain dialogue with the Access Seeker during this process, including in relation to any information provided by the access seeker to assist this process pursuant to section 15 of the Code.
- Incorporate into section 2.2.3, the process for the negotiation of new train paths prior to an access agreement as set out under section 2.2.2 on pages 4 and 5 of WNR’s 2009 TPP with a further sub-section added prior to part (i) as follows: “Pursuant to section 7 of the Code, TPI will on request provide the access seeker with the information required under this section.”
- Amend the third paragraph under section 2.2.3 to add the words “provided the total time does not exceed the relevant timeframe prescribed under the appropriate section of the Code” immediately following the words “... to respond to the request” on the second last line of that paragraph.
- Amend the term “Indicative Access Proposal” to an appropriate term which is consistent with the terms used in the Code.

**Amendment 5**

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

- The arrangements set out for the allocation of train paths should be revised by:
  - Deleting references to the commercial approach for train path allocation (paragraphs two to ten) and the comments in relation to the most favourable applications to TPI in paragraph one.
  - Making it clear that the allocation of train paths will be based on an approach consistent with the requirements of the Code, along the lines outlined under section 2.2.1 of WNR’s 2009 TPP (up to and including paragraph (iii) on page 4 of WNR’s TPP).
- The period for which unused train paths would be reserved to an operator should be set out.
- The words “in accordance with the requirements of section 16 of the Code” should be added following the word “decision” at the end of the second last paragraph.
- Include a new paragraph within this section, with wording similar to that under section 5 of WNR’s 2009 TPP, setting out the allocation arrangements in the case where there is competition for the same train path.
- Include a new paragraph at the end of this section, comprising similar wording to that under section 3 (page 10) of WNR’s 2009 TPP dealing with section 10 of the Code.
- Amend the term “Indicative Access Proposal” to be consistent with the requirements of Amendment 4.
- Amend the last paragraph by changing “Section 25” to “Section 26(1)”.

**Amendment 6**

Section 3.1 (headed “Permanent Variations to Train Paths”) of TPI’s proposed (revised) TPP should be amended by the inclusion of the definition of “reasonable grounds”, as set out under section 2.4.1 of WNR’s 2009 TPP (page 6, second to fourth paragraphs), in section 3.1.1.

**Amendment 7**

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

- Add, at the beginning of section 3.2.1, the first six paragraphs under section 2.5.1 of WNR’s 2009 TPP.
- Clarify, in paragraph 12 of section 3.2.1, the words “to TPI’s reasonable satisfaction” by providing clear guidelines on how an operator will be able to demonstrate appropriate usage which, if not met, will result in the train path being withdrawn.

**Amendment 8**

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

**Amendment 9**

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

- Immediately following the first sentence, provide a description of the dispute resolution process which will apply under an access agreement. This process should be similar to that set out under section 8 of WNR’s 2009 TPP.
- Delete the words “Section 25” and replace with “Section 26(1)”.

**Amendment 10**

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

- Replace the term “Network” with the term “TPI’s Railway Network”.
- Define “TPI’s Railway Network” based on the requirements of the Code, as being “the railway constructed pursuant to the Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 excluding railway infrastructure which is not covered under the definition in section 3 of the Railways (Access) Act 1998”.
- Include a complete list of all the terms used in the TPP which might reasonably be expected to require a definition.
- All definitions should :
  - Be consistent with the definitions in the Act and the Code.
  - If not defined in the Act and the Code, be consistent with the definitions under section 10 of WNR’s 2009 TPP where appropriate.

**Amendment 11**

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

- Include a new section (section 4.3) headed “Rights of an Operator to Sub-Licence a Train Path”.
- The first two paragraphs under section 4 in WNR’s 2009 TPP should be included under this new section 4.3 (replacing “Appendix A” with “Appendix B”).
- Include an Appendix B which sets out the criteria governing the trading of train paths by operators. These criteria should be based on similar lines to the criteria set out in Appendix A of WNR’s 2009 TPP. However, Appendix B should be headed “Trading in Train Paths through Sub-Licence Arrangements”.

**Amendment 12**

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

- Include a new section (section 3.4) headed “Cancellation of Services using Train Paths”.
- Outline arrangements under the new section 3.4, along the lines set out in section 2.7 of WNR’s 2009 TPP, which provide an operator with the right to cancel train paths without penalty.

**Amendment 13**

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

- Include a new section (section 4.4) headed "Consistency between Access Agreements and the TPP".
- Outline arrangements under this new section 4.4 for ensuring consistency between access agreements under the Code and the TPP along the lines set out in section 7 of WNR's 2009 TPP.

**Amendment 14**

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

- Include a new section (section 4.5) headed "Compliance and Review".
- Outline arrangements under this new section 4.5 for the manner in which TPI's compliance with its TPP will be monitored by the Authority and the review interval for TPI's TPP, along the lines set out in section 9 of WNR's 2009 TPP with the exception of the following:
  - First paragraph of WNR's section 9: Delete this paragraph and replace with "TPI agrees to a review of the TPP by the ERA, through a public consultation process, two years after the date when all the regulatory instruments required under the Act and the Code for TPI's railway have been approved by the Authority. It is expected that the review will commence on 1 October 2012 and that TPI will provide the ERA with its proposed revised TPP on this date".
  - Fourth paragraph of WNR's section 9: (1) Replace "WestNet" with "TPI". (2) Replace "The ERA will monitor TPI's compliance..." with "TPI agrees to the monitoring by the ERA of its compliance..." (3) Add the following sentence to the end of this paragraph; "It is expected that the first audit will commence at the end of the 2011-12 financial year."

**Amendment 15**

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



## REASONS FOR THE FINAL DETERMINATION

### BACKGROUND

9. The TPI Railway was commissioned in May 2008. This railway is about 260 kilometres in length and runs from FMG's Cloud Break iron ore mine in the Chichester Ranges (East Pilbara) to TPI's port facilities at Anderson Point in Port Hedland.
10. On 1 July 2008, the TPI Railway became subject to the Act and the Code through the proclamation of Part 3 of the Agreement Act. TPI was required, from this date, to comply with the legislative obligations set out for railway owners under the Act and the Code
11. The TPI Railway is owned and operated by TPI. TPI will perform both access-related rail functions and functions associated with the operation of train services.
12. The TPP is one of the four Part 5 Instruments set out in Section 40(3) of the Code. Section 40(2) of the Code notes that the Part 5 Instruments are binding on the railway owner.
13. Associated with the TPP is the Train Management Guidelines (**TMG**). The TMG is a statement of principles, rules and practices that will be applied in the management of train services. TPI's proposed TMG is the subject of a separate determination by the Authority.
14. In making this final determination, the Authority is mindful of the legislative requirements of the *Rail Safety Act 1998* (**Safety Act**) to which TPI's TPP is required, under the Agreement Act, to comply. Pursuant to section 8 of the Act, TPI's TPP cannot contain any provision which is contrary to or inconsistent with the Safety Act.
15. To assist the Authority in the preparation of its final determination, the Authority engaged a consultant, PricewaterhouseCoopers (**PwC**) to review TPI's proposed TPP and the public submissions and provide advice to the Authority. The PwC final report is available on the Authority's website ([www.era.wa.gov.au](http://www.era.wa.gov.au)).

### DRAFT DETERMINATION

16. The Authority issued its draft determination on 27 March 2009. Fifteen amendments were required to be made to TPI's proposed (revised) TPP under the draft determination.
17. The Authority provided a six week public consultation period on its draft determination, from 27 March 2009 to 8 May 2009. Three public submissions were received during this period, from the North West Iron Ore Alliance (**NWIOA**), United Minerals Corporation (**UMC**) and TPI. A further submission was made by TPI on 21 July 2009. These submissions are available on the Authority's web site ([www.era.wa.gov.au](http://www.era.wa.gov.au)).

## CODE AMENDMENTS

18. Subsequent to the Authority's release of the draft determination on 27 March 2009, amendments to the Code were published in the Government Gazette on 23 June 2009.
19. The Code amendments resulted from a report by the Authority, on its review of the Code, provided to the Government in late 2005, pursuant to the Authority's responsibilities under section 12 of the Act, and subsequent public consultation and deliberations by the Government.
20. References to the Code in this final determination refer to the current version of the Code apart from instances where comments incorporate statements from the draft determination.

## REVISIONS TO WESTNET RAIL'S (WNR) TPP

21. In June 2009 the Authority approved revisions proposed by WNR to its 2006 TPP involving changes to the compliance and review section (Section 9) of the TPP.
22. The changes reflected the outcome of a review by the Authority of compliance arrangements required under the Act and the Code. As a result of this review, the Authority considers that its monitoring role does not include a general function of monitoring the operational performance of the railway network. The Authority believes its functions are only to monitor a railway owner's compliance with the Act and the Code. The Authority also decided that future independent compliance audits would be required generally every two years rather than annually.
23. References to WNR's TPP in this final determination have been changed from WNR's 2006 TPP to WNR's 2009 TPP, to reflect the current version of this document, apart from instances where comments incorporate statements in the draft determination.

## FINAL DETERMINATION

24. The fifteen amendments set out in the draft determination have been listed below. Each of these amendments is followed by:
  - An outline of the comments on the amendment in the public submissions.
  - PwC's advice on the public submission comments.
  - The Authority's assessment of the public submission comments.
  - The Authority's final determination.

### **Draft Determination – Amendment 1**

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

## Public Submissions

26. Both the NWIOA and UMC commented on this amendment. However, the comments by these parties related to Section 1.2 of TPI's TPP which was covered under Amendment 2 of the draft determination. These comments have therefore been discussed under Amendment 2.

## Authority's Assessment

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

## Final Determination

### Required Amendment 1

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

## Draft Determination – Amendment 2

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

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

## Public Submissions

28. The NWIOA and UMC both provided similar comments, to the effect that TPI's TPP should apply to access seekers who have negotiated access agreements both within and outside the Code. Both these parties expressed similar comments in their previous public submissions.

## Authority's Assessment

29. The Authority noted in the draft determination, that the Code only imposes obligations on the railway owner in relation to applying the TPP where access agreements are negotiated under the Code. The Code does not impose any obligation on the railway owner to apply the TPP to access agreements negotiated outside the Code. The Authority therefore considered TPI's statement under section 1.2.2, to the effect that its TPP will apply to all operators with access agreements under the Code, to be appropriate.
30. The Authority also pointed out in the draft determination, that the rail access legislation allows TPI to enter into commercial agreements outside of the Code with

terms and conditions as agreed between TPI and the access seekers and that, in these circumstances, TPI can choose to negotiate equivalent arrangements to those in its TPP or other arrangements as it considers appropriate.

31. The Authority notes that as a result of the Code being amended, by notice in the Government Gazette of 23 June 2009, a new section (section 4A) has been added to the Code which makes clear that a Part 5 instrument (such as the TPP) is only to be taken into account where an access agreement has been made under the Code and if the railway owner and access seeker choose to negotiate an access agreement outside the Code nothing in the Code applies to such negotiations or resulting agreement.
32. The Authority confirms its position as set out in the draft determination.

## Final Determination

### Required Amendment 2

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

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

### Draft Determination – Amendment 3

33. *Section 2.1 (headed 'Specification of Capacity') of TPI's proposed (revised) TPP should be amended, as follows:*
  - *Amend "Cyclic Traffics" to "Cyclic Traffic".*
  - *Delete "per week" under 2.1(b) and replace with "within a particular period of time".*
  - *Provide more detailed definitions of the terms "Timetabled Traffic", "Cyclic Traffic" and "Service Entitlement", including:*
    - *A detailed description of the nature of Timetabled Traffic and Cyclic Traffic.*
    - *A detailed description of how the two forms of train paths (for Timetabled Traffic and Cyclic Traffic) would be set out under a Service Entitlement.*

### Public Submissions

34. The NWIOA and UMC both provided similar comments, to the effect that Gross Tonne Kilometres (GTK) should be used as the basis for determining capacity on

TPI's rail network. Both these parties expressed similar comments in their previous public submissions.

35. Both the NWIOA and UMC noted that the Australian Rail Track Corporation (**ARTC**) uses a GTK approach to estimate capacity for the Hunter Valley coal chain and considered that a similar approach should be adopted for TPI's rail network on the basis that the Hunter Valley rail network is a more suitable comparator for the TPI rail network than other iron ore rail lines in the Pilbara or WNR's rail network.

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

36. PwC noted that both the NWIOA and UMC had raised the issue of using GTK to estimate capacity in their earlier submissions on TPI's proposed TPP.
37. PwC expressed a similar view on the GTK issue to that in its draft report, to the effect that at this stage (particularly in the absence of appropriate information on forecast future usage against the capacity of individual network sections) it did not consider there to be a compelling reason for TPI to change its proposed capacity assessment arrangements from a train path approach to a GTK approach.
38. PwC expected a clearer picture on this issue to emerge in two years time when TPI's TPP would be reviewed by the Authority and suggested that the GTK issue be examined during the course of this review in light of the information likely to be available at that time.

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

39. The Authority commented in its draft determination that, based on PwC's advice, there did not appear to be any compelling reasons to adopt a GTK approach compared to the train path approach as adopted under WNR's 2006 TPP.
40. The comments by the NWIOA and UMC relating to the Hunter valley coal chain are noted, but the Authority does not necessarily agree that the operation of TPI's rail network is similar to the ARTC's Hunter Valley rail network. The Authority notes that the Hunter Valley network carries a significantly greater tonnage than the current maximum design capacity of TPI's rail network, there are likely to be significantly fewer operators on TPI's network compared to the Hunter Valley network and iron ore train configurations for operators on TPI's network may be more variable than for operators using the Hunter Valley network.
41. Based on the above, and in light of PwC's comments, the Authority does not consider that there is a strong case at this stage to implement a GTK approach to capacity estimation for route sections, as used on the Hunter Valley rail network, for TPI's rail network.
42. The Authority notes that Amendment 14 requires TPI to agree to a review of its TPP by the Authority two years after the Authority has approved all of TPI's regulatory instruments. The Authority agrees with PwC, that the issue of using a GTK approach for the estimation of capacity should be given further consideration at the time the review is undertaken (expected to commence in October 2012). Operators (assuming there are access agreements under the Code) are likely to have practical experience with TPI's train path approach under its approved TPP by the time of this review.
43. The Authority confirms its position as set out in the draft determination.

## Final Determination

### Required Amendment 3

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

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

### Draft Determination – Amendment 4

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

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

### Public Submissions

45. Both the NWIOA and UMC commented that the third dot point of Amendment 4 in the draft determination, related to the incorporation of section 2.2.2 of WNR’s 2006

TPP into the proposed section 2.2.3 of TPI's TPP, did not properly reflect the application of section 7 of the Code.

46. In particular, these parties noted that the proposed section 2.2.3 of TPI's TPP was not prefaced with the requirement that TPI provide the access seeker with the information that section 7 of the Code requires the railway owner to provide on request, such as working timetables for the route [section 7(1)(c)].
47. In addition, UMC expressed concern over ensuring that TPI meets its obligations under section 16(2) of the Code when TPI's TPP comes into operation.

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

48. PwC agreed with the comments by the NWIOA and UMC to the effect that an additional paragraph needed to be added to this section of TPI's TPP to reflect the requirement for TPI to provide information to access seekers in accordance with section 7 of the Code.

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

49. The Authority agrees with the NWIOA and UMC, and with PwC that the proposed section 2.23 of TPI's TPP should include reference to the requirements of section 7 of the Code.
50. The Authority also notes that as a result of the Code being amended, by notice in the Government Gazette of 23 June 2009, section 7(1)(c) has been deleted from the Code. The working train timetable information for each route section is now specified under Schedule 2 as a requirement to be included in the rail owner's information publication (section 7A of the Code).
51. Amendment 4 of the draft determination has been revised by the Authority, in this final determination, to incorporate reference to section 7 of the Code as discussed above.
52. The Authority has noted the comment by UMC in relation to TPI meeting its obligations under section 16(2) of the Code and considers that this matter has been dealt with through the required inclusion, under draft determination Amendment 5 (confirmed under this final determination) of the following paragraph in TPI's TPP:

In this regard, TPI recognises its obligations under the Code to ensure that it does not unfairly discriminate between one Access Seeker and another when making its decision in accordance with the requirements of section 16 of the Code.

## Final Determination

### Required Amendment 4

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

- The definitions of Master Train Plan and Master Control Diagram should be amended to more clearly set out the relationship between these instruments including the identification of any areas of overlap.
- Include in section 2.2.3, a statement to the effect that in carrying out its capacity analysis TPI will take account of the following considerations:
  - The need to undertake, where appropriate, modelling of the effect that extra trains would have on the operation of TPI’s Railway Network.
  - The need for the capacity analysis process to be transparent to the access seeker and for TPI to maintain dialogue with the access seeker during this process, including in relation to any information provided by the access seeker to assist this process pursuant to section 15 of the Code.
- Incorporate into section 2.2.3, the process for the negotiation of new train paths prior to an access agreement as set out under section 2.2.2 on pages 4 and 5 of WNR’s 2009 TPP with a further sub-section added prior to part (i) as follows: “Pursuant to section 7 of the Code, TPI will on request provide the Access Seeker with the information required under this section.”
- Amend the third paragraph under section 2.2.3 to add the words “provided the total time does not exceed the relevant timeframe prescribed under the appropriate section of the Code” immediately following the words “... to respond to the request” on the second last line of that paragraph.
- Amend the term “Indicative Access Proposal” to an appropriate term which is consistent with the terms used in the Code.

### Draft Determination – Amendment 5

53. *Section 2.3 (headed ‘Capacity Allocation’) of TPI’s proposed (revised) TPP should be amended, as follows:*

- *The arrangements set out for the allocation of train paths should be revised by:*
  - *Deleting references to the commercial approach for train path allocation (paragraphs two to ten) and the comments in relation to the most favourable applications to TPI in paragraph one.*
  - *Making it clear that the allocation of train paths will be based on an approach consistent with the requirements of the Code, along the lines outlined under section 2.2.1 of WNR’s 2006 TPP (up to and including paragraph (iii) on page 4 of WNR’s TPP).*



- *The period for which unused train paths would be reserved to an operator should be set out.*
- *The words “ in accordance with the requirements of section 16 of the Code” should be added following the word “decision” at the end of the second last paragraph.*
- *Include a new paragraph within this section, with wording similar to that under section 5 of WNR’s 2006 TPP, setting out the allocation arrangements in the case where there is competition for the same train path.*
- *Include a new paragraph at the end of this section, comprising similar wording to that under section 3 (page 10) of WNR’s 2006 TPP dealing with section 10 of the Code.*
- *Amend the term ‘Indicative Access Proposal’ to be consistent with the requirements of Amendment 4.*
- Amend the last paragraph by changing ‘Section 25’ to ‘Section 26(1)’.

### **Public Submissions**

54. On the allocation of train paths, TPI commented that it was far preferable for access seekers to be part of a direct, non-discriminatory, market testing process managed by TPI rather than have the allocation based on an approach consistent with the requirements of the Code as set out under Amendment 5 of the draft determination.

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

55. PwC noted that it was unclear as to how TPI’s proposed capacity allocation process would work. PwC confirmed its draft report position that TPI should adopt similar provisions to those in WNR’s TPP.

### **Authority’s Assessment**

56. The Authority pointed out in the draft determination that sections 13 and 16(1) of the Code impose an obligation on the railway owner to negotiate an access agreement where an access seeker has complied with the relevant provisions of the Code and made a proposal for access to the railway owner. Furthermore, the Authority also noted that section 16 requires that the railway owner cannot unfairly discriminate either between access seekers under the Code or between an access seeker under the Code and the railway owner’s rail operations.
57. The Authority concluded in the draft determination, that based on the above, all access seekers under the Code are entitled to be dealt with on a ‘first come, first served’ basis subject to satisfying the relevant provisions of the Code.
58. The Authority confirms its position as set out in the draft determination.

## Final Determination

### Required Amendment 5

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

- The arrangements set out for the allocation of train paths should be revised by:
  - Deleting references to the commercial approach for train path allocation (paragraphs two to ten) and the comments in relation to the most favourable applications to TPI in paragraph one.
  - Making it clear that the allocation of train paths will be based on an approach consistent with the requirements of the Code, along the lines outlined under section 2.2.1 of WNR’s 2009 TPP (up to and including paragraph (iii) on page 4 of WNR’s TPP).
- The period for which unused train paths would be reserved to an operator should be set out.
- The words “in accordance with the requirements of section 16 of the Code” should be added following the word “decision” at the end of the second last paragraph.
- Include a new paragraph within this section, with wording similar to that under section 5 of WNR’s 2009 TPP, setting out the allocation arrangements in the case where there is competition for the same train path.
- Include a new paragraph at the end of this section, comprising similar wording to that under section 3 (page 10) of WNR’s 2009 TPP dealing with section 10 of the Code.
- Amend the term “Indicative Access Proposal” to be consistent with the requirements of Amendment 4.
- Amend the last paragraph by changing “Section 25” to “Section 26(1)”.

### Draft Determination – Amendment 6

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

### Public Submissions

60. No comments were made in the public submissions relating to Amendment 6.

### Authority’s Assessment

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

## Final Determination

### Required Amendment 6

Section 3.1 (headed “Permanent Variations to Train Paths”) of TPI’s proposed (revised) TPP should be amended by the inclusion of the definition of “reasonable grounds”, as set out under section 2.4.1 of WNR’s 2009 TPP (page 6, second to fourth paragraphs), in section 3.1.1.

## Draft Determination – Amendment 7

62. Section 3.2 (headed ‘Resumption of Capacity’) of TPI’s proposed (revised) TPP should be amended as follows:
- Add, at the beginning of section 3.2.1, the first six paragraphs under section 2.5.1 of WNR’s 2006 TPP.
  - Clarify, in paragraph 12 of section 3.2.1, the words ‘to TPI’s reasonable satisfaction’ by providing clear guidelines on how an operator will be able to demonstrate appropriate usage which, if not met, will result in the train path being withdrawn.

## Public Submissions

63. No comments were made in the public submissions relating to Amendment 7.

## Authority’s Assessment

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

## Final Determination

### Required Amendment 7

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

- Add, at the beginning of section 3.2.1, the first six paragraphs under section 2.5.1 of WNR’s 2009 TPP.
- Clarify, in paragraph 12 of section 3.2.1, the words “to TPI’s reasonable satisfaction” by providing clear guidelines on how an operator will be able to demonstrate appropriate usage which, if not met, will result in the train path being withdrawn.

## Draft Determination – Amendment 8

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

**Public Submissions**

66. No comments were made in the public submissions relating to Amendment 8.

**Authority's Assessment**

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

**Final Determination****Required Amendment 8**

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

**Draft Determination – Amendment 9**

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

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

**Public Submissions**

69. No comments were made in the public submissions relating to Amendment 9.

**Authority's Assessment**

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

**Final Determination****Required Amendment 9**

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

- Immediately following the first sentence, provide a description of the dispute resolution process which will apply under an access agreement. This process should be similar to that set out under section 8 of WNR's 2009 TPP.
- Delete the words "Section 25" and replace with "Section 26(1)".

## Draft Determination – Amendment 10

71. *Appendix A (headed ‘Definitions’) of TPI’s proposed (revised) TPP should be amended as follows:*

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

## Public Submissions

72. No comments were made in the public submissions relating to Amendment 10.

## Authority’s Assessment

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

## Final Determination

### Required Amendment 10

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

- Replace the term “Network” with the term “TPI’s Railway Network”.
- Define “TPI’s Railway Network” based on the requirements of the Code, as being “the railway constructed pursuant to the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* excluding railway infrastructure which is not covered under the definition in section 3 of the *Railways (Access) Act 1998*”.
- Include a complete list of all the terms used in the TPP which might reasonably be expected to require a definition.
- All definitions should :
  - Be consistent with the definitions in the in the Act and the Code.
  - If not defined in the Act and the Code, be consistent with the definitions under section 10 of WNR’s 2009 TPP where appropriate.

## Draft Determination – Amendment 11

74. *TPI’s proposed (revised) TPP should be amended as follows:*

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

## Public Submissions

75. TPI commented that it was strongly opposed to Amendment 11. The arguments put forward by TPI, under its submission on the draft determination and its subsequent submission of 21 July 2009 in support of its position, were principally that:
- It is inappropriate for the Authority to intervene in matters which are best left to the provisions of commercial access agreement negotiations.
  - TPI is best placed to assign train paths and Amendment 11 dilutes the ability of TPI, as the infrastructure owner, from fully managing its assets.
  - The accreditation arrangements for third parties may not be adequate.
  - Capacity could be sterilised during the period of negotiations over the trading of a train path to a third party.
  - Access seekers could negotiate for more train paths than needed in order to subsequently sell some of these paths.
  - Access seekers could 'jump' the queue.
  - Access seekers could use a third option for obtaining capacity involving 'negotiations with an operator' in addition to being 'in' or 'outside' the Code.

## Authority's Assessment

76. In the draft determination, the Authority considered that the efficient utilisation of TPI's railway was likely to be enhanced through the right of operators to on-sell their train paths.
77. The Authority also noted in the draft determination that the provisions proposed under Amendment 11 were intended to be similar to those contained in WNR's 2006 TPP (Section 4.3 and Appendix A).
78. The draft determination also noted that the ARTC, in its submission, had commented that its indicative access agreement provided for an operator to on-sell a train path subject to certain criteria and that the ARTC saw no reason why TPI could not provide for the selling or trading of train paths.
79. In addition, the Authority notes that the provisions in WNR's 2009 TPP, under Appendix A, provide the railway owner with significant protection in relation to the use of these provisions through the following:
- The provisions only allow an operator to sub-licence its train path to a third party operator with the operator having to retain full liability for all the

obligations relating to that train path under his access agreement with the railway owner. This is a very limited form of on-selling which would more appropriately be termed 'sub-licence arrangements' rather than 'on-selling'.

- The operator is required to fully indemnify the railway owner for any actions by the third party operator of the sub-licensed train path should the third party operator cause any damage, loss or other liability to the railway owner.
  - Conditions placed on the third party operator include that it is required to be properly accredited, to adhere to all the requirements of the access agreement and that it cannot further sub-licence the train path without the railway owner's consent.
  - The provisions also state that if the railway owner commences the underutilisation notification process the train path cannot be sub-licensed during the period that the underutilisation monitoring is underway and can only occur at the completion of this process if the train path passes the underutilisation test.
  - In addition to the clauses set out in the provisions protecting the railway owner's interests under the sub-licence agreement between the operator and the third party operator, the railway owner also has the power to insert any provision it considers necessary (subject to the condition being reasonable) into this agreement.
  - In making a proposal under the Code, an access seeker (pursuant to section 8(2) of the Code) is required to make the proposal for the purpose of carrying on rail operations and for no other purpose. This precludes an access seeker from requesting more train paths than required for its operations.
  - With respect to the 'queue jumping' issue raised by TPI, this is not considered relevant as a third party operator using a train path under a sub-licence arrangement with an operator is not taking unallocated capacity which would be available to access seekers in the queue. Rather, this train path is not available to such access seekers as it has been allocated previously to the operator.
  - In relation to a 'third' option for access seekers to obtain capacity, the Authority notes that a sub-licence arrangement still leaves the operator with full liability for the obligations under the access agreement it has negotiated under the Code. Therefore the railway owner still has an 'under the Code' access agreement with the operator notwithstanding that the operator has entered into a sub-licence arrangement for the relevant train path with a third party operator.
80. Based on the above, the Authority considers that its position on this matter as set out in the draft determination should be retained. However, the Authority considers that the new section to be included in TPI's TPP, under Amendment 11, should more appropriately be headed 'Rights of an Operator to Sub-Licence a Train Path'. Similarly, Appendix B in TPI's TPP should be headed 'Trading in Train Paths through Sub-Licence Arrangements'.

## Final Determination

### Required Amendment 11

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

- Include a new section (section 4.3) headed "Rights of an Operator to Sub-Licence a Train Path".
- The first two paragraphs under section 4 in WNR's 2009 TPP should be included under this new section 4.3 (replacing "Appendix A" with "Appendix B").
- Include an Appendix B which sets out the criteria governing the trading of train paths by operators. These criteria should be based on similar lines to the criteria set out in Appendix A of WNR's 2009 TPP. However, Appendix B should be headed "Trading in Train Paths through Sub-Licence Arrangements".

### Draft Determination – Amendment 12

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

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

### Public Submissions

82. TPI commented that it was strongly opposed to Amendment 12. The reason put forward by TPI was that Amendment 12 means that Force Majeure events would then form part of the TPP. This in turn would restrict parties to an access agreement from negotiating alternative Force Majeure events as that would create a risk of non-compliance with the approved TPP.

### Authority's Assessment

83. In the draft determination the Authority noted that while the access agreement would be expected to cover certain aspects of an operator's particular train path arrangements, the TPP should provide clear guidance on the key aspects of the railway owner's train path policy in order to inform access seekers on these matters in a transparent fashion to facilitate an access seeker negotiating an access arrangement under the Code.
84. The Authority considered in the draft determination that the circumstances under which an operator could cancel its services under reasonable circumstances without incurring a penalty should be included in TPI's TPP, along similar lines to the provision covering this matter in WNR's 2006 TPP.
85. In relation to the Force Majeure issue raised by TPI, the Authority does not agree that this is a relevant argument. The TPP is intended to provide an appropriate level of protection to access seekers in negotiating access agreements with TPI under the Code and TPI is required under draft determination Amendment 13 (confirmed



in this final determination) to ensure consistency between the access agreement and the TPP. This amendment does not prevent TPI from negotiating a general Force Majeure clause in its access agreement with access seekers, but in the case of access seekers under the Code, TPI's negotiations need to preserve the rights of access seekers as set out in its approved TPP.

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

### Final Determination

#### Required Amendment 12

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

- Include a new section (section 3.4) headed "Cancellation of Services using Train Paths".
- Outline arrangements under the new section 3.4, along the lines set out in section 2.7 of WNR's 2009 TPP, which provide an operator with the right to cancel train paths without penalty.

### Draft Determination – Amendment 13

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

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

### Public Submissions

88. No comments were made in the public submissions relating to Amendment 13.

### Authority's Assessment

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

### Final Determination

#### Required Amendment 13

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

- Include a new section (section 4.4) headed "Consistency between Access Agreements and the TPP".
- Outline arrangements under this new section 4.4 for ensuring consistency between access agreements under the Code and the TPP along the lines set out in section 7 of WNR's 2009 TPP.

**Draft Determination – Amendment 14**

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

**Public Submissions**

91. UMC commented that it was concerned that the draft determination had not outlined how the Authority intends to monitor compliance with section 16(2) of the Code. UMC also requested that the intent of section 16(2) be incorporated into the proposed section 4.5 (Compliance and Review) of TPI's TPP.
92. The NWIOA supported the two year review period outlined under Amendment 14 but listed as concerns the same matters raised by UMC.
93. TPI suggested some minor wording changes to the effect that 'TPI agrees to a review/monitoring by the ERA' rather than 'The ERA will review/monitor'.

**Authority's Assessment**

94. The Authority notes that in relation to the issue of monitoring TPI's compliance with section 16 of the Code, the draft determination set out a requirement for an independent audit of TPI's TPP every two years. The Authority expects the first such audit to occur at the end of the 2011-12 financial year on the basis that the approval process for TPI's regulatory documents should be completed by the end of the 2009-10 financial year.
95. The Authority also notes that the draft determination set out the requirement for a review of TPI's TPP, through a public consultation process, after two years. This will provide an opportunity for the Authority to assess the views of access seekers in relation to the operation of TPI's TPP.

96. In regard to the issue of incorporating the intent of section 16 of the Code into TPI's TPP, the Authority notes that this has been required under draft determination Amendment 5 (confirmed in this final determination).
97. As a further point, the Authority will be writing to TPI in the near future outlining the requirement for the two-yearly independent audit to cover those provisions of the Code (including section 16) relating to obligations on the railway owner in relation to dealing with access seekers under the Code. A similar arrangement is in place for WNR and is available on the Authority's web site ([www.era.wa.gov.au](http://www.era.wa.gov.au)).
98. With regard to the comments by TPI, the Authority agrees with the proposed changes to Amendment 14 of the draft determination.
99. The Authority also considers that Amendment 14 in the draft determination should be revised to include more specific detail on the timelines for undertaking the audit and review of TPI's TPP.

## Final Determination

### Required Amendment 14

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

- Include a new section (section 4.5) headed "Compliance and Review".
- Outline arrangements under this new section 4.5 for the manner in which TPI's compliance with its TPP will be monitored by the Authority and the review interval for TPI's TPP, along the lines set out in section 9 of WNR's 2009 TPP with the exception of the following:
  - First paragraph of WNR's section 9: Delete this paragraph and replace with "TPI agrees to a review of the TPP by the ERA, through a public consultation process, two years after the date when all the regulatory instruments required under the Act and the Code for TPI's railway have been approved by the Authority. It is expected that the review will commence on 1 October 2012 and that TPI will provide the ERA with its proposed revised TPP on this date".
  - Fourth paragraph of WNR's section 9: (1) Replace "WestNet" with "TPI". (2) Replace "The ERA will monitor TPI's compliance..." with "TPI agrees to the monitoring by the ERA of its compliance..." (3) Add the following sentence to the end of this paragraph; "It is expected that the first audit will commence at the end of the 2011-12 financial year."

### Draft Determination – Amendment 15

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

### Public Submissions

101. No comments were made in the public submissions relating to Amendment 15.

### Authority's Assessment

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

## Final Determination

### Required Amendment 15

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