

FINAL REPORT

Economic Regulation Authority

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

Train Management Guidelines

August 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 report by PricewaterhouseCoopers (PwC) addresses only TPI's proposed TMG.

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. TMG Recommendation 4 in this report is not presented a recommended precondition to the ERA's approval of the TMG, but as a change to the TMG that we consider to be desirable

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

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

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

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

As set out above, on 27 February 2009, TPI submitted amended versions of the TMG and TPP which clarified TPI's intention that these instruments should apply only to access agreements negotiated under the Code (the amendment to the TMG is to section 1.3).

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

On 30 April 2009, the ERA issued its Draft Determination on the proposed TMG submitted by TPI. At the same time, the ERA released PwC's draft report on our analysis and recommendations in relation to the TMG. The ERA's Draft Determination is to not approve the proposed TMG and the ERA identified 20 amendments it requires to the TMG before approval can be given. The ERA's 20 Required Amendments generally reflect the 22 amendments to the TMG provisions recommended by PwC in its draft report and also in this final report.

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 is a summary of our recommendations in relation to TPI's proposed TMG. Our detailed recommendations are contained in section 2 and are also 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 report 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.

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 2

TMG Recommendation 2 relates to a technical matter in that it suggests that the reference in section 1.1 to the TMG being applied in relation to “the requirements imposed on the railway owner under the Railways (Access) Act 1998 (the Act)” should be amended to “the requirements imposed on the railway owner by or under the Railways (Access) Act 1998 (the Act) or the Code.”¹

TMG Recommendation 3

TMG Recommendation 3 sets out proposed amendments to section 1.2 of the TMG, Purpose of the TMG, based on suggestions made by stakeholders. We consider the additional TMG purposes as suggested by stakeholders (in addition to TPI’s existing purposes of fulfilling contractual obligations and ensuring services are operated in a non-discriminatory way) 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).

The purpose in the TMG to “maximise the efficient utilisation of that Network, within the context of the overall supply chain” is considered to inappropriately link port operations and port objectives with the operations and objectives of the railways network. This particular purpose would be deleted from section 1.2 of the TMG by effect of TMG Recommendation 1 above.

¹ It should be noted that the definition of the Code, being the Railways (Access) Code 2000, is provided in preceding provisions of section 1.1 of the TMG.

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.

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 accessing the railway infrastructure are covered by common guidelines under the TMG/TPP.

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

We wish to make clear that we are not proposing such recommendations as changes that we consider necessary in order for the ERA to be able to approve the TMG (and TPP), but as discretionary changes that we consider to be desirable. We recognise that TPI cannot be required to adopt such recommendations.

TMG Recommendation 5

TMG Recommendation 5 is a technical recommendation. It suggests that the time period covered by the Master Train Plan (in terms of whether it covers 12 months, or some other period) is specified in the TMG and that TPI otherwise amends the definitions of Master Train Plan (in the TMG and TPP) and Master Control Diagram (TPP) in a way that clearly describes these instruments and the relationship between them.

TMG Recommendation 6

TMG Recommendation 6 is also a technical recommendation and reflects feedback from stakeholders on the TMG. TMG Recommendation 6 suggests 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

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 7 and 8

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 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."

TMG Recommendation 10

TMG Recommendation 10 suggests that the TPI TMG includes a commitment consistent with that in paragraph 3, page 5, at 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 11

TMG Recommendation 11 suggests that an additional principle should be incorporated into section 3.2 of the TMG 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 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 13

TMG Recommendation 13 suggests that specific 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. The amendments comprise the replacement of a "reasonable endeavours" commitment with a "best endeavours" commitment and suggesting that the TMG incorporates the following statement:

"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."

TMG Recommendation 14

TMG Recommendation 14 suggests 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 TMG (in terms of notice periods and other commitments as discussed above) in order to facilitate effective and efficient real time management of services. TMG Recommendation 14 in this final report differs from our recommendation in the draft report in that it also suggests the following measures in response to feedback from TPI:

- the notice period in section 4.1.2(e) should be "at least six months notice, but where it is not practicable to give at least six months notice, notice will be given as soon as practicable."; and
- the following additional sentence should be added to section 4.1.2(e): "TPI will publish this notice on its web site on the date it is issued to affected Operators and, if notices are not published on a TPI website on the date issued, then TPI should notify operators by some other form of written notice (which may include electronic forms of written communication) to be received by operators on the date that the notice is made."

TMG Recommendation 15

TMG Recommendation 15 suggests that the provisions of paragraphs 2 and 3 of section 2.2 of the WestNet TMG in relation to rights and obligations of operators during network blockages are adopted at paragraph 2 of section 4.2.1 of the TPI TMG.

TMG Recommendation 16

TMG Recommendation 16 suggests 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 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.

TMG Recommendation 18

TMG Recommendation 18 suggests that a process for the parties to an access agreement to agree to Key Performance Indicators should be set out in the 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 19

The WestNet TMG provide for 5-yearly reviews of the TMG. Similar provisions are not incorporated into the TPI TMG.

While we recognise that, at any time, the railway owner can amend or replace the TMG with the approval of the regulator, or the regulator can direct the railway owner to amend or replace the TMG, 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. The ERA’s Required Amendment 19 differs from TMG Recommendation 19 in that it embodies a 2-yearly review process.

In light of matters identified in relation to sections 2.1 and 4.1 of the TMG in relation to future reviews of the TMG, in this final report, we recommend a minor change to TMG Recommendation 19 from the draft report version, so that at the next regulatory review, it is suggested that the following are considered for inclusion in the TMG.

- detailed regime documentation, in relation to matters such as safeworking rules and Master Train Plan Scheduling Principles; and
- a 12 month planning process to provide advance information on matters such as network constraints, planned maintenance works and forthcoming extensions and expansions to the network.

TMG Recommendation 20

TMG Recommendation 20 suggests that the TPI TMG should contain similar procedures for control and management of access to the network to the procedures set out in section 6.1 of the WestNet TMG. Section 6.1 of the WestNet TMG sets out the key obligations of, 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.

TMG Recommendation 21

TMG Recommendation 21 suggests that TPI should provide a complete list of the definitions used in the TMG. Such definitions should be consistent with the definitions in the Code and the Act, and with the definitions the WestNet TMG, where appropriate. Terms that require definition include "Manager, Train Control and Scheduling", "Network" and "Network Rules".

TMG Recommendation 22

TMG Recommendation 22 suggests that the following paragraph, adapted from section 7 of the WestNet TPP, should be incorporated into the TPI TMG:

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

The paragraph above is also a suggested inclusion to the TPI TPP (under TPP Recommendation 18). This recommendation is proposed in order to provide a useful reference during access negotiations and to provide a safeguard in the access agreements to ensure that future changes in basic rights and obligations conferred by the TMG/TPP would pass through to operators.

Our detailed recommendations are contained in the assessment in section 2 of this report and, for ease of reference, all the recommendations are listed in the Appendix.

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.

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. This 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. On 30 April 2009 the ERA issued its Draft Determination on the proposed TMG submitted by TPI and, at the same time, the ERA released PwC’s draft report on our analysis and recommendations in relation to the TMG. Separate PwC reports 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 report we have addressed comments made in public submissions in relation to the proposed TMG and the ERA’s Draft Determination. 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 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.

(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 and TPP.

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 initial proposed TMG were submitted on 3 July 2008.

Initial submissions on the TMG were received from the following parties:

- North West Iron Ore Alliance (North West Alliance, or NWIOA) – submission dated 5 September 2008. This submission contains separate papers on TPI’s Segregation Arrangements, TMG and TPP;
- United Minerals Corporation (UMC) – submission dated 5 September 2008, containing separate papers on the Segregation Arrangements, TMG and TPP;
- Hancock Prospecting Pty Ltd (Hancock Prospecting) – submission dated 2 September 2008, which comprises separate reports by ACIL Tasman (ACIL) and GHD, with each report addressing the three TPI proposals;
- Australian Rail Track Corporation (ARTC) – submission dated 26 August 2008; and

- Yilgarn Infrastructure (Yilgarn) – submission dated 26 August 2008. The Yilgarn submission is comprised of a covering letter and a copy of a submission previously provided to the National Competition Council.

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

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

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

On 30 April 2009, the ERA issued its Draft Determination on the proposed TMG submitted by TPI. At the same time, the ERA released PwC's draft report on our analysis and recommendations in relation to the TMG. The ERA's Draft Determination is to not approve the proposed TMG and the ERA identified 20 amendments it requires to the TPP before approval can be given. The ERA's 20 Required Amendments generally reflect the 22 amendments to the TMG provisions recommended by PwC in its draft report (and also in this final report).

The following parties lodged submissions in relation to the Draft Determination:

- North West Alliance – submission dated 10 June 2009;
- UMC – submission dated 9 June 2009; and
- TPI – submission dated 9 June 2009.

This report considers TPI's proposed TMG and addresses issues raised in the above public submissions in relation to the TPP, in TPI's responses to the public comments by stakeholders, and in the public submissions on the ERA's Draft Determination.

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 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 to the instrument provisions are considered necessary in order for the ERA to be able to approve the TMG. TMG Recommendation 4 is not presented as a recommended precondition to the ERA's approval of the TMG, but as a change to the TMG that we consider to be desirable.

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.²

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 NWIOA TMG submission);

² Excluding TMG Recommendation 4, which is presented only as a change to the TMG that we consider to be desirable, rather than as a recommended precondition to the ERA's approval of the TMG.

- 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 NWIOA TMG submission);
- 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 NWIOA 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 NWIOA 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 NWIOA TMG submission. Bolding is by NWIOA).

“... 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 NWIOA 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 include the interests of the railway owners and persons holding contracts 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’s proposed 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 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.”
(NWIOA 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 on coverage in the proposed 3 July 2008 TMG meant that it was unclear whether the TMG as initially proposed 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

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 arises in relation to TPI's proposed TPP, and similar views are expressed by stakeholders on the TPP as the views expressed above on the TMG.

The North West Alliance, UMC and ARTC interpret TPI's definition of operator to exclude those with access outside the Code (NWIOA 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."

TPI further clarified its intention with the amendment to section 1.3 of the TMG of 27 February 2009, as noted above. In relation to this issue, our draft report noted that the TMG, as a Part 5 instrument under the Code, is only required to apply to operators who negotiate inside the Code. The draft report, however, also contained TMG Recommendation 4, which is set out below (the recommendation below includes minor typographical changes to Recommendation 4 in the draft report).

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 TPP; and

- an additional statement should be added to section 1.3/1.2.2 of the TPI TMG/TPP to clarify that the TMG/TPP apply to TPI/FMG in its role as an operator using the railway infrastructure.

The ERA's Draft Determination did not contain a recommended amendment to the TMG similar to Recommendation 4, to specify that all operators should be covered by the TMG. The ERA's position on this issue is set out in paragraphs 68 to 69 of the Draft Determination and is based on the fact that the Code only imposes obligations on the railway owner in relation to applying the TMG where access agreements are negotiated under the Code, and does not impose any obligation on the railway owner to apply the TMG to access agreements negotiated outside of the Code.

In their responses to the Draft Determination, similar to their responses to the initially submitted TPP, NWIOA and UMC do not accept that the TPP should only apply to operators that have negotiated access under the Code. The NWIOA submits that its comments provided on the ERA's TPP Draft Determination also apply to the TMG Draft Determination. In its submission of 7 May 2009 on the TPP Draft Determination, NWIOA makes the following comments (similar comments are also made by UMC on the TPP Determination):

"The issue of coverage of all arrangements, whether negotiated inside or outside the Code, is fundamental to maintaining a non-discriminatory order of priority for all rail operators, promote efficient investment and use of services infrastructure, promote effective market competition and maintain consistency at a national level."

The NWIOA submission provides background material on the approval of the WestNet TPP and presents that WestNet included all Code and non-Code negotiated access agreements in its TPP on a voluntary basis.

"ARTC also made the very important observation in its original submission in January 2002 (see pp 1-2) that the West Australian Government had sought to have the Code certified by the National Competition Council (NCC) as an effective access regime under Part IIIA of the Trade Practices Act 1974, but withdrew from the certification process - one of the main issues raised by the NCC was to specifically request that the Code be amended to ensure a nationally consistent approach be taken to rail access terms and conditions;"

"Exclusion of agreements negotiated outside the Code creates a "dual" system that distinguishes coverage by the TPP and it is difficult to see how such a system promotes efficient investment, the use of services infrastructure or facilitates a contestable market for rail operations. It is also strongly arguable that to allow this situation to exist is inconsistent with the objectives of Part IIIA of the Trade Practices Act, i.e. "to promote economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and provide framework and guiding principles to encourage a consistent approach to access regulation in each industry"."

In its submission of 9 June 2009 on the TMG Draft Determination, UMC reiterates its view that applying the TMG/TPP to both Code and non-Code arrangements is one way in which section 16(2) of the Code³ is made enforceable, that the regime is transparent and the objectives of the Act are achieved.

We agree with the main points raised by the NWIOA and UMC. Our general view of this issue is the same as the view expressed in our draft report, as follows:

- We consider it important for the achievement of the main object of the Act that all entities accessing the railway infrastructure are covered by common guidelines and policy under the TMG and TPP.
- Coverage of the broad class of operators would provide transparency in the priority order rules applied to different operators which, in turn, would support the rules being applied in a non-discriminatory manner. 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.
- Consistent with the object of encouraging efficient use of 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.
- The application of different guidelines and policy to different entities using the railway infrastructure may not provide an operational and technical environment necessary for the safe and reliable use of the railway infrastructure.

As noted in our draft report and in the view provided by the ERA in the Draft Determination, the TMG, as a Part 5 instrument under the Code, is only required to apply to operators who negotiate inside the Code. Accordingly, the ERA is unable prescribe an amendment to the TMG to extend coverage to all operators and make the adoption of that amendment a precondition for approval of the TMG.

Based on our view that adoption of Recommendation 4 from the draft report would further the main object of the Act, we are retaining Recommendation 4 in this final report. In this report, we wish to make clear that we are not proposing Recommendation 4 as a change that we consider necessary in order for the ERA to be able to approve the TMG, but we are proposing it as a discretionary change that we consider to be desirable. We recognise that TPI cannot be required to adopt such a recommendation.

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 effectively the same as TMG Recommendation 4 above.

³ Section 16(2) of the Code states as follows:

“In the negotiation of access agreements the railway owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner ...”

The North West Alliance, at page 8 of its TMG submission, presents the view that references in the TMG to conditions in access agreements disadvantage 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 NWIOA 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 NWIOA 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 NWIOA 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 NWIOA 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 NWIOA suggests elements of such a regime at page 10 of its TMG submission. These are shown and discussed in relation to section 4.1.2 of the TMG below).

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, in our draft report, we noted 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.

In its 10 June 2009 response to the TMG Draft Determination, the NWIOA emphasises that its suggestion on the additional details that it sought to be included in the Master Train Plan Scheduling Principles (ie the details as set out at page 10 of the NWIOA’s initial TMG submission) was made on the following bases:

- the information is both preliminary information (to assist transparent capacity analysis and to see if the train path can be accommodated on the route) and on-going information in operations and changes to train paths;
- section 7 of the Code does not specifically state that such information is to be provided, and based on a literal interpretation, is not required to be made available (except that under section 7(3) the railway owner is to provide information that affects the design of rolling stock); and
- to assist in ensuring the railway owner meets its obligations under section 16(2) of the Code.

In its submission of 9 June 2009, UMC expresses similar views to those of the NWIOA above.

The NWIOA also requests that the ERA considers ARTC documentation which provides more network information than is required by section 7 of the Code and includes committed capacity diagrams relating to individual line sections (the NWIOA provides examples of the diagrams in its submission).

We continue to hold the view that, to a large extent, the additional details listed by NWIOA 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. That section, in our view, points to specific information being provided to the access seeker, such as the available capacity of a route, working timetables for the route and historical data of gross tonnes for each relevant route section. Also, in our view, section 7(3) of the Code can be interpreted broadly to cover a range of technical requirements. The information to be provided under section 7 of the Code would also be supported by the information to be provided under section 6 (which is to remain reasonably current at all times) which includes, by route section, details of the indicative running times for various types of standard trains, the

maximum axle loads and speed restrictions that apply and the indicative maximum train lengths.

The details that the NWIOA seeks to be included in the Master Train Plan Scheduling Principles are largely addressed by TPI's obligations under the regulatory framework and by provisions in the TMG (incorporating the ERA's required amendments). These relevant provisions apply to the process of seeking access and to the on-going operation of the network, and are shown in the table below.

Suggested NWIOA Inclusion	Where Addressed
Train operating pattern regime	TMG section 2.2 Fortnightly Train Plan (based on Required Amendment 5)
Train operating priorities regime	TMG Appendix B, Decision –Making Matrix, as varied by Required Amendment 15
Track maintenance possession regime	TMG section 4.1, as varied by Required Amendment 9
Network infrastructure constraints e.g. axle loads	Code section 6* (see also comments in relation to TMG section 4.1)
Network operating constraints e.g. train lengths	Code section 6* (see also comments in relation to TMG section 4.1)
Safeworking methods of the network e.g. interfaces to two methods	Not directly addressed in the TMG (discussed below)

* Although such information is generally covered by section 6 of the Code, we consider the information to be integral to a 12 month network plan. Issues concerning the requirement for a 12 month network plan to be available to operators, and the views of the NWIOA and UMC on this issue, are discussed in relation to section 4.1 of the TMG below.

We have considered the ARTC documentation referred to by the NWIOA and, as also noted by the NWIOA, we note that this documentation exceeds the requirements of section 7 of the Code. The documentation deals with matters that are generally covered by the requirements of sections 6 and 7 of the Code, and by the TMG provisions noted above. We note that the documentation appears to have been developed over time in relation to a generally well-established network.

A requirement to specify a similar level of detail in the arrangements for the TPI greenfields network may not be practicable at the outset of proving access to the network and we consider that the costs and potential delay involved in specifying such matters up front would not be consistent with the interests of either TPI or prospective operators, nor with the economically efficient use of the railway infrastructure. On this basis, although it may be desirable to have such details specified up front, we consider the costs of doing so would outweigh the likely benefits. Accordingly, we suggest that detailed regime documentation as embodied in the ARTC documents referred to by the NWIOA should not be required for the forthcoming initial regulatory period, but should be considered for inclusion at the next review of the TMG. Such details would include the safeworking methods of the

network and the interfaces between methods (in terms of the point raised by the NWIOA above).

In its submission in relation to the TMG Draft Determination, the NWIOA also raises an issue that it had set out in its submission of 7 May 2009 on the TPP Draft Determination. The issue raised by the NWIOA relates to the fact that Required Amendment 4 of the TPP Draft Determination requires TPI to incorporate into section 2.2.3 of the TPP wording similar to section 2.2.2 of the WestNet TPP. The suggested wording is along the lines of TPI referring to the Master Control Diagram and reviewing the train paths to determine if the path can be accommodated per se, or by adjusting other paths, and if the path is not feasible, then offering alternative paths.

The NWIOA submits that the procedural wording based on section 2.2.2 of the WestNet TPP is less specific than the wording of section 7 (c) of the Code and that it would lead to an absence of transparency and failure to visibly demonstrate any capacity analysis calculations. In the light of these views, the NWIOA requests that, in the event that the final regime excludes non-Code agreements, TPP Required Amendment 4 should include the requirement that TPI make available to the proponent:

- the Master Control Diagram at the time of the capacity analysis; or
- in accordance with section 7(c) Code, the daily working timetables at the time of the capacity analysis.

Similar to our views in our final report on the TPP, we consider that section 7 of the Code would apply directly to the access proposal process and that it need not be specified in the TPP in order to have effect. However, to avoid potential misunderstandings about TPI's obligations to provide preliminary information to entities that are interested in making an access proposal, we recommend that an additional statement is added to the TPP in order to clarify TPI's obligations in this regard (see TPP Recommendation 7C in our TPP final report). In relation to the on-going operation of the network, the relevant information is provided under the regulatory regime and TMG provisions shown in the table above.

In respect of the issue of TPI taking possession of the network to undertake necessary work, 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 10, 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).

In its submission in relation to the ERA's TMG Draft Determination, the North West Alliance provides further information to support its recommendation that, rather than operators having to rely on a TPI commitment to "use its best endeavours to consult Operators" a regime should be established whereby operators are continuously updated on the competing needs to access the Network, including by way of possessions. The issue is raised

by the North West Alliance in relation to Required Amendment 9, which applies to section 4.1 of the TMG (see discussion of this issue in relation to section 4.1 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.

The ERA’s Required Amendment 4 in respect of section 2.1 of the TMG and Required Amendment 5 in respect of section 2.2 require the deletion of paragraphs in both of those sections which state as follows:

“At all times TPI will reserve the right to take possession of the Network to undertake necessary works in order to satisfy its obligations in relation to the Network, including for reasons relating to safety. TPI will use its best endeavours to consult with affected Operators as soon as this requirement is identified however this does not imply that the agreement of all affected Operators is to be obtained before such possession can be taken.”

In its submission in relation to the ERA’s TMG Draft Determination, TPI comments that while this particular change is acceptable, the change would remove a safety based reason for taking possession of the network. In light of this, TPI suggests that sentence 1 of section 4.1.1 of the TMG, Possessions, should be restated as follows:

“TPI may perform repairs, maintenance or upgrading of the Network, or take possession of any part of the Network for the purpose of undertaking repairs, maintenance and upgrades, including for reasons relating to safety, at any time.”

As the arrangements for taking possession of the network are subject to the processes and controls in section 4.1 of the TMG (which is to incorporate the

changes specified in the ERA's Required Amendment 9)⁴, we consider the restated sentence above to be appropriate.

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 be 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 NWIOA 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 NWIOA 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.

⁴ Issues regarding the processes in section 4.1 are also addressed in TMG Recommendations 13 and 14 in this report.

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 NWIOA 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, at 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, at 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 NWIOA TMG submission and page 9 of the UMC TMG submission. The same suggested wording is used by both of these stakeholders)

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 NWIOA 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. 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. In its submission in relation to the ERA’s TMG Draft Determination, the NWIOA sets out more information in support of its recommendation that a regime should be established whereby operators are continuously updated on the competing needs to access the Network, including through publication of a 12 month possession plan (see discussion of this issue in relation to section 4.1 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 NWIOA 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 the specific changes to section 4.1.2 sought in the NWIOA and UMC submissions of 5 September 2008, we noted the equivalent WestNet notification requirements to section 4.1.2 of the TPI TMG provided more definite and timely commitments of the railway owner to notify an operator of possessions and that the changes proposed by the NWIOA and UMC would further expand upon the measures contained in the WestNet TMG. In our draft report, we considered that while some of the changes to section 4.1.2 recommended by NWIOA and UMC may be desirable, we suggested that the ERA obtained 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 changes suggested above to section 4.1.2 by the NWIOA and UMC are broadly consistent with the recommendation made by NWIOA in relation to section 2.1 above, which is that, rather than operators having to rely on a TPI commitment to “use its best endeavours to consult Operators” with respect to taking possession of the network to undertake necessary work, a regime should be established whereby Operators are continuously updated on the competing needs to access the network including possessions by;

- “1. Preparing and providing an annual track planned maintenance, enhancement and expansion plan for the network.
2. Preparing and reviewing with the Operators a rolling three month possession plan for all planned maintenance.
3. Preparing and reviewing with the Operators a weekly report on planned possessions for the following three weeks. Including a review of the performance of planned possessions for the previous week.
4. Notifying the Operators immediately in writing of changes to the planned possessions.”

In its submission on the Draft Determination, Required Amendment 9 (which incorporates key elements of TMG Recommendations 13 and 14), the NWIOA provides further views in support of its recommended information regime. Similar views are also expressed by UMC in its response to the Draft Determination. In this relation to this issue, the NWIOA:

- expects significant increases in demand for the TPI network to arise based on projected increases in the demand for Australian minerals, particularly from Chinese steel mills, and that such projected development is reinforced by recent moves of Chinese Trading Corporations and steel mills to invest in iron ore mining companies in the Pilbara;
- expects additional demand for the TPI network to arise from continued stalling of rail access regarding the BHP Billiton and Rio Tinto railway networks (leading to NWIOA members having to build rail spurs to the TPI network in order to bring their mines into operation within required timeframes); and
- notes that the TPI network will be exporting over 100 million tonnes in a short timeframe whereas the WestNet network exports 20 million tonnes

(8 million tonnes from Esperance and 12 million tonnes from Bunbury) from operators that have a greater ability to plan stockpiles than operators on the TPI network.

The combination of the developments and factors above leads NWIOA to the view that, dissimilar to the WestNet network, the TPI railway network will be a capacity constrained network. Accordingly, the NWIOA considers that an appropriate benchmark for network planning arrangements for the TPI network should not be the WestNet network, but heavy haulage networks such as ARTC and Queensland Rail, which have 5 year management plans in place and regulators in other jurisdictions require such plans to be in place to support access pricing. On this basis, NWIOA states that the objective should be to have some longer term planning in place and suggests that planned maintenance, enhancement and expansion plans for the network are incorporated into:

- “The fortnightly train plan.
- The three month preliminary train plan prepared and reviewed in conjunction with the operators.
- An overarching 12 month plan. (Alternatively, to make an ‘in principle’ decision in support of a 12 month plan with the latter to be implemented following the first regime review by the Authority).”

The NWIOA’s submission in relation to the Draft Determination therefore deals with an extended information regime to involve operators and to inform them of planned maintenance, enhancement and expansion plans for the network (in terms of recommended items 1-4 above).

With the specific exception of item 1, we consider the Draft Determination to have effectively addressed the items comprising the NWIOA’s initial proposed extended information regime:

- Item 1: Preparing and providing an annual track planned maintenance, enhancement and expansion plan for the network. This item is not addressed in the TMG or in the ERA’s Required Amendments. This issue is discussed further below.
- Item 2: Preparing and reviewing with the Operators a rolling three month possession plan for all planned maintenance. This item is addressed by Required Amendment 5, which specifies adopting appropriate arrangements to establish a three monthly preliminary train plan (or similar) and that TPI is to set out a process for operators to be involved in the preparation and finalisation of the plan, after receiving the operator’s train path request. The amendments to the term, Weekly Train Plan, to become Three Monthly Preliminary Train Plan, given the principle in Required Amendment 14, dot point 2, dash point 3, would ensure that any planned possessions are covered by the train plan.
- Item 3: Preparing and reviewing with the Operators a weekly report on planned possessions for the following three weeks. Including a review of the performance of planned possessions for the previous week. This item is, in part, addressed by Required Amendment 5 which specifies that Weekly Train Plan is to be replaced by Fortnightly Train Plan and that TPI is to set out a process for operators to be involved in the

preparation and finalisation of the plan, after receiving the operator's train path request. The amendments to the term, Weekly Train Plan, to become Fortnightly Train Plan, given the principle in Required Amendment 14, dot point 2, dash point 3, would ensure that any planned possessions are covered by the train plan. A review of the performance of planned possessions for the previous week is not covered by the ERA's Required Amendments. In the absence of a clear need for such ex post information to be developed and provided on a regular basis, we consider the costs of such an arrangement would outweigh the likely benefits and accordingly, we do not recommend adopting this particular suggestion of the NWIOA.

- Item 4: Notifying the Operators immediately in writing of changes to the planned possessions. This item, excluding the requirement for written notice, is addressed by section 4.1.2(f) of the TMG. The arrangements in section 4.1.2(f) would be reinforced by Required Amendment 17, which provides for establishment of protocols for consultation with operators consistently with those in section 2.4 of the WestNet (and includes 24 hour electronic communication links, where agreed).

Other than the parameters of the planned possessions, we do not consider it necessary for Fortnightly Train Plans and Three Monthly Preliminary Train Plans to specify the details of plans for planned maintenance and for network enhancements and expansions, which are considered to be matters appropriate for longer term plans.

Based on the information provided by the NWIOA on 10 June 2009, we consider it to be feasible that the TPI railway network will be a capacity constrained network. We also accept that, as a greenfields project, it is feasible that the initial capacity of the network, by section, may not be sufficient to meet the coincident demands for railway operations that arise from increased demand for Australian minerals and from the connection of additional mines to the network. Because of the potential impact of such outcomes – and of any expansions and extensions of the network in order to deal with resulting constraints and connection requirements – on operators' service entitlements, it would be consistent with the economically efficient use of the network for operators to be provided with long term information on network capacity, including the effects of planned maintenance, and enhancement and expansion plans. We note that it is standard practice in other regulated infrastructure-based industries (for example, electricity and natural gas transmission networks) to provide forward 12 monthly network plans to direct users. Based on the information in such plans, users may be able to take long term actions to avoid, or to lessen the impact of, network constraints, and feedback based on the information provided can assist the network owner to more efficiently plan any expansions and extensions to the network.

Because the establishment and operation of a public 12 month planning process would incur administrative costs and, at this stage, it is not certain that in the short term (eg to the next regulatory review) the TPI network will be a capacity constrained network, the short term costs of adopting such a process may exceed the benefits. On this basis, although we support adoption of the 12 month planning process as suggested by the NWIOA, we recommend that this process not implemented during the forthcoming initial regulatory period, but is considered for inclusion in the TMG at the next

review of the TMG. The NWIOA makes a similar suggestion, as quoted above.

Where a 12 month planning process is implemented, it will be important that the process provides operators with more detailed information than TPI may otherwise be required to provide under section 6 of the Code eg in terms of:

- Network infrastructure constraints eg axle loads; and
- Network operating constraints eg train lengths.

As commented above, we consider the Fortnightly Train Plan and the Three Month Preliminary Train Plan (as specified based on the ERA's required amendments) would provide appropriate short term information to operators.

Also, the change suggested by NWIOA and UMC in relation to section 4.1.2, that notification of possessions should be provided to all operators (not just to affected operators), would 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.

The ERA's Required Amendment 9 incorporates the measures recommended in TMG Recommendation 14 above (except that the ERA does not require notices of possessions to 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. A similar provision is included in the ERA's TMG Required Amendment 9, dot point 7.

In its response to the Draft Determination, TPI comments that in relation to dot point 5 of Required Amendment 9 – for major maintenance activities involving possessions over 48 hours that at least six months notice is required (which consistent with paragraph 4(v) of section 3.5 of the WestNet TMG) – TPI is unable give an unequivocal guarantee that it will give at least six months notice. TPI states that such advance notice is not practical when works may need to commence within six months of becoming evident.

We consider TPI's position in response to the required amendment to be reasonable. That is, it may not be possible to give six months notice if the major maintenance activity is in order to deal with an emerging situation. In such cases, addressing the situation inside a six month timeframe should not result in a breach of the TMG. On this basis, we suggest that the notice period in section 4.1.2(e) should be "at least six months notice, but where it is not practicable to give at least six months notice, notice will be given as soon as practicable." This recommendation is included in the minor amendment to TMG Recommendation 14 set out below.

TPI also comments in relation to dot point 6 of Required Amendment 9 – for TPI to publish a notice given under section 4.1.2(e) of the TMG to be published on the TPI website on the date it is issued to affected operators – that it does not intend to establish a web site and cannot see what benefit the amendment provides to current and future operators, given that TPI will be contacting operators directly in such cases. The website requirement is not specified in 3.5 of the WestNet TMG or in TMG Recommendation 14.

We note that the issue of communications between TPI and operators will be generally covered by the ERA's Required Amendment 17, which requires the TMG to include a new section (section 4.7) headed, Protocols for Consultation with Operators. The new section is to be similar to section 2.4 of the WestNet TMG, which includes the requirement for a 24 hour communications link, unless otherwise agreed.

However, it is important that TPI's arrangements for contacting operators directly are appropriately formalised and, if notices are not published on a TPI website on the date issued, then TPI should notify operators by some other form of written notice (which may include electronic forms of written communication) to be received by operators on the date that the notice is made. On this basis, we suggest that the notification arrangements should include in an additional sentence to be added to section 4.1.2(e) should be as follows:

"TPI will publish this notice on its web site on the date it is issued to affected Operators and, if notices are not published on a TPI website on the date issued, then TPI should notify operators by some other form of written notice (which may include electronic forms of written communication) to be received by operators on the date that the notice is made."

This recommendation is included in the minor amendment to TMG Recommendation 14 set out below.

TMG Recommendation 14A

TMG Recommendation 14 from the draft report is amended in this final report by addition of the following:

- the notice period in section 4.1.2(e) should be "at least six months notice, but where it is not practicable to give at least six months notice, notice will be given as soon as practicable."; and
- the following additional sentence should be added to section 4.1.2(e): "TPI will publish this notice on its web site on the date it is issued to affected Operators and, if notices are not published on a TPI website on the date issued, then TPI should notify operators by some other form of written notice (which may include electronic forms of written communication) to be received by operators on the date that the notice is made."

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 appears to comprise amended versions of provisions from the WestNet TMG (eg section 2.4 of the WestNet TMG includes provision for a 24 hour communications link unless otherwise agreed). 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.”

The ERA’s Required Amendments 11 and 17 are consistent with TMG Recommendation 16 above. Required Amendment 11 specifies that the text of the single sentence comprising section 4.3 should be amended by continuing the sentence as follows

“... causing the delay if practical, subject to consultation with Operators as to their positions and needs including factors such as crewing arrangements, sensitive freight and shipping or production requirements.”

In its submission in relation to the ERA’s TMG Draft Determination, TPI states that it believes that a further clarifier should be added which refers to the overall impact on the railway network. TPI suggests a further amendment to section 4.3, so that, in total, the additions the original sentence in this section would be as follows.

“... causing the delay if practical, subject to the overall impact on the network and in consultation with Operators as to their positions and needs including factors such as crewing arrangements, sensitive freight and shipping or production requirements.”

We consider the meaning of the words “subject to the overall impact on the network” in the above to be unclear. Also given this, we are uncertain about how the amended process suggested by TPI would deal with the interests of operators (eg whether their interests are part of the overall impact on the network, or whether they rank below such impacts). Based on these issues, we do not recommend adopting the amendment suggested by TPI.

The ERA’s Required Amendment 17 requires the TMG to:

“Include a new section (section 4.7) headed ‘Protocols for Consultation with Operators’

Outline arrangements under this new section 4.7, for the manner in which TPI will agree on the arrangements for consultation protocols with operators. These arrangements should be similar to those set out under section 2.4 of WNR’s 2006 TMG.”

In their responses to the TMG Draft Determination, both NWIOA and UMC seek confirmation from the ERA that the above required amendment applies to section 4.4, Management of issues affecting daily operations.

For consistency with the rights to information and general access rights contained in the WestNet TMG, and in order to provide for the safe and economically efficient use of the railway infrastructure, the new TMG section,

Protocols for Consultation with Operators, would apply generally to infrastructure management and network operational issues that give rise to the need for communications between TPI and operators. The protocols would therefore apply to section 4.4 and other parts of sections 3 and 4 as applicable.

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 18 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 15 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, in our draft report we considered 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 that 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.

TMG Recommendation 19 is effectively the same as TPP Recommendation 16.

The ERA's Draft Determination contains Required Amendment 19 which is similar to TMG Recommendation 19 above in that it requires the TPI TMG to include similar provisions to those set out in section 5 of the WestNet TMG (subject to adopting particular drafting changes specified by the ERA) and requires the TMG to include a review provision (except that the ERA's provision is for a review to occur 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 ERA). Required Amendment 19 specifies that these provisions are to be incorporated into a new section of the TMG (section 4.9) headed 'Compliance and Review'

In their responses to the Draft Determination, the NWIOA and UMC express similar views in relation to the required new section 4.9, Compliance and Review. The views of these stakeholders are reflected in the following comments by UMC (which also reflect its comments on the similar ERA required amendment – Required Amendment 14 – in relation to the TPP):

“The Authority does not detail how it intends to monitor section 16(2) of the Code (although the Authority may have an audit procedure to do so) UMC is concerned, particularly if non-Code agreements do not have TPP coverage, with the issue of how can section 16(2) of the Code be monitored and enforced and would request that the intent of section 16(2) be incorporated into the proposed section 4.9 of the TMG.”

We consider section 16(2) of the Code to apply directly to access negotiations and that it does not need to be specified in the TMG on that basis. Also, we note that the ERA's Required Amendment 5 to the TPP, in effect, specifies that TPI is to prepare indicative access proposals in accordance with the requirements of section 16 of the Code.

Similar to its comments in relation to the Required Amendment 14 from the TPP Draft Determination, TPI suggests the following changes to the text of dot point 2 of TMG Required Amendment 19, as follows:

- the text at dash point 1 to change from “The ERA will review the TMG, ...” to “TPI agrees to a review of the TMG, by the ERA ...”; and
- the text at dash point 3 to change from “The ERA will monitor TPI's compliance with the TMG ...” to “TPI agrees to monitoring of its compliance with the TMG, by the ERA ...”.

TPI's issue with the suggested wording in Required Amendment 19 is that TPI “cannot include a commitment in this TMG that compels the ERA to undertake any actions, as it does not have that authority.”

We agree with TPI's suggested changes to the TMG in this case, given that the TMG is to be observed by TPI as the railway owner and the wording suggested by TPI appropriately places the compliance obligation on TPI.

In light of the matters identified in relation to sections 2.1 and 4.1 of the TMG in relation to future reviews of the TMG, in this final report, we are recommending a minor change to TMG Recommendation 19 above from the draft report.

TMG Recommendation 19A

In this final report, the following provisions are added to TMG Recommendation 19 from the draft report:

At the next regulatory review of the TMG, we suggest that the following are considered for inclusion in the TMG:

- detailed regime documentation, in relation to matters such as safeworking rules and Master Train Plan Scheduling Principles; and
- a 12 month planning process to provide advance information on matters such as network constraints, planned maintenance works and forthcoming extensions and expansions to the network.

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 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 TPI 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 18.

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

Note: we are not proposing Recommendation 4 as a change that we consider necessary in order for the ERA to be able to approve the TMG, but we are proposing it as a discretionary change that we consider to be desirable. We recognise that TPI cannot be required to adopt such a recommendation.

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 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 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"

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."

TMG Recommendation 10

We suggest that the TPI TMG includes a commitment consistent with that in paragraph 3, page 5, at 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 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.

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".

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".

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.

We also recommend addition of the following:

- the notice period in section 4.1.2(e) should be "at least six months notice, but where it is not practicable to give at least six months notice, notice will be given as soon as practicable."; and
- the following additional sentence should be added to section 4.1.2(e): "TPI will publish this notice on its web site on the date it is issued to affected Operators and, if notices are not to published on a TPI website on the date issued, then TPI should notify operators by some other form of written notice (which may include electronic forms of written communication) to be received by operators on the date that the notice is made."

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.

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.”

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.”

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.

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.

At the next regulatory review of the TMG, we suggest that the following are considered for inclusion in the TMG:

- detailed regime documentation, in relation to matters such as safeworking rules and Master Train Plan Scheduling Principles; and
- a 12 month planning process to provide advance information on matters such as network constraints, planned maintenance works and forthcoming extensions and expansions to the network.

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.

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.

TMG Recommendation 22

We suggest that the following text adapted from section 7 of the WestNet TPP is incorporated into the TPI 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."