

The Pilbara Infrastructure Pty Ltd (TPI)

Draft Determination on TPI's
Over-payment Rules

January 2010

Economic Regulation Authority



WESTERN AUSTRALIA

A full copy of this document is available from the Economic Regulation Authority website at www.era.wa.gov.au.

For further information, contact:

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

© Economic Regulation Authority 2010

The copying of this document in whole or part for non-commercial purposes is permitted provided that appropriate acknowledgment is made of the Economic Regulation Authority and the State of Western Australia. Any other copying of this document is not permitted without the express written consent of the Authority.

Contents

DRAFT DETERMINATION	1
LIST OF AMENDMENTS	1
REASONS FOR THE DRAFT DETERMINATION	5
BACKGROUND	5
LEGISLATIVE REQUIREMENTS	5
PUBLIC CONSULTATION	6
CONSULTANTS USED BY THE AUTHORITY	7
SCOPE OF MATTERS COVERED UNDER THE DRAFT DETERMINATION	7
DISCUSSION OF ISSUES	8
Introduction (Section 1)	8
Basis of the Over-payment Rules (Section 2)	9
Over-payment Rules (Section 3)	19
Compliance (Section 4)	22
Definitions (Section 5)	24
Additional Issues	25

DRAFT DETERMINATION

1. The Pilbara Infrastructure Pty Ltd (**TPI**), a wholly owned subsidiary of Fortescue Metals Group (**FMG**) is the owner of a recently constructed railway (**TPI Railway**) connecting FMG's Cloud Break iron ore mine in the Pilbara to TPI's port facilities at Port Hedland.
2. On 1 July 2008, the TPI Railway was included in the State's rail access regime (consisting of the *Railways (Access) Act 1998* (**Act**) and the *Railways (Access) Code 2000* (**Code**)) through proclamation of Part 3 of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* (**Agreement Act**).
3. On 28 July 2008, TPI submitted its proposed Over-payment Rules to the Economic Regulation Authority (**Authority**) for approval, in accordance with Part 5, section 47 of the Code. The Agreement Act required TPI to submit its proposed Over-payment Rules to the Authority no later than seven days after the TPI Railway became subject to the State's rail access regime.
4. The Authority has considered TPI's proposed Over-payment Rules in conjunction with comments made in submissions to the Authority by interested parties, including a supplementary submission received from TPI addressing issues raised in interested parties submissions.
5. The draft determination of the Authority is to approve TPI's proposed Over-payment Rules, subject to 15 amendments. These amendments are listed below.

LIST OF AMENDMENTS

Required Amendment 1

Section 1 of TPI's proposed Over-payment Rules (headed 'Introduction') should be amended by deleting the third sentence in the second paragraph and replacing this sentence with; "The Code provides, under section 8(4) of Schedule 4, that where payments to the railway owner exceed total costs this provision is not breached if the Over-payment Rules approved or determined under section 47 are complied with."

Required Amendment 2

Section 5 of TPI's proposed Over-payment Rules (headed 'Definitions') should be amended by adding a definition for "access agreement" consistent with the definition set out under Part 1 of the Code.

Required Amendment 3

Section 2.1.2 of TPI's proposed Over-payment Rules (headed 'Regulatory Ceiling') should be amended by deleting the words "A Route Section"" at the start of the first paragraph and replacing these words with " Each Route Section".

Required Amendment 4

Section 2.1.3 of TPI's proposed Over-payment Rules (headed 'Revenue for the Purposes of the Ceiling Price Test') should be amended by deleting the wording "the access regime will not provide" in the third sentence of the second paragraph and replacing these words with "since the Code does not provide".

Required Amendment 5

Section 5 of TPI's proposed Over-payment Rules (headed 'Definitions') should be amended as follows:

- Add the words "and other entities" immediately after the word "Operators" under the definition of "Access Revenue".
- Add a definition for the word "entities" consistent with the definition set out under Part 1 of the Code.
- Amend the definition for the term "Non-access Revenue" by deleting the words "FMG" and "WNR" and replacing each of these words with "TPI".
- Add a definition for the word "non-regime operators". This definition should state that non-regime operators are "Entities to which track access is provided under arrangements outside of the Code".

Required Amendment 6

Section 2.1.4 of TPI's proposed Over-payment Rules (headed 'Breaches of the Ceiling Price Test') should be amended as follows:

- Delete the words "If, despite efforts to reasonably avoid breaches of the Ceiling Price Test, a breach/breaches occur" under the second paragraph and replace with the words "If breaches of the Ceiling Price Test occur as a result of variations in traffic volume or revenue that are considered to be temporary or unpredictable in nature".
- Include a new paragraph as the first paragraph of this section consisting of the first sentence under section 2.4 of the WNR OPR.

Required Amendment 7

Section 2.1.5 of TPI's proposed Over-payment Rules (headed 'Over-payments and under-recoveries') should be amended as follows:

- Delete the fourth paragraph.
- Insert the sentence "Where under-recovery occurs the Operator is not required to pay TPI compensation for such under-recovery" as the first sentence of the second last paragraph on page 5.

Required Amendment 8

Section 2.1.6 of TPI's proposed Over-payment Rules (headed 'Allocation of Access Revenue') should be amended by adding two new paragraphs to the end of this section. The first new paragraph should have the same wording as the third sentence of the second last paragraph under section 2.6 of the WNR OPR (excluding the first word in this sentence which should be deleted). The second new paragraph should have the same wording as the last paragraph under section 2.6 of the WNR OPR (apart from replacing WNR with TPI).

Required Amendment 9

Section 2.1.7 of TPI's proposed Over-payment Rules (headed 'Allocation of Non-access Revenue') should be amended by the addition of the words "(government or private)" immediately following the word "capital" at the end of the first sentence.

Required Amendment 10

Section 2.1.8 of TPI's proposed Over-payment Rules (headed 'Allocation of an over-payment') should be amended by the addition of the words "divided by the aggregate of all Operators Access Revenue and Non-Access Revenue above the floor recorded on the Route Section" in the second sentence immediately following the word "Section" in the third line of this sentence.

Required Amendment 11

Points 1 to 13 of Section 3 of TPI's proposed Over-payment Rules (headed 'Over-payment Rules') should be amended as follows:

- Point 1 - Insert the words "For the purpose of the Over-payment Rules, the financial year commences on 1 July and finishes on 30 June. The commencement date for the Over-payment Rules will be 1 July of the financial year immediately following completion of the approval process for all the regulatory documents required to be put in place by TPI under the Act and the Code (being the segregation arrangements, the four Part 5 instruments and the floor and ceiling costs)." immediately after the sentence under this point.
- Point 3 - Insert the information under (a) and (b) under the heading "Notes" as set out under section 3, part 6 of the WNR OPR under a similar heading and incorporate "(a)" and "(b)" into the formula in a similar manner to WNR's formula.
- Point 7 – Insert the words "calculated on 30 June each year or, if 30 June falls on a day which is not a business day, the rate published on the first business day after that date."
- Point 8 – Insert the words "within 3 months of the end of the financial year." immediately following the word "Rule 3" at the end of the sentence under this point.
- Point 9 – Delete this sentence.
- Point 10 – Delete the last sentence and replace with the words "TPI will provide the auditor's report to the ERA when it is completed."
- Point 13 – Amend to provide a similar level of detail on TPI's contractual arrangements with operators under the Code, for the Over-payment Rules, as is provided under section 3, part 17 and Schedule 1 of the WNR OPR. The amendment should be broadly consistent with the above section of the WNR OPR.
- Insert the same words, as under section 3, part 2 of the WNR OPR, as an additional point.

Required Amendment 12

Section 4 of TPI's proposed Over-payment Rules (headed 'Compliance') should be amended as follows:

- Amend the heading to read "Compliance and review".
- Delete the wording under this section and replace with wording consistent with section 5 of the WNR OPR, with the exception of the following:
 - a) First paragraph of section 5 of the WNR OPR: Delete this paragraph and replace with "TPI agrees to a review of the Over-payment Rules by the ERA, through a public consultation process, two years after the date when all the regulatory instruments required under the Act and the Code for TPI's railway have been approved by the ERA. It is expected that the review will commence on 1 October 2012 and that TPI will provide the ERA with its proposed revised Over-payment Rules on this date".

- b) Fourth paragraph of section 6 of the WNR CP: (1) Replace “WestNet” with “TPI”, (2) Replace “The ERA will monitor TPI’s compliance” with “TPI agrees to the monitoring by the ERA of its compliance”, (3) Delete the word “internal” in the sixth line, (4) Add the following sentence to the end of this paragraph; “It is expected that the first audit will commence at the end of the 2012-13 financial year”.

Required Amendment 13

Section 5 of TPI’s proposed Over-payment Rules (headed ‘Definitions’) should be amended, in addition to the requirements set out under Amendments 2 and 5 in this draft determination, as follows:

- Include a complete list of all the terms which might reasonably be expected to require a definition.
- Ensure all definitions are consistent with the definitions in the Code and the Act or, if not defined in the Code or the Act, consistent with the definitions under section 6 of the WNR OPR.

Required Amendment 14

TPI’s proposed Over-payment Rules should be amended to include a new section, immediately following section 3, which provides detail on how TPI’s Over-payment Rules would be applied. This new section should be headed “Application of the Over-payment Rules” and should be similar to section 4 of the WNR OPR (including Table 1).

Required Amendment 15

TPI’s proposed Over-payment Rules should be amended to include a new section prior to the ‘Definitions’ section. This section should consist of the following statement; “TPI will ensure, where possible, that those sections of access agreements under the Code which relate to requirements set out in the Over-payment Rules are referenced to the relevant clauses in the Over-payment Rules in order to ensure that consistency is maintained between these access agreements and the Over-payment Rules.”.

REASONS FOR THE DRAFT DETERMINATION

BACKGROUND

6. The TPI Railway was commissioned in May 2008. This railway is about 260 kilometres in length and runs from FMG's Cloud Break iron ore mine in the Chichester Ranges (East Pilbara) to TPI's port facilities at Anderson Point in Port Hedland.
7. On 1 July 2008, the TPI Railway became subject to the Act and the Code through the proclamation of Part 3 of the Agreement Act. TPI was required, from this date, to comply with the legislative obligations set out for railway owners under the Act and the Code.
8. The TPI Railway is owned and operated by TPI. TPI will perform both access-related rail functions and functions associated with the operation of train services.
9. The Over-payment Rules is one of the four Part 5 Instruments set out in Section 40(3) of the Code. Section 40(2) of the Code notes that the Part 5 Instruments are binding on the railway owner.

LEGISLATIVE REQUIREMENTS

10. The key areas of the Code and the Act that have relevance to the formulation and application of the Over-payment Rules are as follows:

Code Requirements

47 Over-payment rules

- (1) As soon as is practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of the rules (***the over-payment rules***) that are to apply where breaches of clause 8 of Schedule 4 occur on the part of that owner that could not reasonably be avoided.
- (2) The rules referred to in subsection (1) must give effect to the following basic requirements —
 - (a) the excess referred to in clause 8(4) of Schedule 4 in respect of an operator or group of operators must at all times be within a limit, being a percentage of the relevant costs, from time to time notified in writing to the railway owner by the Regulator;
 - (b) at the expiry of each successive period of 3 years from the commencement of access by an operator or group of operators there must be no such excess in respect of that operator or group of operators.
 - (2a) The over-payment rules may make provision for a scheme under which amounts are to be determined that the railway owner is to pay to any relevant operator for the purpose of giving effect to subsection (2)(b).
- (3) The Regulator may —
 - (a) approve the statement submitted by the railway owner either with or without amendments; or

- (b) if he or she is not willing to do so, determine what are to constitute the over-payment rules.
- (4) The over-payment rules may be amended or replaced by the railway owner with the approval of the Regulator.
- (5) The Regulator may, by written notice, direct the railway owner —
 - (a) to amend the over-payment rules; or
 - (b) to replace them with other over-payment rules determined by the Regulator, and the railway owner must comply with such a notice.
- (6) The Regulator may in writing direct the railway owner to pay to an operator any amount determined under a scheme referred to in subsection (2a).
- (7) The railway owner must comply with —
 - (a) the provisions of the over-payment rules; and
 - (b) a direction given to the owner by the Regulator under subsection (6).

Act Requirements

20(4) Functions of the Regulator

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

- (a) the railway owner's legitimate business interests and investment in the railway infrastructure;
 - (b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
 - (c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
 - (d) the interests of all persons holding contracts for the use of the railway infrastructure;
 - (e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
 - (f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
 - (g) the economically efficient use of the railway infrastructure; and
 - (h) the benefits to the public from having competitive markets.
11. In exercising its decision-making power pursuant to section 46 of the Code, the Authority is required to take into account the factors listed in section 20(4) of the Act. However, the Authority may allocate such weight to each of the factors listed in section 20(4) as it considers appropriate in order to ensure a balancing of interests in relation to the railway owner, rail operators, access seekers and the public.

PUBLIC CONSULTATION

12. The Code does not require the Authority to undertake public consultation prior to approving the Over-payment Rules prepared by a railway owner pursuant to section 47 of the Code. However, the Authority has noted in previous determinations relating to Part 5 Instruments that it has decided to apply a similar

public consultation process to all these instruments in order to provide consistency in its review approach for these instruments.

13. On 20 August 2008, the Authority issued a notice on its web site calling for submissions from interested parties on TPI's proposed Over-payment rules by 1 October 2008. Four public submissions were received, from:
 - The Australian Rail Track Corporation Ltd.
 - Hancock Prospecting Pty Ltd.
 - North West Iron Ore Alliance
 - United Minerals Corporation NL.
14. On 21 October 2008, TPI requested the Authority's agreement to make a supplementary submission addressing some issues raised in the public submissions. This agreement was provided and TPI's supplementary submission was received by the Authority on 14 November 2008.
15. The four submissions from interested parties and TPI's supplementary submission are available on the Authority's website (www.era.wa.gov.au).
16. Although the submissions from the North West Iron Ore Alliance, United Minerals Corporation NL and TPI (supplementary submission) noted in their headings that comments were included on both the Costing Principles and Over-payment Rules, these submissions did not contain any comments on the Over-payment Rules. Consequently, only the submissions which contained comments relating to the Over-payment Rules (from the Australian Rail Track Corporation Ltd and Hancock Prospecting Pty Ltd) have been discussed in this draft determination.
17. In the discussion below, the Australian Rail Track Corporation has been abbreviated to the **ARTC** and Hancock Prospecting, which submitted a consultant's report prepared on its behalf by ACIL Tasman, has been abbreviated to **Hancock(ACIL)**.

CONSULTANTS USED BY THE AUTHORITY

18. To assist the Authority in the preparation of its draft determination, the Authority engaged a consultant, PricewaterhouseCoopers (**PwC**) to review TPI's proposed Over-payment rules and the public submissions and provide advice to the Authority. The PwC draft report is available on the Authority's website (www.era.wa.gov.au).

SCOPE OF MATTERS COVERED UNDER THE DRAFT DETERMINATION

19. The draft determination deals with the matters to be included in a railway owner's Over-payment Rules as set out under Part 5, section 47 of the Code.
20. Some comments made in the public submissions are outside the scope of matters dealt with under the above section of the Code and, consequently, have not been included in the discussion of relevant issues set out in this draft determination.

DISCUSSION OF ISSUES

21. TPI has set out its proposed Over-payment Rules in five sections. These are:

- Introduction (Section 1)
- Basis of the Over-payment Rules (Section 2)
- Over-payment Rules (Section 3)
- Compliance (Section 4)
- Definitions (Section 5)

Each of these sections are discussed in this draft determination under headings which coincide with those in the TPI proposal.

22. The discussion of each item under the above headings is undertaken in the following order:

- a) A summary of TPI proposal relating to that item.
- b) An outline of comments received in the public submissions.
- c) PwC's advice in relation to the TPI proposal and the public submissions.
- d) The Authority's assessment.
- e) Any amendments required.

23. It should be noted that reference has been made in the discussion below to WestNet Rail's (**WNR**) Over-payment Rules as approved by the Authority in April 2009. WNR's 2009 Over-payment Rules is available on the Authority's web site (www.era.gov.au). This document is referred to as the **WNR OPR** in this draft determination.

Introduction (Section 1)

TPI's Proposal

24. TPI has acknowledged that it is required, in accordance with Section 47 of the Code, to prepare and submit Over-payment Rules to the Authority for approval.
25. This section outlines the Ceiling Price Test, as described in clause 8 of Schedule 4 of the Code, and notes that this provision will not be breached where payments exceed total costs if the approved Over-payment Rules are complied with.

Public Submissions

26. There were no comments received in relation to Section 1.

PricewaterhouseCoopers' (PwC) Advice

27. PwC noted that section 1 of TPI's proposal is generally consistent with section 1 of the WNR OPR.
28. PwC also suggested that the wording in the second paragraph (third sentence) should be changed to better reflect the wording in the Code, by amending this sentence to read as follows:

The Code provides that this provision will not be breached where payments exceed total costs if the over-payment rules approved or determined under section 47 of the Code are complied with.

Authority's Assessment

29. The Authority accepts PwC's suggestion that the third sentence of the second paragraph in this section should be amended to be consistent with the wording in the Code.
30. The Authority also notes that the term "Operator" as used by TPI in this section and elsewhere in its proposed Over-payment Rules is used in the same context as provided under the Code, whereby this term refers to entities to which access is provided under an access agreement negotiated under the Code. However, the definition of Operator under section 5 of TPI's proposed Over-payment Rules does not make this clear.
31. In order to clarify this matter, the term "access agreement" needs to be defined under section 5 of TPI's proposed Over-payment Rules consistent with the definition set out under Part 1 of the Code.

Draft Determination

Required Amendment 1

Section 1 of TPI's proposed Over-payment Rules (headed 'Introduction') should be amended by deleting the third sentence in the second paragraph and replacing this sentence with; "The Code provides, under section 8(4) of Schedule 4, that where payments to the railway owner exceed total costs this provision is not breached if the Over-payment Rules approved or determined under section 47 are complied with."

Required Amendment 2

Section 5 of TPI's proposed Over-payment Rules (headed 'Definitions') should be amended by adding a definition for "access agreement" consistent with the definition set out under Part 1 of the Code.

Basis of the Over-payment Rules (Section 2)

Section 2.1.1 - Definition of Route Sections

TPI's Proposal

32. TPI has proposed that its railway from Cloud Break to Port Hedland forms one route section.

Public Submissions

33. Hancock(ACIL) at page 21 commented that TPI should explain how changes in the definition of route sections would be handled in the Over-payment Rules.

PricewaterhouseCoopers' (PwC) Advice

34. PwC noted that the issue of route sections had been dealt with in the recommendations in its draft report to the Authority on TPI's proposed Costing Principles.
35. In relation to Hancock(ACIL)'s comment, PwC considered that a specific process for defining route sections in TPI's Over-payment Rules was not necessary.

Authority's Assessment

36. The Authority notes that the issue of route sections for TPI's railway was considered under the Authority's assessment of TPI's proposed Costing Principles. In its draft determination on TPI's proposed Costing Principles the Authority concluded that "a single route section best reflects the current situation for TPI's railway network". Amendment 2 of the Costing Principles draft determination made provision for new route sections to be added in the future when new rail lines are constructed connecting to TPI's railway network.
37. In relation to Hancock(ACIL)'s comment that TPI should explain how changes in the definition of route sections would be handled in the Over-payment Rules, the Authority agrees with PwC that this is not necessary. As noted above, Amendment 2 in the Authority's draft determination on TPI's proposed Costing Principles sets out a process for incorporation of new route sections into TPI's Costing principles in the future.

Draft Determination

38. The Authority considers section 2.1.1 to be appropriate.

Section 2.1.2 Regulatory Ceiling**TPI's Proposal**

39. TPI has proposed that a route section will have a regulatory ceiling which will apply to all operators under the Code and would be the basis of determining whether total revenue on that route section exceeded total costs.

Public Submissions

40. Hancock(ACIL) at page 18, submitted that this section should specify that each route section has one regulatory ceiling that will apply to operators.

PricewaterhouseCoopers' (PwC) Advice

41. PwC advised that this section is consistent with section 2.2 of the WNR OPR.
42. In relation to the comment by Hancock(ACIL), PwC considered that the wording of this section of TPI Over-payment Rules was sufficiently clear in representing that one ceiling will apply per route section.

Authority's Assessment

43. The Authority notes PwC's advice that this section is consistent with the WNR OPR.

44. In regard to the matter raised by Hancock(ACIL) the Authority agrees with PwC that TPI's Over-payment Rules is relatively clear. However, the Authority considers that it would be worthwhile, to remove any doubt on this matter, to amend the first line of the first paragraph by deleting the words "A Route Section" and replacing these words with "Each Route Section".

Draft Determination

Required Amendment 3

Section 2.1.2 of TPI's proposed Over-payment Rules (headed 'Regulatory Ceiling') should be amended by deleting the words "A Route Section" at the start of the first paragraph and replacing these words with " Each Route Section".

Section 2.1.3 Revenue for the Purposes of the Ceiling Price Test

TPI's Proposal

45. TPI has proposed that for the purposes of the Ceiling Price Test, all access and non-access revenue received for a route section will be included as total revenue attributable to that route section.
46. TPI has also proposed that the Over-payment Rules will not provide non-regime operators with a legal entitlement to any refund for any over-payment.

Public Submissions

47. Hancock(ACIL) at page 21 has suggested that it would be helpful for TPI to define access revenue and non-access revenue in the text of this section of its proposal.

PricewaterhouseCoopers' (PwC) Advice

48. PwC advised that this section is consistent with section 2.3 of the WNR Over-payment rules.
49. PwC also suggested that the wording "the access regime will not provide" in the second paragraph of this section should be changed to "since the Code does not provide".
50. In regard to the comment by Hancock(ACIL), PwC advised that as access revenue and non-access revenue are defined in section 5 of TPI's proposed Over-payment Rules, TPI should not be required to restate the definitions under section 2.1.3.

Authority's Assessment

51. The Authority accepts PwC's view that the wording "the access regime will not provide" in the third sentence of the second paragraph of this section of TPI's proposed Over-payment Rules should be changed to "since the Code does not provide".

52. In relation to Hancock(ACIL)'s comment, the Authority view is consistent with that of PwC to the effect that definitions of access revenue and non-access revenue do not need to be included under this section as these definitions are provided under section 5.
53. However, the Authority notes that the definitions of access revenue and non-access revenue under section 5 of TPI's proposed Over-payment Rules are not appropriate and need to be amended.
54. In the case of access revenue, TPI's definition under section 5 needs to be amended by adding the words "and other entities" immediately after the word "Operators". The word "entities" also needs to be included in the definitions under section 5 in a manner consistent with the definition under Part 1 of the Code.
55. The amendment required to TPI's definition under section 5 in the case of non-access revenue, is that the word "FMG" in the first line should be replaced with "TPI" and the word "WNR" in the last line should be replaced with "TPI".
56. In addition, the Authority considers that TPI needs to include a definition under section 5 for the term "non-regime operators" used in section 2.1.3. This definition should state that non-regime operators are "Entities to which track access is provided under arrangements outside of the Code".

Draft Determination

Required Amendment 4

Section 2.1.3 of TPI's proposed Over-payment Rules (headed 'Revenue for the Purposes of the Ceiling Price Test') should be amended by deleting the wording "the access regime will not provide" in the third sentence of the second paragraph and replacing these words with "since the Code does not provide".

Required Amendment 5

Section 5 of TPI's proposed Over-payment Rules (headed 'Definitions') should be amended as follows:

- Add the words "and other entities" immediately after the word "Operators" under the definition of "Access Revenue".
- Add a definition for the word "entities" consistent with the definition set out under Part 1 of the Code.
- Amend the definition for the term "Non-access Revenue" by deleting the words "FMG" and "WNR" and replacing each of these words with "TPI".
- Add a definition for the word "non-regime operators". This definition should state that non-regime operators are "Entities to which track access is provided under arrangements outside of the Code".

Section 2.1.4 Breaches of the Ceiling Price Test

TPI's Proposal

57. TPI proposed that the revenue earned on particular route sections shall be assessed by TPI on a periodic basis, and if a potential over-payment is indicated, that TPI will seek to negotiate new access prices with affected Operators to avoid a breach of the ceiling price test.
58. In addition, TPI proposed that if a breach occurs, TPI will advise the Authority of the circumstances and follow the procedures set out in the Over-payment Rules to deal with such over-payments.

Public Submissions

59. Hancock(ACIL) suggested, on page 18, that the second paragraph of this section should be restricted to breaches that arise as a result of temporary or unpredictable variations in traffic volumes or revenues.

PricewaterhouseCoopers' (PwC) advice

60. PwC advised that this section is broadly consistent with section 2.4 of the WNR OPR.
61. In relation to the comment by Hancock(ACIL), PwC considered that the changes suggested by Hancock(ACIL) were appropriate and consistent with the wording in section 2.4 of the WNR OPR.

Authority's Assessment

62. The Authority notes PwC's advice that this section is broadly consistent with the WNR OPR.
63. With regard to the comment by Hancock(ACIL), the Authority agrees that the wording under the second paragraph of this section is not sufficiently clear. Under section 47(1) of the Code, provision is made for application of the Over-payment Rules under circumstances where the railway owner could not reasonably avoid breaches of the Ceiling Price Test (section 8 of Schedule 4). In the Authority's view, such circumstances would be temporary in nature relating to changes in traffic volumes resulting in higher revenues than anticipated. Changes in traffic volumes of long term or permanent nature resulting in higher revenue flows would not be expected to meet the criteria under the Code for application of the Over-payment Rules as the railway owner could reasonably predict its revenue, under such circumstances, and would be required to renegotiate its prices with operators having access agreements under the Code to avoid breaches of section 8 of Schedule 4 of the Code.
64. Based on the above, the Authority considers that the second paragraph of this section of TPI's proposed Over-payment Rules should be amended to be consistent with the relevant wording under the second paragraph of section 2.4 of the WNR OPR.
65. The Authority also considers that the first sentence of section 2.4 of the WNR OPR, which makes reference to section 47(1) of the Code, should also be added to this section of TPI's proposed Over-payment Rules.

Draft Determination**Required Amendment 6**

Section 2.1.4 of TPI's proposed Over-payment Rules (headed 'Breaches of the Ceiling Price Test') should be amended as follows:

- Delete the words "If, despite efforts to reasonably avoid breaches of the Ceiling Price Test, a breach/breaches occur" under the second paragraph and replace with the words "If breaches of the Ceiling Price Test occur as a result of variations in traffic volume or revenue that are considered to be temporary or unpredictable in nature".
- Include a new paragraph as the first paragraph of this section consisting of the first sentence under section 2.4 of the WNR OPR.

Section 2.1.5 Over-payments and under-recoveries**TPI's Proposal**

66. TPI has proposed to define over-payment as the amount of total revenue received by TPI for a route section that exceeds the total costs attributed to the route section for a one year period and under-recovery as the shortfall of total revenue to the railway owner on a route section for a one year period relative to the total costs attributed to the route Section.
67. Under TPI's proposal, there will be circumstances in which TPI will be allowed to carry-over a net under-recovery as an accounting balance into the subsequent three year period. TPI's proposed Over-payment Rules includes an example demonstrating how such circumstances are proposed to be dealt with.

Public Submissions

68. Hancock(ACIL) commented at page 19 that TPI's proposals regarding underpayments appear to be internally inconsistent, as (and unlike WestNet Rail) TPI is proposing that net under-payments be repaid by operators at the end of the three year period, then TPI goes on to propose a limited set of circumstances whereby the under-payment can be carried forward. Hancock(ACIL) considers that it is inappropriate for TPI to be able to recover under-payments from operators at the end of the three year period.
69. The ARTC, at page 6, provided an outline of its view on the risks of the rail owner verses the operators with respect to forecast traffic volumes and noted that IPART allowed access prices to be adjusted in NSW to accommodate under- and over-recoveries on an annual basis.

PricewaterhouseCoopers' (PwC) Advice

70. PwC noted that this section is generally consistent with section 2.5 of the WNR OPR.

71. However, PwC advised that the fourth paragraph of this section of TPI's proposed Over-payment Rules was not included in the WNR OPR. This paragraph states that "net under-recoveries at the end of a three year period will be paid by Operators to the Railway Owner according to these Rules".
72. PwC considered that TPI should adopt measures consistent with the WNR OPR and, on this basis, agreed with the comment by Hancock(ACIL) that TPI should not be able to claim under-payments from operators at the end of the three year period. PwC's view was that any carry-over of under-payments should be limited to the same grounds as under the WNR OPR.
73. In relation to the ARTC's comments, PwC noted that the rail access legislation was different in NSW compared to WA and that the arrangements put in place by the Authority for the Over-payment Rules reflected the requirements of the Code and the Act.

Authority's Assessment

74. The Authority notes PwC's advice that apart from the fourth paragraph, this section is generally consistent with the WNR OPR.
75. In relation to the fourth paragraph of TPI's proposed Over-payment Rules, the Authority considers that the arrangement proposed by TPI, to the effect that net under-recoveries at the end of a three year period should be paid by operators to TPI, is inconsistent with the Code. The Code does not require operators to reimburse the railway owner for any under-recoveries incurred over a route or route section. The arrangements provided under the Code to deal with breaches under section 8 of Schedule 4 (the Ceiling Price Test), by means of the Over-payment Rules set out in section 47, do not provide any basis for TPI to infer that operators should compensate railway owners for under-recoveries.
76. Based on the above the Authority considers that the fourth paragraph should be deleted and replaced with the wording similar to section 2.5 of the WNR OPR to the effect that operators are not required to pay the railway owner compensation for under-recoveries.
77. In relation to the ARTC's comments, the Authority agrees with PwC that the arrangements required for the Over-payment Rules, in the case of Western Australia, are based on the Code and the Act and cannot be directly compared with the arrangements in place in NSW where different legislation applies.

Draft Determination

Required Amendment 7

Section 2.1.5 of TPI's proposed Over-payment Rules (headed 'Over-payments and under-recoveries') should be amended as follows:

- Delete the fourth paragraph.
- Insert the sentence "Where under-recovery occurs the Operator is not required to pay TPI compensation for such under-recovery" as the first sentence of the second last paragraph on page 5.

Section 2.1.6 Allocation of Access Revenue

TPI's Proposal

78. TPI has proposed that the distribution of access revenue earned over a particular route to individual route sections be undertaken in accordance with the rules as set out in this section.

Public Submissions

79. Hancock(ACIL) and the ARTC both commented (at pages 22 and 8 respectively) that TPI should include a provision similar to that in the WNR OPR such that where TPI has entered into an access agreement with an operator which stipulates a different arrangement for the allocation of access revenue then this arrangement should prevail.

PricewaterhouseCoopers' (PwC) Advice

80. PwC advised that the rules under this section appear to be the same as those set out under section 2.6 of the WNR OPR.
81. PwC agreed with the Hancock(ACIL) and the ARTC comments outlined above and recommended that wording similar to that in the last paragraph of section 2.6 of the WNR OPR be added to this section of TPI's proposed Over-payment Rules.
82. PwC also recommended that the TPI include the third sentence in the second last paragraph of section 2.6 of the WNR OPR in order to more fully explain the revenue allocation rules.

Authority's Assessment

83. The Authority notes PwC's advice that this section is similar to the WNR OPR.
84. The Authority also accepts PwC's advice that TPI should include, under this section, some of the information set out under section 2.6 of the WNR OPR which has not been incorporated into TPI's proposed Over-payment Rules.

85. The Authority considers that the third sentence of the second last paragraph under section 2.6 of the WNR OPR should be included by TPI on the basis that this sentence provides the reasoning supporting rule 2(b) applying ahead of rule 2(c).
86. In addition, the Authority considers that the last paragraph under section 2.6 of the WNR OPR should be included by TPI on the basis that this provides operators and the railway owner with the opportunity to agree on revenue allocation arrangements, under an access agreement, which may better suit the circumstances of a particular operator. The Authority notes that both the ARTC and Hancock(ACIL) considered this issue to be important.

Draft Determination

Required Amendment 8

Section 2.1.6 of TPI's proposed Over-payment Rules (headed 'Allocation of Access Revenue') should be amended by adding two new paragraphs to the end of this section. The first new paragraph should have the same wording as the third sentence of the second last paragraph under section 2.6 of the WNR OPR (excluding the first word in this sentence which should be deleted). The second new paragraph should have the same wording as the last paragraph under section 2.6 of the WNR OPR (apart from replacing WNR with TPI).

Section 2.1.7 Allocation of Non-access Revenue

TPI's Proposal

87. TPI has proposed that non-access revenue, consisting of contributed capital, will be allocated only to the route section for which the contribution was received.
88. TPI also proposed that the value of non-access revenue, for the purpose of the ceiling price test, should be calculated as an annualised amount taking into account the total cost, expected life and weighted average cost of capital determined by the Authority.
89. Where a capital contribution is made over multiple route sections, TPI proposed that the actual expenditure be allocated to each route section at the time the expenditure is incurred.

Public Submissions

90. Hancock(ACIL) commented, at page 22, that TPI should indicate that for the purpose of allocating over-payments to operators, the annuity based on any capital contribution will be attributed to the operator who made the payment.

PricewaterhouseCoopers' (PwC) Advice

91. PwC advised that this section is consistent with section 2.7 of WNR's Over-payment rules.

92. In relation to Hancock(ACIL)'s comment, PwC recommended that the additional wording suggested by Hancock(ACIL) be included in this section of TPI's proposed Over-payment Rules in order to provide further clarity on the operation of the Over-payment Rules.

Authority's Assessment

93. The Authority notes PwC's advice that this section is consistent with the WNR OPR.
94. With regard to the comment by Hancock(ACIL) that a further sentence be added, as outlined above, the Authority notes that the details on the allocation of over-payments to operators is set out under section 2.1.8 of TPI's proposed Over-payment Rules. Section 2.1.8 clearly notes that any non-access revenue will be attributed to the operator from which this revenue was received for the purpose of calculating the over-payment amount due to that operator. The Authority therefore does not consider the addition of the information suggested by Hancock(ACIL) to be necessary.
95. The Authority notes that for clarity, TPI should state that contributed capital includes both government and private contributions. The WNR OPR includes a statement to this effect.

Draft Determination

Required Amendment 9

Section 2.1.7 of TPI's proposed Over-payment Rules (headed 'Allocation of Non-access Revenue') should be amended by the addition of the words "(government or private)" immediately following the word "capital" at the end of the first sentence.

Section 2.1.8 Allocation of an over-payment

TPI's Proposal

96. TPI has proposed that where an over-payment occurs as a result of a breach of the ceiling price test, all operators who have contributed to the total revenue on that route section will be entitled to receive a share of the over-payment, except where an operator has paid only the incremental cost on that Route.
97. TPI has also proposed that the proportion of the total over-payment to be paid to each operator will be determined by the amount each has paid in access and non-access revenue above the floor cost, over the preceding 12 month period from July to June.

Public Submissions

98. The ARTC noted, at page 8, that TPI's description of the calculation of over-payments to operators is incomplete as it excludes the words "divided by the

aggregate of all operators access and non-access revenue above the floor for the route section”.

PricewaterhouseCoopers’ (PwC) Advice

99. PwC advised that this section is broadly consistent with the WNR OPR.
100. PwC agreed with the ARTC that the wording of this section of TPI’s proposed Over-payment Rules should be similar to the wording set out under section 2.8 of the WNR OPR. On this basis, PwC recommended that the words identified by the ARTC as missing from this section, should be included by TPI.

Authority’s Assessment

101. The Authority notes PwC’s advice that this section is broadly consistent with section 2.8 of the WNR OPR.
102. In terms of the matter raised by the ARTC, the Authority agrees that TPI should include the additional wording suggested by the ARTC which is in section 2.8 of the WNR OPR. As TPI’s current wording in the second sentence of this section is clearly incomplete, the Authority considers that the exclusion of the wording identified by the ARTC (and included in the WNR OPR) is likely to be an oversight by TPI.

Draft Determination

Required Amendment 10

Section 2.1.8 of TPI’s proposed Over-payment Rules (headed ‘Allocation of an over-payment’) should be amended by the addition of the words “divided by the aggregate of all Operators Access Revenue and Non-Access Revenue above the floor recorded on the Route Section” in the second sentence immediately following the word “Section” in the third line of this sentence.

Over-payment Rules (Section 3)

TPI’s Proposal

103. This section sets out, under thirteen points, TPI’s proposed Over-payment Rules to apply where breaches of the Ceiling Price Test occur which could not reasonably be avoided.

Public Submissions

104. Hancock(ACIL), at page 23, made a number of comments in relation to this section, noting that TPI should provide more detail on the following matters:
 - The date when over-payments will commence and the dates of its financial year start and finish (point 1).

- The over-payment formula should include notes to clarify the position of non-regime operators (point 3).
 - Details similar to those set out under Schedule 1 of the WNR OPR (point 13).
105. The ARTC, at page 8, made the following comments:
- The over-payment formula should include notes to clarify the position of non-regime operators [similar to the comment by Hancock(ACIL)] (point 3).
 - The long term bond rate as at 30 June each year needs to be more fully explained in relation to what happens if June 30 falls on a non-business day (point 7).

PricewaterhouseCoopers' (PwC) Advice

106. PwC advised that the over-payment rules in this section are generally consistent with the rules set out under section 3 of the WNR OPR.
107. PwC agreed with Hancock(ACIL), in relation to point 1, to the effect that TPI should specify a commencement date for its Over-payment Rules. PwC also accepted Hancock(ACIL)'s view that TPI should specify the financial year being used as the basis for calculation of its over-payments. PwC considered that, similar to the WNR OPR, TPI's financial year arrangements for calculation of its over-payments should commence on 1 July.
108. With regard to point 3, PwC also agreed with both the ARTC and Hancock(ACIL) that TPI should include, under its over-payments formula, the notes included with the over-payments formula under section 3 of the WNR OPR.
109. In relation to point 7, PwC agreed with the ARTC that TPI should clarify what happens if 30 June falls on a non-business day. PwC suggested that TPI add the words "but if 30 June falls on a day which is not a business day then the rate published on the first day after that date".
110. PwC also accepted the suggestion from Hancock(ACIL), that point 13 should be expanded to include similar arrangements to those set out under point 17 of the WNR OPR.

Authority's Assessment

111. The Authority notes PwC's advice that this section is generally consistent with the WNR OPR.
112. In relation to point 1, the Authority accepts the view expressed by Hancock(ACIL), supported by PwC, that TPI should provide a commencement date for its Over-payment Rules. The Authority considers that this date should be expressed as "1 July of the financial year immediately following completion of the approval process for all the regulatory documents required to be put in place by TPI under the Act and the Code (being the segregation arrangements, the four Part 5 instruments and the floor and ceiling costs)".
113. In relation to the financial year issue, the Authority considers that TPI should add the sentence under section 3, part 4 of the WNR OPR to point 1. This sentence states that, for the purpose of the Over-payment Rules, the financial year commences on 1 July and finishes on 30 June.

114. With regard to point 3, the Authority notes the comment by Hancock(ACIL) and PwC's advice, and considers that TPI should add the notes under (a) and (b) as outlined under section 3, part 6 of the WNR OPR.
115. The Authority also notes the comments by Hancock(ACIL) and the ARTC in relation to non-regime operators under point 3. The Authority does not consider it appropriate for TPI's Over-payment Rules to discuss how operators with access agreements outside the Code should be dealt with by TPI in relation to over-payments, as this is entirely a commercial issue between TPI and such operators. The Code does not apply to such operators and only includes mention of these operators in relation to calculation of the total revenue under the Ceiling Price Test (section 8(3) of Schedule 4 of the Code).
116. On the issue of calculation of the long term bond rate as at 30 June (point 7), the Authority's view is that the term "as at" does not mean that the calculation of the bond rate needs to be based on the market information available on 30 June. Rather, this wording means that the value applies as from 30 June and it would be expected that market information should be used which is as close as possible to that date. However, in order to avoid any confusion on this issue the Authority considers that the wording of this section should be more closely aligned with the wording under section 3, part 11 of the WNR OPR.
117. In relation to point 8, the Authority's view is that the words "within 3 months of the end of the financial year" should be added at the end of this sentence to be consistent with section 3, part 5 of the WNR OPR.
118. With regard to point 9, the Authority considers that in the context of the above discussion relating to operators outside the Code, this point should be deleted.
119. In relation to point 10, the last sentence should be deleted and replaced with the sentence "TPI will provide the auditor's report to the ERA when it is completed".
120. The Authority agrees with PwC that point 13 should be expanded to provide more detail on the contractual arrangements between TPI and operators under the Code relating to the operation of the Over-payment Rules, along the lines of the arrangements set out under section 3, part 17 and Schedule 1 of the WNR OPR.
121. The Authority also considers that TPI should include the sentence under section 3, part 2 of the WNR OPR under this section of its Over-payment Rules.

Draft Determination

Required Amendment 11

Points 1 to 13 of Section 3 of TPI's proposed Over-payment Rules (headed 'Over-payment Rules') should be amended as follows:

- Point 1 - Insert the words "For the purpose of the Over-payment Rules, the financial year commences on 1 July and finishes on 30 June. The commencement date for the Over-payment Rules will be 1 July of the financial year immediately following completion of the approval process for all the regulatory documents required to be put in place by TPI under the Act and the Code (being the segregation arrangements, the four Part 5 instruments and the floor and ceiling costs)." immediately after the sentence under this point.
- Point 3 - Insert the information under (a) and (b) under the heading "Notes" as set out under section 3, part 6 of the WNR OPR under a similar heading and incorporate "(a)" and "(b)" into the formula in a similar manner to WNR's formula.
- Point 7 – Insert the words "calculated on 30 June each year or, if 30 June falls on a day which is not a business day, the rate published on the first business day after that date."
- Point 8 – Insert the words "within 3 months of the end of the financial year." immediately following the word "Rule 3" at the end of the sentence under this point.
- Point 9 – Delete this sentence.
- Point 10 – Delete the last sentence and replace with the words "TPI will provide the auditor's report to the ERA when it is completed."
- Point 13 – Amend to provide a similar level of detail on TPI's contractual arrangements with operators under the Code, for the Over-payment Rules, as is provided under section 3, part 17 and Schedule 1 of the WNR OPR. The amendment should be broadly consistent with the above section of the WNR OPR.
- Insert the same words, as under section 3, part 2 of the WNR OPR, as an additional point.

Compliance (Section 4)

TPI's Proposal

122. This section sets out TPI's compliance arrangements for its Over-payment Rules. These arrangements include an annual independent audit of the rules.

Public Submissions

123. The ARTC, at page 8, commented that TPI should be required to review its over-payment Rules every three years and should also make it clear that access seekers and operators can at any time request the ERA to consider amendments.
124. Hancock(ACIL), at page 23, expressed comments similar to those of the ARTC.

PricewaterhouseCoopers' (PwC) Advice

125. PwC agreed with the views of the ARTC and Hancock(ACIL) and recommended that:
 - TPI commit to a three yearly review.
 - A new sentence be added by TPI noting that the ERA has the power under the Code to amend the Over-payment Rules at any time and access seekers and operators can at any time request the ERA to consider amendments.

Authority's Assessment

126. The Authority has set out consistent processes for compliance and review in its recent determinations on TPI's other Part 5 Instruments.
127. As the Authority intends that all TPI's Part 5 Instruments have consistent provisions for compliance and review, the Authority requires this section to be amended to comply with the wording set out under its determinations on TPI's other Part 5 Instruments.
128. In relation to audits, the Authority requires an independent audit to be undertaken every three years for the Over-payment Rules and every two years for the other Part 5 Instruments.
129. In the case of reviews, the Authority requires a review to be undertaken, of all the Part 5 Instruments, two years after the date when all of TPI's regulatory documents have been approved by the Authority.
130. The Authority notes that in relation to the issue of requesting amendments, as raised by the ARTC and Hancock(ACIL), the compliance arrangements required for TPI's Part 5 Instruments include a sentence making it clear that access seekers and operators can at any time request the ERA to consider amendments.

Draft Determination

Required Amendment 12

Section 4 of TPI's proposed Over-payment Rules (headed 'Compliance') should be amended as follows:

- Amend the heading to read "Compliance and review".
- Delete the wording under this section and replace with wording consistent with section 5 of the WNR OPR, with the exception of the following:
 - a) First paragraph of section 5 of the WNR OPR: Delete this paragraph and replace with "TPI agrees to a review of the Over-payment Rules by the ERA, through a public consultation process, two years after the date when all the regulatory instruments required under the Act and the Code for TPI's railway have been approved by the ERA. It is expected that the review will commence on 1 October 2012 and that TPI will provide the ERA with its proposed revised Over-payment Rules on this date".
 - b) Fourth paragraph of section 6 of the WNR CP: (1) Replace "WestNet" with "TPI", (2) Replace "The ERA will monitor TPI's compliance" with "TPI agrees to the monitoring by the ERA of its compliance", (3) Delete the word "internal" in the sixth line, (4) Add the following sentence to the end of this paragraph; "It is expected that the first audit will commence at the end of the 2012-13 financial year".

Definitions (Section 5)

TPI's Proposal

131. TPI has provided a list of definitions under this section.

Public Submissions

132. Hancock(ACIL) commented, at page 23, that TPI's list of definitions is incomplete and contains errors, such as the definition for non-access revenue which refers to WNR instead of TPI.

PricewaterhouseCoopers' (PwC) Advice

133. PwC has advised that this section should contain a complete list of the definitions used in TPI's Over-payment Rules and that this list should be consistent with the definitions in the Act and the Code.

134. In particular, PwC highlighted the following issues:

- "Access Agreement" is not defined.
- "non-regime operator" is not defined.

- “ceiling price test” contains wording issues
- “financial year” is not defined.
- “Non-access revenue” includes an inappropriate reference to WNR

Authority’s Assessment

135. The Authority agrees with the comments by Hancock(ACIL) and PwC to the effect that this section contains errors and does not provide a complete list of the definitions required.
136. The Authority notes that it has required, under Amendments 2 and 5 in this draft determination, amendments to TPI’s list of definitions under this section.
137. The Authority considers that TPI’s definitions should be consistent with the Code and the Act. Where terms are not defined in the Code and the Act, these terms should, where appropriate, be consistent with the definitions in the WNR OPR.

Draft Determination

Required Amendment 13

Section 5 of TPI’s proposed Over-payment Rules (headed ‘Definitions’) should be amended, in addition to the requirements set out under Amendments 2 and 5 in this draft determination, as follows:

- Include a complete list of all the terms which might reasonably be expected to require a definition.
- Ensure all definitions are consistent with the definitions in the Code and the Act or, if not defined in the Code or the Act, consistent with the definitions under section 6 of the WNR OPR.

Additional Issues

Application of the Over-payment Rules

138. The Authority notes that TPI’s proposed Over-payment Rules has not included a section similar to section 4 of the WNR OPR which provides an outline of the manner in which the over-payment Rules would be applied, including worked examples.
139. The Authority considers that it would be beneficial for access seekers under the Code to have available detailed information on how TPI’s Over-payment Rules would be applied in a similar manner to the details set out under section 4 of the WNR OPR.

Draft Determination**Required Amendment 14**

TPI's proposed Over-payment Rules should be amended to include a new section, immediately following section 3, which provides detail on how TPI's Over-payment Rules would be applied. This new section should be headed "Application of the Over-payment Rules" and should be similar to section 4 of the WNR OPR (including Table 1).

Consistency with Access Agreements

140. The Authority considers that all of TPI's Part 5 Instruments should include a statement referencing relevant sections of these instruments to access agreements under the Code where requirements relating to the instruments are mentioned in such access agreements, in order to maintain consistency between these access agreements and the Part 5 Instruments.
141. Accordingly, an additional section should be added to TPI's proposed Over-payment Rules, prior to the Definitions section, which commits TPI to appropriate referencing between the Over-payment Rules and access agreements under the Code.

Draft Determination**Required Amendment 15**

TPI's proposed Over-payment Rules should be amended to include a new section prior to the 'Definitions' section. This section should consist of the following statement; "TPI will ensure, where possible, that those sections of access agreements under the Code which relate to requirements set out in the Over-payment Rules are referenced to the relevant clauses in the Over-payment Rules in order to ensure that consistency is maintained between these access agreements and the Over-payment Rules."