



Train Path Policy



TRAIN PATH POLICY

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Submitted: April 2009 **2012**

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INTRODUCTION

Background

~~WestNet Rail Pty Limited ("WestNet"), owned by Babcock and Brown Infrastructure (51%) and Babcock and Brown investment vehicles (49%), is the manager Section 44(2) of the leases of the freight rail infrastructure network in Western Australia, previously operated by the State Government owned Westrail.~~

~~The Railways (Access) Code 2000 ("the Code") requires certain parts of the rail network managed by WestNet to be made available for access by third party rail Operators. Schedule 1 of the Code lists the sections of the WestNet rail network covered by the Code.~~

~~The Economic Regulation Authority (ERA) was established on 1 January 2004 to oversee the economic regulation functions of rail services in Western Australia. Administration of the Rail Access Regime was previously the responsibility of the Office of the Rail Access each Railway Owner to prepare and submit to the Regulator.~~

~~1.21. Relevance a statement of policy ("Train Path Policy (T.P.P.)") "that it will apply in:~~

~~a) The T.P.P. is a statement of Policy in accordance with Section 44 (2) (a) and (b) of the Code relating to the the allocation of Train Pathstrain paths; and~~

~~b) the provision of access to Train Pathstrain paths that have ceased to be used. The ERA must approve or determine the Policy after a period of public consultation."~~

~~The T.P.P. in relation to the provision of capacity on the railway Network it owns.~~

~~2. This Train Path Policy (TPP) is that policy which Brookfield Rail will apply whilst performing its Access Related Functions as a Railway Owner with regard to (a) and (b) above. The Network is defined as those routes listed in Schedule 2 of the Code which Brookfield Rail controls and to which Brookfield Rail has a right to grant Access to Operators.~~

~~3. As stipulated in Section 4A of the Code, the TPP will only be employed when Brookfield Rail is negotiating to provide Access, or is providing Access, to an Operator under an Access Agreement.~~

Goals of Train Path Policy

~~4. The TPP is designed to ensure that the safe and efficient allocation of Network capacity (i.e. Train Paths) is undertaken in a manner that ensures encourages and facilitates:~~

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- a) fairness of treatment between Operators, ~~acknowledges existing while~~ acknowledging contractual rights and ~~any new contractual rights obligations~~ created under Access Agreements ~~entered into under the Code~~; and

~~The Code only requires the T.P.P. to apply to access arrangements negotiated within the Code. WestNet, nevertheless, will apply the T.P.P to each allocated Train Path regardless of whether access applications are made inside or outside of the Code.~~

~~Access Agreements are entered into with the Operator but the Access Agreements explicitly provide that an Operator may engage a third party as its agent or contractor to perform the obligations of the Operator under the Access Agreement. This includes acting as an agent or contractor for the purpose of the T.P.P.~~

- b) ~~The Policy will be managed in such a way as to encourage~~ maximum use of the Network.

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ManagementALLOCATION OF TRAIN PATHS

2.—Purpose of Train Paths

2.1 Master Train Plan

~~WestNet will maintain a Master Control DiagramGuidelines for these routes under its control that are subject to the Code. Initially these Master Control Diagrams will be those in existence at 1 September 2001 which recognize existing contractual arrangements for Access in place at that time.~~

Allocation of Train Paths

~~The Code provides a process for proponents to seek access to the Network for conducting train operations. There are various outcomes in relation to this process, one of which is that successful access seekers will obtain an entitlement to a Train Path. Access seekers are encouraged to review the Code including Sections 7, 8 and 9. It is also possible for proponents to seek a Train Path by negotiation with WestNet outside the provisions of the Code.~~

5. ~~In~~ In accordance with Section 16(1) of the Code, in negotiation of Access Agreements, the Railway Owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of another proponent.

6. In accordance with Section 16(2) of the Code, in 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.

7. In accordance with Section 44(1) of the Code, in negotiation and making of an Access Agreement the ~~issue of~~ allocation of Train Paths and the provision of Access to Train Paths that have ceased to be used will be dealt with in accordance with the T.P.P. and the requirements of the Code and specifically Section 16 (2) of the Code.TPP.

~~In the event that WestNet has not provided the Operators with suitable Train Paths and the Operator believes that WestNet has not complied with the T.P.P. or provisions of the Code related to negotiation of Access Agreements they may seek to have the matter arbitrated as a dispute in~~ accordance with Section 2536(2)(c) of the Code.

8. At the commencement of an Access Agreement ~~the initial Train Paths will have been negotiated between the parties in accordance with the T.P.P. These will be recorded in a schedule to the Access Agreement and be amended from time to time in accordance with the T.P.P. and the Access Agreement~~ must not grant to an entity the exclusive rights to use or occupy any Route.

9. Brookfield Rail recognises that a set of approved guidelines are needed in the event that there are competing interests for use of the same Network capacity.

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Guidelines for assessing whether a request is warranted for a Train Path Allocating Train Paths in Access Agreements

WestNet will apply the following guidelines for requests for new Train Paths either prior to or after commencement of an Access Agreement.

Otherwise (and subject to Section 10 of the Code) Train Paths will be allocated on a first come first served basis.

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

Scheduled Train Paths (Passenger) and (Freight) or Flexible Scheduled Train Paths

10. the Operator can demonstrate an intention to enter into Section 8 of the Code outlines the steps an entity must take when making a proposal for Access to the Network. On receipt of the proposal, Brookfield Rail must act in accordance with Sections 9 and 10 of the Code, and Part 3 of the Code details various requirements on both parties during negotiations.
11. In the event that the proposal and negotiations are conducted in accordance with the relevant sections of the Code, Brookfield Rail and the entity may be in a position to detail Train Path allocation in an Access Agreement.
12. If there is a competing demand for Network capacity at the time of proposal and negotiation, then in order to determine which entity receives an entitlement to Train Paths, Brookfield Rail will compare the relative compliance of the entities to the requirements in the Code with regard to the proposal and negotiation process and will determine the allocation of Train Paths to entities in such a way that:
 - a) is fair, given the competing demand for limited Network capacity;
 - b) maximises use of the Network; and
 - c) satisfies Brookfield Rail's commercial objectives.
13. In addition, Brookfield Rail may also consider the following aspects of each proposal/entity:
 - (i) arrangements or planned arrangements for the operation of freight or passenger train services, to the satisfaction of WestNet, and Services;
 - (ii) the Operator provides details of anticipated increased demand (which justifies the operations detailed in the proposal), including because of:
 - i. an upgrade or expansion of production capacity with confirmation that it will progress (eg. Funding g. funding approved, public announcements etc), or;
 - ii. estimated market growth based on trend data; or

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- iii. (iii) the Operator can demonstrate a committed new project~~projects~~ with agreed funding;

Conditional Paths

- c) (i) the Operator can demonstrate historical need or the planned use of an optional direction path; or the Train Paths;
- d) (ii) the Operator can demonstrate seasonal demand for a seasonal path based on the production or market characteristics of the freight; or
- e) (iii) the Operator can demonstrate the need for surge capacity based on demand or other constraints such as shipping;

In applying these criteria the following process will apply:

- (i) WestNet will seek sufficient documentation from the Operator to assess the request;
- (ii) if WestNet does not believe the other relevant information supports the request it will seek further information; and
- (iii) if WestNet does not believe the request meets the criteria it will advise the Operator and
- f) if as it is a request relating to an existing Access Agreement the dispute will be resolved under the terms of the agreement, or made available to Brookfield Rail.
- if it is a new request the dispute will be resolved in accordance with Division 3 of the Code.

2.2.2 Process for negotiating new Train Paths prior to an access agreement

The process for allocation of Train Paths as part of the negotiation process for accessDisputes regarding Train Path allocation

14. If a proposal has been made by an entity, and in the event that the entity believes that Brookfield Rail has not sufficiently addressed the above requirements, this may constitute a dispute between the entity and Brookfield Rail under Section 25 of the Code, and that entity may seek to have the matter arbitrated as a dispute in accordance with Section 26(1) of the Code. Section 29(3) of the Code stipulates that the matters to be taken into account by the arbitrator include, among other things, the Code and the Train Path Policy.

PROVISION OF ACCESS TO UNDERUTILISED TRAIN PATHS

15. Access Agreements will include clauses which provide for the implementation of sections 16 to 18 of the TPP.

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Identification of an underutilised Train Path

In general, Access Agreements will be:

- (i) the Operator will request the Train Path(s);
- (ii) WestNet will refer to the Master Train Control Diagram to
 - determine if the path(s) are available; or
 - if possible, seek changes to or the deletion of Train Paths allocated to other entitle Operators to create the requested use a Train Paths; or
 - advise the Operator the Train Paths as requested are not available and suggest alternatives that may be available;
- (iii) at all times maintain dialogue with the Operator to ensure all alternatives are explored; and

2.3 Instructions that may be issued for Temporary Variations of Train Paths

The Operator's Train Paths may be temporarily varied by the giving of Instructions for the purpose of preventing any actual or potential:

- (i) breach of the WestNet's Network Rules by the Operator or of similar safety requirements by other Operators Path on the Network; or
- (ii) material damage to the Network or any associated facility; or
- (iii) injury to any person or damage to any property; or
- (iv) delay to the progress of Services on the Network (but only insofar as any trains operated by a third party have priority over the Operator's trains having regard to the Train Management Guidelines.); or
- (v) for the purpose of preventing, or in response to, any actual or threatened breach by the Operator of any of its material obligations under the a regular and recurring basis. If an Operator has failed to utilise such a Train Path as prescribed Access Agreement.

Instructions can be issued in accordance with Section 2.1 of the TMG.

Material obligations in this context means any requirement under the Access Agreement related to the Operators obligations to comply with safety or operational standards or the Operators ability to operate the service.

2.4 Permanent Variations to Scheduled Train Paths by Agreement

2.4.1 Permanent variation to Scheduled Train Paths requested by WestNet

The procedure to be followed by the parties if it is intended that a Train Path is to be permanently varied by WestNet is set out below.

A Train Path may be varied for the remaining term of an an Access Agreement (or for such other duration as may be agreed) if:

- (a) WestNet the ("Requesting Party") sends a notice to the other party ("Notified Party") stating:
 - (i) that the Requesting Party wishes to vary the use by the Operator of a Scheduled Train Path;

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- (ii) ~~the length of time such variation will be in force, may be classified as underutilised. The process for identifying and~~
- (iii) ~~the reason or reasons for the proposal by the Requesting Party; and~~
- (b) ~~the Notified Party consents to the Requesting Party's proposed variation, such consent to be withheld only upon reasonable grounds (save that the Operator cannot withhold consent in the case of variations required by reason of WestNet's obligations relating to safety of the Network)~~

Reasonable grounds in this context includes:

- (i) ~~the Train Path proposed not being available because it is already allocated to another Operator in accordance with the T.P.P.; or~~
- (ii) ~~because it cannot be operated safely or effectively.~~

The Requesting Party must give not less than 30 days notice of a variation request.

~~The Notified Party's response as to confirming whether it consents or not to the Requesting Party's notice must be given to the Requesting Party within 28 days of such notice being received by the Notified Party or within such shorter time if reasonably practicable. If the Notified Party's response is to refuse consent, the Notified Party must within such time also provide full reasons in writing to the Requesting Party.~~

2.4.2 Permanent variation to Scheduled Train Paths requested by the Operator

~~An Operator seeking a variation to an existing Train Path must do so in accordance with the provisions of the Access Agreement and the information supplied by the Operator should specify:~~

- (a) ~~the route for which the a Train Path is requested;~~
- (b) ~~the times when the Train Path is required; and~~
- (c) ~~the nature of the Service which will use the Train Path.~~

~~If WestNet is unable to comply with a request from an Operator to vary a Train Path WestNet will, at the request of the Operator, provide written reasons as to why it is not available.~~

~~WestNet will, in seeking to accommodate a request for a varied or additional Train Path from an Operator, undertake to negotiate with other Operators seeking their agreement to amend their Train Paths which will allow WestNet to accommodate the request for an additional Train Path.~~

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

2.5 Removal of a Train Path

2.5.1 Removal of a Train Path due to under-utilisation

~~If an Operator has failed to use a Train Path (other than when cancelled in accordance with the processes of the specific access agreement) WestNet may withdraw the rights to the Train Path.~~

~~If WestNet proposes to withdraw a Train Path because of lack of use it will only do so when:~~

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

16. In the case of (a) and (b) above, the process WestNet will follow for the withdrawal of a Train Path underutilised is as follows:

- (i) WestNet Brookfield Rail will monitor the Train Path over a period of three consecutive weeks.
- (ii) If the Service allocated the Train Path has not operated at any time over this three week period, WestNet will issue the Operator with a written notice that it intends to withdraw the Train Path subject to the Operator failing to meet the requirements specified under (iii) below for operating the Service.

a) If the Operator fails to operate the Service using the Train Path for more than six weeks in aggregate in the period of six months from the date of WestNet's notice under (ii), WestNet will withdraw the Train Path at the end of this six month period. (Monitoring Period);

(iii) If the Train Path is not utilised as prescribed in the Access Agreement at any time during the Monitoring Period (provided that the failure to operate/utilise the service Train Path is not as a consequence of a Force Majeure event or WestNet Brookfield Rail not making the network Train Path available;

b) Other than if), Brookfield Rail will issue the parties agree to substitute an alternative Train Path Operator with a Service written notice that this Train Path has not been operated if the Operator has failed identified as underutilised;

- to present a Train at the scheduled entry point onto the Network; or
- to operate the relevant train so that it completes its full journey,

in conformance with the locations, days and times set out in the Train Paths applicable to such Service, in any circumstances other than because of Force Majeure.

2.5.2 Removal of a Train Path due to transfer of a contract between operators.

If certain Train Paths are currently allocated under an Access Agreement to an Operator and that Operator loses part or all of its freight haulage or passenger contracts for which the Train Paths are allocated, WestNet will negotiate with the Operator to reach agreement on the Train Paths to be withdrawn from the Operator. In the case of such an agreement not being reached, WestNet will commence the process under Section 2.5.1 for the withdrawal of a Train Path due to under-utilization. Where the process involving the withdrawal of a Train Path due to under-utilisation is initiated by WNR, an Operator who has lost part of his tonnage still has the opportunity to retain his Train Path if he passes the utilisation test set out in section 2.5.1 (iii) of the TPP.

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2.6 – Review of Train Paths

WestNet may at its discretion by written notice given to the Operator cause a Train Path to be reviewed in a bona fide manner by the parties by comparing the stated departure and arrival times for the Train Path with the performance during the preceding continuous 3 month period of the actual trains using or purporting to use that reviewable entitlement (“3 month history”).

If on such comparison of the Train Path with the 3 month history the departure or arrival times for a Train using or purporting to use the Train Path differ in material respects, the parties will negotiate in good faith to amend the Train Path so that the Train Path reflects, as closely as is reasonably practicable, the 3 month history.

Nothing compels WestNet to offer a Train Path to an Operator if:

- (i) such Train Path is unavailable by reason of contractual obligations owed by WestNet to any person (including the Operator); or
- (ii) to do so would materially adversely impact on WestNet’s ability or opportunity to efficiently and safely manage the Network.

Nothing compels the Operator to accept a Train Path offered by WestNet if contractual obligations owed by the Operator to any person (including WestNet) would prevent it from doing so.

In this context “differs in material respects” means for Scheduled Train Paths the service fails regularly to:

- (a) be ready for entry to the network at the agreed departure time; or
- (b) when entering the network on time fails to exit on time and the Scheduled Train Path was available.

The effect of any Force Majeure event, failure by WestNet to make the network available, or mechanical failure of the Operator’s equipment will not be included in any test of performance.

In the case of Flexible Scheduled Train Paths or Conditional Paths, WestNet and the Operator will agree the basis on which performance will be agreed.

Where WestNet and the Operator have agreed to KPI’s in the Access Agreement these will be taken in to account in any review.

2.7 – Cancellation of Services using Train Paths

WestNet will adopt the following policy in granting an Operator the right to cancel Train Paths without penalty and the specific provisions of the policy agreed between WestNet and the Operator will be contained in the relevant Access Agreement.

An Operator may cancel an individual Train Path under any one of the following circumstances (but only if the occurrence of these circumstances is beyond the reasonable control of the Operator):

- (i) where public holidays effect the operation of the Train Path;
- (ii) for each Scheduled Train Path (Passenger or Freight) 5 times per year commencing from the date the path was first approved;
- (iii) there are mechanical difficulties with the rolling stock used or operated by the Operator;
- (iv) there is a failure of any part of the Operator’s equipment used or to be used in connection with a service;

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c) ~~repair, maintenance or upgrading of the Network is being carried out or there is some other event which materially affects the Operator's use of all or any part of the~~ If the Operator fails to utilise the Train Path as prescribed in the Access Agreement more than 6 times in aggregate in a six month period from the date of the notice (**Utilisation Period**), Brookfield Rail will issue the Operator with a written notice confirming the Train Path as underutilised at the end of this period, provided that the failure to utilise the Train Path is not as a consequence of a Force Majeure event or Brookfield Rail not making the Network available;

d) If the failure by the Operator to utilise a Train Path during the Monitoring Period or the Utilisation Period, as the case may be, is the consequence of a Force Majeure event or of Brookfield Rail not making the Train Path available, then the Monitoring Period or the Utilisation Period, as the case may be, will be extended by such period as is required for Brookfield Rail to make available to the Operator the number of Train Paths that were not utilised for those reasons.

Consequences of a confirmed underutilised Train Path

17. Once a Train Path has been confirmed as being underutilised and the relevant Operator is notified as such, then Brookfield Rail may withdraw the contractual entitlement of the Operator to utilise the Train Path.

- (v) ~~Network~~ (including, without limitation, derailment, collision or later running trains) which occurs in Western Australia;
- (vi) ~~the Operator is unable to load trains because of a lack of product at terminals or is unable to unload product at terminals or ports because of insufficient storage space or because of mechanical difficulties with the loading or unloading equipment at terminals or ports;~~
- (vii) ~~because of the seasonal nature of the services.~~

The Operator must give WestNet as much notice of cancellation as is possible in the relevant circumstances.

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3. ERA'S APPROVAL REQUIRED

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 ERA in accordance with Section 10 of the Code. If the ERA grants approval then WestNet will commence negotiations.

4. rights of an operator to sell a Train Path

An Operator may sell the rights to use a Train Path to another Operator in accordance with the provisions set out in Appendix A.

An Operator may assign the rights to entitlements under an Access Agreement in accordance with the assignment provisions of the Access Agreement.

The only exception is for Train Paths which are granted to the Australian Rail Track Corporation (ARTC) under the Wholesale Access Agreement entered into between WestNet and the ARTC.

Under this arrangement the ARTC are able to grant contiguous Train Paths to Operators seeking to operate interstate services requiring the joint use of the WestNet and ARTC's networks.

For the purpose of the T.P.P. when Train Paths are allocated to the ARTC and they subsequently sell the Train Path to an Operator it is not considered to be selling Train Path rights to another Operator.

5. competition for the same Train Path

If two Operators request the same available Train Path and it is not possible to satisfy both requests by using alternative but similar Train Paths, the available Train Path will be provided to the Operator who first requested the Train Path and can establish that it has a requirement for the Train Path.

Whether a requirement exists will be determined on the basis of the criteria set out in 2.2.1 of the T.P.P.

6. non discrimination

WestNet will not discriminate between Operators in the application of the T.P.P. and the application of the WestNet's Network Rules.

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7. ~~CONSISTENCY BETWEEN ACCESS AGREEMENTS AND THE TPP AND TMG.~~

~~WestNet 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.~~

8. ~~dispute resolution~~

~~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 with a 7 day time limit and using reasonable endeavours;~~
- ~~(b) secondly, by mediation between the equivalent Chief Executive Officers and after 14 days if no agreement is reached by expert mediation; and~~
- ~~(c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.~~

COMPLIANCE AND REVIEW

~~The ERA will review the T.P.P. in 2011 through a public consultation process. This review will commence on 1 October 2011 and WestNet will provide the ERA with its proposed revision of its T.P.P. on this date. Subsequent reviews will commence on 1 October every five years thereafter, with WestNet providing its proposed T.P.P. by this date.~~

18. ~~Stakeholders have the ability to express any concern to the ERARegulator, which may arise at any time and the ERARegulator will investigate such claims.~~

19. ~~The ERARegulator has the power under the Code to amend the T.P.P.TPP, at any time and Access Seekers and Operators the public can at any time request the ERARegulator to consider amendments.~~

20. ~~The ERAWhile Brookfield Rail is providing Access under an Access Agreement, or while Brookfield Rail is considering proposals for Access, the Regulator will monitor WestNet's Brookfield Rail's compliance with the Train Path Policy through TPP and where it believes there is reason to do so, the Regulator may request an audit of WestNet's obligations under its Train Path Policy be conducted every two years. This into Brookfield Rail's implementation of the TPP, and such audit will be carried out by an Independent Auditor approved by the ERA, with WestNet managing and funding the audit as follows:~~

- a) ~~The scope of the audit will be determined by the ERARegulator;~~

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~~The final audit report will be provided to the ERA. The ERA will publish this report on its web site (excluding confidential information).~~

~~The ERA can also commission special audits at any time on any T.P.P. issue where additional assurance is required.~~

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10. definitions

- b) The audit will be conducted internally by Brookfield Rail in the first instance, with the Regulator to be provided with the audit findings and associated evidence; and
- c) In the event that the Regulator is not satisfied with the internal audit conducted by Brookfield Rail, it may request that Brookfield Rail engage an independent auditor approved by the Regulator, with Brookfield Rail managing and funding the audit. The independent audit will investigate the application of the TPP with regard to the allocation of Train Paths and the final audit report will be provided to the Regulator.

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that party claiming Force Majeure, including the following causes, events and includes inevitable accident circumstances:

- a) an act of God, lightning, storm, flood, bush fire or fire, earthquake, or explosion, peril of navigation, hostility, cyclone, tidal wave, landslide, heat (including speed restrictions due to the impact of heat or other atmospheric conditions) or adverse weather conditions;
- b) any regional, statewide or nationwide industrial dispute not caused by or contributed to by the party claiming Force Majeure;
- c) an act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, sabotage, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign civil commotion or epidemic;
- d) the effect of any applicable laws, rules, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, breakdown or damage to or confiscation of property but does not include breakdown, orders, judgments, rulings, decisions, decrees or delay enforcement actions of any Train, court, government, tribunal or Rolling Stock other administrative authority which occur after the date of the Agreement and which could not reasonably have been foreseen by the party claiming Force Majeure;
- e) embargo or power shortage; or
- f) the catastrophic failure of, or the breakdown of or accident or other damage to plant, machinery or infrastructure.

but does not include:

- g) lack of funds;
- h) financial hardship;
- i) loss of customers or loss of market share; or
- j) the catastrophic failure of, or the breakdown of or accident or other damage to plant, machinery or infrastructure as a result of a lack of maintenance where such maintenance would have been undertaken by a reasonable and prudent person or where the cause of the event has been the plant, machinery or infrastructure not being operated by the Operator or maintained in accordance with good industry practices.

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Network

~~means the track and infrastructure controlled by WestNet to which Access has or can be granted to an Operator to operate Services under an Access Agreement.~~

Network Instructions

~~means all instructions and directions, issued by WestNet from time to time which:~~

- ~~(a) ensure, facilitate or encourage the proper, efficient, safe and lawful~~
 - ~~(i) use of and access to the Network by all Network users, and~~
 - ~~(ii) management of the Network by WestNet;~~
- ~~(b) are consistent with the Train Management Guidelines; and~~
- ~~(c) are given with a view to minimising the disruption to the Operator in a manner which is reasonable in the circumstances and taking into account the valid objectives of WestNet (as set out in paragraphs (a) and (b) of this definition of "Instructions") in issuing the instruction or direction;~~

~~but does not include instructions and directions which:~~

- ~~(d) derogate from the Train Paths;~~
- ~~(e) prevent the Operator from running a Service of the nature of the Services contemplated at the Commencement Date or as agreed between the parties from time to time; or~~
- ~~(f) are given for the purpose only of achieving WestNet internal commercial objectives unrelated to the valid objectives of WestNet as set out in paragraphs (a) and (b) of this definition of "Instructions";~~

~~unless the instructions or directions:~~

- ~~(g) are Train Control Directions properly given;~~
- ~~(h) relate to safety;~~
- ~~(i) are given to implement or support the Train Management Guidelines;~~
- ~~(j) are necessary to prevent or to minimise the effect of a material breach of an Access Agreement; or~~

~~are otherwise authorised by an Access Agreement. Has the same meaning assigned to "railways network" in Section 3 of the Code; "means —~~

- ~~a) all the railways that were Government railways when the Act received the Royal Assent;~~
- ~~b) all the railways that are on land that is corridor land as defined in the Rail Freight System Act 2000;~~
- ~~c) the railway constructed pursuant to the TPI Railway and Port Agreement; and~~
- ~~d) any railway declared under section 3(2) of the Act to be part of the railways network;"~~

~~(k) but in the context of this document is restricted to~~

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	those items above listed in Schedule 2 of the Code which are controlled by Brookfield Rail and to which Brookfield Rail has a right to grant Access.
Master Control Diagram	means a diagrammatic or electronic record covering specific parts of the Network which shows: <ul style="list-style-type: none"> (iv) all Scheduled Train Paths (Freight or Passenger); (v) all Flexible Scheduled Train Paths (Freight); (vi) all Conditional Train Paths; and (vii) all Reserved Train Paths.
Notified Party	Means WestNet or the person providing access to the Network
Operator	Has the same meaning assigned to "operator" in Section 3 of the Code; "means the Operator or Operator's an entity to which have access to the WestNet Network is provided under an Access Agreement or have made an application for Access under Section 8 of the Code access agreement".
Requesting Party Railway Owner	Means the person or company seeking access to the Network. Has the same meaning assigned to "railway owner" in Section 3 of the Code; "means the person having the management and control of the use of the railway infrastructure concerned", but in the context of this Train Path Policy refers specifically to Brookfield Rail.
Reserved Train Path Regulator	means the future entitlement of the Operator to use a Train Path on the Network and is only received where there are reasonable contractual commitments for its future use. Has the same meaning assigned to "Regulator" in Section 3(1) of the Act; "means the Economic Regulation Authority established by the Economic Regulation Authority Act 2003".
Scheduled Train Path (Freight) Route	means the entitlement of the Operator to use a Train Path for freight services which has a fixed entry and exit time. Means the routes to which the Code applies, as identified in Schedule 1 of the Code.
Scheduled Train Path (Passenger)	means the entitlement of the Operator to use a Train Path on the Network for Passenger Services which has a fixed entry and exit time and fixed intervals for passenger stops in between.
Service	means Means a train Train run by the Operator using the Network by which the Operator provides railway freight or passenger service.
Train	means Means a locomotive and with or without wagons used to operate Services.
Train Control Directions	Means all directions communicated by the Train Controller on duty regarding any network management issue.

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Train Path	is Means an entitlement granted to an Operator by Brookfield Rail to operate a Service on the Network by reference to the day of the week and has to departure, transit and arrival times between the entry and exit points on the Network and includes. In the following typescase, of an ad-hoc, irregular or eccentric Train Path – Conditional Train Path, Scheduled Train Path (Passenger), Scheduled Train Path (Freight), Flexible Scheduled Train Path (Freight) and Reserved Train Path. this definition may also include specific calendar dates on which the entitlement is granted.
Train Management Guidelines (T.M.G.)	means the current Train Management Guidelines approved in accordance with Section 43(4) of the Code.
Train Path Policy (T.P.P./TPP)	means Means Brookfield Rail's Train Path Policy, the current statement of policy referenced in Section 44(2) and approved in accordance with Section 44(3) of the Code. <u>This document is Brookfield Rail's Train Path Policy.</u>
WestNet	means WestNet Rail Pty Limited.
WestNet's Network Rules	means WestNet's rules (including the Appendix to the Rules and Working Timetables) issued in accordance with WestNet's Safety Management Plan approved under Section 40 of the Rail Safety Act 1998 together with any amendments, deletions or additions made in accordance with the Safety Management Plan and all policies and notices issued by WestNet for the purpose of ensuring the safe use of the Network.
Working Timetables	means the train timetables and operating data for all or part of the network issued as part of the WestNet's Network Rules and as amended from time to time.

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Appendix A

1 TRADING IN TRAIN PATHS

1.1 Trading must be in accordance with this clause

The Operator may not trade its rights to any Train Path unless the Operator does so in accordance with the provisions of this clause 1.

1.2 Deemed Sub-licence

If the Operator trades its rights to any Train Path the Operator is taken to have granted a sub-licence to use the relevant Train Path or Train Paths to a Third Party Operator and:

- a) the trading of a Train Path with a Third Party Operator does not in any way release the Operator from, or limit any liability of the Operator in respect of, its obligations in relation to the Train Path under this Agreement; and
- b) without limitation, the Operator indemnifies WestNet from and against all costs and expenses, losses, damage and any other liability suffered or incurred by WestNet as a result of the act or omission of the Third Party Operator or any other person relating to or in connection with the relevant Train Path or Train Paths or the use of the Network by the Third Party Operator or any other person, whether or not the act or omission is negligent or a breach of this Agreement.

1.3 Trading in all Train Paths Prohibited

The Operator must not trade all of its Train Paths but must at all times retain at least one Train Path for its own use.

1.4 Prohibition on Trading Used Train Paths Subject to an Underutilization Notice

A Train Path on which WestNet has issued a notice under Clause 2.5.1 (c) (ii) cannot be on sold during the subsequent 6 month monitoring period. On selling is permitted following this 6 month period provided the Train Path has passed the underutilisation test set out under Clause 2.5.1 (c) (iii).

1.5 Requirements for Trading

If the Operator wishes to trade one or more of its Train Paths, the Operator must arrange for a written agreement to be executed by the Third Party Operator setting out the terms and conditions of the trade. The Trade Agreement must include obligations of the Third Party Operator to:

- a) be bound by and comply with the Access Agreement in relation to the relevant Train Path or Train Paths; and
- b) be properly accredited and provide evidence of accreditation as required by

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the Access Agreement; and

- e) — comply with all Instructions; and
- d) — indemnify the Operator against liabilities arising as a result of the use of the relevant Train Path or Train Paths; and
- e) — take out and maintain insurance in the terms of the Access Agreement; and
- f) — not further trade in the relevant Train Path or Train Paths without WestNet's prior written consent.

1.6 Further Terms of Trade Agreement

The Trade Agreement must also:

- a) — appoint WestNet the attorney of the Third Party Operator for the purpose of enforcing the Trade Agreement if WestNet decides that it wishes to enforce the Trade Agreement against the Third Party Operator; and
- b) — contain a provision that WestNet may enforce the provisions of the Trade Agreement which are for the benefit of WestNet; and
- c) — all recoveries by the Operator under the Trade Agreement which are in common with any matter, act or thing in respect of which WNR has suffered loss is to be held on trust for WNR and is to be applied first in satisfaction of WNR's loss in a manner which WNR in its absolute discretion determines; and
- d) — contain an acknowledgement by the Operator and the Third Party Operator that WestNet is not liable to the Operator or the Third Party Operator in any manner as a result of the trading of the relevant Train Path or Train Paths or as a result of anything connected with that trade and a release of WestNet from any claim by any party under the Trade Agreement; and
- e) — contain any other provisions which WestNet acting reasonably considers to be necessary.

1.7 Commencement of Operation of Trade Agreement

Any Trade Agreement entered into by the Operator with a Third Party Operator is taken not to be capable of having effect or commencing operation unless and until:

- a) — A copy of the Trade Agreement has been submitted to WestNet and WestNet has approved the proposed Trade Agreement as complying with the requirements of this clause 1, such approval not to be unreasonably withheld; and
- b) — WestNet has been given evidence that the Third Party Operator holds the necessary accreditation.

1.8 Definitions

In this clause 1:

- a) — Third Party Operator means any person with whom the Operator enters into

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an agreement of any kind for the trade of a Train Path.

b) ~~trade means, in relation to a Train Path, any agreement by which the Operator gives to a person who is not a party to this Agreement the right to use that Train Path; and other grammatical forms of the word "Trade" have a corresponding meaning.~~

c) **Trade Agreement means any agreement for the trade of a Train Path.**

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