



# Brookfield Rail Draft Determination on Proposed Revised Train Path Policy

August 2012

**Economic Regulation Authority**

WESTERN AUSTRALIA

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# Contents

<b>DRAFT DETERMINATION</b>	<b>1</b>
List of Amendments	1
<b>INTRODUCTION AND OVERVIEW</b>	<b>4</b>
Background	4
Legislative requirements	4
Public Consultation	5
Scope of matters covered under the Draft Determination	6
Discussion of Issues	6
Paragraphs 1-4 - Background and Goals of Train Path Policy	7
Paragraphs 5-9 - Purpose of Guidelines for Allocation of Train Paths	10
Paragraphs 10-14 - Guidelines for Allocating Train Paths in Access Agreements / Disputes Regarding Train Path Allocation.	11
Deleted Sections – Variation, Review and Cancellation of Train Paths	16
Paragraphs 15-17 - Identification of an underutilised Train Path / consequences of an underutilised Train Path.	18
Deleted Sections – ERA’s Approval required, Rights to Sell a Train Path, Competition, Non Discrimination, Consistency with Access Agreement and Dispute Resolution	20
Paragraphs 18-20 - Compliance and Review	23
Definitions	25



# DRAFT DETERMINATION

1. Brookfield Rail is the principal provider of “below” rail freight infrastructure, covering approximately 5,000 kilometres of track in the south-west of Western Australia.
2. On 2 May 2012, Brookfield Rail submitted a proposed revised Train Path Policy (**proposed TPP**) to the Economic Regulation Authority (**Authority**) for approval, in accordance with its approved Train Path Policy of April 2009 (**current TPP**).
3. The Authority’s approval is required, pursuant to section 44 of the Code, before Brookfield Rail can put in place a proposed TPP.
4. The Authority has considered Brookfield Rail’s proposed TPP in conjunction with comments made in submissions to the Authority by interested parties.
5. Following consideration of the requirements set out under section 41 of the Code, the draft determination of the Authority is to approve Brookfield Rail’s proposed TPP, subject to 12 amendments. These amendments are listed below.

## List of Amendments

### Required Amendment 1

- Paragraph 1 of Brookfield Rail’s proposed TPP, should be amended by the replacement the words “railway Network it owns” with “railway network it controls”.
- Paragraph 1 of Brookfield Rail’s proposed TPP should be amended by replacement of the words “Schedule 2” with “Schedule 1”.
- Paragraph 3 of Brookfield Rail’s proposed TPP should be amended by removal of the word “only”.
- Text to the effect of the following should be included following paragraph 4 of Brookfield Rail’s proposed TPP:

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 TPP.

### Required Amendment 2

Paragraph 11 of Brookfield Rail’s proposed TPP, should be amended as follows:

- Delete paragraph 11 and replace with “Subject to clause 13, in the event that the proposal and negotiations are conducted in accordance with the relevant sections of the Code, Brookfield Rail and the entity will detail Train Path allocation in an Access Agreement”.

### Required Amendment 3

Paragraph 12 of Brookfield Rail’s proposed TPP, should be amended as follows:

- Delete “If there is a competing demand for network capacity at the time of proposal and negotiation” and replace with “if there are competing requests for access to the Network”.
- Delete “maximises use of the Network” in (b) and replace with “maximises the efficient use of the Network”.
- Delete “satisfies Brookfield Rail’s commercial objectives” in (c) and replace with “reflects Brookfield Rail’s legitimate business interests and investment in railway infrastructure”.
- Add a new criteria (d) “ensures safe network operations”.
- Following (d) add the words “Otherwise (and subject to section 10 of the Code) Train Paths will be allocated on a first-come first-served basis.”

#### **Required Amendment 4**

Paragraph 13 of Brookfield Rail’s proposed TPP, should be amended as follows:

- Delete “Brookfield Rail may also consider “ and replace with “Brookfield Rail will, where applicable consider the following aspects of each proposal/entity:”
- Delete the word “based” in (b) ii.

#### **Required Amendment 5**

The Definitions section of Brookfield Rail’s proposed TPP should be amended to either provide a complete categorisation of all train path types, or to delete the categorisation of train paths altogether.

#### **Required Amendment 6**

The proposed TPP should be amended to incorporate:

- Paragraphs equivalent to section 2.4 of Brookfield Rail’s current TPP.
- Paragraphs providing an assurance that operators will be consulted on provisions for review of train paths and that underutilisation provisions will be subject to agreement between Brookfield Rail and the operator in an access agreement.
- Paragraphs providing an assurance that provision for cancellation of train paths without penalty will be addressed in access agreements, and will include, as a minimum, when an operator is unable to use a train path due to repair, maintenance or upgrading, or due to derailment, collision or late-running trains.

#### **Required Amendment 7**

Paragraph 16(b) of Brookfield Rail’s proposed TPP should be amended by the replacement of “Brookfield Rail will issue the Operator with a written notice” with “Brookfield Rail may issue the Operator with a written notice”

Paragraph 16(c) of Brookfield Rail’s proposed TPP should be amended by the replacement of “Brookfield Rail not making the Network available” with “Brookfield Rail not making the Train Path available”

Paragraph 16(c) and (d) of Brookfield Rail’s proposed TPP, should both be amended by the addition of “or temporary changes or variations to Train Paths agreed to by Brookfield Rail” after “Brookfield Rail not making the Train Path available”.

### **Required Amendment 8**

Paragraph 17 of Brookfield Rail's proposed TPP should be amended by the addition of the following text:

- Prior to Brookfield Rail withdrawing the contractual entitlement of the Operator to utilise the Train Path, Brookfield Rail will consult with the Operator and provide the Operator with an opportunity to:
  - a) provide any relevant evidence to Brookfield Rail in relation to the underutilisation; or
  - b) demonstrate to Brookfield Rail's reasonable satisfaction a bona fide future requirement for that Train Path."
- In the case of conditional paths, Brookfield Rail and the Operator will agree on the basis on which performance will be assessed.

### **Required Amendment 9**

Brookfield Rail's proposed TPP should be amended to include wording equivalent to section 3 of the current TPP.

### **Required Amendment 10**

Brookfield Rail's proposed TPP should be amended to include wording equivalent to section 4 and Appendix A of the current TPP.

### **Required Amendment 11**

Paragraphs 18-20 of Brookfield Rail's proposed TPP should be amended to replace the existing text with text reflecting the following points:

- The Regulator will review the TPP, through a public consultation process, after a five year period from the current review. Brookfield Rail will submit any proposed revisions of the TPP to the Regulator by 1 October 2016 in order to facilitate this review.
- Part 5, Section 44(4) of the Code enables Brookfield Rail to amend or replace the TPP at any time, with the approval of the Regulator. Section 44(5) of the Code enables the Regulator to direct Brookfield Rail to amend or replace the TPP with another TPP determined by the Regulator at any time.
- Where access agreements have been made, the Regulator will audit Brookfield Rail's compliance with the TPP in the making of those agreements. An audit will be conducted every two years, in respect of any access agreements made over the preceding two year period. The audit will be carried out by an independent auditor approved by the Regulator, with Brookfield Rail funding the audit. The scope of the audit will be determined by the Regulator and the Regulator will manage the audit. The Regulator will publish the final report on its website (excluding confidential information).

### **Required Amendment 12**

The Definitions section of Brookfield Rail's proposed TPP should be amended as follows:

- All definitions relevant to sections of the TPP that were proposed by Brookfield Rail to be deleted but which the Authority has required to be re-instated, should be included.

- The definition of Network should be amended by the replacement of “Schedule 2” with “Schedule 1”.

## INTRODUCTION AND OVERVIEW

### Background

6. WestNet Rail (**WNR**) was acquired in 2009 by Brookfield Infrastructure Partners L.P. as part of its investment in and subsequent merger with Prime Infrastructure. WNR announced that it would become Brookfield Rail in August 2011, aligning its name with that of its parent company.
7. Section 3 of the Act defines a “railway owner” to mean the person having the management and control of the use of the railway infrastructure. Within this context, Brookfield Rail is considered to be the railway owner for the freight rail infrastructure.
8. Brookfield Rail’s rail network is subject to the Code developed as a requirement of the Western Australian *Railways (Access) Act 1998* (**Act**).
9. The Train Path Policy (**TPP**) is one of the four Part 5 Instruments set out in section 40(3) of the Code. Section 40(2) of the Code provides that Part 5 instruments are binding on the railway owner.
10. The TPP is a statement of policy relating to the allocation of train paths and the provision of access to train paths that have ceased to be used. The TPP must be observed by the railway owner in the negotiation and making of an Access Agreement.
11. Associated with the TPP is the Train Management Guidelines (**TMG**). The TMG is a statement of principles, rules and practices that will be applied in the management of train services. Brookfield Rail’s proposed TMG is the subject of a separate determination by the Authority.
12. In making this draft determination, the Authority is mindful of the legislative requirements of the *Rail Safety Act 2010* and the role of the Rail Safety Regulator in TPP related areas. The TPP will need to comply with the requirements of the *Rail Safety Act 2010*.

### Legislative requirements

13. The key areas of the Code and the Act that have relevance to the formulation and application of the TPP are as follows:

#### Code requirements

44. Certain approved statements of policy to be observed
  - (1) A statement of policy for the time being approved or determined by the Regulator under this section in respect of the railway owner must be observed by the railway owner and a proponent in the negotiation and making of an access agreement.
  - (2) 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 policy that it will apply (a statement of policy) in —
    - (a) the allocation of train paths; and



- (b) the provision of access to train paths that have ceased to be used.
- (3) The Regulator may —
  - (a) approve a statement of policy submitted by the railway owner either with or without amendments; or
  - (b) if he or she is not willing to do so, determine what is to constitute the statement of policy.
- (4) A statement of policy 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 a statement of policy; or
  - (b) to replace a statement of policy with another statement of policy determined by the Regulator,
 and the railway owner must comply with such a notice.

### **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.
14. In exercising its decision-making power pursuant to section 44 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**

15. Section 45 of the Code requires the Authority to undertake consultation prior to approving any TPP statement prepared by a railway owner pursuant to section 44(2) of the Code. Section 44(2) of the Code pertains to the initial TPP required to be prepared by a railway owner as soon as is practicable after the commencement of the Code.

16. Public consultation is not required in relation to revisions to the TPP initiated by either the railway owner (section 44(4)) or the Regulator (section 44(5)). Nonetheless, the Authority has chosen to consult with stakeholders in relation to the proposed revisions proposed by Brookfield Rail under section 44(4) due to the range of revisions proposed.
17. On 3 May 2012, the Authority issued a notice on its website calling for submissions from interested parties on Brookfield Rail's proposed TPP by 6 June 2012. Three organisations (Alcoa World Alumina Australia, BHP Billiton Worsley Alumina, and QR National) sought and were granted an extension of the timeframe for public submissions until 8 June 2012.
18. Seven public submissions were received, from:
  - Alcoa World Alumina Australia (**Alcoa**)
  - Asciano (**Asciano**)
  - BHP Billiton Worsley Alumina (**Worsley**)
  - Co-operative Bulk Handling (**CBH**)
  - Department of Agriculture and Food (**DAF**)
  - Department of Transport (**DOT**)
  - QR National (**QRN**)

These submissions are available on the Authority's website.

## Scope of matters covered under the Draft Determination

19. This draft determination deals with matters to be considered in relation to the proper constitution of Brookfield Rail's TPP. Section 44 (Part 4) of the Code does not mandate specific provisions or inclusions to be made in a railway owner's TPP, and does not restrict the scope of matters to be considered.
20. There were some issues raised in submissions which address the application of the Code and other matters which are not relevant to the determination of an appropriate TPP meeting the requirements of the Code. These issues have not been addressed in this draft determination, except where they relate to the application of the TPP to out-of-Code agreements.

## Discussion of Issues

21. This draft determination will address Brookfield Rail's proposed TPP in six sub-sections. These are:
  - Paragraphs 1-4 Background and Goals of Train Path Policy.
  - Paragraphs 5-9 Purpose of Guidelines for Allocation of Train Paths
  - Paragraphs 10-14 Guidelines for Allocating Train paths in Access Agreements, Disputes Regarding Train Path Allocation
  - Paragraphs 15-17 Identification of an underutilised Train, Consequences of a confirmed underutilised Train Path.
  - Paragraphs 18-20 Compliance and Review.
  - Definitions.

22. The numbering convention above reflects component paragraphs of the proposed TPP, as Brookfield Rail has provided numbering for paragraphs but not sections of the document.
23. The following sections of Brookfield Rail's current TPP are proposed by Brookfield Rail to be deleted:
- 2.1 Master Train Plan
  - 2.2.2 Process for negotiating new Train Paths prior to an access agreement.
  - 2.4 Permanent Variations to Scheduled Train Paths by Agreements.
  - 2.5 Removal of a Train Path.
  - 2.6 Review of Train Paths.
  - 2.7 Cancellation of Services using Train Paths.
  - 3 ERA's Approval Required.
  - 4 Rights of an Operator to sell a Train Path.
  - 5 Competition for the same Train Path.
  - 6 Non Discrimination.
  - 7 Consistency between Access Agreements and the TPP and TMG.
  - 8 Dispute Resolution
24. The following discussion is structured to coincide with the six sub-sections in the proposed TPP identified above. Proposed amendments to each of these sub-sections, including the deleted sections, are undertaken in the following order:
- A summary of Brookfield Rail's proposals relating to that section.
  - An outline of comments received in submissions relating to that section.
  - The Authority's assessment.
  - Any required amendments.

## Paragraphs 1-4 - Background / Goals of Train Path Policy

### *Brookfield Rail's Proposal*

25. This section of Brookfield Rail's proposed TPP corresponds to sections 1.1 and 1.2 of the current TPP. Brookfield Rail has proposed the deletion of section 1.1 (Background) of the current TPP, such that this section of the proposed TPP is comprised only of information contained in section 1.2 (Relevance of Train Path Policy) of the current TPP.
26. The description of the goals of the TPP in the proposed TPP is equivalent to the description in the current TPP.
27. In the current TPP, WNR committed to applying the TPP to all track access arrangements, regardless of whether they were made inside or outside of the Code. The Code requires only that the TPP apply to access agreements negotiated within the Code.
28. Brookfield Rail has proposed to amend the TPP to state (at paragraph 3) that 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, which is given the

same meaning as ‘access agreement’ in the Code, being an access agreement negotiated under the Code.

29. The current TPP contains a statement to the effect that access agreements explicitly provide that an Operator may engage a third party as its agents or contractor to perform the obligations of the Operator under the access agreements, including for the purpose of the TPP. This statement has been removed from the proposed TPP.

### **Public Submissions**

30. QRN has submitted that, there is an inconsistency between paragraph 1 and 2 of the proposed TPP, reflecting the ownership status of the network.
31. DAF, Alcoa, Worsley, QRN and CBH expressed concern that the proposed TPP would apply to access agreements made under the Code only, and not to all track access arrangements.
32. DAF submitted that it would be prudent to maintain the statement in the current TPP that it would apply to all operators, regardless of whether the track access arrangement is made inside or outside the Code. DAF submitted that this would allow a transparent process for allocation of all train paths.
33. Alcoa submitted that it is not practical to have one set of rules for trains within the Code, and potentially another set for trains outside the Code. Alcoa submitted that it is not logical that in an open and fair access regime, train paths can be allocated under a different set of principles depending on whether an entity elects to seek access within or outside the Code.
34. Worsley submitted that it is not practical or consistent with an open and fair access regime to have one set of rules for entities who elect access under the Code, and potentially another set for entities who elect access outside the Code.
35. QRN submitted that, by changing their policy of applying the TPP to all agreements, Brookfield have created uncertainty as to how capacity will be allocated and managed between parties operating pursuant to agreements negotiated inside or outside of the Code. QRN further submitted that Brookfield Rail should clarify how competing requests for capacity negotiated inside or outside the Code will be treated.
36. CBH submit that confining the application of the TPP to access agreements would limit the application and utility of the TPP.

### **Authority’s Assessment**

37. Some interested parties submitted that the Code should be amended to require that the TPP be applied to all arrangements for track access. This contention is outside the scope of this review, and has not been addressed by the Authority in this determination. The Code review process is a separate undertaking initiated by the Authority every five years.
38. The Authority notes that Brookfield Rail has defined a Railway Owner and Network in the definitions section of the TPP. The definition of Railway Owner has the same meaning assigned to railway owner in Section 3 of the Code; meaning: “the person having the management and control of the use of the railway infrastructure concerned”. Within this context, Brookfield Rail is considered to be the railway owner for the purposes of the TPP. The Authority nonetheless agrees that there is an

apparent inconsistency between the wording used to describe Brookfield Rail's 'ownership' status of the network in paragraphs 1 and 2, and that this inconsistency should be removed.

39. The Authority notes that Brookfield Rail has referred to Schedule 2 of the Code as being where the routes to which the Code applies are listed. This appears in paragraph 2 and under the definition of network in 'Definitions'. The correct schedule is Schedule 1.
40. It is clear from section 4A of the Code that the railway owner is not obliged to extend the application of the TPP, which is a Part 5 instrument defined in section 40(3) of the Code, to all track access arrangements, including arrangements made outside of the Code.

#### **4A. Parties have option to negotiate agreements outside this Code**

- (1) To avoid doubt it is declared to be the case that –
  - (a) the parties concerned may choose whether negotiations for an agreement for access are carried on under this Code or otherwise; and
  - (b) if the parties choose to negotiate an agreement for access otherwise than under this Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement; and
  - (c) in particular, without limiting paragraph (b), a Part 5 instrument, as defined in section 40(3), is not to be taken into account in determining the rights, powers, duties and remedies of parties to negotiations carried on or an agreement made otherwise than under this Code, except to the extent that the parties concerned agree otherwise.
41. The rail access legislation allows Brookfield Rail to enter into track access arrangements outside of the Code with terms and conditions as agreed between Brookfield Rail and the access seeker. Brookfield Rail can, in these circumstances, choose to negotiate equivalent arrangements to those in its TPP, or other arrangements, as it considers appropriate. The Authority therefore considers that the use of the word 'only' in paragraph 3 to be inappropriate as it precludes the application of the TPP to out-of-Code arrangements.
42. The Authority considers that the statement indicating that an Operator may engage a third party as its agent or contractor to perform the obligations of the Operator under the Access Agreement, should be retained, as this provides for the contracting of rolling stock services by an operator.
43. The Authority is aware that it has become common practice in Australia for railway owners to issue separate "commercial" and "track" access agreements, to "customers" and "operators" respectively, where the "customer" holds the access rights and responsibilities, and the "operator" undertakes all rolling stock related functions on behalf of the "customer".
44. The Code does not provide for a distinction between a "customer" and an "operator", and all Part 5 instruments must be framed in terms of an "operator" who has roles of both "customer" and "operator" as described above, in order to be consistent with the Code.
45. The Authority notes that Brookfield Rail has proposed to replace the term ERA in all cases with the term Regulator. As Brookfield Rail has appropriately defined the term Regulator in the Definitions section of the proposed TPP, the Authority does not object to this change.

## ***Draft Determination***

### **Required Amendment 1**

- Paragraph 1 of Brookfield Rail's proposed TPP, should be amended by the replacement the words "railway Network it owns" with "railway network it controls".
- Paragraph 1 of Brookfield Rail's proposed TPP should be amended by replacement of the words "Schedule 2" with "Schedule 1".
- Paragraph 3 of Brookfield Rail's proposed TPP should be amended by removal of the word "only".
- Text to the effect of the following should be included following paragraph 4 of Brookfield Rail's proposed TPP:

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 TPP.

## **Paragraphs 5-9 - Purpose of Guidelines for Allocation of Train Paths**

### ***Brookfield Rail's Proposal***

46. This section of the proposed TPP corresponds to sections 2.1 and 2.2 of the current TPP.
47. Brookfield Rail has proposed the deletion of section 2.1 (Master Train Plan) from the current TPP. Section 2.1 of the current TPP states that WNR will maintain a Master Control Diagram for those routes under its control that are subject to the Code.
48. Brookfield Rail has proposed to remove from section 2.2 material which describes:
  - That train paths will be negotiated as part of an access agreement and recorded in a schedule to the access agreement.
  - That if an operator believes that WNR has not complied with the TPP or the provisions of the Code in the negotiation of an access agreement, that they may seek to have the matter arbitrated under section 25(c) of the Code. This material now appears in paragraph 14 of the proposed TPP.
49. Brookfield Rail has proposed to add material to this section which describes:
  - That the railway owner must not unfairly discriminate between rail operators,
  - That an Access Agreement must not grant to any entity the exclusive rights to use or occupy any Route,

- That 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.

### **Public Submissions**

50. QRN noted that Brookfield Rail has removed the commitment to maintain a Master Train Control Diagram and the reference to the Master Train Control Diagram when determining the availability of train paths. QRN noted that, under Schedule 2 of the Code, the preliminary information that Brookfield Rail is to make available includes available capacity. QRN submitted that the availability of the Master Control Diagram in the TPP provides an indication of the form and methodology for providing available capacity information.
51. QRN has submitted that Brookfield Rail should provide information as to why references to the Master Control Diagram have been removed from the proposed TPP and provide a suitable alternative to the existing arrangements. If none can be provided then the existing wording regarding the commitment to maintain a Master Control Diagram should be retained.

### **Authority's Assessment**

52. The Authority notes that the current TPP indicates that WNR will maintain a Master Control Diagram for those routes under its control that are subject to the Code. The current TPP does not indicate that the Master Control Diagram will be made available to operators.
53. The Master Control Diagram includes details of all train paths on a particular section of the network. As such, it may contain confidential commercial information.
54. The Authority agrees that Brookfield Rail have a requirement under Schedule 2 of the Code to make certain capacity-related information available to access seekers. The Code does not stipulate that the basis for making this information should be made available, or that a commitment to make this information available needs to be stated in the TPP.

### **Draft Determination**

55. The Authority does not require Brookfield Rail to make any amendments to paragraphs 5-9 in the proposed TPP.

## **Paragraphs 10-14 - Guidelines for Allocating Train Paths in Access Agreements / Disputes Regarding Train Path Allocation.**

### **Brookfield Rail's Proposal**

56. This section of the proposed TPP corresponds to sections 2.2.1 and 2.2.2 of the current TPP.
57. Brookfield Rail has removed the first-in first-served basis of allocation as a 'fall-back' provision following consideration of the requirements of sections 9 and 10 of the Code, which remain as primary criteria.



58. Brookfield Rail has proposed the deletion of section 5 (competition for the same Train Path) of the current TPP and replaced it with Paragraph 12 in the proposed TPP. Paragraph 12 states:
- If there is 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 competing demand for limited Network capacity;
  - b) maximises use of the Network; and
  - c) satisfies Brookfield Rail's commercial objectives.
59. Brookfield Rail has proposed the deletion of section 2.2.2 of the current TPP, which set out the process for negotiating new train paths as part of an access agreement. This process included the railway owner referring to the Master Train Control Diagram to determine whether the requested train paths are available.
60. Brookfield Rail has removed reference to scheduled train paths, flexible scheduled train paths and conditional train paths. This has been replaced with a generic definition of train paths that includes ad-hoc, irregular and eccentric train paths.
61. Brookfield Rail has included provisions for dispute resolution in this section. Provisions for dispute resolution are detailed in section 8 of the current TPP.

### **Public Submissions**

62. Alcoa, Worsley and CBH expressed concern that Brookfield Rail is proposing to replace specific obligations in the existing TPP with less certain statements such as "may be in a position" or "may also consider". These submissions noted that the current TPP provides a clear process for allocating and providing access to train paths during the negotiation period between Brookfield Rail and an access seeker.
63. CBH submitted that paragraph 11 of the proposed TPP states that if an access seeker complies with the process outlined in the Code, "Brookfield Rail and the entity may be in a position to detail Train Path allocation in an Access Agreement." CBH has submitted that the use of the word "may" would enable Brookfield Rail to withhold detailing specific train paths.
64. Alcoa, Worsley and CBH expressed concern with the proposed introduction of a test for the allocation of train paths based on satisfying "Brookfield Rail's commercial objectives" in paragraph 12 of the proposed TPP. Worsley submitted:
- It is logical to assume that a key commercial objective for Brookfield Rail will be to maximise profits. If access to train paths is to be allocated so as to maximise Brookfield Rail's profits, then the access seeker willing to pay the most for access is more likely to be allocated a train path. With access rates on many routes having a large differential between floor and ceiling prices, there is a wide range of rates that can be paid and those with deepest pockets will be best able to satisfy Brookfield Rail's commercial objective in this regard.
- In Worsley's view, determining train path allocation with reference to Brookfield Rail's commercial objectives is not consistent with the Code's objective to ensure that train paths are fairly allocated. Worsley submits that these proposed changes should be refused by the Regulator.



65. QRN submitted that criteria (a) of paragraph 12 of the proposed TPP does not provide access seekers with sufficient certainty, but agrees that it is appropriate to include a fairness obligation for the benefit of access seekers.
66. QRN submitted that criteria (b) and (c) of paragraph 12 of the proposed TPP provide some certainty as to how these competing requests will be dealt with. However, QRN considers that further information is required in the circumstances where (b) and (c) do not materially differentiate the requests. QRN suggested that, under these conditions, it would be appropriate for the decision to be based on a 'first-come first-served' basis.
67. QRN noted that criterion (c) of paragraph 12 of the proposed TPP does not provide access seekers with clarity as to what may constitute Brookfield Rail's commercial objectives. QRN submitted that an approach similar to the ARTC Interstate Access Undertaking, where the present value of future returns is used as a criteria, would better serve the interests of access seekers.
68. QRN submitted that in order to inform the risks to a project, access seekers need to understand the cost and likelihood of contracting capacity to the rail network. To assist access seekers in managing this risk appropriately, QRN suggests that Brookfield Rail's TPP include obligations on Brookfield Rail to:
- notify access seekers of competing access requests (including where the request is for a path that is currently contracted but will be available on the expiration of the contract); and
  - not conduct parallel negotiations for competing access requests.
69. QRN further suggested that:
- References to 'competing demand' in paragraph 12 of the proposed TPP be changed to 'competing access requests'; and
  - Criterion (b) in paragraph 12 of the proposed TPP be changed to 'maximises the safe and efficient use of the Network'.
70. CBH submitted that section 2.2.2 of the current TPP (proposed to be deleted) provides a clear process identifying and detailing Train Paths during the negotiation period between Brookfield Rail and an access seeker and that this section should not be deleted.
71. DAF submitted that paragraph 13 of Brookfield Rail's proposed TPP should be amended to state: "In addition, Brookfield Rail MUST also consider the following aspects of each proposal/entity". In particular, DAF considers that provisions (c), (d) and (e) of paragraph 13 of Brookfield Rail's proposed TPP are of most importance when considering grain rail transportation needs.
72. CBH submitted that the proposed TPP removes all references to "conditional paths", and that this appears to diminish the need for allocating train paths for grain.

### **Authority's Assessment**

73. The Authority considers that the use of words "may be in a position to" and "may also consider" are less certain than the statements in the current TPP which provide for more certain outcomes.

74. The Authority considers that the reference to competing demand needs to be clarified, in paragraph 12 of the proposed TPP, to refer to competing requests for access and not already-contracted demand.
75. The Authority recognises that ‘first-come first-served’ basis for allocation of train paths is a logical basis if all other criterion are met equally by competing requests. The Authority also recognises that competing requests meeting all other criterion equally is unlikely. By this token, the Authority considers that the inclusion of a “first-come first-served” criterion as a fallback basis for train path allocation will not impose a regulatory burden on Brookfield Rail.
76. The Authority considers that the test for allocation in paragraph 12 of the proposed TPP should include safety and efficiency components.
77. The Authority acknowledges that criteria (c) of paragraph 12 of the proposed TPP does not provide an indication as to what may constitute Brookfield Rail’s commercial objectives. The Authority does not consider that Brookfield Rail’s commercial objectives must be detailed in the TPP, and does not consider that a requirement to define these objectives in terms of a specific metric is warranted.
78. The Authority considers that the Code does not require the TPP to detail processes for variations to train paths. The Authority considers that the TPP is a policy document describing how train paths will be allocated in an access agreement, which is a commercial contract. The Authority considers that provision for variations to such contracts should be detailed on a case by case basis in access agreements, as these may vary according to operators’ circumstances and requirements.
79. The Authority notes CBH’s submission that the removal of ‘conditional train path’ diminishes the need to allocate train paths for grain. CBH did not substantiate this submission with further explanation.
80. The Authority notes that the definition of conditional train path in the current TPP allows the allocation of a scheduled train path on a non-take-or-pay basis. Such a train path amounts to the reservation of capacity for an operator, without penalty to the operator if not required.
81. Clearly, in CBH’s case, conditional train paths have been previously contemplated in order to allow for ‘surge capacity’ or additional capacity requirements due to seasonal factors. The Authority notes that this may restrict Brookfield Rail’s ability to meet its legitimate commercial interests in maximising the utilisation of the network.
82. The Authority is aware of the distinction between train paths which are scheduled for the same time everyday (concentric train paths), and those train paths which do not cycle within a 24 hour period, but are nonetheless scheduled regularly (eccentric train paths). In relation to Brookfield Rail’s definition of train paths as ad-hoc, irregular or eccentric, the Authority notes that none of these definitions include a concentric train path, and therefore considers the definition of train path in the Definitions section to be incomplete.
83. As the terms “ad-hoc, irregular or eccentric” do not appear in the body of the proposed TPP, but only in the Definitions section, the Authority considers that this categorisation of train paths is not required in the Definitions section.

### Required Amendment 2

Paragraph 11 of Brookfield Rail's proposed TPP, should be amended as follows:

- Delete paragraph 11 and replace with "Subject to clause 13, in the event that the proposal and negotiations are conducted in accordance with the relevant sections of the Code, Brookfield Rail and the entity will detail Train Path allocation in an Access Agreement".

### Required Amendment 3

Paragraph 12 of Brookfield Rail's proposed TPP, should be amended as follows:

- Delete "If there is a competing demand for network capacity at the time of proposal and negotiation" and replace with "if there are competing requests for access to the Network".
- Delete "maximises use of the Network" in (b) and replace with "maximises the efficient use of the Network".
- Delete "satisfies Brookfield Rail's commercial objectives" in (c) and replace with "reflects Brookfield Rail's legitimate business interests and investment in railway infrastructure".
- Add a new criteria (d) "ensures safe network operations".
- Following (d) add the words "Otherwise (and subject to section 10 of the Code) Train Paths will be allocated on a first-come first-served basis."

### Required Amendment 4

Paragraph 13 of Brookfield Rail's proposed TPP, should be amended as follows:

- Delete "Brookfield Rail may also consider " and replace with "Brookfield Rail will, where applicable consider the following aspects of each proposal/entity:"
- Delete the word "based" in (b) ii.

### Required Amendment 5

The Definitions section of Brookfield Rail's proposed TPP should be amended to either provide a complete categorisation of all train path types, or to delete the categorisation of train paths altogether.

## Deleted Sections – Temporary and Permanent Variations to Train Paths, Review and Cancellation of Train Paths

### *Brookfield Rail's Proposal*

- 84. Brookfield Rail has proposed the deletion of section 2.3 of the current TPP, which provided that the railway owner could temporarily vary an Operator's train path by giving an instruction in certain circumstances.
- 85. Brookfield Rail has proposed the deletion of section 2.4 of the current TPP, which established the procedures to be following by the parties where either the railway owner or the operator requests a permanent variation to the scheduled train path.
- 86. Brookfield Rail has proposed the deletion of section 2.6 of the current TPP, which established the procedures to be following by the parties where either the railway owner or the operator requests a review of train paths.
- 87. Brookfield Rail has proposed the deletion of section 2.7 of the current TPP, which sets out the policy of the railway owner for granting an operator the right to cancel a train path without penalty.

### *Public Submissions*

- 88. CBH submitted that most of the safeguards and processes which exist in the TPP are proposed to be removed. For example: sections 2.3, 2.4, 2.6 and 2.7 (variation and review of Train paths).

Having a framework and processes approved by the regulator covering the matters dealt with by sections 2 and 4 of the current TPP would provide the simplest solution to Brookfield Rail and an access seeker avoiding the need to negotiate and potentially arbitrate basic train path allocation matters.
- 89. In its submission, QRN acknowledged that the ability to permanently vary train service appropriately sits in an access agreement. QRN nonetheless submitted that section 2.4 of the current TPP should not be removed, as the inclusion of this provision in the TPP provides transparency on the minimum terms and conditions to apply. QRN submitted that the permanent variation of a train path relates directly to the allocation and management of capacity and provides information regarding the efficiency of the network and is necessary in order to assess capacity rights.
- 90. QRN submitted section 2.7 of the current TPP should not be removed, as the provision for cancellation of services provides transparency on the minimum terms and conditions to apply and is directly related to the allocation and management of capacity. QRN submitted that such provision provides information regarding the efficiency of the network and is necessary in order to assess capacity rights.
- 91. DOT submitted that the current TPP includes clauses with respect to negotiating new train paths, dealing with temporary and permanent variations of train paths, removal and cancellation of train paths. DOT submitted that the proposed TPP focuses instead on underutilisation of train paths and how Brookfield proposes to manage that situation.

## Authority's Assessment

92. In relation to the proposed deletion of section 2.3 of Brookfield Rail's current TPP, the Authority understands that Brookfield Rail may issue instructions which amount to temporary variations to train paths and that these are issued for operational (maintenance, emergency) reasons and not for commercial reasons. The Authority notes that the need to temporarily vary a train path is most likely to arise from issues affecting the day-to-day management of train services and that provisions for the issuing of instructions is addressed at section 2.1 of Brookfield Rail's current TMG.
93. In relation to the proposed deletion of section 2.4 of Brookfield Rail's current TPP, the Authority considers that the provisions for permanent variation of train paths is a necessary provision of an access agreement. Nonetheless, the Authority considers that the inclusion of a basic level of guidance on permanent train path variation provides transparency on the minimum terms and conditions to apply in an access agreement.
94. In relation to the proposed deletion of section 2.6 of Brookfield Rail's current TPP, the Authority considers that provisions for review of train paths is a necessary provision of an access agreement. The Authority acknowledges that the particular criterion for review of train paths will vary between operators and between the types of train paths under contract. The Authority nonetheless considers that the TPP should contain a general assurance that operators will be consulted on provisions for review of train paths, and that underutilisation provisions will be subject to agreement between Brookfield Rail and the operator in an access agreement.
95. In relation to the proposed deletion of section 2.7 of Brookfield Rail's current TPP, the Authority considers that detailed provisions for the cancellation of train paths without penalty are appropriately addressed in individual access agreements and are not able to be foreshadowed in the TPP, as circumstances will vary between operators.
96. The Authority nonetheless considers that the TPP should include an assurance that provision for the cancellation of train paths without penalty will be addressed in access agreements and that these provisions will include, as a minimum, clause 2.7(v) of the current TPP. Clause 2.7(v) of the current TPP relates to the inability of an operator to use a train path due to repair, maintenance or upgrading of the network, or due to derailment, collision or late-running trains.

## Draft Determination

### Required Amendment 6

The proposed TPP should be amended to incorporate:

- Paragraphs equivalent to section 2.4 of Brookfield Rail's current TPP.
- Paragraphs providing an assurance that operators will be consulted on provisions for review of train paths and that underutilisation provisions will be subject to agreement between Brookfield Rail and the operator in an access agreement.
- Paragraphs providing an assurance that provision for cancellation of train paths without penalty will be addressed in access agreements, and

will include, as a minimum, when an operator is unable to use a train path due to repair, maintenance or upgrading, or due to derailment, collision or late-running trains.

## **Paragraphs 15-17 - Identification of an underutilised Train Path / consequences of an underutilised Train Path.**

### ***Brookfield Rail's Proposal***

97. This section of the proposed TPP corresponds to section 2.5 of the current TPP. Brookfield Rail has proposed a number of amendments to this section, which establishes a process for the railway owner to withdraw the rights to a train path where it can be demonstrated that the train path is under-utilised. These amendments include:
- Deleting the limitations on the situations in which the railway owner will withdraw a train path due to lack of use;
  - Increasing the monitoring period for the railway owner to assess whether a train path is being under-utilised from three weeks to three months;
  - Changing the manner in which an operator is assessed as having under-utilised a train path from 'more than six weeks in aggregate in the period of six months from the date of WestNet's notice' to 'more than six times in aggregate in a six month period from the date of notice'.
  - Deletion of the description of the circumstances in which a services has been deemed to have 'not been operated';
  - Deletion of provisions relating to the removal of a train path due to a transfer of a contract between operators; and
  - Inserting a statement that "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".

### ***Public Submissions***

98. QRN submitted that the removal of underutilised train paths is intended to improve efficiency of the network, and that the efficient use criteria require that there is an alternative use for those train paths. QRN submitted that application of the provisions in this section should only be required in the circumstances where there is competing demand for the underutilised path.
99. QRN submitted that a train path should not be identified or confirmed as underutilised where Brookfield has agreed to the temporary variation or have made available an alternative path that is then used by the operator.

100. QRN submitted that in other jurisdictions it is accepted practice for the operator to retain a train path identified as underutilised where they are able to reasonably demonstrate demand for the path.
101. QRN submitted that the threshold for confirming a train path as underutilised should be relative to the number of services run on that path, rather than the current time-based threshold.
102. Asciano submitted that paragraph 16 should explicitly permit an operator to provide any relevant evidence to Brookfield Rail in relation to the under-utilisation of the train path. For example, the operator may have evidence of force majeure or other information which impacts on the assessment of utilisation of the train path.
103. DAF submitted that the provision of access to under-utilised train paths takes a long term view (3 month monitoring period for a 'notice' and a further 6 month utilisation period), when perhaps only a short-term reallocation of access may be required. DAF is concerned that an above-rail operator could under-utilise a portion of the rail network, and continue to maintain access, at the expense of efficient movement of grain to port via an alternative rail operator.
104. CBH submitted that conditional Train Paths, by their nature, should not be subject to an underutilisation test which does not appropriately take into account the seasonality in the relevant haulage task. This is recognised in section 2.6 of the current TPP, which states that WNR and the operator will agree the basis on which the performance of Conditional Paths will be assessed.

### **Authority's Assessment**

105. The Authority does not consider that removal of underutilised train paths should only be required in the circumstances where there is competing demand. The Authority is of the view that the network owner may be able to improve the efficiency of existing operations on the network by removal of an underutilised train path.
106. The Authority considers that paragraph 16(c) and (d) should be amended to include reference to "temporary changes or variations to train paths agreed to by Brookfield Rail". The Authority notes inconsistent wording between paragraphs 16(c) and 16(d) of the proposed TPP, and considers that both sub-paragraphs should refer to a circumstance where Brookfield Rail does not make a train path available.
107. The Authority agrees that operators should be provided with the opportunity to provide relevant evidence to demonstrate demand for the train path.

### **Draft Determination**

#### **Required Amendment 7**

Paragraph 16(b) of Brookfield Rail's proposed TPP should be amended by the replacement of "Brookfield Rail will issue the Operator with a written notice" with "Brookfield Rail may issue the Operator with a written notice".

Paragraph 16(c) of Brookfield Rail's proposed TPP should be amended by the replacement of "Brookfield Rail not making the Network available" with



“Brookfield Rail not making the Train Path available”.

Paragraph 16(c) and (d) of Brookfield Rail’s proposed TPP, should both be amended by the addition of “or temporary changes or variations to Train Paths agreed to by Brookfield Rail” after “Brookfield Rail not making the Train Path available”.

#### Required Amendment 8

Paragraph 17 of Brookfield Rail’s proposed TPP should be amended by the addition of the following text:

- Prior to Brookfield Rail withdrawing the contractual entitlement of the Operator to utilise the Train Path, Brookfield Rail will consult with the Operator and provide the Operator with an opportunity to:
  - a) provide any relevant evidence to Brookfield Rail in relation to the underutilisation; or
  - b) demonstrate to Brookfield Rail’s reasonable satisfaction a bona fide future requirement for that Train Path.”
- In the case of conditional paths, Brookfield Rail and the Operator will agree on the basis on which performance will be assessed.

## Deleted Sections – ERA’s Approval required, Rights to Sell a Train Path, Competition, Non Discrimination, Consistency with Access Agreement and Dispute Resolution

### *Brookfield Rail’s Proposal*

108. Brookfield Rail has proposed the deletion of section 3 of the current TPP, which provides that:

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.

109. Brookfield Rail has proposed the deletion of section 4 of the current TPP, which provides for the rights of an operator to sell a train path in accordance with the provisions set out in Appendix A in the current TPP.
110. Brookfield Rail has proposed the deletion of section 5 of the current TPP, which describes processes for dealing with competition for the same train path. Provisions for these processes have been discussed in the section addressing Paragraphs 10-14 in this Draft Determination.
111. Brookfield Rail has proposed the deletion of section 6 of the current TPP. This section establishes that the railway owner will not discriminate between operators in the application of the TPP.



112. Brookfield Rail has proposed the deletion of section 7 of the current TPP. This section establishes that the railway owner 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.
113. Brookfield Rail has proposed the deletion of section 8 of the current TPP. Section 8 highlights the area of the Code that provides for arbitration of disputes in the making of access agreements and describes the process that will be applied in resolving disputes once an access agreement has been entered into. Brookfield Rail has proposed to replace section 8 of the current TPP with paragraph 14 of the proposed TPP.

### **Public Submissions**

114. No comments were made in the public submissions about the proposed deletion of section 3 of the current TPP.
115. CBH submitted that the proposed removal of section 4 of the current TPP (rights to sell a train path) constitutes the removal of a safeguard. CBH did not expand on this assertion.
116. QRN submitted that non-discrimination is a fundamental objective of the TPP and that section 6 of the current TPP should be included in the proposed TPP.
117. No comments were made in the public submissions about the proposed deletion of section 7 of the current TPP.
118. No comments were made in the public submissions about the proposed deletion of section 8 of the current TPP.

### **Authority's Assessment**

119. Section 3 of the current TPP outlines the requirements of section 10 of the Code which stipulates that ERA approval must be received for allocation of a train path which would preclude other users. Although section 10 (Part 2 – Proposals for Access) is separate from Part 5 of the Code, the provisions of section 10 are an important constraint on the railway owner in the allocation of train paths in an access agreement. The Authority considers that including a reference to section 10 in the TPP provides guidance to potential access seekers and does not create a regulatory burden on the railway owner.
120. The Authority has not received any substantiated objections in submissions to the removal of section 4 of Brookfield Rail's current TPP.
121. The Authority recognises that ensuring an operator's right to on-sell train paths may interfere with Brookfield Rail's ability to reconfigure train paths and optimise utilisation of its network when the opportunity arises to do so.
122. The Authority considers that in the absence of a defined class of 'conditional' train paths, the scope for an access agreement to accommodate surge capacity requirements is not described in the TPP. Surge capacity is required by operators when, for example, seasonal factors impact on the freight task. Conditional train

paths as defined in Brookfield Rail's current TPP, enable train paths to be scheduled to accommodate surge capacity.

123. The Authority is aware that the Australian Rail Track Corporation includes provisions for the sub-leasing of train paths in its template access agreement. The Authority is also aware that the management of surge capacity requirements near the Hunter Valley is managed by the operations of the Hunter Valley Coal Chain Co-ordinator Ltd and that the sub-leasing provisions of ARTC's access agreement are generally not used for this purpose. The Hunter Valley Coal Chain Co-ordinator is a 'clearing house' for allocating train paths to meet coal shippers' surge capacity requirements.
124. The Authority considers that, in the absence of provisions for surge capacity, the provisions for sub-leasing of train paths should remain in Brookfield Rail's TPP. The Authority will consider this matter further following receipt of submissions in response to this draft determination.
125. The Authority considers that section 6 of the current TPP is not required as non-discrimination is a general requirement outlined in section 16 of the Code. Section 16 of the Code provides that the railway owner must not unfairly discriminate between one proponent and another in the negotiation of access agreements, including without limitation, in relation to –
  - a) the allocation of train paths;
  - b) the management of train control; and
  - c) operating standards.

The Authority also notes that Brookfield has included "fairness of treatment between Operators" as a goal of the TPP in paragraph 4 of the proposed TPP.

126. The Authority recognises that an access agreement, although subject to regulation oversight, is a contract document owned by the railway owner and the operator. The Authority acknowledges that the form of this contract is at the discretion of the parties signatory to it. Moreover, the access agreement is subject to audit review in relation to its adherence to the provisions of the TPP. In relation to the consistency between the TPP and TMG documents, the Authority considers that it has adequate opportunity to review these documents and to require any measure of consistency it considers appropriate at those times.
127. The Authority considers that Paragraph 14 of the proposed TPP adequately outlines the provisions of the Code that an entity must consider if they have a dispute with Brookfield Rail regarding train path allocation. The Authority considers that the provisions outlined by Brookfield Rail in Paragraph 14 adequately cover the requirements in the Code in this respect.

**Required Amendment 9**

Brookfield Rail's proposed TPP should be amended to include wording equivalent to section 3 of the current TPP.

**Required Amendment 10**

Brookfield Rail's proposed TPP should be amended to include wording equivalent to section 4 and Appendix A of the current TPP.

**Paragraphs 18-20 - Compliance and Review**

***Brookfield Rail's Proposal***

128. This section of the proposed TPP corresponds to section 9 of the current TPP.
129. Brookfield Rail has proposed to delete the following clauses of section 9 of the current TPP:
- Reviews of the TPP will commence on 1 October every five years after the initial review in 2011, with WestNet providing its proposed TPP by this date.
  - The ERA will monitor WestNet's compliance with the TPP through an audit of WestNet's obligations under its TPP conducted every two years. This audit will be carried out by an Independent Auditor approved by the ERA, with WestNet managing and funding the audit. The scope of the audit will be determined by the ERA.
  - The final audit report will be provided to the ERA. The ERA will publish this report on its web site (excluding confidential information).
  - The ERA can also commission special audits at any time on any TPP issue where additional assurance is required.
130. Brookfield Rail proposes to include the following statements in this section:
- While Brookfield Rail is providing Access under an Access Agreement, or while Brookfield Rail is considering proposals for Access, the Regulator will monitor Brookfield Rail's compliance with the TPP and where it believes there is reason to do so, the Regulator may request an audit be conducted into Brookfield Rail's implementation of the TPP, and such an audit will be carried out as follows.
- a) The scope of the audit will be determined by the Regulator.
  - b) The audit will be conducted internally by Brookfield Rail in the first instance, with the Regulator being provided the findings and associated evidence.
  - c) In the event that the Regulator is not satisfied with the internal audit, 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.

***Public Submissions***

131. Alcoa submitted that a regular review of the TPP should occur irrespective of any issue being raised with the Regulator. Alcoa submitted that the proposed changes to

the TPP would effectively restrict the Regulator's audit rights to those circumstances where access is provided under the Code. This will severely restrict the ability of the Regulator to carry out its intended functions.

132. DAF submitted that the proposed changes to section 9 of the current TPP will limit the ERA's ability to perform its role. DAF submitted that the ERA should be able to monitor agreements whether they were operating under the Code or not. DAF submitted that publication of audit reports to allow transparency should be required.
133. QRN noted that Brookfield Rail has proposed an additional step prior to an independent audit, which is an internal audit conducted by Brookfield Rail. QRN submitted that a Regulator-appointed independent audit should instead be conducted every two years unless it can be demonstrated that it is not required. QRN submitted that, if Brookfield were to seek to waive the requirement for the independent audit, stakeholders should be provided with an opportunity to comment on the rationale provided by Brookfield. QRN submitted that this would provide transparency around the decision-making process, and provide stakeholders the opportunity to outline – on a collective basis – potential issues of compliance that might not be brought to the attention of the regulator on an individual basis and limit the regulatory burden.
134. QRN submitted, as a further alternative, that the obligations for the audit of performance reports contained in the ARTC Interstate Access Undertaking would provide a reasonable model for compliance and review for Brookfield Rail. Under this model the audit is part of the annual internal audit process and the internal audit is conducted by an independent entity. QRN submitted that this model allows for the provision of timely compliance information with a minimal incremental cost to existing internal audit processes, whilst preserving the "independence" of the audit.

### **Authority's Assessment**

135. The Authority considers that there is a need for periodic review of the TPP (for all railway owners) to allow all parties the opportunity of providing their views on the effectiveness of the TPP. The Authority considers that a five year period to the next review is appropriate.
136. The Authority's view is that a railway owner's compliance with its TPP should be audited in respect of the negotiation and making of each access agreement. As the Code applies the TPP to the negotiation and making of an access agreement (section 44(1)), the Authority notes that it is appropriate to audit the application of the TPP only once in respect of each access agreement.
137. The Authority considers that Brookfield Rail's compliance with its TPP should be assessed every two years in respect of any access agreements made in the preceding two year period.
138. In view of recent Parliamentary criticism of internally-managed performance audits undertaken by electricity and water service providers, and the likely consequent amendments to the legislation applicable to these service providers, the Authority considers that all necessary audits should be managed by the Authority, including scoping of audit requirements and appointment of the auditor.
139. In relation to the DAF concern that the ERA may not be able to audit the application of the TPP to all agreements, the Authority notes that section 4A1(c) of the Code states that Part 5 instruments need not apply to out-of-Code agreements. On this basis, the Authority considers that it would be inappropriate for the Authority to

require audits of the application of the TPP to the negotiation and making of track access arrangements made outside the Code.

### ***Draft Determination***

#### **Required Amendment 11**

Paragraphs 18-20 of Brookfield Rail's proposed TPP should be amended to replace the existing text with text reflecting the following points:

- The Regulator will review the TPP, through a public consultation process, after a five year period from the current review. Brookfield Rail will submit any proposed revisions of the TPP to the Regulator by 1 October 2016 in order to facilitate this review.
- Part 5, Section 44(4) of the Code enables Brookfield Rail to amend or replace the TPP at any time, with the approval of the Regulator. Section 44(5) of the Code enables the Regulator to direct Brookfield Rail to amend or replace the TPP with another TPP determined by the Regulator at any time.
- Where access agreements have been made, the Regulator will audit Brookfield Rail's compliance with the TPP in the making of those agreements. An audit will be conducted every two years, in respect of any access agreements made over the preceding two year period. The audit will be carried out by an independent auditor approved by the Regulator, with Brookfield Rail funding the audit. The scope of the audit will be determined by the Regulator and the Regulator will manage the audit. The Regulator will publish the final report on its website (excluding confidential information).

### **Definitions**

#### ***Brookfield Rail's Proposal***

140. Brookfield Rail has proposed a number of amendments to definitions applied in the TPP.

#### ***Public Submissions***

141. No comments were made in the public submissions about the proposed amendments to definitions applied in the TPP.

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

142. The Authority notes that Brookfield Rail has sought to align the definitions in the TPP with definitions that are contained in the Act and the Access Code.
143. The Authority notes an erroneous reference to Schedule 2 of the Code in the definition of Network. The list of route sections to which the Code applies is at Schedule 1 of the Code.

144. The Authority will require Brookfield Rail to reinstate any definitions that are relevant to sections of the TPP that were proposed by Brookfield Rail to be deleted but which the Authority has required to be re-instated.
145. The Authority will provide a list of required amendments to the Definitions section of Brookfield Rail's proposed TPP as part of its final determination on the TPP.

### ***Draft Determination***

#### **Required Amendment 12**

The Definitions section of Brookfield Rail's proposed TPP should be amended as follows:

- All definitions relevant to sections of the TPP that were proposed by Brookfield Rail to be deleted but which the Authority has required to be re-instated, should be included.
- The definition of Network should be amended by the replacement of "Schedule 2" with "Schedule 1".