

7 September 2012

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Dear Leonie

**Invitation for Public Submission – Draft Determination: Proposed Revised Train Management Guidelines and Train Path Policy**

We refer to the Economic Regulation Authority's (**Regulator**) invitation for submissions from interested parties on the draft determination on the proposed revised Train Path Policy (**TPP**) and Train Management Guidelines (**TMG**).

Brookfield Rail Pty Ltd (**BR**) is largely supportive of the Regulator's assessment and required amendments. In particular, BR notes the Regulator's comments in relation to the application of Part 5 instruments to track access arrangements negotiated outside of the Code, and confirms that it intends to apply the TMG to all operations on the Network, regardless of the nature of the access arrangements.

BR does, however, have concerns in respect of the following required amendments to the TPP:

- The inclusion of an assurance that provisions for cancellation of Train Paths without penalty will be addressed in access agreements;
- The inclusion of references to 'conditional' Train Paths; and
- The reinstatement of wording equivalent to section 4 and Appendix A of the current TPP with regard to the rights of an Operator to sell a Train Path and trading in Train Paths.

Attachments A and B to this letter provide more detailed comments on each of the required amendments to the TMG and TPP respectively.

If any further clarification is required in relation to this submission, please do not hesitate to contact the undersigned.

Yours sincerely,

Paul Hamersley  
General Manager Commercial  
**Brookfield Rail Pty Ltd**

## Attachment A

## BR Comments on Draft Determination - Train Management Guidelines

No.	ERA Recommended Amendments	Brookfield Rail (BR) Comments
1.	The word 'only' to be removed from paragraph 1.1.3	BR agrees with this amendment.
2.	Paragraph 1.1.4 be removed	BR agrees with this amendment.
3.	The following text to be reinstated to section 1 of the TMG: <i>'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 TMG.'</i>	BR notes that the original intent of this section, as included in the TMG, TPP and the Proforma Track Access Agreement approved by the Regulator, was to allow for situations in which an above rail operator performs rolling stock related services on behalf of a customer (e.g. mining company) to whom access has been granted. This intent is consistent with point 39 in the Regulator's Draft Determination which states that this section "should be retained, as this provides for the contracting of rolling stock services by an operator".  On this basis, BR considers that an "operator", as defined under the Code, could be either an above rail operator or an end user or producer, and therefore agrees to the reinstatement of this section.
4.	Section 2.1.1 of BR proposed TMG should be amended by inclusion of the following text as a sixth sub-clause: <i>'provision by the Operator of a Train Manifest in a format acceptable to Brookfield Rail not less than 15 minutes prior to the scheduled departure time.'</i>	BR agrees with this amendment.
5.	Sections 2, 3, 4 and 5 of Brookfield's proposed TMG should be amended by removal of the term 'User' and replacement of that term with the term 'Operator'	As noted in point 3 above, BR considers that an "operator", as defined under the Code, could be either an above rail operator or an end user or producer and therefore agrees with this amendment. BR suggests that the definitions for 'User' and 'Customer' be deleted accordingly.
6.	Section 3.5 of Brookfield Rail's proposed TMG should be amended to reinstate the text contained in section 3.5 of the current (approved) TMG.	BR agrees with this amendment.
7.	Section 3.5 of Brookfield Rail's proposed TMG should be amended to include a statement to the effect that the Railway Owner will endeavour to align possessions of the network with supply chain outages through consultation with Operators.	If the proposed TMG is amended to reinstate the text contained in section 3.5 of the current (approved) TMG, as above, then BR considers that this amendment is unnecessary. BR considers that aligning Possessions of the Network with supply chain outages would fall within the requirement for BR to "take all reasonable steps to minimise any disruption to the Train Paths" (section 3.5(i) of the current TMG).
8.	Section 3.5 of Brookfield Rail's proposed TMG should be amended to include a statement to the effect that the Railway owner will endeavour to	If the proposed TMG is amended to reinstate the text contained in section 3.5 of the current (approved) TMG, as above, then BR considers that this

	offer an Operator that is adversely affected by possession of the network a train path that is the useable by the Operator or their customer.	amendment is unnecessary. BR considers that offering an Operator that is adversely affected by the Possession of the Network a Train Path that is useable would fall within the requirement to “use its best endeavours to provide an alternative Train Path” (section 3.5(ii) of the current TMG).
9.	Section 3.7 of Brookfield Rail’s proposed TMG to be amended to re-instate the text contained in section 3.7 of the current (approved) TMG, with the exception of the words ‘Brookfield Rail’ in place of ‘Westnet’. (Management of daily issues related to Train operations – Section 3.7)	BR does not agree with this amendment. BR does not consider that it is the role of the TMG to dictate the standard to which the Network must be maintained. BR is subject to obligations in respect of maintenance standards under its Network Lease and its Accreditation. Beyond that, BR considers that any commitment as to the standard of the Network is a commercial issue that should be dealt with in an Access Agreement.  BR further considers that it would be impractical and inappropriate for the Regulator to perform a monitoring and audit role (under section 4 of the TMG) in respect of the standard of the Network.
10.	Reinstate text in section 4 of the TMG which outlines: <ul style="list-style-type: none"> <li>• That entities seeking access can refer disputes to arbitration under section 25 of the Code; and</li> <li>• The three stage process for dispute resolution to apply once access agreements are in place, as detailed in the current TMG.</li> </ul>	BR agrees with this amendment.
11.	Section 4 of Brookfield Rail’s proposed TMG should be amended to replace the existing text with text reflecting the following points: <ul style="list-style-type: none"> <li>• The Regulator will review the TMG, through a public consultation process, after a five year period form the current review. BR will submit any proposed revisions of the TMG to the Regulator by 1 October 2016 in order to facilitate this review.</li> <li>• Part 5, section 43(5) of the Code enables BR to amend or replace the TMG at any time, with the approval of the Regulator. Section 43(3) of the Code enables the Regulator to direct BR to amend or replace the TMG with another TMG determined by the Regulator at any time.</li> <li>• Where there are operations on the network pursuant to an access agreement, the Regulator will monitor BR’s compliance with the TMG through an audit of BR’s obligations under its Train Management Guidelines conducted every two years. This audit will be carried out by an independent auditor approved by the Regulator, with BR funding the audit. The scope of the audit will be</li> </ul>	BR agrees with these amendments, but notes that references to “access agreements” should be replaced by “Access Agreements”.

	<p>determined by the Regulator and the Regulator will manage the audit. The Regulator will publish the final report on its website (excluding confidential information).</p> <ul style="list-style-type: none"> <li>• The Regulator may also commission special audits at any time on any issue where additional assurance is required. Such audits may be internal audits or may be carried out by an independent auditor approved by the Regulator, with BR 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).</li> </ul>	
12.	Section 5 of BR's TMG should be amended to include definitions relevant to any sections of the TMG which BR has proposed to delete, but which the Authority requires to be re-instated.	BR agrees with this amendment.

## Attachment B

## BR Comments on Draft Determination - Train Path Policy

No.	ERA Recommended Amendments	Brookfield Rail (BR) Comments
1.	Paragraph 1 of BR's proposed TPP, should be amended by the replacement of the words 'railway Network it owns' with 'railway Network it controls'.	BR agrees with this amendment, but suggests that the words 'railway Network it owns' should be replaced with the words 'railway Network it manages and controls', in keeping with the definition of "railway owner" under the Code.
2.	Paragraph 1 of BR's proposed TPP should be amended by replacement of the words 'Schedule 2' with 'Schedule 1'.	BR agrees with this amendment.
3.	Paragraph 3 of BR's proposed TPP should be amended by removal of the word 'only'	BR agrees with this amendment.
4.	Text to the effect of the following should be included following paragraph 4 of BR's proposed TPP: <i>'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.'</i>	BR notes that the original intent of this section, as included in the TMG, TPP and the Proforma Track Access Agreement approved by the Regulator, was to allow for situations in which an above rail operator performs rolling stock related services on behalf of a customer (e.g. mining company) to whom access has been granted. This intent is consistent with point 39 in the Regulator's Draft Determination which states that this section "should be retained, as this provides for the contracting of rolling stock services by an operator".  On this basis, BR considers that an "operator", as defined under the Code, could be either an above rail operator or an end user or producer, and therefore agrees to the reinstatement of this section.
5.	Paragraph 11 of BR's proposed TPP should be deleted and amended as follows: <i>'subject to clause 13, in the event that the proposal and negotiations are conducted in accordance with the relevant sections of the Code, BR and the entity will detail Train Path allocation in an Access Agreement'</i>	BR agrees with this amendment.
6.	Paragraph 12 of BR's proposed TPP should be amended as follows: <ul style="list-style-type: none"> <li>• Delete <i>'If there is a competing demand for network capacity at the time of proposal and negotiation'</i> and replace with <i>'if there are competing requests for access to the Network'</i>.</li> <li>• Delete <i>'maximises use of the Network'</i> in (b) and replace with <i>'maximises the efficient use of the Network'</i>.</li> <li>• Delete <i>'satisfies BR's commercial objectives'</i> in (c) and replace with <i>'reflects BR's legitimate business interests and investment in railway infrastructure'</i>.</li> </ul>	BR agrees with these amendments.

	<ul style="list-style-type: none"> <li>• Add a new criteria '(d) ensures safe network operations'</li> <li>• 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.'</li> </ul>	
7.	<p>Paragraph 13 of BR's proposed TPP, should be amended as follows:</p> <ul style="list-style-type: none"> <li>• Delete 'BR may also consider' and replace with 'BR will, where applicable consider the following aspects of each proposal/entity.'</li> <li>• Delete the word 'based' in (b)ii.</li> </ul>	BR agrees with these amendments.
8.	The definitions section of BR'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.	<p>BR agrees with this amendment and considers that the sentence, "In the case of an ad-hoc, irregular or eccentric Train Path, this definition may also include specific calendar dates on which the entitlement is granted" should be removed.</p> <p>BR also considers that the words "to operate a Service on the Network" should be changed to "to access the Network" to allow for the possibility that an Operator could be either an above rail operator or an end user/producer.</p>
9.	The proposed TPP should be amended to incorporate paragraphs equivalent to section 2.4 of BR's current TPP.	BR agrees with this amendment.
10.	The proposed TPP should be amended to incorporate 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 BR and the operator in an access agreement.	BR agrees with this amendment and suggests that section 2.6 of the current TPP should be reinstated.
11.	The proposed TPP should be amended to incorporate paragraphs providing assurance that provisions 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.	<p>BR does not agree with this amendment. BR considers that section 2.7 of the current TPP describes situations in which an Operator may cancel a Train Path without incurring penalty, or in other words without incurring the access charges that relate to that Train Path.</p> <p>BR considers that prices and charges are intrinsically commercial issues that should be dealt with in an Access Agreement, as set out in Schedule 3 of the Code.</p> <p>BR considers further that as the TPP does not set out the manner in which BR can charge its customers, it would be inappropriate if the TPP included limitations as to when those charges could be applied.</p>
12.	Paragraph 16(b) of BR proposed TPP should be amended by the replacement of 'BR will issue the Operator with a written notice' with 'BR	BR agrees with this amendment.

	<i>may issue the Operator with a written notice’.</i>	
13.	Paragraph 16(c) of BR proposed TPP should be amended by the replacement of <i>‘BR not making the Network available’</i> with <i>‘BR not making the Train Path available’.</i>	BR agrees with this amendment.
14.	Paragraph 16(c) and (d) of BR’s proposed TPP, should both be amended by the addition of <i>‘or temporary changes or variations to Train Paths agreed to by BR’</i> after <i>‘Brookfield Rail not making the Train Path available.’</i>	BR agrees with this amendment.
15.	Paragraph 17 of BR’s proposed TPP should be amended by the addition of the following text: <ul style="list-style-type: none"> <li>• <i>‘Prior to BR withdrawing the contractual entitlement of the Operator to utilise the Train Path, BR will consult with the Operator and provide the Operator with an opportunity to: <ol style="list-style-type: none"> <li>a) Provide any relevant evidence to BR in relation to the underutilisation; or</li> <li>b) Demonstrate to BR’s reasonable satisfaction a bona fide future requirement for that Train Path.’</li></ol></i></li> </ul>	BR agrees with this amendment.
16.	Paragraph 17 of BR proposed TPP should be amended by the addition of the following text: <ul style="list-style-type: none"> <li>• <i>In the case of conditional paths, BR and the Operator will agree on the basis on which performance will be assessed.</i></li> </ul>	<p>BR does not agree with this amendment. As noted at point 8 above, BR agrees that the categorisation of Train Paths should be deleted from the definition, and such deletion would be inconsistent with a reference to “conditional” Train Paths in the body of the TPP.</p> <p>In respect of ‘conditional’ Train Paths more broadly, BR notes point 122 of the Regulator’s Draft Determination which states 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”.</p> <p>BR does not consider that the reservation of a Train Path (the impact of providing a ‘conditional’ Train Path, as noted in point 80 of the Regulator’s Draft Determination) is necessary to accommodate surge or seasonal requirements. In the event of a surge or seasonal requirement, BR considers that a User should make a proposal in accordance with, and BR should apply, the ‘Guidelines for Allocating Train Paths in Access Agreements’ as set out in sections 10 to 14 of the proposed TPP. BR notes further that section 13 of the proposed TPP includes specific requirements that BR will take into account:</p> <ul style="list-style-type: none"> <li>• “seasonal demand for a seasonal path based on the production or market characteristics of the freight”; and</li> </ul>



		<ul style="list-style-type: none"> <li>• “need for surge capacity based on demand or other constraints such as shipping”.</li> </ul> <p>BR considers that where seasonal or surge demand exists, a Train Path should be allocated in accordance with the Guidelines for the term of that demand, but need not be reserved for use for a greater period. BR considers that the proposed TPP adequately deals with this issue.</p>
17.	BR’s proposed TPP should be amended to include wording equivalent to section 3 of the current TPP. (ERA’s approval required – Section 3)	<p>BR notes the requirements of section 10 of the Code. However, rather than reinstating section 3 of the current TPP exactly as drafted, BR suggests that the following paragraph be included:</p> <p><i>Where a request for a Train Path has been made and Brookfield Rail considers that the granting of the request would involve provision of access to railway infrastructure to an extent that may in fact preclude other entities from access to that infrastructure, Brookfield Rail will not commence negotiations in respect of that Train Path without the approval of the Regulator in accordance with section 10 of the Code.</i></p>
18.	BR’s proposed TPP should be amended to include wording equivalent to section 4 and Appendix A of the current TPP. (Rights of an Operator to sell a train path – Section 4) and (Trading in Train Paths – Appendix A)	<p>BR strongly disagrees with this amendment.</p> <p>BR notes that the wording of Appendix A of the current TPP allows for the fact that the Third Party Operator need only comply with the terms of the pre-existing Access Agreement between BR and the Operator. In effect, the contracting of the Train Path to the Third Party Operator would happen at ‘arms-length’ from BR. BR considers that such an arrangement would impinge on BR’s duty to ensure the safety of Network operations, as required under section 28 of the <i>Rail Safety Act 2010</i>, and understands that the Office of Rail Safety would hold similar concerns.</p> <p>BR also notes that it is the role of BR, as manager and controller of the Network, to allocate Train Paths, not the role of either Customers or Operators. BR considers that to allow such trading in train paths would significantly reduce BR’s ability to optimise utilisation of the Network (as noted in point 121 of the Regulator’s Draft Determination).</p> <p>BR notes point 122 of the Regulator’s Draft Determination which states that “in the absence of a defined class of ‘conditional’ train paths, the scope for an</p>

		<p>access agreement to accommodate surge capacity requirements is not described in the TPP” and point 124 which states that “in the absence of provisions for surge capacity, the provisions for sub-leasing of train paths should remain in Brookfield Rail’s TPP”.</p> <p>BR does not consider that the reservation of a Train Path (the impact of providing a ‘conditional’ Train Path, as noted in point 80 of the Regulator’s Draft Determination) is necessary to accommodate surge or seasonal requirements. In the event of a surge or seasonal requirement, BR considers that a User should make a proposal in accordance with, and BR should apply, the ‘Guidelines for Allocating Train Paths in Access Agreements’ as set out in sections 10 to 14 of the proposed TPP. BR notes further that section 13 of the proposed TPP includes specific requirements that BR will take into account:</p> <ul style="list-style-type: none"> <li>• “seasonal demand for a seasonal path based on the production or market characteristics of the freight”; and</li> <li>• “need for surge capacity based on demand or other constraints such as shipping”.</li> </ul> <p>BR considers that where seasonal or surge demand exists, a Train Path should be allocated in accordance with the Guidelines for the term of that demand, but need not be reserved for use for a greater period. BR considers that the proposed TPP adequately deals with this issue.</p> <p>In light of these legitimate concerns, as well as the fact that the Code does not require provisions for the trading of Train Paths in the TPP, BR considers that such provisions should be removed.</p>
19.	<p>Paragraphs 18-20 of BR’s proposed TPP should be amended to replace the existing text with text reflecting the following points:</p> <ul style="list-style-type: none"> <li>• The Regulator will review the TPP, through a public consultation process, after a five year period from the current review. BR will submit any proposed revisions of the TPP to the Regulator by 1 October 2016 in order to facilitate this review.</li> <li>• Part 5, Section 44(4) of the Code enables BR 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 BR to amend or replace the TPP with another TPP determined by the Regulator at</li> </ul>	<p>BR agrees with these amendments, but notes that references to “access agreements” should be replaced by “Access Agreements”.</p>

	<p>any time.</p> <ul style="list-style-type: none"> <li>• Where access agreements have been made, the Regulator will audit BR's compliance with the TPP in the making of those agreements. An audit will be conducted every 2 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 BR 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).</li> </ul>	
20.	<p>The definitions section of BR's proposed TPP should be amended as follows:</p> <ul style="list-style-type: none"> <li>• All definitions relevant to sections of the TPP that were proposed by BR to be deleted but which the Authority has required to be reinstated should be included.</li> <li>• The definition of Network should be amended by the replacement of '<i>Schedule 2</i>' with '<i>Schedule 1</i>'.</li> </ul>	BR agrees with these amendments.