



Brookfield Rail Final Determination on Proposed Revised Train Path Policy

November 2012

Economic Regulation Authority

WESTERN AUSTRALIA

Important Notice

This document has been compiled in good faith by the Economic Regulation Authority (Authority). The document contains information supplied to the Authority from third parties. The Authority makes no representation or warranty, express or implied, as to the accuracy, completeness, reasonableness or reliability of the information supplied by those third parties.

This document is not a substitute for legal or technical advice. No person or organisation should act on the basis of any matter contained in this document without obtaining appropriate professional advice. The Authority and its staff members make no representation or warranty, expressed or implied, as to the accuracy, completeness, reasonableness or reliability of the information contained in this document, and accept no liability, jointly or severally, for any loss or expense of any nature whatsoever (including consequential loss) arising directly or indirectly from any making available of this document, or the inclusion in it or omission from it of any material, or anything done or not done in reliance on it, including in all cases, without limitation, loss due in whole or part to the negligence of the Authority and its employees.

This notice has effect subject to the *Competition & Consumer Act 2010* (Cwlth), the *Fair Trading Act 1987* (WA) and the *Fair Trading Act 2010* (WA), if applicable, and to the fullest extent permitted by law.

Any summaries of the legislation, regulations or licence provisions in this document do not contain all material terms of those laws or obligations. No attempt has been made in the summaries, definitions or other material to exhaustively identify and describe the rights, obligations and liabilities of any person under those laws or licence provisions.

A full copy of this document is available from the Economic Regulation Authority website at www.erawa.com.au.

For further information, contact:

Economic Regulation Authority
Perth, Western Australia
Phone: (08) 6557 7900

© Economic Regulation Authority 2012

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

Contents

FINAL DETERMINATION	1
List of Amendments	1
INTRODUCTION AND OVERVIEW	4
Background	4
Legislative requirements	4
Public Consultation	5
Scope of matters considered in the Final Determination	6
Final Determination	7

FINAL 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 *Railways (Access) Code 2000* (**Code**), before Brookfield Rail can put in place a proposed TPP.
4. The Authority issued its draft determination on Brookfield Rail’s proposed TPP on 10 August 2012. The draft determination approved the proposed TPP subject to twelve amendments.
5. The Authority has considered Brookfield Rail’s proposed TPP in conjunction with comments made in submissions to the Authority on Brookfield Rail’s proposal and on the draft determination.
6. The final determination of the Authority is to approve Brookfield Rail’s proposed TPP, subject to twelve amendments. These amendments are listed below.

List of Amendments

Required Amendment 1

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

- Paragraph 1 of Brookfield Rail’s proposed TPP, should be amended by the replacement of the words “railway Network it owns” with “railway network it manages and 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:

The TPP sets out the considerations to be made by Brookfield Rail and the process to be followed in the negotiation of an Access Agreement and includes a range of conditions that Brookfield Rail agrees will be incorporated into an Access Agreement. The TPP does not apply to the management of issues or disputes between Brookfield Rail and an Operator after an Access Arrangement has been executed.

- 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 deleted and replaced 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

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

- Dot point 13(d) should be replaced with the following:
“Ad hoc, irregular, seasonal and intermittent demand for a Train Path based on the production or market characteristics of the freight.”
- An additional dot point should be included under paragraph 13, as follows:
“A requirement for multiple or varying origins or destinations.”
- The words “In addition” should be removed from paragraph 13.

The order of paragraphs 12 and 13 should be reversed.

Required Amendment 6

Brookfield Rail's proposed TPP should be amended to incorporate:

- Paragraphs equivalent to section 2.4 of Brookfield Rail's current TPP.
- Paragraphs equivalent to section 2.6 of Brookfield Rail's current TPP.
- 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

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

- 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."
- 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. Appendix A should be amended to include the following clause in place of clause 1.1:

The Operator may not license, assign or novate this agreement, or any right under this Agreement:

- (1) Without the prior written consent of Brookfield Rail, which consent is not to be unreasonably withheld; and
- (2) Unless on or before such assignment the assignee enters into an agreement for access with Brookfield Rail on such terms not inconsistent with this Agreement as Brookfield Rail may reasonably determine.

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:

- 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.
- Stakeholders have the ability to raise any concerns in relation to the TPP with the Regulator, and the Regulator may investigate such claims.

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

7. 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.
8. 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.
9. Brookfield Rail’s rail network is subject to the Code developed as a requirement of the Western Australian *Railways (Access) Act 1998* (**Act**).
10. 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.
11. 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.
12. 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 revisions to its TMG document are the subject of a separate determination by the Authority.
13. In making this final 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

14. 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.
15. 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

16. 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.

17. 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 revisions proposed by Brookfield Rail under section 44(4) due to the range of revisions proposed.
18. On 10 August 2012, the Authority issued a notice on its website calling for submissions from interested parties on the Authority's draft determination on Brookfield Rail's proposed TPP by 7 September 2012. Co-operative Bulk Handling sought and was granted an extension of the deadline for provision of its submission to 21 September 2012.
19. Four public submissions were received, from:
 - Asciano
 - Brookfield Rail
 - Co-operative Bulk Handling
 - QR National

These submissions are available on the Authority's website.

Scope of matters considered in the Final Determination

20. This final determination deals with matters to be considered in relation to the proper constitution of Brookfield Rail's TPP. Section 44 (Part 5) 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.
21. 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.
22. These issues have not been addressed in this final determination, except where they relate to the application of the TPP to out-of-Code agreements.
23. This issue is addressed briefly here, as it has been raised by Asciano and Co-operative Bulk Handling in their submissions, and was the only matter addressed by QR National in its submission.
24. In its submission, Asciano requested that Brookfield Rail clarify how the allocation of paths under two potentially separate regimes will operate in practice.
25. Co-operative Bulk Handling submitted that the concerns raised in earlier submissions by Co-operative Bulk Handling, QR National, Department of Agriculture and Food, Alcoa and Worsley in relation to the application of Part 5 instruments should be looked into further by the Authority using its powers under section 49 of the Code.
26. Co-operative Bulk Handling acknowledged that this issue is not an appropriate matter for consideration in conjunction with a review of Brookfield Rail's proposed TPP, but that this review of Brookfield Rail's TPP has highlighted these matters.
27. QR National submitted that the definition of Access Agreement in the TPP be amended to reflect clause 4A(c) of the Code which allows, where the parties agree,

for the Part 5 instruments to apply to access agreements negotiated outside the Code.

28. Clause 4A(b) of the Code states:

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.

29. Clause 4A(c) of the Code states:

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.

30. In order to avoid restricting the applicability of the TPP to Code agreements, Required Amendment 1 requires the removal of the word “only” from “... the TPP will only be employed when Brookfield Rail is negotiating to provide access under an Access Agreement” as put by Brookfield Rail at clause 3 of its proposed TPP.

31. The ERA does not have a role in overseeing the application of the TPP, or extent of the application of the TPP, for the purpose of negotiating an access agreement outside the Code. The ERA does not have a role in oversighting the manner in which the TPP is written to apply to out-of-Code agreements.

32. The Authority notes references to “agreement for access” in the Code. “Agreement for access” is a not term defined in the Code, although it is used in clause 4A(b) of the Code. The term “agreement for access”, used in the context of the Part 5 Instruments, is taken to mean any agreement for access, including an access agreement – that is, an agreement for access either inside or outside the Code.

33. The Authority notes that the provisions of clause 4A(c), which outline that Part 5 instruments do not apply only to out-of-Code agreements, was gazetted in 2009. This review of Brookfield Rail’s TPP is the first to occur since that Code amendment.

34. The Authority is able to notify the Minister of any concern that it has, or that has been brought to its attention, in relation to the operation of the Code, under section 49 of the Code.

35. The Department of Treasury is currently undertaking a Code Review process which will invite public comment. An interested party may raise any concern that it has with the operation of section 4A of the Code with the Department of Treasury in conjunction with that review.

36. The Authority has notified the Treasurer in writing of the concerns brought to its attention by stakeholders in respect of the limited applicability of Part 5 instruments.

Final Determination

37. The Authority approves Brookfield Rail’s proposed TPP subject to twelve required amendments. These twelve required amendments refer to the twelve required amendments contained in the Authority’s draft determination on Brookfield Rail’s proposed TPP.

38. The twelve required amendments set out in the draft determination have been listed below. Each of these amendments is followed by:

- An outline of the comments on the amendment in public submissions.
- The Authority's assessment of the public submission comments.
- The Authority's final determination.

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.

Public Submissions

39. Asciano did not make any comment in relation to Required Amendment 1, further to those referred to in "Scope of Matters referred to in the Final Determination" above.
40. Brookfield Rail supported all elements of Required Amendment 1 in its submission. Brookfield Rail submitted that the words 'railway Network it owns' should be replaced with 'railway Network it manages and controls', in keeping with the definition of "railway owner" in the Code.
41. Co-operative Bulk Handling did not make any comment in relation to Required Amendment 1, further to those referred to in "Scope of Matters referred to in the Final Determination" above.
42. QR National did not make any comment in relation to Required Amendment 1, further to those referred to in "Scope of Matters referred to in the Final Determination" above.

Authority's Assessment

43. The Authority upholds all elements of Required Amendment 1 of the draft determination, on the basis that no relevant objections were received in submissions.
44. The Authority notes stakeholders comments in relation to Required Amendment 11 of the draft determination, which addressed audit requirements. The comments indicate that stakeholders are of the view that the audit requirements for the TPP should be similar to the audit requirements for the TMG.
45. In its draft determinations the Authority required different audit requirements for the TPP and the TMG due to the different role these instruments play in the execution of an access agreement.

46. The TPP sets out the process to be followed in the negotiation of an access agreement, and any disputes in relation to the application of the TPP must be addressed prior to the making of an agreement. The TPP does not have any further purpose to an access agreement once an agreement has been made.
47. On this basis, the results of an ex-post audit of the application of the TPP to an access agreement is not relevant to the agreement itself and such an audit may not be publishable if it contains confidential information.
48. The Authority requires that the purpose of the TPP document be expanded upon in the Introduction section to the document, in order to provide some clarity around the differences between the TPP and the TMG in their application and audit requirements.

Final Determination

Required Amendment 1

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

- Paragraph 1 of Brookfield Rail's proposed TPP, should be amended by the replacement of the words "railway Network it owns" with "railway network it manages and 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:

The TPP sets out the considerations to be made by Brookfield Rail and the process to be followed in the negotiation of an Access Agreement and includes a range of conditions that Brookfield Rail agrees will be incorporated into an Access Agreement. The TPP does not apply to the management of issues or disputes between Brookfield Rail and an Operator after an Access Arrangement has been executed.

- 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.

Draft Determination – 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”.

Public Submissions

- 49. Brookfield Rail supported Required Amendment 2 in its submission.
- 50. No further comments were received in relation to Required Amendment 2.

Authority’s Assessment

- 51. The Authority upholds Required Amendment 2 of the Draft Determination.

Final Determination

Required Amendment 2

Paragraph 11 of Brookfield Rail’s proposed TPP should be deleted and replaced 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”.

Draft Determination – 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”.*

Public Submissions

- 52. Brookfield Rail supported all elements of Required Amendment 3 in its submission.
- 53. No further comments were received in relation to Required Amendment 3.

Authority’s Assessment

- 54. The Authority upholds Required Amendment 3 of the Draft Determination.

Final Determination

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".

Draft Determination – 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.*

Public Submissions

55. Brookfield Rail supported all elements of Required Amendment 4 in its submission.
56. No further comments were received in relation to Required Amendment 4.

Authority's Assessment

57. The Authority upholds Required Amendment 4 of the Draft Determination, subject to minor text changes.

Final Determination

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.

Draft Determination – 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.

Public Submissions

58. Brookfield Rail submitted that it agrees with Required Amendment 5. Brookfield Rail does not explicitly state whether it considers that the categorisation of Train Paths should be complete, or removed altogether.
59. Brookfield Rail does however, indicate that it considers that the sentence included in the definition of “Train Path” which refers to ad-hoc, irregular or eccentric paths should be removed. This indicates a preference for removal of the categorisation of train paths.
60. Brookfield Rail also submitted that the text “to operate a service on the Network” within the definition of Train Path should be amended to “to access the Network” to ensure consistency with the Code definition of Operator.
61. Co-operative Bulk Handling submitted that it strongly opposes the removal of the references to Conditional Train Paths. Co-operative Bulk Handling also requested that the Authority reconsider the merits of requiring provisions for traffic-specific train paths. A traffic-specific train path is one which is reserved for a particular type of service, usually bulk traffic, and allocated between operators, according to network efficiency, on a daily basis. Co-operative Bulk Handling referred in its submission to the 2006 review of WestNet Rail’s TPP, in which the Authority stated, at paragraph 45 of its Final Determination:

The Authority supports the draft determination recommendation for traffic specific capacity where rail lines carry a single type of bulk commodity displaying multiple source single destination route characteristics. However, the Authority recognises that these characteristics do not exist in the existing freight network except for the grain lines which are under-utilised. The Authority considers that while this may be the current situation, the expected development of new iron ore projects in the mid-west region of the state may cause a future requirement for traffic specific capacity within the context of conditional train paths.

62. The issue of ‘freight-specific’ paths was first raised by Pacific National in a submission to the 2006 review, where it proposed that train paths be reserved for a particular type of service, usually bulk traffic, and allocated between particular operators according to network efficiency, on a daily basis.

Authority’s Assessment

63. Draft Determination Required Amendment 5 is related to the issue of whether the various types of train paths should be referred to in the TPP. Scheduled train paths are those which are fixed to particular dates, departure and arrival times and source

and destination points. Non-scheduled train paths are those which are not fixed to particular dates, or times, or source and destination points.

64. In relation to the specification of non-scheduled train path types, the Authority is concerned that potential operators should be provided with an assurance that they will be able to manage risks associated with variations in their requirements for train paths. Those risks relate to contracting paths that may or may not be required due to inter- or intra-seasonal variations caused by circumstances that are not foreseeable. Such circumstances may include variations in haulage tasks between years due to seasonal agricultural variations, or changes to path requirements within years due to unanticipated shutdowns at source, or changes in shipping schedules.
65. The Authority is of the view that it is inappropriate to require Brookfield Rail to provide train paths other than on a take-or-pay basis. For this reason, the Authority does not require that provisions for conditional train paths be included in the TPP. Co-operative Bulk Handling objected to this in its submission.
66. Provisions for conditional train paths appear in the current TPP at paragraph 2.2.1, under the heading “Conditional Paths”. These provisions are for consideration of historical use, seasonal demand and surge capacity requirements. The Authority notes that, notwithstanding the removal of references to conditional train paths, the proposed TPP includes provisions for these three considerations at paragraphs 13(c), 13(d) and 13(e).
67. The train path types referred to in the definitions section of Brookfield Rail’s proposed revised TPP, which are ‘ad-hoc’, ‘irregular’ and ‘eccentric’ train paths, are types which are sufficient to enable Brookfield Rail to provide for the flexibility required by operators. Eccentric Train Paths are train paths which are scheduled for a particular frequency within a particular period, for example twice per day, or ten times per week. Ad-hoc and irregular train paths are non-scheduled paths. Other non-scheduled path types specified by Brookfield Rail are ‘seasonal’ and ‘intermittent’.
68. The Authority therefore requires that consideration of operator demand for ‘ad hoc’, ‘irregular’, ‘seasonal’ and ‘intermittent’ train paths be included in the body of the TPP. Draft Determination Required Amendment 5 has been replaced with a requirement that paragraph 13 includes that Brookfield Rail take into consideration any requirements for these types of train paths and requirements for multiple or varying origins or destinations.
69. In relation to the provisions for competing demands for access, the Authority considers that the circumstances referred to in paragraph 13 of Brookfield Rail’s proposed TPP should apply to all proposals for access, and not solely where there are competing demands for access. On this basis, the words “In addition” should be removed from paragraph 13 of Brookfield Rail’s proposed TPP, and the order of paragraphs 12 and 13 should be reversed.
70. In relation to traffic-specific train paths, the Authority considers that, as a consequence of the recent ACCC decision impacting on monopoly rights in grain handling, traffic-specific pathing may be required to co-ordinate bulk haulage tasks under certain circumstances. Brookfield Rail has advised that these types of train paths are contemplated by Brookfield Rail and are currently referred to as “task-specific” train paths.

71. The Authority considers that the provisions of paragraph 13 of Brookfield Rail's proposed TPP, which are subject to Required Amendment 5, are sufficient to accommodate task-specific train paths.

Final Determination

Required Amendment 5

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

- Dot point 13(d) should be replaced with the following:
"Ad hoc, irregular, seasonal and intermittent demand for a Train Path based on the production or market characteristics of the freight."
- An additional dot point should be included under paragraph 13, as follows:
"A requirement for multiple or varying origins or destinations."
- The words "In addition" should be removed from paragraph 13.

The order of paragraphs 12 and 13 should be reversed.

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.*

Public Submissions

72. Brookfield Rail submitted that it supported the first two dot point components of this required amendment, and suggested also that the inclusion of paragraph 2.6 (Review of Train Paths) from the current TPP be re-instated.
73. Brookfield Rail submitted that it did not support the third dot point of Required Amendment 6. Brookfield Rail submitted that, as the TPP does not set out the manner in which Brookfield Rail can charge its customers, it would be inappropriate if the TPP included limitations as to when those charges could be applied.
74. No other comments relating to Required Amendment 6 were received in submissions.

Authority's Assessment

75. The Authority accepts Brookfield Rail's proposal that paragraph 2.6 of the current TPP be re-instated. The Authority accepts this proposal as the review provisions outlined paragraph 2.6 support the general statement that "underutilisation provisions will be subject to agreement" required by the second dot point of this required amendment.
76. The Authority notes Brookfield Rail's concerns in relation to the TPP limiting the commercial parameters of an access agreement. Nonetheless, the Authority considers that it is reasonable that prospective access seekers be provided with an assurance that Brookfield Rail will consider circumstances under which train paths may be cancelled without penalty.
77. The Authority considers that the circumstances outlined in the third dot point of Required Amendment 6 are a reasonable minimum set of circumstances under which an operator may expect to be able to cancel operations without penalty, and are significantly less prescriptive than the list of circumstances shown in section 2.7 of Brookfield Rail's current TPP.
78. The Authority has decided to change the second dot point of Required Amendment 6 to enable Brookfield Rail to re-instate the text in paragraphs 2.6 of its current TPP.

Final Determination

Required Amendment 6

Brookfield Rail's proposed TPP should be amended to incorporate:

- Paragraphs equivalent to section 2.4 of Brookfield Rail's current TPP.
- Paragraphs equivalent to section 2.6 of Brookfield Rail's current TPP.
- 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.

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".

Public Submissions

79. Brookfield Rail submitted that it supported all elements of this required amendment.
80. No other comments relating to Required Amendment 7 were received in submissions.

Authority's Assessment

81. The Authority upholds Required Amendment 7 of the Draft Determination.

Final Determination

Required Amendment 7

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

- 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".

Draft Determination – 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.*

Public Submissions

82. Brookfield Rail submitted that it supports the first dot point element of Required Amendment 8. Brookfield Rail submitted that it does not support the second dot point element of the required amendment.
83. Brookfield Rail has submitted that inclusion of a reference to 'conditional' train paths is inconsistent with the removal of such references from elsewhere in the document.
84. No other comments relating to Required Amendment 8 were received in submissions.

Authority's Assessment

85. The Authority accepts that reference to 'conditional' train paths is not appropriate in the absence of a requirement to define that specific class of train path in the TPP. The Authority nonetheless requires that a general statement be included providing for an agreement to be reached on the basis on which performance will be assessed.

Final Determination

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."
- Brookfield Rail and the Operator will agree on the basis on which performance will be assessed.

Draft Determination – Required Amendment 9

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

Public Submissions

86. Brookfield Rail submitted that it recognises the requirements of section 10 of the Code. Brookfield Rail submitted that alternative words to those used in paragraph 3 of the current TPP be inserted. The wording proposed by Brookfield Rail more closely reflects the wording used in the Code, and refers to section 10 of the Code.

87. No other comments relating to Required Amendment 9 were received in submissions.

Authority's Assessment

88. The Authority accepts Brookfield Rail's suggested alternative wording and considers that the alternative wording is equivalent to that in section 3 of the current TPP. The Authority therefore does not consider that Required Amendment 9 needs to be altered to accommodate Brookfield Rail's suggestion.

Final Determination

Required Amendment 9

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

Draft Determination – 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.

Public Submissions

89. Brookfield Rail submitted that it strongly disagrees with this required amendment.
90. Brookfield Rail agrees with paragraph 121 of the draft determination which acknowledges that to allow on-selling of train paths would reduce Brookfield Rail's ability to optimise utilisation of the network.
91. Brookfield Rail submitted that the allocation of a train path at 'arms length' to Brookfield Rail or without an access agreement with Brookfield Rail would impinge on Brookfield Rail's duty under section 28 of the *Rail Safety Act 2010* to ensure the safety of network operations.
92. Brookfield Rail does not agree that the reservation of a train path (i.e. 'conditional' train paths) is necessary to accommodate surge or seasonal requirements. Brookfield Rail referred in its submission to section 13 of the proposed TPP, which requires that Brookfield Rail take into account "seasonal demand for a seasonal path based on production or market characteristics of the freight", and the "need for surge capacity based on demand or other constraints such as shipping".
93. Co-operative Bulk Handling submitted that it does not agree with the Authority's view that on-selling provisions are required only in the absence of provisions allowing for surge capacity, and that on-selling provisions ought to supplement a conditional train path regime, not replace it.
94. The Co-operative Bulk Handling submission also contended that it is impractical to enable on-selling of train paths under Code agreements, when equivalent provisions may not be allowed in out-of-Code agreements. Such a situation would result in train path trades occurring only between operators with agreements under the Code, thereby limiting the effectiveness of this provision.

95. No other comments relating to Required Amendment 10 were received in submissions.

Authority's Assessment

96. In the draft determination, the Authority required provisions for on-selling of train paths to be included in order to enable operators to manage risks associated with variations in demand.
97. In this final determination, the Authority has allowed Brookfield Rail to remove references to conditional train paths from its TPP. The Authority notes that Brookfield Rail has included, at paragraph 13 of its proposed TPP, that it may consider operators' surge requirements. The Authority requires, at Required Amendment 4 that paragraph 13 be amended to require that Brookfield Rail will (rather than 'may') consider these requirements.
98. Nonetheless, the Authority does not require that Brookfield Rail detail the process which will be followed to enable operators' surge requirements to be met, beyond that these requirements will be considered.
99. The Authority requires that, in the absence of specific provisions for conditional train paths and details of how surge capacity requirements will be accommodated, on-selling provisions in Brookfield Rail's TPP should remain. This requirement is qualified by the inclusion of a provision that all operators are required to have an agreement for access with Brookfield Rail.
100. The on-selling provisions in the current TPP were not included in WestNet Rail's first TPP in 2001, and on-selling was explicitly prohibited by section 6 of that document.
101. Provisions to allow on-selling were added to WestNet Rail's TPP pursuant to a requirement of the Authority's final determination on WestNet Rail's TPP in August 2006. This requirement followed on from a submission from the ARTC, which indicated that its own Access Undertaking provides for the on-selling of train paths provided the related "trade agreement" satisfies certain criteria.
102. The ARTC Track Access Agreement for the interstate network (published with the date 15 July 2008) has provisions at clause 19, for "Assignment or Novation" which enable Operators to sell, trade or sub-license a scheduled train path to any person who proposes to operate a train using that scheduled path. In order for this to occur, prior written consent must be provided by ARTC, and the assignee must enter into a track access or other agreement with ARTC.
103. The Authority notes that the wording of Appendix A of Brookfield Rail's current TPP is equivalent to clause 19.2 of ARTC's Track Access Agreement excepting where, at 19.2(a), the ARTC Track Access Agreement requires prior written consent of the railway owner and that the lessee or proposed operator have an agreement for access with ARTC.
104. The Authority notes the legal responsibilities of Brookfield Rail as owner of the Network to ensure safe operations. Brookfield Rail may not be in a position to ensure that these responsibilities are met if it is unable to exert direct control on the proposed operator.
105. The Authority is mindful of Co-operative Bulk Handling's assertion that the effectiveness of trading in train paths is limited in the absence of on-selling provisions

in all agreements for access, inside and outside the Code. The Authority considers that, although an operator with a Code agreement may not be able to 'purchase' train paths from an out-of-Code operator, this would not impede the ability of an operator with a Code agreement to sell its train paths to an out-of-Code operator.

Final Determination

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. Appendix A should be amended to include the following clause in place of clause 1.1:

The Operator may not license, assign or novate this agreement, or any right under this Agreement:

- (1) Without the prior written consent of Brookfield Rail, which consent is not to be unreasonably withheld; and
- (2) Unless on or before such assignment the assignee enters into an agreement for access with Brookfield Rail on such terms not inconsistent with this Agreement as Brookfield Rail may reasonably determine.

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).*

Public Submissions

106. Asciano submitted that the ERA should not be constrained by limiting the number of audits which may occur in a set time period. Asciano submitted that audit provisions for the TPP should be similar to audit provisions for the TMG.
107. Brookfield Rail submitted that it supported Required Amendment 11.

108. No further comments were received in relation to Required Amendment 11.

Authority's Assessment

109. In other Australian jurisdictions, where railway access regulation is more prescriptive, and where 'Access Undertakings' are in place, there are no requirements for a regulatory instrument equivalent to the Train Path Policy, and the matters for consideration in an access agreement are laid out in 'model track access agreements'.
110. The comments submitted by Asciano in relation to Required Amendment 11 highlight the potential for stakeholders to misinterpret the purpose of the TPP.
111. As discussed in relation to Required Amendment 1, the TPP sets out the process to be followed in the negotiation of an access agreement. Any questions or disputes in relation to the application of the TPP must be addressed prior to the making of an agreement.
112. Any dispute in relation to the allocation of train paths will necessarily involve an audit of the application of the TPP. As outlined in paragraph 127 of the draft determination, the Authority considers that clause 14 of Brookfield Rail's proposed TPP adequately outlines the provisions of the Code that an entity must consider if it has a dispute regarding the allocation of train paths.
113. On this basis, the results of an ex-post audit of the application of the TPP to an access agreement is not relevant to the agreement itself and such an audit may not be publishable if it contains confidential information.
114. The Authority has altered Required Amendment 1 to require a deeper explanation of the purpose and application of the TPP. Required Amendment 11 is altered to remove the requirement for any scheduled audit of the TPP.
115. The Authority notes that Brookfield Rail's proposed TPP does not include provision for periodic review of the TPP. The Code requires at Part 5 (section 45) that the determination of a Train Path Policy is required with public consultation on commencement of the application of the Code to a railway. The Code does not require periodic review of the TPP following that initial determination.
116. Sections 44(4) and 44(5) of Part 5 of the Code detail that the railway owner or the Regulator may amend the Train Path Policy at any time. The Authority has altered Required Amendment 11 to remove the requirement for periodic review.

Final 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:

- 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.

- Stakeholders have the ability to raise any concerns in relation to the TPP with the Regulator, and the Regulator may investigate such claims.

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”.*

Public Submissions

117. Brookfield Rail submitted that it supports Required Amendment 12.

118. No further comments were received in relation to Required Amendment 12.

Authority’s Assessment

119. The Authority upholds Required Amendment 12 of the draft determination.

Final 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”.