



The Pilbara Infrastructure

Railways (Access) Code 2000

Train Path Policy

March 2013

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DEFINITIONS

Table 1: Glossary

Word/Term	Definition
Access	means: <ul style="list-style-type: none"> • the use of TPI's Railway Network; and • where applicable, includes the exercise of other rights of the kind described in section 3A(1) of the Act.
Access Agreement	means an agreement in writing under the Code between the railway owner and an entity for access by that entity.
Access Proposal	means a proposal made in writing under the Code for Access.
Access Rights	means the entitlement of an Operator to Access in accordance with a specified Service Entitlement.
Act	means the Railways (Access) Act 1998
Associate	in relation to TPI means: <ul style="list-style-type: none"> • a Related Body Corporate; or • a unit trust, joint venture or partnership where the interest of TPI or of a Related Body Corporate in the unit trust, joint venture or partnership entitles TPI or the Related Body Corporate to: <ul style="list-style-type: none"> - control the composition of the governing body of the unit trust, joint venture or partnership; - cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the unit trust, joint venture or partnership; or - control the business affairs of the unit trust, joint venture or partnership.
Available Capacity	means Capacity that is not Committed Capacity.
Capacity	in relation to any Route Section of TPI's Railway Network, means the number of Rail Operations that can be accommodated on that Route Section during a particular time after providing for TPI's reasonable requirements for the exclusive utilisation of that Route Section for the purposes of performing activities associated with the repair or enhancement of TPI's Railway Network, pursuant to the requirements of section 4 of the Train Management Guidelines, and having regard to: <ul style="list-style-type: none"> • the characteristics of the Route Section; • the length of the rolling stock comprising a train that can be operated on the Route Section, and the speed at which it can be operated; • the requirements of the railway owner's safety standards under section 9 of the Rail Safety Act 1998; or any written law; and <ul style="list-style-type: none"> • the technical requirements for the relevant rolling stock.
Capacity Analysis	means an assessment of the extent to which a specified Route Section of TPI's Railway Network has Available Capacity and whether that Available Capacity is sufficient for the proposed Access Rights and, if the Available Capacity is not sufficient for the proposed Access Rights, an assessment of TPI's Railway Network Expansion or other Capacity enhancements required to meet those proposed Access Rights.
Capacity Resumption Notice	means a notice issued by TPI in accordance with the provisions of Section 3.2.1 of this TPP.
Charge	means the price paid by an Operator for Access under an Access Agreement.
Code	means the Railways (Access) Code 2000 established under the Act.

Committed Capacity	means that portion of the Capacity that is required to meet the Service Entitlements of Operators.
Cyclic Traffic	means a traffic whose Service Entitlements are defined in terms of a number of Services within a particular period of time, for example, a year, month or week, subject to a range of constraints which may include: <ul style="list-style-type: none"> • specified days of operation and times at the origin and/or destination; • specified arrival/departure times at intermediate locations, with an allowable variation around these specified time(s) for the scheduling of the Train Service; • maximum time period between Train Services; • minimum time period between Train Services; • average Below Rail Transit Time; • the agreed threshold for on-time running of the Train Services; • regularity of timetable reviews and the applicable review process; and • allowable modifications of timetable, e.g. cancellation or deferral of Services.
Expansion	means an increase in the Capacity of TPI's Railway Network by an enhancement or improvement of the Railway Infrastructure associated with the network.
FMG	Fortescue Metals Group Ltd.
Force Majeure	means any circumstance beyond the reasonable control of a party which occur without the negligence of that party and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any Trains or Rolling Stock operated by the Operator.
Fortnightly Train Plan	means the document prepared by TPI containing the: <ul style="list-style-type: none"> • Nominated Fortnightly Services for Cyclic Traffic, based on requests submitted by Operators against their Service Entitlement; • the Scheduled Train Paths allocated to Operators Timetabled Traffic during that fortnight; and • any Planned Possessions for that fortnight.
Master Train Plan	means a document prepared and maintained by TPI that will register: <ul style="list-style-type: none"> • the Service Entitlements of each Operator on TPI's Railway Network, including: <ul style="list-style-type: none"> - for Timetabled Traffic, the Train Paths that are allocated to that traffic; - for Cyclic Traffic, the number of Train Paths that will be allocated to that Operator per fortnight in accordance with the Operator's Service Entitlement; • the Capacity required to provide each Operator's Service Entitlements; and • the periods of time allocated for Planned Possessions. <p>The plan provides the basis for preparation of the Fortnightly Train Plan.</p>
Network	Means TPI's railway Network.
Nominated Fortnightly Service	means, for Cyclic Traffic, the number of Services that an Operator has an entitlement to operate during any one fortnight period under an Access Agreement, as specified in its Service Entitlement.
Operator	Means an entity to which access is provided under an access agreement

Planned Possession	means the temporary closure and/or occupation by TPI of part of TPI's Railway Network, for the purpose of carrying out infrastructure maintenance, enhancement, or other work on or in the proximity of TPI's Railway Network which may affect the safety of any person or property where such closure or occupation is entered into the Master Train Plan and adversely impacts upon the operation of Services.
Proponent	means an entity who has submitted a proposal for Access under the Code.
Rail Operations	means the operation of rolling stock on a part of TPI's Railway Network.
Railway Infrastructure	means the facilities necessary for the operation of a railway, including: <ul style="list-style-type: none"> • railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway); • tunnels and bridges; • train control systems, signalling systems and communication systems; • associated plant machinery and equipment, but not including: <ul style="list-style-type: none"> • sidings or spur lines that are excluded by section 3(3) or (4) of the Act from being Railway Infrastructure; and • rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, and terminal yards and depots.
Related Body Corporate	has the same meaning as in the Corporations Act 2001 (Cth).
Resumption Date	means the date nominated for resumption of capacity in the Capacity Resumption Notice.
Rollingstock	means any vehicle, whether self-propelled or not, that operates on or uses TPI's Railway.
Route Section	means the sections of the railways network into which the network is divided for management and costing purposes.
Scheduled Train Path	means the entitlement of an Operator under its Access Agreement, as identified in its Service Entitlement, to use a specified portion of TPI's Railway Network at the times and between the locations specified in the relevant Master Train Plan, so as to allow the passage of one train.
Service	means a train run by the Operator using TPI's Railway Network by which the Operator provides railway freight services.
Service Entitlement	means an Operator's entitlement under an Access Agreement to operate Cyclic Traffic or Timetabled Traffic services in accordance with this Train Path Policy. Service Entitlements to operate Cyclic Traffic will consist of a number of Services within a particular period of time, as specified in the Access Agreement, and will be defined in terms of arrival and departure times in accordance with the Fortnightly Train Plan. Service Entitlements to operate Timetabled Traffic will consist of specified arrival and departure times on a particular day and/or week during a year, as specified in the Access Agreement, and will be included in the Fortnightly Train Plan. A Service Entitlement may specify constraints or operational requirements to be observed by the Operator.
Timetabled Traffic	means a traffic whose Service Entitlements are defined in terms of specified Train Paths, including arrival and departure times, on a particular day and /or week during a year, for the duration of the Access Agreement, subject to a range of constraints which may include: <ul style="list-style-type: none"> • the agreed threshold for on-time running of the Train Services; • regularity of timetable reviews and the applicable review process; and • allowable modifications of timetable, e.g. cancellation or deferral of Services.
TPI	Means The Pilbara Infrastructure Pty Ltd

TPI's Network Rules	means TPI's rules (including the Appendix to the Rules and Working Timetables) issued in accordance with TPI's Safety Management Plan approved under Section 10 of the Rail Safety Act 1998 together with any amendments, deletions or additions made in accordance with the Safety Management Plan and all policies and notices issued by TPI for the purpose of ensuring the safe use of TPI's Railway Network.
TPI's Railway Network	means the railway constructed pursuant to the Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 excluding infrastructure which is not covered under the definition in Section 3 of the Railways (Access) Act 1998.
Train	means any configuration of Rollingstock operating as a unit on TPI's Railway Network.
Train Path	means an entitlement to operate a Service on TPI's Railway Network and has departure, transit and arrival times between the entry and exit points on TPI's Railway Network.
Train Requests	means railing requests for a nominated period of time submitted to TPI, by or on behalf of an Operator, to assist in the scheduling of Train Services.

1. INTRODUCTION

1.1. Background

The Pilbara Infrastructure Pty Ltd (TPI) owns and operates a rail network and port terminal in the Pilbara region in Western Australia. TPI also provides above-rail services on this network. TPI is majority owned and controlled by Fortescue Metals Group (FMG).

The Rail Access Regime is governed by the provisions of the Railways (Access) Code 2000 (the Code). Section 44(2) of the Code requires the railway owner to prepare and submit a statement of policy to the regulator for approval in relation to:

- (a) the allocation of train paths; and
- (b) the provision of Access to train paths that have ceased to be used.

This statement of policy is referred to as the Train Path Policy (TPP).

1.2. Purpose of the TPP

The objective of the TPP is to provide a framework to apply in relation to the allocation and management of network Capacity to:

- ensure that TPI's contractual obligations to any person using TPI's Railway Network are fulfilled;
- maximise the efficient utilisation of TPI's Railway Network;
- ensure that Capacity is allocated and managed in a non-discriminatory way; and
- provide for the safe and reliable use of TPI's Railway Network.

1.2.1. Relationship between the TPP and TMG

The TPP and Train Management Guidelines (TMG) are closely related. There are three key aspects to the allocation and management of Capacity:

- 1 The initial assessment and allocation of Capacity, resulting in the specification of a Service Entitlement for each Operator, which will be governed by the terms of their Access Agreement. The principles governing this assessment and allocation are contained in the TPP. This includes any permanent changes to the Service Entitlement that are subsequently made.
- 2 The short-term scheduling of train paths to fulfil each Operator's Service Entitlement. This is addressed in the TMG.
- 3 The daily operation of Services in real time, which is also addressed in the TMG.

The main functions of the TPP will therefore be to provide a framework governing:

- the initial assessment and allocation of Capacity;
- the management of Capacity, including:
 - (i) permanent variations to Service Entitlements;
 - (ii) resumption of Service Entitlements; and
 - (iii) review of Service Entitlements.

1.2.2. Application of the TPP

The TPP will apply to all Operators with whom TPI has an Access Agreement under the Code (including any third party engaged by the Operator as its agent or contractor to perform its obligations under the Access Agreement).

2. ALLOCATION OF CAPACITY

2.1. Specification of Capacity

Each Operator's Access Rights will be specified in terms of a Service Entitlement. This includes:

- (a) for Timetabled Traffic, the Train Paths that are allocated to that traffic; and
- (b) for Cyclic Traffic, the number of Train Paths that will be allocated to that Operator within a particular period of time in accordance with the Operator's Service Entitlement.

Each Operator's Service Entitlement will be documented in the Master Train Plan (refer clause 2.1 of the TMG).

2.2. Analysis of Capacity

2.2.1. Master Train Plan

TPI will maintain a Master Train Plan for those routes under its control that are subject to the Code.

2.2.2. Access Proposals

In lodging an Access Proposal Proponents are encouraged to review the Code including sections 7, 8 and 9. It is also possible to seek Access Rights by negotiation with TPI outside the provisions of the Code.

2.2.3. Capacity Analysis

When TPI receives an Access Proposal from an Proponent, TPI will undertake a Capacity Analysis. The purpose of this Capacity Analysis is to determine whether there is sufficient Available Capacity to meet the requirements of the Proponent, and if not, the extent to which Capacity enhancements are likely to be required.

In carrying out its Capacity analysis, TPI will take account of the following considerations:

- The need to undertake, where appropriate, modelling of the effect that extra trains would have on the operation of TPI's Railway Network; and
- The need for the Capacity analysis process to be transparent to the Proponent and for TPI to maintain dialogue with the Proponent during this process, including in relation to any information provided by the Proponent to assist this process pursuant to section 15 of the Code.

Where TPI considers that there are major impediments to providing sufficient Capacity to meet the request, and that Capacity enhancements might be necessary that would have a significant bearing on the costs faced by the Proponent, then the Capacity Analysis may

need to be done in more detail which may require more time for TPI to be able to respond to the request, provided the total time does not exceed the relevant timeframe prescribed under the appropriate section of the Code.

Pursuant to Section 7 of the Code, TPI will on request provide the Proponent with the information required under this section.

The process for allocation of train paths as part of the negotiation process for Access will be:

- (a) the Operator will request the Train Path(s);
- (b) TPI will refer to the Master Train Plan to
 - determine if the path(s) are available, or
 - if possible, seek changes to or the deletion of Train Paths allocated to other Operators to create the requested Train Paths, or
 - advise the Operator the Train Paths as requested are not available and suggest alternatives that may be available; and
- (c) at all times maintain dialogue with the Operator to ensure all alternatives are explored.

The finalisation of the Capacity Analysis will enable the finalisation of the resultant Service Entitlement, initial timetable (if relevant), Charges and associated funding arrangements.

2.3. Capacity Allocation

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 TPI will commence negotiations.

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

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

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

Whether a requirement exists will be determined on the basis of the criteria set out below.

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

- (a) the Operator can demonstrate an intention to enter into arrangements for the operation of train Services, to the satisfaction of TPI, or
- (b) the Operator provides details of anticipated increased demand because of
 - an upgrade or expansion of production capacity with confirmation that it will progress (eg. Funding approved, public announcements etc), or
 - market growth based on trend data; or
- (c) the Operator can demonstrate a committed new project with agreed funding.

For the purposes of such negotiations, TPI will effectively reserve an unused Train Path to the Operator for a minimum of 2 months. TPI reserves the right to terminate negotiations with that Operator after that period of time.

TPI recognises its obligations under the Code to ensure that it does not unfairly discriminate between one Proponent and another when making a decision, in accordance with the requirements of Section 16 of the Code.

In the event that an Proponent believes that TPI has not complied with the TPP or provisions of the Code in relation to the allocation of Access Rights, they may have recourse to a dispute resolution mechanism under the Access Agreement. If no Access Agreement is yet in place, an Proponent may seek to have the matter arbitrated as a dispute in accordance with Section 26(1) of the Code.

3. MANAGEMENT OF CAPACITY

3.1. Permanent variations to Train Paths

The following process applies where consideration is being given to the permanent variation of an existing Service Entitlement of an Operator that does not change the overall number of Train Paths allocated to that Operator under its Service Entitlement. Short-term or temporary variations to Train Paths are managed in accordance with the TMG.

Requests for additional Access Rights will be evaluated in accordance with section 2.3. Changes that would result in a reduction in an Operator's Service Entitlements will be evaluated in accordance with section 3.2. Those provisions relate to Operators with Timetabled or Cyclic Traffic.

3.1.1. Permanent variation to Train Path requested by TPI

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

- (a) TPI sends a notice to the Operator stating:
 - that TPI wishes to vary the use by the Operator of the scheduled Train Path;
 - the length of time such variations will be in force;
 - the reason or reasons for TPI's proposal; and
- (b) the Operator consents to TPI's proposed variation, such consent only to be withheld upon reasonable grounds (save that the Operator cannot withhold consent in the case of variations required by reason of TPI's obligations relation to the safety of TPI's Railway Network).

Reasonable grounds in this context includes:

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

TPI must give not less than thirty (30) days notice of a variation request. The Operator must provide its response to this notice within twenty eight (28) days of such notice being received by it, or earlier if possible. If the Operator's response is to refuse consent, it must within such time also provide full reasons in writing to TPI.

3.1.2. Permanent variation to Train Path requested by Operator

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

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

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

TPI will, in seeking to accommodate a request for a varied or additional Train Path from an Operator, undertake to negotiate with other Operators seeking their agreement to amend their Train Paths which will allow TPI to accommodate the request for an additional Train Path. However, as a general principle, once an Operator is given a Train Path and the Operator is subsequently meeting its obligations and requirements under the Code and Access Agreement, that Train Path would not be permanently varied without the consent of both parties.

3.2. Resumption of Capacity

3.2.1. Reduction to Train Service Entitlements due to Under-utilisation

If an Operator has failed to use a Train Path (other than when cancelled in accordance with the processes of the specific Access Agreement) TPI may withdraw the rights to the Train Path.

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

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

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

If an Operator does not operate:

- (a) for Timetabled Traffic, a Service on a Scheduled Train Path seven (7) or more (not necessarily consecutive) times out of any twelve (12) consecutive occasions on which that particular Scheduled Train Path exists; or
- (b) for Cyclic Traffic, 15% of its Service Entitlements under its Access Agreement over any one quarterly period,

the terms of the Access Agreement will provide that TPI may, within thirty (30) days of the last day of the relevant twelve (12) occasions or quarter (whichever is relevant), provide notice in writing to the Operator of an intention to resume the under-utilised capacity (the Intention to Resume Capacity Notice).

Other than if the parties agree to substitute an alternative Scheduled Train Path or Nominated Fortnightly Service, a Service has not been operated if the Operator has failed to:

- present a Service at the scheduled entry point onto the TPI's Railway Network; or
- operate the relevant Service so that it completes its full journey,

in conformance with the locations, days and times set out for that Operator's Service Entitlements in the Fortnightly Train Plan, for any reason other than a Force Majeure event of the failure of TPI to make the Operator's Scheduled Train Path or Nominated Fortnightly Service available.

The Intention to Resume Capacity Notice will state an intention to reduce from a nominated date (referred to as the "Resumption Date"), the Operator's Service Entitlement by:

- (a) in the case of Timetabled Traffic, deleting the Scheduled Train Path from the Operator's Service Entitlement; or
- (b) in the case of Cyclic Traffic, reducing the Operator's Service Entitlement, provided that the remaining Service Entitlement is not less than the Operator's actual usage during the relevant quarter.

The Operator then has twenty eight (28) days from the receipt of this notice to demonstrate, to TPI's reasonable satisfaction, a sustained requirement for that portion of the Service Entitlement that has not been utilised. In this context, the guidelines that apply to reasonable satisfaction are as per Section 2.3 and require that the Operator:

- (i) can demonstrate an ability, access to resources and commitment to address problems where technical problems have contributed to the reduction in usage:
and
- (ii) can demonstrate sufficient demand for Services where market problems have contributed to the reduction in usage.

If this requirement cannot be suitably demonstrated, TPI will issue a notice within thirty (30) days of the intended Resumption Date (the Capacity Resumption Notice), confirming its intention to resume that Operator's Capacity in accordance with subparagraph 3.2.1(c) or (d).

If an Operator does not agree with TPI's decision, the Operator has the option to commence the three stage dispute resolution procedure set out under Section 4.2 of the TPP. The Operator must provide notice to TPI of its intention to pursue this dispute resolution procedure within ten (10) days of receipt of the Capacity Resumption Notice. In

these circumstances, TPI will not implement the resumption until the dispute resolution process has been concluded and then may implement the resumption but only to the extent that such resumption is consistent with the outcomes of the dispute resolution process.

Once the Capacity has been resumed, TPI will vary the Operator's Access Agreement, including adjusting the Charge payable by the Operator in accordance with the terms of the agreement, based on the revised Service Entitlement. This new Charge will be effective from the Resumption Date, or in the event of dispute, from the date of resumption following the conclusion of the dispute resolution process.

3.2.2. Removal of a Service Entitlement due to a transfer of a contract between Operators

If certain Service Entitlements are currently allocated under an Access Agreement to an Operator and that Operator loses part or all of its haulage contracts for which the Service Entitlements are allocated, TPI will negotiate with the Operator to reach agreement on the Service Entitlements to be withdrawn from the Operator.

In the case of such an agreement not being reached, TPI will commence the process under section 3.2.1 for the withdrawal of the Service Entitlement due to under-utilisation. Where the process involving the withdrawal of a Service Entitlement due to under-utilisation is initiated by TPI, an Operator who has lost part of its tonnage still has the opportunity to retain its Service Entitlements if it can satisfy TPI of a sustained requirement for that Capacity in accordance with section 3.2.1.

3.3. Review of Service Entitlements

TPI may, at its discretion, by written notice given to the Operator cause all or part of its Service Entitlements to be reviewed in a bona fide manner by the parties. This will be done by comparing the stated departure and arrival times for identified Scheduled Train Paths and/or Nominated Fortnightly Services with actual performance during the preceding continuous three (3) month period of the actual Trains using or purporting to operate that reviewable Service Entitlement (three month history). In the case of Cyclic Traffic, TPI and the Operator will agree the basis on which performance will be reviewed if a basis for such an assessment is not set out in the Access Agreement.

If on such review of the three month history the departure or arrival times for a Train using or purporting to operate the relevant Service Entitlement differ in material respects, the parties will negotiate in good faith to amend the Service Entitlement so that it reflects, as closely as is reasonably practicable, the three month history. In this context "differs in material respects" means for either Scheduled Train Paths or Nominated Fortnightly Services, the Service fails regularly to:

- (a) be ready for entry to TPI's Railway Network at the specified departure time; or
- (b) when entering TPI's Railway Network on time fails to exit on time.

The effect of any Force Majeure event, failure by TPI to make the network available, or mechanical failure of the Operator's equipment will not be included in any test of performance. Where TPI and the Operator have agreed Key Performance Indicators under the Access Agreement, these will be taken into account in any review.

Nothing compels TPI to revise the Service Entitlement of an Operator if:

- (a) this would compromise the Service Entitlements of any other Operator in accordance with their Access Agreement; or
- (b) to do so would materially adversely impact on TPI's ability or opportunity to efficiently and safely manage the Network.

Nothing compels an Operator to accept a proposal to revise its Service Entitlements if contractual obligations owned by that Operator to any person (including TPI) would prevent it from doing so, unless the regular failure of the Operator's Service compromises the Service Entitlement of another Operator in accordance with its Access Agreement. In this context, regular failure is equivalent to "differs in material respects" defined earlier in this subsection 3.3.

If another Operator's Service Entitlement is being affected:

- (a) TPI will use its reasonable endeavours to renegotiate the affected Service Entitlement of the other affected Operator however that Operator is under no obligation to agree to such variation, recognising that, as a general principle, once an Operator is allocated a Service Entitlement and the Operator is subsequently meeting its obligations and requirements under the Code and Access Agreement, that Service Entitlement would not be permanently varied without the consent of both parties;
- (b) if the affected Service entitlement cannot be reviewed in accordance with (e), the Operator of the non-performing Service Entitlements will use its best endeavours to renegotiate its contractual obligations that would otherwise prevent it from accepting TPI's proposed revisions.

3.4. Cancellation of Services Using Train Paths

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

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

- (i) there are mechanical difficulties with the rolling stock used or operated by the Operator;
- (ii) there is a failure of any part of the Operator's equipment used or to be used in connection with a Service;

- (iii) repair, maintenance or upgrading of TPI's Railway Network is being carried out or there is some other event which materially affects the Operator's use of all or any part of TPI's Railway Network (including, without limitation, derailment, collision or later running trains);
- (iv) the Operator is unable to load trains because of a lack of product at terminals or is unable to unload product at terminals or ports because of insufficient storage space or because of mechanical difficulties with the loading or unloading equipment at terminals or ports.

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

4. OTHER

4.1. Non discrimination

TPI will not discriminate between Operators in the application of this TPP and the application of TPI's network rules.

4.2. Dispute resolution

Any disputes arising in relation to any aspect of these guidelines will be managed in accordance with the Access Agreement. Part 3 of the Code provides for arbitration of Access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.

Once an Access Agreement has been entered into disputes will be resolved by a three-stage process as follows:

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

If no Access Agreement is yet in place, an Proponent, seeking Access under the Code, may seek to have the matter arbitrated as a dispute in accordance with Section 26(1) of the Code.

4.3. Rights of an Operator to Sub-Licence a Train Path

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

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

4.4. Consistency Between Access Agreements and the TPP

TPI will ensure where possible, that those sections of an Access Agreement which relate to requirements set out in the TPP documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the Access Agreement and these documents.

4.5. Compliance and Review

This Train Path Policy may be amended or replaced by TPI with the approval of the ERA.

Stakeholders have the ability to express any concern to the ERA which may arise at any time and the ERA will investigate such claims.

The ERA has the power under the Code to amend the Train Path Policy at any time and Access Seekers and Operators can at any time request the ERA to consider amendments.

APPENDIX A - TRADING IN TRAIN PATHS

1. TRADING IN TRAIN PATHS THROUGH SUB-LICENCES

1.1. Trading must be in accordance with this clause.

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

1.2. Deemed Sub-licence

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

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

1.3. Trading in all Train Paths Prohibited

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

1.4. Prohibition on Trading Used Train Paths Subject to an Intention to Resume Capacity Notice

A Train Path on which TPI has issued a notice under Clause 3.2.1 cannot be on-sold during the subsequent 6 month monitoring period. On-selling is permitted following this 6 month period provided the Train Path has passed the underutilisation test set out under Clause 3.2.1.

1.5. Requirements for Trading

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

- (a) be bound by and comply with the Access Agreement in relation to the relevant Train Path or Train Paths;

- (b) be properly accredited and provide evidence of accreditation as required by the Access Agreement;
- (c) comply with all Instructions;
- (d) indemnify the Operator against liabilities arising as a result of the use of the relevant Train Path or Train Paths; and TPP;
- (e) take out and maintain insurance in the terms of the Access Agreement; and
- (f) not further trade in the relevant Train Path or Train Paths without TPI's prior written consent.

1.6. Further Terms of Trade Agreement

The Trade Agreement must also:

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

1.7. Commencement of Operation of Trade Agreement

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

- (a) A copy of the Trade Agreement has been submitted to TPI and TPI has approved the proposed Trade Agreement as complying with the requirements of this clause 1, such approval not to be unreasonably withheld.; and

- (b) TPI has been given evidence that the Third Party Operator holds the necessary accreditation.

1.8. Definitions

In this clause 1:

- (a) Third Party Operator means any person with whom the Operator enters into an agreement of any kind for the trade of a Train Path.
- (b) Trade means, in relation to a Train Path, any agreement by which the Operator gives to a person who is not a party to the Access Agreement the right to use that Train Path; and other grammatical forms of the word “Trade” have a corresponding meaning.
- (c) Trade Agreement means any agreement for the trade of a Train Path.