

Roy Hill Infrastructure Pty Ltd proposed Train Path Policy

Draft Decision

March 2017

Economic Regulation Authority

WESTERN AUSTRALIA

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Invitation to make submissions

Interested parties are invited to make submissions on the Draft Decision by 21 April 2017 via:

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CONFIDENTIALITY

In general, all submissions from interested parties will be treated as being in the public domain and placed on the Authority's website. Where an interested party wishes to make a submission in confidence, it should clearly indicate the parts of the submission for which confidentiality is claimed, and specify in reasonable detail the basis for the claim. Any claim of confidentiality will be considered in accordance with the provisions of Section 55 of the *Economic Regulation Authority Act 2003*.

The publication of a submission on the Authority's website shall not be taken as indicating that the Authority has knowledge either actual or constructive of the contents of a particular submission and, in particular, whether the submission in whole or part contains information of a confidential nature and no duty of confidence will arise for the Authority.

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Introduction

1. Sections of the *Railways (Access) Code 2000 (Code)* that are relevant to the establishment of a railway owner's Train Path Policy are:
 - Section 44 of the Code requires a railway owner to observe, in the negotiation and making of an access agreement, a statement of policy approved or determined by the Regulator, in the allocation of train paths and the provision of access to train paths that have ceased to be used.
 - Section 45 of the Code requires the Regulator to call for submissions on any statement of policy proposed by a railway owner, prior to it being approved.
 - Section 16(2) of the Code requires that in the negotiation of access arrangements, the railway owner must not discriminate between the proposed rail operations of the proponent and the rail operations of the railway owner, including in relation to the allocation of train paths, the management of train control, and operating standards.
2. On 11 October 2016, Roy Hill Infrastructure (**RHI**) submitted a Train Path Policy for the Authority's approval. The Authority published RHI's proposed Train Path Policy and called for submissions on 25 October 2016.
3. The Pilbara Infrastructure Pty Ltd was the sole submission received and is very brief. It expresses support for all of the regulatory instruments proposed by RHI without providing specific comment on any provisions of the proposals.

Draft Decision

4. This document:
 - Summarises each part of RHI's proposed Train Path Policy, relates these to the relevant provisions of the Code, and compares each part with the provisions of other railway owners' approved Train Path Policies where relevant;
 - Provides the Authority's assessment of relevant issues, and
 - Specifies the Authority's required amendments where appropriate.

Part 1 - Introduction

5. Part 1 of the proposed Train Path Policy provides information on RHI, and on the purpose, scope and application of the Train Path Policy.
6. Part 1.1(b) refers to Roy Hill Holdings (**RHH**) as "having undertaken substantial commercial and operational risk in developing the Roy Hill Project for the benefit of RHH's shareholders".

7. Part 1.1(b) outlines that the tonnages reserved for Roy Hill Iron Ore PL (**RHIO**) haulage by RHI are “a vital element in protecting the investment by Roy Hill Holdings (**RHH**) in the RHI railway”. This part describes RHIO as the “Foundation User”.¹
8. In part 1.1(c), RHI describes its operational philosophy as “run when ready”. Part 1.1(c) provides RHI with the flexibility to adjust train paths to optimally meet Roy Hill’s production requirements.
9. Part 1.2 outlines the purpose of the policy as being, amongst other things, to describe how RHI will allocate train paths when “RH Requirements”² prohibit other operators’ requirements from being met.
10. Part 1.3 proposes that the train path policy has effect under operators’ access agreements, and that the policy does not apply to the process by which access agreements are negotiated. Part 1.2(c) states that “These rules apply to each Operator on the RHI Railway in accordance with the Access Agreement executed by the Operator”.

Authority Assessment

11. References to the ownership of RHI, benefits to the shareholders of RHI associates and the protection of the investment of those shareholders are not relevant in the Train Path Policy.
12. The Train Path Policy should focus on the requirements of the rail access regime and should not contain references to the RHI supply chain or objectives in relation to the supply chain³. In this respect, the Authority notes Hancock Prospecting’s submission⁴ to the review of TPI’s Train Path Policy which stated (at page 4):

There is no requirement to optimise the supply chain in the Access Code. Nor is there any explicit requirement in the Rail and Port Pilbara Infrastructure Agreement Act.

And, at page 9:

By including the infrastructure at the Port, TPI have essentially vertically integrated port operations with the railway. If a third party wishes to use another port, TPI have the ability to adversely impact the Third Party operations by using exigencies at their Port.

13. Part 1 of RHI’s proposed Train Path Policy does not clearly outline a purpose of the Train Path Policy. The purpose of the Train Path Policy is stated in Section 44(2) of the Code as concerning:
 - The allocation of train paths; and

¹ Notwithstanding that RHIO is not a user of the railway infrastructure but a user of the haulage service provided by the above-rail arm of RHI. The above-rail arm of RHI is a user of the railway infrastructure. Part 1.1(b) refers to the “Foundation User” as having a contract with RHI for rail haulage capacity.

² “RH Requirements” is proposed as a defined term, and is defined in Part 6 as “(a) the detailed technical, performance and operational standards under documents and related agreements in connection with any aspect of the Roy Hill Project, including the RH Financier Assumptions; and (b) if at any time RHI’s financing arrangements in respect of the Roy Hill Project end, GRIP (Good Rail Industry Practice)”

³ The *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* contains objectives about the TPI railway and the TPI port (including the railway within the port boundary). The *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010* does not contain objectives about a port.

⁴ <https://www.erawa.com.au/cproot/6862/2/20080912%20D088468%20Public%20Submission%20-%20Hancock%20Prospecting.PDF> GHD for Hancock Prospecting 2008.

- The provision of access to train paths that have ceased to be used.
14. Both Brookfield Rail's (**BR**) and The Pilbara Infrastructure's (**TPI**) Train Path Policies refer to Section 44(2) of the Code. Both the BR and TPI Train Path Policies also state broader goals relating to:
 - protecting the contractual rights of all users of the railway;
 - maximising the utilisation of the railway;
 - ensuring that capacity is allocated in a non-discriminatory way; and
 - providing for the safe use of RHI's railway.
 15. It is not necessary for RHI to refer to specific Code provisions in defining the purpose of its Train Path Policy, but any stated purpose should be consistent with the purpose stated in section 44 of the Code.
 16. Part 1.2 of the proposed Train Path Policy refers to RHI's "run when ready" philosophy as the overarching basis for allocating train paths. This is not a proper tenet on which to base the Train Path Policy, which should be concerned with the allocation of train paths in the making of an access agreement and not with the management of capacity on a day to day basis.
 17. Moreover, it is inappropriate to apply a "run when ready" philosophy with the objective of adjusting departure times of trains so that trains are aligned to optimising a particular operator's transport task, as outlined in 1.1(c).
 18. Section 16 of the Code requires that the railway owner must not unfairly discriminate between rail operations under the Code and rail operations of the railway owner in relation to the allocation of train paths and other matters.
 19. Part 1.3(b) of RHI's proposed Train Path Policy outlines that the Train Path Policy "does not apply to the process by which a person enters into an Access Agreement. Access Agreements are entered into by negotiations in accordance with any applicable access regime."
 20. The statement at 1.3(b) is at odds with the description of the Train Path Policy stated at Section 44(1) as:

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.
 21. Further, in relation to the statement at 1.3(b), the only access regime applicable to the use of the term "access agreement" as defined in the Code is the *Railways (Access) Act 1998 (Act)* and the Code.
 22. The Train Path Policy guides the making (negotiation) of an access agreement, and becomes redundant on the signing of the agreement. The agreement would reflect outcomes consistent with the Train Path Policy. The Train Management Guidelines should guide the day-to-day management of the capacity of the railway consistent with the contractual undertakings contained in all operators' access agreements.
 23. RHI's Train Path Policy should state the relationship between the Train Path Policy and the Train Management Guidelines in the introductory section of the policy.

Required Amendment 1

Part 1 of RHI's proposed Train Path Policy should be amended such that:

- Parts 1.1(b)-(e) are deleted and replaced with:

The RHI railway is subject to the *Railways (Access) Code 2000* (Code). 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
- (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.

- Parts 1.2 and 1.3 are deleted and replaced with text equivalent to Part 1.2 of TPI's Train Path Policy.

Part 2 – Types of Service

24. Part 2 of RHI's proposed Train Path Policy describes a classification scheme for forms of train path entitlement which RHI proposes to provide in access agreements. The proposed scheme is framed in terms of types of "Service". Service is defined in Part 6 of the proposed Train Path Policy as meaning:

access to the RHI Railway and any other services or facilities agreed to be provided by RHI to the Operator as set out in an Access Agreement⁵

25. Part 2.1 describes a "contracted service" as the primary reserved train path entitlement to be offered in an access agreement. A "Contracted Service" may be supplemented by a path under an access agreement enabling an operator to request to run additional trains. This is referred to as a "supplementary service".
26. Part 2.1(c) describes a proposed special category of train path entitlement which would be the paths provided to the "Foundation User" to haul "Foundation Tonnage".⁶
27. Part 2.2 outlines a protocol for the aggregation of contracted services of operators with multiple access agreements.

Authority Assessment

28. The paths proposed to be used by the "Foundation User" to haul the "Foundation Tonnage" are a "contracted Service". On this basis, train paths for hauling the "Foundation Tonnage" would be paths provided under an access agreement.⁷ The

⁵ "Service" is defined in both the BR and TPI Train Path Policies as a train run by the Operator using the railway network by which the Operator provides freight or passenger services, which is the normal industry use of the word. Consistent with this industry practice, RHI at part 1.1(e) of its proposed Segregation Arrangements, refers to the operation of train services as being associated with haulage functions.

⁶ As noted above, RHIO is not a "user" of the railway infrastructure, but a haulage customer (user) of RHI's above-rail operation. Train Paths cannot be provided by RHI to RHIO, but only to RHI's own above-rail operation for the purposes of providing haulage services to RHIO.

⁷ Meaning that RHI proposes to operate its own above rail operations under an access agreement.

proposed Train Path Policy does not indicate directly that RHI will haul RHIO tonnages under an access agreement between the above- and below-rail arms of its business. Further, terminology used by RHI in this part is not accepted, as the “Foundation User”⁸ is a customer of the above-rail operation of RHI (that is a user of the haulage service) and not a “user” of the below rail service, which is the subject of the Train Path Policy.

29. The nomenclature adopted in this part of RHI’s proposed Train Path Policy is not sufficiently clear. The Authority considers that RHI should clarify that RHI will conduct its above-rail operations under an access agreement, if that is the case.
30. Further, references to a customer of an operator (namely the haulage customer referred to as the “Foundation User”) are not appropriate in the Train Path Policy.
31. TPI’s Train Path Policy describes each operator’s service entitlement in terms of “Timetabled Traffic” and “Cyclic Traffic”. These service types enable varying priorities within all operators’ supply chains to be satisfied on an equitable basis. BR’s Train Path Policy does not contemplate different types of train paths, but explicitly allows the trading of train paths as a means of managing short-term variations in service requirements by operators. TPI’s Train Path Policy also allows for the “sub-leasing” of train paths.
32. Part 2.2 refers to services contracted, i.e. contracted services in an access agreement, not the process of negotiating the agreement and therefore is not accepted.
33. Part 2 of RHI’s proposed Train Path Policy is not accepted.

Required Amendment 2

Part 2 of RHI’s proposed Train Path Policy should be deleted

Part 3 – Order of Priority

34. Part 3 of RHI’s proposed Train Path Policy allows for the prioritising of train paths at the discretion of RHI, and set out rules for Disruption of the provision of contracted train paths to an operator.⁹
35. The proposed objective of Disruption is to ensure that an “Entitlement Holder” in a “higher ranked” category receives as many of its contracted paths as possible. Part 3.2 provides a priority ordering of Entitlement Holders.¹⁰ The highest priority Entitlement Holder is the “Foundation User” and its Entitlement quantity described in

⁸ Referred to in part 1.1 of the proposed TPP, and the Foundation Tonnage defined in Part 6 “Definitions and Interpretation”. “Contracted Service” is defined in part 2.1 as “the primary reserved Service under an Access Agreement which may be offered to an Operator”

⁹ Disruption is (also) defined in Part 6 of the proposed TPP as disruption of a haulage service.

¹⁰ Entitlement Holder is not defined in the proposed Train Path Policy.

tonnage terms, not in terms of numbers of train paths. The proposed Train Path Policy provides that RHI has discretion to vary the “Foundation Tonnage” from time to time.

36. In Part 3.2, the second priority “Category”¹¹ is “Other Contracted Services” which appears to correspond with the “Contracted Service” referred to in Part 2.1(a). The Third category is “Ordinary Additional Services” which appears to correspond with the train paths referred to in Part 2.1(b).
37. Parts 3.3 and 3.4 provide proposed guidelines for apportioning available tonnage within category 2 and category 3 respectively.

Authority Assessment

38. Part 3 defines the Entitlement Holder as a haulage customer and defines the entitlement quantity as tonnage. These definitions are not accepted. For the purpose of the Train Path Policy, and consistent with the objectives of the Train Path Policy as outlined in Section 44 of the Code, the ‘person entitled to a’ train path must be an operator and the entitlement must be in terms of train paths.
39. In order to define train paths in terms of a number of trains, a form of capacity analysis must be undertaken as a part of negotiating an access agreement. The proposed Train Path Policy does not deal with analysis of capacity and allocation of capacity. TPI’s Train Path Policy provides a good description of the role of capacity analysis.¹²
40. The prioritising of operators’ entitlements in RHI’s proposed Train Path Policy is not accepted, as it appears to be in contravention of section 16 of the Code, and as it goes beyond the purpose of the Train Path Policy as outlined in the Code. Notwithstanding the concerns with “apportioning available tonnages”, namely variations in the “Foundation Tonnage”, the Train Management Guidelines would normally outline the protocols for management of capacity on a day to day basis.
41. Part 3 of RHI’s proposed Train Path Policy is not accepted.

Required Amendment 3

Part 3 of RHI’s proposed Train Path Policy should be deleted and replaced with text equivalent to Part 2 of TPI’s Train Management Guidelines.

Part 4 – Applying these priority rules

42. Part 4 of RHI’s proposed Train Path Policy describes a “Full Service Objective”. The Full Service Objective is defined in Part 4.2, and means that – subject to the “RH Requirements” – RHI will ensure sufficient paths to enable each operator to receive its contracted train paths for the year.

¹¹ The term “Category”, is referred to in Part 6 Definitions and Interpretations, but the definition of the term is related to Part 3.2, where the term remains undefined. The term appears to refer to Categories of Train Paths.

¹² Part 2 of TPI’s Train Path Policy describes the operation of TPI’s Master Control Diagram and the role of capacity analysis in the allocation of capacity and the making of an access agreement.

43. Part 4 also describes the proposed means of achieving the Full Service Objective under (a) normal operating circumstances and (b) during emergencies, and the remediation of shortfalls. Management of capacity under these circumstances is proposed to be invariably subject to RH Requirements.
44. Part 4.7 provides for a register of decisions, where RHI will make a record of all decisions and the reasons for decisions resulting in a Disruption to a train path.
45. Part 4.8 declares the predominance of RH requirements over all elements of the Train Path Policy. Further, this part outlines that an operator's access agreement may detail the extent to which RH Requirements may be disclosed to the Operator. "Disclosed Requirements" is presented as a defined term¹³ and it is proposed that there may be conflicts or inconsistencies between RH Requirements and Disclosed Requirements.

Authority Assessment

46. The prioritisation of train paths serving the railway owner's above-rail operations over train paths contracted by other operators is not accepted as the basis for application of the Train Path Policy.
47. Accordingly, Part 4 of RHI's proposed Train Path Policy is not accepted.

Required Amendment 4

Part 4 of RHI's proposed Train Path Policy should be deleted

Part 5 – Provision of access to underutilised Train Path

48. Part 5 of RHI's proposed Train Path Policy provides the rules for identifying an underutilised train path, and for the withdrawal of contractual entitlement to use that path.
49. Part 5.1(c) describes the proposed process and requires a three month monitoring period. RHI proposes that if the train path is not utilised as prescribed in the Access Agreement over that period, the Train Path may be identified as underutilised, and a notice issued to the Operator to that effect.
50. If the Operator fails to utilise the train path as prescribed in the Access Agreement more than six times in a six month period from the day of the notice, then the path will be confirmed as underutilised.
51. Part 5.2 provides that RHI may withdraw the contractual entitlement of the Operator to use that underutilised train path. Part 5 makes provision for an Operator to provide RHI with relevant evidence in relation to the underutilisation, proof of a force majeure event or to demonstrate a bona fide future requirement for that Train Path.
52. Part 5 of RHI's Train Path Policy is similar to the equivalent provisions contained in Part 3.2.1 of the TPI Train Path Policy and Part 4 of the BR Train Path Policy.

¹³ The definition of Disclosed Requirements in Part 6 refers to Part 4.8, with no further clarification.

Authority Assessment

53. Part 5 of RHI's Train Path Policy is accepted.
54. RHI's proposed Train Path Policy has not addressed a number of other important reasons for the variation, review or cancellation of Train Paths. These include:
 - permanent variations to train paths, including variations requested by the railway owner or the operator;
 - removal of a service entitlement due to a transfer of contract between operators;
 - review of operator's requirements; and
 - cancellation of a path by the operator.
55. Parts 3.1, 3.2.2, 3.3 and 3.4 of TPI's Train Path Policy and Part 3 of BR's Train Path Policy address these matters.
56. Both the TPI (at Part 4.3) and BR (at Part 5) Train Path Policies contain provisions allowing the sub-leasing or trading of train paths between operators. The ability for a secondary market to operate (under prescribed circumstances) is an important element for ensuring the efficient utilisation of a railway.¹⁴

Required Amendment 5

Part 5 of RHI's proposed Train Path Policy should be amended such that:

- the title of that Part is changed to reflect a broader range of matters impacting on variations to train paths.
- text equivalent to TPI's Train Path Policy Parts 3.1, 3.2.2, 3.3 and 3.4 is incorporated into Part 5.
- text equivalent to TPI's Train Path Policy Part 4.3 and Appendix A "Trading in Train Paths" is included in Part 5, or in a stand-alone Part.

¹⁴ Hancock Prospecting, in its submission to review of TPI's Train Path Policy in 2008, submitted that TPI should include provisions in its Train Path Policy for the on-selling of train paths <https://www.erawa.com.au/cproot/6862/2/20080912%20D088468%20Public%20Submission%20-%20Hancock%20Prospecting.PDF> page 22.

Appendix 1 Summary of Required Amendments

Required Amendment 1

Part 1 of RHI's proposed Train Path Policy should be amended such that:

- Parts 1.1(b)-(e) are deleted and replaced with:

The RHI railway is subject to the *Railways (Access) Code 2000* (Code). 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
- (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.

- Parts 1.2 and 1.3 are deleted and replaced with text equivalent to Part 1.2 of TPI's Train Path Policy.

Required Amendment 2

Part 2 of RHI's proposed Train Path Policy should be deleted

Required Amendment 3

Part 3 of RHI's proposed Train Path Policy should be deleted and replaced with text equivalent to Part 2 of TPI's Train Management Guidelines.

Required Amendment 4

Part 4 of RHI's proposed Train Path Policy should be deleted

Required Amendment 5

Part 5 of RHI's proposed Train Path Policy should be amended such that:

- the title of that Part is changed to reflect a broader range of matters impacting on variations to train paths.
- text equivalent to TPI's Train Path Policy Parts 3.1, 3.2.2, 3.3 and 3.4 is incorporated into Part 5.
- text equivalent to TPI's Train Path Policy Part 4.3 and Appendix A "Trading in Train Paths" is included in Part 5, or in a stand-alone Part.