

Roy Hill Infrastructure Pty Ltd Proposed Train Path Policy

Final Decision

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Economic Regulation 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 as follows:
 - 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 agreements, 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 a draft decision in respect of the proposed policy and called for submissions on 24 March 2017.
3. A submission was received from RHI. That submission has been published on the ERA website.

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4. This document:
 - Summarises issues and required amendments identified by the Authority in each part of RHI's proposed Train Path Policy;
 - Summarises responses from RHI to each of these issues, as laid out in RHI's submission; and
 - Specifies the Authority's final required amendments where appropriate.

Part 1 - Introduction

Subservience of the Train Path Policy to the objectives of the railway owners own above-rail operations

5. Part 1 of Roy Hill Infrastructure's (RHI) proposed Train Path Policy asserts primacy of the haulage task undertaken for Roy Hill Iron Ore (RHIO)¹ and describes the purpose of the Train Path Policy as being to describe how RHI will allocate train paths when "RH requirements"² prohibit other operators' requirements from being met.
6. In its draft decision, the Authority outlined that the Train Path Policy should not contain references to the railway owner's supply chain, and should focus on the requirements of the railways access regime. The Authority highlighted Hancock Prospecting's objections to supply chain references in the Train Path Policy initially proposed by The Pilbara Infrastructure (TPI) in 2008. The draft decision required the deletion of Parts 1.1(b)-(e) of RHI's proposed Train Path Policy.
7. The above concerns of the Authority were laid out in paragraphs 11-12 and 16-17 of the Draft Decision. In its submission, RHI did not agree with the deletion of Parts 1-1(b)-(e) of its proposed Train Path Policy. RHI did not address the concerns of the Authority as laid out in paragraphs 11-12 and 16-17 of the draft decision.
8. In its submission, RHI stated that the Authority should understand that the Train Path Policy must recognise the interests of the Roy Hill companies and their financiers in the railway. The Authority considers that the Train Path Policy must provide RHI's statement of policy that it will apply in the allocation of trains paths and the provision of access to train paths that have ceased to be used.
9. Section 16 of the Code is clear with respect to the general duties of the railway owner in negotiations, in particular section 44(2):
 - (2) In the negotiation of access agreements the railway owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the railway owner including, without limitation, in relation to —
 - (a) the allocation of train paths;
 - (b) the management of train control; and
 - (c) operating standards.
 - (3) In subsection (2) —

rail operations of the railway owner includes the rail operations of an associate of the railway owner.

¹ RHIO is described in RHI's proposed Train Path Policy as the "Foundation User". The Authority considers such a definition misleading, as RHIO is not understood to be a "user" of the below-rail infrastructure, but a customer of RHI's above-rail operation. RHI's above-rail operation is a "user" of the below-rail infrastructure

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)"

10. Accordingly, the Authority is concerned that RHI appears to be seeking to avoid conforming its Train Path Policy with its obligations, i.e. a requirement to not discriminate. The interests of the Roy Hill companies and their financiers cannot override RHI's legislative obligations of providing access to its railway and preparing a suitable Train Path Policy.
11. The Authority confirms its requirement in the draft decision that Parts 1.1(b)-(e) of RHI's proposed Train Path Policy be deleted.

Purpose statement

12. In Part 1.2 of the proposed Train Path Policy, RHI outlines the purpose of the policy as being concerned with day-to-day capacity management.
13. In its draft decision, the Authority required that RHI provide a purpose statement that is consistent with the purpose of the Train Path Policy outlined in section 44(2) of the Code. A purpose statement would refer to the Train Path Policy providing for (a) the allocation of train paths; and (b) the provision of Access to train paths that have ceased to be used. The Authority required that RHI replace Part 1.2 of its proposed Train Path Policy with text equivalent to Part 1.2 of TPI's Train Path Policy.
14. In its submission, RHI did not agree with the deletion of Part 1.2 of its proposed Train Path Policy, but did agree with the required insertion of text equivalent to section 1.2 of TPI's Policy. In its submission, RHI provided suggested text which is not equivalent to Part 1.2 of TPI's Policy. The suggested text refers to Parts 1(c) and 1(d) of its proposed document, which the Authority requires be removed. RHI did not provide reasons for the retention of Part 1.2 of its proposed Train Path Policy.
15. The Authority confirms its requirement in the draft decision that Part 1.2 of the proposed Train Path Policy be replaced with text equivalent to Part 1.2 of TPI's Train Path Policy.

The negotiation and making of an access agreement

16. Part 1.3 of RHI's proposed Train Path Policy states that the Train Path Policy "does not apply to the process by which a person enters into an Access Agreement". This statement contradicts the description of the Train Path Policy stated at section 44(1) of the Code 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 agreement
17. Part 1.3 of the proposed policy also contains a reference to "any applicable access regimes".³ The only access regime applicable to the Train Path Policy is the WA Railways Access Regime (the Act and the Code)
18. In its draft decision, the Authority required the deletion of Part 1.3 of RHI's proposed Train Path Policy.

³ By this, the Authority understands RHI to mean not only the WA Railways Access Regime, but also an Access undertaking under the *Competition and Consumer Act 2010*, as defined in section 5 of its proposed Train Management Guidelines (definition of "Access Regime")

19. In its submission, RHI agreed with the deletion of Part 1.3 of its proposed Train Path Policy.
20. RHI's submission confirms that it will conform to the Authority's draft decision requirement that Part 1.3 of the proposed Train Path Policy be deleted. The Authority confirms its draft decision requirement to delete Part 1.3 of the proposed Train Path Policy submitted in October 2016.

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 infrastructure 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

Definition of “Contracted Services”

21. In Part 2 of its proposed Train Path Policy, RHI defines a contracted service as the primary “reserved” entitlement under an Access Agreement, and stipulates that additional entitlements may be requested under an Access Agreement to run additional trains.
22. At Part 2.1(c), RHI defines a “special” category of contracted entitlement, being the entitlement provided to the “Foundation User” to haul the “Foundation Tonnage”. Part 2.1(c) also states that the Foundation Tonnage is all Tonnage hauled by RHI for the Foundation User.
23. Part 2 of RHI's proposed Train Path Policy presents some conflicting definitions and usage of terms which are not consistent with (a) standard industry practice, and (b) the requirements of the Code:
 - The accepted industry use of the term “Service” is a train run by the Operator using the railway network by which the Operator provides freight or passenger

- services⁴. The term is used in this way in both the BR and TPI Train Path Policies.
- RHIO is described as the “Foundation User”. 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.
 - The paths proposed to be allocated to the “Foundation User” to haul the “Foundation Tonnage” is a category of “contracted Service”. On this basis, these are paths provided under an access agreement. The proposed Train Path Policy does not indicate directly that RHIO tonnages will be hauled by RHI under an access agreement between the above- and below-rail arms of its business.
 - The two sentences comprising Part 2.1(c) are conflicting. The first sentence states that the “Foundation User” will haul the “Foundation Tonnage”, which implies that RHIO will operate the haulage service. The second sentence indicates that RHI will operate the haulage service.
24. The inconsistent terminology referred to in paragraph 23 above was explained at paragraphs 28-30 and footnotes 5-8 of the Authority’s draft decision.
25. In its draft decision, the Authority required that Part 2 of RHI’s proposed Train Path Policy be deleted.
26. In its submission RHI stated that Part 2 should not be deleted from its proposed Train Path Policy as Part 2 reflects how the capacity of the RHI railway infrastructure will actually be used.
27. In its submission RHI stated that the maximum capacity of the existing RHI railway infrastructure is 55mtpa, and that 55mtpa will be hauled for RHIO. On this basis, there would be no capacity available for third party access on the existing railway infrastructure. The Authority understands this and does not consider that this affects its decision on of Part 2 of RHI’s proposed Train Path Policy.
28. RHI has not addressed the Authority concerns with Part 2 of its proposed Train Path Policy.
29. The Authority confirms its requirement in its draft decision, that Part 2 of RHI’s proposed Train Path Policy be deleted.

Required Amendment 2

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

⁴ 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.

Part 3 – Scheduling Principles

Defining ‘Entitlement’ and ‘Entitlement Holder’ in terms of tonnage and customers of operators

30. Part 3 of RHI’s proposed Train Path Policy allows for the prioritising of train paths at the discretion of RHI and sets out rules for “Disruption” of the provision of contracted train paths to an operator.⁵
31. 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.⁶ The highest priority Entitlement Holder is proposed to be the “Foundation User” and its Entitlement quantity is described in tonnage terms, not in terms of numbers of train paths. The proposed Train Path Policy provides that the “Foundation Tonnage” may be varied at the discretion of RHI from time to time.
32. In its draft decision, the Authority did not accept references to haulage customers as Entitlement Holders, or description of entitlement in tonnage terms. 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.
33. In order for train paths to be defined in terms of a number of trains, a form of capacity analysis must be undertaken as a part of negotiating an access agreement. Analysis of capacity and allocation of capacity are not dealt with in the proposed Train Path Policy. Part 2 of TPI’s Train Path Policy provides a good description of the role of capacity analysis.⁷
34. The prioritising of entitlements in RHI’s proposed Train Path Policy is not accepted, as it would be in contravention of section 16 of the Code, and because 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 protocols for management of capacity on a day-to-day basis would normally be outlined in the Train Management Guidelines.
35. In its draft decision, the Authority required that Part 3 of RHI’s proposed Train Path Policy be replaced with text equivalent to Part 2 of TPI’s Train Path Policy.
36. In its submission, RHI stated that Part 3 of RHI’s proposed Train Path Policy deals with different issues from the issues dealt with in Part 2 of the TPI Train Path Policy, and suggested that text equivalent to Part 2 of the TPI Train Path Policy be added to Part 3 of RHI’s proposed Train Path Policy without the removal of the existing text in that part.
37. The Authority accepts RHI’s contention that Part 3 of RHI’s proposed Train Path Policy deals with different issues from the issues dealt with in Part 2 of the TPI Train

⁵ Disruption is defined in Part 6 of the proposed Train Path Policy as disruption of a haulage service.

⁶ Entitlement Holder is not defined in the proposed Train Path Policy.

⁷ 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.

Path Policy. The Authority considers that Part 3 of RHI's proposed Train Path Policy is an inappropriate inclusion in the Train Path Policy and that RHI's proposed Train Path Policy is deficient by the absence of a mechanism for capacity analysis and allocation, of the sort shown in Part 2 of TPI's Policy.

38. RHI stated in its submission that it is appropriate to retain Part 3 of its proposed Policy as that part accurately reflects how it will allocate capacity on the RHI railway infrastructure. RHI re-stated that the "Foundation User" will have first priority for all "Foundation Tonnage" and third parties will have second priority for their contracted tonnage.
39. RHI did not address the concerns of the Authority shown at paragraphs 38-40 of the Authority's draft decision.
40. In its submission, RHI also said that its proposed "priority structure" has been acknowledged and accepted by third parties with whom RHI has commenced to negotiate access "arrangements". The Authority has not been made aware of any access proposals having been made.⁸
41. In its submission, RHI provided suggested text for insertion to Part 3 of its Policy. This text is not equivalent to Part 2 of TPI's Train Path Policy, as it does not include Parts 2.1 and 2.2 of the TPI Policy. Those parts refer to Service Entitlements in terms of train paths and the maintenance of a Master Train Plan.
42. The Authority confirms Required Amendment 3 of the draft decision that Part 3 of RHI's proposed Train Path Policy be deleted and replaced with text equivalent to Part 2 of TPI's Train Path Policy. This should address the Authority's concerns as expressed above.

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 Path Policy.

Part 4 – Applying these priority rules

Making the achievement of contracted third party terms of access subservient to Roy Hill's own requirements

43. 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 services' for the year.

⁸ In accordance with sections 8(3)(d) and 8(4A) of the Code, the Regulator must be provided with a copy of a notice in writing of the proponent's intention to enter into negotiations for an access agreement.

44. 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.
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 term⁹ and it is proposed that there may be conflicts or inconsistencies between RH Requirements and Disclosed Requirements.
46. In its draft decision, at paragraph 46, the Authority indicated that prioritising of train paths for 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, and required that Part 4 be deleted.
47. Further, provisions for the day-to-day management of capacity under emergencies and unusual circumstances should be detailed in the Train Management Guidelines, not the Train Path Policy.
48. In section 4 of its submission, RHI referred to its response to the Authority's draft decision on RHI's proposed Train Management Guidelines. The last paragraph of that section includes:

The Disclosed Requirements and the RH Requirements are dictated to RHI by third parties, namely financiers. Financiers also require that the "run when ready" philosophy dictates appropriate scheduling. It is not commercially possible for the RHI railway to operate in any other way than in accordance with the "Disclosed Requirements", the "RHI Requirements" and the "run when ready" philosophy.
49. The Authority does not accept this. RHI has not addressed the Authority's draft decision concerns (refer to paragraph 46 above). The Authority confirms Required Amendment 4 of the draft decision that Part 4 of RHI's proposed Train Path Policy be deleted.

Required Amendment 4

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

⁹ The definition of Disclosed Requirements in Part 6 refers to Part 4.8, with no further clarification.

Part 5 – Provision of access to underutilised Train Path

The absence of provisions for managing permanent variation to, and cancellation of train paths

50. Part 5 of RHI's proposed Train Path Policy provides rules for identifying an underutilised train path, and for the withdrawal of contractual entitlement to use that path.
51. Part 5 of RHI's proposed policy is framed in terms equivalent to provisions of the TPI and BR Train Path Policies, and appropriately refers to train paths. However, this part does not address a number of important reasons for the variation, review or cancellation of train paths, including:
 - 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.
52. These matters are addressed in Parts 3.1, 3.2.2, 3.3 and 3.4 of TPI's Train Path Policy and in Part 3 of BR's Train Path Policy.
53. The proposed policy does not accommodate operation of a secondary market for train paths, which is considered an important element for ensuring the efficient utilisation of a railway.¹⁰ 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.
54. In its draft decision, the Authority required RHI to amend Part 5 of its proposed Train Path Policy to reflect these additional matters. The Authority otherwise accepted the provisions of Part 5 of the proposed policy.
55. In its submission, RHI accepted the Authority's required amendments to Part 5 of its proposed Train Path Policy.
56. In relation to the trading of train paths, RHI stated that the right of an operator to sell the rights to use a train path, or to assign rights under an access agreement, should be set out in the Access Agreement between RHI and the operator. RHI stated that these rights should not be set out in the Train Path Policy. RHI nonetheless stated that it would provide for a secondary market in the same way that the TPI Train Path Policy acknowledges in relation to the right of an operator to assign rights under an access agreement.

¹⁰ 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.

57. RHI's submission confirms that it will conform to the Authority's draft decision requirement. The Authority confirms Required Amendment 5 of its draft decision on RHI's proposed Train Path Policy.

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 affecting 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.

Part 6 – Definitions and Interpretation

Inclusion of inappropriate definitions

58. The Authority considers that there is a lack of clarity in RHI's use of the terms "RHI Railway". The definition provided by RHI for "RHI Railway" refers to railway infrastructure which is not covered under the definition of railway infrastructure in section 3 of the *Railways (Access) Act 1998*.
59. In fact, all railway infrastructure is included in the definition of railway infrastructure. The definition of railway infrastructure in both the Act and the Code excludes rolling stock and all associated facilities.
60. The Authority requires RHI to provide a definition of "RHI Railway" which is consistent with or refers to the definition of "railway infrastructure" in the Code.

Required Amendment 6

- Part 6 of RHI's proposed Train Path Policy should be amended such that a definition of "RHI Railway" is provided which is consistent with or refers to the definition of "railway infrastructure" in the Code.