

WestNet Rail's Part 5 Instruments Review

Draft Determination on the Proposed Train Path Policy

10 May 2006

Economic Regulation Authority



WESTERN AUSTRALIA

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DRAFT DETERMINATION

1. On 15 December 2005, WestNet Rail Pty Ltd (**WNR**) submitted its proposed Train Path Policy (**TPP**) to the Economic Regulation Authority (**Authority**) for approval. The submission of the proposed TPP resulted from a requirement for WNR to review the existing TPP two years after approval by the Independent Rail Access Regulator (**IRAR**) in February 2003.
2. The Authority has considered the proposed TPP in conjunction with comments made in submissions to the Authority by interested persons.
3. The draft determination of the Authority is to not approve the proposed TPP on the grounds that it does not represent a fair balance of interests between the railway owner, operators (operators and customers) and access seekers as required under Section 20(4) of the *Railways (Access) Act 1998*. The detailed reasons for this draft determination are set out in this document.
4. The nine amendments to the proposed TPP required by the Authority are listed below.

Summary of Amendments

Required Amendment 1

Section 2.2.1, on page 3 of the proposed TPP, should be amended as follows:

- Delete the words “or amended” in the first paragraph.
- Delete the words “Train Paths or additional trains” in the third paragraph and replace with the words “new Train Paths”.
- Delete the words “a contractual commitment to operate trains or deliver passengers or freight” in the fourth paragraph and replace with the words “an intention to enter into arrangements for the operation of freight or passenger train services, to the satisfaction of WestNet”.
- Add the word “or” to the end of the fourth paragraph.

Required Amendment 2

Part (iv) of Section 2.2.2, on page 5 of the proposed TPP, should be deleted.

Required Amendment 3

Section 2.2.1, on page 4 of the proposed TPP (conditional train path process), should be amended to make provision for the introduction of traffic specific capacity for bulk commodities on mainlines where demand for capacity is high, in order to remove potential barriers to entry for new operators.

Required Amendment 4

Sections 2.4 and 2.9, of the proposed TPP, should be combined so that there is only one section dealing with all types of variations to train paths. This combined section should contain two sub-sections. The first sub-section should deal with the process to be followed if WNR wishes to vary a train path and the rights of WNR in this process.

The second sub-section should deal with the process to be followed if an operator wishes to vary a train path and the rights of the operator in this process.

Required Amendment 5

Section 2.5 of the proposed TPP should be deleted as this section is dealt with in Section 3.5 of the proposed TMG.

Required Amendment 6

Section 2.6 of the proposed TPP should be amended by separating this section into two parts. The first part should deal with the removal of train paths due to under-utilisation. The second part should deal with the removal of train paths due to the transfer of a contract between operators. In the second part, WNR should differentiate between:

- Train paths used by single customer trains which lose this customer's tonnage to another operator.
- Train paths used by multi-customer trains which lose a major customer's tonnage to another operator.
- Train paths used by multi-customer trains which lose a minor customer's tonnage to another operator.

Required Amendment 7

Section 2.8, of the proposed TPP, should be amended as follows:

- Add the words "any one of" following the word "under" in the second paragraph of this section.
- Delete the word "and" from the end of the sentence under part (vi) of this section.

Required Amendment 8

Section 4, of the proposed TPP, should be amended to allow operators to sell a train path to another operator subject to the approval of WestNet, which cannot unreasonably be withheld. A set of criteria needs to be specified setting out the conditions under which WestNet would provide its approval. These conditions need to be reasonably based and consistent with the provisions of the Code.

Required Amendment 9

Section 7 (page 12) of the proposed TPP, should be amended by deleting the current wording and replacing it with the following words:

"Consistency between Access Agreements and the TPP and TMG"

WestNet will ensure that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.

INTRODUCTION

Background

5. WNR is the principal provider of “below” rail freight infrastructure, covering approximately 5,000 kilometres of track, in the south-west of Western Australia. WNR is a subsidiary company owned by Babcock & Brown Ltd, a publicly listed Australian company.
6. Section 3 of the Western Australian *Railways (Access) Act 1998* (**Act**) defines a “railway owner” to mean the person having the management and control of the use of the railway infrastructure. Within this context, WNR is considered to be the railway owner for the freight rail infrastructure.
7. The TPP is one of the four Part 5 Instruments set out in Section 40(3) of the *Railways (Access) Code 2000* (**Code**). Each of the Part 5 Instruments is currently being reviewed by the Authority.
8. The scope of the Part 5 Instrument reviews is limited to those matters specifically set out under Part 5 of the Code.
9. In the case of the TPP, Section 44(2) of the Code sets out the extent of the issues considered in this review, as follows:
 - 44(2) As soon as practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of the policy that 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.
10. In February 2003, the IRAR approved the TPP submitted by WNR following the introduction of the Code. The IRAR carried out a public consultation process during the course of its assessment in 2002. In its determination the IRAR stipulated the requirement for a review at the end of two years of operation of the TPP.
11. Following a request from WNR, the Authority approved an extension of time to 15 December 2005 for WNR to submit its proposed revisions to its TPP (proposed TPP) for the purpose of the review.
12. Under Part 5 of the Code, the Authority is required to undertake public consultation prior to making determinations on two of the Part 5 Instruments (Train Management Guidelines and Statements of Policy) but not in relation to the other two Part 5 Instruments (Costing Principles and Over-payment Rules). However, the Authority decided that a consistent approach to public consultation should be followed and invited public submissions on all four Part 5 Instruments. This approach is also consistent with the approach taken by the IRAR in 2002.
13. On 15 December 2005, the Authority issued a notice calling for submissions from interested parties on WNR’s proposed TPP. Four public submissions were received from:
 - Alcoa World Alumina Australia Pty Ltd.

- Australian Rail Track Corporation Ltd.
- Great Southern Railway Ltd.
- Pacific National Pty Ltd.

These submissions are available on the Authority's website (www.era.wa.gov.au).

14. The proposed TPP is designed to ensure that the allocation of train paths is undertaken in a manner that ensures fairness of treatment between operators. It acknowledges existing contractual rights and any new contractual rights created under access agreements entered into under the Code. While the TPP, as one of the Part 5 Instruments in the Code, is only required to apply to operators who negotiate inside the Code, WNR has indicated that the TPP will apply in a non-discriminatory way to all operators (whether they negotiate inside or outside the Code) of the rail freight network so as to maintain the order of priority of the scheduled train paths.
15. Associated with the TPP is the Train Management Guidelines (**TMG**) document. This document is a statement of principles, rules and practices that will be applied in the real time management of train services. The principles, policies and practices described in the TMG will also apply in a non-discriminatory manner between all operators of the network. WNR's proposed TMG document is the subject of a separate determination by the Authority.
16. In making this draft determination, the Authority is mindful of the legislative requirements of the *Rail Safety Act 1998* 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 1998*.
17. This draft determination makes reference to a number of acronyms which are identified in the Glossary in Appendix 1.
18. To assist the Authority in the review of the issues raised in the public submissions, the Authority engaged a consultant Strategic design and Development Pty Ltd (SdD) to review the submissions and provide independent comment to the Authority on the issues raised in these submissions. The SdD report is available on the Authority's website (www.era.wa.gov.au).

Legislative Considerations

19. The key areas of the Code and the Act that have relevance to the formulation and application of the TPP are as follows:
 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 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 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.
20. The Act provides a framework within which the Authority's determination required under Section 44 of the Code is to be made. Section 20(4) states:

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.

The nature of the decision-making power given to the Authority under Section 44 of the Code is mandatory in that the Authority must take into account all the factors listed in Section 20(4) of the Act. However, the Authority has discretion to allocate such weight to each of the factors listed in Section 20(4) of the Act as it considers appropriate for each particular case.

Assessment Process

21. The Authority's draft determination provides the railway owner, operators and access seekers with the proposed outcome of the Authority's consideration of WNR's proposed TPP. The draft determination also proposes amendments which are required to be made to WNR's proposed TPP in order for the Authority to approve this policy.
22. The process for the review of the proposed TPP that the Authority has adopted is as follows:
 - Public submissions on WNR's proposed TPP (January 2006).

- Authority's draft determination published (May 2006).
- Public submissions on draft determination (June 2006).
- Authority's final determination published (June 2006).
- Amended TPP submitted by WNR (June 2006).
- WNR's amended TPP approved by the Authority (July 2006).

REASONS FOR THE DRAFT DETERMINATION

Discussion of Issues

23. Relevant issues raised in public submissions on WNR's proposed TPP are discussed below under the following headings:
 - Management of train paths.
 - Cancellation of services.
 - Rights to sell a train path.
 - Competition for the same train path.
 - Priority of documents.
24. There were some minor issues, related to definitional errors, raised in submissions which are being directly addressed with WNR and do not form part of this draft determination.
25. The Authority has taken the view that those sections of WNR's proposed TPP on which no comment has been made are acceptable to operators and access seekers. The proposed TPP is largely the same as the TPP approved by the IRAR in 2003 so operators and access seekers have had a considerable period to assess the effectiveness and suitability of this policy.
26. The discussion of each item below commences with a summary of WNR's position followed by an outline of relevant comments received in the public consultation process then the Authority's assessment and any amendments required.

Management of Train Paths

Master Train Plan

WNR's Proposal

27. In Section 2.1 of the proposed TPP, WNR has indicated it will maintain a Master Control Diagram for each of the routes under its control that are subject to the Code. The Master Control Diagrams will initially be those in existence when the WA Rail Access Regime commenced in September 2001, recognising existing contractual arrangements for access in place at that time.

Interested Party Submissions

28. Australian Rail Track Corporation (**ARTC**) has indicated¹ that the ARTC Undertaking provides significant plan and capacity information, which includes route capacity, route standards and train running times, to enable access seekers to make a reasonable assessment as to available capacity prior to an application for access. ARTC also provides detailed information to access seekers through the

¹ ARTC, Submission on Review of WestNet Rail's Part 5 Instruments, page 8.

provision of an indicative access proposal in order to provide some balance to the negotiation process. ARTC considers that WNR, as part of a vertically integrated business, should provide similar information to third party access seekers in the interests of transparency.

29. ARTC has also indicated that, under the wholesale access agreement, WNR has committed significant available capacity to ARTC for the purpose of making access available to interstate users and considers that the proposed TPP should recognise this commitment.

Authority's Assessment

30. SdD has indicated that the Authority, in its recently completed review of the Code, has proposed that WNR include capacity information in a comprehensive information package to be placed on WNR's website. SdD believes this requirement would meet ARTC's objective of having WNR provide detailed information on available capacity to access seekers. Therefore, SdD considers that subject to the Code review recommendations being endorsed and enacted by the WA Government, the publication of information for access seekers on WNR's website should satisfy the requirements of ARTC. Further detail is, therefore, not required under Section 2.1 of the proposed TPP.
31. The Authority notes that the comments by ARTC on the need for greater transparency are made in the context that WNR is part of the vertically integrated Australian Railroad Group (**ARG**). Since the closure of the public submission period, it has been announced that ARG will be sold with separate owners for the "above rail" and "below rail" components of the business.
32. The Authority has considered the suggestion by ARTC for the Master Control Diagram and other relevant information to be published in the proposed TPP. Section 6 of the Code requires a railway owner to prepare an information package containing information as outlined in Schedule 2 of the Code for purchase by access seekers. Section 7 also requires railway owners to provide additional information, such as available capacity and train paths, indicative access prices and working timetables, to potential access seekers. This information is consistent with the information that ARTC provides in its Access Undertaking and the type of information that ARTC suggests should be published by WNR.
33. The Authority has also recognised that it is more expedient and effective for the information package to be made available on the railway owner's website to enable potential access seekers to access the information without the need to formally approach the railway owner. Consequently, the Authority, in its recently completed review of the Code, recommended that the Code be amended² (Recommendation 3) to ensure that the more comprehensive information package be made publicly available through the railway owner's website. Accordingly, the Authority does not see a need for the information to be included in the proposed TPP.
34. The Authority has also considered ARTC's request that the proposed TPP recognise WNR's commitment to provide significant available capacity to ARTC, under the wholesale access agreement, for the purpose of making access available

² Economic Regulation Authority, Final Report on the Review of the Railways (Access) Code 2000, 23 September 2005, section 6.3, page 58.

to interstate users. The Authority is not clear on the need for this requirement to be in the proposed TPP rather than included in the information package to be made available on the WNR website. Therefore, the Authority does not consider an amendment to the proposed TPP to be required at this time, but is willing to consider arguments put forward by ARTC and other interested parties on the need to have this issue addressed in the proposed TPP rather than through other means such as WNR's information package which is likely to be placed on WNR's website.

Allocation of Train Paths

WNR's Proposal

35. In Section 2.2.1 of the proposed TPP, WNR has outlined the process for the allocation of train paths. The first part of Section 2.2.1 states:

Guidelines for assessing whether a request is warranted for a Train Path

WNR will apply the following guidelines for requests for new or amended 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.

WNR will negotiate to provide train paths or additional trains where the operator meets the required criteria:

Scheduled Train Paths (Passenger) and (Freight) or Flexible Scheduled Train Paths

- (i) the operator can demonstrate a contractual commitment to operate trains or deliver passengers or freight;
 - (ii) the operator provides details of anticipated increased demand because of:
 - (a) an upgrade or expansion of production capacity with confirmation that it will progress (eg. Funding approved, public announcements etc), or
 - (b) market growth based on trend data; or
 - (iii) the operator can demonstrate a committed new project with agreed funding.
36. In Section 2.2.2 of the proposed TPP, WNR outlines the process for allocation of train paths as part of the negotiation process for access as follows:

Process for negotiating new Train Paths prior to an access agreement

- (i) the operator will request the train path(s);
- (ii) WNR will refer to the Master Control Diagram 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;
- (iii) at all times maintain dialogue with the operator to ensure all alternatives are explored; and
- (iv) if the operator is seeking train paths currently used for the same purpose under another agreement and the new agreement is likely to supersede the existing one then WNR will commit to transfer the existing train paths.

Interested Party Submissions

37. ARTC has indicated³ that WNR's approach to establishing and allocating train path entitlements and managing the utilisation and variation of those entitlements is largely consistent with its approach. However, ARTC makes the point that where the access provider is vertically integrated, the process involved with allocation and management of capacity, as well as the daily management of services provides the railway owner with significant opportunities to hinder third party access in the least detectable way. Therefore, ARTC proposes highly transparent, prescriptive processes with extensive use of performance measurement to contain undesirable practices in these areas.
38. In particular, ARTC seeks greater detail on how the allocation of train paths is to occur and how WNR proposes to deal with the issue of under-utilisation with respect to non-fixed schedule train paths in the context of providing greater capacity information to operators and access seekers. ARTC indicates that its indicative access agreement only provides for scheduled train paths with provisions for ad-hoc services left to individual negotiation.
39. Great Southern Railways (**GSR**) also has outlined⁴ some concerns with the processes for the allocation of train paths. GSR claims that in the "first in–first served" policy, it is not clear if the "first in" refers to the date of the request, the date of the planned commencement of services or the date that the request is secured in an access agreement. GSR also would like the proposed TPP to indicate the time period, prior to the intention to commence services, that a request can be made.
40. GSR is also concerned with the required criteria for WNR to negotiate train paths (Section 2.2.1). It does not see a need for the criteria and suggests that the likely outcome of such a provision is to delay the negotiation of train paths. GSR suggests that the criteria is irrelevant for operators of passenger services as there are no contractual commitments with passengers and believes that the criteria should be deleted. If the purpose of such a provision is to deter frivolous enquiries then, GSR suggests that WNR could apply a nominal charge to operators without an existing access agreement.
41. GSR has concerns with part (iv) of Section 2.2.2. It claims that this provision will allow WNR to commit to a new access seeker seeking a train path(s) and breach its contractual commitments to another operator holding the same train path(s). In particular, GSR has concerns about the criteria for the "same purpose" and "likely to supersede the existing one" before committing to change train paths between operators. GSR suggests that this criteria would disadvantage operators of passenger services as a new operator of passenger services who could obtain a greater than 50% share of the existing passenger market would be able to obtain the train path from the existing operator of passenger services. Consequently, GSR would like part (iv) deleted.
42. Pacific National (**PN**) has indicated⁵ that it is inappropriate for WNR to require an access seeker to demonstrate an underlying demand to justify seeking a train path

³ ARTC page 7.

⁴ GSR, Submission on the WestNet Rail's Part 5 Instruments, page 10.

⁵ PN, Submission on the Review of WestNet Rail's Part 5 Instruments, page 2.

as outlined in Section 2.2.1. PN claims that in the proposed approach, for an operator to contract a train path, it needs to demonstrate an underlying business. To demonstrate an underlying business may require a signed haulage agreement with a customer and to sign a haulage contract with a customer requires demonstration of contracted train paths. Therefore, PN claims that requiring an operator to demonstrate it has business to haul would be sufficient to “kill off” an aspiring entrant.

43. PN suggests that if the purpose of WNR’s approach is to stop an operator from hoarding or unnecessarily accumulating train paths, there are already other mechanisms to discourage this practice through take-or-pay charges and the “use-it-or-lose-it” provisions in Section 2.6 of the proposed TPP. These two mechanisms combined are sufficient to protect WNR from frivolous requests for train paths.

Authority’s Assessment

44. In addressing the issues raised by ARTC (paragraphs 37 and 38 above), SdD does not support the need to develop a more prescriptive set of principles and procedures for allocating train paths. SdD claims WNR has a clear obligation to provide fair access to all parties, enshrined in a range of statutory, legal, contractual and policy documents and it is unlikely that any more prescriptive documents on day to day operational activity would be useful or productive.
45. The Authority has considered the comments by ARTC regarding the requirement for the development of more prescriptive processes and is of the view that this would be inconsistent for a light handed regulatory regime, which the WA Rail Access Regime is intended to be. The Authority notes the change in ownership of WNR to a separated access provider resulting in the elimination of any perceived intention to favour the operator with which WNR was previously incorporated.
46. Further, the Authority ensures that annual independent performance audits are undertaken to ensure that there are no breaches to the TPP, TMG or segregation arrangements. There have been three audits carried out and the results of these have indicated that WNR has not been in breach of its obligations. Consequently, the Authority agrees with SdD that there is no need for more prescriptive principles and procedures to be included in the proposed TPP.
47. In regard to the principle of “first come–first served” (paragraph 39 above) for the allocation of train paths, SdD considers the approach to be simplistic. However, there is no benefit to be derived from imposing more prescriptive processes on WNR in this area. SdD believes that WNR should have the discretion to offer its train paths to the operator which can provide the greatest overall benefit and commercial return, subject to its other undertakings and obligations under the Code.
48. SdD considers that it is reasonable for WNR to seek supporting information from applicants seeking new paths (paragraphs 40, 42 and 43 above). However, the provision in Section 2.2.1 refers to “new or amended” train paths and SdD claims it is inappropriate to require this information from access seekers merely seeking to “amend” a path, particularly as this is catered for under Section 2.9 of the proposed TPP, without the need for supporting documentation. The section would be more acceptable if the words “or amended” were removed. Deletion of the criteria as recommended by GSR is not supported by SdD.

49. The Authority has considered the request by GSR to delete the criteria requirement for the allocation of train paths and the advice from SdD on this issue. The Authority is of the view that there should be some criteria to enable WNR to assess the bona fides of access seekers when applying for train paths.
50. SdD has considered PN's claim (paragraphs 42 and 43 above) that WNR is protected from spurious or non-genuine requests for train paths by other provisions in the TPP. However, SdD asserts that this is not the core reason for the requirement for contractual evidence. The most likely need for this requirement is where two operators are seeking the train path to serve the same new business need. SdD considers it reasonable for WNR to ensure that it offers the path to the operator who wins the business, rather than the one who asks first and then takes the path provided to its prospective customer as a means of winning the contract. However, SdD considers the words "contractual commitment" be replaced by the term "contractual evidence" would alleviate concerns over this provision.
51. The Authority has considered the advice from SdD on this matter and agrees that WNR should have the discretion to apply the appropriate criteria in making judgements on the allocation of train paths. The Authority believes that requiring operators to demonstrate a firm contractual commitment may be premature, particularly when considering requests from operators seeking the same business.
52. The Authority agrees with SdD's view that the words "or amended" in Section 2.2.1 needs to be deleted as there appears to be some conflict in the differing requirements for variations to train paths as outlined in Section 2.9 of the proposed TPP.
53. SdD is concerned at the ability of WNR to remove a train path (paragraph 41 above) despite an access agreement being in place as indicated by part (iv) of Section 2.2.2. This is provided for by the hierarchy of documents, with the policy documents taking precedence over access agreements. SdD considers that WNR should not be seen to have the power to favour one operator over another in winning business contracts through the allocation or removal of train paths.
54. Further, SdD considers the proposed TPP is not clear on what is intended by Section 2.2.2 and the meaning of the term "agreement" referred to in part (iv) of this section. SdD does not think the term refers to another access agreement but may be a reference to the principle espoused in Section 2.6 (Removal of a Train Path). SdD recommends the deletion of part (iv) of Section 2.2.2.
55. The Authority has considered the advice from SdD and agrees that part (iv) of Section 2.2.2 should be deleted.

Draft Determination**Required Amendment 1**

Section 2.2.1, on page 3 of the proposed TPP, should be amended as follows:

- Delete the words “or amended” in the first paragraph.
- Delete the words “Train Paths or additional trains” in the third paragraph and replace with the words “new Train Paths”.
- Delete the words “a contractual commitment to operate trains or deliver passengers or freight” in the fourth paragraph and replace with the words “an intention to enter into arrangements for the operation of freight or passenger train services, to the satisfaction of WestNet”.
- Add the word “or” to the end of the fourth paragraph.

Required Amendment 2

Part (iv) of Section 2.2.2, on page 5 of the proposed TPP, should be deleted.

*Conditional Train Paths***WNR’s Proposal**

56. In Section 2.2.1 of the proposed TPP, WNR makes provision for conditional train paths which may result from the following criteria:

- (i) the operator can demonstrate historical need or the planned use of an optional direction path; or
- (ii) the operator can demonstrate seasonal demand for a seasonal path based on the production or market characteristics of the freight; or
- (iii) the operator can demonstrate the need for surge capacity based on demand or other constraints such as shipping.

In applying these criteria the following process will apply:

- (i) WNR will seek sufficient documentation from the operator to assess the request;
- (ii) if WNR does not believe the information supports the request it will seek further information; and
- (iii) if WNR does not believe the request meets the criteria it will advise the operator and
 - if it is a request relating to an existing access agreement the dispute will be resolved under the terms of the agreement, or
 - if it is a new request the dispute will be resolved in accordance with Division 3 of the Code.

Interested Party Submissions

57. While PN acknowledges⁶ the flexibility through the availability of conditional train paths, it has expressed a concern that the proposed TPP fails to capitalise on the efficiency benefits available from this flexibility in that the proposed TPP allocates the flexible train paths to a particular operator.
58. PN proposes the creation of a new category of train path which has the characteristics of the proposed conditional train paths, but is allocated to a specific operator through a purpose built mechanism closer to the day of deployment. This recognises, for example, that there may be a single port or customer that is the destination (or origin) for a type of traffic (eg. grain or coal) being supplied by more than one operator; it allows for specific co-ordination of activity to enhance efficiency. PN indicates that its proposal would remove the complexity that arises with WNR's provision to reallocate train paths if the business moves to another operator on a temporary or permanent basis.
59. PN defines this concept as traffic specific capacity which allocates capacity on a constrained network across different operators in a flexible manner. It ensures that capacity is available to move a specific traffic and is allocated to the operator that is contracted by the end customer.
60. PN claims that traffic specific capacity is only applicable to trains whose task is overwhelmingly dominated (at least 80 per cent) by a single commodity such as grain or alumina. Traffic specific capacity is not considered to be appropriate for train services that have several customers such as intermodal services.
61. PN indicates that traffic specific capacity is intended to address the need for a variable "quantum and quality" of each type of train path, tailored to the needs of a specific traffic type, while retaining the ability to cater for multiple operators and thus preserve the ability to have competing operators servicing a particular traffic. This is achieved through the creation of a set of train paths that are dedicated to a particular traffic type, or a sub-set of that traffic.
62. PN suggests that traffic specific capacity operates through a process of consultation where the railway owner determines what train paths ought to be set aside for each traffic that would operate in this manner. The train paths are then designated as such (eg. grain or bulk commodities) and made available to any operator that needs them. Allocation of these train paths to operators on a day to day basis (or whatever other time period is relevant) is carried out through a specific process, tailored to the needs of that traffic. For example, if the train requirements to assemble a particular cargo are able to be accurately determined 7 days in advance, then train paths can be allocated at 7 days notice, but if the planning horizon is only 24 hours then allocation of paths before this time would be useless – thus the allocation process needs to be different for each traffic type.
63. PN also suggests that the need for traffic specific capacity to be reserved should be proportional to the total capacity demand for any particular line section. Therefore on a branch line, where the entire traffic may be related to the one traffic type (eg. export grain) and the demand for capacity is low, there is probably no need to actually reserve capacity or set any formal train path. On the other hand, on a main

⁶ PN page 3.

rail line leading to a port, where demand for capacity is high, there will be a significant need for reserving capacity for each traffic type to avoid situations where one traffic that is able to sustain a long term plan reserves all of the available (or just the desirable) train paths, leaving inferior or no train paths for other traffic that has a shorter planning horizon.

64. By allocating train paths to a traffic group rather than to a specific train operator, PN believes that competition is not “locked out” as it would be under the process in the proposed TPP. However, this means that it is not appropriate for the railway owner to contract with one operator for use of specific train paths within a group of train paths. To do so would effectively allocate specific train paths, which is not what is intended by the traffic specific capacity concept. Rather, the concept is that the railway owner will contract with operators to make those train paths available to anyone requiring a train path for that purpose through a specific allocation process that is closer to the point of determining demand. The railway owner is therefore offering a general commitment to capacity for trains of that type without being required to contract a specific train path to an individual operator and therefore introducing inflexibility that would be detrimental to the transport system.
65. Under this approach, PN suggests, it would be perfectly legitimate for the railway owner to offer an un-required train path on a “one off” ad hoc basis to another operator once it has been established that there was no demand from the primary traffic.⁷ However, it is essential that the traffic specific capacity remains available for that traffic until such time as the allocation process releases it.

Authority’s Assessment

66. SdD believes that the introduction of traffic specific capacity to the WNR freight network would remove a potential barrier for other operators seeking access to the grain and bulk commodity tasks in Western Australia. Where conditional train paths are currently allocated to the ARG for these traffics, a new operator, seeking a small percentage of a customer’s business, would have difficulty gaining efficient access to these or similar train paths under the proposed TPP provisions. A traffic specific train path as proposed by PN could be made available to any new operator entering the market with, for instance a single train. This train path may be different on each day, according to the best operational fit between the new train and the existing trains serving the customer or sector. For instance, SdD suggests, in the export grain business, there may be six daily paths in and out of a regional port that are generally used by ARG trains when demand arises. Currently, four ARG trains may be operating in a port zone and they would use the train paths most suited to their train cycle times to the branch-line loading points and back to the main line. Loading points and train cycle times may differ each day, but all train paths are available each day to be used if required.

⁷ For example, during drought conditions where it is certain that the demand for grain train paths will be subdued, the railway owner could, through consultation with operators having determined the requirements, offer the freed-up train paths should there be alternative demand for the period of the expected lack of grain demand. Clearly, this requires a high level of cooperation between the railway owner and operators to be effective. A different example is where, on any given day, train paths have been allocated, where there are spare train paths these could be provided for one off ad hoc movements.

67. A new operator is likely to have a single train and only require one train path per day. However, the train could be serving different loading points each day and likely require a different path on each occasion. There could be a conflict between the new operator and the incumbent operating the majority of the trains for the most suitable train paths on a given day. SdD indicates that if a traffic specific path category existed, the train controller could arbitrate on train path allocation issues unless the operators themselves can agree on protocols for co-ordinating their activities in favour of overall efficiency and customer service. Either way, the train paths would be understood as “belonging” to the export grain sector as a whole, rather than to any single operator.
68. SdD claims that Section 2.2.1 does not appear to contemplate the eventuality of a bulk freight customer deciding to divide an existing task between two or more operators to stimulate price or service improvements. Use of a traffic specific capacity classification would certainly be an improvement and would definitely reduce current barriers to entry into these markets. SdD considers that the growth in demand for minerals haulage over the next few years provides some impetus for this classification to be provided for in the proposed TPP.
69. SdD believes that WNR should amend the proposed TPP to make provision for traffic specific capacity (or a similar mechanism) within the existing conditional train paths for certain bulk traffics. Ideally some differentiation between different train path types should be made throughout the proposed TPP, to recognise the differing train path needs of operators hauling different products on different parts of the network.
70. The Authority has considered PN’s request for the introduction of traffic specific capacity in the proposed TPP. SdD has analysed the proposal from PN and considers the proposal has merit and should be included as part of conditional train paths. The Authority understands that the traffic specific concept has specific application in the transport of bulk commodities. With the expected increase in the transport of bulk commodities through expansions in the alumina industry and the expected development in iron ore projects in the mid-west region of the state there may be a future requirement for traffic specific capacity within the context of conditional train paths. The Authority agrees with PN, that with the introduction of this type of train path greater competition in the “above rail” market will be encouraged. As one of the objectives of the WA Rail Access Regime is to promote competition in the “above rail” market, the Authority believes that traffic specific capacity should be introduced as part of the conditional train path process.

Draft Determination

Required Amendment 3

Section 2.2.1, on page 4 of the proposed TPP (conditional train path process), should be amended to make provision for the introduction of traffic specific capacity for bulk commodities on mainlines where demand for capacity is high, in order to remove potential barriers to entry for new operators.

Variations to Train Paths

WNR's Proposal

71. Section 2.4 of the proposed TPP is titled "Permanent Variations to Train Paths by Agreement". Under this section, WNR has outlined the process for the permanent variation to scheduled train paths by agreement between WNR and operators.
72. Section 2.9 of the proposed TPP is titled "Variation to Existing Train Paths or Additional Paths". Under this section, WNR has outlined the process for the variation to existing train paths or additional paths. In this section WNR outlines the general principle it will follow:

"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."

Interested Party Submissions

73. GSR has indicated⁸ its support for the principle, as outlined under Section 2.9 of the proposed TPP.
74. PN has expressed⁹ some concerns about the procedure outlined in Section 2.4 of the proposed TPP for the varying of scheduled train paths as it suggests there is some repetition with the procedure outlined in Section 2.9. PN believes that the procedure outlined in Section 2.9 is more appropriate as it allows both WNR and the operator to seek a permanent variation. PN's main concern with Section 2.4 is that the grounds deemed to be reasonable for refusal of a variation are both related to the railway owner. It suggests that while the procedure is framed on an "inclusive basis", it is unhelpful to stipulate these so conclusively in one direction. It also suggests that an operator would have legitimate business requirements that ought to suffice as a reasonable refusal to an alternative train path.

Authority's Assessment

75. SdD believes that the intent of GSR's comment, as indicated in paragraph 73 above, is to highlight that WNR in other sections of the proposed TPP gives itself considerable power to remove or vary paths granted under access agreements. SdD recommends that no change is needed to this section.
76. In consideration of PN's comments, as outlined in paragraph 74 above, SdD believes that in drafting the TPP, Sections 2.4 and 2.9 have been inadvertently retained, when one should have been deleted. SdD considers the provisions of Section 2.9 of the proposed TPP would appear to make sense as an introduction to Section 2.4 of the proposed TPP, subject to an edit for duplication. SdD does not agree that Section 2.4 should be deleted as requested by PN as Section 2.4 of the proposed TPP appears to cover the circumstance where either party can initiate a request for permanent variation. Therefore, SdD considers that ultimate authority on these issues should rest with WNR rather than the operator.

⁸ GSR page 12.

⁹ PN page 4.

77. The Authority has considered the comments from GSR and PN and the advice from SdD on this issue and believes there is some confusion, as expressed by stakeholders, on the relevant procedures for the variation of train paths as outlined in Sections 2.4 and 2.9 of the proposed TPP. In order to address this issue, it has been suggested by SdD that the two sections should be combined with the removal of any duplication. The Authority agrees with the SdD proposal that the procedures outlined in Sections 2.4 and 2.9 of the proposed TPP should be consolidated to reduce confusion.

Draft Determination

Required Amendment 4

Sections 2.4 and 2.9, of the proposed TPP, should be combined so that there is only one section dealing with all types of variations to train paths. This combined section should contain two sub-sections. The first sub-section should deal with the process to be followed if WNR wishes to vary a train path and the rights of WNR in this process. The second sub-section should deal with the process to be followed if an operator wishes to vary a train path and the rights of the operator in this process.

Track Possession

WNR's Proposal

78. In Section 2.5 of the proposed TPP, WNR has identified that in performing repairs, maintenance or upgrading of the network, it will need to take possession of the network at any time. If these activities are likely to materially affect the train paths, WNR will, prior to the commencement of the work;

- i. take all reasonable steps to minimise any disruption to the train paths; and
- ii. use its best endeavours to provide an alternative train path but need not obtain the operator's consent to such repairs, maintenance or upgrading, or possession of the network. (Possession of the network means closure of the relevant part of the network to all traffic for the purpose of effecting repairs, maintenance or upgrading).

WNR will in all circumstances, except in the case of an emergency or force majeure, consult with operator's whose train paths may be affected by a possession of the network for repairs or maintenance.

79. WNR has also identified track possession notice periods to be:

- i. Where WNR requires possession for maintenance activities for periods less than six hours it will give 2 days notice;
- ii. Where WNR requires possession for maintenance activities which will effect train paths for periods greater than six hours but less than 48 hours, it will provide a minimum of 2 weeks notice and will negotiate with the operator(s) for temporary adjustments or changes to train paths to facilitate the possession;
- iii. Where WNR requires possession for either major maintenance activities extending beyond 48 hours or where an upgrading will require changes over a long period of time, WNR will give at least six months notice of the works. WNR will also commence negotiations with affected operators from the date of the notice to ensure alternative arrangements are made;

Interested Party Submissions

80. GSR has indicated that its comments in relation to this section of the proposed TPP are the same as those provided on the proposed TMG as the issues of concern are the same in both documents. In regard to the proposed TMG, GSR has expressed¹⁰ its concern that WNR is not required to consult with operators regarding a possession in the case of an emergency or force majeure event. It questions why WNR, in organising a track possession event to make repairs, cannot also consult operators via a prompt communication method. GSR also points out the lack of consultation with operators is inconsistent with the requirement of point (ii) of the track possession management policy which indicates that WNR will advise affected operators where it takes possession because of emergencies related to safety or natural events. GSR would like WNR to consult with operators for all track possessions.
81. GSR is also of the view that the notice periods are too short. It recommends that the time periods suggested remain but expressed as minimum requirements with an obligation to provide as much notice as practicable. For major possessions, it is suggested that 12 months notice be given to be consistent with the notice period in other jurisdictions.

Authority's Assessment

82. Section 2.5 of the proposed TPP is the same as Section 3.5 of the proposed TMG. The submission by GSR on Section 2.5, as outlined in paragraphs 80 and 81 above, contains the same comments as were previously submitted by GSR on Section 3.5 of the proposed TMG. The Authority is of the view that this matter is better addressed in the proposed TMG as it is a network management issue.

Draft Determination

Required Amendment 5

Section 2.5 of the proposed TPP should be deleted as this section is dealt with in Section 3.5 of the proposed TMG.

Removal of a Train Path

WNR's Proposal

83. In section 2.6 of the proposed TPP (titled "Removal of a Train Path") WNR has outlined the conditions for the removal of a train path when an operator has failed to use the train path (other than when cancelled in accordance with the processes of the specific access agreement). The conditions are outlined as follows.

If WNR proposes to withdraw a train path because of use it will only do so when:

- (a) there has been a request for use of the path from another operator; or

¹⁰ GSR page 8.

- (b) it would allow better management of other train paths and encourages efficient use of the network; or
- (c) the operator agrees to its withdrawal.

WNR will give written notice if it intends to withdraw a train path if the service using that train path is not operated for more than 3 consecutive weeks at any time and, after WNR has given the operator notice of that fact, the operator fails to operate the service for more than 6 weeks in aggregate in the period of 6 months from the date of WNR's notice providing that the failure to operate the service is not as a consequence of a force majeure event or WNR not making the network available.

Other than if the parties agree to substitute an alternative train path, a service has not been operated if the operator has failed:

- (i) to present a train at the scheduled entry point onto the network; or
- (ii) to operate the relevant train so that it completes its full journey,

in conformance with the locations, days and times set out in the train paths applicable to such a service, in any circumstances other than because of force majeure.

If certain train paths are currently allocated under an access agreement to an operator and that operator loses the contract to undertake the passenger or freight task for which the train paths are allocated, WNR will withdraw these train paths and allocate them to the substitute operator who can demonstrate the contractual right to operate the services.

Interested Party Submissions

- 84. ARTC agrees with the WNR requirement that WNR's entitlement to cancel a train path should only apply if there is reasonable indication that the train path is sought and will be allocated to another operator. However, ARTC notes¹¹ that in the review of train paths (Section 2.7 of the proposed TPP), WNR requires a three month history of actual train performance measured against the schedule of train paths and that this criteria is not used in the determination of under-utilisation of train paths. ARTC queries whether there is an inconsistency where the removal of train paths requires a six month monitoring of services which may coincide with a three month period where train paths are rescheduled. ARTC believes that this inconsistency may make it difficult to assess the level of utilisation to determine if a train path is not utilised.
- 85. GSR has expressed¹² concern with the provisions of the last paragraph of Section 2.6. GSR believes that while the purpose of this provision is to prevent operators from hoarding train paths and thereby increase utilisation of the network, it may be necessary to limit this provision by requiring the operator to surrender the train path only where it cannot demonstrate a continuing or an alternative use for the train path. GSR considers that there may be good business reasons why an operator would lose a contract with the intention of replacing it with another contract for the same train service. Further, it considers that it is the operator that has secured the right to the train path through an access agreement and not the end customer.

¹¹ ARTC page 9.

¹² GSR page 12.

86. PN also has concerns with the provision outlined in Section 2.6. PN recognises the need for a method to deal with specific traffics where it is appropriate for train path allocation to be linked to end customer contracts. However, PN asserts:¹³

“It is not appropriate to apply such a rubric to all train paths and raises very difficult questions as to who would judge when the underlying business has been lost (eg. if the train is servicing several customers and one customer decides to use road instead of rail is this lost contract a trigger for the above rail operator to lose the whole train path?).”

87. PN supports the right of an end-user to hold an access contract, but believes this right must be accompanied by the commensurate obligations. PN, therefore, rejects the provisions proposed by WNR and suggests that the concept of traffic specific capacity be provided for as an alternative solution.

Authority’s Assessment

88. WNR intends its policy for the removal of train paths to pertain to all train paths, including conditional train paths, in the same way as the definition of train path includes conditional train paths. SdD has considered ARTC’s requirement for a separate train path removal process for conditional train paths and concludes that there does not appear to be any reason to justify a different process for conditional paths to that in place for fixed schedule train paths.
89. SdD has assessed ARTC’s concern that the potential overlap of monitoring periods for the review and removal of train paths may be exploited by WNR in support of some intention to discriminate between operators. SdD considers that ARTC appears to be taking a “devil’s advocate” role here. There is no doubt that if WNR was determined to take action against one operator in favour of another, it could do so by exploiting gaps in these policy documents. To avoid this, SdD indicates they would all need to be tightly drafted by independent lawyers. The documents are, however, intended to be policy statements rather than contractually binding undertakings covering all possible circumstances and therefore SdD considers that the issue raised by ARTC should not be acted on in this instance.
90. The Authority has assessed the comments from ARTC and the advice from SdD and has accepted SdD’s advice that the proposed TPP should not require separate procedures for the removal of conditional train paths as this can be done within the context of the procedure for the removal of ordinary train paths. Accordingly, the Authority will not seek an amendment to the proposed TPP to address this issue.
91. In assessing the issues raised by GSR, SdD understands the term “loses a contract” means “ceases operating trains for a customer” or similar. SdD suggests that while it is possible for a contract to expire and not be renewed for a period while negotiations continue, this should not be a trigger for WNR to transfer paths to another operator and considers this to be an important issue.
92. SdD has considered GSR’s assertion that the train path belongs to the operator rather than the operator’s customer and has indicated that the path actually belongs to the railway owner. Therefore, the railway owner should have the prerogative of determining whether it is used in the service of an operator or his customer. Where the train is serving a single customer, WNR should have the right to transfer the train path between operators, subject to the issues outlined in paragraph 93.

¹³ PN page 4.

93. SdD believes that PN's concern regarding the removal of train paths, as outlined in paragraphs 86 and 87 above, is valid and considers that Section 2.6 of the proposed TPP should be reorganised to separately deal with train path removal arising from different situations. The provision in the proposed TPP should only apply to train paths where the train is wholly dedicated to the carriage of business which has been, or is to be, lost to another operator. The use of the word "wholly" here is significant. If the incumbent operator also uses that train service to carry a small amount of other traffic across a section, it should be able to retain the path until it can make alternative arrangements for that traffic. This could cause some difficulty for the new operator and the customer, but use of a slightly different path in the interim would usually be available. SdD has proposed the following solution to address the concerns of both GSR and PN on this matter.

"Section 2.6 should be separated into two parts with the first dealing with the removal of train paths due to under-utilisation, and the second dealing with the removal of train paths due to the transfer of a contract between operators. In this second part, WNR should differentiate between

- Train paths used by single customer trains;
- Those where a mixed use train loses a dominant or substantial customer to a new operator, who then applies for a train path; and
- Those where a mixed train loses a small customer or volume."

94. The issues raised by GSR and PN are in essence similar in that both parties have concerns about the process by which WNR is able to remove a train path as enunciated in the proposed TPP. The Authority notes SdD's view that the railway owner should have the prerogative of determining whether the train path is used in the service of an operator or his customer and agrees with this view. Consequently, the Authority considers that the rights to determine the train path lie with the railway owner and not the operator as claimed by GSR. The Authority also notes SdD's view that where the train is serving a single customer, WNR should have the right to transfer the train path between operators. However, SdD has some reservations, as outlined in paragraph 93 above, where an incumbent operator also uses that train service to carry a small amount of other traffic across a section, it should be able to retain the path until it can make alternative arrangements for that traffic. The Authority considers that Section 2.6 of the proposed TPP does not satisfactorily address the removal of train paths arising from different situations such as multi-user trains.

Draft Determination**Required Amendment 6**

Section 2.6 of the proposed TPP should be amended by separating this section into two parts. The first part should deal with the removal of train paths due to under-utilisation. The second part should deal with the removal of train paths due to the transfer of a contract between operators. In the second part, WNR should differentiate between:

- Train paths used by single customer trains which lose this customer's tonnage to another operator.
- Train paths used by multi-customer trains which lose a major customer's tonnage to another operator.
- Train paths used by multi-customer trains which lose a minor customer's tonnage to another operator.

Cancellation of Services***WNR's Proposal***

95. In Section 2.8 of the proposed TPP, WNR has outlined a policy which grants operators the right to cancel train paths without penalty and indicates the specific provisions of the policy agreed between WNR and operators will be contained in relevant access agreements. The proposed TPP stipulates under the second paragraph of Section 2.8 that;

"an operator may cancel an individual train path under the following circumstances (but only if the occurrence of these circumstances is beyond the reasonable control of the operator)".

WNR lists seven circumstances, (i) to (vii), under the above paragraph.

Interested Party Submissions

96. GSR has suggested¹⁴ that the circumstances under which a train path may be cancelled, as outlined in the proposed TPP, are appropriate but appear to operate individually rather than collectively and therefore suggests that the word "and" be replaced by the word "or" in section 2.8 (vi) of the proposed TPP.

Authority's Assessment

97. SdD has assessed the comment by GSR and believes that it may be a drafting error made by WNR. SdD suggests that the change to the wording is appropriate.

¹⁴ GSR page 12.

98. The Authority notes the comments from GSR and SdD and agrees that a change is required to Section 2.8 of the proposed TPP to convey the meaning that the circumstances are meant to apply individually which is the correct intention.

Draft Determination

Required Amendment 7

Section 2.8, of the proposed TPP, should be amended as follows:

- Add the words “any one of” following the word “under” in the second paragraph of this section.
- Delete the word “and” from the end of the sentence under part (vi) of this section.

Rights to Sell a Train Path

WNR's Proposal

99. In Section 4 of the proposed TPP, WNR has indicated that an operator cannot sell the rights to use a train path to another operator. If an operator no longer requires a train path to operate a service, then it must advise WNR and the train path will be cancelled in accordance with the proposed TPP and the access agreement. However, the operator may assign the rights to entitlements under an access agreement in accordance with the assignment provisions of the TPP and access agreement.
100. The proposed TPP, however, recognises the special relationship of the wholesale access agreement between ARTC and WNR whereby ARTC is able to grant contiguous train paths to interstate operators requiring the joint use of the ARTC and WNR rail networks. When train paths are allocated to ARTC and it subsequently sells the train path to an operator, it is not considered to be selling train path rights to another operator for the purpose of the proposed TPP.

Interested Party Submissions

101. ARTC has indicated¹⁵ that its Access Undertaking provides for the on-selling of train paths provided the related “trade agreement” satisfies certain criteria. ARTC has stated the benefits of on-selling or trading of train paths between operators as being to maximise utilisation of the rail network and reduce barriers to entry. Therefore, ARTC considers that the proposed TPP should allow the on-selling of train paths between operators.

Authority's Assessment

102. SdD has assessed the comments by ARTC regarding the benefits of on-selling train paths and considers that WNR will share its objective of maximising traffic and

¹⁵ ARTC page 10.

reducing barriers to entry. However, SdD believes that WNR should have the power to decide whether it wants to allow on-selling, particularly if it feels that it is missing revenue-generating opportunities by allowing operators to trade in paths. WNR also has a legitimate right to determine and know the party using its infrastructure.

103. SdD also stipulates that WNR may in future choose to make it easier for paths to be traded as competition increases, but it will presumably do so in such a way as to ensure that any access value that becomes available through the inability of an operator to use a path, comes to it rather than that operator. Therefore, SdD concludes that the decision to on-sell train paths is considered to be a legitimate business decision to be made from time to time by WNR.
104. The Authority notes the comments from ARTC and SdD and believes that WNR as the railway owner and manager of the infrastructure needs to have the right to operate the network in its interests within the requirements of the regulatory regime. However, the Authority also considers that operators should be able to sell the rights under an access agreement for a train path subject to approval of the railway owner (based on specified criteria including those set out in Sections 14 and 15 of the Code) in the interests of ensuring the maximum level of economic efficiency in use of the rail network. The proposed TPP should also make clear that the railway owner cannot unreasonably withhold approval to sell the rights to a train path.

Draft Determination

Required Amendment 8

Section 4, of the proposed TPP, should be amended to allow operators to sell a train path to another operator subject to the approval of WestNet, which cannot unreasonably be withheld. A set of criteria needs to be specified setting out the conditions under which WestNet would provide its approval. These conditions need to be reasonably based and consistent with the provisions of the Code.

Competition for the Same Train Path

WNR's Proposal

105. In Section 5 of its proposed TPP, WNR has outlined its policy where operators compete for the same train path as follows:

"If two operators request the same 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 in 2.2.1 of the TPP Guidelines for assessing whether a request is warranted for a train path."

Interested Party Submissions

106. ARTC has outlined¹⁶ its method of dealing with competing claims for a train path where neither access seeker has executed an access agreement. ARTC has indicated that it has the right to finalise an access agreement with the access seeker with whom it can agree terms and conditions most favourable to it taking into account *the “highest NPV” test and relative risk and opportunity profile of the respective proposals*. This approach has been accepted by the ACCC as part of the ARTC Access Undertaking.
107. ARTC considers the “first come – first serve” approach as outlined in the proposed TPP does not adequately recognise the commercial interests of the railway owner nor does it represent what might occur in normal competitive business circumstances. ARTC asserts that an access provider should have the right to accept a more favourable opportunity, if such an opportunity presents before an agreement with the original, less favourable proposal occurs.
108. ARTC also sees merit in introducing provisions to allow access seekers the right to reserve capacity for a period of time following execution of an access agreement but before commencement of operations provided the pricing of capacity reservation over extended periods take into account the opportunity cost of that capacity to the railway owner. ARTC views this eventuality as becoming common in other jurisdictions and may have competitive benefits through reducing barriers to entry for third parties.
109. GSR has indicated¹⁷ that the policy covering competition for train paths as outlined in the proposed TPP does not effectively provide for all contingencies. It has outlined a number of issues that should be considered as follows:
- a) The extent to which each train path forms part of a much bigger operating plan;
 - b) The extent to which the train path may be varied to accommodate the other train path;
 - c) The permissible time period a request may be made prior to the operation of the train path;
 - d) The commencement date of the train path;
 - e) The communication process between the access seeker and WNR; and
 - f) The use of the network of the total access request.

GSR recommends that this section of the proposed TPP give further consideration to the issues raised above and suggests that the “Capacity Use Rules” document developed for the Victorian rail access regime be considered as an alternative approach.

Authority’s Assessment

110. SdD suggests that the issues raised above should be left largely to the discretion of the access provider. In the absence of evidence to the contrary, WNR should be given the benefit of any doubt as to its ability not to allow capacity to be unfairly

¹⁶ ARTC page 10.

¹⁷ GSR page 13.

reserved by one operator, without using it, at the expense of another which would otherwise be using it.

111. SdD considers that WNR, as the network owner, should be allowed to make its own decisions as to which potential users of a path offer the best commercial return to it, and the best overall utilisation of the network. SdD notes that the constraints of the Code and the individual access agreements should ensure that any blatantly unfair dealings with respect to existing paths by WNR would come to the attention of the Authority and would be subject to dispute resolution procedures.
112. SdD further asserts that where two operators seek access to a train path for the purpose of seeking new business (i.e. a new mining venture) it is reasonable for WNR to allocate the train path (or two very similar paths) theoretically to each access seeker, on the explicit assumption that only one access seeker will actually win the customer's business. In this case, WNR should not discriminate between the two applicants through the offering of different access charges (unless this can be justified on the basis of the terms of the access applications). In other words, WNR's path approval or access price should not become a factor in the customer's choice between two or more operators seeking to win its freight contracts.
113. SdD considers that while the "first come-first served" principle as outlined in the proposed TPP appears too simplistic to be a comprehensive means of distinguishing between multiple applications for a single path, the policy does reflect an intention to be non-discriminatory while providing WNR the room to select the most commercially appropriate operator for a path in relation to the "establishment of a requirement" for the path.
114. The Authority has considered the advice from SdD and agrees that WNR, as the railway owner, should have some discretion to determine what is in its best interests in running the network as long as the policies it proposes are not anti-competitive and treats all parties equally. The Authority has assessed the merits of the ARTC proposal and believes that the alternative proposed by ARTC requires the development of a comprehensive evaluation process which could lead to preferential treatment for one access seeker over another and that the proposed "first come-first served" policy for allocating competing train paths is easier to assess, more transparent and less conducive to gaming.
115. The Authority has considered GSR's comments regarding the requirement of a more comprehensive approach to address the issue of competing train paths and has reviewed the "Capacity Use Rules" as applied in the Victorian rail access regime as suggested by GSR. The Authority is of the view that the issues addressed in WNR's proposed TPP and TMG documents and the content of an access agreement, which is required to be negotiated between an access seeker and WNR, are consistent with the issues outlined in the "Capacity Use Rules" document and consequently sees no need for changes to the proposed TPP at this time.

Priority of Documents

WNR's Proposal

116. In Section 7 of the proposed TPP, WNR has indicated that because the TPP relates closely to the TMG and the provisions of the access agreement, it will use the following order of precedence of the documents:

- (i) Train Path Policy;
- (ii) Train Management Guidelines; and
- (iii) Access Agreements.

Interested Party Submissions

117. PN has expressed concern¹⁸ that the documents overlap and potentially conflict with each other. PN proposes that WNR ensures that:

“when the documents are drafted that the potential for conflict is removed and when access agreements refer to TPP and TMG issues that they reference these documents rather than including clauses that might conflict with them.”

Authority’s Assessment

118. SdD considers that it is reasonable for WNR to state an order of preference between documents. PN is also reasonable in suggesting that overlap be minimised and that access agreements should refer to provisions of policy documents. SdD notes that PN does not question the priority hierarchy provided in the proposed TPP which places the policy documents above the access agreements.
119. SdD considers that the TPP is the more explicit of the two Instruments and should not be constrained by an interpretation of a broader intention as outlined in the TMG. Consequently, the TPP should take precedence over the TMG as indicated in Section 7 of the proposed TPP. Access agreements should be negotiated within the framework of the regulatory regime and the TPP and TMG. Therefore, SdD believes, it is appropriate that any conflict between the documents should be resolved in the way provided by Section 7 of the proposed TPP and consequently no change to this section is recommended.
120. The proposed TPP and TMG documents establish the policy and guidelines respectively within which the specific details of train paths and train management can be negotiated. The access agreement documents the negotiated details of the routes to which access is provided, the services provided by the operator, the allocation of train paths, prices and charges, route control and management, train control, operations and consultation procedures, and other such matters as detailed in Schedule 3 of the Code.
121. The Authority has considered the views of PN and the advice from SdD on this issue. The Authority has also reviewed WNR’s proposed standard access agreement and notes that Section 9 of this access agreement, covering the variation or cancellation of train paths, contains provisions which are almost identical to the provisions in the proposed TPP. When the proposed TPP is varied as a result of a review by the Authority there would also be a requirement to amend Section 9 of the access agreement to ensure consistency between these documents. However, the ability to amend an access agreement may be difficult if an operator and WNR have already agreed to the terms and conditions prior to the amendment of the TPP. The Authority considers it more appropriate to ensure

¹⁸ PN page 5.

consistency between the provisions of the TPP, TMG and access agreements through cross referencing of the common provisions between the documents so that in the event of changes to any of the documents, the changes will also apply to the other documents in the appropriate sections so that consistency is maintained.

Draft Determination

Required Amendment 9

Section 7 (page 12) of the proposed TPP, should be amended by deleting the current wording and replacing it with the following words:

“Consistency between Access Agreements and the TPP and TMG”

WestNet will ensure that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.

APPENDICES

Appendix 1 Glossary

Act	Railways (Access) Act 1998
Alcoa	Alcoa World Alumina Australia Pty Ltd
ARTC	Australian Rail Track Corporation Ltd
Authority	Economic Regulation Authority
ARG	Australian Railroad Group Pty Ltd
Code	Railways (Access) Code 2000
GSR	Great Southern Railway Ltd
Operator	Train Operators and end user customer
PN	Pacific National Pty Ltd
PTA	Public Transport Authority
SdD	Strategic design and Development Pty Ltd
WNR	WestNet Rail Pty Ltd