

TRAIN PATH POLICY  
TO APPLY TO  
THE WESTERN AUSTRALIAN GOVERNMENT  
RAILWAYS COMMISSION

DETERMINATION OF  
THE WESTERN AUSTRALIAN  
INDEPENDENT RAIL ACCESS REGULATOR

IN ACCORDANCE WITH THE REQUIREMENTS OF  
SECTIONS 44 OF THE RAILWAYS (ACCESS) ACT 1998

6 December 2002



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### Appendix 1

Submissions Received On The WAGR Proposed Arrangement

## 1. Introduction

The Western Australian Government Railways Commission (WAGR) is a public sector entity that operates the suburban railway passenger services for the Department of Planning and Infrastructure under a formal arrangement.

WAGR has a major role in the Perth passenger transportation network of bus, train and ferry services, carrying 29.5 million passenger journeys in 1999-00 on 234,000 train services. These passenger journeys account for over 99 percent of WAGR's business. WAGR has management and control of 112 kilometres of track, of which 17 kilometres are dual purpose for both passenger rail and freight.

Section 3 of the *WA Railways (Access) Act 1998* ("the Act") defines a "railway owner" to mean the person having the management and control of the use of the railway infrastructure. Within this context, WAGR is considered to be the railway owner for the Western Australian suburban rail infrastructure.

Section 44 of the *Railways (Access) Code 2000* ("the Code") requires the railway owner to make a statement of policy relating to the allocation of train paths and the provision of access to train paths that have ceased to be used.

The WAGR Train Path Policy (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.

Under Section 44(2) of the Code, the railway owner is required to obtain the Regulator's approval to the TPP it is proposing to implement. In early December 2001, WAGR submitted its proposed TPP to the Regulator. A copy of the WAGR submission is available on the Office of the Rail Access Regulator's website ([www.railaccess.wa.gov.au](http://www.railaccess.wa.gov.au)).

In considering WAGR's proposed TPP, Section 45 of the Code requires that the Regulator publish a notice describing the requirements of Section 44(2) of the Code and a general description of the proposed arrangements in major newspapers, with details on where further information can be obtained and inviting submissions on the proposed arrangements.

To this effect, a notice was placed in *The West Australian* and *The Australian* newspapers on 22 December 2001. Two (2) public submissions were received containing comments relating to WAGR's TPP proposal (refer to Appendix 1 for the list of respondents). These submissions are available on the Office of the Rail Access Regulator's website ([www.railaccess.wa.gov.au](http://www.railaccess.wa.gov.au)).

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 apply in a non-discriminatory manner between all users of the network so as to maintain the order of priority of the scheduled train paths. WAGR's proposed TMG document is the subject of a separate Determination by the Regulator.

The Regulator envisages that the TPP and TMG will establish the policy and guidelines respectively within which the specific details of train paths and train management can be negotiated. The approved TPP and TMG will be attached as an appendix to all access agreements negotiated under the Code.

The access agreement will document the negotiated details of the routes to which access is provided, the services to be 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.

In issuing the TPP Determination, the Regulator 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*. Within that context, the Regulator understands that WAGR's requirement to install automatic train protection devices is a requirement of the Rail Safety Regulator.

## 2. The WA Legislative Context

The legislative requirements in relation to TPP are provided for in Section 44 of the Code and these 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 is practicable after the commencement of this Code each railway owner is to prepare and submit to the Regulator a statement of policy that it will apply ("a statement of policy") in –
  - (a) the allocation of train paths; and*
  - (b) the provision of access to train paths that have ceased to be used.**
- (3) The Regulator may –
  - (a) approve a statement of policy submitted by the railway owner either with or without amendments; or*
  - (b) if he or she is not willing to do so, determine what is to constitute the statement of policy.**
- (4) A statement of policy may be amended or replaced by the railway owner with the approval of the Regulator.*
- (5) The Regulator may, by written notice, direct the railway owner –
  - (a) to amend a statement of policy; or*
  - (b) to replace a statement of policy with another statement of policy determined by the Regulator,*  
*and the railway owner must comply with such a notice.**

Section 20(4) of the Act provides the framework within which the Regulator's determination is to be made.

Section 20(4) states:

*In performing functions under this Act or the Code, the Regulator is to take into account –*

- (a) the railway owner's legitimate business interests and investment in 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 benefit to the public from having competitive markets.*

The nature of the decision-making power given to the Regulator under Section 44 of the Code is such that it is mandatory in so far as the Regulator must exercise it by taking into account all the factors listed in Section 20(4).

However, under Section 44 its application is discretionary in so far as the Regulator may allocate such weight to each of the factors listed in Section 20(4) as the Regulator considers appropriate to ensure a balancing of competing and sometimes conflicting interests for the railway owner, access seekers and the community.

### **3. Discussion of Issues**

Issues considered significant are discussed under the following headings:

- Responsibility for TPP.
- Priority for WAGR (passenger) services.
- Allocation and cancellation of train paths.
- Temporary and permanent variations.
- Approach to be taken in the event of a capacity constraint.
- Effectiveness of train paths and TPP.
- Issues not covered in WAGR's TPP.

The following discussion commences with a summary of WAGR's position under each of the above headings. This is followed by the Regulator's views and comments.

#### **1. Responsibility for TPP**

##### ***Summary of WAGR Proposal (entire document)***

- The TPP defines WAGR as the entity being responsible for all matters relating to TPP, ranging from taking possession to allocating train paths and cancelling services.

##### ***Regulator's views and comments***

- In view of the vertically integrated nature of WAGR's services, the Regulator is of the view that there is a need to segregate WAGR's responsibility for TPP from its other functions. Responsibility for implementing the TPP will need to be assigned specifically to the Network and Infrastructure Division, the infrastructure arm of WAGR, rather than generally to WAGR. This would be consistent with the segregation arrangements as approved by the Regulator on 6 June 2002.
- The relationship between WAGR, Network and Infrastructure Division and its operational arm, the Urban Passenger Division, needs to be clarified in the document.

#### **2. Priority for WAGR (passenger) services**

##### ***Summary of WAGR Proposal (sections 3, 5)***

- WAGR maintains that the safe and reliable operation of the rail-based urban public transport service, which the Government and the users of the system have a right to expect, is paramount and must not be compromised as a result of the presence of other operators on the network.

- WAGR also indicated that it has a right to temporarily vary train paths when its Urban Passenger Division is required to operate additional services for special events.

### ***Regulator's views and comments***

- The main object of the Act is to establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations. In considering WAGR's proposed TPP, the Regulator is obliged to take into account the differing needs of WAGR, access seekers and the community under Section 20(4) of the Act.
- The principle underlining WAGR's approach to the allocation and management of train paths would appear to be protective of its own passenger services. The proposed arrangements, if approved, will be conditional on WAGR continuing as the only passenger service provider on the urban network.
- WAGR does not have an unreserved right to temporarily vary negotiated train paths simply because it is required to operate additional services for special events. WAGR has an obligation to give sufficient notice to and consult with operators whose train paths are affected with the aim to arrive at an agreed outcome. The right to vary train paths should also be clearly spelled out in access agreements between WAGR and operators with WAGR identifying and providing details on all known special events.

### **3. Allocation and cancellation of train paths**

#### ***Summary of WAGR's Proposal (sections 1, 3, 5, 6)***

- WAGR's proposal states that the policy will be managed in such a way as to maximise the use of the network. WAGR will maintain a master control diagram for all routes subject to the Code.
- WAGR states that it currently has allocated certain train paths to the Urban Passenger Division and these paths form an integrated system of public transport services within the Perth metropolitan area. WAGR further advised that at certain peak periods, the allocated priority train paths used by Urban Passenger Division fill the available capacity of some routes having regard to section lengths, signalling capability and safety.
- WAGR has the right, by notice in writing to the operator, to delete any scheduled train path from the schedule if the service using that scheduled train path is not operated for more than 3 consecutive weeks at any time and, after WAGR 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 WAGR's notice.



Unless the parties agree to substitute an alternative train path or because of force majeure, a service has not been operated if the operator has failed to:

- ◇ present a train at the scheduled entry point onto the network; or
- ◇ operate the relevant train so that it completes its full journey, in conformance with the locations, days and times set out in the scheduled train paths applicable to that service.

- WAGR further states that the operator may cancel any services for scheduled train paths if any of the following circumstances occur, but only if the occurrence of those circumstances is beyond the reasonable control of the operator:
  - ◇ there are mechanical difficulties with the locomotives used or operated by the operator;
  - ◇ there is a failure of any part of the operator's equipment used or to be used in connection with the service; and
  - ◇ repair, maintenance or upgrading of the network is being carried out or there is some other event which materially affects the operator's use of all or any part of the network (including, without limitation, derailment, collision or later running trains) which occurs in WA.

The operator must give to WAGR as much notice of cancellation as is possible in the relevant circumstances.

WAGR and the operator may agree that there be an alternative method of cancellation such as conditional pathway for seasonal traffic.

The operator may cancel services in accordance with the relevant access agreement:

- ◇ to take account of public holidays which may impact on the ability to provide or operate the service; or
  - ◇ up to 5 times per year for regularly scheduled services.
- WAGR states that where there is competition between operators for a particular train path, WAGR will allocate the train path in order to achieve the best commercial outcome. At another part of its submission, WAGR also indicated that it will allocate available train paths on a "first come" basis.
  - If an operator has reason to believe that WAGR has not complied with the TPP, the operator is to write to the General Manager, Network and Infrastructure Division with supporting evidence, who will investigate the allegation and respond within 10 days, advising the outcome of the investigation.

Any dispute arising between WAGR and an operator during the negotiation of an access agreement will be resolved in accordance with the dispute management provisions in the Code. Any dispute arising between WAGR and an operator

after the signing of an access agreement will be resolved in accordance with the dispute management provision of that agreement.

- Where a previously used train path becomes available for allocation, the cessation of the service will be published in the Weekly Notices, which are provided to all operators on the WAGR system.

### **Regulator's views and comments**

- Section 1 of the WAGR proposal contains a statement which says that WAGR will manage the TPP in such a way as to encourage maximum use of the network. The Regulator is of the view that the proposal, together with the recommended changes in this Determination, form a policy that is consistent with the Act and the Code, provided that it complies with the *Rail Safety Act 1998*. In maximising the use of the network, WAGR will need to ensure that its allocation of train paths are undertaken in a manner that does not unfairly discriminate between operators, notwithstanding the priority that is allocated for urban public passenger services.
- The Regulator agrees that the TPP needs to be consistent and applicable for each allocated train path regardless of whether access applications are made inside or outside the Code, and has noted that WAGR will apply the TPP to all access agreements negotiated outside the Code.
- The Code defines an "operator" as an entity to which access is provided under an access agreement but requires the operator to show that either its management and staff have the necessary knowledge and experience, or it will be able to, and will, engage the services of another entity whose management and staff have the necessary knowledge and experience to carry on the proposed rail operations (Section 14(1)(a) of the Code).

In effect, the Code provides for the likelihood of an access seeker engaging a third party as its agent or contractor who is accredited to carry on the proposed rail operations. As a matter of clarification, WAGR should acknowledge the right of an access seeker to appoint or engage a third party as its agent or contractor to exercise the rights or the performance of any obligations required by the TPP.

- Section 5.2 of the WAGR proposal does not provide sufficient detail in how the allocation of train paths is to occur. The detail on how WAGR will actually address train path allocation and dispute resolution should be clearly described and included in the TPP.
- With regard to the process and conditions to remove train paths for under-utilisation, there is a need to allow flexibility to vary the details of particular train paths, agreed usage and performance requirements within an individual access agreement and that is where more specific detail should be provided. Nevertheless, the Regulator believes that more information is required in this area so as to improve the overall effectiveness of the TPP.

In relation to the “three month history” for assessing whether a train path is being underutilised, that assessment period should be based on the characteristics for the industry that the operator is servicing. It would be expected that for seasonal industries that the assessment period would coincide with, for example, the tourist season for a tourist train.

The Regulator considers that the individual circumstances for potentially allowing the re-allocation of a train path, caused by a change in contract and carrier, network capacity issues, and any “allowable variation” from the operator’s entry time onto the network, are best negotiated in individual access agreements. However, as a general policy, the paths that are required for existing customers should be withdrawn by WAGR if the above rail operator performing the task loses the contract.

There is a view that train paths should not be resumed if other train paths exist. The Regulator does not support this view. On the other hand, WAGR’s entitlement to cancel a train path should apply only if there is a reasonable indication that the train path is sought by and will be allocated to another operator. A statement to this effect should be incorporated in the TPP.

WAGR should give consideration to the following in its policy regarding cancellation of services using scheduled train paths:

- ◇ individual circumstances giving additional cancellation rights to be detailed in the access agreement;
- ◇ allowance for built in “surge capacity”; and
- ◇ clarification of “5 times per year”, including information on the commencement date and whether they apply to each train path.

WAGR will need to provide a guidance statement on the general cancellation conditions within the TPP, with reference to further details in the individual access agreements. WAGR will also need to define and provide examples as to what constitutes “force majeure”. Under-utilisation by an operator that can be attributed to force majeure, WAGR’s maintenance activities or matters contributed to by other operators should not result in the removal of a train path.

- The Regulator requires assurances that WAGR will not give preferential treatment to its own operating arms or to existing operators at the expense of new operators or by compromising fair competition when allocating train paths and resolving competition for the same train path.

The Regulator supports a “first come, first served” principle for allocating train paths on the condition that the access seeker will also have to establish that it has the requirement to use the path. This principle is fair and non pre-emptive where WAGR would always consider requests for access in the order in which they are received. The need to use the train paths would prevent their potential

control by an operator for the purpose of preventing others from accessing the rail network.

WAGR is required to provide indicative guidelines and procedures for assessing and verifying whether an operator's request and requirement for a train path is warranted. Clarification of the process for the allocation of train paths when competition for the same train path exists to ensure an open and transparent process should also be added to section 5.4 of the TPP. A statement covering non-discrimination in terms of the application of train path allocation, pricing principles and considerations, the determination of other contractual terms, and the application of the Network Rules would provide such clarity.

- Part 3 of the Code sets out the process for arbitration of disputes. This process refers to disputes arising between the railway owner and a proponent seeking access before an access agreement has been made. The TPP should make reference to the appropriate section of the Code and clearly state the circumstances for which this dispute resolution process applies.

As any dispute on train paths will be resolved in accordance with the dispute management provisions of the individual access agreement after an access agreement has been made, WAGR should also provide details of the intended dispute resolution process for these disputes in the TPP.

#### **4. Temporary and permanent variations**

##### ***Summary of WAGR's Proposal (section 3)***

- WAGR states that train paths may be temporarily varied by giving instructions for the purpose of preventing any actual or potential:
  - ◇ breach of the WAGR Network Rules by the operator or of similar safety requirements by other operators on the network;
  - ◇ material damage to the network or any associated facility;
  - ◇ injury to any person or damage to any property;
  - ◇ delay to the progress of services on the network (but only insofar as any trains operated by a third party have priority over the operator's trains having regard to the TMG); or
  - ◇ for the purpose of preventing or in response to any actual or threatened breach by the operator of any of its material obligations under the access agreement.
- Train paths may also be temporarily varied when WAGR's Urban Passenger Division is required to operate additional services in order to provide public transport services for special events, and such additional services conflict with the operator's train paths.

- The instructions may comprise, but need not be confined to, instructions in one or more of the following:
  - ◇ to cease use of a train path by the service and for the service to proceed over such path on the network as WAGR nominates;
  - ◇ to continue use by the service of the network subject to such variations of the applicable train path or the service or the composition or quality of trains as WAGR nominates;
  - ◇ to cause the service to proceed to a point on the network and stand there until WAGR issues a further instruction in relation to the service; or
  - ◇ if the service operates outside of its train path, to delay or redirect the service to allow access to the network by another operator of a train whose service would, but for the delay or redirection of the operator's service, be delayed or further delayed.
- Train paths may be temporarily varied by WAGR at the request of the operator as follows:
  - ◇ if the operator's train will be unavoidably delayed or otherwise unavailable for presentation at the agreed entry time; or
  - ◇ if the time of an event for which the operator is providing a service is changed due to circumstances beyond the control of the operator.
- A scheduled train path may be varied for the remaining term of an access agreement (or for such other duration as may be agreed) if one party to the agreement sends a notice to the other party stating the request for variation, the length of time, the reason, and the other party consents to the request. The requesting party must give not less than 30 days notice of a variation request. The response must be given within 28 days of receipt of request if not sooner if reasonably practicable. If the response is to refuse consent, the full reasons must be provided in writing to the requesting party.
- WAGR states that it may, without the consent of or notice to the operator, perform repairs, maintenance or upgrading of the network or take possession of any part of the network, at any time.

If such repairs, maintenance or upgrading are reasonably likely to materially affect the scheduled train paths, WAGR will, prior to commencement of the works:

- ◇ take all reasonable steps to minimise any such disruption;
- ◇ notify the operator of the works as soon as reasonably practicable; and
- ◇ use its best endeavours to provide an alternative train path.

WAGR states that 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. WAGR will consult with the operator over a reasonable amount of time before taking possession of the network (except in the case of an emergency) with a view to efficient possession planning and with a view to minimising disruption to services.

***Regulator's views and comments***

- The Regulator does not see a need to alter or expand on the content contained in this section of the TPP as the variation process described is consistent with other railway regimes. As a general principle, once an operator is given a train path, it should not be permanently varied without the consent of both parties if the operator is meeting its obligations and requirements under the Code and access agreement.
- There should be an allowance for appropriate arrangements to be made within the access agreement to address individual circumstances which would influence aspects of a temporary or permanent variation.
- A definition for “material obligations” and “instruction” should be included in the definitions section of the TPP for clarification purposes. The instructions that WAGR can issue should be clearly defined, and the principles as to when an instruction may be issued will need to be detailed.
- WAGR will need to consult with operators on and provide operators with a time profile of its schedule of repair, maintenance or upgrading works to be undertaken and the length of potential disruptions. In instances when WAGR is unable to meet an identified time commitment, it will need to advise the operators of the revised time profile as soon as possible. The Regulator expects further details of track possession and track maintenance practice will be addressed in individual access agreements if required.
- The term “reasonable time” is not specific. While the Regulator is of the view that the time frame for consultation need not be specific, consultation should occur before WAGR issues its notice to take possession of the network (except in the case of an emergency or because of force majeure).
- The Regulator expects that issues relating to the compensation of operators for adverse impacts of WAGR track possession management would be addressed in the relevant access agreement. However, if it can be proven that WAGR has unjustifiably disrupted the train paths of one operator more than another operator, the Regulator may consider whether WAGR has breached the provisions of Section 34A of the Act which deals with conduct aimed at hindering or preventing access.
- The Regulator would expect that scheduled train paths to be minimally affected by planned track maintenance activities, but at this stage is of the view that it is

not reasonable to require WAGR to ensure that these train paths would not be affected. However, if through performance monitoring, the Regulator finds that certain train paths or individual operators are unacceptably affected, then consideration will be given to addressing this issue by either amending the TPP or reflecting the reduced service level in the ceiling for that route section. In any event, access seekers should be negotiating suitable arrangements with WAGR as part of their access agreement.

- Access agreements provide for the establishment key performance indicators (KPIs) which are to be agreed between the railway owner and the operator. These KPIs include performance measures for both the operator and the railway owner. Reference should be included in the TPP to the fact that agreed KPIs in the access agreement will establish a method of measuring performance in this area by way of agreed standards to be achieved and through the monitoring and review of actual performance against these standards.
- As previously stated in the Determination, WAGR has an obligation to give sufficient notice to and consult with operators whose train paths are affected by special events. The right to vary train paths should be clearly spelled out in access agreements between WAGR and operators with WAGR identifying and providing details on all known special events.

## **5. Approach to be taken in the event of a capacity constraint**

### ***Summary of WAGR's Proposal (section 3)***

- If a proposal for access is made that WAGR believes triggers the provisions of Section 10 of the Code, WAGR will inform the access seeker of that belief prior to seeking the Regulator's approval.

### ***Regulator's views and comments***

- Section 10 of the Code requires the Regulator to give approval to negotiate where a proposal has been made, and the railway owner considers that it would involve the provision of access to railway infrastructure to an extent that may in effect preclude other entities from access to that infrastructure. In such a case negotiations on the proposal must not be entered into by the railway owner without the approval of the Regulator. Before the Regulator gives an approval, a public notice seeking opinion is to be published and the other requirements of Section 10 are to be followed.
- It needs to be noted that the merit of Section 10 is in:
  - ◇ informing the Regulator when there are potential constraint issues on the capacity of a route within the WA railway network;

- ◇ allowing interested parties an opportunity to bring their capacity constraint concerns to the Regulator and other stakeholders in a public forum for consideration prior to entering into negotiations;
  - ◇ requiring the Regulator to independently assess the implications of such an access on the route taking into consideration the broadest perspective; and
  - ◇ providing to the railway owner an appreciation of the public and stakeholders' concerns if capacity is constrained on the route, as well as an indication of the future needs for access on that route.
- Section 10 provides for only two possible outcomes. The Regulator can either approve or not approve the negotiation of access. There are no provisions to enable the Regulator to give his approval subject to certain conditions being met.
  - If approved by the Regulator, negotiation will commence and, in accordance with the Code, the conditions of access will be negotiated between WAGR and the access seeker.

## **6. Effectiveness of train paths and TPP**

### ***Summary of WAGR's Proposal (sections 5, 7)***

- WAGR states that it may at its discretion by written notice given to the operator cause a scheduled train path to be reviewed in a bona fide manner by the parties by comparing the stated departure and arrival times for the scheduled train path with the performance during the preceding continuous three-month period of the actual train using or purporting to use that reviewable entitlement ("three month history").
- If such a comparison differs in material respects, the parties will negotiate in good faith to amend the scheduled train path so that the scheduled train path reflects, as closely as is reasonably practicable, the three-month history.
- Nothing compels WAGR to offer a train path to an operator if:
  - ◇ such train path is unavailable by reason of scheduled public transport services operated by WAGR's Urban Passenger Division or contractual obligations by WAGR to any person (including the operator); or
  - ◇ to do so would materially adversely impact on WAGR's ability or opportunity to efficiently and safely manage the network.
- Nothing compels the operator to accept the train path offered by WAGR if contractual obligations owed by the operator to any person (including WAGR) would prevent it from doing so.
- WAGR states that it will develop KPIs allowing monitoring of WAGR's application of the TPP and published by WAGR in its annual reports.



**Regulator's views and comments**

- The WAGR access agreement deals with KPIs and offers a logical tie-in with the train path review process proposed in section 5.9 of WAGR's TPP. By linking the agreed KPIs with a train path review a broader scope of the review process would be achieved by the following:
  - ◇ for individual operators, the KPIs as set out in the access agreement should be relevant to both parties and must be complied with during the term unless a shorter period is specified. WAGR and the operator will monitor the appropriateness of the KPIs in accordance with the access agreement;
  - ◇ the parties should meet when agreed during the term for the purpose of discussing and determining actual performance against the KPIs; and
  - ◇ the parties will jointly determine the appropriateness of the KPIs for the purpose of reward or penalty.
- WAGR will need to clarify the meaning of "differ in material respects" and broaden the scope of the review process to ensure consistency between the TPP and the access agreement.
- In addition, for the performance evaluation assessment, WAGR will need to state the consideration it will give to factors for which it is responsible. For example, within that assessment, how will WAGR treat conditions of track and disruptions caused by its own maintenance, repair and upgrading activities.
- Under Section 12(1)(a) of the Act, the Code must be subject to a full public consultative review process on the third anniversary of its commencement. The Code came into operation on 1 September 2001 and the Regulator intends using the review of the Code at that time to also trigger a review of, among others, the TPP.
- Under Section 44(5) of the Code, the Regulator may, by written notice, direct the railway owner to amend the TPP, or to replace the TPP with another as determined by the Regulator, and the railway owner must comply with such a notice.
- Stakeholders have the ability to express any concern which may arise at any time. The Regulator will investigate such claims and if the need arises the Regulator will review the TPP prior to 1 September 2004. Equally, any recommendation from WAGR to amend the TPP will be considered by the Regulator.
- The Regulator will be developing a KPI reporting system in consultation with stakeholders. For the purpose of this Determination it is sufficient to note the following KPIs that the Regulator may use to assess the effectiveness of the TPP.
  - ◇ number of disputes relating to train paths;

- ◇ number of mutually exclusive traffics; and
- ◇ number of train paths that are being under-utilised, inside and outside the Regime.
- The Regulator has a number of powers to monitor compliance by WAGR with the TPP. Annual audit programs will be the key monitoring tool for assessing compliance.
- The annual independent external audit required for WAGR's access arrangements will include an assessment of WAGR's compliance with the TPP. As mentioned in previous Determinations, WAGR will need to advise the Regulator who it intends to engage for the purpose of conducting the annual audit at the appropriate time. The Regulator may select and manage the auditor. At the minimum, the Regulator's approval of the scope of the annual audit will be required and the final audit report will be made available to the Regulator and the public.
- The annual independent external audit may be supplemented by special audits, which would be commissioned following the identification of a material complaint.
- Schedule 3 of the Code requires KPIs to be included in WAGR's access agreement. WAGR has indicated that KPIs will be developed, agreed and documented within individual access agreements. These KPIs will be specific to the access agreement and are subject to measurement and review.
- A statement to confirm the intended inclusion of KPIs within individual access agreements should be included in the TPP.

## **7. Issues not covered in WAGR's TPP**

### ***Regulator's views and comments***

- The on-selling of train paths by operators will not be permitted since any on-selling would compromise WAGR's ability to price discriminate as permitted under Clause 13, Schedule 4 of the Code.

The one exception is the arrangement between WAGR and the Australian Rail Track Corporation (ARTC) as set out under the ARTC and Infrastructure Owner Agreement to achieve the intent of the 14 November 1997 Inter-Governmental Agreement to improve the interstate rail network.

- WAGR's TPP refers only to scheduled train paths. WAGR is required to clarify how it intends to manage the other types of train paths in the TPP.

## 4. Regulator's Required Amendments

In assessing WAGR's proposed TPP, consideration has been given to WAGR's differing business focus and the likelihood of access being sought on the network.

In any event, the Regulator is satisfied that the TPP to apply to WAGR is consistent with and similar to the TPP that was approved for WestNet Rail (WNR), the State's other railway owner.

The assessment in this Determination has addressed each section of WAGR's proposed TPP dated December 2001. The refinements and additions that are being sought to WAGR's proposal have accordingly been directed to the appropriate section of the submission.

In subsequent discussions, WAGR has agreed to implement a number of the suggested changes detailed below. Even so, these required amendments are provided in full in the following table so that stakeholders can gauge the changes that are being required of WAGR on its TPP as lodged with the Regulator on 7 December 2001.

It is the view of the Regulator that the required amendments below appropriately address and balance the differing needs of WAGR, access seekers and the community under Section 20(4) of the Act. In addition, the required amendments detailed below have also taken into account the issues to be considered by the Regulator under Section 41(b) of the Code, being:

- the comments derived from public submissions;
- the "public interest" as determined by the Regulator; and
- any other issues that the Regulator considers to be relevant.

The adoption of these required amendments in the TPP should ensure the effectiveness of the State's access regime, in addition to meeting the requirements of Section 20(4) of the Act and Section 41(b) of the Code.

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p><i>Section 1</i> <i>Introduction</i></p> <p>The following Statement of Policy will be applied by the Western Australian Government Railways Commission (WAGR) in its performance of functions related to requirements imposed on WAGR by or under the Railways (Access) Act 1998 or the Railways (Access) Code 2000.</p> <p>Specifically, the function to which this Statement</p>	<p><i>Section 1</i></p> <ul style="list-style-type: none"> <li>▪ Clarify responsibility for the TPP within WAGR, which should be the Network and Infrastructure Division rather than simply WAGR.</li> <li>▪ Define the relationship between WAGR, Network and Infrastructure Division and Urban Passenger Division.</li> <li>▪ Acknowledge the right of an access seeker to</li> </ul>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p>of Policy applies is the allocation of train paths by WAGR on the urban rail network and the provision of access to train paths on that network that have ceased to be used. This Statement Of Policy applies to train paths allocated with respect to Access Agreements made under the Railways (Access) Code 2000 and to train paths allocated with respect to access arrangements made other than under that Code.</p> <p>The purpose of the policy is to ensure that the allocation of train paths is undertaken in a manner that ensures fairness of treatment between operators and to acknowledge the existing contractual rights and any new contractual rights created by the code.</p> <p>With the aim of maximising the use of the network, the policy establishes a set of principles under which an Operator has an entitlement to access train paths on the WAGR network and the circumstances under which variation to those train paths may occur.</p> <p>This Statement of Policy is submitted to the Regulator under section 44(2) of the Railways (Access) Code 2000. Under section 44(3), the Regulator may approve this Statement of Policy as submitted by WAGR either with or without amendments, or may reject it and determine what is to constitute the Statement of Policy. The Regulator is required by section 45 of the Code to seek public comment before approving the Statement of Policy submitted by WAGR. The Statement of Policy may be amended or replaced by the railway owner with the approval of the Regulator. The Regulator may direct WAGR to amend the Statement of Policy or to replace them with another Statement of Policy determined by the Regulator.</p> <p>This Statement of Policy will form a schedule to all Access Agreements made under the Railways (Access) Code 2000.</p>	<p>engage a third party as its agent or contractor to exercise the rights or the performance of any obligations required by the TPP.</p>
<p><i>Section 2</i> <i>Associated reference documents, including procedures, rules, standards, acts and regulations</i></p> <p>This Statement of Policy must be read in conjunction with the following associated reference documents, all of which are publicly available and may be obtained from WAGR.</p> <ul style="list-style-type: none"> <li>▪ WAGR Network Rules;</li> <li>▪ Appendix to the WAGR Network Rules;</li> <li>▪ WAGR Rail Infrastructure Codes of Practice and Procedures;</li> <li>▪ WAGR Operating Procedure for Traffic Management (4010-409-001);</li> <li>▪ WAGR Emergency Management Plan;</li> </ul>	

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<ul style="list-style-type: none"> <li>▪ WAGR Procedure for Emergency Management – Urban Electrified Area (4010-409-501);</li> <li>▪ WAGR Working Timetables;</li> <li>▪ Rail Safety Act 1998 (WA);</li> <li>▪ Rail Safety Regulations 1999 (WA);</li> <li>▪ Railways (Access) Act 1998 (WA);</li> <li>▪ Railways (Access) Code 2000 (WA);</li> <li>▪ Australian Standard – Railway Safety Management (AS4292.1 (Part 1));</li> <li>▪ Australian Dangerous Goods Code (Volume 1) (Requirements and Recommendations) comprising: <ul style="list-style-type: none"> <li>▪ The Australian Code for Transport of Dangerous Goods by Rail and Road;</li> <li>▪ Dangerous Goods – Initial Response Guide (SAA/NZS HB76:1997);</li> <li>▪ Dangerous Goods (Transport) (Road and Rail) Regulations.</li> </ul> </li> </ul> <p>WAGR is aware of and undertakes to comply with the requirements of all the above referenced and associated documents. All Operators seeking to run trains on the WAGR network must also be aware of and undertake to comply with the requirements of the above referenced and associated documents.</p>	
<p><i>Section 3</i> <i>Principle governing the use of the WAGR rail network</i></p> <p>The reason for the existence of the WAGR urban rail network, and its essential function, is to provide a safe, reliable and efficient rail-based public transport service within metropolitan Perth. Certain performance standards for the provision of that public transport service are required by Government, which funds the urban rail network and the public transport service. WAGR currently operates a rail-based public transport service that is close to world best practice in terms of on-time running (within three minutes of schedule) and the use of safe systems such as Automatic Train Protection. The Government and the users of the system have a right to expect that these standards will be maintained.</p> <p>The State rail access regime requires that third party operators be permitted to negotiate agreements to use the WAGR network and WAGR is committed to facilitating such use. However, WAGR maintains that the safe and reliable operation of the rail-based urban public transport service is paramount and must not be compromised as a result of the presence of other operators on the network. This principle underlies WAGR's approach to the allocation and management of train paths.</p>	<ul style="list-style-type: none"> <li>▪ State that WAGR will give sufficient notice to and consult with operators whose train paths are affected by special events, and that the right to vary train paths will be spelled out in access agreements, providing operators with details on all known special events.</li> </ul>
<i>Section 4</i>	<i>Section 2</i>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p><i>Definition</i></p> <p>WAGR provides definitions for fifteen (15) aspects related to Train Path Policy:</p> <ul style="list-style-type: none"> <li>(i) Access Agreement</li> <li>(ii) Accredited Operator</li> <li>(iii) Automatic Train Protection</li> <li>(iv) Dangerous Goods Code</li> <li>(v) Interface Coordination Plan</li> <li>(vi) Master Control Diagrams</li> <li>(vii) Network</li> <li>(viii) Operator</li> <li>(ix) Scheduled Train Paths</li> <li>(x) Service</li> <li>(xi) Special Events</li> <li>(xii) Standards</li> <li>(xiii) Train Path</li> <li>(xiv) Train</li> <li>(xv) WAGR</li> <li>(xvi) WAGR's Network Rules</li> </ul>	<ul style="list-style-type: none"> <li>▪ Ensure all terms and definitions are consistent with other documents under the Code, in particular the TMG and Access Agreement.</li> <li>▪ Delete definitions that are not used in the TPP, eg. Accredited Operator, Interface Coordination Plan.</li> </ul>
<p>Section 5 Management of Train Paths</p> <p>5.1 Master control diagrams</p> <p>WAGR will maintain master control diagrams for all routes subject to the Railways (Access) Code 2000.</p> <p>5.2 Allocation of train paths</p> <p>WAGR currently has allocated certain train paths to its operational arm ("Urban Passenger Division") and these paths form an integrated system of public transport services within the Perth metropolitan area. They are set out in published timetables, are integrated with other public transport services such as bus services, and these paths are considered priority train paths. At certain peak periods, the allocated priority train paths used by Urban Passenger fill the available capacity of some routes having regard to section lengths, signalling capability and safety.</p> <p>Where capacity is available to insert an additional train path between existing Urban Passenger train paths, WAGR will use its best endeavours to allocate a train path preferred by an Operator, including rescheduling of public transport services where such rescheduling would not be contrary to the public interest. However, WAGR will not guarantee that additional train paths will be able to be allocated to third party operators during peak periods.</p> <p>Subject to the above, WAGR will allocate available train paths on a "first come" basis, provided the access seeker can demonstrate that its rolling stock and operating procedure are consistent with</p>	<p><i>Section 3</i></p> <ul style="list-style-type: none"> <li>▪ Consider a clearer statement in section 5.2, which emphasises consistency with the Code on this aspect. The method of train path allocation, as well as the dispute resolution process, should be clearly stated and described.</li> <li>▪ Provide indicative guidelines and procedures for assessing and verifying whether an operator's request and requirement to a train path is warranted.</li> </ul>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p>adherence to the train path. For certain train paths where short headways prevail, particularly in peak periods, this may include a requirement for Automatic Train Protection devices to be installed on the rolling stock.</p> <p>At the commencement of an access agreement the initial scheduled train path will have been agreed between the parties in accordance with the Railways (Access) Code. This will be recorded in a schedule to the access agreement (as amended from time to time) in accordance with this policy and the access agreement.</p> <p>5.3 Request for train paths that would result in capacity constraints</p> <p>Section 10 of the Railways (Access) Code 2000 requires that, if a proposal for access is made that the railway owner considers would involve the provision of access to railway infrastructure to an extent that may preclude the provision of access to other entities, the railway owner may not enter negotiations with respect to that proposal for access without the approval of the Regulator. The Regulator is required to conduct a public consultation process before giving such approval.</p> <p>If a proposal for access is made that WAGR believes triggers the provisions of section 10 of the Code, WAGR will inform the access seeker of that belief prior to seeking the Regulator's approval.</p> <p>5.4 Competition for train paths</p> <p>Where an operator desires a train path that is already being utilised by, or that is subject to an application from, another operator, including WAGR's own operating arms, the following principles will apply: No operator with a current access agreement, who is not in breach of any of the terms and conditions of that agreement, will be obliged to relinquish an established, scheduled train path other than voluntarily. WAGR will use its best endeavours to enable the applicant to purchase its desired train path. These endeavours may include, but are not limited to, approaching the holder of the desired train path to seek a permanent variation of that operator's train path, or offering compensation (to be funded by the applicant) for the relinquishment of a train path. The safe, reliable and integrated operation of the urban public transport system is to be given priority. Where there is competition between Operators for a particular train path, WAGR will allocate the train path in order to achieve the best commercial outcome for WAGR.</p>	<ul style="list-style-type: none"> <li>▪ State that negotiation could take place in accordance with the Code if approved by the Regulator.</li>   <li>▪ Add a statement covering non-discrimination in terms of WAGR's application of train path allocation, pricing principles and considerations, the determination of other contractual terms, and the application of the Network Rules.</li> <li>▪ Replace the last sentence with "Where there is competition between operators for a particular train path, the available train path will be provided to the first operator who first requested the train path and can establish that it has the requirement to use the path".</li> </ul>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p>5.5 Temporary variations of train paths.</p> <p>Train paths may be temporarily varied by WAGR on the issuing of instructions to the Operator as follows:</p> <p>(1) For the purpose of preventing any actual or potential:</p> <ul style="list-style-type: none"> <li>▪ breach of WAGR's Network Rules by the operator or of similar safety requirements by other operators on the network;</li> <li>▪ material damage to the network or any associated facility;</li> <li>▪ injury to any person or damage to any property; or</li> <li>▪ delay to the progress of trains on the network (but only insofar as any trains operated by a third party have priority over the operator's trains, having regard to the train management guidelines); or</li> <li>▪ for the purpose of preventing, or in response to, any actual or threatened breach by the operator of any its material obligations under the access agreement.</li> </ul> <p>(2) When WAGR's Urban Passenger Division is required to operate additional services in order to provide public transport services for Special Events, and such additional services conflict with the Operator's train paths.</p> <p>(3) The instructions may comprise, but need not be confined to, one or more of the following terms: to cease use of a train path by the service and for the service to proceed over such a path on the network as WAGR nominates;</p> <ul style="list-style-type: none"> <li>▪ to continue use by the service of the network subject to such variation of the applicable train path or the service or the composition or quality of trains as WAGR nominates;</li> <li>▪ to cause the service to proceed to a point on the network and stand there until WAGR issues a further instruction in relation to the service; or</li> <li>▪ if the service operates outside of its train path, to delay or redirect the service to allow access to the network by another operator of a train whose service would, but for the delay or redirection of the operator's service, be delayed or further delayed.</li> </ul> <p>Train paths may be temporarily varied by WAGR at the request of the Operator as follows:</p> <ul style="list-style-type: none"> <li>▪ if the Operator's train will be unavoidably delayed or otherwise unavailable for presentation at the agreed entry time;</li> <li>▪ if the time of an event for which the Operator is providing a service is changed due to circumstances beyond the control of the Operator.</li> </ul> <p>The Operator is to submit a request for such temporary variation to WAGR at least 24 hours</p>	<ul style="list-style-type: none"> <li>▪ Define the term "material obligations" and "instructions". WAGR's instructions should be clearly defined, with examples, and the principles outlining when they are issued will need to be detailed.</li> </ul>



WAGR’s proposed Train Path Policy	Changes required to WAGR’s Train Path Policy
<p>prior to the time at which the original train path was to commence. WAGR will not withhold its consent to such requests, unless the requested variation is likely to:</p> <ul style="list-style-type: none"> <li>▪ breach WAGR’s Network Rules or otherwise pose a risk to safety;</li> <li>▪ delay or otherwise conflict with the progress of other trains on the network, having regard to the Train Management Guidelines.</li> </ul> <p>5.6 Permanent variations to scheduled train paths by agreement between the parties</p> <p>The procedure to be followed by the parties if it is intended that a scheduled train path is to be permanently varied is set out in this section.</p> <p>A scheduled train path may be varied for the remaining term of an access agreement (or for such other duration as may be agreed) if:</p> <p>(a) One party to the agreement (“Requesting Party”) sends a notice to the other party (“Notified Party”) stating:</p> <ul style="list-style-type: none"> <li>▪ that the requesting party wishes to vary the use by the operator of a scheduled train path;</li> <li>▪ the length of time such variation will be in force; and</li> <li>▪ the reason or reasons for the proposal by the requesting party.</li> </ul> <p>(b) The notified party consents to the requesting party’s proposed variation, such consent to be withheld only upon reasonable grounds (save that the operator cannot withhold consent in the case of variations required by reason of WAGR’s obligations relating to safety of the network).</p> <p>The requesting party must give at least 30 days notice of a variation request.</p> <p>The notified party’s response as to whether it consents or not to the requesting party’s notice must be given to the requesting party within 28 days of such notice being received by the notified party or within shorter time if reasonably practicable. If the notified party’s response is to refuse consent, the notified party must, within such time, also provide full reasons in writing for the refusal to the requesting party.</p> <p>5.7 Maintenance provisions</p> <p>WAGR, without the consent of or notice to the operator, has the right to effect repairs, maintenance or upgrading of the network, or take possession of any part of the network, at any time.</p> <p>In doing so, if there is likely to be an effect on scheduled train paths, WAGR will, prior to commencement of any works;</p> <ul style="list-style-type: none"> <li>▪ take all reasonable steps to minimise any disruption to the scheduled train paths;</li> </ul>	<ul style="list-style-type: none"> <li>▪ Give examples as to what constitutes “reasonable grounds’ when consent to its proposed variation could be withheld.</li> <li>▪ Add the word “and” at the end of (a).</li> <li>▪ Define “variation request”.</li> </ul> <ul style="list-style-type: none"> <li>▪ Include a commitment to consult with operators on and provide operators with a time profile of the works to be undertaken and the length of potential disruptions. In instances when WAGR is unable to meet identified time commitments to repair, upgrade or maintain the track, it needs to advise the operators of its revised time profile.</li> <li>▪ Recognise the Regulator’s power in the TPP that if it can be proven that WAGR has</li> </ul>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p> <ul style="list-style-type: none"> <li>▪ notify the operator of the works as soon as reasonably practicable; and</li> <li>▪ use its best endeavours to provide an alternative train path,</li> </ul>           but need not obtain the operator's consent to such repairs, maintenance or upgrading, or possession of the network.         </p> <p>Possession of the network means closure of the relevant part of the network to all services for the purpose of effecting repairs, maintenance or upgrading. WAGR will consult with the operator a reasonable time before taking possession of the network (except in the case of an emergency) with a view to efficient possession planning and with a view to minimising disruption to services.</p> <p>5.8 Removal of train path for under-utilisation</p> <p>WAGR has the right, by notice in writing to the operator, to delete any scheduled train path from the schedule if the service using that scheduled train path is not operated for more than three consecutive weeks at any time and, after WAGR has given the operator notice of that fact, the operator fails to operate the service for more than six weeks in aggregate in the period of six months from the date of WAGR's notice.</p> <p>Other than if the parties agree to substitute an alternative train path, a service has not been operated within the meaning of this clause if the operator has failed:</p> <p>(a) to present a service at the scheduled entry point onto the network; or</p> <p>(b) to operate the relevant service so that it completes its full journey,</p> <p>in conformance with the locations, days and times set out in the scheduled train paths applicable to such a service, in any circumstances other than those in clause 5.10 or because of force majeure.</p> <p>5.9 Review of scheduled train paths</p> <p>(1) Scheduled train paths will be subject to a review in accordance with this clause 5.9.</p> <p>(2) WAGR may at its discretion by written notice given to the operator cause a scheduled train path to be reviewed in a bona fide manner by the parties by comparing the stated departure and arrival times for the scheduled train path with the performance during the preceding continuous three month period of the actual services using or purporting to use that reviewable entitlement ("3-month history").</p> <p>(3) If on such a comparison of the scheduled train path with the 3-month history, the departure or arrival times for a train using or purporting to use the scheduled train path differ in material respects, the parties will negotiate in good faith to amend the scheduled train path so that the scheduled</p>	<p>unjustifiably disrupted the train paths of one operator more than another operator, the Regulator may consider whether WAGR has breached the provisions of Section 34A of the Act which deals with conduct aimed at hindering or preventing access.</p> <ul style="list-style-type: none"> <li>▪ State that consultation would occur before WAGR issues its notice to take possession of the network (except in the case of an emergency or because of force majeure).</li> </ul> <ul style="list-style-type: none"> <li>▪ State that the paths that are required for existing customers should be withdrawn if the above rail operator performing the task loses the contract.</li> <li>▪ Under-utilisation that can be attributed to force majeure, WAGR's maintenance activities or matters contributed to by other operators will not result in the removal of a train path.</li> <li>▪ Define and provide examples as to what constitutes "force majeure".</li> <li>▪ Clarify how WAGR intends to handle seasonal industries.</li> </ul> <ul style="list-style-type: none"> <li>▪ Broaden the scope of the review process to take into consideration the elements described in the access agreement dealing with KPIs.</li> <li>▪ Clarify the meaning of "differ in material respects".</li> <li>▪ For the performance evaluation assessment ("three-month history"), state the considerations WAGR will give to factors for which it is responsible. For example, within that assessment how will WAGR treat conditions of track and disruptions caused by its own maintenance, repair and upgrading activities.</li> </ul>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p>train path reflects, as closely as is reasonably practicable, the 3-month history</p> <p>(4) Nothing in this clause compels WAGR to offer a train path to the operator under clause 5.9 (3) if:</p> <ul style="list-style-type: none"> <li>▪ such a train path is unavailable by reason of scheduled public transport services operated by WAGR's Urban Passenger Division or contractual obligations by WAGR to any person (including the operator); or</li> <li>▪ to do so would adversely impact on WAGR's ability or opportunity to efficiently and safely manage its network.</li> </ul> <p>(5) Nothing in this clause 5.9 compels the operator to accept a train path offered by WAGR under clause 5.9 (3) if contractual obligations by the operator to any person (including WAGR) would prevent it from doing so.</p> <p>5.10 Cancellation of services using scheduled train paths</p> <p>The operator may cancel any services for scheduled train paths if any of the following circumstances occur, but only if the occurrence of those circumstances is beyond the reasonable control of the operator:</p> <p>(a) where there are mechanical difficulties with the locomotives used or operated by the operator;</p> <p>(b) where there is a failure of any part of the operator's equipment used or to be used in connection with a service;</p> <p>(c) Where repair, maintenance or upgrading of the network is being carried out or there is some other event which materially affects the operator's use of all or any part of the network (including, without limitation, derailment, collision or late running trains).</p> <p>The operator must give to WAGR as much notice of cancellation as possible in the relevant circumstances.</p> <p>The operator may cancel services in accordance with the relevant Access Agreement to take account of Public Holidays which may impact on the ability to provide or operate the service.</p> <p>The operator may in addition, cancel any service no more than five times in respect of each separate scheduled train path in each year from the commencement date without penalty.</p> <p>WAGR and the operator may agree that there be an alternative method of cancellation such as a conditional pathway for seasonal services.</p> <p>5.11 Provision of access to train paths that have ceased to be used</p> <p>Where, under any of the above provisions, a previously used train path ceases to be used, that</p>	<ul style="list-style-type: none"> <li>▪ Give consideration to the following regarding cancellation of services using scheduled train paths: <ul style="list-style-type: none"> <li>◇ individual circumstances giving additional cancellation rights to be detailed in the access agreement;</li> <li>◇ allowance for built in "surge capacity"; and</li> <li>◇ clarification of "5 times per year", including information on the commencement date and whether they apply to each train path.</li> </ul> </li> <li>▪ Provide a guidance statement on the general cancellation conditions within the TPP, with an additional reference that specific details will be provided in the individual access agreements.</li> <li>▪ State that WAGR would cancel a train path only if there is a reasonable indication that the train path is sought by and will be allocated to another operator.</li> <li>▪ Provide examples of when train paths can be removed.</li> </ul>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
<p>path becomes available for allocation under the provisions of this policy. Notification of the cessation of a service will be published in the Weekly Notices, which are provided to all operators on the WAGR system.</p>	
<p><b>Section 6</b> <b>Disputes</b></p> <p>If an Operator has reason to believe that WAGR has not complied with this Statement of Policy, the Operator will notify the General Manager, Network and Corridor, in writing, as soon as practicable after forming this belief, with such evidence as supports the Operator's belief. The General Manager, Network and Corridor will investigate the allegation and provide a written response to the Operator within 10 days, advising the outcome of the investigation.</p> <p>If a dispute related to train path allocation arises between the parties to an Access Agreement they must use reasonable endeavours and act in good faith to settle the dispute as soon as practicable in accordance with the dispute resolution procedures set out in the Access Agreement.</p> <p>If such resolution is not achievable within the contractual framework of the Access Agreement, either party or both parties will notify the Regulator of a dispute under the Railways (Access) Code 2000.</p> <p>If a dispute related to train path allocation arises during the negotiation of an Access Agreement the parties must use reasonable endeavours and act in good faith to settle the dispute as soon as practicable. Failure to resolve such a dispute constitutes grounds for notifying the Regulator of a dispute under the Railways (Access) Code 2000.</p>	<p><b>Section 6</b></p> <ul style="list-style-type: none"> <li>▪ Within the TPP, detail how WAGR will address train path allocation and dispute resolution. The appropriate sections of the Code should be referenced and, alongside each section, WAGR must clearly state the circumstances for which the dispute resolution process applies.</li> <li>▪ Provide details of the intended dispute resolution process for disputes arising after an access agreement is in place.</li> </ul>
<p><b>Section 7</b> <b>Performance Monitoring</b></p> <p>Key performance indicators allowing monitoring of WAGR's application of this Statement of Policy will be developed by WAGR by June 2002 and published by WAGR thereafter in each Annual Report.</p>	<p><b>Section 7</b></p> <ul style="list-style-type: none"> <li>▪ Indicate that KPIs, including those for service quality and cost efficiency will be developed by the Regulator in consultation with stakeholders to assess the effectiveness of the TPP.</li> <li>▪ Include a statement to confirm the intended inclusion of KPIs within individual access agreements.</li> <li>▪ Explain that WAGR's compliance with the TPP will be subjected to an annual independent external audit. The Regulator may select and manage the auditor with costs paid by WAGR. At the minimum, the Regulator's approval of the scope of the audit will be required and the final audit report will be made available to the Regulator and the public.</li> <li>▪ The Regulator can also commission special</li> </ul>

WAGR's proposed Train Path Policy	Changes required to WAGR's Train Path Policy
	<p>audits on any TPP issue or area where additional assurance is sought.</p> <ul style="list-style-type: none"> <li>▪ Add "Stakeholders have the ability to express any concern to the Regulator which may arise at anytime and the Regulator will investigate such claims.</li> <li>▪ State that the Regulator has the power under the Code to amend the TPP at any time and access seekers and operators can at any time request the Regulator to consider amendments.</li> </ul>
<p><i>Other</i> Changes or additions required which do not relate to one specific section of the TPP</p>	<p><i>Other</i></p> <ul style="list-style-type: none"> <li>▪ Rights of an operator to sell a train path – state that an operator may not sell the rights of a train path to another operator, provide detail on the rights of operators (if any) to assigning the rights to entitlements under the access agreement, identify ARTC to be the exception and provide a brief description of the arrangement.</li> <li>▪ Non-scheduled train paths – clarify how WAGR intends to manage the other types of train paths in the TPP.</li> </ul>

## **5. Determination**

The proposed Train Path Policy submitted by WAGR dated 7 December 2001 is not approved. WAGR will be required to make the amendments as tabled in section 4 of this Determination and resubmit them for the Regulator's consideration within 60 days of the receipt of the Determination. The Regulator notes that in the event that agreement is not reached on the required amendments, the Regulator may give directions in writing to effect the necessary changes under Section 44(3) of the Code.

Should it ever become apparent that there is another operator seeking access in the same competitive market as WAGR, then the Regulator may review the TPP arrangements and may require changes to them.

Dr Ken Michael  
ACTING RAIL ACCESS REGULATOR

6 December 2002

**Appendix 1 – Submission Received On The WAGR Proposed Arrangement**

1. Keith Jones
2. Leisure Rail WA Ltd