

WestNet Rail's Part 5 Instruments Review

Final Determination and Approval of the Proposed Train Path Policy

28 August 2006

Economic Regulation Authority



WESTERN AUSTRALIA

Copies of this final determination and approval and WestNet Rail's approved revised Train Path Policy are available from the Economic Regulation Authority website at www.era.wa.gov.au.

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EXECUTIVE SUMMARY

Final 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 was to not approve the proposed TPP on the ground 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 not accepting the proposed TPP were outlined in the draft determination which was released for public consultation on 10 May 2006.
4. Following a period of further public consultation, the Authority considered issues raised in submissions and prepared its final determination. The eight amendments to the proposed TPP required by the Authority in its final determination 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

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 4

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 5

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.

Required Amendment 6

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 7

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 8

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.

Approval

5. WNR submitted a revised TPP on 8 August 2006 which was in compliance with the Authority’s final determination. The Authority has approved WNR’s revised TPP and this document has been placed on the Authority’s website www.era.wa.gov.au.

INTRODUCTION

Background

6. WestNet Rail (**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.
7. 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.
8. 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.
9. The scope of the Part 5 Instrument reviews is limited to those matters specifically set out under Part 5 of the Code.
10. 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.
11. 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.
12. 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.
13. 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.
14. 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).

15. 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 it will apply similar arrangements to all operators who negotiate outside the Code so as to maintain the order of priority of the scheduled train paths.

In addition to the TPP, the other Part 5 Instrument which relates to the management and control of trains on the network is the Train Management Guidelines (TMG). The TMG is the 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. 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).
17. The draft determination was released for public consultation on 10 May 2006.
18. Subsequent to the Authority issuing a notice on 10 May 2006 calling for submissions from interested parties on the draft determination, seven submissions were received as listed below.
- Alcoa World Alumina Australia.
 - Australian Rail Track Corporation Ltd (**ARTC**).
 - Department for Planning and Infrastructure (**DPI**).
 - Goldfields Esperance Development Commission.
 - Great Southern Railway Ltd.
 - WestNet Rail Pty Ltd.
 - Worsley Alumina Pty Ltd (**Worsley**).

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

19. In making this final 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*.

20. It should be noted that some of the comments in the public submissions received during the course of this review fall outside the scope of the TPP review. The Authority's determination is limited to the scope of this review and consequently, comments from the public submissions which have been determined to fall outside this scope have not been considered by the Authority in making its determinations.
21. This final determination makes reference to a number of acronyms which are identified in the Glossary in Appendix 1.

Legislative Considerations

22. 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.
23. 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

24. The process which has been followed for the review of WNR's proposed TPP is outlined below:
- January 2006 - Public submissions received on WNR's proposed TPP.
 - May 2006 - Authority's draft determination published.
 - June 2006 - Public submissions received on draft determination.
 - August 2006 - Authority's final determination and approval published.

REASONS FOR THE FINAL DETERMINATION

Discussion of Issues

25. Relevant issues raised in public submissions, during the second round of public consultation, on the Authority's draft determination are discussed below under the following headings:
 - Management of train paths.
 - Rights to sell a train path.
26. The discussion of each of these items commences with the draft determination's required amendments followed by an outline of relevant comments received in the public consultation process on each amendment then the Authority's assessment and final determination.
27. 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.
28. Some submissions contained comments which were within the scope of the review but which did not specifically address the amendments outlined in the draft determination. These comments are addressed at the end of this section under "Other Relevant Matters Raised in Submissions".
29. The Authority received seven submissions on the Authority's draft determination. However, only four submissions (from ARTC, DPI, WNR and Worsley) addressed the amendments in the draft determination. WNR¹ indicated that it accepted six out of the nine amendments with its objections being to Amendments 3, 6 and 8.
30. On the basis that WNR has accepted six of the nine draft determination amendments (Amendments 1, 2, 4, 5, 7 and 9) and no comment has been made on these six amendments in submissions on the draft determination, the Authority does not consider that any change to these six amendments is necessary in the final determination.
31. It should be noted that of those final determination amendments listed on the following page, Amendments 3, 4, 6 and 8 correspond with Amendments 4, 5, 7 and 9 in the draft determination.

¹ WNR, Part 5 Instruments- Submission on the draft determination of Train Path Policy, page 1.

Final Determination Amendment

Required Amendment 1

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

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- 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

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 4

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 2.8, 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 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.

Management of Train Paths***Conditional Train Paths*****Draft Determination Amendment**

32. One amendment was outlined in the draft determination relating to conditional train paths in the proposed TPP, as listed below.

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.

Interested Party Submissions

33. Three submissions were received (from DPI, WNR and Worsley) on the amendment.
34. DPI² has indicated that it does not agree with the amendment as there is no evidence to suggest that operators are currently experiencing any difficulties in accessing the freight network because of the lack of scheduled, reserved and/or conditional train paths. DPI does not believe there is a need for this level of prescriptive approach to managing conditional train paths for bulk commodities and suggests that the Authority identify the various ways in which conditional train paths for bulk commodities can be efficiently managed and consult with bulk commodity customers such as Alcoa before arriving at a recommended approach. DPI also suggests that as WNR is no longer a vertically integrated railway owner, it is of the view that WNR, in consultation with operators and end customers, is best placed to determine how it can best manage train path capacity as a below rail operator. DPI also states that unless WNR is happy to comply with this amendment to the TPP, it suggests that the Authority monitors the “problem” in the first instance to ascertain that it is real before imposing the requirement on WNR.
35. WNR³ did not accept the amendment and indicated that traffic patterns on all of WNR’s mainlines are not dominated by any single product. It suggested that setting aside pathways for product specific traffics on routes that already have

² DPI, Submission on the draft determinations of WestNet Rail’s Part 5 Instruments, page 1.

³ WNR page 1.

- limited remaining capacity available would create barriers to entry to the network for any other product traffics, other than the specific product.
36. WNR further indicated that if a remaining train path was to be taken up by an operator and it considered that this action would preclude other entities from access to that infrastructure, Section 10 of the Code would be triggered requiring WNR to seek approval from the Authority before continuing with the access application. WNR considers that, as the network manager, it should continue to have sole discretion in the efficient management of train path allocation on any route and remaining train paths should be available to any operator or product willing to utilise a pathway on the “use it or lose it” premise that the TPP is based upon.
 37. Worsley⁴ outlined concerns with the amendment on the basis that the application of the provisions of the amendment would create an unacceptable business risk for its operations and it claims that the conditional train paths it has negotiated with WNR are not considered to be barriers to entry for potential operators. Worsley has identified a number of issues which it used to support its position.
 38. Worsley has highlighted some differences between the rail operations serving the coal industry in New South Wales and the rail operations serving the bulk commodity industry in Western Australia. In essence, it is argued, that the business needs of the coal industry are different to the business needs of the alumina industry. Centralised planning is utilised in the coal industry in New South Wales with pathway requirements being determined on an overall coal industry needs basis. Coal trains are not allocated specific origin-destination tasks but form a common pool of resources available to undertake various tasks defined by the centralised planning group. In Western Australia, none of the above circumstances exist. Each company plans its own rail transport requirements, trains are allocated to specific origin-destination tasks and pathway requirements for alumina industry trains are allocated to specific train movements.
 39. Worsley has argued that conditional train paths form a significant component of its business risk strategy and to have these pathways become part of a pool would create an unacceptable risk and jeopardise the capacity and performance of its export supply chains and risk plant shutdowns. Worsley also contends that the WA Access Regime allows it to go to the market and test the competitive environment and therefore asserts that conditional pathways are not a potential barrier for rail operators seeking access. Worsley also indicates that it is satisfied that appropriate mechanisms exist within the Part 5 Instruments to allow re-allocation of pathways to a newly contracted operator. Further, Worsley asserts that it is the rail customer, and not the operator, which creates the demand for rail transport and therefore it is the customer’s requirements which need to be met when considering pathway allocations. Worsley suggests that WNR understands this need and the need is currently adequately provided for within the WA Access Regime.
 40. Worsley agrees that the provision for traffic specific capacity may have an application in the rail network that services the grain industry through similarities with the coal industry supply chain in New South Wales. However, Worsley contends that as the grain network is under-utilised, there is little need for the provision of traffic specific capacity as a new operator would have little difficulty in

⁴ Worsley, Draft Determinations on WestNet Rail’s Part 5 Instruments- Submission by Worsley Alumina Pty Ltd, page 5.

securing train paths that could be used effectively and the flexibility sought by the proposal for traffic specific capacity is already available to the grain industry because of low train path usage.

41. On the basis of the above arguments, Worsley asserts that the proposal for traffic specific capacity does not have any validity for either heavily or lightly used rail lines and consequently the proposal should not be pursued.

Authority's View on Comments in Submissions

42. The Authority notes the comments from DPI and WNR in regard to the existing use of the freight network and considers that while there may not be an existing requirement for the provision of traffic specific capacity in the TPP, there may be a future requirement for this provision as competition in the above rail market increases and new freight tasks eventuate.
43. The Authority also notes the comments from Worsley in regard to the differences in rail services for the coal industry in New South Wales and rail services for bulk commodities in Western Australia and the likely impact of the draft recommendation on the business risk of customers in circumstances where rail lines carry multiple commodities. The Authority has also considered the comments from WNR outlined in paragraph 36 and notes that the proposal to offer traffic specific capacity should only apply to rail lines carrying a single bulk commodity as exists for coal rail lines in New South Wales.
44. The Authority notes Worsley's comments in paragraph 40 on the potential application of traffic specific capacity in the grain network albeit the grain network has plentiful spare capacity.
45. The Authority supports the draft recommendation for traffic specific capacity where rail lines carry a single type of bulk commodity displaying multiple source single destination route characteristics. However, the Authority recognises that these characteristics do not exist in the existing freight network except for the grain lines which are under-utilised. The Authority considers that while this may be the current situation, the expected development of new iron ore projects in the mid-west region of the state may cause a future requirement for traffic specific capacity within the context of conditional train paths.
46. Having considered the issues raised in the submissions from DPI, WNR and Worsley, the Authority is of the view that making provision for traffic specific capacity in the proposed TPP is premature at this stage. The Authority will monitor the situation and should the need arise the Authority has the ability under section 9 of the TPP to require an appropriate change to this document.
47. Based on the above, the Authority has removed the requirement for Amendment 3 in the final determination.

Removal of a Train Path

Draft Determination Amendment

48. One amendment was outlined in the draft determination relating to removal of a train path in the proposed TPP, as listed below.

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.

Interested Party Submissions

49. Two submissions were received (from ARTC and WNR) on the amendment.
50. ARTC⁵ commented that WNR's policy may make it difficult to assess the level of utilisation where the criteria of six months monitoring of services coincides with a re-scheduling of train paths as an outcome of a three-month period review against actual train performance. ARTC believes that there is some inconsistency between its approach and the approach taken by WNR in the proposed TPP, in regard to the removal of train paths, and suggests that there is a need for consistency in approach across the interstate network.
51. WNR⁶ has accepted the first part of Amendment 6 and the first point of the second part of the amendment regarding the loss of a single customer train contract and has indicated that it will be included in the updated version of the TPP submitted by WNR.
52. However, WNR contends that the second two points regarding the loss of freight (major or minor) by an operator from multi-customer trains should be dealt with under section 2.5.1 of the TPP as a train path utilisation issue. WNR has noted that as multi-customer trains are predominantly general freight the operator should be given the opportunity to replace freight or ultimately consolidate his services under the rules governing train path utilisation.

Authority's View on Comments in Submissions

53. In regard to the issue of consistency between the ARTC and WNR policies as outlined in paragraph 50, the Authority notes that the policy covering the review of train paths in the proposed TPP is very similar to the provisions outlined in ARTC's Access Undertaking with both railway owners undertaking to review train paths following train path performance over a three month period. In regard to the removal of train paths, the Authority notes that there are differences in the approach taken by WNR in the proposed TPP and ARTC in its Undertaking. However, the Authority considers that the provisions for the removal of train paths in the proposed

⁵ ARTC, Submission on Draft Determinations on WestNet Rail's Part 5 Instruments, page 3.

⁶ WNR page 2.

TPP are more generous than in the ARTC's Undertaking allowing for a longer period of non utilisation of train paths before the removal of train paths which would benefit incumbent operators. Consequently, the Authority does not consider that the provisions for the removal of train paths in the proposed TPP need to be changed to be identical with the ARTC Access Undertaking.

54. The Authority notes that WNR has accepted part of draft determination Amendment 6 but has concerns with the second part of the amendment. The Authority holds the view that operators who lose a small or significant part of its traffic should be given the opportunity to seek new business to replace the lost business before it is required to surrender the effected train path and that the operator should be consulted prior to the removal provisions taking effect. The Authority notes that WNR has recognised this in the last sentence of paragraph 52. The Authority understands that WNR's position is not dissimilar to the Authority's view.
55. The Authority has revised draft determination Amendment 6, in relation to the transfer of contracts between operators, to reflect WNR's position while retaining the principle outlined in the draft determination, and agreed by WNR, to the effect that operators should have the opportunity to retain train paths where they can make up lost tonnages in a reasonable timeframe.

Final Determination Amendment

Required Amendment 5

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.

Rights to Sell a Train Path

Draft Determination Amendment

56. One amendment was outlined in the draft determination relating to the rights to sell a train path in the proposed TPP, as listed below.

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.

Interested Party Submissions

57. Two submissions were received (from DPI and WNR) on the amendment.

58. DPI⁷ indicated that in approving the existing TPP, the Independent Rail Access Regulator agreed to not permit the on-selling of train paths on the basis that any on-selling would likely compromise WNR's ability to price discriminate as permitted under Clause 13, Schedule 4 of the Code and increase the likelihood of gaming by operators to effect barriers to entry. DPI supports these arguments and also considers that Amendment 8 will conflict with the provisions in the proposed TPP for the removal of a train path and will need to be addressed if the amendment is to be progressed. DPI, in the absence of a detailed assessment of the yet-to-be developed criteria, holds the view that, on balance, competition in the market place for train paths is not a better alternative than ensuring that WNR assumes full responsibility and accountability for maximising traffic and reducing barriers to entry on the network.
59. WNR⁸ asserts that allowing existing operators to on-sell their train paths to another operator is anti competitive as it constrains the flexibility available to WNR as the network manager. WNR claims that if train paths become available they should revert back to it in accordance with Section 2.5.1 of the TPP.
60. WNR's reasons for opposing the on-selling of train paths are:
- It is not an operators core business to on-sell Train Paths.
 - It may create the potential for gaming between operators which discourages entry into the market.
 - The remaining capacity can be more efficiently managed by WNR.
 - It creates another unnecessary level of administration to deal with on-selling terms and conditions.
 - Maximising utility of remaining pathways will be constrained by third party involvement.
 - WNR should have the right to negotiate with operators on price and usage for pathways that are in demand.

WNR understands that one of the reasons that the Authority wishes to make this change is to align the regulation of rail with the regulation of electricity and gas, the other industries regulated by the Authority. WNR does not believe that this reason on its own justifies such a change.

Authority's View on Comments in Submissions

61. The Authority has noted the comments from DPI as represented in paragraph 58 and considers that the on-selling of train paths is not likely to have a major impact on WNR's ability to price discriminate as this provision is not likely to be widely utilised. The Authority has noted that the provision for on-selling of train paths between operators exists in other jurisdictions for the ARTC and Queensland Rail Access Undertakings and considers the provisions in the ARTC Access Undertaking could be adopted by WNR with minimal change. The Authority noted

⁷ DPI page 2.

⁸ WNR page 1.

in its draft determination that ARTC outlined 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. The Authority also considers that the adoption of on-selling provisions that are similar to that in the ARTC Undertaking would not unduly impact on WNR's ability to manage the freight network to ensure greater utilisation of the network.

62. The Authority notes WNR's claim that allowing existing operators to on-sell their train paths may be anti-competitive as it constrains the flexibility of the network manager. However, the Authority considers that the primary objective of on-selling of train paths is to ensure the maximum level of economic efficiency in use of the rail network. The Authority recognises the importance for WNR as the network manager to have the ability to manage the network to ensure greater network utilisation and considers that similar provisions for on-selling of train paths as outlined in the ARTC Access Undertaking would enable WNR to meet this objective.
63. Consequently, the Authority continues to hold the view that WNR should make provision for the on-selling of train paths in its proposed TPP and confirms the need for Amendment 6 as set out in the draft determination.

Final Determination Amendment

Required Amendment 7

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.

Other Relevant Matters Raised in Submissions

64. In its submission, in regard to the issue of competition for the same train path, ARTC re-iterated its view that the use of a NPV calculation when assessing competition for the same train path was preferred to a "first in-first served" policy as proposed by WNR on the basis that the WNR proposal does not adequately recognise the commercial interests of the railway owner. ARTC also suggested that the proposed TPP should allow access seekers to reserve capacity for a period of time following execution of an access agreement and subject to payment of an appropriate reservation fee.
65. The Authority noted in the draft determination that a NPV approach could lead to preferential treatment for one access seeker over another and was less transparent than the "first in-first served" approach which was easier to assess by all parties and less conducive to gaming. The Authority also noted the advice from SdD which indicated 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 treat all parties equally. On this basis, the

Authority did not seek an amendment in the draft determination to WNR's proposed policy.

66. The Authority notes that apart from ARTC there have been no other submissions which addressed this issue which may suggest that it may not be an area of concern to operators and end users. Consequently, the Authority continues to hold the view that the "first in-first served" approach is acceptable.
67. In regard to the issue of capacity reservation as outlined in paragraph 64, the Authority, in the draft determination, noted that its consultant SdD suggested WNR should be given the benefit of any doubt as to its ability not to allow capacity to be unfairly reserved by one operator, without using the reserved capacity, at the expense of another which would otherwise be using the reserved capacity. SdD also considered that WNR 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.
68. The Authority considers that the issue of capacity reservation should be left largely to the discretion of the railway owner to ensure flexibility depending on train path availability. The Authority notes that the constraints of the Code and individual access agreements should ensure that any unfair dealings with respect to train paths by WNR would come to the attention of the Authority and would be subject to dispute resolution procedures. The Authority notes that no other submissions have addressed the issue of capacity reservation indicating it may not be an area of concern among operators or end users indicating that this provision can be negotiated with WNR if capacity is available and section 10 of the Code is not breached. The Authority, therefore, considers that no amendment is necessary.

APPROVAL OF WNR'S REVISED TRAIN PATH POLICY

69. Subsequent to release of the draft determination and receipt of WNR's submission on this determination, representatives of the Authority held discussions with WNR in relation to the amendments required by the Authority. On 8 August 2006, WNR submitted a further submission containing a revised TPP.
70. The Authority has reviewed the revised TPP and is satisfied that the changes made by WNR meet the requirements of this final determination.
71. The Authority, consequently, approves the revised TPP as submitted by WNR on 8 August 2006.
72. WNR's approved revised TPP has been placed on the Authority's website www.era.wa.gov.au.

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