

TRAIN PATH POLICY
TO APPLY TO
WESTNET RAIL

DETERMINATION OF
THE WESTERN AUSTRALIAN
INDEPENDENT RAIL ACCESS REGULATOR

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

31 October 2002



Contents

1. Introduction
2. The WA Legislative Context
3. Discussion Of Issues
4. Regulator's Required Amendments
5. Determination

Appendices

1. Submissions Received From The Public Consultation Process
2. Submissions Received On The Draft Of The Determination

1. Introduction

WestNet Rail (WNR) is the principal provider of “below” non-urban rail infrastructure in Western Australia, covering approximately 5,000 kilometres of track in the southwestern corner of Western Australia. WNR is a subsidiary of the Australian Railroad Group (ARG), a company owned 50:50 by Wesfarmers and Genesee Wyoming. ARG also has another subsidiary company, Australian Western Railroads (AWR), which provides above rail services in Western Australia.

Section 3 of the *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, WNR is considered to be the railway owner for the Western Australian non-urban railway 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 WNR 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 November 2001, WNR submitted its proposed TPP to the Regulator. A copy of the WNR submission is available on the Office of the Rail Access Regulator’s website (www.railaccess.wa.gov.au).

In considering WNR’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 17 November 2001. After granting an extension in the submission deadline, the closing date for submissions was 11 January 2002.

Seven (7) public submissions were received containing comments relating to WNR’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) along with WNR’s response, dated 18 April 2002, to some of the issues raised in the public submissions.

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. WNR's proposed TMG document is the subject of a separate Determination by the Regulator.

WNR, in its letter of 18 April 2002 to the Office of the Rail Access Regulator included a statement of priority of documentation. In this statement, WNR has advised that the order of precedence in the documents would be (1) Train Path Allocation Policy, (2) Train Management Guidelines, and (3) Access Agreements.

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 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.

The Regulator understands that the approved TPP and TMG will be attached as an appendix to all access agreements negotiated under 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*.

On 15 August 2002, the Regulator released the Draft of the Determination on Train Path Policy to apply to WNR and invited interested parties to provide comments on the draft by 5 September 2002. The submission deadline was extended by a week at the request of stakeholders.

Six submissions on the Draft of the Determination were received, five from the public and one from WNR (refer to Appendix 2 for the list of respondents). One of the submissions was provided to the Regulator on a confidential basis. The remaining submissions are available on the Office of the Rail Access Regulator's website (www.railaccess.wa.gov.au).

2. The WA Legislative Context

The legislative requirements in relation to TPP are provided for in Section 44 of the Code and these are summarised 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 interest for the railway owner, access seekers and the community.

3. Discussion of Issues

Issues raised in public submissions which are considered significant are discussed under the following headings:

- Terms and definitions.
- Allocation and cancellation of train paths.
- Temporary and permanent variations.
- Approach to be taken in the event of a capacity constraint.
- On-selling of train paths.
- Effectiveness of train paths and TPP.

The following discussion commences with a summary of WNR's position under each of the above headings and the comments received from the public consultation process. WNR's response to the public comments and a summary of additional information from comments received on the Draft of the Determination considered relevant by the Regulator are then provided. This is followed by the Regulator's views and comments.

The public submissions demonstrated the diverse and, at times, conflicting views of the various stakeholders when addressing what they considered to be deficiencies in the WNR proposal. As there is no consensus view among submissions, rather than presenting a summary of comments under the heading "*Comments from the public submissions process*" the Regulator has attempted to present the point of view of each submission on the relevant issue.

1 Terms and definitions

Summary of WNR's Proposal (section 2)

- The WNR TPP submission defined conditional train paths, scheduled train paths and unscheduled train paths as:
 - ◇ Conditional Train Paths – the entitlement of an operator to use the network between agreed locations at times which are not in conflict with the operator of scheduled train paths that exist for that part of the network and which are seasonal or vary over time because of the nature of the operations;
 - ◇ Scheduled Train Paths – the entitlement of the operator to use a train path on the network between the times and between the locations set out in the access agreement (and as amended or varied permanently in accordance

with the access agreement and may be published in the working timetables, in graphical form on a master control diagram or an electronically or other printed form); and

- ◇ Unscheduled Train Paths – train paths recorded on the master control diagram which (a) provide for the commencement of a scheduled train path within 6 months of it being placed on the master control diagram, or (b) provide for the use of a scheduled train path on a seasonal or agreed intermittent basis.

Comments from the public consultation process

- The Policy should clarify the definitions of the train paths listed.
- There appeared to be an inconsistency between the concept intended by the use of the defined terms and the manner in which the terms are used within the document.

WNR's response

- WNR has resubmitted the definitions which are to be included in the TPP. These focus on two groupings being (a) types of customers, and (b) types of train paths.

Types of customers defined are:

- ◇ Passenger trains – A fixed entry and exit time and fixed intervals at points along the network for passenger pick-ups;
- ◇ Fixed freight services – A fixed entry and exit time on a regular basis;
- ◇ Bulk operator fixed services – A fixed entry and exit time on a regular basis;
- ◇ Bulk operator flexible services – A fixed entitlement to a number of train paths which represents the desired capacity but with high flexibility subject to other rights; and
- ◇ Tourist train operator – Seeks fixed entry and exit times on an irregular basis.

The train paths defined are:

- ◇ Scheduled Train Paths (Passenger) – Fixed entry and exit, fixed intervals in between;
- ◇ Scheduled Train Paths (Freight) – Fixed entry and exit time;
- ◇ Flexible Scheduled Train Paths (Freight) – Fixed entry and exit but able to be changed at short notice provided it does not effect a Scheduled Train Path – Passenger or Freight;
- ◇ Conditional Paths – Paths included on the master control diagram and will be available to the operator for whom they are reserved if required but otherwise

can be reallocated on a temporary basis. They can be reserved because of the (i) requirements for optional destinations, (ii) to provide reserve or surge capacity, (iii) because of known seasonal or intermittent requirements; and

- ◇ Reserved Paths – Paths which will, at a point in the future, become a path in one of the defined categories and should only be reserved based on reasonable contractual commitments.

Additional information from comments on the Draft of the Determination

- Stakeholders questioned the need to “compartmentalise” customer and train paths to the level of detail proposed by WNR – arguing that there is no reason why passenger trains could not operate using a scheduled freight path type, that not all passenger trains have fixed intervals in between and not all freight trains have no intervals in between, as well as questioning the difference between a scheduled path type and a flexible scheduled path type.

Regulator’s views and comments

- The Regulator is of the view that a general definition of the types of train paths is necessary in the TPP for policy formulation and administration. The Regulator recognises that there will be exceptions to any set of definitions but these exceptions are best considered as variations within individual access agreements.
- The Regulator understands that access seekers who were provided a copy of the revised definitions by WNR have generally agreed to the new definitions. The revised definitions should be incorporated into the revised TPP.
- The word “reserved” should not be used in the definition of “Conditional Paths” as it is confusing when there is also a defined term of the same name.
- There will be a need for WNR to re-examine its proposed process and procedures, eg. the implication of flexible scheduled train paths on an operator’s three month history, as a result of these changes.

2 Allocation and cancellation of train paths

Summary of WNR’s Proposal (sections 1, 3.1, 3.2, 3.6, 3.8, 7, 8)

- WNR’s proposal states that the policy will be managed in such a way as to encourage maximum use of the network. WNR will maintain a master control diagram for all routes subject to the Code. Initially these master control diagrams will be those in existence at 1 September 2001 which recognise existing contractual arrangements for access in place at that time.

- WNR states that the Code provides for proponents to seek access to the network for conducting train operations and encourages access seekers to review the Code with particular reference to Part 3, and Sections 7, 8 and 9. It is also possible for proponents to seek a train path by negotiation with WNR outside the provisions of the Code.
- WNR 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 WNR has given the operator notice of that fact, the operator fails to operate the service for more than 6 weeks in aggregate in the period of 6 months from the date of WNR's notice.

Other than if the parties agree to substitute an alternative train path, a service has not been operated if the operator has failed to present a train at the scheduled entry point onto the network or to 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 such service, in any circumstances other than because of force majeure.

- WNR 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 WNR as much notice of cancellation as is possible in the relevant circumstances.

WNR 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; or

- ◇ the inability for the customer to provide product for transport from a mine, refinery or other similar facility; or
 - ◇ the inability to unload the product at discharge points or ports not caused by the operator; or
 - ◇ because of the seasonal nature of the services.
- WNR states that if two operators request the same available train path and it is not possible to satisfy both requests by using alternative but similar train paths, the available train path will be provided to the operator who first requested the train path.
 - WNR refers to Part 3 of the Code which provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed access agreement.

Any dispute arising between WNR and an operator after the signing of an access agreement will be resolved in accordance with the dispute management provision of that agreement.

Comments from the public consultation process

- Comments from access seekers reflected a concern for a fair and equitable TPP which would be open, transparent and provide equal opportunity for all access seekers.
- Reference to access applications being made outside the Code must be removed. All applications and arrangements must comply with the Code to ensure consistency and fairness between parties. The TPP, TMG and the terms of the standard access agreement should apply consistently to all parties to ensure the effective operation of the master control diagram and scheduled train paths.
- Details of the assignment and cancellation arrangements in the access agreement should be specified in the TPP to provide protection to operators of the provisions of the arrangements.

The removal of train paths for under-utilisation is inadequate in its present form. Given the characteristics of certain operator services, the removal of train paths for under-utilisation should only apply to conditional train paths where the access party consistently fails to use a train path in circumstances where the prescribed condition has been applicable.

Cancellation of trains in accordance with an access agreement should not be regarded as under-utilisation.

Under-utilisation caused by force majeure applying to an access party should not result in the removal of a train path.

The concept of a “three-month history” is inappropriate. The review should be based on broader information and undertaken by comparing the access party’s contracted scheduled train paths with its current and expected reasonable requirements.

There should be a resumption right for WNR. This would apply to situations where an operator loses the contract to move freight for a customer. To allow another operator to compete for above-rail business the paths that are required to move freight for existing customers should be able to be resumed by WNR if the above-rail operator performing the task loses the contract. The paths can then be re-assigned to the operator that wins the business. This will give potential operators the access certainty required to bid for business.

There should be appeal rights to an independent expert before resumption occurs. Disruption may occur for reasons that are quite legitimate and do not suggest that operations will cease altogether. It is important to recognise that ill-defined capacity resumption arrangements will become a significant barrier to entry in practice on account of the risks involved in a third party operator’s investment in rolling stock being devalued due to path resumption. This is likely to be a major concern for financiers.

There is no reason for train paths to be resumed unless utilisation of the network is nearing capacity. In order to assess this, the policy should indicate the basis upon which network capacity will be assessed.

The Queensland Competition Authority (QCA) has the concept of allowable variation around times which may be useful in defining the concept of operating a train in conformance with times set out in the scheduled train paths. The QCA also imposes an obligation on the access provider to demonstrate that there existed a genuine alternative use for a path before it was allowed to remove it from an operator. Such a requirement is an important safeguard to avoid game-playing by the access provider in a situation where common ownership cannot help but raise the prospect of a conflict of interest.

WNR’s entitlement to cancel a train path should only apply if there is a reasonable indication that it is sought by and will be allocated to another operator.

The Australian Rail Track Corporation’s (ARTC) under-utilisation threshold is seven out of any twelve consecutive train paths. WNR’s proposed threshold appears to be far more onerous. ARTC considers that its approach represents a more balanced position between the interests of the access provider and the seeker.

- The TPP should contemplate that particular access parties may have individual circumstances requiring it to be entitled to cancel services in addition to the general rights of cancellation, which can be detailed in the individual access agreement.

An operator should not be constrained as to the circumstances in which it chooses to cancel a service – it could be as simple as a lack of demand.

An operator should be able to reserve capacity, for which it pays an appropriate price, even though it may not always and indeed may not expect to always require that capacity in the case of defined surge capacity. Failure to operate trains in those circumstances should involve no penalty (other than the ultimate risk of resumption of capacity for under-utilisation for paths not reserved for surge capacity).

There would appear to be no reason for there to be adverse implications from cancellation where there is clarity as to the expected likelihood of path utilisation over time. This is because the charging arrangements should reflect the cost of a path based on the incremental cost of an additional path.

To the extent that provisions in the access agreement affect underlying rights, they should form part of the TPP so that operators are not subsequently disadvantaged.

Clause 3.8 gives five reasons why an operator may cancel a service. Subsection (b) allows cancellations of up to 5 times a year. This is a very low level of cancellation in particular when compared to say a daily service in which it would equate to 1.4 percent of services. It is recommended that similar to the proposed ARTC regime and agreements in other jurisdictions that up to 10 percent of scheduled paths can be cancelled with no penalty.

The circumstances described in section 3.8, sub-clause (iii) should not be limited to those occurring in WA. An interstate operator should not be penalised in one jurisdiction because of events beyond its control occurring in another jurisdiction.

It is assumed that the allowable cancellation of 5 trains per year for each service is on the basis that a different train service runs each day of the week (ie. 5 cancellations per year represents about 10 percent of the number of times each scheduled service is timetabled). This should be clarified.

ARTC's approach to cancellation of services provides for the cancellation of up to a certain number of services per year per path without liability to ARTC, for any reason. Beyond this, the flag fall component is payable and under-utilisation provisions apply. WNR's approach appears to allow any number of cancellations where the circumstances are beyond the control of the operator. It would also

appear that access agreements might allow cancellations for a number of circumstances (up to 5 for regularly scheduled services) including public holidays, inability to provide product from an input facility, inability to unload at a port and seasonality. With respect to regularly scheduled services WNR's approach appears similar, but more generous, than that for ARTC. ARTC has no objection to this as it does not create a cross-jurisdictional issue and is really a commercial decision to be made by the access provider.

- There must be an appropriate procedure for awarding of train paths among access seekers to ensure competition works effectively. An access seeker should not necessarily be awarded a train path simply if it was first to apply, but must first establish that it has the capacity to use the path.

Preference given to the operator who first requests a train path where there is competition for the same train path may work against access by new operators.

- Dispute resolution procedures are set out in Part 3 of the Code. Issues under the policy that may give rise to disputes should be individually identified. This ensures a right to access the dispute resolution procedures under section 8 of the TPP.

The TPP should refer to Section 25 of the Code instead of section 3.2 of the TPP.

Additional information from comments on the Draft of the Determination

- A provision be added in the TPP to enable an access seeker to engage a third party as its agent or contractor to exercise the rights or the performance of any obligations required by the TPP, TMG and access agreement.
- WNR proposes to review train paths to ensure that the train can actually operate on them and the access agreement requires the parties to negotiate in good faith if the performance varies from the train path in "material aspects". WNR proposes to define "material aspects" as follows:
 - ◇ the train is unable to meet its schedule because the equipment used by the operator is inadequate (eg. insufficient horsepower to maintain required speed), or the time allowed for proposed loading and unloading is not sufficient, but not because the infrastructure is not maintained properly to allow the train to meet its schedule; and
 - ◇ because the train is regularly late and effecting other train paths.
- WNR will apply the following guidelines to changes requested to existing paths or additional paths under an access agreement, or when a new applicant has applied for a train path but there is no agreement signed.

WNR will negotiate to provide train paths or additional train where the operator or

potential operator meets the following criteria:

For Scheduled Train Paths (passenger) and (freight), or Flexible Scheduled Train Paths:

- ◇ the operator can demonstrate a contractual commitment to operate trains or deliver passengers or freight;
- ◇ the operator provides details of anticipated increased demand because of an upgrade or expansion of production capacity with confirmation that it will progress (eg. funding approved, public announcements, etc.), or market growth based on trend data; and
- ◇ the operator can demonstrate a committed new project with agreed training.

For Conditional Paths:

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

In applying these criteria the following process will apply:

- ◇ WNR will seek sufficient documentation from the operator to assess the request;
- ◇ if WNR does not believe the information supports the request it will seek further information;
- ◇ if WNR does not believe the request meets the criteria it will advise the operator and
 - ◇ if it is a request relating to an existing access agreement the dispute will be resolved under the terms of the agreement; or
 - ◇ if it is a new request the dispute will be resolved in accordance with Division 3 of the Code.
- The process for allocation of train paths as part of the negotiation process for access will be:
 - ◇ the operator will request the train path(s);
 - ◇ WNR will refer to the Master Train Control Diagram and determine if the path(s) are available, or seek changes to or the deletion of owned paths allocated to other operators to create the paths, or advise the operator the paths as requested are not available and suggest alternatives that may be

available;

- ◇ at all times maintain dialogue with the operator to ensure all alternatives are explored; and
 - ◇ if the operator is seeking path(s) currently used for the same purpose under another agreement and the new agreement is likely to supersede the existing one then WNR will commit to transfer the existing path(s).
- WNR proposes that the following policy apply to the circumstances where an operator may cancel a train path. The details applying to each operator will be in the access agreement.

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

- ◇ where public holidays effect the operation of the train path;
 - ◇ for each Fixed Scheduled Train Path (passenger or freight) 5 times per year commencing from the date the path was first approved;
 - ◇ there are mechanical difficulties with the rolling stock 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 a service;
 - ◇ 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; and
 - ◇ the operator is unable to load trains because of a lack of product at terminals or is unable to unload product at terminals or ports because of insufficient storage space or because of mechanical difficulties with the loading or unloading equipment at terminals or ports.
- If WNR proposes to withdraw a train path because of lack of use it will only do so when:
 - ◇ there has been a request for use of the path from another operator; or
 - ◇ it would allow better management of other train paths and encourages efficient use of the network; or
 - ◇ the operator agrees to its withdrawal.

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 WNR's proposed TPP, the Regulator is obliged to take into account the differing needs of WNR, access seekers and the community under Section 20(4) of the Act.

- Section 1 of the WNR proposal contains a statement which says that WNR 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, WNR will need to ensure that its allocation of train paths are undertaken in a manner that does not unfairly discriminate between operators.
- Section 3.2 of the WNR proposal does not provide sufficient detail in how the allocation of train paths is to occur. It encourages the access seeker to review Sections 7, 8 and 9 and Part 3 of the Code for details of various process outcomes and arbitration of disputes. While such reference to the Code can be an appropriate method of indicating the source of a requirement to be addressed, the detail on how WNR will actually address train path allocation and dispute resolution should be clearly described and included in the TPP.
- 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. The Regulator understands that WNR will apply the TPP to all access agreements negotiated outside the Code. Accordingly, a statement to confirm this intent should be included in the TPP.
- 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, WNR 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.

- With regard to the process and conditions to remove train paths for under-utilisation, the revised definitions for types of train paths submitted by WNR (refer to the discussion under "Terms and definitions") will assist in clarifying some of the points raised in submissions received.

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 harvesting season.

The Regulator considers that the individual circumstances for potentially allowing the re-allocation of a train path, caused by a change in contract and freight 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 to move freight for existing customers should be withdrawn by WNR if the above rail operator performing the task loses the contract.

The Regulator disagrees with the view that train paths should not be resumed if other train paths exist. On the other hand, the Regulator agrees that WNR’s entitlement to cancel a train path should only apply 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.

WNR 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.

WNR 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. WNR will need to define “regularly scheduled service” and provide examples of when train paths can be removed. WNR 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, WNR’s maintenance activities or matters contributed to by other operators should not result in the removal of a train path.

- The Regulator believes that access seekers require assurances that WNR will not

give preferential treatment to an associated company 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. In relation to WNR providing preferential treatment to an associated company, the Regulator believes that this issue has been addressed in the Regulator's Determination on the "*Segregation Arrangements to Apply to WestNet Rail*" (6 June 2002).

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 WNR 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.

In the event that WNR is presented with a more favourable opportunity for the same train path that it is negotiating with an access seeker, WNR would not be able to unreasonably delay negotiations as the Code prescribes specific time lines for the various stages of the negotiation of access. It should be pointed out that, at any time, WNR can renegotiate access arrangements, and in particular variations to agreed train paths, with access seekers and operators.

WNR is required to provide indicative guidelines and procedures for assessing and verifying whether an operator's request and requirement to a train path is warranted. Clarification of the process for the allocation of train paths when competition for the same train path exists to cover an open and transparent process should also be added to Section 7 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, WNR should also provide details of the intended dispute resolution process for these disputes in the TPP.

- The Regulator has noted the additional information provided by WNR in its response to the Draft of the Determination on TPP in an attempt to provide clarity

to some of the issues raised by the Regulator. While the additional information provided by WNR is generally consistent with the Regulator's Determination, WNR will need to incorporate these comments into its revised TPP for the Regulator's approval.

3 Temporary and permanent variations

Summary of WNR's Proposal (sections 3.3, 3.4, 3.5)

- WNR states that train paths may be temporarily varied by giving instructions for the purpose of preventing any actual or potential:
 - ◇ breach of the 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.
- 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 WNR 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 WNR nominates;
 - ◇ to cause the service to proceed to a point on the network and stand there until WNR issues a further instruction in relation to the service; or
 - ◇ if the service operates outside of its scheduled 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.
- 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.

- More specifically, WNR states that it may, without 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, WNR 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.

WNR 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. WNR 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.

Comments from the public consultation process

- Instructions may be given which are unnecessary and the policy should ensure that the instructions issued by WNR are appropriate to prevent the occurrence of one or more of the matters specifically referred to in items (i) to (iv) of section 3.4 of the TPP. In addition, Part 3 of the Code should be identified in each relevant place within section 3.4 where there is a right to refer such issues to arbitration.
- The Network Rules themselves should form part of the TPP or TMG. This will assist in clarifying what is meant by “similar safety requirements”. The meaning of “material obligations” under an operator’s access agreement should be defined, as well as the term “reasonable grounds”.
- WNR has too much freedom to vary train paths and the type of instructions which WNR can issue should be tightly defined and the principles outlining when they are to be issued needs to be detailed.
- There should be no minimum time required for notice of a variation request, only a maximum time by which the notified party must respond.
- The proposed approach is consistent with the approach incorporated in the indicative access agreement forming part of the ARTC Access Undertaking.

- Routine maintenance should be provided for in establishing the scheduled train paths. WNR must not be able to affect scheduled train paths for planned routine maintenance (except in an emergency or to ensure safety). Consultation with the operator should occur at a specified time before maintenance, rather than an unspecified “reasonable time”.
- There is only vague protection against excessive possession times or unreasonably short notice. Terms such as “all reasonable steps”; “as soon as reasonably practicable”; and “best endeavours” may have little meaning in practice.
- There needs to be considerably more accountability and transparency in the possession planning process and for it to be integrated into the capacity management processes. In this way, possessions for scheduled maintenance would be transparently provided for in the master control diagram and the daily train plans.
- Notice should be required to be provided in all instances in which repairs, maintenance or upgrading of the network may affect an operator’s train paths and all notice should be provided within a defined time limit.
- There is a need to develop a performance regime with rewards and penalties with regard to possession management. Transparent penalties should apply where disruptions occur for maintenance that is not reasonably necessary in the circumstances as determined by an independent expert appointed by the Regulator. This will drive improvement in infrastructure quality, monitoring and planning.

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.
- The benefits to including the Network Rules as part of the TPP are questionable and would create uncertainty as to which Office has responsibility for approving or amending the TPP – keeping in mind that these rules are approved under the *Rail Safety Act 1998* by the Rail Safety Regulator.

- As the Code clearly defines the circumstance and processes for arbitration, the Regulator does not see a need to include references to Part 3 of the Code in each relevant place where there is a right to refer the issue to arbitration within section 3.4 of the TPP. However, WNR should give examples as to what constitutes “reasonable grounds” when consent to its proposed variation could be withheld.
- A definition for “material obligations” and “instruction” should be included in the definitions section of the TPP for clarification purposes. The instructions that WNR can issue should be clearly defined, with examples, and the principles outlining when they are issued will need to be detailed.
- The Regulator is also of the view that WNR’s approach to track possession and track maintenance does not appear to be unreasonable or inconsistent with other railway owner’s policies, such as the ARTC.
- WNR 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 WNR is unable to meet an identified time commitments, it will need to advise the operators of the revised time profile as soon as possible. The Regulator expects that further detail of track possession and track maintenance practice will be addressed in individual access agreements if required.
- Access seekers have indicated that 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 WNR issues its notice to take possession of the network (except in the case of an emergency or because of force majeure).
- The Regulator has received advice indicating that the Regulator does not have the power to make determinations relating to the compensation of operators for adverse impacts of WNR track possession management. The Regulator would expect that these issues would be addressed in the relevant access agreement. Nevertheless, if it can be proven that WNR has unjustifiably disrupted the train paths of one operator more than another operator, the Regulator may consider whether WNR 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 WNR 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 WNR 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.

4 Approach to be taken in the event of a capacity constraint

Summary of WNR's Proposal (section 5)

- Where a request for a train path(s) or additional train path(s) may preclude other entities from gaining access to that infrastructure, the train path(s) will not be granted without the approval of the Regulator in accordance with section 10 of the Code.

Comments from the public consultation process

- This area within the TPP was unclear. As any allocation of train paths will preclude another operator from using the same train paths, there is a need to provide a clear indication of the process for this aspect.

Regulator's views and comments

- Section 10 of the Code allows 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 relative to this requirement, a public notice seeking opinion is to be made and the 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 WNR and the access seeker.

5 On-selling of train paths

Summary of WNR's Proposal (section 6)

- WNR states that an operator may not sell the rights to use a train path to another operator.
- If an operator no longer requires a train path to operate a service the operator will advise WNR and the train path will be cancelled in accordance with the access agreement.
- An operator may assign the rights to entitlements under an access agreement in accordance with the assignment provisions of the access agreement.

Comments from the public consultation process

- ARTC's indicative access agreement provides for an operator to assign an agreement with ARTC's consent (not to be unreasonably withheld). The operator may also sell or trade rights under an agreement so long as certain conditions are met (including the use of a written "trade agreement" having certain characteristics designed to protect the reasonable interests of ARTC and the parties involved). ARTC sees no reason why WNR could not provide for the selling or trading of a path. Without this, the selling of interstate paths will not be possible if the path exists in WA and generally limits the flexibility of path ownership. Continuity of path is critical to an operator.

Regulator's views and comments

- The Code is silent on the on-selling of train paths.
- The Regulator agrees that the on-selling of train paths by operators will not be permitted since any on-selling would compromise WNR's ability to price

discriminate as permitted under clause 13, Schedule 4 of the Code.

- The one exception is the arrangement between WNR and ARTC as set out under the WNR-ARTC Track Access Agreement to achieve the intent of the 14 November 1997 Inter-Governmental Agreement to improve the interstate rail network.

6 Effectiveness of train paths and TPP

Summary of WNR's Proposal (section 3.7, 9)

- WNR 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 WNR to offer a train path to an operator if:
 - ◇ such train path is unavailable by reason of contractual obligations owed by WNR to any person (including the operator); or
 - ◇ to do so would materially adversely impact on WNR's ability or opportunity to efficiently and safely manage the network.
- Nothing compels the operator to accept the train path offered by WNR if contractual obligations owed by the operator to any person (including WNR) would prevent it from doing so.
- WNR states that it will formally consult with the Regulator at the end of the initial two years of operation of the TPP to determine whether any amendments are required.

Comments from the public consultation process

- The concept of "three-monthly history" is inappropriate and should be removed. The review should be undertaken by comparing the access party's contracted scheduled train paths with its current and expected reasonable business requirements. To the extent that a concept similar to the "three-month history" is retained, the differences between the three-month history and the access party's contracted scheduled train paths that have been caused or contributed to by WNR will not be taken into account in the review. In other words, the review is

only to be undertaken if the operator's performance has caused the differences between the three-month history and the contracted scheduled train paths. Further, the access party should have, at the highest, an obligation to consult with WNR in relation to a review of scheduled train paths rather than an obligation to negotiate in good faith.

- The meaning of "differ in material respects" should be defined so that there is an objective threshold for determining whether the actual departure or arrival times for a train using a scheduled train path differs sufficiently from those set out in the scheduled train path.
- There should be a limit on the number of reviews per year. There should be provision for an independent party to conduct the review; and the outcomes of the review should be transparent.
- The provisions of this clause should be tightened so that it cannot be used by WNR to degrade train transit performance because infrastructure condition has been allowed to deteriorate. The emphasis should be on maintaining infrastructure condition so that agreed train transit times can be achieved on a continuing basis.
- WNR's proposed approach to review scheduled train paths is consistent with the approach incorporated in the indicative access agreement forming part of ARTC's access undertaking.
- The policy should be reviewed in one year with all parties present including WNR and the Regulator.

Regulator's views and comments

- The WNR access agreement deals with KPIs and offers a logical tie-in with the train path review process proposed in section 3.7 of WNR'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. WNR 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.
- WNR 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.

- The Regulator notes that WNR's review of an operator's three-month history only applies to scheduled train paths. WNR is required to clarify how it intends to assess the other types of train paths and how it handles seasonal industries.

In addition, for the performance evaluation assessment, WNR will need to state the considerations it will give to factors for which it is responsible for. For example, within that assessment, how will WNR 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 WNR to amend the TPP at the end of the initial two years 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 WNR with the TPP. Annual audit programs will be the key monitoring tool for assessing compliance.
- The annual independent external audit required for WNR's access arrangements will include an assessment of WNR's compliance with the TPP. As mentioned in previous Determinations, WNR 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 WNR's access agreement. WNR 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.

4. Regulator's Required Amendments

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

In subsequent discussions, WNR has agreed to implement a number of the suggested changes detailed below (refer to WNR's submission on the Draft of the Determination). 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 WNR on its TPP as lodged with the Regulator in November 2001.

It is the view of the Regulator that the required amendments below appropriately address and balances the differing needs of WNR, 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.

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p><i>Section 1</i> <i>Introduction</i></p> <p>WestNet Rail Pty Ltd ("WestNet") is the "manager" of the leases of the freight rail infrastructure network in WA. WestNet Rail recognises its obligation to make certain parts of the rail network available for access by third party operators.</p> <p>WestNet Rail has developed a Train Path Policy in accordance with Section 44 (2) (a) and (b) of the Code designed to ensure that the allocation of Train Paths is undertaken in a manner that ensures fairness of treatment between operators, acknowledges existing contractual rights and any new contractual rights created under access agreements entered into under the Code. The Policy will be managed to encourage maximum use of the network.</p>	<p><i>Section 1</i></p> <ul style="list-style-type: none"> ▪ State that the TPP will apply to each allocated train path regardless of whether access applications are made inside or outside the Code. ▪ Acknowledge the right of an access seeker to engage a third party as its agent or contractor to exercise the rights or the performance of any obligations required by the TPP.

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p><i>Section 2</i> <i>Definitions</i></p> <p>WestNet Rail provides definitions for fifteen (15) aspects related to Train Path Policy:</p> <ul style="list-style-type: none"> (i) Access Agreement (ii) Accredited Operator (iii) Government Lease (iv) Code (v) Conditional Train Paths (vi) Leased Railway Infrastructure (vii) Network (viii) Master Control Diagrams (ix) Operator (x) Scheduled Train Paths (xi) Service (xii) Train (xiii) Train Path (xiv) WestNet (xv) Unscheduled Train Paths 	<p><i>Section 2</i></p> <ul style="list-style-type: none"> ▪ Revise the definitions to reflect those submitted by WNR to the Regulator in their letter of 18 April 2002. ▪ Redefine the term "Conditional Paths" without using the word "reserved". ▪ Ensure all terms and definitions are consistent with other documents under the Code, in particular the TMG and Access Agreement.
<p><i>Section 3</i> <i>Management of Train Paths</i></p> <p>3.1 Master Train Plan WestNet Rail will maintain a Master Control Diagram for all routes subject to the Code.</p> <p>3.2 Allocation of Train Paths The Code provides a process for proponents to seek access to the network for conducting train operations. Access seekers are encouraged to review the Code, including sections 7, 8 and 9. It is also possible for proponents to seek a train path by negotiation with WestNet outside the provision of the Code.</p> <p>The Code provides for a process of negotiation and arbitration. Access seekers are encouraged to review part 3 of the Code in this regard.</p> <p>At the commencement of an access agreement the initial scheduled train paths will have been negotiated. These will be recorded in a schedule to the access agreement and be amended from time to time in accordance with this policy and the access agreement.</p> <p>If the nature of the business for the train path is seasonal or if the locations to and from which the services may operate are also variable on a daily or less frequent basis, the access agreement may specify an entitlement to unscheduled train paths. Such entitlement shall describe those parts of the network over which the unscheduled train paths will apply and any conditions that will apply to those entitlements. The application of an unscheduled train path entitlement cannot be used to alter or override a scheduled train path.</p> <p>WestNet may create conditional train paths at the request of an operator for two (2) purposes:</p>	<p><i>Section 3</i></p> <ul style="list-style-type: none"> ▪ Consider a clearer statement in section 3.2, 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. ▪ Provide indicative guidelines and procedures for assessing and verifying whether an operator's request and requirement to a train path is warranted. ▪ State that WNR 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.

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p>(i) if an operator requests a train path and can demonstrate a contractual arrangement which would require the operator to run services within 6 months the train path will be added to the Master Control Diagram up to 6 months before the service is scheduled to operate as a conditional train path;</p> <p>(ii) if an operator requests a train path which is seasonal in nature the train path may also be added to the Master Control Diagram as a conditional train path. In this case, the access agreement must specify the conditions required in terms of use and it will only remain as a conditional train path if the conditions of the access agreement are met.</p> <p>3.3 Temporary Variations</p> <p>Operator's train paths may be temporarily varied by the giving of instructions for the purpose of preventing any actual or potential:</p> <p>(i) breach of the WestNet's Network Rules by the operator or of similar safety requirements by other operators on the network; or</p> <p>(ii) material damage to the network or any property; or</p> <p>(iii) injury to any person or damage to any property; or</p> <p>(iv) 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 Train Management Guidelines); or</p> <p>(v) for the purpose of preventing, or in response to, any actual or threatened breach of the operator of any of its material obligations under the access agreement.</p> <p>The instructions may comprise, but need not be confined to, instructions in one or more of the following terms:</p> <p>(i) to cease use of a train path by the service and for the service to proceed over such path on the network as WestNet nominates;</p> <p>(ii) 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 WestNet nominates;</p> <p>to cause the service to proceed to a point on the network and stand there until WestNet issues a further instruction in relation to the service; or</p> <p>if the service operates outside of its scheduled 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.</p> <p>3.4 Permanent Variations</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 one party to the agreement sends a notice to the other party stating:</p>	<ul style="list-style-type: none"> Define the term "material obligations" and "instructions". WNR's instructions should be clearly defined, with examples, and the principles outlining when they are issued will need to be detailed. Give examples as to what constitutes "reasonable grounds" when consent to its proposed variation could be withheld.

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p>(i) that the requesting party wishes to vary the use by the operator of a scheduled train path;</p> <p>(ii) the length of time such variation will be in force; and</p> <p>(iii) the reason or reasons for the proposal by the requesting party; and</p> <p>(iv) 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 WestNet's obligations relating to safety of the network).</p> <p>The requesting party must give not less than 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 given must be given to the requesting party within 28 days of such notice being received or within such shorter time if reasonably practicable. If the response is to refuse consent, the notified party must within such time also provide full reasons in writing to the requesting party.</p> <p>3.5 Repairs, Maintenance and Upgrading</p> <p>WestNet may, without notice to the operator, perform repairs, maintenance or upgrading of the network or take possession of any part of the network, at any time.</p> <p>If repairs, maintenance, upgrading or taking possession are reasonably likely to materially affect the scheduled train paths, WestNet must, prior to the commencement of the works:</p> <p>(i) take all reasonable steps to minimize any disruption to the scheduled train paths;</p> <p>(ii) notify the operator of the works as soon as reasonably practicable; and</p> <p>(iii) use its best endeavours to provide an alternative train path, but need not obtain the operator's consent to such repairs, maintenance or upgrading, or possession of the network.</p> <p>WestNet 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 minimizing disruption to services.</p> <p>3.6 Removal of Train Path</p> <p>WestNet has the right to delete any scheduled train path from the schedule if the service is not operated for more than 3 consecutive weeks at any time after giving notice fails to operate for more than 6 weeks in aggregate in the period 6 months from the date of WestNet's notice.</p> <p>A service has not been operated if the operator has failed:</p> <p>(i) to present a train at the scheduled entry point onto the network; or</p>	<ul style="list-style-type: none"> ▪ 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 WNR 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. ▪ Recognise the Regulator's power in the TPP that if it can be proven that WNR has unjustifiably disrupted the train paths of one operator more than another operator, the Regulator may consider whether WNR has breached the provisions of Section 34A of the Act which deals with conduct aimed at hindering or preventing access. ▪ State that consultation would occur before WNR issues its notice to take possession of the network (except in the case of an emergency or because of force majeure). <ul style="list-style-type: none"> ▪ State that the paths that are required to move freight for existing customers should be withdrawn if the above rail operator performing the task loses the contract. ▪ Under-utilisation that can be attributed to force majeure, WNR's maintenance activities or matters contributed to by other operators will not result in the removal of a train path.

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p>(ii) to operate the relevant train so that it completes its full journey,</p> <p>in accordance with the locations, days and times set out in the scheduled train paths applicable to the service, in any circumstances other than because of force majeure.</p> <p>3.7 Review of Scheduled Train Paths Westnet 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 3 month period of the actual trains using or purporting to use that reviewable entitlement ("3 month history").</p> <p>If on such a comparison the results differ 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 reasonably practicable, the 3 month history.</p> <p>Nothing compels WestNet to offer a train path to an operator if:</p> <p>(i) such train path is unavailable by reason of contractual obligations owed by WestNet to any person (including the operator); or</p> <p>(ii) to do so would materially adversely impact on WestNet's ability or opportunity to efficiently and safely manage the network.</p> <p>Nothing compels the operator to accept a train path offered by WestNet if contractual obligations owed by the operator to any person (including WestNet) would prevent it from doing so.</p> <p>3.8 Cancellation of Services using Scheduled Train Paths 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>(i) there are mechanical difficulties with the locomotives used or operated by the operator;</p> <p>(ii) there is a failure of any part of the operator's equipment used or to be used in connection with a service;</p> <p>(iii) 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 Western Australia. And</p> <p>The operator must give WestNet as much notice of cancellation as is possible in the relevant circumstances.</p>	<ul style="list-style-type: none"> ▪ Define and provide examples as to what constitutes "force majeure". ▪ Broaden the scope of the review process to take into consideration the elements described in the access agreement dealing with KPIs. ▪ Clarify the meaning of "differ in material respects". ▪ For the performance evaluation assessment ("three-month history"), state the considerations WNR will give to factors for which it is responsible. For example, within that assessment how will WNR treat conditions of track and disruptions caused by its own maintenance, repair and upgrading activities. ▪ Clarify "regularly scheduled services" and if each service is on the basis that a different train service runs each day of the week. ▪ Give consideration to the following regarding cancellation of services using scheduled train paths: <ul style="list-style-type: none"> ◊ 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. ▪ 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.

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p>WestNet and the operator may agree that there will be an alternative method of cancellation such as conditional pathway for seasonal traffic.</p> <p>The operator may cancel services in accordance with the relevant access agreement to take account of:</p> <ul style="list-style-type: none"> (i) public holidays which may impact on the ability to provide or operate the service; or (ii) up to 5 times per year for regularly scheduled services; or the inability for the customer to provide product for transport from a mine, refinery or other similar facility; or (iv) the inability to unload the product at discharge points or ports not caused by the operator; or (v) because of the seasonal nature of the services. 	<ul style="list-style-type: none"> ▪ State that WNR's entitlement to cancel a train path will only apply if there is a reasonable indication that the train path is sought by and will be allocated to another operator. ▪ Provide examples of when train paths can be removed.
<p><i>Section 4</i> <i>Information required for allocation of train paths</i></p> <p>4.1 Compliance The operator may cancel any services for Scheduled Train Paths if any of the following occur beyond the reasonable control of the operator:</p> <ul style="list-style-type: none"> (i) There are mechanical difficulties with the locomotives used or operated by the operator; (ii) There is a failure of any part of the operator's equipment used or to be used in connection with the service; (iii) 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 which occurs in Western Australia. <p>The operator must give WestNet as much notice of cancellation as possible.</p> <p>WestNet and the operator may agree on alternative methods of cancellation such as a conditional pathway for seasonal traffic.</p> <p>The operator may cancel services in accordance with the relevant access agreement to take account of:</p> <ul style="list-style-type: none"> (i) public holidays which may impact on the ability to provide or operate the service; or (ii) up to 5 times per year for regularly scheduled services; or (iii) the inability for the customer to provide product for transport from a mine, refinery or other similar facility; or (iv) the inability to upload the product at discharge points or ports not caused by the operator; or (v) because of the seasonal nature of the services. <p>4.2 Variation An operator seeking a variation to an existing train path must do so in accordance with the provisions of the access agreement and the information</p>	<p><i>Section 4</i></p>

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p>supplied by the operator should:</p> <ul style="list-style-type: none"> (i) specify the route for which the train path is requested; (ii) the times when the train path is required; (iii) the nature of the service which will use the train path. <p>If WestNet is unable to comply with a request for variation, it will provide written reasons why if requested by the operator.</p> <p>In seeking to accommodate a request for varied or additional train paths from an operator, WestNet will negotiate with other operators seeking their agreement to amend their scheduled train paths which will allow accommodation of the request.</p>	
<p><i>Section 5</i> <i>Regulator's approval required</i></p> <p>Where a request for a train path(s) or additional train path(s) may preclude other entities from gaining access to that infrastructure, the train path(s) will not be granted without the approval of the Regulator in accordance with section 10 of the Code.</p>	<p><i>Section 5</i></p> <ul style="list-style-type: none"> ▪ State that negotiation could take place in accordance with the Code if approved by the Regulator.
<p><i>Section 6</i> <i>Rights of an operator to sell a train path</i></p> <p>An operator may not sell the rights of a train path to another operator.</p> <p>If an operator no longer requires a train path to operate a service the operator will advise WestNet and the train path will be cancelled in accordance with the access agreement.</p> <p>An operator may assign the rights to entitlements under an access agreement in accordance with the assignment provisions of the access agreement.</p>	<p><i>Section 6</i></p> <ul style="list-style-type: none"> ▪ Identify ARTC to be the exception and provide a brief description of the arrangement.
<p><i>Section 7</i> <i>Competition for the same train path</i></p> <p>If two operators request the same available train path and it is not possible to satisfy both requests by using alternative but similar train paths, the available train path will be provided to the operator who first requested the train path.</p>	<p><i>Section 7</i></p> <ul style="list-style-type: none"> ▪ Add "and can establish that it has the requirement to use the path" to the end of the paragraph. ▪ Add a statement covering non-discrimination in terms of WNR's application of train path allocation, pricing principles and considerations, the determination of other contractual terms, and the application of the Network Rules.
<p><i>Section 8</i> <i>Dispute resolution</i></p> <p>As noted in Section 3.2, Part 3 of the Code provides for arbitration of access disputes in</p>	<p><i>Section 8</i></p> <ul style="list-style-type: none"> ▪ Within the TPP, detail how WNR will address train path allocation and dispute resolution.

WNR's proposed Train Path Policy	Changes required to WNR's Train Path Policy
<p>certain circumstances in relation to the provisions to be contained in a proposed access agreement.</p> <p>Any dispute arising between WestNet and an operator after the signing of an access agreement shall be resolved in accordance with the dispute management provisions of that agreement.</p>	<p>The appropriate sections of the Code should be referenced and, alongside each section, WNR must clearly state the circumstances for which the dispute resolution process applies.</p> <ul style="list-style-type: none"> ▪ Provide details of the intended dispute resolution process for disputes arising after an access agreement is in place.
<p><i>Section 9</i> <i>Consultation and review</i></p> <p>WestNet will formally consult with the Regulator at the end of the initial two years of operation of this policy to determine whether any amendments are required.</p>	<p><i>Section 9</i></p> <ul style="list-style-type: none"> ▪ Add "Stakeholders have the ability to express any concern to the Regulator which may arise at anytime and the Regulator will investigate such claims. ▪ 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.
<p><i>Other</i> <i>Changes or additions required which do not relate to one specific section of the TPP</i></p>	<p><i>Other</i></p> <ul style="list-style-type: none"> ▪ Clarify how WNR intends to assess the performance of other types of train paths and how it handles seasonal industries, as well as what considerations are given to factors which WNR is responsible for, eg. conditions of track and disruptions caused by its own maintenance, repair and upgrading activities. ▪ 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. ▪ Include a statement to confirm the intended inclusion of KPIs within individual access agreements. ▪ Explain that WNR'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 WNR. 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. ▪ The Regulator can also commission special audits on any TPP issue or area where additional assurance is sought.

5. Determination

The proposed Train Path Policy submitted by WNR dated November 2001 is not approved. WNR will be required to make the amendments as tabled in section 4 of this Determination and resubmit them for the Regulator's consideration within 30 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.

Ken Michael

ACTING RAIL ACCESS REGULATOR

31 October 2002

Appendix 1 – Submissions Received From The Public Consultation Process

1. Alcoa World Alumina Australia
2. Australian Rail Track Corporation
3. AWB Ltd. - The Grain Pool of Western Australia
4. Freight Corp
5. National Rail
6. Portman Iron Ore Ltd
7. Worsley Alumina

Appendix 2 – Submissions Received On The Draft Of The Determination

1. Alcoa World Alumina Australia
2. Australian Rail Track Corporation
3. Pacific National
4. Portman Iron Ore Ltd
5. WestNet Rail
6. Worsley Alumina