

Train Path Policy



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1. INTRODUCTION

1.1 Background

WestNet Rail Pty Limited (“WestNet”), a wholly owned subsidiary of the Australian Railroad Group Pty Limited (“ARG”), is the manager of the leases of the freight rail infrastructure network in Western Australia, previously operated by the State Government owned Westrail.

The Railways (Access) Code 2000 (“the Code”) requires certain parts of the rail network managed by WestNet to be made available for access by third party rail Operators. Schedule 1 of the Code lists the sections of the WestNet rail network covered by the Code.

With the appointment of an Acting Rail Access Regulator with effect from 1 September 2001 and the proclamation of the Code, the Code is now effective in all respects.

1.2 Relevance of Train Path Policy (T.P.P.)

The T.P.P. is a statement of Policy in accordance with Section 44 (2) (a) and (b) of the Code relating to the allocation of Train Paths and the provision of access to Train Paths that have ceased to be used. The Regulator must approve or determine the Policy after a period of public consultation.

The T.P.P. is 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 T.P.P. will apply to each allocated Train Path regardless of whether access applications are made inside or outside of the Code.

Access Agreements are entered into with the Operator but the Access Agreements explicitly provide that an Operator may engage a third party as its agent or contractor to perform the obligations of the Operator under the Access Agreement. This includes acting as an agent or contractor for the purpose of the T.P.P.

The Policy will be managed in such a way as to encourage maximum use of the Network.

2. MANAGEMENT OF TRAIN PATHS

2.1 Master Train Plan

WestNet will maintain a Master Control Diagram for those routes under its control that are subject to the Code. Initially these Master Control Diagrams will be those in existence at 1 September 2001 which recognize existing contractual arrangements for Access in place at that time.

2.2 Allocation of Train Paths

The Code provides a process for proponents to seek access to the Network for conducting train operations. There are various outcomes in relation to this process, one of which is that successful access seekers will obtain an entitlement to a Train Path. 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 provisions of the Code.

In negotiation of an Access Agreement the issue of allocation of Train Paths will be dealt with in accordance with the T.P.P. and the requirements of the Code and specifically Section 16 (2) of the Code.

In the event that WestNet has not provided the Operators with suitable Train Paths and the Operator believes that WestNet has not complied with the T.P.P. or provisions of the Code related to negotiation of Access Agreements they may seek to have the matter arbitrated as a dispute in accordance with Section 25 of the Code.

At the commencement of an Access Agreement the initial Train Paths will have been negotiated between the parties in accordance with the T.P.P.. These will be recorded in a schedule to the Access Agreement and be amended from time to time in accordance with the T.P.P. and the Access Agreement.

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

WestNet will apply the following guidelines for requests for new or amended Train Paths either prior to or after commencement of an Access Agreement.

Otherwise (and subject to Section 10 of the Code) Train Paths will be allocated on a first come first served basis.

WestNet will negotiate to provide Train Paths or additional trains where the Operator meets the following criteria:

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

- (i) the Operator can demonstrate a contractual commitment to operate trains or deliver passengers or freight;
- (ii) the Operator provides details of anticipated increased demand because of

- (a) an upgrade or expansion of production capacity with confirmation that it will progress (eg. Funding approved, public announcements etc), or
- (b) market growth based on trend data; or
- (iii) the Operator can demonstrate a committed new project with agreed funding.

Conditional Paths

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

In applying these criteria the following process will apply:

- (i) WestNet will seek sufficient documentation from the Operator to assess the request;
- (ii) if WestNet does not believe the information supports the request it will seek further information; and
- (iii) if WestNet 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.

2.2.2 *Process for negotiating new Train Paths prior to an access agreement*

The process for allocation of Train Paths as part of the negotiation process for access will be:

- (i) the Operator will request the Train Path(s);
- (ii) WestNet will refer to the Master Train Control Diagram to
 - determine if the path(s) are available, or
 - if possible, seek changes to or the deletion of Train Paths allocated to other Operators to create the requested Train Paths, or
 - advise the Operator the Train Paths as requested are not available and suggest alternatives that may be available;

- (iii) at all times maintain dialogue with the Operator to ensure all alternatives are explored; and
- (iv) if the Operator is seeking Train Paths currently used for the same purpose under another agreement and the new agreement is likely to supersede the existing one then WestNet will commit to transfer the existing Train Paths.

2.3 Instructions that may be issued for Temporary Variations of Train Paths

The Operator's Train Paths may be temporarily varied by the giving of Instructions for the purpose of preventing any actual or potential:

- (i) breach of the WestNet's Network Rules by the Operator or of similar safety requirements by other Operators on the Network; or
- (ii) material damage to the Network or any associated facility; or
- (iii) injury to any person or damage to any property; or
- (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
- (v) 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.

Examples of Instructions for these purposes include, but are not limited to, the following:

- (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;
- (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;
- (iii) 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;
- (iv) 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;
- (v) to change the entry and exit time of a Train Path;
- (vi) to issue notification of a temporary speed restriction on a section of track;
- (vii) to cancel a Train Path;
- (viii) to upgrade a Conditional Train Path to a Scheduled Train Path; and
- (ix) to amend or clarify application of the WestNet's Network Rules.

Material obligations in this context means any requirement under the Access Agreement related to the Operators obligations to comply with safety or operational standards or the Operators ability to operate the service.

2.4 Permanent Variations to Scheduled Train Paths by Agreement

The procedure to be followed by the parties if it is intended that a Train Path is to be permanently varied is set out below.

A Train Path may be varied for the remaining term of an Access Agreement (or for such other duration as may be agreed) if:

- (a) one party to the Agreement (“Requesting Party”) sends a notice to the other party (“Notified Party”) stating
 - (i) that the Requesting Party wishes to vary the use by the Operator of a Scheduled Train Path,
 - (ii) the length of time such variation will be in force, and
 - (iii) the reason or reasons for the proposal by the Requesting party; and
- (b) the Notified Party consents to the Requesting Party’s proposed variation, such consent to be withheld only upon reasonable grounds (save that the Operator cannot withhold consent in the case of variations required by reason of WestNet’s obligations relating to safety of the Network).

Reasonable grounds in this context includes:

- (i) the Train Path proposed not being available because it is already allocated to another Operator in accordance with the T.P.P.; or
- (ii) because it cannot be operated safely or effectively.

The Requesting Party must give not less than 30 days notice of a variation request.

The Notified Party’s response as to whether it consents or not to the Requesting Party’s notice must be given to the Requesting Party within 28 days of such notice being received by the Notified Party or within such shorter time if reasonably practicable. If the Notified Party’s response is to refuse consent, the Notified Party must within such time also provide full reasons in writing to the Requesting Party.

2.5 Repairs, Maintenance and Upgrading of the Network

WestNet may perform repairs, maintenance or upgrading of the Network, or take possession of any part of the Network, at any time. If repairs, maintenance or upgrading of the Network, or taking possession of the Network, are reasonably likely to materially affect the Train Paths, WestNet must, prior to commencement of the works:

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

WestNet will at all times, except in the case of an emergency or Force Majeure, consult with Operators whose Train Paths may be effected by a possession of the Network for repairs or maintenance.

WestNet recognises its responsibilities to treat all Operators fairly in the application of its possession management and recognises the Regulator's powers under Section 34A of the Act if the Regulator believes WestNet's conduct would be construed as hindering or preventing access.

The policy WestNet will apply to possession management is as follows:

- (i) where the maintenance can be carried out without affecting use of Train Paths no notice is required;
- (ii) where WestNet has to take possession because of emergencies related to safety or natural events such as fire or flood WestNet will advise affected Operators as soon as practicable of
 - the circumstances,
 - the likely impact on Train Paths, and
 - the likely duration of the possession;
- (iii) where WestNet requires possession for maintenance activities for periods less than six hours it will give 2 days notice;
- (iv) where WestNet requires possession for maintenance activities which will effect Train Paths for periods greater than six hours but less than 48 hours, it will provide a minimum of 2 weeks notice and will negotiate with the Operator(s) for temporary adjustments or changes to Train Paths to facilitate the possession;
- (v) where WestNet requires possession for either major maintenance activities extending beyond 48 hours or where an upgrading will require changes over a long period of time WestNet will give at least six months notice of the works. WestNet will also commence negotiations with affected Operators from the date of the notice to ensure alternative arrangements are made;

- (vi) any notice given under this policy will describe
 - (a) the extent and nature of the works,
 - (b) the potential effect on Train Paths, and
 - (c) what alternative arrangements are proposed; and
- (vii) in the event that the time frames for the maintenance activity notified by WestNet are not achievable WestNet will
 - (a) as soon as practical notify effected Operators, and
 - (b) provide a revised and continuing estimate of the anticipated completion time of the works.

2.6 Removal of a Train Path

If an Operator has failed to use a Train Path (other than when cancelled in accordance with the processes of the specific access agreement) WestNet may withdraw the rights to the Train Path.

If WestNet proposes to withdraw a Train Path because of lack of use it will only do so when:

- (a) there has been a request for use of the path from another Operator; or
- (b) it would allow better management of other Train Paths and encourages efficient use of the network; or
- (c) the Operator agrees to its withdrawal.

WestNet will give written notice if it intends to withdraw a Train Path if the Service using that Train Path is not operated for more than 3 consecutive weeks at any time and, after WestNet 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 WestNet's notice providing that the failure to operate the service is not as a consequence of a Force Majeure event or WestNet not making the network available.

Other than if the parties agree to substitute an alternative Train Path, a Service has not been operated if the Operator has failed:

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

in conformance with the locations, days and times set out in the Train Paths applicable to such Service, in any circumstances other than because of Force Majeure.

If certain Train Paths are currently allocated under an Access Agreement to an Operator and that Operator loses the contract to undertake the passenger or freight task for which the Train Paths are allocated, WestNet will withdraw these Train Paths and allocate them to the substitute Operator who can demonstrate the contractual right to operate the services.

2.7 Review of Train Paths

WestNet may at its discretion by written notice given to the Operator cause a Train Path to be reviewed in a bona fide manner by the parties by comparing the stated departure and arrival times for the 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”).

If on such comparison of the Train Path with the 3 month history the departure or arrival times for a Train using or purporting to use the Train Path differ in material respects, the parties will negotiate in good faith to amend the Train Path so that the Train Path reflects, as closely as is reasonably practicable, the 3 month history.

Nothing compels WestNet to offer a Train Path to an Operator if:

- (i) such Train Path is unavailable by reason of contractual obligations owed by WestNet to any person (including the Operator); or
- (ii) to do so would materially adversely impact on WestNet’s ability or opportunity to efficiently and safely manage the Network.

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.

In this context “differs in material respects” means for Scheduled Train Paths the service fails regularly to:

- (a) be ready for entry to the network at the agreed departure time; or
- (b) when entering the network on time fails to exit on time and the Scheduled Train Path was available.

The effect of any Force Majeure event, failure by WestNet to make the network available, or mechanical failure of the Operator’s equipment will not be included in any test of performance.

In the case of Flexible Scheduled Train Paths or Conditional Paths, WestNet and the Operator will agree the basis on which performance will be agreed.

Where WestNet and the Operator have agreed to KPI’s in the Access Agreement these will be taken in to account in any review.

2.8 Cancellation of Services using Train Paths

WestNet will adopt the following policy in granting an Operator the right to cancel Train Paths without penalty and the specific provisions of the policy agreed between WestNet and the Operator will be contained in the relevant 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):

- (i) where public holidays effect the operation of the Train Path;
- (ii) for each Fixed Scheduled Train Path (Passenger or Freight) 5 times per year commencing from the date the path was first approved;
- (iii) there are mechanical difficulties with the rolling stock used or operated by the Operator;
- (iv) there is a failure of any part of the Operator's equipment used or to be used in connection with a service;
- (v) 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;
- (vi) 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; and
- (vii) because of the seasonal nature of the services.

The Operator must give WestNet as much notice of cancellation as is possible in the relevant circumstances.

2.9 Variation to Existing Train Paths or Additional Paths

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 supplied by the Operator should specify:

- (a) the route for which the Train Path is requested;
- (b) the times when the Train Path is required; and
- (c) the nature of the Service which will use the Train Path.

If WestNet is unable to comply with a request from an Operator to vary a Train Path WestNet will, at the request of the Operator, provide written reasons as to why it is not available.

WestNet will, in seeking to accommodate a request for a varied or additional Train Path from an Operator, undertake to negotiate with other Operators seeking their agreement to amend their Train Paths which will allow WestNet to accommodate the request for a varied or additional Train Path.

However, as a general principle, once an Operator is given a train path and the Operator is subsequently meeting its obligations and requirements under the Code and Access Agreement, that train path would not be permanently varied without the consent of both parties.

3. REGULATOR'S APPROVAL REQUIRED

Where a request for a Train Path or Train Paths or a request for an additional Train Path 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. If the Regulator grants approval then WestNet will commence negotiations.

4. RIGHTS OF AN OPERATOR TO SELL A TRAIN PATH

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 WestNet and the Train Path will be cancelled in accordance with the T.P.P. and Access Agreement.

An Operator may assign the rights to entitlements under an Access Agreement in accordance with the assignment provisions of the T.P.P. and Access Agreement.

The only exception is for Train Paths which are granted to the Australian Rail Track Corporation (ARTC) under the Wholesale Access Agreement entered into between WestNet and the ARTC.

Under this arrangement the ARTC are able to grant contiguous Train Paths to Operators seeking to operate interstate services requiring the joint use of the WestNet and ARTC's networks.

For the purpose of the T.P.P. when Train Paths are allocated to the ARTC and they subsequently sell the Train Path to an Operator it is not considered to be selling Train Path rights to another Operator.

5. COMPETITION FOR THE SAME TRAIN PATH

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 and can establish that it has a requirement for the Train Path.

Whether a requirement exists will be determined on the basis of the criteria set out in 2.2.1 of the T.P.P..

6. NON DISCRIMINATION

WestNet will not discriminate between Operators in the application of the T.P.P. and the application of the WestNet's Network Rules.

7. PRIORITY OF DOCUMENTS

Because the T.P.P. relates closely to the Train Management Guidelines (T.M.G.) and provisions of the Access Agreement, WestNet will use the following order of precedence of the documents:

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

8. DISPUTE RESOLUTION

Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.

Once an Access Agreement has been entered into disputes will be resolved by a three-stage process as follows:

- (a) firstly, negotiation of the dispute between the parties with a 7 day time limit and using reasonable endeavours;
- (b) secondly, by mediation between the equivalent Chief Executive Officers and after 14 days if no agreement is reached by expert mediation; and
- (c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.

9. CONSULTATION AND REVIEW

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.

Stakeholders have the ability to express any concern to the Regulator which may arise at any time and the Regulator will investigate such claims.

The Regulator has the power under the Code to amend the T.P.P. at any time and Access Seekers and Operators can at any time request the Regulator to consider amendments.

WestNet acknowledges the Regulator will develop a regime of KPI's, in consultation with stakeholders, to assess the effectiveness of the T.P.P.. This is in addition to KPI's that will be developed in individual access agreements.

WestNet's compliance will be subject to an annual independent external audit. The Regulator may select and manage the Auditor with costs paid by WestNet. At a minimum the Regulator's approval 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 T.P.P. issue or area where additional assurance is sought.

10. DEFINITIONS

Access Agreement	means an agreement entered into by an Operator and WestNet governing access for the Operator to run Services on the Network
Accredited Operator	means an Operator who is Accredited or taken to be Accredited under the Rail Safety Act 1998.
Act	means the Railways (Access) Act 1998.
Code	means the Railways (Access) Code 2000 established under the Act.
Conditional Train Path	means the entitlement of the Operator to use a Train Path on the Network which is included on the Master Control Diagram and will be available to the Operator to whom it is allocated but otherwise can be re-allocated on a temporary basis. They can be allocated because of the requirements for; <ul style="list-style-type: none">(i) optional destinations;(ii) to provide reserve or surge capacity;(iii) because of known seasonal or intermittent requirements.
Flexible Scheduled Train Path (Freight)	means the entitlement of the Operator to use a Train Path which has a fixed entry and exit time but which can be changed at short notice providing it does not impinge on a Scheduled Train Path (Freight or Passenger)
Force Majeure	means any circumstances beyond the reasonable control of a party which occur without the negligence of that party and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any Trains or Rolling Stock operated by the Operator.
Network	means the track and infrastructure controlled by WestNet to which Access has or can be granted to an Operator to operate Services under an Access Agreement.

Instructions

means all instructions and directions, issued by WestNet from time to time which:

- (a) ensure, facilitate or encourage the proper, efficient, safe and lawful
 - (i) use of and access to the Network by all Network users, and
 - (ii) management of the Network by WestNet;
- (b) are consistent with the Train Management Guidelines; and
- (c) are given with a view to minimising the disruption to the Operator in a manner which is reasonable in the circumstances and taking into account the valid objectives of WestNet (as set out in paragraphs (a) and (b) of this definition of “Instructions”) in issuing the instruction or direction;

but does not include instructions and directions which:

- (d) derogate from the Train Paths;
- (e) prevent the Operator from running a Service of the nature of the Services contemplated at the Commencement Date or as agreed between the parties from time to time; or
- (f) are given for the purpose only of achieving WestNet internal commercial objectives unrelated to the valid objectives of WestNet as set out in paragraphs (a) and (b) of this definition of “Instructions”;

unless the instructions or directions:

- (g) are Train Control Directions properly given;
- (h) relate to safety;
- (i) are given to implement or support the Train Management Guidelines;
- (j) are necessary to prevent or to minimise the effect of a material breach of an Access Agreement; or
- (k) are otherwise authorised by an Access Agreement.

Master Control Diagram

means a diagrammatic or electronic record covering specific parts of the Network which shows;:

- (iv) all Scheduled Train Paths (Freight or Passenger);
- (v) all Flexible Scheduled Train Paths (Freight);
- (vi) all Conditional Train Paths; and

	(vii) all Reserved Train Paths.
Operator	means the Operator or Operator's which have access to the WestNet Network under an Access Agreement or have made an application for Access under Section 8 of the Code.
Regulator	means the person appointed as the Western Australian Independent Rail Access Regulator under Section 13 of the Act.
Reserved Train Path	means the future entitlement of the Operator to use a Train Path on the Network and is only received where there are reasonable contractual commitments for its future use.
Scheduled Train Path (Freight)	means the entitlement of the Operator to use a Train Path for freight services which has a fixed entry and exit time.
Scheduled Train Path (Passenger)	means the entitlement of the Operator to use a Train Path on the Network for Passenger Services which has a fixed entry and exit time and fixed intervals for passenger stops in between.
Service	means a train run by the Operator using the Network by which the Operator provides railway freight or passenger service.
Train	means a locomotive and with or without wagons used to operate Services.
Train Path	is an entitlement to operate a Service on the Network and has departure, transit and arrival times between the entry and exit points on the Network and includes the following types of Train Path – Conditional Train Path, Scheduled Train Path (Passenger), Scheduled Train Path (Freight) and Reserved Train Path.
Train Management Guidelines (T.M.G.)	means the current Train Management Guidelines approved in accordance with Section 43(4) of the Code.
Train Path Policy (T.P.P.)	means the current statement of policy approved in accordance with Section 44(3) of the Code.
WestNet	means WestNet Rail Pty Limited.
WestNet's Network Rules	means WestNet's rules (including the Appendix to the Rules and Working Timetables) issued in accordance with WestNet's Safety Management Plan approved under Section 10 of the Rail Safety Act 1998 together with any amendments, deletions or additions made in accordance with the Safety Management Plan and all policies and notices issued by WestNet for the purpose of ensuring the safe use of the Network.

Working Timetables

means the train timetables and operating data for all or part of the network issued as part of the WestNet's Network Rules and as amended from time to time.