



# **TRAIN PATH POLICY**

**Approved: February 2013**

<b>1</b>	<b>INTRODUCTION .....</b>	<b>3</b>
	1.1 <i>Background .....</i>	3
	1.2 <i>Goals of Train Path Policy.....</i>	3
<b>2</b>	<b>ALLOCATION OF TRAIN PATHS .....</b>	<b>4</b>
	2.1 <i>Purpose of Guidelines for Allocation of Train Paths.....</i>	4
	2.2 <i>Guidelines for Allocating Train Paths in Access Agreements .....</i>	4
<b>3</b>	<b>VARIATION, REVIEW AND CANCELLATION OF TRAIN PATHS .....</b>	<b>6</b>
	3.1 <i>Permanent Variations to Train Paths .....</i>	6
	3.2 <i>Review of Train Paths .....</i>	7
	3.3 <i>Cancellation of Train Paths .....</i>	8
<b>4</b>	<b>PROVISION OF ACCESS TO UNDERUTILISED TRAIN PATHS .....</b>	<b>8</b>
	4.1 <i>Identification of an underutilised Train Path .....</i>	8
	4.2 <i>Consequences of a confirmed underutilised Train Path.....</i>	9
<b>5</b>	<b>RIGHTS OF AN OPERATOR TO TRADE A TRAIN PATH .....</b>	<b>9</b>
<b>6</b>	<b>DISPUTES.....</b>	<b>Error! Bookmark not defined.</b>
<b>7</b>	<b>COMPLIANCE AND REVIEW.....</b>	<b>9</b>
<b>8</b>	<b>DEFINITIONS .....</b>	<b>10</b>

# 1 INTRODUCTION

## 1.1 Background

1.1.1 Section 44(2) of the Code requires each “Railway Owner to prepare and submit to the Regulator a statement of policy (Train Path Policy) that it will apply in:

- a) the allocation of train paths; and
- b) the provision of access to train paths that have ceased to be used”,

in relation to the provision of capacity on the railway Network it manages and controls.

1.1.2 This Train Path Policy (TPP) is the policy which Brookfield Rail will apply, whilst performing its Access Related Functions as a Railway Owner with regard to 1.1.1a) and 1.1.1b) above.

1.1.3 The Network is defined as those Routes listed in Schedule 1 of the Code which Brookfield Rail controls and to which Brookfield Rail has a right to grant Access to Operators.

1.1.4 As stipulated in Section 4A of the Code, the TPP will be employed when Brookfield Rail is negotiating to provide Access, or is providing Access, to an Operator under an Access Agreement.

## 1.2 Goals of Train Path Policy

1.2.1 The TPP is designed to ensure that the allocation of Network capacity (i.e. Train Paths) is undertaken in a manner that encourages and facilitates:

- a) fairness of treatment between Operators, while acknowledging contractual rights and obligations created under Access Agreements;
- b) maximum efficient use of the Network; and
- c) safe Network operations.

1.2.2 The TPP sets out the considerations to be made by Brookfield Rail and the process to be followed by Brookfield Rail and an Operator in the negotiation of an Access Agreement and includes a range of terms and conditions that Brookfield Rail agrees will be incorporated into Access Agreements.

1.2.3 The TPP does not apply to the management of issues or disputes between Brookfield Rail and an Operator after an Access Agreement has been executed. Such issues and disputes should be managed in accordance with the terms of the Access Agreement.

1.2.4 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 TPP.

## **2 ALLOCATION OF TRAIN PATHS**

### **2.1 Purpose of Guidelines for Allocation of Train Paths**

- 2.1.1 In accordance with Section 16(1) of the Code, in negotiation of Access Agreements, the Railway Owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of another proponent.
- 2.1.2 In accordance with Section 16(2) of the Code, in negotiation of Access Agreements, the Railway Owner must not unfairly discriminate between the proposed rail operations of a proponent and the rail operations of the Railway Owner.
- 2.1.3 In accordance with Section 44(1) of the Code, in negotiation and making of an Access Agreement the allocation of Train Paths and the provision of Access to Train Paths that have ceased to be used will be dealt with in accordance with the TPP.
- 2.1.4 In accordance with Section 36(2)(c) of the Code, an Access Agreement must not grant to an entity the exclusive rights to use or occupy any Route.
- 2.1.5 Brookfield Rail recognises that a set of approved guidelines are needed in the event that there are competing interests for use of the same Network capacity.

### **2.2 Guidelines for Allocating Train Paths in Access Agreements**

- 2.2.1 Section 8 of the Code outlines the steps an entity must take when making a proposal for Access to the Network. On receipt of the proposal, Brookfield Rail must act in accordance with Sections 9 and 10 of the Code. Part 3 of the Code details various requirements on both parties during negotiations.
- 2.2.2 Subject to clause 2.2.2, in the event that the proposal and negotiations are conducted, in accordance with the relevant sections of the Code, Brookfield Rail and the entity will detail Train Path allocation in an Access Agreement. Brookfield Rail will, where applicable, consider the following aspects of each proposal/entity:
  - a) arrangements or planned arrangements for the operation of freight or passenger Services;
  - b) details of anticipated increased demand (which justifies the operations detailed in the proposal), including because of:
    - i. an upgrade or expansion of production capacity with confirmation that it will progress (e.g. funding approved, public announcements etc);
    - ii. estimated market growth; or
    - iii. committed new projects with agreed funding;

- c) historical use of the Train Paths;
- d) seasonal, intermittent, irregular or ad hoc demand for a Train Path based on the production or market characteristics of the freight;
- e) need for surge capacity based on demand or other constraints such as shipping;
- f) a requirement for multiple or varying origins or destinations;
- g) other relevant information as it is made available to Brookfield Rail.

2.2.3 If there are competing requests for Access to the Network, then in order to determine which entity receives an entitlement to Train Paths, Brookfield Rail will compare the relative compliance of the entities to the requirements in the Code with regard to the proposal and negotiation process and will determine the allocation of Train Paths to entities in such a way that:

- a) is fair, given the competing demand for limited Network capacity;
- b) maximises the efficient use of the Network;
- c) reflects Brookfield Rail's legitimate business interests and investment in railway infrastructure; and
- d) ensures safe Network operations.

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

2.2.5 Where a request for a Train Path has been made and Brookfield Rail considers that the granting of that request would involve the provision of Access to railway infrastructure to an extent that would preclude other entities from gaining Access to that infrastructure, Brookfield Rail will not commence negotiations in respect of that Train Path without the approval of the Regulator in accordance with Section 10 of the Code.

## **2.3 Disputes Regarding Train Path Allocation**

2.3.1 If a proposal has been made by an entity, and in the event that the entity believes that Brookfield Rail has not sufficiently addressed the above requirements, this may constitute a dispute between the entity and Brookfield Rail under Section 25 of the Code, and that entity may seek to have the matter arbitrated as a dispute in accordance with Section 26(1) of the Code. Section 29(3) of the Code stipulates that the matters to be taken into account by the arbitrator include, among other things, the Code and the Train Path Policy.

### **3 VARIATION, REVIEW AND CANCELLATION OF TRAIN PATHS**

#### **3.1 Permanent Variations to Train Paths**

- 3.1.1 Access Agreements will include provisions for the procedure to be followed by the parties if it is intended that a Train Path is to be permanently varied, as set out in clauses 3.1.2 to 3.1.8 below.
- 3.1.2 A party (Requesting Party) may give a written notice (a Variation Request) to the other party (Notified Party) stating:
- a) that the Requesting Party wishes to vary a Train Path (a Variation);
  - b) the length of time the Variation is proposed to be in force;
  - c) the date the Variation is proposed to commence (Variation Date); and
  - d) the reason or reasons for the proposed Variation.
- 3.1.3 Promptly following receipt by the Notified Party of the Variation Request, the parties, each acting reasonably, will attempt to agree the following:
- a) any changes that must be made to the Train Paths to accommodate the Variation;
  - b) the Variation Date; and
  - c) any other amendments to the Access Agreement required as a consequence of varying the Train Path.
- 3.1.4 Brookfield Rail may withhold its consent to a Variation on Reasonable Grounds.
- 3.1.5 The Operator may not withhold its consent to a Variation where the Variation is required by reason of BR's obligations relating to a material issue affecting the safety of the Network.
- 3.1.6 If the parties are able to agree the matters set out in clause 3.1.3 in relation to a Variation, then:
- a) the Access Agreement will be amended to reflect the agreed matters;
  - b) the amendment to the Access Agreement will become effective on the Variation Date; and
  - c) from the Variation Date the Operator will be entitled to utilise each varied Train Path.
- 3.1.7 If the parties are unable to agree any of the matters set out in clause 3.1.3 in relation to a Variation, the Variation will not occur and the Access Agreement will remain unchanged.

3.1.8 Subject to clause 3.1.55, Brookfield Rail will, in seeking to accommodate a request for a Variation, undertake to negotiate with other Operators seeking their agreement to the amendment of their Train Paths such that Brookfield Rail is able to accommodate the Variation, save that no such amendment will be made without the consent of the other Operators.

## **3.2 Review of Train Paths**

3.2.1 Access Agreements will include provisions for the procedure to be followed by the parties if it is intended that a Train Path is to be reviewed, as set out in clauses 3.2.2 to 3.2.7 below.

3.2.2 Brookfield Rail 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 Train Path entitlement (3 month history).

3.2.3 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.

3.2.4 Brookfield Rail may refuse to offer a Train Path to an Operator on Reasonable Grounds.

3.2.5 Nothing compels the Operator to accept a Train Path offered by Brookfield Rail if contractual obligations owed by the Operator to any person (including Brookfield Rail) would prevent it from doing so.

3.2.6 For the purposes of clause 3.2.33, “differ in material respects” means:

- a) The Service fails to regularly be ready for entry to the Network at the agreed departure time; or
- b) The Service fails to regularly enter and exit the Network on time;

where the Train Path was available.

3.2.7 Train Paths for which the performance has been affected by any of the following will not be included in any test of performance:

- a) any Force Majeure event;
- b) failure by Brookfield Rail to make the Train Path available;
- c) temporary change or variation to the Train Path agreed by Brookfield Rail; or
- d) mechanical failure of the Operator’s equipment.

### 3.3 Cancellation of Train Paths

- 3.3.1 Access Agreements will include provisions detailing the circumstances in which an Operator may cancel a Train Path without penalty and (unless otherwise agreed between the parties) will include, as a minimum, circumstances in which an Operator is unable to use a Train Path due to:
- a) Brookfield Rail undertaking repair, maintenance or upgrading works on the Network;
  - b) a derailment, collision or other emergency event, unless that event is caused by an act or omission of the Operator; or
  - c) late-running trains, unless the late-running is caused by an act or omission of the Operator.

## 4 PROVISION OF ACCESS TO UNDERUTILISED TRAIN PATHS

### 4.1 Identification of an underutilised Train Path

- 4.1.1 Access Agreements will include clauses which provide for the implementation of clauses 4.1.2 to 4.1.3 of the TPP.
- 4.1.2 In general, Access Agreements will entitle Operators to use a Train Path on a regular and recurring basis. If an Operator has failed to utilise such a Train Path as prescribed in an Access Agreement, that Train Path may be classified as underutilised.
- 4.1.3 The process for identifying and confirming whether a Train Path is underutilised is as follows:
- a) Brookfield Rail will monitor the Train Path over a three month period (**Monitoring Period**);
  - b) If the Train Path is not utilised as prescribed in the Access Agreement at any time during the Monitoring Period (provided that the failure to utilise the Train Path is not as a consequence of a Force Majeure event or Brookfield Rail not making the Train Path available), Brookfield Rail may issue the Operator with a written notice that this Train Path has been identified as underutilised;
  - c) If the Operator fails to utilise the Train Path as prescribed in the Access Agreement more than 6 times in aggregate in a six month period from the date of the notice (**Utilisation Period**), Brookfield Rail will issue the Operator with a written notice confirming the Train Path as underutilised at the end of that period, provided that the failure to utilise the Train Path is not as a consequence of a Force Majeure event or Brookfield Rail not making the Train Path available or temporary changes or variations to the Train Paths agreed to by Brookfield Rail;



- d) If the failure by the Operator to utilise a Train Path during the Monitoring Period or the Utilisation Period, as the case may be, is the consequence of a Force Majeure event or of Brookfield Rail not making the Train Path available, or temporary changes or variations to the Train Paths agreed to by Brookfield Rail, then the Monitoring Period or the Utilisation Period, as the case may be, will be extended by such period as is required for Brookfield Rail to make available to the Operator the number of Train Paths that were not utilised for those reasons.

## 4.2 Consequences of a confirmed underutilised Train Path

4.2.1 Once a Train Path has been confirmed as being underutilised and the relevant Operator is notified as such, then Brookfield Rail may withdraw the contractual entitlement of the Operator to utilise the Train Path.

4.2.2 Prior to Brookfield Rail withdrawing the contractual entitlement of the Operator to utilise the Train Path, Brookfield Rail will consult with the Operator and provide the Operator with an opportunity to:

- a) Provide any relevant evidence to Brookfield Rail in relation to the underutilisation; or
- b) Demonstrate to Brookfield Rail's reasonable satisfaction a bona fide future requirement for that Train Path.

## 5 RIGHTS OF AN OPERATOR TO TRADE A TRAIN PATH

5.1.1 An Operator may only license, assign or novate (**Trade**) the right to utilise a Train Path (as granted to it by Brookfield Rail under an Access Agreement) to another Operator (**Third Party Operator**) in accordance with the provisions set out in Appendix A.

## 6 COMPLIANCE AND REVIEW

6.1.1 Stakeholders have the ability to express any concerns in relation to the TPP with the Regulator, and the Regulator may investigate such claims.

6.1.2 Part 5, Section 44(4) of the Code enables Brookfield Rail to amend or replace the TPP at any time, with the approval of the Regulator.

6.1.3 Section 44(5) of the Code enables the Regulator to direct Brookfield Rail to amend or replace the TPP with another TPP determined by the Regulator at any time.

## 7 DEFINITIONS

<b>Access</b>	Has the same meaning assigned to “access” in Section 3 of the Code; “means — <ul style="list-style-type: none"> <li>a) the use of railway infrastructure; and</li> <li>b) where applicable, includes the exercise of other rights of the kind described in section 3A(1) of the Act”.</li> </ul>
<b>Access Agreement</b>	Has the same meaning assigned to “access agreement” in Section 3 of the Code; “means an agreement in writing under the Code between the railway owner and an entity for access by that entity”.
<b>Access Related Function</b>	Has the same meaning assigned to “access-related functions” in Schedule 4, Clause 1 of the Code; “means the functions involved in arranging the provision of access to railway infrastructure under the Code”
<b>Accreditation</b>	Has the meaning assigned to it under the <i>Rail Safety Act 2010</i> (WA).
<b>Act</b>	Has the same meaning assigned to “Act” in Section 3 of the Code; “means the <i>Railways (Access) Act 1998</i> ”.
<b>Brookfield Rail</b>	Means Brookfield Rail Pty Ltd.
<b>Code</b>	Means the “Railways (Access) Code 2000” established under the Act.
<b>Force Majeure</b>	Means any cause, event or circumstance (or combination of causes, events or circumstances) beyond the reasonable control of the party claiming Force Majeure, including the following causes, events and circumstances: <ul style="list-style-type: none"> <li>a) an act of God, lightning, storm, flood, bush fire or fire, earthquake or explosion, cyclone, tidal wave, landslide, heat (including speed restrictions due to the impact of heat or other atmospheric conditions) or adverse weather conditions;</li> <li>b) any regional, statewide or nationwide industrial dispute not caused by or contributed to by the party claiming Force Majeure;</li> <li>c) an act of public enemy, war (declared or undeclared), sabotage, blockade, revolution, riot, insurrection, civil commotion or epidemic;</li> <li>d) the effect of any applicable laws, rules, regulations, orders, judgments, rulings, decisions, decrees or enforcement actions of any court, government, tribunal or other administrative authority which occur after the date of the Agreement and which could not reasonably have been foreseen by the party claiming Force Majeure;</li> <li>e) embargo or power shortage; or</li> <li>f) the catastrophic failure of, or the breakdown of or accident or other damage to plant, machinery or infrastructure,</li> </ul> <p>but does not include:</p> <ul style="list-style-type: none"> <li>g) lack of funds;</li> <li>h) financial hardship;</li> </ul>

	<ul style="list-style-type: none"> <li>i) loss of customers or loss of market share; or</li> <li>j) the catastrophic failure of, or the breakdown of or accident or other damage to plant, machinery or infrastructure as a result of a lack of maintenance where such maintenance would have been undertaken by a reasonable and prudent person or where the cause of the event has been the plant, machinery or infrastructure not being operated or maintained in accordance with good industry practices.</li> </ul>
<b>Instructions</b>	<p>Means all instructions and directions, issued by Brookfield Rail from time to time which:</p> <ul style="list-style-type: none"> <li>a) ensure, facilitate or encourage the proper, efficient, safe and lawful <ul style="list-style-type: none"> <li>i. use of and access to the Network by all Network Operators, and</li> <li>ii. management of the Network by Brookfield Rail;</li> </ul> </li> <li>b) are consistent with the Train Management Guidelines; and</li> <li>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 Brookfield Rail (as set out in paragraphs (a) and (b) of this definition of “Instructions”) in issuing the instruction or direction;</li> </ul> <p>but does not include instructions and directions which:</p> <ul style="list-style-type: none"> <li>d) derogate from the Train Paths;</li> <li>e) prevent the Operator from running a Service of the nature of the Services contemplated by the Access Agreement or as agreed between the parties from time to time; or</li> <li>f) are given for the purpose only of achieving Brookfield Rail’s internal commercial objectives unrelated to the valid objectives of Brookfield Rail as set out in paragraphs (a) and (b) of this definition of “Instructions”;</li> </ul> <p>unless the instructions or directions:</p> <ul style="list-style-type: none"> <li>g) are Train Control Directions properly given;</li> <li>h) relate to safety;</li> <li>i) are given to implement or support the TMG;</li> <li>j) are necessary to prevent or to minimise the effect of a material breach of an Access Agreement; or</li> </ul> <p>are otherwise authorised by an Access Agreement.</p>
<b>Network</b>	<p>Has the same meaning assigned to “<i>railways network</i>” in Section 3 of the Code; “<i>means</i> —</p> <ul style="list-style-type: none"> <li>a) <i>all the railways that were Government railways when the Act received the Royal Assent;</i></li> <li>b) <i>all the railways that are on land that is corridor land as defined in the Rail Freight System Act 2000;</i></li> </ul>

	<p>c) <i>the railway constructed pursuant to the TPI Railway and Port Agreement; and</i></p> <p>d) <i>any railway declared under section 3(2) of the Act to be part of the railways network;</i></p> <p>but in the context of this document is restricted to those items above listed in Schedule 1 of the Code which are controlled by Brookfield Rail and to which Brookfield Rail has a right to grant Access.</p>
<b>Operator</b>	Has the same meaning assigned to “operator” in Section 3 of the Code; “ <i>means an entity to which access is provided under an access agreement</i> ”.
<b>Railway Owner</b>	Has the same meaning assigned to “railway owner” in Section 3 of the Code; “ <i>means the person having the management and control of the use of the railway infrastructure concerned</i> ”, but in the context of this Train Path Policy refers specifically to Brookfield Rail.
<b>Reasonable Grounds</b>	<p>Includes:</p> <ul style="list-style-type: none"> <li>a) the Train Path (or Train Paths) proposed not being available because it is already allocated to another Operator;</li> <li>b) the Train Path proposed not being able to be operated safely or effectively in the opinion of Brookfield Rail (acting reasonably); or</li> <li>c) where consent to the proposed Variation would result in Brookfield Rail breaching: <ul style="list-style-type: none"> <li>i. any obligations imposed by law, including any law relating to the safety of the Network;</li> <li>ii. the Act or the Code; or</li> <li>iii. any agreement to which it is a party.</li> </ul> </li> </ul>
<b>Regulator</b>	Has the same meaning assigned to “Regulator” in Section 3(1) of the Act; “ <i>means the Economic Regulation Authority established by the Economic Regulation Authority Act 2003</i> ”.
<b>Route</b>	Means the routes to which the Code applies, as identified in Schedule 1 of the Code.
<b>Service</b>	Means a Train run by the Operator using the Network by which the Operator provides railway freight or passenger service.
<b>Train</b>	Means a locomotive with or without wagons used to operate Services.
<b>Train Control Directions</b>	<p>Means all Instructions issued by Brookfield Rail or its agents relating to management, continuity and safe operation of Train movements on the Network, including Instructions concerning the actual movement, deployment or placement of Trains, but only to the extent such Instructions:</p> <ul style="list-style-type: none"> <li>a) are consistent with the Train Management Guidelines; and</li> <li>b) are reasonably made 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 Brookfield Rail in issuing the Instruction.</li> </ul>

<b>Train Path</b>	Means an entitlement granted to an Operator by Brookfield Rail to access the Network by reference to the day of the week and to departure, transit and arrival times between entry and exit points on the Network.
<b>Train Path Policy (TPP)</b>	Means Brookfield Rail's Train Path Policy, the current statement of policy referenced in Section 44(2) and approved in accordance with Section 44(3) of the Code. This document is Brookfield Rail's Train Path Policy.

## Appendix A – Trading in Train Paths

1. An Operator may only license, assign or novate (**Trade**) the right to utilise a Train Path (as granted to it by Brookfield Rail under an Access Agreement) to another Operator (Third Party Operator) if:
  - 1.1. Brookfield Rail grants its prior written consent to the Trade of the right to utilise a Train Path (which consent will not be unreasonably withheld);
  - 1.2. the Third Party Operator holds Accreditation and provides evidence of that Accreditation to Brookfield Rail; and
  - 1.3. before such Trade, the Third Party Operator enters into an Access Agreement with Brookfield Rail on such terms not inconsistent with the Operator's Access Agreement as Brookfield Rail may reasonably determine, including, but not limited to:
    - 1.3.1. a requirement that the Third Party Operator comply with all Instructions issued by Brookfield Rail;
    - 1.3.2. a requirement that the Third Party Operator indemnifies Brookfield Rail in respect of the Third Party Operator's obligations and responsibilities under the Access Agreement;
    - 1.3.3. a requirement that the Third Party Operator takes out insurance on commercial terms sufficient to cover such indemnity; and
    - 1.3.4. a provision that prevents the further Trade of a right to utilise a Train Path by the Third Party Operator to another Operator.
2. The term of an Access Agreement between Brookfield Rail and a Third Party Operator will be no longer than the term of the agreement under which the Operator Trades the right to utilise a Train Path to the Third Party Operator.
3. The Trade of a right to utilise a Train Path to a Third Party Operator does not in any way release the Operator from, or limit any liability of the Operator in respect of, its obligations in relation to the Train Path under its Access Agreement with Brookfield Rail.
4. The Operator must not Trade the right to utilise all of the Train Paths granted to it by Brookfield Rail under its Access Agreement and must at all times retain at least one Train Path for its own utilisation.
5. If a Train Path has been identified as underutilised in accordance with clause 4.1.3b), the Operator may not Trade its right to utilise that Train Path during the Utilisation Period set out in clause 4.1.3c). Following the Utilisation Period, the Operator may Trade its right to utilise the Train Path only if its contractual entitlement to utilise that Train Path has not been removed in accordance with clause 4.2.1.