

Essential Services Commission
Victorian Rail Access Regime
Capacity Use Rules

1. Background

1.1 Legislative Background

Section 38T of the *Rail Corporations Act 1996* provides for the Commission to make capacity use rules in accordance with the procedures set out in section 38N. Section 38T provides:

38T. Capacity use rules

- (1) *The Commission must make rules for or with respect to the carrying out of a relevant capacity allocation activity.*
- (2) *Without limiting sub-section (1), rules must be made that—*
 - (a) *require an access provider, or a related body corporate of the access provider, to surrender unutilised or under utilised train paths allocated to that access provider or that related body corporate and the circumstances for the surrender; and*
 - (b) *require a user to surrender unutilised or under utilised train paths allocated to them under this Part and the circumstances for that surrender; and*
 - (c) *require an access provider to report to the Commission actual train path utilisation and the method of that reporting.*
- (3) *The Commission may make rules—*
 - (a) *for or with respect to requiring an access provider to prepare and maintain protocols for the allocation of the capacity of a rail network;*
 - (b) *for or with respect to requiring an access provider to comply with protocols referred to in paragraph (a);*
 - (c) *for or with respect to the method by which an access provider must report to the Commission actual train path utilisation;*
 - (d) *that confer a function or power on, or leave anything to be decided by, the Commission in relation to any matter or thing specified in sub-section (1), (2) or this sub-section, including the power to approve protocols referred to in paragraph (a) consistent with the rules.*
- (4) *Rules made under this section—*
 - (a) *must be consistent with the principle of passenger priority; and*
 - (b) *must prohibit an access provider from, while carrying out a relevant capacity allocation activity, unreasonably favouring itself or another person over any other person.*
- (5) *In making rules under this section, the Commission must have regard to the desirability, where practicable, of reserving train paths for access seekers who are not related bodies corporate of an access provider.*

Note: The procedure for making of the capacity use rules is set out in section 38N.

These capacity use rules are made pursuant to section 38T.

1.2 Purpose

The purposes of these **capacity use rules** are to:

- (a) provide for a transparent and non-discriminatory process for the allocation of the capacity of a **rail network** of an **access provider** as between the **access provider** itself (including any **related body corporate** of the **access provider**), **access seekers** and **users**;
- (b) prevent capacity allocation practices designed to discourage third party access to a **rail network** of an **access provider**, for example, by prohibiting the “hoarding” of capacity;
- (c) encourage optimum use of the **rail network** of an **access provider**, for example, by requiring the surrender of unutilised or under utilised **train paths**; and
- (d) establish a framework for capacity and **train path** allocation that is consistent with the **principle of passenger priority**, and to clarify priorities between non-**passenger train paths**.

1.3 Application

Subject to section 9.2, these **capacity use rules** apply in their entirety to any **access provider**.

1.4 Commencement

These **capacity use rules** commence with effect from 1 January 2006.

2. Obligations of an access provider with respect to relevant capacity allocation activities

- (a) In carrying out a **relevant capacity allocation activity**, an **access provider** must, subject to all relevant **legislation** (including in relation to safety):
 - (i) not unreasonably favour itself or another person (including any **related body corporate** of the **access provider** or a **business unit** of the **access provider** that carries out **other activities**), over any other person;
 - (ii) act in a manner that is consistent with the **principle of passenger priority**; and
 - (iii) subject to paragraphs (i) and (ii), carry out that activity so as to encourage maximum use of the **rail network** of the **access provider**.
- (b) An **access provider** must use **all reasonable endeavours** to allocate to an **access seeker** any **train path** requested by the **access seeker** in an access application.

3. Master train timetable and network map

3.1 Master train timetable

- (a) An **access provider** must prepare, maintain and keep up to date a current **master train timetable** that shows all **passenger train paths** and **scheduled train paths**.
- (b) An **access provider** must:
 - (i) provide a copy of the **master train timetable** to an **access seeker**, a **user** or the **Commission** on request; and
 - (ii) if requested in writing to do so by an **access seeker**, a **user** or the **Commission**, answer questions about how the **access provider** has determined the **master train timetable**, including whether a **train path** is the subject of an access agreement and if so, whether it is a **scheduled train path** or an **unscheduled train path**.

3.2 Network Map

- (a) An **access provider** must prepare, maintain and update annually a **network map** of the **access provider's rail network**.
- (b) The **network map** must show:
 - (i) each **line** of the **access provider's rail network**;
 - (ii) for each **line**, the number of **passenger train paths**, **scheduled train paths** and **unscheduled train paths** and any **available train paths**.
- (c) In preparing the **network map** and identifying **available train paths**, an **access provider** must use the standard **freight train path** specified in the protocol made under section 6.3(a)(ii).
- (d) An **access provider** must update the **network map** at least annually.
- (e) An **access provider** must make available on request by the **Commission**, or an **access seeker** or a **user**, a copy of the **network map**, together with an explanation of any assumptions underlying the allowances made by the **access provider** in producing the **network map**.

4. Allocating capacity and train paths in response to access applications

4.1 Assessment of available capacity on receipt of an access application

- (a) An **access provider** must, on receipt of an access application by an **access seeker** in accordance with section 4.1 of the **negotiation guidelines**, and in accordance with section 4.2(a) of the **negotiation guidelines**:
 - (i) if the access application relates to a request for access to a **train path**, make an assessment as to whether there is sufficient **available capacity**, in the form of an **available train path**, to meet the **access seeker's** request, having regard to the **master train timetable**, the **network map**

and any information provided by the **access seeker** under section 4.1 of the **negotiation guidelines**;

- (ii) if the access application relates to a request for the provision of **declared rail transport services** at a **terminal**, make an assessment as to whether there is sufficient **available capacity** to meet the **access seeker's** request.
- (b) Where, in the **access provider's** reasonable opinion there is insufficient **available capacity** to satisfy an **access seeker's** request under paragraph (a), the **access provider** must:
- (i) if the request is for the provision of **declared rail transport services** in respect of a **line**, use **all reasonable endeavours** to find an alternative **train path** that satisfies the requirements of the **access seeker**; and
 - (ii) make an assessment of whether part of the **access seeker's** request can be satisfied with **available capacity** and an assessment of the works that would be required to satisfy the balance of the **access seeker's** request, consistently with each protocol made under section 4.4 of the **negotiation guidelines**; and
 - (iii) provide a written explanation to the **access seeker** as to why the **access seeker's** request could not be satisfied in full.
- (c) The **access provider** must notify the **access seeker** in writing in respect of the matters referred to in paragraph (b) in accordance with section 4.2 of the **negotiation guidelines**.

4.2 Allocation of capacity and train paths

If an **access provider**, after assessing any information provided by an **access seeker** under section 4.1 of the **negotiation guidelines**, and in accordance with section 4.2(a) of the **negotiation guidelines**, determines that there is **available capacity** to satisfy the **access seeker's** request, including a request for a **train path**, the **access provider** must notify the **access seeker** in accordance with section 4.2 of the **negotiation guidelines**.

4.3 Resolving conflicts with respect to freight train paths

- (a) This section 4.3 applies where an **access provider** receives an access application under section 3 of the **negotiation guidelines** with respect to a **freight train path** and, prior to the execution of an access agreement or the withdrawal of the access application, the **access provider** receives an access application from another **access seeker** with respect to a **freight train path**.
- (b) If two or more **access seekers** request the same **available train path** as a **freight train path** and it is not possible to satisfy both requests by using alternative but similar **train paths**, the **access provider** must allocate the **available train path** in accordance with the principle that the access application that offers the greatest utilisation of the **rail network** has priority over and will be allocated the **available train path** in preference to other applications.

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- (c) For the purposes of this section 4.3:
- (i) "utilisation" includes the duration of use of the **train path** and the frequency of use of the **train path** and the aggregate tonnage of the **freight services** that use that **train path**; and
 - (ii) where a request for the same **available train path** by more than one **access seeker** referred to in paragraph (b) is associated with the servicing of the same freight task, the **access seeker** that can demonstrate a contractual commitment to provide that freight task shall be deemed to be the person whose access application offers the "greatest utilisation" of the **rail network**.
- Note:** The reference to "utilisation" in paragraphs (b) and (c) above is not to be taken to be a reference to **utilisation** (as defined in section 10).
- (d) An **access provider** must:
- (i) notify an **access seeker** of a decision made under paragraph (b) in accordance with section 4.2 of the **negotiation guidelines** and must provide reasons for that decision referable to the "utilisation" criteria set out in paragraph (c); and
 - (ii) provide a copy of the notice referred to in sub-paragraph (i) to the **Commission** at the same time as the **access provider** provides the notice to the **access seeker**.
- (e) For the avoidance of doubt, an **access provider** may not require or request an **access seeker** seeking the provision of **declared rail transport services** for the purpose of providing **freight services** to identify a consignee.

4.4 Allocation of train paths must be in accordance with these capacity use rules

An **access provider** must not allocate a **train path** other than in accordance with these **capacity use rules**.

5. Variation of and surrender of a train path

5.1 Permanent variation of train paths consequent upon variation of passenger service timetable approved by Director of Public Transport

- (a) If the Director of Public Transport approves, varies or approves the variation of a timetable for a **passenger service** in accordance with section 10 of the *Transport Act 1983*, then, subject to the matters set out in that section, an **access provider** must make the relevant **train paths** available to the relevant **user** for the provision of those **passenger services** and must vary any **train path** of another **user** (including a **user** with a **train path** under an **existing arrangement**) that is necessary to accommodate the change in the **passenger service** timetable.
- (b) When varying the **train paths** of other **users** in the circumstances referred to in paragraph (a), an **access provider** must:
 - (i) first, vary **train paths** in the following order:

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- (A) **unscheduled train paths**;
 - (B) **scheduled train paths**; and
 - (C) other **passenger train paths**, but only where there is no other means of accommodating the change in the **passenger service** timetable;
- (ii) second, having complied with paragraph (i), re-allocate **train paths** in accordance with the following order of priorities:
- (A) other **passenger train paths**;
 - (B) **scheduled train paths**; and
 - (C) **unscheduled train paths**;
- (iii) subject to complying with paragraph (ii), use **all reasonable endeavours** to minimise the disruption to **users** with entitlements to affected **train paths**; and
- (iv) subject to complying with paragraph (iii), use **all reasonable endeavours** to provide satisfactory alternative **train paths** to affected **users**.

5.2 Permanent variation of certain freight train paths

- (a) An **access provider** must make available an **unscheduled train path** for the purposes of making that **train path** available to an **access seeker** who seeks to use that **train path** as a **scheduled train path** and must vary the **train path** of that **user** if that **train path** is allocated to that **access seeker**.
- (b) An **access provider** must give the **user** not less than 30 days prior written notice of the variation to the **train path** of the **user**.

5.3 Variation of train paths by agreement between access provider and user

Subject to complying with each **binding protocol**, if a **user** requests a permanent variation to an existing **train path**, the **access provider** must:

- (a) negotiate with the **user** in good faith; and
- (b) use **all reasonable endeavours** to vary the **train path**, so long as such variation does not interfere with a **train path** of another **user**.

5.4 Variation or surrender of train paths as a result of a breach of relevant legislation, standards or access provider's requirements

Subject to complying with each **binding protocol**, an **access provider** may permanently vary, temporarily vary, or require a **user** to surrender a **train path** of that **user** where the **user** is in breach of relevant **legislation**, any applicable **standard** or the **access provider's rolling stock interface standards** or fails to comply with other material requirements for the operation of **rolling stock** on a **rail network** of the **access provider**.

5.5 Revision of status and surrender of under utilised freight train paths

Where an **access provider** determines that a **freight train path** has not been operated to the level of **utilisation** applicable to that **train path**, as stated in the protocol made under section 6.3(a)(iv), the **access provider** must:

- (a) if the **freight train path** is a **scheduled train path**, revise the status of that **train path** to the status of an **unscheduled train path**; and
- (b) if another **access seeker** or **user** has made a request for that **train path** as a **scheduled train path**, require the **user** to surrender the **train path** for the purpose of making the **train path** available to satisfy the request.

5.6 Surrender of train paths

If:

- (a) an **access provider** reasonably believes that a **user** is no longer able or will no longer be able to **utilise** or fully **utilise** a **freight train path**:
 - (i) to the extent contemplated in an access agreement or **existing arrangement** or entitlement to that **train path** (for example, due to loss of a freight contract); or
 - (ii) if the **existing arrangement** or entitlement does not specify a degree of **utilisation** with respect to that **train path**, in accordance with the level of **utilisation** applicable to that type of **train path** stated in the protocol made under section 6.3(a)(iv),

then:

- (b) after having complied with any **binding protocol** made under section 6.3(a)(viii); and
- (c) provided that the **access provider** has acted reasonably and in good faith when considering any response by a **user** to the notice given by the **access provider**,

if the **access provider** determines that the **user** has failed to demonstrate its ability to **utilise** or fully **utilise** that **train path** to the extent contemplated in that access agreement or entitlement, or has otherwise failed to show cause, the **access provider** must by notice in writing to the **user** require the **user** to surrender the **train path**.

5.7 Temporary variations to train paths by access provider

- (a) Subject to complying with each **binding protocol**, an **access provider** may vary a **train path** on a temporary basis for one or more of the following purposes:
 - (i) safety;
 - (ii) repair, maintenance, the upgrading or extension or construction of or making alterations to the **rail network** or **rail infrastructure** of the **access provider**;
 - (iii) at the request of a **user**, where such an adjustment does not interfere with a **train path** of another **user**; or

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- (iv) at the request of the Director of Public Transport, where such adjustment is for the purposes of providing passenger services for a special event.
 - (b) If an **access provider** varies a **train path** on a temporary basis, the **access provider** must:
 - (i) first, vary **train paths** in the following order:
 - (A) **unscheduled train paths**;
 - (B) **scheduled train paths**; and
 - (C) **passenger train paths**;
 - (ii) second, having complied with paragraph (i), re-allocate **train paths** in accordance with the following order of priorities:
 - (A) **passenger train paths**;
 - (B) **scheduled train paths**; and
 - (C) **unscheduled train paths**;
 - (iii) subject to complying with paragraph (ii), use **all reasonable endeavours** to minimise the disruption to **users** with entitlements to affected **train paths**; and
 - (iv) subject to complying with paragraph (iii), use **all reasonable endeavours** to provide satisfactory alternative **train paths** to affected **users**.

6. Protocols and capacity allocation protocols

6.1 Obligation to prepare capacity allocation protocols

- (a) An **access provider** must prepare and maintain a statement of capacity allocation protocols.
- (b) The statement of capacity allocation protocols must contain a copy of each **binding protocol** that the **access provider** is required to prepare and maintain under these **capacity use rules** and that the **Commission** has approved under these **capacity use rules**.
- (c) If a **binding protocol** is varied, the **access provider** must update the statement of capacity allocation protocols accordingly.

6.2 Publication of statement of capacity allocation protocols

An **access provider** must:

- (a) make available for inspection at its offices; and
- (b) publish on its website,
a copy of the statement of capacity allocation protocols, as updated from time to time.

6.3 Content of protocols

- (a) An **access provider** must prepare and maintain protocols for the allocation of the capacity of a **rail network** of the **access provider**, which must include:
- (i) a policy for identifying each **line** of the **access provider's rail network**;
 - (ii) a definition of the standard **freight train path** used for allocating **freight train paths**;
 - (iii) a policy, guidelines and procedures that an **access provider** will apply when assessing a request to be provided a **declared rail transport service**, including a request for a **train path**, which must be consistent with the **negotiation guidelines**;
 - (iv) a description of the required degrees of **utilisation** in respect of **scheduled train paths** and **unscheduled train paths** and the decision criteria that the **access provider** will employ, and an explanation of how the **access provider** will apply those decision criteria, for the purpose of determining whether a **train path** will be:
 - (A) reassigned as an **unscheduled freight train path** in accordance with section 5.5; or
 - (B) required to be surrendered in accordance with section 5.6,which decision criteria must represent an objective test based on the proposed or actual degree of **utilisation** of that **train path**;
 - (v) guidelines, principles and procedures that the **access provider** will apply when responding to or issuing a request to vary permanently a **train path**;
 - (vi) a description of the circumstances in which an **access provider** may permanently vary or require the surrender of a **train path** of a **user** due to a breach by the **user** of relevant **legislation**, an applicable **standard** or the **access provider's rolling stock interface standards** or any other requirement of the **access provider** for the operation of **rolling stock** on a **rail network** of the **access provider** and, where those circumstances create a risk of injury to persons or damage to property, including damage to **rail infrastructure**, may permit the **access provider** to suspend the **train path** immediately until the **user** has addressed the risk to the reasonable satisfaction of the **access provider**;
 - (vii) guidelines, principles and procedures that the **access provider** will apply when determining whether to vary permanently or require the surrender of a **train path** of a **user** in the circumstances referred to in paragraph (vi), which must require an **access provider**.
 - (A) to give a **user** a written notice stating:
 - (1) that it is a notice under section 5.4 of these **capacity use rules**;
 - (2) the alleged breach;

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- (3) that the **user** is required to show cause in writing why the **access provider** should not require the permanent variation or surrender of the **train path** the subject of the alleged breach;
 - (4) the date by which the **user** is required to show cause (which must not be less than 14 days after the **user** receives the notice); and
 - (5) that if the **user** does not show reasonable cause by the stated date, the **access provider** may by written notice to the **user** permanently vary or require the surrender of the **train path**;
- (B) subject to complying with paragraph (A) and when considering any response by a **user** to a "show cause" notice given by the **access provider** under paragraph (A), to act reasonably and in good faith; and
- (C) subject to complying with paragraph (B), and if the **access provider** determines that the **user** has failed to show cause and that the **train path** should be permanently varied or surrendered, to give the **user** a written notice varying permanently or requiring the surrender of the **train path** and stating the date on which the permanent variation or surrender of the **train path** shall be effective, such date to be not less than 14 days from the date of receipt by the **user** of the notice;
- (viii) guidelines, principles and procedures that the **access provider** will apply when determining whether a **user** is no longer able or will no longer be able to **utilise** or fully **utilise** a **freight train path**, which must require the **access provider**:
- (A) to give the user a written notice:
 - (1) stating that it is a notice given under section 5.6 of these **capacity use rules**;
 - (2) requiring the user to demonstrate its ability to **utilise**, or fully **utilise** that **train path** to the extent contemplated in section 5.6(a)(i) or (ii) (as applicable) or otherwise to show cause in writing why the **access provider** should not require the surrender of the **train path** the subject of the notice;
 - (3) stating the date by which the **user** is required to provide a written response to the **access provider** (which must not be less than 14 days after the **user** receives the notice); and
 - (4) stating that if the **user** does not show reasonable cause in writing by the stated date, the **access provider** may by written notice to the **user** require the surrender of the **train path** that is the subject of the notice;

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- (B) to act reasonably and in good faith when considering any response by a **user** to a notice given under paragraph (A);
 - (ix) a description of the circumstances in which the **access provider** may vary a **train path** on a temporary basis:
 - (A) to repair, maintain, upgrade, extend, construct or make alterations to the **rail network** or **rail infrastructure** of the **access provider**;
 - (B) for reasons of safety or for the prevention of injury or damage to the **rail network** or **rail infrastructure** of the **access provider** or to other persons or property; and
 - (C) at the request of a **user**;
 - (x) the procedures and communications protocols that the **access provider** will follow when varying a **train path** on a temporary basis, including:
 - (A) the period and form of notice that the **access provider** is required to give to affected **users**; and
 - (B) processes for consultation with affected **users**; and
 - (xi) principles and procedures for addressing complaints from a **user** or **access seeker** about an alleged failure of the **access provider** to comply with these **capacity use rules**, which must require an **access provider** to:
 - (A) address each complaint in good faith; and
 - (B) report to the **Commission** each such complaint and the measures taken by the **access provider** in response to such complaint.

6.4 Decision on proposed protocols

- (a) An **access provider** must submit to the **Commission** for approval at the same time as it is required to submit a proposed access arrangement proposed protocols for the matters set out in section 6.3.
- (b) The **Commission** must make a decision whether or not to approve a proposed protocol provided to it under section 6.4(a).
- (c) If the **Commission** makes a decision to approve a proposed protocol, that protocol will be a **binding protocol** for the purposes of these **capacity use rules**.
- (d) If the **Commission** is not satisfied that the proposed protocol:
 - (i) provides for those matters listed in section 6.3 that the proposed protocol states it provides; and
 - (ii) is consistent with the objectives set out in section 38F of the **Act**,the **Commission** may reject the proposed protocol.
- (e) If the **Commission** rejects the proposed protocol:
 - (i) the **Commission** must return the proposed protocol to the **access provider** with a notice in writing that outlines the matters that must be

addressed for the **Commission** to approve the proposed protocol as a binding protocol;

- (ii) the **access provider** must amend the proposed protocol to address the matters specified by the **Commission** under paragraph (i); and
 - (iii) the **access provider** must submit the amended proposed protocol to the **Commission** within 14 days after receipt of the notice referred to in paragraph (i).
- (f) If the **Commission** decides to reject the amended proposed protocol submitted to the **Commission** in accordance with paragraph (e)(iii), the process in this section 6.4 will continue to apply until the proposed protocol is accepted as a **binding protocol**:
- (i) with such alterations and modifications as are necessary; and
 - (ii) as if the amended proposed protocol were a proposed protocol submitted for approval under section 6.4(a).

6.5 Access provider's obligation to comply with protocols

On and from the date the **Commission** approves a proposed protocol as a **binding protocol** with respect to an **access provider**, the **access provider** must comply with the **binding protocol**.

6.6 Variation of protocols

- (a) An **access provider** may apply to the **Commission** to vary a **binding protocol**.
- (b) The variation must be consistent with these **capacity use rules**.
- (c) An application must:
 - (i) be in writing;
 - (ii) include a description of the proposed variation; and
 - (iii) state the reasons for the proposed variation.
- (d) The **Commission** must make a decision whether or not to approve a variation to a **binding protocol**.
- (e) If the **Commission** considers that the variation that is the subject of the application is a material variation, section 6.4 applies to that variation:
 - (i) with such alterations and modifications as are necessary; and
 - (ii) as if:
 - (A) the proposed variation to be made were a proposed protocol submitted for approval under section 6.4(a); and
 - (B) a decision under this section were a decision under section 6.4.
- (f) If the **Commission** decides to approve a variation to a **binding protocol** under this section, the variation takes effect, and is binding on the **access provider**, on and from the date of the decision.

7. Access agreements and other arrangements with users

- (a) Subject to paragraphs (c) and (d), an **access provider** must ensure that any contract, agreement, arrangement or understanding entered into by the **access provider** and an **access seeker** or a **user** for the provision of **declared rail transport services**:
- (i) is consistent with these **capacity use rules**;
 - (ii) is consistent with each **binding protocol** that the **access provider** is required to prepare and maintain under these **capacity use rules**; and
 - (iii) permits the **access provider** to comply with its obligations under these **capacity use rules**, including with respect to varying, making available or requiring the surrender of **train paths** in accordance with section 5.
- (b) Without limiting paragraph (a), an **access provider** must ensure that any contract, agreement, arrangement or understanding referred to in paragraph (a) which commences after the commencement date of these **capacity use rules**:
- (i) specifies, in respect of each allocated **train path**, whether that **train path** is a **passenger train path**, a **scheduled train path** or an **unscheduled train path**; and
 - (ii) if the relevant **train path** is a **scheduled train path** or an **unscheduled train path**, specifies a proposed degree of **utilisation** in respect of that **train path** which is consistent with each binding protocol that the **access provider** is required to prepare and maintain under these **capacity use rules**.
- (c) Except where these **capacity use rules** provide otherwise, an **access provider** must use **all reasonable endeavours** to ensure that any **existing arrangement**:
- (i) is consistent with these **capacity use rules**;
 - (ii) is consistent with each **binding protocol** that the **access provider** is required to prepare and maintain under these **capacity use rules**; and
 - (iii) permits the **access provider** to comply with its obligations under these **capacity use rules**, including with respect to varying, making available or requiring the surrender of **train paths** in accordance with section 5.
- (d) For the avoidance of doubt, subject to complying with paragraph (c), if an **access provider**, after having used **all reasonable endeavours**, is unable to vary or require the surrender of a **train path** under an **existing arrangement** the **access provider** is not required to vary or require the surrender of that **train path** in accordance with those sections.

Note: If practicable to do so, the Commission expects **access providers** to use **all reasonable endeavours** to renegotiate their **existing agreements** to incorporate processes that are consistent with the requirements of sections 5.2 to 5.6.

8. Reporting of actual train path utilisation

8.1 Recording utilisation of train paths

An **access provider** must prepare, maintain and keep records of movements of **rolling stock**, including **train services** and **trains**, on each **line** of the **access provider**, which records must be kept in a form such as to enable them to be reviewed against the **access provider's master train timetable**.

8.2 Reporting utilisation of train paths

- (a) An **access provider** must provide a report to the **Commission** on or before the twentieth day of each calendar quarter describing actual **train path utilisation** in the calendar quarter immediately preceding the date of the report.
- (b) A report submitted under paragraph (a) must include, with respect to each **user**, details of:
 - (i) actual **utilisation** of **scheduled train paths**;
 - (ii) actual **utilisation** of **unscheduled train paths**, including maintenance **train paths** but excluding sidings;
 - (iii) the methodology used to produce the calculations in the report;
 - (iv) any notices given by the **access provider** to a **user** of the variation or surrender of a **train path** under sections 5.2, 5.3, 5.4, 5.5 and 5.6;
 - (v) evidence of the **access provider's** compliance with its obligations under sections 5.2, 5.3, 5.4, 5.5 and 5.6;
 - (vi) any **trains** or **train services** cancelled by the **access provider**; and
 - (vii) instances of the unavailability of any part of the **rail network** the subject of a **scheduled train path** not due to State-sponsored **rail network alterations**.
- (c) If directed in writing to do so by the **Commission**, an **access provider** must adjust the methodology used to produce the calculations in the report submitted under paragraph (a) and must resubmit the report to the **Commission** within 28 days of the date of such direction or such longer period as notified by the **Commission** in writing to the **access provider**.

9. Application

9.1 Application of capacity use rules to joint ventures

- (a) This section applies if there is more than one **access provider** in connection with **rail infrastructure**, including if:
 - (i) the relevant **rail infrastructure** is owned or operated by two or more persons as a joint venture or partnership; or
 - (ii) the **rail infrastructure** is owned and operated by different persons; or

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- (iii) **rail infrastructure** is legally owned by a person or persons on trust for others.

In such a case each **access provider** in connection with the **rail infrastructure** is referred to in this section as a **participant**.

- (b) If these **capacity use rules** require or permit something to be done by the **access provider**, that thing may be done by one of the **participants** on behalf of all the **participants**.
- (c) If a provision of these **capacity use rules** refers to the **access provider** bearing any costs, the provision applies as if the provision referred to any of the **participants** bearing any costs.

9.2 Waiver of capacity use rules

- (a) The **Commission** may at its sole discretion and by notice in writing to an **access provider** waive any of an **access provider's** obligations under these **capacity use rules** where the **Commission** considers this would be consistent with the **Commission's** statutory objectives and that compliance with the obligation would not be necessary to achieve the purpose of these **capacity use rules** as set out in section 1.2.

10. Definitions

In these **capacity use rules**, unless the context otherwise requires:

- (a) terms that appear **like this** and that are not otherwise defined in these **capacity use rules** have the same meaning as in the **Act**;
- (b) **access provider** has the meaning set out in the **Act**;
- (c) **access seeker** when used in these **capacity use rules** means a person, including a **business unit** or **related body corporate** of the **access provider**, seeking to be provided a **declared rail transport service** by an **access provider**;
- (d) **Act** means the *Rail Corporations Act 1996* (Vic);
- (e) in deciding whether an **access provider** has used **all reasonable endeavours**, regard shall be had to relevant **standards**, **good industry practice** and other regulatory requirements, the performance of other **access providers** and to interstate, national and international benchmarks;
- (f) **alteration** in respect of **rail infrastructure**, means any material addition to, extension to, modification of, replacement of, recovery of, repair of, maintenance of, removal from, deletion to, destruction of, damage to, loss of or inability to use that **rail infrastructure**;
- (g) **available capacity** means:
- (i) with respect to a rail **line**, the **available train paths** for that line, as determined by the **access provider** in accordance with these **capacity use rules** and each **binding protocol**;

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- (ii) with respect to a **terminal**, the capability of **providing declared rail transport services** at that **terminal** after taking into account existing contractual commitments and any requirements to reserve capacity for the prudent operation of the **terminal** in accordance with all applicable **standards** and **good industry practice**;
- (h) **available train path** means:
- (i) a **train path** that is not allocated to a **user** in the **access provider's master train timetable**;
- (ii) with respect to a **freight train path**, any **freight train path** that a **user** is required to surrender in accordance with these **capacity use rules**;
- (iii) with respect to a **passenger service**, any **freight train path**;
- (iv) with respect to an application for a **scheduled train path**, any other **freight train path**;
- (i) **binding protocol** means a protocol that has been approved by the **Commission** under section 6.4, and includes a protocol containing amendments approved by the **Commission** in accordance with section 6.6;
- (j) **business unit** means a distinct division, department, branch, group, team or unit of a business or company, or a separate company;
- (k) **conditional**, in respect of a **freight train path**, means the entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** which **train path**:
- (i) does not conflict with a **passenger train path** or a **scheduled train path**; and either
- (ii) provides for optional destinations; or
- (iii) permits the **train path** to be re-allocated:
- (A) on the basis of seasonal or intermittent requirements; or
- (B) in order to provide reserve or surge capacity;
- (l) **declared rail transport service** means a rail transport service declared by an Order under section 38I of the **Act**;
- (m) **existing arrangement** means a contract or agreement between the **access provider** and a **user** for the provision of **declared rail transport services** (which includes, for the avoidance of doubt, the provision of **declared rail transport services** by the **access provider** to itself or to a **related body corporate** under a memorandum of understanding) that commenced before the commencement date of these **capacity use rules** and that is still in force;
- (n) **flexible**, in respect of a **freight train path**, means the entitlement of a **user** to a **train path**:
- (i) which does not conflict with a **passenger train path** or a **scheduled train path**; and

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- (ii) which, for a particular day, the **line** entry and exit time (nominated by the **access provider**) is a time as close as possible to the **line** entry and exit time requested by the **user** but not less than 48 hours prior to the requested **line** entry time; and
- (iii) where that entitlement arises other than pursuant to an access agreement with the **access provider**;
- (o) **force majeure event** means any circumstances beyond the reasonable control of a person (including a **business unit** of an **access provider**) which occur without the negligence of that person (including a **business unit** of an **access provider**) 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 **rolling stock** operated by the **user**;
- (p) **freight services** means **rail transport services** that are not **passenger services** or **rail transport services** that are provided by means of a **terminal**;
- (q) **freight train path** means an entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** to provide **freight services**, and includes a **scheduled train path** and an other **freight train path**;
- (r) **good industry practice** means all those practices followed in the commercial railway industry when an activity is undertaken in accordance with all applicable **legislation** and **standards** and with due care and skill;
- (s) **legislation** means Commonwealth, Victorian or local government legislation including regulations, orders, by-laws, rules and other subordinate legislation or other document enforceable under any such legislation, regulations, orders, by-laws, rules or subordinate legislation;
- (t) **line** in respect of the **rail network** of an **access provider**, means the rail path between two locations on the **rail network** that may be the subject of a **train path** and that has a common volume of capacity, identified in accordance with the protocol referred to in section 6.3(a)(i);
- (u) **master train timetable** means the timetable prepared and maintained in accordance with section 3.1(a);
- (v) **network map** means the map prepared and maintained in accordance with section 3.2;
- (w) **other activity** means any activity carried out by an **access provider** other than an **access activity**;
- (x) **passenger services** means railway services for the carriage of passengers by **train** between locations on the **rail network** of an **access provider**;

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- (y) **passenger train path** means either:
- (i) an entitlement of a **user** under an access agreement to use a **train path** on a **rail network** of an **access provider** to provide **passenger services** which has a fixed **line** entry and exit time and fixed intervals for passenger stops; or
 - (ii) a passenger train path specified in the timetable approved by the Director of Public Transport, as amended from time to time, under section 10 of the *Transport Act 1983*;
- (z) **principle of passenger priority** means the giving of priority to the provision of **declared rail transport services** to **passenger service users** over the provision of **declared rail transport services** to **other users**;
- (aa) **rail network** means the **rail infrastructure** used to provide **declared rail transport services**;
- (bb) **related body corporate** has the meaning set out in the *Corporations Act 2001* (Cth);
- (cc) **relevant capacity allocation activity** means:
- (i) assessing the **capacity** of a **rail network**;
 - (ii) allocating the **capacity** of a **rail network**;
 - (iii) allocating **train paths**;
 - (iv) any activity that is ancillary to any activity referred to in paragraphs (i) to (iii);
- (dd) **reserved**, in respect of a **train path**, means the future entitlement of a **user**, including an **access provider** or a **related body corporate** of an **access provider**, to use a **train path** on the **rail network** of the **access provider** and is only received where there are reasonable contractual commitments for its future use;
- (ee) **rolling stock** means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses the rail track;
- (ff) **rolling stock interface standards** means the rolling stock interface standards that an **access provider** is required to prepare and maintain under and in accordance with the **network management rules**;
- (gg) **scheduled**, in respect of a **freight train path**, means the entitlement of a **user** to use a **train path** on a **rail network** of an **access provider** for **freight services** which has a fixed **line** entry and exit time;
- (hh) **standard** means any standard or code of practice issued from time to time by Standards Australia (an incorporated body formerly known as the Standards Association of Australia), the Association of American Railroads, the International Union of Railways, British Standards, Federal Railroad Administration, the

Australasian Railway Association or such similar body to the extent that the standard or code is applicable to the Victorian railway industry;

- (ii) **train** means a locomotive and with or without wagons used to operate **train services**;
- (jj) **train path** means a right (whether arising under an agreement or otherwise) to operate **rolling stock** between particular locations on a **rail network** at particular times;
- (kk) **train service** means a **train** run by a **user**, an **access provider** or a **related body corporate** of an **access provider** by which that person provides railway **freight services** or **passenger services**;
- (ll) **unscheduled**, in respect of a **freight train path**, means a **conditional train path**, a **flexible train path** or any other **train path** that is not a **passenger train path** or a **scheduled train path**;
- (mm) **user**, when used in these **capacity use rules**, means any person, including the **access provider** or a **related body corporate** of the **access provider** who:
 - (i) acquires or uses a **declared rail transport service** or is a party to an agreement, arrangement or understanding under which they acquire or use a **declared rail transport service**; or
 - (ii) has a right to be provided a **declared rail transport service** under a **dispute resolution decision**; and
- (nn) **utilisation**, with respect to a **train path**, means the frequency with which the **train path** is used. A **train path** is used when a **train service** or **train** is:
 - (i) presented at the scheduled **line** entry point;
 - (ii) exits at the scheduled **line** exit point;
 - (iii) the times of entry or exit are not so dissimilar to the scheduled **line** entry and exit times so as to require the issue of a separate or new **train path**; and
 - (iv) the relevant **train service** or **train** operates reasonably in accordance with the terms of the access agreement or **existing arrangement** or **dispute resolution decision** applicable to that **train** or **train service** on that **train path**.

For the avoidance of doubt, there is no failure to use a **train path** as contemplated in paragraphs (i), (ii) and (iii) if the failure occurs:

- (v) because an **access provider** and a **user** agree to substitute an alternative **train path**; or
- (vi) because of a **force majeure event** or because the **access provider** does not make the **rail network** available to the **user**, other than as a result of an act or omission of the **user**.