

## MEMORANDUM

### PORTMAN IRON ORE LIMITED'S COMMENTS ON THE REGULATOR'S APPROVAL UNDER SECTION 10 OF THE RAILWAYS (ACCESS) CODE 2000 ("CODE").

1. The acting Rail Access Regulator ("**Regulator**") is seeking comments on the application to the Regulator for the Regulator to approve a proposal which in the opinion of WestNet Rail would involve the provision of access to the Kalgoorlie to Esperance railway line to an extent that may in effect preclude other entities from access to that infrastructure, in accordance with section 10 of the Code. This requires the railway owner to obtain the approval of the Regulator before entering into negotiations on an access proposal. There are two fundamental issues which arise from the requirements of section 10.

Firstly, whether the access proposal which has been made would involve the provision of access to an extent that may in effect preclude other entities from access. If the access proposal is unlikely to have that effect in the opinion of the Regulator, then the Regulator must give his approval to the negotiations.

Secondly, whether the Regulator approves the negotiations being entered into. There is no criteria in the *Railways (Access) Act 1998*, or the Code, upon which the Regulator is to base his decision to approve or not to approve the negotiations. There is no indication that if entities are precluded from access to railway infrastructure that he must not approve negotiations on the access proposal. On the contrary, the clear implication is that the Regulator may approve negotiations on the proposal even if other entities are likely to be precluded from access. This would involve the Regulator forming a view that the provision of access to the access proponent in the relevant circumstances, to the preclusion of others, is reasonable or justifiable.

2. Portman's view as to the role of section 10 is that it is misconceived. The nature of railway systems is that no person requiring access need be precluded. Railway systems can be expanded or enhanced in ways that, in theory, increase the capacity of the railway system infinitely. Adding crossing loops, refuges or parallel track as required, as well as upgrading existing track and sleepers to the axle loads and speed of a modern equivalent asset will increase the capacity of the railway system to accommodate the needs of all access proponents. Clause 6(4)(j) of the Competition Principles Agreement establishes that the owner may be required to extend, or permit the extension of, the relevant facility if necessary, which is subject only to:
  - (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;
  - (ii) the owner's legitimate business interests in the facility being protected;

- (iii) the terms of access for the third party taking into account the costs borne by the parties to the extension and the economic benefits to the parties resulting from the extension.

These principles apply to the WestNet network because the arbitrator appointed to arbitrate rail access disputes is specifically directed by section 29(2) of the Code to take into account clause 6(4)(j) and other provisions of the Competition Principles Agreement. The arbitrator accordingly has power to order the railway owner to extend or enhance the railway system provided the 3 matters identified in clause 6(4)(j), and mentioned above, are satisfied. The railway owner's legitimate business interests can be protected by ensuring that he receives, through the track access tariffs, a reasonable rate of return on his investment in the extension or enhancement. Alternatively, the access proponent could be required to make a capital contribution towards all or part of the expansion or enhancement capital costs. Ownership of the extension or enhancement, as between the railway owner and the access proponent making the capital contribution, can be decided depending upon the nature and extent of the capital contribution by the access proponent.

The track access charges will also be adjusted to reflect the costs borne by the party for the extension or enhancement and the economic benefits to the parties resulting from the extension in accordance with paragraph (iii) of clause 6(4)(j).

Given this fundamental right of access proponents to have extensions and/or enhancements made to the railway system, it seems unlikely that any entity could be precluded from access as a result of an access proposal in general, or Portman's access proposal in particular.

Later in this submission, we mention WestNet's obligations in accordance with section 12(6) of the *Rail Freight System Act 2000*. This additionally supports the proposition that it is unlikely, if not impossible, that any entity may be precluded from access to the railway system as a result of Portman's access proposal.

- 3. Dealing firstly with the issue of whether other entities may in effect be precluded from access to the railway infrastructure Portman submits that this will not be the case. The reasons for this are as follows:

- (a) (i) Portman's proposal for increased access to the route has been based on the information previously provided by WestNet as to the capacity and present usage of the route between Kalgoorlie and Esperance ("**the route**"). WestNet gave to Portman a master control diagram dated 22 November 2000 ("master control diagram") which was Westnet's proposal as to the accommodation of Portman's haulage requirements and which shows that a 5 train operating plan is available to Portman. This would meet Portman's needs for increased access to the route. A copy of the master control diagram is enclosed with this submission.

It is noted that this master control diagram has cycle times of 36 hours. Cycle times of 36 hours operated from 1 June 2001 until late August 2001 as contemplated in the master control diagram. WestNet asked that cycle times increase to 42 hours to allow for a track upgrade and maintenance program, which was, and is, to be reviewed after 6 months. The cycle times should then revert to 36 hours as contemplated in the master control diagram. WestNet must be asked to demonstrate to the Regulator why the master control diagram prepared by it and given to Portman in November 2000 as WestNet's proposal to accommodate Portman's increased haulage requirements does not allow a 5 train operating plan for Portman.

- (ii) Portman can demonstrate, based upon WestNet's master control diagram that after the introduction of Portman's 5 train operating plan, there are still train paths available each day on the Kalgoorlie-Esperance route, in either direction.
- (iii) As previously mentioned generally, improvements can be made to the railway infrastructure on the Kalgoorlie-Esperance route which are not necessarily capital intensive and can increase the number of available train paths, beyond that demonstrated by Portman to already exist with the Network in its present state.

Portman is of course prepared to provide the Regulator with the detailed analysis to support this submission, if WestNet does not accept the position put by Portman, as to the availability of a 5 train operating plan for Portman, and moreover the availability of other train paths after the introduction of a 5 train operating plan for Portman.

- (b) Under section 12(6) of the *Rail Freight System Act 2000*, any proposal to dispose of standard gauge corridor land between Koolyanobbing and Esperance must ensure that if the holder of the land has a contract under which more than 3 million tonnes of freight per year are to be carried on the track between Kalgoorlie and Esperance, the railway track on the land is within two years after the disposal or the making of the contract (whichever is later) improved over the whole length of the track between Koolyanobbing and Esperance to a standard suitable to allow rolling stock of a 23-tonne axle load to travel along at a maximum speed of 80 kilometres per hour and an average speed of 60 kilometres per hour. The track is to be maintained to at least that standard over that length of track during the term of the standard gauge corridor licence. Portman has sought a copy of the "Government Lease" by which the standard gauge corridor land is licensed to WestNet and the rail

infrastructure is leased to WestNet. However Portman has been forced to seek a copy of that document by making a request under the Freedom of Information Act and at the time of making this submission has not received a copy of the Government Lease. The improvement of the route in accordance with the requirements of section 12(6) of the *Rail Freight System Act 2000* will ensure that requirements of Portman for increased access are met and no other entities are precluded from access to that route.

- (c) Portman is not aware of any entity (other than Portman) seeking access or seeking to increase access to the route. Further for the reasons which will be described below no entity which presently has access to the route will be precluded from access.

Turning to the second issue of, if in fact the provision of access to Portman may preclude other entities in the future from access to the route (which for the reasons set out above Portman does not consider is possible), whether the Regulator should give approval to the commencement of negotiations in any event. The background to the current situation is significant and is as follows:

- (a) On 9 January 1995 Koolyanobbing Iron Pty Ltd, a company owned by Portman Limited, entered into a freight agreement ("**Freight Agreement**") with the Western Australian Government Railways Commission ("**Westrail**") for the carriage of iron ore between Koolyanobbing and Esperance. The interests of Koolyanobbing Iron Ore Pty Ltd have since been assigned to Portman Iron Ore Limited.
- (b) The term of the Freight Agreement is 10 years from 1 August 1994.
- (c) In order to meet its obligations under that Freight Agreement, Westrail invested capital in the enhancement / upgrade of its railway system. Portman, through its freight charges since August 1994, has provided a return to Westrail of that capital expenditure and a rate of return on that investment. In other words, money expended by the Portman Group of Companies has significantly contributed to the development and maintenance of the railway infrastructure on the route.

At the time of entering into the Freight Agreement, the long term sustainability of the Portman iron ore mining operations at Koolyanobbing were uncertain. However, Portman, through its commitment under the Freight Agreement and commitment to its Koolyanobbing iron ore project has been a major contributor to the sustainability and improvements to the railway infrastructure on the route.

Additionally Portman has undertaken significant capital expenditure on assets and infrastructure which are related to or which depends upon the railway infrastructure. Without attempting to be exhaustive Portman has:

- developed the Koolyanobbing rail siding;
- underwritten the development of the Esperance port;
- developed the iron ore mining operations at Koolyanobbing; and
- acquired 225 railway wagons.

Prior to Portman's commitment to the development of the Koolyanobbing iron ore mine, the Kalgoorlie-Esperance route was not viable. Portman's development of the mine, with related infrastructure, and routing the transport of its iron ore through Esperance (rather than through Kwinana which was a viable option for Portman) and the commitment to the Rail Freight Agreement has ensured the continued viability of the Kalgoorlie-Esperance route when otherwise that may not have been ensured.

Over recent years, the long term sustainability of the mining operations at Koolyanobbing and to the north of Koolyanobbing have been proven. An essential element of the development of the iron ore resource at, or north, of Koolyanobbing is the ability to transport the iron ore to world markets in an efficient manner and at competitive costs.

Portman's has made significant commitments to and expenditure on the railway infrastructure which is related to and depends upon the appropriate level of access to the railway infrastructure. As a result, Portman's present needs for increased access to the railway system to accommodate a rational and foreseeable expansion of its iron ore mining project at Koolyanobbing, should justifiably be accommodated by the grant of access in accordance with its access proposal. Even if this had the effect of precluding other future access proponents from access to the route (which Portman denies would be the result) it is reasonable and appropriate that Portman be granted the increased access it requires.

Enclosed with this submission is a copy of Portman's Application to the National Competition Council for declaration of the railway system as an essential facility under Part IIIA of the *Trade Practices Act* 1974. This application contains details as to Portman's operations and its future plans which Portman asks the Regulator to consider in assessing whether or not to give his approval under section 10 of the Code.