

MEMORANDUM OF FURTHER SUBMISSIONS
PORTMAN IRON ORE LIMITED'S COMMENTS ON
WESTNET'S PROPOSED TRAIN MANAGEMENT GUIDELINES

General - access party and operator

1. As discussed in Portman's first memorandum on the Train Management Guidelines issued by WestNet Rail Pty Ltd ("**WestNet**") in November 2001 ("**First TMG Memorandum**"), the Train Management Guidelines ("**TMG**") must recognise and accommodate an arrangement where an access agreement is entered into by an entity which has the access rights under that agreement (ie Portman would prefer the term "access party" but it seems "the operator" has some currency) but who engages the services of another entity to carry on the rail operations (ie Portman would prefer the term "operator" for this entity, but "contractor" is also appropriate). Again, the Railways (Access) Code 2000 ("**Code**") allows and contemplates that type of arrangement (see in particular section 14 of the Code).

It is Portman's view that the recognition of the above concept is fundamental to the relationship between the rail owner and the entity that obtains access to the rail line and should be expressly recognised in the TMG. In this regard, we note the draft determination issued by the Regulator in relation to the TMG ("**Draft Determination**") recognises such an arrangement, where it is proposed, in relation to clause 6 of the TMG that "*access seekers and operators can at any time request the Regulator to consider amendments [to the TMG]*". In negotiations on the terms of an access agreement, WestNet has recognised the distinction, and agreed the following provision, which Portman submits must also be included in the TMG:

"WestNet and the operator may respectively appoint or engage any third party as its agent or contractor in relation to the exercise of any rights or the performance of any obligations under an Access Agreement and so long as either that party or its agent or contractor complies with the requirements of the Access Agreement, including being an Accredited Operator, or obtaining any other authorisation, approval, consent, permit or licence required by these Guidelines, the Train Path Policy, or an Access Agreement to be obtained or held by that party, the requirements of these Guidelines, the Train Path Policy or this Access Agreement will be taken to have been complied with by that party."

In addition to the inclusion of the above suggested words, Portman considers that clause 3(a) of the TMG should be amended by deleting the words "is an Accredited Operator" and inserting the word "accreditation".

Clause 2 - Definitions

2. The defined term "Government Lease" is used in clause 7.1.2 in the sense that the rights of access granted are subject to the provisions of the Government Lease. Again, Portman considers that this is not acceptable and restates its position as expressed in the First TMG Memorandum, that either the Government Lease must be made available for detailed consideration by proposed access parties, or the grant of access should not be made subject to the provisions of the Government Lease. We note that this issue has also arisen in the context of the negotiations in relation to the track access agreement between Portman and WestNet and WestNet has indicated that it is willing to remove from that

document the limitation on access rights by reference to the "Government Lease" and to warrant that there is nothing in the Government Lease (or any other document) that prevents WestNet from entering into and carrying out its obligations under the access agreement. Portman considers that this approach must be included in the TMG.

3. Portman notes the amendments suggested in the Draft Determination in relation to clause 2 which seek to improve the operation of the TMG. However, concerning the amendments to the definition of "Instructions" in particular, even if the TMG are amended as suggested by the Regulator, WestNet will still be allowed to retain a level of authority and discretion which is unnecessary and inappropriate. Generally, WestNet's obligations should be performed in accordance with the terms of access agreements and the TMG except for emergency and to ensure safety on the network. WestNet should not be given a discretion, within the general operation and administration of the network, allowing it to derogate from its contractual obligations except in emergency situations or to preserve safety. For this reason, paragraphs (g) to (k) of that definition must be deleted, and replaced with the words "are issued to prevent, or in response to, an emergency relating to safety".
4. Further, in the definition of "Train Control Directions", the word "management," in line 2 should also be deleted for the same reasons; WestNet should be obliged to manage its operations in a manner that will not require it to derogate from its contractual obligations to access parties except where this is required for emergency or safety reasons.
5. The examples of "Instructions" requested in the Draft Determination should be consistent with the above principles.

Clause 3 - Infrastructure Issues

6. Concerning clause 3, in line with the comments above that the TMG must recognise and accommodate an arrangement where the access party under the access agreement appoints another person as contractor to carry on the rail operations, it is the operator's contractor that must be the "Accredited Operator" and not necessarily the operator or access party under the access agreement.
7. Again, in clause 3(b):
 - (a) the words "The Operator must" should be added at the beginning as the last sentence of clause 3(b) applies to both (a) and (b); and
 - (b) the words "policies and practices of these Guidelines" should be added at the end of that sentence.
8. The references to service should have a capital "S" (see clause 3.1, line 1).
9. WestNet's management of the Services in clause 3.1 should be made subject to its obligations in clause 4.2 relating to allocation of priority to trains.
10. In clause 3.1(c), the reference should be to 15 minutes and not to 10 minutes.
11. The reference to operator should have a capital "O" consistently (see clause 3.1(d)).
12. Concerning 3.1 the distinction between a "healthy" and an "unhealthy" train should be introduced into that clause, to ensure that it operates effectively in relation to unhealthy

trains. Further, while the Draft Determination requires WestNet to define "on-time" (healthy) trains, "late" (unhealthy) and trains running "ahead" of time (see the amendments required in relation to clauses 4.2 and 4.3), the definition of an on-time or a "healthy train" should only be approved if it provides that it is a train that presents for departure on or within 15 minutes of the scheduled departure time and keeps within 15 minutes of its scheduled train path for the whole of the Service (except where delays to the train path are caused by WestNet).

13. It must be made clear in the TMG that the powers and discretions given to WestNet under clause 3.1 should not apply to an on-time or healthy train which should always get its scheduled train path, except for emergencies or to preserve safety.
14. Finally, there are a number of instances in the TMG where contractual matters are dealt with, which is inappropriate (eg. the exclusion of liability for WestNet and the operator, in the last 2 paragraphs of clause 3.1 of the TMG). Such matters should be dealt with in the access agreement between WestNet and the access party.

Clause 3.2 - Network blockage

15. Concerning clause 3.2, the following principles should apply to the regime proposed under clause 3.2, irrespective of whether the amendments to that clause, which are set out in the Draft Determination and which specify the matters that should be dealt with under the regime, are made:
 - (a) each access party using the Network should provide an indemnity against all costs and damages incurred by other access parties (including consequential damages) in respect of the failure by the train of the access party giving the indemnity, which blocks the passage of other trains;
 - (b) an access party whose train failed on the Network must pay WestNet for the service provided in assisting in the clearing of the failed train; and
 - (c) if a locomotive and crew of another access party is used on the instruction of WestNet to assist in clearing a Network blockage, the cost of that service is to be recovered from WestNet by the assisting party.

In negotiating with WestNet in relation to an access agreement, WestNet has indicated it is prepared to remove all its rights and powers relating to clearing blockages, and to rely upon the ad hoc assistance from operators as required. This would also be an acceptable approach. However, if that approach is not adopted and WestNet is to have powers to require assistance to be rendered, a fully detailed regime must be incorporated into the TMG, including those items mentioned in (a), (b) and (c) above.

Clause 3.4 - Operator and track consultation protocols

16. Clause 3.4 should contain a further clarification of WestNet's obligation to advise the operator of a Network failure or potential deviation from the scheduled train path. In this regard, WestNet should be obliged to notify the operator at the earliest possible time and, in any event, within 15 minutes of becoming aware of that failure or potential deviation.

Clause 4.1 - Real time allocation of train paths

- 17. Again, the terms "Working Timetables", "Special Train Notices", "Rail Access Management System", "Access Manager", "WestNet Customer Services Officer" and "Train Controller" used in clause 4.1 should all be defined unless they have a clear meaning in the industry in which case the terms should not be capitalised. Either way, an appropriate amendment to clause 4.1 should be required before the TMG are approved by the Regulator.

Clause 4.2 - Resolution of prioritisation scheduled to train paths or train

- 18. Concerning clause 4.2, the definitions of "healthy" trains or on-time trains suggested in paragraph 12 above should be used. Further, the word "network" should have a capital "N".

Clause 4.3 - General principles for train management

- 19. The revised matrix provided by WestNet in its letter of 12 February 2002 is not acceptable. Portman considers that the 4 empty boxes in the table in clause 4.3 should be completed as follows:

A or B Rule 2	A Rule 3
B Rule 1	A or B Rule 4

Again, in rule 4 the word "lose" should be replaced with "lost".

Clause 4.4 and 4.3 - Maintenance provisions and management of emergencies

- 20. The formatting of clause 4.4 is incorrect and reference should be made to clause 9.3 of WestNet's proposed standard access agreement.
- 21. While the Draft Determination directs WestNet to provide a more detailed description of its maintenance and possession management process, this process should be expressly made subject to the following principles:
 - (a) routine planned maintenance (including both cyclical maintenance and fettling) should not affect any scheduled train paths, except where maintenance is required in response to an emergency or to ensure safety after an incident (eg. track flooding etc or to ensure safety after an incident);
 - (b) WestNet's interference with access parties' scheduled train paths to conduct routine planned maintenance, whether cyclical maintenance or fettling, must be regarded as a breach of WestNet's obligations to the access parties (although WestNet will be able to seek the consent of access parties whose scheduled train paths may be affected by planned routine maintenance on an ad hoc basis if that

becomes necessary), because cyclical maintenance and fettling must be taken into account and scheduled when establishing the scheduled train paths; and

- (c) WestNet should be required to notify access parties well in advance of all routine planned maintenance.

The Regulator's comments that WestNet's approach to track possession and maintenance does not appear to be unreasonable, by comparison to, for example, ARTC does not seem appropriate as Portman understands that ARTC has a strong policy, consistently applied, to honour train path obligations to customers and to have track works subordinated to train paths except where absolutely unavoidable. Further, Portman does not see contracted individual access contracts as an appropriate means for addressing the detail of track possession and track maintenance practice because of WestNet's clear position of strength in negotiations. The ability to significantly affect the train paths of operators, and therefore the fundamental nature of service provided by WestNet, through maintenance including routine maintenance, is not something which shall be left for individual negotiation. The limitations on WestNet and the protection for the operators must be clarified on the TMG.

- 21.2 Concerning the rail Network maintenance standard to be imposed on WestNet under clause 4.4, the "safe and fit" standard accepted under the Draft Determinations is insufficient. Again, the appropriate standard should be the standard that is safe and fit *for the purpose of meeting WestNet's obligations under all existing and future access agreements*, being the standard required to maintain accreditation as a track owner. This standard should apply whether or not WestNet is technically required to be an "Accredited Owner".
- 22. In line with the comments above, the power of WestNet to give notice of speed and weight restrictions must be exercisable only in response to an emergency or to ensure safety on the Network.
- 23. Finally, the TMG should impose an express obligation on WestNet in relation to clauses 4.4 and 4.5, to restore the Network and to restore all trains to the scheduled train paths, as soon as is possible.

Clause 4.6 - Management of daily issues related to train operations

- 24. In clause 4.6, the reference should be to "WestNet Network Rules" as this is the term used in the proposed standard access agreement. As submitted in the First TMG Memorandum, as a general principle, the Regulator should not approve the TMG unless all documents that are incorporated by reference to or form part of the TMG ("**Incorporated Documents**") are available to all access seekers. In addition, Incorporated Documents must be approved by the Regulator in accordance with section 43 of the Code, as must be any subsequent amendments to Incorporated Documents. The TMG should also set out an appropriate mechanism for the Regulator to approve any subsequent amendments to Incorporated Documents.

Clause 5 - Disputes and performance monitoring

- 25. In line with the comments made in paragraph 1 above in relation to the distinction between the "access party" and the "operator, the reference to "Accredited Operator" in the first paragraph of clause 5 of the TMG, should be a reference to "operator" as it does not

matter whether the operator is or is not accredited, so long as the person performing the relevant services is.

- 25.1 The universal key performance indicators ("KPIs") relating to the Network should deal with at least the following:
- (a) the number of speed restriction and/or axle load restriction notices given by WestNet;
 - (b) the number of delays to scheduled train paths caused by WestNet in general operation;
 - (c) the number of times WestNet has used its emergency maintenance powers to interfere with scheduled train paths; and
 - (d) a general obligation to report on the performance of WestNet as lessee and operator of the track.
- 25.2 All reference to "access agreements" in clause 5, and generally should be capitalised as a defined term.
- 25.3 While the Regulator will determine the scope of the annual external audit ("**Audit**") the TMG should provide that the Audit must include all access parties operating on the Network during that year, WestNet and the Regulator.

Clause 6 – Consultation and review

26. The reference in clause 6 should be to "these Guidelines" rather than "this Guideline".
27. Clause 6 should provide expressly that any amendments to or replacement of the TMG must be approved by the Regulator as provided for in section 43 of the Code.

Clause 7 – Annexures

28. Concerning clause 7.1.2, as mentioned in paragraph 2 above, the limitation on the warranty as to the entitlement to grant the rights of access being subject to the provisions of the Government Lease is unacceptable. As previously submitted, WestNet must warrant unconditionally that it is able to enter into and carry out its obligations under all access agreements.
29. We also make the following comments in relation to clause 7:
- (a) the references to "access agreement" should be references to "Access Agreement" and the phrase "Train Control Centre" (which is also used in clause 3.1) should be defined (it is defined in WestNet's proposed standard access agreement);
 - (b) in clause 7.1.3(f), WestNet's obligation must be to provide the operator with details of operating incidents as soon as possible and, in any event, within 15 minutes of WestNet becoming aware of the incident;
 - (c) clause 7 and, in particular, clauses 7.1.3, 7.1.4 and 7.1.5 must be included in the access agreement whether or not they are included in the TMG;

- (d) in relation to clause 7.1.2, WestNet should be required undertake to, at all times, maintain accreditation as a track owner under the *Rail Safety Act 1998* and subordinate legislation;
- (e) the formatting is incorrect in clause 7.1.4 and reference should also be made to clause 5.4 of WestNet's proposed standard access agreement as to the correct formatting;
- (f) it would be more appropriate to replace the specific references to the standards mentioned in clause 7.1.4 with a generic reference to those standards required to be satisfied by the operator to maintain its accreditation;
- (g) the terms "access term", "Train Crew" and "Operator's Procedures" used in clause 7.1.5 must be defined. The term "Instruction 141", which is contained in the Appendix to the WestNet Rules should be defined by reference to that document;
- (h) in clause 7.1.6(e), the reference to "this access agreement" is incorrect. The reference should be to "these Guidelines or any Access Agreement";
- (i) Concerning clause 7.1.6(h), WestNet must be obliged to either obtain the consent of access parties to an upgrade of equipment which will require expenditure by the access parties to ensure continuing compatibility, or compensate the access parties for the cost of upgrading to equipment which is compatible with WestNet's upgraded equipment;
- (j) In clause 7.2.1, the phrase "Dangerous Goods Code" should defined. Further, a regime should be established under which access parties can give an undertaking to WestNet that they will, at no time, carry dangerous goods, which should then exonerate that access party from any of the procedures or notifications under or relating to the Dangerous Goods Code; and
- (k) the terms "Environmental Condition" and "Environmental Damage" used in clause 7.2.3 should be defined by reference to WestNet's proposed standard access agreement, in which they are also used.

The above amendments should be made before the TMG are approved by the Regulator under the provisions of the Code.