

MEMORANDUM

PORTMAN IRON ORE LIMITED'S COMMENTS ON WESTNET'S PROPOSED TRAIN MANAGEMENT GUIDELINES

1. The Train Management Guidelines ("**Guidelines**") are based upon the concept that the access agreement is entered into by an operator and WestNet which governs access for the operator to run services on the network. The Railways (Access) Code 2000 ("**Code**") allows and contemplates that the entity which has the access rights under an access agreement may engage the services of another entity to carry on the rail operations (see in particular section 14 of the Code). The Guidelines must be amended to expressly accommodate arrangements under which the entity which enters into the access agreement with WestNet, and which has the access rights (the "**access party**"), may contract the rail operations to another entity. It is the entity carrying out the rail operations (the "**operator**") (which may also be the access party) which must, be and remain accredited under the *Rail Safety Act 1998*. The access party should be able to remove and appoint other entities to carry on the rail operations, as operator during the term of the access agreement provided they meet the requirements for an operator. The access party may in fact contract different aspects of the rail operations to different persons, provided these persons are each appropriately accredited for the aspects of rail operations they are contracted to carry out eg the person contracted to supply and maintain locomotives may be different to the person contracted to service rolling stock.
2. The defined term "Government Lease" is used in clause 7.1.2 so that the rights of access granted are subject to the provisions of the Government Lease. 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.
3. The level of authority and discretion given to WestNet in the Guidelines is unnecessary and inappropriate. Generally, WestNet's obligations are to be performed in accordance with the terms of access agreements and the Guidelines except for emergency and to ensure safety on the network. WestNet must not have discretions within the general operation and administration of the network which allow it to derogate from its contractual obligations except in emergency situations or to preserve safety. Specifically, in the definition of "Instructions":
 - in (b) delete the words "WestNet considers upon the exercise of reasonable care"; and
 - delete (j).Also in the definition of "Train Control Directions":
 - delete "management," in line 2; and
 - in (a) delete the words "considered by WestNet upon the exercise of reasonable care to be".
4. There are a large number of typographical and formatting errors in the document which we will comment upon without necessarily mentioning them all. For example, in the

definition of "Network" the references to "areas" in 2 places should be references to "access".

5. In the definition of "Operator" the words "see definition" are meaningless.
6. There are a number of terms used in the Guidelines which are not defined. These same terms are used in the standard access agreement issued by WestNet, and are used in the same context in the Guidelines. Definitions should be provided for all of these terms and we will point them out in the context of the Guidelines.
7. Concerning clause 3, as previously mentioned, the Code allows the access party under the access agreement to appoint another person as operator to carry on the rail operations. It is the person contracted to carry on the rail operations as operator that must be the "Accredited Operator" and not necessarily the access party under the access agreement.
8. In clause 3(b) the words "The Operator must" should be added at the beginning. The last sentence of clause 3(b) applies to both (a) and (b) and the formatting is accordingly inappropriate. The words "policies and practices of these Guidelines" should be added at the end of that sentence.
9. The references to service should have a capital "S" (see clause 3.1, line 1).
10. 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.
11. In clause 3.1(c), the reference should be to 15 minutes and not to 10 minutes.
12. The reference to operator should have a capital "O" consistently (see clause 3.1(d)).
13. Concerning 3.1 generally, the concept and definition of a "healthy train" must be incorporated into the Guidelines. A healthy train is one which 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). The powers and discretions given to WestNet under clause 3.1 should not apply to a healthy train which should always get its scheduled train path, except for emergencies or to preserve safety. It is only if a train is unhealthy that WestNet may exercise the powers given to it to operate the Network in such a way that changes the unhealthy train to a healthy train and maximises the continuity of operations on the Network, for all users.

Generally, if the distinction between healthy and unhealthy trains is introduced into clause 3.1, the provisions of that clause will operate effectively and well in relation to unhealthy trains.

14. There are a number of instances in the Guidelines where contractual matters are dealt with, which is inappropriate given the nature and role of the Guidelines. For example, the exclusion of liability for WestNet and the operator is inappropriately dealt with in the last 2 paragraphs of clause 3.1 of the Guidelines and these matters should be dealt with in the access agreement between WestNet and the access party. In this respect it would be reasonable that the access party (and its operator or other subcontractors if appropriate) is indemnified against liability incurred in following WestNet's lawful and binding Instructions given under the Guidelines or the access agreement, and this is a matter which will be required to be dealt with in the access agreement when that is negotiated.

15. Concerning clause 3.2, a cost recovery and charges regime must be established to support the arrangements set out in this clause. If a locomotive and crew of an access party is used on the instruction of WestNet to assist in clearing a Network blockage, then the cost of that service should be recovered from WestNet. In conjunction, the access party whose train failure blocked the passage of trains, must pay WestNet for the service provided in assisting the clearing of the failed train. In addition, the regime should also provide for an indemnity by the party whose train failure caused the blockage against all costs and damages incurred by other access parties, including consequential damages.
16. WestNet's obligation under clause 3.4 to advise the operator of a network failure or potential deviation from the scheduled train path must be at the earliest possible time and, in any event, within 15 minutes of WestNet becoming aware of that failure or potential deviation.
17. In clause 4.1, the terms "Working Timetables", "Special Train Notices", "Rail Access Management System", "Access Manager", "WestNet Customer Services Officer" and "Train Controller" should all be defined unless they have a clear meaning in the industry in which case the terms should not be capitalised.
18. Concerning clause 4.2, the new definitions of healthy and unhealthy trains previously suggested should be used. An unhealthy train is one which enters the network late or loses time en route through the fault of the operator and not of WestNet. These new definitions will also overcome the uncertainty created by the use of the term "late" in clause 3.1, which is not defined. Further, the word "network" should have a capital "N".
19. The 4 empty boxes in the table in clause 4.3 need to be completed as follows:

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

Further, in rule 4 the word "lost" should be the word "lose".

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. The scheduled train paths should not be affected by any routine planned maintenance including both cyclical maintenance and fettling. Only where maintenance is required in response to an emergency, such as track flooding etc or to ensure safety after an incident, should any maintenance undertaken by WestNet affect scheduled train paths. 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 because cyclical maintenance and fettling must

be taken into account and scheduled when establishing the scheduled train paths. WestNet can, of course, seek to obtain 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. To ensure that it complies with its obligation not to interfere with scheduled train paths, WestNet should also notify access parties well in advance of all routine planned maintenance.

22. In clause 4.4, the obligation upon WestNet to maintain the Network should be to the standard that is safe and fit for the purpose of meeting WestNet's obligations under all existing and future access agreements. The standard is the standard which is required to maintain accreditation as a track owner and this should be specified as the maintenance standard under the Guidelines, whether or not WestNet is technically required to be an "Accredited Owner".
23. 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.
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, and the term should be defined. A copy should also be made available to access parties and prospective access parties. However, as a general principle, the Regulator should not approve the Guidelines unless all documents that are incorporated by reference to or form part of the Guidelines ("**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 Guidelines should also set out an appropriate mechanism for the Regulator to approve any subsequent amendments to Incorporated Documents.
25. In relation to both clauses 4.4 and 4.5, WestNet must be under an obligation to restore the Network, and to restore all trains to the scheduled train paths, as soon as is possible.
26. In the first paragraph of clause 5, the reference to "Accredited Operator" should simply be a reference to "operator" as it may or may not be a separate obligation that the operator be accredited.

Certain universal key performance indicators relating to the Network generally should be established and recorded in the Guidelines, with an obligation upon WestNet to report its performance as against those indicators to the Regulator on a regular basis. The indicators should deal with at least the following:

- the number of speed restriction and/or axle load restriction notices given by WestNet;
- the number of delays to scheduled train paths caused by WestNet in general operation;
- the number of times WestNet has used its emergency maintenance powers to interfere with scheduled train paths; and
- a general obligation to report on the performance of WestNet as lessee and operator of the track.

Specific key performance indicators relevant to each access agreement should, of course, be included in that particular access agreement.

There are a number of references to access agreements in clause 5, and generally which should be capitalised as a defined term.

27. The reference in clause 6 should be to "these Guidelines".
28. A review of the Guidelines should be carried out within one year of the later of the date on which they first approved by the Regulator or the date on which an access party first commences operations on the Network under an access agreement. The review should include all access parties operating on the Network during that year, WestNet and the Regulator. Any amendments to or replacement of the Guidelines must be approved by the Regulator as provided for in section 43 of the Code.
29. In clause 7.1.2, as previously mentioned, the limitation on the warranty as to the entitlement to grant the rights of access (as being subject to the provisions of the Government Lease) is unacceptable unless access parties are given the opportunity of ensuring there is nothing inconsistent with the access rights contained in the Government Lease.
30. In clause 7, there are references to "access agreement" which should be a reference to the "Access Agreement" and the phrase "Train Control Centre" has not been defined.
31. 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.
32. The content of 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 Guidelines.
33. Concerning clause 7.1.2, WestNet must also undertake to, at all times, maintain accreditation as a track owner under the *Rail Safety Act 1998* and subordinate legislation.
34. Concerning clause 7.1.4, the formatting is incorrect and reference should again be made to clause 5.4 of WestNet's proposed standard access agreement as to the correct formatting. As a general comment, the specific references to the standards mentioned in clause 7.1.4 could be replaced by a generic reference to those standards required to be satisfied by the operator to maintain its accreditation.
35. In clause 7.1.5, the terms "access term", "Train Crew" and "Operator's Procedures" are required to be defined. The term "Instruction 141" should be defined by reference to the Appendix to the WestNet Rules, in which it is contained.
36. In clause 7.1.6(e), there is an incorrect reference to "this access agreement". The reference should be to "these Guidelines or any Access Agreement".
37. 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.

38. In clause 7.2.1, the phrase "Dangerous Goods Code" is not defined. A regime should be established whereby 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.
39. In clause 7.2.3, the terms "Environmental Condition" and "Environmental Damage" should be defined. They are defined in WestNet's proposed standard access agreement.