

MEMORANDUM

PORTMAN IRON ORE LIMITED'S COMMENTS ON WESTNET'S PROPOSED TRAIN PATH POLICY

1. The defined term "Government Lease" does not appear to be used in Westnet's proposed train path policy ("**the Policy**"). In any event, the commitments of WestNet under the Policy must not be subject to the Government Lease unless the Government Lease is made available to access parties so that they can assure themselves that the rights under Access Agreements and to the scheduled train paths are valid and not inconsistent with WestNet's rights and powers under the Government Lease.
2. The definition of "Network" should read as follows:

"means that part of the track and infrastructure controlled by WestNet, access to which has been granted to an Access Party to operate Services under an Access Agreement".
3. The person to whom access is granted under the access agreement ("**access party**") need not be the operator of the rail services and this distinction needs to be accommodated in the Policy. The access party may contract the carrying out of the rail operations to a rail operator and it is the rail operator which must be appropriately accredited. Different aspects of the rail operations may be contracted by the access party to different persons, provided each of these persons is appropriately accredited.
4. Concerning clause 3.1, the existing contractual arrangements for access in place at 1 September 2001 must include access arrangements (whether formal or informal) between WestNet and AWR where it has been agreed that another party will become the access party in substitution for AWR in relation to the train paths presently used by AWR to provide contracted rail services for that party. The relationship between that access party and AWR (as the rail operator of that access party) will be established contractually between those parties separate to the access arrangements.
5. Concerning clause 3.2 and the definition of "master control diagram" the pooling diagram also needs to be defined and mentioned in the Policy. What is established in a reasonably permanent way, and what remains flexible, in relation to locomotive and rolling stock movements and train crew movements as well as in relation to train path schedules, needs to be identified with some clarity under the master control diagram and the pooling diagram. The Policy should be based upon that distinction (ie what is established and must be adhered to under the master control diagram and the pooling diagram; and the areas in which WestNet may have discretion to add train paths, create additional train paths and use unscheduled train paths).
6. The concepts of scheduled train paths, unscheduled train paths and conditional train paths need to be clarified, as it appears that there is inconsistency between the definition of those terms and the manner in which those terms are used in clause 3.2. The following should be established:
 - Scheduled train paths are the established rights of the access party to use a train path on the Network between the times and between the locations set out in the access agreement, which will be also reflected in the master control diagram.

- Conditional train paths are train paths which entitle the access party to use the Network between agreed locations and at agreed times (which do not conflict with scheduled train paths) upon the happening of some prescribed condition (or circumstance) and which may be seasonal or vary over time or which otherwise may be preconditioned by the need for use. These are recorded on the master control diagram.
 - Unscheduled train paths are either conditional train paths or scheduled train paths which are not being used by the relevant access party and can be granted to another access party by WestNet subject to the entitled access party using that train path if it wishes to.
7. In clause 3.3, there must be an overriding requirement that WestNet only give the type of Instruction which is necessary to achieve the outcome for which the direction is being given; in other words the Instruction which WestNet is entitled to give must be appropriate to prevent the occurrence of one or more of the matters listed in items (i) to (v), which is at risk of occurring.
 8. The formatting of clause 4 is incorrect and reference should be made to clause 9.2 of WestNet's proposed standard access agreement for the appropriate formatting.
 9. Issues under the Policy which may give rise to disputes and which should be referred to the disputes resolutions procedures of Part 3 of the Access Code should be identified in each relevant place on the text of the Policy. For example, if a party believes that the withholding of consent to a variation to a scheduled train path is unreasonable, that party should have the right to refer that issue to arbitration under the provision of Part 3 of the Code and this should expressly be referred to in clause 3.4.
 10. Concerning clause 3.5, all planned routine maintenance, including cyclical maintenance and fettling should be taken into account and scheduled in establishing the scheduled train paths. WestNet must not be able to affect scheduled train paths for planned routine maintenance and must only be able to do so for emergency maintenance and to ensure the continued safety of the Network. However, the requirement that WestNet consult with the operator "a reasonable time" before taking possession of the Network to carry out routine maintenance is too uncertain and a specified time should be provided.
 11. Clause 3.6 must establish that:
 - the removal of train paths for under-utilisation does not apply to conditional train paths unless the access party persistently fails to use a train path in circumstances where the prescribed condition has been applicable;
 - WestNet must cancel a train path if it meets the tests as to under-utilisation established in clause 3.6 and WestNet has no discretion in the matter where the train path can be used by a third party requiring access or increased access;
 - cancellation of trains in accordance with an access agreement by an access party is not be regarded as under-utilisation;
 - under-utilisation caused by force majeure applying to an access party does not result in removal of a train path. Force majeure includes anything beyond an access party's control including full stockpiles, weakening of market demand etc.

- WestNet may cancel a train path if an access party loses the contract to carry freight for a customer, and re-assign the train path to a new access party that has capacity to utilise that train path (eg the access party who has won the new contract to carry the customer's freight). This will give parties wishing to gain access more certainty when bidding for contracts to carry freight on the Network.
12. Concerning clause 3.7 the concept of "three month history" is inappropriate and should be removed. The review should be undertaken by comparing the access party's contracted scheduled train paths with its current and expected reasonable business requirements. To the extent that a concept similar to the "three month history" is retained, the differences between the three month history and the access party's contracted scheduled train paths that have been caused or contributed to by WestNet will not be taken into account in the review; in other words the review is only to be undertaken if the operator's performance has caused the differences between the three month history and the contracted scheduled train paths. Further, the access party should have, at the highest, an obligation to consult with WestNet in relation to a review of scheduled train paths rather than an obligation to negotiate in good faith.
 13. Concerning clause 3.8 the Policy should contemplate that particular access parties may have individual circumstances requiring it to be entitled to cancel services in addition to the general rights of cancellation, which can be detailed in the individual access agreement. For example, in the case of Portman Iron Ore Limited the matters set out in (c) and (d) will be required to be expanded for the purposes of its access agreement with WestNet.
 14. The references in the Policy to access applications being made outside the Code must be removed. All access applications and access agreements must be undertaken and entered into in accordance with the Code so that there is complete consistency between the rights and obligation of WestNet and the rights and obligations of all access parties. The train management guidelines, the train path policy and the terms of the standard access agreement should apply consistently to all parties so that the master control diagram, the pooling diagram and scheduled train paths, conditional train paths and unscheduled train paths operate effectively.
 15. To promote competition effectively amongst access seekers, the Policy must provide appropriately for the awarding of train paths by WestNet. An access seeker should not be awarded a train path merely because it is the first access seeker to request access to that train path. This will encourage access seekers to request access to train paths to prevent access to that train path by a competitor. The Policy must therefore also provide that WestNet will initially only provide letter of intent to each access seeker in relation to the allocation of train paths, with allocation of each train path to be confirmed by WestNet only when the access seeker is able to establish that it has the capacity to utilise that train path.
 16. There are a number of formatting errors in the Policy and also a number of typographical errors. Without attempting to capture them all:
 - clause 3.5 should be reformatted (refer to clause 9.3 of the Proposed Standard Access Agreement;
 - in clause 4.2 second line of the last paragraph, the word should be "undertake".

17. In clause 4.2 the principle that scheduled train paths are protected and are not to be interfered with should be stated.
18. The Policy should be reviewed within one year of the later of the date on which it is 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 as provided for in section 43 of the Code.