

MEMORANDUM OF FURTHER SUBMISSIONS

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

1. As discussed in Portman's first memorandum on the Train Path Policy issued by WestNet Rail Pty Ltd ("**WestNet**") in November 2001 ("**First TPP Memorandum**"), the Train Path Policy ("**TPP**") must recognise and accommodate an arrangement where an access agreement is entered into by an entity which has the access rights under an access 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 TPP. In negotiations on the terms of an access agreement, WestNet has recognised the distinction, and agreed the following provisions, which Portman submits must also be included in the TPP:

"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 this Policy, that the Train Management Guidelines, or the Access Agreement to be obtained or held by that party, the requirements of this Policy, the Train Management Guidelines or the Access Agreement, will be taken to have been complied with by that party."

Clause 2 - Definitions

2. WestNet has not provided a revised definition of "Network" in its letter dated 18 April 2002. In this regard, Portman considers that the appropriate 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".

Clause 3.1 - Master Train Plan

3. 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 Australian Western Railroad Pty Ltd ("**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. This is the case, for example between AWR, WestNet and Portman, and it must be ensured that Portman is regarded as the person entitled to access to all its relevant train paths, in the Master Control Diagram.

The relationship between that access party (in this case Portman) and AWR (as the rail operator of that access party) will be established contractually between those parties separate to the access arrangements.

Clause 3.2 – Allocation of train paths

4. The TPP must make it clear that once a train path has been allocated it is sacrosanct, and cannot be varied by WestNet, other than in accordance with the TPP, the Train Management Guidelines, or the Access Agreement for safety or in emergency situations.
5. There are some discrepancies in the definitions proposed by WestNet relating to train paths, for example not all passenger trains have fixed intervals in between, and not all freight trains have no intervals in between. However, depending upon the detailed wording, the approach to the categories of train paths is acceptable.

Clause 3.3 – Temporary variations

6. Concerning clause 3.3, Portman is concerned with how WestNet may be able to use its power to vary train paths. Accordingly, there should 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) of the TPP, which is at risk of occurring.

Clause 3.5 – Repairs, maintenance and upgrading

7. Although the draft determination issued by the Regulator in relation to the TPP ("**Draft Determination**") directs WestNet to commit to provide operators with a time profile of the works to be undertaken and the length of potential disruptions, it is important to also specify that all planned routine maintenance, including cyclical maintenance and fettling should be taken into account and scheduled in establishing the scheduled train paths. While the Regulator will have the power to consider whether WestNet has breached the provisions of Section 34A of the Act which deals with conduct aimed at hindering or preventing access, it may be difficult to establish that WestNet has "unjustifiably disrupted the train paths of one operator more than another operator". Further, a "remedy" provided by a decrease in service levels causing a lowering in the tariff ceiling is not a helpful or expeditious remedy. Access parties need the certainty that their train paths will be available except in emergencies or for the preservation of safety. Instead, there should be an express acknowledgment by WestNet that it will not be able to affect scheduled train paths for planned routine maintenance, except where emergency maintenance is required and to ensure the continued safety of the Network. Further, 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.

Clause 3.6 – Removal of train paths

8. Concerning clause 3.6, Portman still considers that it must be amended to clearly establish that:
 - (a) 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;

- (b) 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;
- (c) cancellation of trains in accordance with an access agreement by an access party is not be regarded as under-utilisation;
- (d) 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. This is covered to a significant degree on the present TPP but not completely and should be put beyond doubt in the TPP; and
- (e) 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. The Regulator has made suggestions which are consistent with the general approach, but Portman considers the transfer of access rights to the relevant train paths in these circumstances must be spelled out in detail.

Clause 3.7 – Review of scheduled train paths

- 9. While the directions made under the Draft Determination are consistent with Portman's concern, expressed in the First TPP Memorandum, that any differences between the three month history and the access party's contracted scheduled train paths that have been caused or contributed to by WestNet should be taken into account in the review, Portman still believes the concept of "three month history" to be inappropriate in that it is not required to be undertaken by comparing the access party's contracted scheduled train paths with its current and expected reasonable business requirements, as was submitted in the TPP Memorandum. Further, in undertaking the review, only under utilisation which is within the control of the operator should be considered, eg matters contributed to by WestNet, or other operators, should be excluded.
- 10. Further, the access party should have an obligation to consult with WestNet in relation to a review of scheduled train paths. It should not be subject to an obligation to negotiate in good faith.

Clause 3.8 – Cancellation of services using scheduled train paths

- 11. Concerning clause 3.8, it is important, in the interest of promoting competition effectively amongst access seekers, that the TPP should provide appropriately for the awarding of train paths by WestNet. For example, 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. As submitted in the First TPP Memorandum, this will encourage access seekers to request access to train paths to prevent access to that train path by a competitor. Therefore, the TPP should provide that:
 - (a) initially, WestNet will only provide letter of intent to each access seeker in relation to the allocation of train paths; and

- (b) the allocation of each train path will be able to be confirmed by WestNet only when the access seeker is able to establish that it has the capacity to utilise that train path.

Clause 4 – Information required for allocation of train paths

- 12. 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.

Clause 4.2 – Variation

- 13. Concerning clause 4.2:
 - (a) the principle that other operators' scheduled train paths are protected and are not to be interfered with should be expressly stated; and
 - (b) in the second line of the last paragraph, the word should be "undertake" not "undertakes".

Clause 9 – Regulator's approval required

- 14. Concerning clause 9, it should expressly state that the annual independent external audit will include all access parties operating on the Network during that year, WestNet and the Regulator (consistently with the provisions of section 43 of the Code).