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## **SECTION 10: Determination of application for access by Portman Iron Ore Ltd**

Dear Dr. Michael,

WestNet Rail is responding to comments made by ALCOA and Portman Ltd over the intent and interpretation of Section 10 of the Railways (Access) Code.

They both argue that railway capacity can easily be augmented through capital expenditure on the existing network, such as through the addition of new crossing loops. In particular:

- ALCOA argue that Section 10 should only apply where it is technically infeasible to augment capacity.
- Portman argue that Section 10 is redundant because of provisions in the Competition Principles Agreement. Arbitration of disputes must account for section 6(4) j of this agreement, which states that an owner may be required to extend a facility provided that, essentially, it is economically feasible to do so.
- Portman go on to argue that “this fundamental right of access proponents to have extensions and or enhancements made to the railway system” would effectively mean that no access proponent would ever use the available capacity.

From a legal perspective, our submission is that section 10 is very clearly drafted, and must be given effect in accordance with the plain words used. Once an owner forms the view that the proposal may in effect preclude access to other entities, the regulator must make a determination under section 10, based on the existing capacity of the infrastructure as it exists at the time of the application. Clear words would have been used if it had been intended that the owner be required to take into account railway infrastructure that does not presently exist.

The regulator cannot rely on the potential for the capacity to be increased by negotiations under the code or indeed on some predetermined view of the potential outcome of arbitration. The arbitration provisions may (in some circumstances) lead to an outcome that included an increase in capacity but the arbitration outcome is not binding on the access seeker and therefore the process could lead to an outcome where the arbitrated allocation of costs are not acceptable to the access seeker or indeed an outcome where the costs exceeds the benefits and the extension is simply not viable.

WestNet Rail submits that the purpose of Section 10 is to protect the public interest in access to existing railway infrastructure. We provide examples below as to where the provisions under Section 10 can serve the public interest.

The main basis for our argument is that, while we accept the point that railway infrastructure can in some circumstances be expanded to meet additional demand, the nature of costs in expanding infrastructure are not “marginal” ones in the economic sense, but instead are rather “lumpy” ones involving discrete investment decisions. Not all expansions are technically, or economically, viable.

In any event, Alcoa’s argument that section 10 only applies where capacity expansion is “technically infeasible” is impossible to apply in practice; when is expansion “technically infeasible”, and what account is to be taken of the fact that the cost involved might make the expansion economically unviable?

The nature of costs may give rise to situations where the public interest would not be served by allowing purely bilateral negotiations over access, when demand is close to the capacity of the existing network. Consider the following examples:

1. There may be a situation where there are a number of potential users unable to pay the full cost of expansion, but are willing to pay more than the floor price to access the remaining (existing) capacity. If the access proposal involves using up remaining capacity, then it is in the public interest to consider the potential demand by other users. If there are more potential users than remaining capacity, then a situation may arise where questions of rationing must be considered. Without section 10, the public interest would not be served as the potential need for rationing would not be signalled without the public consultation process surrounding the “near capacity” access proposal.
2. Similarly, in cases where capital expansion is warranted in order to grant the new access proposal, the process involved under Section 10 allows for other parties to express interest in potential access. This will subsequently assist in determination of appropriate capital expansion and pricing structures to satisfy foreseeable demand. Again, based on the argument that expansion investments are “lumpy” (and there are economies of scale in making larger incremental investments in capacity), a public process concerning expressions of potential interest in railway capacity is in the public interest.

In summary, the regulator must consider the public interest based on the existing infrastructure, taking into account the interests of existing and potential users of the line and the economic costs that may be imposed on those users as well as the proponent. The arguments of Alcoa and Portman would defeat the intention of section 10 to protect the interests of other potential users, and thus, the public generally. Section 10 would effectively be rendered meaningless.

There are a number of other issues raised in the submissions and we respond as follows;

- Portman have referred to section 12 (6) of the Rail Freight System Act and suggests that there is an obligation on WestNet under that Act for WestNet to increase the capacity of the line. WestNet’s and Portman’s views on the application of that section of the Act differ (WestNet regards section 12(6) as requiring, in certain circumstances, improvements to the standard of the line, rather than an increase in capacity) but in any event WestNet argues that that is not a matter for the Regulator to take into account. The question is whether WestNet has formed the view that the effect of the Portman application is that it may preclude access to other entities based on the capacity that exists at the time of the application.

- Whilst there are theoretical train paths available WestNet believes that there is a need to consider whether they are useable train paths, as most operators will need connecting paths from or to other routes to achieve an effective train path. This applies in the case of Portman's own trains as available trains paths on the Kalgoorlie/Esperance line are only effective if there are continuous paths available between Koolyanobbing and Kalgoorlie.
- WestNet's view is that the requests of tourist train operators could be reasonably met with the existing capacity but regular commuter services would be problematical. We are however, unaware of any reasonable plans to operate regular commuter services.
- We note the concerns of other operators (in particular Shell and WMC) about the potential effect of surge capacity and increased costs if they had to pay higher access fees to meet expanded capacity. These are matters that will require your consideration.
- It is important to ensure that the grain train pathways are given active consideration. Whilst they only operate at the southern end of the line they are nevertheless critical to the industry. WestNet is aware that the grain industry plans to upgrade Grass Patch and the potential for grain production in the area to expand is good.
- Section 10 is not capable of being made "redundant" by clause 6(4)(j) of the Competition Principles Agreement. Section 10 is part of the legislative response subsequent to, and in consequence of, that Agreement (and which Agreement does not, of itself, have any status as law).

#### Conclusion.

WestNet believes that section 10 requires the Regulator to make a determination, in accordance with the Code to protect the public interest. That determination must be made taking into account the public interest and (both as a matter of statutory construction and logic) can only be based on the existing capacity of the infrastructure. Far from the request being ill conceived, we believe that the public process and the determination is the correct application of the provisions of the code. We accept that the public process has not identified any other significant potential users of the line but a decision based on the ability to increase capacity needs to be tempered by the fact that there is no automatic right to have that capacity increased, and nor is it inevitable that capacity increases will be economically viable.

I would be happy to provide further information.

Yours sincerely

T. W. Ryan  
General Manager