BROCKMAN MINING AUSTRALIA PTY LTD

Ref: O10_0356

4 July 2013

Economic Regulation Authority
Level 4, Albert Facey House
469–489 Wellington Street
PERTH WA 6000

Attention: Mr Jeremy Threlfall
Assistant Director Rail

By Email and Mail

Dear Jeremy,

Submission on section 10 of the Railways (Access) Code 2000 (WA)

I refer to the publication by the Economic Regulation Authority (ERA) of a notice seeking public consultation on the request under section 10 of the *Railways (Access) Code 2000* (WA) by The Pilbara Infrastructure Pty Ltd.

Brockman Mining Australia Pty Ltd is pleased to have this opportunity to comment on behalf of Brockman Iron Pty Ltd and our submission is attached.

This submission is provided without any confidentiality restriction and with the expectation that the submission will be published on the ERA website as part of the public consultation process.

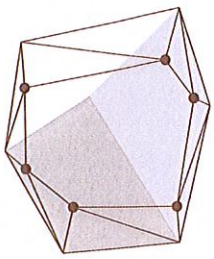
Yours sincerely,

Graeme Carlin
General Counsel
Brockman Mining Australia Pty Ltd.

c.c.
Mr Rob Pullella
Executive Director Access

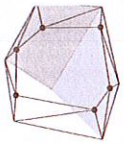
BROCKMAN

BROCKMAN MINING AUSTRALIA PTY LTD



Submission to the Economic Regulation Authority – Notification under section 10(1) by The Pilbara Infrastructure (TPI)

4 July 2013



1. INTRODUCTION

Pursuant to a "Proposal for Access to a part of TPI Rail Infrastructure" lodged on 15 May 2013 (**Access Proposal**), Brockman Iron Pty Ltd (**Brockman**) seeks access to part of the below-rail infrastructure owned by The Pilbara Infrastructure Pty Ltd (**TPI**).

Brockman is seeking access to TPI's below-rail infrastructure in order to allow it to haul up to 20 Mtpa of iron ore from its Marillana Iron Ore Project, to Port Hedland. The Access Proposal seeks access for a term of 20 years, commencing in late 2016.

Access to the relevant rail infrastructure is governed by the provisions of the *Railways (Access) Act 1998* (WA) (**Act**) and the *Railways (Access) Code 2000* (WA) (**Code**).

Section 10(1)(b) of the Code requires the approval of the Economic Regulatory Authority (**ERA**) before negotiations can be entered into in relation to an access proposal, in circumstances where:

> '...*the railway owner considers that it would involve the provision of access to railway infrastructure to an extent that may in effect preclude other entities from access to that infrastructure*...'

TPI has notified the ERA that it considers that the Access Proposal may preclude other entities from accessing its below-rail infrastructure.

If section 10 applies to the present circumstances, the ERA's approval is required before negotiations can be entered into in relation to the Access Proposal.

This submission is made by Brockman in support of its submissions that:

(a) the provisions of section 10 are not enlivened, and the ERA should determine that its consent is not required as a precursor to negotiations in the present circumstances; and

(b) in the event that either the ERA determines that section 10 applies in the present circumstances or that it proposes to formally respond to TPI's notification under section 10 of the Code in any event, that it approve negotiations on the Access Proposal, pursuant to section 10(1)(b) of the Code on the basis that the access sought will not "preclude other entities from access to that infrastructure".

2. INTERPRETATION OF SECTION 10

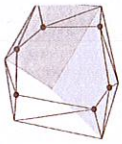
Section 10 does not apply in the present circumstances

The Code clearly contemplates scenarios where a request for access might necessitate an extension or expansion of existing infrastructure in order to accommodate the access sought. In those circumstances, the Code provides mechanisms by which additional capacity can be developed to accommodate the additional usage.[1]

Inherent in this concept is a recognition that an access proposal which sought to utilise all remaining capacity (or even an amount of capacity in excess of that available) should, and could, be the subject of negotiation between the parties.

In Brockman's submission, the reference in s10(1)(b) to "*preclude other entities from access to that infrastructure*" must therefore mean something more than simply utilising

[1] Railways (Access) Code 2000 (WA), section 8(4), s 15(2).



the existing infrastructure (regardless of whether or not that infrastructure has surplus capacity, even taking the access being sought into account).

The appropriate threshold for the application of section 10 of the Code is whether the utilisation of the infrastructure is likely to preclude other entities from being able to access that infrastructure in absolute terms, rather than where it remains possible to expand that infrastructure (i.e. in any technically feasible configuration, the access sought will preclude any further access because the infrastructure cannot be expanded further).

Accordingly, where, because of the access sought, the utilisation of the infrastructure simply deprives others from using that infrastructure for a specific time and at a given configuration, then it is not precluding other parties from accessing the infrastructure for the purposes of section 10 of the Code.

In Brockman's submission, the burden rests on the access provider – here, TPI - to demonstrate why the Access Proposal results in "*other entities* [being precluded] *from access to* [the relevant] *infrastructure*". TPI has presented no material to support that conclusion.

Further, Brockman is firmly of the view that there is no logical basis for the implicit assertion underpinning TPI's section 10 request.

It is appropriate for TPI to bear the burden of proof because:

- TPI has made the assertion that the Access Proposal will preclude other entities from access to its infrastructure - it should prove why this is in fact the case; and
- TPI is best placed to provide the ERA with information on the technical feasibility of expanding its infrastructure. This will allow the ERA to develop a more informed view on the matter and assess in fact whether there is any basis to the assertion put by TPI.

If TPI cannot demonstrate that its below-rail infrastructure is structurally incapable of being expanded, section 10 of the Code is not enlivened.

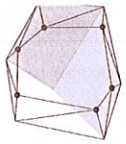
For the above reasons, Brockman submits that section 10 has no application in the present circumstances.

How the ERA should apply section 10 if it determines that it applies in the present circumstances

In making a decision under section 10, the ERA may be informed in any manner it sees fit, but must take into account:

- any submission relevant to the decision;
- the public interest; and
- any other relevant matter.[2]

[2] Section 10(4) of the Code.



Where section 10 applies, it should be interpreted in a manner that is consistent with the objectives and purpose of the Act and the Code of:

> *'establishing an access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations.'*[3]

Given that any decision by the ERA not to approve negotiations on an access proposal would deprive an access seeker of any entitlement to negotiate access (including the right to negotiate to develop additional capacity on a commercial basis in circumstances where existing capacity constraints necessitated such a discussion), the ERA should only refuse to approve negotiations on an access proposal in the most exceptional circumstances. There is no basis to find such a conclusion.

Even if the infrastructure is incapable of being expanded to cater for future access by other parties (which is not the case here), this is still not determinative of the issue. Rather, it is simply a factor to be taken into account by the ERA in determining whether or not to grant approval for the parties to commence negotiations.

Access proposal for the Kalgoorlie – Esperance Railway Line - Final Determination

In its Final Determination on the access proposal for the Kalgoorlie – Esperance Railway Line (**Final Determination**),[4] the Office of the Rail Access Regulator endorsed the position that the aim of section 10 of the Code is not to disallow the negotiation of access to a particular route simply because the current configuration of that route may not accommodate an access proposal. Rather, it determined that the merit in section 10 was in:

a) informing the Regulator when there are potential constraint issues in respect of a route within the WA railway network;

b) allowing interested parties an opportunity to bring their constraint concerns to the Regulator and other stakeholders in a public forum for consideration prior to entering into negotiations;

c) requiring the Regulator to independently assess the implications of such an access on the route taking into consideration the broadest perspective; and

d) providing to the railway owner an appreciation of the public and stakeholders' concerns if there is a constraint on the route, as well as an indication of the future needs for access on that route.[5]

For the reasons set out above, Brockman submits that, if the ERA determines that section 10 is enlivened in the present circumstances (which Brockman submits unequivocally that it is not), the ERA should approve the parties entering into negotiations in relation to the Access Proposal.

---

[3] Railways (Access) Act 1998 (WA), section 2A.

[4] Independent Rail Access Regulator, Final Determination on the access proposal for the Kalgoorlie – Esperance Railway Line (March 2002).

[5] Independent Rail Access Regulator, Final Determination on the access proposal for the Kalgoorlie – Esperance Railway Line (March 2002), p 2.

3. OTHER RELEVANT CONSIDERATIONS

The public interest

Brockman submits that allowing negotiations on the Access Proposal will be in the public interest for the following reasons:

- The infrastructure will play an important part in the development of Port Hedland and is important in maintaining the region's iron ore export focus.
- Allowing Brockman to haul from the Marillana Iron Ore Project to Port Hedland will generate significant economic activity and employment opportunities in the region over a 20 year period.
- It would be unreasonable, and contrary to the public interest, to prevent negotiations for access, given the positive economic and regional benefits that can be expected from the Access Proposal.
- Preventing negotiations on the Access Proposal would convey the wrong signal to the investment community and may discourage parties to expand iron ore projects in the region for fear of not being able to negotiate access to export the iron ore.

Similar public interest considerations were instructive in the Final Determination, in making a decision to allow negotiations for access in that case.[6]

4. CONCLUSION

In Brockman's submission, the purpose of s10 is to simply enable the ERA to be aware of any proposal which might have the effect of precluding other entities from access to that infrastructure (properly defined).

For the reasons stated above, this should only be a (non-determinative) consideration for the ERA where it can be shown that the current configuration of the infrastructure does not accommodate an access proposal, and it is technically or structurally not possible to expand the facility to enable further access to be provided.

Where the access provider cannot demonstrate that it is technically or structurally impossible to expand the facility to enable further access to be provided (an outcome wholly inconsistent with a reasonable review of the infrastructure), section 10 of the Code is not enlivened and does not apply.

Where section 10 of the Code applies, the ERA should not prevent negotiations where future negotiations are capable of delivering an infrastructure solution to provide further capacity (an outcome consistent with any reasonable review of the infrastructure).

Even if the access provider can demonstrate that a constraint cannot be overcome (not the case here), this should not be determinative of the matter, as this is simply a factor to be considered by the ERA in determining whether to approve negotiations under the Code.

---

[6] See in particular, Independent Rail Access Regulator, Final Determination on the access proposal for the Kalgoorlie – Esperance Railway Line (March 2002), pp 3 – 4.