



The Pilbara Infrastructure Pty Ltd
ACN: 103 096 340
87 Adelaide Terrace East Perth
Western Australia 6004
PO Box 6915, East Perth, Western Australia 6892

Telephone: + 61 8 6218 8888
Facsimile: + 61 8 6218 8880
Website: www.fmgl.com.au

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ATTENTION: JEREMY THRELFALL

Assistant Director Rail
Economic Regulation Authority
Level 4, Albert Facey House
469 Wellington Street
PERTH WA 6000

Dear Mr Threlfall

**SUBMISSION ON BROCKMAN IRON PTY LTD'S PROPOSAL FOR ACCESS
SECTION 10 OF THE RAILWAYS (ACCESS) CODE 2000 ("CODE")**

On 23 May 2013, The Pilbara Infrastructure Pty Ltd (**TPI**) notified the Economic Regulation Authority (**ERA**) that it considered that the access proposal submitted by Brockman Iron Pty Ltd (**Brockman**) on 15 May 2013 (**Proposal for Access**) would involve the provision of access to TPI's railway infrastructure to an extent that may, in effect, preclude other entities from access to that infrastructure.

In response to that letter, on 4 June 2013, the ERA called for written submissions on Brockman's Proposal for Access to be submitted to the ERA by 4.00pm WST on 4 July 2013. Please accept this submission in response to that request.

EXECUTIVE SUMMARY

This submission by TPI to the ERA establishes that Brockman's Proposal for Access will require the provision of access to TPI's railway to an extent that will preclude other entities from access to that railway.

The ERA must not approve negotiations on Brockman's Proposal as there is no current capacity on TPI's railway and TPI does not reasonably expect that there will be any surplus capacity to accommodate Brockman's Proposal for Access. As Brockman's Proposal for Access states that an expansion or extension of TPI's railway is not required, the ERA cannot infer that an expansion or extension of TPI's railway would permit other entities to access TPI's railway, notwithstanding Brockman's Proposal for Access, nor that an expansion or extension would be technically and economically feasible.

Further, in making a determination under section 10(1) of the Code, the ERA must take into consideration and give appropriate weight to the following factors:

1. TPI's legitimate business interest in only receiving proposals that are bona fide and capable of giving rise to a binding access agreement under section 20(4)(a) of the *Railways (Access) Act 1998 (Act)*;
2. the high costs to TPI of providing access to Brockman, in circumstances where an agreement to access TPI's railway may never result in access to TPI's railway contrary to section 20(4)(b) of the Act;
3. the interests of Fortescue Metals Group Limited (**Fortescue**) and the fact that if access is granted to Brockman, Fortescue will be precluded from utilising its existing rights to access TPI's railway, contrary to section 20(4)(d) and (e) of the Act;
4. the risk that any potential economic and regional benefits that may be associated with third party access will not be realised due to the uncertainty of Brockman accessing TPI's railway contrary to the public interest (section 10(4)(b)(ii) of the Code); and
5. the high transactional costs and inefficiencies associated with Brockman's Proposal for Access contrary to section 20(4)(g) of the Act.

MATTERS TO BE CONSIDERED BY THE ERA

In deciding whether or not to grant approval to the negotiations between TPI and Brockman, section 10(4)(b) of the Code requires the ERA to have regard to:

1. any submission relevant to the decision that is made in accordance with a notice under section 10;
2. what the ERA determines to be the public interest; and
3. any other matter that he or she considers relevant.

In addition, in performing its functions under the Code, including approving negotiations under section 10 of the Code, the ERA must take into account the eight criteria listed in section 20(4) of the Act. Those eight criteria are as follows:

1. the railway owner's legitimate business interests and investment in railway infrastructure;
2. the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
3. the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
4. the interests of all persons holding contracts for the use of the railway infrastructure;
5. firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
6. the operational and technical requirements necessary for the same and reliable use of the railway infrastructure;
7. the economically efficient use of the railway infrastructure; and
8. the benefit to the public from having competitive markets.

Each of these criteria must be considered by the ERA and be given a weighting as a fundamental element in the ERA's decision under section 10(1) of the Code.

The ERA has only made one previous determination under section 10(1) of the Code. This determination was made by the Acting Rail Access Regulator from the Office of the Rail Access Regulator (now the Rail Division of the ERA) in March 2002 in relation to the proposal for access made by Portman Iron Ore Ltd (**Portman**) for access to the WestNet Rail (now Brookfield Rail) railway. There is no evidence in the ERA's Final Determination that the ERA considered the statutory criteria in section 20(4) of the Act as is required by law.

CAPACITY

In its Proposal for Access, Brockman asserts that TPI's railway will provide sufficient capacity to accommodate Brockman's proposed railway operations at the date that access is proposed (i.e. late 2016). In reaching this conclusion, Brockman states that it has relied on:

- *“the current observed operations on the railway;*
- *the Access requested in this Proposal;*
- *the current and projected production and raiing rates reported by FMG and the Nullagine Iron Ore JV; and*
- *the port capacity (including shipping rights) held by TPI's current access holders (that is, FMG and the Nullagine Iron Ore JV).”*

It is difficult, if not impossible, to understand how Brockman could have arrived at this conclusion in relying on these four bullet points because:

1. TPI's railway is currently being expanded and any “current observed operations on the railway” are based on the capacity of the current railway configuration, not the expanded railway configuration.
2. Fortescue has publicly stated that by December 2013 its annualised run rate will be 155mtpa by which time the current expansion works will be complete. Moreover, Fortescue has publicly stated that it intends to economically expand the capacity of TPI's port and rail infrastructure in order to meet Fortescue's future production targets.
3. While TPI has been allocated 120mtpa of priority channel capacity at Port Hedland, this only relates to the priority A and B class, tidally constrained shipping allocations provided by the Port Hedland Port Authority (**Port Authority**). The Port Authority's Vessel Movement Protocols contain a mechanism by which D class, tidally constrained capacity vessels will be allocated on an “opportunistic basis” if an entity has fully utilised its A and B class allocations. In addition, TPI is investigating other available port solutions to accommodate Fortescue's planned production increases.

Based on TPI's assessments of the availability of D class capacity now and in the future, and other available port solutions, it is reasonably anticipated that channel allocation in the inner harbour of Port Hedland will not be a constraint on TPI's ability to accommodate Fortescue tonnes.

In response to a request for information under section 7(1) of the Code, TPI previously advised Brockman that there is no current available capacity on the route referred to in Brockman's request for information. The Code does not contemplate access being provided to a proponent at a future or indeterminate point of time. A railway owner is not required, under the Code, to provide information relating to the future capacity of its railway.

TPI's parent company, Fortescue, exclusively funded TPI's entire railway infrastructure, including the current expansion works to increase the capacity of the railway to 155 million tonnes per annum, on the basis that Fortescue will utilise 100% of the capacity of the railway. Based on Fortescue's extensive reserves in the Pilbara, its current production and its future production targets, there will not be 20mtpa of surplus capacity on the railway during the period proposed by Brockman to accommodate Brockman's proposed trains, without an expansion of the capacity of TPI's railway.

Accordingly, any access granted to Brockman would preclude Fortescue from utilising its existing rights to access the railway, which would be contrary to section 20(4)(d) and (e) of the Act.

EXPANSION OR EXTENSION OF TPI'S RAILWAY

Brockman's Proposal for Access does not propose an expansion or extension of TPI's railway, aside from the construction of Connecting Infrastructure. Under section 20(4)(c) of the Act, the ERA must take account of the economic value, or in this case the absence of economic value, to TPI of any additional investment in the railway that will be made by an access seeker.

Under section 8(4) of the Code, Brockman had the option of specifying an extension or expansion, or both, of TPI's railway. However, Brockman elected not to specify an extension or expansion and, indeed, in its Proposal for Access, Brockman clearly states, at page 27, that:

"Brockman does not consider that any additional expansion or extension of the TPI Infrastructure would be necessitated by the provision of access pursuant to this Proposal."

Given that Brockman has expressly stated that it does not propose any expansion or extension of TPI's railway, the ERA cannot, in making a determination under section 10(1) of the Code, infer that an expansion or extension of TPI's railway would permit other entities to access TPI's infrastructure notwithstanding Brockman's proposal. In addition, the ERA must not, as it did in its Final Determination on Portman's proposal for access, rely on any supposed technical feasibility of an expansion or extension of the railway.

In any event, we note that in order to determine whether any extension or expansion is technically or, indeed, economically feasible, there is a significant amount of work, at considerable cost, that needs to be undertaken. Firstly, it is necessary for a survey of the railway to be undertaken in order to identify the proposed rail corridor and map the route. Secondly, once the location(s) of the extension or expansion is determined, it is necessary to, *inter alia*, negotiate licences to access and carry out the construction, identify and resolve any environmental, heritage and native title issues, and then design and engineer the proposed extension or expansion.

Only once this work is completed can an assessment be undertaken to determine whether an extension or expansion is technically and economically feasible. Any assumptions made by the ERA regarding the technical and economic feasibility of an expansion or extension of TPI's railway prior to this work being undertaken would be ultra vires.

BONA FIDE PROPOSAL

Pursuant to section 20(4)(a) of the Act, the ERA has an obligation to protect the legitimate interests of railway owners. It must ensure that only bona fide proposals, capable of giving rise to binding agreements and compliant with the Code are received by railway owners and progress to negotiation.

It is evident from the Proposal for Access that Brockman has not undertaken a process to verify the economic feasibility of the proposed rail operations and it does not have the capital to carry out the proposed rail operations, including, for example, the payment of access charges to TPI, the acquisition of rolling stock, and the construction of a port terminal and the Connecting Infrastructure (as defined in the Proposal for Access). As such, TPI considers that Brockman is incapable of entering into an agreement giving rise to a binding legal commitment by Brockman to access TPI's railway and that Brockman is merely seeking an option to access TPI's railway, if it so desires.

In addition, Brockman has publicly stated that its preferred infrastructure solution is the East Pilbara Independent Rail solution. This fact supports the inference made above that Brockman only seeks an access arrangement that gives it an option to obtain access at some future time, if it so desires. TPI submits that this is contrary to the fundamental objectives and the requirements of the Code.

Further, given the uncertainty associated with Brockman's Proposal for Access, there is a real risk that any potential economic and regional benefits that may be associated with providing third party access will never be realised if Brockman's Proposal for Access is allowed to proceed. Accordingly, any public interest analysis by the ERA in making a determination under section 10(1) of the Code must take into account the uncertainty of Brockman accessing TPI's railway in the future.

COSTS ASSOCIATED WITH ACCESS

In making a determination under section 10(1) of the Code, the ERA must, pursuant to section 20(4)(b) of the Act, have regard to the costs associated with Brockman's Proposal for Access. In particular, the ERA must have regard to the costs to TPI in reaching an

access agreement with Brockman, in circumstances where that agreement may never result in access to TPI's railway.

It is submitted that the obvious shortcomings in Brockman's Proposal for Access and the fact that Brockman has not undertaken detailed feasibility studies in order to verify the economic feasibility of its proposed rail operations, including the cost of building the Connecting Infrastructure, will result in high transactional costs and inefficiencies for TPI in circumstances where Brockman has not demonstrated an ability to enter into a binding agreement.

CONCLUSION

For the reasons set out in this submission, Brockman's Proposal for Access would involve the provision of access to TPI's railway to an extent that will preclude other entities, most notably Fortescue, from access to that railway.

TPI expects that the ERA will, in making a determination under section 10(1) of the Code, consider and appropriate weight the statutory criteria in section 20(4) of the Act as is required by law.

Further, to ensure that TPI is afforded natural justice by the ERA in relation to the ERA's determination under section 10(1) of the Code, TPI requires an adequate opportunity to review and respond to all submissions made to the ERA and all adverse material upon which the ERA intends to rely in making its decision. We also request that the ERA issue a draft decision, and provide detailed reasons (as it did in relation to Portman's access proposal in 2002), and provide TPI and other relevant stakeholders with an adequate opportunity to comment on the decision, so as to minimise any potential administrative error by the ERA.

Yours sincerely

SPENCER DAVEY

Commercial Compliance Officer
The Pilbara Infrastructure Pty Ltd