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23 October 2015

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

Dear Sir/Madam

REVIEW OF THE RAILWAYS (ACCESS) CODE 2000

1. The Economic Regulation Authority (**ERA**) has invited submissions in relation to its Draft Report on its Review of the *Railways (Access) Code 2000* (**Code**).

2. In making this Submission, we refer to (and repeat) our earlier submissions dated 2 April 2015 and 11 June 2015 made in respect of the ERA's Review of the Code.

RECOMMENDATION 1

3. In its Draft Report, the ERA has recommended that the Government implement the 2006 Competition and Infrastructure Reform Agreement (**CIRA**) in respect of TPI's railway.

4. We do not support the ERA's recommendation. We cannot find anywhere in the Draft Report where the ERA provides its rationale for making this recommendation other than to state very briefly, at paragraph 29, that in its opinion:

> *the homogeneity of freight task, standard of track and also the above-rail operation of the railway owner will result in prices being negotiated at, or close to, the ceiling, thereby diminishing the usefulness of the negotiate-arbitrate framework in relation to [TPI's] railway.*

We disagree with this statement. In order to properly consider the ERA recommendation, we would need much more detailed analysis supporting this statement.

5. Most rail access regimes in Australia adopt a negotiate-arbitrate approach because rail infrastructure has a number of characteristics that favour such an approach. These include the operational complexities and the interactions and dependencies between above-rail, below-rail and end effects (mine and port), the costs of coordinating above-rail and below-rail operations, the implications of regulatory error and the trade-off between certainty and flexibility.

6. Clause 6 of the Competition Principles Agreement and paragraph 2.2 of the CIRA provide that wherever possible, third party access to services provided by means of a facility should be on the basis of commercially agreed terms and conditions. In addition, the Australian Competition & Consumer Commission (**ACCC**), the Productivity Commission and the Harper Review Panel[1] consider that negotiated outcomes between parties are preferable to "upfront" regulatory arrangements. In its 2013 Review of the National Access Regime, the Productivity Commission concluded that it:

> *does not see sufficient benefit from imposing upfront regulatory arrangements to justify the cost of abandoning the established processes of negotiation and arbitration*[2]

and that:

> *primacy should be given to negotiation, subject to an effective threat of arbitration.*[3]

7. We agree that commercial outcomes will yield greater benefits to both rail owners and access seekers and we have a proven track record of entering into commercial arrangements for access to our rail and port with third parties, including BC Iron and, most recently, the Australian Aboriginal Mining Corporation. However, in the absence of commercial agreement, the negotiate-arbitrate framework adopted by the Code is preferable and more suitable for TPI's railway than a prescriptive regulatory regime.

8. Additionally, it is wrong to assume that the Australian Rail Track Corporation Inc (**ARTC**) Access Undertaking would be appropriate as a model for TPI's railway. The rail networks and markets in which TPI and ARTC operate are vastly different. As a public entity that receives substantial funding from the Australian Government, the ARTC has different commercial objectives, supply chain risks, customers and supply chain risks than TPI.

9. Accordingly, in finalising its Review of the Code, the ERA should not proceed with making Recommendation 1 as it relates to TPI's railway.

10. However, whilst we do not endorse Recommendation 1 of the ERA's Draft Report, we share the ERA's view that a review of regulatory approach to WA railway networks is necessary. There is a patchwork of infrastructure regimes that regulate the iron ore railways operating in the Pilbara. Aside from the WA Rail Access Regime applying to TPI's railway, there are three other regulatory regimes that apply in the Pilbara, namely:

    (a) BHP Billiton Iron Ore's Goldsworthy railway is declared under Part IIIA;

    (b) BHP Billiton Iron Ore's Mount Newman railway and Rio Tinto Iron Ore's Hamersley and Robe railways are unregulated; and

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[1] The Harper Report states : *competition and economic efficiency will be advanced if market participants are free to negotiate private arrangements concerning access" at page 73*
[2] Productivity Commission, 2013 Review of the National Access Regime, p124.
[3] Ibid, p128.

(c) Roy Hill Infrastructure's railway will be the subject of the WA Rail Access Regime until an access undertaking for haulage is accepted and regulated by the ACCC. It is relevant, at this point, to note that surprisingly the ERA did not also recommend that the Government implement the CIRA in respect of Roy Hill's railway, despite TPI and Roy Hill's railways sharing the same fundamental characteristics, including homogeneity of freight task, standard of track and vertical integration.

11. The emphasis on more consistent rail regulation in the CIRA should be applied to the Pilbara railways and all four railways in the Pilbara should be governed by one access regime and one regulator. We submit that the national access regime with the ACCC as regulator should apply to all four Pilbara railways. This would require an access seeker to apply to have the relevant railway "declared". Declaration of a railway would give any access seeker a right to apply for binding negotiation before the ACCC if commercial terms and conditions of access cannot be agreed with the railway owner.

12. Consistent economic regulation in the Pilbara would ensure that all Pilbara railway operators operate on a level regulatory playing field, thereby guaranteeing competitive neutrality, one of the key underpinning principles of the Competition Principles Agreement. This consistency in regulation would also assist potential access seekers.

RECOMMENDATION 3

13. For the reasons stated in our initial Submission, the matters dealt with in sections 14 and 15 of the Code should be treated as threshold issues that must be satisfied by a proponent before consideration of its proposal by the railway owner.

14. We agree with the ERA's recommendation that sections 14 and 15 of the Code should be clarified to prescribe the date by which a proponent must satisfy sections 14 and 15. However, we consider that 30 business days is too long because of the significance of these issues for the railway owner in considering an Access Proposal. Rather, a timeframe of seven days should be sufficient for a proponent to provide the necessary information, given that these are matters that are central to the proponent's Access Proposal. A timeframe of seven days is also commensurate with the time given to the railway owner to respond to an Access Proposal.

15. We do not agree with the ERA's recommendation that section 15 should be amended to include a blanket requirement that the railway owner provide "any required information necessary for the proponent to undertake a capacity assessment". This would allow a proponent to make unlimited arbitrary requests for information, which are unreasonable and unnecessary in assessing the capacity of the railway.

16. Further, pursuant to section 7A of the Code, the railway owner is already required to make available the information necessary to enable an access seeker to undertake a capacity assessment. The railway owner is required to provide, inter alia, details of available capacity, the length of the railway, the location and length of passing loops and the running times of existing trains. This information, combined with the railway

owner's Train Path Policy and Train Management Guidelines, is sufficient for a proponent to undertake a reasonable assessment of capacity and meet the requirements of section 15.

RECOMMENDATION 4

17. We support this recommendation.

RECOMMENDATION 5

18. We do not consider that a change in the prescribed time limit, as recommended by the ERA is warranted. Section 7C(2) provides that a review and any necessary amendment or replacement must be carried out:

    (a) "as often as is necessary to ensure that the information remains reasonably up-to-date at all times; and
    (b) in any case, at not less than 2 yearly intervals…"

19. Given the requirement in section 7C(2)(a), the amendment proposed by the ERA is unnecessary and only will serve to increase the burden of compliance on the railway owner. In any event, there is no apparent justification for requiring the information, such as it is, to be updated more than once per year.

RECOMMENDATION 6

20. The ERA has recommended that Schedule 2 be amended to clarify the meaning of "available capacity", but does not make any suggestion as to what that definition ought to be. We do not agree with this recommendation.

21. "Capacity" is not a term of art. It is defined in the Code as "the number of rail operations that can be accommodated on the route during a particular time". Issues as to what can and cannot be accommodated on a route of a railway raise matters of factual complexity and judgment and cannot be easily agreed or determined. Indeed, the Code contemplates that there may be differences between the railway owner and proponent as to capacity. That is why the Code includes an obligation on the railway owner to provide required information and an obligation on the proponent to demonstrate that there is "available capacity". If "capacity" cannot be simply agreed or determined, neither can "available capacity".

22. Further, given the fundamental differences in the characteristics and operations of the various rail networks regulated by the Code, it will be extremely difficult, if not impossible, to draft a single, workable definition of "available capacity" suitable for all rail networks. Accordingly, this recommendation should be withdrawn.

23. While the ERA has not invited submissions on the meaning of "available capacity", should an attempt be subsequently made by the ERA to define "available capacity", we submit that any such definition should incorporate, at least, the following principles:

- the relevant railway owner's Train Path Policy and Train Management Guidelines;
- the "actual and reasonably projected demand"[4] of the railway owner and its customers (actual or potential) for train paths on the network;
- any limitations on other parts of the supply chain, including end effects, must be accounted for;
- the number of trains operating on the network must not be such as to cause congestion delays and prevent operators from meeting scheduled cycle times and operating safely. This includes a reasonable level of variability around the published train run times.

24. The ERA also recommends that Schedule 2 be amended to specify the information which must be provided under item 4(o). Just as TPI has done in the past, we suggest that a railway owner should be required to provide the number of available train paths for each route section.

CONCLUSION

25. In making this Submission, we reiterate our earlier comments made in our submissions dated 2 April 2015, which includes the comments contained in the paper prepared by Ernst & Young, and 11 June 2015.

26. We have not addressed every comment made in the various submissions received by the ERA in relation to the Code Review. The fact that we have not responded to each specific comment should not be construed as agreement with the relevant comment.

27. The ERA has made a number of significant recommendations in its Draft Report. If, in finalising its Report, the ERA materially departs from the recommendations in the Draft Report and where such departure may have a material impact on us, including (but not limited to) proffering a definition of "available capacity", we expect an opportunity to comment on those departures.

Yours sincerely

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DENICE JOHNS
Assistant Commercial Compliance Officer
The Pilbara Infrastructure Pty Ltd

[4] Clause 3(4) of Schedule 4 of the Code.