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27 February 2009

Mr Jeremy Threlfall  
Assistant Director Rail  
Economic Regulation Authority  
PO Box 8469  
Perth BC WA 6849

**RE: TPI Train Path Policy and Train Management Guidelines**

Dear Jeremy

On 3 July 2008, The Pilbara Infrastructure Pty Ltd (TPI) submitted to the ERA, its draft Train Management Guidelines (TMG) and Train Path Policy (TPP), required under Sections 43 and 44 of the Railways (Access) Code 2000 ("Code"). Consistent with our recent discussions, it is preferable that some minor changes be made to the documents to clarify that the TMG and TPP apply only to Operators who have an Access Agreement with TPI under the Code.

To that end, I have amended TPI's draft TMG and TPP, as attached. Specifically I have made the above mentioned clarification in:

- Section 1.3 of the TMG;
- Section 1.2.2 of the TPP; and
- Section 4.2 of the TPP.

I trust that these changes are helpful. Please contact me if you need any additional information on this matter.

Yours sincerely  
**FORTESCUE METALS GROUP LTD**

**Greg Dellar**  
Government Relations

for

The Pilbara Infrastructure Pty Ltd

Enc



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# Train Path Policy

## 1 Introduction

### 1.1 Background

The Pilbara Infrastructure Pty Ltd (TPI) owns and operates a rail network and port terminal in the Pilbara region in Western Australia. TPI also provides above-rail services on this network. TPI is majority owned and controlled by Fortescue Metals Group (FMG).

TPI has developed separate Access Regimes (the Regimes) to enable third party access to the rail network (the Network) and the port terminal (the Port).

The Rail Access Regime is governed by the provisions of the *Railways (Access) Code 2000* (the Code). Section 44(2) of the Code requires the railway owner to prepare and submit a statement of policy to the regulator for approval in relation to:

- (a) the allocation of train paths; and
- (b) the provision of access to train paths that have ceased to be used.

This statement of policy is referred to as the Train Path Policy (TPP).

### 1.2 Purpose of the TPP

The objective of the TPP is to provide a framework to apply in relation to the allocation and management of Network Capacity to:

- ensure that TPI's contractual obligations are fulfilled;
- maximise the efficient utilisation of that Network, within the context of the overall supply chain;
- ensure that Capacity is allocated and managed in a non-discriminatory way.

#### 1.2.1 Relationship between the TPP and TMG

The TPP and Train Management Guidelines (TMG) are closely related. There are three key aspects to the allocation and management of Capacity:

1. The initial assessment and allocation of Capacity, resulting in the specification of a Service Entitlement for each Operator, which will be governed by the terms of their Access Agreement. The principles governing this assessment and allocation are contained in the TPP. This includes any permanent changes to the Service Entitlement that are subsequently made.
2. The short-term scheduling of train paths to fulfil each Operator's Service Entitlement. This is addressed in the TMG.
3. The daily operation of services in real time, which is also addressed in the TMG.

The main functions of the TPP will therefore be to provide a framework governing:

- the initial assessment and allocation of Capacity;
- the management of Capacity, including:
  - (i) permanent variations to Service Entitlements;
  - (ii) resumption of Service Entitlements; and
  - (iii) review of Service Entitlements.

### **1.2.2 Application of the TPP**

The TPP will apply to all Operators with whom TPI has an Access Agreement under the Code (including any third party engaged by the Operator as its agent or contractor to perform its obligations under the Access Agreement).

## **2 Allocation of capacity**

### **2.1 Specification of Capacity**

Each Operator's Access Rights will be specified in terms of a Service Entitlement. This includes:

- a) for Timetabled Traffics, the Train Paths that are allocated to that traffic;
- b) for Cyclic Traffics, the number of Train Paths that will be allocated to that Operator per week in accordance with the Operator's Service Entitlement.

Each Operator's Service Entitlement will be documented in the Master Train Plan (refer clause 2.1 of the TMG).

## **2.2 Analysis of Capacity**

### **2.2.1 Master Control Diagram**

TPI will maintain a Master Control Diagram for those routes under its control that are subject to the Code.

### **2.2.2 Access Applications**

In lodging an Access Application Access Seekers are encouraged to review the Code including sections 7, 8 and 9. It is also possible to seek Access Rights by negotiation with TPI outside the provisions of the Code.

### **2.2.3 Capacity Analysis**

When TPI receives an Access Application from an Access Seeker, TPI will undertake a Capacity Analysis. The purpose of this Capacity Analysis is to determine whether there is sufficient Available Capacity to meet the requirements of the Access Seeker, and if not, the extent to which Capacity enhancements are likely to be required.

Where TPI considers that there are major impediments to providing sufficient Capacity to meet the request, and that Capacity enhancements might be necessary that would have a significant bearing on the costs faced by the Access Seeker, then the Capacity Analysis may need to be done in more detail which may require more time for TPI to be able to respond to the request and prepare an Indicative Access Proposal).

The finalisation of the Capacity Analysis will enable the finalisation of the resultant Service Entitlement, initial timetable (if relevant), Charges and associated funding arrangements.

## **2.3 Capacity Allocation**

Subject to clauses 2.3(a) to (c) below, Access Rights will be allocated to the first Access Seeker with whom TPI can negotiate and execute an Access Agreement in relation to the Access Rights that are the subject of the application which, in the opinion of TPI, is most favourable to it.

If at any time, two or more Access Seekers are seeking access to mutually exclusive Access Rights, each of the Access Seekers who have received an Indicative Access Proposal with respect to those mutually exclusive Access

Rights will be so advised. The allocation of these Access Rights will be determined on a reasonable commercial basis applying a market testing process, which may involve applying an allocation criteria applied in other Australian access regimes.

Any market testing process applied by TPI to allocate Access Rights in this manner must:

- a) be applied in a non-discriminatory way (including without limitation no one Access Seeker having priority over any other Access Seeker); and
- b) allow all Access Seekers the opportunity to bid.

In adopting a reasonable commercial approach to the allocation of Access Rights, TPI may progress negotiations with one Access Application in priority to another where that Access Seeker can demonstrate to TPI's reasonable satisfaction that it is more advanced in the process of establishing demand for the Access Rights. Before making such a determination, TPI must provide each Access Seeker with a written notice providing that Access Seeker with not less than 14 days to identify to TPI its status in terms of:

- a) whether the Access Seeker has secured or is reasonably likely to secure the rights required in order to unload at its destination (that is, port capacity);
- b) whether the Access Seeker has secured or is reasonably likely to secure a haulage agreement with an end customer to operate the Services that are the subject of the Access Application; and
- c) the speed and timeliness of the Access Seeker in conducting its negotiations.

Once TPI has received the responses of each Access Seeker, it may make a determination that one Access Seeker is more likely to establish demand for the Access Rights so as to warrant conferring upon that Access Seeker priority in conducting access negotiations.

In this regard, TPI recognises its obligations under the Code to ensure that it does not unfairly discriminate between one Access Seeker and another when making its decision.

In the event that an Access Seeker believes that TPI has not complied with the TPP or provisions of the Code in relation to the allocation of Access Rights, they may have recourse to a dispute resolution mechanism under the Access Agreement. If no Access Agreement is yet in place, an Access Seeker may

seek to have the matter arbitrated as a dispute in accordance with Section 25 of the Code.

## **3 Management of capacity**

### **3.1 Permanent variations to Train Paths**

The following process applies where consideration is being given to the permanent variation of an existing Service Entitlement of an Operator that does not change the overall number of Train Paths allocated to that Operator under its Service Entitlement. Short-term or temporary variations to Train Paths are managed in accordance with the TMG.

Requests for additional Access Rights will be evaluated in accordance with section 2.3. Changes that would result in a reduction in an Operator's Service Entitlements will be evaluated in accordance with section 3.2. Those provisions relate to Operators with Timetabled or Cyclic Traffics.

#### **3.1.1 Permanent variation to Train Path requested by TPI**

A Service Entitlement may be varied for the remaining term of an Access Agreement (or for such other duration as may be agreed) if:

- a) TPI sends a notice to the Operator stating:
  - (i) that TPI wishes to vary the use by the Operator of the scheduled Train Path;
  - (ii) the length of time such variations will be in force;
  - (iii) the reason or reasons for TPI's proposal; and
- b) the Operator consents to TPI's proposed variation, such consent only to be withheld upon reasonable grounds (save that the Operator cannot withhold consent in the case of variations required by reason of TPI's obligations relation to the safety of the Network).

TPI must give not less than thirty (30) days notice of a variation request. The Operator must provide its response to this notice within twenty eight (28) days of such notice being received by it, or earlier if possible. If the Operator's response is to refuse consent, it must within such time also provide full reasons in writing to TPI.



### **3.1.2 Permanent variation to Train Path requested by Operator**

An Operator seeking a variation to an existing Train Path must do so in accordance with the provisions of the Access Agreement and the information supplied by the Operator should specify:

- (a) the route for which the Train Path is requested;
- (b) the times when the Train Path is required; and
- (c) the nature of the Service which will use the Train Path.

If TPI is unable to comply with a request from an Operator to vary a Train Path TPI will, at the request of the Operator, provide written reasons as to why it is not available.

TPI will, in seeking to accommodate a request for a varied or additional Train Path from an Operator, undertake to negotiate with other Operators seeking their agreement to amend their Train Paths which will allow TPI to accommodate the request for an additional Train Path. However, as a general principle, once an Operator is given a Train Path and the Operator is subsequently meeting its obligations and requirements under the Code and Access Agreement, that Train Path would not be permanently varied without the consent of both parties.

## **3.2 Resumption of Capacity**

### **3.2.1 Reduction to Train Service Entitlements due to Under-utilisation**

If an Operator does not operate:

- (a) for Timetabled Traffics, a Service on a Scheduled Train Path seven (7) or more (not necessarily consecutive) times out of any twelve (12) consecutive occasions on which that particular Scheduled Train Path exists; or
- (b) for Cyclic Traffics, 15% of its Service Entitlements under its Access Agreement over any one quarterly period,

the terms of the Access Agreement will provide that TPI may, within thirty (30) days of the last day of the relevant twelve (12) occasions or quarter (whichever is relevant), provide notice in writing to the Operator of an intention to resume the under-utilised capacity (the Intention to Resume Capacity Notice).

Other than if the parties agree to substitute an alternative Scheduled Train Path or Nominated Weekly Service, a Service has not been operated if the Operator has failed to:

- present a Service at the scheduled entry point onto the Network; or
- operate the relevant Service so that it completes its full journey,

in conformance with the locations, days and times set out for that Operator's Service Entitlements in the Weekly Train Plan, for any reason other than a Force Majeure event of the failure of TPI to make the Operator's Scheduled Train Path or Nominated Weekly Service available.

The Intention to Resume Capacity Notice will state an intention to reduce from a nominated date (referred to as the "Resumption Date"), the Operator's Service Entitlement by:

- (c) in the case of Timetabled Traffics, deleting the Scheduled Train Path referred to in subparagraph 3.2.1(a) from the Operator's Service Entitlement; or
- (d) in the case of Cyclic Traffics, reducing the Operator's Service Entitlement referred to in subparagraph 3.2.1(b), provided that the remaining Service Entitlement is not less than the Operator's actual usage during the relevant quarter.

The Operator then has twenty eight (28) days from the receipt of this notice to demonstrate, to TPI's reasonable satisfaction, a sustained requirement for that portion of the Service Entitlement that has not been utilised.

If this requirement cannot be suitably demonstrated, TPI will issue a notice within thirty (30) days of the intended Resumption Date (the Capacity Resumption Notice), confirming its intention to resume that Operator's Capacity in accordance with subparagraph 3.2.1(c) or (d).

If an Operator does not agree with TPI's decision, reference is made to the dispute resolution provisions under the Access Agreement. The Operator must provide notice to TPI of its intention to pursue dispute resolution under the terms of the Access Agreement, within ten (10) days of receipt of the Capacity Resumption Notice. In these circumstances, TPI will not implement the resumption until the dispute resolution process has been concluded in accordance with the terms of the Access Agreement, and then may implement the resumption only to the extent that such resumption is consistent with the outcomes of the dispute resolution process.

Once the Capacity has been resumed, TPI will vary the Operator's Access Agreement, including adjusting the Charge payable by the Operator in accordance with the terms of the agreement, based on the revised Service Entitlement. This new Charge will be effective from the Resumption Date, or in the event of dispute, from the date of resumption following the conclusion of the dispute resolution process.

### **3.2.2 Removal of a Service Entitlement due to a transfer of a contract between Operators**

If certain Service Entitlements are currently allocated under an Access Agreement to an Operator and that Operator loses part or all of its haulage contracts for which the Service Entitlements are allocated, TPI will negotiate with the Operator to reach agreement on the Service Entitlements to be withdrawn from the Operator.

In the case of such an agreement not being reached, TPI will commence the process under section 3.2.1 for the withdrawal of the Service Entitlement due to under-utilisation. Where the process involving the withdrawal of a Service Entitlement due to under-utilisation is initiated by TPI, an Operator who has lost part of its tonnage still has the opportunity to retain its Service Entitlements if it can satisfy TPI of a sustained requirement for that Capacity in accordance with section 3.2.1.

### **3.3 Review of Service Entitlements**

TPI may, at its discretion, by written notice given to the Operator cause all or part of its Service Entitlements to be reviewed in a bona fide manner by the parties. This will be done by comparing the stated departure and arrival times for identified Scheduled Train Paths and/or Nominated Weekly Services with actual performance during the preceding continuous three (3) month period of the actual Trains using or purporting to operate that reviewable Service Entitlement (three month history). In the case of Cyclic Traffics, TPI and the Operator will agree the basis on which performance will be reviewed if a basis for such an assessment is not set out in the Access Agreement.

If on such review of the three month history the departure or arrival times for a Train using or purporting to operate the relevant Service Entitlement differ in material respects, the parties will negotiate in good faith to amend the Service Entitlement so that it reflects, as closely as is reasonably practicable, the three month history. In this context "differs in material respects" means for either

Scheduled Train Paths or Nominated Weekly Services, the Service fails regularly to:

- (a) be ready for entry to the Network at the specified departure time; or
- (b) when entering the Network on time fails to exit on time.

The effect of any Force Majeure event, failure by TPI to make the network available, or mechanical failure of the Operator's equipment will not be included in any test of performance. Where TPI and the Operator have agreed Key Performance Indicators under the Access Agreement, these will be taken into account in any review.

Nothing compels TPI to revise the Service Entitlement of an Operator if:

- (c) this would compromise the Service Entitlements of any other Operator in accordance with their Access Agreement; or
- (d) to do so would materially adversely impact on TPI's ability or opportunity to efficiently and safely manage the Network.

Nothing compels an Operator to accept a proposal to revise its Service Entitlements if contractual obligations owned by that Operator to any person (including TPI) would prevent it from doing so, unless the regular failure of the Operator's Service compromises the Service Entitlement of another Operator in accordance with its Access Agreement. If another Operator's Service Entitlement is being affected:

- (e) TPI will use its reasonable endeavours to renegotiate the affected Service Entitlement of the other affected Operator however that Operator is under no obligation to agree to such variation, recognising that, as a general principle, once an Operator is allocated a Service Entitlement and the Operator is subsequently meeting its obligations and requirements under the Code and Access Agreement, that Service Entitlement would not be permanently varied without the consent of both parties;
- (f) if the affected Service entitlement cannot be reviewed in accordance with (e), the Operator of the non-performing Service Entitlements will use its best endeavours to renegotiate its contractual obligations that would otherwise prevent it from accepting TPI's proposed revisions.

## **4 Other**

### **4.1 Non discrimination**

TPI will not discriminate between Operators in the application of this TPP and the application of TPI's Network Rules.

### **4.2 Dispute resolution**

Any disputes arising in relation to any aspect of these guidelines will be managed in accordance with the Access Agreement. If no Access Agreement is yet in place, an Access Seeker, seeking access under the Code, may seek to have the matter arbitrated as a dispute in accordance with Section 25 of the Code.

## A Definitions

<b>Access</b>	means the non-exclusive utilisation of a specified section of Network for the purposes of operating Services.
<b>Access Agreement</b>	means an agreement entered into by an Operator and TPI governing access for the Operator to run Services on the Network.
<b>Access Application</b>	means a request for Access by an Access Seeker which has been prepared in writing and which complies with the information requirements as stipulated by TPI.
<b>Access Rights</b>	means the entitlement of an Operator to Access in accordance with a specified Service Entitlement.
<b>Access Seeker</b>	means a party who is seeking new or additional Access Rights.
<b>Act</b>	means the <i>Railways (Access) Act 1998</i> .
<b>Associate</b>	<p>in relation to TPI means:</p> <p>a) a Related Body Corporate; or</p> <p>b) a unit trust, joint venture or partnership where the interest of TPI or of a Related Body Corporate in the unit trust, joint venture or partnership entitles TPI or the Related Body Corporate to:</p> <ul style="list-style-type: none"><li>• control the composition of the governing body of the unit trust, joint venture or partnership;</li><li>• cast, or control the casting of, more than one half of the maximum number of votes that might be cast at a general meeting of the unit trust, joint venture or partnership; or</li></ul>

- control the business affairs of the unit trust, joint venture or partnership.

<b>Available Capacity</b>	means Capacity that is not Committed Capacity.
<b>Capacity</b>	means the capability of a specified section of Network to accommodate Services within a specified time period after providing for TPI's reasonable requirements for the exclusive utilisation of that specified section of Network for the purposes of performing activities associated with the repair or enhancement of the Network, including the operation of work Trains.
<b>Capacity Analysis</b>	means an assessment of the extent to which a specified section of the Network has Available Capacity and whether that Available Capacity is sufficient for the proposed Access Rights and, if the Available Capacity is not sufficient for the proposed Access Rights, an assessment of the Network expansion or other Capacity enhancements required to meet those proposed Access Rights.
<b>Charge</b>	means the price paid by an Operator for Access under an Access Agreement.
<b>Code</b>	means the <i>Railways (Access) Code 2000</i> established under the Act.
<b>Committed Capacity</b>	means that portion of the Capacity that is required to meet the Service Entitlements of Operators.
<b>Cyclic Traffic</b>	means a traffic whose Service Entitlements are defined in terms of a number of Services within a particular period of time, for example, a year, month or week, subject to a range of constraints which may include: <ul style="list-style-type: none"> <li>a) specified days of operation and times at the origin and/or destination;</li> <li>b) specified arrival/departure times at intermediate locations, with an allowable variation around</li> </ul>

these specified time(s) for the scheduling of the Train Service;

- c) maximum time period between Train Services;
- d) minimum time period between Train Services;
- e) average Below Rail Transit Time;
- f) the agreed threshold for on-time running of the Train Services;
- g) regularity of timetable reviews and the applicable review process; and
- h) allowable modifications of timetable, e.g. cancellation or deferral of services.

**FMG**

Fortescue Metals Group Ltd

**Force Majeure**

means any circumstance beyond the reasonable control of a party which occur without the negligence of that party and includes inevitable accident, storm, flood, fire, earthquake, explosion, peril of navigation, hostility, war (declared or undeclared), insurrection, sabotage, executive or administrative order or act of either general or particular application of any government prohibition or restriction by domestic or foreign laws, regulations or policies (other than laws specifically for that purpose passed by the Commonwealth), quarantine or customs restrictions, strike, lockout or industrial dispute, break-down or damage to or confiscation of property but does not include breakdown or delay of any Trains or Rolling Stock operated by the Operator.

**Indicative Access Proposal** means a non-binding, written response from TPI to an Access Application.

**Master Control Diagram** means a diagrammatic or electronic record covering specific parts of the Network which shows all of the Train Paths on that Network.

**Master Train Plan** means a document prepared and maintained by TPI that will register:



(a) the Service Entitlements of each Operator on the Network, including:

- (i) for Timetabled Traffics, the Train Paths that are allocated to that traffic;
- (ii) for Cyclic Traffics, the number of Train Paths that will be allocated to that Operator per week in accordance with the Operator's Service Entitlement;

(b) the Capacity required to provide each Operator's Service Entitlements; and

(c) the periods of time allocated for Planned Possessions.

**Network**

means the track and infrastructure controlled by TPI to which Access has or can be granted to an Operator to operate Services under an Access Agreement, including railway infrastructure at the Port.

**Nominated Weekly Service**

means, for Cyclic Traffic, the number of Services that an Operator has an entitlement to operate during any one week period under an Access Agreement, as specified in its Service Entitlement.

**Operator**

means the Operator or Operators which have access to the Network under an Access Agreement or have made an application for Access under Section 8 of the Code.

**Planned Possession**

means the temporary closure and/or occupation by TPI of part of the Network, for the purpose of carrying out infrastructure maintenance, enhancement, or other work on or in the proximity of the Network which may affect the safety of any person or property where such closure or occupation is entered into the MTP and adversely impacts upon the operation of Services.

<b>Port</b>	Fortescue Herb Elliot Port at Anderson Point, Port Hedland.
<b>Related Body Corporate</b>	has the same meaning as in the <i>Corporations Act 2001</i> (Cth).
<b>Rollingstock</b>	means locomotives, carriages, wagons, rail cars, rail motors, light rail vehicles, light inspection vehicles, rail/road vehicles, trolleys and any other vehicle that operates on or uses the Network.
<b>Scheduled Train Path</b>	means, for a Timetabled Traffic, the entitlement of an Operator under its Access Agreement, as identified in its Service Entitlement, to use a specified portion of the Network at the times and between the locations specified in the relevant Master Train Plan, so as to allow the passage of one Train.
<b>Service</b>	means a train run by the Operator using the Network by which the Operator provides railway freight services.
<b>Service Entitlement</b>	means an Operator's entitlement under an Access Agreement to operate a specified number and type of Services over the Network within a specified time period and in accordance with these Train Management Guidelines for the purpose of either carrying a specified commodity or providing a specified transport service. A Service Entitlement may specify constraints or operational requirements to be observed by the Operator.
<b>Timetabled Traffics</b>	means a traffic, the Service Entitlement in respect of which, is defined in terms of a specified Train Path on a particular day and/or week.
<b>TPI</b>	means The Pilbara Infrastructure Pty Ltd
<b>Train</b>	means any configuration of Rollingstock operating as a unit on the Network.

<b>Train Path</b>	means an entitlement to operate a Service on the Network and has departure, transit and arrival times between the entry and exit points on the Network.
<b>Train Requests</b>	means raiing requests for a nominated period of time submitted to TPI, by or on behalf of an Operator, to assist in the scheduling of Train Services.
<b>Weekly Train Plan</b>	means the document prepared by TPI containing the:  (a) Nominated Weekly Services for Cyclic Traffics, based on requests submitted by Operators against their Service Entitlement;  (b) the Scheduled Train Paths allocated to Operators Timetabled Traffics; and  (c) any Planned Possessions for that week.