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8 May 2009

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

## **RE: DRAFT DETERMINATION ON TRAIN PATH POLICY**

Dear Jeremy

On 27 March 2009, the Economic Regulation Authority released a Draft Determination on the Train Path Policy that would apply to The Pilbara Infrastructure Pty Ltd's (TPI) railway from Cloud Break to Port Hedland.

Through this letter, TPI provides comment on the Draft Determination, as follows:

### **1. Recommended Amendment 5**

ERA has required that TPI amend its Section 2.3, headed Capacity Allocation. The effect of the bulk of amendment is to remove TPI's ability to use a market based process to deal with multiple Access Seekers seeking access to mutually exclusive Access Rights (ie capacity constraints prevent all Access Seekers gaining access).

TPI appreciates that Section 10 of the Code establishes a regulator-lead process to manage the circumstances where an access proposal is submitted by a party where such access may in effect preclude other entities from access.

In TPI's view, it is not clear how that Section of the Code would resolve the situation where multiple parties seek access to limited capacity. Strict reliance on that section would potentially prevent TPI from entering any negotiations with Access Seeker over long periods of time.

Section 10 prevents TPI negotiating with an Access Seeker (and therefore the Access Seeker cannot negotiate with TPI) until the Regulator provides approval for the negotiations, where such approval follows a public comment process on access proposals. In the case of multiple access proposals, quite probably separated by short periods of time, a lengthy, unwieldy and highly uncertain outcome for all Access Seekers is very likely. Access Seekers may be prevented by the Regulator from negotiating access after waiting for say

four to six months on the Regulator's decision under Section 10(1) of the Code. That timetable could grow if new proposals are submitted during the process.

It is far preferable for Access Seekers to be part of a direct, non discriminatory, market testing process managed by TPI. This will provide a very rapid timetable for Access Seekers to be advised of their rights to negotiate access. This even has a benefit for unsuccessful Access Seekers in that they may then pursue alternative transport options without a lengthy delay.

## **2. Recommended Amendment 11**

ERA has required that TPI add a new section to the TPP headed "Rights of an Operator to sell a Train Path".

Such an inclusion is strongly resisted by TPI.

TPI will enter into contractual arrangements with Access Holders through an access agreement that is executed by both parties. It is the intention of TPI to abide by its contractual obligations so as to ensure the provision of contracted services to the Access Holder. TPI similarly expects the Access Holder to abide by the terms of the agreement which will include a requirement that it pays for and uses the contracted services.

The agreement will include provisions, including Force Majeure and a legal remedy in the event of default, as agreed between the parties, that deal with the instances where the Access Holder is unable to utilise its contracted train paths. Such provisions are very typical of service contracts.

It is unnecessary for Government to intervene in such commercial matters by mandating a right for the Access Holder to assign its train paths to another operator.

The scenario of an Access Holder on-selling train paths also dilutes the ability of TPI, as the infrastructure owner, from fully managing its assets. Should spare capacity become available on the railway, due to an Access Holder being unable to utilise its contracted train paths, TPI should be responsible for determining the provision of Access Rights to another entity, on the basis of the following:

- TPI is accountable under the Act and Code, the Access Holder wanting to assign train paths, has no such constraints;
- TPI will be best informed as to the identities and needs of all potential parties seeking such access; and
- TPI is best placed to evaluate the capabilities of all such parties, as provided for under Section 14(1) of the Code.

TPI is further concerned with the accreditation elements that emerge from this required amendment. TPI does appreciate that the amendment allows for the

inclusion of the equivalent WestNet provisions, which provide that (in this instance) TPI must be satisfied with accreditations of the new entity before it commences operations. However, such a mechanism risks leaving the adequacy of accreditations to the end of the negotiation process, rather than from the outset as would be expected if an Access Seeker submitted an application to TPI under Section 8 of the Code. It is totally unsatisfactory for accreditations to be the subject of discussions after access rights are put into place through an assignment.

Secondly, in the event of the new entity failing to satisfy TPI with the adequacy of its accreditations, then until such time as this is resolved and the new entity commences operations, the relevant capacity on the railway remains sterilised. Such inefficiency is clearly against the principles of any Australian access regime, as enunciated by the Competition Principles Agreement.

Further, if the new entity never satisfies TPI on its accreditations, then the above inefficiency continues while the original Access Holder is now increasingly involved in marketing of rights to another party's infrastructure. Given that the Access Holder is unable to utilise all its contracted train paths, it could be that it is under financial or operational pressure and may be in a very poor position to undertake additional responsibilities such as marketing its access rights. An even worse scenario for TPI is that such marketing may be undertaken by appointed administrators or receivers to the Access Holder.

The responsibility to re-allocate train paths must reside with TPI.

### **3. Recommended Amendment 12**

ERA has required that TPI add a new section to the TPP headed "Cancellation of Services using Train Paths".

Such an inclusion is strongly resisted by TPI.

The effect of the amendment is that Force Majeure events, which deal with cancellation of services, form part of the TPP. That then restricts the parties to the access agreement from negotiating alternative Force Majeure events as that creates a risk of non compliance with the approved TPP.

It is far more appropriate that the parties to the agreement be allowed to negotiate such key terms of the agreement, without instruction or intervention by Government.

### **4. Recommended Amendment 14**

ERA has required that a new section, headed "Compliance and Review" be added. TPI does not oppose the inclusion of this section. However, it notes that the ERA has required the inclusion of text as follows:

- “The ERA will review the TPP, through a public consultation process...”;  
and
- “the ERA will monitor TPI’s compliance with the TPP, through an audit...”

The TPP, along with other instruments under Part 5 of the Code and the segregation arrangements under Section 29 of the Act, represent company commitments. However, TPI cannot include a commitment in this TPP that compels the ERA to undertake any actions, as it does not have that authority.

TPI suggests a modification of relevant text as follows:

- “TPI agrees to a review of the TPP, by the ERA...”; and
- “TPI agrees to monitoring of its compliance with the TPP, by the ERA...”

TPI trusts that these comments are helpful and looks forward to an opportunity to discuss key issues with the ERA. Please contact the undersigned if you need any additional information or clarification of comments provided.

Yours sincerely

**FORTESCUE METALS GROUP LTD**

**Greg Dellar**  
Government Relations

for

The Pilbara Infrastructure Pty Ltd