



AUSTRALIAN RAIL TRACK CORPORATION LTD

Ref No:

3 July 2009

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

Dear Mr Threlfall,

**THE PILBARA INFRASTRUCTURE'S
PROPOSED RAIL ACCESS SEGREGATION MANUAL**

ARTC SUBMISSION

Please find attached a submission prepared by the Australian Rail Track Corporation in response to The Pilbara Infrastructure's proposed Rail Access Segregation Manual.

The submission contains no information that ARTC would consider commercial-in-confidence.

For further information regarding the preparation of this submission, could you please contact Jacqui Lim on (08) 8217 4332 (Ph) or jlim@artc.com.au (Email).

Simon Ormsby
General Manager Commercial

THE PILBARA INFRASTRUCTURE PTY LTD

RAIL ACCESS SEGREGATION MANUAL

ARTC SUBMISSION – JULY 2009

Background

The Western Australian Economic Regulation Authority (ERA) has invited submissions from interested parties on The Pilbara Infrastructure's (TPI) proposed Segregation Manual for its railway in the Pilbara.

ARTC has actively participated in the consultation processes conducted by the ERA (or its predecessor) and the NCC in relation to the WA Rail Access Regime and the regulatory supervision of track managers in WA. Throughout this involvement, ARTC's positions and comments have largely been based around two broad themes, being:

- ▶ the need for a consistent approach to access to the interstate network, including that part of the interstate network in WA; and
- ▶ the need for the WA Access Regime and regulatory supervision to ensure that adequate measures are put in place to provide the market with confidence that access to the WA network can be gained in a timely, fair and equitable way when the access provider is vertically integrated

The WA Rail Access Regime applies to all rail networks in WA including, from 1 July 2008, the TPI railway.

To date, ARTC has participated in the consultation process relating to The Pilbara Infrastructure's:

- ▶ Segregation Arrangements;
- ▶ Train Management Guidelines;
- ▶ Train Path Policy;

- ▶ Costing Principles;
- ▶ Overpayment Rules; and
- ▶ Weighted Average Cost of Capital.

ARTC is the manager of a substantial part of the national interstate rail network of which the standard gauge network between Perth (including its ports) and Kalgoorlie is an important part. As such ARTC has no direct interest in the TPI railway as an adjoining infrastructure manager, nor as a potential applicant for access.

Segregation Arrangements

The TPI railway is exclusively focussed on the transport of iron ore from Fortescue Metals Group (FMG) mining operations in the Pilbara region through its port at Port Hedland to overseas markets. In this market, the infrastructure owner is vertically integrated and could have substantial market power in relation to competing operations in the region. The question of market power should include consideration of the international market for iron ore and the extent of competition that exists between relevant supply chains both within Australia and overseas.

The proposed Segregation Arrangements and Manual are intended to deal primarily with the vertically integrated nature of TPI (as a subsidiary of FMG) and how it deals with third parties, both in arranging access and during operations.

ARTC provided comments in relation to TPI's proposed Segregation Arrangements in August 2008. The main points in the submission, were:

- ▶ The Tarcoola – Darwin access regime and the light-handed approach to regulating access is not the appropriate regulatory precedent in this case for reasons including:
 - the fact that for the Tarcoola – Darwin railway there are stronger constraints on the below-rail service provider's effective market power (significant intermodal competition, competition in downstream market, or little congestion on track infrastructure);

- the greenfields nature of the rail project and the relative risks facing investors; and
 - the viability of the railway was expected to be under substantial pressure for a number of years.
- ▶ In determining whether TPI's proposals in relation to Segregation Arrangements were reasonable in the circumstances, the ERA needed to balance the stated concerns and interests of TPI against those of access seekers.
 - ▶ Due to the likelihood of third parties seeking access to the TPI railway sooner rather than later, any benefits of the two stage implementation of segregation arrangements proposed by TPI would be limited.
 - ▶ ARTC had no strong objection to where TPI had adopted similar provisions to those existing in the current Segregation Arrangements for WestNet Rail (WNR), and where TPI have omitted certain elements of the WestNet arrangements, the ERA needed to establish the reasonableness for TPI's position.

In relation to this its submission, ARTC acknowledges the following ERA's views in its subsequent Draft Determination on the Proposed Segregation Arrangements, December 2008:

- ▶ The obligations on TPI under the Act are different from the obligations on the railway owner under the legislation applying to the Tarcoola to Darwin railway being the *AustralAsia Railway (Third Party Access) Act 1999*.
- ▶ TPI's proposed staged segregation approach is not consistent with the Act, as the Act does not contemplate a two stage process for a railway owner to meet its obligations as set out under sections 31 to 34 of the Act.

Segregation Manual

In its Draft Determination, ERA also stated that TPI's Segregation Arrangements did not contain sufficient information to meet the requirements of the Act and that TPI's Segregation Manual needed to be submitted in order for the ERA to properly assess TPI's proposed Segregation Arrangements in its entirety.

TPI's subsequent Rail Access Segregation Manual outlines in detail, information for personnel involved in Access Related functions on how segregation is implemented within TPI. In general, ARTC finds the Segregation Manual to be a comprehensive document, however submits the following comments:

1.5 Segregation Objectives and Strategies

The statements provided here are brief and high level. It is ARTC's view that the list presented does not clearly reflect the objectives, and then the strategies designed to achieve those objectives. Also, some of the points could be fleshed out more in terms of detail, for example:

- Specification of the Railways (Access) Act 1998, and Railways (Access) Code 2000;
- Protection of Confidential Information arising from...;
- Avoidance of Conflicts of Interests which may arise where...;
- Duty of Fairness requiring...;
- Separate Accounts and Records to ensure...

More clearly defined objectives and strategies will assist in ensuring that those involved have a clearer understanding. The strategies should reflect how TPI will achieve its objectives. These should then provide the framework for the Segregation Manual.

2.6 Duty of Fairness

It is ARTC's view that TPI should outline the circumstances under which various parties will be treated in a fair manner. For example, responding to applications, determining prices, negotiating methodology, train scheduling, etc.

As Train Management Guidelines and the Train Path Policy are related to Duty of Fairness, ARTC believes that it would be worth TPI referring to these as a part of the Duty of Fairness.

Also, TPI should make it clear that they will ensure Duty of Fairness with all access seekers, primarily relating to confidentiality, from commencement of negotiations, irrespective of whether these negotiations have commenced inside or outside the provisions of the Code.

3 Compliance Plan

The Compliance Plan should make it clear as to what circumstances constitute a breach, and provide an outline of the proposed corrective action if a breach were to occur. ARTC suggests that TPI add additional information to this section under the existing 'Type of Behaviour' headings, and also include information for:

- Duty of Fairness
- Separation of Accounts and Records
- Physical Segregation of Premises/Personnel

Information under the various headings should clarify what does and does not constitute a breach.

In terms of corrective action, ARTC suggests the inclusion of a process which outlines how breaches will be dealt with, to ensure that all parties are dealt with fairly and consistently.

General Comments

As mentioned earlier in this paper, the proposed Segregation Manual is intended to deal largely with the vertically integrated nature of TPI and how it deals with third parties, both in arranging access and during operations. Where such integration exists, regulation needs to be more 'heavy handed' than light, ensuring fairness and transparency in order to promote market confidence. The ERA should consider this when making their determination on the Segregation Manual.

ARTC feels consistent regulation is important and with this in mind, it is suggested that the content of TPI's Segregation Manual should be consistent with any approved manual applying to WNR when it was vertically integrated. ARTC feels that such a document should act as a model document given WNR's vertical integration at the time of development and approval. In the cases where TPI's content varies, or where TPI may have omitted certain elements of the WestNet arrangements, the ERA needs to establish the reasonableness of TPI's position.