



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

Our Ref: LS-160-O-0026

21 July 2009

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

RE: TPI TRAIN PATH POLICY – ADDITIONAL COMMENTS

Dear Jeremy

Thank you for our recent discussions on the above matter. TPI's concerns expressed in its letter dated 8 May 2009 are expanded upon below.

Firstly, a point of clarification. The legal form of transfer (ie selling or sub-licensing) is irrelevant from TPI's perspective. It still amounts to another party having rights to train paths, through selling or an assignment of train paths by a contracted Operator. The term assignment is used throughout this letter to describe all possible mechanisms.

An Operator having an ability to assign its train path obligations to another party (even in the short term) is not acceptable. TPI will sign an agreement where it and the Operator are required to meet their obligations. TPI will have no ability to assign its obligation to another railway owner, so why would it agree to the Operator being able to assign its obligations to another party. The agreement will deal with circumstances that might prevent TPI or the Operator from meeting their contracted obligations on any given day. I cannot reiterate strongly enough that this is a commercial matter and it is highly inappropriate that a Regulator should be attempting to intervene through the TPP.

TPI does appreciate that the Westnet TPP provisions require the Operator to remain liable for its contracted obligations. It is well understood that, in the event of another party taking up some of the train paths, the original Operator remains liable for the performance of the new party, including meeting all financial obligations. To put it bluntly, TPI does appreciate that if the new party does not pay its bills, then TPI has recourse through the original Operator. TPI is concerned that the Operator's ability to assign train paths to another party (where TPI can only refuse the assignment on accreditation grounds) creates other (not necessarily commercial) issues.

Un-Regulated Spot Markets

In our discussions, it was put to TPI that an Operator may wish to assign train paths under circumstances where, having negotiated an access agreement, it cannot take it up immediately and wants to retain it until it can. Alternatively

The New Force in Iron Ore

the Operator may have a mine redevelopment and cannot use it for a period, but does not want to hand the train paths back permanently.

Based on these circumstances, the Operator has negotiated an access agreement where it may or may not be able to use the contracted train paths. TPI would question then, on what basis has that Operator agreed to a contract with TPI?

Presumably the answer is on the basis that it is confident it will have a need. However, the Operator is encouraged under the TPP (if assignment of train paths is allowed) to negotiate access to more train paths than it needs and to have them available potentially earlier than it needs. That way it can be certain of having its exact train path requirements at hand when needed. TPI understands why an Operator may want to do that but there should be ramifications for seeking more than what you need.

If an Operator cannot start on time or does not need all contracted train paths, he is effectively speculating. He is obtaining train paths under a form of option arrangement. The Operator is then able to trade in surplus train paths. If the market is as strong as the volume of current junior iron ore players in the Pilbara seem to suggest, then this Operator can command a premium when it assigns these surplus requirements to the market.

As stated in our letter of 8 May, the Operator is then selling access rights without being subjected to the price scrutiny that TPI is facing through the legislation. It is creating its own spot market for train paths that is not the subject of any price regulation or behaviour controls.

Separately, there could be circumstances where TPI is negotiating in good faith with an Access Seeker who is simultaneously (and presumably confidentially) negotiating with an existing Operator for the same number of train paths. The Access Seeker is able to "game the system". Meanwhile TPI is forced to continue processing the proposal in accordance with the legislation.

Queue Jumping

A further factor of relevance here is the ability for an Access Seeker to "jump the queue" by securing access to train paths via an assignment mechanism (i.e. by paying the highest fee to the existing Operator). ERA has indicated its requirement for a first come first served process to apply in the event of multiple applicants for limited capacity (eg see Amendment 5 of the draft Determination and its reference to Westnet's TPP section 2.2.1). That requirement is clearly compromised by the ability of an Access Seeker to gain access, via an assignment, in advance of other Access Seekers who would otherwise be ahead in the queue.

TPI's Marketing Responsibilities

TPI has also commented, in its 8 May letter, on key concerns around TPI's primary marketing responsibilities being undermined. It is unacceptable for an Operator to be mandated a marketing ability through the TPP. The Operator has limited knowledge of the rail network and is in no position to deal with the multiple issues that will arise during negotiations.

A Third Route to Securing Access

TPI also notes that the concept of negotiations being held either "under the Code" or "outside the Code" is now being augmented by a third option, ie "negotiations with an Operator – outside the Code, where rights are enforceable under the Code". TPI would find that a very problematic circumstance and it would not be clear what jurisdiction would apply in the event of disputes.

TPI looks forward to the Authority's position on this matter.

Yours sincerely

FORTESCUE METALS GROUP LTD

Greg Dellar

Government Relations

for

The Pilbara Infrastructure Pty Ltd