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By email: publicsubmissions@era.wa.gov.au

Ms Audrey Hia
Senior Project Officer
Economic Regulation Authority
PO Box 8469
Perth BC WA 6849

Dear Madam

Review of the Railway Access Code 2000

We write in respect of the Economic Regulation Authority's Notice dated 28 October 2009 inviting interested parties to comment on Issues relevant to the review of the *Rail Access Code 2000*, as required under Section 12 of the *Railways (Access) Act 1998*.

North West Iron Ore Alliance Ops Pty Ltd (**NWIOA**) represents the interests of "junior" producers of iron ore in the Pilbara region of Western Australia. NWIOA welcomes the opportunity to submit a response to the ERA as per the attached Annexure.

Should you require any clarification on the points raised, please contact Catherine Pinchin on 9389 3021.

Yours sincerely,

Catherine Pinchin
Director, Legal Regulatory and Corporate Affairs

"Annexure A"

North West Iron Ore Alliance's Submission

in relation to

the Economic Regulation Authority's

Rail (Access) Code Issues Paper

INTRODUCTION

The Economic Regulation Authority (ERA) has released an Issues Paper seeking public comment regarding a Review of the Railways (Access) Code 2000 (as at June 2009) (Code). The ERA is required to review the Code under section 12 of the Railways (Access) Act 1998 (Act). The North West Iron Ore Alliance (NWIOA) welcomes the opportunity to provide the following submission.

Under Part 5 of the Code there are five Instruments that lay the principles for ultimately determining the segregation of a railway owner's functions from those of an infrastructure operator and determining the ultimate floor and ceiling price for route sections of the railway for the infrastructure operator and the access seeker to negotiate, under a negotiate and arbitrate model.

During the period commencing September 2008 until December 2009 the NWIOA has responded to the ERA's various requests for public submissions relating to the ERA's Issues Papers and Draft Determinations for The Pilbara Infrastructure Pty Ltd (TPI Regime) Part 5 Instruments proposals under the Code.

Throughout this consultation process the main issues addressed by NWIOA concern the transparency afforded by the TPI Regime, whether the train paths of those operators who have access agreements negotiated outside the Code (including FMG) are visible in the capacity calculations. NWIOA believes that it is vital the TPI Regime achieve full transparency, as was the case with the WestNet Rail South West Regime (WNR Regime).

In many respects the TPI Regime resembles the WNR Regime but does not provide the same level of transparency and does not furnish as much information as the WNR Regime. Under the WNR Regime the ERA publishes route section GTK's, annual tonnages, train paths and floor and ceiling prices by section of line. This information enables cost modeling of both likely access charges for existing infrastructure and the calculation of capital expenditure to increase capacity based on known capacity and the calculation of the likely access charges thereof.

The Code covers the WNR Regime, the TPI Regime and Public Transport Authority Regime. The Code Review Issues Paper provides the opportunity for NWIOA to provide a further submission on the issues outlined above, particularly with regard to transparency and the ability to model and negotiate likely expansion scenarios and costs. The following is NWIOA's response to the List of Issues raised by the ERA.

PARTS 1 & 2A – PRELIMINARY AND PUBLICATION OF INFORMATION & PART 2 – PROPOSALS FOR ACCESS

The Issues raised by ERA in this section are:

Issue 1: - Whether the information a railway owner is required to provide to a prospective access seeker is sufficient to provide that access seeker with a preliminary understanding of the railway network characteristics and relevant route section infrastructure capability and traffic loads.

Response: - By reference to the specific example of the TPI Regime, NWIOA submits that the information to be provided may not provide a sufficient understanding of traffic loads and is not equivalent to that required under the WNR Regime. Additionally, the Code was amended between the submission of NWIOA's response to the Train Path Policy Draft Determination (March 2009) and the Final Determination (August 2009). As a result of the amendment TPI's obligation to provide "the working timetables for the route" altered to the provision of "the running times of existing trains". Whilst these are similar concepts it is not clear if the latter includes trains being operated outside the Code whereas the WNR Regime makes clear that these are included. "The running times of existing trains" also does not appear to provide the access seeker with specific departure and arrival times but only the duration of the journeys undertaken by existing trains.

In response to the ERA's Draft Determination of TPI's Train Path Policy, NWIOA previously submitted that the Code does not imply an obligation to apply the Train Path Policy to agreements negotiated outside the Code and commented further with regard to transparency issues as follows:

"Required Amendment 4 - Transparency of the Regime

As discussed earlier in this submission, the exclusion of non-Code agreements reduces transparency. However, there are other significant transparency issues the NWIOA considers should be addressed, particularly if the regime were to exclude non-Code agreements.

The NWIOA submission to the Issues Paper on the TPI TPP requested the Authority set parameters or models for each item of information to provide third party access seekers the transparency to negotiate with TPI effectively. As a consequence, the NWIOA supports the Draft Determination Amendment 4 that TPI take account of the need for the capacity analysis process to be transparent.

However, the NWIOA strongly believes the procedural basis must also be structured to facilitate this direction toward transparency. Under section 15 the proponent must show the proposed train path can be accommodated on the route or if not, provide the railway owner with a preliminary assessment, based on information reasonably available to the proponent, showing that the proposed extension or expansion:

- (a) Can be carried out in a technically and economically feasible way; and*
- (b) Will be consistent with the carrying on of safe and reliable rail operations on the route.*

The NWIOA understands the procedure for an initial access application to be that the proponent can seek

from the owner information regarding the network capacity (under section 7 of the Code) including the working timetables for the route (under section 7 (c) of the Code). The Draft Determination Amendment 4 also requires TPI to incorporate into section 2.2.3 wording similar to section 2.2.2 of the WestNet Rail (WNR) 2006 TPP. The suggested wording is along the lines of TPI referring to the Master Control Diagram (MCD) and reviewing the train paths to determine if the path can be accommodated per se, or by adjusting other paths, and if the path is not feasible, then offering alternative paths.

The NWIOA submits that the above procedural wording is clearly less specific than the wording of section 7 (c) and will inevitably lead to an absence of transparency, and failure to visibly demonstrate any capacity analysis calculations. The NWIOA therefore requests that, in the event the final regime excludes non-Code agreements, this Amendment should include the requirement that TPI make available to the proponent:

- (a) The MCD at the time of the capacity analysis; or*
- (b) In accordance with section 7(c), the daily working timetables at the time of the capacity analysis.*

These requirements will encourage greater transparency in the analysis. Further, such information is:

- (a) Critical for the proponent to meet the requirements of section 15 of the Code; and*
- (b) Assists in ensuring the railway owner meets the obligation of section 16 (2) for the railway owner not to unfairly discriminate against access seekers under the Code.*

The NWIOA also submitted that the operating regime be transparent and notes that the Authority considers these matters to be covered by section 7 of the Code or the Train Management Guidelines”.¹

In the Final Determination of the TPI Train Path Policy the ERA agreed with NWIOA and United Minerals (UMC) submissions and stated:-

“Public Submissions

45. Both the NWIOA and UMC commented that the third dot point of Amendment 4 in the draft determination, related to the incorporation of section 2.2.2 of WNR’s 2006 TPP into the proposed section 2.2.3 of TPI’s TPP, did not properly reflect the application of section 7 of the Code.

46. In particular, these parties noted that the proposed section 2.2.3 of TPI’s TPP was not prefaced with the requirement that TPI provide the access seeker with the information that section 7 of the Code requires the railway owner to provide on request, such as working timetables for the route [section 7(1)(c)].

47. In addition, UMC expressed concern over ensuring that TPI meets its obligations under section 16(2) of the Code when TPI’s TPP comes into operation.

¹ NWIOA Submission to the ERA Draft Determination TPI’s proposed Train Path Policy, 7th May 2009, p4

PricewaterhouseCoopers' (PwC) Advice

48. PwC agreed with the comments by the NWIOA and UMC to the effect that an additional paragraph needed to be added to this section of TPI's TPP to reflect the requirement for TPI to provide information to access seekers in accordance with section 7 of the Code.

Authority's Assessment

49. The Authority agrees with the NWIOA and UMC, and with PwC that the proposed section 2.23 of TPI's TPP should include reference to the requirements of section 7 of the Code.

50. The Authority also notes that as a result of the Code being amended, by notice in the Government Gazette of 23 June 2009, section 7(1)(c) has been deleted from the Code. The working train timetable information for each route section is now specified under Schedule 2 as a requirement to be included in the rail owner's information publication (section 7A of the Code).

51. Amendment 4 of the draft determination has been revised by the Authority, in this final determination, to incorporate reference to section 7 of the Code as discussed above.

52. The Authority has noted the comment by UMC in relation to TPI meeting its obligations under section 16(2) of the Code and considers that this matter has been dealt with through the required inclusion, under draft determination Amendment 5 (confirmed under this final determination) of the following paragraph in TPI's TPP:

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 accordance with the requirements of section 16 of the Code".²

The NWIOA therefore requests that the ERA consider a clearer definition of Section 2, Information, 4(g), page 48 of the Code namely "the running times of existing trains".

Issue 2: - Whether such information be published on the owners web site.

Response: - NWIOA submits that this information should be published and regularly updated on the owner's website. NWIOA submits that it is important for planning and capacity calculation purposes for TPI to provide fulsome and clear information regarding all train movements. The information is critical for modelling mining feasibility scenarios both within and between networks without the onerous need on both parties to seek such information under an access application. Such feasibility monitoring is done on an ongoing basis by many potential mining companies within the industry.

Issue 3: - Whether such information is sufficient for access seekers to prepare an access proposal and if a railway owner's response provides the proponent with sufficient detail to proceed to the negotiation

² ERA, Final Determination, TPI Train Path Policy, 18th August 2009, p13 & 14

stage. Whether such information should include forecasts of available capacity over future years (say three years).

Response: - In relation to the TPI Regime, the Regime is not yet operational and the ERA is yet to make a Final Determination with regard to the Costing Principals. However, from the Final Determinations made so far, NWIOA submits that the information provided would not provide sufficient detail for access seekers to prepare an access proposal unless it included information similar to that provided under the WNR Regime. Estimates of future available capacity and likely costs are essential for the development of successful negotiations. However, NWIOA considers that these estimates are likely to be offered as a flat access charge with no basis for calculation.

Issue 4: - As an ancillary question to the Issue 3 above, if the railway owner is unable to provide the proponent with floor and ceiling prices for the forecast capacity as required under section 9(1)(c) (based on Gross Replacement Value (GRV) of the railway existing at the time the GRV is undertaken), should the GRV methodology be amended to provide for forecast infrastructure upgrading expenditure to be taken into account?

Response: - The NWIOA is of the view that the GRV methodology should be amended accordingly. However this amended methodology should only provide an estimate as there may be other third parties, and indeed the railway owner, considering capacity increases at the same time. Additionally, the quantum of infrastructure required in order to achieve the capacity has not been approved by the Regulator and there is a natural tendency by railway owners to future proof capacity which is generally a matter for the negotiation or arbitration process.

PART 3 – NEGOTIATIONS (DIVISIONS 1 AND 2)

Issue 1; - Whether, under section 15, sufficient information can be obtained from the railway owner by a proponent pursuant to sections 6 and 7, to show that its proposed rail operations can be accommodated on the relevant route or that an upgrading, if required, is technically and economically feasible.

Response: - For access seekers to be able to negotiate access and for existing operators to negotiate capacity expansion, certain network information is required in order to comply with section 15 of the Code. The main detail to be provided by the railway owner is itemised in Schedule 2 of the Code. Item 4(o) of Schedule 2 requires the railway owner to provide details of the available capacity. If this capacity is to be measured by train paths, all train paths and estimates of maintenance and renewal possession need to be made available and preferably published on the web site.

Issue 2: - Whether, under section 16, there is a need to expand 16(2) to clarify the intended meaning of the term “unfairly discriminate” in this context.

Response: - NWIOA submits that this concept is needed to guarantee the ability of the access seeker to be able to negotiate with the railway owner.

Issue 3: - Any other matters relating to this part of the Code.

Response: - Under the Code the railway owner can refuse to negotiate access or an expansion agreement inside the Code. NWIOA would therefore request that as part of the Code review, the ERA consider the scenarios which may arise as a result of a refusal to negotiate. .

PART 3 – NEGOTIATIONS (DIVISION 3)

Issue 1: - Whether, under section 25 the circumstances which constitute “disputes” under the Code (which can therefore be arbitrated under the Code) are appropriate or should be expanded to include disputes which may arise between the railway owner and an entity seeking access under other relevant parts of the Code.

Response: - NWIOA proposes that the current definition of "disputes" be expanded to include disputes relating to the following:

- provision of information prior to the access seeker making a proposal;
- disputes in relation to an access seeker's proposal under Part 2 of the Code; and
- disputes in relation to a railway owner's response to the proposal under Part 2 of the Code

NWIOA submits that widening the definition of "disputes" will avoid unnecessary and expensive Supreme Court proceedings. For example, the issue of available capacity is likely to arise prior to a proposal being submitted. The arbitration of the issue may be the only appropriate means of effective settlement given a railway owner's self interest or power. Similarly a railway owner's response to a capacity expansion may relate to excessive infrastructure additions and arbitration may be the only appropriate means of effective settlement.

Issue 2: - Any other matters relating to this part of the Code.

Response: - NWIOA refers the ERA to its response to Issue 3 of section 2 above regarding the refusal of a railway owner to negotiate inside the Code.

NWIOA also refers the ERA to the Australian Rail Track Corporation Access Undertaking 15 July 2008 section 3.12.1 *Disputes*. NWIOA notes that disputes that may lead to arbitration include disputes arising under the ARTC Access Undertaking as well as through the general negotiation of access.

CERTAIN APPROVAL FUNCTIONS OF THE REGULATOR

The key issues of relevance to Part 5 of the Code identified by the ERA are as follows:

- ▶ Whether section 45 should include the costing principles and over-payment rules in order to ensure consistency in the public consultation process across all four Part 5 Instruments.
- ▶ Whether a provision should be included providing for reviews of the Part 5 Instruments after a specific period (for example 5 years or as otherwise determined by the Authority).
- ▶ Whether in the case of section 42, relating to public consultation of segregation arrangements or variations to segregation arrangements, provision should be made to only require such consultation for variations to segregation arrangements considered by the Authority to constitute material changes.

Response: - NWIOA is in agreement with both the inclusion of costing principles and over-payment rules in the public consultation process. NWIOA also agrees with the suggested provisions relation to reviews of Part 5 Instruments and section 42 consultations.

SCHEDULES

Issue 1: - Whether the definition under section 52 of Schedule 1 needs to be more clearly defined with respect to the term 'railway'.

Response: - NWIOA agrees that the definition should relate to the entire railway, and be consistent with the definition of "Railway" in the TPI Railway and Port Agreement.

Issue 2: - Whether under Schedule 2; (a) any clarification of the items listed under this schedule is required or (b) there is need for further information to be made available by the railway owner under this schedule. These matters have also been discussed in this issues paper under Parts 1 and 2A of the Code.

Response: - NWIOA refers the ERA to NWIOA's responses to Parts 1, 2 and 3 above.

Issue 3: - Whether section 3(2) of Schedule 4 should include the requirement that for a new railway under the Code, the public consultation arrangements set out under sections 3(3) to 3(5) of Schedule 4 should apply to the initial WACC determination under the Code for such a railway.

Response: - NWIOA agrees that the public consultation process should apply for the WACC of a new railway.

Issue 4: - Whether Schedule 4 should include provisions setting out a review period for floor and ceiling determinations, along similar lines to that suggested for the Part 5 Instruments and segregation arrangements (ie five years or as otherwise determined by the Authority).

Response: - NWIOA's view is that the floor and ceiling price reviews should remain at three years rather than being extended to five years. Price reviews for utilities also determine the amounts of capex that a utility can undertake and charge for during the period in order to meet their performance targets whereas the TPI and the WNR networks do not have performance targets. In the case of new railway infrastructure (such as TPI) new entrants will seek access in the initial period through capital expansions. To some extent either new entrants or existing operators will also seek capacity expansion of the WNR network. The GRV calculations in such cases should be undertaken as soon as possible after major capital expansions. NWIOA submits that five years is too lengthy a period between reviews for networks that have the potential for new capital works.

Issue 5: - Whether the GRV methodology under section 2 of Schedule 4 should be amended to include the provision for floor and ceiling cost calculations to take into account forecast expenditure by the railway owner on the upgrading of rail routes as discussed in this issues paper under Part 2 of the Code.

Response: - NWIOA refers to the ERA to NWIOA's responses to Parts 1 and 2 Issue 4.
