

The Pilbara Infrastructure Pty Ltd (TPI)

# Final Determination on TPI's Proposed Over-payment Rules

6 April 2010

Economic Regulation Authority  
 WESTERN AUSTRALIA

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For further information, contact:

Jeremy Threlfall  
Assistant Director Rail  
Economic Regulation Authority  
Perth, Western Australia  
Phone: (08) 9213 1900

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## FINAL DETERMINATION

1. The Pilbara Infrastructure Pty Ltd (**TPI**), a wholly owned subsidiary of Fortescue Metals Group (**FMG**) is the owner of a recently constructed railway (**TPI Railway**) connecting FMG's Cloud Break iron ore mine in the Pilbara to TPI's port facilities at Port Hedland.
2. On 1 July 2008, the TPI Railway was included in the State's rail access regime (consisting of the *Railways (Access) Act 1998* (**Act**) and the *Railways (Access) Code 2000* (**Code**)) through proclamation of Part 3 of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* (**Agreement Act**).
3. On 28 July 2008, TPI submitted its proposed Over-payment Rules to the Economic Regulation Authority (**Authority**) for approval, in accordance with Part 5, section 47 of the Code. The Agreement Act required TPI to submit its proposed Over-payment Rules to the Authority no later than seven days after the TPI Railway became subject to the State's rail access regime.
4. The Authority issued its draft determination on TPI's proposed Over-payment Rules on 15 January 2010. The draft determination listed 15 amendments which were required to be made to TPI's proposed Over-payment Rules before the Authority could approve this proposal.
5. The Authority has considered TPI's proposed Over-payment rules in conjunction with comments made in submissions to the Authority on TPI's proposal and on the draft determination.
6. The final determination of the Authority is to approve TPI's proposed Over-payment Rules, subject to 15 amendments. These amendments are listed below.

## LIST OF AMENDMENTS

### Required Amendment 1

Section 1 of TPI's proposed Over-payment Rules (headed 'Introduction') should be amended by deleting the third sentence in the second paragraph and replacing this sentence with; "The Code provides, under section 8(4) of Schedule 4, that where payments to the railway owner exceed total costs this provision is not breached if the Over-payment Rules approved or determined under section 47 are complied with."

### Required Amendment 2

Section 5 of TPI's proposed Over-payment Rules (headed 'Definitions') should be amended by adding a definition for "access agreement" consistent with the definition set out under Part 1 of the Code.

### Required Amendment 3

Section 2.1.2 of TPI's proposed Over-payment Rules (headed 'Regulatory Ceiling') should be amended by deleting the words "A Route Section"" at the start of the first paragraph and replacing these words with " Each Route Section".

#### **Required Amendment 4**

Section 2.1.3 of TPI's proposed Over-payment Rules (headed 'Revenue for the Purposes of the Ceiling Price Test') should be amended by deleting the wording "the access regime will not provide" in the third sentence of the second paragraph and replacing these words with "since the Code does not provide".

#### **Required Amendment 5**

Section 5 of TPI's proposed Over-payment Rules (headed 'Definitions') should be amended as follows:

- Add the words "and other entities" immediately after the word "Operators" under the definition of "Access Revenue".
- Add a definition for the word "entities" consistent with the definition set out under Part 1 of the Code.
- Amend the definition for the term "Non-access Revenue" by deleting the words "FMG" and "WNR" and replacing each of these words with "TPI".
- Add a definition for the word "non-regime operators". This definition should state that non-regime operators are "Entities to which track access is provided under arrangements outside of the Code".

#### **Required Amendment 6**

Section 2.1.4 of TPI's proposed Over-payment Rules (headed 'Breaches of the Ceiling Price Test') should be amended as follows:

- Delete the words "If, despite efforts to reasonably avoid breaches of the Ceiling Price Test, a breach/breaches occur" under the second paragraph and replace with the words "If breaches of the Ceiling Price Test occur as a result of variations in traffic volume or revenue that are considered to be temporary or unpredictable in nature".
- Include a new paragraph as the first paragraph of this section consisting of the first sentence under section 2.4 of the WNR OPR.

#### **Required Amendment 7**

Section 2.1.5 of TPI's proposed Over-payment Rules (headed 'Over-payments and under-recoveries') should be amended as follows:

- Delete the fourth paragraph.
- Insert the sentence "Where under-recovery occurs the Operator is not required to pay TPI compensation for such under-recovery" as the first sentence of the second last paragraph on page 5.

#### **Required Amendment 8**

Section 2.1.6 of TPI's proposed Over-payment Rules (headed 'Allocation of Access Revenue') should be amended by adding two new paragraphs to the end of this section. The first new paragraph should have the same wording as the third sentence of the second last paragraph under section 2.6 of the WNR OPR (excluding the first word in this sentence which should be deleted). The second new paragraph should have the same wording as the last paragraph under section 2.6 of the WNR OPR (apart from replacing WNR with TPI).

### Required Amendment 9

Section 2.1.7 of TPI's proposed Over-payment Rules (headed 'Allocation of Non-access Revenue') should be amended by the addition of the words "(government or private)" immediately following the word "capital" at the end of the first sentence.

### Required Amendment 10

Section 2.1.8 of TPI's proposed Over-payment Rules (headed 'Allocation of an over-payment') should be amended by the addition of the words "divided by the aggregate of all Operators Access Revenue and Non-Access Revenue above the floor recorded on the Route Section" in the second sentence immediately following the word "Section" in the third line of this sentence.

### Required Amendment 11

Points 1 to 13 of Section 3 of TPI's proposed Over-payment Rules (headed 'Over-payment Rules') should be amended as follows:

- Point 1 - Insert the words "For the purpose of the Over-payment Rules, the financial year commences on 1 July and finishes on 30 June. The commencement date for the Over-payment Rules will be 1 July of the financial year immediately following completion of the approval process for all the regulatory documents required to be put in place by TPI under the Act and the Code (being the segregation arrangements, the four Part 5 instruments and the floor and ceiling costs)." immediately after the sentence under this point.
- Point 3 - Insert the information under (a) and (b) under the heading "Notes" as set out under section 3, part 6 of the WNR OPR under a similar heading and incorporate "(a)" and "(b)" into the formula in a similar manner to WNR's formula.
- Point 7 – Insert the words "calculated on 30 June each year or, if 30 June falls on a day which is not a business day, the rate published on the first business day after that date."
- Point 8 – Insert the words "within 3 months of the end of the financial year." immediately following the word "Rule 3" at the end of the sentence under this point.
- Point 9 – Delete this sentence.
- Point 10 – Delete the last sentence and replace with the words "TPI will provide the auditor's report to the ERA when it is completed."
- Point 13 – Amend to provide a similar level of detail on TPI's contractual arrangements with operators under the Code, for the Over-payment Rules, as is provided under section 3, part 17 and Schedule 1 of the WNR OPR. The amendment should be broadly consistent with the above section of the WNR OPR.
- Insert the same words, as under section 3, part 2 of the WNR OPR, as an additional point.

### Required Amendment 12

Section 4 of TPI's proposed Over-payment Rules (headed 'Compliance') should be amended as follows:

- Amend the heading to read "Compliance and review".
- Delete the wording under this section and replace with wording consistent with section 5 of the WNR OPR, with the exception of the following:

- a) First paragraph of section 5 of the WNR OPR: Delete this paragraph and replace with “TPI agrees to a review of the Over-payment Rules by the ERA, through a public consultation process, two years after the date when all the regulatory instruments required under the Act and the Code for TPI’s railway have been approved by the ERA. It is expected that the review will commence on 1 October 2012 and that TPI will provide the ERA with its proposed revised Over-payment Rules on this date”.
- b) Fourth paragraph of section 6 of the WNR CP: (1) Replace “WestNet” with “TPI”, (2) Replace “The ERA will monitor TPI’s compliance” with “TPI agrees to the monitoring by the ERA of its compliance”, (3) Delete the word “internal” in the sixth line, (4) Add the following sentence to the end of this paragraph; “It is expected that the first audit will commence at the end of the 2012-13 financial year”.

### **Required Amendment 13**

Section 5 of TPI’s proposed Over-payment Rules (headed ‘Definitions’) should be amended, in addition to the requirements set out under Amendments 2 and 5 in this draft determination, as follows:

- Include a complete list of all the terms which might reasonably be expected to require a definition.
- Ensure all definitions are consistent with the definitions in the Code and the Act or, if not defined in the Code or the Act, consistent with the definitions under section 6 of the WNR OPR.

### **Required Amendment 14**

TPI’s proposed Over-payment Rules should be amended to include a new section, immediately following section 3, which provides detail on how TPI’s Over-payment Rules would be applied. This new section should be headed “Application of the Over-payment Rules” and should be similar to section 4 of the WNR OPR (including Table 1).

### **Required Amendment 15**

TPI’s proposed Over-payment Rules should be amended to include a new section prior to the ‘Definitions’ section. This section should consist of the following statement; “TPI will ensure, where possible, that those sections of access agreements under the Code which relate to requirements set out in the Over-payment Rules are referenced to the relevant clauses in the Over-payment Rules in order to ensure that consistency is maintained between these access agreements and the Over-payment Rules.”.

## REASONS FOR THE FINAL DETERMINATION

### BACKGROUND

7. The TPI Railway was commissioned in May 2008. This railway is about 260 kilometres in length and runs from FMG's Cloud Break iron ore mine in the Chichester Ranges (East Pilbara) to TPI's port facilities at Anderson Point in Port Hedland.
8. On 1 July 2008, the TPI Railway became subject to the Act and the Code through the proclamation of Part 3 of the Agreement Act. TPI was required, from this date, to comply with the legislative obligations set out for railway owners under the Act and the Code.
9. The TPI Railway is owned and operated by TPI. TPI will perform both access-related rail functions and functions associated with the operation of train services.
10. The Over-payment Rules is one of the four Part 5 Instruments set out in Section 40(3) of the Code. Section 40(2) of the Code notes that the Part 5 Instruments are binding on the railway owner.
11. To assist the Authority in the preparation of its final determination, the Authority engaged a consultant, PricewaterhouseCoopers (**PwC**) to review TPI's proposed Over-payment Rules and public submissions, and provide advice to the Authority. The PwC final report is available on the Authority's website ([www.erawa.com.au](http://www.erawa.com.au)).

### PUBLIC CONSULTATION

12. The Authority issued its draft determination on 15 January 2010. Fifteen amendments were required to be made to TPI's proposed Over-payment Rules under the draft determination.
13. The Authority provided a six week public consultation period on its draft determination, from 15 January 2010 to 25 February 2010. One submission was received, from the North West Iron Ore Alliance (**NWIOA**). This submission is available on the Authority's website.
14. TPI did not provide a submission on the Authority's draft determination.
15. It should be noted that reference has been made in the discussion below to WestNet Rail's (**WNR**) Over-payment Rules (**OPR**), as approved by the Authority in April 2009. WNR's OPR is available on the Authority's website.

### SCOPE OF MATTERS COVERED UNDER THE FINAL DETERMINATION

16. The final determination deals with the matters to be included in a railway owner's Over-payment Rules as set out under Part 5, section 47 of the Code.

## FINAL DETERMINATION

17. As noted above, only one submission (from the NWIOA) was received on the draft determination. The NWIOA submission related to Amendment 6 of the draft determination, which dealt with section 2.1.4 of TPI's proposed Over-payment Rules.
18. The NWIOA noted that in the equivalent section of WNR's OPR, non-access revenue may include private and government contributions in accordance with WNR's Costing Principles. The NWIOA submitted that in order to be consistent with WNR's OPR, section 2.1.4 of TPI's Over-payment Rules should be amended to contain similar wording, in relation to the definition of the term 'non-access revenue', to that in the WNR OPR.
19. PwC advised that TPI's proposed Over-payment Rules defined Revenue as including "Access Revenue" and "Non-access Revenue" in its definitions section (Section 5). This section also defined Non-access Revenue as revenue "that may include private and government contributions".
20. PwC's view was that TPI's definition of "Non-access Revenue" in Section 5 of its proposed Over-payment Rules adequately defined this term in a manner similar to the definition of this term under the WNR OPR.
21. Consequently, PwC did not consider a revision to section 2.1.4 of TPI's proposed Over-payment Rules, as suggested by the NWIOA, to be necessary. In forming its view, PwC also noted that draft determination Amendment 5 required some changes to the definition of "Non-access Revenue" and expressed its view on the basis of this definition being revised as required under this amendment.
22. The Authority agrees with PwC's view with respect to the NWIOA's comment. The Authority therefore confirms its position, as set out in the draft determination, in relation to Amendment 6.
23. No public submission comments were received on any of the other amendments set out in the draft determination. The Authority confirms its position, as set out in the draft determination, in relation to these amendments (Amendments 1 to 5 and 7 to 15).