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API Management Pty Ltd
ABN 66 112 677 595
Level 2 Aquila Centre
1 Preston Street
Como WA 6152
Australia

PO Box 1038
South Perth WA 6951

Telephone: + (61) 8 9423 0222
Facsimile: + (61) 8 9423 0233
mail@apjiv.com.au
www.apjiv.com.au

Economic Regulation Authority
Attention: Senior Project Officer, Access
PO Box 8469
PERTH BC WA 6849
By email :publicsubmissions@erawa.com.au

SUBMISSION ON THE REVIEW OF THE RAILWAYS (ACCESS) CODE 2000 BY THE ECONOMIC REGULATION AUTHORITY

We refer to the Economic Regulation Authority (ERA) Review of the Railways (Access) Code Issues Paper October 2009 (**Issues Paper**).

The Issues Paper outlines the key issues relating to the Railways (Access) Code 2000 (**the Code**), in which the ERA is seeking comment from interested parties.

API Management Ltd (**API**) is developing mines in the West Pilbara and a heavy haul railway to a proposed port at Anketell Point. It is not yet determined but, it is anticipated that the Code may apply to the railway. Accordingly, API welcomes the opportunity to respond to the issues raised in the Issues Paper. API has prepared its submissions to respond to the amendments proposed by the ERA, and to raise further issues in relation to provisions of the Code, which are not covered in the Issues Paper.

Attached is a copy of API's submission. API consents to its submission being published on the ERA website.

If you have any queries raised in relation to this submission, please do not hesitate to contact me on (08) 9423 0222.

Yours sincerely

A handwritten signature in blue ink, appearing to read 'Kevin Watters', written over a light blue horizontal line.

Kevin Watters

PROJECT DIRECTOR

Attachment: API's submissions on the ERA's Review of the Code

1 Background

- 1.1 By way of background, API Management Pty Ltd (**API**) is the manager of the Australian Premium Iron Joint Venture (**APIJV**) an unincorporated joint venture comprising two participants, Aquila Resources Ltd and American Metals and Coal International Inc. Both companies hold a 50% participating interest in the joint venture via wholly owned subsidiaries.
- 1.2 The APIJV is developing the West Pilbara Iron Ore Project, a long-term iron ore export operation in the Pilbara region of WA (**Project**). The APIJV controls iron ore rights to one of the largest tenement portfolios across the Pilbara region (approximately 10,000km²). Some 8,000km² is focused in the West Pilbara, in four primary project areas, some accessed by joint venture with other companies. The Project mine sites are situated between 30km and 85km south of Pannawonica in the Pilbara region.
- 1.3 Capital expenditure on the Project is estimated at A\$5.77 billion.
- 1.4 As part of the Project, the APIJV is undertaking an infrastructure development that will provide transport infrastructure for iron ore from the Project mine sites to a deep-water port at Anketell Point, approximately 30km northeast of Karratha. The transport infrastructure will be an entirely new greenfields railway with a planned route comprising almost 300km of heavy haul rail track from the Project mine sites to the Anketell Point port.
- 1.5 API are confident that, subject to statutory approvals and funding, construction of the greenfields railway could commence in the March Quarter 2012 with first shipments of iron ore estimated early in 2014.
- 1.6 It is not yet determined but, it is anticipated that the Code may apply to the railway. Accordingly, API has an interest in ensuring that the Code provisions are appropriate for a greenfields railway.

2 The key issues

- 2.1 Parts 1 and 2A - Preliminary information and publication of information
 - 2.1.1 Part 1 of the Code defines the key terms used in the Code.
 - 2.1.2 Part 2A of the Code contains provisions for the publication of information by a railway owner, to a potential access seeker.
 - 2.1.3 The ERA have sought comment as to whether :
 - (a) the '*required information*' defined in section 6 of the Code, is sufficient for prospective access seekers to gain a preliminary understanding of the rail network characteristics and relevant route section infrastructure capability and traffic loads; and

- (b) should the '*required information*' be provided on the railway owner's website, as well as in hard copy.
- 2.1.4 API considers that the '*required information*' defined in section 6 of the Code is sufficient.
- 2.1.5 If a railway owner has a current website, then API supports the ERA's proposal that the required information be published on the railway owner's website, as well as provided in hard copy format.
- 2.2 Part 2 - Proposals for access
 - 2.2.1 Part 2 of the Code deals with proposals by access seekers to railway owners for access to the railway owner's network.
 - 2.2.2 The ERA have sought comment as to whether:
 - (a) the extent of information, which access seekers can request from railway owners under section 7, is sufficient to allow such access seekers to properly prepare an access proposal pursuant to section 8 of the Code;
 - (b) whether such entities seeking access should also be provided with forecasts of available capacity over future years;
 - (c) whether section 7 of the Code should include a further clause noting that any capacity information provided by the railway owner must be compiled on a reasonable basis, consistent with the railway owners duty not to unfairly discriminate between the proposed rail operations of an access seeker and the railway operations of the railway owner; and
 - (d) whether section 9 should allow a railway owner to also provide floor and ceiling prices to an access seeker for future upgrading to rail infrastructure to meet the access seeker's proposed traffic requirements.
 - 2.2.3 API considers that the extent of the information access seekers can request from railway owners under section 7 of the Code is sufficient.
 - 2.2.4 Nonetheless, API considers that it may be difficult for a greenfields railway owner to provide an access seeker with some of the preliminary information prescribed under section 7. In particular, it may be arduous for a greenfields railway owner to give an initial indication of the price that an access seeker might pay for access. In the event that an indication of the price is attainable, it may be a challenge to provide the information within 14 days, as required under section 7(2) of the Code.
 - 2.2.5 Relevantly, API acknowledges that access seekers should also be provided with forecasts of available capacity over future years, but only to the extent that such information can be reasonably forecasted by a railway owner, taking into account a railway owner's obligations not to unfairly discriminate.
 - 2.2.6 Finally, to the extent that a greenfields railway owner can provide an access seeker with floor and ceiling prices in relation to future upgrading to rail

infrastructure, then API strongly supports the ERA's proposal that section 9 be expanded to allow for this.

2.2.7 API notes however that section 9 may require further amendment if the price access provisions contained in Schedule 4 of the Code are amended. API has canvassed this issue further in its submissions to the Department of Treasury and Finance regarding amendments to the Code, and later at section 4 of these submissions.

2.3 Part 3 - Negotiations (Divisions 1 and 2)

2.3.1 Part 3 Divisions 1 and 2 of the Code outline provisions for the negotiation of an access agreement between the access seeker and the railway owner.

2.3.2 The ERA has sought comment as to whether:

- (a) under section 15, sufficient information can be obtained from the railway owner by an access seeker 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; and
- (b) whether the term '*unfairly discriminate*' referred to in section 16(2) requires further clarification.

2.3.3 API considers that sufficient information can be obtained by an access seeker under section 15, particularly in circumstances where the ERA has proposed that section 7 be amended to allow access seekers to be provided with forecasts of available capacity over future years.

2.3.4 API neither supports nor objects to the clarification of the term '*unfairly discriminate*' referred to in the context of section 16(2). API considers however, that the term '*unfairly discriminate*' as referred to in section 16(1)(b) may need to be clarified. In this regard, API submits that section 16(1)(b) should be expanded to allow railway owners some discretion in determining one access seeker over another. API suggests that this section could be amended to include a non-exclusive list of the considerations a railway owner is allowed to take into account in determining whether to choose one access seeker over another.

2.4 Part 3 - Negotiations (Division 3)

2.4.1 Part 3 Division 3 of the Code outlines the process for arbitration of disputes in the negotiation of access agreements.

2.5 The ERA has sought comment as to whether :

- (a) the circumstances which constitute '*disputes*' under section 25 of the Code (and 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 access seeker under other parts of the Code.

2.5.2 API does not support any amendment to section 25 as to what constitutes a '*dispute*'. The section is drafted entirely from the point of view of an access

seeker's right to arbitration. This is qualified in section 26(1) which provides that :

*'an entity (**the other party**) that is in dispute with the railway owner may, by notice in writing to the Regulator, refer the dispute to arbitration.'*

API considers that the section should be amended to allow either party to refer the dispute to arbitration.

2.5.3 Furthermore, API notes that Division 3 makes no provision for:

- (a) the costs of the preliminary conference;
- (b) the costs of the arbitration;
- (c) appealing a determination.

2.6 Part 4 - Access Agreements

2.6.1 Part 4 of the Code deals with matters relating to access agreements. The ERA is not aware of any issues that parties may have concerns with in relation to the provisions contained in Part 4.

2.6.2 API's submissions in relation to Part 4 of the Code are addressed at section 4 of these submissions.

2.7 Part 5 - Certain approval functions of the Regulator

2.7.1 Part 5 of the Code outlines the approval functions of the ERA in relation to the Part 5 instruments:

- (a) train management guidelines;
- (b) statements of policy;
- (c) costing principles; and

- (d) over-payment rules.

A railway owner is required to submit such instruments to the ERA for approval.

Part 5 also contains provisions for a public comment process which the ERA must comply with before approving a railway owner's train management guidelines, train path policy and segregation arrangements.

2.7.2 The ERA has sought comment as to whether:

- (a) section 45 in relation to train path policies should include costing principles and over-payment rules to ensure consistency in the public consultation process across all Part 5 instruments;
- (b) a provision should be included providing for reviews of Part 5 instruments after a specific period eg 5 years;
- (c) whether, in the case of segregation arrangements or variations to segregation arrangements, provision should be made to only require public consultation for variations, considered by the ERA to be material changes.

2.7.3 Although API supports the ERA's views on consistency in the public consultation process, and the ERA's other suggested amendments to Part 5, API does not consider that all of the provisions relating to Part 5 Instruments can be applied to greenfields railway owners. In particular, it is difficult to see how a greenfields railway owner would be in a position to:

- (a) submit to the ERA an accurate statement of the principles, rules and practices (the '*train management guidelines*') that are to be applied and followed by a railway owner, pursuant to section 43 of the Code;
- (b) submit to the ERA an accurate statement of the principles, rules and practices (the '*costing principles*') that are to be applied to the railway owner, pursuant to section 46 of the Code; and
- (c) submit to the ERA an accurate statement of the rules (the '*overpayment rules*') that are to apply where breaches of Clause 8 of Schedule 4 occur, relating to the ceiling price test, pursuant to section 47 of the Code.

2.7.4 Accordingly, API recommends that the ERA considers the relevance of Part 5 provisions to the operations of greenfields railway owners.

2.8 Part 6 - General

2.8.1 Part 6 of the Code deals with general matters including inquiry issues and obligations of the ERA with respect to confidential information. The ERA is

not aware of any issues that parties may have concerns with in relation to the provisions contained in Part 6.

2.8.2 API makes no submissions in relation to Part 6 of the Code.

2.9 Schedule 1- Routes to which the Code applies

2.9.1 Schedule 1 lists the routes to which the Code applies including:

- (a) standard guage route;
- (b) narrow guage route;
- (c) dual guage routes;
- (d) urban network; and
- (e) TPI Railway and Port Agreement Route.

2.9.2 The ERA has sought comment as to whether the definition under section 52 in Schedule 1 needs to be more clearly defined with respect to the term '*railway*'.

2.9.3 API considers that the definition of '*railway*' in section 52 is sufficient. If however the ERA intends to amend the definition, API recommends that the amendment reflect, where possible, the defined term contained in the TPI Railway and Port Agreement, ie :

'Railway means a standard guage heavy haul railway initially from the mining area to be developed under the Mining Agreement in the vicinity of the

Chichester Ranges in the Pilbara region of the said State to the Company's Port Facilities within the Port or to a location near the boundary of the Port. . .'

2.10 Schedule 2 – Information to be made available

2.10.1 Schedule 2 lists the required information as referred to in section 6(b) of the Code in respect of the relevant parts of the railways network.

2.10.2 The ERA has sought comment as to whether :

- (a) any of the items listed in Schedule 2 require clarification; and
- (b) there is a need for any further information to be made available by the railway owner.

2.10.3 API considers that the items listed in Schedule 2 do not require further clarification, nor is there a need for any further information to be made available by a railway owner.

2.10.4 Importantly, API considers that it may be difficult for a greenfields railway owner, particularly in the early stages of its operation, to provide to an

access seeker, all of the information listed in Schedule 2. For example, it is unlikely that a greenfields railway owner will be able to provide the total gross tonnage of all trains operated (where 'gross tonnage' means the total weights of the rolling stock of the train and the freight carried).

2.11 Schedule 4 – Provisions relating to prices to be paid for access

2.11.1 Schedule 4 outlines the provisions relating to prices to be paid for access.

2.11.2 The ERA has sought comments as to whether :

- (a) 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 weighted average cost capital determination under the Code;
- (b) whether Schedule 4 should include provisions setting out a review period for floor and ceiling determinations, along similar lines to that suggested for Part 5 instruments and segregation arrangements; and
- (c) whether the gross replacement value 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.

2.11.3 API supports all of the ERA's proposed amendments to Schedule 4. API wishes to make further submissions in relation to the access price provisions of the Code. API advises that it has also provided detailed submissions to the Department of Treasury and Finance (DTF) in response to the DTF's Consultation Paper regarding its proposed amendments to the access pricing provisions of the Code.

3 Part 4 - Price access provisions

3.1 API considers that the current access pricing provisions of the Code do not facilitate reasonable cost recovery for greenfield railway owners from access seekers. Accordingly, API strongly supports any amendments to the Code to facilitate reasonable cost recovery and certainty for greenfield railway owners from access seekers.

3.2 The DTF's proposed amendments only go so far as to amend the definitions of '*capital costs*' and '*operating costs*' as referred to in Schedule 4 of the Code. Although the amendments now allow a railway owner to recover land acquisition, aboriginal heritage, native title, lease and license costs for land, they do not make provision for the recovery of costs relating to :

3.2.1 finance;

3.2.2 establishment;

3.2.3 legal, regulatory and compliance;

3.2.4 pre-feasibility and feasibility assessment;

3.2.5 design, supply and construction;

3.2.6 overheads, utilities, labour and maintenance; and

3.2.7 expansion and redevelopment.

3.3 The ERA, in performing its functions under the Act and Code is required to take into account:

3.3.1 the railway owner's legitimate business and investment in railway infrastructure roles;

3.3.2 the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure.

Without certainty of the types of costs recoverable, a greenfields railway owner is not able to make appropriate investment decisions in relation to the development of the railway. Similarly, without certainty as to their potential cost liability, an access seeker is not equipped with the necessary information to negotiate an access agreement.

4 Additional points not raised in Issues Paper

4.1 Regulation under the Code

4.1.1 The Code was established in accordance with section 4 of the *Railways (Access) Act 1998 (the Act)* to give effect to the Competition Principles Agreement in respect of railways to which the Code applies.

4.1.2 In summary, provision is made in the Code for :

- (a) railway infrastructure to be available for use by persons other than the railway owner to carry on rail operations in accordance with agreements with the railway owner or determinations made by way of arbitration;

- (b) prescribing which parts of the railways network and which railway infrastructure associated with those parts are available to other persons;
 - (c) setting out -
 - (i) provisions governing the content of agreements;
 - (ii) rights, powers and duties that are to apply in relation to negotiating and implementing the agreements; and
 - (iii) duties and requirements of railway owners in provision of the access;
 - (d) the ERA to have supervisory and other functions for the purpose of the Code including a person making a proposal for access to the Code.
- 4.1.3 The Act and the Code were drafted on the basis that they applied to a railway network consisting of :
- (a) the government railways;
 - (b) the railways that are on land that is corridor land as defined in the *Rail Freight System Act 2000*;
 - (c) the railway constructed pursuant to the TPI Railway and Port Agreement; and
 - (d) any new railway declared to be a part of the railways network.
- 4.1.4 The current provisions of the Code provide a regulatory regime for existing brownfields railways, where there is already an established network and infrastructure. Consequently, it is difficult to reconcile the existing provisions of the Code in relation to a greenfields railway operation. For example, a greenfields operator has a greater exposure to costs in circumstances where:
- (a) their infrastructure has not yet been built;
 - (b) demand for third party access may be uncertain; and
 - (c) there is no guidance or certainty as to the types of costs recoverable from third party access seekers.
- 4.1.5 Furthermore, it may be difficult for a greenfields railway owner, particularly in the early stages of its operations, to provide an access seeker:
- (a) with an initial indication of the price an access seeker might pay for access (section 7(a)(ii) of the Code);
 - (b) with technical information about any aspect of the railway owner's railway infrastructure that affects the design of rolling stock (section 7(3) of the Code);
 - (c) upon receipt of an access proposal, with :
 - (i) the floor and ceiling price for the proposed access;
 - (ii) the costs for each route section on which the prices have been calculated; and

(iii) a copy of the costing principles,
(section 9 of the Code).

4.1.6 Additionally, it will be also be a challenge for greenfields railway owners to cover the specific matters outlined in section 17 of the Code when negotiating an access agreement, including:

- (a) the allocation of train paths that have ceased to be used by the operator;
- (b) prices and charges;
- (c) train control, operations and consultation procedures;
- (d) the powers of the railway owner in relation to the inspection of, the obtaining of information about, and the testing of the operator's rolling stock and other equipment; and
- (e) giving effect to the access price provisions outlined in Schedule 4 of the Code.

4.2 For the above reasons, API strongly recommends that the ERA gives careful consideration as to whether the regulatory regime applicable to brownfields railway owners can be adequately adopted and applied to greenfields railway owners.