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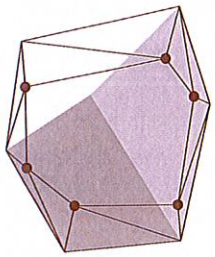

Submission in response to the Economic Regulation Authority Western Australia 12 April 2013 - Revisions proposed by The Pilbara Infrastructure (TPI) to its Segregation Arrangements

10 May 2013

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1. PURPOSE AND CONTEXT

This submission is Brockman Mining Australia Pty Ltd's response to the publication by the Economic Regulation Authority (**ERA**) of a notice seeking public comment on revisions proposed by The Pilbara Infrastructure (**TPI**) to its Segregation Arrangements (**Arrangements**) for the railway networks the subject of the *Railways (Access) Act 1998* (WA) (**Act**) and the *Railways (Access) Code 2000* (WA) (**Code**).

Brockman Mining Australia Pty Ltd is a wholly owned subsidiary of Brockman Mining Limited (**Brockman**), an emerging multinational diversified mining and services group with interests in Australia, the mainland Peoples' Republic of China and Hong Kong. Brockman is listed on both the Australian and Hong Kong securities exchanges. In 2012, Brockman completed the takeover of an Australian based iron ore explorer and is now advancing its acquired portfolio of high quality, high potential iron ore deposits in the Pilbara.

The most significant of these projects is the Marillana hematite iron ore project (**Marillana**) and the recently discovered Ophthalmia hematite iron ore project (**Ophthalmia**). A mining lease has been secured for Marillana, which has reported ore reserves in excess of 1Bt of hematite iron ore. The project has established native title agreements, advanced environmental approvals, and completed mine planning and engineering studies including definitive engineering and front end engineering. Marillana is targeting production in excess of 400 Mt of iron ore product over a mine life in excess of 20 years. Brockman has reported maiden iron ore Mineral Resources in three deposits over the last five months, for a combined total Mineral Resource for the project of 290 Mt grading 59.1% ("Mineral Resource" referred to for the purposes of the JORC Code). The projects are located in the East Pilbara in close proximity to the TPI railway, Fortescue Metals Group Limited's (**FMG**) Nyidinghu iron ore project and to other major and junior mining company iron ore deposits.

The focus for this submission is consideration of how the Arrangements may operate with respect to the TPI railway and the extent to which this will facilitate outcomes in accordance with the Competition Principles Agreement. Brockman recognises that the WA Rail Access Regime (**Regime**) was established as a framework to promote effective fair and transparent competition on Western Australia's railway networks. We understand the Regime aims to encourage the efficient use of railways and investment in railways by facilitating a contestable market for access to railway lines and on-the-ground facilities.

2. TIMING OF TPI'S OBLIGATION TO COMPLY WITH THE ARRANGEMENTS

To be effective, the Arrangements need to apply to TPI and FMG at all times, whether or not an access proposal is on foot or contemplated.

3. VISIBILITY OF TPI'S ARRANGEMENTS WITH ITS RELATED BODIES CORPORATE

The Arrangements state that access agreements offered under the Code will be 'broadly consistent' with those between TPI and FMG. However, it is impossible to test this unless TPI is required to provide (redacted) copies of access agreements with FMG or, alternatively, is required to use the same form of agreement for all access arrangements.

4. SEGREGATION OF ACCESS-RELATED FUNCTIONS FROM FMG

Section 28 of the Act requires that TPI segregate its "access-related functions" from its other functions, giving rise to the Arrangements under the Code. The Arrangements, as such, only apply to "access-related functions". "Access-related functions" are defined very narrowly in section 2 of the Arrangements, and the list of identified "access-related functions" do not include anything prior to the commencement of negotiations. This would mean that initial requests for information (**RFI**) under section 7 of the Code and the submission of the access proposal itself (under section 8 of the Code) would not be covered by the Arrangements. Such a narrow definition defeats the purpose of the Arrangements, particularly given the nature of the information generally required to be given to TPI by an access seeker at this stage of the access application process.

Further to this, the Arrangements should deal more prescriptively with RFI requests made under the Code, and other pre-Access Proposal steps (such as the requirement to establish a standard access agreement). The Arrangements should prescriptively describe how TPI responds to RFIs (and deal specifically with the requirement to provide an access seeker with detailed capacity information).

With respect to the segregation of TPI/FMG business operations, the Arrangements should more explicitly require segregation between below rail operations and FMG's mining or other operations. The Arrangements focus on segregation between above and below rail operations, but there are also significant reasons to require strong segregation between TPI activities and FMG mining activities. See further comments at point 9 below.

5. HOW TPI EXERCISES ITS RIGHTS UNDER S 14 AND 15

Sections 14 and 15 of the Code allow TPI to require that any access seeker give further assurance that it has both the managerial and financial ability to carry on the proposed rail operations and that those operations will be within the capacity of the existing or proposed expansion of the route.

The Arrangements do not include any guidance or restrictions on how these rights might be exercised. The Arrangements should include requirements or limitations of some nature as to governance of TPI's rights under sections 14 and 15 of the Code. In the absence of these, it would seem that there is scope for TPI to exercise these powers so broadly as to be a misuse of those rights.

6. DEFINITION OF CONFIDENTIAL INFORMATION

Confidential information is defined very narrowly in section 4.1 of the Arrangements. For example, the Arrangements only contemplate confidential information as including matters relating to access negotiations and operations. The Arrangements should reflect the fact that all access-related matters, regardless of where in the application (or RFI) process they relate, should be treated as confidential and thereby the Segregation Arrangements should prevent any sharing of confidential information outside of TPI's staff and which should specifically exclude FMG staff.

7. DUTY OF FAIRNESS

The duty of fairness, under the Act, requires that any officer dealing with "access-related functions" cannot unfairly discriminate between the interests of the railway owner and the access seeker. The current Arrangements interpret the duty of fairness and non-discrimination under section 33 of the Act very narrowly. For example, other comparable arrangements, such as the *QR Network's 2010 Access Undertaking* include, as basic principles, that the rail owner and its related parties must conduct business on an arms-length basis, and that they must not provide access on more favourable terms than those offered to third party access seekers. Similar provisions should be included in the Arrangements.

8. TPI CONSIDERATION OF FMG SUPPLY CHAIN

The Arrangements state that TPI will have regard to the efficiency of the FMG supply chain (mine-rail-port) when performing "access-related functions". This is exactly the conduct that the Arrangements are meant to avoid. As an alternative to a blanket prohibition on this, the ERA has flagged that if it were permissible for a railway owner to have regard to the supply chain, there would be a case for the Part 5 instruments to apply to all Code and non-Code access holders (with the result that decisions on capacity, scheduling and the like should be made more equitably). We are supportive of more equitable outcomes as a principle. However, we are not satisfied that the alternative proposed will necessarily have an equitable result.

9. TREATMENT OF CORPORATE SERVICES STAFF

The Arrangements should require that there are dedicated legal and financial services staff for access-related functions. If it is the case that the current arrangements with 'shared services' staff within FMG/TPI (such as legal and financial) are such that the same staff within FMG/TPI are performing multiple functions and accessing confidential information, then Brockman would assert that such an arrangement represents very weak segregation. In this respect Brockman would encourage the ERA to use its investigatory powers to determine if there is adequate segregation in place and effective in respect of the FMG/TPI legal and financial services teams.

10. PHYSICAL SEPARATION

To make the Arrangements effective, there should be complete physical separation of information between above and below rail business units and between TPI and FMG in general.

11. TPI SELF-REGULATION

Consideration should be given to whether the current self-regulation processes are working, for example, the extent to which TPI is satisfying its obligations to educate and monitor its own staff regarding the operation of the Arrangements. Further to point 9 above, Brockman would encourage the ERA to use its investigatory powers to determine if there are adequate self-regulation processes in place to educate and monitor TPI's own staff regarding the operation of the Arrangements.

12. EFFECTIVENESS OF REVIEW AND AUDIT PROCESSES

The Arrangements require an audit of TPI's compliance every 2 years, however no such audit has yet occurred. Similarly, the review that was to commence on 1 October 2012 has not yet occurred. If this is because no Code-based access application has yet been made, one issue to be considered should be whether provisions in the Arrangements (and other requirements to which TPI is subject) are in themselves creating an unacceptable barrier to entry.

TPI's proposed amendments to the Arrangements include the removal of the requirement for mandatory periodic review by public consultation. In addition, the amendments propose that the timing of compliance audits is limited so that it is "not more than" once every 2 years. The result is that there is no certainty as to when compliance audits will be held. This is clearly an unacceptable position, particularly given the concerns regarding current self-regulation raised in point 11 above.