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Our Ref: LS-160-O-0017

29 January 2009

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

RE: DRAFT DETERMINATION ON PROPOSED SEGREGATION ARRANGEMENTS

Dear Jeremy

On 3 December 2008, the Economic Regulation Authority released a Draft Determination on the Proposed Segregation Arrangements that would apply to The Pilbara Infrastructure Pty Ltd's (TPI) railway from Cloud Break to Port Hedland.

Through this letter, TPI provides comment on the Draft Determination. In its response, TPI has focused on three key aspects being:

1. Staged Approach

TPI does not agree that a two staged implementation of segregation arrangements is inconsistent with, or not contemplated by the Act. In its comments, TPI highlights that while the Act may be silent on any given matter, it does not preclude such a matter from being acceptable to the Regulator. Further the Act is non-prescriptive, gives no direction as to the acceptability of any arrangements and requires that the Regulator make a subjective evaluation of any proposal. It is far more effective for the Authority, in evaluating any proposal, to provide policy based advice on the content of the proposal and justify any changes that it may require in its draft determination.

2. Separate Computer File Server

TPI does not agree that a dedicated and stand alone computer file server, for managing access information, is necessary. The Authority has justified its requirements on the basis of consistency with the 2003 Westnet determination. That ignores the overall improvements in computer security systems since 2003 and the existing secure systems put into place by TPI and its parent Fortescue Metals Group to manage a range of confidential information across the businesses. The role of the Authority in this instance should be to prescribe outcomes rather than methodologies.

3. Public Comment on Segregation Manual.

The Authority has required that TPI's Segregation Manual be released for public comment. TPI has commented that there is no precedent for such a requirement, this goes beyond the recommendation of its consultant Price Waterhouse Coopers, and was not justified in any way by the Authority in its Draft Determination.

Please contact the undersigned if you need any additional information or clarification of comments provided.

Yours sincerely

FORTESCUE METALS GROUP LTD

Greg Dellar
Government Relations

for

The Pilbara Infrastructure Pty Ltd

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Attachment – Comments on the Draft Determination on the Proposed Segregation Arrangements, applying to The Pilbara Infrastructure Pty Ltd.

1 Staged Introduction of Segregation Arrangements

The Authority's draft determination says the Act does not contemplate a two stage process and such a process is not consistent with the requirements of the Act.

TPI holds the view that the Act does not prohibit a staged approach, rather it is silent on such an approach. The legislation provides no direction to the acceptability of any proposed segregation arrangements. It equally does not give any direction as to the timing of implementation of any component of proposed segmentation arrangements. Rather it requires (in S28) that a railway owner must make such arrangements, they must operate effectively, be complied with and (in S30) that the provisions of S31-34 are satisfied. In its proposal, TPI has described arrangements that meet the above criteria. As such, TPI rejects the assertion that's its proposed segregation arrangements are inconsistent with and/or not contemplated by the Act.

The Act gives power to the Regulator to approve or determine arrangements. The Regulator is required to make a subjective assessment of whether the proposed arrangements are suitable given its responsibilities to administer the legislation. It is also incumbent upon the Regulator to explain the basis of its findings and requirements. That is a very different process to, and should not be confused with a rejection of proposed arrangements on the ill defined grounds of being inconsistent with or not contemplated by the Act.

The Authority's position is based on its acceptance of advice from PriceWaterhouse Coopers (PWC) that TPI's approach is inconsistent with the Act. In its report, PWC comments that "the incomplete functional separation proposed by TPI at Stage 1 is considered to be inconsistent with the requirements of the Act". It does not elaborate on why it has formed this view.

TPI has proposed that a partial functional separation be implemented during Stage One. PWC makes no comment on why this degree of separation is not adequate. It is also not clear if PWC has formally taken legal advice in reaching this conclusion. We note PWC's use of the term "the Act does not appear to contemplate a 2 staged approach". In our view the Act contemplates only that the Regulator will approve or determine segregation arrangements, it does not provide any context as to what is acceptable (or is "contemplated" as PWC suggests). What is clear is that the legislation does not prohibit such an arrangement.

TPI considers that during Stage One, its proposed arrangements are consistent with the Act. It could have submitted the Stage One arrangements

as the entirety of its segregation arrangements and in its view; it still would have been consistent with the Act. Whether such an arrangement may or may not be acceptable to the Authority, on subjective grounds, is a different matter to it being consistent or inconsistent with the Act.

The relevant sections of the Act are as follows:

28. Duty to segregate

- (1) A railway owner must make arrangements to segregate its access-related functions from its other functions.*
- (2) A railway owner must have appropriate controls and procedures to ensure that the measures in place under subsection (1) —*
 - (a) operate effectively; and*
 - (b) are complied with.*

29. Powers of Regulator in relation to segregation

- (1) Before a railway owner puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28 it must obtain the Regulator's approval to the arrangement or variation.*
- (2) In addition to subsection (1), the Regulator may confer with a railway owner on any matter which relates to the way in which the railway owner's obligations under section 28 are to be carried out, with a view to the Regulator and the railway owner reaching agreement on the matter.*
- (3) The Regulator may give directions in writing to a railway owner with respect to a matter to the extent that agreement is not reached under subsection (2), and the railway owner is to comply with any such direction.*
- (4) If a railway owner fails to comply with —*
 - (a) an arrangement, or varied arrangement, approved under subsection (1);*
 - (b) an agreement reached under subsection (2); or*
 - (c) a direction given under subsection (3),*

the railway owner commits an offence.

Penalty: \$100 000.

30. Matters to be covered under section 28

Without limiting section 28, in carrying out its obligations under that section a railway owner must ensure that the provisions of sections 31, 32, 33 and 34 are satisfied.

31. Protection of confidential information

- (1) *There must be an effective regime designed for the protection of confidential information relating to the affairs of persons seeking access or rail operators from —*
 - (a) *improper use; and*
 - (b) *disclosure by relevant officers, or other persons, to other officers or employees of the railway owner or other persons, except for proper purposes.*
- (2) *In this section —*

confidential information *means information that has not been made public and that —*

 - (a) *is by its nature confidential;*
 - (b) *was specified to be confidential by the person who supplied it; or*
 - (c) *is known by a person using or disclosing it to be confidential.*

32. Avoidance of conflict of interest

The arrangements under section 28 must be such as to ensure that a relevant officer does not have a conflict between his or her duties —

- (a) *as a person concerned in the performance of access-related functions, on the one hand; and*
- (b) *as a person involved in other business of the railway owner, on the other.*

33. Duty of fairness

In performing their functions relevant officers must not have regard to the interests of the railway owner in a way that is unfair to persons seeking access or to other rail operators.

34. Maintenance of separate accounts and records

A railway owner must ensure that its accounts and records are in such form as to enable —

- (a) *all income, expenditure, assets and liabilities relating to the carrying out of its access-related functions to be properly recorded and distinguished from the railway owner's other income, expenditure, assets and liabilities; and*
- (b) *where necessary, any item of income, expenditure, assets or liabilities which relates only in part to the carrying out of its access-related functions to be apportioned in a fair and reasonable manner.*

In its proposal, TPI laid out arrangements that operate effectively, will be complied with and addressed the provisions of S31-34. Specifically it included arrangements to address the protection of confidential information; the

avoidance of conflict of interest; a duty of fairness and maintenance of separate accounts and records. In doing so it met the requirements and objectives of the Act. As such, it cannot be argued that TPI's proposed arrangements are inconsistent with the Act. TPI's proposed arrangements are highly consistent with and meet the requirements of the Act.

It is separate matter that the Authority may disagree with the content of TPI's proposed arrangements on policy grounds. Under S29, effectively the Authority may agree or determine segregation arrangements. In the draft determination, the Authority indicates, at paragraphs 93 and 94 and subsequently in Required Amendments 5-7, that it does not agree with TPI's proposed staged approach to implementing segregation arrangements, on the grounds that such arrangements are inconsistent with the Act. The Authority gave no indication of whether it would agree the arrangements if it was satisfied that the proposed arrangements were consistent with the Act. TPI has argued in this submission that its proposed arrangements are consistent with the Act. Should that view prevail, after due consideration by the Authority, then the Authority must revisit its position on the acceptability of the proposed arrangements and make that position publicly known.

The effective administration of the Act is best achieved by the Authority fully disclosing its views on proposals such as those submitted in this instance by TPI; and justifying any required changes. In its proposal, TPI laid out a two stage approach to implementing its segregation arrangements. The staged approach recognises the need for maximum interaction and sharing of information between rail infrastructure staff and haulage staff to achieve a safe and productive overall rail system. Given that, as explained earlier in this submission, that the objectives of the Act are met in both stages of the proposed segregation arrangements, it is necessary that the Authority disclose any policy-based reservations it may have on this approach.

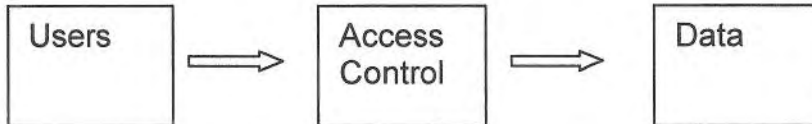
2 Separate Computer File Server

The Authority has required in Amendment 12 that a "dedicated and stand alone computer file server "be used as part of the electronic security measures for protection of confidential information. Its position was based on the precedent of the 2003 Westnet Determination. It agreed with the recommendation of PWC in reaching this position. Evidently, both PWC and the Authority have based their views on the 2003 precedent, without any further justification; and no recognition of the improvement in IT security systems in the intervening 6 years.

TPI believes it can implement a secure IT system without resorting to a stand alone computer file server for managing Access Seekers information. TPI acknowledges that the Authority has a role to ensure that protection of third party data and information is to be put into place. However, with respect, it does not agree that the Authority can mandate the exact nature of IT systems and models that should apply.

The Security model established by FMG; and in use for all of TPI's operations; is described below.

Data is accessed using the following security model:



This model provides two levels of security:

- 1) Domain level authentication of users against Microsoft Active Directory by supplying username and password credentials, and
- 2) Access control through the use of Microsoft Active Directory groups.

Furthermore users are only able to access data through network share and are not able to login or access the servers themselves.

FMG has chosen this model as Microsoft Active Directory is in use for many of the other services it provides and specifically for its single-logon capability and centralised management of user security. This security model is commonly found in the IT infrastructure of many Australian and global companies, including those with considerably more daily, confidential commercial transactions than FMG/TPI.

FMG currently runs Active Directory on Windows 2003 which has extended functionality compared to the initial Windows 2000 release and the earlier directory service NTDS. In this model the separation of data and access by users is managed by the access control of Microsoft Active Directory groups. File shares and directories are configured with access as categorised by the data owner and users must be placed into groups to gain access. It should be noted that this requires a user to be deliberately granted access. That is access must be given as opposed to access being removed. The maintenance of the groups is performed by IT administration staff, not the users.

In response to the requirement for a "dedicated and stand alone computer file server", no justification was provided as to why this improves security. The implementation of FMG's security model is software based and does not specifically require hardware standards. This means that the security model can be implemented entirely on one server or spread across multiple servers. The decision on what hardware configuration to use is based on performance, redundancy and capacity, not security as the same access control applies.

A common example of this type of data segregation is the configuration of user home directories. A file share for each user is created and access granted to that specific user only. All of the individual home file shares reside on the same server, but each user only has access to their own share.

Restricted data areas in use at FMG include (but are not limited to):

- ASX Compliance
- Human Resources
- Payroll
- Recruitment
- Procurement and contracts
- Marketing
- Accounts
- New Business Ventures

The security requirements of all these areas are self evident, with substantial financial penalties and other sanctions (including jail) possible in the event of a breach. TPI's parent FMG is motivated by many reasons to establish the most robust system to ensure confidentiality. With due respect to the need to protect information associated with potential Access Seekers, FMG and TPI have other, considerably greater requirements to establish a secure system. As such, Access Seekers can be assured that their information is afforded the highest level of protection from unauthorised access.

The audit and compliance processes that will apply to TPI's segregation arrangements would be expected to include a review of electronic access to confidential data.

3 Public Comments on Segregation Manual

The Authority has required in Amendment 19 that "TPI acknowledge that the Regulator will undertake public consultation on TPI's Segregation Manual..." TPI notes that this was not recommended by PWC and further that the Authority has not justified its requirement.

In its assessment of the 2003 Westnet segregation arrangements, the Authority agreed to the provision of a manual by Westnet, to be approved by the Regulator. TPI took the view that such a manual would be appropriate as part of its Segregation Arrangements and included a commitment to the manual in its proposal. It further had an expectation that the approval process would be replicated. The Authority has required that the manual be subjected to public comment without providing any further explanation. The lack of justification is particularly stark given the break from precedent established with Westnet and the variance from the advice provided by PWC.

TPI also notes the likely extended timetable for implementation of the procedures outlined in the manual, given that's its approval by the Authority will be delayed due to the public comment phase. It is difficult to see how such delays are in the interests of Access Seekers.

TPI again advocates that the Authority must justify any required changes to proposals, to allow TPI and other parties to comment.