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Ms Aditi Varma
A/Director Economic Reform
Department of Treasury
Locked Bag 11 Cloisters Square
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Dear Ms Varma

REVIEW OF THE WESTERN AUSTRALIAN RAIL ACCESS REGIME

1. The Department of Treasury has invited submissions in relation to its Issues Paper on its Review of the Western Australian Rail Access Regime (**Access Regime**), established by the *Railways (Access) Act 1998* and the *Railways (Access) Code 2000* (**Code**) (**Issues Paper**).

2. The Pilbara Infrastructure Pty Ltd (**TPI**), provides the following submission in relation to certain areas of the Issues Paper which concern TPI.

3. However, TPI would like to state upfront that it is in favour of the current Access Regime and does not consider that the improvements suggested in the Issues Paper are needed in order for the Access Regime to better achieve its objective of encouraging the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations. TPI has however suggested some improvements to further this objective, which are detailed below.

4. TPI is a strong proponent of third party access to infrastructure and is the only company to have provided junior miners access to its rail and port infrastructure, having shipped close to 18 million tonnes of iron ore for third parties.

5. We confirm our ongoing commitment to providing infrastructure access to third parties who are committed to the development of their projects and have the necessary financial and management capability.

6. TPI has addressed certain proposals made in the Issues Paper that are of particular importance to TPI, however, where TPI has not responded to a particular proposal this should not be construed as agreement with the relevant proposal.

7. After addressing the Issues Paper, TPI has taken the opportunity to address areas of the Code which TPI considers would benefit from further clarification.

BALANCE OF POWER IN NEGOTIATIONS: ABILITY TO OPT OUT

8. The Issues Paper contemplates at Questions 1.1-1.5 restricting the ability of parties to opt out of the Code, for example:
   a) Making the non-discrimination requirements in section 16 of the Code mandatory;
   b) Requiring that the Part 5 Instruments apply to access arrangements executed inside or outside of the Code; and
   c) Allowing the dispute resolution procedures in the Code to apply to negotiations outside of the Code.

9. Firstly, it is not clear to TPI from the Issues Paper what the perceived imbalances in power are that exist outside of the Code process. In order to properly address the proposals set out in the Issues Paper, TPI needs to understand what the concern is that needs to be addressed by the proposals.

10. In TPI's view, access seekers and railway owners are not consumers but are companies with various professional advisers and advocates who actively participate in negotiating the price and terms of access. Therefore, TPI does not agree that an imbalance in negotiating power exists that needs to be rectified through imposing certain Code requirements on negotiations outside of the Code.

11. Secondly, TPI considers that introducing certain Code requirements on commercial negotiations could be seen to be inconsistent with the Competition Principles Agreement, clause 6 of which provides that wherever possible, third party access to services provided by means of a facility should be on the basis of commercially agreed terms and conditions.

12. In addition, the Australian Competition & Consumer Commission (**ACCC**), the Productivity Commission and the Harper Review Panel[1] consider that negotiated outcomes between parties are preferable to "upfront" regulatory arrangements. In its 2013 Review of the National Access Regime, the Productivity Commission concluded that it:

    '...does not see sufficient benefit from imposing upfront regulatory arrangements to justify the cost of abandoning the established processes of negotiation and arbitration'[2]

13. Thirdly, TPI considers that negotiations outside of the Code should not be restrained by any prescriptive mechanisms. TPI considers that commercial negotiations outside of the Code yield greater benefits to both rail owners and access seekers and TPI has a proven track record of entering into commercial arrangements for access to rail and port with third parties, including BC Iron and the Australian Aboriginal Mining Corporation.

14. In any event, the parties can always agree to the application of a Part 5 instrument or that arbitration will be used to resolve any dispute arising from the negotiations.

[1] The Harper Report, Competition Policy Review, 2015 states : *'competition and economic efficiency will be advanced if market participants are free to negotiate private arrangements concerning access'*, p73

[2] Productivity Commission, 2013 Review of the National Access Regime, p124.

Nothing in the Code limits the ability of the parties to revert to arbitration or incorporate Part 5 instruments (section 4A(c) of the Code).

15. Finally, if there in fact was a power imbalance between the parties, for example, if the access seeker was a small business and the upfront price payable for access was less than $300,000 (or $1 million if the contract was more than 12 months), then the unfair contract terms regime of the *Competition and Consumer Act 2010* (Cth) would provide for the regulation needed to preclude or counteract any potential unfair terms. Therefore, further regulation under the Code would not be required.

BALANCE OF POWER IN NEGOTIATIONS: BARRIERS TO NEGOTIATIONS

16. Questions 1.6-1.11 ask whether the existing obligations imposed on the access seeker to demonstrate that the proposed operations can be accommodated on the rail network and to specify the details of any required extension, create a barrier to access negotiations. The Issues Paper contemplates reversing the obligations onto the railway owner. The Issues Paper suggests that access seekers might not be best placed to meet the obligations given they have access to limited information only.

17. TPI does not understand the rationale for this suggestion of reversing the onus. That is, it is not understood why it is perceived that an access seeker cannot meet the obligations. Additionally, even if it was accepted that there was an issue, it seems that responsibility for the issue would just be reallocated to the railway owner, rather than resolved, through the reversing of the onus. The Issues Paper itself refers to the fact that the railway owner must provide the access seeker with information to assist it in demonstrating the matters set out in section 15.

18. Pursuant to sections 6 and 7 of the Code, the railway owner is already required to make available the information necessary to enable an access seeker to undertake a capacity assessment. The railway owner is required to provide, inter alia, details of available capacity, the length of the railway, the location and length of passing loops and the running times of existing trains. This information, combined with the railway owner's Train Path Policy and Train Management Guidelines, is sufficient for a proponent to undertake a reasonable assessment of capacity and meet the requirements of section 15.

19. Therefore, TPI does not consider that the proposal to reverse the onus is justified in the circumstances.

20. Whilst the Issues Paper suggests that the access seeker is unlikely to be best placed to assess whether the network can accommodate the proposed operations, by the same token, TPI submits that the railway owner is not in the best position to demonstrate this as it does not have intimate knowledge of the access seeker's proposed operations to enable it to demonstrate that they can be accommodated on the network. Nor is the railway owner in the best position to demonstrate that an expansion is required to accommodate the operations nor that this expansion is feasible and safe.

21. Further, as addressed in the Issues Paper, reversing the onus would lead to additional costs for the railway owner. It is suggested that it may be appropriate to limit this obligation to bona fide access applications, or to allow the railway owner to recover its costs from the access seeker.

22. The difficulty with this suggestion would be in determining whether an application is a "bona fide" application and who would make this determination. If it was to be the ERA then the Code would need to prescribe the principles upon which the ERA would need to make such an objective determination. Also, it is difficult to contemplate how the recovery of costs would make up for the time lost in addressing such requirements of the access seeker. It can be seen that reversal of the onus could open the floodgates to unlimited arbitrary requests for the railway owner to demonstrate the matters in section 15. This would place an unreasonable burden on the railway owner and shouldering this burden may prove futile if the access seeker is not in fact in a position to meet the managerial and financial requirements of section 14 of the Code. We note that we discuss this issue further at paragraphs 85-87 below.

RAILWAY OWNER ACCOUNTABILITY TO COMPLY WITH REGIME

23. Questions 2.1-2.4 in the Issues Paper contemplate the imposition of regular reporting obligations on a railway owner to improve the transparency of the Rail Access Regime. The reporting contemplated is:

    a) Compliance with Part 5 instruments;
    b) Progress of access negotiations; and
    c) Service quality.

24. TPI considers that the motivation for this change needs to be more clearly understood. It is not clear from the Issues Paper as to why regular reporting on these matters will further the objective of the Code to encourage the efficient use of railway facilities by facilitating a contestable market for rail operations. Further, TPI does not appreciate the justification for providing access seekers with performance information to assist in negotiations. Again, TPI queries why it is perceived that access seekers need further assistance in negotiations.

25. At the moment, the Code obliges the railway owner to provide to any entity that is interested in making a proposal the 'required information' under section 6 and 7 (including Schedule 2). TPI considers that this 'required information' is not necessarily information that is in the public domain and may be commercially sensitive. As such, a railway owner should not be required to publish this information on the Internet or in any other public forum and should only be required to provide the information to entities genuinely considering making a valid proposal for access under the Code.

26. The proposal to require railway owners to publicly report on service quality matters such as track condition, percentage of track under speed restrictions and percentage of train services delayed or cancelled may be commercially sensitive information for which TPI would not want to disclose publicly.

27. Over and above this, TPI submits that the railway owner should only be required to provide any confidential information to an entity that has provided a confidentiality undertaking in respect of that information.

28. In addition, TPI would consider confidential the progress of any negotiations within or outside of the Code or disputes or judicial challenges and does not agree that reporting on qualitative aspects of negotiations would assist to assess the effectiveness of the Access Regime as this is not objective independently verifiable data.

29. As stated in the Issues Paper, regular reporting obligations would impose a burden on railway owners in terms of cost and time to prepare reports. In addition, it would increase compliance costs for the ERA. TPI considers the weight of this burden to outweigh the potential economic benefits to stakeholders in terms of facilitating a contestable market.

MERITS REVIEW

30. In the 2015 Review of the Code, the ERA recommended providing for access to a merits review in relation to certain regulatory decisions. Questions 2.5-2.7 ask for comment on the value of introducing a merits review.

31. Inclusion of a merits review of regulatory decisions in the Access Regime would provide a number of advantages and disadvantages:
    a) Advantages
        i. Reduction in the risk of regulatory error and the costs associated with erroneous decisions on all parties; and
        ii. Improved investor confidence due to there a fundamental protection against any misuse of administrative powers. This would in turn improve the incentives to invest in rail infrastructure and protect the legitimate business interests of railway owners and their financiers.
    b) Disadvantages
        i. Potential to extend timeframes for decisions to be finalised, though this would be offset by reduced cost burdens and timeframes from situations where regulatory decisions are challenged through the Courts.

32. We agree that a merits review should be introduced to reduce regulatory error.

LEVEL OF DETAIL IN THE CODE

33. Questions 3.1 and 3.2 suggest that the lack of detail in the Code around the process for progressing an expansion or extension creates a barrier to access negotiations or an imbalance in negotiating power and that more process should be provided in the Code to guide negotiation and the development of a project.

34. The Issues Paper raises the question as to whether the lack of detail creates a barrier to access negotiations, however it does not elaborate on the origin of this perception. Without understanding the drivers for these proposals, it is difficult for TPI to comment on whether the proposals are warranted or could be effective.

35. TPI does not support the Code being made more prescriptive in terms of negotiation or the process for progressing an expansion. We consider that it is important to reinforce that the Code is not designed around consumer protection. Proponents under the Code are not consumers but are companies with various professional advisers and advocates who actively participate in negotiating the price and terms of access. There is not the imbalance in negotiating power that exists, for example, in the context of gas regulation. Further, railway owners have far more onerous statutory obligations and responsibilities than proponents, which act as constraints in the negotiation of price and terms.

36. Increasing the prescriptiveness of the Code would increase compliance costs for both the ERA and railway owners. It would likely require the design of a sophisticated framework that limits regulatory discretion and ensures the rigorous review and correction of regulatory error. The cost of introducing such a framework will outweigh any perceived benefits relating to economic efficiency. Further, given the limited number of railway owners in Western Australia and the historical contractual and commercial basis underlying access, increasing the prescriptiveness of the Access Regime would impose a significant burden on railway owners without materially increasing the net economic benefits to stakeholders.

INDICATIVE TARIFFS

37. Questions 4.1 and 4.2 of the Issues Paper contemplate the imposition of an indicative tariff in limited circumstances where:

    a) The service is priced at the total cost;
    b) There are a reasonable number of services using a route and they are relatively homogenous; or
    c) The railway owner is vertically integrated (noting that the current access charge implicit in existing contracts may be a relevant consideration to this assessment).

38. We do not support a move to an indicative tariff in those circumstances. To do so would be contrary to the flexibility objectives contained in the Competition Principles Agreement.

39. The object of regulating infrastructure under the Code is to promote competition while ensuring economic efficiency in dependant markets. Where third party access is to be made available to privately owned infrastructure, any constraints imposed on the infrastructure owner should be limited so as to encourage maintenance, investment and technical innovation, and enhance economic efficiency. Negotiated agreements with prices and terms that are appropriate to the specific access that is sought reduces the risk of regulatory error in setting prices and allows for more efficient access prices to be set.

40. Imposition of an indicative tariff would require regulatory decisions on the circumstances under which one would be imposed. For example, a decision could be required on whether services were sufficiently homogenous to require an indicative tariff. Although a seemingly common product may be carried as part of these services,

many other operational characteristics of the services may not be considered to be homogenous (for example, axle load, product density etc.).

41. An approved indicative tariff could lead to a more substantial scope of regulatory error, given that limited information is available to regulators regarding the particular railway facilities. Regulatory error is a significant issue as it can result in access prices that are set either too high or too low, and the concern is that prices that are set too low are more damaging than prices that are set too high because they discourage investment, which is inconsistent with the objectives of the Code.

42. The Productivity Commission: '... *considers that the consequences for efficiency from setting access prices too low are, all else being equal, likely to be worse than setting access prices too high. This is because deterring infrastructure investment (from setting access prices too low) is likely to be more costly than allowing service providers to retain some monopoly rent (from setting access prices too high)*'[3]

43. Further, a more prescriptive access regime with indicative tariffs would lessen the railway owner's ability to take into account the particular requirements or risks of a proponent in developing an access agreement. This would invariably hinder negotiation of the terms and conditions of access and the adoption of innovative approaches to access agreements so as to meet the specific needs of the proponent.

ASSESSING THE CAPITAL CHARGE USING GRV

44. The Issues Paper asks at Questions 4.3-4.5 about the consequences to railway owners of changing from a Gross Replacement Value (**GRV**) approach to an Established Asset Base approach (**EAB**) and whether other elements of the pricing provisions should be amended to align with the use of a depreciated asset value.

45. The EAB approach outlined in the ERA's 2015 Review of the Railways (Access) Code Final Report was proposed as follows[4]
    a) Initial asset bases would need to be established;
    b) The EAB would be established by the railway owner on the basis of an opening value, capital additions and depreciation;
    c) Depreciation would be calculated for each class of assets using the remaining economic life, where the method of depreciation would be consistent with the depreciation profile underlying an annuity calculation, taking account of cyclical maintenance required to achieve the economic life; and
    d) All determinations of efficient capital cost (including capital additions) and operating costs made by the railway owners would be approved by the regulator.

46. TPI maintains that GRV should be retained as the basis to estimate the capital costs of railway infrastructure.

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[3] Productivity Commission, 2013 Review of the National Access Regime, p104

[4] Economic Regulation Authority WA, December 2015 Review of the Railways (Access) Code 2000, p17, para. 138

47. The Code defines GRV as:

> *'the gross replacement value of the railway infrastructure, calculated as the lowest current cost to replace existing assets with assets that –*
> *(i) have the capacity to provide the level of service that meets the actual and reasonably projected demand; and*
> *(ii) are, if appropriate, modern equivalent assets...'*[5]

48. Incorporating the 'modern equivalent assets' concept, GRV enables access negotiations to take place using the most current information available (including consideration of the latest understood improvements in efficiency and technology), allowing outcomes to occur that are economically efficient.

49. GRV is the most appropriate valuation methodology for calculating capital costs under the Code because of the long life and cost structure of below rail assets. Moreover, GRV will lead to more consistent prices over time than other valuation methodologies, including EAB.

50. Using GRV as the valuation methodology in the Code best reflects the intent of criterion (b) of clause 6 of the Competition Principles Agreement. Ceiling prices calculated using a GRV methodology will reflect the maximum revenue able to be earned by a railway owner, with the lowest current costs to replace existing assets reflected in price signals. This revenue cap reflects the alternative costs available to an access seeker if they were to construct their own infrastructure.

51. The EAB concept has not been clearly defined to date, with a lack of clarity around the calculation mechanisms that would apply in practice. We could not find any precedents for this concept in other Australian (or international) regulatory regimes. Given the impact to pricing/tariff outcomes, substantial consultation and feedback should be sought from both railway owners and proponents to develop this concept in detail before any potential implementation.

52. A change in the valuation approach under the Code would require significant amendment to those sections of the Code that prescribe the negotiation and arbitration procedures. Further, such a change would be prejudicial to the legitimate business interests of railway owners currently covered by the Code, contrary to the Competition Principles Agreement. These factors, together with the material compliance costs associated with a change to the valuation methodology in the Code, outweigh any perceived benefits to changing the valuation approach under the Code. Certainly the adoption of a valuation methodology to enable national consistency is not, in our view, a valid basis upon which to materially alter the Code.

53. Specifically in relation to question 4.3(b), TPI considers that the change in approach from GRV to EAB would arguably increase investment risks related to greenfield railways or major brownfields extension/expansions. The ability for a railway owner to recover their invested capital over time based on an EAB approach is highly uncertain due to the lack of clarity around the valuation method applied.

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[5] *Railways (Access) Code 2000* (WA) Schedule 4, clause 2.

54. In response to question 4.4, the pricing framework developed in the Access Regime currently provides sufficient flexibility for access seekers to negotiate commercial outcomes that reflect the costs and risks inherent in access applications.

55. The Access Regime allows a railway owner and access seeker to negotiate an access price within a floor or ceiling limit under a negotiate-arbitrate approach to access.

56. A floor price ensures that access services are supplied only to customers willing to cover the additional costs involved in the provision of additional services. A ceiling price ensures that the railway owner does not charge a price greater than it would charge in a contestable market. Ceiling prices ensure that the railway owner does not receive a higher charge than an efficient new entrant would charge if they entered the market, that is, the stand alone cost of providing the infrastructure service.

57. Changing from a GRV to an EAB approach would create greater uncertainty in the valuation of railway infrastructure. An EAB approach, as recommended by the ERA, may contain potential flaws and inconsistencies, depending on an interpretation of the approach:

    a) Any depreciation calculation based on an annuity and a Weighted Average Cost of Capital (**WACC**) that is reset periodically would vary the value of depreciation in any period, leading to a permanent reduction in the asset base based on current factors;
    b) The proportion of an annuity charge relating to a "return of capital" component would vary based on the life of asset, current period of life of the asset and WACC applied;
    c) In an annuity calculation, minimal depreciation occurs at the beginning of an asset's life, with the majority of depreciation occurring at the end of its life;
    d) Variation in the WACC applied to any specific time period would result in variation in the depreciation component of any charge. The value of depreciation would loosely vary with the inverse movement of WACC. That is, a reduction in WACC would generally increase the amount of depreciation;
    e) Hence the depreciation applied in writing down the value of the EAB over time would inherently vary, and any decision on WACC would have to take into account the impact on the EAB.

58. In response to question 4.5(a), assuming an EAB valuation method is to be applied, the capital costs should be theoretically assessed as the sum of depreciation, or a "return of capital" and a "return on capital". Depreciation however, should not necessarily be influenced by a decision on WACC without due consideration, and consultation with railway owners. Flexibility in choosing an appropriate, consistent valuation approach should be available to the railway owner in order to provide greater certainty of sufficient returns to justify investment.

59. In response to question 4.5(b), if an EAB method incorporates an annuity approach to the calculation of charges, any capital investment beyond initial investment should be separated into individual asset bases to ensure at least some form of theoretical consistency. Including extension or expansion capital in a single EAB based on an

annuity approach would likely lead to an under-recovery of capital, and insufficient returns for a railway owner. If an annuity approach is to be used, individual asset bases would be required for each investment, reflecting age and asset life of each investment. However, this is likely to provide complications for both railway owners and access seekers in determining appropriate pricing.

60. In response to question 4.5(c), the definition of costs used to determine the incremental and total costs are currently sufficiently aligned with the concept of efficient costs. The current definition of total costs assumes a GRV that is calculated as the lowest current cost to replace existing assets with modern equivalent assets that have the capacity to provide services sufficient for actual and reasonably projected demand. Both incremental and total costs assume the adoption of efficient practices using modern equivalent assets. GRV is estimated with reference to benchmark unit rates. Incremental and total costs provide a range.

61. The underlying objective of rail access charges is to set prices that bring about "economic efficiency". Overall economic efficiency (allocative, technical and dynamic) is fostered when the use of resources in the provision of substitutable services is based on prices that reflect their respective (short and long-run) marginal social costs of production, and also appropriate cost recovery from user charges[6]. Rail access charges in the Access Regime are structured to set market based negotiated charges between a set of floor and ceiling revenue boundaries that represent short term marginal costs and full economic costs required to encourage appropriate investment.

62. Aligning the definition of incremental and total costs to an arbitrary access period requirement would be unlikely to satisfy longer term efficiency objectives. The actual age and condition of assets should not be relevant given that the basis of floor and ceiling cost estimation is to provide a range of short term marginal costs and full economic costs between which market prices can be negotiated.

63. In response to question 4.5(d), and as stated earlier, a merits review should always be available for ERA decisions in a similar manner to other regimes. Given the high degree of regulatory discretion involved in a determination on costs, a merits review process would reduce the risk of regulatory error.

64. In response to question 4.7, the use of an EAB and inclusion of expansion costs in the determination of floor and ceiling costs may not necessarily assist the negotiation process due to the fundamental uncertainties that exist in any expansion process. These uncertainties include variations in actual costs incurred to budget costs in completing an expansion, as well as variations in actual incremental capacities achieved to forecast.

65. In response to question 4.8, there is certainly an inconsistency between how costs, including expansion costs, are assessed for the purpose of an access application, and the subsequent assessment of costs for the over-payment rules or later access applications. This inconsistency creates a risk that railway owners will not recover these costs or may over recover costs due to the potential differences between these

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[6] Australian Competition and Consumer Commission, May 2016 Submission to the Productivity Commission – Review of Road and Rail Freight Infrastructure pricing, p7

assessments, and negotiated commercial outcomes, during each of these periods of time.

66. As stated by the ERA in their 2012 Review of the Railways Access Code Report[7],

> *'Because it is not possible to know in advance the exact cost of any capital expansion, alternative valuation methods do not provide an advantage over the GRV method for this purpose. The "ex poste" (after it is built) approach stipulated in the Code is the only means by which expansion costs may be assessed accurately via any valuation method'.*

GREENFIELD DEVELOPMENT- TREATMENT OF FOUNDATION CUSTOMERS

67. Questions 6.3-6.5 ask whether the costs and risks borne by foundations customers are materially different and whether the Code should permit different treatment of foundation customers of a greenfield development to subsequent customers to reflect the differences in cost and risk.

68. Foundation customers for a greenfields infrastructure project are essential to underwrite the development of the infrastructure. The development costs for any infrastructure project are effectively covered by foundation customers. These customers bear a disproportionate share of risks compared to future customers, including the potential that the infrastructure project will not be able to sufficiently satisfy their own demand. In addition, the requirement to underpin demand in order to ensure that the infrastructure can be funded has associated risks, such as delays to the start of access, ramp-up infrastructure risks and contracting for guaranteed minimum demand.

69. Other risks include the risk of developer failure at any time prior to construction being complete, the risk of delayed services commencement, the risk of the long term commitment to pay for the service and the opportunity cost of locking into a specific transport solution.

70. Given the material differences between the risks borne by foundation customers and those borne by subsequent access seekers, the Code should permit different treatment between both types of customers to reflect these differences in costs and risks.

RECOUPING COSTS FOR OWNERS USING A HAULAGE REGIME

71. Questions 7.1-7.5 talk about a below rail regime and the costs and benefits of this. Specifically, question 7.2 asks what costs and risks for owners of vertically integrated rail lines can be easily recouped through the Access Regime pricing mechanisms and what cannot.

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[7] Economic Regulation Authority WA, December 2011 Review of the Railways (Access) Code 2000, p32, para. 217

72. In response to question 7.1, there could be substantial benefits to the general community and the WA economy in promoting more effective arrangements for new mines to access railways. TPI supports the development of new mines in the Pilbara region through its third party access arrangements, which have all been conducted with the Access Regime as a regulatory backdrop. More effective arrangements would be desired but this would need to be tempered with consideration of potential costs and risks associated with provision of access. For example, third party access without consideration of network capacity effects could create interference with other customers on a rail network, de-rating capacity on the network, and reducing the ability for the railway owner to provide sufficient services and access.

73. The critical issue for a railway owner is overall supply chain efficiency, yet the Code has generally been applied without regard to the fact that Pilbara railways are dedicated parts of a supply chain, with integrated infrastructure operations (eg. rail to port). More effective arrangements for any mine to access a railway needs to ensure these issues are considered, and costs incorporated into pricing regimes.

74. With regards to a number of the questions identified in 7.2:
    a) Substantial costs and risks for the owners of vertically integrated rail lines would not be easily recouped through Access Regime pricing mechanisms through provision of access to access seekers, leading to commercial agreements having to be negotiated outside of the regime; and
    b) As noted above, provision of third party access could reduce network capacity with potential impacts to current customer services not accounted for in Access Regime pricing mechanisms.

75. In response to questions 7.3 to 7.5, a haulage regime, comprising bundled above and below rail access, may not be helpful in facilitating access for new mines to railways in the region.

76. Haulage regimes can be found widely in the US. However, this generally does not occur with any regulatory involvement. If it is proposed that a regulator becomes involved, the access seeker may be able to use it to force the railway owner to accept compromises in operational parameters which would advantage the access seeker but increase the costs of the railway owner.

77. In the US, haulage agreements are based upon bilateral negotiation, creating an incentive for a railway to grant access when doing so will not displace its own more highly valued business. In the case where a railway is at capacity, and private wagons can only be accommodated by displacing wagons operated by the railway itself, the relevant cost of the railway regime has to include the opportunity cost of one of the railway's own wagons, and the cost of new infrastructure required, hence haulage regimes are best suited for lines with spare capacity.

CERTIFICATION AS AN EFFECTIVE REGIME

78. Question 8.4 raises the possibility of access seekers using either the Access Regime or the National Access Regime (**NAR**) to access rail lines and asks what the costs are, if any, of the duplication of regimes.

79. There is a patchwork of infrastructure regimes that regulate the iron ore railways operating in the Pilbara. Aside from the Access Regime applying to TPI's railway, there are three other regulatory regimes that apply in the Pilbara, namely:

    (a) BHP Billiton Iron Ore's Goldsworthy railway is declared under Part IIIA;

    (b) BHP Billiton Iron Ore's Mount Newman railway and Rio Tinto Iron Ore's Hamersley and Robe railways are unregulated; and

    (c) Roy Hill Infrastructure's railway will be the subject of the Access Regime until an access undertaking for haulage is accepted and regulated by the ACCC.

80. We submit that all four railways in the Pilbara should be governed by one access regime and one regulator, with consistent rail regulation, in order to ensure more consistent economic regulation.

81. Consistent economic regulation in the Pilbara would ensure that all Pilbara railway operators operate on a level regulatory playing field, thereby guaranteeing competitive neutrality, one of the key underpinning principles of the Competition Principles Agreement. This consistency in regulation would also assist potential access seekers.

82. Therefore, we submit that certification should be pursued in order to keep the Access Regime in place.

83. We note that one concern of the National Competition Council noted in the Issues Paper, that existed when the Access Regime was certified, was that 'there was different regulatory approaches to rail access taken in Iron Ore State Agreements'. TPI highlights that its State Agreement cements and reinforces the Access Regime. Therefore, for TPI, there is consistency and no difference in regulatory approach[8].

84. We have not addressed every proposal in the Issues Paper. The fact that we have not responded to each proposal should not be construed as agreement with the relevant proposal.

OUTSIDE OF THE ISSUES PAPER- PROPOSALS FOR ACCESS

85. Section 8(1) of the Code entitles an entity to make a proposal in writing 'for the use of railway infrastructure'. A proposal must conform to the requirements in sections 8(2) and 8(3) of the Code. Section 8(2) confines the purpose for which a proposal may be made to the purpose of carrying on the operation of rolling stock on a part of railway infrastructure to which the Code applies. Section 8(3) requires a proposal to:

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[8] *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004*, clause 16.

a) Specify the route, including the railway infrastructure the use of which is sought;
b) The times when that use is required; and
c) The nature of the proposed rail operations.

The proposal must be accompanied by a written notice of the proponent's intention to enter into negotiations under the Code for an access agreement between the railway owner and the proponent for the use of the railway infrastructure by the proponent.

86. The railway owner should only be obliged to participate in negotiations with a proponent who has a genuine requirement to use the railway infrastructure, and who intends to make a binding agreement for actual use of railway infrastructure. The Code is not aimed at assisting a proponent to make an agreement by which rail capacity is effectively reserved, especially for a long period of time, while the proponent ascertains whether and when it has genuine requirements for use of railway infrastructure and whether it is able to, and wishes to, actually use the railway infrastructure. This reservation of rail capacity is not consistent with the economic objectives of the Code nor the Competition Principles Agreement.

87. Accordingly, the Code would benefit from clarification that:
a) The proponent owes a duty of good faith to the railway owner in making an access proposal;
b) The proponent must have a genuine intention to enter into an access agreement with the railway owner to actually use the railway infrastructure; and
c) The proponent must provide a specific indication of the times when access is required, not merely a time from which access might possibly be required. This requirement should require the proponent to specify the times of day and the days of the week when access is required, along with a commencement date that the proponent genuinely believes can be met.

OUTSIDE OF THE ISSUES PAPER- DUTY TO NEGOTIATE

88. Sections 14-20 of the Code govern a railway owner's duty to negotiate, and a proponent's entitlement to insist upon the railway owner engaging in negotiations for an access agreement. Under sections 14 and 15 of the Code, a railway owner is entitled to require a proponent to show three things, namely that:
a) It has or will be able to and will engage the services of another entity which has the necessary knowledge and experience to carry on the proposed rail operations;
b) It has the necessary financial resources to carry on the proposed rail operations, and to pay its share of any extension or expansion costs, including that it has the necessary ability to meet its financial obligations under an access agreement to the railway owner and to other persons, including excesses under policies of insurance;
c) Having regard to the capacity of the relevant route and any information provided under section 6 and 7 of the Code, the route (with any relevant extensions or expansions) can accommodate the proposed entry and

exit times to which the proposal relates and the length and speed of the proposed rolling stock.

89. Sections 14 and 15 provide important protection for a railway owner, in the context of a scheme which may lead to the railway owner being bound by an agreement for the use of its railway infrastructure by a third party. Accordingly, these provisions are and should be treated as, threshold issues that the proponent is required to establish at the date of making a proposal for access or shortly after. The satisfaction of these requirements should not be postponed until some future time if or when a proponent is ready, willing and able to decide whether it wishes to make actual use of railway infrastructure. Accordingly, the Code would benefit from an amendment which makes clear the status of sections 14 and 15 as threshold issues.

90. Further the Code should prescribe the date by which a proponent must satisfy sections 14 and 15 (if required by the railway owner). The Code prescribes the times by which a railway owner must do certain things, including responding to a proposal, providing its floor and ceiling determination to the ERA and providing a notice of readiness to negotiate. However, the Code fails to prescribe the time within which the proponent must satisfy the railway owner of the matters in sections 14 and 15. Given the importance of sections 14 and 15 to the railway owner, the proponent should be required to meet these threshold issues either at the time of lodging the access proposal or within a short time after that. A delay by the proponent in satisfying the railway owner of the matters contained in sections 14 and 15, especially a long delay of more than 12 months, creates uncertainty for the railway owner and is not consistent with the economic objectives of the Code or the Competition Principles Agreement.

91. Finally, the railway owner should be able to challenge through arbitration the validity of an access proposal at any time if the information provided by the proponent relating to sections 14 or 15, or indeed any other matter under the Code, is not satisfactory. This will ensure that proponents are accountable for ensuring the legitimacy, genuineness and accuracy of their proposals. Due to the significant resources expended by a railway owner (and the ERA) in reviewing and assessing access proposals, any proposals found not to be genuine or accurate should be deemed invalid and immediately withdrawn by the proponent.

Thank you for the opportunity to make this submission on the Issues Paper.

Yours sincerely
FORTESCUE METALS GROUP

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