



**North West  
IRON ORE ALLIANCE**

NWIOA OPS Pty Ltd  
ABN 33 137 476 370  
PO Box 141  
117 Stirling Highway  
NEDLANDS WA 6909  
Telephone: +618 9389 3021  
Facsimile: +618 9389 3033  
Email: [info@nwioa.com.au](mailto:info@nwioa.com.au)  
Website: [www.nwioa.com.au](http://www.nwioa.com.au)

## **NORTH WEST IRON ORE ALLIANCE**

### **Submission in relation to the application for certification of the Western Australian Rail Access Regime**

1. The North West Iron Ore Alliance (NWIOA) welcomes the opportunity to provide this submission in response to the Notice of the National Competition Council (NCC) dated 17 May 2010 seeking public comment regarding the Application for certification of the Western Australian Rail Access Regime (Regime) under section 44M of the Trade Practices Act (TPA).
2. NWIOA was formed in 2007 to represent the interests of a group of dynamic emerging iron ore companies operating in the Pilbara region of Western Australia. NWIOA's core objective is to work with communities in the region, government, infrastructure providers, existing producers and other stakeholders to promote the development of a vibrant emerging iron ore industry. NWIOA is currently comprised of 3 shareholders:
  - Atlas Iron Limited;
  - Brockman Resources Limited; and
  - FerrAus Limited.

#### **Submission**

3. NWIOA submits that in order for the Regime to be an effective access regime for the purposes of the *Trade Practices Act 1974*, it requires improvement in two major respects:
  - » the timeline for rail access requests by a third party; and
  - » the scope of the operation of the Regime.

#### **Timelines under the Regime**

##### *Part 5 Instruments*

4. NWIOA submits that the timelines prescribed for access to railways under the Railways (Access) Code 2000 (Code) is too open-ended to produce timely access solutions.
5. Part 5 of the Code states that railway owners are to comply with certain Part 5 Instruments which are to be approved by the Economic Regulation Authority (ERA). Section 40(3) of the Code defines Part 5 Instruments as:
  - train management guidelines;

- train path policy;
  - costing principles; and
  - over-payment rules.
6. Each individual owner of a railway covered by the Code is obliged to submit the above-mentioned Part 5 instruments to the ERA for approval. However, the Code does not specify a definitive timeframe for submission to the ERA of the relevant documents. Rather, the Code requires that the information be provided to the ERA "as soon as is practicable after the commencement" of the Code.
  7. NWIOA submits that the terminology used to determine the timeline for submission of documents to the ERA for approval is sufficiently vague to hamper the objective of the Regime to provide timely access to the prescribed railway routes in Western Australia. The absence of a definitive timetable undermines the effectiveness of the Code.
  8. In addition, the Code provides for the ERA to approve, or make alternative determinations in regard to, a railway owner's submitted documents in order to constitute them as ERA approved documents, which triggers their 'in force' status under the relevant sections. However, there is no time limit for this ERA approval process.
  9. Whilst it is always open to an access seeker and a railway owner to commence negotiations outside the scope of the Code, NWIOA is concerned as to the viability of this alternative, given that the previous history of access requests to rail infrastructure in the Pilbara reveals that railway owners are generally unwilling to provide access to third parties. It is therefore imperative to have in place a robust and well regulated access regime in order to facilitate the access process.
  10. An additional flaw in the Code is that it does not appear possible to make an application to commence negotiations for access under the Code until all Part 5 Instruments have been completed and approved by the ERA. Once a final determination has been made by the ERA in respect of a Part 5 Instrument, there appears to be no timeframe for the final "approval" to be made to the ERA. Therefore, an access seeker does not have access to the final form document upon which to base its negotiations until this approval has been granted. This highlights the need to have a definitive timetable for the submission of Part 5 instruments to, and both their final determination and ultimate "approval" by, the ERA.
  11. With respect to the determination of floor and ceiling prices, section 9 of the Code provides that once an access proposal is received by the railway owner, it must provide the access seeker with the following within seven days of the receipt of the access proposal:
    - the floor and ceiling costs for the proposed access;
    - the cost of each route section on which those prices have been calculated; and
    - a copy of the costing principles that are in effect.

12. Clause 10 of Schedule 4 provides that where a proposal has been made, the floor and ceiling prices provided to an access seeker by the railway operator are to be approved and/or determined by the Authority within 30 days.
13. However, it is a curious feature of the Regime that under Clause 9 of Schedule 4, the Regulator may pre-empt the process under Clause 10. If the Regulator considers it likely that a proposal will be made to the railway owner in respect of a route, he or she may determine the floor and ceiling costs that apply to the relevant route. Again, there is no specific timetable attached to this determination process which may significantly delay the ability of an access seeker to submit a proposal and the parties to reach an agreement.
14. As a matter of logic, if the ERA initiates its process for the determination of floor and ceiling costs, until that process is completed, no floor and ceiling prices would be readily available. This would render submitting any form of proposal by an access seeker pointless as a railway owner would be unable to comply with its obligations under section 9 to provide floor and ceiling prices within 7 days of receipt.
15. NWIOA submits that the determination procedure set out in Clause 9 of Schedule 4 should provide greater certainty such that unnecessary delay does not result.

#### **Scope of the Regime**

16. Schedule 1 of the Code nominates the routes to which the Code applies. However, not included in the Regime's nominated routes are any of the railways of BHP Billiton and Rio Tinto in the Pilbara.
17. NWIOA submits that for the Regime to be effective, it should cover *all* key state-based rail infrastructure in the region. The current operation of two separate regulatory regimes, one being the Regime and the other being declaration under Part IIIA of the TPA, has the potential to result in anomalies in the competitive landscape of the Pilbara region. A consistent regulatory environment that applies equally to all railway infrastructure owners is imperative.

#### **Cloudbreak Railway Example**

18. The Cloudbreak railway linking Fortescue Metals Group's (FMG) Cloudbreak mine in the eastern Pilbara to FMG-owned port facilities in Port Hedland provides a concrete example of how the Regime is currently operating in practice.
19. The 260 kilometre railway is owned by The Pilbara Infrastructure (TPI), a wholly owned subsidiary of FMG.
20. The State of Western Australia and TPI signed the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* in December 2004, which laid down the framework for the construction and operation of the railway and port. Construction began in November 2006 and by April 2008 the railway was fully connected and operational between Cloudbreak and Port Hedland. TPI's first shipment of iron ore took place on 15 May 2008. The Cloudbreak railway was included in the Regime on 1 July 2008, when Part 3 of that State Agreement was proclaimed.

- 
21. While construction commenced in November 2006, was completed in April 2008, and the Cloudbreak line was brought within the scope of the Regime by July 2008, the ERA process for approval of TPI's Part 5 instruments has only recently been completed:
- (a) TPI's Train Management Guidelines and Train Path Policy were approved by the ERA on 22 February 2010;
  - (b) TPI's Costing Principles and Over-payment Rules (which were issued on 12 March 2010 and 6 April 2010 respectively) were only approved by the ERA on 2 June 2010.
22. It should be noted that the consultation and approval of TPI's Part 5 Instruments did not occur simultaneously. This resulted in issues arising during the consultation period for the Costing Principles having a direct impact on the measures set out in the Train Management Guidelines and the Train Path Policy. However, these documents had already been the subject of a final determination which meant that they could not be altered. As a result some difficulties arose when determining the best approach to be taken with respect to the Costing Principles.
23. In addition, TPI's Costing Principles stated that TPI must submit its floor and ceiling prices to the ERA for evaluation within 3 months of the final determination of those Principles. It is not clear on what basis within the Code this timetable has been invoked or how long the ERA's evaluation of these floor and ceiling principles may take. Nor is it clear whether proposals may be made in the interim period without creating confusion in respect of the railway owner's obligations under section 9 of the Code. It is clear, however, that the process as currently operating creates sufficient uncertainty such that further clarification through the implementation of more definitive timeframes within the Code is merited.
24. Competition Principle 4(a) of the Competition Principles Agreement 1995 states that where possible, terms and conditions should be agreed between the owner of a facility and a person seeking access. However, Principle 4(g) acknowledges that an independent body is required to resolve disputes where owners and access seekers are unable to agree upon terms independently. Whilst the Code does currently provide for an arbitration model, it is submitted that this will not kick in until the official processes (submission of proposals, furnishing of information) under the Code have been adhered to.
25. Although the Cloudbreak railway has been operating for a number of years and the Code became effective in respect of the route on 1 July 2008, to date, no third party has yet secured access to the route under the Code due to the fact it is still not operational. The lengthy approvals process has excluded the possibility of any access seeker even submitting a proposal and certainly not being in a position to seek independent arbitration.

### Recommendations

26. In relation to the timelines associated with the Regime, NWIOA submits that new mechanisms should be introduced to speed up the overall process for rail access requests by a third party under the Regime. This can be accomplished by the introduction of definitive deadlines for the provision of information that aligns all considerations (except perhaps costing) with a particular route becoming subject to the

Regime. The Part 5 Instruments represent statements of principles and generic rules which are capable of being formulated prior to the actual completion of the relevant route. With respect to the Cloudbreak railway, the *Railway and Port (The Pilbara Infrastructure) Agreement 2004*, between the WA Government and TPI, set out the period by which TPI was to submit its proposed Part 5 Instruments following the commencement date of the Code. This period was generally 7 days. While this timing appears efficient on its face, its activation is dependent upon the relevant part of the State Agreement being proclaimed. It would be advantageous for the timing of submission of Part 5 Instruments to be independent of Government proclamation procedures. This could be implemented into the Code for example, by introducing the modified phrase "as soon as is reasonably practicable after the commencement of this Code and no later than 90 days following execution by the relevant parties of the State Agreement the subject of the railway".

27. It is submitted that infrastructure owners who wish to sign up to the Code should be in a position to submit their proposed documentation within a short timeframe. Alternatively, in order to ensure that access seekers are able to submit viable proposals, negotiate and gain access as soon as possible following the completion of infrastructure, it is submitted that an appropriate mechanism should be introduced to ensure that owners contemplating the construction of rail infrastructure should be required to sign up to the Code and commence the Part 5 approvals process upon commencement of construction and/or signing a State Agreement.
28. It is also submitted that the consultation in respect of Part 5 Instruments be sufficiently synchronised to ensure that sufficient flexibility is built into the process to ensure that the final approved instruments complement each other. It would be useful to incorporate into the Code timeframes for specific periods of public consultation, publication of issues papers etc by the ERA.
29. The acceleration of the preparation of these Part 5 instruments will hopefully ensure that proposals for access could be made to the railway owner soon after the construction of the new railway was completed.
30. In addition, with respect to the determination of floor and ceiling prices, should the ERA decide to exercise its power of determination of costs under Schedule 4 clause 9 of the Code, it should be determined within a definitive timeframe prior to completion of the infrastructure. Furthermore, an immediate and definitive timetable for exercising this power should also be added. At present, upon exercise of the power, the ERA must publish notices calling for written submissions over a specified period not less than 30 days, but other than this there is no prescribed timetable for determination under the clause.
31. If the railway owners' obligations are expedited in line with these recommendations, the ERA's extensive consultation process could commence as the railway is being built, rather than under the present regime where consultation only commences after completion of construction, which delays by a number of years the time at which access seekers are in a position to submit a proposal. This appears to have been the experience for TPI's Cloudbreak railway.
32. With respect to the scope of the Regime, NWIOA recommends that inclusion of BHP Billiton and Rio Tinto's Pilbara railways in the scope of the Regime be a precondition

for certification of the Regime. This would create increased stability and regulatory certainty in respect of rail access in the Pilbara region.