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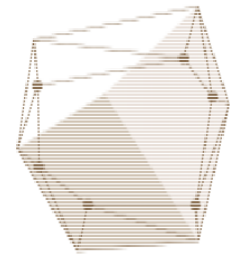

Submission in response to the Invitation for Public Submissions of 4 June 2014 from the Western Australian Economic Regulation Authority The Pilbara Infrastructure Pty Ltd (TPI) Amendment to Segregation Arrangements

4 July 2014

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1 Purpose

This is Brockman Mining Australia Pty Ltd's (**BMA**) submission to Economic Regulation Authority (**ERA**) in response to the notice of 4 June 2014 seeking public comment on revisions proposed by The Pilbara Infrastructure Pty Ltd (**TPI**) to its Segregation Arrangements (**Segregation Arrangements**). These apply to TPI's railway network which is the subject of the *Railways (Access) Act 1998* (WA) (**Act**) and the *Railways (Access) Code 2000* (WA) (**Code**).

BMA's wholly owned subsidiary, Brockman Iron Pty Ltd, is the only entity to have ever submitted an access proposal under the Code in respect of TPI's railway network. The access proposal process is ongoing. As such, BMA is very familiar with TPI's existing Segregation Arrangements and is, to our knowledge, the only entity to have direct and actual experience of how they are applied by TPI. In this regard, we would expect our submissions to carry a certain weight with the ERA, and for them to be taken into account by the ERA in its decision to approve or reject the proposed Segregation Arrangements, both in respect of the currently proposed amendments and in respect of the ongoing review, audit and compliance function for which the ERA is responsible.

2 Overview of submission

For the reasons outlined in this submission, BMA submits that the ERA should not approve the revised Segregation Arrangements. While they represent a minor improvement on the existing Segregation Arrangements, they do not address some of the fundamental issues with the Segregation Arrangements, issues which have been known and identified for some time, including by the ERA's own advisers in the December 2008 PWC Review of Proposed Segregation Arrangements.

BMA submits that the ERA should exercise its powers under section 29(3) of the Act to direct TPI to address these issues with the Segregation Arrangements, to ensure that TPI does in fact comply with its duty to segregate, as set out in section 28 of the Act, and its related duties of:

(a) protection of confidential information (section 31);

(b) avoidance of conflict of interest (section 32);

(c) duty of fairness (section 33); and

(d) maintenance of separate accounts and records (section 34).

Unlike any other currently existing railway network owner in Australia which is subject to an open access regime, TPI is wholly owned by a mining company, Fortescue Metals Group Limited (**FMG**). FMG is a direct competitor to Brockman, and indeed, to all potential users of TPI's network. As such, TPI must be subject to the most stringent of all segregation arrangements (or ring-fencing arrangements, as they are also known), within the requirements of the Act and the Code. Unlike any other existing railway network owner, there are real and present commercial issues and risks at play for the ultimate end users of TPI's railway network which the Segregation Arrangements must address.

The table below illustrates the point made above:

Railway network	Owner	Competitor of above rail operators?	Competitor of ultimate end users?
Western Australian rail freight network (south west)	Brookfield Rail	No	No
Interstate rail freight network	ARTC	No	No
Tarcoola to Darwin railway (SA/NT)	Genesee & Wyoming	Yes	No
Western System (QLD)	Queensland Rail	Yes	No
Central Queensland coal network	Aurizon	Yes	No
Hunter Valley coal network (NSW)	ARTC	No	No
Victorian intrastate network	V/Line (Victorian Government)	No	No
TPI	TPI	Yes	Yes (via its parent company parent FMG)

3 About Brockman

BMA 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.

Brockman is developing its 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 Ophthalmia hematite iron ore project. 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 an estimated mine life of 20 years.

Both of these projects are located in the East Pilbara in close proximity to TPI's railway network, FMG's Nyidinghu iron ore project and other major and junior mining company iron ore deposits.

The access proposal made by Brockman Iron Pty Ltd is in respect of the Marillana project.

4 Fundamental issues with proposed Segregation Arrangements

4.1 Narrow definition of access-related functions

Section 2 of the Segregation Arrangements defines 'access-related functions'.

The importance of this definition is that it is only access-related functions of TPI that are ring-fenced from other activities of TPI.

Best practice for the definition of access-related functions is to define it as all activities related to the ownership and operation of a railway network, unless specifically excluded.

TPI has adopted the reverse approach, such that it is only the identified functions set out in section 2 of the Segregation Arrangements that are covered.

This means that if there is an access-related function that has not yet been identified by either TPI or the ERA it will not fall within the definition and accordingly will not be subject to the Segregation Arrangements. An obvious example of such a function is the response by TPI to queries from 'Interested Parties' to requests for preliminary information or required information (each as defined under the Code).

It is not at all clear why the ERA or TPI consider that it is appropriate that access seekers or access holders should bear the risk of a narrow definition of access-related functions, when it is those very parties who risk being disadvantaged and treated unfairly by the railway owner. Accordingly, the Segregation Arrangements should be amended to incorporate the wider definition of access-related functions.

4.2 Management and personal

It is very difficult to have an effective segregation regime when a single legal entity (in this case TPI) carries out both above rail (train operations) and below rail (railway network) activities, in addition to other supply-chain activities.

Best practice, both in Western Australia and interstate (such as Queensland), is for separate legal entities to carry out these activities.

To achieve this outcome a corporate restructure must be undertaken. In the absence of a corporate restructure, at the very least the below rail business should be separated from the rest of TPI in the following ways:

(a) dedicated staff who only undertake access-related functions (defined in the broader sense referred to in section 4.1 above);

(b) physical separation of such staff from other TPI and FMG staff (in a meaningful sense);

(c) separate accounting systems; and

(d) separate IT systems (or adequate security protection which does not rely on human intervention for it to apply).

None of these basic requirements apply in the case of the Segregation Arrangements. As such, they are almost wholly ineffective and offer little comfort to Interested Parties, Proponents or Operators that TPI is capable of complying with its duties under sections 31 to 34 of the Act.

Dedicated access personnel

In relation to the dedicated access team, we note that TPI does not have a single employee who falls within this category. The most obvious practical example of the failure of the current Segregation Arrangements is, as Brockman understands the case to be, that even the 'Commercial/Compliance Officer' Mr Spencer Davey has functions

which relate to both above and below rail operations by TPI and also holds a dual role for which the responsibilities relate to other commercial activities in the wider FMG group.

With respect to the individual involved, again, it is difficult to see how a person in that role could meaningly comply with the obligation under the Act to avoid a conflict of interest, or the duty to act fairly, when the employee owes a general duty to use all reasonable care and skill in the performance of their work and a duty of fidelity and good faith to both TPI and FMG contemporaneously.

Conflicts of interest

Of greater concern is the statement on page 19 that the Commercial/Compliance Officer reports directly to the General Manager Rail who in turn reports to the Director Operations. Both of these roles directly oversee the entire FMG logistics chain. As the Segregation Arrangement imply, these people are responsible for the integrated FMG logistics chain (including above rail, below rail and port). It is almost impossible to see how such people would be capable of not finding themselves in an ongoing and fundamental conflict of interest in contravention of section 31 of the Code when considering matters relating to an access proposal and the negotiation of an access agreement with third parties.

A meaningful reporting chain should be put in place such that TPI staff who have sole responsibility for access-related functions do not report directly to the people responsible for FMG's supply chain. While this may not be FMG's preferred way of structuring its operations, Brockman submits that it is an essential requirement in order for TPI to comply with the requirements of the Act, which FMG knew would apply when they were granted the right by the State of Western Australia to build, own and operate TPI's railway network as an open access system for use by third parties. As mentioned above, this is best achieved by a corporate restructure.

Transfers of people and functions

In addition to these requirements, the Segregation Arrangements should also prohibit secondments between the TPI access staff and other parts of TPI or the wider FMG group. Secondments do not appear to be covered by the 'transfer' provisions in section 4.3.1 of the Segregation Arrangements.

The second paragraph of the transfer provisions is not at all clear (see section 4.3.1). It must be redrafted to ensure, at a minimum, that transfers may not occur into the access team if they have had any involvement in TPI's above rail activities or the FMG group's logistics team in the year prior to that transfer.

Finally, there should also be an express strict prohibition on the delegation or subcontracting of access-related functions to other parts of TPI or the FMG group.

4.3 Confidential information

Definition

The definition of confidential information simply mirrors the definition of the Act. No attempt has been made to explain what information may fall within that category. This is a failing of the Segregation Arrangements – they are not simply meant to restate the Act or Code obligations, but rather to explain how those obligations will be adhered to in practice.

To this end, Brockman believes that the Segregation Arrangement must be amended such that all information provided by an Interested Party, Proponent or Operator which may be used by TPI to unfairly discriminate between such parties, afford an entity with the FMG group an unfair commercial advantage or result in some form of discrimination by TPI or an FMG group member against an Interested Party, Proponent or Operator must be treated as 'Confidential Information'.

Application in practice

There also needs to be clear requirement that all confidential information must be ring-fenced from other parts of TPI and the FMG group. Over the nine or so pages of the Segregation Arrangements which deal with confidential information there is no single clear statement to the effect that this will occur. In fact, it rather reads as a list of exceptions to that general principle. There is an overreliance on disclosing confidential information to people that have signed 'Segregation Awareness Statements' and an abject and complete lack of actual systems and procedures that meaningfully protect such information.

By way of example only, on pages 23 and 58 (Marked-Up Version_May 2014) there are references to an exception to the non-disclosure principle allowing disclosure to 'line management for approval purposes'. It is not clear that such 'line management' (who are apparently approving access terms and conditions for their competitors) are even required to have signed a 'Segregation Awareness Statement' at first instance, quite apart from the obvious apprehension of conflict.

5 Duty of fairness

Section 5 of the Segregation Arrangements, which deal with TPI's duty of fairness, suffers from the same problem as identified in respect of confidential information, in that it simply repeats the requirements of the Act, without attempting in any way to explain how the duty of fairness will be applied by TPI on a day to day basis.

It is one thing to say TPI will act fairly, it is another to describe what that actually means. Examples from other regulated railways include:

(a) conducting business with related parties (including the case of TPI, itself when acting as above rail operator) on an arm's length basis;

(b) an obligation to not unfairly discriminate between Interested Parties, Proponents or Operators;

(c) standard, fair and reasonable access terms and conditions which are publically available (ideally on their website);

(d) managing demand or future interest for capacity by way of transparent queuing mechanisms;

(e) maintaining public capacity registers (thereby providing transparency); and

(f) an obligation to schedule trains in an equitable and non-discriminatory manner.

None of these basic protections are afforded by the Segregation Arrangements. Brockman submits that these basic protections should be afforded as a fundamental precondition to any approval by the ERA of the Segregation Arrangements as effective segregation arrangements as contemplated by the Code and the Act and the proper interpretation commonly given to the word 'effective' under Australian third party regulatory laws. The above examples also serve as evidence of how regulators other than the ERA have sought to apply their administration role to achieve the objects of third party regulatory legislation.

Instead, TPI has offered several ways in which parties can assess the fairness of TPI's actions, including by seeking intervention of the ERA (on pricing) and comparing the access terms and conditions offered with their standard access terms (which are not publically available).

Finally, in terms of unfair discrimination, the only assurance TPI gives to third parties about the terms and conditions of access it gives to related parties (which includes itself acting as above rail operator) is that the terms will be 'broadly comparable'. This is not subject to any external audit or checking process. At a minimum, the ERA should be entitled to

review any access agreements (on a confidential basis) to ensure that TPI complies with its duty to treat all operators fairly. The review by the ERA of such arrangements falls within the ERA's broad powers to monitor and enforce compliance pursuant to section 20(1)(a) ("The Regulator — is responsible for monitoring and enforcing compliance by railway owners with this Act and the Code") and to obtain any documents or records pursuant section 21(1)(c) ("The Regulator may by notice in writing require a railway owner — to send to the Regulator, before a day specified in the notice, any book, document, or record that is in the possession or under the control of the railway owner.").