



The Pilbara Infrastructure (TPI) Rail  
Part 5 Instruments submission  
for the proposed

Train Path Policy

BY

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# 1 Introduction

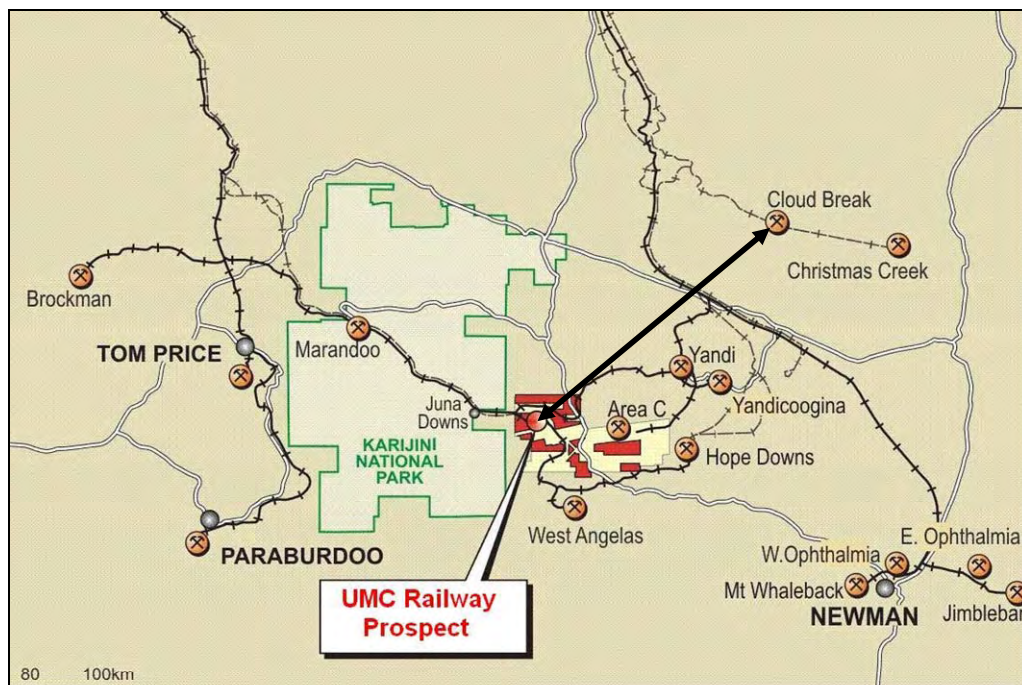
## United Minerals Corporation NL

United Minerals Corporation NL (United Minerals) is an ASX-listed company whose focus is exploring and developing high value bulk commodities, namely iron ore and bauxite. The company has two projects:

- Iron ore in the Central Pilbara District of W.A. (100% owned)
- Bauxite in the Kimberley Region of W.A. (25% owned in joint venture with major aluminium producer Norsk Hydro who is a Fortune 500 Company with a market capitalization of approximately US\$41 billion)

The United Minerals Railway Prospect is located 330km south of Port Hedland. Production is due to commence in 2010 at an initial rate of 2-5mtpa increasing to 10mtpa during its target mine life of 10-20 years. The Railway Project is 160km South West of the FMG siding at Cloud Break, Figure 1 below.

**Figure 1: United Minerals Deposits in the Pilbara**



## The Submission

The Economic Regulation Authority (**Authority**) is inviting public submissions on the proposed segregation arrangements, train management guidelines (**TMG**) and train path policy (**TPP**) that have been submitted by the railway owner, The Pilbara Infrastructure Pty Ltd (**TPI**), for its recently-constructed railway in the Pilbara.

United Minerals will most likely be users of the proposed access arrangements being put in place for the TPI railway. United Minerals makes the following submission to assist the Authority in finalising the Part 5 instruments.

This submission endeavours to, among other things:

- Review the draft TPP document prepared by TPI;
- advise the Authority of United Minerals key concerns in relation to the documents; and
- provide constructive suggestions to improve the workability of the documents.

United Minerals would be pleased to address any additional queries the Authority may have in relation to this submission.

## 2 Executive Summary

### 2.1 The objectives of the rail access regime

The TPI railway was included in the State's rail access regime, consisting of the Railways (Access) Act 1998 and the Railways (Access) Code 2000, when the Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 amended both the Act and the Code to make the inclusion.

The Authority has received the proposed segregation arrangements, train path policy and train management guidelines from TPI and invited submissions that must be received by 4:00pm on Friday 5 September 2008.

### 2.2 Framework for determinations

The Act provides a framework within which the Authority's determination required under Section 43 of the Code is to be made. Subsection 20(4) states:

In performing functions under the Act or Code, the Authority is to take into account:

- a) the railway owner's legitimate business interests and investment in the railway infrastructure;
- b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
- c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
- d) the interests of all persons holding contracts for the use of the railway infrastructure;
- e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
- f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
- g) the economically efficient use of the railway infrastructure; and
- h) the benefits to the public from having competitive markets.

The decision making power given to the Authority under Section 43 of the Code is mandatory in that the Authority must take into account all the factors listed in Section 20(4) of the Act. However, the Authority has discretion to allocate such weight to each of the factors listed in Section 20(4) of the Act as it considers appropriate for each particular case.

### 2.3 Railway (Access) Code 2000

Section 43, of the Railway Access Code 2000 requires the railway owner to comply with approved train path policy which is described as a statement of policy in:

- a) the allocation of train paths; and
- b) the provision of access to train paths that have ceased to be used.

### 2.4 Railway Safety Act 1998

In making this final determination into the Westnet TPP<sup>1</sup>, the Authorities final determination stated that "the TPP will need to comply with the requirements of the Rail Safety Act 1998". The TPI railway, unlike other Pilbara railways, operates under the Rail Safety Act (RSA) administered by the Office of Rail Safety WA.

The Rail Safety ACT 1998: SECT 26 Compliance with rail safety standards, states:

<sup>1</sup> Westnet Rail's Part 5 Instruments Review, Final Determination and Approval of the Proposed Train Path Policy, 28 August 2006, Economic Regulation Authority WA

1. The owner and the operator of a railway must comply with-
  - a) the Australian Rail Safety Standard<sup>2</sup>;
  - b) safety standards-
    - i. prescribed; or
    - ii. approved, as relevant to the operation of this Act, of which written notice has been given to him or her;
  - and
  - c) safety standards with which he or she has agreed to comply under this Act.
2. The owner and the operator of a railway must comply with the provisions of his or her safety management plan.

## **2.5 WestNetRail 2006**

The Authority approved WestNetRails 2006 TMG & TPP and as such we view them as a benchmark for comparison to the TPI documents.

## **2.6 Issues with Achievement of Regime Objectives**

United Minerals submits that the proposed documents are generally satisfactory but that some of the elements of the Westnet documentation would provide further reassurances of the constructive processes being proposed. In particular, United Minerals submits that the following key additions be made to the two documents. Detailed comments are provided in following sections.

United Minerals submits that the following key replacements be made to the TPP document. Detailed comments are provided in following sections.

### ***Definition of operator***

*Operator means the Operator or Operator's which have access to the TPI Network under an Access Agreement or have made an application for Access under Section 8 of the Code.*

### ***Disputes Process***

*Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.*

*Once an Access Agreement has been entered into disputes will be resolved by a three stage process as follows:*

- (a) firstly, negotiation of the dispute between the parties within a 7 day time limit and using reasonable endeavours;*
- (b) secondly, by mediation between the equivalent Chief Executive Officers and after if no agreement has been reached 14 days by expert mediation; and*
- (c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.*

*No later than 90 days after the commencement of an Access Agreement, the parties will meet for the purpose of identifying and agreeing on the means of measuring the performance of each party under the agreement. The agreed means are referred to as Key Performance Indicators.*

In addition United Minerals submits that the following key additions be made to the TPP document. Detailed comments are provided in following sections.

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<sup>2</sup> AS4292:2006 Railway Safety Management

### **Key Performance Indicators**

*When agreed, the Key Performance Indicators must be set out in writing signed by both parties. The parties will also agree in writing:*

- 1. the manner in which, and the frequency with which, the Key Performance Indicators are to be monitored and recorded;*
- 2. the consequences in relation to rights and obligations under the Access Agreement or otherwise of not meeting or of exceeding Key Performance Indicators; and*
- 3. any other relevant arrangements relating to the use of Key Performance Indicators in connection with the Access Agreement.*

*When recorded in writing and signed by the parties the agreed arrangements relating to Key Performance Indicators will constitute part of an Access Agreement. The parties may in writing signed by each of them vary the terms of the Key Performance Indicators.*

*The Key Performance Indicators are relevant to both parties and must be complied with during the access agreement unless a shorter period is specified. TPI and the Operator will monitor the appropriateness of the Key Performance Indicators.*

*The parties must meet when agreed but not less than quarterly for the purpose of discussing and determining actual performance against the Key Performance Indicators. The parties will jointly determine the appropriateness of the Key Performance Indicators for the purpose of reward or penalty.*

### **Authority Approval**

*Where a request for a Train Path or Train Paths or a request for an additional Train Path may preclude other entities from gaining access to that infrastructure the Train Path(s) will not be granted without the approval of the Authority in accordance with Section 10 of the Code. If the Authority grants approval then TPI will commence negotiations.*

### **Consistency between documents**

*TPI will ensure where possible, that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.*

### **Dispute Resolution**

*Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.*

*Once an Access Agreement has been entered into disputes will be resolved by a three-stage process as follows:*

- (a) firstly, negotiation of the dispute between the parties with a 7 day time limit and using reasonable endeavours;*
- (b) secondly, by mediation between the equivalent Chief Executive Officers and after 14 days if no agreement is reached by expert mediation; and*
- (c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.*

### **Consultation & Review**

*TPI will review the TPP, every fifth year after the Authority's approval of this document to determine whether any amendments are required.*

*Stakeholders have the ability to express any concern to the Authority which may arise at any time and the Authority will investigate such claims.*

*The Authority has the power under the Code to amend the TPP at any time and Access Seekers and Operators can at any time request the Authority to consider amendments.*

*TPI acknowledges the Authority will develop a regime of KPI's, in consultation with stakeholders, to assess the effectiveness of the TPP. This is in addition to KPI's that will be developed in individual access agreements.*

*TPI's compliance will be subject to an annual independent external audit. The Authority may select and manage the Auditor with costs paid by TPI. At a minimum the Authority's approval will be required and the final audit report will be made available to the Authority and the public.*

*The Authority can also commission special audits on any TPP issue or area where additional assurance is sought.*

## 3 TPP submission Comments

### 1 Introduction

#### 1.1 Background

No further comments.

#### 1.2 Purpose of the TPP

No further comments.

##### 1.2.1 Relationship between the TPP and TMG

No further comment with regard to the TPP and more detailed comments are provided in the segregation submission.

##### 1.2.2 Application of the TPP

We would request the addition of the following:

*TPI will negotiate to provide new Train Paths where the Operator meets the following criteria:*

*(i) the Operator can demonstrate an intention to enter into arrangements for the operation of services, to the satisfaction of TPI, and*

*(ii) the Operator provides details of anticipated increased demand because of*

*(a) an upgrade or expansion of production capacity with confirmation that it will progress (e.g. Funding approved, public announcements etc), or*

*(b) market growth based on trend data; or*

*(iii) the Operator can demonstrate a committed new project with agreed funding.*

### 2 Allocation of capacity

We would request the addition of the following:

*In negotiation of an Access Agreement the issue of allocation of Train Paths will be dealt with in accordance with the TPP and the requirements of the Code and specifically Section 16 (2) of the Code.*

*In the event that TPI has not provided the Operators with suitable Train Paths and the Operator believes that TPI has not complied with the TPP or provisions of the Code related to negotiation of Access Agreements they may seek to have the matter arbitrated as a dispute in accordance with Section 25 of the Code.*

#### 2.1 Specification of Capacity

The description of Cyclic Traffics in the body differs from the definition in the appendix, the description should read;

*b) for Cyclic Traffic, the number of Train Paths that will be allocated to that Operator per period in accordance with the Operator's Service Entitlement.*

The specification of capacity grants TPI a broad discretion to determine capacity. A standard measure of capacity needs to be adopted by the Authority to minimise confusion and manipulation by negotiating parties. We recommend Capacity be described as:

- Train paths, that is the number of trains in each direction for a given time on a section of track, usually illustrated on a train graph (as described by TPI); and
- Gross tonnes per kilometre (GTK), which is the number of tonnes that can be carried through the section of railway for a given mix of train types.



Adopting a train path approach can be manipulated by inefficient train management and may not reflect the true capacity of the line or section.

## **2.2 Analysis of Capacity**

### **2.2.1 Master Control Diagram**

No further comments.

### **2.2.2 Access Applications**

UMC recommends the following sentence be added to this section:

*The Code only requires the TPP to apply to access arrangements negotiated within the Code. TPI, nevertheless, will apply the TPP to each allocated Train Path regardless of whether access applications are made inside or outside of the Code.*

### **2.2.3 Capacity Analysis**

The extra time required by TPI to consider enhancements should be limited and there should be an obligation to consult with the access seeker when developing enhancement proposals.

## **2.3 Capacity Allocation**

We note the draft Costing Principles make mention of Capacity and related topic of Optimisation in section 3.1.1 as follows:

*Capacity of infrastructure – TPI considers that the network as constructed can meet current and reasonably projected demand. As a greenfields development, TPI does not consider that any optimisation should occur on its network. If TPI seeks to include the costs of additional infrastructure to meet projected demand it will demonstrate:*

- the basis of the demand projection; and*
- a commitment to the capital expenditure.*

*Route optimisation – as a greenfields development, TPI will assume that the optimised network is provided by the rail track within the existing corridor of the land and, hence, route alignment and infrastructure configuration is optimal and efficient.*

We will make more comment on this in our submission on Costing Principles.

## **3 Management of capacity**

### **3.1 Permanent variations to Train Paths**

Permanent variations should have a ninety (90) day notice period not thirty (30) days. Permanent variations may materially alter the economics of the mine and as such there should be longer periods for consideration and consultation. This would of course not withhold either party from agreeing in a shorter period if the change was not reasonable and practical.

### **3.2 Resumption of Capacity**

No comments at this time.

### **3.3 Review of Service Entitlements**

No comments at this time.

## **4 Other**

### **4.1 Non-discrimination**

No comments at this time.

## 4.2 Dispute resolution

The Access Agreement has not been provided so it is difficult to comment on the proposed process. Disputes should at least follow the disputes process outlined below.

*Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.*

*Once an Access Agreement has been entered into disputes will be resolved by a three stage process as follows:*

*(a) firstly, negotiation of the dispute between the parties within a 7 day time limit and using reasonable endeavours;*

*(b) secondly, by mediation between the equivalent Chief Executive Officers and after if no agreement has been reached 14 days by expert mediation; and*

*(c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.*

## Appendix A. Definitions

We proposed that the definition of an operator be amended to be:

*Operator means the Operator or Operator's which have access to the TPI Network under an Access Agreement or have made an application for Access under Section 8 of the Code.*

## Additional Sections

And we would add the following new section to the TPP:

### **Cancellation of Services using Train Paths**

*TPI will adopt the following policy in granting an Operator the right to cancel Train Paths without penalty and the specific provisions of the policy agreed between TPI and the Operator will be contained in the relevant Access Agreement.*

*An Operator may cancel an individual Train Path under any one of the following circumstances (but only if the occurrence of these circumstances is beyond the reasonable control of the Operator):*

*(i) where public holidays effect the operation of the Train Path;*

*(ii) for each Scheduled Train Path 5 times per year commencing from the date the path was first approved;*

*(iii) there are mechanical difficulties with the rolling stock used or operated by the Operator;*

*(iv) there is a failure of any part of the Operator's equipment used or to be used in connection with a service;*

*(v) repair, maintenance or upgrading of the Network is being carried out or there is some other event which materially affects the Operator's use of all or any part of the Network (including, without limitation, derailment, collision or later running trains) which occurs on the TPI Network;*

*(vi) the Operator is unable to load trains because of a lack of product at terminals or is unable to unload product at terminals or ports because of insufficient storage space or because of mechanical difficulties with the loading or unloading equipment at terminals or ports;*

*(vii) because of the seasonal nature of the services.*

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*The Operator must give TPI as much notice of cancellation as is possible in the relevant circumstances.*

### **Authority Approval**

*Where a request for a Train Path or Train Paths or a request for an additional Train Path may preclude other entities from gaining access to that infrastructure the Train Path(s) will not be granted without the approval of the Authority in accordance with Section 10 of the Code. If the Authority grants approval then TPI will commence negotiations.*

### **Consistency between documents**

*TPI will ensure where possible, that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.*

### **Consultation & Review**

*TPI will review the TPP, every fifth year after the Authority's approval of this document to determine whether any amendments are required.*

*Stakeholders have the ability to express any concern to the Authority which may arise at any time and the Authority will investigate such claims.*

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*TPI's compliance will be subject to an annual independent external audit. The Authority may select and manage the Auditor with costs paid by TPI. At a minimum the Authority's approval will be required and the final audit report will be made available to the Authority and the public.*

*The Authority can also commission special audits on any TPP issue or area where additional assurance is sought.*

### **Key Performance Indicators**

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The Pilbara Infrastructure (TPI) Rail  
Part 5 Instruments submission  
for the proposed

Segregation Arrangements

BY

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# 1 Introduction

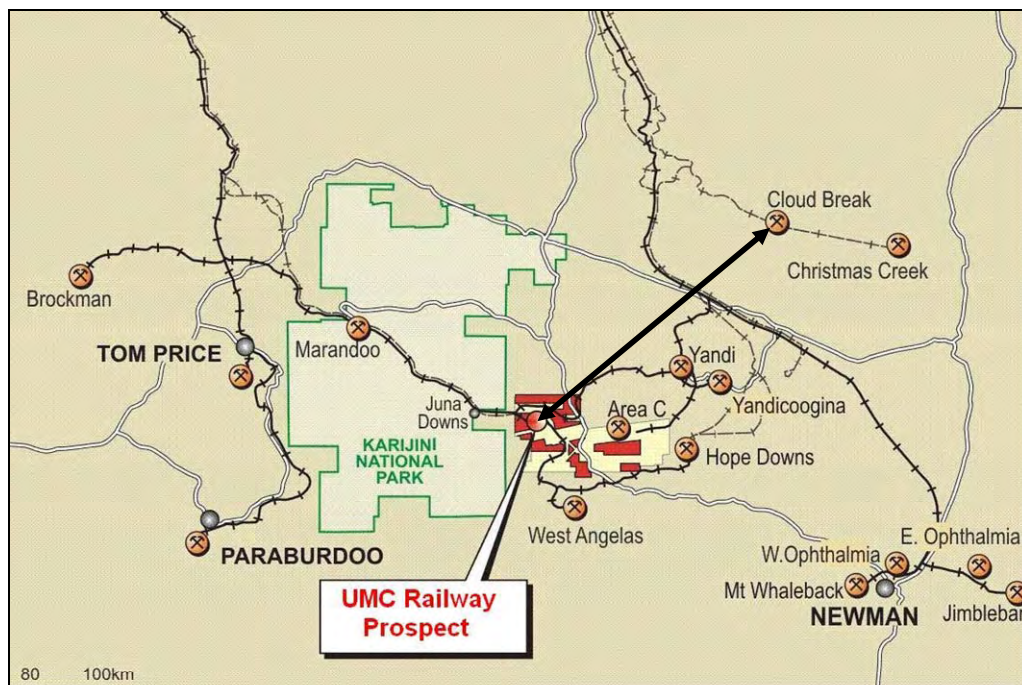
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**Figure 1: United Minerals Deposits in the Pilbara**



## The Submission

The Economic Regulation Authority (**Authority**) is inviting public submissions on the proposed segregation arrangements, train management guidelines (**TMG**) and train path policy (**TPP**) that have been submitted by the railway owner, The Pilbara Infrastructure Pty Ltd (**TPI**), for its recently-constructed railway in the Pilbara.

United Minerals will most likely be users of the proposed access arrangements being put in place for the TPI railway. United Minerals makes the following submission to assist the Authority in finalising the Part 5 instruments.

This submission endeavours to, among other things:

- Review the draft segregation arrangements documents prepared by TPI;
- advise the Authority of United Minerals key concerns in relation to the documents; and
- provide constructive suggestions to improve the workability of the documents.

United Minerals would be pleased to address any additional queries the Authority may have in relation to this submission.

## 2 Executive Summary

This submission by United Minerals Corporation NL (United Minerals) is in response to the Economic Regulation Authority of Western Australia (**Regulator**) inviting public submissions with regard to The Pilbara Infrastructure Pty Ltd (**TPI**) proposed Segregation Arrangements, Train Management Guidelines and Train Path Policy required under section 28 of the *Railways (Access) Act 1998* (**Access Act**) that have been submitted by TPI, the railway owner, for its recently-constructed railway in the Pilbara. Part 3 of the *Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004* (**Agreement Act**) came into effect on 1 July 2008 and the railway, constructed pursuant to the Agreement Act by TPI (**access provider**), a subsidiary company of Fortescue Metals Group Ltd (**FMG**), is now listed under Schedule 1 of the *Railways (Access) Code 2000* (**Access Code**).

The Act provides a framework within which the Authority's determination required under Section 43 of the Code is to be made. Subsection 20(4) states:

In performing functions under the Act or Code, the Regulator is to take into account:

- a) the railway owner's legitimate business interests and investment in the railway infrastructure;
- b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
- c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
- d) the interests of all persons holding contracts for the use of the railway infrastructure;
- e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
- f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
- g) the economically efficient use of the railway infrastructure; and
- h) the benefits to the public from having competitive markets.

The decision making power given to the Authority under Section 43 of the Code is mandatory in that the Authority must take into account all the factors listed in Section 20(4) of the Act. However, the Authority has discretion to allocate such weight to each of the factors listed in Section 20(4) of the Act as it considers appropriate for each particular case.

The Agreement Act ratifies and authorises an agreement between the State, TPI and FMG for the development of a new multi-user railway, port and additional infrastructure for the transport and export of iron ore in the Pilbara as well as giving statutory backing to open access arrangements for the multi-user railway. In the Second Reading speech of the Bill, the Parliamentary Secretary stated "the Government anticipates that the multi-user railway and port facilities will open the Pilbara iron ore industry to new entrants seeking to supply (the) growing demand for iron ore, especially from China<sup>1</sup>."

Section 2A of the Access Act provides that the main object of the Access Act is to "establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations"<sup>2</sup>. The Access Act and the Code provisions are directed toward establishing the level playing field and empower the Regulator to seek these objectives under section 29 of the Access Act.

The aim of the rail access regime is to establish and implement a framework that ensures effective; fair; and transparent competition, on Western Australia's railway network to achieve a net public benefit to the State.

<sup>1</sup> Parliamentary Papers 16/11/2004

<sup>2</sup> Railways (Access) Act 1998



The TPI railway was included in the State's rail access regime, consisting of the Railways (Access) Act 1998 and the Railways (Access) Code 2000, when the Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 amended both the Act and the Code to make the inclusion.

The aim<sup>3</sup> of the rail access regime is to establish and implement a framework that ensures effective, fair; and transparent competition, on Western Australia's railway network to achieve a net public benefit to the State.

Section 2A of the Access Act provides that the main object of the Access Act is to "establish a rail access regime that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations"<sup>4</sup>. The Access Act and the Access Code provisions are directed toward establishing the level playing field and empower the Regulator to seek these objectives under section 29 of the Access Act.

It is United Minerals' view that a contestable market for rail operations will only be facilitated if a level playing field is created for all parties having or seeking access (access seekers) to railway infrastructure and train guidelines and controls appropriate to the task (below rail).

TPI is claiming a greenfield railway operation would be affected by the separation between rail infrastructure and rail haulage operations with regard to safety, operations and cost.

TPI is proposing, in consideration of the above greenfield factors and the regulatory precedence of the Tarcoola to Darwin railway, a two stage implementation of the Segregation Agreement with Stage 1 keeping the infrastructure and haulage components as one entity whilst, and until, six months before any initial negotiated access agreement comes into effect. The segregation proposals for Stage 1 are proposed by TPI to be adequate to separate the commercial aspects of the total FMG business entities from influencing rail access negotiations with access seekers. Stage 2 arrangements propose that TPI "will ensure those staff performing access-related functions, such as train control and scheduling will not perform any haulage-related functions"<sup>5</sup>. The Stage 2 proposals also do not change the common role performed by the Executive Officers of FMG and the proposed common Directors on the FMG and TPI Boards.

In conclusion, TPI states that "TPI consider that this reporting arrangement (as above) is necessary because of the need to closely integrate the operation of the mine, rail and port logistics chain infrastructure owned by FMG and TPI".

United Minerals is supportive of TPI and FMG with regard to their agreement with the State to provide an open access railway and its preparedness to provide access.

However, United Minerals considers that in the context of a vertically integrated railway:

1. TPI is assuming that the separation of above rail materially affects safety, operation and cost for a railway at the greenfield stage, yet this has been effectively done initially with the separation of Westrail and in other jurisdictions on the basis that there is a net public benefit, and
2. TPI, in basing its proposal on the case that segregation of above rail and below rail will affect integration of mine, rail and port logistics in its own business which relates more to the efficiency of FMG's supply chain logistics rather than the efficient use of the railway for all users, which was the intent of the Agreement Act.

United Minerals would submit that the retention of the integration of the railway haulage business of FMG is linked to the overall business of FMG. To keep the haulage business integrated with TPI activities during Stage 1 unintentionally provides FMG market power with regard to access negotiation and, as a consequence, haulage and mine gate sales. Accordingly United Minerals would submit that the Segregation Arrangements should not be a staged process

<sup>3</sup> [http://www.era.wa.gov.au/3/195/48/the\\_regime.pm](http://www.era.wa.gov.au/3/195/48/the_regime.pm)

<sup>4</sup> Railways (Access) Act 1998

<sup>5</sup> TPI Segregation Arrangements Submission to ERA July 2008, at 1.3.2, Stage 2, page 7, dot point

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United Minerals also has concern that the Segregation Arrangements relate to port considerations. The rail priorities are determined by the TPI port priorities and is port driven rather than mine driven. This will result in undue uncertainty with the Rail Access arrangements forcing negotiation outside the Access Code and as a consequence make the Rail Access Regime potentially unworkable, reinforcing FMG's market power as a buyer and seller for iron ore

The Rail Access Regime therefore should exclude port considerations as the Regulator has no authority with regard to the Port Access Regime and with mooted port development options there maybe more than one port controller in the medium term future

United Minerals would suggest that the Regulator should set the Segregation Arrangements parameters to allow Third Party access seekers the transparency to negotiate effectively with TPI as a stand alone business. This should consider the concept of TPI treating FMG as an access seeker within the Access Code as FMG has considerable market power as a potential buyer of iron ore, effectively a monopoly provider of rail and port access as well as having dominant market power for rail haulage contracts. It is also suggested that the Regulator require TPI to include some fundamental objectives or principles of the Segregation Arrangements as they relate to sections 31-34 of the Act

United Minerals would request in consideration of the Access Act section 29 (1) that the Regulator not accept the Segregation Arrangements as proposed by TPI and would suggest that, as a minimum, the compliance with arrangements clauses be similar to those of WestNetRail Segregation Arrangements Revised Submission to the Authority in February 2007.

In view of the fact that most Junior Miners need to finalise rail and port contractual arrangements either now, or in the immediate near future, an effective Access Regime as envisaged by the Agreement Act needs to be in place for negotiation inside the Access Code. The Segregation Arrangements need to be a structural framework with regard to the aim of the Rail Access Regime to achieve a net public benefit to the State and the objectives of Section 2A of the Access Act.

### 3 Segregation Arrangements Proposed Structure

A contestable market for rail operations will only be facilitated if a level playing field is created for all parties having or seeking access (**access seekers**) to railway infrastructure and train guidelines and controls appropriate to the task (**below rail**) on which to run rollingstock in a safe manner at the direction of the access provider.

TPI is claiming a greenfield railway operation would be affected by the separation between rail infrastructure and rail haulage operations with regard to safety, operations and cost.

With regard to access regulation the TPI understanding is that "full segregation arrangements have not been imposed on any new railways in Australia since the introduction of the National Competition Principles Agreement in April 1995<sup>6</sup>".

TPI is claiming that there is a precedent of the Tarcoola to Darwin railway certified access regime<sup>7</sup> in which "there is no legislative requirement for the access provider to separate its access related and rail operator functions".

TPI is proposing, in consideration of the above greenfield factors and the regulatory precedence, a two stage implementation of the Segregation Agreement with Stage 1 keeping the infrastructure and haulage components as one entity whilst, and until, six months before any initial negotiated access agreement comes into effect. The segregation proposals for Stage 1 are proposed by TPI to be adequate to separate the commercial aspects of the total FMG business from influencing rail access negotiations with access seekers.

Stage 2 arrangements propose that TPI "will ensure those staff performing access-related functions, such as train control and scheduling will not perform any haulage-related functions<sup>8</sup>". The Stage 2 proposals also do not change the common role performed by the TPI Head of Rail, the FMG Chief Operating Officer (COO) the FMG Chief Executive Officer (CEO) and the common Directors on the FMG and TPI Boards.

In conclusion, TPI states that "TPI consider that this reporting arrangement (as above) is necessary because of the need to closely integrate the operation of the mine, rail and port logistics chain infrastructure owned by FMG and TPI".

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<sup>6</sup> TPI Segregation Arrangements Submission to ERA July 2008, at 1.3.2, para 2

<sup>7</sup> AustralAsia Railway (Third Party Access) Act 1999 (SA & NT)

<sup>8</sup> TPI Segregation Arrangements Submission to ERA July 2008, at 1.3.2, Stage 2, page 7, dot point

## 4 Submission in relation to the proposed structure

United Minerals is supportive of TPI and FMG with regard to their agreement with the State to provide an open access railway and its preparedness to provide access. However, United Minerals also considers that it is important, in the context of a vertically integrated railway, that a segregation framework be put in place that assures both access seekers and investors that treatment by the access provider will be equitable and will not compromise the access seekers commercial interests, sufficient to encourage their efficient use of the network and encourage growth.

In the presented Segregation Arrangements TPI has not verified any case that the separation of above rail materially affects safety, operation and cost for a railway at the greenfield stage, nor have TPI presented any case that segregation of above rail and below rail will affect integration of mine, rail and port logistics in its own business. It is suggested that these statements by TPI would require clarification by the Regulator in its Draft Determination.

Reference to the overall supply chain and specifically the logistics of the FMG supply chain, (presumably in relation to part (a) of the Determination Framework – the railway owners legitimate business interests and investment in the railway infrastructure) supports the case for strong Regulatory control. United Minerals would submit that the optimisation of the FMG supply chain does not equate to efficient use of the railway as intended by the Access Act and Access Code.

United Minerals would request that this interpretation be done in the context of the meaning of part (a) relating to TPI only and the Regulator ensures that the Access Regime is managed in such a way as to encourage maximum usage of the rail network as intended by the Access Code and the Agreement Act.

TPI and FMG clearly entered into the State Agreement on the basis, and with the knowledge that, the FMG entities would receive the benefits of the State Agreement and which would also imply the obligations of providing third party access. TPI/FMG, with full knowledge that such third party provision would be subject to the railway Access Act and Code of Western Australia, did not request in the Agreement such a consideration clause to retain an integrated operation during potential negotiation stages, nor are they indicating that retention of a vertically integrated structure provides benefits to the access seeker or the State. The Access Act section 28 (1)<sup>9</sup> states "A railway owner must make arrangements to segregate its access-related functions from its other functions" but more importantly that "A railway owner must have appropriate controls and procedures to ensure that the measures in place under subsection (1), operate effectively; and are complied with".

With regard to the claim by TPI that the Tarcoola to Darwin Access Regime is a precedent to model from is both inaccurate and inappropriate. Firstly, the Segregation Arrangements are the subject of and must comply with the Access Act, not different legislation in another jurisdiction. Secondly, The Tarcoola to Darwin Railway is fundamentally different to the TPI Railway as the railway owner does not compete with the rail users in upstream or downstream markets. There are several operators utilising the Tarcoola to Darwin Railway and the railway owners revenue source is access to below rail infrastructure. Unlike the Tarcoola to Darwin Railway (and indeed other parties to the WA Access Code), TPI and other FMG entities not only provide above and below rail infrastructure and haulage services, they also compete directly for iron ore customers which access seekers are also trying to serve and they compete in the market for iron ore tenements.

The FMC business consists of mining and transporting mineral ores (or potentially other bulk handling products), negotiating rail haulage, participating in the market for mineral tenements, potentially buying iron ore at the mine gate at a discount to spot FOB price and incorporating said product into its port stockpiles, port staging and blending and selling iron ore blended product.

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<sup>9</sup> Railways (Access) Act 1998

United Minerals would submit that the retention of the integration of the railway haulage business of TPI is linked to the overall business of FMG and provides FMG market power with regard to negotiation both inside and outside the Access Code. This is with regard to the unstated FMG objectives and issues in relation to its own product quality and potential to secure tonnage either on a haulage basis for port blending or direct purchase at the mine gate.

Maintaining the arguably unfair Stage 1 proposal in place until six months before the first successful third party access negotiation commences appears to make the prospect of achieving such a first time access arrangement unlikely. Retention of an integrated structure severely affects the other sections of Division 3 of the Access Act particularly in relation to sections 31-34 and there would need to be in place very stringent accounting separation and conflict of interest management arrangements. These would need to exceed those currently applied to the common carrier rail operations under the WA Code. These would also need to be applied at the outset and not staged to avoid prejudicing access seekers ability to convince customers and investors that timely and cost effective access will be achievable.

TPI is proposing that the Rail Access Regime key driver is the port requirements. The fact is that the Train Management Guidelines (TMG) and Train Path Policy (TPP) documents subordinate the Rail Access Regime to the Port Access Regime. For example, the train path priorities normally espoused in the decision making matrix overrides the expected rules by giving the port, which is TPI/FMG controlled and outside the rail access regime, the authority to overrule the rail priorities. TPI does not provide a basis as to the proposal as to why the system is driven by port priorities. United Minerals would contend that the priorities should be driven by all the rail access users (including FMG) mine priorities in the relationship linkage between mine, train control and port (refer the United Minerals Submissions regarding TMG and TPP).

United Minerals is concerned that this approach sets an uncompetitive precedent for above rail access seekers. Not all rail access seekers will want or need access to the TPI port. This arrangement will obviously unfairly disadvantage non-TPI trains and third party operators.

The Service Level agreement will be usurped by the TPI port priorities. There will be undue uncertainty with the Rail Access arrangements as a consequence making the Regime potentially unworkable and reinforcing TPI's market power as a buyer and seller for iron ore. At the very least, a rail access regime that gives the power to set train priorities to the port will undermine the above rail access market on the TPI railway. From an ore delivery sense, the only viable alternative is to either sell the ore to TPI or have them haul the ore and handle it at their port effectively ensuring a monopoly power on the haulage of ore as compared to obtaining access to both rail and port with TPI.

United Minerals contends that this is not the intention of the Code or the Act and United Minerals strongly urges the Authority not to allow and the TPI Rail Access Regime to be driven by the TPI Port Access Regime. Secondly, all references to non-rail entities and roles, but particularly the Port, should be removed from the Segregation Arrangements, TMG and TPP documents. This is on the basis that:

- The port has authority to overrule the rail priorities,
- The Port Access Regime has not yet been proposed to the rail access seekers,
- The Port Access Regime is approved by the Minister and is outside the control of the Regulator,
- There is uncertainty with regard to future port developments

The circumstances of being in a monopoly position with regard to logistics and without adequate separation of functions or "ring fencing" at the commencement of the access regime generates an unintended market power that TPI/FMG can extract from Junior Miners. United Minerals contends that this is not the intention of the Access Act, the Access Code, the Agreement Act, the Parliamentary Secretaries Second Reading speech and does not meet the decision making framework that the Authority must follow.

It is also suggested that the Regulator require TPI to include some fundamental objectives or principles of the Segregation Arrangements including:

- Access is negotiated in a competitively neutral environment
- Access negotiations are conducted in a timely and on a commercial basis between TPI and access seekers
- Access seekers, including all entities affiliated with FMG, will be treated fairly in relation to that access price and terms including the concept that FMG be treated as an access seeker within the Access Code (this being a concept that was canvassed with the separation of Westrail by Gensee Wyoming as the operator and WestNetRail as the access provider)
- The common Directors of TPI/FMG have clear conflict of interest guidelines with regard to the interests of FMG (except those required under the Corporations Act or any other Associate or entity within the Group which has or may require access)
- All information which might reasonably be expected to affect the decisions of other entities of FMG, must be kept confidential within TPI
- The TPI railway infrastructure must be operated as a stand alone business which is accounted for separately and transparently so it can be demonstrated that there are no cross subsidies between the other entities of FMG
- An expanded definitions section be provided including access related functions

Generally the proposed Segregation Arrangements lack detail and refer to further Arrangements being developed but without any timing, detail or framework, for example:

- Development of a Segregation Manual,
- Development of control measures for managing Board members conflict of interest,
- Development of Stage 2 implementation documents, and
- There is no proposal for provision of a draft Access Agreement.

#### **4.1 SECTION 31 – PROTECTION OF CONFIDENTIAL INFORMATION**

The proposal is very limited when compared to others coverage of section 31 such as WestNetRail Confidential Information Arrangements<sup>10</sup> and it is suggested that the following be considered:

- A definition of confidential information,
- independent audits of confidential information arrangements,
- physically and functional separation of staff,
- Greater detail on system security for both IT and hard copy systems,
- That TPI be self sufficient for regulatory accounting, access pricing and revenue management,
- Aggregation of financial management reporting,
- Nomination of staff or contractors accessing confidential information and covered by a confidentiality deed,
- The access seeker and TPI sign their own confidentiality deed as part of the negotiation process,

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<sup>10</sup> WestNetRail, Segregation Arrangements, Revised Submission to the Regulator, Section 4

## 4.2 SECTION 32 – AVOIDANCE OF CONFLICT OF INTEREST

As stated above TPI has not verified a case for staging the Segregation Arrangements and the proposal that the decisions of common Directors are not stringently covered at the outset further reinforces the case for not staging the Segregation Arrangements.

TPI state they will develop control measures to manage potential conflicts of interest but TPI do not provide any framework of what these control measures would consist of or how they would work. It is requested that whatever control measures and protocols that TPI submit to the Regulator that the Regulator ensures that they are consistent with the requirements of section 33 of the Access Act. The Segregation Awareness Statements and the Segregation Manual should also be approved by the Regulator.

United Minerals would request that the Regulator should be satisfied that adequate documented protocols and security measures with regard to sharing of information duty of fairness and rectification of conflicts of interest with FMG entities and the TPI/FMG Boards were in place to ensure the fiduciary responsibilities of Directors and shared executive staff was not compromised.

Additionally, it is suggested that Directors can potentially avoid conflicts of interest by being briefed and provided with aggregated financial and other information. Where more detailed information is required by Directors and Executives in order for them to carry out their responsibilities TPI should implement a protection mechanism which would also apply when briefing the Directors and Executives outside of Board meetings.

In order to protect confidentiality at the negotiation stage (if required by the Third Party) the parties enter a confidentiality agreement to reflect TPI's confidentiality obligations under the Act and these Arrangements.

## 4.3 SECTION 33 – DUTY OF FAIRNESS

The information provided to access seekers must be the same for all access seekers including FMG. The provision of accurate information relating to the operation of the railway system by TPI to all access parties is a fundamental aspect of segregation and fairness.

TPI state that they will ensure that the key terms and conditions of internal access arrangements will be broadly comparable to those provided or offered to third party access seekers<sup>11</sup>. United Minerals suggests that “broadly comparable” is not satisfying the obligation of duty of fairness and requests the Regulator ensure that there is a commitment by TPI to treat all access seekers fairly in relation to prices, service quality, train paths and priorities. An important issue is that any price differentiation between operators reflects a fair assessment of the different costs and risks borne by the access provider, and the value the market places on the path. To this extent, and as suggested earlier, that TPI should treat FMG as an access seeker within the Access Code

TPI should not discriminate between operators that operate like services and are competing in the same end markets. In this regard, United Minerals suggests that all access agreements, including the FMG agreement, be provided to the Regulator. Industry should know the nature and extent of current contractual commitments of TPI existing over particular routes on the TPI network.

United Minerals suggests that the Regulator develop in consultation with TPI key performance indicators (KPI's) to assess and monitor the effectiveness of the Segregation Arrangements (e.g. such as breaches), service quality and cost efficiency. There should be regular reporting to the Regulator on the monitoring, investigation and reporting procedures.

The Segregation Arrangements should also provide for an internal investigation of alleged breaches with a reporting system in respect of those investigations and the outcome of those investigations. In addition external auditing of TPI's compliance should be carried out at

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<sup>11</sup> Page 20 of Arrangements

regular specified intervals and when an actual or alleged breach of the Segregation Arrangements takes place.

The Segregation Arrangements should detail a procedure for dealing with access matters and the order in which they are treated to prevent any access seeker receiving inappropriate priority in dealing with its access matters or proposals.

#### **4.4 SECTION 34 – SEPERATION OF ACCOUNTS AND REPORTS**

United Minerals agrees with the TPI objective that TPI be self sufficient for regulatory accounting, access pricing and revenue management. The TPI railway infrastructure must be operated as a standalone business which is accounted for separately and transparently in order to demonstrate that there are no cross subsidies between the other entities of FMG. In addition TPI would need to ensure that reporting to FMG be only at an aggregated level.

With regard to Regulatory accounting the Regulator should require that the accounts contain sufficient information and to be presented in such a manner as would enable verification by the Regulator of the calculation of the various costs.

##### **Costing Principles**

Whilst the Costing Principles are subject to a separate submission they are referenced here as the sharing of common costs amongst the FMG entities and the cost drivers should be only those that apply to the rail infrastructure asset.

#### **4.5 COMPLIANCE**

United Minerals would suggest with regard to compliance that:

- The Segregation Manual be completed promptly, be available for public comment and be reviewed and approved by the Regulator,
- Contain detailed compliance procedures and practices to ensure all TPI staff, common Executives and common Directors comply with the segregation obligations,
- TPI be required to report any suspected breaches of the obligations to the Regulator and affected access seekers,
- Where the Regulator suspects or considers a breach of the obligations has occurred, TPI is required to conduct an audit in the same manner as the annual audits.





The Pilbara Infrastructure (TPI) Rail  
Part 5 Instruments submission  
for the proposed

Train Management Guidelines

BY

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Dated 5 September 2008

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# 1 Introduction

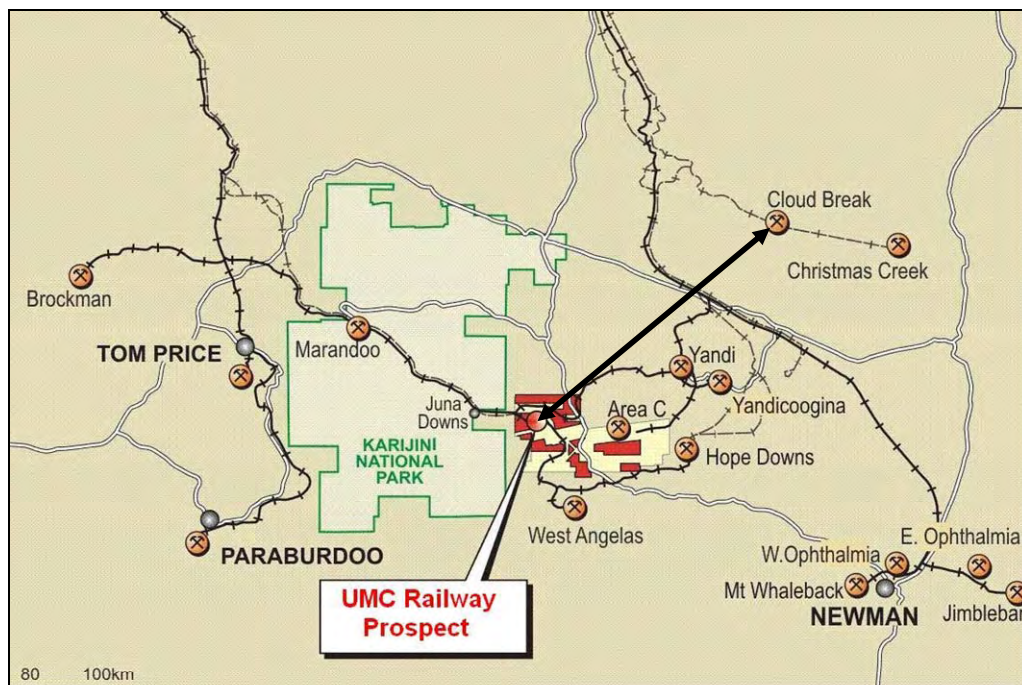
## United Minerals Corporation NL

United Minerals Corporation NL (United Minerals) is an ASX-listed company whose focus is exploring and developing high value bulk commodities, namely iron ore and bauxite. The company has two projects:

- Iron ore in the Central Pilbara District of W.A. (100% owned)
- Bauxite in the Kimberley Region of W.A. (25% owned in joint venture with major aluminium producer Norsk Hydro who is a Fortune 500 Company with a market capitalization of approximately US\$41 billion)

The United Minerals Railway Prospect is located 330km south of Port Hedland. Production is due to commence in 2010 at an initial rate of 2-5mtpa increasing to 10mtpa during its target mine life of 10-20 years. The Railway Project is 160km South West of the FMG siding at Cloud Break, Figure 1 below.

**Figure 1: United Minerals Deposits in the Pilbara**



## The Submission

The Economic Regulation Authority (**Authority**) is inviting public submissions on the proposed segregation arrangements, train management guidelines (**TMG**) and train path policy (**TPP**) that have been submitted by the railway owner, The Pilbara Infrastructure Pty Ltd (**TPI**), for its recently-constructed railway in the Pilbara.

United Minerals will most likely be users of the proposed access arrangements being put in place for the TPI railway. United Minerals makes the following submission to assist the Authority in finalizing the Part 5 instruments.

This submission endeavours to, among other things:

- Review the draft TMG document prepared by TPI;
- advise the Authority of United Minerals key concerns in relation to the documents; and
- provide constructive suggestions to improve the workability of the documents.

United Minerals would be pleased to address any additional queries the Authority may have in relation to this submission.

## 2 Executive Summary

### 2.1 The objectives of the rail access regime

The TPI railway was included in the State's rail access regime, consisting of the Railways (Access) Act 1998 and the Railways (Access) Code 2000, when the Railway and Port (The Pilbara Infrastructure Pty Ltd) Agreement Act 2004 amended both the Act and the Code to make the inclusion.

The Authority has received the proposed segregation arrangements, train path policy and train management guidelines from TPI and invited submissions that must be received by 4:00pm on Friday 5 September 2008.

### 2.2 Framework for determinations

The Act provides a framework within which the Authority's determination required under Section 43 of the Code is to be made. Subsection 20(4) states:

In performing functions under the Act or Code, the Authority is to take into account:

- a) the railway owner's legitimate business interests and investment in the railway infrastructure;
- b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;
- c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;
- d) the interests of all persons holding contracts for the use of the railway infrastructure;
- e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;
- f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;
- g) the economically efficient use of the railway infrastructure; and
- h) the benefits to the public from having competitive markets.

The decision making power given to the Authority under Section 43 of the Code is mandatory in that the Authority must take into account all the factors listed in Section 20(4) of the Act. However, the Authority has discretion to allocate such weight to each of the factors listed in Section 20(4) of the Act as it considers appropriate for each particular case.

### 2.3 Railway (Access) Code 2000

The TMG is one of the four Part 5 Instruments set out in Section 40(3) of the Railways (Access) Code 2000 (Code). It requires the railway owner to comply with the approved Train Management Guideline which is a statement of principles, rules and practices which will be applied in the real time management of services.

### 2.4 Railway Safety Act 1998

In making this final determination into the Westnet TMG<sup>1</sup>, the Authorities final determination stated that "the TMG will need to comply with the requirements of the Rail Safety Act 1998". The TPI railway, unlike other Pilbara railways, operates under the Rail Safety Act (RSA) administered by the Office of Rail Safety WA.

The Rail Safety ACT 1998: SECT 26 Compliance with rail safety standards, states:

<sup>1</sup> Westnet Rail's Part 5 Instruments Review, Final Determination and Approval of the Proposed Train Management Guideline, 28 August 2006, Economic Regulation Authority WA

1. The owner and the operator of a railway must comply with-
  - a) the Australian Rail Safety Standard<sup>2</sup>;
  - b) safety standards-
    - i. prescribed; or
    - ii. approved, as relevant to the operation of this Act, of which written notice has been given to him or her;
  - and
  - c) safety standards with which he or she has agreed to comply under this Act.
2. The owner and the operator of a railway must comply with the provisions of his or her safety management plan.

## **2.5 WestNetRail 2006**

The Authority approved WestNetRails 2006 TMG & TPP and as such in this submission they are taken as the benchmark for comparison to the TPI submissions.

## **2.6 Issues with Achievement of Regime Objectives**

United Minerals submits that the proposed documents are generally satisfactory but that some of the elements of the Westnet documentation would provide further reassurances of the constructive processes being proposed.

United Minerals submits that the following key replacements be made to the TMG document. Detailed comments are provided in following sections.

### ***Definition of operator***

*Operator means the Operator or Operator's which have access to the TPI Network under an Access Agreement or have made an application for Access under Section 8 of the Code.*

### ***Disputes Process***

*Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.*

*Once an Access Agreement has been entered into disputes will be resolved by a three stage process as follows:*

- (a) firstly, negotiation of the dispute between the parties within a 7 day time limit and using reasonable endeavours;*
- (b) secondly, by mediation between the equivalent Chief Executive Officers and after if no agreement has been reached 14 days by expert mediation; and*
- (c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.*

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<sup>2</sup> AS4292:2006 Railway Safety Management

In addition United Minerals submits that the following key additions be made to the TMG document. Detailed comments are provided in following sections.

### **Key Performance Indicators**

*No later than 90 days after the commencement of an Access Agreement, the parties will meet for the purpose of identifying and agreeing on the means of measuring the performance of each party under the agreement. The agreed means are referred to as Key Performance Indicators.*

*When agreed, the Key Performance Indicators must be set out in writing signed by both parties. The parties will also agree in writing:*

- 1. the manner in which, and the frequency with which, the Key Performance Indicators are to be monitored and recorded;*
- 2. the consequences in relation to rights and obligations under the Access Agreement or otherwise of not meeting or of exceeding Key Performance Indicators; and*
- 3. any other relevant arrangements relating to the use of Key Performance Indicators in connection with the Access Agreement.*

*When recorded in writing and signed by the parties the agreed arrangements relating to Key Performance Indicators will constitute part of an Access Agreement. The parties may in writing signed by each of them vary the terms of the Key Performance Indicators.*

*The Key Performance Indicators are relevant to both parties and must be complied with during the access agreement unless a shorter period is specified. TPI and the Operator will monitor the appropriateness of the Key Performance Indicators.*

*The parties must meet when agreed but not less than quarterly for the purpose of discussing and determining actual performance against the Key Performance Indicators. The parties will jointly determine the appropriateness of the Key Performance Indicators for the purpose of reward or penalty.*

### **Authority Approval**

*Where a request for a Train Path or Train Paths or a request for an additional Train Path may preclude other entities from gaining access to that infrastructure the Train Path(s) will not be granted without the approval of the Authority in accordance with Section 10 of the Code. If the ERA grants approval then TPI will commence negotiations.*

### **Consistency between documents**

*TPI will ensure where possible, that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.*

### **Consultation & Review**

*TPI will review the TMG, every fifth year after the Authority's approval of this document to determine whether any amendments are required.*

*Stakeholders have the ability to express any concern to the Authority which may arise at any time and the Authority will investigate such claims.*

*The Authority has the power under the Code to amend the TMG at any time and Access Seekers and Operators can at any time request the Authority to consider amendments.*

*TPI acknowledges the Authority will develop a regime of KPI's, in consultation with stakeholders, to assess the effectiveness of the TPP. This is in addition to KPI's that will be developed in individual access agreements.*

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*TPI's compliance will be subject to an annual independent external audit. The Authority may select and manage the Auditor with costs paid by TPI. At a minimum the Authority's approval will be required and the final audit report will be made available to the Authority and the public.*

*The Authority can also commission special audits on any TMG issue or area where additional assurance is sought.*

## **2.7 Costing & Overpricing Principles**

The TPI Costing Principles and the Over Pricing Principles proposals were released on the 20/8/2008 for regulatory review submission by 1st October.

These are vitally influencing principles that affect the other Part 5 Instruments. The TMG and TPP will be reviewed in that light to add comments to those submissions as they include pricing elements such as floor pricing.

United Minerals reserves the right to vary its response to this submission in the response to the Costing and Overpricing principles submission.

## **2.8 Port & Rail Access Agreements**

The TMG document references two highly influential documents not provided as part of this review:

- Rail Access Agreement
- Port Terminal Access Regime

Whereas United Minerals has proposed above that the Rail Access Agreement should be consistent with the TMG and TPP documents to overcome this difficulty; United Minerals reserves the right to vary its response to this submission in later responses once the Port Terminal Access Regime becomes available.

## 3 TMG submission Comments

### 1 Introduction

#### 1.1 Background

No further comments.

#### 1.2 Purpose of the TMG

With reference to the Rail Safety Act and associated standards and guidelines and as notes as a principle in the WestNetRail TMG we would add:

- To ensure operational safety is maintained through compliance with Safeworking rules, regulations and procedures.
- To ensure the integrity of the track and other infrastructure so that the train plan be met.
- To ensure operating integrity, including train crewing, locomotives, wagons and loading so that the train plan can be met.
- To manage the Network based on agreed entry/exit times.

#### 1.3 Pre-conditions

No further comments.

### 2 Scheduling Principles

No further comments.

#### 2.1 Master Train Plan

TPI undertakes to “use its best endeavours to consult Operators” with respect to taking possession of the Network to undertake necessary work. We would add:

*To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed.*

*All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements.*

#### 2.2 Weekly Train Plan

TPI have proposed that the Weekly Train Plan would be prepared following Train Requests from the Operators and in consultation with the Port Operator with consideration to stockpile management and shipping requirements. We highly recommend a further requirement for a longer period of planning be added to the TMG e.g. three months to allow all users the opportunity to communicate and consider each others track usage requirements.

With regards to subsequent modifications to the Weekly Train Plan we again would request the following addition:

*To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed.*

*All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements.*



## 2.3 Contested Train Path

United Minerals agrees with the proposed approach but would request that the decisions and the information that the decisions are made upon should be recorded in an auditable manner so as to demonstrate consistency with the proposed process.

Again we would add:

*To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed.*

*All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements.*

## 3 Real-time Management of Services

### 3.1 Services presented on time, late or early

No further comments.

### 3.2 Instructions

The period for which the instruction applies should be clearly stated.

We recommend the following additions:

*Where that instruction is unreasonable or impractical for operating and cost reasons the Operator may decline to run the service without penalty to its Service Level performance record.*

## 4 Managing infrastructure issues

The UMC has a preference for TPI to publish a twelve month network possession plan for planned maintenance, enhancements and expansion work together with the MTP so that they can reasonably anticipate planned closures, their duration and location. In this way the Mine will be able to mirror the availability of the railway optimizing mine maintenance and production to every ones benefit.

### 4.1 Network repairs, maintenance and upgrades

#### 4.1.1 Possessions

To be treated fairly and to meet reasonable endeavours to consult TPI we propose to substitute part b) with:

*All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements.*

#### 4.1.2 Consultation

a) All possessions should be published whether they affect train paths or not to allow for contingency planning by all Operators

b) No further comments

c) TPI should notify all Operators as path changes as this may affect others, Operators need this for contingency planning.

d) TPI should notify all Operators to allow contingency planning to occur.

e) A rolling three month review of planned possessions should occur at a joint consultative meeting/forum each month.

f) And TPI will provide a revised DWTT so that Operators may have a basis to review the impact on their services.

## 4.2 Management of emergencies or other incidents

No further comments.

### 4.2.1 Network blockages

We would add:

*An operator is not required to provide assistance if it will incur cost and risk unless agreement is reached on how the costs and risks will be shared. Agreement on the terms and conditions for providing assistance may be negotiated within the Access Agreement.*

## 4.3 Train activities following an incident or an emergency

We would add:

*To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed.*

*All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements.*

## 4.4 Management of issues affecting daily operations

We would add:

*To facilitate the communications process, the Operator and TPI shall provide for a 24 hour communications link unless otherwise agreed.*

*All affected Operators will be consulted as to their positions and needs including factors such as crewing arrangements; sensitive freight; and shipping or production requirements.*

## 4.5 Disputes

The Access Agreement has not been provided so it is difficult to comment on the proposed process. Disputes should at least follow the disputes process outlined below.

*Part 3 of the Code provides for arbitration of access disputes in certain circumstances in relation to the provisions to be contained in a proposed Access Agreement. Those circumstances are set out in Section 25(2) of the Code.*

*Once an Access Agreement has been entered into disputes will be resolved by a three stage process as follows:*

*(a) firstly, negotiation of the dispute between the parties within a 7 day time limit and using reasonable endeavours;*

*(b) secondly, by mediation between the equivalent Chief Executive Officers and after if no agreement has been reached 14 days by expert mediation; and*

*(c) thirdly, by arbitration in accordance with the Commercial Arbitration Act 1985.*

## Appendix A. Definitions

We proposed that the definition of an operator be amended to be:

*Operator means the Operator or Operator's which have access to the TPI Network under an Access Agreement or have made an application for Access under Section 8 of the Code.*

## Appendix B. Decision-Making Matrix

United Minerals has a preference to review the Port Access arrangements before commenting on the Decision Making Matrix.

## **Additional Sections**

And we would add the following new section to the TMG:

### **Authority Approval**

*Where a request for a Train Path or Train Paths or a request for an additional Train Path may preclude other entities from gaining access to that infrastructure the Train Path(s) will not be granted without the approval of the Authority in accordance with Section 10 of the Code. If the Authority grants approval then TPI will commence negotiations.*

### **Consistency between documents**

*TPI will ensure where possible, that those sections of an access agreement which relate to requirements set out in the TPP or TMG documents are referenced to the relevant clauses in these documents to ensure consistency is maintained between the access agreement and these documents.*

### **Consultation & Review**

*TPI will review the TMG, every fifth year after the Authority's approval of this document to determine whether any amendments are required.*

*Stakeholders have the ability to express any concern to the Authority which may arise at any time and the Authority will investigate such claims.*

*The Authority has the power under the Code to amend the TMG at any time and Access Seekers and Operators can at any time request the Authority to consider amendments.*

*TPI acknowledges the ERA will develop a regime of KPI's, in consultation with stakeholders, to assess the effectiveness of the TMG. This is in addition to KPI's that will be developed in individual access agreements.*

*TPI's compliance will be subject to an annual independent external audit. The Authority may select and manage the Auditor with costs paid by TPI. At a minimum the Authority's approval will be required and the final audit report will be made available to the Authority and the public.*

*The Authority can also commission special audits on any TMG issue or area where additional assurance is sought.*

### **Key Performance Indicators**

*No later than 90 days after the commencement of an Access Agreement, the parties will meet for the purpose of identifying and agreeing on the means of measuring the performance of each party under the agreement. The agreed means are referred to as Key Performance Indicators.*

*When agreed, the Key Performance Indicators must be set out in writing signed by both parties. The parties will also agree in writing:*

- 1. the manner in which, and the frequency with which, the Key Performance Indicators are to be monitored and recorded;*
- 2. the consequences in relation to rights and obligations under the Access Agreement or otherwise of not meeting or of exceeding Key Performance Indicators; and*
- 3. any other relevant arrangements relating to the use of Key Performance Indicators in connection with the Access Agreement.*

*When recorded in writing and signed by the parties the agreed arrangements relating to Key Performance Indicators will constitute part of an Access Agreement. The*

*parties may in writing signed by each of them vary the terms of the Key Performance Indicators.*

*The Key Performance Indicators are relevant to both parties and must be complied with during the access agreement unless a shorter period is specified. TPI and the Operator will monitor the appropriateness of the Key Performance Indicators.*

*The parties must meet when agreed but not less than quarterly for the purpose of discussing and determining actual performance against the Key Performance Indicators. The parties will jointly determine the appropriateness of the Key Performance Indicators for the purpose of reward or penalty.*