



Brookfield Rail  
Segregation Arrangements  
Draft Decision

November 2015

Economic Regulation Authority

WESTERN AUSTRALIA

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## Executive Summary

1. This Draft Decision is an approval of Segregation Arrangements proposed by Brookfield Rail (**BR**) subject to 12 required amendments. The amendments refer in large part to changes in terms used and definitions in the proposed Segregation Arrangements which may be in conflict with the definitions used in the *Railways Access Act 1998 (Act)* or the *Railways (Access) Code 2000 (Code)*.
2. In addition to definitional issues, there are three significant structural requirements included in the required amendments.
3. The first two structural requirements are to remove provisions which exist currently in railway owners' Segregation Arrangements or have existed in other railway owners' Arrangements. Those provisions are (1) a requirement for regular audit and review and (2) a provision defining "access-related functions" as functions involved in arranging railway operations both inside and outside the Code.
4. The third significant structural requirement is the removal of the dispute resolution procedure proposed to be included for the first time by Brookfield Rail (**BR**).

### Requirement for audit and review

5. The Authority approved amendments to The Pilbara Infrastructure's (**TPI**) segregation arrangements in 2013 which removed the requirement for regular review and audit of the arrangements. This was partly because the Act and the Code provide sufficient power for the Regulator to require amendments to be made to railway owner's segregation arrangements, and require an audit to be undertaken in relation to any issue at any time.
6. This Draft Decision requires that the provisions for regular audit and review are removed from the proposed Segregation Arrangements.

### Access-related Functions

7. "Access-related functions" are only those functions involved in arranging the provision of access to railway infrastructure under the Code. This means that functions involved in arranging commercial contracts to use railway infrastructure outside the Code is not an "access-related function" but an "other function". This Draft Decision requires that provisions of the proposed Segregation Arrangements be amended where required to reflect the Act definition of "access-related functions".<sup>1</sup>
8. There are a number of follow-on amendments that are necessitated by the requirement to not include arranging out-of-Code contracts as an access-related function.
9. For example, throughout the document, BR had proposed to use the words "Proponents and Network Participants" to refer to the entities whose interests are protected by the Segregation Arrangements. Brookfield Rail defined a Network Participant to mean an "Access Holder or Operator" and defined "Access Holder" to mean anyone with a commercial agreement. The draft decision requires that the

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<sup>1</sup> The issue of the definition of access-related functions was highlighted by the Authority in the Draft Report on the Code Review (September 2015). BR in its submission in response to the Code Review Draft Report indicated its view that the definition of access-related functions the Act was not the intention of Parliament when the Act was promulgated.

words “Proponents and Network Participants” be replaced with “persons seeking access<sup>2</sup> and operators” throughout.

#### Dispute resolution

10. The dispute resolution procedure proposed to be included by BR for the first time appears to relate to negotiations occurring otherwise than under the Code. The Code provides for a dispute resolution mechanism to apply to negotiations in Part 3 of the Code. The Draft Decision includes a requirement that Part 8A of the proposed arrangements, which comprises the new dispute resolution mechanism, be removed.

## Invitation to make submissions

Interested parties are invited to make submissions on the Authority’s draft decision by

**4:00 pm (WST) Friday 4 December 2015** via:

Email address: [publicsubmissions@erawa.com.au](mailto:publicsubmissions@erawa.com.au)

Postal address: PO Box 8469, PERTH BC WA 6849

Office address: Level 4, Albert Facey House, 469 Wellington Street, Perth WA 6000

Fax: 61 8 6557 7999

### CONFIDENTIALITY

In general, all submissions from interested parties will be treated as being in the public domain and placed on the Authority’s website. Where an interested party wishes to make a submission in confidence, it should clearly indicate the parts of the submission for which confidentiality is claimed, and specify in reasonable detail the basis for the claim. Any claim of confidentiality will be considered in accordance with the provisions of the *Railways Access Act 1998*.

The publication of a submission on the Authority’s website shall not be taken as indicating that the Authority has knowledge either actual or constructive of the contents of a particular submission and, in particular, whether the submission in whole or part contains information of a confidential nature and no duty of confidence will arise for the Authority.

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<sup>2</sup> “Persons seeking access” includes Proponents who have made a proposal under section 8, and “Entities interested in making a proposal” who have requested information under Section 7 of the Code.

## Introduction

11. The sections of the *Railways (Access) Act 1998 (Act)* that are relevant to the establishment of segregation arrangements are as follows:
  - Section 28 of the Act requires a railway owner to make arrangements to segregate its access-related functions from its other functions.
  - Section 29 of the Act requires a railway owner, before it puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28, to obtain the Regulator's approval to the arrangement or variation.
  - Section 42 of the *Railways (Access) Code 2000 (Code)* provides the requirements for public consultation associated with the Regulator approving a railway owner's Segregation Arrangements.
12. In September 2015, Brookfield Rail (**BR**) submitted Segregation Arrangements for the Authority's approval. The Authority published BR's proposed Segregation Arrangements and called for submissions on 18 September.
13. One submission was received, from Co-operative Bulk Handling (**CBH**).
14. This document:
  - summarises each part of BR's proposed Segregation Arrangements, including variations from the current arrangements and any relevant provisions of the Act and the Code;
  - summarises comments from CBH's submission relevant to each part of the proposed Segregation Arrangements;
  - provides the Authority's assessment of relevant issues, including those raised by CBH; and
  - provides the Authority's required amendments where appropriate.

## Part 1 – Objectives of Segregation Arrangements

15. Part 1 of the proposed Segregation Arrangements provides a summary of the objectives of the Segregation Arrangements in terms of meeting the requirements of sections 28 and sections 30 to 34 of the Act.<sup>3</sup> This part mirrors the purpose and structure of Part 1 of BR's current Segregation Arrangements.
16. The objectives detailed in the proposed Segregation Arrangements align with the requirements as outlined in the relevant sections of the Act, except in relation to section 33 ("Duty of fairness") which is detailed at Part 1(c) of the proposed Segregation Arrangements. In that part, the proposed segregation arrangements refer to the duty of fairness in respect only of persons seeking access.
17. The Act, at section 33 requires that:

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<sup>3</sup> Section 30 requires a railway owner to satisfy the provisions of Sections 31 to 34, which relate to the protection of confidential information, avoidance of conflict of interest, duty of fairness and maintenance of separate accounts and records, respectively.

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

18. Brookfield Rail's current Segregation Arrangements at Part 1(iii) provide for a duty of fairness to be extended to "persons seeking access, proponents or operators". In this respect, the Authority has noted that the terms "proponent" and "operator" are terms defined in the Code, and that "persons seeking access" is not.
19. Persons seeking access is taken by the Authority to include a proponent and an "entity that is interested in making a proposal" as referred to in section 7 of the Code.
20. In the proposed Segregation Arrangements, BR is appropriately defined as Brookfield WA Rail PL CAN 118 144 960.

### **CBH Submission**

10. CBH submitted that BR's statement of the objectives does not reflect the requirements of the Act, such that BR's legal obligations are misconstrued and narrowed. CBH submitted that the Objectives part should be redrafted so that it reflects BR's legal obligations under the Act (submission page 10).

### **Authority Assessment**

21. The Authority considers that the Objectives part of the proposed Segregation Arrangements adequately reflects the obligations of BR in relation to segregation, and that this part refers appropriately to BR's obligations under sections 28-34 of the Act.
22. The Authority considers that a proponent is a person seeking access and need not be separately identified in Part 1(c) of the proposed Segregation Arrangements. The Authority considers that "other operators" should be identified in this part, in order for the Segregation Arrangements to meet the requirements of section 33 of the Act.

### **Required Amendments**

#### **Required Amendment 1**

BR's proposed Segregation Arrangements should be amended such that Part 1(c) reads as follows:

Section 33 of the Act relating to the duty of fairness which requires that relevant officers in performing their duties must not have regard to the interests of the railway owner in a way that is unfair to persons seeking access or to other operators.

## **Part 2 – Access related functions**

23. Part 2 of the proposed Segregation Arrangements provides a definition of access related functions. This part mirrors the purpose and structure of Part 2 of BR's current Segregation Arrangements.

24. “Access-related functions” is defined in the Act at section 24 as “the functions involved in arranging the provision of access to railway infrastructure under the Code”. The term “access agreement” is defined in the Code at section 3 as “an agreement in writing under this Code between the railway owner and an entity for access by that entity”.
25. The Code at section 4A(1)(b) states that “if the parties choose to negotiate an agreement for access otherwise than under the Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement.”
26. The proposed Segregation Arrangements provide for arrangements to be put in place in respect of access agreements “made inside or outside the Code”. In Part 2 of the proposed Segregation Arrangements, this is evident at 2(a)(iv) where reference is made to “Access Agreements inside the Code”, and at 2(b) where reference is made to “Access Agreements (either inside or outside the Code)”.
27. BR removed references to agreements made outside the Code from its Train Management Guidelines and Train Path Policy in 2013.
28. The proposed Segregation Arrangements at Part 2(a)(i) identifies “calculating floor and ceiling costs” as an access-related function. The Authority has ceased referring to “floor and ceiling costs” as these are not terms defined in the Code. The Authority now refers to these costs as “incremental costs” and “total costs”. These terms are defined in the Code at schedule 4 clause 1.
29. References to access agreements “inside and outside the Code” and to “floor and ceiling costs” are carried over from BR’s current Segregation Arrangements.

### **CBH Submission**

30. CBH submitted that the definition of “Access Related Functions” in BR’s proposed Segregation Arrangements does not coincide with the definition of the term “access-related functions” in the Act (submission page 10).
31. CBH submitted that the drafting of Part 2A(a)(i) should make clear that “contractors and other third parties” are obliged to engage in conduct which ensures that BR and the relevant officers comply with the arrangements, as the obligations of section 28 of the Act are on the railway owner.
32. CBH submitted that limiting the definition of “Confidential Information” in Part 2A(a) to Confidential Information in relation to Access Related Functions limits the scope of confidential information which is defined in the Act as “confidential information relating to the affairs of persons seeking access”. CBH submitted that the words “in relation to Access Related Functions” should be removed (submission page 12).

### **Authority Assessment**

33. The Authority considers that references to “floor” and “ceiling” costs should be replaced with references to “incremental” and “total” costs, to be consistent with terms defined in the Code.
34. The Authority considers that references to access agreements “made outside the Code” should be removed from the document, as agreements made outside the Code are not access agreements. This means that a function associated with an



agreement made outside the Code is not an “access-related function”, but an “other function”.

35. In terms of the requirements of section 28 of the Act, therefore, functions associated with access agreements must be segregated from functions associated with agreements made outside the Code.
36. The Authority considers that the “obligations imposed by the Act” do not require clarification in Part 2A(a) of the proposed Segregation Arrangements to state that they are obligations on BR.
37. The Authority agrees that the definition of confidential information should not be limited in Part 2A(a).

### Required Amendments

#### Required Amendment 2

Part 2 of BR’s proposed Segregation Arrangements should be amended such that:

- the words “For the purposes of these Segregation Arrangements, ‘Access Related Functions’ means” in the preamble are replaced with “Access Related Functions has the meaning given to the term ‘access-related functions’ in section 24 of the Act, and includes:”
- the words “floor and ceiling” are replaced with “incremental and total” in Part 2(a)(i)
- the words “inside the Code” are removed from Part 2(a)(iv)
- the words “(either inside or outside of the Code)” are removed from Part 2(b)

Part 2A of BR’s proposed Segregation Arrangements should be amended such that:

- The words “with respect to Access Related Functions” are removed from Part 2A(a)(ii)

## Part 3 – Management and Compliance Processes

38. Part 3 of the proposed Segregation Arrangements refers to an Appendix A, which is titled ‘Management and Compliance Processes’. This part mirrors the purpose and structure of Part 3 of BR’s current Segregation Arrangements.
39. Part 3 at 3(e)(iv) includes reference to a compliance plan and auditors.

### CBH Submission

40. CBH submitted that the Management and Compliance Processes – Appendix A of the Segregation Arrangements should be issued to all BR staff and not just those involved in access related functions (submission page 12).

## Authority Assessment

41. The Authority notes that the provisions of Part 3(d) of the Segregation Arrangements are equivalent to the current Segregation Arrangements, and that the Management and Compliance Processes is a controlled document. The Authority does not consider that it is necessary for all BR employees to be issued with this document, and that the term “relevant officer” as defined<sup>4</sup> in section 24 of the Act should be used in place of ‘employee’.
42. For reasons given at paragraph 97, the Authority does not consider that references to a compliance plan or to auditors is required.

## Required Amendments

### Required Amendment 3

Part 3 of BR’s proposed Segregation Arrangements should be amended such that:

- The words “BR staff” are replaced with “relevant officer” in Part 3(d)
- Part 3(e)(iv) is removed.

## Part 4 – Confidential Information

43. Part 4 of the proposed Segregation Arrangements describes the obligations of BR in relation to confidential information. This part mirrors the purpose and structure of Part 4 of BR’s current Segregation Arrangements, with the following additions:
  - Part 4(c) which provides for circumstances under which BR may disclose confidential information
  - Part 4(f) which provides for BR to disclose confidential information in aggregated form such that it cannot be attributed to a particular person
44. The additional provisions at Part 4(c), relating to circumstances under which BR may disclose confidential information, includes reference to “Access Dispute” and “Price Dispute”. These terms are defined in the Definitions part and these definitions refer to a Dispute Resolution Process which is outlined in Appendix C to the Segregation Arrangements and which is distinct from the dispute resolution process outlined in Part 3 of the Code.
45. BR’s current Segregation Arrangements refers to confidential information belonging to “persons seeking access” and “proponents”. As detailed in paragraph 19, a proponent is considered to be a person seeking access, along with an “entity that is interested in making a proposal” as referred to in Part 3 Division 3 of the Code.
46. BR’s proposed Segregation Arrangements refers to confidential information belonging to “Network Participants” and “Proponents”. Network Participant is not a term defined in the Code. BR has provided definitions (in the Definition part) which

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<sup>4</sup> Relevant officer is defined in section 24 of the Act to mean “an officer or employee of a railway owner who is in any way concerned in the performance of access-related functions”.

indicate that a Network Participant is an operator (an entity with an access agreement) or an entity with an agreement outside the Code.

47. BR's proposed Segregation Arrangements do not provide protection for confidential information owned by all persons seeking access, that is proponents and "entities interested in making a proposal" as referred to in section 7 of the Code.
48. Section 31 of the Act requires that confidential information "relating to the affairs of persons seeking access or rail operators" must be protected.

### **CBH Submission**

49. CBH submitted that the definition of Confidential Information has been limited (submission page 12). This matter has been addressed by the Authority in the section for "Definitions" in this decision document.
50. CBH submitted that the Segregation Arrangements should provide a clear description of "proper use of information, and the proper purposes for which it may be disclosed (submission page 15).
51. CBH submitted that the reference in Part 4(c)(i) to disclosing Confidential Information with prior consent and "such consent not to be reasonably withheld" is not consistent with the Act, and that BR must have an effective regime for protecting the confidential information relating to the affairs of a person, and cannot override a person's wishes to prevent disclosure.

### **Authority Assessment**

52. In relation to CBH's submission that 'the proper use of information' should be clarified, the Authority considers that the reference in Part 4(a)(ii) to the "purpose for which it was provided" is adequate to define the proper use of information.
53. The Authority agrees with CBH's submission that it is not appropriate for Part 4(c)(i) to allow confidential information to be disclosed against the wishes of a person to whom the protection of confidentiality belongs.
54. The Authority considers that Part 4 must provide for protection of confidential information belonging to persons seeking access and operators.
55. The Authority considers that the additional provisions included by BR at Parts 4(c) and 4(f) are acceptable provisions, with the exception of references to 'Network Participants and Operators', and the reference in 4(c) to categories of disputes not related to the definition of disputes in section 25(2) of the Code.
56. The Authority considers that it is not appropriate for the Segregation Arrangements to refer to dispute resolution procedures other than the dispute resolution procedures outlined in Part 3 Division 3 of the Code.

## Required Amendments

### Required Amendment 4

Part 4 of BR's proposed Segregation Arrangements should be amended such that:

- The words "Network Participant or Proponent" are replaced with "person seeking access or operator". This is required at 4(a)(i), 4(a)(ii), 4(c), 4(c)(i), 4(c)(iv), and 4(f)
- Part 4(b)(i) is replaced with "Proposals and preliminary information from persons seeking access"
- The words "such consent not to be unreasonably withheld" are removed from 4(c)(i)
- The words "an Access Dispute or a Price Dispute" in 4(c)(iv) are replaced with "a dispute"

## Part 5 – Conflicts of Interest

57. Part 5 of the proposed Segregation Arrangements makes provisions for the management of conflicts of interest. This part mirrors the purpose and structure of Part 5 of BR's current Segregation Arrangements with the addition of substantial additional provisions associated with managing interactions with "Related Operators" and "Related Body Corporate".
58. Definitions of Related Operators and Related Body Corporate are provided in the 'Definitions' part of the proposed Segregation Arrangements.
59. The definition provided for Related Body Corporate is the same as defined in the Code which is the same as that given in the Corporations Law (*Corporations Act 2001*).
60. The Code does not define "Related Operator". The Definitions part of the proposed Segregation Arrangements defines Related Operator as "a Network Participant which is a Related Body Corporate of BR". This definition presents an inconsistency between the BR definition of Network Participant – which is an entity with an access agreement or an agreement outside the Code – and the Code definition of an operator, which is an "entity to which access is provided under an access agreement".
61. The Code provides a comprehensive definition of "associate" which is used in section 16(3) of the Code, where *rail operations of the railway owner* includes the rail operations of an associate of the railway owner, and in clause 13(a) of Schedule 5 to the Code, where the railway owner is required to ensure consistency in pricing for rail operations carried out or proposed to be carried out by a railway owner or an associate or another entity.
62. Part 5(f) of the proposed Segregation Arrangements refers to a deed between BR and the relevant holding company of its Related Operator, as at the date of these Segregation Arrangements.

63. Part 5(g) introduces the term “Common Directors”, for which a definition is provided at 5(j).

### **CBH Submission**

64. CBH submitted a range of general comments in relation to Part 5 of BR’s proposed Segregation Arrangements (submission pages 16-19). Some of these general issues have been addressed in specific amendments required by the Authority.
65. CBH submitted, in relation to Part 5(e), that the six month ban on BR employees who have had access to confidential information from being engaged in a role with a ‘Related Operator’ is inadequate and should be 2 years (submission page 19), and that this is consistent with the restrictions cited by CBH in relation to *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd (No 2)* [2014] WASC 38. CBH submitted that the ban should extend to any “relevant officer” as defined in section 24 of the Act (submission page 20).
66. CBH submitted that the temporary transfer of employees between business functions of BR has the potential to undermine the segregation that BR is required to maintain, and that the provisions of Part 5(d) are inadequate to ensure that BR does not breach the Arrangements more broadly (submission page 20).
67. CBH submitted that the provisions of Part 5(d) are too narrow and that the governance arrangements should be specified (submission page 21).
68. CBH submitted that BR should not be permitted to conduct its own railway operations (submissions page 22).
69. CBH submitted that a copy of the deed referred to in Part 5(f) should be provided as part of the Arrangements, and that there should be an equivalent obligation in relation to all future Related Operators.

### **Authority Assessment**

70. The Authority considers that the term “associate” as defined in the Code should apply in the place of the term “Related Operator”, to ensure consistency with the Code. The railway operations of a railway owner’s associate may be enabled by either an access agreement or an agreement outside the Code, whereas the term “operator” is defined in the Code to mean an entity with an access agreement which is an agreement made only under the Code.
71. In relation to Part 5(d) the Authority considers that the scope of this provision has been widened to encompass requests for preliminary information by the inclusion of the term “person seeking access”.
72. The Authority considers that Part 5(d) provides adequate assurance that the broader requirements of segregation are considered by BR when transferring employees between business units, and that provisions in addition to those previously provided for by BR in its Segregation Arrangements are not warranted.
73. The Authority agrees with CBH, in relation to Part 5(e), that a restriction period of 6 months is inadequate as commercial information at that time is likely to still have high commercial value, and is capable of being exploited in favour of an operator related to the railway owner. The Authority agrees that a period of 2 years for

exclusion of relevant officers (as defined in section 24 of the Act) is appropriate, and consistent with other restraint periods associated with BR.

74. The Authority does not consider that prohibiting BR from conducting (its own) rail operations is consistent with the Act or the Code which, for example, clearly contemplates railway operations by the railway owner at clause 13 Schedule 4 of the Code.
75. The Authority does not consider the inclusion of Part 5(f) is appropriate, as neither the holding company nor the Related Operator is named, and the deed is not included for consideration as part of the proposed Segregation Arrangements.

## Required Amendments

### Required Amendment 5

Part 5 of BR's proposed Segregation Arrangements should be amended such that:

- The words "six months" are replaced with "two years" and the words "employee of BR who has had access to Confidential Information of a Network Participant or a Proponent" are replaced with "relevant officer" in 5(e)
- The words "Network Participant or Proponent" are replaced with "person seeking access or operator" in 5(h)(iv)
- The words "Related Operator" are replaced with "associate". This is required at 5(h)(iii), 5(h)(iv), 5(j)(ii)
- 5(f) is removed

## Part 6 – Duty of Fairness and Non-discrimination

76. Part 6 of the proposed Segregation Arrangements provides assurances relating to the duty of fairness obligations of BR under section 33 of the Act. This part contains substantial provisions additional to BR's current Segregation Arrangements, including references to the hindrance provisions of the Act, the prospect of permissible discrimination and a dispute resolution process specified in Appendix C of the proposed Segregation Arrangements.
77. In Part 6.3, the additional provisions relating to permissible discrimination relate to discrimination on price only, and not to the requirements of section 16 of the Code "General duties of a railway owner in negotiations". These duties relate to avoiding discrimination between the proposed operations of a proponent and the rail operations of the railway owner in the allocation of train paths, train control and operating standards.
78. The Code provides for fairness in price negotiation at clause 13 of Schedule 4. The Act makes provisions relating to hindrance or preventing access at section 34A. Section 30 of the Act does not require either of the above-mentioned provisions of the Code or the Act to be satisfied by a railway owner in carrying out its obligations under section 28.

79. BR's proposed Segregation Arrangements does not include statements ensuring that persons seeking access, including those who initiated negotiations outside the Code, will be informed of their rights to confidentiality, which appear as the last two paragraphs of part 6 of BR's current Segregation Arrangements.

### **CBH Submission**

80. CBH provided general comments in relation to Part 6 of the proposed Segregation Arrangements (submission pages 22 – 25). Some of these matters are addressed by definitional amendments required elsewhere by this draft decision document.
81. CBH provided comments of the narrow scope of "Proponents and "Network Participants", on the inclusion of provisions relating to non-discrimination and hindrance and the dispute mechanism.

### **Authority Assessment**

82. The Authority considers that reference to "discrimination" is not appropriate in the title to Part 6, or in Part 6.2(b) as the requirements of section 33 relate to a duty of fairness only, and provisions relating to discrimination appear in the Code.
83. The Authority considers that the statement at Part 6.2(a) is not appropriate, as section 34A of the Act prohibits hindrance or preventing access, and does not make allowance for hindrance or prevention on fair or reasonable grounds.
84. The Authority considers that the additional provisions in BR's proposed Segregation Arrangements at Part 6.3 are not necessary and may limit the Regulator's discretion in relation to the exercise of its duties, if required, under section 21 of the Code. Clause 13 of Schedule 4 of the Code provides guidelines for the negotiation of prices and makes reference to permissible differentiation on the basis of the operations proposed to be carried out, the costs and risks of access, the characteristics of the infrastructure concerned and relevant market conditions.
85. The Authority considers that the statement at Part 6.2(b) of BR's proposed Segregation Arrangements is adequate reference to discrimination for the purposes of meeting BR's obligations under section 28 and 30 of the Act.
86. BR's proposed Segregation Arrangements provides at Part 6.4(c) for a dispute mechanism to apply in negotiations with other entities (persons seeking access other than under the Code). The Authority considers that reference to a dispute resolution mechanism separate from that detailed in Part 3 of the Code is not appropriate. The Authority considers that BR may include a dispute mechanism within its standard access agreement, to facilitate the resolution of any disputes following completion of negotiations.
87. The Authority considers that the statements referred to in paragraph 79 above, which are included in BR's current Segregation Arrangements, but not included in BR's proposed Segregation Arrangements, assist in ensuring that all entities who may seek to undertake rail operations outside the Code fully understand the protections available to them under the Code.



## Required Amendments

### Required Amendment 6

Part 6 of BR's proposed Segregation Arrangements should be amended such that:

- The words “and Non-discrimination” are removed from the title of that part.
- The words “Network Participant” and “Proponent” are replaced with “person seeking access and operator” in section 6.1.
- Parts 6.2, 6.3 and 6.4(a) are removed.
- The text contained in the last two paragraphs of part 6 of BR's current Segregation Arrangements, or words to that effect, are included in part 6 of the proposed Segregation Arrangements.

## Part 7 – Preparation of Accounts and Records

88. Part 7 of the proposed Segregation Arrangements refers to BR's obligation to maintain accounts and records in such a form that accounts and records relating to BR's access-related functions are distinguished from accounts and records related to its other functions. This part mirrors the purpose and structure of Part 7 of BR's current Segregation Arrangements, and is identical in wording except for naming conventions.

### CBH Submission

89. CBH submitted that specific procedures and form of accounts undertaken to be maintained by BR should be described and that controls to ensure compliance with section 34 of the Act should be put in place in the Arrangements.

### Authority Assessment

90. The Authority considers that BR may be required to provide separate accounts and records on occasions determined by the Regulator, in the event that it performs any access-related functions. The Segregation Arrangements provide an assurance that BR will be in a position to do this at the appropriate time.
91. The Authority notes that Part 7 of the proposed Segregation Arrangements are identical to the current arrangements.
92. The Authority does not require any amendments to Part 7 of BR's proposed Segregation Arrangements.

## Part 8 – Audit, Compliance and Review

93. Part 8 of the proposed Segregation Arrangements relates to Audit, Compliance and Review provisions attached to the proposed Segregation Arrangements. None of the text contained in Part 8 of BR's current Segregation Arrangements has been carried over to Part 8 of the proposed Segregation Arrangements.



94. The principle differences between Part 8 of the current and proposed Segregation Arrangements are that the proposed Segregation Arrangements:
- Does not nominate a review date for Segregation Arrangements
  - Provides for an annual audit of the Segregation Arrangements, instead of every two years as at present
  - Does not allow for the Regulator to determine the scope of the audit, as at present, but nominates a scope of audit to apply
95. The Authority in 2013 approved amendments to The Pilbara Infrastructure's Segregation Arrangements which removed requirements for regular review and annual audits, on the grounds that the Act and the Code provide power sufficient for the Regulator to commission audits on any issue associated with the Segregation Arrangements at any time, and can require amendments to be made to the Segregation Arrangements with or without the railway owner's agreement.

### **CBH Submission**

96. CBH has provided general and specific comments in relation to Part 8 of the proposed Segregation Arrangements (submission pages 26-29).

### **Authority Assessment**

97. The Authority does not consider it necessary for regular audits or review of the Segregation Arrangements to be required. Such provisions would go beyond the requirements of the Act and the Code.
98. The Authority considers that it is appropriate for the Segregation Arrangements to refer to the powers of the Regulator to investigate railway owners' compliance with the Segregation Arrangements at any time, and to require amendments to be made to the Segregation Arrangements.

## Required Amendments

### Required Amendment 7

Part 8 of BR's proposed Segregation Arrangements should be amended such that:

- The word "Audit" is removed from the title of that part
- The words "Network Participant or Proponent" are replaced with "person seeking access or operator" at 8.1(a)
- The following words or words to this effect are inserted following 8.1(c):
  - "Section 29 also allows the Regulator to require amendments to BR's Segregation Arrangements, with or without BR's agreement"
  - "The Act and the Code provide powers sufficient for the Regulator to commission special audits on any issue at any time"
  - "Any audit required by the Regulator will be carried out by an independent auditor approved by the ERA, with BR managing and funding the audit"
- Parts 8.2, 8.3 and 8.4 are removed

## Part 8A – Dispute Resolution

99. Part 8A of the proposed Segregation Arrangements relates to a dispute resolution procedure detailed in an Appendix to the proposed Segregation Arrangements.
100. The dispute resolution procedure appears to be intended to apply in situations where the dispute resolution process in Part 3 of the Code does not apply – that is, to the negotiation of agreements made outside the Code.

### CBH Submission

101. CBH has provided general and specific comments in relation to Part 8A of the proposed Segregation Arrangements (submission pages 29-31).

### Authority Assessment

102. The Authority considers that Part 3 of the Code provides for adequate dispute resolution associated with negotiations, and that access agreements may incorporate dispute resolution mechanisms, as indicated at Part 6.4(c) of BR's proposed Segregation Arrangements.
103. The Authority does not consider it appropriate for BR's Segregation Arrangements to detail a dispute resolution mechanism which would apply to negotiations conducted outside the Code.

## Required Amendments

### Required Amendment 8

BR's proposed Segregation Arrangements should be amended such that Part 8A is removed

### Required Amendment 9

BR's proposed Segregation Arrangements should be amended such that Appendix C is removed

## Definitions

104. The Definitions part of BR's proposed Segregation Arrangements provides meanings for terms used in the document.

### CBH Submission

105. CBH submitted that the definition of Confidential Information has been altered from that in the Act by excluding information under certain circumstances (submission page 14).

### Authority Assessment

106. The Authority agrees with CBH that the definition of Confidential Information in CBH's Segregation Arrangements should not deviate from the definition in section 31 of the Act. In particular, the Authority agrees with CBH's statement that "the only time a piece of information may change from being 'confidential information' under the Act to being 'non-confidential' is if it no longer falls within the scope of the definition in section 31(2)."

107. The Authority requires amendments to the Definitions part of BR's proposed Segregation Arrangements consistent with the reasoning and effect of the amendments required elsewhere in this draft decision document.

## Required Amendments

### Required Amendment 10

The Definitions part of BR's proposed Segregation Arrangements should be amended such that:

- "Access" is defined to have the meaning ascribed to the term "access" in section 3 of the Code
- "Access Agreement" is defined to have the meaning ascribed to the term "access agreement" in section 3 of the Code

- “Access Related Functions” is defined to have the meaning ascribed to the term “access-related functions” in section 24 of the Act
- “Confidential Information” is defined to have the meaning ascribed to the term “confidential information” in section 31(2) of the Act
- “Operator” is defined to have the meaning ascribed to the term “operator” in section 3 of the Code
- “Proponent” is defined to have the meaning ascribed to the term “proponent” in section 3 of the Code
- The term “person seeking access” is added and is defined to mean a person who has made a request in accordance with section 7 of the Code or who has made a proposal in accordance with section 8 of the Code
- The term “associate” is added and defined to have the meaning ascribed to it in section 3 of the Code
- The term “relevant officer” is added and defined to have the meaning ascribed to it in section 24 of the Act
- References to the following terms are removed:
  - Access Dispute
  - Access Holder
  - Auditor
  - Dispute Applicant
  - Dispute Resolution Process
  - Disputed Access Charge
  - Final Dispute Notice
  - Independent Price Expert
  - Network Participant
  - Objection Notice
  - Price Dispute
  - Related Operator

## Appendix A – Management and Compliance Processes

108. Appendix A – Management and Compliance Processes – of BR’s proposed Segregation Arrangements outlines the management processes BR will have in place to meet its segregation obligations. Appendix A of BR’s proposed Segregation

Arrangements mirrors the purpose and structure of Appendix A of BR's current Segregation Arrangements.

109. A point of difference between Appendix A in BR's current and proposed Segregation Arrangements is that the current Segregation Arrangements includes a list of designated position titles alongside specific responsibilities in the Appendix A part titled "2. Responsibilities and Authorities", and the proposed Segregation Arrangements does not. The proposed Segregation Arrangements states only that position descriptions are prepared for each designated position and that these position descriptions describe the functional areas of responsibility. The proposed Segregation Arrangements does not list the designated positions.
110. Similarly, the Appendix A part titled "3.2. Confidential Information – General Management of Confidential Information" in the current Segregation Arrangements includes a list of generic personnel groupings required to undertake Access Segregation Arrangements Training and sign a Confidentiality and Compliance Agreement", and the proposed Segregation Arrangements does not. The proposed Segregation Arrangements states only that BR will maintain such a list.
111. In the Appendix A Part 3.4 "Duty of Fairness", BR has included a list of permissible discriminations in the Proposed Segregation Arrangements, which do not appear in the current Segregation Arrangements, and has removed statements which indicate a commitment to inform entities who are negotiating out of Code of their rights to confidentiality under the Code.

#### **CBH Submission**

112. CBH has provided some general and specific comments in relation to Appendix A of the proposed Segregation Arrangements (submission pages 32-33). Some of the concerns raised by CBH have been addressed in requirements elsewhere in this decision document.
113. CBH has submitted that Part 4.1 of Appendix A to the proposed Segregation Arrangements imposes a duty on the Regulator to act in a certain way, and that this is not appropriate (submission page 32).

#### **Authority Assessment**

114. The Authority agrees with CBH's comment in relation to the imposition of a duty on the Regulator in Part 4.1 of the Appendix.
115. The Authority considers that the removal of the list of designated positions alongside specific responsibilities in Part 2 of the Appendix A is reasonable, as the names of some of these positions may be altered periodically. The Authority considers that it would be desirable for BR to indicate that it maintains such a list, and include a reference to the term "Responsible Manager" as used elsewhere in the Appendix in the place of the designated position titles.
116. The Authority considers that it is reasonable to remove the list of Responsible Manager titles, but that the list of functional areas of responsibility should remain.
117. The Authority does not consider that the removal of the list of generic personnel groupings required to undertake Access Segregation Arrangements Training and sign a Confidentiality and Compliance Agreement from Part 3.2 of the Appendix is

reasonable. This is because the list of position groupings is generic and the generic group names are less likely to change.

118. For reasons given in paragraph 84 above, the Authority does not consider that inclusion of a list of permissible discriminations is reasonable.
119. For reasons given in paragraph 87 above, the Authority considers that a statement ensuring that interested entities will be informed of their rights to confidentiality under the Code should be included in the proposed Segregation Arrangements.

## Required Amendments

### Required Amendment 11

The Appendix A of BR's proposed Segregation Arrangements should be amended such that:

- In Part 2, the term “designated position” is replaced with “Responsible Manager”, and the words “BR will maintain a current list of Responsible Managers” are added
- In Part 2, that the list of functional responsibilities from the equivalent Part 2 of the current Segregation Arrangements is included
- The wording of Part 3.2(a) is changed to “proposals and preliminary information provided by persons seeking access”
- Part 3.2 (e) includes the list of generic position groups from the equivalent Part 3.2 of the current segregation arrangements, with amendments to reflect current naming conventions
- The words “Network Participant or Proponent” are replaced with “person seeking access or operator”. This is required at Parts 3.4(a), 3.4(b)(ii), 4.1, 4.3
- Parts 3.4(b)(i), 3.4(c) and 3.4(d)(i) are removed
- The paragraph in Part 4.1 beginning with the words “If the Regulator considers” is removed
- The text contained in the last two paragraphs of Part 6 of BR's current Segregation Arrangements, or words to that effect, are included in Part 3.4
- The words ““These measures are in addition to the audits conducted in accordance with section 8 of the Segregation Arrangements” in Part 4.1 are removed
- The words “Also no Board member of BR is permitted to be a board member or executive member of any above rail operator. Should at any time, there be evidence to the contrary, this would be classified as a breach” are added to Part 4.3
- The first paragraph of the dot point of Part 4.4 “Application for Access” reads “Subject to section 6.3 of the Segregation Arrangements, a person seeking

access is not provided with a fair response to a request under section 7 of the Code or a proposal”

- The words “Related Operator” is replaced with “Network Participant” in the second dot point of part 4.4 “Access Negotiation”
- The words “Network Participant” is replaced with “Operator” in the second dot point of Part 4.4 “Access Negotiation”
- Part 5 is removed

## Appendix B – Confidentiality and Compliance Agreement

120. Appendix B – Confidentiality and Compliance Agreement – of BR’s proposed Segregation Arrangements is a deed in BR’s favour which provides that the person signatory to the deed must comply with the provisions of the Act in carrying out access-related functions.
121. Appendix B of the proposed Segregation Arrangements is in the same form as the equivalent part of the current Segregation Arrangements.
122. The Confidentiality and Compliance Agreement differs only in some form of words between the current and proposed Segregation Arrangements.

### CBH Submission

123. CBH submitted that the definition of Confidential Information has been limited (submission page 34). This matter has also been addressed in the section for “Definitions” in this decision document.

### Authority Assessment

124. Consistent with the requirement to amend the definition of Confidential Information (Required Amendment 10), the Authority considers that the limitations on confidential information described in Part 2 of Appendix B to the proposed Segregation Arrangements should be removed.

### Required Amendments

#### Required Amendment 12

The Appendix B of BR’s proposed Segregation Arrangements should be amended such that:

- The words “but excludes information that” and Parts 2(c)(iv) to 2(c)(vii) are removed