

Stephen King
Chairman
Economic Regulatory Authority
Level 4, Albert Facey House
469 Wellington St
Perth, WA 6000

Email: publicsubmissions@era.com.au

Draft Decision on Brookfield Rail's Proposed Segregation Arrangements

5 December 2015

Dear Stephen,

Aurizon welcomes the opportunity to comment on the Economic Regulatory Authority's (ERA) draft decision on Brookfield Rail's proposed segregation arrangements.

The proposed segregation arrangements have been submitted to the ERA by the proponent on the expectation that a related party will acquire an interest in the Pacific National rail business (**the merger**). Section 29 of the *Railways (Access) Act 1998* (**the Act**) requires the railway owner to seek approval of the segregation arrangements prior to varying any arrangement relevant to how the railway owner will fulfil its duty to segregate its access related functions.

The consideration of the proposed segregation arrangements is occurring concurrently with a market inquiry by the Australian Competition and Consumer Commission (ACCC). On 26 November 2015 the ACCC released the following statement in relation to behavioural undertakings submitted by Brookfield Rail:

The ACCC will only consult on proposed undertakings if the ACCC considers that the undertakings are capable of being enforced and have the potential to adequately address competition concerns arising from the acquisition. The ACCC considers that the proposed undertakings offered by Brookfield do not meet these criteria.

On the basis of this statement it is highly circumspect whether the segregation arrangements proposed by Brookfield Rail will relate to an organisational structure as contemplated by the railway owner. Aurizon considers the consultation process on the proposed segregation arrangements should be extended until it becomes clear what undertakings the ACCC would be prepared to accept. This will allow stakeholders to participate in a consultation process which will be relevant to the organisational structure, ownership, governance and independence which is acceptable to the ACCC. The proposed segregation arrangements are speculative and are unable to be implemented by the railway owner without that approval.

The draft decision also includes the requirement that the review provisions be amended to note that Section 29 of the Act allows ERA to require amendments to Brookfield Rail's segregation arrangements. The exercise of this power may allow for further review of the segregation arrangements to address any variations due to the proposed merger or to modify them in a way which improves their effectiveness.

Notwithstanding the need for further review of the segregation arrangements, Aurizon notes the following issues with the proposal and draft decision.

1. There are aspects of the Act which may restrict the effectiveness of the segregation arrangements. These include:
 - a. Section 36 should allow for damages. Where the railway owner obtains a benefit from non-compliance then it has weak incentives to comply. Importantly, the benefit may be unable to be redressed by injunction which potentially provides no remedy or relief to a party damaged by the non-compliance. The ability for the courts to award damages is a key factor in promoting a compliance culture and is reflected in other access regimes, including section 158A(3) of the *Queensland Competition Authority Act 1997*¹; and
 - b. Section 30 does not limit the matters the regulator is able to require to be addressed in the segregation arrangements. This includes the ability for the regulator to require the approved segregation arrangements to include:
 - i. a complaints handling mechanism; and
 - ii. public and confidential reporting of service quality and performance metrics to allow for effective industry monitoring of compliance.

The proposal and the draft decision have adopted a narrow application of segregation arrangements and sought only to address the requirements of sections 31 to 34 rather than evaluate what should be required to facilitate the objectives in section 2A of the Act.

2. Confidential information is broader than information provided by the access seeker and also includes data collected in the provision of the access rights. This includes information obtained by the railway owner in relation to agreements negotiated outside of the Code. Information is also collected through various engagement forums involving the railway operator and the customer.

The definition of confidential information in the section 31(2) of the Act includes reference to information that is not in the public domain and is by its nature confidential. Information collected by the railway owner in relation to a rail operator's performance may fall within that definition. It is therefore, important that segregation arrangements not seek to circumvent the requirements of the Act by referring only to information provided. Accordingly, clause 4(a)(i) of the proposed segregation arrangements should be amended to include '*Confidential Information provided to, or collected by, BR in the negotiation or provision of access*'.

¹ Section 158A(3)(b) allows the court to make 'an order directing the responsible person to compensate anyone who has suffered loss or damage because of the breach

3. The ERA amendments in relation to access-related functions creates uncertainty as to the protections obtained from the segregation arrangements. In particular, paragraph 34 of the draft decision states:

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 of the Code is not an 'access-related function', but an 'other function'.

Aurizon is concerned that such an interpretation could potentially lead to the provision of access under agreements negotiated outside of the Code not being protected by the segregation arrangements. This would be inconsistent with Section 33 of the Act which makes no distinction between a railway operator with access rights inside or outside of the Code.

If the segregation arrangements do not protect the confidential information of a railway operator collected in the provision of access under an agreement negotiated with a structural separated railway owner outside of the Code then this could be potentially harmful to any subsequent negotiation under the Code if the railway owner vertically integrates. In addition, paragraph 35 of the draft decision also states:

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 of the Code.

It is unclear how this distinction could be practically implemented. For example, does this mean that the staff and personnel associated with negotiating an access agreement inside the Code must be distinct from those negotiating an access agreement outside of the Code? At its extreme this would also require preparation of regulatory accounts in relation to only Code agreements. Assuming all access arrangements between the railway owner and an associated railway operator are negotiated outside of the Code then the segregation arrangements could have limited practical effect.

Access related functions should be defined with reference to the functional activities and not whether or not they relate to an agreement negotiated inside or outside of the Code. Segregation arrangements should therefore apply to the negotiation and provision of access inside or outside of the Code.

4. The railway owner should be permitted to voluntarily submit its compliance to audit. While the Act may not specifically require an annual compliance audit this should not preclude the ERA from accepting proposed segregation arrangements from a railway owner who voluntarily commits to do so at its own cost.
5. Access to real time train movement information allows railway operators to assess ongoing compliance with the traffic management guidelines. Railway operators in the Central Queensland Coal Network are provided transparency of live operations through real time access to the network providers train management system (RTOA). This allows a railway operator to observe whether a train has been advanced or given priority over another train and allows the affected party to query the railway owner. Traffic management guidelines necessarily require some level of discretion for network controllers to maintain operations to plan. Live run transparency provides an important and effective instrument to allow a railway operator to ensure the exercise of that discretion is not discriminatory.

Aurizon considers that the effectiveness of the access regime could be improved by making complimentary changes to the traffic management guidelines to include a requirement to provide all railway operators with full transparency of live operations.

Aurizon proposes to make a further submission to ERA in relation to the proposed segregation arrangements following the publication of any behavioural or structural undertakings that are published by the ACCC. Aurizon requests that the ERA extend the timeframes for submissions on the draft decision to allow consideration of any subsequent developments or the publication of relevant materials.

Should you have questions in relation to this submission please contact Dean Gannaway, Principal Regulatory Economist by phone on (07) 3019 2055, or by email via dean.gannaway@aurizon.com.au.

Kind regards,



John Short
Vice President