

Jeremy Threlfall  
Assistant Director  
Economic Regulation Authority of Western Australia  
Level 4, Albert Facey House  
469 Wellington Street  
Perth WA 6000  
[records@erawa.com.au](mailto:records@erawa.com.au)

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By email

Dear Jeremy

## **Brookfield Rail Segregation Arrangements – Draft Decision**

Thank you for your draft decision in relation to the Brookfield Rail Segregation Arrangements dated November 2015 (**Draft Decision**).

Brookfield Rail accepts the vast majority of the required amendments as set out in the Draft Decision. However, Brookfield has three substantive concerns with the Draft Decision, which are discussed in detail below.

In addition, following a detailed review of the revised Segregation Arrangements, it became apparent that a number of consequential amendments were required to ensure consistency and clarity throughout the document, largely as a result of adopting the ERA's required amendments in its Draft Decision.

The draft of the Segregation Arrangements which accompanies this letter includes:

- the ERA's required amendments (subject to the comments below) – these are shown in mark-up; and
- additional amendments proposed by Brookfield Rail – these are shown in mark-up and highlighted in yellow. These amendments are accompanied by drafting notes which explain the rationale for the amendment and are shaded in blue.

### **1. Board of Brookfield Rail**

Required Amendment 5 in the Draft Decision provides that the words 'Related Operator' in section 5(j)(ii) must be replaced with 'associate'. Section 5(j)(ii) sets out the definition of the term 'Prohibited RO Person'. This term is used in section 5(i) which provides that Brookfield Rail must ensure that the directors of Brookfield Rail are not Prohibited RO Persons.

The required amendment to section 5(j)(ii) would significantly expand the prohibition in section 5(i) and require the board of Brookfield Rail to be wholly independent of the Brookfield group. We do not believe that this was the intended effect of the required amendment to section 5(j)(ii), particularly given the inconsistency of this amendment with the required amendments to section 4.3 of Appendix A which is discussed in further detail below. In addition, it is not feasible for Brookfield Rail's parent company to be prohibited from having directors on the board of its subsidiary.

Further, the required amendment to section 5(j)(ii) would cause section 5(i) to be inconsistent with the required amendment to section 4.3 of Appendix A (as set out in Required Amendment 11) which requires section 4.3 to provide that no board member of Brookfield Rail may be a board member of any above rail operator. This is clearly a narrower prohibition than the prohibition that would arise if the required amendments to section 5(j)(ii) were made.

Brookfield Rail's proposed amendments to section 5(j)(ii), which are shown in mark-up in the enclosed version of the Segregation Arrangements, restrict the definition of 'Prohibited RO Person' to related above rail operators of Brookfield Rail.

### **2. Stand-down period**

Required Amendment 5 in the Draft Decision provides that the words 'six months' in section 5(f) must be replaced with 'two years'. Section 5(f) requires Brookfield Rail to ensure that no Relevant Officer of Brookfield Rail will, within the specified stand-down period after ceasing employment with

Brookfield Rail, be employed or engaged with an Associate in a role which is involved in commercial dealings with Operators, Proponents or their respective customers.

Brookfield Rail has grave concerns about the equity of this increased stand-down period, particularly given that the only two other vertically integrated, regulated rail infrastructure owners in Australia (The Pilbara Infrastructure and Aurizon Network) are not subject to equivalent stand-down obligations and are only required to provide debriefing to transferring employees (which Brookfield Rail is also obliged to do under section 5(d) of the Segregation Arrangements).

Brookfield Rail has offered a stand-down period of six months which it considers reasonable and is concerned that a two year stand-down period is unreasonable and onerous and potentially unenforceable.

On that basis, Brookfield Rail has retained the reference to six months in section 5(f) of the Segregation Arrangements.

### **3. Limited application of Segregation Arrangements**

The ERA in its Draft Decision requires that the Segregation Arrangements apply only to access functions under the Code (and access agreements made under the Code), to the exclusion of non-Code access functions (and non-Code access agreements) (Required Amendment 2).

We agree with the ERA that the Segregation Arrangements must, in accordance with section 28 of the *Railways (Access) Act 1998 (WA)* (**Railways Act**), deal with the segregation of 'access-related functions' (as defined in section 24 of the Railways Act) from other functions. However, we do not share the same view as the ERA with respect to its interpretation of 'access-related functions'.

We understand that the ERA interprets 'access related functions' as meaning the functions involved in arranging Code access. This appears to be based on a reading of the words 'under the Code' in the definition of 'access related functions' as attaching to the words 'the provision of access' or 'the provision of access to railway infrastructure' and not merely to the words 'railway infrastructure'.

In our view, the words 'under the Code' attach to the words 'railway infrastructure', and do not attach to 'the provision of access'. This means that 'access-related functions' include both Code and non-Code access-related functions. This approach is consistent with the current approved segregation arrangements for both Brookfield Rail and The Pilbara Infrastructure, and preferable on the basis that:

- it is a more straightforward and workable approach and does not lead to a perverse result, i.e. allowing a railway owner to operate a wholly vertically integrated above and below rail operation in respect of access provided outside of the Code; and
- it is consistent with the intention of the legislation and the circumstances in place at the time of its enactment.

In relation to the last point, Hansard records give context that makes it clear that the aim of segregation was to separate the above rail operations from the below rail operations, in the context of the government creating a vertically integrated private entity when it privatised the Western Australian Government Railways:

*The rail access Bill states that the number one obligation of an operator is to segregate access functions from its other functions. If a company is to be a track manager and a rail operator, to use the terminology of the task force and the Government in discussions with users, it will have to ring fence its operations and put up Chinese walls. It will have to completely separate out the costing and the accounting and every aspect of the business relating to rail management from that which relates to the operation as an above-line rail provider.<sup>1</sup>*

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<sup>1</sup>

<http://www.parliament.wa.gov.au/hansard/hans35.nsf/16ab30a0303e54f448256bf7002049e8/17b1fa3328400e324825679b00251b53?OpenDocument>

On this basis, Brookfield Rail has not adopted the ERA's Required Amendments which limit the application of the Segregation Arrangements to access functions under the Code (and access agreements made under the Code), to the exclusion of non-Code access functions (and non-Code access agreements).

As a consequence of retaining the existing definition of 'access related functions' in the Segregation Arrangements, BR has not made other related amendments required by the ERA such as the amendments to the definitions of 'Access Agreement', 'Operator' and 'Proponent' and the deletion of definitions such as 'Network Participant' and 'Access Holder'.

\* \* \* \* \*

Brookfield Rail would welcome the opportunity to discuss the enclosed version of the revised Segregation Arrangements and the concerns raised in this letter with the Economic Regulation Authority at its earliest convenience.

Yours sincerely



Tim Cooling  
Manager Commercial Access  
Brookfield Rail

# Brookfield Rail

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## SEGREGATION ARRANGEMENTS

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[Brookfield Rail draft dated 24 November 2015 in response to the ERA's Draft Decision dated November 2015.](#)

[This draft includes:](#)

- [amendments requested by ERA \(in mark-up\); and](#)
- [consequential amendments \(in mark-up and shaded yellow\).](#)

## TABLE OF CONTENTS

<u>1. OBJECTIVES OF THE SEGREGATION ARRANGEMENTS .....</u>	<u>1</u>
<u>2. ACCESS RELATED FUNCTIONS .....</u>	<u>1</u>
<u>2A. APPLICATION TO THIRD PARTIES .....</u>	<u>2</u>
<u>3. MANAGEMENT AND COMPLIANCE PROCESSES.....</u>	<u>2</u>
<u>4. CONFIDENTIAL INFORMATION .....</u>	<u>3</u>
<u>5. CONFLICTS OF INTEREST.....</u>	<u>5</u>
<u>6. DUTY OF FAIRNESS .....</u>	<u>7</u>
<u>7. PREPARATION OF ACCOUNTS AND RECORDS.....</u>	<u>8</u>
<u>8. COMPLIANCE AND REVIEW.....</u>	<u>8</u>
<u>8A DISPUTE RESOLUTION.....</u>	<u>11</u>
<u>DEFINITIONS: .....</u>	<u>13</u>
<u>APPENDIX A - MANAGEMENT AND COMPLIANCE PROCESSES .....</u>	<u>18</u>
<u>APPENDIX B – CONFIDENTIALITY AND COMPLIANCE AGREEMENT.....</u>	<u>31</u>
<del>1. OBJECTIVES OF THE SEGREGATION ARRANGEMENTS .....</del>	<del>1</del>
<del>2. ACCESS RELATED FUNCTIONS .....</del>	<del>1</del>
<del>2A. APPLICATION TO THIRD PARTIES .....</del>	<del>2</del>
<del>3. MANAGEMENT AND COMPLIANCE PROCESSES.....</del>	<del>2</del>
<del>4. CONFIDENTIAL INFORMATION .....</del>	<del>3</del>
<del>5. CONFLICTS OF INTEREST.....</del>	<del>5</del>
<del>6. DUTY OF FAIRNESS .....</del>	<del>6</del>
<del>7. PREPARATION OF ACCOUNTS AND RECORDS.....</del>	<del>7</del>
<del>8. COMPLIANCE AND REVIEW.....</del>	<del>7</del>
<del>8A DISPUTE RESOLUTION.....</del>	<del>8</del>
<del>DEFINITIONS: .....</del>	<del>9</del>
<del>APPENDIX A – MANAGEMENT AND COMPLIANCE PROCESSES .....</del>	<del>13</del>

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~~APPENDIX B – CONFIDENTIALITY AND COMPLIANCE AGREEMENT..... 25~~

## 1. OBJECTIVES OF THE SEGREGATION ARRANGEMENTS

BR is the owner for the purposes of the Act of a railways network in Western Australia which is subject to the provisions of the Act and the Code.

BR recognises its obligation to comply with the Act and the Code and specifically Section 28 and Sections 30 to 34 of the Act. The objective of these Segregation Arrangements is to ensure that BR complies with the requirements of Sections 28 and 30 of the Act to segregate its access related functions from its other functions and to give effect to the obligations set out in:

- (a) Section 31 of the Act which requires an effective regime for the **protection of confidential information** arising from performing access related functions.
- (b) Section 32 of the Act which requires the avoidance of **conflict of interest** between the duties of a relevant officer in performing access related functions and duties involved in other business of the railway owner.
- (c) Section 33 of the Act relating to the **duty of fairness** which requires that relevant officers in performing their duties must not have regard for the interests of the railway owner in a way that is unfair to [Proponents or Network Participants persons seeking access](#).
- (d) Section 34 of the Act which requires that **accounts and records** are maintained to ensure that the railway owner accurately records and distinguishes income, expenditure, assets and liabilities related to carrying out access related functions from other activities of the railway owner. This also requires that any apportionment required between its access related functions and other functions be done in a fair and reasonable way.

Section 29 of the Act allows the Regulator to impose requirements on BR, other than those covered in Sections 31 to 34 of the Act, to further improve the effectiveness of these Segregation Arrangements if and as required.

## 2. ACCESS RELATED FUNCTIONS

For the purposes of these Segregation Arrangements, 'Access Related Functions' [has the meaning given to the term 'access-related functions' in section 24 of the Act, and includes means:](#)

- (a) Performance of activities specified under the Act and Code including (but not limited to):
  - (i) calculating the [floor-incremental](#) and [ceiling-total](#) costs for approval by the Regulator;
  - (ii) applying the costing principles, the overpayment rules, the Train Management Guidelines and the Train Path Policy;
  - (iii) ensuring that suitable controls, measures and procedures are established to give effect to the segregation arrangements approved by the Regulator; and
  - (iv) undertaking the steps defined in Parts 2 and 3 of the Code for the negotiation of Access Agreements inside the Code.
- (b) Negotiation of Access Agreements (either inside or outside of the Code) and granting of Access rights.

- (c) Management of Access Agreements including performance monitoring and day-to-day operation issues.
- (d) Collection, use, and dissemination of train running data including manifest details.
- (e) Train scheduling, train path allocation, publication of Working Timetables, control planning and the granting of ad-hoc train path entitlements.
- (f) Train control including provision of appropriate authorities for trains to use scheduled train paths (train orders or signals) and real-time management of trains.
- (g) Emergency management of the Network including co-ordination of emergency service responses.
- (h) Development, maintenance and monitoring compliance with appropriate rail safety standards for BR's staff, its contractors and any Operators on the Network.
- (i) Development and authorisation of the BR Rules (including the General Appendix and Working Timetables) and issue of special notices, instructions and warnings related to the rules.
- (j) Development of train operating standards (to the extent they relate to the rail infrastructure) including maximum braking distances and maximum train lengths.
- (k) Development of maintenance standards for the rail infrastructure.
- (l) Maintenance of the track and other rail infrastructure including signalling and communications maintenance.
- (m) Any administrative or corporate functions required to support the activities referred to in sections 2(a) to 2(l) above.

## 2A. APPLICATION TO THIRD PARTIES

- (a) Subject to section 2A(b), where BR engages contractors or other third parties to provide any part of the Access Related Functions it will ensure that:
  - (i) those parties are aware of and comply with any obligations imposed by the Act and the Code with respect to Access Related Functions; and
  - (ii) where those parties have access to Confidential Information ~~in relation to Access Related Functions~~, require those parties to sign a Confidentiality and Compliance Agreement.
- (b) Section 2A(a) does not apply to BR's professional advisers or consultants who are under a duty of confidentiality.

## 3. MANAGEMENT AND COMPLIANCE PROCESSES

- (a) BR has detailed specific management and compliance processes in Appendix A to this document.
- (b) Appendix A describes the manner in which BR manages these Segregation Arrangements including the processes put in place to ensure an effective compliance regime is maintained.
- (c) Appendix A is the vehicle by which these Segregation Arrangements and any changes to the segregation processes, procedures and practices are formalised and communicated throughout BR.
- (d) Appendix A will be:



- (i) issued as a controlled document to the BR senior management team and ~~other BR staff who are involved in Access Related Functions~~ BR's Relevant Officers, who must comply with Appendix A;
  - (ii) reviewed and updated as required by law with changes to Appendix A being issued to ~~BR staff~~ BR's Relevant Officers in accordance with BR's procedures for controlled documents; and
  - (iii) used to develop the training requirements for ~~BR staff involved in Access Related Functions~~ BR's Relevant Officers to raise awareness of their obligations under the Act and the Code with respect to Access Related Functions. Drafting note: The definition of 'relevant officer' in section 24 of the Act picks up involvement in Access Related Functions, so we have deleted the references to 'involved in Access Related Functions'.
- (e) Appendix A includes:
- (i) Specific details of the security arrangements in place to protect Confidential Information including details of the arrangements for securing paper and electronic records and for access to information systems.
  - (ii) Details of the security systems in place in BR offices.
  - (iii) A list of the types of behaviour which may breach these Segregation Arrangements and the appropriate corrective arrangement for each breach.
- ~~(-) A compliance plan that will be a key monitoring tool for the Regulator and any Auditor in assessing effectiveness of these Segregation Arrangements.~~

#### **5.4. CONFIDENTIAL INFORMATION**

- (a) BR must:
- (i) keep confidential and not disclose, and ensure that its employees keep confidential and not disclose, any Confidential Information provided to BR by a Network Participant or Proponent except in accordance with:
    - (A) section 4(c), 4(e) or 4(f) of these Segregation Arrangements; or
    - (B) a Confidentiality and Compliance Agreement signed by the relevant employee; and
  - (ii) subject to section 4(c), ensure that its employees only use Confidential Information provided to BR by a Network Participant or Proponent for the purpose for which it was provided.
- (b) Confidential Information may include the following types of information:
- (i) ~~Access applications and preliminary information provided by Proponents with their Access applications~~ Proposals and preliminary information from Proponents.
  - (ii) Correspondence related to the negotiation of the Access Agreement.
  - (iii) The Access Agreement itself and information exchanged in the management of the Access Agreement over time.
  - (iv) Any data related to the recording of usage of the Access Agreement including the data held in RAMS.
  - (v) Master Train Control Diagrams (to the extent they identify specific operations).

- (vi) Completed train control diagrams and voice logging tapes from Train control.
- (c) BR may disclose Confidential Information of a Network Participant or Proponent:
- (i) in accordance with, or as permitted by, an Access Agreement; **Drafting note: if a party has agreed to a different confidentiality arrangement in its access agreement then the Segregation Arrangements should not override that position.**
  - ~~(ii)~~(ii) if the Network Participant or Proponent provides its prior written consent to BR, ~~such consent not to be unreasonably withheld;~~
  - ~~(iii)~~(iii) to the extent disclosure is required or compelled by any applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator;
  - ~~(iii)~~(iv) to the extent disclosure is necessary for:
    - (A) the provision of advice from legal advisers, financiers, accountants or other consultants or professional advisers; or
    - (B) notifications to brokers, insurers or claims assessors,provided that the person to whom the disclosure is made is under a legal obligation to keep the information confidential;
  - ~~(iv)~~(v) to any mediator, expert or arbitrator to the extent necessary for the purpose of resolving ~~an Access Dispute or a Price Dispute~~ dispute provided that BR does not disclose the Confidential Information of one Network Participant or Proponent to another Network Participant or Proponent without the first Network Participant's or Proponent's consent;
  - ~~(v)~~(vi) to the extent disclosure is required for the purpose of facilitating the performance of yard control services;
  - ~~(vi)~~(vii) to the extent the disclosure is required to protect the safety or security of persons or property or in connection with an accident or Emergency; or
  - ~~(vii)~~(viii) to the extent the Confidential Information comprises the Operator's or the Proponent's (where the Proponent proposes to be an Operator) rollingstock details.
- (d) Where an employee of BR has prescribed duties which involve managing or conducting Access Related Functions, BR will require the employee to sign a Confidentiality and Compliance Agreement. BR will provide training to all BR employees who are required to sign a Confidentiality and Compliance Agreement with respect to their obligations under the Act, the Code and these Segregation Arrangements.
- (e) BR has established a regime for protecting Confidential Information including:
- (i) A system of securing Access related information that only allows authorised BR staff and contractors to access the records. This information will be located in secure and lockable facilities within BR's offices and Train control centres.  
  
BR will control access to its entire head office and its regional offices and these offices will be locked when not attended.  
  
Train control centres are secured and entry is controlled by BR.

- (ii) A security system on electronic records that allows only authorised BR staff and contractors to access the records.

Access to electronic records that are confidential can only be given by the Responsible Manager and will only be given to persons who have signed a Confidentiality and Compliance Agreement.

BR has physically dedicated computer file servers. User Ids and passwords are set up and managed by the BR Information Technology Group. Authority to allocate passwords resides with the Responsible Manager.

- (iii) Appropriate controls on data, including information in RAMS and costing and pricing information to protect Confidential Information.

The Responsible Manager must authorise all access to and use of Confidential Information held in RAMS and will only grant access to persons who have signed Confidentiality and Compliance Agreements.

This process of granting access and usage is capable of being, and ~~will~~ may be, audited in accordance with section 8 of these Segregation Arrangements.

**Drafting note: Section 8 no longer specifies a mandatory audit process.**

- (iv) Specific provisions in each Access Agreement imposing contractual obligations on BR to protect Confidential Information.
- (f) For the avoidance of doubt, nothing in this section 4 prevents BR from disclosing, in the ordinary course of business, financial reporting information which has been aggregated with other information of a similar nature such that it cannot reasonably be, and is not reasonably capable of being, identified with, attributed to or used to identify any Network Participant or Proponent.

## 6.5. CONFLICTS OF INTEREST

- (a) BR will manage its Access Related Functions so that, for ~~BR's~~ ~~Relevant eOfficers~~ (as defined in the Act), no conflicts of interest exist between his or her duties:
  - (i) as a person concerned in the performance of Access Related Functions, on the one hand; and
  - (ii) as a person involved in other business of BR, on the other.
- (b) In the case of train scheduling and Train control, these functions will be undertaken by BR staff or contractors who have signed a Confidentiality and Compliance Agreement.
- (c) If a person employed by BR whose duties involve the management or conduct of Access Related Functions ceases to work for BR in order to commence employment with ~~an Related Body Corporate Associate~~ of BR, then BR will provide to that employee, as part of the exit process for that employee, a debriefing to remind the employee of BR's obligations relating to the management of Confidential Information. **Drafting note: consequential drafting change as a result of the new ERA definition of Associate.**
- (d) In making all decisions in relation to the temporary transfer of BR employees whose duties involve the management or conduct of Access Related Functions to roles in ~~an AssociateRelated Body Corporate~~ of BR, BR must have regard to the potential implications of any such transfer on BR's obligations to manage Confidential

Information. Drafting note: consequential drafting change as a result of the new ERA definition of Associate.

- (e) BR will procure that no ~~employee of BR who has had access to Confidential Information of a Network Participant or a Proponent Relevant Officer of BR~~ will, within a six month period of ceasing employment with BR, be employed or engaged ~~in a role with a Related Operator~~ an Associate of BR in a role which is involved in commercial dealings with: Drafting note: the ERA did not specify the change to Associate in this clause but we assume that this was an oversight. Clarification changes have also been made to this clause.
- (i) Access Holders;
  - (ii) customers of Operators;
  - (iii) Proponents (where the Proponent proposes to be an Access Holder); or
  - (iv) customers of Proponents (where the Proponent proposes to be an Operator).
- ~~(f)~~ BR has procured, by way of a deed between BR and the relevant holding company of its Related Operator (as at the date of these Segregation Arrangements), an undertaking from the relevant holding company that it will ensure that the Related Operator complies with the arrangements specified in section 5(e).
- ~~(g)~~(f) BR must, at all times, ensure that:
- (i) less than 50% of the number of directors of BR are Common Directors; and
  - (ii) Common Directors do not have responsibility for, or involvement in, the operations of BR, other than in their capacity as a director of BR.
- ~~(h)~~(g) BR must establish corporate governance arrangements which ensure that Common Directors do not:
- (i) receive or access Confidential Information; or
  - (ii) participate in any decisions or attend any meetings,
- in respect of services that BR provides, or is proposing to provide, to:
- (iii) ~~the Related Operator~~ an Associate of BR in respect of which the relevant Common Director holds a directorship (Relevant Related Operator Network Participant); or
  - (iv) any Network Participants or Proponents that compete with, or is proposing to compete with, the Relevant Related Operator Network Participant.
- ~~(i)~~(h) BR must ensure that the directors of BR are not Prohibited RO Persons.
- ~~(j)~~(i) For the purposes of this section 5:
- (i) **'Common Director'** means a person who, at the relevant time, is a director of BR and a director of a holding company of BR.
  - (ii) **'Prohibited RO Person'** means a person who:
    - (A) is a current employee of a related above rail operator Related Operator of BR;
    - (B) has been an employee of a Related Operator related above rail operator of BR in the past 3 years;
    - (C) holds 5% or more of the total number of votes attached to voting shares in a related above rail operator of BR a Related Operator; or

(D) has a material contractual relationship with a related above rail operator of BRa-Related Operator.

**Drafting note:** for the reasons outlined in the cover letter to the ERA that accompanies this draft, we have not adopted the changes suggested by the ERA as this would have what we believe to be unintended consequences as to who may be a director of BR. BR does however accept, as per its original drafting, that there can be no common directors between BR and any related above rail operator of BR. This position was reflected by the ERA in its amendments to Appendix A and are therefore consistent with its draft decision.

## 7.6. DUTY OF FAIRNESS AND NON-DISCRIMINATION

### 7.16.1 Overview

BR acknowledges that, in performing Access Related Functions, BR and its employees must not have regard to the interests of BR in a way that is unfair to Proponents or to other Network Participants.

### 7.2 Access

BR must not unfairly or unreasonably:

- ( ) hinder or deny Access to any Proponent or Network Participant; or
- ( ) discriminate against a Proponent or Network Participant as to the terms and conditions (including Access Charges, priority of Access and service levels) upon which Access is provided, or is proposed to be provided, when compared to a Related Operator.

### 7.6 Reasonable discrimination permitted

Discrimination as to terms and conditions is not to be taken as unfair or unreasonable for the purposes of these Segregation Arrangements if the relative terms reflect reasonable commercial and technical considerations including (without limitation):

- ( ) relative costs of providing Access to different Network Participants, having regard to:
  - ( ) the commodity being transported;
  - ( ) the type of rollingstock used by the relevant Operator including the length and mass of the rollingstock;
  - ( ) the geographic area in which the Access is being provided; and
  - ( ) the relative effect of the task on the efficient utilisation of the Network;
- ( ) the costs and risks associated with providing services required by, or in respect of, some Network Participants, but not others;
- ( ) the nature and characteristics of the sections of the Network to which Access is sought;
- ( ) circumstances in the market which have had, or will have, a material effect on a Network Participant's ability to pay Access Charges; and
- ( ) the extent of competition for the task with other modes of transport.

### 7.176.2 Ensuring duty of fairness

The mechanisms for ensuring BR's compliance with its duty of fairness include:

- (a) the Dispute Resolution Process specified in Appendix C of these Segregation Arrangements (where applicable);

- ~~(b)~~(a) the process under the Code for determining the fairness of prices negotiated under provisions of Section 21(1) of the Code (where applicable); and
- ~~(e)~~(b) relevant provisions in BR's standard Access Agreements including consultation mechanisms, obligations to provide information and dispute resolution mechanisms.

### **7.186.3 Application of fairness to Part 5 instruments**

BR acknowledges that its obligation to comply with its duty of fairness includes compliance with the Regulator's determinations under Part 5 of the Code including:

- (a) these Segregation Arrangements;
- (b) the Train Management Guidelines;
- (c) the Train Path Policy;
- (d) the costing principles; and
- (e) the overpayment rules.

### **6.4 Confidentiality**

- (a) BR will inform Proponents at the onset of negotiations (whether inside or outside the Code) of their rights to confidentiality.
- ~~(e)~~(b) If negotiations have commenced outside the Code and a Proponent subsequently makes an access application under the Code, BR and the Proponent will agree on what information previously supplied by the Proponent is subject to the confidentiality provisions of these Segregation Arrangements.

## **8.7. PREPARATION OF ACCOUNTS AND RECORDS**

- (a) BR will maintain accounts and financial records for the purposes of complying with the Act and the Code. BR employees also control the data used to generate invoices for Access customers.
- (b) BR will present the accounts or financial reports required to comply with the Act and Code or to assist the Regulator in the performance of the Regulator's duties under the Act or the Code in the manner approved by the Regulator.
- (c) In preparing such regulatory accounts or reports BR must have regard to the costing principles determined by the Regulator under Part 5 of the Code.

## **9.8. ~~AUDIT, COMPLIANCE AND REVIEW~~**

### **9.1 ~~Regulator monitoring, enforcement and review~~**

- ~~(b)~~(a) BR acknowledges that stakeholders, including Network Participants and Proponents, may notify the Regulator of any concerns in relation to these Segregation Arrangements and the Regulator may investigate such concerns.
- ~~(e)~~(b) Under sections 20(1) and (2) of the Act, the Regulator is responsible for monitoring and enforcing compliance with the Act and the Code utilising the powers granted to the Regulator under the Act. The responsibilities of the Regulator under sections ~~20~~(1) and (2) of the Act extend to the monitoring and enforcement of these Segregation Arrangements.
- (c) Under section 29(1) of the Act, BR may amend or replace the Segregation Arrangements at any time, subject to the approval of the Regulator. Section 29 also allows the Regulator to require amendments to these Segregation Arrangements, with or without BR's agreement.

- (d) The Act and the Code provide powers sufficient for the Regulator to commission special audits on any issue arising in relation to these Segregation Arrangements at any time. Any such audit commissioned by the Regulator will be carried out by an independent auditor approved by the ERA, with BR managing and funding the audit. **Drafting note: consequential drafting changes intended to clarify the ERA required amendments.**

## 9.2— Subject of audit

~~In respect of each year ending 30 June, an audit of BR's compliance during that year with its obligations in respect of the following will be conducted in accordance with section 8.3:~~

- ~~(a) sections 4, 5, 1.1 (having regard to section 1.1) and 7 of these Segregation Arrangements;~~
- ~~— any matters specifically identified in Appendix A of these Segregation Arrangements as being subject to an audit under this section 8; and~~
- ~~(b) its compliance with the Train Path Policy and Train Management Guidelines.~~

## 9.3— Audit report

~~The Auditor will compile an audit report identifying:~~

- ~~(a) to the extent feasible, whether BR has complied in all material respects with its obligations referred to in section 8.2, and, if not, details as to the relevant non-compliance;~~
- ~~(a) the process adopted for the conduct of the audit;~~
- ~~(a) any complaints made by a Network Participant or Proponent to BR about BR's compliance with the obligations referred to in section 8.2, and the outcome of any such complaint;~~
- ~~(a) any disputes initiated by a Network Participant or Proponent under section 8A, and the outcome of any such dispute;~~
- ~~(a) any recommendations by the Auditor to improve BR's processes or reporting systems in relation to compliance with the obligations referred to in section 8.2; and~~
- ~~(a) the implementation and outcome of any prior recommendations by the Auditor.~~

## 9.3— Conduct of audit

~~An audit required under section 8.2 must be conducted in accordance with the following process:~~

- ~~(a) BR will annually appoint the auditor subject to the Regulator's prior approval of the auditor. Where the Regulator does not approve the appointment of a particular auditor, BR must nominate an alternative auditor or replacement auditor as soon as practicable after the Regulator notifies BR of such non-approval;~~
- ~~(a) the auditor must be:
 
  - ~~(-) independent of BR; and~~
  - ~~(-) appropriately qualified and experienced;~~~~
- ~~(a) the Regulator's approval of an auditor (or replacement auditor) in accordance with section 8.4(a) continues unless and until withdrawn in accordance with section 8.4(d);~~

- ~~(b) — if the Regulator is of the reasonable belief that an audit conducted by an Auditor has not been conducted to a satisfactory standard, the Regulator may, within three (3) months after completion of the audit, notify BR in writing that its approval of the Auditor in relation to the next audit of those matters is withdrawn;~~
- ~~— the Auditor will have a duty of care to the Regulator in the provision of the audit and, in the event of a conflict between the Auditor's obligations to BR and its duty of care to the Regulator, the Auditor's duty of care to the Regulator will take precedence;~~
- ~~(c) — prior to commencing the audit the Auditor must agree an audit plan with BR, document that audit plan, and obtain the Regulator's approval of the audit plan;~~
- ~~(c) — the audit plan will:~~
- ~~(-) — consist of a proposed work program for the execution of the audit, including audit costs (which are payable by BR);~~
  - ~~(-) — provide that the audit must be completed by 30 September immediately following the year ending 30 June in respect of which the audit is being undertaken or such later date as may be agreed between the Auditor and BR; and~~
  - ~~(-) — provide for the establishment of an audit liaison group, comprising the Auditor, BR and the Regulator, during the course of the audit, to provide a forum for the resolution of any audit issues that arise;~~
- ~~(c) — BR will:~~
- ~~(-) — provide any relevant information the Auditor reasonably requires for the purpose of conducting the audit, within a nominated timeframe that is determined by the Auditor to be reasonable after consultation with BR;~~
  - ~~(-) — in relation to the audit of BR's obligations under section 7 of these Segregation Arrangements, provide access to BR's financial records and information systems necessary for the purpose of conducting the audit; and~~
  - ~~(-) — not interfere with, or otherwise hinder, the Auditor's ability to carry out his or her functions under this section 8;~~
- ~~(c) — the Auditor will be required to enter into a Confidentiality and Compliance Agreement in relation to any information provided by BR, to the effect that it must keep the information confidential and only use that information for the purpose of conducting the audit and completing the audit report;~~
- ~~(c) — the Auditor will provide to BR and the Regulator a copy of:~~
- ~~(-) — the audit report (which the Regulator may publish provided that the Regulator must ensure that any Confidential Information specified in the published version of the audit report is redacted); and~~
  - ~~(-) — any letter or report from the Auditor accompanying the audit report which explains the audit findings in greater detail;~~
- ~~(c) — BR must use reasonable endeavours to implement any recommendations made by the Auditor in the audit report or any other letters or reports provided in accordance with section 8.4(j) (except to the extent the non-implementation is approved by the Regulator) as soon as reasonably practicable after the documents are provided by the Auditor; and~~
- ~~(c) — BR must use reasonable endeavours to comply with any direction of the Regulator in relation to matters arising from the audit report as soon as reasonably practicable.~~



## 8A DISPUTES RESOLUTION

All disputes under these Segregations Arrangements will be determined in accordance with the Code.

### ~~8A.1 Dispute Resolution Process under the Segregation Arrangements~~

- ~~(a) If a Dispute Applicant gives BR an Objection Notice in accordance with clause 2.1 of Appendix C then BR must comply with the Dispute Resolution Process to determine the dispute.~~
- ~~BR may, from time to time, amend the Dispute Resolution Process provided that BR has obtained the prior written consent of the Regulator.~~

### ~~8A.2 Disputes under the Code and the Segregation Arrangements~~

- ~~(b) A Code Access Seeker must not commence or participate in any dispute resolution process outside the Code (including under these Segregation Arrangements) with respect to any terms or conditions (including Access Charges) that apply to the Access rights specified in its Access proposal under the Code. BR is not obliged to participate in any dispute resolution proceedings referred to in this clause 8A.2(a).~~
- ~~(b) If a Code Access Seeker is granted an arbitral award under the Code then:~~
- ~~(-) it must not commence or participate in any dispute resolution process under these Segregation Arrangements in respect of the subject matter of the award; and~~
  - ~~(-) BR is not obliged to participate in any dispute resolution proceedings referred to in clause 8A.2(b)(i).~~
- ~~(b) If a Non-Code Access Seeker:~~
- ~~(-) commences or participates in a Dispute Resolution Process under these Segregation Arrangements; and~~
  - ~~(-) subsequently submits an Access proposal to BR under the Code for Access rights which are the same, or substantially the same, as the Access rights specified in its Access proposal outside the Code,~~
- ~~then the Dispute Resolution Process under these Segregation Arrangements will be taken to be discontinued, and may not be re-enlivened, and BR is not obliged to participate any further in any dispute resolution proceedings under these Segregation Arrangements in relation to the same issues.~~
- ~~(b) If a binding decision is made under these Segregation Arrangements with respect to Access rights specified in a Non-Code Access Seeker's Access proposal then:~~
- ~~(-) the Non-Code Access Seeker must not subsequently submit an Access proposal to BR under the Code for Access rights which are the same, or substantially the same, as the Access rights specified in its Access proposal outside the Code; and~~
  - ~~(-) BR is not obliged to consider any Access proposal referred to in clause 8A.2(d)(i).~~
- ~~(b) For the avoidance of doubt, the purpose of this clause 8A.2 is to ensure that a person does not commence, or participate in, a dispute resolution process under the Code when it has also commenced, or is participating in, a dispute resolution process outside the Code (and vice versa) in respect of the same, or substantially the same, subject matter.~~

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- ~~(b) BR acknowledges that nothing in this clause 8A.2 is intended to limit the Segregation Arrangements from applying in respect of Access Agreements entered into under the Code.~~
  - ~~(b) For the purposes of this clause 8A.2:
    - ~~(i) a '**Code Access Seeker**' is a person that has submitted an Access proposal to BR under the Code; and~~
    - ~~(i) a '**Non-Code Access Seeker**' is a person that is:
      - ~~(i) negotiating with BR for Access outside the Code; and~~
      - ~~(i) not a Code Access Seeker in respect of the Access rights the subject of the outside the Code negotiations.~~~~~~

**DEFINITIONS:**

Access	<del>(a) the use of the Network; and (b) where applicable, includes the exercise of other rights of the kind described in section 3A(1) of the Act. The meaning ascribed to the term 'access' in section 3 of the Code.</del>
Access Agreement	Means an agreement in writing between BR and an entity for the grant of Access by BR to that entity and includes a Commercial Track Access Agreement, an Operational Track Access Agreement or a Track Access Agreement, as applicable.
Access Charges	Means the fees or charges payable by a Network Participant to BR under an Access Agreement.
<del>Access Dispute</del>	<del>Means a bona fide commercial dispute raised by a Dispute Applicant which is not a Price Dispute.</del>
Access Holder	Means a party that is granted Access under a Commercial Track Access Agreement or a Track Access Agreement, as applicable.
Access Related Functions	Has the meaning ascribed to it in section 2 of this document.
Act	Means the <i>Railways (Access) Act 1998</i> (WA).
<u>Associate</u>	<u>The meaning ascribed to the term 'associate' in section 3 of the Code.</u>
<del>Auditor</del>	<del>Means an auditor appointed by BR and approved by the Regulator in accordance with section 8.4(a) or 8.4(c) of this document.</del>
BR	Means Brookfield WA Rail Pty Ltd ACN 118 144 960.
BR Rules	Means the rules (including any appendix to the rules and the Working Timetables) issued in accordance with BR's 'Rail Safety Management Plan' approved under Section 10 of the <i>Rail Safety Act 2010</i> (WA) together with any amendments, deletions or additions made in accordance with the Rail Safety Management Plan and all policies and notices issued by BR for the purpose of ensuring the safe use of the Network.
Code	Means the <i>Railways (Access) Code 2000</i> (WA) established under the Act.
Commercial Track Access Agreement	Means an agreement in writing between BR and a party pursuant to which BR grants Access to that party for the operation of train services on the Network by one or more Operators nominated by the party.

Confidentiality and Compliance Agreement	Means a deed substantially in the form specified in Appendix B.
Confidential Information	<p><del>Has the meaning ascribed to it in Section 31(2) of the Act but excludes information that:</del></p> <p><del>(b) subsequently becomes available other than through a breach of confidence or a breach of these Segregation Arrangements;</del></p> <p><del>(b) was in the lawful possession of BR before being provided to BR by the Network Participant or the Proponent;</del></p> <p><del>(b) ceases to be confidential in nature by any other lawful means; or</del></p> <p><del>is received by BR independently from a third party free to disclose such information. The meaning ascribed to the term 'confidential information' in section 31(2) of the Act.</del></p>
Dispute Applicant	Means a Proponent or a Network Participant.
Dispute Resolution Process	Means the dispute resolution process specified in Appendix C.
Disputed Access Charge	Means an Access Charge that is the subject of a Price Dispute.
Emergency	Means any event or incident which by its nature requires immediate intervention or action.
ERA	Means the Economic Regulation Authority of Western Australia.
Final Dispute Notice	Has the meaning given in clause 5.1(b) of Appendix C.
Independent Price Expert	Means the expert appointed in accordance with clause 4.1(a), 4.1(c) or 4.1(d) of Appendix C.
Master Train Control Diagrams	<p>Means diagrams for train working which show:</p> <p>(a) all train movements scheduled and included in the Working Timetable as permanent train movements;</p> <p>(b) all train movements which have been proposed and agreed and for which there is a contractual agreement which reserves that Train path for an Operator; and</p> <p>(c) all planned train movements for which advice has been given to <b>thean</b> Operator that the Train path for the train movement is available and able to be practically operated but for which no contractual agreement has been reached.</p>

Network	Means the railways network and associated infrastructure controlled by BR in Western Australia to which: <ul style="list-style-type: none"> <li>(a) Access has or can be granted to an Operator to operate train services under an Operational Track Access Agreement or Track Access Agreement; and</li> <li>(b) the Code applies.</li> </ul>
Network Participant	Means an Access Holder or an Operator, as applicable.
<del>Objection Notice</del>	<del>Has the meaning given in clause 2.1 of Appendix G.</del>
<del>Operator</del>	<del>Means a party that is granted Access for the operation of train services on the Network under an Operational Track Access Agreement or a Track Access Agreement.</del>
Operational Track Access Agreement	Means an agreement in writing between BR and a party nominated by a customer of BR under a Commercial Track Access Agreement pursuant to which BR grants Access to that nominated party for the operation of train services on the Network on behalf of the customer.
<u>Operator</u>	<u>Means a party that is granted Access for the operation of train services on the Network under an Operational Track Access Agreement or a Track Access Agreement.</u> [Drafting note: alphabetical re-ordering.]
<del>Price Dispute</del>	<del>Means a bona fide commercial dispute raised by a Dispute Applicant about an Access Charge which is payable, or proposed to be payable, by the Dispute Applicant in contravention of section 6.2.</del>
Proponent	Means <u>any of the following entities</u> : <ul style="list-style-type: none"> <li>(a) an entity that has submitted a bona fide Access proposal to BR whether under the Code or otherwise; <u>and</u></li> <li><del>(a)</del><u>(b) an entity who has made a request in accordance with section 7 of the Code.</u></li> </ul>
<u>Railway infrastructure</u>	<u>The meaning ascribed to the term 'railway infrastructure' in section 3 of the Act. [Drafting note: change made for consistency with ERA's approach to definitions.]</u>

<u>Railway infrastructure</u>	<p>Means the facilities necessary for the operation of a railway, including:</p> <ul style="list-style-type: none"> <li><del>(a) railway track, associated track structures, over or under track structures, supports (including supports for equipment or items associated with the use of a railway);</del></li> <li><del>(b) tunnels and bridges;</del></li> <li><del>(c) stations and platforms;</del></li> <li><del>(d) train control systems, signalling systems and communication systems;</del></li> <li><del>(e) electric traction infrastructure;</del></li> <li><del>(f) buildings and workshops; and</del></li> <li><del>(g) associated plant machinery and equipment;</del></li> </ul> <p>but not including:</p> <ul style="list-style-type: none"> <li><del>(h) sidings or spur lines that are excluded by section 3(3) or (4) of the Act from being railway infrastructure; and</del></li> <li><del>(i) rolling stock, rolling stock maintenance facilities, office buildings, housing, freight centres, terminal yards and depots.</del></li> </ul>
RAMS	Means the 'Rail Access Management System' which is the computer system operated by BR for the purpose of preparing train consists and monitoring train progress on the Network and generally for the purpose of Train control and invoicing, including for the provision of information relating to timetables, special train notices, temporary speed restrictions and track warnings.
Regulator	Means the person who holds, or is acting in, the office provided for by Part 3 of the Act.
<u>Related Body Corporate</u>	<del>Has the meaning given in the Corporations Act 2001 (Cth).</del>
<u>Related Operator</u>	<del>A Network Participant which is a Related Body Corporate of BR.</del>
<u>Relevant Officer</u>	<u>The meaning ascribed to the term 'relevant officer' in section 24 of the Act.</u>
Responsible Manager	Means the responsible manager of BR with the relevant delegated authority.
Segregation Arrangements	Means this document including any schedules or appendices to it but only to the extent this document has been approved by the Regulator.
Track Access Agreement	Means an agreement in writing between BR and a party pursuant to which BR grants Access to that party for the operation of train services on the Network by that party.

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Train control	Means the control of trains by BR or its agents on the Network.
Train control centre	Means the facility or facilities maintained and operated by BR or its agents at any geographic location for the purposes of communication with train crew in order to exercise Train control.
Train controller	Means a person or agent appointed by BR to carry out the function of Train control.
Train Management Guidelines	Means BR's Train Management Guidelines, as approved by the Regulator under section 43 of the Code.
Train path	Is a contractual entitlement to operate a train service on the Network where that train service has departure, transit and arrival times between the entry and exit points on the Network.
Train Path Policy	Means BR's Train Path Policy, as approved by the Regulator under section 44 of the Code.
Working Timetable	Means the train timetables and operating data for all or part of the Network issued as part of the BR Rules and as amended from time to time.

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**APPENDIX A - MANAGEMENT AND COMPLIANCE PROCESSES**



## 1. PURPOSE AND OVERVIEW

Consistent with the obligations and intent of the *Railways (Access) Act 1998 (WA)* (the **Act**) and the corresponding *Railways (Access) Code 2000 (WA)* (the **Code**) this Appendix addresses BR's processes and compliance obligations to give effect to its Segregation Arrangements. Accordingly this Appendix describes how BR manages its segregation obligations and processes and specifically outlines the responsibilities and authorities with respect to segregation, day-to-day management processes and compliance requirements, including the auditing process.

The essential business of BR is the sale of Access at a price that will provide acceptable returns on investment and encourage utilisation and competition on the Network. In addition, a core function of BR is to maintain the Railway infrastructure to acceptable operating and safety standards.

BR will grant access to the Network and will ensure all Network Participants are treated in a fair and reasonable manner in accordance with its obligations under the Act.

Capitalised terms in this Appendix A have the meaning given in the Segregation Arrangements unless otherwise defined in this Appendix A.

## 2. RESPONSIBILITIES AND AUTHORITIES

The responsibilities and authorities for BR's employees carrying out Access Related Functions is further defined and detailed in the documents described below:

### Documented Procedures

BR's documented procedures describe the allocation of responsibilities to particular ~~designated positions~~ [Responsible Managers](#). The documented procedures also indicate the allocation of responsibilities and authorities for particular Access related tasks.

### Position Descriptions

Position descriptions are prepared for each ~~designated position~~ [Responsible Manager](#) within BR. These position descriptions describe the functional areas of responsibility. [BR will maintain a current list of Responsible Managers within BR.](#)

### Functional responsibilities

[The functional areas of responsibility allocated to Responsible Managers within BR are as follows:](#)

- [ensuring that a compliance regime for the Segregation Arrangements is put in place in BR;](#)
- [responsibility for commercial arrangements, dealings and negotiations with new and existing customers of BR and ensuring the arrangements, dealings and negotiations comply with the Segregation Arrangements;](#)
- [ensuring that documented processes and procedures are established and implemented to maintain compliance with segregation obligations as described in the Act;](#)
- [ensuring that day to day Access Related Functions including train control, customer liaison and train schedulers conform to the Segregation Arrangements; and](#)
- [ensuring that:](#)

- new employees of BR are required to sign the Confidentiality and Compliance Agreement and are aware of the requirements in the Confidentiality and Compliance Agreement;
- Confidentiality and Compliance Agreements are actually signed by new employees of BR;
- signed Confidentiality and Compliance Agreements are kept safe; and
- appropriate records are maintained in relation to Confidentiality and Compliance Agreements.

#### Confidentiality and Compliance Agreement

A copy of the Confidentiality and Compliance Agreement is attached in Appendix B.

### **3. DETAILS OF THE MANAGEMENT OF SEGREGATION ARRANGEMENTS**

#### **3.1 Access Related Premises and Locations**

*(Ref. Section 28 – Act)*

Within BR there are several functional groups housed at various geographical locations throughout the Network including:

- the infrastructure (both civil and signalling and communications) management groups, which are located at head office and regional offices;
- the access management group and the commercial, legal, training and corporate support teams, which are located at head office; and
- currently three BR Train control centres at Midland, Avon and Picton.

#### Access to head office

Head office is only accessed by BR employees and authorised contractors of BR through the use of access security cards. Visitors to ~~the~~ BR's head office must enter into a reception area which is separated from the main office facility. Bona fide visitors are then escorted to the area of business.

Apart from BR employees and authorised contractors of BR, the only other permitted entry after hours is by the specified cleaning contractor. This cleaning contractor is briefed on the confidentiality requirements and obligations of the facility and any documents therein. The cleaning contractor's management team is also asked to sign a Confidentiality and Compliance Agreement obliging the cleaning contractor's management team and any of the cleaning contractor's staff to observe and protect the confidentiality requirements and obligations. Drafting note: tidy-up drafting change.

#### Access to regional offices

Regional offices of BR are accessed only by BR employees and authorised contractors of BR.

#### Train control centres

Train control centres are secured and entry is controlled by BR.

#### **3.2 Confidential Information**

*(Ref. Section 31 – Act)*

##### 3.2.1 Types of Confidential Information

Confidential Information may include the following types of information:

- (a) ~~Access applications and preliminary information provided by Proponents with their Access applications~~ Proposals and preliminary information provided by Proponents.
- (b) Correspondence related to the negotiation of the Access Agreement.
- (c) The Access Agreement itself and information exchanged in the management of the Access Agreement over time.
- (d) Any data related to the usage of the Access Agreement including the data held in RAMS.
- (e) Master Train Control Diagrams (to the extent they identify specific operations).
- (f) Completed train control diagrams and voice logging tapes from Train control.

### 3.2.2 General Management of Confidential Information

The following describes the particular processes which promote and manage the regime of confidentiality of Access related matters within BR.

- (a) All:
  - (i) employees of BR who are required to perform Access Related Functions; and
  - (ii) contractors of BR who are required to perform Access Related Functions and have access to Confidential Information in relation to Access Related Functions other than BR's professional advisers or consultants who are under a duty of confidentiality,will complete an 'Access Segregation Awareness Training Session' and sign a Confidentiality and Compliance Agreement within 10 business days after commencing their employment or engagement with BR (as applicable).
- (b) The Access Segregation Awareness Training Session is a training session that covers an overview of the Act and the Code, the Segregation Arrangements, breaches of Segregation Arrangements and BR's requirement for certain personnel to sign Confidentiality and Compliance Agreements.
- (c) BR shall maintain a list of all personnel who have undertaken the Access Segregation Awareness Training Session.
- (d) Confirmation of appropriate personnel having signed a Confidentiality and Compliance Agreement shall be carried out on an annual basis and will-may be confirmed under the audit processes specified in section 8 of the Segregation Arrangements. **Drafting note: Section 8 no longer specifies a mandatory audit process.**
- (e) BR will maintain a current list of personnel positions, including contractors, required to undertake the Access Segregation Awareness Training Session and sign a Confidentiality and Compliance Agreement. The list of personnel positions, as at the date of the Segregation Arrangements were submitted to the Regulator, is set out below:
  - (i) BR head office staff at Welshpool including:
    - (A) the CEO;
    - (B) accountants and finance-related personnel;
    - (C) commercial functions personnel;

(D) infrastructure-related personnel (including engineers and technicians);

(E) access-related personnel (including schedulers, timetabling and others liaising with above rail operations);

(F) legal personnel;

(G) safety and compliance personnel;

(H) human resource personnel;

(I) business and development personnel;

(J) administrative personnel; and

(K) IT related staff;

(ii) Train controllers;

(iii) directors of BR;

(iv) BR Regional Superintendents including Perway, Signalling and Communications; and

(v) consultants and contractors who have occasion to work in the BR head office for a period of more than 4 consecutive days or are working in the BR head office without being directly escorted or supervised.

(e)(f) Visitors under the direct supervision of a BR employee are not required to undertake an Access Segregation Awareness Training Session or sign a Confidentiality and Compliance Agreement.

(f)(g) BR will maintain a current register of signed Confidentiality and Compliance Agreements. The Responsible Manager shall record on the Confidentiality and Compliance register the following information with respect to persons that have signed a Confidentiality and Compliance Agreement:

- (i) the name of the person who signed the agreement;
- (ii) the date the agreement was signed;
- (iii) the job role of the person;
- (iv) the work group of the person;
- (v) the date that the person completed the Access Segregation Awareness Training Session; and
- (vi) the location of the stored document on the Confidentiality and Compliance Register.

(g)(h) The Responsible Manager will keep a file containing all signed Confidentiality and Compliance Agreements under lock and key.

### **3.2.3** Management of Electronic Data

BR operates with a security system including time-limited passwords on electronic records that allows only authorised BR staff and authorised contractors to access records, information and data related to Access Related Functions. Other security measures include:

- (a) The authority to access electronic information that is confidential can only be given by the Responsible Manager and will only be given to persons who have signed a Confidentiality and Compliance Agreement.

- (b) When a user logs-on to the computer network his or her access to any shared files, information systems, e-mail and the ability to generate reports etc is automatically restricted to their Business section.
- (c) BR has a physically separate computer file server from any other business unit or company.
- (d) User Ids and passwords are set up and managed by the Information Technology Section of BR. All personnel within the Information Technology Section are required to sign a Confidentiality and Compliance Agreement. Authority to allocate passwords for Access related matters resides with the Responsible Manager.
- (e) A further restriction is applied to users who have the ability to access any stand-alone computer system. This restriction only allows specific information to be viewed or reported by the user in accordance with their allocated user ID scope and approved by the Responsible Manager.
- (f) The Access management area utilises computing equipment with access rights confined to that management area to carry out train path planning and allocation. This process is an independent function to the RAMS which is separately secured on a BR server with authorised controlled passwords.
- (g) BR has implemented a regime of security on accessing any specific data considered Confidential Information to appropriate personnel authorised by the Responsible Manager and who have signed a Confidentiality and Compliance Agreement. The process of authorising access and the general usage of Confidential Information in RAMs shall may be audited in accordance with section 8 of the Segregation Arrangements. **Drafting note: Section 8 no longer specifies a mandatory audit process.**
- (h) All computer systems management and back-up processes are managed by the Information Technology (IT) section.

With respect to the treatment of Confidential Information, all IT staff members who have access to BR systems are required to sign a Confidentiality and Compliance Agreement.

The regional offices of BR have dedicated BR computer directory structures which are not accessible by non BR staff or unauthorised contractors of BR. Backup tapes are handled by authorised BR staff or authorised BR contractors and forwarded to the IT staff for safe-storing.

#### 3.2.4 Management of Other Specific Confidential Information

- (a) Train control diagrams

Train Control Master Diagrams are prepared and kept within the secured Access Management Area. Completed train control diagrams from BR's Train control centres are addressed and dispatched to the Responsible Manager under separate bag and following examination are secured and stored within the Access Management Area.

- (b) Voice logged tapes

All conversations on both radio and telephone between the Train controllers and train crews, on-track equipment or vehicles or track-side maintenance staff are voice recorded utilising a continuous running magnetic digital tape system.

The tapes are stored in a secure or locked facility to maintain a history of communication. Only authorised BR staff and authorised BR contractors will have a

key to the facility and, subject to the following paragraph, will only access the facility for the purposes of tape replacement and rotation. Any movement or interchange of tapes is recorded in a log book which is endorsed with time and date and signed.

The retrieval of any tape information for monitoring, audit or incident investigation purposes can only be carried out with the express authority of the Responsible Manager and tape movements can only be between the locked tape housing and the office area of the Responsible Manager in a sealed envelope.

### 3.3 Conflicts of Interest

*(Ref. Section 32 – Act)*

BR will manage its Access Related Functions in a manner which provides for, and ensures that, all relevant BR staff do not have a 'conflict of interest' between their duties:

- (a) in performing Access Related Functions, on the one hand; and
- (b) as a person involved in the other business of BR, on the other.

All Access management and Access operational staff including those involved in Access applications and negotiations, train scheduling, train control as well as Access pricing and invoice information preparation shall sign a Confidentiality and Compliance Agreement.

The use of contractors, consultants, legal expertise and any other services provided by external personnel or companies will be managed to ensure that there are no conflict of interest issues between the performance of Access Related Functions (on the one hand) and the other business of BR (on the other).

Should the use of any external service involve access by external service provider personnel to Confidential Information in relation to Access Related Functions (particularly that involving above-rail operator information) then those personnel shall be required to sign a Confidentiality and Compliance Agreement unless those personnel are otherwise under a duty of confidentiality.

Each director of BR will be required to sign a Confidentiality and Compliance Agreement. BR must comply with the restrictions specified in section 5 of the Segregation Arrangements with respect to the directorships of BR.

### 3.4 Duty of Fairness

*(Ref. - Section 33 of the Act).*

- (a) BR acknowledges that, in performing Access Related Functions, BR and its employees must not have regard to the interests of BR in a way that is unfair to Proponents or to other Network Participants including with respect to the following:-
  - (i) BR's response to Access applications;
  - (ii) BR's negotiation methodology in relation to Access applications and Access Agreements;
  - (iii) Access Charges; or
  - (iv) the quality of Access related services provided by BR, including liaison, correspondence, scheduling Train paths, Train control priority and Emergency responses.

- (b) BR must not unfairly or unreasonably discriminate against a Proponent or Network Participant as to the terms and conditions (including Access Charges, priority of Access and service levels) upon which Access is provided, or is proposed to be provided, when compared to an Associate of BR. ∴
- ~~(-) hinder or deny Access to any Proponent or Network Participant; or~~
  - ~~(-) discriminate against a Proponent or Network Participant as to the terms and conditions (including Access Charges, priority of Access and service levels) upon which Access is provided, or is proposed to be provided, when compared to a Related Operator.~~
- ~~(e) Discrimination as to terms and conditions is not to be taken as unfair or unreasonable for the purposes of the Segregation Arrangements if the relative terms reflect reasonable commercial and technical considerations including (without limitation):~~
- ~~(-) relative costs of providing Access to different Network Participants, having regard to:
 
    - ~~(-) the commodity being transported;~~
    - ~~(-) the type of rollingstock used by the relevant Operator including the length and mass of the rollingstock;~~
    - ~~(-) the geographic area in which the Access is being provided; and~~
    - ~~(-) the relative effect of the task on the efficient utilisation of the Network;~~~~
  - ~~(-) the costs and risks associated with providing services required by, or in respect of, some Network Participants, but not others; and~~
  - ~~(-) the nature and characteristics of the sections of the Network to which Access is sought;~~
  - ~~(-) circumstances in the market which have had, or will have, a material effect on a Network Participant's ability to pay Access Charges; and~~
  - ~~(-) the extent of competition for the task with other modes of transport.~~
- ~~(e)(c)~~ The mechanisms for ensuring BR's duty of fairness include:
- ~~(i) the Dispute Resolution Process specified in Appendix C of the Segregation Arrangements (where applicable);~~
  - ~~(iii)(i) the process under the Code for determining the fairness of prices negotiated under provisions of Section 21(1) of the Code (where applicable); and~~
  - ~~(iii)(ii) the provisions of BR's standard Access Agreements.~~

The 'Access Segregation Awareness Training Session' will include a section on BR's duty of fairness. The Confidentiality and Compliance Agreement requires the signatory to understand and comply with specific obligations under the Act, including BR's duty of fairness.

BR acknowledges that, in accordance with Part 5 of the Code, the Regulator will issue determinations to ensure the appropriate application, management and enforcement of certain Access related protocols which are also aimed at facilitating a duty of fairness including:-

- the Train Management Guidelines; and
- the Train Path Policy.

BR will inform Proponents at the onset of negotiations (whether inside or outside the Code) of their rights to confidentiality.

If negotiations have commenced outside the Code and a Proponent subsequently makes an access application under the Code, BR and the Proponent will agree on what information previously supplied by the Proponent is subject to the confidentiality provisions of the Segregation Arrangements.

### 3.5 Separation of Accounts and Records

*(Ref. Section 34 - Act)*

BR maintains separate accounts information and financial calculations records which comply with Section 34 of the Act and relevant provisions of the Code.

Details of information associated with accounts are handled directly and only by authorised BR staff and authorised BR contractors.

## 4. ACCESS SEGREGATION ARRANGEMENTS COMPLIANCE PLAN

### 4.1 General

BR has implemented, as part of establishing and maintaining a compliance regime, a series of measures which will, in effect, monitor the following:

- verification of obligations under the Act and Code;
- identification and acknowledgement of breaches of the Segregation Arrangements; and
- reporting of identified breaches of the Segregation Arrangements to the Regulator.

~~These measures are in addition to the audits conducted in accordance with section 8 of the Segregation Arrangements.~~

Stakeholders, including Network Participants and Proponents, may submit complaints regarding BR's compliance with the Segregation Arrangements directly to the Regulator.

~~If the Regulator considers that the stakeholder's complaint warrants recording and/or investigation as a breach or potential breach of the Segregation Arrangements it must forward the complaint to BR for follow up action.~~

Complaints which are provided to BR by the Regulator or made by the Regulator which claim there was breach or potential breach of the Segregation Arrangements must, in the first instance, be investigated by the Responsible Manager to determine if there has been an actual breach of the Segregation Arrangements.

### 4.2 Confidential Information Compliance

BR is committed to maintaining confidentiality of information as detailed in Section 3.2 of this Appendix A.

If a person (including any employee of BR) reports a breach of Section 3.2 of this Appendix A, the report must contain details of the breach and whether the Confidential Information has been disclosed either advertently or inadvertently.

Breaches of confidentiality obligations will include inappropriate disclosure of Confidential Information as described in Section 3.2 of this Appendix.

Breaches of confidentiality obligations may occur verbally through conversations or telephone discussions; in writing through paper correspondence or email; or any other process which communicates information.



### 4.3 Conflicts of Interest Compliance

A breach of BR's conflict of interest obligations under the Segregation Arrangements may occur when it is determined that the arrangements described in Section 3.3 of this Appendix have failed.

A breach of BR's conflict of interest obligations under the Segregation Arrangements may occur if:

(a) a Relevant Officer of BR carries out tasks for or on behalf of a Proponent or Network Participant; and

(b) the tasks referred to in paragraph (a) above are not Access Related Functions or other access related functions carried out for or on behalf of BR. [Drafting note: this paragraph has been reworded for clarification and consistency with the parts of section 4.]

~~A breach of the conflict of interest obligations will occur primarily where a person carrying out Access Related Functions for BR carries out tasks, other than its Access Related Functions for BR, for or on behalf of a Network Participant or a Proponent.~~

A breach of the Segregation Arrangements may occur if BR fails to comply with the restrictions specified in section 5 of the Segregation Arrangements with respect to the directorships of BR.

Also no board member of BR is permitted to be a board member or executive member of any above rail operator on the Network. Should at any time, there be evidence to the contrary, this would be classified as a breach. [Drafting note: clarification change.]

### 4.4 Duty of Fairness and Non-Discrimination Compliance

Breaches of section 6 of the Segregation Arrangements may occur when:

- Application for Access

~~Subject to section 1.1 of the Segregation Arrangements, a~~ Proponent is not provided with a fair response to an Access application or proposal. [Drafting note: consequential drafting changes as a result of the ERA required amendments.]

Fairness relates to preferential consideration or treatment provided to another Proponent or Network Participant in the form of Access provision, Access Charges or demands on required resources, processes or standards with respect to operations or rollingstock in circumstances where such treatment is not permitted.

- Access Negotiation

~~Subject to section 1.1 of the Segregation Arrangements, a~~ Proponent does not receive a 'fair' negotiation process in comparison with ~~Related Operators~~Network Participants in terms of timing of responses, Access Charges, Access provision or required resources, processes, staffing levels and standards. [Drafting note: consequential drafting changes as a result of the ERA required amendments.]

- Managing The Operation of Access Provision

~~Subject to section 1.1 of the Segregation Arrangements, a~~ N Operator is unfairly or unreasonably discriminated against with respect to allocation of Train paths and the management of Train control including communication processes. [Drafting note: consequential drafting changes as a result of the ERA required amendments.]

- Services related to Access

~~Subject to section 1.1 of the Segregation Arrangements, a~~ Network Participant is unfairly or unreasonably discriminated against with respect to the provision of services related to Access including:- liaison, correspondence, Confidential Information, invoice information, treatment of priority requests and responses to Emergencies. **Drafting note: consequential drafting changes as a result of the ERA required amendments.**

#### 4.5 Separation of Accounts and Records Compliance

Breaches to the separation of accounts and records arrangements as described in Section 3.5 of this Appendix may occur when:

- Individual train information, consists, kms, tonnes or rates for an Operator are supplied to another Operator either advertently or inadvertently.
- Individual train information or invoicing, costing, pricing or processes in respect of a Network Participant are worked on, prepared or reported on by unauthorised personnel or by persons outside BR and in particular by employees of another Network Participant.
- RAMS is accessed by unauthorised personnel for preparing or working on or reporting on any financial aspects of BR's Access Related Functions either by design or through inadvertent breakdown of the security password system.

#### 4.6 Physical Segregation of Premises/Personnel Compliance

Breaches to the physical segregation arrangements as described in Section 3.1 of [this Appendix](#) may occur when:

- Unauthorised persons have unaccompanied or unsupervised access or entry into the BR head office or a BR regional office area.
- There is a failure of the physical security arrangements (key cards or locks) on the BR head office or [a](#) BR regional office area or any of the Train control centres, with particular emphasis on after hours security failures.
- Unauthorised persons are given or are in possession of key cards or keys allowing access to the BR head office or a BR regional office area or a [BR](#) Train control centre.
- The formal servicing or maintenance arrangements in place within the BR physically segregated area (including cleaning organisations) have been compromised which allowed, or potentially allowed, disclosure of Confidential Information. There is a particular emphasis on after hours compromised circumstances. **Drafting note: tidy-up drafting changes.**

#### 4.7 Corrective Action Resulting from Breaches

The Responsible Manager will maintain a register of all complaints which claim there was a breach or a potential breach of Segregation Arrangements and which were submitted to BR by external parties, the Regulator or employees of BR.

If BR receives a complaint that claims that a breach or potential breach of the Segregation Arrangements has occurred, BR will provide an acknowledgment of receipt of the complaint to the complainant and then the Responsible Manager will determine if the complaint has identified an actual breach of the Segregation Arrangements.

For the purposes of this Appendix A, a breach of the Segregation Arrangements is a departure from the Segregation Arrangements as described in Section 3 of this

Appendix, which may actually, or potentially, adversely impact a Proponent or a Network Participant.

Should the Responsible Manager determine that the complaint has identified a breach of the Segregation Arrangements then the following actions will be initiated:

- (a) The chief executive officer of BR shall be advised of the breach as soon as practicable.
- (b) Notice of the breach shall be submitted to the Regulator within 5 business days after the Responsible Manager determines that the complaint has identified a breach.
- (c) The breach shall be investigated by the Responsible Manager to establish:
  - (i) how the breach occurred including whether there was an inadvertent or deliberate departure from the Segregation Arrangements; and
  - (ii) the causes and reasons for the breach including whether there was a process or technology failure.
- (d) An investigation report shall be submitted to the chief executive officer of BR and, if the investigation by BR determines that a breach of the Segregation Arrangements occurred, the report shall contain findings and recommendations to prevent any re-occurrence of the breach.
- (e) Following the endorsement of the recommendations in the investigation report by the chief executive officer of BR, the recommendations shall be implemented which may include counselling and or disciplinary action if an employee of BR has breached the Segregation Arrangements.
- (f) Once the investigations are completed and the process of implementing the recommendations has been initiated, a report will be submitted to the Regulator detailing the findings, recommendations and the follow up action to be taken by BR to prevent a re-occurrence of the breach.
- (g) The Responsible Manager will ensure that a register is maintained which records the following information:
  - (i) any complaint submitted to BR which identifies a breach of the Segregation Arrangements; and
  - (ii) when the recommendations specified in the report of the investigation of the relevant breach have been implemented by BR.

#### **4.8 Segregation Training/Awareness**

To facilitate compliance with the requirements of the Act and Code, all:

- (a) employees of BR who are required to perform Access Related Functions; and
- (b) contractors of BR who are required to perform Access Related Functions and have access to Confidential Information in relation to Access Related Functions other than BR's professional advisers or consultants who are under a duty of confidentiality,

shall complete an Access Segregation Awareness Training Session.

#### **4.9 Confidentiality and Compliance Agreements Compliance**

All:

- (a) employees of BR who are required to perform Access Related Functions; and

- (b) contractors of BR who are required to perform Access Related Functions and have access to Confidential Information in relation to Access Related Functions other than BR's professional advisers or consultants who are under a duty of confidentiality,

are required to sign a Confidentiality and Compliance Agreement as described in Section 4 of the Segregation Arrangements.

The signing of a Confidentiality and Compliance Agreement commits the signatory to protect Confidential Information and comply with the relevant obligations under the Act and Code. The signing of the Confidentiality and Compliance Agreement confirms that the signatory understands the relevant obligations under the Act and Code.

If a person has breached the requirements of the Segregation Arrangements it shall be mandatory for that person to repeat the completion of the Access Segregation Awareness Training Session and subsequently sign a new Confidentiality and Compliance Agreement which will replace the existing Confidentiality and Compliance Agreement signed by the person. This process is in addition to any counselling or disciplinary action which may result from the breach.

The Responsible Manager shall maintain a register of all people have breached the Segregation Arrangements and follow-up action taken, including training and resigning a Confidentiality and Compliance Agreement.

#### ~~5. INDEPENDENT EXTERNAL ACCESS SEGREGATION COMPLIANCE AUDIT~~

~~BR will procure audits in accordance with Section 8 of the Segregation Arrangements.~~

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**APPENDIX B – CONFIDENTIALITY AND COMPLIANCE AGREEMENT**

## CONFIDENTIALITY and COMPLIANCE AGREEMENT for Brookfield Rail Segregation Arrangements

### 1. PURPOSE

As required by the *Railways (Access) Act 1998* (WA) (**Act**), this deed, which is given in favour of Brookfield WA Rail Pty Ltd ACN 118 144 960 (**Brookfield Rail**), provides that the person who is the signatory to this deed (**signatory**) must comply with the provisions of the Act in carrying out the signatory's access related functions with respect to any of the following: -

- (a) Section 28 - 'Duty to Segregate'
- (b) Section 31 - 'Protection of Confidential Information'
- (c) Section 32 - 'Avoidance of Conflict of Interest'
- (d) Section 33 - 'Duty of Fairness'
- (e) Section 34 - 'Maintenance of Separate Accounts and Records'

### 2. SPECIFIC OBLIGATION RELATED TO SECTION 31

- (a) The signatory agrees to comply with the following obligations of this deed with respect to Confidential Information.
- (b) For the purposes of this deed, 'Confidential Information' means information that has not been made public and that:
  - (i) is by its nature confidential;
  - (ii) was specified to be confidential by the person who supplied it; or
  - (iii) is known by the person using or disclosing it to be confidential.   ,

~~but excludes information that:~~

~~(-) subsequently becomes publicly available other than through a breach of confidence or a breach of Brookfield Rail's Segregation Arrangements;~~

~~(-) was in the lawful possession of Brookfield Rail before being provided to Brookfield Rail by the owner;~~

~~(-) ceases to be confidential in nature by any other lawful means; or~~

~~(-) is received by Brookfield Rail independently from a third party free to disclose such information.~~

~~(h)~~(c) For the purposes of this deed 'Confidential Information' includes information or data contained in any communication or record, whether written, electronic or oral.

(d) For the purposes of this deed, the term 'access related functions' has the meaning ascribed to that term in the Brookfield Rail Segregation Arrangements. **Drafting note: tidy-up drafting change.**

~~(i)~~(e) In consideration of Brookfield Rail:

- (i) disclosing Confidential Information to the signatory; or

- (ii) retaining or agreeing to retain that signatory to perform functions for Brookfield Rail,

the signatory must:

- (iii) keep strictly confidential the Confidential Information; and
- (iv) not, at any time disclose, divulge, make known or in any way communicate to any person in any part of the world any of the Confidential Information which the signatory has acquired or received or will acquire or receive while engaged by Brookfield Rail or subsequent thereto, except:
  - (A) to an employee, officer or contractor of, or consultant or adviser to, Brookfield Rail in the proper performance of an access related function by the signatory; or
  - (B) to the extent required by applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator.

~~(j)~~(f) If the signatory must make a disclosure of Confidential Information in accordance with clause 2(e)(iv), the signatory must disclose only the minimum Confidential Information required to comply with the applicable law, order or requirement; and before making such disclosure, the signatory must:

- (i) give Brookfield Rail reasonable written notice of the full circumstances of the required disclosure and the Confidential Information which the signatory proposes to disclose; and
- (ii) consult with Brookfield Rail as to the form of the disclosure.

~~(k)~~(g) The signatory must not directly or indirectly at any time use or permit the use of any of the Confidential Information:

- (i) for his or her own advantage or gain;
- (ii) for the benefit or gain of any third party (whether associated with the signatory or not);
- (iii) in any manner which may cause injury to any person or loss to Brookfield Rail or any person to whom Brookfield Rail provides access, or access related, services; or
- (iv) in any manner which may cause Brookfield Rail to breach the Act, the *Railways (Access) Code 2000 (WA) (Code)*, Brookfield Rail's Segregation Arrangements or any regulation, determination, ruling or requirement pursuant to the Act or Code.

~~(t)~~(h) The signatory must at all times take, and cause to be taken, such precautions as are necessary to maintain the confidentiality of the Confidential Information and to prevent its disclosure.

~~(m)~~(i) The signatory must immediately upon demand, deliver up to Brookfield Rail all material (whether documents, papers, plans, drawings, tapes, disks, computer software, or any other medium of storing or recording information) comprising or containing Confidential Information (including all copies, extracts, abstracts and analyses thereof) which is in the possession, or under the control of, the signatory.

~~(n)~~(j) The signatory must immediately disclose to Brookfield Rail, in writing, any breach of this deed of which it becomes aware.

**3. AGREEMENT**

- (a) In signing this deed I understand:
  - (i) the confidentiality obligations in connection with access related functions that are imposed under the Act, the Code, Brookfield Rail's Segregation Arrangements or any regulation or determination pursuant to the Act or Code; and
  - (ii) that in carrying out duties and responsibilities related to access related functions I must not breach the requirements and obligations specified in the Act or the Code, Brookfield Rail's Segregation Arrangements or any regulation or determination pursuant to the Act or Code.
- (b) I undertake to comply with the provisions of this deed and not disclose use or permit the use of Confidential Information other than in accordance with this deed.

Signed as a deed poll:

PERSON ..... POSITION .....

LOCATION .....

SIGNATURE .....

WITNESS .....

DATE .....



## APPENDIX C – DISPUTE RESOLUTION PROCESS

### 1. OVERVIEW

Subject to the terms of this Appendix C, this Dispute Resolution Process is intended to resolve certain disputes relating to:

- (a) Access Charges; and
- (b) the granting, refusal to grant, conditions or administration of an Access Agreement, other than in relation to Access Charges.

Capitalised terms in this Appendix C have the meaning given in the Segregation Arrangements unless otherwise defined.

In this Appendix C, clause references are references to clauses of this Appendix C unless expressly stated otherwise.

### 2. RAISING A DISPUTE

#### 2.1 CRITERIA FOR SUBMITTING AN OBJECTION NOTICE

A Dispute Applicant who considers that BR has not complied with section 6.2 of the Segregation Arrangements may raise a dispute with BR by giving a written notice (**Objection Notice**) to BR provided that the following criteria are satisfied:

- (a) the dispute specified in the Objection Notice must be:
  - (i) in respect of a service which is:
    - (A) the subject of an Access proposal submitted by the Dispute Applicant to BR or an Access Agreement between the Dispute Applicant and BR; and
    - (B) subject to clause 2.1(b), comparable to a service provided by BR to a Related Operator under an Access Agreement by reference to:
      - (1) the commodity being transported;
      - (2) the type of rollingstock used, including the length and mass of the rollingstock; and
      - (3) the geographic area in which the Access is being sought or provided.
  - (ii) relevant to an entity which is a customer of both:
    - (A) the Dispute Applicant (where the Dispute Applicant is an Operator or a Proponent that proposes to be an Operator); and
    - (B) a Related Operator (where the Related Operator is an Operator), where the Dispute Applicant is seeking, and the Related Operator has obtained, from BR (as applicable) Access for at least one Comparable Service for the benefit of the customer;

- ~~(b) — if the dispute specified in the Objection Notice relates to an Access Agreement between BR and a Related Operator, the relevant Access Agreement must have been entered into after 17 August 2015 (being the date of the public announcement of the proposed acquisition of Asciano Limited by the consortium assembled by Brookfield Asset Management Inc that includes Brookfield Infrastructure Partners LP) provided that a dispute in relation to:~~
- ~~(i) — a waiver by BR of rights under an Access Agreement entered into on or before 17 August 2015 between BR and a Related Operator; or~~
  - ~~(ii) — amendments to an Access Agreement referred to in clause 2.1(b)(i), which take effect after 17 August 2015, are not prohibited under this criteria; and~~
- ~~(c) — the dispute specified in the Objection Notice must not relate to an Access Charge, or any part of an Access Charge, which has been approved or determined by the Independent Price Expert pursuant to clause 4.2.~~

## **2.2 — OBJECTION NOTICE**

- ~~(a) — An Objection Notice must set out details of:~~
- ~~(i) — the Dispute Applicant's reasons for issuing the Objection Notice;~~
  - ~~(ii) — the nature of the dispute;~~
  - ~~(iii) — the outcome sought by the Dispute Applicant in relation to the dispute; and~~
  - ~~(iv) — the action on the part of BR which the Dispute Applicant believes will resolve the dispute.~~
- ~~(b) — By submitting an Objection Notice, the Dispute Applicant agrees to comply with this Dispute Resolution Process.~~

## **2.3 — WITHDRAWAL OF OBJECTION NOTICE**

~~A Dispute Applicant may, at any time prior to determination of a dispute specified in an Objection Notice, withdraw the Objection Notice by written notice to BR and the person responsible for determining the dispute, in which case the powers and authority of the person responsible for determining the dispute to make a determination of that Objection Notice under this Appendix C shall cease.~~

## **3. — NEGOTIATION**

- ~~(a) — Within 7 days after the Dispute Applicant provides an Objection Notice to BR, the chief executive officers (or nominees of the chief executive officers) of each party must meet and negotiate with a view to resolving the dispute expeditiously by joint discussion.~~
- ~~(b) — If the dispute is not resolved in accordance with clause 3(a) within 21 days after the Dispute Applicant provides an Objection Notice to BR then:~~
- ~~(i) — if the dispute is a Price Dispute, it will be resolved in accordance with clause 4; or~~
  - ~~(ii) — if the dispute is an Access Dispute, it will be resolved in accordance with clause 5.~~

## **4. — PRICE DISPUTE**

### **4.1 — APPOINTMENT OF INDEPENDENT PRICE EXPERT**

- ~~(a) Subject to clauses 4.1(c) to 4.1(f), a Price Dispute will be determined by an expert appointed by agreement between BR and the Dispute Applicant.~~
- ~~(b) The expert appointed under this clause 4 must be an economist having at least 10 years' experience and must not be:~~
- ~~(i) an employee or officer of BR, the Dispute Applicant or their Related Bodies Corporate, whether current or in the past 3 years;~~
  - ~~(ii) a person who is a professional adviser of BR, the Dispute Applicant or their Related Bodies Corporate, whether current or in the past 3 years;~~
  - ~~(iii) a person who has a contractual relationship with BR, the Dispute Applicant or their Related Bodies Corporate (other than the terms of appointment of the expert);~~
  - ~~(iv) a Network Participant;~~
  - ~~(v) a supplier or material customer of BR, the Dispute Applicant or of their Related Bodies Corporate; or~~
  - ~~(vi) an employee of a firm or company referred to in paragraphs (iii) to (v) above.~~
- ~~(c) If BR and the Dispute Applicant fail to agree on the appointment of an expert in accordance with clause 4.1(a) within 7 days after the conclusion of the 21 day negotiation period for the Price Dispute under clause 3(b)(i), then:~~
- ~~(i) BR or the Dispute Applicant may request that the Perth Centre for Energy and Resources Arbitration:~~
    - ~~(A) select the expert; or~~
    - ~~(B) if the Perth Centre for Energy and Resources Arbitration declines to select the expert, provide a list of suitable people that could be appointed as the expert; and~~
  - ~~(ii) if the Perth Centre for Energy and Resources Arbitration selects the expert, then BR and the Dispute Applicant must, within 5 days after the Perth Centre for Energy and Resources Arbitration has selected the expert, appoint the selected expert and refer the Price Dispute to the selected expert.~~
- ~~(d) If:~~
- ~~(i) the Perth Centre for Energy and Resources Arbitration declines to:~~
    - ~~(A) select the expert; and~~
    - ~~(B) provide a list of suitable people that could be appointed as the expert; or~~
  - ~~(ii) Perth Centre for Energy and Resources Arbitration does not exist at the relevant time,~~
- ~~then:~~
- ~~(iii) BR and the Dispute Applicant must request that the ERA:~~
    - ~~(A) select the expert; or;~~
    - ~~(B) if the ERA declines to select the expert, provide a list of suitable people that could be appointed as the expert; and~~
  - ~~(iv) BR and the Dispute Applicant must, within 5 days after ERA has selected the expert, appoint the selected expert and refer the Price Dispute to the selected expert.~~

- ~~(e) — If the expert is to be selected by a person referred to in clause 4.1(c) or 4.1(d) and that person declines to select the expert but provides to BR and the Dispute Applicant a list of suitable people that could be appointed as the expert, then:~~
- ~~(i) — the first person specified in that list will be taken to be selected by the relevant person as the expert on the date the list is provided to BR and the Dispute Applicant;~~
  - ~~(ii) — if the first person specified in that list does not accept the appointment as the expert, then the next person specified in that list will be taken to be selected by the relevant person as the expert on the date the first person notifies BR and the Dispute Applicant of its non-acceptance; and~~
  - ~~(iii) — the process specified in clause 4.1(e)(ii) will apply to the next and each subsequent person specified in that list until a person that is taken to be selected by the relevant person as the expert accepts the appointment as the expert.~~
- ~~(f) — Subject to clause 4.1(e), if the expert is to be selected by a person referred to in clause 4.1(c) or 4.1(d) and the person selected as the expert does not accept appointment as the expert, then an alternative person is to be selected as the expert at either party's request by the same person referred to in clause 4.1(c) or 4.1(d) (as applicable).~~

#### **~~4.2 — INDEPENDENT PRICE EXPERT DETERMINATION~~**

- ~~(a) — The Dispute Applicant must:~~
- ~~(i) — provide the Objection Notice to the Independent Price Expert within 2 days after the Independent Price Expert is appointed; and~~
  - ~~(ii) — notify BR within 1 day after it has provided the Objection Notice to the Independent Price Expert that it has done so.~~
- ~~(b) — If the Independent Price Expert receives an Objection Notice in accordance with clause 4.2(a), then BR and the Dispute Applicant must instruct the Independent Price Expert that:~~
- ~~(i) — if it determines that the Disputed Access Charge has not been set in accordance with section 6.2 of the Segregation Arrangements, then it must determine the Price Dispute taking account of the matters specified in section 29 of the Code and the provisions of these Segregation Arrangements; and~~
  - ~~(ii) — that it may accept or reject the Disputed Access Charge or may vary the Disputed Access Charge taking account of the matters specified in section 29 of the Code and the provisions of these Segregation Arrangements.~~
- ~~(c) — BR and the Dispute Applicant must request that the Independent Price Expert makes his or her determination within:~~
- ~~(i) — 60 days after it receives the Objection Notice;~~
  - ~~(ii) — such further period, not being more than 20 days, as the Independent Price Expert in his or her sole discretion requires; or~~
  - ~~(iii) — such further period as may be agreed by BR and the Dispute Applicant.~~

- ~~(d) — BR and the Dispute Applicant:
  - ~~(i) — must provide the Independent Price Expert with any information he or she requires to make a determination under this clause 4.2; and~~
  - ~~(ii) — may make submissions to the Independent Price Expert on the Price Dispute, within a timeframe reasonably determined by the Independent Price Expert.~~~~
- ~~(e) — If BR or the Dispute Applicant makes submissions to the Independent Price Expert on the Price Dispute in accordance with clause 4.2(d)(ii) then the Independent Price Expert must have regard to those submissions in making its determination of the Price Dispute.~~
- ~~(f) — BR and the Dispute Applicant must instruct the Independent Price Expert to provide the parties with a written statement of reasons for its decision, setting out:
  - ~~(i) — the matters it took into account and the respective weight it gave to them; and~~
  - ~~(ii) — the matters it disregarded.~~~~
- ~~(g) — Except in the case of manifest error or fraud, the Independent Price Expert's decision is final and binding on BR and the Dispute Applicant.~~
- ~~(h) — When making a determination under this clause 4.2, the Independent Price Expert is acting as an expert and not as an arbitrator.~~

#### **4.3 — NOTICE OF DECISION BY INDEPENDENT PRICE EXPERT**

- ~~(a) — The Independent Price Expert must notify BR and the Dispute Applicant, of his or her determination under clause 4.2(b)(ii) within 2 days after making the determination.~~
- ~~(b) — BR must provide a copy of the Independent Price Expert's determination to the Auditor:
  - ~~(i) — within 7 days after BR receives the determination; or~~
  - ~~(ii) — if the Auditor has not been appointed within 7 days after BR receives the determination, within 7 days after the Auditor is appointed.~~~~
- ~~(c) — The cost of the expert determination must be shared equally between BR and the Dispute Applicant, unless the Independent Price Expert determines, or the parties agree, otherwise.~~
- ~~(d) — BR and the Dispute Applicant must indemnify the Independent Price Expert against any loss or damage incurred by the Independent Price Expert in the course of carrying out his or her functions in accordance with his or her terms of appointment excluding circumstances where the conduct of the Independent Price Expert constitutes:
  - ~~(i) — negligence (whether wilful or otherwise); or~~
  - ~~(ii) — dishonest or unlawful conduct.~~~~

## **5. — ACCESS DISPUTE**

### **5.1 — REFERRAL OF ACCESS DISPUTE TO EXPERT DETERMINATION OR ARBITRATION**

- ~~(a) — BR and the Dispute Applicant may agree:
  - ~~(i) — to refer an Access Dispute which remains unresolved to:
    - ~~(A) — an expert for determination in accordance with clause 5.2; or~~~~~~

- (B) — an arbitrator for arbitration in accordance with clause 5.3; or
- (ii) — that an Access Dispute which remains unresolved will not be referred to either an expert for determination in accordance with clause 5.2 or an arbitrator for arbitration in accordance with clause 5.3,
- within 7 days after the conclusion of the 21 day negotiation period for the Access Dispute under clause 3(b)(ii).
- (b) — If BR and the Dispute Applicant:
- (i) — agree to refer an Access Dispute which remains unresolved to an expert or an arbitrator in accordance with clause 5.1(a)(i) then, on the date that such agreement is reached, the parties must exchange notices which acknowledge such agreement; or
- (ii) — do not reach agreement within the 7 day period specified in clause 5.1(a) in respect of the matters specified in clause 5.1(a) then the parties must exchange notices which acknowledge that agreement has not been reached, each notice being a **Final Dispute Notice**.
- (c) — BR and the Dispute Applicant must agree on:
- (i) — which of expert determination or arbitration will be conducted to resolve the Access Dispute within 7 days after the Final Dispute Notice is exchanged; and
- (ii) — the identity of the expert or arbitrator to be appointed to conduct the expert determination or arbitration within the later of:
- (A) — 12 days after the Final Dispute Notice is exchanged; or
- (B) — if clause 5.1(d) applies, 5 days after the ERA gives BR and the Dispute Applicant a notice under clause 5.1(d)(ii).
- (d) — If BR and the Dispute Applicant cannot agree on which of expert determination or arbitration will be conducted to resolve the Access Dispute within the timeframe specified in clause 5.1(c)(i), then BR and the Dispute Applicant must request that the ERA:
- (i) — determine whether the Access Dispute will be determined by expert determination or arbitration; and
- (ii) — notify BR and the Dispute Applicant of its determination.
- A determination by the ERA under this clause 5.1(d) is final and binding on BR and the Dispute Applicant.
- (e) — If BR and the Dispute Applicant cannot agree on the identity of the expert or arbitrator, as the case may be, within the relevant timeframe specified in clause 5.1(c)(ii) then either party may request that the President (for the time being) of the Law Society of Western Australia:
- (i) — select the expert or arbitrator, as the case may be; or
- (ii) — if the President (for the time being) of the Law Society of Western Australia declines to select the expert or arbitrator, as the case may be, provide a list of suitable people that could be appointed as the expert or arbitrator, as the case may be.
- (f) — If the President (for the time being) of the Law Society of Western Australia selects an expert or arbitrator, as the case may be, in accordance with clause 5.1(e) then

~~BR and the Dispute Applicant must, within 5 days after the President (for the time being) of the Law Society of Western Australia has made the selection, appoint the selected person and refer the Access Dispute to the selected person.~~

~~(g) If:~~

~~(i) the President (for the time being) of the Law Society of Western Australia declines to:~~

~~(A) select the expert or arbitrator, as the case may be; and~~

~~(B) provide a list of suitable people that could be appointed as the expert or arbitrator, as the case may be; or~~

~~(ii) the Law Society of Western Australia or the position of President does not exist at the relevant time,~~

~~then:~~

~~(iii) BR or the Dispute Applicant may request that the Perth Centre for Energy and Resources Arbitration:~~

~~(A) select the expert or arbitrator, as the case may be; or~~

~~(B) if the Perth Centre for Energy and Resources Arbitration declines to select the expert or arbitrator (as the case may be), provide a list of suitable people that could be appointed as the expert or arbitrator (as the case may be); and~~

~~(iv) if the Perth Centre for Energy and Resources Arbitration selects the expert or arbitrator, as the case may be, then BR and the Dispute Applicant must, within 5 days after the Perth Centre for Energy and Resources Arbitration has selected the relevant person, appoint the selected person and refer the Access Dispute to the selected person.~~

~~(h) If:~~

~~(i) the Perth Centre for Energy and Resources Arbitration declines to:~~

~~(A) select the expert or arbitrator, as the case may be; and~~

~~(B) provide a list of suitable people that could be appointed as the expert or arbitrator, as the case may be; or~~

~~(ii) the Perth Centre for Energy and Resources Arbitration does not exist at the relevant time,~~

~~then:~~

~~(iii) BR and the Dispute Applicant must request that the ERA:~~

~~(A) select the expert or arbitrator, as the case may be; or~~

~~(B) if the ERA declines to select the expert or arbitrator, as the case may be, provide a list of suitable people that could be appointed as the expert or arbitrator, as the case may be; and~~

~~(iv) if the ERA selects the expert or arbitrator, as the case may be, then BR and the Dispute Applicant must, within 5 days after the ERA has selected the relevant person, appoint the selected person and refer the Access Dispute to the selected person.~~

- ~~(i) — If the expert or arbitrator (as applicable) is to be selected by a person referred to in clause 5.1(f), clause 5.1(g) or clause 5.1(h) and that person declines to select the expert or arbitrator, as the case may be, but provides to BR and the Dispute Applicant a list of suitable people that could be appointed as the expert or arbitrator, as the case may be, then:~~
- ~~(i) — the first person specified in that list will be taken to be selected by the relevant person as the expert or arbitrator on the date the list is provided to BR and the Dispute Applicant;~~
  - ~~(ii) — if the first person specified in that list does not accept the appointment as the expert or arbitrator, then the next person specified in that list will be taken to be selected by the relevant person as the expert or arbitrator on the date the first person notifies BR and the Dispute Applicant of its non-acceptance; and~~
  - ~~(iii) — the process specified in clause 5.1(i)(ii) will apply to the next and each subsequent person specified in that list until a person that is taken to be selected by the relevant person as the expert or arbitrator accepts the appointment as the expert or arbitrator.~~
- ~~(j) — Subject to clause 5.1(i), if the expert or arbitrator is to be selected by a person referred to in clause 5.1(f), 5.1(g) or 5.1(h) and the person selected as the expert or arbitrator does not accept appointment as the expert or arbitrator, then an alternative person is to be selected as the expert or arbitrator at either party's request by the same person referred to in clause 5.1(f), 5.1(g) or 5.1(h) (as applicable).~~
- ~~(k) — The expert or arbitrator appointed under this clause 5.1 must have at least 10 years' experience in the field relevant to the Access Dispute (as determined by BR) and the qualifications reasonably necessary to carry out the functions of the expert or arbitrator, as the case may be, and must not be:~~
- ~~(i) — an employee or officer of BR, the Dispute Applicant or their Related Bodies Corporate, whether current or in the past 3 years;~~
  - ~~(ii) — a person who is a professional adviser of BR, the Dispute Applicant or their Related Bodies Corporate, whether current or in the past 3 years;~~
  - ~~(iii) — a person who has a contractual relationship with BR, the Dispute Applicant or their Related Bodies Corporate (other than the terms of appointment of the expert or arbitrator);~~
  - ~~(iv) — a Network Participant;~~
  - ~~(v) — a supplier or material customer of BR, the Dispute Applicant or of their Related Bodies Corporate; or~~
  - ~~(vi) — an employee of a firm or company referred to in paragraphs (iii) to (v) above.~~

## **5.2 — EXPERT DETERMINATION**

~~If the Access Dispute is referred to an expert for expert determination pursuant to clause 5.1(a), the following provisions will apply:~~

- ~~(a) — BR and the Dispute Applicant must:~~
- ~~(i) — instruct the expert to provide; and~~
  - ~~(ii) — use all other reasonable endeavours to ensure that the expert provides;~~



- ~~the expert's determination on the Access Dispute within 60 days after the referral under clause 5.1.~~
- ~~(b) BR and the Dispute Applicant must instruct the expert that if it determines that BR has not complied with section 6.2 of the Segregation Arrangements, then it must determine the Access Dispute taking account of the matters specified in section 29 of the Code and the provisions of these Segregation Arrangements.~~
  - ~~(c) The expert must decide the Access Dispute as an expert not an arbitrator. Except in the case of manifest error or fraud, the expert's decision is final and binding on both BR and the Dispute Applicant.~~
  - ~~(d) BR must take all reasonable steps within its power to ensure that the expert's decision is fulfilled or otherwise given effect to, including by enforcing BR's contractual rights against third parties.~~
  - ~~(e) The expert may seek legal advice on issues raised in the Access Dispute if the expert, acting reasonably, considers that it requires legal advice in order to determine the Access Dispute.~~
  - ~~(f) The cost of the expert determination must be shared equally between BR and the Dispute Applicant, unless the expert determines, or the parties agree, otherwise.~~
  - ~~(g) BR and the Dispute Applicant may make submissions to the expert on the Access Dispute.~~
  - ~~(h) If BR or the Dispute Applicant makes submissions to the expert on the Access Dispute in accordance with clause 5.2(g) then the expert must, subject to clause 5.2(b), have regard to those submissions in making its determination of the Access Dispute.~~
  - ~~(i) BR and the Dispute Applicant must use all reasonable endeavours to ensure that the expert is provided with:
    - ~~(i) all relevant information available to BR and the Dispute Applicant; and~~
    - ~~(ii) all reasonable assistance, in a timely manner, to enable the expert to make a determination in relation to the Access Dispute within 60 days of referral under clause 5.1.~~~~
  - ~~(j) BR and the Dispute Applicant must indemnify the expert against any loss or damage incurred by the expert in the course of carrying out his or her functions in accordance with his or her terms of appointment excluding circumstances where the conduct of the expert constitutes:
    - ~~(i) negligence (whether wilful or otherwise); or~~
    - ~~(ii) dishonest or unlawful conduct.~~~~
  - ~~(k) BR and the Dispute Applicant must instruct the expert to provide the parties with a written statement of reasons for its decision, setting out:
    - ~~(i) the matters it took into account and the respective weight it gave to them; and~~
    - ~~(ii) the matters it disregarded.~~~~
  - ~~(l) BR must provide a copy of any determination made by the expert to the Auditor:
    - ~~(i) within 7 days after BR receives the determination; or~~
    - ~~(ii) if the Auditor has not been appointed within 7 days after BR receives the determination, within 7 days after the Auditor is appointed.~~~~

**5.3— ARBITRATION**

- ~~(a) If the Access Dispute is referred to an arbitrator pursuant to clause 5.1, BR and the Dispute Applicant must, subject to clause 5.3(b), agree on the terms on which the arbitration will be conducted.~~
- ~~(b) BR and the Dispute Applicant must instruct the arbitrator that if it determines that BR has not complied with section 6.2 of the Segregation Arrangements, then it must determine the Access Dispute taking account of the matters specified in section 29 of the Code and the provisions of these Segregation Arrangements.~~
- ~~(c) If, within 14 days after the arbitrator is appointed, BR and the Dispute Applicant are unable to reach agreement on the terms on which the arbitration will be conducted, the arbitration must be conducted in accordance with the IAMA & LEADR Arbitration Rules, as modified by the provisions of this Dispute Resolution Process.~~
- ~~(d) The arbitrator is not required to proceed with the arbitration unless and until the Dispute Applicant has agreed to:
  - ~~(i) pay the arbitrator's costs and other costs as determined in accordance with clause 5.3(q); and~~
  - ~~(ii) provide any indemnity as may be required in accordance with clause 5.3(r).~~~~
- ~~(e) BR and the Dispute Applicant may make submissions to the arbitrator on the Access Dispute.~~
- ~~(f) If BR or the Dispute Applicant makes submissions to the arbitrator on the Access Dispute in accordance with clause 5.3(e) then the arbitrator must, subject to clause 5.3(b), have regard to those submissions in making its determination of the Access Dispute.~~
- ~~(g) Unless BR and the Dispute Applicant agree otherwise, the arbitration must be conducted in private.~~
- ~~(h) BR and the Dispute Applicant may appoint a person, including a legally qualified person, to represent it or assist in the arbitration.~~
- ~~(i) The arbitrator must present its determination in draft form to BR and the Dispute Applicant and allow them the opportunity to comment before making a final determination.~~
- ~~(j) The arbitrator must hand down a final determination in writing which includes its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based.~~
- ~~(k) Subject to clause 5.3(s) and unless BR and the Dispute Applicant agree otherwise, any determination by the arbitrator must be kept confidential.~~
- ~~(l) The arbitrator may at any time terminate an arbitration (without making a determination save for any determination under clause 5.3(q)) and the subject matter of the Objection Notice shall be regarded as resolved, if he or she thinks that:
  - ~~(i) the notification of the Access Dispute is vexatious;~~
  - ~~(ii) the subject matter of the Access Dispute is trivial, misconceived or lacking in substance; or~~
  - ~~(iii) the Dispute Applicant has not engaged in negotiations in good faith.~~~~
- ~~(m) In deciding an Access Dispute, the arbitrator may have regard to any matters that he or she thinks are relevant.~~

- ~~(n) — In deciding an Access Dispute, the arbitrator must not:
  - ~~(i) — without the consent of BR and the Dispute Applicant, make a determination which relates to matters which were not specified in the Objection Notice; or~~
  - ~~(ii) — without the consent of BR and the Dispute Applicant, allow any other party to join or intervene in the arbitration.~~~~
- ~~(o) — A determination or direction of the arbitrator will be final and binding, subject to any rights of review by a court, and will have effect on and from the date specified by the arbitrator. Any or all of the provisions of a final determination may be expressed to apply from a specified day which is earlier than the day on which the final determination is made.~~
- ~~(p) — Other than in circumstances where the determination or direction is the subject of review by a court, if a Dispute Applicant does not comply with a determination or direction of the arbitrator, BR is not obliged to continue to seek to resolve the matters subject of the Objection Notice.~~
- ~~(q) — The arbitrator's costs and the costs of the parties to the arbitration must be borne by BR and the Dispute Applicant in such proportions as the arbitrator determines. BR and the Dispute Applicant may make submissions to the arbitrator on the issue of costs at any time prior to the arbitrator's costs determination.~~
- ~~(r) — Where the arbitrator requires it, BR and the Dispute Applicant must indemnify the arbitrator from any claims made against the arbitrator arising in connection with the performance by the arbitrator of its duties under this clause 5.3, such indemnity excluding circumstances where the conduct of the arbitrator constitutes:
  - ~~(i) — negligence (whether wilful or otherwise); or~~
  - ~~(ii) — dishonest or unlawful conduct.~~~~
- ~~(s) — BR must provide a copy of any determination made by the arbitrator to the Auditor:
  - ~~(i) — within 7 days after BR receives the determination; or~~
  - ~~(ii) — if the Auditor has not been appointed within 7 days after BR receives the determination, within 7 days after the Auditor is appointed.~~~~
- ~~(t) — BR must take all reasonable steps within its power to ensure that any determination by the arbitrator is fulfilled or otherwise given effect to, including by enforcing BR's contractual rights against third parties.~~

## ~~6. GOVERNING LAW AND JURISDICTION~~

- ~~(a) — This Appendix C shall be interpreted according to the laws for the time being in force in Western Australia.~~
- ~~(b) — Subject to clause 6(c), BR and the Dispute Applicant submit to the exclusive jurisdiction of the courts of Western Australia in respect of any dispute raised under clause 2.1 and the jurisdiction of all courts competent to hear appeals therefrom and waives any right to object to any proceedings being brought in these courts.~~
- ~~(c) — Compliance with this Dispute Resolution Process is a necessary precondition to the court's jurisdiction (except in the case of urgent injunctive relief).~~

**7. GENERAL**

Except for the obligations of disclosure to the Auditor provided for in this Dispute Resolution Process, the dispute and any terms of resolution are to be kept strictly confidential by BR and the Dispute Applicant.