

# Roy Hill Infrastructure Pty Ltd proposed Segregation Arrangements

Draft Decision

February 2017

**Economic Regulation Authority**

WESTERN AUSTRALIA

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## Invitation to make submissions

Interested parties are invited to make submissions on the draft decision by 23 February 2017 via:

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### CONFIDENTIALITY

In general, all submissions from interested parties will be treated as being in the public domain and placed on the Authority's website. Where an interested party wishes to make a submission in confidence, it should clearly indicate the parts of the submission for which confidentiality is claimed, and specify in reasonable detail the basis for the claim. Any claim of confidentiality will be considered in accordance with the provisions of Section 55 of the *Economic Regulation Authority Act 2003*.

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

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## Introduction

1. The sections of the *Railways (Access) Act 1998 (Act)* and *Railways (Access) Code 2000 (Code)* that are relevant to the establishment of the Segregation Arrangements are as follows:
  - Section 28 of the Act requires a railway owner to make arrangements to segregate its access-related functions from its other functions, and to have appropriate controls and procedures in place to ensure that the arrangements operate effectively and are complied with.
  - Section 29 of the Act requires a railway owner, before it puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28, to obtain the Regulator's approval to the arrangement or variation.
  - Section 42 of the Code provides the requirements for public consultation associated with the Regulator approving a railway owner's Segregation Arrangements.
2. On 13 June 2016, Roy Hill Infrastructure (**RHI**) submitted Segregation Arrangements for the Authority's approval. The Authority published RHI's proposed Segregation Arrangements and called for submissions on 25 October 2016.
3. One submission was received from The Pilbara Infrastructure Pty Ltd. The submission is very brief and expresses support for all of the regulatory instruments proposed by RHI without providing specific comment on any provisions of the proposals.
4. Consequently, this decision does not include reference to any comments received in submissions.

## Draft Decision

5. This document:
  - Summarises each part of RHI's proposed Segregation Arrangements, relates these to the relevant provisions of the Act, and compares each part with the provisions of other railway owners' segregation arrangements where relevant;
  - Provides the Authority's assessment of relevant issues; and
  - Provides the Authority's required amendments where appropriate.

## Part 1 - Introduction

6. Part 1 of the proposed segregation arrangements provides a summary of the objectives of the Segregation Arrangements and outlines the requirements of section 28 and sections 30-34 of the Act<sup>1</sup>, which must be addressed.

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<sup>1</sup> Section 30 of the Act requires a railway owner to satisfy the provisions of Sections 31 to 34, which relate to the protection of confidential information, avoidance of conflicts of interest, duty of fairness and maintenance of separate accounts and records, respectively.

7. The objectives detailed in the proposed segregation arrangements align with the requirements of the Act.
8. The proposed segregation arrangements at part 1.1(e) states that RHI will perform both access-related functions and rail haulage functions associated with the operation of train services.
9. Part 1.1(f) of the proposed segregation arrangements describes RHI as a wholly-owned subsidiary of Roy Hill Holdings Pty Ltd (**RHH**). RHH is described as a vertically integrated business with a variety of functions in the conduct Roy Hill's mining operations.<sup>2</sup>
10. The proposed segregation arrangements, at parts 1.1(g)-(h) state that RHH's objective to minimise costs results in limited senior management roles across the vertically integrated business. The proposed segregation arrangements allow for the recovery of all costs incurred by RHH associated with the requirement for RHI to segregate its access-related functions from its other functions.
11. Part 1.2 of the proposed segregation arrangements indicates that access-related functions will be undertaken in "phases", and proposes that "phase 1 access-related functions" are those relevant to the period prior to the first access agreement taking effect, and "phase 2 access-related functions" are those relevant to the period after the first access agreement takes effect.

### Authority Assessment

12. The objectives of the proposed segregation arrangements adequately reflect the obligations of RHI in relation to segregation as laid out in sections 31-34 of the Act.
13. The obligations referred to in part 1 of the proposed segregation arrangements<sup>3</sup> apply to RHI and are referred to in the *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 (Agreement Act)*. The Act does not impose any segregation obligations on RHH.
14. The recovery of costs incurred by RHH with respect to RHI's segregation obligations can be adequately addressed in RHI's Costing Principles. Accordingly, reference in the proposed segregation arrangements to the recovery of costs is unnecessary.
15. Further, any cost incurred by RHI in providing access should be considered in the context of RHI having contractual obligations to provide third party access.<sup>4</sup> Therefore, segregation is not imposing 'additional costs and burdens'. These costs are normal costs associated with operating a regulated open access railway.
16. On this basis, parts 1(g) and 1(h) of RHI's proposed segregation arrangements are not accepted.

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<sup>2</sup> Including the construction and operation of mining facilities, the marketing of iron ore and the operation of port facilities.

<sup>3</sup> See paragraph 6 of this decision.

<sup>4</sup> RHI's business interests must be considered in a context where RHI knew, at the time it decided to proceed with its investment in the railway infrastructure, that it would be subject to third party access proposals. In particular, in order to obtain the State's assistance with development of the rail infrastructure, RHI has made commitments to the State Government in the Agreement Act, including a commitment to make the railway subject to open third party access arrangements.

17. With reference to part 1.2 of RHI's proposed segregation arrangements, the Authority accepts that the measures necessary for RHI to protect confidential information, ensure fairness, avoid conflicts of interest and provide regulatory accounts may differ depending on whether a person is an entity seeking access or is an operator using the railway.

### Required Amendment 1

Part 1 of RHI's proposed segregation arrangements should be amended such that parts 1(g) and 1(h) are removed.

## Part 2 – Access-Related Functions

18. Part 2 of RHI's proposed segregation arrangements outlines the functions RHI has identified as access-related functions. These include a range of functions dealing with negotiating and administering access agreements.
19. RHI has proposed to compile a separate document (controls and procedures) to "give effect to the Segregation Arrangements approved by the Regulator" at a future time. RHI has described the establishment of controls and procedures as an access-related function in parts 2(a)(iii) and 2(h)(iii)(B) of its proposal.
20. In the final paragraph of Part 2, the proposed segregation arrangements provide that, where the segregation arrangements impose any additional direct or indirect costs on RHH, these costs will be paid by the third party operator.

### Authority Assessment

21. The Authority accepts the list of functions RHI has designated as access related functions, except for those functions listed at Parts 2(a)(iii) and 2(h)(iii)(B).
22. This is because the Act requires, at Section 28(2), that the railway owner must have appropriate controls and procedures in place to ensure that the segregation arrangements operate effectively and are complied with. The railway owner should not rely on a separate future document (the 'controls and procedures') to 'give effect to' the segregation arrangements.
23. Segregation arrangements are the means by which access-related functions are separated from other functions. As such the duty to segregate cannot be considered an access-related function. Hence there is a need to remove the establishment of controls and procedures as an access-related function in parts 2(a)(iii) and 2(h)(iii)(B) of RHI's proposal.
24. The Part 2 reference to recovering additional costs imposed by the segregation arrangements, on RHH or any of its subsidiaries, being reimbursed by the third party operator is problematic and was addressed at paragraph 15 of this decision; provision for recovery of costs is a matter to be addressed in the railway's costing principles.
25. On this basis the last paragraph of Part 2 is not accepted.

## Required Amendment 2

Part 2 of RHI's proposed segregation arrangements should be amended such that:

- Parts 2(a)(iii) and 2(h)(iii)(B) are removed
- the last paragraph of Part 2 is removed.

## Part 3 – Conflicts of Interest

26. Part 3 of the proposed segregation arrangements canvasses a range of issues relevant to avoiding conflicts of interest.
27. Part 3(a) states that:
 

RHI will manage its Access Related Functions so that for RHI's relevant officers, 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 with the business of RHI on the other.
28. This is a paraphrase of Section 32 of the Act (in its entirety) except that Section 32 of the Act refers to the "other business of the railway owner", not "the business of the railway owner".
29. The proposed segregation arrangements provide that RHI will manage its access-related functions in such a way that no conflicts of interest exist in the areas of:
  - Train scheduling and control;
  - Common duties between RHI and RHH functions;
  - Information flow; and
  - Common directorships.
30. The proposed segregation arrangements commit to controlling information flow, ensuring employees sign a Confidentiality and Compliance Agreement, and the implementation of control measures to manage potential Board level conflicts. No proposed Confidentiality and Compliance Agreement or control measures were provided.
31. The text contained in part 3 of the proposed segregation arrangements replicates the text appearing in part 3 of TPI's segregation arrangements, except for the exclusion of the word "other" as noted in paragraph 27, and the exclusion of text equivalent to paragraphs 5 and 6 of part 3 of the TPI document.<sup>5</sup>

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<sup>5</sup> These parts deal with the control of confidential information between personnel managing the mine, rail and port operations of FMG and TPI, the disclosure of information only for the purposes of progressing an access proposal, and the signing of Segregation Awareness Statements.

## Authority Assessment

32. The statutory functions (functions) of Roy Hill Infrastructure, as the railway owner, are:
- “access-related functions” as defined in the Act and the Code, and including functions referred to in the *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 (Agreement Act)* as “access-related functions”
- and
- “other functions” being all other functions contemplated by the Act and the Code,<sup>6</sup> and any other relevant law (such as the Rail Safety Act).
33. The wording of part 3(a) of the proposed segregation arrangements appears to make “access-related functions” separate to the normal business functions of RHI. Access-related functions are a part of the normal business of RHI.
34. RHI appears to have based its part 3 wording on a part of the equivalent section of TPI’s segregation arrangements, as noted in paragraph 31. RHI should include the entirety of the relevant TPI text, including the Segregation Awareness Statement shown in Appendix A to the TPI segregation arrangements, and referred to in this part.<sup>7</sup> The provisions contained in each part of the TPI Segregation Arrangements were approved as complete provisions.
35. Text equivalent to paragraphs 5 and 6 of Part 3 of TPI’s Segregation Arrangements should be included in RHI’s Segregation Arrangements in order to ensure that reporting and disclosure procedures provide adequate protection against conflicts of interest.
36. Further to the considerations of paragraph 22, controls and procedures must be in place and approved by the Regulator as an integral part of the Segregation Arrangements.

### Required Amendment 3

Part 3 of RHI’s proposed segregation arrangements should be amended such that:

- The words “person involved with the business of RHI” are replaced with “person involved in the other business of RHI” in Part 3(a)(ii)
- Text equivalent to paragraphs 5 and 6 of Part 3 of TPI’s segregation arrangements is included
- Text equivalent to that shown in Part 2.5 and Part 4.1 of Appendix A of TPI’s segregation arrangements is included.

<sup>6</sup> Provision of access otherwise than under the Code is not contemplated in the Code or the Act and therefore is not an “other function” of the railway owner.

<sup>7</sup> In particular in part 2.5 of Appendix A, which deals with the management of conflicts of interest, and including the Segregation Awareness Statement (part 4.1 of Appendix A).

## Part 4 – Confidential Information

37. The proposed segregation arrangements provide a definition of confidential information which aligns with the definition provided in the Act. The proposed arrangements acknowledge the Act requirement that RHI must protect confidential information.
38. Part 4.1 of the proposed segregation arrangements provides definitions of confidential information under headings of Phase 1 and Phase 2 – being, respectively, information provided by access seekers prior to an agreement coming into effect and information exchanged in the management of an access agreement.
39. The proposed segregation arrangements provide an assurance that Phase 1 confidential information will be used only for responding to a proposal or negotiating an agreement, or as specifically authorised by the provider.
40. Part 4.1 of the proposed segregation arrangements replicates the provisions of part 4.1 of TPI's segregation arrangements.
41. Part 4.2 of the proposed segregation arrangements replicates the provisions of parts 4(c) - 4(f) of Brookfield Rail's segregation arrangements. This part outlines circumstances in which RHI may disclose confidential information belonging to a person seeking access or an operator, refers to the signing of a Confidentiality and Compliance Agreement by relevant staff, and describes a regime which RHI proposes for the protection of confidential information.
42. Part 4.2(c) provides an assurance that RHI has established, or will establish, a regime for protecting confidential information and describes the scope of that regime. The wording of this part is identical to the wording of Part 4(e) of the Brookfield Rail segregation arrangements, except for the reference to auditing of the access to confidential information in Brookfield Rail's segregation arrangements (at part 4(e)(iii)) which does not appear in RHI's proposed segregation arrangements.

### Authority Assessment

43. The requirements for Brookfield Rail to adequately protect confidential information are not as onerous as the requirements for TPI, as Brookfield Rail is not a vertically integrated operation and does not operate above-rail on its own network, potentially in competition with its access customers. Any misuse of confidential information potentially has more serious consequences in the case of the Pilbara railways owned by TPI and RHI.
44. For this reason, the provisions of Brookfield Rail's segregation arrangements relating to confidential information are much simpler than those in TPI's segregation arrangements. Accordingly, the TPI provisions are more appropriate for RHI's segregation arrangements.
45. The provisions of BR's segregation arrangements at Parts 4(c) to 4(f) – and in part 4.2 of RHI's proposed segregation arrangements - do not address all of the matters addressed in parts 4.2 - 4.4 of TPI's segregation arrangements as summarised below.
46. Part 4.2 of RHI's proposed segregation arrangements addresses 'disclosure' matters in a summary form over one page. Parts 4.2 - 4.4 of TPI's segregation arrangements cover eight pages and address the following issues:

- Confidential information flows – including the role of a compliance officer in controlling access seekers' and operators' information, the aggregation of data for purposes of presentation to management and board
  - Use of the Segregation Awareness Statement and Confidentiality and Compliance Agreement, and the role of parent company executives and board members
  - Hard copy access, and electronic access to confidential information
  - Staff issues, including transfers, consultants and the use of staff in emergency situations
47. Further, part 4 of TPI's Segregation Arrangements refers to Appendix A Attachments 1 - 5. These are controls and procedures relating to:
- Protecting Confidential Information
  - Use of TPI staff in an emergency
  - Preparation by Operators of amendments to daily or fortnightly plans for variable services
  - Provision of information to the TPI or FMG Board/CEO/Management
  - Protection of information to be given to FMG Finance
48. RHI's segregation arrangements should address the matters addressed in parts 4.2 - 4.4 of TPI's segregation arrangements,<sup>8</sup> and should include controls and procedures covering the matters dealt with in TPI's segregation arrangements at Appendix A, Attachments 1 - 5.<sup>9</sup>

#### Required Amendment 4

Part 4 should be amended by the deletion of part 4.2, and replacement of that text with text equivalent to that in TPI's segregation arrangements at parts 4.2 – 4.4, and Appendix A, Attachments 1-5.

## Part 5 – Duty of fairness

49. The proposed segregation arrangements provide an assurance that RHI acknowledges that it must not have regard to the interests of RHI in a way that is unfair to persons seeking access or to other operators.
50. The provisions of part 5 of RHI's proposed segregation arrangements are equivalent to those contained in part 5 of TPI's approved segregation arrangements and include references to the provisions of the Code which assist in ensuring fairness in prices negotiated, and to the consultation, information sharing and dispute resolution mechanisms contained in RHI's standard access agreement.
51. Part 5 also refers to its obligations to comply with its Code Part 5 instruments.

<sup>8</sup> As detailed in paragraph 46 of this decision

<sup>9</sup> As detailed in paragraph 47 of this decision

52. Part 5 replicates the wording of part 5 of Brookfield Rail's segregation arrangements. This part references all of the matters referred to in part 5 of TPI's segregation arrangements

### **Authority Assessment**

53. Part 5 of RHI's proposed segregation arrangements is accepted.

## **Part 6 – Preparation of accounts and records**

54. Part 6 of RHI's proposed segregation arrangements replicates part 6 of TPI's approved segregation arrangements.
55. The proposed segregation arrangements indicate that, prior to the commencement of the first access agreement ("phase 1") RHH will provide regulatory accounts for RHI, and that these will be presented in a format approved by the Regulator.
56. The proposed segregation arrangements indicates that, following commencement of the first access agreement ("phase 2"), RHI will provide its own regulatory accounts, but that statutory and cost accounting functions will remain with RHH.

### **Authority Assessment**

57. The Authority recognises the restrictions on RHI's capacity to provide statutory accounts resulting from its corporate structure. These limitations are similar to those currently applying to TPI.
58. Part 6 of RHI's proposed segregation arrangements is drafted appropriately.

## **Part 7 – Compliance and review**

59. Part 7 of RHI's proposed segregation arrangements contains provisions relating to compliance, review and complaints handling. Part 7.1 provides an assurance that RHI must ensure compliance with the segregation arrangements, and will undertake compliance auditing and implement a complaints handling process. This provision replicates part 7 of TPI's segregation arrangements except for RHI excluding references to the monitoring and audit of compliance by the Regulator.<sup>10</sup>
60. Part 7.2 provides an assurance that RHI will implement a complaints handling process. In this part, RHI provides for any person seeking access to approach the Regulator, and acknowledges the Regulator's powers to investigate any alleged breach of the segregation arrangements.
61. Provision is also made for a complainant to lodge a complaint in writing with RHI and for RHI to conduct an internal investigation. RHI undertakes in this part to provide a written response to the complainant and to provide a copy of that response to the Regulator.
62. The wording of part 7.2 of RHI's proposed segregation arrangements replicates the wording of part 7.2 of TPI's segregation arrangements, except for RHI including a

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<sup>10</sup> TPI has made allowance in its Segregation Arrangements for a TPI-funded compliance audit, not more than once every two years. This assurance is provided in the last two paragraphs of Part 7 of TPI's segregation arrangements.

distinction between persons entitled to (a) approach the Regulator and (b) lodge a written complaint with the railway owner.

63. TPI's segregation arrangements allow for "Interested Entities, Proponents and Operators" to pursue both avenues of complaint. RHI allows only for a "person seeking access" to approach the Regulator, and for a "person seeking access or a rail Operator" to lodge a written complaint with RHI. This distinction suggests that operators may not approach the Regulator with any complaint, but must lodge a written complaint with RHI.
64. RHI's segregation arrangements do not provide a separate "control and procedures" document relating to complaints handling, as TPI does in Appendix A<sup>11</sup> to its segregation arrangements.

### Authority Assessment

65. Part 7.1(a) of RHI's proposed segregation arrangements provides an assurance that auditing of compliance with the segregation arrangements will be undertaken. The text of this part appears to be based on the equivalent part of TPI's segregation arrangements, but the two final paragraphs in part 7 of TPI's segregation arrangements are not replicated in RHI's part 7. These two paragraphs make provision for the Authority to require an audit of compliance with the segregation arrangements, but not more often than once every two years. TPI makes provision for these audits on the basis that the Authority will determine the scope of the Audit, approve the appointment of the auditor, and that TPI will manage and fund the audit.
66. The provisions made by TPI for the Authority to require audits of compliance with the segregation arrangements should be replicated in RHI's segregation arrangements.
67. RHI has used the following words in the opening paragraph (part 7.1(a)) of part 7:
 

*RHI must ensure compliance with these Segregation Arrangements encompass commitments to:*

whereas TPI, in its corresponding part, uses the following words:

*TPI's commitment to ensure compliance with these segregation arrangements encompass commitments to:*

The alternate form of words used by RHI is not clear.
68. It is not acceptable that both "persons seeking access and operators" may lodge a written complaint with RHI, but that only "persons seeking access" may approach the Regulator. Segregation arrangements should not restrict access to the Regulator for a particular class of stakeholder.
69. At part 7.1(b), RHI proposes that "Stakeholders have the ability to express any concern to the Regulator which may arise at any time and the Regulator will investigate such claims". This wording is identical to the wording used by TPI in the second paragraph of its part 7, and does not exclude operators from approaching the Regulator.
70. The word 'will' in part 7.1(b) is not appropriate, as it places obligations on the Regulator which are not in the Code or the Act.

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<sup>11</sup> TPI Segregation Arrangements Appendix A, Attachment 6 "Rail Access - Handling Complaints and Breaches".

71. Further, RHI should use the following description of stakeholders used by TPI: “Interested Entity, Proponent and Operator”. TPI agreed to use these terms in order to offer protection of confidential information to any interested entity who has made a request for information under section 7 of the Code.
72. The descriptions of the complaints handling procedure proposed by RHI (based on the TPI segregation arrangements) is sufficient in detail and would not be improved by the addition of a “controls and procedures” section similar to Appendix A Attachment 6 to TPI’s segregation arrangements, because the relevant text in TPI’s Appendix A is already included in RHI’s proposed segregation arrangements.

### Required Amendment 5

Part 7 of RHI’s proposed segregation arrangements should be amended such that:

- The words “RHI must ensure compliance with these” are replaced with “RHI commits to ensure compliance with these” in part 7.1(a)
- Text equivalent to the last two paragraphs of part 7 of TPI’s segregation arrangements is included as the last two paragraphs of part 7.1
- The words “person seeking Access” in 7.2(a) and “person seeking Access or a rail Operator” in 7.2(b) are replaced with the words “Interested Entities, Proponents and Operators”
- Interested Entity is defined in the definitions part as “an entity that is interested in making an Access Proposal and who has made a request for information under section 7 of the Code”
- Proponent is defined in the definitions part as “an entity that has made a proposal under section 8 of the Code”

## Appendix 1: Summary of Required Amendments

### Required Amendment 1

Part 1 of RHI's proposed segregation arrangements should be amended such that parts 1(g) and 1(h) are removed.

### Required Amendment 2

Part 2 of RHI's proposed segregation arrangements should be amended such that:

- Parts 2(a)(iii) and 2(h)(iii)(B) are removed
- the last paragraph of Part 2 is removed.

### Required Amendment 3

Part 3 of RHI's proposed segregation arrangements should be amended such that:

- The words "person involved with the business of RHI" is replaced with "person involved in the other business of RHI" in Part 3(a)(ii)
- Text equivalent to paragraphs 5 and 6 of Part 3 of TPI's segregation arrangements is included
- Text equivalent to that shown in Part 2.5 and Part 4.1 of Appendix A of TPI's segregation arrangements is included.

### Required Amendment 4

Part 4 should be amended by the deletion of part 4.2, and replacement of that text with text equivalent to that in TPI's segregation arrangements at parts 4.2 – 4.4, and Appendix A, Attachments 1-5.

### Required Amendment 5

Part 7 of RHI's proposed segregation arrangements should be amended such that:

- The words "RHI must ensure compliance with these" are replaced with "RHI commits to ensure compliance with these" in part 7.1(a)
- Text equivalent to the last two paragraphs of part 7 of TPI's segregation arrangements is included as the last two paragraphs of part 7.1
- The words "person seeking Access" in 7.2(a) and "person seeking Access or a rail Operator" in 7.2(b) are replaced with the words "Interested Entities, Proponents and Operators"
- Interested Entity is defined in the definitions part as "an entity that is interested in making an Access Proposal and who has made a request for information under section 7 of the Code"
- Proponent is defined in the definitions part as "an entity that has made a proposal under section 8 of the Code"