

# Roy Hill Infrastructure Pty Ltd proposed Segregation Arrangements

Final Decision

April 2017

Economic Regulation Authority

WESTERN AUSTRALIA

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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 control 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.
3. The Authority published a Draft Decision on RHI's proposed Segregation Arrangements and called for submissions on 9 February 2017. RHI alone responded with a submission.
4. RHI provided with its submission, a revised form of its proposed Segregation Arrangements. The current review of RHI's proposed Segregation Arrangements concerns the document submitted on 13 June 2016, and does not relate to the revised document provided with RHI's submission.
5. Nonetheless, this Final Decision refers to some passages and additional parts contained in the revised document, which address the required amendments outlined in the Draft Decision.
6. This document provides, where applicable:
  - a summary of RHI's proposed Segregation Arrangements and the Authority's Draft Decision in respect of each part of RHI's proposal;
  - a summary of RHI's submission in response to the Authority's Draft Decision as it relates to each part;
  - the Authority's consideration of RHI's submission; and
  - a Final Decision on required amendments to each part.

# Final Decision

## Part 1 – Introduction

### Proposal and Draft Decision

7. Part 1 of the proposed Segregation Arrangements provides a summary of the objectives of the Segregation Arrangements. The Authority agreed in its Draft Decision that the stated objectives adequately reflect the obligations of RHI in relation to segregation as laid out in sections 31 to 34 of the Act.
8. The proposed Segregation Arrangements at Part 1.1(e) describes the functions of RHI, as being to perform access-related functions and also rail haulage functions associated with the operation of train services. Part 1.1(f) of the proposed Segregation Arrangements describes RHI as a wholly-owned subsidiary of Roy Hill Holdings Pty Ltd (**RHH**), describes RHH as a vertically integrated business and describes the various business functions of RHH.
9. The Authority noted in its Draft Decision that the obligations referred to in Part 1 of the proposed Segregation Arrangements apply to RHI and are described by the provisions of the *Railway (Roy Hill Infrastructure Pty Ltd) Agreement Act 2010 (Agreement Act)*. The Act does not impose any segregation obligations on RHH.
10. The proposed Segregation Arrangements, at Parts 1.1(g) and 1.1(h) state that RHH's objective to minimise costs results in limited senior management roles across the vertically integrated business.
  - 1.1(g) Consistent with its objective to be a low cost producer and exporter of iron ore product, RHH has limited senior management roles and a limited number of employees each of whom may assume numerous roles within the complete vertically integrated business.
  - 1.1(h) RHI notes that the objective of these Segregation Arrangements is to ensure that RHI complies with the requirements of the Act to segregate its Access-Related Functions from its other functions, and the functions of RHH. To the extent that the segregation of Access-Related Functions as set out in these Segregation Arrangements imposes additional costs and burdens on RHH and its subsidiary companies (either directly or indirectly), these Segregation Arrangements permit the complete recovery of all of those costs.
11. The proposed Segregation Arrangements provide 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.
12. The Authority outlined in its Draft Decision that reference in the proposed Segregation Arrangements to the recovery of costs is not appropriate, and required the removal of Parts 1.1(g) and 1.1(h).
13. 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.

14. With reference to this part, the Authority accepted 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.

### RHI Submission

15. RHI submitted that paragraphs 1.1(g) and 1.1(h) must be retained in the RHI Segregation Arrangements.
16. RHI submitted that “the Authority refers (in paragraph 14) to the fact that the recovery of costs incurred by RHI can be adequately addressed in RHI’s costing principles”,<sup>1</sup> and that this statement is incorrect.
17. The submission goes on to state that the intent of the costing principles, as provided in section 46 of the Code, is to prescribe the means of determining the floor and ceiling price.

Clause 46 of the Code prescribes that the costing principles document will be prepared by the railway owner to be a “... *statement of the principles, rules, and practices that are to be applied and followed by the railway owner: (a) in the determination of the costs referred to in clauses 7 and 8 of Schedule 4.*” The costs referred to in clauses 7 and 8 of Schedule 4 are only the Floor Price Test (clause 7) and the Ceiling Price Test (clause 8). Therefore it is wrong to suggest that the method by which price of access to a third party might be determined will be dealt with in the Costing Principles – the Costing Principles will deal only with the determination of the Floor Price and the Ceiling Price.

18. RHI submitted that it is important that proponents are made aware that segregation imposes a cost on RHI which will be recovered from the access seeker, and that these costs should be referred to in the Segregation Arrangements, and are relevant to the implementation of the Segregation Arrangements.
19. RHI referred to paragraph 15 of the Authority’s Draft Decision, which states:
- ... any cost incurred by RHI in providing access should be considered in the context of RHI having contractual obligations to provide third party access. Therefore, segregation is not imposing additional costs and burdens. These costs are normal costs associated with operating a regulated open access railway.
20. RHI submitted that it is not correct to suggest that the Segregation Arrangements do not impose additional costs and burdens on RHI. RHI submitted that, although it has assumed a contractual obligation to provide third party access, “... it did not agree to provide access at no cost to the third party access seeker” and that “... the additional costs would not otherwise be incurred if no third party had access to the RHI railway.”<sup>2</sup>

### Authority Assessment

21. RHI submitted, as referred to in paragraph 17 above, that “... it is wrong to suggest that the method by which the price of access to a third party might be determined will be dealt with in the Costing Principles”. The Authority did not suggest this. The price for access is determined not in the costing principles but through negotiations

<sup>1</sup> RHI Submission, 23 February 2017, p.1. In fact, paragraph 14 of the Authority Draft Decision stated that “The recovery of costs incurred by *RHH* (emphasis added) with respect to RHI’s Segregation Arrangements can be adequately addressed in RHI’s costing principles”.

<sup>2</sup> Roy Submission, 23 February 2017, p. 2.

between the railway owner and the proponent. The costing principles provide only for calculating the incremental and total cost, which are used to determine the floor and ceiling prices which should be the boundaries for a negotiated price.<sup>3,4</sup>

22. The Authority agrees with RHI that it has assumed a contractual obligation to provide access, and on this basis the Authority re-states that the costs of providing access, including the costs associated with segregation, are normal business costs of RHI as a regulated open-access railway.
23. The Authority did not suggest in its Draft Decision that RHI has agreed to provide access at no cost, or denied recovery of these costs. The recovery of costs is a matter dealt with in a railway owner's costing principles and is not relevant to the implementation of Segregation Arrangements.<sup>5</sup>

## Final Decision

### Required Amendment 1

Part 1 of RHI's proposed Segregation Arrangements must be amended such that parts 1(g) and 1(h) are removed.

## Part 2 – Access-Related Functions

### Proposal and Draft Decision

24. 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.
25. Parts 2(a)(iii) and 2(h)(iii)(B) refer to the establishment of controls and procedures to "give effect to the Segregation Arrangements approved by the Regulator" as an access-related function.<sup>6</sup>

#### 2. Access-Related Functions

For the purpose of these Segregation Arrangements, Access-Related Functions means:

- (a) performance of activities specified under the Act and the Code including (but not limited to):

...

<sup>3</sup> The Code, at section 9, requires that the railway owner provide a proponent with a floor and ceiling price, and the costs (incremental and total costs) on which those prices are based. A price for access is negotiated based on these limits. The costs referred to in Clauses 7 and 8 of Schedule 4 to the Code are the Incremental Costs and Total Cost, not the Floor Price Test and the Ceiling Price Test as stated by RHI (see quote at paragraph 17).

<sup>4</sup> Refer also to paragraphs 34 and 35 below.

<sup>5</sup> Costs associated with segregation will be incurred by an open-access railway regardless of whether or not a third party has access to the railway.

<sup>6</sup> Roy Hill Infrastructure Segregation Arrangements, 13 June 2016, pp. 4-5.

(iii) ensuring that suitable controls, measures and procedures are *established* to give effect to the Segregation Arrangements approved by the Regulator; and

...

(h) regulatory compliance which includes:

(iii) access-related legislative compliance matters as required under the Act and Code, including:

(B) ensuring that suitable policies, procedures and controls are *established* to give effect to, and facilitate compliance with, these Segregation Arrangements approved by the Regulator;

[Italicised emphasis added]

26. These parts indicate RHI is proposing that compliance with the requirements of the Act Section 28(2) (“Duty to segregate”) is an access-related function. The Act, at section 24 defined an “access-related function” as meaning “the functions involved in arranging the provision of access to railway infrastructure under the Code”.
27. In its Draft Decision, the Authority did not accept, as access-related functions, those functions listed at Parts 2(a)(iii) and 2(h)(iii)(B) on the basis that the Segregation Arrangements<sup>7</sup> must be in place regardless of whether or not access is being provided.
28. The last paragraph (not numbered) of Part 2 of the proposed Segregation Arrangements stipulates that third party operators will pay additional direct or indirect costs to the extent these imposed on RHH by the Segregation Arrangements. Consistent with its Draft Decision in respect of Part 1 of RHI’s proposed Segregation Arrangements, the Authority required the removal of this provision as the Segregation Arrangements do not deal with the determination or recovery of costs.<sup>8</sup>

## RHI Submission

29. RHI submitted that the establishment of controls and procedures as described in Parts 2(a)(iii) and 2(h)(iii)(B) of its proposed Segregation Arrangements should be retained as access-related functions on the basis that these are listed as access-related functions in Brookfield Rail’s Segregation Arrangements.
30. RHI did not provide further justification for the inclusion of these functions, or any counter to the Authority’s considerations outlined in paragraphs 22 and 23 of the Draft Decision.<sup>9</sup> RHI submitted that it was not aware of any reason why these functions would be acceptable in Brookfield Rail’s Segregation Arrangements, but not in those submitted by RHI.<sup>10</sup>

<sup>7</sup> Including associated controls and procedures.

<sup>8</sup> Railway owners are required by section 28 of the Act to have Segregation Arrangements in place. Section 28 describes the duty to segregate in terms of separating access-related functions from other functions. It is not the place of segregation arrangements to provide for the determination of costs, and Costing Principles (required by section 46 of the Code) are provided for that purpose.

<sup>9</sup> Referred to in paragraph 27 above.

<sup>10</sup> Prior to 2009, WestNet Rail was permitted to establish controls and procedures as a separate process to the approval of Segregation Arrangements. The continued inclusion in Brookfield Rail’s Segregation Arrangements of the “establishment” of controls and procedures as an access-related function has been a carry-over from those circumstances, and may be subject to review.



31. RHI submitted that its Segregation Arrangements should retain the last paragraph of Part 2, stating that costs are a significant issue in the context of the Segregation Arrangements.

### Authority Assessment

32. Section 28 of the Act requires the railway owner to make arrangements to segregate its access-related functions from other functions. Section 28 also requires the railway owner to have appropriate controls and procedures to ensure compliance with the Segregation Arrangements and their effective operation.
33. The segregation of access-related functions from other functions therefore cannot occur until the controls and procedures are established and put in place.
34. The Authority is prepared to accept that the maintenance of Segregation Arrangements may include ongoing review of controls and procedures, and related compliance and reporting obligations. On this basis, the Authority will accept the inclusion of Parts 2(a)(iii) and 2(h)(iii)(B) with the word “established” replaced with “maintained” in both instances.<sup>11</sup>
35. A railway owner’s Costing Principles provide the means of determining recoverable costs. The Authority has not allowed the recovery of costs related to the establishment of Segregation Arrangements in previous cost determinations.<sup>12</sup> The Code does not provide for the recovery of actual historical costs of setting up a regulated railway, but only for the recovery of the efficient costs of operating a regulated railway providing access, which would include the maintenance of segregated business units, but not necessarily their establishment.

### Final Decision

#### Required Amendment 2

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

- the last paragraph of Part 2 is removed.
- The word “established” is replaced with “maintained” in Parts 2(a)(iii) and 2(h)(iii)(B).

## Part 3 – Conflicts of Interest (section 32)

### Proposal and Draft Decision

36. Part 3 of RHI’s proposed Segregation Arrangements canvas a range of issues relevant to avoiding conflicts of interest.
37. Part 3(a) states that:

<sup>11</sup> Refer to italicised wording in paragraph 25 of this document.

<sup>12</sup> For TPI in 2013 and Brookfield Rail in 2014.

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.

38. 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”. 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.
39. In its Draft Decision, the Authority clarified that access-related functions are a part of the normal business of RHI, and required that the word “other” be inserted into Part 3(a) such that it reads:.

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 *other* business of RHI on the other.  
[Italicised emphasis added]

40. The proposed Segregation Arrangements commits to controlling information flow, ensuring employees sign a Confidentiality and Compliance Agreement, and the implementation of control measures to manage potential Board level conflicts. However, a proposed Confidentiality and Compliance Agreement and control measures are not provided. The Authority required that these elements be added to this part.
41. 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 above, and the exclusion of text equivalent to paragraphs 5 and 6 of Part 3 of TPI's Segregation Arrangements. These paragraphs state:

Relevant managers will report to the General Manager Rail, who in turn reports to the Director Operations. TPI considers that this reporting arrangement is necessary because of the need to closely integrate the operation of the mine, rail and port logistics chain infrastructure owned by FMG and TPI. However, measures will be in place to ensure the protection of Interested Entity, Proponent and Operator Confidential Information where any convergence occurs. Specifically, the managers responsible for train control and track will liaise with the Commercial/Compliance Officer on access-related matters. Further, they will report directly to the General Manager Rail and will disclose Interested Entity's, Proponent's and Operator's Confidential Information to this position only for the purpose of progressing an Access Proposal, negotiation of access or in support of administering an Access Agreement. Similarly, the General Manager Rail, in its direct reporting to the Director Operations on access-related matters, will be bound by the same framework.

The General Manager Rail, Director Operations and the CEO will sign Segregation Awareness Statements. They will be under an obligation to not disclose Interested Entity or Proponent Confidential Information to other areas or staff within TPI and FMG. TPI will implement control measures (as outlined below and in the Segregation Manual) to manage potential conflicts of interest in handling Proponents' and Operator's Confidential Information. These procedures will be in relation to the handling of the details of Access negotiations and Access Agreements.<sup>13</sup>

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<sup>13</sup> Rail Access Segregation Arrangements The Pilbara Infrastructure, May 2014, paragraphs 5 and 6.

42. These parts of TPI's document 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. In its Draft Decision, the Authority required that text equivalent to paragraphs 5 and 6 of Part 3 of the TPI document be added.

### **RHI Submission**

43. In its submission, RHI accepted the Authority's requirement that the word "other" be added to Part 3(a).
44. RHI submitted, in respect of the requirement to insert text equivalent to paragraphs 5 and 6 of Part 3 of TPI's Segregation Arrangements, that it had deliberately omitted this text. RHI indicated that it had omitted this text as, in its view, the text provides too much detail on reporting chains, and that such detail becomes out of date too quickly.
45. RHI submitted that it is sufficient for the Segregation Arrangements to impose an obligation to avoid conflicts of interest without setting out in detail the organisational structure of RHI.
46. RHI accepted the requirement to add text equivalent to Parts 2.5 and 4.1 of Appendix A of TPI's Segregation Arrangements. RHI provided suggested text in its submission to meet that requirement.<sup>14</sup>

### **Authority Assessment**

47. RHI has stated that it is sufficient for the Segregation Arrangements to impose an obligation to avoid conflicts of interest without setting out in detail the organisational structure of RHI. However, the Authority considers that it is not sufficient for the Segregation Arrangements to impose an obligation to avoid conflicts of interest without providing adequate assurance to access seekers of the way that obligation will be met. For this reason, the Authority does not consider that the organisational details shown in paragraphs 5 and 6 of Part 3 of TPI's Segregation Arrangements provide unwarranted detail, but instead provide the detail necessary to adequately assure access seekers who expect to liaise or rely upon those parts of RHI's business.
48. However, the Authority agrees that the nomination of position titles may render such details out of date from time to time.
49. RHI has indicated positions elsewhere in its suggested text<sup>15</sup> without referring to position titles. Where TPI refers to "The Commercial and Compliance Officer", RHI refers to "the person responsible for access proposals and responding to access proposals". The Authority considers that RHI may provide further assurances relating to the depth of linkages of functions within its business that are subject to the obligation to avoid conflicts of interest without nominating position titles.

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<sup>14</sup> At the italicized paragraphs on page 4 of its submission, and as Annexure A to the revised document attached to its submission.

<sup>15</sup> The italicized text on page 4 of RHI's submission, provided to replicate Part 2.5 of Appendix A of TPI's Segregation Arrangements.

50. The Authority agrees that the text provided by RHI in its submission by way of meeting the requirement to replicate the provisions of Parts 2.5 and 4.1 of Appendix A of TPI's Segregation Arrangements is sufficient for that purpose.

## Final Decision

### 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.

## Part 4 – Confidential Information (section 31)

### Proposal and Draft Decision

51. The proposed Segregation Arrangements provides a definition of confidential information which aligns with the definition provided in the Act. 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.
52. 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.
53. Part 4.1 of the proposed Segregation Arrangements replicates the provisions of Part 4.1 of TPI's Segregation Arrangements. 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 of 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.
54. 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.
55. 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 could have more direct commercial consequences in the case of the Pilbara railways owned by TPI and RHI.

56. For this reason, the provisions of Brookfield Rail's Segregation Arrangements relating to confidential information are simpler than those in TPI's Segregation Arrangements.
57. In its Draft Decision, the Authority considered TPI's provisions are more appropriate for RHI's Segregation Arrangements than Brookfield Rail's provisions, and provided reasons. The Authority listed the matters addressed in TPI's Segregation Arrangements, and these are restated below.
58. Parts 4.2-4.4 of TPI's Segregation Arrangements 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
59. 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
60. Part 4.2 of RHI's proposed Segregation Arrangements addresses 'disclosure' matters in a summary fashion over one page, consistent with the equivalent provisions of Brookfield Rail's Segregation Arrangements.
61. In its Draft Decision, the Authority required that RHI's Segregation Arrangements address the matters addressed in Parts 4.2 - 4.4 of TPI's Segregation Arrangements, and should include controls and procedures covering the matters dealt with in TPI's Segregation Arrangements at Appendix A, Attachments 1 - 5.

## **RHI Submission**

62. RHI submitted that the obligations to protect confidential information in the Brookfield Rail Segregation Arrangements are not less onerous than those in TPI's Segregation Arrangements. RHI submitted that the obligations are "expressed far more succinctly, in one page instead of (the) eight pages". In its submission RHI did not acknowledge

the matters addressed in TPI's Segregation Arrangements and not in the equivalent part of Brookfield Rail's document.<sup>16</sup>

63. RHI submitted that it is not necessary that confidentiality obligations are set out in any more detail than proposed by RHI, as that level of detail is appropriate for Brookfield Rail.
64. RHI did not address in its submission the relevant differences between the Brookfield Rail and TPI businesses – referred to by the Authority in paragraphs 43 and 44 of its Draft Decision<sup>17</sup> – that explain the less comprehensive obligation for protection of confidential information on Brookfield Rail than on TPI.

### **Authority Assessment**

65. RHI's business has more in common with TPI than with Brookfield Rail. The Authority therefore considers that RHI's confidentiality obligations should be similar to TPI's confidentiality obligations.
66. Many provisions in Parts 4.2-4.4 and Appendix A of TPI's Segregation Arrangements were added following a review of TPI's Segregation Arrangements in 2013-14.
67. These revisions resulted in a clear distinction between the Stage 1 and Stage 2 provisions of TPI's Segregation Arrangements such that adequate protections were extended to all access seekers<sup>18</sup> and operators in a manner agreed to by TPI as appropriate for the operation of its Pilbara railway.
68. In the absence of a similar level of detail, the references in RHI's Segregation Arrangements to Phase 1 and Phase 2 (analogous to TPI's Stage 1 and Stage 2) are less meaningful or useful, as there are no proposed controls and procedures outlining the different protections afforded access seekers and operators, as outlined in paragraph 51 and 52 of this document.
69. In the absence of further detail, the references to phase 1 and phase 2 in RHI's proposed Segregation Arrangements do little more than highlight that the requirements to protect entities are different under each phase, without describing the manner in which these protections will be offered.
70. In the Pilbara, protection of confidential information belonging to access seekers is critical for commercial reasons and the obligations of a vertically integrated railway

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<sup>16</sup> As referred to in paragraphs 58 and 59 of this document.

<sup>17</sup> The principle difference in the businesses is that TPI operates on its own network, in potential competition with third party operators, and Brookfield Rail does not.

<sup>18</sup> Not just proponents, but also persons seeking access who have not yet lodged a proposal.

owner in the Pilbara therefore should be more comprehensive than for a below-rail owner of a general freight network.

## Final Decision

### 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 (section 33)

### Proposal and Draft Decision

71. 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.
72. 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.
73. Part 5 also refers to RHI's obligations to comply with its Code Part 5 instruments.
74. In its Draft Decision, the Authority accepted Part 5 of RHI's proposed Segregation Arrangements.

## Part 6 – Preparation of accounts and records (section 34)

### Proposal and Draft Decision

75. Part 6 of RHI's proposed Segregation Arrangements replicates Part 6 of TPI's approved Segregation Arrangements.
76. The proposed Segregation Arrangements indicates that, prior to the commencement of the first access agreement ("phase 1") RHH will provide regulatory accounts for RHI, and that these will be in a format approved by the Regulator.
77. 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.
78. In its Draft Decision, the Authority accepted Part 6 of RHI's proposed Segregation Arrangements.

## Part 7 – Compliance and review

### Proposal and Draft Decision

79. 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 the exclusion of references to the monitoring and audit of compliance by the Regulator.<sup>19</sup>
80. 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, use the following words:
- TPI's commitment to ensure compliance with these Segregation Arrangements encompass commitments to:*
- The Authority, in its Draft Decision, required RHI to adopt the form of words used by TPI, as the text proposed by RHI is not clear.
81. Part 7.1(a) of RHI's proposed Segregation Arrangements provides an assurance that auditing of compliance with the Segregation Arrangements will be undertaken, but does not provide for audits to be undertaken at the ERA's request. TPI makes provision for the Authority to request an audit, but not more often than once every two years. In its Draft Decision, the Authority required that RHI replicate the TPI provisions for the Authority to require audits of compliance with the Segregation Arrangements.
82. 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.
83. RHI allows 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.<sup>20</sup> This distinction indicates a proposal by RHI that operators may not approach the Regulator with any complaint, but must lodge a written complaint with RHI.
84. It is not acceptable that Segregation Arrangements restrict access to the Regulator by a particular class of stakeholder. The Authority required, in its Draft Decision, that "Interested Entities, Proponents and Operators" have access to both recourses for complaint.

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<sup>19</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.

<sup>20</sup> TPI's Segregation Arrangements allows for "Interested Entities, Proponents and Operators" to pursue both avenues of complaint.



85. RHI's Segregation Arrangements do not provide a separate "control and procedures" document relating to complaints handling, as TPI does in Appendix A<sup>21</sup> to its Segregation Arrangements.
86. In its Draft Decision, the Authority agreed that 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.
87. In its Draft Decision, the Authority required that RHI use the following description of stakeholders used by TPI: "Interested Entity, Proponent and Operator", and to adopt the definitions of each term as used by TPI. TPI has 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.

### **RHI Submission**

88. RHI agreed with all elements of Required Amendment 5 in the Authority's Draft Decision.

### **Authority Assessment**

89. In its Draft Decision, the Authority noted that the word "will" as it appears in Part 7.1(b) of RHI's proposed Segregation Arrangements is not appropriate, as it places obligations on the Regulator which are not in the Code or the Act.
90. The Authority did not reflect this notation in Required Amendment 5 of the Draft Decision, and a requirement to replace "will" with "may" in 7.1(b) is added to Required Amendment 5 in this Final Decision.

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<sup>21</sup> TPI Segregation Arrangements Appendix A, Attachment 6 "Rail Access - Handling Complaints and Breaches".

## Final Decision

### 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's commitments to ensure compliance with these" in Part 7.1(a)
- The word "will" is replaced with "may" in 7.1(b)
- Text equivalent to the last two paragraphs of Part 7 of TPI's Segregation Arrangements are 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 must 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:

- the last paragraph of Part 2 is removed.
- The word "established" is replaced with "maintained" in Parts 2(a)(iii) and 2(h)(iii)(B).

### 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's commitments to ensure compliance with these" in Part 7.1(a)
- The word "will" is replaced with "may" in 7.1(b)
- Text equivalent to the last two paragraphs of Part 7 of TPI's Segregation Arrangements are 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"