

ROY HILL INFRASTRUCTURE PTY LTD
SUBMISSION TO ECONOMIC REGULATION AUTHORITY
DRAFT DECISION –PROPOSED SEGREGATION ARRANGEMENTS

1 INTRODUCTION

This submission is made by Roy Hill Infrastructure Pty Ltd (**RHI**) in response to the invitation by the Economic Regulation Authority (**Authority**) dated 9 February 2017 for written submissions on the Authority’s draft decision published in February 2017 (**Draft Decision**) in relation to RHI’s proposed Segregation Arrangements.

2 REQUIRED AMENDMENT 1

The Authority has requested that paragraphs 1.1(g) and 1.1(h) are removed.

Paragraphs 1.1(g) and 1.1(h) state as follows:

“(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 completely vertically integrated business.

“(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.”

RHI submits that paragraphs 1.1(g) and (h) must be retained in the RHI Segregation Arrangements. The Draft Decision of 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, and that *“reference in the proposed segregation arrangements to the recovery of costs is unnecessary”*.

Those statements are incorrect, and do not reflect the purpose and intent of the Costing Principles as prescribed in clause 46 of the Railways (Access) Code 2000 (**Code**). 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.

RHI submits that it is important that all participants in the third party access regime process understand and are made aware that the implementation of these Segregation Arrangements imposes a cost on the RHI business, which will be recovered from a third party access seeker. Those costs need to be referred to in the Segregation Arrangements, and should be borne in mind when assessing the implementation of the Segregation Arrangements.

Further, in paragraph 15 of the Draft Decision, the ERA incorrectly suggests that “... 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.”

It is not correct to suggest that the Segregation Arrangements do not impose additional costs and burdens on RHI. RHI may have assumed a contractual obligation to encourage and provide third party access to its railway in its State Agreement (clause 15 of the Railway (Roy Hill Infrastructure Pty Ltd) Agreement 2010), but it did not agree to provide third party access at no cost to the third party access seeker. The references to the recovery from the third party access seeker of the additional costs and burdens imposed on RHI by the Segregation Arrangements is a reference to the additional costs which would not otherwise be incurred if no third party had access to the RHI railway.

It would be quite misleading not to refer to the additional costs and burdens in the Segregation Arrangements – there are real costs involved in the implementation and enactment of the Segregation Arrangements, and they should not be ignored.

Finally, RHI notes that no potential third party access seeker has objected to the references to the recovery of all additional costs in the Segregation Arrangements. Third party access seekers had an opportunity to object to the references to the additional costs which would be required to be paid by the third party during the consultation phase of the segregation arrangements, but no potential third party access seeker chose to do so.

3 REQUIRED AMENDMENT 2

The Authority has requested that paras 2(a)(iii) and 2(h)(iii)(B) are removed, and the last paragraph of Part 2 is removed.

RHI submits that paras 2(a)(iii) and 2(h)(iii)(B) should be retained. The suggestion by the Authority that “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)” is incorrect. Identical paragraphs to those sought to be deleted from RHI’s Segregation Arrangements have been included in the segregation arrangements for Brookfield Rail. RHI is not aware of any reason why the

paragraphs would be acceptable in Brookfield Rail's segregation arrangements, but not in those which have been submitted by RHI.

The last paragraph of Part 2 should be retained as (as stated above) it is quite misleading if the Segregation Arrangements do not discuss or consider costs. Costs are a significant issue in the context of the Segregation Arrangements, and they should not be dismissed or hidden.

4 REQUIRED AMENDMENT 3

The Authority has suggested that Part 3 of RHI's proposed segregation arrangements should be amended so that the words "person involved with the business of RHI" are replaced with "person involved in the other business of RHI". This amendment is acceptable, although RHI would question whether that change is of any practical effect.

The Authority has also requested that "text equivalent to paragraphs 5 and 6 of Part 3 of TPI's segregation arrangements is included". RHI deliberately omitted from the RHI Segregation Arrangements text equivalent to paragraphs 5 and 6 of TPI's segregation arrangements because those paragraphs set out in detail (in RHI's view, too much detail) the reporting chain at FMG. In the view of RHI, detail such as that set out in paragraphs 5 and 6 of TPI's segregation requirements should not be included because reporting chains and organisational structures change frequently, and detail such as that included in TPI's document quickly becomes out of date and redundant. In RHI's view it is sufficient if the segregation requirements impose obligations to avoid conflicts of interest on personnel: it is not necessary to set out in detail the organisational structures of RHI.

The Authority has also required that "text equivalent to that shown in Parts 2.5 and Part 4.1 of Appendix A of TPI's segregation arrangements is included."

RHI suggests that the following text, which is equivalent to Part 2.5 of Appendix A of TPI's segregation arrangements, may be included in Part 3 of RHI's proposed segregation arrangements:

"RHI commits that no person will perform duties concurrently for RHI and RHH in relation to Access Related Functions. In particular the person responsible for access proposals and responding to access proposals and negotiating access agreements shall not at the same time perform other duties with RHI or RHH which perform haulage functions or could otherwise affect the operations of access seekers.

The following are the main protection control mechanisms which are in place:

- (a) segregation awareness statements;*
- (b) access related procedures;*
- (c) protection of confidential information."*

Further, RHI suggests that a Segregation Awareness Statement (which is equivalent to the statement included in Part 4.1 of Appendix A of TPI's Segregation Arrangements) is not

necessary since RHI has now suggested that the form of Confidentiality and Compliance Agreement attached to the Segregation Arrangements, is executed by any employee or consultant who deals with Access Related Functions.

5 REQUIRED AMENDMENT 4

The Authority has required that Part 4 (which deals with Confidential Information) “...*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.*”

As noted by the Authority, Part 4 of RHI’s Segregation Arrangements has been based on the Brookfield Rail Segregation Arrangements approved by the Authority in December 2016. The obligations in relation to the protection of Confidential Information in the Brookfield Rail segregation arrangements are not less onerous than the obligations set out in the TPI segregation arrangements – they are expressed far more succinctly, in one page instead of the eight pages referred to in the Authority’s draft decision – but that does not lead to the conclusion that the obligations are less onerous. The obligation to maintain the confidentiality of the information is prescribed (in paragraph 4), and the employees of RHI will be required to sign a Confidentiality and Compliance Agreement (paragraph 4.2(b)). The regime for protecting Confidential Information is set out in paragraph 4.2(c) of the Segregation Arrangements.

It is not necessary that confidentiality obligations are set out in any more detail than as set out in paragraph 4 of the RHI Segregation Arrangements – that level of detail was appropriate for Brookfield Rail in December 2016 and it remains appropriate for RHI in February 2017.

RHI is happy to commit to a form of Confidentiality and Compliance Statement. The document attached to this response as Annexure A would be acceptable to RHI. The document has been based on the Confidentiality and Compliance Statement issued by Brookfield Rail in its approved Segregation Arrangements.

6 REQUIRED AMENDMENT 5

The Authority has required that Part 7 of RHI’s proposed segregation arrangements should be amended so that:

- (a) in part 7.1(a) the words “RHI must ensure compliance with these” are replaced with “RHI commits to ensure compliance with “in part 7.1(a).

This amendment is acceptable.

- (b) 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.

This amendment is acceptable. Accordingly the following paragraphs will be inserted at the end of Part 7.1:

RHI agrees to the Regulator monitoring RHI's compliance with the segregation arrangements through an audit of RHI's compliance with the segregation arrangements conducted not more than once every two years. The audit will be carried out by an Independent Auditor approved by the Regulator, with RHI managing and funding the audit. The scope of the audit will be determined by the Regulator.

The final audit report will be provided to the Regulator. The Regulator will publish this report on its website (excluding Confidential Information).

- (c) the words "persons seeking Access" in part 7.2(a) and "person seeking access or a Rail Operator" in clause 7.2(b) are replaced with the words "Interested Entities, Proponents and Operators".

These amendments are acceptable.

- (d) "Interested Entities" 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".

This amendment is acceptable.

- (e) "Proponent" is defined in the definitions part as "an entity that has made a proposal under section 8 of the Code."

This amendment is acceptable.

Attached to this submission is a revised draft of the Segregation Arrangements, which incorporates the amendments required by the Authority, and those amendments which Roy Hill has advised in this response are acceptable.

Roy Hill Infrastructure Pty Ltd

23 February 2017