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Brookfield Rail's Proposed Segregation Arrangements

Public Submission

29 October 2015

[DDG\JDJ\09 3001 2328]

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1. INTRODUCTION

On 18 September 2015, the Economic Regulation Authority (**Authority**) issued a notice seeking public comments on revisions proposed (**Proposed Revisions**) by Brookfield WA Rail Pty Ltd (**BR**) to the segregation arrangements (**Arrangements**) that BR is required to have in place under section 28 of the *Railways (Access) Act 1998* (WA)(**Act**).[1]

Co-operative Bulk Handling Limited (**CBH**) considers that the requirements set out in section 28 are fundamentally important components of the access regime established by the Act. The fact that the requirements are expressly required by a provision of the Act (thereby giving them the same force and prominence as the very obligation for the Minister to establish the *Railways (Access) Code 2000* (the **Code**) itself), as well as the fact that a breach of the Arrangements is an offence, reinforces the importance of the requirements.

Appropriate segregation, as required by section 28, is necessary to ensure the achievement of the main object of the Act of establishing a rail access regime "that encourages the efficient use of, and investment in, railway facilities by facilitating a contestable market for rail operations" (section 4). Without it, the main object cannot be achieved.

The importance of the segregation requirements under section 28 is reflected in the report by the Standing Committee on Constitutional Affairs on the *Government Railways (Access) Bill 1998* (which subsequently became the Act). The report stated that:

> [Section 28] requires the Commission to segregate its access-related functions from its other operational activities with internal controls and procedures. The proper segregation of the access-related functions (i.e. those functions related to the use of railway infrastructure per definitions in clause 3) from operational functions is **extremely important** to ensure that equity and confidentiality are maintained when Third Parties are negotiating access to rail infrastructure … (CBH's **emphasis**)

For CBH, the importance of the Arrangements has a number of implications. First, it suggests that the Authority should take considerable care in assessing the Proposed Revisions of the Arrangements to ensure that they satisfy the specific requirements of the Act (especially sections 28 and 30) and the main object of the Act. Second, it suggests that the Authority should examine each of the Proposed Revisions in detail on an individual basis to ensure that that they satisfy BR's obligations. Third, it suggests that the Authority should take a strict view as to the requirements of section 28 (and other related provisions) and compliance with them.

To assist the Authority, this document sets out CBH's comments in relation to the Proposed Revisions. It requests the Authority take them into account before making a decision under section 29(1) about whether to approve the Proposed Revisions.[2]

CBH has a number of serious concerns about the Arrangements and the Proposed Revisions. Those concerns include the following matters:

(a) It appears that the wrong entity may have submitted the Arrangements. The Arrangements should have been submitted by Brookfield Rail Pty Ltd, not its holding company, Brookfield WA Rail Pty Ltd.

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[1] Unless otherwise indicated, references to sections are references to sections of the Act.

[2] The Proposed Revisions to the Arrangements are extensive, as shown in the "marked-up" version of the Arrangements published on the Authority's website. For convenience, these comments refer to Proposed Revisions by referring to the "clean" version of the Arrangements (illustrating the Arrangements as they would stand if the Authority were to approve them) on the Authority's website.

(b) The Arrangements do not segregate BR's access related functions (as defined in the Act) from its other functions. This may be because BR has interpreted "access-related functions" to mean access to the railway infrastructure. The definition of "access-related function" is more narrow than that: it only covers the functions involved in arranging the provision of access to railway infrastructure **under the Code**. It does not include the provision of access to railway infrastructure **otherwise than under** the Code (or any other function).

(c) The drafting of the Proposed Revisions is unclear and imprecise in many places, with the result that it is difficult to follow and understand them. In addition, the Proposed Revisions lack any meaningful controls or procedures to ensure they operate effectively and are complied with. CBH considers that the Arrangements need to be substantially re-drafted so that:

(i) the language is the same as the language in the Act—the Proposed Revisions recast the obligations in a way that substantially lessens the extent of the obligations on BR;

(ii) there are controls and procedures to ensure the Arrangements operate effectively and are complied with; and

(iii) all controls and procedures and clearly defined, so that compliance with them can be objectively assessed (particularly given that it is an offence to breach the Arrangements under section 29(4)).

(d) The Proposed Revisions include the creation of a dispute resolution process that, in effect, appears to be an attempt to create a "stunted access regime" for entities seeking access **outside** the Code only (leading to the unusual situation that a person seeking access outside the Code has additional rights to enforce the Act that are not available to a person seeking access under the Code). The inclusion of such a regime in a document of this kind is unusual, and the regime itself is manifestly inadequate as an access regime (or, if any issue is taken to describing as an access regime, dispute resolution mechanism). CBH considers that if a dispute resolution mechanism is to be included in the Arrangements, then it needs to be entirely redrafted before it can be viewed as a control that ensures the Arrangements operate effectively and are complied with.

For the detailed reasons set out in this document, CBH submits that, taking account of the matters set out in section 20(4) of the Act, the Authority should not and cannot make a decision under section 29(1) to approve the Proposed Revisions. Further, CBH submits that the Proposed Revisions reveal that the existing Arrangements do not meet the requirements of the Act, and need to be urgently reviewed.

2. LEGAL BASIS FOR THE ARRANGEMENTS/PROPOSED REVISIONS

2.1 Authority's role

Section 29(1) of the Act provides that, before a railway owner puts in place or varies any arrangement for the purpose of carrying out its obligations under section 28, it must obtain the Authority's approval to the arrangement or variation. In this case, BR is seeking approval to Proposed Revisions to the existing Arrangements, which were approved by the Authority on 6 October 2009.

When performing the function of deciding whether or not to approve the Proposed Revisions under section 29(1), the Authority must take into account the matters set out in section 20(4) of the Act. These are:

(a) the railway owner’s legitimate business interests and investment in railway infrastructure;

(b) the railway owner's costs of providing access, including any costs of extending or expanding the railway infrastructure, but not including costs associated with losses arising from increased competition in upstream or downstream markets;

(c) the economic value to the railway owner of any additional investment that a person seeking access or the railway owner has agreed to undertake;

(d) the interests of all persons holding contracts for the use of the railway infrastructure;

(e) firm and binding contractual obligations of the railway owner and any other person already using the railway infrastructure;

(f) the operational and technical requirements necessary for the safe and reliable use of the railway infrastructure;

(g) the economically efficient use of the railway infrastructure; and

(h) the benefit to the public from having competitive markets.

CBH submits that a core objective of segregating a railway owner's access-related functions from its other functions is to promote the economically efficient use of railway infrastructure, and increase public benefits by promoting competitive markets that depend on below-rail access, by ensuring that the railway owner treat access seekers fairly and equitably, in accordance with the requirements of the Act and Code.

It is also important to understand the context of the Proposed Revisions. CBH understand that BR is proposing the variations because a consortium assembled by Brookfield Asset Management Inc (which includes Brookfield Infrastructure Partners L.P.) (which are related to BR) is seeking "merger clearance" from the Australian Competition and Consumer Commission (**ACCC**) in relation to its proposed acquisition of Asciano Limited (**Asciano**). The ACCC is conducting public inquiries about that proposed acquisition, which specifically includes the impact on competition arising from the vertical integration that will result from the proposed acquisition. This relevantly includes "the combination of the above rail freight services operated by Pacific National with the below rail infrastructure network operated by Brookfield Rail in Western Australia".[3]

Given this, the focus of the Authority's assessment may be on segregating BR's access-related functions from its potential interests in Pacific National. However, while that is critically important, CBH's view is that the Authority must not only consider the proposed variations, but also the Arrangements as a whole (irrespective of whether or not the Asciano transaction proceeds). While CBH's submission is focussed on the Arrangements as varied by the Proposed Revisions, it submits that it should not be open for the "status quo" under the existing approved Arrangements to continue. The Arrangements need to be updated whether or not the Asciano acquisition proceeds. Unfortunately, the Proposed Revisions are inadequate and should not be accepted.

2.2 Obligation to have Arrangements

Section 28 states that:

(1) A railway owner must make arrangements to segregate its access-related functions from its other functions.

(2) A railway owner must have appropriate controls and procedures to ensure that the measures in place under subsection (1) —

[3] See the letter to interested parties dated 19 August 2015 from David Jones, Acting General Manager, Merger Investigations entitled "Request for submissions: Brookfield consortium proposed acquisition of Asciano Limited" published on the ACCC website.

(a) operate effectively; and

(b) are complied with.

There are a number of important concepts in this section. First, it applies to a "railway owner". Second, it requires a railway owner to make "arrangements". Third, the arrangements must be to "segregate". Fourth, the segregation that occurs is between the railway-owner's "access-related functions" and the railway-owner's "other functions".

2.3 Railway owner and railway infrastructure

Section 3(1) states that a "railway owner" is "the person having the management and control of the use of the railway infrastructure". Accordingly, section 28 imposes an obligation, in relation to railway infrastructure, on the person "…having the management and control of the use of…" that railway infrastructure.

This raises two foundational questions. First, what is the "railway infrastructure" with which the Arrangements are concerned? And second, who is the person having the management and control of the use of that railway infrastructure?

What is the "railway infrastructure"?

On the first question, the Arrangements state that:

> 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. (Page 1) (Emphasis added).

Elsewhere, the Arrangements refer to the "Network". That term is defined as meaning:

> …the railways network and associated infrastructure **controlled** by BR in Western Australia to which:
>
> (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
>
> (b) the Code applies. (Page 13)(Emphasis added)

Based on these definitions alone, there is ambiguity as to the railway infrastructure to which the Arrangements apply. In particular:

- it is unclear whether the Arrangements are intended to apply to infrastructure which BR "owns" or infrastructure which BR "controls", or whether it is intended to refer to infrastructure which BR both owns and controls; and
- in any event, the Arrangements do not themselves identify the railway infrastructure that BR owns, controls, or owns and controls, to which the Code applies (or which are subject to the Code) that are the subject of the Arrangements.

Due to that ambiguity, it is not possible to conclusively determine – on the face of the Arrangements – exactly to which railway infrastructure the Arrangements are intended to apply. To make such a determination, it is necessary for a reader to work out for him or herself which railway infrastructure in Western Australia is both owned or controlled (or owned and controlled) and subject to the Act and Code.

This ambiguity is undesirable and could lead to uncertainty in relation to the precise extent of the railway owner's obligation to comply with section 28 and the Arrangements themselves. It could also lead on to unnecessary difficulties in enforcing the Arrangements under section 29(4)(a) of the Act.

Accordingly, CBH submits that the Authority should not approve the Arrangements in their current form. CBH suggests that these uncertainties could be addressed relatively easily

by changing the Arrangements to specify precisely (such as by listing) the railway infrastructure to which they apply.

In addition, it seems that paragraph (a) of the definition of "Network" may limit the extent of the railway infrastructure to which the Arrangements apply. That paragraph seems to indicate that at least some parts of the Arrangements only apply to railway infrastructure to which "Access has or can be granted to an Operator to operate train services under an Operational Track Access Agreement or Track Access Agreement". By deduction, parts of the railway infrastructure to which access has not been so granted to an "Operator" do not form part of the "Network" and, it would seem, do not fall within the scope of the Arrangements. If that is the case, then it would seem that the Arrangements do not satisfy the railway owner's obligations under section 28 in respect of that "out of scope" railway infrastructure, and that the railway owner will require separate Arrangements in relation to that infrastructure.

Who is the person who owns and controls?

As noted above, the Arrangements state (at page 1) that "BR" is the "owner" of a "railways network in Western Australia" and also (at page 13) that it controls a railway network and associated infrastructure. This raises a number of issues.

The first is that the person who must implement the Arrangements under section 28 is the person "…having the management and control of the use of…" the relevant railway infrastructure. As the Arrangements do not record that BR manages (as opposed to owning or controlling the use of) the railway infrastructure, it is not clear whether BR is the "railway owner" for the purposes of section 3(1). In this respect, it is notable that the definition of "railway owner" in section 3(1) draws a distinction between "management" and "control of the use of".

The second is concerned with a factual question as to whether it is actually "BR" that owns and controls the relevant railway infrastructure, as stated in the Arrangements (or, more relevantly for the purposes of sections 3(1) and 28, manages and controls). That question arises because:

(a) "BR" is defined (at page 12) to mean "Brookfield WA Rail Pty Ltd ACN 118 144 960", but the person with whom CBH has been dealing in relation to its current access proposal under the *Railways (Access) Code 2000* (WA)(**Code**) is Brookfield Rail Pty Ltd ABN 42 094 721 301 (and Co-operative Bulk Handling Limited's application to the Supreme Court in relation to that proposal was made against Brookfield Rail Pty Ltd: see, for example, the interlocutory decisions *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd* [2014] WASC 31 and *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd (No 2)* [2014] WASC 38);

(b) the **existing** Segregation Arrangements (approved April 2008) are in the name of "WestNet Rail Pty Limited", which, according to a search of the Australian Securities and Investments Commission's register, is Brookfield Rail Pty Ltd's (ABN 42 094 721 301) former name;

(c) the existing "Part 5 instruments" under the Code have been submitted in the name of:

    (i) "Brookfield Rail Pty Ltd" (but the Authority did not require it to nominate an ACN or ABN) in the case of the Train Management Guidelines (approved in February 2013), and Train Path Policy (approved in February 2013); and

    (ii) "WestNet Rail Pty Limited" (which is Brookfield Rail Pty Ltd's former name) in the case of the Costing Principles (approved April 2011), and Overpayment Rules (approved April 2011); and

(d) the persons who are the lessees of the Western Australian rail network that was "privatised" in December 2000 (which CBH assumes is the railway infrastructure to which the Arrangements are intended to apply) are Brookfield Narrowgauge Pty Ltd and Brookfield Standardgauge Pty Ltd.

Brookfield Rail Pty Ltd has previously represented to CBH that it is the railway owner of the Western Australian Government rail freight network for the purposes of the Act. It has also fully engaged with CBH on the basis that it is the person who controls the use of the railway infrastructure to which CBH has sought access under the Code.

CBH has not had any dealings (of which it is aware) with Brookfield WA Rail Pty Ltd in relation to the provision of access under the Act and Code. All of its dealings have been with Brookfield Rail Pty Ltd. If that is not the case, then CBH has not been aware of it.

On that basis, it is apparent to CBH that the person who controls the use of (at least) the railway infrastructure to which CBH seeks access is not "Brookfield WA Rail Pty Ltd ACN 118 144 960". If that is the case, then "Brookfield WA Rail Pty Ltd ACN 118 144 960" cannot be the "railway owner" for the purposes of section 28 and the Arrangements.

In these circumstances, CBH submits that the Authority should clarify the identity of the railway owner of the relevant railway infrastructure. It should confirm that "Brookfield WA Rail Pty Ltd ACN 118 144 960" has both:

- the management; and
- the control of the use of,

the relevant railway infrastructure.

If the railway owner is not "Brookfield WA Rail Pty Ltd ACN 118 144 960", then the Authority should not approve the Arrangements (or Proposed Revisions).[4]

2.4 Arrangements

As discussed above, section 28(1) requires that the railway owner to make "arrangements". Under section 29(1), the railway owner must obtain the Authority's approval before it puts in place, or varies, "any arrangement". Under section 29(4)(a), a railway owner commits an offence if it fails to comply with "an arrangement" approved under section 29(1).

The Act does not define the term "Arrangement". Its ordinary meaning is:

> *n.* arranging or being arranged; condition or manner of being arranged; thing arranged…; (in *pl.*) plans, measures,… (The Australian Concise Oxford Dictionary).

Based on that ordinary meaning, it is apparent that section 28(1) requires the railway owner to arrange, make plans or take measures, to segregate as required by that section.

In addition, it is apparent based on the language of section 29(1) – which requires approval before an arrangement is put in place or varied – that the arrangement must actually be put in place. To do that, it must be capable of actually being put in place (and subsequently varied).

On this basis, a railway owner is required to arrange things (such as by developing plans or measures) to segregate as required by section 28(1) and to then actually put those things in place. By virtue of section 29(4)(a), it must subsequently comply with them.

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[4] For convenience, CBH assumes for the purposes of the rest of this document that "BR" is the railway owner.

Consistently with this, it is CBH's view that a railway owner cannot satisfy the requirements of section 28(1) by merely proposing that it will do the thing required by a section (such as by merely stating that it will segregate as required in section 28(1) or that it will " not have regard to the interests of the railway owner in a way that is unfair" as required by section 34). The railway owner must actually arrange things – have plans or measures supported by controls and procedures – that actually do these things or ensure that they are complied with.

CBH therefore submits that the Authority should not approve the Arrangements (or Proposed Revisions) if they, or any part of them, merely proposes to do a thing required by a provision of the Act without actually specifying the arrangement that it proposes to put in place to do or ensure that thing. (And, in terms of the "language" used, the document describing the Arrangements should describe what **is** in place, rather than describe what **will** be put in place at an unspecified time in the future.)

This is an issue that arises in a number of places in the Arrangements.

In addition, CBH notes that language of sections 29(1) and (4) operates by reference to "any arrangement" and "the arrangement" respectively. That is, they are concerned with the singular, whereas section 28(1) is concerned with the plural (ie "arrangements"). This suggests that the railway owner is required to put in place as many arrangements as necessary to segregate, but that the Authority is required to approve each separate arrangement in and of itself (rather than as a composite).

2.5 Segregate

The Act does not define the term "segregate". Its ordinary meaning is to "…put apart from the rest, isolate" or to "set apart, separate" (The Australian Concise Oxford Dictionary).

On that basis, the fundamental obligation imposed by section 28(1) is that a railway owner must put in place arrangements to set apart, separate or isolate some of its functions from its other functions.

It follows from this that the arrangements proposed by a railway owner must achieve an actual separation or isolation of the railway owner's access related functions from its other functions. A railway owner will not satisfy that obligation if the arrangements it makes do not actually separate or isolate the access-related functions.

Further, it is notable that the obligation to make arrangements to segregate (in the sense of separating or isolating) access related functions is absolute and is not qualified in any way. As a result, Arrangements will not discharge the obligation under section 28(1) if they only partially separate or isolate the access related functions.

CBH submits that this is an issue in relation to the Arrangements and Proposed Amendments as they do not put in place arrangements to fully separate or isolate BR's access related functions from its other functions. For that reason, CBH submits that the Authority should not approve them in their current form (and nor should the Authority allow the existing Arrangements to continue in their current form).

2.6 Access related functions

Section 24(1) defines the term "access-related functions" to mean:

> … the functions involved in arranging the provision of access to railway infrastructure under the Code;

Accordingly, the arrangements that a railway owner is required to make under section 28(1) must segregate (in the sense of separating or isolating):

(a) its functions involved in arranging the provision of access to railway infrastructure under the Code; from

(b) its other functions.

In the case of BR, this means that the Arrangements must segregate:

(a) the functions of BR that are involved in arranging the provision of access to railway infrastructure under the Code; from

(b) BR's other functions.

The Arrangements and Proposed Revisions do not, on CBH's reading, address the separation of BR's functions in arranging the provision of access under the Code from its other functions. For example, they do not appear to address the segregation of BR officers and directors involved in arranging the provision of access under the Code from those officers and directors involved in arranging the provision of access outside the Code.

CBH requests that the Authority carefully consider whether the Arrangements and Proposed Revisions satisfy this fundamental obligation under section 28(1). CBH is concerned that they do not and therefore submits that the Authority should not approve the Arrangements or Proposed Revisions.

2.7 **What should the Arrangements contain?**

While CBH does not propose to set out the appropriate terms of a complying Arrangement in this submission, it submits that it should contain arrangements that provide for the structural and operational separation of access-related functions from other functions of BR, which are supported by clear controls and procedures to ensure they operate effectively and are complied with. This should include the following features.

(a) prohibitions on staff involved in conducting, marketing or selling above-rail services for BR (or any associate) from being engaged in an access-related function (except, potentially, where the person only provides administrative, legal or accounting services to both functions), and a procedure for vetting staff movements and activities to ensure this prohibition is complied with;

(b) ring-fencing rules (including physical and electronic separation) of the access-related functions from the rest of the business;

(c) obligations to ensure that if BR provides access to other parts of its business (or associates), then it must do so on arm's-length terms, and as if the person were a separate unrelated entity, supported by procedures to notify the Authority about that access, and a procedure for independently "testing" terms of access and price;

(d) information controls that ensure staff in an access-related function only have access to, and consider, information relevant to providing access under the Code (whether confidential or otherwise) to ensure decision-making does not take account of any information that might reduce the effectiveness of the Arrangements, supported by physical and information technology barriers;

(e) an organisation structure, including "hard" and "soft" reporting lines, that support the segregation of access-related functions from the rest of the business, supported by a procedure for ensuring the organisational chart is actually complied with, and any changes are reviewed before implementation;

(f) rules about role descriptions, financial incentives, remuneration, and performance assessment that support the Arrangements, supported by procedures for reviewing them; and

(g) compliance monitoring, reporting and audit procedures, which may include a combination of regular formal independent reviews and "spot checks".

BR, and the Authority, should consider implementing the structural and operational requirements specified in other third party access regimes, such as in Part 2 of Chapter 4 of the National Gas Law, and Chapter 13 of the Electricity Networks Access Code.

3. OBJECTIVES OF THE ARRANGEMENTS

(Section 1 of the Segregation Arrangements)

3.1 Description of the objective of the Arrangements

Section 28(1) requires BR to make arrangements to segregate its access-related functions from its other functions. Under section 28(2), it must have controls and procedures to ensure the measures in place under section 28(1) operate effectively, and are complied with.

Section 30 sets out the **additional** specific requirement that BR must ensure the provisions of sections 31, 32, 33 and 34 are satisfied. Sections 31, 32, 33 and 34, in effect, set out specific elements of the arrangements that BR is required to implement under section 28(1).

Importantly, the core obligation in section 28 means that the Arrangements to separate and isolate access-related functions must be comprehensive, and is not limited to the specific matters set out in sections 31 to 34 (inclusive). It is not sufficient for BR to simply provide for the particular matters in sections 31 to 34. This is because, while those matters are important and must be addressed, complying with them falls short of separating and isolating access-related functions from other functions of the business.

In doing this, it is important to ensure that the Arrangements:

(a) do not misconstrue, recast, or narrow, any of the obligations in the Act or the Code (which, as explained below, is the case with many of the definitions and provisions of the proposed Arrangements); and

(b) are consistent with BR's other statutory obligations (including under the Act or the Code). There is no basis on which the Arrangements can change, or lessen, BR's other statutory obligations.

CBH submits that BR's statement of the objectives of the Arrangements does not reflect the requirements of the Act, and place a "gloss" on the words in the Act that misconstrues, and purports to narrow, BR's actual legal obligations. The objective section should be redrafted so that it faithfully reflects and records BR's legal obligations under the Act.

4. ACCESS RELATED FUNCTIONS

(Section 2 of the Arrangements)

4.1 BR should not re-define statutory definition of "access-related functions"

The Arrangements provide their own exhaustive definition of "access-related functions" in the place of the statutory definition. Section 24 defines the term as "the functions involved in arranging the provision of access to railway infrastructure under the Code".

While it may be helpful for BR to set out a non-exhaustive list of the particular activities that it considers may fall within the statutory definition of "access-related functions", BR's particularised exhaustive definition **cannot** replace the statutory definition, and the Authority must make an assessment about whether each of those particular activities have been appropriately described. The Authority should be careful not to allow BR to include a non-access-related function into the list of access-related functions (or not omit access-related functions from this list).

Further, the Arrangements are misleading to the extent they recast the definition of "access-related function", as they create the incorrect impression that BR has complied with its statutory obligation to segregate its access-related function when, in fact, it has only put in place measures that (at their best) provide for the segregation of the "access

providing" (both under and outside the Code) activities from other activities (and, even then, fail to do so for the reasons explained in these submissions).

4.2 Errors with the definition

Further, the definition is incorrect as a matter of law. BR has combined the provision of access **under** the Code with the provision of access **outside** the Code. The definition of "access-related function" covers the provision of access to railway infrastructure **under** the Code only. If the Parliament had intended for "access-related function" to include the provision of access **outside** the Code, then the words "under the Code" would be redundant. In accordance with the accepted principle of statutory interpretation that all words should be given meaning and effect, the words "under the Code" must be given meaning and effect when interpreting the definition of "access-related functions".

Further, consistently with this definition, the Code draws a clear distinction between access "under the Code" and access "otherwise than under this Code": see section 4A of the Code. In particular, the Code expressly states that "if the parties choose to negotiate an agreement for access otherwise than under this Code, nothing in this Code applies to or in relation to the negotiations or any resulting agreement": section 4A(1)(b).[5]

This means that the Arrangements **must** ensure that:

(a) the negotiation and management of "Access Agreements" made **under** the Code is segregated from the negotiation and management of "Access Agreements" made outside the Code;

(b) it is clear how the performance of the various activities set out in (d) to (m) of the Arrangements (which are essentially concerned with the operation and management of the network generally) contribute to the "arranging the provision of access to the railway infrastructure under the Code" and, to the extent they are, how they are segregated from "arranging the provision of access to the railway infrastructure otherwise than under the Code"; and

(c) separation (also known as ring-fencing) requirements, of the kind described in section 2.7 of this submission, are implemented.

4.3 Definitional error pervades the document

The defined term "Access-Related Function" is used throughout the Arrangements. As a consequence, the Arrangements fail to comply with the Act wherever they rely on, or use, this incorrect definition. To avoid repetition in these submissions, CBH does not propose to point out this problem in every case where the definition is used. However, it is a "foundational" problem throughout the document.

5. APPLICATION TO THIRD PARTIES
(Section 2A of the Arrangements)

5.1 General comments

Section 2A(a) requires BR to ensure that "contractors or other third parties" engaged by BR to provide any part of the Access Related Functions:

(a) are aware of and comply with any obligations imposed by the Act and the Code with respect to Access Related Functions; and

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[5] This provision was added to the Code by the *Railways (Access) Amendment Code 2009*. This followed recommendations made by the Authority to amend the Code to clarify that negotiations could be either conducted under the Code, or outside it (without those protections). See: ERA *Final Report Review of the Western Australian Railways (Access) Code 2000* (23 September 2015).

(b) where those parties have access to Confidential Information in relation to Access Related Functions, require those parties to sign a Confidentiality and Compliance Agreement.

CBH generally agrees with the requirements of section 2A(a)(i), but considers that the drafting should make it clear that the obligation is for "contractors and other third parties" to engage in conduct that ensures that **BR** and the relevant officers complies with the Arrangements, as the obligations in section 28 are on the railway owner.

CBH submits that the requirement in section 2A(ii) is expressed too narrowly. BR has confined it to "access to Confidential Information in relation to Access Related Functions". However, section 31 requires there to be an effective regime designed for the protection of confidential information relating to the affairs of persons seeking access or rail operators (ie whether under the Code or not) from improper use, and disclosure by relevant officers, or other persons, to other officers or employees of BR or other persons, except for proper purposes. That obligation is not restricted to apply only "in relation to Access Related Functions", as suggested in the Arrangements.

As a consequence, the words "in relation to Access Related Functions" should be deleted, and the arrangements should specifically state how BR will comply with section 31.

5.2 Carve-out for professional advisers and consultants?

Section 2A(b) provides a "carve-out" from the requirements of section 2A(a) for "professional advisers or consultants who are under a duty of confidentiality". CBH agrees that it may not be necessary to always require persons in those categories to sign a separate Confidentiality and Compliance Agreement in order to comply with section 31. However, CBH suggests that the Authority should satisfy itself that this is true in all cases. For example, it may be true in the case of legal practitioners, but may not be the case in relation to other categories of advisors and consultants (such as investment advisers), and may depend on the nature and extent of any duties they have. BR should also be required to make sure those persons are aware of the Act and Code requirements, and put in place controls and procedures to monitor compliance.

5.3 Confidentiality and Compliance Agreement

CBH's comments about the Confidentiality and Compliance Arrangement are set out in Schedule 2 of this submission. As set out in that schedule, one of the key issues with that document is that it is essentially concerned with confidentiality requirements, and does not include any controls or procedures that promote awareness, and ensure BR's compliance, with its other obligations under the Act.

6. MANAGEMENT AND COMPLIANCE PROCESSES
(Section 3 of the Arrangements)

6.1 General comments

BR proposes to implement the Arrangements through the management and compliance process at Appendix A. Putting aside the difference in the language adopted by BR compared to the language used in section 28 ("processes" versus "controls and procedures"), CBH considers that, in order for the Arrangements to operate effectively and be complied with, the following changes should be made.

Firstly, BR should provide for Appendix A (or a simplified variation of it) to also be issued to staff that are **not** involved in an access-related function in order to avoid any "inadvertent" breach of section 28 (by breaching the Arrangements), and ensure compliance with the Act. Section 3(d) only contemplates distribution to the "BR senior management team and other BR staff who are involved in Access Related Functions".

Secondly, section 3(d)(i) may be read as only requiring "BR senior management team and other BR staff who are involved in Access Related Functions" to comply with the Arrangements, as opposed to **all** BR management and staff. CBH recommends that this be clarified.

Thirdly, sections 3(d)(ii) and (iii) refer to distribution of updates to Appendix A, and training, as only being sent to "BR staff involved in Access Related Functions" and not BR senior management (as indicated elsewhere). CBH recommends that this apply to all BR management and staff.

6.2 Management and compliance processes in Appendix A

Section 4(e) of the Arrangements refer to Appendix A, which sets out particular "management compliance processes". CBH's comments about Appendix A are set out below in Schedule 1.

7. CONFIDENTIAL INFORMATION
(Section 4 of the Arrangements)

7.1 General comments

Section 4 of the Arrangements sets out BR's proposed regime to protect confidential information and satisfy its obligations under section 31 of the Act.

CBH's concerns about the proposed regime fall into categories:

(a) BR has made subtle, but significant, changes to definitions that mean the regime applies more narrowly than required by the Act;

(b) BR has not proposed any arrangements, controls or procedures to prevent "improper use" of confidential information (as distinct from improper disclosure);

(c) BR has granted itself "carve-outs" to the term confidential information that are not available to it under the Act; and

(d) BR's description of the "regime" is general, and does not detail the "controls and procedures" needed to ensure the Arrangements operate effectively, and are complied with.

7.2 BR has defined Confidential Information too narrowly

Section 31(2) of the Act defines "confidential information" as follows:

> ***Confidential information*** means information that has not been made public and that —
>
> (a) is by its nature confidential;
>
> (b) was specified to be confidential by the person who supplied it; or
>
> (c) is known by a person using or disclosing it to be confidential.

The Arrangements impermissibly narrow that definition in a number of ways.

Firstly, the capitalised term "Confidential Information" is defined in the Arrangements as follows:

> Confidential Information has the meaning ascribed to it in Section 31(2) of the Act but excludes information that:
>
> (a) subsequently becomes available other than through a breach of confidence or a breach of these Segregation Arrangements;

(b) was in the lawful possession of BR before being provided to BR by the Network Participant or the Proponent;

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

(d) is received by BR independently from a third party free to disclose such information.

While these kinds of "carve-outs" may sometimes be found in contractual confidentiality provisions, there is no basis on which BR is entitled to "re-write" the legislation to set its own standard for confidential information. The only time a piece of information may change from being "confidential information" under the Act to being "non-confidential information" is if it no longer falls within the scope of the definition in section 31(2).

If, for example, an operator provides information that is not public, and specifies it as confidential, then it is not open for BR to decide to treat that information as *not* being confidential because it is later received by BR independently from a third party. It might fall outside the definition of section 31(2) if it can be established that it is no longer public, but that must be assessed on a case-by-case basis.

Similarly, the fact information "subsequently becomes available" does not automatically make it "public" and therefore no longer regulated by section 31.

Secondly, sections 4(a)(i) and 4(a)(ii) refer to confidential information "provided to BR by a Network Participant or Proponent". Superficially, this appears to relate to the language in section 31(1) of the Act, but, on closer inspection, it is more narrow.

Section 31 refers to the protection of confidential information "relating to the affairs of persons seeking access or rail operators". It is not limited to information "provided to" BR by persons seeking access or rail operators. It simply refers to information "relating to" their affairs, however it comes into the possession of BR (for example, information that BR gleans from the nature of the operations conducted by a rail operator on its network, or its level of usage).

In addition, the definition of "Network Participant" and "Proponent" are more narrow than "persons seeking access" and "rail operators".

"Network Participant" is defined in the Arrangements as "an Access Holder or an Operator, as applicable". In turn, "Access Holder" is defined as "a party that is granted Access under a Commercial Track Access Agreement or a Track Access Agreement, as applicable" and "Operator" is defined as a "party that is granted Access for the operation of train services on the Network under an Operational Track Access Agreement or Track Access Agreement". Both Commercial Track Access Agreement, Operational Track Access Agreement, and Track Access Agreement are given specific meanings.

It may be the case that, under current practice, most entities that have access to the railway infrastructure fall within those categories. However, this may not always be the case. For example, the definitions do not expressly contemplate a person that has rights to access the railway infrastructure under an access *determination* made under the Code.

"Proponent" is defined as "an entity that has submitted a bona fide Access Proposal to BR whether under the Code or otherwise". This suggests that no confidential restrictions apply if BR forms the view that the entity has not submitted a "bona fide" Access Proposal.

There are no grounds for BR to restrict its obligations to protect confidentiality in this manner.

Thirdly, the confidentiality requirements only deal with obligations for "employees" and do not include arrangements, controls or procedures that deal with third parties (or, indeed, BR as a whole). The regime required under section 31(1) must ensure that BR protects

confidential information (whether through the actions of employees, third parties, or any other entities acting for or on behalf of BR).

While section 2A includes requirements in respect of third parties, CBH submits that neither section 4 or section 2A establish an "effective regime" for the protection of confidential information, which must extend to third parties that are engaged by BR.

Fourthly, the inclusive "list" in section 4(b) is brief, and risks creating the misleading impression that it "covers the field" (or a majority of it), when it in fact is only a small snapshot of some types of information that may constitute confidential information.

7.3 **Regime must also prevent "improper use"**

The regime proposed by BR primarily deals with keeping information confidential, and disclosure. It does not contain any arrangements, controls or procedures to ensure that confidential information is not used for an "improper purpose".

As a starting point, confidential information that is provided to BR by a person seeking access or rail operator should only be used for the purpose for which it is provided, and not for other purposes (which is contemplated in section 4(a)(ii), but subject to "carve-outs" in section 4(c)).

However, the regime must operate more broadly than that, given that it applies to any confidential information relating to the affairs of a person. For example, it must regulate confidential information collected by BR in operating the network. The Arrangements lack any controls or procedures to ensure that information of that kind is only used for legitimate purposes, and not any improper purpose. Similarly, it must not be disclosed, except for a "proper purpose".

In this regard, it may assist for the Arrangements to provide a clear description of the proper use of information, and proper purposes for which it may be disclosed.

7.4 **Carve-outs that do not exist under the Act**

As explained above, the definition of "Confidential Information" in the Arrangements sets out carve-outs that do not exist in the Act. In addition:

(a) section 4(c) lists the circumstances in which BR may disclose "Confidential Information of a Network Participant or Proponent" to third parties; and

(b) section 4(f) impermissibly allows BR to disclose, "in the ordinary course of business", financial reporting information which has been "aggregated" such that it cannot reasonably be, and is not reasonably capable of being, identified with, attributed to or used to identify a Network Participant or Proponent.

One of the circumstances in which BR is allowed to disclose information is "in accordance with a Confidentiality and Compliance Agreement" signed by the relevant employee. However, this is defined as a deed "substantially in the form specified in Appendix B", which provides room for changes to be negotiated. While the use of a deed may be part of an effective regime to protect confidential information, the terms of the deed need to be clear and approved by the Authority, and the mere fact that a person signed a deed does not establish that the person's use of the information is proper, or the disclosure of information to that person is for a proper purpose.

Further, CBH submits that any carve-outs must be framed by reference to section 31(1). This means that there should be no improper use of confidential information, and no disclosure of confidential information to "other officers or employees of BR", or "other persons", except for "proper purposes". Those "proper uses" and "proper purposes" should be clearly articulated in the Arrangements.

CBH understands that a "proper purpose" for disclosing information is where BR is required to do so to comply with another law, as contemplated in section 4(c)(ii). However, each other example listed in in section 4(c)(iii) to (vii), and 4(f), should be re-cast to explain the controls and procedures that will ensure that:

(a) any proposed disclosure is for a "proper purpose" (with specificity—for example, simply stating "to the extent disclosure is required for the purpose of facilitating the performance of yard control services" is vague and uncertain);

(b) the confidentiality of the information will continue to be preserved after disclosure; and

(c) rather than simply applying the list "blindly", BR should be required to consider whether disclosure is for a proper purpose on a case-by-case basis: the list is merely a guide that may assist in that assessment, but cannot be a substitute for making an assessment about the purpose of disclosure.

Similarly, section 4(f) appears to demonstrate that BR misapprehends its requirements. It is couched in terms commonly found in privacy policies, which focuses on whether a particular person can be identified by the confidential information that is disclosed, as opposed to whether the disclosure was for a proper purpose. CBH submits that it is not open for BR to aggregate confidential information and disclose it for an improper purpose (or, indeed, without a proper purpose) whether or not it is possible to identify the source of that information, or who that information relates to.

Finally, CBH also accepts that BR may disclose confidential information where the relevant person who provided the confidential information has given prior written consent to its disclosure (as contemplated in section 4(c)(i)). However, it is not consistent with the Act to provide that the relevant person cannot "unreasonably withhold" that consent. If the confidential information relates to the affairs of that person, then BR is required to have an effective regime for protecting it, and cannot override a person's wishes to prevent use or disclosure on the basis that such a position is "unreasonable".

7.5 Regime is too vague

Section 4(e) of the Arrangements purports to set out an inclusive (ie non-exhaustive) list of features of BR's "regime" for protecting Confidential Information.

As explained above, CBH submits that the purpose of the Arrangements is to specify that regime, not simply assert that one exists or will exist in the future. Otherwise, the Authority cannot decide whether or not its satisfies sections 28(1) and 31(1). BR has failed to do this.

Further, while the "features" of the regime set out in section 4(e)(i), (ii), (iii) and (iv) are appropriate, CBH submits that more detail needs to be provided about them in order to enable the Authority to assess whether or not they satisfy the requirements of the Act.

In this respect, CBH submits that the elements described are vague and uncertain. How can one judge whether BR has, for example, complied with section 4(e)(iii), which says that the regime includes "appropriate controls on data"? It is unclear how this could be enforced, particularly given that it is an offence not to comply with the provision.

8. CONFLICTS OF INTEREST
(Section 5 of the Arrangements)

8.1 General comments

Section 5 of the Arrangements purports to set out the arrangements, required under sections 28 and 32, that ensure that a relevant officer does not have a conflict between his or her duties:

(a) as a person concerned in the performance of access-related functions, on the one hand; and

(b) as a person involved in other business of the railway owner, on the other.

Section 24 of the Act defines "relevant officer" as "an officer or employee of a railway owner who is any way concerned in the performance of access-related functions". This is a very broad definition, and captures a potentially wide-scope of individuals.

When considering these obligations, it is important to recognise that a conflict between duties as a person concerned in the performance of access-related functions, and as a person involved in other business of BR, may manifest itself in a number of different ways. For example, it may arise because:

(a) the person's duties (in the sense of activities and responsibilities) in relation to access-related functions directly or indirectly conflict with the person's duties to other business of the railway owner;

(b) the person's financial (including remuneration) and other incentives are designed in a way that means the person will prioritise BR's interests in other business of the railway owner over the performance of access-related functions (for example, if financial incentives or career enhancement drive the person to advance BR's other interests at the expense of performing access-related functions in accordance with the Act); or

(c) the person has access to information from other business of the railway owner that affects the person's ability to properly perform access-related functions (for example, information about BR's commercial objectives in relation to activities concerning its own use of the network that leads to the employee favouring those commercial objectives at the expense of performing access-related functions).

The most straight-forward way to avoid these conflicts is for the access-related functions of the business to be physically and operationally separately from any other functions, so that "relevant officers" do not have any duties (or even interests) in relation to other business. There might be limited exceptions where the duties can be performed without any risk of conflict (for example, purely legal[6] or administrative functions), and there may be a relatively senior point in the management hierarchy where a person may have broad responsibility for staff performing both access-related functions and other functions (subject to controls and procedures to avoid conflict, including conflict arising from the issues outlined above).

By contrast, the approach taken by BR is much more limited, and focuses primarily on conflicts between access-related functions of BR, and "other business" carried on by a Related Operator. While it is helpful to address those particular concerns, the Arrangements must be much broader, and satisfactorily address the many ways in which a conflict could manifest.

In particular, in addition to the issues created by the definition of "Access Related Function" (which are discussed at section 2.6 and 4 of this submission), CBH considers that section 5 of the Arrangement does not properly address the requirements of

[6] However, BR has argued that the duties of legal advisers—including external legal advisers—are not sufficient to protect its confidential information and sought orders that were significantly more onerous than those contemplated by the Arrangements. See *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd (No 2)* [2014] WASC 38 referred to at section 8.5 of this submission.

section 32 (or section 28 generally). Relevantly, the proposed arrangements fail in at least the following important respects:

(a) the arrangements lack detail, and do not specify the controls and procedures that will ensure the arrangements operate effectively and are complied with;

(b) there are insufficient "information controls";

(c) the arrangements do not address segregation **within** BR—only segregation between BR and other related bodies corporate;

(d) directorship and employment restrictions are not sufficient;

(e) BR should be prohibited from carrying on rail operations itself; and

(f) better controls need to be implemented to ensure that access provided to BR (or other entities in which BR has an interest) is on an arm's length basis that does not favour those entities over other access seekers and rail operators.

8.2 **Arrangements lack detail**

A number of provisions simply state that BR "will" ensure no conflicts exist, without setting out the particular controls and procedures that have been (or are, following approval, to be) implemented (see sections 5(a), 5(d), 5(h), and the terms of the "Confidentiality and Compliance Agreement"). This lack of detail makes it impossible to objectively assess what those particular arrangements are and whether BR has complied with the Arrangements.

The Arrangements should specify the particular controls and procedures that will be put in place, including:

(a) a clear statement reinforcing the fact the provisions of the Act, and the Code, must be complied with;

(b) the particular person or committee responsible for making decisions;

(c) the specific criteria that will be applied to assess whether or not there is a conflict;

(d) when assessments will be made (for example, when a role description is prepared, prior to engaging an employee or contractor, periodic checks etc);

(e) what BR must do in the event an issue arises; and

(f) role descriptions and remuneration structures that do not encourage or motivate a person to place their duties to other business of BR above their duties in performing access-related functions.

8.3 **Information controls are too narrow**

One of the ways in which a conflict can arise is where a relevant officer obtains information in connection with an access related function, and is then required or able to use it in connection with other business carried on by BR (or vice-versa). This may lead to a person favouring their direct or indirect duties in respect of other business of BR over their access-related functions.

For example:

(a) information about the price paid by an operator under the Code could influence decisions about the price to be paid for access by another BR business unit; and

(b) information about BR's future plans in relation to conducting its own rail operations could influence a decision about offering access to a proponent under the Code.

Generally, it is not enough to simply require the person to not use the information inappropriately, as an individual would ordinarily have great difficulty in doing so because their duties might otherwise require or motivate them to do so. Consequently, BR should have in place clear ring-fencing arrangements that mean that each relevant officer does not disclose, does not receive, and does not deal with information that may lead to a conflict.

This may not necessarily be limited to "confidential information" (as defined in the Act). For example, it may extend to anything that would result in a person making a decision, or taking action, for the benefit of, or to advance, BR's business interests outside the provision of access under the Code.

One of the key arrangements in respect of conflicts is that train scheduling and train control functions will be undertaken by BR staff or contractors who have signed a Confidentiality and Compliance Agreement (section 5(b) of the Arrangements). That Confidentiality and Compliance Agreement deals largely with confidentiality. It otherwise only requires the relevant person not to do anything to cause BR to breach the Act, Code or Arrangements.

What is missing from the Arrangements is any provision that actually ensures there is no conflict of duties and, more generally, properly segregates the access-related functions from the other business of the railway.

Further, this requirement only deals with a small "subset" of BR's employees and contractors. It does not address the position of the rest of BR's workforce or any of its management.

8.4 **Arrangements do not deal with segregation "within" BR**

The Arrangements do not recognise that sections 28 and 32 impose restrictions both between companies in the BR "group", and "within" BR entities. The focus of the provisions must be on the distinction between:

(a) the performance of access-related functions (which, as outlined above, is the provision of access **under the Code** only), on the one hand; and

(b) other business of the railway owner, on the other.

8.5 **Restrictions on directorship and employment are insufficient**

Employment by a Related Operator

Section 5(e) provides, in effect, a six month ban on BR employees who have had access to "Confidential Information of a Network Participant or Proponent" from being engaged in a role with a "Related Operator" which is "involved in commercial dealings" with:

(a) Access Holders;

(b) customers of Operators;

(c) Proponents (where the Proponent proposes to be an Access Holder); or

(d) customers of Proponents (where the Proponent proposes to be an Operator).

A "Related Operator" is defined as a "Network Participant which is a Related Body Corporate of BR".

Putting aside the definitional issues with the term "Confidential Information" (discussed at section 7 of this submission), CBH considers a period of 6 months to be too short, as confidential information obtained from an access related function is likely to still have high commercial value, and is therefore capable of being exploited by the employee in favour of the Related Operator. Relevantly, in CBH's previous dealings with BR, BR has required much longer restraint periods than 6 months, which can be taken as an indication of BR's own views as to how long information continues to have material value or sensitivity.

These requirements are recorded in *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd (No 2)* [2014] WASC 38. For example, at paragraph 10 the court states:

> The most significant additional restriction is that which prevents the parties who inspect the attachments, including the legal advisers who do so, to refrain for two years from being involved in any negotiations for,
>
> > "(i) the drafting of contracts or any other documents relating to any application for; or
> >
> > (ii) any arbitrations in relation to,
> >
> > access to the defendant's railway network, pursuant to the *Railways (Access) Act 1998* (WA) (and/or the *Railways (Access) Code 2000* (WA)) or otherwise."

CBH similarly suggests that a restraint period should be no less than 2 years.

CBH also considers that the limitation should apply to **any** role with a Related Operator (and in any capacity, whether as an employee, contractor, officer, director, agent or otherwise), rather than just roles where the person is "involved in commercial dealings". This is because the employee need not be involved in commercial dealings to misuse information for the benefit of the Related Operator without being directly involved in commercial negotiations with any of the entities outlined above. The list also fails to cover potential customers of Operators or Proponents, who might be targeted by the Related Operator.

Finally, it should not be limited to "employees", and should be extended to cover any "relevant officer" as defined in the Act.

Exit process requirements

Section 5(c) provides for employees that leave BR to commence work at a Related Body Corporate of BR, whose duties involved the management or conduct of Access Related Functions, to receive a "debriefing" to remind them of BR's obligations relating to the management of Confidential Information. CBH submits that this obligation should be extended to other obligations under the Arrangements (not just in relation to confidentiality).

Transfer of employees

Section 5(d) contemplates that an employee involved in an access-related function might be temporarily transferred to another function, and requires BR to "have regard to the potential implications of such a transfer on BR's obligations to manage Confidential Information". CBH submits that this is manifestly inadequate, and there should be a formal control or procedures to ensure that the transfer of the employee does not lead to BR breaching the Arrangements more broadly. CBH is concerned that the ability to "temporarily transfer" employees between business functions of BR has the potential to fundamentally undermine the "segregation" that BR is required to put in place under section 28 of the Act.

Directors of BR

Section 5(g) sets out restrictions on the directors that may be appointed to BR. It is not clear how BR is able to enforce these requirements, given that directors are appointed by shareholders (not the entity itself). BR should provide an explanation of how it is able to enforce this requirement.

In addition, the definition of "Common Directors" is too narrow. It is defined as "a person who, at the relevant time, is a director of BR and a director of a holding company of BR". It should be broadened to be a director of BR and a director of any related body corporate of BR (including a Related Operator) or any body or venture in which BR has a financial or other interest.

Further CBH submits that the Authority should consider the appropriateness of what Common Directors are permitted to do under section 5(g)(ii), given that they may have an interest in favouring the interest of Related Operators. CBH suggests that the Arrangements should specify how these "relevant officers" are to avoid conflicts of interests.

Prohibited RO Persons

The Arrangements do not expressly prevent a Prohibited RO Person from working for, or contracting with, BR in connection with an access-related function. This should be expressly prohibited under the Arrangements.

8.6 **Requirement to establish "corporate governance arrangements" lacks detail and is too narrow**

Section 5(h) states that BR must establish corporate governance arrangements which ensure Common Directors do not:

(a) receive or access Confidential Information; or

(b) participate in any decisions or attend any meetings,

in respect of services that BR provides, or is proposing to provide, to:

(c) the Related Operator in respect of which the relevant Common Director holds a directorship (**Relevant Related Operator**); or

(d) any Network Participants or Proponents that compete with, or is proposing to compete with, the Relevant Related Operator.

CBH submits that the Arrangements should actually specify the corporate governance arrangements, so that the Authority can assess them and make a decision about whether they are sufficient, and so that BR's compliance with them can be properly assessed.

Further, the scope of the governance arrangements is too narrow. It should cover anything to do with access that may, or is being sought by, a person (particularly under the Code). For example, as currently drafted, it would be permissible for a Common Director to participate in decisions about how to deal with a person seeking access, but who has not yet reached a stage where BR is providing, or proposing to provide, any service, such as in respect of requests for preliminary information under the Code.

It should also not be limited to situations where the access seeker might compete with, or propose to compete with, a Relevant Related Operator. For example, if capacity on a line section is constrained, then a Common Director would have an incentive to deny train paths to any rail operator using the same line as a Relevant Related Operator (whether or not the particular rail operator competes with the Relevant Related Operator – for example, they may transport entirely different commodities).

8.7 **BR should not be permitted to access the network in its own right to conduct rail operations**

The Arrangements appear to contemplate that BR will not itself conduct rail operations, and that any rail operations would be conducted by a Related Operator. A prohibition on BR accessing the network for the purpose of conducting rail operations should be expressly stated in the Arrangements.

Further, there should be arrangements, supported by controls and procedures, to ensure that any access provided to a "Related Operator" is on arm's length terms, and as if the person were a separate unrelated entity. This should be supported by procedures to notify the Authority about that access, and a procedure for independently "testing" terms of access and price.

8.8 **BR has an incentive to favour any entity in which it has a financial interest, not just Related Operators**

Finally, BR might not only seek to favour a "Related Operator", but any other entity in which it has a financial or other interest (even if its interest does not give it the level of control required to make that person a related body corporate). This might include, for example:

(a) joint venture or consortium partners;

(b) entities in which BR's financial or other interest falls short of giving BR (or a related entity to BR) "control"; or

(c) entities in which BR does not have a current interest, but is planning to pursue in the future.

Consequently, the Arrangements should provide for BR to similarly deal with such entities on arm's length terms, and as if it did not have a financial or other interest in that entity.

8.9 **Deed between BR and holding company of Related Operator**

Section 5(f) of the Arrangements states that BR has procured an undertaking from the "relevant holding company of its Related Operator" to ensure that the Related Operator complies with the requirements in section 5(e) of the Arrangements. CBH submits that a copy of the undertaking should be provided as part of the Arrangements, so that it can be properly considered, and BR should be expressly required to enforce it. Further there should be an equivalent obligation in relation to all future related operators.

9. **DUTY OF FAIRNESS AND NON-DISCRIMINATION**
(Section 6 of the Arrangements)

9.1 **General comments**

Section 6 of the Arrangements is entitled "duty of fairness and non-discrimination". It appears to be intended to address the requirements of section 33, and therefore should set out the arrangements, controls and procedures that will ensure that in performing their functions relevant officers must not have regard to the interests of BR in a way that is unfair to persons seeking access or to other rail operators (as required under section 33 of the Act).

The approach that BR has adopted under the Arrangements is to:

(a) set out a general standard of conduct (in different and narrower terms to the Act) for BR under sections 6.1 and 6.2;

(b) specify an extremely broad set of circumstances that are, in effect, an **exception** to the general standard BR has set itself, and which, upon closer scrutiny, provide BR such significant discretion as to render its obligations meaningless; and

(c) set out, in a vague and general way, some measures that partially address the requirement of "fairness".

Fundamentally, BR appears to have tried to define the limits of its obligations under sections 28 and 33 in respect of "fairness". It has done so in a manner that is not consistent with the requirements of those provisions, and shifts the standard from the general requirement to ensure that a relevant officer does not have regard to the interests of BR in a way that is "unfair" to persons seeking access or to other rail operators, to a complex set of provisions that only deal with a small subset of situations in which a relevant officer might breach this standard, and introduce extraneous concepts such as "reasonableness" and "discrimination". It is not open for BR to seek to amend its obligations in this way.

Accordingly, CBH submits that the Arrangements fall considerably short of complying with the Act (or the Code), and in fact enables BR to have regard to the interests of BR in a manner that is unfair to persons seeking access (including by allowing BR to motivate operators to negotiate outside the Code instead of under it).

9.2 **General standard adopted by BR**

Section 6.1 of the Arrangements is an "acknowledgement" in the following terms:

> 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.

As previously explained, by adopting its own idiosyncratic, and narrower, defined terms rather than using the terms used in the Act, BR appears to seek to narrow its obligations under section 33 of the Act. This should be rejected, and any acknowledgement should be consistent with the express wording of the Act.

Similarly, section 6.2 of the Arrangements sets out a new standard for BR, which provides that BR must not unfairly "or unreasonably":

(a) hinder or deny Access to any Proponent or Network Participant; or

(b) "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.

There are a number of difficulties with BR's approach.

Dealing firstly with terminology, CBH has emphasised the terms "unreasonably" and "discriminate" above because these words do not appear in section 33. While CBH agrees that BR should not be entitled to act unreasonably, or to unfairly discriminate, CBH's view is that the core obligation of "fairness" should be the central requirement, with "unreasonableness" and unfair discrimination set out as a "subset" of unfairness, given that those terms do not appear in the Act.

Moreover, there is tension between the standard expressed in the Arrangements, and the express non-discrimination requirements in section 16 of the Code, which are in different terms to what is set out in the Arrangements. This creates the risk that BR could seek to rely on the Arrangements to not only lessen its obligations in respect of section 33 the Act, but to also lessen its obligations under section 16 of the Code.

Secondly, section 6.2(a) appears to be a "constrained" version of section 34A of the Act. Importantly, section 34A prohibits BR from engaging in conduct aimed at "hindering or preventing" access. There is **no reference** to "unfairness" or "unreasonableness" in section 34A: it is a blanket prohibition on hindering or preventing access in prescribed circumstances. BR cannot grant itself discretion to hinder or deny access for the purposes of section 33 in circumstances where it is prohibited from doing so under another provision of the Act, and the Arrangements document (which BR says is the core document for ensuring compliance with the Act and the Code) should reflect that.

A further complication is that there are different penalties for breaching section 29(4) and section 34A (including daily penalties for section 34A). This creates unnecessary complexity, and potential confusion, about the consequences for BR in the event that it breaches both the Arrangements, and section 34A.

Thirdly, section 6.2(b) refers to discrimination between Proponent and Network Participants compared to a Related Operator. While this is a relevant consideration, it is only part of the obligation under section 33 of the Act. Section 33 is not confined to having regard to interests of BR and a Related Operator in a way that is unfair: it is a prohibition on having regard to interests of BR in a way that is unfair. This means that **any** interests of BR are relevant. For example, it would be unfair for BR to have regard to its financial interests in increasing profits from providing below-track access, to unfair (such as monopoly) levels, or denying access so that it can close tracks to reduce costs. The provision should be therefore re-framed accordingly.

9.3 **Permitted "reasonable discrimination"**

Section 6.3 of the Arrangements seek to "re-write" the test of "fairness" under section 33 with a new test, which provides that:

> 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 …

BR then provides a non-exhaustive list of matters that constitute "reasonable commercial and technical considerations". While the factors listed in section 6.3 may (or may not be) relevant considerations as to whether something is unfair or not, they do not establish that discrimination on those grounds is therefore not unfair. Section 6.3 effectively provides BR a level of discretion that is so broad as to make it impossible to enforce the provisions of the Arrangement, and potentially seeks to qualify BR's express non-discrimination obligations under section 16 of the Code.

For example:

(a) section 6.3(a) provides wide scope for BR to unfairly discriminate against an access seeker, but claims that this is permitted "reasonable" discrimination because "the relative costs of providing access" are different because of the "relative effect of the task on the efficient utilisation of the Network or because BR decides that a costs for a "geographic area in which access is being provided" should be allocated or calculated differently;

(b) section 6.3(b) allows BR to unfairly discriminate on the basis that "circumstances in the market" will have a material effect on one person's ability to pay at its discretion, even though BR might exercise its discretion differently in relation to another person; and

(c) section 6.3(e) allows BR to exercise broad discretion to charge higher prices for access where "competition for the task with other modes of transport" is lower than in other circumstances.

Further, the provisions are inconsistent with the requirements of schedule 4 to the Code, particularly the pricing guidelines in section 13. The Arrangements should expressly refer to the pricing guidelines, and require BR to comply with them.

9.4 **Inadequate controls for ensuring fairness**

Section 6.4 sets out a non-exhaustive list of the "mechanisms" for ensuring BR complies with its duty of fairness, being:

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

(b) the process under the Code for determining the fairness of prices negotiated under the provisions of Section 21(1) of the Code (where applicable); and

(c) relevant provisions in BR's standard Access Agreements including consultation mechanisms, obligations to provide information and dispute resolution mechanisms.

CBH submits that this list of mechanisms fall considerably short of the arrangements, and minimum necessary controls and procedures, needed to ensure BR complies.

Firstly, the Dispute Resolution Process specified in Appendix C is essentially part of an "out of Code" access regime that includes a requirement that an aggrieved access seeker forgo making an application under the Code, and forgo taking any legal proceedings. It is also unclear how a breach of section 33 of the Act may be properly dealt with by arbitration (except in the general sense that the **outcome**, that is, the **terms of access**, might be regulated). It does not protect an access seeker from a **relevant officer** having regard to the interests of BR in a way that is unfair.

Secondly, there is no process under the Code for determining the fairness of prices. The Authority may be required to provide a non-binding opinion on price under section 21 of the Code, but there are no consequences for BR if the price is found to be inappropriate. The Authority must also only examine the price, and not the conduct of BR in formulating it (or dealing with the access seeker).

Finally, the provisions of BR's access agreement are **not** regulated, may be changed by BR at any time, and are not in any sense binding on BR (unless it enters into a contract based on those terms). The standard access agreement also **does not** require BR to comply with section 33, nor does it require BR to comply with the Arrangements. As a consequence, it does not in any way represent a relevant control or procedure to ensure that relevant officers comply with section 33.

Further, there is nothing in sections 6.3 or 6.4 which puts in place an arrangement, or controls and procedures, that ensure relevant officers do not have regard to the interests of BR in a way that is unfair to persons seeking access or to other rail operators.

9.5 **Reference to Part 5 instruments**

Section 6.5 of the Arrangements is an acknowledgement that BR's obligation to comply with its duty of fairness includes compliance with the Authority's determinations under Part 5 of the Code. It is not clear how this is relevant, and CBH is concerned that it provides BR with an "excuse" to breach its duty by pointing to a provision of an approved Part 5 instrument that may or may not be consistent with fairness, or the way in which the relevant officers have regard to the interests of BR and access seekers or rail operators.

Section 33 imposes an independent obligation on BR that overrides any contrary discretion it might have under the Part 5 instrument. It is not discharged by complying

with the Part 5 instruments. The fact the Authority has approved them is not relevant to that question.

10. PREPARATION OF ACCOUNTS AND RECORDS
(Section 7 of the Arrangements)

10.1 General comments

Section 7 of the Arrangements is an unusual provision. It is in the following terms:

> (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 the 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.

The provision fails to explain how BR complies with section 34 of the Act, and simply indicates in a general way that BR "will" comply with the Act and the Code. The Arrangements should describe, in detail, the form of the accounts and records, and the controls and procedures that BR will implement to ensure compliance with section 34 (and other relevant legal obligations, including under the costing principles and over-payment rules approved by the Authority, and the requirements of the *Corporations Act 2001* (Cth) relating to financial administration). In short, the Arrangements should be a statement of what BR actually does to comply with the Act, not a general statement that it will do unspecified things that will comply with the Act.

The significance of the statement that "BR employees also control the data used to generate invoices for Access customers" is unclear and needs to be explained.

The provision also states that BR "must have regard to" the costing principles determined by the Authority. However, that misstates the obligation under section 46(1) of the Code, which relevantly provides that:

> … each railway owner is to prepare and submit to the Regulator a statement of the principles, rules and practices (***the costing principles***) that are to be applied and followed by the railway owner …

It is not a matter of "having regard" to them: it is a matter of applying and following them. Once again, BR appears to have taken a statutory obligation and recast it in a way that provides it with greater discretion than it is afforded under the Act and the Code.

11. AUDIT, COMPLIANCE AND REVIEW
(Section 8 of the Arrangements)

11.1 General overview

Section 8 of the Arrangements sets out a process for audit, compliance and review. This is a critically important part of the arrangement, as it is a key control and procedure necessary to ensure the arrangement operates effectively, and is complied with.

CBH has a range of concerns about the provisions, relating to the following issues:

(a) the scope of the audit appears to be unnecessarily confined;

(b) some aspects of the conduct of the audit should be improved;

(c) BR is not obliged to adopt recommendations by the auditor.

11.2 **Scope of the audit is confined**

Section 8.2 sets out the scope of the audit. It is limited to:

(a) section 4 (Confidential Information), section 5 (Conflicts of Interest) and section 6.2 (unfair or unreasonable access) and 7 (preparation of accounts and records);

(b) the matters specifically identified in Appendix A, which appear to be limited to:

(i) confirming that personnel have signed a Confidentiality and Compliance Agreement (section 3.2(d) of Appendix A under "General Management of Confidential Information); and

(ii) the process of authorising access and general usage of Confidential Information in RAMS (section 3.2(g) of Appendix A under "Management of Electronic Data"); and

(c) compliance with the Train Path Policy and Train Management Guidelines (but not other Part 5 Instruments, such as the Costing Principles and Over-payment Rules).

CBH does not understand, and can see no reason why, the audit should not be in relation to all aspects of the Arrangements, and any complaints made about BR's conduct. This is consistent with BR's obligation under the Act, including the fact that a failure to comply with the Arrangements, or direction by the Authority under section 29(3) in respect of the Arrangements, is a offence.

CBH agrees that complying with the Train Path Policy and Train Management Guidelines may be an important tool for ensuring that BR has properly segregated its business, avoids conflicts, and does not unfairly treat access seekers. However, the Train Path Policy and Train Management Guidelines are significantly out of date, and require urgent review. CBH is concerned that the discretion afforded to BR under those documents may allow it to seek to "excuse" itself from complying with the Arrangements on the basis that those documents (in any unspecified way) assist in determining the objectives of the Arrangements.

Further, the other Part 5 instruments are equally important. BR should be required to ensures that it complies with them, as an important control and procedure that ensures the Arrangements operates effectively. However, as with the Train Path Policy and Train Management Guidelines, these documents require urgent review.

11.3 **Conduct of the audit**

Sections 8.3 and 8.4 deal with the appointment of the auditor, its conduct, and the final report. CBH considers the following changes should be made in order to ensure that the audit is effective and accords with best practice:

(a) the auditor should be independent of not only BR, but any related body corporate of BR (see section 8.4(b));

(b) the auditor should also warrant that he or she has no conflict of interest; and

(c) the auditor should be appointed annually, rather than having an "ongoing" appointment, which would remove the need for the processes set out in sections 8.4(c) and 8.4(d).

Further, the Authority should consider whether the provisions of the Arrangements meet "best practice", having regard to the approach to audit in other jurisdictions.

11.4 **Complying with audit findings**

The audit process serves at least two functions:

(a) it promotes compliance with the Arrangements by establishing a process under which any breaches should be identified and then reported on (creating an incentive for BR to comply); and

(b) it identifies areas where the Arrangements can be improved through changes to controls and procedures.

The first function will be served by having an effective audit process, resulting in a report available in full to the Authority, and to the public (with any confidential information "redacted"). The critical issue will be the extent to which the Authority (or the Director of Public Prosecutions) is willing to enforce any breaches of the Arrangements.

However, the second function is substantially undermined by sections 8.4(k) and 8.4(i), which provide that BR is only required to use "reasonable endeavours" to implement recommendations by the auditor, and "reasonable endeavours" to comply with any direction of the Authority in relation to matters arising from the audit report.

Firstly, any recommendations by the auditor should be implemented by BR, unless they require a variation to the Arrangements. In that case, the Arrangements will need to be varied in accordance with the process in section 29 of the Act. This should be reflected in the Arrangements.

Secondly, BR does not have the option of simply using "reasonable endeavours" to comply with a direction of the Authority: it is required to do so, and it is a criminal offence for it not to do so: section 29(4) of the Act. It is inappropriate for the Arrangements to be cast in different terms.

Finally, section 8.4(k) suggests that the Authority can "approve" non-implementation of the Arrangements. There is no basis for this provision in law. The Authority could make a direction, or approve a variation, of the Arrangements, but that seems unlikely to be something that can be done retrospectively.

In this regard, CBH understands that, while the Authority is responsible for administering the Act, the Director of Public Prosecutions is responsible for prosecution decisions and the Authority may not have the power to "excuse" non-compliance with the Arrangements as contemplated by section 8.4(k).

11.5 **Drafting issues undermine the value of an audit**

More generally, an audit is only effective to the extent that the subject-matter of the audit can be objectively considered. As explained throughout these submissions, the approach that BR has taken is to:

(a) re-cast the language of the Act into terms that materially lessen the extent of its obligations under the Act;

(b) set very broad standards that are not capable of being objectively assessed; and

(c) provide itself broad discretion as to the particular controls and procedures that are to be implemented.

As a consequence, while an audit function is an essential control to ensure the Arrangements operate effectively, the subject-matter must be "auditable" in a meaningful way. CBH urges the Authority to consider this as it reviews the Arrangements.

11.6 **Authority's involvement in audit process**

The Arrangements provide for the Authority to approve the appointment of the auditor. CBH queries whether it is appropriate, having regard to the Authority's statutory functions, for it to have such a role under the Arrangements. CBH appreciates that this is a matter for the Authority to consider, and does not have any objection to the Authority performing that role if it considers that it has the statutory power, and considers it appropriate, for it to do so.

12. DISPUTE RESOLUTION

(Section 8A of the Arrangements)

12.1 **General comments**

Section 8A, combined with Appendix C, to the Arrangements establish a regime under which a "Dispute Applicant" can complain about a breach of section 6.2 of the Arrangements (subject to a range of conditions), and then have the matter determined by arbitration or expert determination.

At the outset, CBH submits there is a real question about whether it is appropriate for the Arrangements to establish what amounts to a "incomplete third party access regime", which does not have to meet the requirements, or feature any of the safeguards, of a certified effective access regime through this instrument that sits in "parallel" to the Code process. CBH submits that the Authority should exercise significant caution about deciding whether or not it should, as a matter of principle, allow BR to establish and operate such a regime in the Arrangements.

Turning specifically to the proposed provisions, CBH submits that there are several fundamental problems with the drafting of these provisions:

(a) a breach of the Arrangements is an offence, and there is a risk the dispute resolution process seeks to "side-step" that by setting up a private commercial arbitration to deal with a complaint; and

(b) extraordinarily, BR will require a person making a complaint to forgo:

(i) exercising its rights to make a proposal under the Code; and

(ii) exercising any other rights to have the matter determined by another tribunal,

which demonstrates that BR has not segregated its access related functions (under the Code) from its other functions (including out of Code access processes);

(c) the provisions mean that a person who seeks access **outside** the Code has rights to resolve a breach of the Act that are not available to a person who makes a proposal under the Code; and

(d) the right to change the dispute resolution mechanism with the "prior written consent" of the Authority, instead of in accordance with section 29(1) of the Act, appears to be a method of avoiding the public consultation requirements under section 42 of the Code.

CBH submits that the Arrangements cannot change BR's legal obligations. They can only supplement them by setting out what it must do to ensure that it has arrangements to segregate its access related function from all other functions. The dispute resolution process may assist this, but should not be used to remove BR's liability, or eliminate an access seeker's other rights.

12.2 **Triggering the dispute resolution process**

The trigger for the dispute resolution process is in section 8A.1 of the Arrangements. This allows a "Dispute Applicant" to provide an "Objection Notice" under clause 2.1 of Appendix C, which then triggers the dispute process.

"Dispute Applicant" is defined as a "Proponent" or a "Network Participant". The meaning of those terms is addressed in section 7.2 of these submissions. Significantly, the term "Proponent" is limited to a person who has made a "bona fide Access proposal". There is nothing in the Arrangements to explain how an assessment is made about whether a proposal is "bona fide" or not, so it is presumably left to BR to make this decision. This allows BR to refuse to engage in the dispute resolution process on the basis that it considers a proposal not to be "bona fide", even before moving through the restrictive circumstances in which a dispute may be triggered (which are addressed in the discussion about Appendix C to the Arrangement: see Schedule 3 of this submission).

CBH submits that this significantly undermines the utility of the dispute resolution process.

12.3 **Requirement to forgo rights to make a Code proposal**

Section 8A.2 provides that:

(a) a person who makes a proposal under the Code is **denied** access to **any** dispute resolution process outside the Code;

(b) if a person obtains an arbitral award under the Code, then it cannot commence a separate Arrangements dispute resolution process;

(c) if a person starts a process under Arrangements dispute resolution process, but then makes a proposal under the Code, the dispute resolution process discontinues; and

(d) if a person obtains a binding decision under the Arrangements dispute resolution process, then it cannot make a proposal under the Code (and BR unilaterally relieves itself of the obligation to consider one).

CBH submits that the Arrangements cannot, as a matter of law, change the legal rights of third parties. This means that the matters in (a) and (d) cannot be enforceable and, because they misrepresent the true legal position, are misleading. BR cannot remove its liability to deal with a person who makes a proposal under the Code, nor can it unilaterally decide that a person who makes a proposal under the Code has no rights to any other dispute resolution process (which might include an application for an injunction under section 37 of the Act).

BR seeks to achieve this outcome by forcing Dispute Applicants to enter into a contract with BR that, in effect, commits the person to this process or else be sued for breach of contract (exposing the Dispute Applicant to, among other things, contractual remedies such as damages). This fundamentally rewrites the way that the Act operates, in circumstances where the subject-matter of the dispute—ie whether BR has complied with the Arrangements—is an offence.

Significantly, the matters in (a) to (d) demonstrate that BR has not segregated its access related function from its other functions. As discussed in section 2.6 of this submission, this is likely because it has wrongly construed "access related function" to mean access to the network, whether under the Code or outside of it. As explained above, that is not the case: the access related function under the Code must be segregated from access outside the Code.

Further, CBH submits that requiring a person to forgo its rights to seek access under the Code is potentially a breach of BR's obligations under sections 34A(1) and 34A(2). For this reason alone, the Authority must not approve the Arrangements.

12.4 Changes to the dispute resolution mechanism

Section 8A.1(b) of the Arrangements provide that the dispute resolution mechanism can change from time to time with the written consent of the Authority. This appears to "side-step" the requirements of section 29(1) of the Act, and therefore should not be allowed. Importantly, if this provision is allowed to stand then (assuming it is lawful) it appears that changes could be made to the dispute resolution mechanism without triggering the public consultation requirements in section 42 of the Code.

CBH submits that this is inconsistent with the regulatory scheme established by the Act and the Code, and must therefore be rejected.

12.5 Comments on Appendix C – Dispute Resolution Process

CBH's comments on Appendix C are set out in Schedule 3.

SCHEDULE 1

Management and Compliance Processes

1. The Management and Compliance Process

1.1 About the process

The Management and Compliance Process sets out the specific processes that BR has put in place to manage and comply with the Arrangements. Some aspects of the Management and Compliance Process do this effectively, insofar as they set out specific controls and procedures that show how BR will ensure the Arrangements operate effectively and is complied with. However, many of the "processes" are general, and simply repeat the general propositions contained in the Arrangements. As a consequence, many of the issues with the Management and Compliance Process reflect the specific issues that CBH has raised about the substantive provisions of the Arrangements.

1.2 Specific issues with the Management and Compliance Process

CBH does not have any comments about section 1 to 3.2 of Appendix A, except to highlight that some of the problems contained in the substantive Arrangements have been repeated in Appendix A (particularly in respect of incorrect definitions, and incorrect statements about the requirements of the Act).

Sections 3.3, 3.4 and 3.5 provide no detail of the controls and procedures used to ensure the Arrangements operate effectively and are complied with, and simply restate the corresponding provisions of the substantive Arrangements.

The "compliance plan" in section 4 of Appendix A provides some guidance about the controls and procedures that BR may have in place, but only in a limited way. CBH has the following specific submissions about section 4.

(a) Section 4.1 refers to "a series of measures" but does not specify them. The measures should be specified in Appendix A.

(b) Section 4.1 also seeks to impose a positive obligation on the Authority to forward complaints to BR "for follow up". While the Authority may elect to ask BR to respond, it is not appropriate for BR to impose a duty of this kind on the Authority.

(c) Section 4.2 requires a person that reports a breach of section 3.2 of Appendix A to disclose details of the breach and whether the confidential information has been disclosed either advertently or inadvertently. It may not be appropriate to require a person who "reports" a breach to do this, particularly where the breach has not been carried out by him or her.

(d) Section 4.3 suggests that a breach of conflict of interest will "primarily" occur 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 Proponent. As explained in section 8 of this submission, this is too narrow and does not recognise the breadth of BR's obligations under section 32 of the Act.

(e) Similarly, sections 4.4 and 4.5 sets out an arbitrary list of circumstances where section 6 and 3.5 of Appendix A (respectively) of the Arrangements may be breached. The lists are too brief, and do not provide any general guidance to assist relevant officers to understand and comply with their obligations.

(f) Section 4.7 sets out the "corrective action" resulting from breaches. CBH's central concern is that it limits the "type" of breaches that BR will investigate to a breach

"which may actually, or potentially, adversely impact a Proponent or Network Participant". This is too broad, and fails to recognise that:

(i) repeated minor breaches of the Arrangements would have a cumulative impact and demonstrate a lack of a compliance culture that should be rectified; and

(ii) a breach of the Arrangements is a criminal offence, no matter how "minor" the breach might be, and whether or not it "may actually, or potentially, adversely impact a Proponent or Network Participant ".

CBH does not have any comments about section 5 of Appendix A.

SCHEDULE 2

Confidentiality and Compliance Agreement

2. Confidentiality and Compliance Agreement

The Confidentiality and Compliance Agreement in Appendix B is a document that BR will require its employees and contractors to sign (other than professional advisors or consultants who are under a duty of confidentiality).

The Arrangements hold this out as a document that will promote compliance with the requirements of the Act but, in reality, the document is essentially a confidentiality deed. While it refers to sections 28, 31, 32, 33 and 34 of the Act, it only substantively deals with confidentiality. As a consequence, it is not capable of ensuring the Arrangements operate effectively, or are complied with, other than in respect of preserving some types of confidential information.

Notably, the document is significantly less onerous than the orders that BR sought to protect its confidential information in *Co-operative Bulk Handling Ltd v Brookfield Rail Pty Ltd (No 2)* [2014] WASC 38. Those orders included a 2 year prohibition on a person accessing BR's confidential information from, in effect, being involved in any negotiations or arbitrations about access. The Authority should ask BR to explain why it is not seeking to impose that higher standard in this case, given that the information concerned essentially covers the same subject-matter.

CBH's only specific comment on the document is that the definition of Confidential Information should properly reflect the definition in section 31 of the Act. In particular, the "carve-outs" need to be removed, as they do not appear in the Act.

SCHEDULE 3

Dispute Resolution Process

3. The Dispute Resolution Process

3.1 About the process

The Dispute Resolution Process in Appendix C is a process for resolving complaints that BR has, contrary to section 6.2 of the Arrangements, unfairly or unreasonably:

(a) hindered or denied Access to any Proponent or Network Participant; or

(b) discriminated 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.

CBH's concerns about section 6.2 of the Arrangements are set out in section 9.2 of this submission. In addition to those concerns, CBH has a number of concerns about Appendix C, as follows:

(a) the Dispute Resolution Process in Appendix C applies to only a small part of the Arrangements and is therefore not an effective control or procedure to ensure the Arrangements operate effectively or is complied with;

(b) CBH has concerns about some elements of the dispute resolution process;

(c) CBH does not consider it appropriate for the outcome of the process to be final, particularly given that a finding in favour of the Dispute Applicant is evidence of a criminal offence by BR; and

(d) CBH is concerned about confidentiality requirements.

CBH also observes that a number of provisions confer obligations on the Authority. The Authority should carefully consider whether it is appropriate, having regard to (among other things) its statutory functions and the impact on its resourcing, for the Arrangements to impose those obligations on the Authority.

3.2 Process applies to a narrow range of disputes

The already narrow scope of the dispute resolution process is further confined by section 2.1 of Appendix C. This means that a "Dispute Applicant" may only raise a dispute with BR where, in effect:

(a) it is in respect of a service which is:

  (i) the subject of a "bona fide" access proposal or under an existing access agreement either made after 17 August 2015 (being the date the Brookfield Asset Management Inc consortium intends to take over Asciano Limited), or a waiver or amendment of a right in an existing Access Agreement after that date; and

  (ii) for a service, that is comparable to a service that BR provides to a Related Operator (having regard to the commodity being transported, the type of rolling stock, and geographic area); or

(b) "relevant" to an entity which is a customer of both the Dispute Applicant and a Related Operator, and the Related Operator already provides a service to the customer.

This effectively means that a Dispute Applicant is only permitted to make an objection in relation to the terms of access offered to it compared to the terms of access that BR provides a Related Operator after it acquires Asciano Limited.

Further, by limiting permissible disputes to ones that involve "comparable services" or the same customers, the dispute resolution process fails to take into account the ways in which BR might seek to favour its Related Operator. For example, BR may have an incentive to provide a Related Operator a "whole of network" access agreement on relatively low prices, on the basis the potential amount of access may be large. In those circumstances, it may argue that a dispute raised by a person seeking access to only a small part of the network is therefore outside the scope of this regime.

Finally, as explained in section 8.8, BR has an incentive to favour any entities in which it has a current (or proposed) financial or other interest, and not just Related Operators as defined in the Arrangements. The dispute resolution mechanism fails to protect against discrimination in respect of those entities.

3.3 Process issues – pricing dispute process

The pricing dispute process in section 4 applies to a "Price Dispute". This is defined as 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 Application in contravention of section 6.2 [of the Arrangements]".

The process, on its face, appears to be detailed. However, on closer examination, many of the provisions are concerned with the selection of an expert, and relatively few provisions deal with process or issues of substance. This creates the misleading impression that the dispute resolution regime is sophisticated, when in fact it does not, even in a cursory way, meet any of the requirements of an effective access regime, and therefore should be rejected on those grounds alone.

CBH has the following concerns about the pricing dispute process:

(a) The process calls for a single economist to be appointed as the "Independent Price Expert" to make an expert determination of the dispute. However, a dispute about an access charge is not simply a matter of economics. The expert is called on to determine if it amounts to an "unfair" hindering or denial of access, or "unfair" discrimination, taking account of the matters in section 29 of the Code, which calls for a legal analysis (see section 4.2(b)(i)). While economic evidence may be relevant, this matter is not simply a question of economics. It is necessarily a factual and legal argument. CBH's view is that expert determination is not appropriate, and the matter should be arbitrated before an arbitrator (who might be assisted by an economist).

(b) It is unusual for an expert determination process to provide an indemnity to be given by the parties to the Independent Price Expert (section 4.3(d)).

3.4 Process issues – access disputes

The access dispute process in section 5 applies to an "Access Dispute". This is defined as a "bona fide commercial dispute raised by a Dispute Application which is not a Price Dispute.

As with the pricing dispute process, the access dispute process appears to be detailed. However, on closer examination, many of the provisions are concerned with the selection of an expert, and relatively few provisions deal with process.

CBH has the following concerns about the access dispute process:

(a) The referral for a dispute is "by agreement" (section 5.1(a)). As a result, a Dispute Applicant cannot compel BR to refer a matter to dispute resolution. It appears that, if they cannot agree, then the process continues to the next step of selecting between expert determination or arbitration, but this should be made clearer.

(b) For the same reasons that it is not appropriate for a pricing dispute to be resolved through expert determination, an access dispute should not be determined by expert determination, unless the Dispute Applicant agrees. The process should be amended so that expert determination is only available with the Dispute Applicant's consent, and not otherwise.

(c) It is highly unusual for an expert determination process to provide an indemnity to be given by the parties to the Independent Price Expert (sections 5.2(j) and 5.3(r)).

3.5 Should the processes be final and binding?

The expert determination of a pricing dispute, and an expert determination of an access dispute, is "final and binding" except in the case of "manifest error or fraud" (sections 4.2(g), 5.2(c)). By contrast, a determination by an arbitrator is "final and binding, subject to any rights of review by a court" (section 5.3).

As indicated above, CBH's view is that expert determination is unlikely to be appropriate in the circumstances, and the decisions made by the expert (whether on price or access) should be subject to review by a court.

This is particularly important given that a breach of section 6.2 of the Arrangements is a criminal offence. If a breach has occurred, then the criminal offence cannot be "extinguished" through a private dispute resolution process. It is therefore inappropriate for the dispute resolution process to be determinative of whether BR has complied with the Act. It must necessarily be subject to judicial review, and it is manifestly inappropriate to seek to deny a victim of the right to make a complaint in order to utilise the dispute resolution process.

3.6 Confidentiality

Section 7 of Appendix C provides that the dispute, and any terms of resolution, are to be kept strictly confidential by BR and the Dispute Applicant. However, sections 5.3(g) and 5.3(k) indicate that an arbitration could be conducted in public, and the decision not kept confidential, by agreement.

CBH's view is that the determinations should be public, except that any confidential information (as defined in the Act) should be redacted. This is because, otherwise, determinations will have no "precedent" value to other access seekers. This creates a number of issues, including:

(a) potentially inconsistent outcomes for access seekers, even if the access seekers are seeking the same service and are otherwise in the same position as each other; and

(b) "wasted" time and effort for access seekers, as the decisions made in one arbitration determination cannot be transferred to another. By contrast, a railway

owner can develop its strategy and arguments based on its past experience in other access arbitrations.

There is no public interest in keeping a dispute about whether BR has breached the Act confidential. This is not simply a private commercial matter: it is one of compliance with the law. These issues would be avoided by providing for the determinations to be public.

Separately and in addition, the determinations should be provided to the Authority in its capacity, so that it can determine whether or not to take further action in respect of a breach of the Arrangements by BR (independently of any audit report).

3.7 Governing law and jurisdiction

Appendix C includes a "governing law and jurisdiction" provision, which is drafted as if Appendix C were part of a contract between BR and the Dispute Applicant. The purpose of this provision is unclear, and its drafting is out of place. CBH submits that it should not be included in the Arrangements.