

Part 11:- Dispute Resolution and Decision Making

11.1 Dispute Resolution

11.1.1 Disputes

- (a) Any dispute (**Dispute**) arising in respect of:
- (i) as this Undertaking or any matter under this Undertaking, including the operation of Standard User Funding Agreements, System Rules, the Network Development Plan and [Associated Services];
 - (ii) any matter under clause 2 of this Undertaking;
 - (iii) the negotiation of Access or Access related Services between an Access Seeker and Aurizon Network ~~in relation to the negotiation or grant of Access;~~; or
 - (iv) the negotiation of a Train Operations Agreement between a Train Operator and Aurizon Network, ~~the negotiation of a Train Operations Agreement~~; or
 - (v) in respect of any matters expressly required by this Undertaking to be resolved in accordance with this Part 11,
 - and to the extent not provided for in an Access Agreement or a Train Operations Agreement, any other agreement for Access related Services

shall be resolved in accordance with this **Part 11** and any party to the Dispute may give to the other party or parties a Dispute Notice.

- (b) Unless otherwise agreed by the parties in writing, Disputes in connection with an Access Agreement or a Train Operations Agreement shall be dealt with in accordance with the provisions of that Access Agreement or the Train Operations Agreement, as applicable, and are not to be dealt with under this Undertaking (even if the Dispute relates to provisions included in that Access Agreement or Train Operations Agreement that are similar to, required by, or inconsistent with this Undertaking).
- (c) For the purposes of this **clause 11.1**, where
- (i) a Dispute involves an Access Seeker who proposes to be an End User; or
 - (ii) a Dispute involves a Train Operator,
then:
 - (iii) Aurizon Network must provide the relevant Train Operator(s) (where paragraph (ii) applies) or the relevant End User (where paragraph (ii) applies) with:
 - (A) — a copy of the Dispute Notice and any subsequent notices or correspondence given by

Aurizon Network to the Access Seeker or Train Operator, as applicable, in connection with the Dispute; and

- (B) a reasonable opportunity to participate in any discussions between the parties under clause **11.1.2; and 11.1.2; and**

(i) any such Train Operator or End User may elect, by giving written notice to Aurizon Network and the other parties to the Dispute within 5 Business Days after receiving the Dispute Notice under clause **11.1.1(c)(iii)(A), 11.1.1(c)(iii)(A),** to become a party to the Dispute for the purposes of clauses **11.1.2** to **11.1.6**.

11.1.2 Chief executive resolution and mediation

Unless otherwise agreed by both parties in writing:

- (a) **Subject to clause 11.1.2(c),** any Dispute shall, within 5 Business Days of the receipt of a Dispute Notice, be referred in the first instance to each party's chief executive (or his or her nominee) for resolution.; **and**
- (b) **Subject to clause 11.1.2(c),** if the Dispute is not resolved within 10 Business Days after the referral under clause **11.1.2(a)**, the relevant Dispute may, **by written agreement between the parties,** be referred **by either party** to mediation administered by the Australian Commercial Disputes Centre (ACDC) in accordance with ACDC's guidelines for mediation. -The costs charged by ACDC for the mediation shall be borne equally by the parties and each party shall bear its own costs of preparing for and attending the mediation.
- (c) **Where this Undertaking requires a Dispute to be determined by expert determination, the Dispute will be referred directly to expert determination without the Dispute first being referred to the chief executives under clause 11.1.2(a) or to mediation under clause 11.1.2(b).**

Any communications made between the parties as part of an attempt to resolve the dispute through Chief Executive resolution are confidential and should be treated as being made on a without prejudice basis.

11.1.3 Mediation

- (a) Referral of a Dispute to the ACDC for mediation (or any other entity by agreement) shall qualify as an attempt to have the Dispute resolved by mediation for the purposes of the Act.
- (b) Where mediation resolves the Dispute, the resolution must be documented in writing and signed by the parties to the Dispute. -The mediator must provide a copy of the agreement by which the Dispute was resolved to the QCA. - If the mediator fails to do so, Aurizon Network must provide a copy of the agreement to the QCA.
- (c) If:
- (i) neither party refers the matter to mediation within 10

Business Days of the failure to resolve the Dispute through negotiation as contemplated by clause 11.1.2(a); or

(ii) the matter was referred to mediation under clause 11.1.2(b), then on the earlier of any of the following occurring:

(A) the mediator considers that the parties to the relevant mediation cannot achieve a mediated resolution of the Dispute;

(B) the mediator considers that a party to the relevant mediation fails to participate in the mediation process in good faith; or

(A)(C) mediation fails to resolve the Dispute within four months of referral to mediation under clause 11.1.2(b).

(A) where this Undertaking prescribes that the subject matter of the Dispute be resolved by expert determination, the parties will refer the Dispute to an expert for determination in accordance with clause 11.1.4; and in other cases, the parties may agree to:

(D) where agreed between the parties, refer the Dispute for resolution by an expert in accordance with clause 11.1.4. Failing such 11.1.4; or

(B)(E) where agreement, either party or, (where applicable) the mediator, may on expert determination is not reached within 5 Business Days refer the Dispute to the QCA for a determination of the Dispute in accordance with clause 11.1.5.

(d) All mediations shall be administered by the ACDC in accordance with, and subject to, the then current ACDC guidelines for mediation.

(e) All communications during the mediation will be confidential and shall be treated as being made on a without prejudice basis.

11.1.4 Expert Determination

(a) Where a provision of this Undertaking requires a matter to be referred to an expert for determination or where the parties to a Dispute agree to refer a matter to an expert for determination, the Dispute must be referred to the expert for determination in accordance with this clause 11.1.4.

(b) Where a Dispute is referred to an expert:

(i) the expert shall be appointed by agreement between the parties, or in default of such appointment, the expert appointed is to be the person nominated by:

(A) if the parties agree that the Dispute is of a

- financial nature, the President (for the time being) of CPA Australia;
- (B) if the parties agree that the Dispute is of a non-financial nature, the chief executive (for the time being) of the Institute of Arbitrators and Mediators (IAMA); or
 - (C) in any other case, the President (for the time being) of the Queensland Law Society Incorporated;
 - (ii) either party to the Dispute may engage with the relevant nominating party under **clause 11.1.4(a)** to initiate the nomination process; and
 - (iii) the expert shall:
 - (A) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
 - (B) have no interest or duty which conflicts or may conflict with his or her function as expert, he or she being required to fully disclose any such interest or duty by written notice to the parties before his or her appointment;
 - (C) not be an employee of the parties or of a Related Party of any of them; nor have provided services to them within the previous 12 months;
 - (D)** not be permitted to act until he or she has given written notice to each party that he or she is willing and able to accept the appointment;
 - (E)(D)** have regard to the provisions of this Undertaking and consider all submissions (including oral submissions by each party provided that such oral submissions are made in the presence of the parties to the Dispute), supporting documentation, information and data with respect to the matter submitted by the parties;
 - (F)(E)** not make a determination in relation to a Dispute that is inconsistent with this Undertaking;
 - (G)(F)** provide to the parties a copy of his or her determination in relation to the Dispute in the form of a report within a reasonable time after his or her appointment;
 - (H)(G)** be required to undertake to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her

duties; and

(H) be deemed to be and shall act as an expert and not an arbitrator and the law relating to arbitration (including the Commercial Arbitration Act 1990 (Qld)), shall not apply to him or her or to the determination or the procedures by which he or she may reach a determination.

- (c) The parties shall, upon request by the expert, provide or make available to the expert, as soon as reasonably practicable, all information in their possession or control and all assistance that the expert may reasonably require.
- (d) In the absence of manifest error, the decision of the expert shall be final and binding upon the parties. If a party believes that there has been a manifest error it may refer the matter to the QCA for a determination. -If the QCA determines that there has been a manifest error, then the parties may agree to refer the Dispute to another expert in accordance with this clause 11.1.4, or failing such agreement, either party may refer the Dispute to the QCA for resolution in accordance with clause 11.1.5.
- (e) Unless otherwise agreed by the parties:
 - (i) the parties shall be liable for the costs of the expert and any advisers to the expert, and where applicable under clause 11.1.4(b), any costs payable to the third party nominating the expert, in equal shares; and
 - (ii) each party shall bear their own costs of participating in the expert determination.

11.1.5 Determination by the QCA

- (a) If a Dispute is referred to the QCA for determination by arbitration pursuant to this Undertaking, Subdivision 3 of Division 5 of Part 5 of the Act shall apply in relation to any determination by the QCA of that Dispute.
- (b) Any referral of a Dispute to the QCA must be accompanied by a written Dispute Notice setting out the information required by section 113 of the Act.
- (c) **If a Dispute is referred to the QCA in accordance with this Undertaking the QCA will provide written notices of the Dispute to the parties specified in section 114 of the Act.**
- (d) If a Dispute is referred to the QCA in accordance with this Undertaking, the QCA shall seek the advice of the Safety Regulator on any aspect of the Dispute that either party to the Dispute or the QCA considers to be a safety-related matter. The QCA shall not make any decision that is inconsistent with any advice it receives from the Safety Regulator to the extent that the advice relates to any aspect of safety. The QCA will provide to the parties a copy of any advice it receives from the Safety Regulator.
- (e) Any cost imposed by the Safety Regulator for the provision of its

advice to the QCA shall be borne equally by the parties to the Dispute in such proportion as the QCA determines.

- (f) ~~The QCA must not make a determination in relation to a Dispute that could prejudice the land or Rail Infrastructure tenure of Aurizon Network. Aurizon Network bears the onus of establishing to the QCA that the decision will have that effect. Where the QCA is not satisfied that its determination will have that effect it shall notify Aurizon Network accordingly at least five Business Days before making the determination final.~~
- (g) ~~The QCA may, as part of an arbitral determination, make a costs order as contemplated by section 208 of the Act.~~
- (c) Any determination conducted by the QCA will be done in accordance with its obligations under Division 5 of Part 5 of the Queensland Competition Authority Act 1997 (Qld). To the extent that there is any discrepancy between this Part 11 and the Act, the provisions of the Act will take precedence.

11.1.6 Procedure

Where a Dispute is referred to either an expert or the QCA (**decision maker**) for determination:

- (a) the parties to the Dispute ~~must~~may provide written submissions to the decision maker outlining their respective views on the matter(s) in dispute, including reasons why their view should be preferred and an outline of how they would like to see the Dispute resolved;
- (b) each party to a dispute will be provided with a reasonable opportunity to respond to submissions made to the decision maker by the other party; under clause 11.1.6(a);
- ~~(b)(c)~~ where the matter in Dispute arises under a provision of this Undertaking which sets out the relevant matters to be taken into account by Aurizon Network or the decision maker in making a decision:
 - (i) ~~the submissions~~any submission under clause 11.1.6(a) to the decision maker by the parties to the Dispute must address those matters; and
 - ~~(ii)~~(ii) the decision maker must make its decision in relation to the Dispute having regard to those matters; and
- ~~(c)(d)~~ the decision maker will:
 - (i) publish to the parties a draft determination with reasons;
 - (ii) provide the parties with a reasonable opportunity to respond to the draft determination in writing; and
 - ~~(iii)~~(iii) have regard to ~~the~~ any responsive submissions submitted by the parties under clause 11.1.6(d)(ii) before issuing a final determination.

11.1.7 Time

- (a) Where a dispute is likely to delay a project or mine development, both parties will use reasonable endeavours to resolve the dispute so as not to impact the project.
- (b) Where a dispute delays a project or mine development because of unreasonable delay by one of the parties, the party responsible will bear the cost of that delay.

11.2 QCA decision-making

- (a) The QCA may not make a decision (**Decision**) under this Undertaking (including a determination under this **Part 11**) that may affect Aurizon Network or any other party to the dispute (including to require Aurizon Network~~a party~~ to do, give or submit anything to the QCA, to resolve a Dispute or to refuse to approve, approve or consent to or grant anything), unless:~~inconsistent with the *Queensland Competition Authority Act 1997 (Qld)*, the *Judicial Review Act 1991 (Qld)* or any common law rules of natural justice to the extent they apply.~~
 - (i) ~~the QCA observed the rules of natural justice;~~
 - (ii) ~~the QCA observed any procedures that were required by law or this Undertaking;~~
 - (iii) ~~the QCA had jurisdiction to make the Decision under this Undertaking;~~
 - (iv) ~~the QCA was authorised to make the Decision under this Undertaking;~~
 - (v) ~~the QCA's Decision would not be an improper exercise of the power conferred by this Undertaking. An improper exercise of power includes a reference to:~~
 - (A) ~~taking an irrelevant consideration into account in the exercise of a power;~~
 - (B) ~~failing to take a relevant consideration into account in the exercise of a power;~~
 - (C) ~~an exercise of a power for a purpose other than a purpose for which the power is conferred;~~
 - (D) ~~an exercise of a discretionary power in bad faith;~~
 - (E) ~~an exercise of a personal discretionary power at the discretion or behest of another person;~~
 - (F) ~~an exercise of a discretionary power in accordance with a rule or policy without regard to the merits of a particular case;~~
 - (G) ~~an exercise of a power that is so unreasonable that no reasonable person could so exercise the power;~~
 - (H) ~~an exercise of a power in such a way that the result of the exercise of the power is uncertain; and~~

- (i) any other exercise of a power in a way that is an abuse of the power;
 - (vi) the QCA's Decision did not involve an error of law (whether or not the error appears on the record of the Decision);
 - (vii) the QCA's Decision was not induced or affected by fraud;
 - (viii) to the extent that any matters were required to be established before the Decision could be made or taken, there was some material or evidence from which the QCA could reasonably be satisfied the matter was established to justify the Decision or, to the extent that the existence of a particular fact forms the basis on which the Decision is made, the fact did or does exist; and
 - (ix) the Decision was not otherwise contrary to law or this Undertaking.
For the avoidance of doubt, the terms of this clause 11.2(a) are intended to have the same meaning as used in the Judicial Review Act 1991 (Qld).
- (b) If the QCA's Decision or conduct is challenged on the basis of a breach of a requirement in this **clause 11.2**, Aurizon Network and the QCA agree that Aurizon Network may seek an order suspending the operation of the Decision and a stay of any proceedings under the Decision.
- (c) This **clause 11.2** does not affect the right of any party to seek any other form of remedy or relief including relief by way of the equitable remedies of injunction or declaration or to seek review under the *Judicial Review Act 1991* (Qld).
- (d) Where the QCA makes a Decision, both parties will use reasonable endeavours to ensure prompt enforcement so that the Decision is not delayed or frustrated.
- (e) Where a party causes delay or frustration to the enforcement of a QCA Decision, that party will bear the cost of the delay or frustration.
- (f)