

## Part 11: Dispute Resolution and Decision Making

### 11.1 Dispute Resolution

#### 11.1.1 Disputes

- (a) Any dispute (Dispute) arising:
- (i) as between Aurizon Network and an Access Seeker, an Access Holder, a Customer or a Train Operator in relation to:
    - (A) the negotiation or grant of Access or Access related Services;
    - (B) the negotiation of a Train Operations Agreement; or
    - (C) the operation of, or anything required or permitted to be done or not to be done, by Aurizon Network under, this Undertaking; or

~~except to the extent that the relevant matter in dispute relates to Aurizon Network's compliance with any obligations under Part 36 or Part 107; or~~

- (ii) in respect of any matters expressly required by this Undertaking to be resolved in accordance with this Part 11,

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)~~ (i) a Dispute involves an Access Seeker who proposes to be an End User or an Access Holder who is an End User;
  - ~~(ii)~~ (ii) a Dispute involves an Access Seeker or an Access Holder who is seeking or holds Access Rights for another party (that is, a party who is that Access Seeker's or Access Holder's proposed Customer); or
  - (ii) a Dispute involves a Train Operator,  
then:
    - (iii) Aurizon Network must provide the relevant Train Operator(s) (where paragraph (i) applies) or the relevant Customer (where paragraph (ii) applies) or the relevant End User (where paragraph (iii) applies) ~~(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, Access Holder or Train Operator, as applicable, in connection with the Dispute; and
      - (B) a reasonable opportunity to participate in any discussions.

- (iv) All parties to, and other persons involved in resolving, a Dispute must use reasonable endeavours to facilitate the resolution of the Dispute in a timely manner.

### 11.1.2 Chief executive resolution

- (a) ~~Subject to clause 11.1.4(a) and u~~Unless otherwise agreed in writing by the parties to the relevant Dispute, 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.
- (b) All communications between the parties to a Dispute, including by, to or through each party's chief executive (or his or her nominee), as part of an attempt to resolve the Dispute under this clause 11.1.2 are made on a without prejudice and confidential basis.

### 11.1.3 Mediation

- (a) Subject to clause 11.1.4(a), if the Dispute is not resolved within 10 Business Days after the referral under clause 11.1.2, then the parties may, by agreement, refer the relevant Dispute 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.
  - (b) All communications made between the parties to a Dispute, including to or through the mediator, as part of an attempt to resolve the Dispute under this clause 11.1.3 are made on a without prejudice and confidential basis.
  - (c) 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.
  - (d) If:
    - (i) the matter is not referred to mediation within 10 Business Days after the failure to resolve the Dispute through negotiation under clause 11.1.2; or
    - (ii) the matter is referred to mediation under clause 11.1.3(a) and either:
      - (A) the mediator notifies the parties to the mediation that the mediator considers:
        - (1) the parties to the relevant mediation cannot achieve a mediated resolution of the Dispute; or
        - (2) a party to the relevant mediation has failed to participate in the mediation process in good faith; or
      - (B) mediation fails to resolve the Dispute within 4 months after referral to mediation under clause 11.1.3(a),
- then:
- (iii) where this Undertaking prescribes that the subject matter of the Dispute be resolved by expert determination, the Dispute will be referred to an expert for determination in accordance with clause 11.1.4; and
  - (iv) in other cases:

- (A) the parties may agree to refer the Dispute for resolution by an expert in accordance with clause 11.1.4; or
- (B) failing such agreement within 5 Business Days, either party may refer the Dispute to the QCA for a determination of the Dispute in accordance with clause 11.1.5.

#### 11.1.4 Expert Determination

- (a) Where this Undertaking requires a Dispute to be determined by expert determination, the Dispute will be referred directly to expert determination without the Dispute being referred to mediation under clause 11.1.3, provided that, in all cases, the Dispute is first referred to chief executives under clause 11.1.2.
- (b) Where this Undertaking requires a Dispute 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.
- (c) Where a Dispute is referred to an expert:
  - (i) the expert shall be:
    - (A) appointed by agreement between the parties to the Dispute; or
    - (B) in default of such appointment within 10 Business Days after the requirement or right (as applicable) to refer the matter to an Expert arose, the person nominated by (at request of any party to the Dispute):
      - (1) if the parties agree that the Dispute is purely of a financial or accounting nature, the President (for the time being) of The Institute of Chartered Accountants in Australia;
      - (2) if the parties agree that the Dispute is purely of a technical nature, the President (for the time being) of the Institute of Arbitrators and Mediators (IAMA); or
      - (3) in any other case, the President (for the time being) of the Queensland Law Society Incorporated;
  - (ii) if the expert is to be nominated by a person referred to in clause 11.1.4(c)(i), then the parties to the Dispute must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of that person (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne by the parties in equal shares)) that must be satisfied or complied with as a condition of that person agreeing to nominate an expert;
  - (iii) if the expert is to be nominated by a person referred to in clause 11.1.4(c)(i) and that person declines to nominate a person as the expert but provides a list of people that could be appointed as the expert, then:
    - (A) the first person specified in that list will be taken to be nominated as the Expert;
    - (B) if the first person specified in that list does not accept the appointment as the Expert or, whether or not willing to accept the appointment, does not meet all of the requirements set out in clause 11.1.4(c)(vi), then the next person specified in that list will be taken to be nominated as

the Expert; and

- (C) the process specified in clause 11.1.4(c)(iii)(B) will apply to the next and each subsequent person specified in that list until a person that is taken to be nominated as the Expert and who meets all of the requirements set out in clause 11.1.4(c)(vi) accepts the appointment as the Expert;
- (iv) subject to clause 11.1.4(c)(iii), if the expert is to be nominated by a person referred to in clause 11.1.4(c)(i) and the person nominated as the expert does not accept appointment as the expert or does not meet all of the requirements set out in clause 11.1.4(c)(vi), then an alternative person is to be nominated as the expert at the request of any party to the Dispute by the relevant person referred to in clause 11.1.4(c)(i);
- (v) the parties to the Dispute must comply with, and do all things necessary to satisfy and to give effect to, the reasonable requirements of an agreed or nominated expert (including providing relevant indemnities and paying any charges or fees (which charges or fees will be borne by the parties in equal shares)) that must be satisfied or complied with as a condition of that person accepting the appointment as an expert;
- (vi) 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 their function as expert, the expert being required to fully disclose any such interest or duty by written notice to the parties before their appointment;
  - (C) not be, or have been in the last five years, an employee of any of the parties to the Dispute 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 the expert has given written notice to each party that the expert is willing and able to accept the appointment;
  - (E) 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 other parties to the Dispute), supporting documentation, information and data with respect to the matter submitted by the parties;
  - (F) not make a determination in relation to a Dispute that is inconsistent with this Undertaking;
  - (G) provide to the parties a copy of the expert's determination in relation to the Dispute in the form of a report setting out reasonable details of the reasons for the expert's determination within a reasonable time after their appointment;
  - (H) be required to undertake to keep confidential all matters coming to their knowledge by reason of their appointment and performance of their duties (including, if required by a party, by entering into a confidentiality agreement in favour of the parties to the relevant Dispute); and
  - (I) 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 2013 (Qld)), shall not apply to the expert or to the determination or the procedures by which the expert may reach a determination.

- (d) The parties shall do everything reasonably requested by the expert to assist the expert in determining the Dispute, including providing or making available to the expert, as soon as reasonably practical, all information and materials in their possession or control reasonably requested by the expert and attending any hearing reasonably convened by the expert.
- (e) In the absence of manifest error, the decision of the expert shall be final and binding upon the parties.
- (f) 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.
- (g) Unless otherwise agreed by the parties to the Dispute:
  - (i) the costs of the expert (and the costs of any advisers to the expert) shall be borne by the parties in equal shares; and
  - (ii) each party shall bear their own costs of participating in the expert determination process.

#### 11.1.5 Determination by the QCA

- (a) If this Undertaking requires that a Dispute be resolved by the QCA under this clause 11.1.5, then that Dispute may only be referred to the QCA after:
  - (i) clause 11.1.1 has been complied with in relation to that Dispute; and
  - (ii) the party referring the Dispute to the QCA ~~a party to the Dispute~~ has used reasonable endeavours to resolve the Dispute with the other parties to the Dispute:
    - (A) by referring it to each party's chief executive (or his or her nominee) for resolution in accordance with clause 11.1.2; and
    - (B) by mediation in accordance with clause 11.1.3, where the parties have agreed that the Dispute be referred to mediation.
- (b) 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.
- (c) 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.
- (d) 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.
- (e) 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.
- (f) 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.

~~(g) The QCA must give a draft determination for a Dispute to the parties to the Dispute (as required by section 117(5) of the Act) and give those parties a reasonable opportunity to make relevant submissions in relation to that draft determination. Without limiting the matters that the parties may make submissions on, submissions may include matters relating to whether compliance by Aurizon Network is reasonably possible without breaching Aurizon Network's land or Rail Infrastructure tenure or accreditation as a Rail Infrastructure Manager, any Law or this Access Undertaking (Compliance Submission).~~

~~(h) The QCA must consider all submissions made under clause 11.1.5(g) in making a final determination.~~

~~(i) Where:~~

~~(A) Aurizon Network makes a Compliance Submission; and the QCA makes a determination that is inconsistent with the Compliance Submission, the QCA must, without limiting any of its obligations to provide reasons, give reasons to Aurizon Network for its decision in relation to the Compliance Submission. [QRC Note: The matters in these deleted paragraphs appear to be already covered in more general terms in clause 11.1.6(d).]~~ [QRC Note: The matters in these deleted paragraphs appear to be already covered in more general terms in clause 11.1.6(d).]

~~(B)~~

~~(i)(g)~~ The QCA may, as part of an arbitral determination, make a costs order as contemplated by section 208 of the Act.

~~(i)(h)~~ To the extent that there is 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 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;
- (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 to the decision maker by the parties to the Dispute must address those matters; and
  - (ii) the decision maker must make its decision in relation to the Dispute having regard to those matters; and
- (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) have regard to the any responsive submissions before issuing a final

determination including reasons for that final determination:-

(e) once the decision maker has made a final determination, the parties to the Dispute will use reasonable endeavours to ensure prompt enforcement so that the final determination is not delayed or frustrated; and

(f) where a party to the Dispute causes delay or frustration to the enforcement of a final determination, that party will bear the cost of the delay of frustration.

#### **11.1.7 Application to Part 8 Disputes**

- (a) Part 8 expressly sets out additional requirements in relation to resolution of specified disputes (Part 8 Disputes).
- (b) Nothing in this clause 11.1 prevents a person who is entitled to refer a Part 8 Dispute to dispute resolution under this clause 11.1 from doing so.
- (c) To the extent of any inconsistency between Part 8 and this Part 11, Part 8 prevails.

#### **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:
  - (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).