

# Queensland Competition Authority

Summary guide

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## Access disputes under the QCA Act

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June 2019

## Important notice

- (1) This summary guide is non-binding. It is designed to provide basic information on access disputes under the *Queensland Competition Authority Act 1997* (QCA Act). The guide therefore:
  - (a) does not cover all aspects of the applicable dispute resolution procedures
  - (b) does not use formal or legal language
  - (c) relates only to access disputes arising under Part 5 of the QCA Act for services that have been declared\*
  - (d) should not be considered a substitute for professional advice.
- (2) Each dispute process is likely to be different. The QCA Act gives the Queensland Competition Authority (QCA) wide discretion in determining the appropriate form and path for each dispute resolution process. Therefore, where this document provides any guidance on how proceedings might be conducted, the QCA is not necessarily bound to act in a manner consistent with such statement in any access dispute.
- (3) Access to services provisions within the QCA Act are in many respects based on provisions within federal competition and consumer legislation, primarily the *Competition and Consumer Act 2010* and its predecessor, the *Trade Practices Act 1974*. The Australian Competition and Consumer Commission (ACCC) published a guide in April 2006 about access disputes under the federal access regime, titled *Arbitrations: A guide to resolution of access disputes under Part IIIA of the Trade Practices Act 1974*. With the ACCC's approval, certain sections of that guide have been modified and adopted within this document in relation to elements of the Queensland access regime that closely align with the federal regime.

\*Note—for services not presently declared, any person may apply to the QCA for a recommendation to the relevant Minister that a service provided by a facility be declared for third-party access under the Queensland Access Regime. The framework for the declaration process is contained in Part 5 of the QCA Act.

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## ABOUT THIS SUMMARY GUIDE

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This summary guide to access disputes under the QCA Act provides basic information to stakeholders regarding the QCA's decision-making role in relation to access disputes, and how the QCA discharges that role (including by outlining the QCA's procedures and requirements that may be adopted when resolving access disputes in accordance with Part 5 the QCA Act).<sup>1</sup> By providing this information, the guide is intended to assist in maintaining workable and effective access dispute processes, and to enable parties to an access dispute to be adequately prepared for the QCA's dispute resolution processes.

There are four main sections to this guide:

- Raising an access dispute
- Dispute resolution process
- Disclosure orders and confidentiality
- Determination.

Template documents are provided as appendices to the guide. They are primarily designed to assist parties in the process of referring access disputes to the QCA.

### Access disputes under the QCA Act

A range of potential types of dispute may arise between the owner/operator of a declared service and parties who are either using or seeking access to the service.

It is important to note that not every type of dispute arising will automatically be subject to referral to the QCA for dispute resolution under Part 5 of the QCA Act. In some cases, the dispute resolution provisions under the QCA Act will not apply at all, whilst in others they may apply only after the parties have complied with certain preliminary steps (before referring the matter to the QCA). In each instance, the dispute parties should refer to the provisions of any applicable agreement (e.g. an access agreement) and/or approved access undertaking concerning a declared service in order to confirm (a) whether the dispute falls to be determined under Part 5 of the QCA Act and, if so, (b) whether the necessary pre-conditions for referral of a dispute to the QCA have been met.<sup>2</sup> This guide only applies in relation to access disputes that have been properly referred to the QCA for determination under Part 5 of the QCA Act. It does not cover any other type of dispute that may be referred to the QCA.

The QCA may deal with access disputes by way of mediation or arbitration (or, in some instances, by mediation followed by arbitration). This guide deals with both processes.

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<sup>1</sup> Unless otherwise stated, references to parts or sections within this guide are to the relevant provisions of the QCA Act.

<sup>2</sup> For example, the provisions of an access agreement or approved access undertaking may include a dispute resolution mechanism with an escalation process.

## Enquiries

The QCA cannot give legal advice, but can provide information on the issues discussed in this guide. The QCA's contact details are:

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GPO Box 2257  
Brisbane QLD 4001

tel: (07) 3222 0555

fax: (07) 3222 0599

[www.qca.org.au](http://www.qca.org.au)

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# 1 RAISING AN ACCESS DISPUTE

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## 1.1 Which sections of the QCA Act deal with access disputes?

The sections of the QCA Act most relevant to access disputes are:

- Part 5, Division 5 (ss. 111–127D): access disputes about declared services
- Part 6A (ss. 187A–187K): conduct of mediation
- Part 7 (ss. 188–208): conduct of arbitration hearings
- Part 8, Division 1 (ss. 213–214D): QCA associate members.

## 1.2 What is the QCA's role in arbitrating or mediating access disputes?

Part 5 sets out the statutory access regime in Queensland, including the process for declaration of services and the negotiation of terms of access.<sup>3</sup> The regime is based on a negotiate–arbitrate framework, which envisages that, in the first instance, access to a declared service should be procured on the basis of terms and conditions that are commercially agreed between the access seeker and the provider of the declared service.

Importantly for the Queensland access regime, to date the suite of approved access undertakings<sup>4</sup> are the primary means of setting out:

- a process required for an access seeker to negotiate access
- general terms and conditions that apply when negotiating access agreements
- how disputes in relation to access are to be resolved.

In the instance where there is an approved access undertaking in place, a dispute may be governed by applicable dispute resolution provisions within the undertaking. Those provisions will need to be considered before a dispute is referred to the QCA, in order to ascertain (a) whether the relevant dispute falls to be determined under Part 5 of the QCA Act and, if so, (b) whether all preliminary requirements for referral have been met. As stated previously, for the purposes of this guide, it is assumed that both of these requirements have been met, and that the dispute can be properly dealt with under Part 5.

If an access seeker and the provider of a declared service are unable to agree on one or more aspects of access to the service, and there is no access agreement between the access provider and access seeker relating to the service, they may seek mediation and/or arbitration of the dispute by the QCA under Part 5.

If an access dispute is referred to the QCA for mediation, the QCA's role is primarily to assist the parties to reach an agreement on the terms of access by negotiation. In arbitration, the QCA's

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<sup>3</sup> At the time of production of this guide, the declared services are: rail transport services provided by Aurizon Network's Central Queensland Coal Network (CQCN), rail transport services on the intrastate passenger and freight rail network (provided by Queensland Rail), and coal handling services at the Dalrymple Bay Coal Terminal (DBCT) (provided by DBCT Management). See s. 250 of the QCA Act.

<sup>4</sup> At the time of production of this guide, the access undertakings in force are the 2017 access undertaking (Aurizon Network), 2016 access undertaking (Queensland Rail) and 2017 access undertaking (DBCT Management).

role is to make a determination concerning the matter in dispute that is final and binding on the parties.

Even if a dispute has been referred to the QCA, it does not preclude the parties from continuing to negotiate the terms of access directly between themselves. Such discussions may take place in parallel with any mediation/arbitration.

### 1.3 What is an 'access dispute' for the purposes of Part 5?

An access dispute, for the purposes of Part 5 of the QCA Act, is where an access seeker 'cannot agree' with the provider of the declared service on one or more aspects of access to the declared service.<sup>5</sup> Importantly, an access seeker or access provider can only notify the QCA of an access dispute if there is no access agreement in place between parties to the dispute<sup>6</sup>, or if there is an agreement and the aspect about access to the service concerning which the parties cannot agree is increased access to the service.<sup>7</sup>

The person notifying the QCA of the dispute (who can be the access provider or the access seeker) must provide information indicating that the parties have been unable to reach agreement about one or more matters related to access to the declared service.

A general rule-of-thumb in considering whether the access seeker and access provider 'cannot agree' is that:

- Either the access seeker or the access provider must have made a request of the other party, or put a proposal to the other party.
- The other party must have refused the request or rejected the proposal, and it must remain unresolved. The refusal may be an explicit refusal or a constructive refusal (e.g. where the other party has not responded to the request or proposal within a reasonable time or where the other party is only prepared to agree on terms that are so onerous, no reasonable person in the position of that party would agree to those terms).
- If the parties already have an agreement in place, the issue in question is not already addressed by the agreement.

If there is insufficient information in the notification for the QCA to be satisfied that the access seeker and access provider have been unable to agree, the QCA will likely ask the parties for further clarification.

### 1.4 What should the dispute notice include?

To start an access dispute under Part 5, an applicant must provide notice to the QCA.<sup>8</sup> The dispute notice must be in writing and state the following:

- the names and addresses of the access seeker and the access provider
- whether the dispute is to be dealt with by mediation or arbitration
- the steps the applicant/notifying party has taken (or tried to take) to satisfy its obligations in carrying out negotiations for an access agreement in good faith. These steps include, if the

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<sup>5</sup> Section 112(1)(a).

<sup>6</sup> Section 112(1)(b).

<sup>7</sup> Section 112(3).

<sup>8</sup> Section 112.

dispute is to be dealt with by arbitration, whether or not an attempt has been made to resolve the dispute by mediation.<sup>9</sup>

In addition, it is helpful to the QCA if the notifying party also provides adequate details concerning the access dispute (together with supporting documents), including:

- the notifier's existing and anticipated business
- the service and the facility used to provide the service
- whether the dispute is about the varying of existing access arrangements and, if so, a description of those arrangements (including a copy of any current access agreement)
- each aspect of the access to the service on which the parties to the dispute are able to agree
- each aspect of the access to the service on which the parties to the dispute are not able to agree
- existing users and those with rights to use the service, and a brief description of how access may affect these other users
- if relevant to the dispute, whether access would involve extending the facility
- whether access will involve a third party / access seeker becoming the owner of any part or extension of the facility.

The notifier of the access dispute will not necessarily have full knowledge of some of these matters. Therefore, the QCA only requires that details be provided to the best of the notifier's knowledge.

The notifying party should also provide contact details of its appointed representative(s) (including legal representatives), so that they can receive further communication concerning the dispute.

A template dispute notice is provided at Appendix A.

## 1.5 Will the access dispute be dealt with by arbitration or mediation?

The dispute notice must indicate whether the applicant wishes the matter to be dealt with by mediation or arbitration.<sup>10</sup> However, the QCA may refer an access dispute to mediation when the parties have initially sought to refer the matter to arbitration. This may occur if the parties have made no obvious attempt to resolve the dispute by mediation and the QCA considers a mediated resolution of the dispute can be achieved.<sup>11</sup> If this happens, the QCA must give the access seeker and access provider written notice asking them to attend a conference to attempt to resolve the dispute.<sup>12</sup>

If an access dispute is referred to mediation and the matter is not resolved (and the dispute notice is not withdrawn), the mediator must refer the dispute to the QCA for arbitration. This may occur if any of the following apply:

- the mediator considers that the parties cannot reach a mediated resolution

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<sup>9</sup> Section 113.

<sup>10</sup> Section 113(2)(c).

<sup>11</sup> Section 115A.

<sup>12</sup> Section 115A(2).



- a party does not attend the mediation conference
- the access dispute remains unresolved four months after the QCA was notified of the dispute.<sup>13</sup>

A party may also, by further dispute notice, refer an access dispute to arbitration when it had been initially dealt with through mediation. This applies if the parties have reached agreement on the resolution of the dispute (documented in a mediation agreement) and a party claims that another party has not complied with the agreement.<sup>14</sup>

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<sup>13</sup> Section 115F.

<sup>14</sup> Section 115G.

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## 2 THE DISPUTE RESOLUTION PROCESS

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### 2.1 What is the mediation process?

The mediator, as nominated by the chair of the QCA, assists the parties to the mediation process to negotiate mutually acceptable terms of agreement for access. There is no set mediation process under the QCA Act, other than the general requirements for the conduct of mediation conferences discussed below. The mediator ordinarily consults with the parties in designing and implementing the mediation process. To a large extent, the parties themselves control the outcome of mediation. There is no final and binding determination to the process.

However, if the mediator considers that the parties cannot reach a mediated resolution (in the circumstances described in section 1.5), the matter must then be referred to the QCA for an access determination by way of arbitration.<sup>15</sup>

The requirements about the way mediation conferences are conducted include that they:

- must be conducted in private, although the mediator can give directions about those who may attend a conference<sup>16</sup>
- generally involve each party conducting its own case—although companies may be represented and other parties may be represented where the mediator is satisfied this should be allowed<sup>17</sup>
- involve mediators acting with as little formality as possible, whilst still complying with natural justice. Mediators are not required to follow particular technicalities or rules of evidence and may inform themselves in any way considered appropriate<sup>18</sup>
- must not involve a person making an official record of anything said at a mediation conference.<sup>19</sup>

### 2.2 What is the arbitration process?

There are ordinarily three main phases to an arbitration—the preliminary, substantive and determination phases. Although the phases can overlap, such a distinction is useful, because the tasks undertaken in each phase are qualitatively different.

During the **preliminary** phase of arbitration, after the QCA has been formally notified of a dispute, or the dispute has been referred following an unsuccessful mediation, the QCA sets out to ascertain the parties to the dispute, resolve any jurisdictional issues and ensure that the relevant parties have identified the substantive issues in dispute. Where relevant, this may also involve the QCA deciding that arbitration should not be started or should be ended (if the giving of the access dispute notice was vexatious, the subject matter of the dispute is trivial, misconceived or lacking in substance, or the party who gave the access dispute notice has not engaged in good faith negotiations).<sup>20</sup>

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<sup>15</sup> Section 115F.

<sup>16</sup> Section 187F.

<sup>17</sup> Section 187G.

<sup>18</sup> Section 187H.

<sup>19</sup> Section 187J.

<sup>20</sup> Section 122.

The **substantive** phase involves the QCA—as constituted for an arbitration (the arbitration authority), in the way nominated by the QCA's chair—shaping the processes relevant to the arbitration and receiving all the relevant information. The arbitration authority generally makes directions for the parties to follow and seeks submissions from the parties before deliberating on the issues in dispute. The arbitration authority may undertake its own analysis and research in addition to that provided by the parties. The arbitration authority may also seek expert advice on particular matters.

In arbitrating an access dispute, the arbitration authority does not merely choose between the positions put by each party. The arbitration authority may inform itself in any way it wants regarding the subject matter relevant to the dispute.<sup>21</sup> Further, a determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis of the dispute notification.<sup>22</sup>

However, the arbitration authority must take certain matters into account in making a determination.<sup>23</sup> There are also restrictions affecting the making of access determinations.<sup>24</sup>

The **determination** phase of an arbitration involves the arbitration authority issuing a draft determination for comment by the parties and then making a determination.<sup>25</sup> The arbitration authority may terminate the arbitration without making a determination in certain circumstances.<sup>26</sup>

### General guide to arbitration process

Each arbitration is likely to be different. Accordingly, the QCA does not adhere to, and is not obliged to adhere to, any particular format or process for conducting an arbitration. The process, where possible, is designed and determined by the arbitration authority in consultation with the parties, having regard to the matters in dispute.

An arbitration hearing must be held in private unless the parties agree that the hearing, or part of a hearing, may be held in public.<sup>27</sup> The member of the arbitration authority who is presiding may make directions about who attends a private arbitration hearing.

While each resolution of an access dispute under Part 5 could look different, an example of the process for an access dispute resolution is shown in Figure 1.<sup>28</sup>

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<sup>21</sup> Section 196(1)(c).

<sup>22</sup> Section 117(3).

<sup>23</sup> Section 120.

<sup>24</sup> Section 119.

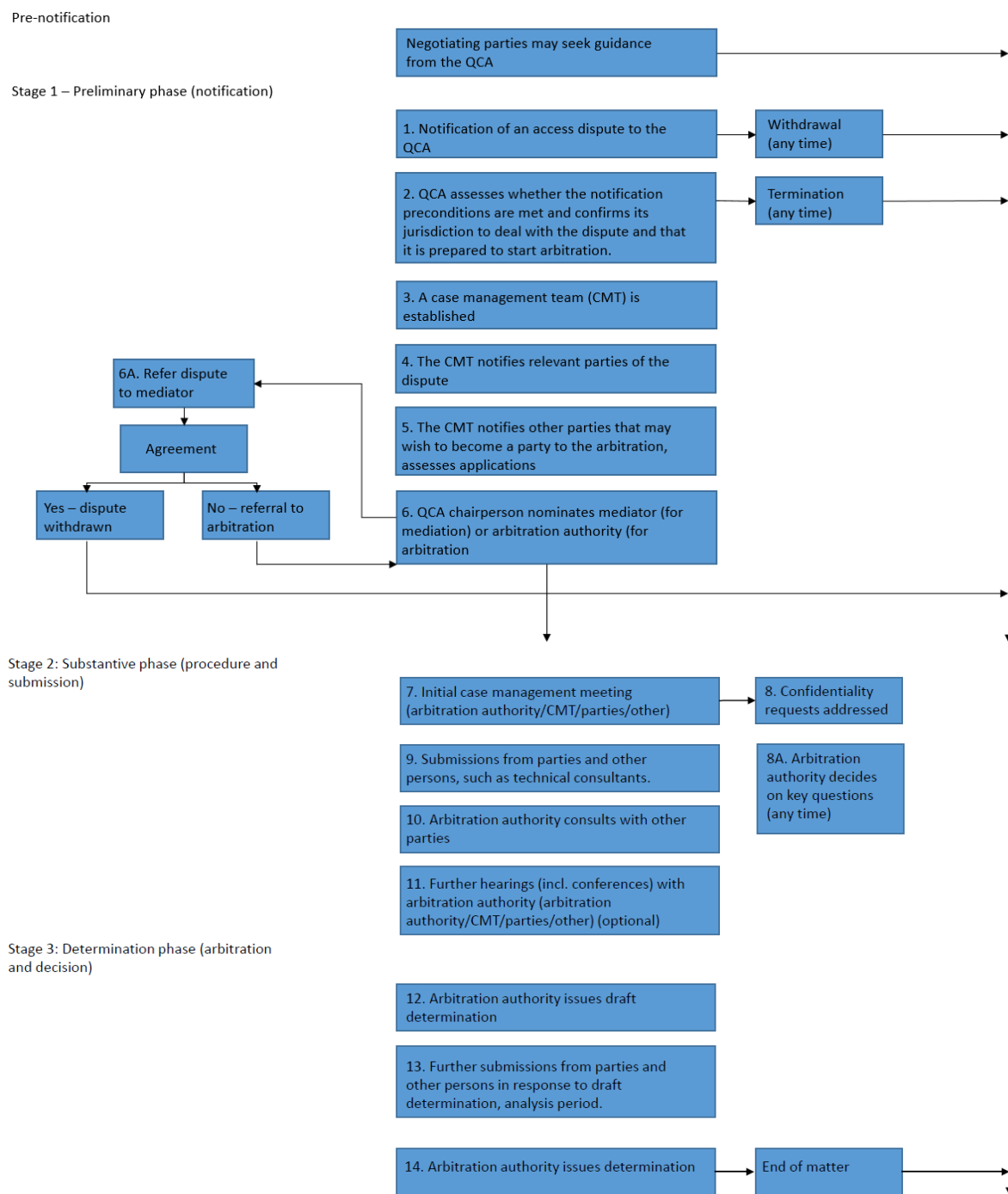
<sup>25</sup> Sections 117(1), (5).

<sup>26</sup> Sections 122, 117(2).

<sup>27</sup> Section 194.

<sup>28</sup> For the reasons outlined above, the flow chart provides only a general guide as to how proceedings might be conducted.

**Figure 1 Process access dispute resolution**



The arbitration authority established within the QCA to arbitrate the dispute conducts the arbitration with as little formality as possible.<sup>29</sup> The arbitration authority is not a court, nor are arbitrations comparable to court proceedings, so some of the formalities associated with court proceedings may not be appropriate. For example, the authority is not bound by technicalities or rules of evidence and may inform itself on any matter relevant to the dispute in any way it considers appropriate.<sup>30</sup>

<sup>29</sup> Section 196(1)(a).

<sup>30</sup> Section 196(1)(b),(c).

An arbitration may be conducted by way of oral or written submissions (or a combination of both) and may be informed by:

- meetings with the parties
- written submissions
- hearings with the arbitration authority<sup>31</sup>
- other means as may be considered appropriate to address particular issues (e.g. site inspections).

The arbitration authority is required to conduct arbitration proceedings in a certain way (discussed in section 2.1).<sup>32</sup> The arbitration authority also has wide powers when conducting an arbitration. These include the giving of directions in the course of, or for, an arbitration; and generally giving directions, and doing things that are necessary or expedient for the speedy hearing and determination of a dispute.<sup>33</sup> The arbitration authority may also exercise powers to require the presentation of evidence. For example, the arbitration authority can require a witness to appear before it to give evidence or produce documents.<sup>34</sup>

The arbitration authority will ordinarily issue case management directions orders (an example of such an order is at Appendix B).<sup>35</sup>

## 2.3 Who in the QCA conducts the arbitration?

The chair of the QCA nominates two or more members of the QCA to constitute the arbitration authority for the purposes of a particular arbitration.<sup>36</sup> The QCA informs all parties once the arbitration authority has been constituted.

If the arbitration authority is constituted by two or more members, any question before the arbitration authority is to be decided according to the opinion of the majority of those members, or if the members are evenly divided on the question, according to the opinion of the member who is presiding.<sup>37</sup>

While the arbitration authority is responsible for making decisions in the arbitration, it is typically supported by an internal case management team (CMT), comprising QCA staff reporting to the QCA's Director of Business Performance. The Director of Business Performance is the contact point for all enquiries regarding an arbitration.

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<sup>31</sup> An arbitration hearing may be conducted by telephone, closed circuit television (e.g. video conference facilities), or any other means of communication allowing reasonably simultaneous and continuous communication between the QCA and the parties, as determined by the arbitration authority.

<sup>32</sup> For example, under s. 196(1), the arbitration authority (a) must act with as little formality as possible; (b) is not bound by technicalities, legal forms or rules of evidence; (c) may inform itself on any matter relevant to the dispute in any way it considers appropriate; (d) must comply with natural justice and (e) it must act as speedily as a proper consideration of the dispute allows.

<sup>33</sup> Section 197.

<sup>34</sup> Section 200

<sup>35</sup> These are the type of directions that are likely to apply in a relatively simple matter in which no oral evidence is presented (only written submissions).

<sup>36</sup> Section 190.

<sup>37</sup> Section 193. The presiding member is the chair, or a member of the QCA nominated by the chair (s. 191).

The arbitration authority must ensure that the arbitration is managed and conducted in a balanced and transparent manner, such that all parties have a fair and reasonable opportunity to present their case.<sup>38</sup> In the interests of transparency and procedural fairness:

- the arbitration authority/CMT will ordinarily correspond with the parties jointly (or by way of copied correspondence)
- written communication from a party to the arbitration authority/CMT in relation to the dispute should be copied to the other parties to the dispute at the same time as it is delivered to the arbitration authority/CMT
- the arbitration authority will not generally meet and discuss matters that are the subject of dispute with the parties outside of case management meetings.

## 2.4 How long does the arbitration process take?

During the course of the arbitration, each party is required to observe the arbitration authority's case management directions, including any timeframes for the making of submissions. The QCA may determine the periods that are reasonably necessary for the 'fair and adequate' presentation of the respective cases of the parties.<sup>39</sup> The timing of the parties' responses depends on the complexity of the issues under consideration.

The time taken by the QCA to arbitrate the dispute and its final determination depends on the nature of the dispute, the complexity of the issues under consideration, and the conduct of parties (particularly in providing necessary information to the QCA promptly). However, it is important to note that in an arbitration the QCA is required to:

- act as speedily as a proper consideration of the dispute allows<sup>40</sup>
- use best endeavours to make an access determination within six months from the day it receives the access dispute notice. The six-month period excludes time dedicated to certain functions and activities.<sup>41</sup>

The QCA will publish details on its website about the period of the arbitration.<sup>42</sup>

## 2.5 What information is required from the parties?

The arbitration authority generally issues case management directions, specifying the information that it requires from the parties. The arbitration authority may require parties to present evidence or arguments in writing and may decide the matters on which it will hear oral evidence. Ordinarily, written submissions will be the primary means by which the arbitration authority receives arguments from the parties. Detailed written submissions are particularly appropriate in disputes involving:

- complex questions of law
- methodology of calculating costs and/or charges

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<sup>38</sup> Sections 196(1)(d), 196(3).

<sup>39</sup> Section 196(3).

<sup>40</sup> Section 196(1)(e).

<sup>41</sup> Under s. 117A(2), the following periods are excluded from the six months: (a) mediation; (b) responses to information notices under s. 205; (c) periods allowed for parties' comments on a draft determination; (d) days the parties agree to exclude.

<sup>42</sup> Section 117A(3).

- analysis of detailed or large amounts of information that has been presented into evidence
- resolution of apparent conflicts in the evidence upon which an argument is based (e.g. evidence on the availability of capacity or state of competition).

## 2.6 How much does an access dispute determination cost?

The cost of proceedings depends on various factors, including:

- the complexity of the dispute (and the nature of evidence considered)
- the length of the arbitration process
- whether or not the parties are legally represented.

A significant consideration is that the arbitration authority's final determination may include an order regarding costs of the arbitration process. The arbitration authority can make any order it considers appropriate with respect to costs, including:

- the payment by a party of the costs, or part of the costs, incurred by another party in the arbitration, and/or
- the payment by a party of the costs, or part of the costs, incurred by the QCA itself in conducting the arbitration.<sup>43</sup>

## 2.7 How can an arbitration be ended?

An arbitration can be brought to an end in any of the following ways:

- The access dispute notice is withdrawn at any time before the arbitration authority makes its determination.<sup>44</sup>
- The QCA decides not to start an arbitration, or at any time ends an arbitration, for reasons as set out at section 2.2.<sup>45</sup>
- The arbitration authority makes a final access determination.

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<sup>43</sup> Section 208.

<sup>44</sup> Section 115.

<sup>45</sup> Section 122.

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## 3 DISCLOSURE DIRECTION AND CONFIDENTIALITY

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The receipt of information is crucial to the QCA's ability to arbitrate access disputes. Matters of confidentiality, disclosure and use of information have an important bearing on the way in which arbitrations are conducted.

Issues of confidentiality may also arise in the context of mediations. The way in which a mediator deals with these issues will be very similar to the way in which an arbitration authority deals with them in arbitration.<sup>46</sup>

### 3.1 How is confidentiality maintained during arbitration?

The arbitration authority may give a general confidentiality direction to the parties (including their employees, contractors and agents) at any stage of an arbitration.<sup>47</sup> This is an instruction that recipients not disclose any information obtained from the other party or the arbitration authority in the course of the arbitration, except to the extent the QCA permits.

In the QCA's view, issuing this type of direction and order at the start of an access dispute contributes to an environment in which the parties can more openly discuss issues with each other and the arbitration authority.

### 3.2 How does the QCA deal with specific confidentiality requests?

The QCA Act provides a specific regime for the QCA's treatment of confidentiality requests by a party (i.e. a request that relevant information not be disclosed to other parties to a dispute).<sup>48</sup> After considering the request and any objections, the QCA may decide not to give the information to the other parties to the dispute. Claims regarding confidentiality are always balanced against considerations of procedural fairness. A person who receives information of a confidential nature in circumstances of confidence must not make unauthorised use of that information.

If a party wishes to claim confidentiality over any information in an access dispute, it is recommended that the party brings the claim to the attention of the QCA as early as possible in the process. In making a confidentiality claim (in either mediation or arbitration), the party making the claim should:

- clearly indicate the information that it considers should not be disclosed to other parties to the dispute
- state that it believes disclosure of the information is likely to damage its commercial activities and provide supporting justification for this view, and why
- state if disclosure of the information will not be in the public interest, and why.<sup>49</sup>

A confidentiality claim template is provided at Appendix C.

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<sup>46</sup> Issues of confidentiality in mediations are dealt with in s. 187K.

<sup>47</sup> Section 198.

<sup>48</sup> Section 207.

<sup>49</sup> Information that will help the QCA to assess a claim for confidentiality includes (a) details of the information that the claimant considers to be confidential; (b) the category of confidentiality for each claim and (c) the reasons why the information is considered to be confidential.



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## 4 THE DETERMINATION

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### 4.1 Is a draft determination issued?

Before the arbitration authority makes a final determination, it is required to give a draft determination to the parties.<sup>50</sup> This gives the parties an opportunity to comment on the draft determination and gives the arbitration authority an opportunity to further consider its analysis and position before making its final determination.

### 4.2 What matters must the arbitration authority consider in making a determination?

The arbitration authority is required to have regard to the following when making an access determination:<sup>51</sup>

- the object of Part 5 of the QCA Act<sup>52</sup>
- the access provider's legitimate business interests and investment in the facility
- the legitimate business interests of persons who have, or may acquire, rights to use the service
- the public interest, including the benefit to the public in having competitive markets
- the value of the service to:
  - the access seeker, or
  - a class of access seekers or users
- the direct costs to the access provider of providing access to the service, including any costs of extending the facility, but not costs associated with losses arising from increased competition
- the economic value to the access provider of any extensions to, or other additional investment in, the facility that the access provider or access seeker has undertaken or agreed to undertake
- the quality of the service
- the operational and technical requirements necessary for the safe and reliable operation of the facility
- the economically efficient operation of the facility
- the effect of excluding assets for pricing purposes
- the pricing principles mentioned in s. 168A of the QCA Act<sup>53</sup>

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<sup>50</sup> Section 117(5).

<sup>51</sup> Section 120.

<sup>52</sup> Section 69E (Object of Part 5)—The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

<sup>53</sup> The pricing principles in relation to the price of access to a service are that the price should—

The arbitration authority may take into account any other matters relating to the above matters that it considers are appropriate.

### 4.3 What restrictions affect the making of a determination?

The arbitration authority must not make an access determination that is inconsistent with:

- an approved access undertaking, or access code, for the relevant service
- a ruling relating to the service that is in effect under division 7A of the QCA Act.<sup>54</sup>

The arbitration authority also must not make an access determination that will have certain effects (e.g. reduce the amount of the service that can be obtained by an access provider).<sup>55</sup>

### 4.4 What matters does a determination cover?

A determination may deal with any matter relating to access by the third party to the service, including matters that were not the basis for notification of the dispute. These may include:

- requiring the provider to provide access to the service by the third party<sup>56</sup>
- requiring the third party to accept and pay for access to the service
- specifying the terms and conditions of the third party's access to the service
- requiring the provider to extend the facility.<sup>57</sup>

An arbitration authority may also make an order regarding costs of the arbitration.

When making an access determination, the arbitration authority must give the parties its reasons for making the determination.<sup>58</sup>

### 4.5 How can a determination be reviewed?

The determination of an arbitration authority is final and binding. There is no right to any form of merits review in relation to a determination. However, a party to an access determination may possibly pursue other avenues, including:

- recourse to judicial review (under the *Judicial Review Act 1991* (Qld))

- 
- (a) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and
  - (b) allow for multi-part pricing and price discrimination when it aids efficiency; and
  - (c) not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher; and
  - (d) provide incentives to reduce costs or otherwise improve productivity.

<sup>54</sup> Subject to s. 150K.

<sup>55</sup> The restrictions affecting the making of access determinations are set out in full in s. 119.

<sup>56</sup> Equally, an arbitration authority is not required to make an access determination that requires an access provider to provide access to the service (s. 117(4)).

<sup>57</sup> Section 118(1).

<sup>58</sup> Section 117(7).

- applying to the QCA for the amendment or revocation of an access determination, if it reasonably believes there has been a material change in circumstances (since the determination) that justifies amendment or revocation.<sup>59</sup>

Applicable requirements and procedures under the relevant legal regime will apply in relation to any such applications.

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<sup>59</sup> Section 127A.

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## APPENDIX A: DISPUTE NOTICE

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### Dispute notice

Notice of a dispute between:

1. [Insert company name].....

of .....

(Applicant—access seeker/access provider)

and

2. [Insert company name].....

of .....

(Respondent—access seeker/access provider)

### Existence of a dispute

In accordance with s. 112 of the Queensland Competition Authority Act 1997 (QCA Act), the applicant notifies the Queensland Competition Authority (QCA) that an access dispute exists between the parties set out above.

### Appointment of the QCA to conduct [arbitration] [mediation]

The QCA is requested to conduct [an arbitration proceeding to hear and determine the access dispute / a mediation regarding the access dispute] in accordance with Part 5, division 5 of the QCA Act.

### Details of the dispute

The dispute concerns the following issues between the parties:<sup>60</sup>

.....  
.....  
.....  
.....  
.....  
.....

### Negotiations

The applicant has [taken / tried to take] the following steps to satisfy its obligations concerning carrying out negotiations for an access agreement in good faith (as required by ss. 99 and 100 of the QCA Act):

.....  
.....  
.....  
.....  
.....

---

<sup>60</sup> Section 1.4 of the guide describes the type of information that the notifying party can provide that will be helpful.

**No agreement to otherwise resolve dispute**

The parties have not agreed to deal with the access dispute otherwise than by arbitration in accordance with this notice.

**No access agreement in place relating to the declared service**

The parties do not have an access agreement in place relating to access to the declared service (as required by section 112(1)(b) of the QCA Act).

**Persons to whom notice of dispute may need to be given**

The following persons or groups of persons, other than the parties, may need to be given notice of the dispute:

.....

**Confidentiality**

The applicant [wishes / does not wish] to claim confidentiality in relation to information concerning the dispute [as set out within the attached confidentiality claim document].<sup>61</sup>

**Notification**

The applicant has appointed the following as its authorised representative(s) for the purposes of further communication regarding this dispute:

[Name] .....

[Contact details] .....

Dated: ..... (day) ..... (month) ..... (year)

.....

(Signed by, for and on behalf of the applicant)

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<sup>61</sup> An applicant who wishes to claim confidentiality in relation to any of the information or supporting documents to the dispute notice should use the confidentiality claim form (template in Appendix C).

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## APPENDIX B: DIRECTIONS ORDER

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### QUEENSLAND COMPETITION AUTHORITY

#### Directions

Dispute between [.....] (Applicant) and [.....] (Respondent) pursuant to dispute notice dated [.....] (Dispute)

Date made: [.....]

Following a case management hearing conducted on [.....], the Queensland Competition Authority (QCA) directs that:

- (1) On or before [.....], the Applicant will deliver to the QCA and to the Respondent, written submissions setting out its position in relation to the Dispute, together with any supporting documents.
- (2) On or before [.....], the Respondent will deliver to the QCA and to the Applicant written submissions setting out its position in relation to the Dispute, together with any supporting documents.
- (3) On or before [.....], the Applicant may deliver to the QCA and to the Respondent further written submissions in response to the Respondent's written submissions, together with any supporting documents.
- (4) On or before [.....], the Respondent may deliver to the QCA and to the Applicant further written submissions in response to the Applicant's written submissions, together with any supporting documents.
- (5) If requested by the QCA, the parties will provide any further written submissions to the QCA on the date specified by the QCA.
- (6) If a party wishes to make submissions in response to any draft determination of the Dispute by the QCA, it will deliver to the QCA written submissions on the date that is 10 business days from the date of that draft determination.
- (7) Any written communication between a party and the QCA in relation to the Dispute must be delivered to the other party at the same time as it is delivered to the QCA.
- (8) The QCA will determine the Dispute on the basis of the written submissions and supporting documents provided by the parties pursuant to directions 1 to 6. There will be no further hearing in respect of the Dispute unless:
  - (a) requested by the QCA; or
  - (b) requested by one of the parties and determined to be appropriate by the QCA.

.....  
 [Signed by arbitration authority members]

## APPENDIX C: CONFIDENTIALITY CLAIM TEMPLATE

### Confidentiality claim

Name of the claimant: .....

Document associated with the claim: .....

.....

Page(s) and paragraphs	Nature of confidentiality claim and how access should be restricted	Reason(s) that disclosure of the information is likely to damage the claimant's (or another party's) commercial activities	Information as to why disclosure is not in the public interest
Outline the relevant information associated with your claim, including page or paragraph numbers, as relevant.	Outline why you consider the information should be kept confidential. Provide details on the party you are requesting the QCA not to disclose the information to.	Provide an explanation as to why the information is likely to damage your (or another party's) commercial activities if disclosed.	Provide any supporting information as to why it is not in the public interest to disclose the relevant information.

*Note: If possible, the confidentiality claimant should provide the QCA with a proposed redacted version of any documentation in addition to the unredacted original.*