Queensland Competition Authority

Guideline

Arbitration of disputes in relation to the DBCT service

Version **2**

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Important notice

(1) This arbitration guideline is designed to provide basic guidance on the arbitration of disputes arising in relation to the Dalrymple Bay Coal Terminal (DBCT) service where the Queensland Competition Authority (QCA) is the arbitrator. It is intended to promote workable and effective dispute resolution processes, and to enable parties to an access dispute to be adequately prepared for the QCA's dispute resolution processes.

(2) This guideline:

(a) is related to but is not part of the 2021 DBCT access undertaking

(b) is non-binding

(c) does not cover all aspects of the applicable dispute resolution procedures

(d) does not use formal or legal language

(e) should not be considered a substitute for professional advice.

(3) Each dispute process is likely to be different. Where arbitrations are conducted under the processes in the *Queensland Competition Authority Act 1997* (Qld) (QCA Act), the QCA Act gives the QCA wide discretion in determining the appropriate form and path for each dispute resolution process. The QCA may also need to take into account the terms of the existing users' access agreements or the currently approved access undertaking, where relevant. 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 guidance in dealing with a dispute.

(4) The QCA may, from time to time, revise this guideline at its discretion. This may include, for example, correcting typographical errors or updating terminology and cross-references as required. If substantive changes are proposed, the QCA will conduct an appropriate consultation process with stakeholders, which may include issuing draft revised guidelines and inviting submissions from stakeholders.

Contents

1 INTRODUCTION

1.1 The declared service

Part 5 of the QCA Act sets out the statutory access regime in Queensland, which provides a framework for third party access to services provided by significant infrastructure facilities where there may be a lack of effective competition. A service that is declared under part 5 is subject to regulation by the QCA.

For the purposes of this guideline, the declared service is the service described in section 250 of the QCA Act as 'the handling of coal at Dalrymple Bay Coal Terminal (DBCT) by the terminal operator' (DBCT service). While section 250 no longer directly gives effect to the declaration, the Queensland Treasurer and Minister for Infrastructure and Planning said when declaring the DBCT service that: 'the service currently declared under section 250(1)(c) of the QCA Act will be referred to as the "DBCT service"' (see Box 1).[1]

Box 1 Section 250 of the QCA Act

250 Saving of declarations of particular services

(1) Each of the following services is taken to be a service declared by the Ministers under part 5, division 2 —

…

(c) the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator.

…

(5) In this section—

"Dalrymple Bay Coal Terminal" means the port infrastructure located at the port of Hay Point owned by Ports Corporation of Queensland or the State, or a successor or assign of Ports Corporation of Queensland or the State, and known as Dalrymple Bay Coal Terminal and includes the following which form part of the terminal—

(a) loading and unloading equipment;

(b) stacking, reclaiming, conveying and other handling equipment;

(c) wharfs and piers;

(d) deepwater berths;

(e) ship loaders.

"handling of coal" includes unloading, storing, reclaiming and loading.

…

"terminal operator" means—

(a) the owner or lessee of Dalrymple Bay Coal Terminal; or

(b) a person operating Dalrymple Bay Coal Terminal for the owner or lessee.

[1] See Queensland Government, *Gazette: Extraordinary*, no. 31, vol. 384, 1 June 2020, p. 267. At the time of publishing this guideline, the Treasurer's decision to declare the service was subject to judicial review by the Supreme Court of Queensland.

The current terminal operator is Dalrymple Bay Infrastructure Management Pty Limited (DBIM).[2]

The DBCT service was declared under section 250 until 8 September 2020. On 1 June 2020, the Treasurer and Minister for Infrastructure and Planning, following the processes of division 2 of part 5 of the QCA Act, declared the DBCT service until 8 September 2030.

1.2 The 2021 DBCT access undertaking

The access regime under part 5 of the QCA Act 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.

Access to the DBCT service has been regulated under a series of QCA-approved access undertakings, which have been the primary means of setting out:

- the general terms and conditions that DBIM offers to third parties accessing the declared service
- the process for an access seeker to negotiate access
- the general terms and conditions that apply when negotiating access agreements
- the way disputes in relation to access are to be resolved.

The QCA approved the 2021 DBCT access undertaking on 1 July 2021. It will operate for five years, until 1 July 2026. Unlike previous access undertakings for the DBCT service, the 2021 undertaking does not include a reference tariff for access to the DBCT service. Rather, it provides for access prices to be negotiated between access seekers and DBIM, with recourse to arbitration where an agreement cannot be reached. Under the access undertaking and the broader access regime, the QCA may act as arbitrator in disputes regarding access charges or non-price terms of access. The QCA has published this guideline to support workable and effective dispute resolution processes, and to enable parties to a dispute to be adequately prepared for the QCA's dispute resolution processes.

1.3 The QCA's role in arbitrating or mediating disputes relating to access to the DBCT service

The QCA Act empowers the QCA to assist in resolving disputes that relate to access to the DBCT service, in specified circumstances. These circumstances include:

- to mediate to resolve access disputes
- if asked by the parties to access agreements—to mediate to resolve disputes under the agreements
- to conduct arbitration hearings for resolving access disputes
- if asked by the parties to access agreements—to arbitrate to resolve disputes under the agreements.[3]

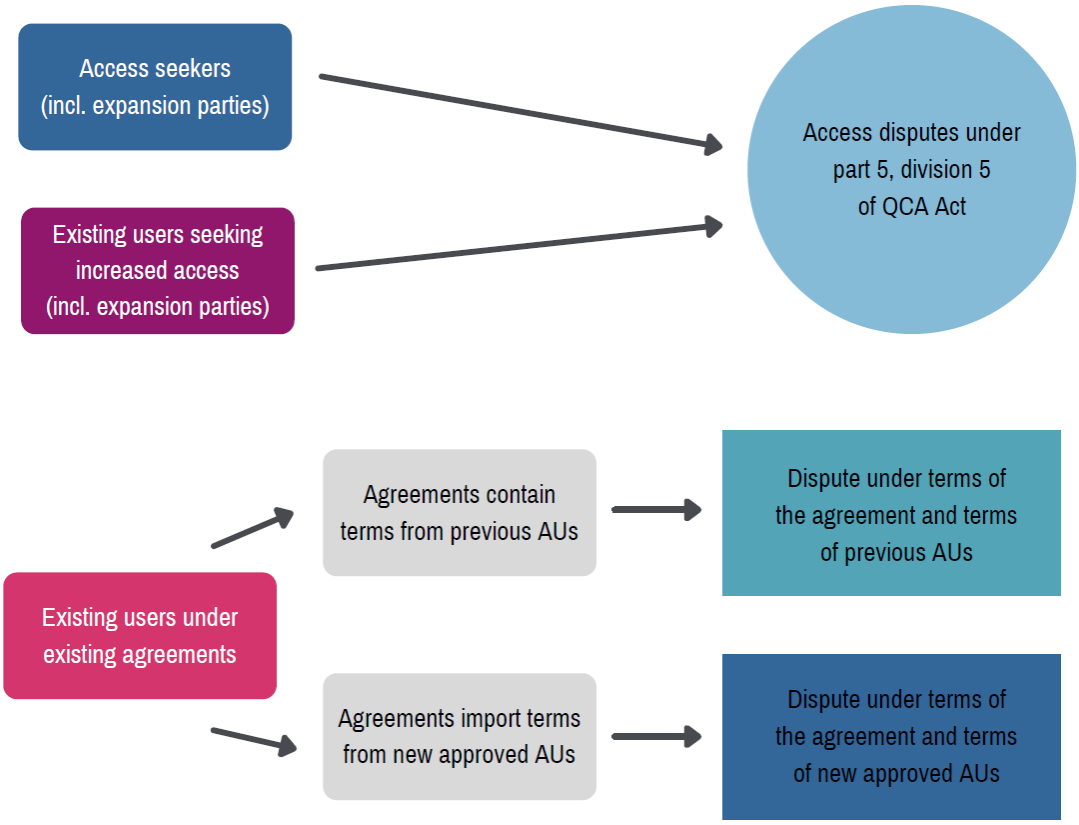
[2] The operator was previously known as DBCT Management Pty Ltd (DBCTM), but it changed its name on 8 December 2020.

[3] The QCA's relevant functions are described in ss. 10(fa), (fb), (g) and (ga) of the QCA Act.

Arbitration is a process whereby the parties submit their dispute to an arbitrator, who makes a determination that is binding upon the parties. Mediation, on the other hand, is a more consensual form of dispute resolution, whereby the mediator seeks to facilitate agreement between the parties on the issues in dispute.

The procedure to be followed by the QCA in conducting an arbitration (or mediation) depends on the circumstances in which the dispute arose. Figure 1 provides a summary of the broad categories of dispute addressed in this guideline.

Figure 1 Broad categories of circumstances in which disputes can arise



Note: 'AU' is the abbreviation here for 'access undertaking'.

The term 'access seeker' has a specific definition under the QCA Act—it is a person who wants access, or increased access, to the declared service. Thus, access seekers include 'new' access seekers as well as existing access holders who are seeking increased access to the declared service.[4] Similarly, an 'access agreement' is defined as an agreement between an access provider of a declared service and another person that provides for access to the service by the other person and has been entered into after 22 May 1997.[5]

1.4 Application and status of this guideline

This document is intended to provide guidance for stakeholders on how the QCA may deal with disputes relating to the DBCT service that are referred to it under part 5, division 5 of the QCA Act, an access undertaking (including the 2021 DBCT access undertaking) or an access agreement. This guideline is a publication of the QCA and does not form part of the undertaking.

[4] Schedule 2 and s. 112(3) of the QCA Act.
[5] Schedule 2 of the QCA Act.

This updated version of the guideline accompanies the QCA's decision to approve the 2019 DBCT draft access undertaking (DAU), as resubmitted by DBIM on 12 May 2021, which is now the 2021 access undertaking.[6]

This guideline may be further updated from time to time to reflect amendments to, among other things, the QCA Act, the *Commercial Arbitration Act 2013* (Qld) (CAA), or the relevant access undertaking and standard access agreement (SAA). The guideline may also be updated to correct typographical errors or update terminology and cross-references as required.

[6] This update (version 2) removes references to the 2019 DAU that were in version 1 of the guideline, which was published in March 2021 to accompany the QCA's final decision on the 2019 DAU. This version refers to the terms and relevant clauses of the new approved undertaking. It retains references to the 2017 SAA, as access agreements based on that SAA remain in force.

2 CATEGORIES OF DISPUTES FOR THE DBCT SERVICE

There are three categories of dispute involving DBIM and its customers:

- access disputes referred to the QCA under part 5, division 5 of the QCA Act (section 2.1 of this chapter)
- matters referred to the QCA for arbitration under an access agreement (section 2.2)
- disputes referred to the QCA under an approved access undertaking (section 2.3).

A dispute may arise in more than one of these categories.

Any of these categories of dispute could potentially be arbitrated collectively (section 2.4).

2.1 Disputes between access seekers and DBIM (access disputes)

2.1.1 QCA arbitration of access disputes under part 5, division 5 of the QCA Act

The term 'access dispute' has a specific meaning in the QCA Act. Access disputes are described in section 112 of the QCA Act as matters where:

(a) an access provider and access seeker cannot agree on an aspect of access to a declared service

(b) there is no access agreement between the access provider and access seeker relating to the service.

An access dispute also encompasses matters where an existing access holder may be seeking increased access to the service.[7]

Either the access seeker or DBIM may notify the QCA that an access dispute exists.[8]

An access seeker is a person who wants access, or increased access, to the service.[9] Importantly, access disputes under part 5, division 5 of the QCA Act can only arise between access seekers and the access provider. That is, unless the matter relates to increased access, a dispute between an existing access holder and DBIM regarding a term in an existing access agreement would not be an 'access dispute' within the meaning of section 112 of the QCA Act.

Access disputes are subject to specific procedures under part 5, division 5 of the QCA Act. In particular, section 120 lists the matters to be considered by the QCA in making a determination in an arbitration on access to the declared service by the access seeker.

[7] Section 112(3) of the QCA Act.
[8] Section 112(2) of the QCA Act.
[9] Schedule 2 of the QCA Act. This means an access seeker is a person who does not currently have access (or increased access) to the service.

Box 2 Section 120 of the QCA Act

Section 120 Matters to be considered by authority in making access determination

(1) In making an access determination, the authority must have regard to the following matters—

(a) the object of this part;

(b) the access provider's legitimate business interests and investment in the facility;

(c) the legitimate business interests of persons who have, or may acquire, rights to use the service;

(d) the public interest, including the benefit to the public in having competitive markets;

(e) the value of the service to—

(i) the access seeker; or

(ii) a class of access seekers or users;

(f) 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;

(g) 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;

(h) the quality of the service;

(i) the operational and technical requirements necessary for the safe and reliable operation of the facility;

(j) the economically efficient operation of the facility;

(k) the effect of excluding existing assets for pricing purposes;

(l) the pricing principles mentioned in section 168A.

(2) The authority may take into account any other matters relating to the matters mentioned in subsection (1) it considers are appropriate.

The QCA *must* have regard to the matters listed in section 120(1) of the QCA Act in an arbitration of an access dispute. However, the QCA may take into account any other matters relating to the considerations mentioned in section 120(1) it considers appropriate in such an arbitration. These matters may, for example, include the terms of an undertaking.

2.1.2 Expansion parties

Expansion parties include access seekers seeking access that can only be accommodated through a terminal capacity expansion at DBCT. There are two categories of expansion parties:

- 'new' access seekers seeking access that can only be accommodated through a terminal capacity expansion
- existing access holders seeking additional access that can only be accommodated through a terminal capacity expansion.

For either case, a dispute that arises regarding the terms of access to the declared service would be classified as an 'access dispute' under section 112 of the QCA Act. In arbitrating such an access

dispute, the QCA would be required to have regard to the factors listed in section 120 of the QCA Act.

2.1.3 Parties can agree to address dispute outside part 5, division 5 of the QCA Act

An access provider and access seeker may agree to address a dispute about access outside the framework set out in part 5, division 5 of the QCA Act.[10] However, this can only occur if both parties agree to an alternative means of resolving the dispute. The default mechanism for resolution of disputes about access to declared services—which will apply in the absence of agreement by both parties to an alternative mechanism—is QCA arbitration under part 5, division 5 of the QCA Act.

If the parties agree that the dispute will be determined by an arbitrator other than the QCA, then the CAA will apply. This guideline does not address alternative means of dispute resolution that may be agreed by an access seeker and the access provider.

2.2 Disputes between existing access holders and DBIM

A dispute may arise between an existing access holder (who is not seeking increased access) and DBIM regarding a term in an existing access agreement.[11] Such a dispute would not be an access dispute within the terms of section 112 of the QCA Act. In this case, the dispute would need to be resolved according to the terms of the relevant agreement. Clause 17.1(b) of the 2021 undertaking states:

> **(Disputes under Access Agreements)** Unless otherwise agreed by the parties, Disputes under an Access Agreement or Existing User Agreement will be dealt with in accordance with the provisions of that Access Agreement or Existing User Agreement.

2.2.1 General principles

The arbitrator

The arbitrator for a dispute between an existing access holder and DBIM is usually specified in the relevant access agreement. This arbitrator may be the QCA or a private (non-QCA) arbitrator.

The QCA Act provides that one of the functions of the QCA is to arbitrate to resolve disputes under access agreements, if asked by the parties to the access agreements.[12] As a dispute between an existing access holder and DBIM will not be an access dispute within part 5, division 5 of the QCA Act, the process that the QCA follows when arbitrating such a dispute is governed by the terms of the access agreement—such as terms setting out the dispute resolution procedure, including factors to be considered by an arbitrator in an arbitration.[13] Similarly, a private arbitrator agreed upon by the parties will also be bound by the terms of the access agreement.

Arbitrations conducted in relation to such disputes (i.e. that are not access disputes within part 5, division 5 of the QCA Act) will be commercial arbitrations within the scope of the CAA.[14] The CAA outlines, among other things, matters of process for conducting arbitrations, including in relation to attendance of parties and the conduct of the hearings. The CAA also enables disputes to be

[10] Section 111(2) of the QCA Act.
[11] For example, a dispute may arise in relation to a price reset under an existing agreement.
[12] Section 10(ga) of the QCA Act.
[13] An example of terms in an SAA setting out factors to be considered by an arbitrator in an arbitration is in cl. 7.2(e) of the 2017 and 2021 SAAs.
[14] In accordance with s. 1 of the CAA.

considered via collective arbitrations under specific circumstances (see section 2.4 of this chapter).

Access agreements may contain terms from previous undertakings

An access agreement between an existing access holder and DBIM may contain or refer to terms contained in a previous undertaking. In that case, a dispute between the access holder and DBIM would be conducted in accordance with the terms in the access agreement and the relevant provisions of the previous undertaking. That is, any terms from a new approved undertaking would not be automatically included in an access agreement, unless the term is contained in the QCA Act (or another Act), or subsequently agreed to by the parties.

Access agreements may apply terms from new approved undertakings

An access agreement between an existing access holder and DBIM may apply terms from any undertakings approved after the access agreement is entered into. For example, an access agreement may state that a dispute between the access holder and DBIM will be resolved according to the dispute resolution clause contained in the undertaking as approved from time to time. Alternatively, an access agreement may require that the arbitrator must not make a determination that is inconsistent with the undertaking as approved from time to time. The arbitration would then be conducted in accordance with the terms of the access agreement and the terms of any relevant new undertakings that the agreement imports.

Access agreements that do not contain terms relating to arbitration process

If an access agreement does not specify the arbitration process, or the factors that an arbitrator is required to consider, it may be open to the arbitrator to determine the process and factors to be considered. If the QCA were the arbitrator in this scenario, having regard to the specific circumstances of the dispute, it is likely that it would be informed by the arbitration procedures set out in the QCA Act in terms of process, and by the matters set out in section 120 of the QCA Act in terms of factors to be considered.

For example, this might arise in a review of charges, or a general dispute under an access agreement. Ways in which the provisions from the 2017 SAA, and the 2021 undertaking and SAA, might be applied in these cases are illustrated in sections 2.2.2 and 2.2.3.

2.2.2 Example 1: Review of charges dispute resolution (cl. 7 in the 2017 and 2021 SAAs)

Clause 7 of the 2017 SAA concerns the review of capital charges through the term of the access agreement. Clause 7 of the 2021 SAA also concerns the review of access charges through the term of the access agreement and is similar in drafting to clause 7 of the 2017 SAA.

The arbitrator

Clause 7.2(c)(ii) of the 2017 and 2021 SAAs provides that if the parties do not reach agreement on the review of charges by a certain date, either party may refer the determination of the issues to arbitration in accordance with clause 7.2. Clause 7.2(d) of the 2017 and 2021 SAAs states:

> (d) If the matter is referred under clause 7.2(c)(ii) to arbitration, then arbitration must be effected as follows:
>
> (i) by the QCA in such manner as it sees fit, after consultation with the parties; or
>
> (ii) if the QCA is unwilling or unable to act, by a single arbitrator agreed upon between the parties; or

> (iii) in default of agreement under clause 7.2(d)(ii) within 10 days after the matter is referred to arbitration, by a single arbitrator selected by the Chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.

As such, for disputes referred to arbitration under clause 7.2(c)(ii), the QCA will be the arbitrator in the first instance.[15] If the QCA is unwilling or unable to act, then the arbitrator may be a single arbitrator agreed upon by the parties, or a single arbitrator selected by the chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.

QCA arbitration

Clause 7.2(f) of the 2021 SAA provides that if the matter is referred to the QCA for arbitration (i.e. under clause 7.2(d)(i)), then the arbitration 'must be conducted in accordance with the Access Undertaking'. The 'Access Undertaking' is defined in the 2021 SAA as:

> the access undertaking submitted by DBIM from time to time relating to provision of the Services by it, and at the commencement of this Agreement means the access undertaking approved by the QCA on [insert date].

Therefore, if a dispute arose under clause 7.2(d)(i) of the 2021 SAA, and the QCA were the arbitrator, then the QCA must conduct the arbitration in accordance with the access undertaking in place at the time the dispute occurs. Importantly, such an arbitration will have reference to terms from new approved undertakings from time to time, even if such terms differ from the terms in the undertaking in place at the time the agreement was initially entered into.

Clause 17 of the 2021 undertaking contains a range of dispute resolution rules and procedures. Clause 17.4(b) provides:

> (b) **(Process in other cases)** If an issue is referred to the QCA for determination as specified in accordance with this Undertaking but does not constitute a Dispute for the purposes of Division 5 of Part 5 of the QCA Act, then the QCA will make a determination through any process that it considers appropriate, provided that:
>
> (1) prior to considering the issue, the QCA advises all parties of the process that it will use to make the determination and all parties are given the opportunity to advise the QCA of any concerns they may have with that process and receive a response from the QCA as to how it will deal with such concerns, if at all; and
>
> (2) the QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).

If the QCA becomes the arbitrator pursuant to clause 7.2(d)(i) of the 2017 or 2021 SAAs, then the arbitration must be conducted in accordance with the relevant access undertaking. In such cases, the QCA intends to have regard to the arbitration procedures set out in the QCA Act in terms of process, and to the matters set out in section 120 of the QCA Act in terms of factors to be considered in an arbitration.

[15] Clause 7.2(d)(i) of the 2021 SAA.

Non-QCA arbitration

If the arbitrator is not the QCA, as would be the case under clause 7.2(d)(ii) or (iii), that arbitrator will be required to have regard to factors specified in clause 7.2(e) in the 2017 and 2021 SAAs:

> (e) If a matter is referred to arbitration under clause 7.2(d)(ii) or clause 7.2(d)(iii), then the arbitrator must have regard to the following matters:
>
> (i) an appropriate asset valuation of the Terminal and the relevant Terminal Component;
>
> (ii) an appropriate rate of return for DBIM;
>
> (iii) the terms of this Agreement;
>
> (iv) the expected future tonnages of Coal anticipated to be Handled through the Terminal and the relevant Terminal Component;
>
> (v) any other matter agreed to by the User and DBIM and notified by them in writing to the arbitrator;
>
> (vi) any other matter which is submitted by either the User or DBIM and accepted by the arbitrator as being relevant; and
>
> (vii) the then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined it).

2.2.3 Example 2: General dispute resolution (cl. 15 in the 2017 and 2021 SAAs)

Clause 15 of both the 2017 and 2021 SAAs contains general dispute resolution provisions for disputes arising under the access agreements.

The arbitrator

Clause 15.4 of the 2021 SAA provides:

> (a) If any dispute is referred to arbitration under this Agreement, except a dispute referred to arbitration under clause 7.2(d)(i), arbitration must be effected either:
>
> (i) by a single arbitrator agreed upon between the parties; or
>
> (ii) in default of such agreement within 10 days after the dispute is referred to arbitration, then by a single arbitrator selected by the Chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.

Clause 15.4 of the 2017 SAA is similar.[16]

In addition, clause 15.6 of the 2017 and 2021 SAAs states:

> For the avoidance of doubt, the parties may agree to refer any dispute in connection with this Agreement to the QCA for resolution.

As such, for disputes referred to arbitration under clause 15.4, the arbitrator may be a single arbitrator agreed upon by the parties—the parties may agree that this arbitrator is the QCA—or a single arbitrator selected by the chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.

[16] Clause 15.4(a) of the 2017 SAA does not contain the words 'except a dispute referred to arbitration under cl. 7.2(d)(i)'. A similar carve-out from the cl. 15.4 process for QCA arbitrations under cl. 7.2(d)(i) is provided in cl. 7.2(f) of the 2017 SAA. See section 2.2.2 of this guideline.

Arbitration—procedural and substantive issues

Clause 15.4(b) of the 2017 and 2021 SAAs states:

> (b) The arbitration must be conducted in accordance with and subject to the Institute of Arbitrators and Mediators Australia Rules for the Conduct of Commercial Arbitrations.

If the QCA is the arbitrator for a dispute referred to arbitration under clause 15.4, the QCA will be bound by the Institute of Arbitrators and Mediators Australia's Rules for the Conduct of Commercial Arbitrations.

These rules are procedural in nature and provide for the conduct of an arbitration. While the matters set out in these rules provide procedural guidance to an arbitrator (including the QCA), they do not contain specific criteria the arbitrator needs to take into account. For the purposes of a dispute referred to the QCA for arbitration under clause 15.4 of the 2017 and 2021 SAAs, it is likely that the QCA would have regard to the matters set out in section 120 of the QCA Act in terms of factors to be considered in resolving substantive issues in that arbitration.

2.3 Disputes arising under the access undertaking

2.3.1 General principles

Disputes may arise between access seekers/holders and DBIM in relation to clauses of the access undertaking. Such disputes would be resolved according to the dispute resolution clause within the access undertaking. However, depending on the circumstances of the case, such disputes may also be able to be resolved through the dispute pathways in a relevant access agreement, or through part 5, division 5 of the QCA Act, if applicable.

2.3.2 Example 3: General dispute resolution under the access undertaking (cl. 17 in the 2021 undertaking)

Parties to a dispute

Clause 17 contains the general dispute resolution provisions for the 2021 undertaking. Clause 17.1(a) provides:

> (a) **(Disputes under this Undertaking)** If any dispute or question arises under this Undertaking or in relation to the negotiation of Access between an Access Seeker, Access Holder or a Collective Negotiation Group and DBIM (Dispute) then, unless otherwise expressly agreed by all parties, such Dispute will be resolved in the manner specified in this Undertaking (where applicable) and in accordance with this Section 17 and either party may give to the other party the Dispute notice in writing (Dispute Notice) specifying the Dispute and requiring that it be dealt with in the manner specified in this Undertaking (where applicable) and as set out in this Section 17.

The following parties may raise a dispute under clause 17:

- an 'Access Seeker'—defined in the 2021 undertaking as ' a party seeking Access, or increased Access, to the Services and includes a party to a Conditional Access Agreement'[17]
- an 'Access Holder'—defined in the 2021 undertaking as ' a party who has an entitlement to Access under an Access Agreement or an Existing User Agreement'[18]

[17] Schedule G of the 2021 undertaking.
[18] Schedule G of the 2021 undertaking.

- a 'Collective Negotiation Group'—defined in clause 5.14(a) of the 2021 undertaking as 'any group of two or more Access Holders or Access Seekers that wishes to engage in collective negotiations'
- DBIM.

Clause 17 includes other provisions to address arbitration of collective disputes (see section 2.4 of this guideline for specific matters relating to collective arbitration).

Choice of dispute pathways

Access seekers

Generally, access seekers are able to refer a dispute, including a dispute arising under an access undertaking, for arbitration to the QCA pursuant to part 5, division 5 of the QCA Act.[19] For disputes arising under the 2021 undertaking, clause 17.1(a) also enables an access seeker to refer the dispute for resolution under the access undertaking. The 2021 undertaking enables a group of access seekers to refer a dispute for resolution under the access undertaking as well.

Access holders

Access holders, by definition, have an entitlement to access under an access agreement or existing user agreement (terms as defined in the undertaking). Therefore, it is possible that bespoke dispute resolution mechanisms have been expressly agreed by the parties and are recorded in their access agreements, including for disputes that may arise under an access undertaking.[20]

Clause 17.1(b) of the 2021 undertaking contemplates this possibility and provides:

> (b) **(Disputes under Access Agreements)** Unless otherwise agreed by the parties, Disputes under an Access Agreement or Existing User Agreement will be dealt with in accordance with the provisions of that Access Agreement or Existing User Agreement.

For access holders, where there are similar obligations specified in an access agreement and an access undertaking, disputes relating to that obligation will be dealt with according to that access agreement in the first instance, unless otherwise agreed by the parties. The 2021 undertaking enables a group of access holders to refer a dispute for resolution under the access undertaking as well.

Determination of the dispute by the QCA

Access seekers

Subject to the dispute resolution processes specified in clauses 17.2 and 17.3 of the 2021 undertaking, unresolved disputes may ultimately be referred to the QCA for arbitration pursuant to clause 17.4. Part 5, division 5 of the QCA Act would apply to any disputes instituted under clause 17.4(a) (i.e. as between access seekers and DBIM):

> (a) **(Division 5 Part 5 process)** If a Dispute is referred to the QCA in accordance with this Undertaking, then Division 5 of Part 5 of the QCA Act will apply. In any Dispute relating to Access Charges or the Expansion Pricing Approach, the QCA must determine on terms and conditions relating to Access Charges that are in accordance with Section 11 of this Undertaking, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration. The QCA must not make an access determination that is

[19] See section 2.1 of this guideline.
[20] For example, where similar obligations are specified in the access undertaking and an access agreement.

> inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).

The QCA considers that in arbitrating a dispute under clause 17.4(a) of the 2021 undertaking, it would be required to follow the general processes specified in part 5, division 5 of the QCA Act, and be required to have regard to the matters set out in section 120 of the QCA Act.

Additionally, the QCA is required under clause 17.4(a) to not make an access determination that is inconsistent with the access undertaking, unless all parties agree and no other relevant stakeholder is adversely affected. In this respect, the process under clause 17.4(a) of the 2021 undertaking is slightly different to the process if the same dispute were referred to the QCA under part 5, division 5 of the QCA Act. In making an access determination under part 5, division 5 of the QCA Act, section 119 of the QCA Act provides further restrictions affecting the QCA's power to make an access determination, in addition to the requirement that the QCA must not make an access determination that is inconsistent with an approved access undertaking.[21]

Access holders

Clause 17.4(b) applies to disputes to which part 5, division 5 of the QCA Act would not apply, including disputes between existing access holders and DBIM.[22] It provides:

> (b) **(Process in other cases)** If an issue is referred to the QCA for determination as specified in accordance with this Undertaking but does not constitute a Dispute for the purposes of Division 5 of Part 5 of the QCA Act, then the QCA will make a determination through any process that it considers appropriate, provided that:
>
> (1) prior to considering the issue, the QCA advises all parties of the process that it will use to make the determination and all parties are given the opportunity to advise the QCA of any concerns they may have with that process and receive a response from the QCA as to how it will deal with such concerns, if at all; and
>
> (2) the QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).

In arbitrating a dispute under clause 17.4(b), the QCA is likely to have regard to the arbitration procedures set out in the QCA Act in terms of process, and to the matters set out in section 120 of the QCA Act in terms of factors to be considered in an arbitration, subject to the terms of clause 17.4(b).

2.4 Collective arbitration

For all three categories of dispute, there is potential for the dispute to be subject to collective arbitration, with a single process involving some or all of the affected access holders and/or seekers. Adopting collective arbitration would be decided on by the arbitrator on a case-by-case basis. The applicable arbitration process and directions would also depend on the relevant circumstances of the dispute.

For disputes under the QCA Act and under the undertaking or an access agreement, there are mechanisms to notify relevant parties that a dispute is on foot, and for those parties to apply to join an arbitration. The QCA would then be able, if it found it appropriate, to join relevant parties

[21] An access determination has no effect if it is made in contravention of s. 119 of the QCA Act, even if all parties agreed on the determination, and no other relevant stakeholder was adversely affected (s. 119(7) of the QCA Act).
[22] See section 2.2 of this guideline.

to a collective arbitration. The relevant provisions differ depending on whether the disputes involve access seekers or access holders.

Access seekers—access disputes under the QCA Act

For access disputes under the QCA Act, the QCA Act anticipates that parties in addition to the access seeker or provider who gave the dispute notice may be included in an arbitration. Section 114(c) provides that the QCA may provide written notice:

> (c) to any other person the authority considers is appropriate to become a party to the arbitration of the access dispute.

Section 116(d) also provides that the parties to the arbitration of a dispute can include:

> (d) any other person who applies to the authority in writing to be made a party and is accepted by the authority as having a sufficient interest.

Access holders—disputes under existing user agreements and access agreements

Arbitrations conducted in Queensland by the QCA (or a private arbitrator) will be commercial arbitrations within the scope of the CAA (s. 1). Section 27C(1) of the CAA permits consolidation of proceedings by the arbitral tribunal on application of a party to the arbitration, on the grounds that:

> (a) a common question of law or fact arises in all those proceedings; or
>
> (b) the rights to relief claimed in all those proceedings are in respect of, or arise out of, the same transaction or series of transactions; or
>
> (c) for some other reason specified in the application, it is desirable that an order be made under this section.

These criteria would need to be considered on the facts of any given dispute.

Additionally, section 27C(4) of the CAA permits the arbitral tribunal to consolidate proceedings by its own motion if all the related proceedings are being conducted by that same tribunal.

Notification of disputes under the 2021 undertaking

The 2021 undertaking provides for relevant parties to be made aware of disputes subject to the undertaking, so they can apply to join the arbitration. Disputes under the undertaking may also be subject to consolidation under the QCA Act and CAA as appropriate. Clause 17.4(c) provides that DBIM must notify any other parties of the existence of an arbitration on foot:

> (c) **(Notice of Dispute or issue to be determined)** If a Dispute or issue is referred to the QCA for determination in accordance with this Undertaking, DBIM must give written notice of the Dispute or issue to be determined to:
>
> (A) each person identified in the notice as being a party to the Dispute or issue; and
>
> (B) any other person the QCA directs DBIM to provide notice of the Dispute or issue to, on the basis that the QCA considers that person may wish to apply to be joined as a party to any arbitration.

3 THE DISPUTE RESOLUTION PROCESS

3.1 The QCA mediation process

3.1.1 Access disputes under part 5, division 5 of the QCA Act

For access disputes under part 5, division 5 of the QCA Act, the dispute notice lodged by a party must indicate whether the applicant wishes for the dispute to be dealt with by mediation or arbitration.[23] The QCA may refer an access dispute to mediation, notwithstanding that the parties have initially sought to refer the dispute to arbitration. This may occur if the parties have made no attempt to resolve the dispute by mediation and the QCA considers a mediated resolution of the dispute can be achieved.[24]

The mediator, nominated by the chair of the QCA, will assist 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 described below for the constitution of the mediation and conduct of mediation conferences. 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. The process does not include a final and binding determination.

However, if the mediator considers that the parties cannot reach a mediated resolution, the matter must then be referred to the QCA for an access determination by way of arbitration.[25] Similarly, a party may also 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.[26]

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

- must be conducted in private, although the mediator can give directions about those who may attend a conference[27]
- 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[28]
- involve mediators acting with as little formality as possible, while 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[29]

[23] Section 113(2)(c) of the QCA Act.
[24] Section 115A of the QCA Act.
[25] Section 115F of the QCA Act.
[26] Section 115G of the QCA Act.
[27] Section 187F of the QCA Act.
[28] Section 187G of the QCA Act.
[29] Section 187H of the QCA Act.

- must not involve a person making an official record of anything said at a mediation conference.[30]

3.1.2 Mediation under existing access agreements

The disputing parties may agree themselves to mediation of the dispute—this may occur for a dispute arising between existing users and DBIM. In such a case, the conduct of the mediation is subject to the relevant dispute resolution processes in existing access agreements or such terms as may be agreed by the parties at the time of dispute.

3.2 The QCA arbitration process

3.2.1 Three phases of arbitration

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. This section provides a broad overview of the processes the QCA may undertake in an arbitration—the specific process to be followed will depend on the circumstances in which the dispute arose[31], and the specific details of the relevant dispute.[32] The conduct of each arbitration will be determined by the QCA on a case-by-case basis, taking into account the specific details of that case.

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 (including whether any other parties should be notified), resolve any jurisdictional issues and ensure that the relevant parties have identified the substantive issues in dispute. For disputes arising under part 5, division 5 of the QCA Act, 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).[33]

The **substantive** phase involves the QCA shaping the processes relevant to the arbitration and receiving all the relevant information. The QCA generally makes directions for the parties to follow and seeks submissions from the parties before deliberating on the issues in dispute.

For disputes arising under part 5, division 5 of the QCA Act, the QCA may undertake its own analysis and research in addition to that provided by the parties, and may also seek expert advice on particular matters.[34] The QCA may inform itself in any way it wants regarding the subject matter relevant to the dispute.[35] Further, a determination may deal with any matter relating to

[30] Section 187J of the QCA Act.
[31] For example, whether the dispute is an access dispute under part 5, division 5 of the QCA Act, or a dispute arising from the access undertaking or an existing user agreement.
[32] Including any terms agreed between the parties for the process for the resolution of the dispute. For example, these may be the arbitration processes specified by the Institute of Arbitrators and Mediators Australia. These bespoke processes agreed between the parties will be considered on a case-by-case basis.
[33] Section 122 of the QCA Act. For disputes arising under access agreements, the QCA may also be empowered to make such a determination by specific terms within that agreement.
[34] Section 197 of the QCA Act.
[35] Section 196(1)(c) of the QCA Act.

access by the third party to the service, including matters that were not the basis of the dispute notification.[36]

The **determination** phase of an arbitration involves the QCA issuing a draft determination for comment by the parties and then making a determination (see Chapter 5 of this guideline).[37] The QCA intends in most cases to issue a draft determination for arbitrations, whether the dispute arises under the QCA Act, the undertaking or user agreements.

3.2.2 General guide to QCA arbitration process

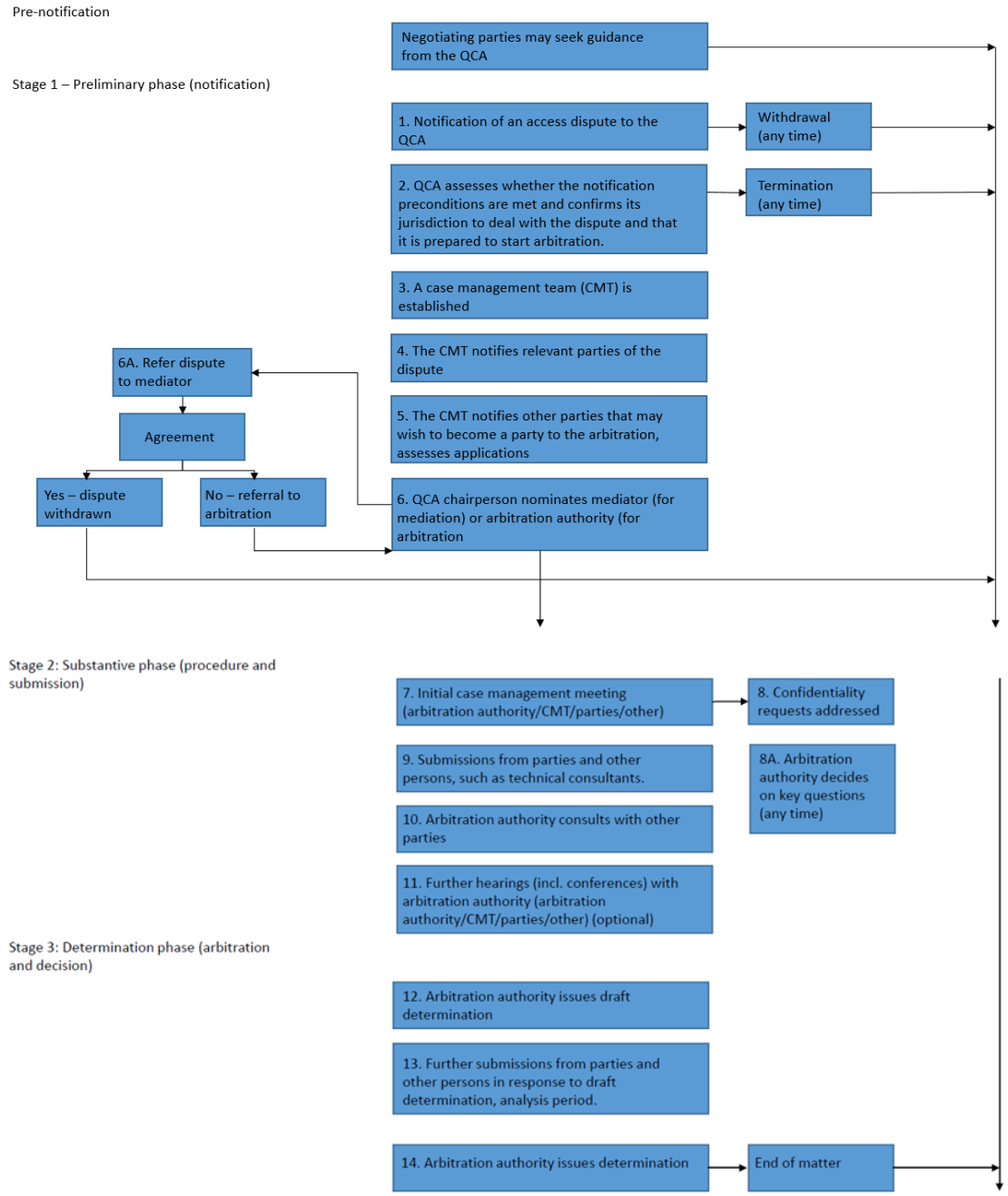
Each arbitration is likely to be different. Accordingly, the QCA does not adhere to, and is not obliged to adhere to, any particular format or process for conducting an arbitration, subject to the provisions of the QCA Act, CAA, an access undertaking (including the 2021 DBCT access undertaking) or relevant existing user agreement or access agreement. Where possible, the process is designed and determined by the QCA 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.[38] The member of the QCA 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 2.[39]

[36] Section 117(3) of the QCA Act.
[37] For disputes arising under part 5, division 5 of the QCA Act, the QCA is required to follow the provisions of s. 117 of the QCA Act in making an 'access determination' (as defined in that section).
[38] Section 194 of the QCA Act.
[39] The flowchart provides only a general guide as to how proceedings might be conducted.

Figure 2 Process for an access dispute resolution



In conducting an arbitration for disputes arising under part 5, division 5 of the QCA Act, the QCA must act with as little formality as possible.[40] The QCA 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 QCA 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.[41]

[40] Section 196(1)(a) of the QCA Act.
[41] Sections 196(1)(b) and (c) of the QCA Act.

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 QCA[42]
- other means as may be considered appropriate to address particular issues (e.g. site inspections).

The QCA has wide powers when conducting an arbitration under part 5 of the QCA Act. These include giving 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.[43] The QCA may also exercise powers to require the presentation of evidence. For example, the QCA can require a witness to appear before it to give evidence or produce documents.[44]

3.3 The arbitration authority

3.3.1 Access disputes under part 5, division 5 of the QCA Act

For disputes arising under part 5, division 5 of the QCA Act, 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.[45] 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.[46]

While the arbitration authority is responsible for making decisions in the arbitration, it is typically supported by an internal case management team (CMT).

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.[47] 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

[42] 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 QCA.
[43] Section 197 of the QCA Act.
[44] Section 200 of the QCA Act.
[45] Section 190 of the QCA Act.
[46] Section 193 of the QCA Act. The presiding member is the chair, or a member of the QCA nominated by the chair (s. 191).
[47] Sections 196(1)(d), 196(3) of the QCA Act.

- the arbitration authority will not generally meet and discuss matters that are the subject of dispute with the parties outside of case management meetings.

3.3.2 Disputes under existing access agreements

For disputes arising under existing user agreements or the access undertaking, the QCA is likely to follow a similar process (presented in section 3.3.1), in consultation with the parties.

3.4 Length of the arbitration process

During the course of the arbitration, each party is required to observe the QCA'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.[48] The timing of the parties' responses will depend on the complexity of the issues under consideration.

The time taken by the QCA to arbitrate the dispute and make 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). In an arbitration of a dispute under part 5, division 5 of the QCA Act, the QCA is required to:

- act as speedily as a proper consideration of the dispute allows[49]
- 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, such as waiting for information and comments from the parties.[50] Therefore, while the statutory timeframe provides some indication of the length of an arbitration process, it is only a guide. The QCA will endeavour to make the process as short as possible, subject to proper consideration, whether the dispute is under the QCA Act or another category. For disputes not under the QCA Act, the QCA may also need to have regard to the particular terms of the access agreements or existing user agreements, which may provide specific timeframes.

The QCA will publish details on its website about the period of the arbitration.[51]

3.5 Required information

In conducting an arbitration, the QCA will generally issue case management directions, specifying the information that the QCA requires from the parties. For disputes arising under part 5, division 5 of the QCA Act, the QCA Act empowers the QCA to require any person to give information and documents to the QCA for the purposes of an arbitration hearing.[52]

The QCA 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

[48] Section 196(3) of the QCA Act.
[49] Section 196(1)(e) of the QCA Act.
[50] Under s. 117A(2) of the QCA Act, the following periods are excluded from the six months: mediation; responses to information notices under s. 205; periods allowed for parties' comments on a draft determination; and days the parties agree to exclude.
[51] For access disputes under the QCA Act, this is required by s. 117A(3) of the QCA Act. However, a similar process is likely to be followed by the QCA for disputes arising under existing user agreements or the access undertaking, in consultation with the parties and subject to the terms of the access agreements or existing user agreements.
[52] Section 205. Failure to comply without a reasonable excuse may lead to a penalty.

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

3.6 Cost of proceedings

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.

Costs under QCA Act

For disputes arising under part 5, division 5 of the QCA Act, the QCA's final determination may include an order regarding costs of the arbitration process. The QCA 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.[53]

Costs under 2021 undertaking

The 2021 undertaking provides for the QCA to determine which parties will bear the costs of the QCA and the reasonable costs of the parties. Clause 17.4(d) states:

> (d) (**Costs awarded as QCA determines**) The costs of the QCA and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the QCA.

Conduct of parties and awarding of costs

In awarding costs, the QCA will take account of the conduct of parties during negotiations and dispute resolution proceedings, where appropriate and legally permissible. This means that if any party is seen not to have acted reasonably during negotiations or dispute resolution proceedings, the QCA may consider requiring that party to pay all or a larger portion of the costs of the other party and the QCA.

[53] Section 208 of the QCA Act.

3.7 Ending an arbitration

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

- For access disputes under part 5, division 5 of the QCA Act:
  - (a) the access dispute notice is withdrawn at any time before the QCA makes its determination[54]
  - (b) the QCA at any time ends an arbitration, pursuant to section 122 of the QCA Act.[55]
- For an arbitration commenced under an existing access agreement—the arbitration is withdrawn or ended pursuant to the terms of that agreement.
- The QCA makes a final determination.

The QCA intends to apply a similar approach for all arbitrations where permissible, whether the dispute arises under the QCA Act, the undertaking or user agreements.

[54] Section 115 of the QCA Act.
[55] The QCA may also decide not to start an access dispute arbitration.

4 DISCLOSURE AND CONFIDENTIALITY

4.1 Introduction

The receipt of information is crucial to the QCA's ability to arbitrate 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 would deal with these issues is likely to be very similar to the way in which the QCA would deal with them in arbitration.[56]

The specific principles that are presented in this section relate to procedures specified in the QCA Act for the conduct of arbitrations of access dispute arising under part 5, division 5 of the QCA Act. However, it is likely that the QCA would follow these principles in the conduct of an arbitration for disputes arising under existing access agreements or the access undertaking. The QCA's general confidentiality obligations are set out in section 239 of the QCA Act.

4.2 How is confidentiality maintained during arbitration?

The QCA may give a general confidentiality direction to the parties (including their employees, contractors and agents) at any stage of an arbitration under the QCA Act and access undertaking.[57] This is an instruction that recipients not disclose any information obtained from the other party or the QCA in the course of the arbitration, except to the extent the QCA permits.

Issuing this type of direction and order at the start of an access dispute fosters an environment in which the parties can more openly discuss issues with each other and the QCA.

4.3 How is confidentiality addressed during a collective arbitration?

As a general principle, the more relevant information about the matters in dispute that can be shared among all the parties involved in a collective arbitration, the more effective the process will be. However, there is likely to be information that is confidential to individual parties that will not be shared. There may also be information that is subject to a general confidentiality direction. The nature of the confidentiality regime will reflect the wishes expressed by the parties, and the particular circumstances of the dispute. The QCA's directions for the parties to follow will generally provide guidance on how confidentiality will be managed.[58]

4.4 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 to an arbitration under part 5, division 5—that is, a request that relevant information not be disclosed to other parties to a dispute.[59]

[56] Issues of confidentiality in mediations are dealt with in s. 187K of the QCA Act.
[57] Section 198 of the QCA Act. Confidentiality is also addressed in cl. 17.4(e) of the 2021 undertaking.
[58] Section 198 of the QCA Act. Confidentiality is also addressed in cl. 17.4(e) of the 2021 undertaking.
[59] Section 207 of the QCA Act.

Box 3 Section 207 of the QCA Act

207 Confidential information

(1) This section applies if a party to an arbitration (the **"applicant"**) believes that—

(a) stated information to be made available in the arbitration is confidential; and

(b) the disclosure of the information to another party to the arbitration is likely to damage the applicant's commercial activities.

(2) The applicant may—

(a) inform the authority of the applicant's belief; and

(b) ask the authority not to disclose the information to the other party.

(3) On receiving a request, the authority must—

(a) inform the other party or parties of the request and general nature of the information to which the request relates; and

(b) ask the other party or parties whether there is any objection to the authority complying with the request.

(4) If a party objects to the authority complying with a request, the party may inform the authority of its objection and the reasons for it.

(5) If, after considering a request, and any objection and any further submission a party has made about the request, the authority is satisfied the applicant's belief is justified and that the disclosure of the information to another party would not be in the public interest, the authority must take all reasonable steps to ensure the information is not, without the applicant's consent, disclosed to the other party.

(6) In this section—

"commercial activities" means activities conducted on a commercial basis.

After considering the confidentiality 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 a 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.[60]

[60] Information that will help the QCA to assess a claim for confidentiality includes details of the information that the claimant considers to be confidential; the category of confidentiality for each claim; and the reasons why the information is considered to be confidential.

In the absence of any express provisions in an access agreement or existing user agreement for an access holder, the QCA is likely to apply these same approaches regarding confidentiality to those arbitrations.

5 THE DETERMINATION

5.1 Disputes between access seekers and DBIM (access disputes)

In a QCA arbitration on an access dispute under part 5, division 5 of the QCA Act, the QCA is required to make a written determination, called an 'access determination'.[61]

An access determination may deal with any matter relating to access by the access seeker to the service, including matters that were not the basis for the initial notification of the dispute.[62] The QCA Act provides some examples of access determinations:

Box 4 Section 118 of the QCA Act

118 Examples of access determinations

(1) Without limiting section 117(3), an access determination may—

(a) require the access provider to provide access to the service by the access seeker; or

(b) require the access seeker to pay for access to the service; or

(c) state the terms on which the access seeker has access to the service; or

(d) require the access provider to extend, or permit the extension of, the facility; or

(e) require the access provider to permit another facility to be connected to the facility; or

(f) include a requirement that the access provider and access seeker enter into an access agreement to give effect to a matter determined by the authority.

(2) Also, if the authority makes an access determination that requires or permits the extension of a facility and none of the costs of the extension are to be paid by the access provider, the authority may make an access determination that relates to the ownership of the extension.

The QCA may also make an order regarding the costs of the arbitration.

An access determination cannot be inconsistent with an approved access undertaking for the service.[63] Additionally, the QCA must not make an access determination that would have any of the following effects, except in circumstances specified in the QCA Act:

- reducing the amount of the service able to be obtained by an access provider
- resulting in the access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement
- requiring an access provider to pay some or all of the costs of extending the facility.[64]

Before making a final access determination, the QCA is required to give a draft determination to the parties. A final access determination the QCA makes is final and binding, and may be enforced

[61] Section 117(1) of the QCA Act.
[62] Section 117(3) of the QCA Act.
[63] Section 119(1)(a) of the QCA Act.
[64] See s. 119 of the QCA Act.

under part 5, division 8 of the QCA Act.[65] There is no right to any form of merits review in relation to an access determination; however, a party to an access determination may pursue other avenues, including:

- recourse to judicial review
- 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 of the determination.[66]

5.2 Disputes between existing access holders and DBIM

Arbitration in relation to disputes that arise between existing access holders and DBIM is governed by the relevant access agreement under which the dispute arose. The form and content of a final written determination (if any) in such a dispute, as well as the procedures to be followed in issuing a final determination, will depend on the terms of the relevant access agreement.

For example, arbitrations under clause 15.4 of the 2017 and 2021 SAAs must be conducted in accordance with and subject to the Institute of Arbitrators and Mediators Australia's Rules for the Conduct of Commercial Arbitrations.

For disputes referred to the QCA for arbitration under existing access agreements, subject to the terms of the relevant access agreement, the QCA intends to consult with the parties about process in relation to the issuing of a final determination. For example, depending on the complexity of the dispute, the QCA may depart from its default approach of issuing a draft written determination before making a final written determination.

5.3 Disclosure of arbitration determinations

The QCA is required to keep a register of access determinations made under part 5, division 5 of the QCA Act, including the QCA's reasons for the determination.[67] Additionally, and subject to an approved undertaking, DBIM is required to provide an access seeker with information about access determinations made by the QCA in relation to arbitrations on access disputes (i.e. disputes under part 5, division 5, subdivision 3 of the QCA Act).[68]

DBIM will necessarily be a party to every arbitration for the types of disputes identified in this guide—and is likely to be the only party to have knowledge of the determinations made in all arbitrations.[69]

The 2021 undertaking provides for effective negotiations between access seekers and holders and DBIM by extending certain of the measures aimed at providing transparency in relation to access determinations made under the QCA Act to those determinations made under existing user agreements and the access undertaking.[70]

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[65] Section 124 of the QCA Act.
[66] Section 127A of the QCA Act.
[67] Section 127 of the QCA Act.
[68] Section 101(2)(h) of the QCA Act.
[69] Note that the QCA will not have knowledge of the details of any private arbitrations conducted under existing user agreements—if the QCA is not the arbitrator for a dispute arising under the existing user agreement, the QCA does not have the power to require the parties to a private arbitration to disclose details of that arbitration (including the determination or reasons for the determination) to the QCA.
[70] The QCA will not necessarily be the arbitrator for disputes arising under the existing user agreements—see chapter 2 of this guideline. The provisions in the QCA Act do not require the QCA or DBIM to provide information

DBIM is required to provide relevant information[71] on access determinations made in relation to the DBCT service during the period of the 2021 access undertaking (from 2021 to 2026), whether or not the QCA is the arbitrator. This disclosure regime in clause 17.5 of the 2021 undertaking provides that before DBIM discloses arbitrated outcomes:

- DBIM will provide the QCA a copy of the final determination for a private arbitration, including reasons. For QCA arbitrations, the QCA will already have a copy of the determination
- the QCA will, in both instances, consult with the parties to the arbitration on any matters in the determination they regard as confidential and consider should be redacted. The QCA will have regard to the submissions of the parties in issuing the final form of the determination which is required to be disclosed by DBIM.

The redacted determinations will not be published, but will be available, if relevant, to access seekers and holders, during any negotiation or dispute under the undertaking or an access agreement. The process for parties negotiating with DBIM to receive information on relevant determinations is as follows:

- DBIM will maintain a register of all determinations, that will include the date, the decision-maker (QCA or private), whether the party was an access seeker or holder (but not the name of the party), and a summary of the substantive issues addressed in the determination.
- At the start of negotiations or a dispute, DBIM will provide an access seeker or access holder with a copy of the register. The access seeker or access holder may request relevant redacted determinations, and DBIM will provide only those it also considers relevant, within five business days.
- If the access seeker or holder is not satisfied with what DBIM has provided after their request, they can refer the dispute to the QCA, which will decide the matter and issue the appropriate direction to DBIM about its disclosure obligations within 20 business days.
- DBIM may require access seekers and existing users who will receive details of determinations and associated reasons to enter into a confidentiality deed, substantially in the form set out in schedule C of the 2021 undertaking.

to existing access holders relating to determinations made in disputes between existing access holders and DBIM (that is, disputes not falling within part 5, division 5 of the QCA Act).

[71] The method by which this information is to be provided is described in chapter 6 of the QCA's decision on the 2019 DBCT DAU.

6 CONSIDERATION OF MATTERS IN PRICING DISPUTES

Pricing disputes may arise under part 5, division 5 of the QCA Act, under existing user agreements, or under the access undertaking. For any of these three categories of dispute, the QCA will likely have regard to the criteria in section 120 of the QCA Act (see Box 2 in section 2.1.1 of this guideline) when forming a view on appropriate access charges where permissible. This chapter covers:

- selected pricing clauses in the 2021 undertaking (section 6.1)
- general considerations in pricing disputes, including:
  - establishing an appropriate terminal infrastructure charge (TIC) (section 6.2.1)
  - applying discretion in weighing relevant factors (section 6.2.2)
- specific pricing matters, including:
  - the relevant terminal component (section 6.3.1)
  - cost, risk and the regulatory framework (section 6.3.2)
  - the value of the service to an access seeker or group (section 6.3.3).

This chapter is intended as a general guide only, to assist the parties to a dispute—the QCA will determine each dispute on a case-by-case basis, having regard to the specific facts of that case.

6.1 Pricing clauses in the 2021 undertaking

Under the 2021 undertaking, access charges are defined as 'the amounts payable by an Access Holder under an Access Agreement or Existing user Agreement for the Services'.[72] Clause 11.2 provides that:

> (a) Access Charges for each Terminal Component[73] will comprise two parts:
>
> (1) A Terminal Infrastructure Charge; and
>
> (2) An Operation and Maintenance Charge.

Clause 11.3 sets out the determination of the access charges:

> (a) The Access Charges for each Terminal Component in respect of which the Access Holder has an entitlement to Access will be:
>
> (1) in respect of the Operation and Maintenance Charge, determined in accordance with Section 11.6; and
>
> (2) in respect of the Terminal Infrastructure Charge, as agreed between DBIM and the Access Holder.

Subsequent clauses specify approaches to a range of possible disagreements between access seekers, access holders and DBIM in relation to the TIC. For example:

- Clause 11.3(b) discusses disagreements between an access seeker and DBIM on the initial TIC to apply from the commencement of an access agreement.

[72] Schedule G of the 2021 undertaking.
[73] Terminal component means each of the existing terminal and the differentiated expansion component, as in schedule G of the 2021 undertaking.

- Clause 11.3(c) discusses disputes between an access holder and DBIM concerning the TIC to apply under an existing access agreement.

Where DBIM, an access holder or an access seeker refers a dispute in relation to the initial TIC for arbitration to the QCA[74], clause 11.4(d) of the 2021 undertaking states that in determining the initial TIC, the QCA:

> (1) must have regard to the matters in section 120(1) of the QCA Act; [and]
>
> (2) may also take into account any other matters relating to the matters mentioned in section 120(1) of the QCA Act that it considers appropriate[.]

6.2 Determining a dispute on pricing matters

6.2.1 Establishing an appropriate TIC

In establishing an appropriate TIC, the QCA will consider the appropriateness of the access proposal, having regard to the factors outlined in section 120 of the QCA Act (see Box 2 in section 2.1.1).

In doing so, the QCA considers it appropriate to have regard to the proposals made by each party during the negotiation phase. These proposals may inform the QCA's assessment of the factors in section 120 of the QCA Act, particularly where the proposals reflect some consideration of those factors.

The QCA considers this remains consistent with an appropriate balancing of the factors in section 120 of the QCA Act—noting it would likely involve, for example, some consideration of the extent to which the parties' proposals took into account both:

- DBIM's legitimate business interests and investment in the facility (s. 120(1)(b)), and
- the legitimate business interests of persons who have, or may acquire, rights to use the service (s. 120(1)(c)).

This will not operate as an evidentiary constraint, but the QCA acknowledges that in assessing the reasonableness of a TIC sought in an arbitration, it may be relevant to have regard to the extent to which any claim is inconsistent with a TIC sought by the same party during the negotiation phase—on the presumption that all parties would have acted reasonably in making such claims in the negotiation phase.

This approach for considering a dispute on the TIC recognises that:

- forming a view as to what may constitute an appropriate TIC for providing access to coal handling services at DBCT will require the QCA to apply its judgment, due to the uncertainty inherent in estimating, among other things, costs associated with providing access
- considering the reasonableness of the access proposal as part of an arbitration, rather than applying a strict rules-based approach to estimating an appropriate TIC, will facilitate genuine negotiation between the parties. It will give DBIM incentives to propose a reasonable TIC when negotiating with access seekers or holders and give access seekers or holders incentives to make reasonable counter-proposals.

In arbitrating a dispute under an access agreement (including a review of access charges), the QCA would have particular regard to the terms of that agreement. It is likely that the QCA would

[74] Such a dispute may be referred to the QCA under part 5, division 5 of the QCA Act, or under an existing user agreement or access undertaking, depending on the facts of the dispute (see chapter 2 of this guideline).

also have regard to the terms of the access undertaking effective at the time of review where permissible. However, the QCA will consider the dispute on its own merits.

6.2.2 Applying discretion in having regard to the relevant factors

The QCA will apply its discretion in determining how to have regard to the factors in section 120 of the QCA Act as part of an arbitration. The matters listed in section 120 of the QCA Act may give rise to competing considerations that need to be weighed in deciding whether it is appropriate to approve the TIC.

Some of the matters to which the QCA must have regard may lend themselves to different conclusions on whether a TIC is appropriate. For example, the QCA must give consideration to whether proposals have been made in accordance with DBIM's legitimate business interests and investment in the facility (s. 120(1)(b)) and to the legitimate business interests of persons who have, or may acquire, rights to use the service (s. 120(1)(c)).

The QCA Act does not provide guidance on how to assign weight to respective considerations before applying them to any given issue. The QCA will determine the appropriate balancing of these considerations on a case-by-case basis.

In establishing an appropriate TIC, the QCA will have regard to relevant evidence provided by the parties to the dispute, as well as the circumstances under which access is provided. The QCA does not consider it appropriate to specify a particular approach or methodology for establishing the appropriate TIC for all access seekers. Relevantly, under section 196(1)(c), the QCA may inform itself on any matter relevant to the dispute subject to arbitration in any way it considers appropriate.

For the reasons set out below, the QCA, when exercising its discretion, will not be bound by any of the following:

- previous regulatory decisions on pricing matters
- DBIM's information disclosure reports
- the actions of parties throughout the regulatory period.

Previous regulatory decisions on pricing matters

The approaches adopted in past determinations have been in reference to the information provided and circumstances specific to those previous determinations. Past regulatory decisions or previous considerations do not preclude the QCA from making a different determination in an arbitration having regard to the relevant facts of the dispute. The QCA is of the view that the previous methodologies and approaches used to estimate a reference tariff for DBIM need not define or constrain its approach in determining an appropriate TIC in an arbitration.

In previous regulatory determinations, a cost-based building block methodology was applied to estimate a reference tariff for a terminal component. The costs incurred by DBIM in providing access (and the efficiency of such costs) remain a relevant consideration that the QCA must have regard to as part of a dispute on an appropriate TIC for an access seeker.[75] The costs, however, are just one matter for consideration.

[75] One of the factors the QCA must have regard to is the pricing principles mentioned in s. 168A (s. 120(1)(l) of the QCA Act). Section 168A(a) of the QCA Act stipulates that the price of access to a service should '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'.

For instance, the factors outlined in section 120 of the QCA Act require the QCA to have regard to, among other things, the value of access to the relevant access seeker (or a class of access seekers or users). Guidance on matters relating to consideration of value is given in section 6.3.3.

While the QCA intends to exercise judgment and discretion in its approach, it acknowledges there are accepted regulatory approaches, and it will have regard to these where appropriate in forming its views.

DBIM's information disclosure reports

The QCA considers that the information provision arrangements outlined in the 2021 undertaking are sufficient to enable access seekers to form a view on a reasonable TIC for the purpose of negotiating with DBIM.[76]

However, while the QCA considers the form and content of the information provision arrangements (including any past, relevant arbitral determinations) to be sufficient to reach informed views about the likely and reasonable range of pricing outcomes likely to be determined in any arbitration, this should not be taken as QCA endorsement of the methods or assumptions used to estimate cost information provided to access seekers, in establishing an appropriate TIC. The QCA will assess the overall appropriateness of the TIC as part of the arbitration process.

Actions of parties throughout the regulatory period

While certain actions of parties may provide context or evidence in considering whether a TIC is appropriate, the QCA will not base its decision (about an appropriate TIC for an access seeker or access holder) on the previous behaviour of those parties involved in the dispute.

For instance, where relevant, the QCA will not necessarily be bound to apply actual costs incurred, or strategies implemented[77], by DBIM throughout the regulatory period. The QCA may instead form a view as to the efficient costs of providing access with reference to a benchmark entity, which may not resemble the actual behaviour of DBIM throughout the regulatory period by taking into account the factors in section 120 of the QCA Act.

Where the access undertaking or access agreements do not provide guidance as to how such matters are to be considered, the QCA will use its discretion in considering such matters.

6.3 Specific pricing matters

6.3.1 The relevant terminal component

In making a determination in relation to a dispute on pricing matters, the QCA will take into consideration the characteristics of the relevant terminal component.

Clause 5.12 of the 2021 undertaking provides for DBIM to make an application to the QCA for an expansion ruling as part of the expansion process.

Where relevant, an expansion ruling will identify the terminal component that negotiation should be based on. For example, should the QCA determine that the cost of an expansion is to be socialised, DBIM will provide access to the existing terminal component, and negotiations should occur on this basis. If the expansion ruling determines that an expansion should be differentially priced, negotiations should be based on an alternative, differentiated terminal component.

[76] These issues are considered in chapter 6 of the QCA's final decision on the 2019 DBCT DAU.
[77] For instance, DBIM may adopt specific hedging strategies in order to manage the risk of varying market conditions throughout the regulatory period.

The costs and risks associated with providing access may differ considerably across terminal components. The cost and risk characteristics of a terminal component, and the way in which these are allocated among parties, may be a key consideration that forms the basis for negotiating access.

The QCA will take into account the characteristics of the relevant terminal component, in accordance with any relevant expansion ruling.

Thus, the QCA considers it appropriate for DBIM to outline to access seekers the relevant terminal component as part of the negotiation process.

6.3.2 Cost, risk and the regulatory framework

In arbitrating a dispute on pricing matters, the QCA will have regard to how cost and risk are allocated to parties within the regulatory framework. In particular, the access undertaking and relevant access agreements specify the terms on which access is to be provided, which may include arrangements that allocate volume and cost risks between the parties. These regulatory and contractual arrangements will be directly relevant when the QCA has regard to the matters outlined in section 120 of the QCA Act, which include, among other things:

- the value of the service to an access seeker, or class of access seekers or users (s. 120(1)(e))
- the direct costs of providing access to the service (s. 120(1)(f))
- the economically efficient operation of the facility (s. 120(1)(j)).

The matters listed in section 120 also include the pricing principles in section 168A of the QCA Act, which stipulate that the price of access to a service should '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'.

The QCA will also likely have regard to (among other things) investments made by the parties, changes to cost or risk, an appropriate asset valuation and an appropriate rate of return.

6.3.3 Consideration of the value of the service

The concept of value of the service to an access seeker or class of access seekers in section 120(1)(e) of the QCA Act is not present in similar lists of assessment criteria in other jurisdictions, or in the undertaking approval criteria in the QCA Act (s. 138(2)). It is therefore appropriate to provide some context on how value might be considered, among the various criteria in section 120, in determining an appropriate TIC as part of a dispute on pricing matters:

- Consideration will be given to whether to carry out the value assessment by reference to an individual access seeker[78] or to a defined class of access seekers or users, and to the QCA's discretion in this regard.
- Consideration of the value of the service may in some instances provide for access prices to be set higher than the efficient costs of providing access. However, the QCA does not consider it appropriate for access prices to be set at a level that impairs economic efficiency, either in the use of the Terminal or in a related market.

[78] For instance, the operational and supply chain costs for each mine will differ depending on the site and location characteristics of that mine. Additionally, the price obtained for the product may differ considerably depending on the characteristics of the coal produced.

- The QCA may have regard to any relevant contractual provisions, including provisions within contracts concluded between DBIM and users within an appropriately defined class of users, that may have bearing on the issue of value.
- At the time when the QCA assesses access charges for access holders, the access holders have already committed to entering the market and may have incurred considerable sunk costs. Therefore, in considering matters set out in section 120 of the QCA Act, including value, as part of a review of access charges for an existing access agreement, a key consideration for the QCA to have regard to is likely to be the context and terms of any relevant agreements between the parties and the legitimate business interests of the access holder in respect of any sunk investment (s. 120(1)(c)).
- High levels of volatility in traded coal prices have been a feature of global coal markets, and much of the short-term volume risk has been and may continue to be allocated to access holders through the regulatory and contractual arrangements. Therefore, the value of the service to an access seeker or group of access seekers may vary significantly throughout the coal price cycle, reflecting market conditions.

GLOSSARY

CAA	Commercial Arbitration Act 2013 (Qld)
DAU	draft access undertaking
DBCT	Dalrymple Bay Coal Terminal
DBCT Management/DBCTM	DBCT Management Pty Ltd and DBCT Trustee (now DBIM)
DBI Management/DBIM	Dalrymple Bay Infrastructure Management Pty Limited (operator of the Terminal, previously DBCTM)
QCA	Queensland Competition Authority
QCA Act	Queensland Competition Authority Act 1997
SAA	standard access agreement
Terminal	DBCT
TIC	terminal infrastructure charge—the price charged for access to the DBCT service
WACC	weighted average cost of capital

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