

**Dispute** means a dispute between an Applicant and the Port Operator in relation to access to the Port Terminal Services under this Undertaking and includes disputes arising in the course of the negotiation process in Part 7 of this Undertaking but does not include disputes in relation to an executed Access Agreement.

**Dispute Notice** has the meaning given in clause 8.1(b).

## 8 Dispute resolution

### 8.1 Disputes

- (a) Any Dispute shall, unless otherwise expressly agreed by both parties, be resolved in accordance with this **clause 8**.
- (b) Either party may give to the other party to the Dispute a notice in writing (**Dispute Notice**) specifying the Dispute and requiring it to be dealt with in the manner set out in this **clause 8**. The parties acting in good faith shall attempt to resolve the Dispute as soon as is practicable.
- (c) Any disputes in relation to an executed Access Agreement will be dealt with in accordance with the provisions of that Access Agreement.
- (d) The Port Operator will by 31 July of each year provide a report to the ACCC on any disputes in relation to an Access Agreement and any Disputes in the preceding 12 months (except for the first year in which case the report will apply to the period from the commencement of this Undertaking) including the details of any resolutions and the status of unresolved matters.

### 8.2 Negotiation

Within five Business Days of a party giving the other party a Dispute Notice, senior representatives from each party will meet and negotiate in good faith to resolve the Dispute.

### 8.3 Mediation

- (a) If the Dispute is not resolved under **clause 8.2** within five Business Days after the date of the Dispute Notice then:
  - (i) if the parties agree, they will attempt to resolve the Dispute by formal mediation conducted by a mediator appointed by agreement between the parties or as appointed by the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**); or
  - (ii) if the parties do not agree to resolve the Dispute by mediation, either party may by notice in writing to the other and the arbitrator, refer the Dispute to be determined by arbitration under **clause 8.4**.
- (b) Unless the parties agree otherwise:

- (i) any mediation will be conducted by a mediator under the IAMA Mediation Rules (whether or not the mediator is a legal practitioner);
- (ii) any mediation shall be conducted within [ten] Business Days of the appointment of the mediator;
- (iii) each party may appoint a person, including a legally qualified person to represent it or assist it in a mediation;
- (iv) each party will bear their own costs relating to the preparation for and attendance at a mediation; and
- (v) the costs of the mediator will be borne equally by the parties.

#### **8.4 Referral to arbitration**

- (a) If the Dispute is not resolved under **clause 8.2**, or at any time after the appointment of the mediator (if any) under **clause 8.3** either party may by notice in writing to the other party and to the mediator terminate any mediation proceedings and give notice that the Dispute must be referred to arbitration under this **clause 8.4**.
- (b) Where a Dispute is referred to arbitration, it shall be referred to the ACCC in the first instance.
- (c) Upon referral to the ACCC of the Dispute, the ACCC shall, within five Business Days, give notice to the parties as to whether the Dispute shall be arbitrated by the ACCC or referred to a private arbitrator.
- (d) Where the ACCC determines that it shall conduct the arbitration such arbitration shall be conducted by the ACCC in accordance with the arbitration provisions of Part IIIA of the TPA.
- (e) Where either party serves notice under **clause 8.4(a)**, that notice will also include an agreement by that party in the case of referral by the ACCC of the Dispute to a private arbitrator to,
  - (i) pay any amounts determined in accordance with **clause 8.9**; and
  - (ii) indemnify the private arbitrator from any claims made against the private arbitrator arising in connection with the performance by the private arbitrator of its duties, such indemnity excluding circumstances where the conduct of the private arbitrator constitutes wilful negligence, or is dishonest or unlawful conduct.

#### **8.5 Arbitration procedure – private arbitrator**

- (a) If a Dispute is referred to a private arbitrator, the parties shall attempt to agree upon a suitably qualified person to act as arbitrator.
- (b) If the parties fail to agree an arbitrator within 10 Business Days of a referral to a private arbitration under **clause 8.4**, either party may request the President of the Western Australian Chapter of the Institute of Arbitrators and Mediators of Australia (**IAMA**) to appoint an arbitrator,

such appointment to be made within five Business Days of the request to IAMA.

- (c) Subject to the involvement of, and disclosures to, the ACCC, unless the Port Operator and the Applicant agree otherwise, the arbitration by a private arbitrator must be conducted in private.
- (d) A party may appoint a person, including a legally qualified person, to represent it or assist it in the arbitration.
- (e) The private arbitrator will, when conducting the arbitration:
  - (i) keep the ACCC informed of the progress of the arbitration, including timelines and processes for making submissions;
  - (ii) observe the rules of natural justice but is not required to observe the rules of evidence;
  - (iii) proceed as quickly as is possible and consistent with a fair and proper assessment of the matter;
  - (iv) while having the right to decide on the form of presentations, encourage a written presentation by each party with exchange and with rebuttal opportunities and questioning by the private arbitrator;
  - (v) call on any party the private arbitrator believes necessary to give evidence;
  - (vi) permit the ACCC, on request, to make submissions to the private arbitrator on matters relevant to the Dispute;
  - (vii) decide how to receive evidence and consider the need to keep evidence confidential and the need to protect the confidentiality of the arbitration process;
  - (viii) present its determination in a draft form to the parties and hear argument from the parties before making a final determination; and
  - (ix) hand down a final determination in writing which includes all its reasons for making the determination and findings on material questions of law and fact, including references to evidence on which the findings of fact were based;
  - (x) provide a copy of the final determination to the ACCC at the time of handing down the final determination.
- (f) The private arbitrator may at any time terminate arbitration (without making an award) if it thinks that:
  - (i) the notification of the Dispute is vexatious;
  - (ii) the subject matter of the Dispute is trivial, misconceived or lacking in substance; or
  - (iii) the party who notified the Dispute has not engaged in negotiations in good faith.

## **8.6 Matters which private arbitrator must take into account**

- (a) In deciding a Dispute the private arbitrator will take into account:
  - (i) the principles, methodologies and provisions set out in this Undertaking;
  - (ii) the provisions of Part IIIA of the TPA and the Competition Principles Agreement;
  - (iii) any relevant guidelines published by the ACCC;
  - (iv) any submissions provided by the ACCC; and
  - (v) any other matters that the private arbitrator thinks are appropriate to have regard to.
- (b) In making its determination, the arbitrator:
  - (i) may deal with any matters referred to in section 44V of the TPA;
  - (ii) will not make a determination that would have any of the effects described in section 44W of the TPA; and
  - (iii) will take into account the matters referred to in section 44X of the TPA.

## **8.7 Confidentiality – private arbitration**

- (a) The private arbitrator must take all reasonable steps to protect the confidentiality of information that a party has identified is confidential or commercially sensitive.
- (b) The private arbitrator may require the parties to comply with rules and orders aimed at protecting the confidentiality of information provided by the parties, including:
  - (i) requiring each party to give confidentiality undertakings to the other party and their external advisers; and
  - (ii) limiting access to confidential information to specified individuals subject to confidentiality undertakings provided by those individuals.
- (c) The private arbitrator may make confidential and non-confidential versions of its determination and limit access to the confidential versions to specific individuals.
- (d) For the purpose of clarity, save for an arbitration conducted by the ACCC pursuant to **clause 8.4(d)** the entire dispute resolution process outlined in this clause **8** is subject to **clause 9**.

## **8.8 Effect of private arbitrator's determination**

- (a) The determination of the private arbitrator will be final and binding subject, to any rights of review by a court of law.
- (b) Except where the determination or direction is subject to a review by a court of law, if an Applicant does not comply with a determination or

direction of the private arbitrator, then the Port Operator will no longer be obliged to continue negotiations regarding the provision of access for that Applicant.

- (c) Except where the determination or direction is subject to a review by a court of law, the Port Operator will comply with the lawful directions or determinations of the private arbitrator.

### **8.9 Private Arbitrator's costs**

The private arbitrator's costs and the costs of the parties to the arbitration will be borne by the parties in such proportions as the private arbitrator determines. Each party may make submissions to the private arbitrator on the issue of costs at any time prior to that determination.

### **8.10 Backdating of arbitration determination**

The ACCC and a private arbitrator shall have the discretion to determine that an arbitration determination shall take effect from the date upon which the Notice of Dispute was served, notwithstanding that the determination post dates the Notice of Dispute.