

New Hope Group

Submission in Response to QCA Consultation Paper – DBCT Management’s Executed Deed Poll

28 October 2019



1 Introduction

This submission has been prepared by New Hope Group (**New Hope**). New Hope thanks the Queensland Competition Authority (**QCA**) for the opportunity to provide comments on the QCA Consultation Paper considering DBCT Management's Executed Deed Poll (**Consultation Paper**).

This submission sets out the views of New Hope on the matters raised in the Consultation Paper. New Hope is eager to assist the QCA in its consideration of the matters raised in the Consultation Paper, and would be willing to provide any further information necessary to assist the QCA in its consideration of the declaration review.

2 Executive summary

New Hope agrees with the recommendation made in the QCA's draft recommendation that the service at the Dalrymple Bay Coal Terminal (**DBCT**) satisfies each of the access criteria in the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) and should therefore remain declared.

New Hope does not consider that the amendments made by DBCT Management to the deed poll and the associated access framework between the date of the draft recommendation and the Consultation Paper should change that recommendation.

In particular, New Hope makes the following points in this submission.

(1) **The deed poll will not constrain DBCT Management's ability to exercise market power in respect of access seekers.**

DBCT Management will not have its ability to exercise market power in respect of access seekers restrained by the deed poll in the absence of declaration. In particular, New Hope strongly disagrees with any contention that the \$3 price cap proposed by DBCT Management would eliminate or materially reduced the detriment to competitive conditions in the coal tenements market.¹

This is because:

- (a) there has been no evidence provided by DBCT Management that the TIC that would be determined under a QCA administered pricing regime for the existing terminal component is ascertainable in the absence of the expertise of the regulator – such that it is impossible to know what limit the cap would actually impose as it is a cap on a number that DBCT Management effectively gets to self-determine;
- (b) \$3 is a material cost per tonne to access seekers in the coal tenements market who are seeking to develop marginal projects – and the asymmetrical terms applied between access seekers and existing users will continue to have a detrimental impact on access seekers competing in the coal tenements market even where a price cap is notionally imposed;
- (c) the relevant counterfactual should not be that, with declaration, the differential pricing provisions in the existing undertaking would result in future users paying up to \$3.50 tonnes more than existing users as:
 - (i) there is some capacity in DBCT that is not expansion capacity;

¹ For the purposes of this submission, New Hope has referred to the coal tenements market, with those references intended to have the meaning given by the QCA to that term in the Consultation Paper and draft determination.

- (ii) incremental expansions are unlikely to result in that level of price differential; and
- (iii) there is no guarantee that differential pricing will apply at the point an expansion occurs (as the terms of the relevant undertaking as the time may be different from those in the 2017 AU).

Given the material impact a \$3 price differential would have on project proponents seeking to development projects in the coal tenement market, it is clear that even where DBCT Management has imposed a \$3 cap above an uncertain hypothetical TIC, there would be a material promotion of competition in the coal tenements market where the service is declared.

(2) **The threat of declaration does not constrain DBCT Management’s conduct**

New Hope does not consider that the actions of DBCT Management following the draft recommendation demonstrate that the threat of declaration is a meaningful constraint on DBCT Management’s ability to exercise market power. New Hope submits that this contention must be considered in light of how meaningful the threat of declaration would actually be – particularly where DBCT Management has already become undeclared through a protracted regulatory process, the parties that are likely to be disadvantaged and therefore seeking redeclaration are access seekers who will have less motivation, fewer financial resources and significantly less experience in the regulatory process than DBCT Management. As such, it is not a credible threat – and not a threat that will curtail the conduct of DBCT Management.

There is significant cost involved in any potential declaration project – so where, as New Hope submits is the case – access seekers are often not as well-resourced as existing users or DBCT Management itself, those access seekers would be bearing the higher price of access and less advantageous terms whilst also spending significant financial resources on a potential declaration process. Given existing users will enjoy the benefit of existing user agreements, the costs of this regulatory process would likely fall to access seekers.

Realistically, it is unlikely that any access seeker would be able to financially sustain such a regulatory process – such that the threat of declaration holds very little credibility as threat to constrain the conduct of DBCT Management and offers no comfort to access seekers at DBCT.

New Hope submits that a distinction should be drawn between conduct of DBCT Management during the existing declaration review process and any conduct that they may engage in if the service is undeclared. DBCT Management has clear incentives in the current process to be responsive to the QCA’s concerns with a view that the process is a specific opportunity to have the declaration of the service at DBCT removed. These incentives are different where declaration is removed and the threat for DBCT Management is whether an access seeker would be able to successfully initiate and complete a process with the QCA to seek declaration (particularly where all parties would be aware that DBCT Management was successful in removing declaration).

3 New Hope

New Hope Corporation Limited is a majority Australian owned and operated diversified energy company which has been based in South East Queensland for more than 60 years. A subsidiary of New Hope is New Lenton Coal Pty Ltd which is a participant in the Lenton Joint Venture (**LJV**). The Lenton joint venture participants are New Lenton Coal Pty Ltd (90%) and MPC Lenton Pty Ltd (10%) which is a Formosa Plastics Group subsidiary. The

LJV is seeking to develop an open cut coal resource located within the northern part of the Bowen Basin. The project consists for the most part of the Rangal coal measures, namely the Leichhardt and Vermont seams. There is an existing mining lease on the project, ML70337, which was granted in 2008, with three additional exploration permits for coal extending beyond the mining lease boundary. The Environmental Authority associated with ML70337, allows for mining of up to 2.0 million tonnes per annum of coal.



4 The impact of the deed poll as executed

4.1 The inherent uncertainty created by the deed poll

New Hope does not consider that the implementation of the Deed Poll and access framework on the proposed terms, combined with the threat of declaration, would be sufficient to constrain DBCT Management's conduct in the absence of declaration. New Hope considers that declaration would – as determined in the QCA's draft recommendation – result in a material increase in competition in the coal tenements market.

New Hope considers that while the \$3 price cap may be notionally enforceable, it is important to consider that this is a \$3 price cap above a price which is uncertain and difficult to predict. Further, the latest DBCT Management DAU indicates that it considers that there is merit in charging for components of the declared in addition to the base TIC (such as blending and coshipping) - such that there is no guarantee for an access seeker that the differential would practically be limited to \$3.

Access seekers make decisions to invest in the tenements market based on modelled costs of the various supply chain inputs required to bring a project to market. Where the access framework provides for DBCT Management to essentially estimate what price the QCA would have determined if the service was declared, it is difficult to model the cost of the service when investing in a tenement. The QCA has a wealth of experience in considering the appropriate pricing for declared services in Queensland and published history of decisions (along with the reasoning for those decision). It is clear from extent of submissions by interested parties in relation to pricing on QCA determined undertaking that there is not a singular view as to what the price should be. It seems likely to New Hope that the \$3 cap is likely to be imposed against an estimation of the QCA TIC that is favourable to DBCT Management – such that the absence of declaration will increase the cost of access for access seekers by significantly more than \$3 per tonne. This is likely to dampen competition in the market for tenements as the viability of developing tenements depends on being able to model costs to understand the potential of projects.

Relying on a hypothetical QCA price (noting that DBCT Management has not had significant historical success in anticipating the TIC determined by the QCA and instead has proposed higher TICs in its submissions on DAUs) creates a significant amount of uncertainty in the costs for access seekers. Even if access seekers had enough insight into the complexities of determining an appropriate TIC (which as prospective users to DBCT, they are unlikely to have), there would be a large enough potential range of potential QCA determined prices that it would be almost impossible to meaningfully monitor compliance by DBCT Management with its obligation to adhere to the \$3 cap.

4.2 The materiality of \$3 for access seekers

As explained above, New Hope considers that it is unlikely that the actual cost differential between the terms imposed on access seekers and those imposed on existing users will

be limited to \$3 per tonne. However, even if it is only \$3 per tonne, New Hope still considers that declaration would nonetheless result in a material increase of competition in the coal tenements market.

New Hope, as an access seeker and an investor in the coal tenements market, has clear insight into the impact that cost differences make on the viability of projects. [REDACTED]

[REDACTED] \$3 per tonne is a genuinely material amount. This means that the asymmetry of terms between access seekers and access holders at DBCT is likely to result in a lessening of competition in the market for coal tenements and deter access seekers from investing in those projects.

[REDACTED]

[REDACTED]

4.3 **There is surplus capacity at DBCT**

New Hope submits that the above cost differential as a proportion of the overall project value should also be considered in light of the existing capacity at DBCT.

It is incorrect to assume that all future capacity that could be utilised by access seekers would only be expansion capacity as there is clearly capacity at DBCT presently – and the contract profile of DBCT indicates that capacity will continue to arise periodically. While New Hope accepts that these may not be large tranches of capacity, it is important to note that not all projects arising from developments in the coal tenements markets will be large projects that require significant capacity. As such, there is a real possibility that with declaration an access seeker would be able to obtain access sufficient to develop a project in the coal tenements market at the same price as existing users of DBCT – and in the absence of declaration, that same access seeker would instead be paying \$3 or more per tonne for the same access. Such a differential clearly impacts on the viability of that investment decision by the access seeker – and creates an unfair differential in terms between access seekers and existing access holders at DBCT.

This also means that the comparative analysis that suggests that the \$3 cap is reasonable given the differentially priced expansion would cost at least \$3.50 more per tonne than existing capacity relies on an incorrect premise.

4.4 **Differential pricing should not be assumed**

Even if it is accepted that the only available capacity would be expansion capacity, New Hope submits that the assumption that this capacity would be differentially priced is not sound.

While New Hope accepts that different pricing was provided for in the 2017 AU for DBCT, it notes that DBCT Management opposed those changes. Moreover, the provision for

something in an access undertaking does not mean that position will remain forever – the QCA is a dynamic regulator who is responsive to changing regulatory environments and is not bound by the decisions made in one access undertaking in perpetuity. No access seekers appeared to have made submissions in relation to the differential pricing provisions in the 2017 AU – indeed, it appears that existing users and DBCT Management authored the submissions considered by the QCA.

If, as the DBCT User Group and New Hope have demonstrated through submissions, a \$3 price uplift on capacity causes significant competitive harm in the coal tenements market, New Hope would suggest that the QCA should reconsider the appropriateness of differential pricing in the 2020 AU (given the QCA's modelling the differential pricing is likely to result in a price difference of approximately \$3.50 per tonne). It would be appropriate for the QCA to reconsider the appropriateness of differential pricing where it would clearly cause detriment to access seekers at DBCT (and exacerbate the asymmetry between access seekers and access holders at DBCT) if the service is redeclared.

Given the harm caused by the \$3 cap – and would be caused by a \$3.50 differential pricing cost – it would be inappropriate for the QCA to assume that differential pricing will necessarily apply to expansion capacity and access seekers at DBCT. As such, the relevant consideration should not involve a comparison between the impact of a \$3 cap and the \$3.50 likely cost of expansion capacity – but of the existing QCA pricing and the \$3 cap as it is imposed on access seekers. When this lens is used to consider the access framework, it is clear that it harms competition in the coal tenements market where access seekers seek to develop projects – and that declaration would materially promote competition in the coal tenements market.

5 The threat of declaration

New Hope does not consider that the actions of DBCT Management following the draft recommendation demonstrate that the threat of declaration is a meaningful constraint on DBCT Management's ability to exercise market power. New Hope submits that this contention must be considered in light of how meaningful the threat of declaration would actually be – particularly where DBCT Management has already become undeclared through a protracted regulatory process, the parties that are likely to be disadvantaged and therefore seeking declaration are access seekers (who will have less motivation, fewer financial resources and significantly less experience in the regulatory process than DBCT Management).

Further, there is significant cost involved in any potential declaration project – so where, as New Hope submits is the case – access seekers are often not as well-resourced as existing users or DBCT Management itself, those access seekers would be bearing the higher price of access and less advantageous terms whilst also spending significant financial resources on a potential declaration process. The cost of economic reports and analysis and external counsel to make submissions on a process run by the QCA is already significant for access seekers – let alone where that access seeker is also expected to write exhaustive initial submissions setting out the case for declaration. It is difficult to envision how an individual access seeker could avoid these costs given the extent of resources DBCT Management is clearly willing to invest in regulatory processes and has invested in the declaration review process.

Realistically, it is unlikely that any access seeker would be able to sustain such a regulatory process – such that the threat of declaration holds very little credibility as threat to constrain the conduct of DBCT Management and offers no comfort to access seekers at DBCT. This is particularly the case given that, in the case where the service is undeclared, DBCT Management will know with full confidence that they achieved non-declaration through a fully contested regulatory process and would likely be able to achieve that outcome again. Similarly, access seekers would assume that the prospects

of having the service re-declared are low, given the most recent regulatory precedent involved DBCT Management getting the service undeclared.

Additionally, New Hope submits that a distinction should be drawn between conduct of DBCT Management during the existing declaration review process and any conduct that they may engage in if the service is undeclared. DBCT Management has clear incentives in the current process to be responsive to the QCA's concerns with a view that the process is a specific opportunity to have the declaration of the service at DBCT removed. These incentives are different where declaration is removed and the threat for DBCT Management is whether an access seeker would be able to successfully initiate and complete a process with the QCA to seek declaration (particularly where all parties would be aware that DBCT Management was successful in getting undeclared). The costs of an individual access seeker seeking declaration of the service at DBCT would be prohibitive for the vast majority of users – and would be prohibitive for New Hope.

Relying on the threat of declaration to regulation DBCT Management's behaviour assumes that access seekers and users of DBCT could make that a credible threat – which New Hope submits is not the case.