

DBCT User Group Submission –
QCA Draft Decision to refuse to approve 2017 Access Undertaking – Modification DAUU

Dalrymple Bay Coal Terminal User Group



1 Executive Summary

The DBCT User Group welcomes the opportunity to provide further submissions to the Queensland Competition Authority (**QCA**) on the Draft Decision to refuse to approve DBCT Management Pty Ltd's (**DBCTM**) modification draft amending access undertaking (**Modification DAAU**), which seeks to make several amendments to the DBCT 2017 Access Undertaking (**2017 AU**).

The DBCT User Group supports the QCA's Draft Decision in respect of the majority of the amendments with the exception of the proposed approval of three of the substantive changes sought in the Modification DAAU, which the DBCT User Group maintains are not appropriate.

Specifically, the DBCT User Group considers it is appropriate for the QCA to refuse to approve, DBCTM's requested amendments in respect of the proposed changes to:

- sections 3.2 and 3.3 regarding the role of Dalrymple Bay Coal Terminal Pty Ltd (*the Operator*) and the Operations and Maintenance Contract (**OMC**);
- the definition of Supply Change Business; and
- the non-expansion capital expenditure (**NECAP**) approval process.

In respect of these matters, the DBCT User Group considers that the Draft Decision:

- fails to identify an appropriate justification for approving the amendments; and
- underplays the significance of the public interest in regulatory certainty.

These issues and other matters raised in the Draft Decision are addressed in this submission.

2 Regulatory Certainty – the Overarching Matter

As noted in the DBCT User Group's initial submission of 20 October 2017, the DBCT User Group considers that the QCA should be cautious about approving substantive changes to a recently approved access undertaking where they are not justified by a change in external circumstances or events.

The DBCT User Group agrees with the QCA's assessment that regulatory certainty is clearly a factor the QCA should take into account in assessing the appropriateness of the undertaking, and is an overarching matter that weighs against all changes.

Stakeholders other than the infrastructure provider have no rights to voluntarily seek changes in the same manner as DBCTM is doing. Consequently, to allow an infrastructure provider to reopen approved access undertaking in the manner proposed by the Draft Decision encourages and incentivises infrastructure providers to seek to 'chip away' at the balanced regulatory position which the QCA must have determined was appropriate at the time the access undertaking was originally approved.

It is flawed logic to leap from the premise that because the *Queensland Competition Authority Act 1997* (Qld) makes the draft amending access undertaking process available to infrastructure providers without placing any constraint on what may be submitted, that the decision as to whether a proposed amendment is appropriate should not give material weight to the context of timing since the approval. In addition, this is not a case of 'simply the timing of the request' as the QCA's draft decision seems to suggest – but the combination of timing without material justification for the changes the DBCT User Group opposes.

The DBCT User Group is, of course, not opposed to non-substantive clarifications or improvements that have been agreed between the infrastructure providers and users as providing an appropriate position. Changes of that nature were clearly supported in the DBCT User Group's

initial submission to the QCA, such that it should be abundantly clear that the DBCT User Group is not pursuing a hard-line approach. None of the matters being resisted are of that nature.

3 QCA Positions in the Draft Decision: Supported by the User Group

3.1 General non-substantive amendments or improvements

As noted above, the DBCT User Group is not opposed to non-substantive clarifications or improvements agreed between the infrastructure providers and users as providing an appropriate position under the 2017 AU.

To that end, and consistent with the DBCT User Group's initial submissions, the DBCT User Group supports the QCA's Draft Decision to approve DBCTM's proposed changes in respect of the:

- circumstances in which an expansion pricing ruling must be sought (clause 5.12);
- interaction between the notifying access seeker process and access negotiations that are then underway (clause 5.7);
- summary of the Operations and Maintenance Contract (**OMC**) terms in Schedule I; and
- non-substantive amendments to which the DBCT User Group did not object in its initial submission, including those of a typographical or formatting nature noted in Chapter 5 of the Draft Decision.

3.2 Removal from the queue when an indicative access proposal is not accepted

The DBCT User Group supports the QCA's draft position to refuse to approve the amendment to clause 5.6(a) in respect of the current queuing arrangements.

The QCA's analysis correctly identifies that there is no compelling reason to alter the existing 2017 AU wording of clause 5.6(a).

As set out in the initial submission, to allow DBCTM to amend clause 5.6(a) by providing DBCTM greater discretion in relation to how the queue operates has the potential to result in an inequitable application of the queuing mechanism and to undermine the certainty and transparency of the existing queuing process.

In respect of the QCA's query as to the practical implications of the existing drafting and the existing queuing mechanism, members of the DBCT User Group have experienced the queuing mechanism as both access holders and access seekers.

The practical implications of the existing drafting are that:

- (a) the consequences of not indicating a willingness to proceed to negotiate access on the basis of the IAP are clear (i.e. the access seeker loses their place in the queue);
- (b) that effectively makes the queue workable and ensures that it is possible for access seekers to progress through the queue;
- (c) however, this does not have the adverse consequences that DBCTM asserts on an access seeker who was progressing their access application in good faith as the notifying access seeker regime permits such an access seeker removed by the queue to effectively be re-prioritised over other access seekers if it is willing to execute an access agreement.

3.3 Amendment with regard to owning a supply chain business

The DBCT User Group supports the QCA's decision to refuse to approve DBCTM's proposed amendment to clause 9.1(a) with regard to owning a supply chain business.

As the QCA has pointed out (correctly, in the view of the DBCT User Group), the proposed amendment to the wording of clause 9.1(a) does not improve the clarity or effectiveness of the existing wording and is unnecessary in circumstances where the DAAU process is already set out under the QCA Act.

3.4 The 60/60 tonnage exclusion

The DBCT User Group strongly supports the QCA's draft position to refuse to approve deletion of clause 12.5(h)(1)(C) which excludes certain access holders from voting on the 60/60 test.

As outlined in the DBCT User Group's initial submission, and recognised by the QCA, the exclusion is vital to ensuring that the existing access holders' vote is not influenced by those who have a vested interest in the expansion proceeding due to also being expansion access seekers (or related to such access seekers). As recognised by the QCA, the whole point of the 60/60 test is to provide a methodology for measuring the support among two different groups of users which may have divergent interests (existing users and expansion users).

This check and balance is of significant importance to existing expansion procedures in the approved access undertaking, and its removal would be highly prejudicial to existing access holders who are independent of proposed expansion access seekers.

3.5 Fees for QCA regulatory services

The DBCT User Group is willing to support the QCA's proposed approval of the amendment to Schedule C, Part A, clause 4(a)(3) (despite the opposition stated regarding the DBCTM amendment). The DBCT User Group's support in respect of this matter extends to the decision to refuse to approve the current form of DBCTM's proposed mechanism for the later amendment of the Annual Revenue Requirement (**ARR**) under Schedule C, Part A, clause 4(a), but agrees the form of the clause suggested by the QCA (included at Appendix B of the Draft Decision) is appropriate.

Whilst the DBCT User Group remains cautious of endorsing substantive changes to the 2017 AU so soon after it was finalised by the QCA, the DBCT User Group accepts the QCA's analysis in respect of this amendment and supports the decision to approve it on that basis.

3.6 Early termination security

The DBCT User Group supports the QCA's draft decision to refuse to approve DBCTM's proposed amendment to the definition of the early termination security (**ETS**).

As set out in the DBCT User Group's initial submission, and supported by the QCA, DBCTM should be incentivised to call on security it holds as soon as that is possible to recover as much of any losses it incurs as a consequence of early termination from the relevant access holder before it is then able to socialise remaining losses amongst others through a review event.

As recognised by the QCA, removing this obligation blunts DBCTM's incentive to call on that security and affords DBCTM an unnecessarily broad discretion to double recover, or choose whether to deal with those losses by either calling upon security held or through socialisation.

Further, given that this amendment seeks (essentially) a review of the QCA's final decision on the 2017 AU (which, as the QCA has identified, found DBCTM had a greater ability to manage revenue risk associated with user default in the pre-termination date) it is inappropriate for DBCTM to seek to amend this clause so soon after the 2017 AU was finalised.

3.7 Other formatting and typographical changes

The DBCT User Group is willing to support the QCA's proposed approach on these issues as set out in the Draft Decision. For those changes of this nature which the QCA has refused to approve

or is proposing to approve with amendments, the DBCT User Group notes its initial submissions (as summarised in Appendix A of the Draft Decision) which, with the exception of the approach to pricing ruling fees, are consistent with the QCA's position.

4 QCA Positions in the Draft Decision: Not Supported by the User Group

4.1 The Role of the Operator and the OMC

The DBCT User Group does not support the QCA's draft decision to approve DBCTM's proposed amendments to sections 3.2 and 3.3 of the 2017 AU with regard to the role of Dalrymple Bay Coal Terminal Pty Ltd (the **Operator**) and the OMC.

The QCA states that it 'agrees with the DBCT User Group that the proposed amendments to clauses 3.2 and 3.3 do not alter the application of clause 3' however, the QCA goes on to reason that the proposed change should be approved because it does not alter the application of clause 3 and because 'is important to DBCTM and... provide[s] some level of comfort.'

The DBCT User Group considers this is an inappropriate basis on which to propose to approve the amendments for two reasons:

- DBCTM have not expressed any basis in written submissions on which this proposed amendment is considered to be particularly 'important' to them – to the extent that DBCTM have expressed views privately to the QCA it is a failure to provide natural justice for the QCA to make a decision on that basis without DBCTM's asserted justification being made public; and
- any apparent comfort afforded to DBCTM as a result of the proposed amendment is not, of itself, an appropriate basis on which to approve the proposed amendment.

The DBCT User Group notes the QCA's statement that:

'this acceptance reflects no judgement (either way) on the appropriateness of DBCT PL remaining the Operator or on the operations of the OMC beyond the term of the 2017 AU. For the avoidance of doubt, the QCA's acceptance of these amendments should not be read so as to imply that other provisions of the 2017 AU do not apply 'during the term of the AU'.

That acknowledgement is critical, but the DBCT User Group still has deep discomfort with these amendments as there are no reasons given by the QCA for favouring DBCTM's comfort over the DBCT User Group's opposition.

For these reasons, and the reasons set out in the DBCT User Group's submission dated 20 October 2017, the DBCT User Group urges the QCA to reconsider its draft decision to approve this amendment and instead, refuse to approve it.

4.2 Definition of Supply Chain Businesses

The DBCT User Group welcomes the QCA's draft position to refuse to approve the amendment to the wording of clause 9.1(a) but strongly urges the QCA to reconsider its draft position to approve the amendment to the definition of Supply Chain Business.

As set out in the DBCT User Group's initial submission dated 20 October 2017, it is vital that the definition of Supply Chain Business remain broad.

This is an issue where the risks of the definition 'over-capturing' are easily resolved by the QCA ensuring the relevant DAAU process is swiftly conducted, whereas the risk of the definition 'under-capturing' is that anti-competitive vertical integration can occur without any adjustment of the undertaking to ensure that it remains appropriate.

In other words, if the definition becomes unduly narrow and the DAAU process is able to be avoided, there will be no way to amend the 2017 AU to resolve the problems which arise from subsequent vertical integration.

At the very least it should be made clear that the definition applies to not just rail services that access the terminal, coal mines that export coal via the terminal or purchases of coal from mines that export via the terminal – but also those that are reasonably likely to access the terminal, export coal via the terminal.

4.3 NECAP Approval Process

The DBCT User Group urges the QCA to reconsider its draft position to approve DBCTM's proposed amendment to the definition of 'review event' under Schedule G to provide for NECAP under clause 12.10(b) and as a review event in Schedule C, Part A, clause 4(f)(1).

The DBCT User Group maintains that the current process (as provided for in the approved access undertaking) regarding NECAP approvals is satisfactory and does not display any inappropriate, inefficient or adverse outcomes such that it ought to be amended.

As set out in the DBCT User Group's initial submission, the DAAU process affords beneficial regulatory transparency that ought to be applied to the operation of a regulated asset, without imposing a material administrative burden.

Moreover, the DBCT User Group objects to any inference that its silence in not specifically objecting to the streamlined NECAP process during previous reviews should be taken as a type of tacit acceptance of amending the process or as a basis to disregard the opposition raised in its initial submission.

As always, please do not hesitate to contact Mark Smith of Peabody Energy (as chairperson of the DBCT User Group) or John Hedge of Allens (as legal adviser to the DBCT User Group) if you have any queries.