

***APPLICATION TO THE NATIONAL COMPETITION
COUNCIL FOR A RECOMMENDATION TO EXTEND
THE CERTIFICATION OF AN ACCESS REGIME***

**Queensland's third party access regime for coal
handling services at Dalrymple Bay Coal
Terminal (DBCT)**

January 2021



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1. Application details

This application is made under section 44NA(2) of the *Competition and Consumer Act 2010* (Cth) (**CCA**).

The following information is provided in accordance with regulation 6B of the *Competition and Consumer Regulations 2010* (Cth).

Applicant

The application is made on behalf of the State of Queensland.

Responsible Minister

The responsible Minister for the State of Queensland is the Honourable Anastacia Palaszczuk MP, Premier and Minister for Trade.

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Description of the access regime

The Dalrymple Bay Coal Terminal access regime (**DBCT Access Regime**) comprises the following:

- (a) the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) (**Attachment 1**);
- (b) DBCT Management Pty Limited's access undertaking as accepted by the Queensland Competition Authority (**QCA**) under the provisions of the QCA Act and amended from time to time. The current access undertaking is the 2017 access undertaking (**Attachment 2**); and

- (c) the port safety regime in Queensland which is established by the *Transport Infrastructure Act 1994* (Qld) (**TIA**) (**Attachment 3**) and the *Transport Operations (Marine Safety) Act 1994* (Qld) (**TOMSA**) (**Attachment 4**).

Description of the service

The relevant service to which the DBCT Access Regime applies is *the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator*.

A detailed discussion regarding the scope of the service is provided at Chapter 8 below.

Grounds in support of the application

The grounds in support of the application are set out below in this application.

2. Basis for application for re-certification

The Queensland Government previously applied for certification of the DBCT Access Regime in December 2010. On 11 July 2011, the Commonwealth Minister decided to certify the DBCT Access Regime as effective for a period of ten years. This decision was consistent with the National Competition Council's final recommendation.

Under section 44NA(2) of the CCA, an application can be made asking the National Competition Council (**Council**) to recommend that the Commonwealth Minister decide to extend the period for which the decision certifying the effectiveness of the DBCT Access Regime is in force.

To ensure certainty for government and industry about whether the third party access regime under Part IIIA of the CCA could be applied to govern third party access in Queensland to the DBCT service in addition to the current DBCT Access Regime, the Queensland Government is requesting that the Council assess the effectiveness of the DBCT Access Regime and make a recommendation to the Commonwealth Minister that the decision to certify the access regime as effective be extended. An extension period of ten years is sought for certification of the effectiveness of the DBCT Access Regime. This period reflects the period for which the Treasurer and Minister for Infrastructure and Planning, the Honourable Cameron Dick MP, declared the handling of coal at Dalrymple Bay Coal Terminal (**DBCT**) as a service under the QCA Act.

The Queensland Government considers that the principles outlined in clause 6 of the Competition Principles Agreement continue to remain satisfied in respect of the DBCT Access Regime.

Consequently, this application updates the material contained in the previous application for certification, taking into account changes to the DBCT Access Regime since 2011, including relevant amendments to the QCA Act. Where relevant, these changes are discussed in further detail in this application.

3. Background

The Competition Principles Agreement¹ (**CPA**) provides that States and Territories may establish statutory regimes for regulating third party access to significant infrastructure within their respective jurisdictions. Where a State or Territory regime is certified by the designated Commonwealth Minister, it applies to the exclusion of the third party access regime under Part IIIA of the CCA (**National Access Regime**). An effective access regime is one that conforms to the principles outlined in clause 6 of the CPA (**Clause 6 principles**).

Division 2A of Part IIIA of the CCA details the process for access regimes to be certified as effective. A State or Territory can apply to the Council for a recommendation to be made to the responsible Commonwealth Minister that the Minister decide that a regime is an effective access regime. Where a decision by the Commonwealth Minister to certify an access regime as effective is in force, a State or Territory can also apply for an extension of the certification period.

In 1997, the Queensland Government passed the QCA Act, which contains a third party access regime in Part 5. This third party access regime, as amended from time to time, is modelled on the National Access Regime.

In 2001, the Queensland Government made the *Queensland Competition Authority Amendment Regulation (No.1) 2001* (Qld) which declared as a service, the handling of coal at Dalrymple Bay Coal Terminal (**DBCT**) by the terminal operator.² On 8 September 2010, the ability to declare a service by regulation was removed from the QCA Act.³ As a result, the declaration of DBCT was removed from the QCA Regulation and made in a new Part 12 of the QCA Act.

Section 250(1)(c) of the QCA Act provided that the 'handling of coal at Dalrymple Bay Coal Terminal by the terminal operator' was taken to be a service declared by the Minister under Part 5, Division 2 of the QCA Act. In accordance with section 250(2) of the QCA Act, this declaration expired on 8 September 2020.

¹ The Competition Principles Agreement is an intergovernmental agreement dated 11 April 1995 between the Commonwealth of Australia and the States of New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania, and the Australian Capital Territory and the Northern Territory (as amended to 13 April 2007).

² The declaration was remade by the *Queensland Competition Authority Regulation 2007* (Qld) (QCA Regulation).

³ The *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld) amended the QCA Act and the QCA Regulation.

On 31 May 2020, the Treasurer and Minister for Infrastructure and Planning, the Honourable Cameron Dick MP, as the responsible Minister for the QCA Act, declared the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator as a service under section 84(1)(a) of the QCA Act. The declaration started to operate on 9 September 2020 and expires at the end of 8 September 2030 (a period of 10 years).⁴

This has the effect of making the declared service subject to the continued operation of the third party access regime in Part 5 of the QCA Act.⁵

Part 5 of the QCA Act provides two methods of regulating access to declared services:

- (a) a 'negotiate/arbitrate' model under which the QCA Act imposes an obligation upon the provider of the service to negotiate with access seekers for the making of an access agreement⁶ and, if agreement cannot be reached, allows a dispute to be arbitrated, and a determination made, by the QCA in respect of the access dispute⁷; and
- (b) an 'access undertaking' model which allows the provider of the service to voluntarily submit an undertaking which sets out in detail the terms and conditions upon which the provider will give access to the declared service.⁸ The QCA also has the power under the regime to require a provider of a declared service to submit an undertaking.⁹

DBCT was established in 1983 by the Queensland Government to provide a common-user coal export facility to service coal mining developments. The terminal is owned by the Queensland Government through a wholly owned government entity, DBCT Holdings Pty Ltd. In 2001, DBCT Holdings Pty Ltd awarded a 50 year lease of the terminal (with an option for a further 49 years) to DBCT Management Pty Limited and the DBCT Trustee (**the lessees**). DBCT Management Pty Limited (**DBCT Management**) is responsible for the operation, maintenance and development of the terminal.

Dalrymple Bay Coal Terminal Pty Ltd (**DBCT Pty Ltd**), an independent entity owned by a selection of DBCT users, is contracted by DBCT Management under an operations and

⁴ *Notice of decision to declare a service under sections 84-87*, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 267, <https://www.publications.qld.gov.au/dataset/extraordinary-gazettes-june-2020/resource/9c57ea19-3f3f-4650-8836-6ff45f1a9439>.

⁵ Part 5, Division 4, Subdivision 1 of the QCA Act.

⁶ Part 5, Division 4, Subdivision 1 of the QCA Act.

⁷ Part 5, Division 5 of the QCA Act.

⁸ Part 5, Division 7 of the QCA Act. The QCA has the power to require a provider to submit an access undertaking under section 133 of the QCA Act.

⁹ Section 133 of the QCA Act.

maintenance contract to operate and maintain the terminal on a daily basis. However, DBCT Pty Ltd does not set the terms and conditions of access to the terminal or enter into access agreements with access seekers. The provision of access (including the terms and conditions on which access is provided) and development of the terminal are the responsibility of DBCT Management. DBCT Management does not have any interests in upstream or downstream markets and is not a vertically integrated business.

DBCT Management's operation, use of and investment in the terminal are subject to legislative and contractual arrangements put in place by the Queensland Government prior to the lease of the terminal in 2001. In particular, the Port Services Agreement (between the lessees and the State) establishes the rights and responsibilities of DBCT Management with respect to the operation, management and expansion of the terminal. In accordance with the Port Services Agreement, DBCT Management is required to submit a draft access undertaking to the QCA.

The access undertaking which currently applies in respect of the handling of coal at DBCT by the terminal operator is the 2017 access undertaking (**2017 Access Undertaking**). This access undertaking is due to expire on 1 July 2021. The QCA is currently in the process of considering DBCT Management's 2019 draft access undertaking but this has not yet been finalised. The current version of the 2017 Access Undertaking is provided at **Attachment 2**.

4. Overview of Queensland's coal export industry and DBCT

Queensland coal export industry

Queensland is Australia's largest producer and exporter of coal, producing over 239 million tonnes of saleable coal in 2019–20. Over 213 million tonnes of coal were exported in 2019–20, which amounts to almost 90 per cent of Queensland's coal.¹⁰

There were 48 operating coal mines in Queensland in 2019–20.¹¹ Most of Queensland's coal is sourced from the Bowen Basin in central Queensland and then transported by rail to a port before it is shipped internationally to over 30 countries around the world.¹²

The demand for coal export services is spread across Queensland, with Queensland's coal mines exporting through six coal export terminals. These terminals are located at:

- (a) Port of Brisbane – Queensland Bulk Handling (QBH) Coal Export Terminal;
- (b) Port of Gladstone – RG Tanna Coal Terminal and Wiggins Island Coal Export Terminal;
- (c) Port of Hay Point – Dalrymple Bay Coal Terminal and Hay Point Coal Terminal; and
- (d) Port of Abbot Point – Adani Abbot Point Terminal.

All of the coal terminals are common-user facilities except for Hay Point Coal Terminal which is owned by the BHP Mitsubishi Alliance.

A map of the central Queensland coal export systems (excluding the Port of Brisbane) is provided below.¹³

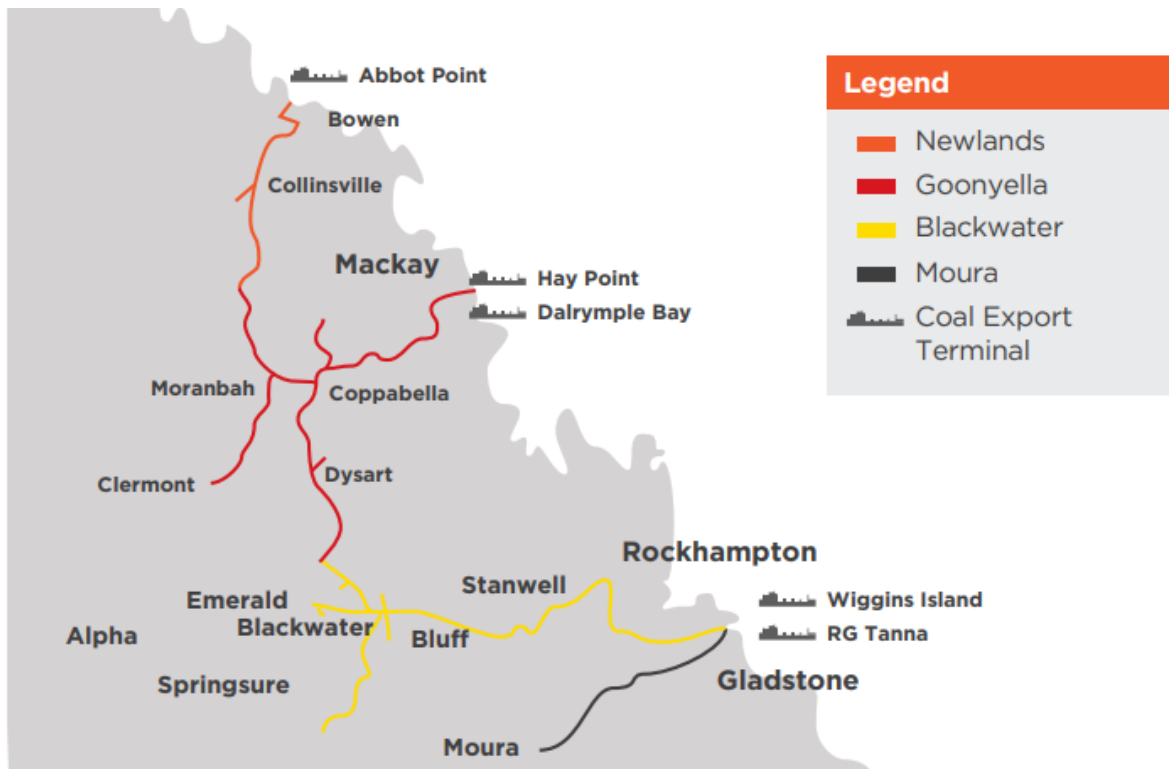
¹⁰ Department of Natural Resources, Mines and Energy, *Coal Industry Summary*, Queensland Coal Industry Review statistical tables, updated September 2020, <https://www.data.qld.gov.au/dataset/coal-industry-review-statistical-tables>.

¹¹ Department of Natural Resources, Mines and Energy, *Coal Industry Summary*, Queensland Coal Industry Review statistical tables, updated September 2020.

¹² Department of Natural Resources, Mines and Energy, *Coal exports by country*, Queensland Coal Industry Review statistical tables, updated September 2020.

¹³ The Port of Brisbane accounted for 6.59 million tonnes of coal exports in 2018–19 out of a total 226.2 million tonnes of coal exported from Queensland. See Department of Transport and Main Roads, *Trade Statistics for Queensland Ports: Throughput statistics for the five years ending 30 June 2019*, 2019, <https://www.tmr.qld.gov.au/-/media/busind/Transport-sectors/Ports/Trade-statistics/DBN15154-TRADE-STATISTICS-REPORT.pdf?la=en>.

Figure 1: Central Queensland coal export systems



Source: Aurizon Network, 2020 Sustainability Report, p. 5.

After a period of sustained growth, Queensland’s coal industry’s export volumes have been broadly stable since 2014–15 in the range of 200 to 230 million tonnes per year.¹⁴

DBCT

DBCT is a dedicated coal loading terminal at one of the world’s largest coal export ports, Hay Point. It is located approximately 40 kilometres south of Mackay and is situated on approximately 200 hectares of strategic port land and 160 hectares of offshore sea-bed lease.¹⁵

DBCT is a common-user facility and services around 18 mines in the Bowen Basin coal fields of central Queensland via an integrated rail-port network.¹⁶ It is a critical component of the Dalrymple Bay Coal Chain, which includes the Goonyella rail system that extends over 300 kilometres from the mines to the port. This rail system is also subject to a declaration under

¹⁴ Department of Natural Resources, Mines and Energy, *Coal Industry Summary*, Queensland Coal Industry Review statistical tables, updated September 2020.

¹⁵ DBCT Management, *DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal*, updated August 2019, <https://www.dbctm.com.au/wp-content/uploads/2019/09/Approved-Master-Plan-2019.pdf>.

¹⁶ DBCT Management, *DBCT Sustainability Strategy 2020*, p. 6, <https://dbinfrastructure.com.au/dbct-sustainability/?page=8>.

Part 5 of the QCA Act and is the subject of a separate certification extension application submitted to the Council at the same time as this application. Rail haulage is supplied by four rail haulage providers – Aurizon Operations, Pacific National, BMA Rail and One Rail.

DBCT is the largest coal export terminal in Queensland, with a nameplate capacity of 85 million tonnes per annum (mtpa).¹⁷ In 2019–20, DBCT exported approximately 61 million tonnes of coal in 2019–20.¹⁸ This means almost 30 per cent of coal exported from Queensland was transported through DBCT in 2019–20.¹⁹

Coal arrives at DBCT on trains that are over two kilometres long and carry approximately 10,000 metric tonnes of coal. It is unloaded at one of three inloading rail receival stations before being transported by conveyor to the DBCT stockyard.²⁰ 6375 trains delivered coal to the terminal in 2019–20.²¹ Over 600 vessels were loaded at DBCT in 2019–20.²²

The stockyard at DBCT covers an area of almost 67 hectares. In the stockyard, different types of coal are categorised into piles before being transferred by conveyors to shiploaders 3.8 kilometres offshore. The shiploaders then transfer the coal onto customer vessels for export.²³

DBCT caters for all coal types and is able to blend coal into 58 registered coal products to meet buyer requirements.²⁴

¹⁷ DBCT Management, *DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal*, updated August 2019, <https://www.dbctm.com.au/wp-content/uploads/2019/09/Approved-Master-Plan-2019.pdf>.

¹⁸ North Queensland Bulk Ports Corporation, Throughputs, <https://nqbp.com.au/trade/throughputs>.

¹⁹ Around 213 million tonnes of coal were exported from Queensland in 2019–20. See Department of Natural Resources, Mines and Energy, *Coal Industry Summary*, Queensland Coal Industry Review statistical tables, updated September 2020.

²⁰ DBCT Management, The Supply Chain, accessed 8 October 2020, <https://www.dbctm.com.au/coal-chain/the-supply-chain/>.

²¹ DBCT Pty Ltd, *Performance Indicators Operational Performance*, operator report, April–June 2020, viewed 9 October 2020, <https://www.dbctm.com.au/wp-content/uploads/2020/07/KPI-Q2-2020.pdf>.

²² DBCT Pty Ltd, *Performance Indicators Operational Performance*, operator report, April–June 2020, viewed 9 October 2020.

²³ DBCT Management, The Supply Chain, accessed 8 October 2020, <https://www.dbctm.com.au/coal-chain/the-supply-chain/>.

²⁴ QCA, *Part C: DBCT declaration review*, final recommendation, March 2020, p. 26, https://www.qca.org.au/wp-content/uploads/2019/05/declaration-reviews-final-recommendations-part-c_-dbct-service.pdf.

5. Overview of Queensland's third party access regime

The QCA Act provides the legislative framework for economic regulation in Queensland, including a third party access regime for services provided by means of significant infrastructure.

The DBCT Access Regime comprises the following:

- (a) the QCA Act (**Attachment 1**);
- (b) DBCT Management's access undertaking as accepted by the QCA under the provisions of the QCA Act and amended from time to time. As outlined above, the current access undertaking is the 2017 Access Undertaking (**Attachment 2**); and
- (c) the port safety regime in Queensland which is established by the *Transport Infrastructure Act 1994* (Qld) (**TIA**) (**Attachment 3**) and the *Transport Operations (Marine Safety) Act 1994* (Qld) (**TOMSA**) (**Attachment 4**).

The scope of services covered by Part 5 of the QCA Act is determined by declarations made by the Minister under section 84 of the QCA Act. On 31 May 2020, the Minister declared the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator as a service under section 84(1)(a) of the QCA Act (**Attachment 5**). The declaration started to operate on 9 September 2020 and expires at the end of 8 September 2030 (a period of 10 years)²⁵, unless it is revoked earlier in accordance with Part 5, Division 2, Subdivision 5 of the QCA Act. The Minister also made declarations concerning rail services at this time, which are the subject of a separate certification extension application submitted to the Council at the same time as this application.

As set out in section 69E of the QCA Act, the object of the DBCT Access Regime is to promote the economically efficient operation of, use of and investment in significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets. This mirrors the object of Part IIIA of the CCA, which is set out in section 44AA(a) of the CCA.

QCA Act

Part 5 of the QCA Act establishes the State-based third party access regime for services provided by means of significant infrastructure in Queensland. A service may be declared for third party access under the regime and subject to regulation by the QCA.

²⁵ *Notice of decision to declare a service under sections 84-87*, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 267.

As outlined above, Part 5 of the QCA Act contains two separate methods of obtaining access to declared services. Those are the negotiate-arbitrate model and the access undertaking model. These methods are only available where a service is declared, and so the structure of Part 5 of the QCA Act is essentially as follows:

- (a) *Declaration of a service* – Part 5, Division 2 of the QCA Act sets out a process for the declaration of services which triggers the two methods of obtaining access under the QCA Act. A declaration can only be made by ministerial decision;
- (b) *Negotiation framework* – Part 5, Division 4 of the QCA Act provides that once a service has been declared, there is a statutory obligation on access providers to negotiate access rights with access seekers.²⁶ This part of the regime contains various provisions to provide a framework for good faith negotiations between parties as set out below;
- (c) *Dispute resolution process* – Part 5, Division 5 of the QCA Act provides mechanisms in the event that there is an access dispute, including that the QCA may act as an arbitrator and make an access determination to settle the dispute;
- (d) *Access undertaking framework* – Part 5, Division 7 of the QCA Act sets out a process for the submission and approval of access undertakings which cover a wide range of issues relating to the service including access charges, the provision of information to access seekers, ring fencing arrangements, extensions of the facility and the safe operation of the facility; and
- (e) *Enforcement* – Part 5, Division 8 of the QCA Act sets out various enforcement mechanisms including orders to enforce access determinations and the prohibition on hindering access, as well as injunctions and orders to enforce access undertakings.

The QCA Act itself has not changed materially since the Commonwealth Minister decided to certify the DBCT Access Regime as effective in 2011. The main changes relate to the access criteria in section 76 of the QCA Act in order to remain consistent with amendments made to the declaration criteria specified in s44CA of the CCA.²⁷ These changes ensured that the QCA Act continues to align with the National Access Regime.

²⁶ Section 99 of the QCA Act.

²⁷ See *Queensland Competition Authority Amendment Act 2018* (Qld).

Access Undertakings under the QCA Act

The 2017 Access Undertaking is made and enforced under the QCA Act and covers a range of issues, including:

- (a) framework for negotiating access (Section 5);
- (b) reporting arrangements for DBCT Management (Section 10);
- (c) pricing arrangements (Section 11);
- (d) procedures for terminal capacity expansions (Section 12);
- (e) development of access agreements (Section 13);
- (f) arrangements to promote supply chain coordination (Section 14);
- (g) master planning processes (Section 15); and
- (h) dispute resolution processes (Section 17).

Previous access undertakings also covered the matters listed above. Section 137 of the QCA Act prescribes the specific matters that must be included in a compliant access undertaking.

The 2017 Access Undertaking will expire on 1 July 2021. The QCA is currently assessing DBCT Management's 2019 draft access undertaking but has not yet finalised its consideration. The QCA's draft decision in relation to the 2019 draft access undertaking is available on the [QCA's website](#).

Port safety regime

The port safety regime in Queensland is established by the TIA and TOMSA.

The TIA governs the safe use of transport infrastructure. Part 8 of the TIA specifically deals with port infrastructure. It covers, amongst other things, the functions and powers of port authorities, as well as land management.

Port authorities are given appropriate powers, such as the giving of port notices or directions, with which to control the activities at the port and ensure the efficient and safe operation of port facilities and services. The relevant port authority for DBCT is North Queensland Bulk Ports Corporation Ltd.

The TOMSA provides various provisions relating to general safety obligations and standards, the registration of ships and the licensing of masters, crew members and pilots of ships.

The relevant port safety legislation has not changed materially since the Commonwealth Minister decided to certify the DBCT Access Regime in 2011. The TIA and TOMSA are still the applicable laws, and only minor amendments have been made to the legislation as it

relates to port safety at DBCT. These changes do not impact upon the provision of the safe use of the DBCT facility.

6. Approach to analysis of Clause 6 principles

The CCA and the CPA set out the appropriate approach to the consideration of an application for certification (or extension of certification).

Sections 44M(4) and 44N(2) require that the Council, in deciding what recommendation should be made as to certification, and the Commonwealth Minister, in deciding whether to certify the regime must:

- (a) assess whether the access regime is an effective access regime by applying the relevant principles set out in the CPA;
- (b) have regard to the objects in Part IIIA of the CCA; and
- (c) subject to section 44DA, not have regard to any other matter.²⁸

Section 44DA imposes an obligation on the Council and the relevant Minister to treat each individual Clause 6 principle as having the status of a guideline rather than a binding rule and provides that an effective access regime may contain additional matters that are not inconsistent with the Clause 6 principles.

Clause 6(3) of the CPA states that provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a Clause 6 principle, the regime can be taken to have reasonably incorporated that principle.

Clause 6(3A) of the CPA states that in assessing whether a State or Territory access regime is an effective access regime, the Council and the Commonwealth Minister should not consider any matters other than the Clause 6 principles. Those matters which should not be considered include the outcome of any arbitration or any decision made under the access regime.

It is clear from the above matters that the approach to considering an application for certification (or extension of certification) is:

- (a) to consider the Clause 6 principles;
- (b) that there are a range of approaches to the incorporation of a Clause 6 principle, and that as long as the approach adopted by the State access regime is a reasonable approach, then that Clause 6 principle is satisfied; and
- (c) to have regard to the objects of Part IIIA of the CCA set out in section 44AA.

²⁸ In relation to the consideration of an application for extension of the Commonwealth Minister's decision, sections 44NA(4) and 44NB(1) also direct the Council and the Commonwealth Minister to make their assessment in accordance with sections 44M and 44N(2) respectively.

The NCC Guidelines state that an application may consider the Clause 6 principles sequentially or according to the Council's categories as outlined in the NCC Guidelines.²⁹ For the purposes of this application, each of the clauses are discussed sequentially.

The QCA Act also contains other matters that are not relevant for the purposes of this application and consequently, have not been discussed in the application. In accordance with section 44DA(2) of the CCA and clause 6(3A)(b) of the CPA, these matters are not inconsistent with the relevant principles of the CPA and do not impact the effectiveness of the DBCT Access Regime.

²⁹ NCC Guidelines at [3.6].

7. Clause 6(2): jurisdictional issues

Clause 6(2): jurisdictional issues

The regime to be established by Commonwealth legislation is not intended to cover a service provided by means of a facility where the State or Territory Party in whose jurisdiction the facility is situated has in place an access regime which covers the facility and conforms to the principles set out in this clause unless:

- (a) the Council determines that the regime is ineffective having regard to the influence of the facility beyond the jurisdictional boundary of the State or Territory; or*
- (b) substantial difficulties arise from the facility being situated in more than one jurisdiction.*

The NCC Guidelines state that clause 6(2) suggests that a state or territory access regime may be found to be ineffective as a result of its influence beyond the jurisdictional boundary of the state or territory, or substantial difficulties arising because the infrastructure subject to the regime crosses a state or territory border.³⁰

Section 76(5)(a) of the QCA Act requires that the QCA and Minister must have regard to cross-jurisdictional issues when considering whether a service meets the criteria for declaration under Part 5 of the QCA Act. Specifically, if the facility for the service extends outside Queensland, the QCA and the Minister must have regard to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and the desirability of consistency in regulating access to the service.

The DBCT Access Regime only applies to the use of coal handling services at DBCT. DBCT is located entirely within Queensland and services only central Queensland mines. There is no interstate demand in respect of the coal handling services at DBCT.

Therefore, the DBCT Access Regime is not ineffective having regard to the influence of the facility beyond the jurisdictional boundary of Queensland, nor is the facility situated in more than one jurisdiction.

Summary

The infrastructure covered by the DBCT Access Regime does not extend beyond the jurisdictional boundary of Queensland.

The clause 6(2) principle is satisfied.

³⁰ NCC Guidelines at [5.83].

8. Clause 6(3): significant infrastructure

Clause 6(3): significant infrastructure

For a State or Territory access regime to conform to the principles set out in this clause, it should:

- (a) apply to services provided by means of significant infrastructure facilities where:
 - (i) it would not be economically feasible to duplicate the facility;*
 - (ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market; and*
 - (iii) the safe use of the facility by the person seeking access can be ensured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist; and**
- (b) reasonably incorporate each of the principles referred to in subclause (4) and (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) subclause (5).*

There may be a range of approaches available to a State or Territory Party to incorporate each principle. Provided the approach adopted in a State or Territory access regime represents a reasonable approach to the incorporation of a principle in subclause (4) or (5), the regime can be taken to have reasonably incorporated that principle for the purposes of paragraph (b).

The NCC Guidelines state that clause 6(3)(a) sets out threshold effectiveness principles which require that the coverage of a certifiable access regime be limited to a narrow range of services. It is necessary to:

- (a) define the service(s) covered by the access regime; and
- (b) demonstrate that the access regime applies only to the services of a significant infrastructure facility in the circumstances described in clause 6(3)(a).³¹

Service covered by the DBCT Access Regime

The NCC Guidelines state that an effective access regime (and an application for certification of the regime) should clearly and precisely define the services subject to it.³²

Section 72(1) of the QCA Act provides that Part 5 of the QCA Act applies to services provided, or to be provided by means of a facility and includes:

- (a) the use of a facility (including, for example, a road or railway line);
- (b) the transporting of people;
- (c) the handling or transporting of goods or other things; and
- (d) a communications service or similar service.

³¹ NCC Guidelines at [4.1]–[4.2].

³² NCC Guidelines at [4.3].

Section 72(2) of the QCA Act specifically excludes the following from the definition of services covered by the QCA Act:

- (a) the supply of goods (except to the extent the supply is an integral, but subsidiary, part of the service);
- (b) the use of intellectual property or a production process (except to the extent the use is an integral, but subsidiary, part of the service); or
- (c) a service—
 - (i) provided, or to be provided, by means of a facility for which a decision of the Australian Competition and Consumer Commission (ACCC), approving a competitive tender process under the CCA, section 44PA, is in force; and
 - (ii) that was stated under section 44PA(2) of the CCA in the application for the approval.

The declaration of the Minister on 31 May 2020 under section 84(1)(a) of the QCA Act specifies the service to which the DBCT Access Regime applies as the *handling of coal at Dalrymple Bay Coal Terminal by the terminal operator*. The notice of the Minister's decision outlines that this phrase has the same meaning as the expression which appears in section 250(1)(c) of the QCA Act.

Section 250(5) of the QCA Act specifies that in that 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 the 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.'

The definitions of 'Dalrymple Bay Coal Terminal' and 'handling of coal' clearly define the facility and service that are the subjects of the declaration.

If an access seeker believes there are other services or infrastructure which should be included in the DBCT Access Regime, under the DBCT Access Regime the access seeker may seek a declaration of those particular services. The criteria to be applied in considering an application for declaration are discussed below.

Access regime applies only to the services of a significant infrastructure facility

The NCC Guidelines state that to meet the clause 6(3)(a) principles, an access regime should only apply to services (or proposed services) of significant infrastructure facilities where:

- (a) duplication of the facility is not economically feasible (clause 6(3)(a)(i));
- (b) access is necessary to permit effective competition in an upstream or downstream market (clause 6(3)(a)(ii)); and
- (c) safe use of the facility by an access seeker is economically feasible and subject to appropriate regulatory arrangements (clause 6(3)(a)(iii)).³³

In essence, the clause 6(3)(a) principles refer primarily to the services of significant infrastructure that cannot be economically duplicated and that occupy a strategic position in the service delivery chain whereby access is essential for effective competition in a dependent market or markets.³⁴

The DBCT Access Regime incorporates these principles through the declaration process contained in the QCA Act and the port safety provisions contained in the TIA and TOMSA.

The declaration process is a two-step process, similar to the declaration process in the National Access Regime. Section 77 of the QCA Act provides that an application may be made to the QCA for a recommendation that a particular service be declared by the Minister. Pursuant to section 79 of the QCA Act, the QCA must then make a recommendation to the Minister as to whether the service should be declared.

Section 80 of the QCA Act outlines that the QCA may only recommend that a service be declared by the Minister if the QCA is satisfied about the access criteria for the service. Section 84 provides that upon receiving a recommendation, the Minister must then make a decision as to whether the service should be declared. Pursuant to section 86 of the QCA Act, the

³³ NCC Guidelines at [4.8].

³⁴ NCC Guidelines at [4.9].

Minister must declare a service if they are satisfied about all of the access criteria for the service.

The access criteria are set out in section 76(2) of the QCA Act and mirror the declaration criteria in the National Access Regime.³⁵ Specifically, the access criteria in section 76(2) of the QCA Act are as follows:

- (a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service;
- (b) that the facility for the service could meet the total foreseeable demand in the market—
 - (i) over the period for which the service would be declared; and
 - (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service);
- (c) that the facility for the service is significant, having regard to its size or its importance to the Queensland economy; and
- (d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.

The Council considers it appropriate to interpret the clause 6(3)(a) principles as far as possible in a manner consistent with the declaration criteria in the National Access Regime, while recognising the differences in wording.³⁶ The NCC Guidelines state that despite some differences in expression, the principles in clause 6(3)(a) and subclauses (i) and (ii) are broadly equivalent to criteria (c), (b) and (a) in section 44CA(1) of the CCA.

Given the similarities between the access criteria outlined in section 44CA(1) of the CCA and section 76(2) of the QCA Act, this suggests that the principles in clause 6(3)(a) and subclauses (i) and (ii) are also broadly equivalent to criteria (c), (b) and (a) in section 76(2) of the QCA Act.³⁷

Table 1 contains a comparison of the principles set out in clause 6(3)(a) of the CPA and the access criteria in section 76(2) of the QCA Act.

³⁵ Section 44CA(1) of the QCA Act.

³⁶ NCC Guidelines at [4.12].

³⁷ NCC Guidelines at [4.10].

Table 1: Summary of principles satisfied under clause 6(3)(a)

Clause 6(3)(a) principles	Corresponding declaration criteria (section 76(2) of the QCA Act)
(a) apply to services provided by means of significant infrastructure facilities where:	(c) the facility for the service is significant having regard to its size or its importance to the Queensland economy
(i) it would not be economically feasible to duplicate the facility	(b) that the facility for the service could meet total foreseeable demand in the market— (i) over the period for which the service would be declared; and (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service)
(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market	(a) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service

Given that the principles in clause 6(3)(a) and subclauses (i) and (ii) are broadly equivalent to criteria (c), (b) and (a) in section 76(2) of the QCA Act and taking into account that the safe use of the facility is ensured through the port safety provisions outlined in the TIA and TOMSA, the DBCT facility can be considered to be significant infrastructure.

The features of DBCT that support its categorisation as significant infrastructure in accordance with clause 6(3)(a) are discussed in further detail below.

Features of DBCT

The NCC Guidelines state that the Council’s approach to clause 6(3)(a) is to consider whether a facility providing services subject to a state or territory regime is ‘significant’ in terms of its size or importance to the economy of the state or territory or, if applicable, the regional or national economy.³⁸

³⁸ NCC Guidelines at [4.14].

Size and importance to the Queensland economy

Size of DBCT

DBCT is the largest coal export terminal in Queensland, with a nameplate capacity of 85 million tonnes per annum (mtpa).³⁹ In 2019–20, DBCT exported approximately 61 million tonnes of coal.⁴⁰ This means almost 30 per cent of coal exported from Queensland was transported through DBCT in 2019–20.⁴¹

DBCT is situated on approximately 200 hectares of strategic port land and 160 hectares of offshore sea-bed lease.⁴² The key components of the terminal are the three rail receiving stations, a stockyard (covering nearly 67 hectares) and four offshore wharves. The site stretches for more than 2 kilometres from the rail in-loading stations to the shore-side jetty head, with the wharves a further 3.8 kilometres offshore.⁴³

DBCT is a common-user facility and services around 18 mines in the Bowen Basin coal fields of central Queensland via an integrated rail-port network.⁴⁴ It is a critical component of the Dalrymple Bay Coal Chain, which includes the Goonyella system rail network that extends over 300 kilometres from the mines to the port.

Importance of the facility to the Queensland economy

Coal mining is an important economic driver in Queensland, with around 213 million tonnes of coal exported from Queensland to over 30 countries around the world in 2019–20.⁴⁵ DBCT is of substantial importance to the Queensland economy, as it facilitates coal exports.

³⁹ DBCT Management, *DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal*, updated August 2019, <https://www.dbctm.com.au/wp-content/uploads/2019/09/Approved-Master-Plan-2019.pdf>.

⁴⁰ North Queensland Bulk Ports Corporation, Throughputs, <https://nqbp.com.au/trade/throughputs>.

⁴¹ Department of Natural Resources, Mines and Energy, *Coal Industry Summary*, Queensland Coal Industry Review statistical tables, updated September 2020.

⁴² DBCT Management, *DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal*, updated August 2019.

⁴³ DBCT Management, *DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal*, updated August 2019.

⁴⁴ DBCT Management, *Sustainability Strategy 2020*, p. 6, <https://dbinfrastructure.com.au/dbct-sustainability/?page=8>.

⁴⁵ Department of Natural Resources, Mines and Energy, *Coal exports by country*, Queensland Coal Industry Review statistical tables, updated September 2020, <https://www.data.qld.gov.au/dataset/coal-industry-review-statistical-tables>.

In 2019–20, DBCT exported approximately 61 million tonnes of coal.⁴⁶ This means almost 30 per cent of coal exported from Queensland was transported through DBCT in 2019–20. The terminal operator of DBCT also directly and indirectly employs approximately 350 workers.⁴⁷

As Queensland's largest common-user coal export terminal, DBCT is a critical component in the Bowen Basin export coal supply chain and is significant infrastructure.

Duplication of DBCT is not economically feasible

The NCC Guidelines state that the Council's view is that the clause 6.3(a)(i) principle requires an application of the natural monopoly test.⁴⁸ Similarly, the Council interprets criterion (b) in the National Access Regime (which is reflected in the DBCT Access Regime) as being concerned with the waste of resources associated with duplication of facilities that exhibit natural monopoly characteristics; that is, where a single facility could meet all likely demand for a service at lesser cost than two or more facilities.⁴⁹

It is clear from the structure of the DBCT Access Regime that access regulation under the QCA Act is intended only to be applied to a limited class of facilities, specifically those that exhibit natural monopoly characteristics. The object of Part 5 of the QCA Act and the access criteria in section 76 of the QCA Act which guide declaration of services reflect this by ensuring that services are only declared where it can be demonstrated that access regulation is appropriate and efficient, having regard to the nature of the facility and the competition outcomes which may result from declaration.

It is generally well recognised that port infrastructure facilities exhibit natural monopoly characteristics. Given the long life, high cost and sunk nature of infrastructure assets associated with developing a coal terminal, this port infrastructure is associated with significant economies of scale. Development requires large initial outlays however once operational, the actual operating costs for these facilities are relatively low, resulting in decreasing average unit costs.

Port infrastructure may also be uneconomical to duplicate due to the specific geographic requirements inherent with its development, including access to shipping channels and related transport links (e.g. rail) and proximity to coal deposits. Currently, there are only three coal ports capable of servicing the Bowen Basin coalfields – the Port of Hay Point, Port of Abbot Point and Port of Gladstone. These sites all have access to deep water shipping channels and

⁴⁶ North Queensland Bulk Ports Corporation, Throughputs, <https://nqbp.com.au/trade/throughputs>.

⁴⁷ Peabody Energy Australia, *Response to QCA Staff Paper Declaration Review*, 30 May 2018, p. 12, https://www.qca.org.au/wp-content/uploads/2019/05/33691_2-Peabody-Energy-Submission-2.pdf.

⁴⁸ NCC Guidelines at [4.8].

⁴⁹ NCC Guidelines at [4.17].

have established rail connections linking the ports to the mines. While additional terminals may be feasible at these ports, these will ultimately be limited by the availability of land, the capacity for associated transport links (rail and shipping channels) to accommodate additional throughput and the ability to address any environmental and social issues.

Supply chain coordination is also an important consideration in the context of determining whether duplication of a port facility is efficient. In the Goonyella system, demand for coal handling services at DBCT is dependent upon the capacity of the rail network to deliver coal to the terminal. If port facilities are duplicated without corresponding expansions in rail network capacity, under-utilisation of terminal capacities will result.

The natural monopoly characteristics of DBCT mean that it is more efficient to expand terminal capacity in response to rising demand, rather than duplicate the facility. The proposed expansion pathways at DBCT are outlined in DBCT Management's Terminal Master Plan.⁵⁰

It is more efficient to realise the economies of scale in expanding DBCT than to expend the considerable costs (and time) necessary to duplicate the terminal and associated infrastructure. Accordingly, it is not economically feasible to duplicate DBCT.

Access to the service permits effective competition in another market

The NCC Guidelines state that the clause 6(3)(a)(ii) principle is satisfied where the regulation of access by the regime will improve the conditions or environment for effective competition in a dependent market or markets.⁵¹

Australia is the world's largest metallurgical coal exporter and second largest thermal coal exporter.⁵² As noted above, Queensland is Australia's largest producer and exporter of coal. Almost 30 per cent of Queensland coal exports were exported through DBCT in 2019–20.⁵³ Without access to DBCT, coal producers in the Bowen Basin would have limited alternative choice of port.

⁵⁰ DBCT Management, *DBCT Master Plan 2019 Expansion Opportunities at the Dalrymple Bay Coal Terminal*, updated August 2019, <https://www.dbctm.com.au/wp-content/uploads/2019/09/Approved-Master-Plan-2019.pdf>.

⁵¹ NCC Guidelines at [4.8].

⁵² Office of the Chief Economist, *Resources and Energy Quarterly*, September 2020, pp. 39, 50, <https://publications.industry.gov.au/publications/resourcesandenergyquarterlyseptember2020/documents/Resources-and-Energy-Quarterly-Sept-2020.pdf>.

⁵³ Department of Natural Resources, Mines and Energy, *Coal Industry Summary*, Queensland Coal Industry Review statistical tables, updated September 2020, <https://www.data.qld.gov.au/dataset/coal-industry-review-statistical-tables>.

Although there is another terminal at Hay Point (Hay Point Coal Terminal), it is a privately owned single-user terminal and is currently operating at, or near full capacity.⁵⁴ Additionally, the terminal owner, BMA, has no incentive or intention to operate this terminal as a common-user facility in the future.⁵⁵

The only alternative coal export terminals are located over 200 kilometres north at Abbot Point near Bowen or approximately 400 kilometres south at Gladstone. Capacity is not available at other coal handling terminals, other than at Wiggins Island Coal Export Terminal, which is significantly more expensive.⁵⁶

DBCT occupies a strategic position in the Goonyella coal supply chain and use of the facility has a significant influence and effect on dependent upstream and downstream markets. In particular, access to the DBCT service allows for effective competition in the development stage tenements market. The development stage tenements market refers to the market for the supply and acquisition of late stage exploration and development tenements for metallurgical coal in the Hay Point catchment. The market for these tenements depends on access to the coal handling service at DBCT as this service is an essential part of the coal export supply chain in the Hay Point catchment. Competition in the market also depends on access being provided on appropriate terms and conditions, as governed by the DBCT Access Regime.

Safe use of DBCT can be ensured

The NCC Guidelines state that clause 6(3)(a)(iii) requires that access regimes apply to services where ‘the safe use of the facility...can be assured at an economically feasible cost and, if there is a safety requirement, appropriate regulatory arrangements exist’.⁵⁷

⁵⁴ BHP, which has a 50% ownership interest in the entity that owns the Hay Point Coal Terminal (the BHP Mitsubishi Alliance) made submissions to this effect to the QCA as part of the QCA’s declaration reviews process, see BHP, *Submission to the Queensland Competition Authority on the Declaration Review of the Dalrymple Coal Terminal*, 16 July 2018, pp. 4-6, https://www.qca.org.au/wp-content/uploads/2019/05/34424_18-BHP-Cross-Submission-2.pdf and BHP, *Submission to the Queensland Competition Authority on the Declaration Review of the Dalrymple Bay Coal Terminal*, 11 March 2019, p. 2, <https://www.qca.org.au/wp-content/uploads/2019/05/27-bhp-submission-on-draft-recommendation.pdf>. These submissions were accepted by the Minister in his reasons concerning the declaration of DBCT, see DBCT Statement of Reasons, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 274.

⁵⁵ See BHP submissions in footnote 62 above accepted by the Minister in the DBCT Statement of Reasons, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 272.

⁵⁶ QCA, *Part C: DBCT declaration review*, final recommendation, March 2020, p. 10, <https://www.qca.org.au/wp-content/uploads/2019/05/declaration-reviews-final-recommendations-part-c-dbct-service.pdf>.

⁵⁷ NCC Guidelines at [4.21].

The TIA governs the safe use of transport infrastructure. Part 8 of the TIA specifically deals with port infrastructure. It provides for the establishment of port authorities, whose functions include, among other things, to:

- (a) establish, manage, and operate effective and efficient port facilities and services in its port; and
- (b) keep appropriate levels of safety and security in the provision and operation of the facilities and services.

Port authorities are given appropriate powers, such as the giving of port notices or directions, with which to control the activities at the port and ensure the efficient and safe operation of port facilities and services.

The relevant port authority for DBCT is North Queensland Bulk Ports Corporation Ltd.

The TOMSA also provides various provisions relating to general safety obligations and standards, the registration of ships and the licensing of masters, crew members and pilots of ships.

Further to these legislative safeguards, the 2017 Access Undertaking includes provisions that deal with the safe provision of access. These require that DBCT Management, DBCT Pty Ltd and access holders all comply with the Terminal Regulations which set out detailed procedures and obligations for the safe and efficient operation of the terminal. In accordance with Section 6 of the 2017 Access Undertaking, DBCT Management can only amend the Terminal Regulations in consultation with access holders and access seekers and only if it considers that:

- (a) the amendments relate to operational issues;
- (b) the amended Terminal Regulations, as a whole, will operate equitably amongst access holders, access seekers, expansion parties and where the relevant amendments affect rail operators, amongst affected rail operators;
- (c) the amendments are consistent with the 2017 Access Undertaking, and any access agreements; and
- (d) the amendments are reasonably necessary for the operation of the terminal in accordance with applicable laws and regulatory standards, approvals, good operating and maintenance practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.⁵⁸

⁵⁸ Clauses 6.2(c)(1)-(4) of the 2017 Access Undertaking.

DBCT Management must notify access holders, access seekers and the QCA of any proposed amendments. If an access holder or access seeker does not consider that the amended Terminal Regulations satisfy the criteria outlined above, the matter may be referred to the QCA. If the QCA determines that the amended Terminal Regulations do not satisfy the criteria, the proposed amendments will not be made.⁵⁹

There are sufficient regulatory arrangements in place to ensure the safe use of DBCT by an access seeker at an economically feasible cost.

Summary

The services that are the subject of the DBCT Access Regime are clearly defined. The access criteria in the QCA Act are consistent with the clause 6(3)(a) principles, such that DBCT can be considered to be significant infrastructure. In respect of the service provided at DBCT:

- (a) DBCT is significant infrastructure when its size or importance to the Queensland economy is considered;
- (b) it is not economically feasible to duplicate DBCT;
- (c) access to the service promotes competition in dependent markets; and
- (d) the safe use of the facility can be ensured through the port safety provisions of the TIA and TOMSA.

Therefore, the clause 6(3)(a) principles are satisfied.

⁵⁹ Clause 6.2(f) of the 2017 Access Undertaking.

9. Clauses 6(4)(a)–(c): negotiated access

Clause 6(4): negotiated access

A State or Territory access regime should incorporate the following principles:

- (a) Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.*
- (b) Where such agreement cannot be reached, governments should establish a right for persons to negotiate access to a service provided by means of a facility.*
- (c) Any right to negotiate access should provide for an enforcement process.*

The NCC Guidelines state that clauses 6(4)(a)–(c) seek to ensure that an access regime provides an incentive for parties to reach agreement by commercial negotiation with recourse to regulatory intervention where negotiations are unsuccessful.⁶⁰

The objective of the DBCT Access Regime, which flows from the object of Part 5 of the QCA Act set out in section 69E of that Act, is to encourage the economically efficient operation of, use of, and investment in the facility by which the service is provided, with the effect of promoting effective competition in both upstream and downstream markets. In order to realise this, the DBCT Access Regime is based on a negotiate-arbitrate model. This model facilitates the commercial negotiation of access agreements between DBCT Management and access seekers. In the case of disagreement between the parties, a rigorous dispute resolution process is in place to resolve the dispute. The 2017 Access Undertaking facilitates commercial negotiation by setting out a process for negotiation and then providing a 'safety net' to be applied in circumstances where agreement by the parties cannot be reached.

Primacy of Contractual Negotiations

The DBCT Access Regime incorporates the principle of the primacy of contractual negotiations through the adoption of a negotiate-arbitrate model in the QCA Act.

The QCA Act operates so that if a service is declared:

- (a) the access provider is obliged to negotiate with an access seeker in respect of an access agreement⁶¹; and
- (b) if commercial agreement cannot be reached, then an access dispute exists and the dispute may be referred to mediation or arbitration by the QCA.⁶²

⁶⁰ NCC Guidelines at [5.1].

⁶¹ Section 99 of the QCA Act.

⁶² Section 115A and 116 of the QCA Act.

The primacy of contractual negotiations is also recognised by the 2017 Access Undertaking which includes:

- (a) a detailed negotiation framework to facilitate commercial negotiation.⁶³ The framework provides for access agreements consistent with the terms of the standard access agreement approved by the QCA (**Standard Access Agreement**)⁶⁴ or on other terms agreed between DBCT Management and the access seeker;⁶⁵
- (b) a dispute resolution process where commercial agreement cannot be reached.⁶⁶

It is therefore clear that the DBCT Access Regime incorporates the principle of the primacy of contractual negotiations.

Right to Negotiate and the Negotiation Process

Consistent with clause 6(4)(b), if a service is declared, section 99 of the QCA Act gives an access seeker the right to negotiate with the access provider of the declared service for the making of an access agreement. Section 100 of the QCA Act provides that the access provider and the access seeker⁶⁴ must negotiate in good faith. The obligation to negotiate in good faith is complemented by an obligation upon the access provider to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker.⁶⁷

The NCC Guidelines also state that an effective access regime should appropriately address information asymmetries to enable access seekers to enter into meaningful access negotiations.⁶⁸

The negotiation process under the 2017 Access Undertaking is as follows:

- (a) an access seeker may at any time request the information specified in Section 5.2 of the 2017 Access Undertaking, which must be provided by DBCT Management within 10 business days of receiving the request. This information includes:
 - (i) reasonably available preliminary information relating to an access application (including copies of the Standard Access Agreement and Terminal Regulations); and

⁶³ Section 5 of the 2017 Access Undertaking.

⁶⁴ The 2017 Access Undertaking includes a Standard Access Agreement at Schedule B which sets out the terms and conditions upon which an access seeker will, as a minimum, be offered access to the terminal.

⁶⁵ Section 13.1 of the 2017 Access Undertaking.

⁶⁶ Section 17 of the 2017 Access Undertaking.

⁶⁷ Section 101 of the QCA Act.

⁶⁸ NCC Guidelines at [5.2].

- (ii) information prescribed under section 101(2) of the QCA Act.
- (b) an access seeker may also request initial meetings with DBCT Management to discuss a proposed access application and the requirements of the access application form set out in Schedule A of the 2017 Access Undertaking—which DBCT Management must facilitate within a reasonable time after being requested to do so;
- (c) an access seeker makes an access application containing information (as specified in the Access Undertaking) necessary for DBCT Management to evaluate the access application and prepare an Indicative Access Proposal (**IAP**)⁶⁹;
- (d) DBCT Management must acknowledge receipt of the access application within 10 business days of receiving it and confirm whether the application complies with the specified requirements. Alternatively, DBCT Management may request further information from the access seeker⁷⁰;
- (e) DBCT Management must use its reasonable endeavours to provide an IAP within 20 business days following receipt of all required information⁷¹;
- (f) The IAP must set out:
 - (i) an indicative assessment as to whether there is sufficient available system capacity at all relevant times to accommodate the access application;
 - (ii) advice in respect of the existence of (but not the identity of) other access seekers who have already submitted an access application and the aggregate tonnage profiles requested in those access applications;
 - (iii) the Standard Access Agreement or a draft access agreement where an access application contemplates access on non-reference terms;
 - (iv) the expiry date of the IAP, which will be 30 business days following the date the access seeker receives the IAP;
 - (v) if there is sufficient available system capacity to accommodate the access application, advice to that effect, and:
 - (1) an initial assessment of the pricing method applicable to the access sought (including reasons), having regard to any planned or reasonably expected terminal capacity expansion that is required,

⁶⁹ Section 5.2 and 5.5 of the 2017 Access Undertaking.

⁷⁰ Section 5.3 of the 2017 Access Undertaking.

⁷¹ Section 5.5 of the 2017 Access Undertaking.

relevant QCA rulings and the expansion pricing principles;

- (2) an initial (alternative) estimate of the access charge, including an estimate of current, and where reasonable to provide such estimate, prospective access charges, for the requested services in the access application based on:
 - the initial assessment of the applicable pricing method; and
 - where provision of any of the access sought depends upon completion of a terminal capacity expansion, the pricing method for which has not yet been determined by the QCA, the alternative pricing method

with the non-expansion costs being allocated in accordance with the 2017 Access Undertaking for any estimates related to a differentiated expansion component.

- (3) the Terminal Master Plan⁷² and System Master Plan⁷³;
 - (4) any additional information required by DBCT Management to progress the access application and develop terms and conditions for acceptance;
 - (5) details of any security, guarantee, other support or other information required by DBCT Management to establish the solvency and creditworthiness of the access seeker (and guarantor if required);
- (vi) if there is insufficient available system capacity to accommodate the access application, advice to that effect, and:
- (1) reasonable particulars as to why this circumstance prevails;
 - (2) an estimate of what the available system capacity is at relevant times;
 - (3) whether a queue has been formed in accordance with the 2017 Access Undertaking;
 - (4) an initial assessment of the pricing method applicable to the access sought (including reasons) having regard to any planned or reasonably

⁷² The Terminal Master Plan is a plan for the future development of DBCT.

⁷³ The System Master Plan is a plan for the future development of the Dalrymple Bay/Goonyella coal supply chain from mines to DBCT. It includes rail loading facilities of mines, railway infrastructure, railway locomotives and rolling stock, and DBCT's coal handling facilities.

expected terminal capacity expansions, relevant QCA rulings and the expansion pricing principles;

- (5) where reasonable, an estimate of relevant prospective access charges based on the initial assessment of the applicable pricing method and the alternative pricing method, with the non-expansion costs being allocated in accordance with the 2017 Access Undertaking for any estimates related to a differentiated expansion component; and
 - (6) the System Master Plan and an indicative timetable for any expansion of the System Capacity which may be undertaken (if any).
- (g) if an access seeker believes that the IAP has not been prepared in accordance with the 2017 Access Undertaking and would therefore not be an appropriate basis for continuing negotiation, it may give a notice to DBCT Management and failing agreement may seek to resolve the matter in accordance with the prescribed dispute resolution process⁷⁴;
 - (h) if an access seeker is satisfied with the contents of the IAP, it must notify DBCT Management of its intent to progress with the negotiation on the basis of the IAP within 30 business days of receiving the IAP⁷⁵; and
 - (i) if during the subsequent negotiation, the access seeker is not satisfied with the terms and conditions of access proposed by DBCT Management, the matter may be referred to the QCA for determination.⁷⁶

The 2017 Access Undertaking also contains extensive mechanisms to assist access seekers in respect of other issues including:

- (a) detailed queuing and expansion policies providing for the allocation of existing and future capacity at the terminal⁷⁷;
- (b) detailed terminal and system master planning to promote efficiency in the planning of capacity expansions at the terminal and coordination with other elements of the Goonyella coal supply chain.⁷⁸ The 2017 Access Undertaking also provides for the consideration of capacity at the terminal in the context of available

⁷⁴ Section 5.6 and Section 17 of the 2017 Access Undertaking.

⁷⁵ Section 5.6(a) of the 2017 Access Undertaking.

⁷⁶ Section 13.1 of the 2017 Access Undertaking.

⁷⁷ Section 5 and Section 12 of the 2017 Access Undertaking.

⁷⁸ Section 15 of the 2017 Access Undertaking.

capacity in the other elements of the Goonyella coal supply chain (such as the rail network)⁷⁹;

- (c) systems for dealing with safety and operational issues, including provisions for compliance with the applicable Terminal Regulations⁸⁰, which set out detailed procedures and obligations for the safe and efficient operation of the terminal, including with respect to the rail and shipping aspects of the terminal's operations; and
- (d) requirements for DBCT Management to publicly report on certain key performance indicators related to service quality.⁸¹

It can be seen from the above process that the DBCT Access Regime provides for extensive information to be provided to the access seeker on both pricing and non-pricing terms and conditions of access as part of the negotiation process which addresses information asymmetries and provides an effective basis for negotiations. The DBCT Access Regime also deals extensively with safety requirements, the allocation and expansion of capacity, operational issues and service quality issues.

Independence and transparency

The NCC Guidelines state that the Council considers that for an access regime to encourage efficient access outcomes, it must incorporate regulatory processes that are transparent and consultative and are undertaken by a regulatory body that is independent and has the resources it needs to be effective.⁸²

The independence of the QCA and the transparency of the DBCT Access Regime's regulatory arrangements support effective commercial negotiations.

There are several measures that ensure that the QCA has the requisite degree of independence. Section 12(2)(c) of the QCA Act stipulates that, in relation to access to services, the QCA is not subject to directions from the Minister, thus ensuring independence from government. Section 219 of the QCA Act also provides a process that addresses any conflicts of interest that a QCA Member may have in a matter being considered, or about to be considered, by the QCA. Furthermore, the QCA has sufficient information gathering powers to ensure it is well placed to carry out its functions effectively.

⁷⁹ See, for example, Section 12 of the 2017 Access Undertaking.

⁸⁰ Section 6 of the 2017 Access Undertaking.

⁸¹ Section 10.3 of the 2017 Access Undertaking.

⁸² NCC Guidelines at [5.3].

The transparency of the DBCT Access Regime’s regulatory arrangements is enhanced by the public consultation requirements contained in the QCA Act. The QCA Act provides for extensive public consultation processes in respect of the following issues:

- (a) making a recommendation as to whether to declare a service⁸³;
- (b) the revocation of a declaration⁸⁴;
- (c) the making of an access code⁸⁵; and
- (d) the approval of an access undertaking and any amendments to the access undertaking.⁸⁶

In respect of access determinations, the QCA is required to maintain a register of access determinations which must include certain information.⁸⁷

The extent of the public transparency in respect of issues relating to the DBCT Access Regime can be seen on the [QCA’s website](#).

Enforcement mechanisms

The NCC Guidelines note that under clause 6(4)(c) an effective access regime provides a means for dealing with situations where access providers and access seekers are unable to reach agreement.⁸⁸

In the event that a dispute arises during access negotiations, a party can access the DBCT Access Regime’s dispute resolution process to enforce the right to negotiate and resolve the dispute through either mediation or arbitration.⁸⁹ This process is outlined in Part 5, Division 5 of the QCA Act and is discussed in further detail below in Chapter 13.

The DBCT Access Regime also provides enforcement mechanisms through civil penalties for breaches of certain requirements under the QCA Act. For example, civil penalties are available for a failure to provide information to the QCA when requested to do so⁹⁰ and a failure to keep separate accounting records.⁹¹

⁸³ Sections 79(2) and 81–83 of the QCA Act.

⁸⁴ Sections 89–91 of the QCA Act.

⁸⁵ Section 128 of the QCA Act.

⁸⁶ Sections 144–147 of the QCA Act.

⁸⁷ Section 127 of the QCA Act.

⁸⁸ NCC Guidelines at [5.1].

⁸⁹ Sections 112–113 of the QCA Act.

⁹⁰ Section 205 of the QCA Act.

⁹¹ Section 163 of the QCA Act.

The DBCT Access Regime also allows a party to obtain relief through the Supreme Court to remedy certain conduct, such as the hindering of access, or contraventions of an access agreement or determination.⁹² Relief that may be sought includes compensation and the grant of various types of injunctions. Provisions relating to the enforcement of the DBCT Access Regime are set out in Part 5, Division 8 of the QCA Act and are discussed in detail below at Chapter 14.

Summary

The DBCT Access Regime provides for the primacy of commercial negotiations and requires the provision of extensive information to access seekers in respect of the terms and conditions of access including pricing issues, safety requirements, the allocation and expansion of capacity, operational issues and service quality issues. There is independent and transparent regulation and enforcement under the DBCT Access Regime.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(a)–(c) principles.

⁹² Sections 152–153 of the QCA Act.

10. Clause 6(4)(d): regular review

Clause 6(4)(d): regular review

Any right to negotiate access should include a date after which the right would lapse unless reviewed and subsequently extended; however, existing contractual rights and obligations should not be automatically revoked.

The NCC Guidelines state that the clause 6(4)(d) principle is intended to ensure there is periodic review of the need for access regulation to apply to a particular service.⁹³ The clause also makes clear that a review of access regulation should not override commercially determined outcomes by automatically revoking any existing contractual rights.⁹⁴

Review mechanism

Under the DBCT Access Regime, all declarations must state a date upon which the declaration will expire.⁹⁵ On 31 May 2020, the Minister declared the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator as a service under section 84(1)(a) of the QCA Act. The declaration started to operate on 9 September 2020 and expires at the end of 8 September 2030 (a period of 10 years).⁹⁶

Part 5, Division 2, Subdivision 5 of the QCA Act contains the provisions relating to revocation of declaration. Per sections 88 and 89 of the QCA Act, the QCA may conduct an investigation and recommend to the Minister that a declaration be revoked. This process may be commenced by the owner of a declared service, who can ask the QCA to recommend to the Minister that a particular declaration be revoked.⁹⁷ In making a revocation recommendation, the QCA must be satisfied that, at the time of the recommendation, section 86 of the QCA Act would prevent the Minister from declaring the service.⁹⁸ Section 86 lists the factors affecting the making of a declaration, which includes the need for the service to satisfy the access criteria found in section 76 of the QCA Act. Therefore, a revocation recommendation can only be made where the declared service no longer satisfies the access criteria.

The Minister is similarly constrained in their decision to revoke a declaration. Section 92 of the QCA Act stipulates that the Minister may only revoke a declaration after receiving a revocation

⁹³ NCC Guidelines at [5.4].

⁹⁴ NCC Guidelines at [5.5].

⁹⁵ Section 84(4) of the QCA Act.

⁹⁶ *Notice of decision to declare a service under sections 84-87*, Queensland Government Gazette, Extraordinary No. 31, 1 June 2020, 267.

⁹⁷ Section 88(2) of the QCA Act.

⁹⁸ Section 88(3) of the QCA Act.

recommendation from the QCA and after being satisfied that, at the time of the revocation, section 86 of the QCA Act would prevent the declaration of the service.

The DBCT Access Regime includes a compulsory review mechanism which requires the QCA to review an existing declaration before it expires and make a recommendation to the Minister about whether a declared service should continue to be declared after the existing declaration expires.⁹⁹ On receiving the QCA's recommendation, the Minister must either declare all or part of the service or decide not to declare the service.¹⁰⁰ Like the revocation process, the QCA and Minister are constrained in the recommendations and decisions they may make under this process. In making a recommendation that the service continue to be declared, the QCA must be satisfied that all of the access criteria in section 76 are satisfied.

If the QCA is not satisfied about any of the access criteria, it cannot recommend that the service continue to be declared. Similarly, section 86 stipulates that the Minister must declare the service if they are satisfied about all of the access criteria but must decide not to declare the service if they are not satisfied that all the access criteria would be met. This review mechanism ensures the appropriateness of ongoing access regulation is considered in a timely manner and provides certainty to access providers and access seekers about the ongoing regulatory arrangements that will apply to a service following the expiration of a declaration.

Protection of existing rights

The second element of the clause 6(4)(d) principle requires that existing contractual rights and obligations are not automatically revoked upon the lapsing of a declaration.

Section 95 of the QCA Act preserves existing rights in the event that a declaration is revoked or expires. These rights include mediation or arbitration of an access dispute, the operation of an access agreement, and the operation and enforcement of an access determination.

Summary

The DBCT Access Regime provides for the expiry of declarations after a specified period of time and a compulsory review of an existing declaration prior to the expiry of the declaration. It also includes a mechanism for the revocation of a declaration where the access criteria are no longer satisfied. Where a declaration is revoked or expires, existing contractual rights and obligations are not automatically revoked.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(d) principle.

⁹⁹ Part 5, Division 2, Subdivision 4A of the QCA Act.

¹⁰⁰ Section 84 of the QCA Act.

11. Clause 6(4)(e): reasonable endeavours

Clause 6(4)(e): reasonable endeavours

The owner of a facility that is used to provide a service should use all reasonable endeavours to accommodate the requirements of persons seeking access.

The NCC Guidelines state that in applying this principle, the Council considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect.¹⁰¹

The DBCT Access Regime explicitly incorporates the requirement of clause 6(4)(e) in section 101 of the QCA Act. In section 101(1), the wording of clause 6(4)(e) is substantially reproduced as a general obligation for the access provider to 'make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker'.

This general obligation is complemented by section 101(2), which provides that subject to the operation of an approved access undertaking, the access provider must give an access seeker the following:

- (a) information about the price at which the access provider provides the service, including the way in which the price is calculated;
- (b) information about the costs of providing the service, including the capital, operation and maintenance costs;
- (c) information about the value of the access provider's assets, including the way in which the value is calculated;
- (d) an estimate of the spare capacity of the service, including the way in which the spare capacity is calculated;
- (e) a diagram or map of the facility used to provide the service;
- (f) information about the operation of the facility;
- (g) information about the safety system for the facility; and
- (h) information about any access determinations made by the QCA through arbitration.

The NCC Guidelines indicate that an access regime should ensure that access seekers have sufficient information to enable them to make informed decisions and to negotiate effectively. However, information disclosure requirements should neither oblige disclosure (without

¹⁰¹ NCC Guidelines at [5.6].

appropriate confidentiality protections) of information that is genuinely commercially sensitive nor impose an onerous burden or disproportionate costs on the information provider.¹⁰²

Section 101(6) of the QCA Act protects against the disclosure of confidential information by mandating that the access provider or seeker must not, without the giver's consent, disclose information provided under section 101 to another person. In this way, the DBCT Access Regime acknowledges potential confidentiality concerns and is careful to balance the need to keep an access seeker well informed with the need to protect confidentiality.

Where it is reasonably considered that the disclosure of certain information may be likely to damage the commercial activities of an access provider, user or seeker, section 101(3) allows the QCA to either categorise or aggregate information, so that its disclosure is not unduly damaging, or authorise the access provider not to give the access seeker the damaging information.

To assist in the effectiveness of the obligation to satisfy all reasonable requests, section 101(5) of the QCA Act allows the access provider or the access seeker to ask the QCA for advice or directions about a matter contained in section 101.

The 2017 Access Undertaking supports section 101 of the QCA Act by providing for a detailed negotiation process and information requirements. These are discussed in detail in Chapter 9 above. In particular, the 2017 Access Undertaking:

- (a) provides for detailed information to be given to access seekers on pricing and non-pricing terms and conditions;
- (b) sets out specific timeframes for the provision of information; and
- (c) requires DBCT Management to explain when there is insufficient capacity to accommodate the request for access.¹⁰³

It also provides for the protection of confidentiality, and if required, includes a right for DBCT Management or the access seeker to request that the parties sign a confidentiality deed in respect of the information provided to them.¹⁰⁴

Summary

The DBCT Access Regime imposes an explicit obligation upon the service provider to use all reasonable endeavours to accommodate the requirements of persons seeking access.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(e) principle.

¹⁰² NCC Guidelines at [5.7].

¹⁰³ Section 5 of the 2017 Access Undertaking.

¹⁰⁴ Section 8 of the 2017 Access Undertaking.

12. Clause 6(4)(f): access on different terms

Clause 6(4)(f): access on different terms

Access to a service for persons seeking access need not be on exactly the same terms and conditions.

The NCC Guidelines state that an access regime will be consistent with clause 6(4)(f) if it provides for access to be provided on different terms and conditions to different users.¹⁰⁵

An access regime should not limit the scope for commercial negotiation. Rather, the terms and conditions under the DBCT Access Regime should facilitate commercial negotiations and act as a safety net when a reasonable outcome cannot be negotiated. This is consistent with the principles of commercial negotiation in clauses 6(4)(a)–(c). Additionally, the NCC Guidelines also state that under an effective access regime, a service provider cannot unfairly discriminate between access seekers.¹⁰⁶

Section 102 of the QCA Act specifically provides that an access provider is not required to provide access on the same terms under each access agreement. There are also a number of provisions in the QCA Act which prohibit an access provider from unfairly discriminating between access seekers.

Section 100(2) of the QCA Act provides that during negotiations an access provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of one or more of the access seekers to compete with other access seekers. Section 100(3) clarifies that this does not prevent an access provider from treating access seekers differently to the extent it is reasonably justified due to the different circumstances, relating to access to the declared service, applicable to the access provider or any of the access seekers. Similarly, section 168C(1) provides that in providing access to a declared service, an access provider must not unfairly differentiate between users of a declared service in a way that has a material adverse effect on the ability of one or more of the users to compete with other users.

DBCT Management is not a vertically integrated access provider as it does not currently have affiliated businesses in upstream or downstream markets. However, there are a number of provisions in the QCA Act which limit the ability of an access provider to unfairly favour a related entity. These would apply in the event that DBCT provides (or proposes to provide) access to the declared service to itself or a related entity in the future.

¹⁰⁵ NCC Guidelines at [5.8].

¹⁰⁶ NCC Guidelines at [5.8]–[5.9].

Section 104(1) of the QCA Act prohibits an access provider from engaging in conduct for the purposes of preventing or hindering a user's access to a declared service under an access agreement. Section 104(2) of the QCA Act specifically provides that an access provider engages in conduct for preventing or hindering a user's access if the access provider provides (or proposes to provide) access to the declared service to an affiliated entity on more favourable terms than the terms on which the access provider provides (or proposes to provide) access to the declared service to a competitor.

Section 104 of the QCA Act makes it clear that the prohibition applies to conduct prior to the entering into of an access agreement by using the phrase 'or proposes to provide'. Section 104(3) of the QCA Act also makes it very clear that the prohibition applies to unfair discrimination in respect of both price and non-price issues. The provisions of section 104 of the QCA Act in respect of access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

Section 137(1A) also requires an access undertaking to contain any necessary provisions to ensure that there is no unfair discrimination in favour of affiliated entities if the access provider provides (or proposes to provide) access to the declared service to itself or a related entity.

Section 168A of the QCA Act sets out the pricing principles which are to be considered by the QCA as arbitrator of any access dispute and in approving the terms of any access undertaking. Those pricing principles include a principle that access prices should not allow a related access provider¹⁰⁷ to set terms and conditions that discriminate in favour of its downstream operations except to the extent the cost of providing access to other operators is higher.

There are also mechanisms in the 2017 Access Undertaking to prevent unfair discrimination. Section 11.12 of the 2017 Access Undertaking places limits on price differentiation, requiring DBCT Management to demonstrate to the access seeker that any divergence in capital charges that it proposes is justified.

The DBCT Access Regime contains effective mechanisms to ensure that access providers do not engage in unfair discrimination between access seekers.

Summary

The DBCT Access Regime explicitly acknowledges that access agreements do not need to be on the same terms and conditions but also contains prohibitions on unfair discrimination between access seekers.

¹⁰⁷ Schedule 2 of the QCA Act provides that a related access provider, in relation to a service, means an access provider that owns or operates the services and provides, or proposes to provide, access to the service to itself or a related body corporate of the access provider.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(f) principle.

13. Clause 6(4)(g): independent dispute resolution

Clause 6(4)(g): independent dispute resolution

Where the owner and a person seeking access cannot agree on terms and conditions for access to the service, they should be required to appoint and fund an independent body to resolve the dispute, if they have not already done so.

The NCC Guidelines state that clause 6(4)(g) requires an effective access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body. The arbitration framework should be designed to produce credible and consistent outcomes.¹⁰⁸ Additionally, an effective access regime should require the parties to a dispute to fund some or all of the costs of having an independent body resolve the dispute.¹⁰⁹

The DBCT Access Regime contains detailed dispute resolution processes in the event that an access seeker and access provider cannot agree on the terms and conditions of access.

Part 5, Division 5 of the QCA Act sets out an arbitration process for access disputes and will apply where an access provider or access seeker give the QCA a valid 'dispute notice'. This notice may only be given if the access provider and access seeker have not agreed to deal with the dispute otherwise than by arbitration under the QCA Act.¹¹⁰

Where an access dispute notice is received, the QCA may initially refer the matter to mediation.¹¹¹ Where the matter proceeds to arbitration, section 117 of the QCA Act provides that the QCA must make a written determination in an arbitration on access to the declared service. Before making the determination, a draft determination must be given to the parties.¹¹²

Section 118 of the QCA Act sets out a list of examples of access determinations which can be made by the QCA and includes the following:

- (a) require the access provider to provide access to the service;
- (b) require the access seeker to pay for access to the service;
- (c) state the terms on which the access seeker has access to the service;
- (d) require the access provider to extend, or permit the extension of, the facility;
- (e) require the access provider to permit another facility to be connected to the facility;

¹⁰⁸ NCC Guidelines at [5.10].

¹⁰⁹ NCC Guidelines at [5.15].

¹¹⁰ Section 111 of the QCA Act.

¹¹¹ Section 115A of the QCA Act.

¹¹² Section 117(5) of the QCA Act.

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 QCA.

Section 119 of the QCA Act sets out restrictions on access determinations which can be made by the QCA and includes that an access determination cannot:

- (a) be inconsistent with an approved access undertaking, access code or a binding ruling;
- (b) reduce the amount of the service able to be obtained by an access provider;
- (c) result in the access seeker, or someone else, becoming the owner, or one of the owners, of the facility, without the existing owner's agreement; or
- (d) require an access provider to pay some or all of the costs of extending the facility.

The QCA is an independent dispute resolution body. The Council has previously noted that the QCA is established and resourced so as to enable it to maintain independence in exercising its regulatory functions.¹¹³ Nothing of substance has changed in relation to the QCA's role in regulating declared monopoly business activities since the Council's finding in the final recommendation for certification of the DBCT Access Regime in 2011.

Part 7, Division 3 of the QCA Act outlines provisions for the general conduct of arbitration hearings. It requires that an arbitration hearing must be held in private (unless otherwise agreed by the parties) and parties have the right to representation.¹¹⁴ The QCA has wide powers when conducting an arbitration. It may give directions in the course of the arbitration and do things that are necessary or expedient for the speedy hearing and determination of a dispute.¹¹⁵ It can require written evidence from the parties and can refer any matter to an expert about the matter and accept the expert's statement as evidence.¹¹⁶ Section 196 of the QCA Act also requires that the arbitration authority must comply with natural justice in an arbitration and determine periods that are reasonable and necessary for the fair and adequate presentation of the respective cases of the parties to a dispute.¹¹⁷ The QCA considers that the obligations of natural justice require the arbitration authority to ensure that the arbitration is

¹¹³ National Competition Council, *Application for certification of the Dalrymple Bay Coal Terminal access regime*, final recommendation, 10 May 2011, p. 29, <https://ncc.gov.au/images/uploads/CECTQIFR-001.pdf>.

¹¹⁴ Sections 194–195 of the QCA Act.

¹¹⁵ Section 197 of the QCA Act.

¹¹⁶ Sections 196–197 of the QCA Act.

¹¹⁷ Sections 196(1)(d) and 196(3) of the QCA Act.

managed and conducted in a balanced and transparent manner, such that all parties have a fair and reasonable opportunity to present their case.¹¹⁸

In an arbitration, the QCA may make any order it considers appropriate in respect of the costs of the arbitration in respect of both the parties' costs and the QCA's costs.¹¹⁹ This approach allows an appropriate balance between the parties being required to pay the costs of arbitration and ensuring that the costs of arbitration do not deter parties from seeking access. Section 127 of the QCA Act provides for a register of access determinations to be kept by the QCA.

The 2017 Access Undertaking provides that where a dispute or question arises in relation to the negotiation of access between an access seeker and DBCT Management, the dispute resolution process under Section 17 of the 2017 Access Undertaking will apply unless otherwise expressly agreed by both parties.¹²⁰ This involves the following:

- (a) any access dispute is referred in the first instance to the Chief Executive Officers of DBCT Management and the other party;
- (b) if resolution is not reached within 10 business days then the parties may agree for the dispute to be referred to an expert for resolution; or
- (c) if the parties do not agree for the dispute to be referred to an expert for resolution then the matter can be referred to the QCA.¹²¹

In respect of expert determination, the expert may be appointed by the parties, or failing agreement between the parties, by the President of the Australian Society of Certified Practising Accountants for financial matters, and the President of the Institute of Engineers Australia for non-financial matters. The expert must have appropriate qualifications and practical experience, have no interest or duty which conflicts with his or her functions as an expert, or be a current or immediate past employee of the access seeker or DBCT Management or a related party of either.¹²²

The costs of the expert (or the QCA) and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the expert (or the QCA).¹²³

¹¹⁸ Queensland Competition Authority, *Access disputes under the QCA Act*, summary guide, June 2019, p. 8, <https://www.qca.org.au/wp-content/uploads/2020/03/summary-guide-to-access-disputes.pdf>.

¹¹⁹ Section 208 of the QCA Act.

¹²⁰ Section 17.1 of the 2017 Access Undertaking.

¹²¹ Sections 17.1 and 17.2 of the 2017 Access Undertaking.

¹²² Section 17.3 of the 2017 Access Undertaking.

¹²³ Section 17.3(i) of the 2017 Access Undertaking.

Summary

The DBCT Access Regime provides for the referral of a dispute to the QCA as an independent dispute resolution body for mediation or arbitration, as well as the appointment of an independent expert to resolve a dispute. The DBCT Access Regime also provides an appropriate balance between the parties being required to pay the costs of arbitration and ensuring that the costs of arbitration do not deter parties from seeking access.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(g) principle.

14. Clause 6(4)(h): binding decisions

Clause 6(4)(h): binding decisions

The decisions of the dispute resolution body should bind the parties; however, rights of appeal under existing legislative provisions should be preserved.

The NCC Guidelines state that an arbitrator's decision, and the ultimate decision of any dispute resolution appeals body, must be binding on the parties. This requires that the enforcement process has legislative underpinnings, with the regulator or courts able to impose appropriate sanctions and remedies for non-compliance.¹²⁴

Section 118 of the QCA Act provides that the QCA may make an access determination which includes a requirement that the access provider and access seeker enter into an access agreement to give effect to a matter determined by the QCA. The QCA in making any determination under section 118 of the QCA Act must take into account the legitimate business interests of the access seeker.¹²⁵

The enforcement provisions set out in Part 5, Division 8 of the QCA Act ensure that the parties to an access dispute are bound by an access determination. Section 152 allows the Queensland Supreme Court, upon the application of a party to an access determination, to make certain orders to enforce an access determination where it is satisfied that another party has engaged, is engaging, or proposes to engage in conduct constituting a contravention of the determination. Enforcement orders that are available to the Queensland Supreme Court include the awarding of compensation for loss or damage suffered as a result of a contravention, as well as the granting of consent, interim, restraining and mandatory injunctions, as set out under sections 154 to 158 of the QCA Act.

Rights of appeal

Decisions made by the QCA (including access determinations, decisions about access undertakings and rulings) may be subject to judicial review in accordance with the *Judicial Review Act 1991* (Qld) (**JR Act**). Under the JR Act, any person aggrieved by a decision of the QCA may apply to the Queensland Supreme Court for a review in relation to the decision.

Where an application is successful, the Court may:

- (a) set aside the decision;
- (b) refer the matter to the decision-maker for further consideration;

¹²⁴ NCC Guidelines at [5.19].

¹²⁵ Section 120(1)(c) of the QCA Act.

- (c) declare the rights of all parties in respect of the matter;
- (d) direct the parties to do anything that the court considers appropriate.

The decision of the Queensland Supreme Court is binding.

The independence and expertise of the QCA, the provisions of the QCA Act prescribing mandatory decision-making processes, and Queensland's judicial review arrangements ensure the rights of affected parties are protected while providing for timely resolution of access related disputes. This provides increased certainty for access providers and access seekers by removing risks associated with regulatory gaming and unnecessary access and investment delays.

Summary

The DBCT Access Regime provides for binding dispute resolution and judicial review of any decision of the QCA.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(h) principle.

15. Clause 6(4)(i): principles for dispute resolution

Clause 6(4)(i): principles for dispute resolution

In deciding on the terms and conditions for access, the dispute resolution body should take into account:

- (i) the owner's legitimate business interests and investment in the facility;*
- (ii) the costs to the owner of providing access, including any costs of extending the facility but not costs associated with losses arising from increased competition in upstream or downstream markets;*
- (iii) the economic value to the owner of any additional investment that the person seeking access or the owner has agreed to undertake;*
- (iv) the interests of all persons holding contracts for use of the facility;*
- (v) firm and binding contractual obligations of the owner or other persons (or both) already using the facility;*
- (vi) the operational and technical requirements necessary for the safe and reliable operation of the facility;*
- (vii) the economically efficient operation of the facility; and*
- (viii) the benefit to the public from having competitive markets.*

Clause 6(4)(i) outlines both price and non-price terms and conditions of access that a dispute resolution body should be obliged to take into account in deciding on the terms and conditions for access.

Sections 120 and 138(2) of the QCA Act list the matters that the QCA must consider in the making of an access determination and the approval of access undertakings. Section 137(2) outlines the provisions that an access undertaking must contain. These sections broadly reflect the clause 6(4)(i) principles.

Access determinations

Section 120 of the QCA Act provides that in making an access determination, the QCA must have regard to the following matters:

- (a) the object of Part 5 of the QCA Act;
- (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; and
- (l) the pricing principles mentioned in section 168A.

Under section 120(2), the QCA may take into account any other matters relating to the matters mentioned in subsection (1) it considers are appropriate.

Access undertakings

Section 138(2) of the QCA Act provides that the QCA may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following:

- (a) the object of Part 5 of the QCA Act;
- (b) the legitimate business interests of the owner or operator of the service;
- (c) if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;
- (d) the public interest, including the public interest in having competition in markets (whether or not in Australia);
- (e) the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;
- (f) the effect of excluding existing assets for pricing purposes;
- (g) the pricing principles mentioned in section 168A; and
- (h) any other issues the authority considers relevant.

Contents of access undertakings

Section 137(2) of the QCA Act set out the matters which may be contained in an access undertaking and includes:

- (a) requirements for the safe operation of the facility¹²⁶; and
- (b) how contributions by users to the cost of establishing or maintaining the facility will be taken into account in calculating charges for access to the service.¹²⁷

Incorporation of Clause 6(4)(i) principles in QCA Act

Table 2 sets out the sections of the QCA Act that correspond with the Clause 6 principles.

Table 2: Comparison of Clause 6(4)(i) principles

Clause 6(4)(i) principle	Making access determination under QCA Act	Approval of access undertaking under QCA Act
6(4)(i)(i) – Owner’s legitimate interests	s. 120(1)(b)	s. 138(2)(b)
6(4)(i)(ii) – costs to owner of providing access	s. 120(1)(f)	s. 138(2)(b), s. 138(2)(h), s. 168A and the pricing arrangements in section 11 of the 2017 Access Undertaking
6(4)(i)(iii) – value to the owner of additional investment	s. 120(1)(g)	s. 138(2)(h), s. 137(2)(i), s. 69E ¹²⁸ and s. 168A
6(4)(i)(iv) – interests of users with contracts	s. 120(1)(c)	s. 138(2)(e)
6(4)(i)(v) – firm and binding contractual obligations	s. 119(2)(a), s. 120(1)(b) and s. 120(1)(c)	s. 138(2)(b) and s. 138(2)(e)
6(4)(i)(vi) – safe operation	s. 120(1)(i)	s. 137(2)(h)
6(4)(i)(vii) – economically efficient operation of the facility	s. 120(1)(j) and s. 69E ¹²⁹	s. 69E, s. 168A and the 2017 Access Undertaking
6(4)(i)(viii) – public benefit in competition	s. 120(1)(d) and s. 69E	s. 138(2)(d) and s. 69E

Summary

The DBCT Access Regime provides principles of dispute resolution to guide the QCA that substantially mirror those principles set out in clause 6(4)(i). This allows access terms and

¹²⁶ Section 137(2)(h) of the QCA Act.

¹²⁷ Section 137(2)(i) of the QCA Act.

¹²⁸ Section 69E (the objects of Part 5) applies by way of s. 138(2)(a) which requires the QCA to have regard to the objects of Part 5 in approving an access undertaking.

¹²⁹ Section 69E (the objects of Part 5) applies by way of s. 120(1)(a) which requires the QCA to have regard to the objects of Part 5 in making an access determination.

conditions to be set by the QCA where agreement cannot be reached by the parties. It ensures that the interests of both access providers and access seekers are adequately considered.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(i) principles.

16. Clause 6(4)(j): facility extension

Clause 6(4)(j): facility extension

The owner may be required to extend, or to permit extension of, the facility that is used to provide a service if necessary but this would be subject to:

- (i) such extension being technically and economically feasible and consistent with the safe and reliable operation of the facility;*
- (ii) the owner's legitimate business interests in the facility being protected; and*
- (iii) the terms of access for the third party taking into account the costs borne by the parties for the extension and the economic benefits to the parties resulting from the extension.*

The NCC Guidelines state that matters in respect of clause 6(4)(j) should be subject, in the first instance, to negotiation between the parties. If the parties cannot reach an agreement, the arbitrator should then be empowered, subject to the safeguards in clause 6(4)(j)(i)–(iii), to require the owner to extend or permit extension of the facility.¹³⁰

Section 118 of the QCA Act provides that an access determination may require the access provider to extend or permit the extension of the facility or require the access provider to permit another facility to be connected to the facility.

Section 119(4) provides that the QCA may make an access determination requiring an access provider to extend, or permit the extension of, a facility if either:

- (a) the requirement is consistent with an approved access undertaking in response to the submission of a voluntary access undertaking¹³¹ and the QCA is satisfied that:
 - (i) the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility; and
 - (ii) the legitimate business interests of the owner and operator of the facility are protected¹³²; or
- (b) the access provider is the owner or operator of the facility and the QCA is satisfied that the extension will be technically and economically feasible and consistent with the safe and reliable operation of the facility, the legitimate business interests of the owner are protected and that the access provider does not pay the costs of extending the facility.¹³³

¹³⁰ NCC Guidelines at [5.61].

¹³¹ Section 119(4)(a) of the QCA Act.

¹³² Section 119(4)(a) and 119(4B) of the QCA Act.

¹³³ Section 119(5) of the QCA Act.

In addition, section 137 of the QCA Act provides that an access undertaking may include terms relating to extending the facility. In this regard, the 2017 Access Undertaking includes detailed provisions regarding terminal extensions (i.e. capacity expansions) including a general obligation that DBCT Management will undertake capacity expansions to accommodate current and reasonably anticipated future capacity demands of existing users and access seekers.¹³⁴ This is consistent with the Port Services Agreement (PSA) which requires that DBCT Management must, at its own cost and expense, develop and expand DBCT and undertake construction as is necessary to, among other things:

- (a) accommodate the actual and reasonably anticipated future growth of demand for the use of DBCT by users and prospective users; and
- (b) ensure that DBCT complies with world's best practice in respect of quality standards for such facilities, environmental best practices and applicable environmental standards.

To provide for the orderly, efficient and timely expansion and development of the terminal, DBCT Management is required by the PSA to undertake expansions and developments in accordance with a master planning process. This requires that DBCT Management prepare a Terminal Master Plan setting out future expansion paths in consultation with a range of stakeholders including DBCT Pty Ltd, terminal users, and the rail operators providing rail transport services delivering coal to DBCT. The Terminal Master Plan and terminal expansion framework set out in Section 12 of the 2017 Access Undertaking provide for the timely approval of expansion proposals by the QCA and ensure terminal developments and expansions are logical and efficient.

Summary

The DBCT Access Regime provides that the owner of a facility may be required to extend the facility where the extension is technically and economically feasible and consistent with the safe and reliable operation of the terminal. The owner's legitimate business interests must also be taken into account.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(j) principles.

¹³⁴ Section 12 of the 2017 Access Undertaking.

17. Clause 6(4)(k): material change in circumstances

Clause 6(4)(k): dealing with a material change in circumstances

If there has been a material change in circumstances, the parties should be able to apply for a revocation or modification of the access arrangement which was made at the conclusion of the dispute resolution process.

Clause 6(4)(k) provides for an access arrangement to be revoked or modified following a material change in circumstances. The NCC Guidelines state that this does not mean that an effective access regime will undermine the certainty of contractual arrangements. Once a contract is signed, whether through commercial negotiation or following arbitration, it should govern the relationship between the parties.¹³⁵

The DBCT Access Regime incorporates this principle in the following ways:

- (a) a declaration may be revoked where there is a material change in circumstances, such that the access criteria are no longer satisfied.¹³⁶ Where a declaration is revoked, existing contractual rights and obligations are not automatically revoked¹³⁷;
- (b) an access determination may be varied or revoked where there is a material change in circumstances¹³⁸;
- (c) the 2017 Access Undertaking may be amended with the approval of the QCA to deal with a material change in circumstances¹³⁹; and
- (d) the Standard Access Agreement contains the usual terms such as force majeure to deal with certain material changes in circumstances.¹⁴⁰

Summary

The DBCT Access Regime provides mechanisms to deal with a material change in circumstances.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(k) principle.

¹³⁵ NCC Guidelines at [5.64].

¹³⁶ Part 5, Division 2, Subdivision 5 of the QCA Act.

¹³⁷ Section 95 of the QCA Act.

¹³⁸ Part 5, Division 5, Subdivision 4 of the QCA Act.

¹³⁹ Part 5, Division 7, Subdivision 2 of the QCA Act.

¹⁴⁰ Clause 13.3 of the Standard Access Agreement to the 2017 Access Undertaking.

18. Clause 6(4)(l): compensation

Clause 6(4)(l): compensation

The dispute resolution body should only impede the existing right of a person to use a facility where the dispute resolution body has considered whether there is a case for compensation of that person and, if appropriate, determined such compensation.

The NCC Guidelines state that clause 6(4)(l) does not mean that an access regime need allow a dispute resolution body to impede existing rights but, where a dispute resolution body can do this, it must also be empowered to consider and determine compensation, if appropriate.¹⁴¹

There are a number of protections for existing users under the DBCT Access Regime:

- (a) Sections 119(2)(a) and 119(3) of the QCA Act provide that the QCA may not make an access determination which reduces the amount of the service able to be obtained by an access provider unless the QCA considers and, if appropriate, makes an award of compensation that is factored into the price of access; and
- (b) Section 138(2)(e) of the QCA Act provides that the QCA in approving a draft access undertaking must take into account the interests of persons who may seek access to the service; including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected.

Summary

The DBCT Access Regime provides mechanisms for the consideration and award of compensation if the existing rights of an access provider or user are impeded.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(l) principle.

¹⁴¹ NCC Guidelines at [5.67].

19. Clause 6(4)(m): hindering access

Clause 6(4)(m): hindering access

The owner or user of a service shall not engage in conduct for the purpose of hindering access to that service by another person.

Clause 6(4)(m) requires that an effective access regime prohibits conduct for the purpose of hindering access. This principle applies both to existing users and facility owners. The Council considers that an access regime should incorporate this clause explicitly or contain other provisions that have the same effect.¹⁴²

This principle is enshrined explicitly in section 104(1) of the QCA Act which prohibits an access provider or user of a declared service from engaging in conduct for the purpose of preventing or hindering a user's access to a declared service under an access agreement.

Although DBCT Management is not currently a vertically integrated entity, the QCA Act also provides sufficient protections against the hindering of access should DBCT have interests in upstream or downstream markets in the future.

Section 104(2) of the QCA Act provides that an access provider engages in conduct for preventing or hindering a user's access if the access provider provides (or proposes to provide) access to the declared service to itself or a related body corporate on more favourable terms than the terms on which the access provider provides (or proposes to provide) access to the declared service to a competitor.

Section 104 of the QCA Act specifies that the prohibition applies to conduct prior to the entering into of an access agreement, by using the phrase 'or proposes to provide'. Section 104(3) of the QCA Act also outlines that the prohibition applies to unfair discrimination in respect of:

- (a) the fees, tariffs or other payments to be made for access to the declared service by the access provider and the competitor; and
- (b) the nature and quality of the declared service provided, or proposed to be provided, to the access provider and competitor.

The provisions of section 104 of the QCA Act in respect of access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

¹⁴² NCC Guidelines at [5.68].

Sections 104(4) and 125(4) of the QCA Act provide that an access provider or user, or a related body corporate of either party, may be held to have engaged in conduct for preventing or hindering access even if that purpose is only ascertainable by inference from their conduct.

These prohibitions are reinforced by sections 100(2) and 168C which explicitly prohibit unfair differentiation by an access provider when negotiating access agreements or amendments to access agreements or in the provision of access to users.

Section 137(1A) also requires an access undertaking to contain any necessary provisions to ensure that there is no unfair discrimination in favour of affiliated entities if the access provider provides, or proposes to provide, access to the declared service to itself or a related entity. The 2017 Access Undertaking provides that DBCT Management and its related bodies corporate will not own or operate a supply chain business.^{143,144} It also prohibits DBCT Management from engaging in conduct for the purpose of preventing or hindering an access holder or access seeker's access or unfairly differentiating between access seekers, access holders or rail operators.¹⁴⁵

The pricing principles in relation to a declared service under section 168A of the QCA Act are discussed in further detail below in relation to the clause 6(5)(b) principle (Chapter 24).

The DBCT Access Regime contains effective mechanisms to ensure that service providers do not engage in unfair discrimination.

Enforcing the prohibition against the hindering of access

To enhance the effectiveness of this prohibition, the QCA has specific information gathering powers under sections 105 and 126 of the QCA Act to investigate possible breaches of sections 104 and 125 of the QCA Act respectively. Under these sections, the QCA can require an access provider to provide information about the arrangements under which access to a service is provided, or proposed to be provided, to itself or a related body corporate. A failure to provide the requested information, without reasonable excuse, can result in a maximum penalty of 500 penalty units or six months imprisonment.

¹⁴³ A supply chain business is defined in Schedule G of the 2017 Access Undertaking to mean an entity which provides, or proposes to provide, above rail services in Queensland which access the terminal; owns or holds an interest in, or proposes to acquire such an interest in, coal-producing mines in Queensland that export coal via the terminal; purchases coal that has been produced in Australia and exports that coal via the terminal; or provides shipping services from the terminal or trades in capacity at the terminal.

¹⁴⁴ Section 9 of the 2017 Access Undertaking. This provision is subject to an exception relating to the Trading Supply Chain Business. However, subject to Section 9.5 of the 2017 Access Undertaking, the activities of the relevant Trading Supply Chain Business ceased from 1 September 2018.

¹⁴⁵ Clause 9.2(a)-(b) of the 2017 Access Undertaking.

Additionally, the prohibitions on preventing or hindering access under sections 104, 125, 100(2) and 168C can be enforced by the orders outlined in section 153 of the QCA Act. The orders available to the court are listed in section 153(2) and include:

- (a) the granting of an injunction to restrain or compel the conduct of the obstructor;
- (b) the awarding of compensation to be paid to the aggrieved party for loss or damage suffered because of the contravention; and
- (c) another order the court considers appropriate.

Furthermore, if the court has power to grant an injunction under section 153(2), then the court may make any other order, including granting an injunction, it considers appropriate against any other person involved in the contravention.¹⁴⁶

Summary

The DBCT Access Regime prohibits conduct hindering access and provides a number of protections to ensure that an access provider does not unfairly discriminate between access seekers.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(m) principle.

¹⁴⁶ Section 153(3) of the QCA Act.

20. Clause 6(4)(n): separate accounting

Clause 6(4)(n): separate accounting

Separate accounting arrangements should be required for the elements of a business which are covered by the access regime.

The NCC Guidelines state that an effective access regime should impose separate accounting arrangements on service providers for the elements of the business covered by the regime. To satisfy clause 6(4)(n), an effective access regime should include provisions that require a facility owner to at least:

- (a) maintain a separate set of accounts for each service that is the subject of an access regime;
- (b) maintain a separate consolidated set of accounts for all of the activities undertaken by the facility owner; and
- (c) allocate any costs that are shared across multiple services in an appropriate manner.¹⁴⁷

Part 5, Division 9 of the QCA Act sets out the accounting procedures for declared services.

Section 163 of the QCA Act provides that the access provider must keep, in a form approved by the QCA, accounting records related to the declared service, separately from accounting records relating to other operations of the access provider. The QCA may direct that the accounting records for the declared service be published by the access provider if the QCA considers publication is in the public interest and would not be likely to damage the access provider's commercial activities.¹⁴⁸

Section 159 of the QCA Act also provides for the preparation of a cost allocation manual at the request of the QCA. A cost allocation manual is binding on the relevant access provider¹⁴⁹ and the access provider must keep books of account and other records in accordance with the cost allocation manual.¹⁵⁰ As DBCT Management does not currently have any interests in related markets and is not vertically integrated, the QCA has not, to date, requested that DBCT Management prepare a cost allocation manual.

¹⁴⁷ NCC Guidelines at [5.72]–[5.74].

¹⁴⁸ Section 163(4) of the QCA Act.

¹⁴⁹ Section 161 of the QCA Act.

¹⁵⁰ Section 162 of the QCA Act.

The 2017 Access Undertaking specifies that DBCT Management will include the following information in its regulatory accounts which must be supplied to the QCA and each access holder on an annual basis¹⁵¹:

- (a) asset base details;
- (b) indexation of asset base;
- (c) depreciation;
- (d) corporate overheads;
- (e) new assets (capital expenditure);
- (f) disposals;
- (g) operating and maintenance costs;
- (h) explanation of significant variances in actual and forecast costs; and
- (i) where a cost for the terminal component has been apportioned among multiple terminal components, details of the relevant apportionments and the basis of the allocation.

Ring fencing

Section 137(2)(ea) of the QCA Act provides that an access undertaking may include details of the arrangements to be made by the owner or operator to separate the owner or operator's operations concerning the service from other operations of the owner or operator concerning another commercial activity.

However, as noted above, DBCT Management does not participate, or have interests, in the same markets as those in which third party access seekers participate. The 2017 Access Undertaking also specifies that DBCT Management and its related bodies corporate will not own or operate a supply chain business in any market that is related to or uses the terminal.¹⁵²

Additionally, the 2017 Access Undertaking provides that DBCT Management will ensure that each of its directors executes a confidentiality deed pursuant to which the directors agree to only use and disclose confidential information obtained as a director of DBCT Management in connection with that role.¹⁵³

¹⁵¹ Section 10.1 of the 2017 Access Undertaking.

¹⁵² Section 9.1 of the 2017 Access Undertaking.

¹⁵³ Section 9.3 of the 2017 Access Undertaking.

Summary

The DBCT Access Regime provides for separate accounting arrangements for the elements of the business which are covered by the access regime. It also provides adequate ring fencing arrangements to ensure that the potential for anti-competitive behaviour is reduced.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(n) principle.

21. Clause 6(4)(o): access to financial information

Clause 6(4)(o): access to financial information

The dispute resolution body, or relevant authority where provided for under specific legislation, should have access to financial statements and other accounting information pertaining to a service.

The NCC Guidelines state that an effective access regime should provide the dispute resolution body and other relevant bodies (for example, regulators and appeals bodies) with the right to inspect all financial documents pertaining to the service. This principle seeks to ensure that the dispute resolution body and other relevant bodies have access to all information necessary to properly assess and settle any issues relating to third party access.¹⁵⁴

The QCA Act provides for the QCA to obtain all relevant financial information, while also providing for the protection of confidential information.

Information gathering powers at the investigation stage

Part 6 of the QCA Act sets out the provisions relating to investigations undertaken by the QCA. Under section 185, the QCA may give written notice to a person requiring that they provide to the QCA a statement setting out stated information or produce stated documents to the QCA by a reasonable date.

During investigation hearings conducted by the QCA, the QCA may give written notice to a person to appear at the hearing and give evidence or produce a stated document.¹⁵⁵ A failure to comply with the notice provisions without a reasonable excuse carries a maximum penalty of 1000 penalty units or 1 year's imprisonment.¹⁵⁶

Under section 186, when a document is produced to the QCA, the QCA may inspect and make copies of the document or take possession of the document as necessary for the investigation.

The DBCT Access Regime makes provision for the protection of confidential information supplied to the QCA during an investigation. Under section 187, a person may ask the QCA not to disclose the information to another person if they believe that it is confidential and that its disclosure is likely to damage their commercial activities. If the QCA is satisfied that the person's belief is justified, and that disclosure would not be in the public interest, the QCA must take all reasonable steps to ensure the information is not, without the person's consent, disclosed to another person other than those categories of persons listed in section 187(3).

¹⁵⁴ NCC Guidelines at [5.78].

¹⁵⁵ Section 181 of the QCA Act.

¹⁵⁶ Sections 183–184 of the QCA Act.

Persons listed under this subsection include, for example, the Minister or relevant industry-specific regulators or ombudsmen.

Information gathering powers at the arbitration stage

Part 7 of the QCA Act concerns the conduct of arbitration hearings by the QCA. The information gathering powers under this part substantially reflect the powers given to the QCA at the investigation stage, as outlined above.

Under section 205, the QCA can give written notice to a person requiring stated information or documents to be produced to the QCA. Section 200 of the QCA Act provides that during arbitration hearings conducted by the QCA, a person may be summoned to appear before the QCA as a witness and give evidence or produce stated documents.

As is the case at the investigation stage, when a document is provided to the QCA, the QCA may inspect and make copies of the document or take possession of it while it is necessary for the arbitration.¹⁵⁷ Penalties of up to 1000 penalty units or 1 year's imprisonment apply for failures to produce information without a reasonable excuse.¹⁵⁸

There is also a process for the protection of confidential information that is made available during the arbitration process. Under section 207, an applicant may ask the QCA not to disclose certain information to the other party, where they believe that the information is confidential and that its disclosure is likely to damage their commercial activities. After considering the request, and any objections received from the other party, if the QCA is satisfied the applicant's belief is justified and that the disclosure would not be in the public interest, the QCA must take all reasonable steps to ensure the information is not disclosed to the other party without the applicant's consent.

The 2017 Access Undertaking also includes a commitment by DBCT Management to comply with an information request of the QCA, where the QCA requires the specified information to perform its obligations and functions under the undertaking or an access agreement developed in accordance with the undertaking.¹⁵⁹

Summary

The DBCT Access Regime provides for the QCA to obtain all relevant financial information and also provides protection for confidential information.

Accordingly, the DBCT Access Regime satisfies the clause 6(4)(o) principle.

¹⁵⁷ Section 206 of the QCA Act.

¹⁵⁸ Sections 202, 203 and 205 of the QCA Act.

¹⁵⁹ Section 7 of the 2017 Access Undertaking.

22. Clause 6(4)(p): multiple access regimes

Clause 6(4)(p): multiple access regimes

Where more than one State or Territory access regime applies to a service, those regimes should be consistent and, by means of vested jurisdiction or other co-operative legislative scheme, provide for a single process for persons to seek access to the service, a single body to resolve disputes about any aspect of access and a single forum for enforcement of access arrangements.

Section 76(5)(a) of the QCA Act requires that the QCA and Minister must have regard to cross-jurisdictional issues when considering whether a service meets the criteria for declaration under Part 5 of the QCA Act. Specifically, if the facility for the service extends outside Queensland, the QCA and the Minister must have regard to whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction and the desirability of consistency in regulating access to the service.

In any case, the DBCT Access Regime is the only State or Territory access regime that applies to the use of coal handling services at DBCT. Therefore, compliance with clause 6(4)(p) is not required.

Summary

The infrastructure covered by the DBCT Access Regime does not extend beyond the jurisdictional boundary of Queensland. The service is not subject to multiple state and territory access regimes.

The clause 6(4)(p) principle is satisfied.

23. Clause 6(5)(a): promote efficiency and effective competition

Clause 6(5)(a): objects clause

A State, Territory or Commonwealth access regime (except for an access regime for: electricity or gas that is developed in accordance with the Australian Energy Market Agreement; or the Tarcoola to Darwin railway) should incorporate the following principle:

- (a) Objects clauses that promote the economically efficient use of, operation and investment in significant infrastructure thereby promoting effective competition in upstream or downstream markets.*

The NCC Guidelines state that clause 6(5)(a) requires that an effective access regime incorporate an objects clause that provides a clear statement that the purpose of regulating third party access is to promote economic efficiency in the operation of, use of and investment in infrastructure thereby promoting competition in upstream and downstream markets.¹⁶⁰

The DBCT Access Regime satisfies this clause through section 69E of the QCA Act, which establishes the object of Part 5 of the QCA Act. Section 69E states:

The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

Summary

The DBCT Access Regime includes an objects clause that provides a clear statement that the purpose of regulating third party access is to promote the economically efficient operation of, use of and investment in infrastructure, with the effect of promoting effective competition in upstream and downstream markets.

Accordingly, the DBCT Access Regime satisfies the clause 6(5)(a) principle.

¹⁶⁰ NCC Guidelines at [6.1].

24. Clause 6(5)(b): pricing should promote efficiency

Clause 6(5)(b): pricing review

Regulated access prices should be set so as to:

- (i) generate expected revenue for a regulated service or services that is at least sufficient to meet the efficient costs of providing access to the regulated service or services and include a return on investment commensurate with the regulatory and commercial risks involved;*
- (ii) allow multi-part pricing and price discrimination when it aids efficiency;*
- (iii) not allow a vertically integrated access provider to set terms and conditions that discriminate in favour of its downstream operations, except to the extent that the cost of providing access to other operators is higher; and*
- (iv) provide incentives to reduce costs or otherwise improve productivity.*

The NCC Guidelines state that the clause 6(5)(b) principles emphasise that the price of access should promote the efficient use of, operation and investment in infrastructure as a means of promoting effective competition in dependent markets. The pricing principles in clause 6(5)(b) require that regulated access prices be set to cover costs and provide a return on investment that is commensurate with the risks involved.¹⁶¹

The QCA Act requires that the QCA must consider certain pricing principles when making an access determination or approving access undertakings for declared services.¹⁶²

Section 168A of the QCA Act sets out the pricing principles that apply, namely that the price should:

- (a) generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved;
- (b) allow for multi-part pricing and price discrimination when it aids efficiency;
- (c) not allow a related access provider¹⁶³ to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate¹⁶⁴ of the access provider, except to the extent the cost of providing

¹⁶¹ NCC Guidelines at [6.5].

¹⁶² Section 120(1)(l) of the QCA Act; section 138(2)(g) of the QCA Act.

¹⁶³ Schedule 2 of the QCA Act provides that a related access provider, in relation to a service, means an access provider that owns or operates the services and provides, or proposes to provide, access to the service to itself or a related body corporate of the access provider.

¹⁶⁴ Schedule 2 of the QCA Act provides that a related body corporate means a body corporate that is related to the other body corporate under section 50 of the Corporations Act or another entity that is a subsidiary of the other body corporate under section 3 of the *Government Owned Corporations Act 1993*.

access to other operators is higher; and

(d) provide incentives to reduce costs or otherwise improve productivity.

Summary

The DBCT Access Regime reflects the pricing principles as required by clause 6(5)(b).

Accordingly, the DBCT Access Regime satisfies the clause 6(5)(b) principles.

25. Clause 6(5)(c): merits review of decisions

Clause 6(5)(c): merits review of decisions

Where merits review of decisions is provided, the review will be limited to the information submitted to the original decision-maker except that the review body:

- (i) may request new information where it considers that it would be assisted by the introduction of such information;*
- (ii) may allow new information where it considers that it could not have reasonably been made available to the original decision-maker; and*
- (iii) should have regard to the policies and guidelines of the original decision-maker (if any) that are relevant to the decision under review.*

Merits review is not provided for in the DBCT Access Regime and therefore, compliance with clause 6(5)(c) is not required.

26. The objects of Part IIIA

Section 44M(4)(aa) of the CCA provides that the Council must have regard to the objects of Part IIIA of the CCA in deciding what recommendation it should make to the Commonwealth Minister regarding the effectiveness of an access regime.

The DBCT Access Regime has regard to the objects of Part IIIA through section 69E of the QCA Act, which with only minor variations reflects the language used in section 44AA(a) of the CCA and the corresponding principle found in clause 6(5)(a) of the CPA. As outlined above, in Chapter 23 of this application, the DBCT Access Regime incorporates the object of the promotion of economically efficient operation of, use of and investment in infrastructure.

In addition to the consideration of economic efficiency, section 44AA of Part IIIA also requires the Council to give consideration to the objective of Part IIIA of the CCA of providing a framework and guiding principles to encourage a consistent approach to access regulation, per section 44AA(b) of the CCA.

The object contained in section 44AA(b) of the CCA is achieved through the structure of the CCA and the Clause 6 principles themselves. The fundamental purpose of the Clause 6 principles is to foster a consistent approach to access regulation between the Commonwealth and State access regimes. In practice, this is achieved through the effective and consistent application of the Clause 6 principles by the Council and the Commonwealth Minister.

In Queensland, DBCT is the only port which is subject to access regulation. Access to other Queensland ports can be achieved through an application for declaration of the port services under the provisions of the QCA Act. If a declaration of a Queensland port's services is made, then it is likely that the QCA will adopt a consistent approach to the regulation of that port as it adopts with DBCT.

Summary

The DBCT Access Regime reflects the efficiency objectives of Part IIIA through section 69E of the QCA Act. The Clause 6 principles provide the framework for a consistent approach to access regulation and the consistent application of the Clause 6 principles by the Council and the Minister will satisfy the object of section 44AA(b).

Accordingly, the DBCT Access Regime demonstrates consistency with the objects of Part IIIA and satisfies section 44M(4)(aa) of the CCA.

27. Abbreviations

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
Council	National Competition Council
Clause 6 principles	The principles set out in clause 6(2)–6(5) of the Competition Principles Agreement (as amended to 13 April 2007).
CCA	<i>Competition and Consumer Act 2010</i> (Cth)
CPA	Competition Principles Agreement
DBCT	Dalrymple Bay Coal Terminal
DBCT Access Regime	The State's third party access regime as it applies to the coal handling services at DBCT and as described in Chapter 5 of this application.
DBCT Management	DBCT Management Pty Limited
DBCT Pty Ltd	Dalrymple Bay Coal Terminal Pty Ltd
IAP	Indicative Access Proposal as defined in the 2017 Access Undertaking
National Access Regime	The access regime set out in Part IIIA of the CCA
NCC Guidelines	National Competition Council, <i>Certification of State and Territory Access Regimes – A guide to Certification under Part IIIA of the Competition and Consumer Act 2010 (Cth)</i> , December 2017
Part IIIA	Part IIIA of the <i>Competition and Consumer Act 2010</i> (Cth)
penalty unit	\$133.45 (current from 1 July 2020)
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997</i> (Qld)
Standard Access Agreement	An access agreement in the form approved by the QCA under the 2017 Access Undertaking
Terminal Regulations	Rules in force from time to time governing procedures for the operation of DBCT and provision of the services under an access agreement
TIA	<i>Transport Infrastructure Act 1994</i> (Qld)
TOMSA	<i>Transport Operations (Marine Safety) Act 1994</i> (Qld)
Tribunal	Australian Competition Tribunal
2017 Access Undertaking	DBCT Management's 2017 access undertaking which has been approved by the QCA and expires on 1 July 2021