



**Queensland  
Government**

***APPLICATION TO THE NATIONAL  
COMPETITION COUNCIL FOR A  
RECOMMENDATION ON THE EFFECTIVENESS  
OF AN ACCESS REGIME***

**Queensland Third Party Access Regime for coal  
handling services at Dalrymple Bay Coal  
Terminal**

**December 2010**

## Table of Contents

1.	Application and Contact Details .....	3
2.	Background .....	4
3.	Overview of Queensland coal export industry and DBCT .....	8
4.	Overview of Queensland's third party access regime.....	12
5.	Approach to analysis of Clause 6 Principles .....	15
6.	Clauses 6(2) and 6(4)(p): jurisdictional issues .....	17
7.	Clause 6(3): significant infrastructure.....	19
8.	Clauses 6(4)(a)-(c): negotiated access .....	33
9.	Clause 6(4)(d): regular review .....	42
10.	Clause 6(4)(e): reasonable endeavours.....	45
11.	Clause 6(4)(f): negotiated access .....	48
12.	Clause 6(4)(g): independent dispute resolution.....	51
13.	Clause 6(4)(h): binding decisions .....	54
14.	Clause 6(4)(i): principles for dispute resolution .....	56
15.	Clause 6(4)(j): facility extension.....	60
16.	Clause 6(4)(k): material change in circumstances .....	63
17.	Clause 6(4)(l): compensation.....	64
18.	Clause 6(4)(m): hindering access .....	65
19.	Clause 6(4)(n): separate accounting.....	68
20.	Clause 6(4)(o): access to financial information .....	71
21.	Clause 6(5)(a): promote efficiency and effective competition .....	74
22.	Clause 6(5)(b): pricing should promote efficiency .....	75
23.	Clause 6(5)(c): merits reviews of decisions.....	77
24.	The Objects of Part IIIA .....	78
25.	Abbreviations.....	80

## **1. Application and Contact Details**

This Application is made under section 44M(2) of the *Trade Practices Act 1974* (Cth).

The following information is provided in accordance with Regulation 6B of the *Trade Practices Regulations 1974* (Cth).

### **Applicant**

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

### **Responsible Minister**

The responsible Minister for the State of Queensland is the Honourable Anna Bligh MP, Premier of Queensland.

### **Contact Officer**

The relevant contact officer is:

Ms Tania Homan  
Queensland Treasury  
100 George St  
BRISBANE Q 4000

Postal Address  
GPO Box 611  
BRISBANE Q 4001

### **Address for Service**

The address for service for the responsible Minister is:

The Honourable Anna Bligh MP  
Premier of Queensland  
PO BOX 15185  
CITY EAST Q 4002

## 2. Background

The Competition Principles Agreement<sup>1</sup> (**CPA**) provides that States and Territories may establish statutory regimes for regulating third party access to significant infrastructure within their respective jurisdictions. The CPA also provides that where the State or Territory regime is an effective access regime, then it would apply to the exclusion of the third party access regime under Part IIIA of the *Trade Practices Act 1974* (Cth) (**National Access Regime**).

As a result of the CPA, amendments were made to the *Trade Practices Act 1974* (Cth) (**TPA**) to provide for a process whereby a State or Territory could apply to the National Competition Council (**Council**) for a recommendation to be made to the relevant Commonwealth Minister that the Commonwealth Minister decide that a regime is an effective access regime.

In 1997, the Queensland Government passed the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**), which contained a third party access regime in Part 5 of that Act which was 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. This made DBCT subject to the operation of the third party access regime in Part 5 of the QCA Act and it has remained declared ever since. The declaration was remade by the *Queensland Competition Authority Regulation 2007* (Qld) (**QCA Regulation**).

On 8 September 2010, the ability to declare a service by regulation was removed from the QCA Act<sup>2</sup>. As a result, the DBCT declaration was removed from the QCA Regulation and made under a new Part 12 of the QCA Act. Section 250 of Part 12 of

---

<sup>1</sup> 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.

<sup>2</sup> The *Motor Accident Insurance and Other Legislation Amendment Act 2010* (Qld) amended the QCA Act and the QCA Regulation.

the QCA Act provides that the handling of coal at DBCT by the terminal operator is taken to be a service declared by the Ministers under Part 5, Division 2 of the QCA Act. In accordance with Part 12 of the QCA Act, the DBCT declaration expires on 8 September 2020 unless revoked earlier<sup>3</sup>.

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 agreement<sup>4</sup> and, if agreement cannot be reached, allows a dispute to be arbitrated, and a determination made by the Queensland Competition Authority (**QCA**) in respect of the access dispute<sup>5</sup>; 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<sup>6</sup>. The QCA also has the power under the QCA Act to require a provider of a declared service to submit an undertaking<sup>7</sup>.

DBCT was established in 1983 by the Queensland Government to provide a common-user coal export facility to service coal mining developments unable to access the nearby Hay Point Coal Terminal. In 2001, the Queensland Government awarded a 50 year lease of the terminal (with option for a further 49 years) to DBCT Management Pty Limited and DBCT Trustee (companies within the Prime

---

<sup>3</sup> A party can seek to have the DBCT declaration revoked under Part 5, Division 2, Subdivision 5 of the QCA Act.

<sup>4</sup> Part 5, Division 4, Subdivision 1 of the QCA Act.

<sup>5</sup> Part 5, Division 5 of the QCA Act.

<sup>6</sup> Part 5, Division 7 of the QCA Act.

<sup>7</sup> Section 133 of the QCA Act.

Infrastructure Group<sup>8</sup>) (**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**), a company owned by a selection of miners using the terminal, is contracted by DBCT Management under an operations and 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 neither a vertically nor horizontally integrated business.

In accordance with the Port Services Agreement (an agreement between the lessees and the State), DBCT Management is required to submit a draft access undertaking to the QCA.

DBCT Management's first approved access undertaking commenced on 15 June 2006. This access undertaking is referred to as the 2006 Access Undertaking. It expires on 31 December 2010.

In December 2009, the QCA issued DBCT Management with an initial undertaking notice, requiring it to submit a replacement draft access undertaking by 22 March 2010. DBCT Management submitted a replacement draft access undertaking (2010 Draft Access Undertaking) on 19 March 2010. The QCA approved the 2010 Draft Access Undertaking on 23 September 2010. It will commence on 1 January 2011, and is therefore referred to in this application as the

---

<sup>8</sup> In July 2005, Prime Infrastructure changed its name to Babcock and Brown Infrastructure (BBI). In November 2009, BBI was recapitalised and renamed Prime Infrastructure. At the same time, its economic interest in DBCT was reduced to 50.1%, with Brookfield Infrastructure Australia Partners obtaining the remaining 49.9%. In August 2010, Prime Infrastructure entered into a merger agreement with Brookfield Infrastructure Partners and on 8 December 2010, the merger was completed.

2011 Access Undertaking. The termination date of the 2011 Access Undertaking is 30 June 2016, or when the operator changes, whichever is earlier.

The DBCT access regime has facilitated competition in the market for Queensland coal tenements and in the market for the shipping and export of coal. It means terminal users are not charged access prices higher than those that would apply in a competitive market, while ensuring sufficient returns for the operator to facilitate significant expansions of the terminal. Upon commencement of regulation, access charges fell by around 17 per cent and the price approved by the QCA was around 40 per cent lower than that proposed by DBCT's new owner. Ongoing oversight of DBCT by the QCA also ensures that only the prudent costs of infrastructure expansion are passed through to customers.

A period of ten years is sought for the certification of the effectiveness of the DBCT access regime.

### **3. Overview of Queensland coal export industry and DBCT**

#### **Queensland coal export industry**

Queensland is Australia's largest producer and exporter of coal, producing over 190 million tonnes of saleable coal in 2008/09<sup>9</sup>. Preliminary production data indicates this rose to over 201 million tonnes in 2009/10<sup>10</sup>. Over 85 per cent of Queensland's coal is exported, making coal mining Queensland's largest export industry and Queensland the largest exporter of seaborne coal in the world.

There are currently 54 operating coal mines in Queensland<sup>11</sup>. Most of Queensland's coal is sourced from the Bowen Basin in Central Queensland. It is then transported by rail to a port before it is shipped to over 35 countries around the world.

Queensland's coal mines export through six coal export terminals located at the Port of Brisbane (1 terminal), Gladstone (2 terminals), Hay Point (2 terminals) and Abbot Point (1 terminal). All of the coal terminals are common-user facilities except for the Hay Point Services Coal Terminal which is owned by BHP Billiton Mitsubishi Alliance.

The Fisherman Islands Coal Terminal at the Port of Brisbane services mines in the State's south-east (the Western System). It is the smallest of the six terminals, handling less than four per cent of Queensland's exported coal<sup>12</sup>. The remaining five terminals service four major coal systems located in the Bowen Basin. These are the Newlands, Goonyella, Blackwater, and Moura systems. A map of Queensland's coal export systems is provided below.

---

<sup>9</sup> Department of Employment, Economic Development and Innovation (DEEDI) 2010, *Financial Year coal statistics – 2008-09*, Queensland Government, Brisbane.

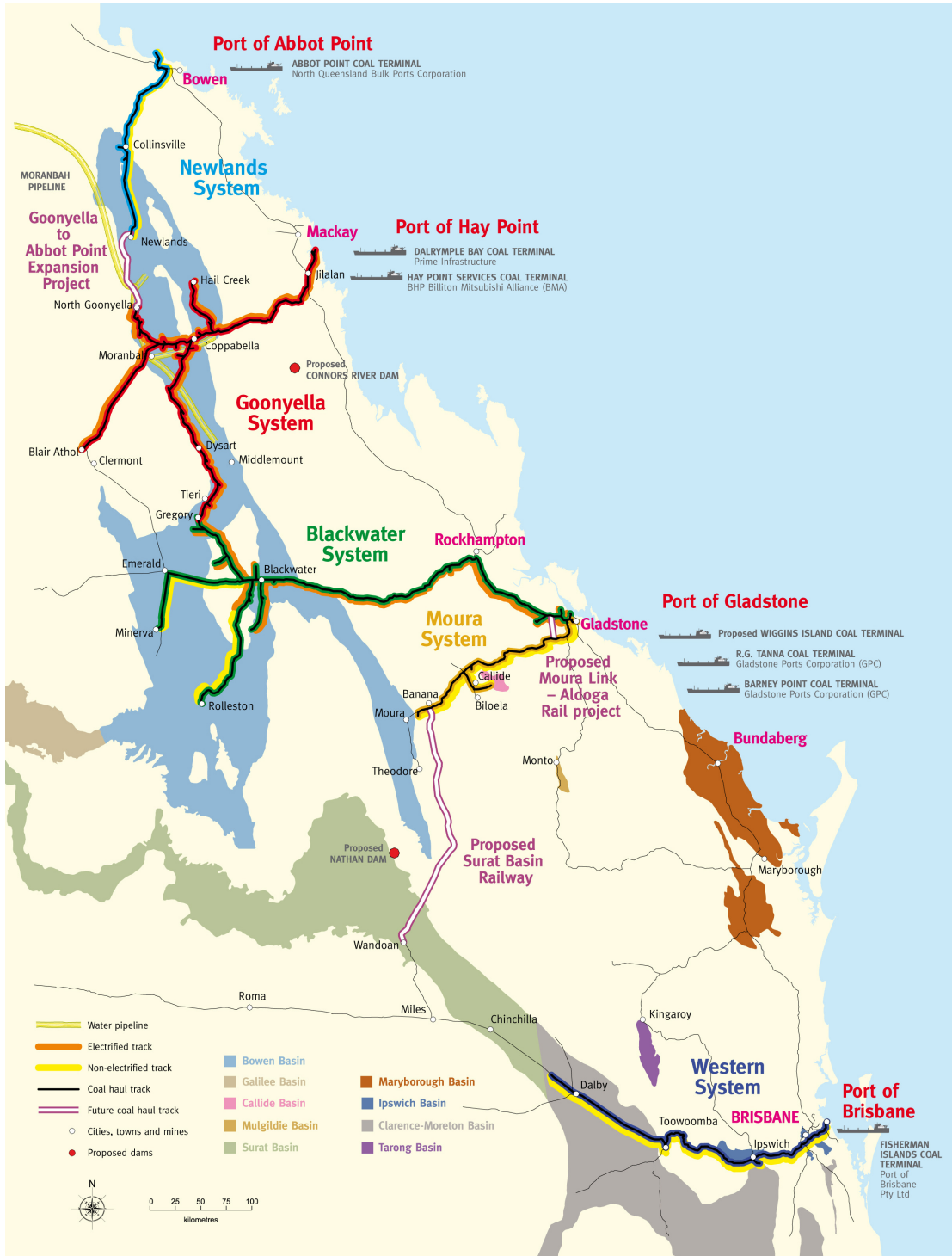
<sup>10</sup> DEEDI 2010, *Monthly Coal Statistics June 2010*, Queensland Government, Brisbane, 24 September 2010.

<sup>11</sup> DEEDI 2010, *Queensland's coal – mines and advanced projects (June 2010)*, Queensland Government, Brisbane, June 2010.

<sup>12</sup> DEEDI 2010, *Financial Year coal statistics – 2008-09*, Queensland Government, Brisbane.



Figure 1 – Queensland Coal Export Systems



The coal export industry has experienced significant growth over the last decade and international demand for coal continues to increase. Between 1996/97 and 2008/09 Queensland coal exports increased from 79.6 million tonnes<sup>13</sup> to a record 159.3 million tonnes<sup>14</sup>, an increase of over 100 per cent.

## 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 around 200 hectares of land. The terminal 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. It is a critical component of the Goonyella coal supply chain (**Goonyella System**) which extends over 300 kilometres from the port to the mines. Eight users currently export coal through DBCT. Coal is transported from the mines to DBCT via rail transport infrastructure that is also subject to a third party access declaration under Part 5 of the QCA Act and is the subject of a separate certification application currently before the Council. Rail haulage is supplied by two rail haulage providers working in a competitive environment.

DBCT is Queensland's largest coal export terminal and one of the largest in the world. It has a nameplate capacity of 85 million tonnes per annum, with 63 million tonnes of coal transported through the terminal in 2009/10<sup>15</sup>. This means over 30 per cent of coal exported from Queensland, and over 20 per cent of coal exported nationally, was transported through DBCT in 2009/10<sup>16</sup>.

---

<sup>13</sup> Department of Transport and Main Roads, <http://www.tmr.qld.gov.au/Business-and-industry/Transport-sectors/Multimodal-coal-and-minerals-infrastructure.aspx> (accessed August 2010).

<sup>14</sup> DEEDI 2010, *Financial Year coal statistics – 2008-09*, Queensland Government, Brisbane.

<sup>15</sup> North Queensland Bulk Ports Corporation Ltd (NQBPC) 2010, *Annual Report 2009-10*.

<sup>16</sup> Based on preliminary coal export data sourced from: Australian Bureau of Agricultural and Resource Economics – Bureau of Rural Science (ABARE-BRS) *Australian Mineral Statistics 2010, June quarter 2010*, ABARE-BRS, Canberra, September 2010; and DEEDI 2010, *Monthly Coal Statistics June 2010*, Queensland Government, Brisbane, 24 September 2010.

Coal arrives at DBCT on trains that are up to two kilometres long and carry an average of 9600 tonnes. It is unloaded at three rail receipt stations before being transported by conveyor to either the wharf for loading onto ships, or to the stockyard. 6601 trains delivered coal to DBCT in 2009/10<sup>17</sup>.

Stockyards at the terminal cover an area of almost 67 hectares and can hold over 2.28 million tonnes of coal. Large stockyard machines are used to stack the coal from the inloading conveyors into stockpiles and to reclaim coal back onto the outloading conveyor systems when ships are ready to be loaded. Yard machines at the terminal include four stackers, six stacker/reclaimers and two reclaimers.

From the stockyard, coal is transported to a 'surge bin' where it is sampled to ensure it meets customer requirements before being moved by conveyor along the 3.8 kilometre jetty to the wharf. The 1.65 kilometre wharf includes four berths suitable for a range of ship sizes. Three ship-loaders transfer the coal from the wharf conveyors to the ships. 727 vessels arrived for loading at DBCT in 2009/10<sup>18</sup>.

The terminal caters for all coal types and coal can be blended at the terminal to meet buyer requirements.

---

<sup>17</sup> DBCT Management and DBCT Pty Ltd 2010, *Dalrymple Bay Coal Terminal Performance Indicators* April 2010 to June 2010. <http://www.primeinfrastructure.com/media/435064/dbctm%20quarterly%20report.pdf> (accessed November 2010).

<sup>18</sup> DBCT Management and DBCT Pty Ltd 2010, *Dalrymple Bay Coal Terminal Performance Indicators* April 2010 to June 2010. <http://www.primeinfrastructure.com/media/435064/dbctm%20quarterly%20report.pdf> (accessed November 2010).

## 4. 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) the DBCT 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 2006 Access Undertaking will expire on 31 December 2010<sup>19</sup>. The 2011 Access Undertaking (**Attachment 2**) was approved by the QCA on 23 September 2010 and will commence on 1 January 2011; 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**).

### (DBCT Access Regime).

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 competition in upstream and downstream markets. This mirrors the object of Part IIIA of the TPA, which is set out in section 44AA(a) of the TPA.

### 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.

---

<sup>19</sup> The 2006 Access Undertaking, including amendments approved by the QCA, are available on the QCA website at [www.qca.org.au](http://www.qca.org.au)

The declaration of the coal handling services at DBCT provided by the terminal operator (**the Service**) is made under section 250(1)(c) of the QCA Act. The Service is taken to be a service declared by the Ministers under Part 5, Division 2 of the QCA Act. In accordance with section 250(2), the declaration of the Service expires on 8 September 2020, unless it is revoked earlier in accordance with Part 5, Division 2, Subdivision 5 of the QCA Act.

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 a declared service 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* – once a service has been declared there is a statutory obligation on access providers to negotiate access rights with access seekers<sup>20</sup>. The regime contains various provisions to provide a framework for good faith negotiations between parties as set out below;
- (c) *Dispute resolution process* – in the event that there is an access dispute, 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

---

<sup>20</sup> Section 99 of the QCA Act.

prohibition on hindering access, injunctions and orders to enforce access undertakings.

## **Access Undertaking under QCA Act**

The current 2006 Access Undertaking expires on 31 December 2010, after which it will be replaced by the 2011 Access Undertaking which was approved by the QCA on 23 September 2010.

The 2011 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).

## **5. Approach to analysis of Clause 6 Principles**

The TPA and the CPA set out the appropriate approach to the consideration of an application for certification.

Sections 44M(4) and 44N(2) of the TPA require that the Council, in considering 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 TPA; and
- (c) not, subject to section 44DA, have regard to any other matter.

Section 44DA confers 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 highlights 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 and those matters which should not be considered include the outcome of any arbitration or any decision made under the access regime. This includes pricing decisions such as the establishment of the revenue cap, the Weighted Average Cost of Capital (WACC) and the Reference Tariffs.

It is clear from the above matters that the approach to considering an application for certification is:

- (a) to consider the Clause 6 Principles, and that general debate about the details of how the regime operates is not relevant unless the debate relates to a Clause 6 Principle;
- (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 Queensland Government is a reasonable approach, then the Clause 6 Principle is satisfied; and
- (c) to have regard to the objects of Part IIIA of the TPA set out in section 44AA.



## 6. Clauses 6(2) and 6(4)(p): jurisdictional issues

*Clause 6(2) - 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.*

*Clause 6(4)(p) - cross-jurisdictional 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(3)(i) of the QCA Act requires that the QCA and Ministers must have regard to cross-jurisdictional issues when considering whether access to a service is in the public interest and suitable for declaration under Part 5 of the QCA Act. Specifically, if the facility for the service extends outside Queensland, the QCA and Ministers 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 coal handling services at DBCT. The terminal 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 the State nor do substantial difficulties arise from the facility being situated in more than one jurisdiction.

## **Summary**

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

Therefore, the clause 6(2) and 6(4)(p) principles are satisfied.

## 7. Clause 6(3): significant infrastructure

*Clause 6(3) - 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).*

### Services covered by the DBCT Access Regime

The NCC Guidelines state that a clear and precise definition of the service(s) and/or proposed service(s) that an access regime covers is essential to ensuring that the regime applies only to services for which access is necessary to promote competition in upstream or downstream markets<sup>21</sup>.

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.

---

<sup>21</sup> NCC Guidelines at [3.3].

Section 72(2) specifically excludes the following from the definition of services covered by the DBCT Access Regime:

- (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 TPA, section 44PA, is in force; and
  - (ii) that was stated under section 44PA(2) of the TPA in the application for the approval.

The declaration in Part 12 of the QCA Act specifies the services to which the DBCT Access Regime applies.

Specifically, section 250(1)(c) provides that the declared service is *the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator*.

For the purpose of the declaration, section 250(5) specifies that:

*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, 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.

### **Significant infrastructure facility**

The NCC Guidelines state that, to satisfy the clause 6(3)(a) principle, an access regime should apply only to the service(s) and/or proposed service(s) of a significant infrastructure facility or facilities where<sup>22</sup>:

- (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)).

The DBCT Access Regime incorporates these principles in the declaration process. The declaration process is a two step process, similar to the declaration process in the National Access Regime. An application may be made to the QCA for a recommendation that a particular service be declared by the Ministers<sup>23</sup>. The QCA must then make a recommendation to the Ministers as to whether the service should

---

<sup>22</sup> NCC Guidelines at [3.7].

<sup>23</sup> Section 77 of the QCA Act.

be declared.<sup>24</sup> The QCA may only recommend that a service be declared by the Ministers if the QCA is satisfied about all of the access criteria for the service.<sup>25</sup> Upon receiving a recommendation, the Ministers must then make a decision as to whether the service should be declared<sup>26</sup>. The Ministers must declare a service if they are satisfied about all of the access criteria for the service.<sup>27</sup>

The access criteria are set out in section 76(2) of the QCA Act and reflect the principles set out in clause 6(3)(a) of the CPA. Specifically, the access criteria are as follows:

- (a) that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service;
- (b) that it would be uneconomical to duplicate the facility for the service;
- (c) that the facility for the service is significant, having regard to its size or importance to the Queensland economy;
- (d) that access (or increased access) to the service can be provided safely; and
- (e) that access (or increased access) to the service would not be contrary to the public interest.

The access criteria in the DBCT Access Regime largely replicate the declaration criteria contained in the National Access Regime. 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.

---

<sup>24</sup> Section 79 of the QCA Act.

<sup>25</sup> Section 80 of the QCA Act.

<sup>26</sup> Section 84 of the QCA Act.

<sup>27</sup> Section 86 of the QCA Act.

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

Clause 6(3)(a) Principles	Related declaration criteria - QCA Act
(a) significant infrastructure facility	<p>Section 70 of the QCA Act defines “facility” to include port infrastructure and other infrastructure which is generally considered to be significant.</p> <p>Section 69E of the QCA Act clearly states that the object of Part 5 is to promote the efficient operation of, and investment in, "significant" infrastructure.</p> <p>Section 76(2)(c) requires the QCA and Ministers to consider the size of the facility and the importance of the facility to the State economy when deciding whether to recommend or make a declaration.</p>
(i) it would not be economically feasible to duplicate the facility	Section 76(2)(b) - that it would be uneconomical to duplicate the facility for the service.
(ii) access to the service is necessary in order to permit effective competition in a downstream or upstream market	Section 76(2)(a) - that access (or increased access) to 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.
(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	Section 76(2)(d) - that access (or increased access) to the service can be provided safely.

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 which guide declaration decisions reflect this intention by ensuring that services are only declared where there is a demonstrated case that access regulation is appropriate and efficient, having regard to the nature of the facility and the competitive outcomes which may result from declaration.

The NCC Guidelines state that State and Territory governments can consider the public interest effects of implementing an access regime for a particular industry<sup>28</sup>. The DBCT Access Regime incorporates a consideration of the public interest through the access criteria set out in section 76 of the QCA Act. The criterion in section 76(2)(e) is that access (or increased access) to the service would not be contrary to the public interest. The DBCT Access Regime gives further guidance in section 76(3) on the matters to be considered in respect of the public interest and include:

- (a) the object of Part 5 of the QCA Act;
- (b) legislation and government policies relating to ecologically sustainable development;
- (c) social welfare and equity considerations including community service obligations and the availability of goods and services to consumers;
- (d) legislation and government policies relating to occupational health and safety and industrial relations;
- (e) economic and regional development issues, including employment and investment growth;
- (f) the interests of consumers or any class of consumers;
- (g) the need to promote competition;
- (h) the efficient allocation of resources; and
- (i) if the facility for the service extends outside Queensland – 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.

These public interest considerations support the fundamental objective of Part 5 of the QCA Act.

---

<sup>28</sup> NCC Guidelines at [3.13].



## **The Dalrymple Bay Coal Terminal**

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 services around 18 mines in the Bowen Basin coal fields of Central Queensland. The terminal is a critical component of the Goonyella Coal Supply Chain which extends over 300 kilometres from the port of Hay Point to the mines. Coal is transported from the mines to DBCT via rail transport infrastructure that is also subject to a third party access declaration under Part 5 of the QCA Act and is the subject of a separate certification application currently before the Council. Rail haulage is supplied by two rail haulage providers working in a competitive environment.

### **Size of the facility**

DBCT is one the largest coal export terminals in the world. It has a nameplate capacity of 85 million tonnes per annum, with 63 million tonnes of coal transported through the terminal in 2009/10<sup>29</sup>. It is situated on approximately 200 hectares of land.

Coal arrives at DBCT on trains that are up to two kilometres long and carry an average of 9600 tonnes. Trains are unloaded at three rail receival stations where coal is transported by conveyor to either the wharf for loading onto ships, or to the stockyard. Stockyards at the terminal cover an area of almost 67 hectares and can hold over 2.28 million tonnes of coal. Large stockyard machines are used to stack the coal from the inloading conveyors into stockpiles and to reclaim coal back onto the outloading conveyor systems when ships are ready to be loaded. Yard machines at DBCT include four stackers, six stacker/reclaimers and two reclaimers.

From the stockyard, coal is transported to a 'surge bin' where it is sampled to ensure it meets customer requirements before being moved by conveyor along the 3.8 kilometre jetty to the wharf. The 1.65 kilometre wharf includes four berths suitable for a range of ship sizes. Three ship-loaders transfer the coal from the wharf conveyors to the ships.

---

<sup>29</sup> NQBPC 2010, *Annual Report 2009-10*.

The terminal caters for all coal types and coal can be blended at the terminal to meet buyer requirements.

**Figure 2 - Aerial view of DBCT**



Source: DBCT Management 2010

### **Importance of the facility to the Queensland economy**

Coal mining is an important economic driver in the State, with an estimated contribution to the Queensland economy of over \$26 billion in 2008-09<sup>30</sup> (equal to approximately 11 per cent of Queensland's Gross Value Added, which calculates

---

<sup>30</sup> Office of Economic and Statistical Research (OESR) 2010, Queensland Government, Brisbane.

broader economic benefits). The industry directly supports tens of thousands of Queensland jobs.

The coal mining industry is the State's largest export industry, with over 85 per cent of coal mined in Queensland being exported to over 35 countries around the world.

Queensland is the largest exporter of seaborne coal in the world. Over 159 million tonnes of coal was exported from Queensland in 2008/09<sup>31</sup> and preliminary data indicates this rose to over 182 million tonnes in 2009/10<sup>32</sup>. Around 30 per cent of these exports were transported through DBCT. From a national perspective, around one fifth of Australia's exported coal was transported through DBCT in 2008-09 and 2009-10<sup>33</sup>.

### ***Duplication of the facility is not economically feasible***

The NCC Guidelines state that the test to be applied in determining whether this criterion is satisfied is whether, over the likely range of reasonably foreseeable demand for the services covered by the regime, it would be more efficient, in terms of the costs and benefits to the community as a whole, for the facility to provide those services than for two or more facilities to do so<sup>34</sup>.

In general terms, this test requires that the facility is a "natural monopoly"<sup>35</sup>. This approach has been endorsed by the Australian Competition Tribunal (**Tribunal**) in

---

<sup>31</sup> DEEDI 2010, *Financial Year coal statistics – 2008-09*, Queensland Government, Brisbane..

<sup>32</sup> DEEDI 2010, *Monthly Coal Statistics June 2010*, Queensland Government, Brisbane, 24 September 2010.

<sup>33</sup> ABARE-BRS 2010, *Australian Mineral Statistics 2010, June quarter 2010*, ABARE-BRS, Canberra, September 2010.

<sup>34</sup> NCC Guidelines at [3.7].

<sup>35</sup> See the approach of the NCC in *Australian Cargo Terminal Operators Pty Ltd* [1997] ATPR (NCC) 70-000 where the NCC applied the test that a facility is "uneconomic to duplicate" if it has natural monopoly characteristics (pp. 30-31).

the decision of *Review of Freight Handling at the Sydney International Airport*<sup>36</sup> where the Tribunal found that the features of a natural monopoly include:

- (a) economies of scale (i.e. unit cost falls sharply as the scale of operations increases);
- (b) economies of scope (lower unit cost because the facility produces a number of different but complementary products); and
- (c) specialised assets (i.e. high sunk costs).

In *Specialized Container Transport* [1997] ATPR (NCC) 70-004 the definition of the natural monopoly adopted by the Council was that the total costs of production are lower when a single firm produces the entire industry output than two or more<sup>37</sup>. This test was applied by the Council in a number of declaration decisions<sup>38</sup>.

It is generally well recognised that port infrastructure facilities exhibit natural monopoly characteristics<sup>39</sup>. Port infrastructure is associated with significant economies of scale, in that its development requires large initial outlays, typically sunk costs. 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 serving the Bowen Basin coal mines – the Port of Hay Point, Port of Abbot Point and Port of Gladstone. These sites all have access to deep water shipping channels and have established rail

---

<sup>36</sup> (2000) ATPR 41-754 at para 82.

<sup>37</sup> *Specialized Container Transport* [1997] ATPR (NCC) 70-004 at [70,353].

<sup>38</sup> *NSW Minerals Council Ltd* [1997] ATPR (NCC) 70-005 at [70,401]; *Application for Declaration of Rail Network Services Provided by Freight Australia* (unreported, NCC, December 2001) at 16; *Application for Declaration of the Wirrida-Tarcoola Rail Track Services* (unreported, NCC, July 2002) at 16.

<sup>39</sup> Independent Committee of Inquiry, *National Competition Policy*, Canberra, Commonwealth of Australia, 1993, at [240].

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.

The potential for new coal ports to be developed along the central Queensland coast is also limited as it would require access to:

- (a) appropriate land;
- (b) landside transport links;
- (c) deepwater harbours; and
- (d) shipping channels

Such sites are limited and their development would be associated with significant environmental and social issues that would also need to be appropriately addressed.

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 have meant that it has been more efficient to expand terminal capacity in response to rising demand, rather than duplicate the facility. Between 2006 and 2009, terminal capacity increased from 60 million tonnes per annum to 85 million tonnes per annum in order to meet reasonably anticipated future demand. The capital cost of these expansions was approved by the QCA and totalled in excess of \$1.45 billion.

Regardless of whether duplication of the terminal becomes commercially feasible in the future, DBCT exhibits natural monopoly characteristics that make it uneconomic

to duplicate while it is able to cater for supply chain demand. DBCT Management has planned for future expansions of the terminal<sup>40</sup>.

Clearly, it is more efficient to realise economies of scale than to expend the considerable costs (and time) necessary to duplicate the terminal and associated infrastructure.

Accordingly, given these natural monopoly characteristics, it is not economically feasible to duplicate DBCT.

### ***Access permits effective competition in another market***

Access to DBCT is necessary to permit effective competition in upstream and downstream markets. In particular, access to the terminal is necessary to promote competition in the market for Queensland coal tenements and the coal export market.

Australia is the world's largest exporter of coal. As noted above, over 20 per cent of national coal exports (and over 30 per cent of Queensland's coal exports) are transported via DBCT. Without access to the terminal, coal producers in the Bowen Basin would be required to transport their coal to alternative export ports. Although there is another terminal at Hay Point (Hay Point Coal Terminal), it is a privately owned single-user terminal and has a nameplate capacity of only 44 million tonnes per annum<sup>41</sup>. Over 36 million tonnes was transported through the Hay Point Coal Terminal in 2009/10<sup>42</sup>. The only alternative coal export terminals are located over 200 kilometres north at Abbot Point near Bowen or approximately 400 kilometres south at Gladstone. None of the alternative coal terminals currently have sufficient spare capacity to cater for DBCT's entire current throughput. Furthermore, while some coal may be diverted to these export ports, substantial diversions may not be possible due to the rail network limitations.

---

<sup>40</sup> DBCT Management 2009, *Dalrymple Bay Coal Terminal Master Plan 2009 – Post 85 MTPA Expansion of Dalrymple Bay Coal Terminal*, June 2009.

<sup>41</sup> NQBPC 2010, <http://www.nqbp.com.au/index.cfm?contentID=4>, (Accessed 3 November 2010).

<sup>42</sup> NQBPC 2010, *Annual Report 2009-10*.

DBCT was developed by the Queensland Government to provide a coal export facility for Bowen Basin coal mining developments unable to access the Hay Point Coal Terminal. Since its commissioning, coal mining in the region has grown significantly and substantial new mining developments have been established in the Goonyella coal supply chain. If the coal mines were unable to get access to DBCT under the DBCT Access Regime, then there would be a significant decrease in competition in respect of coal mining tenements because a coal mining tenement is only valuable if it has access to a railway (which it does under the Queensland Rail Access Regime, established under Part 5 of the QCA Act) and port infrastructure. If access was denied to DBCT, coal mines are unlikely to obtain access to Hay Point and there is limited ability to establish a new port. Therefore, the DBCT Access Regime permits effective competition in respect of coal mining tenements.

DBCT is the State's largest export coal terminal. It occupies a strategic position in the Goonyella coal supply chain and use or control of the facility has a significant influence and effect over dependent upstream and downstream markets.

***Safe use of the facility can be ensured***

The TIA governs the safe use of transport infrastructure. Chapter 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 the 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 2011 Access Undertaking includes provisions dealing with the safe provision of access. These require that DBCT Management, DBCT Pty Ltd and access holders all comply with the Terminal Regulations (**Attachment 5**) which set out detailed procedures and obligations for the safe and efficient operation of the terminal. In accordance with Section 6 of the 2011 Access Undertaking, DBCT Management can only amend the Terminal Regulations in consultation with access holders and access seekers and only if it considers that the Terminal Regulations, as a whole, will operate equitably amongst access holders and access seekers. DBCT Management must notify access holders, access seekers and the QCA of any amendments. If an access holder or access seeker does not consider that the amended Terminal Regulations as a whole operate equitably among access holders and access seekers, the matter may be referred to the QCA. If the QCA determines that any part of the amended Terminal Regulations does not as far as is practicable operate equitably amongst access holders and access seekers, then the amendments will lapse.

Therefore, 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 the subject of the DBCT Access Regime are clearly defined and the access criteria in the QCA Act are consistent with the clause 6(3)(a) principles. In respect of DBCT:

- (a) it is significant infrastructure when its size and importance to the Queensland economy is considered;
- (b) it is not economically feasible to duplicate;
- (c) access to the facility 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) principle is satisfied.



## 8. Clauses 6(4)(a)-(c): negotiated access

*Clause 6(4) - 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 together clauses 6(4)(a)–(c) seek to ensure that access regimes provide an appropriate balance between commercial negotiation and regulatory intervention to facilitate access negotiations. An appropriate balance means that regulatory arrangements support the achievement of negotiated outcomes. Therefore regulatory arrangements should not preclude negotiated outcomes<sup>43</sup>.

The objective of the DBCT Access Regime, as specified in the QCA Act, is to encourage the efficient use of, and investment in, the port facility by facilitating a contestable market for coal tenements and coal exports. In order to realise this, the DBCT Access Regime is based on the negotiate-arbitrate model. This model facilitates the commercial negotiation of access agreements between the terminal operator and access seekers. In the case of disagreement between the parties, a rigorous dispute resolution process is in place to resolve the dispute. The 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 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.

---

<sup>43</sup> NCC Guidelines at [3.17].

This operates so that once a service is declared the following process applies:

- (a) the access provider is obliged to negotiate with an access seeker in respect of an access agreement<sup>44</sup>; and
- (b) if, and only if, commercial agreement cannot be reached then an access dispute may be raised<sup>45</sup> and arbitration by the QCA is available<sup>46</sup>.

The primacy of contractual negotiations is also recognised by the Access Undertaking which contains the following provisions:

- (a) a detailed negotiation framework to facilitate commercial negotiation<sup>47</sup>. The framework provides for access agreements consistent with the terms of the standard access agreement approved by the QCA (Standard Access Agreement)<sup>48</sup> or *on other terms agreed between DBCT Management and the access seeker*<sup>49</sup>. This was also recognised by the QCA in their decision on the 2006 Access Undertaking where they noted that an access seeker and DBCT Management are free to agree to terms and conditions that differ from those contained in a Standard Access Agreement<sup>50</sup>.
- (b) a dispute resolution process where commercial agreement cannot be reached<sup>51</sup>.

---

<sup>44</sup> Section 99 of the QCA Act.

<sup>45</sup> Section 112 of the QCA Act.

<sup>46</sup> Part 5, Division 5, Subdivision 3 of the QCA Act.

<sup>47</sup> Section 5 of the 2011 Access Undertaking.

<sup>48</sup> The 2011 Access Undertaking includes a Standard Access Agreement which sets out the terms and conditions upon which an Access Seeker, will, as a minimum, be offered access to the Terminal.

<sup>49</sup> Sections 5.4, 5.5 and 13.1 of the 2011 Access Undertaking.

<sup>50</sup> QCA Decision (June 2006), *Dalrymple Bay Coal Terminal 2006 Draft Access Undertaking*.

<sup>51</sup> Section 17 of the 2011 Access Undertaking.

Therefore it is clear that the DBCT Access Regime incorporates the principle of the primacy of contractual negotiation.

## **Right to Negotiate and the Negotiation Process**

Consistent with clause 6(4)(b), once a service becomes declared, section 99 of the QCA Act gives an access seeker the right to negotiate with an access provider for the making of an access agreement. Section 100 of the QCA Act then goes on to provide that the access provider and the access seeker must negotiate in good faith. The obligation to negotiate in good faith is supported by an obligation upon the access provider to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker as set out in section 101 of the QCA Act.

The negotiation process approved under the 2011 Access Undertaking is as follows:

- (a) an access seeker may at any time request the information specified in Section 5.2 of the 2011 Access Undertaking. This includes:
  - (i) reasonably available preliminary information relating to an access application (including copies of the Standard Access Agreement and Terminal Regulations); and
  - (ii) information prescribed under section 101(2) of the QCA Act.
- (b) the above information should be provided by DBCT Management within 10 business days of DBCT Management receiving the request;
- (c) 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 approved as part of the 2011 Access Undertaking – DBCT Management must facilitate these meetings within a reasonable time after being requested to do so;
- (d) an Access Application is made containing specified information necessary for DBCT Management to evaluate the Access Application as detailed in the Access Undertaking and prepare an Indicative Access Proposal (**IAP**)<sup>52</sup>;
- (e) DBCT Management must acknowledge receipt of the Access Application within 10 business days of receiving it and confirm whether the application

---

<sup>52</sup> Section 5.2 of the 2011 Access Undertaking.

complies with the specified requirements. DBCT Management may request further information from the access seeker<sup>53</sup>;

- (f) DBCT Management should provide an IAP within 20 business days of receipt of all required information<sup>54</sup>;
- (g) 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 estimate of the relevant access charge based on the pricing arrangements in the 2011 Access Undertaking;
    - (2) the Terminal Master Plan<sup>55</sup> and System Master Plan<sup>56</sup>;
    - (3) any additional information requirement by DBCT Management to progress the Access Application and develop terms and conditions for acceptance; and

---

<sup>53</sup> Section 5.3 of the 2011 Access Undertaking.

<sup>54</sup> Section 5.5 of the 2011 Access Undertaking.

<sup>55</sup> The Terminal Master Plan is a plan for the future development of DBCT.

<sup>56</sup> 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.

- (4) 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 not sufficient 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 2011 Access Undertaking;
  - (4) where reasonable, an estimate of relevant prospective access charges based on pricing arrangements in the 2011 Access Undertaking; and
  - (5) the System Master Plan and an indicative timetable for any expansion of the System Capacity which may be undertaken (if any).
- (h) if an access seeker believes that the IAP has not been prepared in accordance with the 2011 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 process<sup>57</sup>;
- (i) if an access seeker is happy with the contents of the IAP it notifies DBCT Management of its intent to progress with the negotiation on the basis of the IAP; and
- (j) if during the subsequent negotiation, the access seeker is unhappy with the terms and conditions of access proposed by DBCT Management, the matter may be referred to the QCA for determination<sup>58</sup>.

---

<sup>57</sup> Section 17 of the 2011 Access Undertaking.

<sup>58</sup> Section 13.1 of the 2011 Access Undertaking.

If commercial agreement cannot be reached then any relevant Standard Access Agreement will be applied and if a Reference Tariff applies to the service the subject of the Access Application, then the Reference Tariff will be applied.

The 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 terminal;
- (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<sup>59</sup>;
- (c) systems for dealing with safety and interoperability issues, including provisions for compliance with the applicable Terminal Regulations<sup>60</sup>, 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. The Undertaking also provides for the consideration of capacity at the terminal in the context of available capacity in the other elements of the Goonyella coal supply chain (such as the rail network)<sup>61</sup>; and
- (d) requirements for DBCT Management to publicly report on certain key performance indicators related to service quality<sup>62</sup>;

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 deal with information asymmetries and provide an effective basis for negotiations. The DBCT Access Regime also deals extensively with safety requirements, the allocation and expansion of capacity, interoperability issues and service quality issues.

---

<sup>59</sup> Section 15 of the 2011 Access Undertaking.

<sup>60</sup> Section 6 of the 2011 Access Undertaking.

<sup>61</sup> See for example Section 12 of the 2011 Access Undertaking.

<sup>62</sup> Section 10.3 of the 2011 Access Undertaking.

## Independence and transparency

The independence of the QCA as State regulator and transparency of the regime's regulatory arrangements support commercial negotiations. The NCC Guidelines state that the NCC has previously considered that the QCA is independent and sufficiently resourced to properly carry out tasks in the context of access regulation<sup>63</sup>.

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 Ministers, thus ensuring independence from government. The DBCT Access Regime 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<sup>64</sup>. Furthermore, the QCA has sufficient information gathering powers to ensure it is well placed to carry out its functions effectively.

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 service<sup>65</sup>;
- (b) the revocation of a declaration<sup>66</sup>;
- (c) the making of an access code<sup>67</sup>; and
- (d) the approval of an access undertaking and any amendments to the access undertaking<sup>68</sup>.

---

<sup>63</sup> NCC Guidelines at [3.31].

<sup>64</sup> Section 219 of the QCA Act.

<sup>65</sup> Sections 79(2) and 81-83 of the QCA Act.

<sup>66</sup> Sections 89-91 of the QCA Act.

<sup>67</sup> Section 128(2) of the QCA Act.

<sup>68</sup> Sections 144-146 of the QCA Act.

In respect of access determinations, the QCA is required to maintain a register of access determinations which must include certain information<sup>69</sup>.

The extent of the public transparency in respect of issues relating to the DBCT Access Regime can be seen through the QCA's website on its port pages.

## **Enforcement mechanisms**

The NCC Guidelines note that under clause 6(4)(c) an effective access regime must have credible enforcement mechanisms. It may be appropriate for some provisions to be enforceable through arbitration or through regulation<sup>70</sup>.

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 obtain a settlement to the dispute. This process is outlined in Part 5, Division 5 of the QCA Act and is discussed in further detail in Chapter 12.

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 so<sup>71</sup> and a failure to keep separate accounting records<sup>72</sup>.

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. Relief that may be sought includes compensation and the grant of various types of injunctions. Provisions relating to the enforcement of the Regime are set out in Part 5, Division 8 of the QCA Act and are discussed in detail below at Chapter 13.

---

<sup>69</sup> Section 127 of the QCA Act.

<sup>70</sup> NCC Guidelines at [3.54].

<sup>71</sup> Section 205 of the QCA Act.

<sup>72</sup> Section 163 of the QCA Act.



## **Summary**

The DBCT Access Regime provides for the primacy of commercial negotiation and provides extensive information to access seekers in respect of the terms and conditions of access including pricing issues, safety requirements, the allocation of capacity, operability 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 clauses 6(4)(a)-(c) principles.

## 9. 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 NCC interprets the clause 6(4)(d) principle to mean that an access regime should include periodic reviews to assess whether regulation need cover a particular service and/or facility<sup>73</sup>.

There are two elements to this clause. The first element requires that the regime contains a mechanism to review the appropriateness of a declaration of a particular service and/or facility. The second element requires that existing contractual rights and obligations should not be automatically overridden in the event that a declaration expires or is revoked.

### **Review mechanism**

Under the regime, all declarations must state a date upon which the declaration will expire<sup>74</sup>. Section 250(2) of the QCA Act specifies that the declaration of the coal handling services at DBCT expires either at the end of the expiry day (8 September 2020)<sup>75</sup> or if it is revoked earlier.

Part 5, Division 2, Subdivision 5 of the QCA Act contains the provisions relating to the revocation of declarations. Under sections 88 and 89 of the QCA Act, the QCA may conduct an investigation and recommend to the Ministers that a declaration be revoked. This process may be started by the owner of a declared service, who can ask the QCA to recommend to the Ministers that a particular declaration be

---

<sup>73</sup> NCC Guidelines at [3.57].

<sup>74</sup> Section 84(4) of the QCA Act.

<sup>75</sup> Section 248 of the QCA Act defines expiry day as the day that is 10 years from the day the section commenced. The section commenced on 8 September 2010 when the *Motor Accident Insurance and Other Legislation Amendment Act* was assented to.

revoked<sup>76</sup>. 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 Ministers from declaring the service<sup>77</sup>. 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 Ministers are similarly constrained in their decision to revoke a declaration. Section 92 of the QCA Act stipulates that the Ministers may only revoke a declaration after receiving a revocation 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 also includes a compulsory review mechanism which requires the QCA to review an existing declaration before it expires and make a recommendation to the Ministers about whether a declared service should continue to be declared after the existing declaration expires<sup>78</sup>. On receiving the QCA's recommendation, the Ministers must either declare all or part of the service or decide not to declare the service<sup>79</sup>. Similar to the revocation process, the QCA and Ministers 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 can not recommend that the service continue to be declared. Similarly, section 86 stipulates that the Ministers 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.

---

<sup>76</sup> Section 88(2) of the QCA Act.

<sup>77</sup> Section 88(3) of the QCA Act.

<sup>78</sup> Part 5, Division 2, Subdivision 4A of the QCA Act.

<sup>79</sup> Part 5, Division 2, Subdivision 4 of the QCA Act.

## **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 also includes a mechanism for the revocation of a declaration where the access criteria are no longer satisfied. If a declaration is revoked or expires then existing contractual rights and obligations are not automatically revoked.

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

## 10. 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 NCC considers that an access regime may either incorporate clause 6(4)(e) explicitly, or through general provisions that have the same effect<sup>80</sup>.

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 following list of specific types of information that an access provider must give to an access seeker include:

- (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

---

<sup>80</sup> NCC Guidelines at [3.64].

- (h) information about any access determinations made by the QCA through arbitration.

The NCC Guidelines indicate that an access regime should ensure sufficient information is disclosed to enable the access seeker to make informed decisions, so as to facilitate effective negotiation. However, information disclosure requirements should not be so onerous as to impose unnecessary costs on service providers or unduly harm their business<sup>81</sup>.

Section 101(6) 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 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 2011 Access Undertaking supports section 101 of the QCA Act by providing for a detailed negotiation process and information requirements. These are discussed in detail above. In particular, the 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

---

<sup>81</sup> NCC Guidelines at [3.66].

- (c) requires DBCT Management to explain when there is insufficient capacity to accommodate the request for access.

It also has provisions for the protection of confidentiality which include the right for DBCT Management or the access seeker to request that the parties sign a confidentiality agreement in respect of the information provided to them<sup>82</sup>.

## **Summary**

The DBCT Access Regime provides for 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.

---

<sup>82</sup> Section 8 of the 2011 DBCT Access Undertaking.

## 11. Clause 6(4)(f): negotiated access

*Clause 6(4)(f): negotiated access*

*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 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<sup>83</sup>. However, the NCC Guidelines also state that this clause does not permit a vertically integrated service provider to set the terms and conditions of access so as to favour an affiliated entity<sup>84</sup>.

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.

DBCT Management is not a vertically integrated access provider as it does not currently have affiliated businesses in upstream or downstream markets from the declared service. 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, and these would apply in the event that DBCT Management provides (or proposed to provide) access to the declared service to itself or a related entity in the future.

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 an access provider must not unfairly differentiate between

---

<sup>83</sup> NCC Guidelines at [3.73].

<sup>84</sup> NCC Guidelines at [3.75].



users of a declared service in a way that has a material adverse effect on the ability of 1 or more of the users to compete with other users of the service.

Section 104(1) of the QCA Act prohibits an access provider from engaging in conduct for the purposes of preventing or hindering access under an access agreement to a declared service. 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 to 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 proposed 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 taken into account 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 provider<sup>85</sup> 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.

---

<sup>85</sup> 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.

Section 11.10 of the 2011 Access Undertaking places limits on price differentiation, requiring DBCT Management to justify to the access seeker any divergence in capital charges that it proposes.

The DBCT Access Regime contains effective mechanisms to ensure that access providers do not engage in unfair discrimination in favour of affiliated entities.

## **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 in favour of affiliated entities.

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

## 12. 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 access regime to contain a mechanism to ensure that parties to a dispute have recourse to an independent dispute resolution body<sup>86</sup>. In general, the State or Territory regime should provide for:

- (a) the appointment of a dispute resolution body;
- (b) reasonable funding arrangements – that do not deter parties from seeking access;
- (c) independence of the dispute resolution body;
- (d) independence of the arbitrator from the regulator;
- (e) constraints on the arbitrator;
- (f) sufficient resources to ensure quality of process;
- (g) a mechanism to deal with minor disputes; and
- (h) public access to decisions.

Part 5, Division 5 of the QCA Act sets out an arbitration process for access disputes. Specifically, section 117 of the QCA Act provides that the QCA must make a written determination in an arbitration on access to the declared service. 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) requiring 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;

---

<sup>86</sup> NCC Guidelines at [3.76].

- (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; 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.

The QCA is an independent dispute resolution body. The QCA has informal policies and procedures to deal with its separate roles as regulator and arbitrator and intends to formalise these in the near future. 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<sup>87</sup>. 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 119 of the QCA Act sets out restrictions on access determinations which can be made by the QCA and include 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 1 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 above restrictions on access determinations are consistent with the National Access Regime.

The QCA Act also provides the QCA with the ability to appoint an associate member for a particular investigation, mediation or arbitration. Associate members are appointed by Governor in Council upon the recommendation of the Minister under section 214 of the QCA Act.

---

<sup>87</sup> Section 208 of the QCA Act.

Section 127 of the QCA Act provides for a public register of access determinations.

The 2011 Access Undertaking provides for a dispute resolution process for disputes arising under the Access Undertaking or in relation to the negotiation of access which contains the following elements:

- (a) any access dispute is referred to 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<sup>88</sup>.

In respect of expert determination, the expert may be appointed by the parties, or failing agreement between the parties, by the President of CPA Australia for financial matters, and the President of the Institute of Engineers Australia for non-financial matters<sup>89</sup>. The expert must have appropriate qualifications, 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<sup>90</sup>. 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)<sup>91</sup>.

## Summary

The DBCT Access Regime provides for the appointment of the QCA as an independent dispute resolution body as well as allowing an independent expert to resolve a dispute.

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

---

<sup>88</sup> Sections 17.1 and 17.2 of the 2011 Access Undertaking.

<sup>89</sup> Section 17.3(a) of the 2011 Access Undertaking.

<sup>90</sup> Section 17.3(b) of the 2011 Access Undertaking.

<sup>91</sup> Sections 17.3(i) and 17.4 of the 2011 Access Undertaking.

## 13. 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.*

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 interests of the access seeker<sup>92</sup> and would not require an access seeker to take access on terms and conditions unacceptable to the access seeker.

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, is, 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.

### **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.

---

<sup>92</sup> Section 120(1)(c) of the QCA Act.

Where an application is successful, the Court may:

- (a) set aside the decision;
- (b) refer the matter to the decision-maker for further consideration;
- (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 in 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 approach 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 by the QCA.

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

## 14. 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.*

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. These sections reflect the clause 6(4)(i) principles.

### **Matters to be considered by authority in making an access determination**

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

- (a) the object of Part 5;
- (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 authority may take into account any other matters relating to the matters mentioned in subsection (1) it considers are appropriate.

### **Factors affecting approval of draft access undertaking**

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;
- (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; and
- (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 facility<sup>93</sup>; 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<sup>94</sup>.

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**

<b>Clause 6 Principle</b>	<b>Access Determination (s.120)</b>	<b>Access Undertaking (s.138(2))</b>
6(4)(i)(i) – Owner’s legitimate interests	120(1)(b)	138(2)(b)
6(4)(i)(ii) – costs to owner of providing access	120(1)(f)	138(2)(b), 138(2)(h), 168A and the pricing arrangements in Section 11 of the 2011 Access Undertaking

<sup>93</sup> Section 137(2)(h) of the QCA Act.

<sup>94</sup> Section 137(2)(i) of the QCA Act.

6(4)(i)(iii) – value to the owner of additional investment	120(1)(g)	138(2)(h), 137(2)(i), 69E and 168A
6(4)(i)(iv) – interests of users with contracts	120(1)(c)	138(2)(e)
6(4)(i)(v) – firm and binding contractual obligations	119(2)(a) and 120(1)(b) and (c)	138(2)(e)
6(4)(i)(vi) – safe operation	120(1)(i)	137(2)(h)
6(4)(i)(vii) – economically efficient operation of the facility	120(1)(j) and 69E	69E, 168A and Access Undertaking
6(4)(i)(viii) – public benefit in competition	120(1)(d) and 69E	138(2)(d) and 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 conditions to be set by the QCA where agreement cannot be reached in a fair and timely manner. 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.

## 15. 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 to determine, subject to the clause 6(4)(j) criteria, whether the owner should be required to extend or permit extension of the facility<sup>95</sup>.

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. The QCA may only make this access determination if either:

- (a) the determination is consistent with a commitment made by an access provider voluntarily in an approved access undertaking and the QCA is satisfied that the extension will be technically and economically feasible, consistent with the safe and reliable operation of the facility and the legitimate business interests of the owner/operator of the facility are protected<sup>96</sup>; or
- (b) 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

---

<sup>95</sup> NCC Guidelines at [3.176].

<sup>96</sup> Sections 119 (4) – 119(4B) of the QCA Act.

legitimate business interests of the owner are protected and that the access provider does not pay the cost of extending the facility<sup>97</sup>.

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 2011 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<sup>98</sup>. This is consistent with the Port Services Agreement which requires that the 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 Port Services Agreement to undertake expansions and developments in accordance with a master planning process. This requires that DBCT prepare a Master Plan setting out future expansion paths in consultation with a range of stakeholders including DBCT Pty Ltd, terminal users, and the rail operator providing rail transport services delivering coal to DBCT. The Master Plan and terminal expansion framework set out in Section 12 of the 2011 Access Undertaking provide for the timely approval of expansion proposals by the QCA and ensure terminal developments and expansions are logical and efficient.

---

<sup>97</sup> Section 119(5) of the QCA Act.

<sup>98</sup> Section 12 of the 2011 Access Undertaking.

## **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.

## 16. 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 of circumstances. The NCC Guidelines state that the NCC is reluctant to interpret this clause in a way that would compromise the certainty of contractual arrangements<sup>99</sup>.

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<sup>100</sup>;
- (b) an access determination may be varied or revoked where there is a material change of circumstances<sup>101</sup>;
- (c) the Access Undertaking may be amended with the approval of the QCA to deal with a material change in circumstances<sup>102</sup>; and
- (d) the Standard Access Agreement contains the usual terms such as force majeure to deal with some material changes in circumstances.

### 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.

---

<sup>99</sup> NCC Guidelines at [3.181-3.182].

<sup>100</sup> Part 5, Division 2, Subdivision 5 of the QCA Act.

<sup>101</sup> Part 5, Division 5, Subdivision 4 of the QCA Act.

<sup>102</sup> Part 5, Division 7, Subdivision 2 of the QCA Act.

## 17. 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 the NCC does not consider that clause 6(4)(l) means that an access regime need allow a dispute resolution body to impede existing rights. However, where the dispute resolution body has the power to impede existing rights it must also be empowered to consider and, if appropriate, determine compensation<sup>103</sup>.

There are a number of protections for existing users in the DBCT Access Regime, including:

- (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 when assessing the interests of persons who may seek access to the service; 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 is impeded.

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

---

<sup>103</sup> NCC Guidelines at [3.186].



## 18. 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 prohibit conduct for the purpose of hindering access.

This principle is enshrined in section 104(1) of the QCA Act which prohibits an access provider from engaging in conduct for the purposes of preventing or hindering access to a declared service.

Although DBCT Management is not currently a vertically or horizontally integrated entity, the QCA Act 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 specifically deals with the issue of vertical and horizontal integration and 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 very 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:

- (a) the fees, tariffs or other payments to be made for access to the declared service by the access provider and the competitor; and
- (a) 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 to access agreements are replicated in section 125 of the QCA Act in respect of access determinations.

Sections 104 and 125(4) 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 proposed to provide access to the declared service to itself or a related entity. The 2011 Access Undertaking includes a commitment by DBCT Management to advise the QCA and make necessary amendments to its undertaking if it acquires interests in markets upstream or downstream to the declared services in the future<sup>104</sup>.

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

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

## **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

---

<sup>104</sup> Section 9 of the 2011 Access Undertaking.

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.

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<sup>105</sup>.

## **Summary**

The DBCT Access Regime prohibits conduct hindering access and has 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.

---

<sup>105</sup> Section 153(3) of the QCA Act.

## 19. 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.*

Part 5, Division 9 of the QCA Act sets out the regime to be applied in respect of 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 relating 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<sup>106</sup>.

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 provider<sup>107</sup> and the access provider must keep books of account and other records in accordance with the cost allocation manual<sup>108</sup>. 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.

The 2011 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 basis<sup>109</sup>:

- (a) asset base details;

---

<sup>106</sup> Section 163(4) of the QCA Act.

<sup>107</sup> Section 161 of the QCA Act.

<sup>108</sup> Section 162 of the QCA Act.

<sup>109</sup> Section 10.1 of the 2011 Access Undertaking.

- (b) indexation of asset base;
- (c) depreciation;
- (d) corporate overheads;
- (e) new assets (capital expenditure);
- (f) disposals;
- (g) operating and maintenance costs; and
- (h) explanation of significant variances in actual and forecast costs.

## **Ring fencing**

Section 137(2)(ea) provides that an access undertaking may include details of the arrangements to be made by the owner or operator to separate the owner's, 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. For this reason, the 2011 Access Undertaking does not include ringfencing arrangements. As previously noted, the 2011 Access Undertaking includes a requirement that DBCT Management must notify the QCA if it acquires interests in markets upstream or downstream from the declared service and will, if required by the QCA, prepare a draft amending access undertaking in accordance with the QCA Act setting out its obligations in relation to ringfencing<sup>110</sup>. For example, the amendments to the undertaking could include measures that:

- (a) protect confidential information disclosed by an access seeker to the access provider from improper use and disclosure to affiliated bodies; and
- (b) establish staffing arrangements between the access provider and affiliated bodies that avoid conflicts of interest.

---

<sup>110</sup> Section 9 of the 2011 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.

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

## 20. 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 states 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<sup>111</sup>.

### **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<sup>112</sup>. 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<sup>113</sup>.

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

---

<sup>111</sup> NCC Guidelines at [3.198].

<sup>112</sup> Section 181 of the QCA Act.

<sup>113</sup> Sections 183-184 of the QCA Act.

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, then 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 listed in section 187(3). Persons listed under this subsection include, for example, the Ministers 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<sup>114</sup>.

Penalties of up to 1,000 penalty units or 1 year's imprisonment apply for failures to produce information without a reasonable excuse<sup>115</sup>.

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

---

<sup>114</sup> Section 206 of the QCA Act.

<sup>115</sup> Sections 202, 203 and 205 of the QCA Act.



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 2011 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<sup>116</sup>.

## **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.

---

<sup>116</sup> Section 7 of the 2011 Access Undertaking.

## 21. 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 DBCT Access Regime satisfies this clause through section 69E of the QCA Act, which establishes the object of Part 5 of the QCA Act as:

*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 reflects the objects clause as required by clause 6(5)(a).

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

## 22. 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 pricing principles are set out in section 168A of the QCA Act, 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 provider<sup>117</sup> to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate<sup>118</sup> of the access provider, except to the extent the cost of providing access to other operators is higher; and
- (d) provide incentives to reduce costs or otherwise improve productivity.

---

<sup>117</sup> 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.

<sup>118</sup> 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 the Corporations Act, section 50 or another entity that is a subsidiary of the other body corporate under the *Government Owned Corporations Act 1993*, section 3.

The QCA must consider these principles when it makes an access determination<sup>119</sup> and when it approves access undertakings for declared services<sup>120</sup>.

## **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) principle.

---

<sup>119</sup> Section 120(1)(l) of the QCA Act.

<sup>120</sup> Section 138(2)(g) of the QCA Act.

## 23. Clause 6(5)(c): merits reviews 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 regime and therefore compliance with clause 6(5)(c) is unnecessary.

## **24. The Objects of Part IIIA**

Section 44M(4)(aa) of the TPA provides that the Council must have regard to the objects of Part IIIA of the TPA 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) and the corresponding principle found in Clause 6(5)(a) of the CPA. As outlined above, in Chapter 21 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 the TPA of providing a framework and guiding principles to encourage a consistent approach to access regulation in section 44AA(b) of the TPA.

The object contained in section 44AA(b) of the TPA is achieved through the structure of the TPA 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 objects 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 TPA.

## 25. Abbreviations

Abbreviation	Description
ACCC	Australian Competition and Consumer Commission
Council	National Competition Council
Clause 6 Principles	The principles set out in clauses 6(2)-6(5) of the Competition Principles Agreement (as amended to 13 April 2007).
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 4 of the Application.
DBCT Management	DBCT Management Pty Limited.
DBCT Pty Ltd	Dalrymple Bay Coal Terminal Pty Ltd
IAP	Means Indicative Access Proposal as defined in the 2011 Access Undertaking.
National Access Regime	The access regime set out in Part IIIA of the TPA
NCC Guidelines	National Competition Council 2009: <i>Certification of State and Territory Access Regimes: A Guide to Certification under Part IIIA of the Trade Practices Act</i> , Melbourne
Part IIIA	Part IIIA of the TPA
Penalty Unit	\$100.00
QCA	Queensland Competition Authority
QCA Act	<i>Queensland Competition Authority Act 1997 (Qld)</i>
QCA Regulation	<i>Queensland Competition Authority Regulation 2007 (Qld)</i>
Reference Tariffs	Means "reference tariffs" as that term is defined in the 2011 Access Undertaking



Standard Access Agreement	An access agreement approved by the QCA under the 2011 Access Undertaking
Terminal Regulations	Rules in force from time to time governing procedures for the operation of the Dalrymple Bay Coal Terminal and provision of the services under an Access Agreement.
TIA	<i>Transport Infrastructure Act 1994 (Qld)</i>
TOMSA	<i>Transport Operations (Marine Safety) Act 1994 (Qld)</i>
TPA	<i>Trade Practices Act 1974 (Cth)</i>
TPA Regulations	<i>Trade Practices Regulations 1974 (Cth)</i>
Tribunal	Australian Competition Tribunal
WACC	Weighted Average Cost of Capital
2006 Access Undertaking	DBCT Management's 2006 Access Undertaking which has been approved by the QCA and expires on 31 December 2010.
2011 Access Undertaking	DBCT Management's 2011 Access Undertaking approved by the QCA on 23 September 2010 and scheduled to commence on 1 January 2011.