Dalrymple Bay Coal Terminal User Group

1 Executive Summary

On 9 May 2018, DBCT Management Pty Ltd (***DBCTM***) lodged the 2018 Modification Draft Amending Access Undertaking (the ***2018 Modification DAAU***), which seeks to make several amendments to the DBCT 2017 Access Undertaking (***2017 AU***).

The DBCT User Group notes that the changes addressed in DBCTM's letter to the QCA (dated 9 May 2018) principally reference the proposed amendments to sections 3.2 and 3.3 in relation the role of the Operator and the OMC, and the definition of Supply Chain Business, while indicating that the proposed amendments (which go beyond those matters) are in 'full compliance' with the Draft Decision.

It appears to the DBCT User Group that the further changes marked-up in the 2017 AU and submitted with the 2018 Modification DAAU (that is, everything except for the proposed changes to sections 3.2 and 3.3 and the definition of Supply Change Business) appear to have been settled with the DBCT User Group and/or the Queensland Competition Authority (***QCA***) during the 2017 Modification Draft Amending Access Undertaking (***2017 Modification DAAU***) process.

Accordingly, with one exception regarding the queuing provisions noted below where there has been a change in circumstances, the DBCT User Group does not propose to deal in this submission with those changes which the DBCT User Group has previously indicated it would support.

For the reasons noted in this submission, the DBCT User Group continues to consider that it is not appropriate for the QCA to approve the 2018 Modification DAAU.

2 Inappropriateness of ongoing attempts to modify previously opposed provisions

In comparing the amendments for both sections 3.2 and 3.3 and the definition of Supply Chain Business as they were formerly proposed under the 2017 Modification DAAU with the current proposal under the 2018 Modification DAAU – there is no change at all.

DBCTM has not provided any new material in support of the proposed changes and simply attempts to reargue old issues on the basis of information that was already available to the QCA and the DBCT User Group at the time of addressing the 2017 Modification DAAU.

The DBCT User Group remains unconvinced of the merits of those changes - which can only be being sought by DBCTM because they provide it with greater comfort that it will have a basis in the future for asserting that the QCA has already effectively accepted that it will be appropriate, at least in some circumstances.

It remains inappropriate for the QCA to accept something that implicitly suggests that the QCA has a pre-determined view on such matters (particularly when DBCTM themselves admit that they consider the changes do not change the substantive impact of the clauses in question).

3 Operator and the OMC

The DBCT User Group continue to consider the proposed changes to sections 3.2 and 3.3 are unnecessary and do not alter the substantive application of those sections 3 in any way.

DBCTM has relied upon the contents of its letter to the QCA on 22 December 2016 to elaborate the reasoning for the requested amendments to sections 3.2 and 3.3. That letter, in essence, specifies that it is against DBCTM's legitimate business interests to prevent it from contracting an operator other than Dalrymple Bay Coal Terminal Pty Ltd (***DBCTPL***).

That is only one of the factors the QCA must take into account in considering whether amendments are appropriate. In terms of other factors, the DBCT User Group particularly notes

DBCTM's 2018 Modification DAAU letter, in which DBCTM acknowledges that a user-owned operator is important to the DBCT User Group.

The DBCT User Group considers it clear that the current form of sections 3.2 and 3.3 is precisely why DBCTM 'has not sought to make any change to the operator to date, as those sections limit DBCTM from doing so. Furthermore, the reasoning in DBCTM's letter of 22 December 2016 highlights that the changes would create the apparently much coveted discretion to change the operator such that if the amendments were to be accepted, it appears DBCTM may look for future opportunities to change the operator in spite of the commentary provided to justify the current change in wording.

As such, the DBCT User Group considers that the lack of evident issues with the existing wording and that retaining the existing wording does not prevent DBCTM from submitting a draft amending access undertaking to the QCA if it wishes to change the operator – with the QCA then having a proper opportunity to assess whether such a change is appropriate at the time when the change is proposed – indicates that the proposed amendments should be refused.

Irrespective of the QCA's decision on these amendments, the DBCT User Group considers it critical that any QCA decision explicitly expresses that it does not accept that it would cease to be appropriate for DBCTPL to remain the operator, or the Operations and Maintenance Contractor (***OMC***) beyond the term of the 2017 AU.

4 Definition of Supply Chain Business

The DBCT User Group also maintains its position in respect of the amendments to the definition of Supply Chain Business, which the DBCT User Group continues to consider would narrow the definition inappropriately.

DBCTM argues in its letter dated 9 May 2018 that *'competition regulation in Australia provides robust mechanisms to protect all stakeholders in any market from anti-competitive practices by participants in that market'.*

The first example DBCTM goes on to provide in respect of this competition regulation is the existing wording of section 9.1(a) of the 2017 AU (which prevents DBCTM and its related bodies corporate from owning or operating a supply chain business (other than a trading supply chain business) in any market that is related to or uses DBCT). DBCTM also cites the jurisdiction of the QCA under the QCA Act and the jurisdiction of the ACCC to regulate anti-competitive conduct arising from vertical integration.

The fact that it is theoretically possible that the ACCC may subsequently take action to prevent anti-competitive conduct does not make it appropriate to remove protections against anti-competitive conduct from an access undertaking. If that was true, merger control for example would not be a needed part of competition law. However, once of the key principles in economic and competition regulation is that prevention by not allowing anti-competitive market structures to develop is often better than seeking to cure (even assuming anti-competitive conduct is detected).

The DBCT User Group does not consider that DBCTM has bolstered its argument in favour of the amendments at all, and if anything, has reiterated that the existing drafting of the 2017 AU is providing the exact type of competitive regulation it is designed to provide.

The DBCT User Group maintains that it is important for the definition of Supply Chain Business to be defined more broadly than those businesses that may ultimately cause competition issues or required changes to the 2017 AU.

As has been addressed in previous submissions, to the extent that a new Supply Chain Business is acquired which is not problematic, that will result in an swift draft amending access undertaking

process which will not be objected to by stakeholders and will be easy for the QCA to consider and approve quickly, such that the risk of a broader definition is a minor administrative process cost.

On the other hand, if the definition becomes unduly narrow (and for example a Supply Chain Business is acquired by DBCTM that does not currently operate in the coal supply chain but then commences to do so post-acquisition in a substantial way) there will be no way to amend the 2017 AU to resolve the problems which arise from that vertical integration. Even in circumstances where the QCA or ACCC did become interested in such an acquisition from a regulatory perspective it is possible such interest may arise only after the damage of vertical integration had been caused, with no recourse against, or ability to unwind, attributable losses.

Accordingly, the DBCT User Group considers that the existing definition of Supply Chain Business should remain unaltered, and is consistent with the competitive regulation spruiked by DBCTM in the 2018 Modification DAAU.

5 Changes to Queuing / Notifying Access Seeker provisions

The DBCT User Group has previously supported the proposed amendments to the queuing / notifying access seeker provisions which are reflected in the Modification DAAU.

However, since the previous submissions provided by the User Group, the DBCT User Group understands that:

(a) one or more access seekers have given an indication to progress negotiations under clause 5.7(a); and

(b) DBCTM has contacted access seekers in the queue about having received a notice which triggers the notifying access seeker provisions (based on an email sent on 24 May 2018).

In that context, the DBCT User Group suggests consideration now needs to be given to the appropriateness of the amendment to clause 5.7(a)(6) (and consequential references to it), given the impact the amendment will have on individual access seekers. In particular, without transitional provisions, it will result in the cessation of negotiations with an access seeker who has received an indicative access proposal as the first in the queue (under clause 5.4(a)) who has subsequently given a notice to commence negotiations under the existing queuing provisions on the understanding that they will have 6 months to negotiate access with access to commence in the time frame reflected in their access application (rather than the shortened 3 month period and priority being based on earliest commencement date which is a product of the notifying access seeker provisions).

The DBCT User Group notes this is a transitional issue, and more broadly remains aligned with clarifying the operation of the queue (consistent with all of the other clarifications to the queuing provisions the DBCT User Group has supported).