NORTH QUEENSLAND EXPORT TERMINAL

9 November 2025

Ravi Prasad and Paul Gold
Queensland Competition Authority
Level 27, 145 Ann Street
BRISBANE QLD 4000

Dear Ravi and Paul

Re: Application for Declaration of coal handling service at the North Queensland Export Terminal – NQXT response to QCoal further submissions

I refer to the QCoal Users' further submission dated 21 October 2025 (**Further QCoal Submissions**) and the further expert report of Mr Houston of the same date (**Further Houston Report**).

NQXT recognises that there is no formal process for further submissions. However, the materials filed by QCoal include a number of material factual and legal errors. Given the importance of this process, and the limited timeframes involved, we wished to bring these concerns promptly to the QCA's attention to ensure that any draft recommendation did not incorporate them.

In summary, we set out in **Annexure A** to this letter a short supplementary submission that addresses the following:

1. **QCoal's submission is wrong to submit that it does not bear an onus to demonstrate that the declaration criteria are satisfied**. QCoal appears to suggest that it need not, and appears to accept it cannot, demonstrate that the declaration criteria are satisfied. While evidently, as an administrative decision, the formal legal onus applicable in judicial processes does not apply to a declaration decision. However, the administrative decision required to be made by the QCA (and the Minister) under section 76 requires both to be positively *satisfied* that the criteria have been met. This is the standard or practical onus that QCoal must meet.

2. **QCoal's application of criterion (a) is legally unsound**. QCoal submits that it need not show that there would be any difference in the terms of access as a result of declaration. QCoal's interpretation of criterion (a) is that may be satisfied "*even if the terms of access are substantively similar or the same*" in a future with and without declaration. This interpretation is clearly incorrect. If the QCA were to adopt this interpretation of criterion (a), it would fall into legal error.

3. **QCoal's approach to criterion (b) is also legally unsound**. QCoal criticises NQXT's approach to market definition on the basis that it is "*driven by an overreliance on a colloquial description of the criterion (b) test as a "natural monopoly" test*". This criticism reflects a misunderstanding of what is required by criterion (b). The purpose of criterion (b) clearly ***is*** to determine whether NQXT is a natural monopoly, and the approach to market definition ***must*** be aligned with this purpose. QCoal's approach to market definition – which is focused exclusively on identifying a set of 'captive' customers rather than assessing the size of the market for NQXT's service – is divorced from the statutory purpose. The QCA could not accept the interpretation of the naturally monopoly test as contended for by QCoal.

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4. **QCoal's definition of the market is based on an unorthodox and inappropriate application of the SSNIP test.** QCoal and Mr Houston claim that their approach to market definition is an orthodox application of the SSNIP test, while the CEG methodology is unconventional. In fact the opposite is true. It is Mr Houston's approach that is unorthodox and inapt for defining the relevant market for the purposes of criterion (b). The approach taken by Mr Houston cannot be properly described as a credible SSNIP analysis and could not be relied upon as such.

5. **QCoal misconstrues Her Honour's judgement in *NSW Ports***. Contrary to what is suggested by QCoal's submission, Her Honour did not criticise the Hotelling framework as a tool to aid market definition. In *NSW Ports*, the question of market definition was resolved by reference to commercial reality and the purpose of the inquiry. Her Honour rejected an approach to market definition based on the SSNIP test and instead adopted a broader market definition which reflected the observed commercial reality – an approach that is clearly at odds with QCoal's position in this matter.

6. **QCoal's approach to defining the relevant market is inconsistent with the service that they have sought to be declared.** The scope of any declaration can only legally extend as far as the market within which any natural monopoly is said to exist for the purpose of criterion (b). The QCoal Users seek a recommendation for declaration by the QCA of "*Coal Handling Services at the Abbot Point Coal Export Terminal including the unloading, storing, reclaiming and loading of coal*". This suggests that QCoal anticipates that declaration would apply to ***all*** users and services at the Terminal. This cannot be the case given that they submit that the market for the "Service" is limited to the so-called captive 'northern mines', which would extend to only [redacted] of the users of the Terminal. The QCA cannot recommend declaration of the service, as requested by QCoal, if it limits any consideration of the relevant market for this service to "northern mines" only.

Enclosed with this letter at **Annexure B** is a short supplementary expert note prepared by CEG which responds to a number of submissions made by QCoal and Houston in relation market definition and criterion (b) (**CEG Further Supplementary Report**).

Unless otherwise stated, capitalised terms have the meaning given to them in our earlier submissions.

Should the QCA have any questions in relation to this submission please do not hesitate to contact me.

Yours sincerely

Mark Smith
General Manager
North Queensland Export Terminal

Annexure A – NQXT response to errors in Further QCoal Submission

1. QCoal submissions regarding legal onus

QCoal appears to accept that it cannot demonstrate that the declaration criteria are satisfied, by suggesting it does not need to.[1] QCoal explains and defends the absence of any concrete commercial evidence in support of its submission by suggesting that it does not need to prove certain factual matters that are critical to satisfaction of those criteria, including:

- that declaration would lead to different (or more reasonable) terms and conditions of access; or
- that any such difference in the terms of access would either promote competition or promote the public interest.

The Further QCoal Submission states that "*no onus rests on the QCoal Users*".[2]

This is a remarkable submission from a party seeking a recommendation for declaration. While it may be true that the QCA Act does not expressly place the onus on an applicant to demonstrate that the declaration criteria are satisfied, if an applicant does not do this then the QCA cannot safely recommend in favour of declaration. As the administrative decision maker, the QCA must be positively *satisfied* that all of the criteria have been satisfied. The QCA can only make that decision based on the evidence before it. This places a practical evidentiary and legal burden on the applicant. Drawing fine legal distinctions between this burden and the legal onus applied under judicial proceedings misses the point.

The QCoal Users consider themselves under no obligation to provide evidence and no third party has come forward with any compelling material in support of declaration. It is difficult in those circumstances to see how the QCA could reach the view that the relevant statutory criteria are satisfied.

2. QCoal's application of criterion (a) is legally unsound

QCoal submits that criterion (a):

> "*does not impose a "with and without" test whereby the QCA is to consider whether access seekers would obtain better terms in a future with declaration than without*".

QCoal instead submits that

> *"competition may be promoted, and the public interest served, even if the terms of access are substantively similar or the same*".[3]

This submission is legally wrong. The QCA would fall into legal error if it were to adopt this construction of criterion (a).

[1] QCoal Further Submissions, [34], [37], [39].
[2] QCoal Further Submissions, [39].
[3] QCoal Further Submissions, [44].

As set out in NQXT's Initial Submission, material amendments were made to criterion (a) in 2018[4] and the amendments to s 76(2)(a) of the QCA Act were intentionally aligned with those changes.[5] The amendments to criterion (a) adopted recommendations made in the Harper Review, which in turn picked up recommendations of the Productivity Commission in its review of the National Access Regime.[6]

The changes were specifically directed at focusing the inquiry on the effect of *declaration* (rather than the effect of having *access* to the service) – and specifically the effect of declaration on the terms and conditions of access to the service. It is for this reason that criterion (a) now refers to the effect of access on reasonable terms and conditions, as a result of a declaration of the service.

The Productivity Commission report which recommended this change expressly stated that:[7]

> *This amended criterion would require a comparison of the future state of competition under the status quo (including where access may already be available under the status quo) against the future state of competition where access is granted on reasonable terms and conditions through declaration.*
>
> *This competition test would not be satisfied where there is already effective competition in dependent markets.* ***It would also not be satisfied where access is already granted to all third parties on reasonable terms and conditions, as declaration would not be expected to alter the terms and conditions of access.***

Similarly, the Minister's decision in the most recent DBCT re-declaration decision expressly accepted the approach of the QCA, which contemplated a conventional counterfactual (with and without) assessment:[8]

> *I accept that the approach to assessing the service under Criterion A taken by the QCA, that is, by considering whether access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market compared to a scenario without declaration (****that is, a future with and without approach****).*

QCoal's interpretation conflicts with both the express economic intent and statutory purpose of criterion (a). Indeed, the statutory purpose of criterion (a), as explained above, is to ***prevent*** declaration in circumstances where the terms of access would be *"substantively similar or the same"*[9] in a future with and without declaration. It is also intended to prevent declaration where there is already effective competition in dependent markets, such that any change to the terms of access would not materially alter the conditions for competition in those dependent markets.

The QCoal Users have tried to sidestep the central and critical task of demonstrating that there would be a meaningful difference in the terms of access in a future world with declaration, compared to a world without declaration. They have also, separately, failed to identify any dependent market where a change to the terms of access at NQXT (if one occurred) would materially affect the conditions for competition.

In those circumstances, the QCA cannot reasonably be expected to form a view that criterion (a) is satisfied.

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[4] NQXT Initial Submission, [379]-[384].
[5] Explanatory Memorandum to the Queensland Competition Authority Amendment Bill 2018.
[6] Harper Review, pp 432-433, referring to the 2013 Productivity Commission Review of the National Access Regime.
[7] PC Report, p 249.
[8] Statement Of Reasons Concerning The Declaration Of The Handling Of Coal At Dalrymple Bay Coal Terminal By The Terminal Operator, 1 July 2020, [4.5.1].
[9] QCoal Further Submissions, [44].

3. QCoal's approach to criterion (b) is legally unsound

The QCoal Users criticise NQXT's approach to market definition on the basis that it is "*driven by an overreliance on a colloquial description of the criterion (b) test as a "natural monopoly" test*".[10]

The history of criterion (b) makes abundantly clear that the current formulation is intended to be a "natural monopoly" test. This is not a 'colloquial' term. It is a term of art that has a long history in the development of Part IIIA and one which is well understood. Any submission to the contrary fundamentally misunderstands the legislative intention. Indeed, the Further QCoal Submissions refer extensively to the secondary materials which make clear that criterion (b) is, and is intended to be, a natural monopoly test.[11]

Without repeating the full chequered history of criterion (b), the QCA will be aware that:

- In the early 2000s, in relation to an earlier formulation of the criterion, there were three competing approaches to criterion (b). A "net social benefit test", a "natural monopoly test" and a "private profitability test".

- The High Court in the long running *Fortescue* dispute ultimately endorsed the private profitability test. Simply, this test focused upon whether it would be privately profitable for another facility operator to construct a second facility that could absorb all or part of market demand.

- The private profitability test was squarely rejected by the Productivity Commission in their 2013 Review of the National Access Regime.[12] In its place, the Productivity Commission recommended a varied form of natural monopoly test.[13]

- The criterion was subsequently amended to implement the Productivity Commission's recommendation and the statutory language can therefore be seen to give effect to a natural monopoly test, as proposed.[14]

The QCoal Users' criticism of NQXT and CEG's approach to market defining as being driven by a characterisation of criterion (b) as a natural monopoly test is misplaced and, if anything, supports the NQXT position. Criterion (b) clearly ***is*** and is required to be applied as a natural monopoly test.

The QCoal Users' focus on "captive northern mines" misses the point

Rather than seeking to identify the market for NQXT's service for the purposes of assessing whether NQXT is a natural monopoly, the QCoal Users and Mr Houston undertake an altogether different exercise, which is to analyse whether certain mines currently served by NQXT could (or would) switch to DBCT. The purpose of the analysis appears to be to demonstrate that certain NQXT users are effectively "captive".[15]

At a factual level, it seems implausible that mines in the Newlands System ***could not*** access DBCT. Given that there are coal trains regularly running north from the Goonyella System to NQXT and then returning south to those mines, it is clearly feasible trains to carry coal from Newlands mines to DBCT. Indeed, Mr

[10] QCoal Further Submissions, [78(a)].
[11] QCoal Further Submissions, [69].
[12] Productivity Commission Inquiry Final Report, National Access Regime, No. 66, 25 October 2013, see page 19.
[13] At page 160.
[14] Competition and Consumer Amendment (Competition Policy Review) Bill 2017 Explanatory Memorandum, [12.22]. As noted above, the amendments to the QCA Act criteria were expressly intended to align with the changes to the CCA criteria: Explanatory Memorandum to the Queensland Competition Authority Amendment Bill 2018.
[15] QCoal Further Submissions, [11], [26], [76].

Moore's evidence demonstrates that [redacted][16]

Moreover, to the extent that Mr Moore's argument refers to the cost of switching to DBCT, and the relative below rail costs of hauling south, his evidence is also unreliable. This submission is entirely based on [redacted]. No explanation is provided for why this approach is adopted, which is an entirely false and inappropriate basis to seek to use to support the cost of permanently switching all of QCoal's capacity to DBCT – something that would necessarily be done under a long-term, standard take or pay contract at regulated tariffs. Mr Moore's cost data is clearly cherry picked and could not be safely relied upon.

However putting this factual issue to one side, it is unclear how it is relevant to determining the size of the market for NQXT's service. At best, it may be of some relevance to a question of whether Newlands System users are within the market for ***DBCT's*** coal handling service. It is irrelevant to the question of whether the market for ***NQXT's*** service includes users in the Goonyella System, which is the question at hand.

Mr Houston's analysis is similarly focused on whether northern mines would be likely to switch away from NQXT to DBCT. Again, this provides no relevant information as to the size of the market for NQXT's service. At best, his work merely confirms that the market for NQXT's service ***includes*** the northern mines – a fact that is not in dispute. However. Mr Houston's analysis says nothing about the ability or willingness of users in the Goonyella System to use NQXT.

In short, QCoal and Houston both ask the wrong question because they are focused on whether customers that use NQXT would use DBCT and not the relevant question, which is whether current or potential customers of DBCT (in the Goonyella System) would use NQXT. If that is the case, then NQXT cannot be a natural monopoly asset.

By contrast, CEG defines the market in a way that allows for a proper assessment of total foreseeable demand for *NQXT's coal handling service*. This takes into account all mines that could economically be served *by NQXT*. This will include mines that are currently served by DBCT or other terminals or that may prefer to use DBCT or other terminals if there was capacity available, as well as mines that currently use NQXT. This is consistent with the intent of criterion (b) to include demand for substitute services as well as demand for use of the facility itself.[17]

The CEG Further Supplementary Report demonstrates that Mr Houston has estimated ***firm-specific*** demand rather than ***market demand***. CEG explains the difference as follows:[18]

> *Mr Houston explicitly identifies that there are alternative / substitute services that are influencing demand for NQXT's service and removes the share of the overall demand that would flow to these alternatives.*
>
> *The difference between Mr Houston and our approach is simple. Our estimate of market demand includes demand for those alternative / substitute services, whereas Houston excludes demand for those substitute / alternative services.*
>
> *In doing so, Mr Houston defines a narrower demand curve which is the demand for the firm in question (NQXT, neighbourhood Italian restaurant etc) given the existence of competitors (other*

[16] Statement of David Moore dated 20 October 2025, [10], [15].
[17] Competition and Consumer Amendment (Competition Policy Review) Bill 2017 Explanatory Memorandum, [12.23]; PC Report, p 167.
[18] CEG Further Supplementary Report, [12]-[14].

> *coal expert terminals, other neighbourhood restaurants etc) who are offering a differentiated service (e.g., by location and/or other attributes (e.g., cuisine style)).*

CEG notes that on Mr Houston's methodology, a local restaurant could satisfy the natural monopoly test.[19]

The CEG approach is clearly what is required for the purposes of criterion (b), while adopting the Houston approach would lead the QCA into error. Criterion (b) plainly requires an estimate of "***total*** *foreseeable demand in the* ***market***"[20], including demand for alternative or substitute services.

It is not explained how current NQXT customers can be outside the market for NQXT's coal handling service

The QCoal Users accept that "*if a mine is situated on the Goonyella rail line, its operator has the choice of railing its coal either to NQXT or DBCT (assuming it can obtain access at DBCT*".[21] Given that Goonyella mines can and do use NQXT, the basis for the exclusion from the relevant market is unclear.

The only attempt to explain this appears at paragraph 87 of the QCoal Further Submissions, which states:

> *Although four mines outside the identified market use the Terminal, if (as Mr Houston concludes and the QCA previously accepted) those mines would (in the absence of existing contracts) seek to use of NQXT's coal handling service in response to price or quality incentives, the market is correctly defined to exclude these.*

This is irrational and wrongly applies the statutory test in criterion (b). A customer cannot cease to be in the market for NQXT's service the moment it switches to another facility in response to a price or quality incentive. Again, this confuses the estimation of *firm-level demand* with the estimation of *market demand*.

The Hotelling model is an orthodox and well-accepted economic tool and has been applied by CEG in a conventional manner

The QCoal Users and Mr Houston criticise CEG's use of the Hotelling model, referring to it as "unorthodox" and "contrary to the principles which must be applied".[22]

The Hotelling model is a conventional and well-accepted tool in industrial organization, modelling how firms compete when consumers are distributed across a spatial or preference dimension. It is not contrary to any legal or economic principle. CEG notes that since its development nearly a century ago, it has been one of the foundational frameworks in industrial organisation for analysing competition between firms offering differentiated products.[23]

Contrary to the Further QCoal Submissions, CEG's application of the Hotelling model does not ignore or exclude considerations of substitutability. On the contrary, the Hotelling model provides a better and more robust framework for understanding and analysing substitutability in markets where customers are spatially distributed. CEG's primary report demonstrates how the Hotelling framework can explain varying degrees of substitutability depending on a customer's location or preferences.

[19] CEG Further Supplementary Report, [18]-[20].
[20] QCA Act, s 76(2)(b).
[21] QCoal Further Submissions, [22].
[22] QCoal Further Submissions, [77].
[23] CEG Further Supplementary Report, section 5.

4. QCoal's approach to market definition

The QCoal Users and Mr Houston claim that their approach to market definition involves an orthodox application of the SSNIP test, while the CEG methodology is described an "unconventional".

The CEG Further Supplementary Report demonstrates that in fact the opposite is true. CEG demonstrates that Mr Houston's approach does not involve an orthodox application of the SSNIP test at all. CEG shows that an orthodox application of the hypothetical monopolist SSNIP test supports a conclusion that NQXT and DBCT are in the same market.[24]

5. QCoal's submissions regarding *NSW Ports*

QCoal correctly observes that, in *NSW Ports*, Jagot J rejected arguments based on a SSNIP test to the effect that there would be separate markets for container terminal services within NSW.[25] The SSNIP test had indicated that, if a container terminal were to be developed at Newcastle, it would not be a close substitute for Port Botany (i.e. there would be negligible substitution in response to a SSNIP at either terminal).[26] As correctly acknowledged by QCoal, this argument based on the SSNIP test was rejected by Jagot J because it did not accord with commercial reality.

This is precisely the point that NQXT seeks to draw from Her Honour's judgement in *NSW Ports*: the exercise of market definition should not be driven by results of narrowly focused SSNIP tests in circumstances where this would be at odds with commercial reality. Market definition needs to be purposive and accord with the observed commercial reality. In the present case, the SSNIP analysis conducted by Mr Houston leads him to a conclusion that is entirely at odds with the observed commercial reality. An alternative framework is therefore needed to understand the economics of the market in which NQXT operates.

NQXT does not suggest that the Hotelling model was applied to define the market in *NSW Ports*. Instead, Her Honour simply relied on the observed commercial reality to define a NSW-wide market for container terminal services. Adopting this approach in the present case would clearly align with NQXT's position, not the approach adopted by the QCoal Users and Mr Houston.

However we would observe that the reference to Hotelling in *NSW Ports* referred to in the QCoal Further Submissions has been misread because it is taken from its context. There are in fact two references to Hotelling in *NSW Ports*:

- In the section of Her Honour's judgement addressing market definition, the Hotelling model is referred to with apparent approval as a tool for understanding spatial economies and the role of transport costs.[27] The QCoal Further Submissions omit this reference.

- The passage referred to in the QCoal Further Submissions appears at the end of Her Honour's judgement, in a section containing various criticisms of evidence given by the ACCC's expert, Mr Patrick Smith. The quoted passage is unrelated to the issue of market definition. It is referring to a stylised example that had been used by Mr Smith, based on the Hotelling framework, in an attempt to demonstrate the likely effect of the impugned contractual provisions on pricing behaviour. Her Honour considered that in circumstances where each terminal would offer differentiated services and customer demand was not homogeneous (particularly as between import and export customers), Mr Smith's framework could not provide an accurate indication of the price effects of the impugned

[24] CEG Further Supplementary Report, section 3.1.
[25] QCoal Further Submissions, [60].
[26] *ACCC v NSW Ports* [2021] FCA 720, [474].
[27] *ACCC v NSW Ports* [2021] FCA 720, [748].

contractual provisions. This passage says nothing about the utility of the Hotelling model more broadly or in the context of market definition.

No inconsistency between Ockerby evidence in NSW Ports and present case

QCoal's criticism of CEG for apparent inconsistency with evidence given in *NSW Ports* is also misplaced.

Mr Ockerby's evidence in *NSW Ports* related to whether the *container terminal at Port Botany* (as the only container terminal in NSW) displayed natural monopoly characteristics. This was relevant to a key factual issue in that matter – i.e. whether it would be economically viable to build a second and new container terminal at the Port of Newcastle.

Mr Ockerby clearly was not giving evidence as to whether NQXT or any other Queensland coal terminal displays natural monopoly characteristics. Indeed, in Mr Ockerby's written evidence in that matter he explained the difference between this case of a single supplier and situations where there are multiple facilities (as is the case here). He specifically explained that applying criterion (b) to the case where there are multiple existing facilities would be different to the case where there is only one facility. He explained that where there are multiple facilities that at least some shippers regard as close substitutes, this would imply that a single facility is not a natural monopoly.[28]

Mr Ockerby's evidence in NSW Ports is entirely consistent with his considered view in this case that it cannot be the case that NQXT is a natural monopoly in circumstances where there are some users that see NQXT and DBCT as actual or potential substitutes.

QCoal Users seek declaration of a Service broader than the market for the Service

As noted above, and in earlier submissions, NQXT strongly rejects any suggestion that there is a distinct market for NQXT services supplied to "Northern Mines". This confuses demand for NQXT with demand within the relevant market, which must extend to other users and potential users of the service including in current and potential users in the Goonyella System. The approach proposed by the QCoal Users also does not align with the defined service for which they see declaration, which is said to be:

> *Coal Handling Services at the Abbot Point Coal Export Terminal including the unloading, storing, reclaiming and loading of coal*".

This service does not appear to be limited to services supplied to mines or users within the relevantly limited geographic area now claimed by the QCoal Users.

Evidently, the scope of declaration cannot extend beyond the extent to which the statutory criteria are satisfied. For that reason, any declaration cannot extend to regulate services outside the "market" for which criterion (b) is satisfied. In this case, the QCA could not accept the market as now limited by the QCoal Users and also accept the scope of declared services, as requested.

[28] CEG Further Supplementary Report, section 6.