



# QCOAL USERS' SUBMISSIONS IN RESPONSE TO QCA'S DRAFT RECOMMENDATION

Declaration of a service sought for the coal  
handling services at the North Queensland  
Export Terminal facility at Abbot Point

## 1 Overview

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- 1 On 26 March 2026, the Queensland Competition Authority (**QCA**) issued a draft recommendation (the **Draft Recommendation**) in respect of the QCoal Users' request dated 13 June 2025 that the QCA recommend to the Treasurer that the coal handling services at the Terminal be declared a service under Part 5 of the *Queensland Competition Authority Act 1997* (Qld) (the **Act**), with a declaration date of 1 July 2027 and a declaration period of 10 years (the **QCoal Users' 13 June 2025 request**).
- 2 The Draft Recommendation found that criteria (b) and (c) of the access criteria in s 76(2) of the Act were satisfied, but not criteria (a) and (d).
- 3 The Draft Recommendation invited stakeholders to comment on the Draft Recommendation by 15 May 2026, which was later extended to 12 June 2026. These submissions are made in accordance with that invitation.
- 4 In support of this submission, the QCoal Users rely upon a further independent expert report from Greg Houston of Houston Kemp dated 12 June 2026 (**Further HK Report**). The Further HK Report relies upon an updated production forecast from Wood Mackenzie dated 12 June 2026.
- 5 Unless stated otherwise, this submission adopts the terms and definitions as used in the QCoal Users' 13 June 2025 request and further submissions provided on 21 October 2025 (**QCoal Further Submissions**).
- 6 Confidential Material in these submissions is marked as follows:
  - (a) Category A
  - (b) Category B
  - (c) Category C

## 2 Executive Summary

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- 7 As recorded in the Executive Summary on p 3 of the Draft Recommendation, the QCA expressed the preliminary view that:
  - (a) the Terminal can meet foreseeable demand over a declaration period of 10 years at least cost compared to 2 or more facilities, such that criterion (b) is satisfied; and
  - (b) the Terminal is significant, having regard to both its size and importance to the Queensland economy, such that criterion (c) is satisfied.
- 8 Despite finding that criterion (a) (material increase in competition) was not satisfied, the QCA expressed numerous preliminary views with which the QCoal Users agree and which support criterion (a) being satisfied, including that:
  - (a) there are markets for: (a) coal exports ([3.2.1], p 43); and (b) the later-stage exploration and development tenements for coal and a market for the supply and acquisition of operating mines in the Newlands-Galilee catchment, together described as the "**coal tenements market**" ([3.3.4], p 50);
  - (b) the coal tenements market "currently do[es] not have high levels of competition" and "may not have high levels of competition in a future without declaration" ([3.10.4], p 82);
  - (c) the coal tenements market is "in part, driven by access to the Terminal" and "[b]oth markets also involve site-specific and substantial sunk costs in developing tenements" ([3.3.4], p 50);
  - (d) "coal mines are typically long-life projects spanning beyond the 10-year term of a typical access agreement. Renewal of access agreements brings inherent uncertainty around future terms and conditions" ([3.10.2], p 80);

- (e) potential buyers from outside the coal tenements market “would be sufficiently certain of access to export facilities in other regions on reasonable terms, but less certain in relation to access on reasonable terms at the Terminal” ([3.3.4], p 52);
- (f) “coal tenements outside the catchment are unlikely to be close substitutes for tenements within the Newlands–Galilee catchment”, such that the geographic boundary of the coal tenements market should be confined to the Newlands–Galilee catchment ([3.3.4], p 52);
- (g) as a vertically integrated service provider, NQXT “will have an incentive to deny access or act in a discriminatory way (including self-preferencing or engaging in foreclosure) where the benefit from denying or restricting access for the Adani Group, as a whole, exceeds the loss of access revenue that NQXT itself might incur” ([3.4.2], p 57);
- (h) “NQXT has the ability to promote the interests of the Adani Group by favouring related entities in providing the service” through the access terms offered to Bravus compared to third parties, cost allocation, terminal operations and handling of access seeker confidential information, and that the “risk of possible future discriminatory conduct by NQXT increases risk and uncertainty for third party users compared to Adani Group entities” ([3.4.2], p 59);
- (i) the “Terminal has natural monopoly characteristics” and “there is an enduring lack of competition in the market for the coal handling service provided by the Terminal”. This is in circumstances where DBT is not a close economic substitute due to prohibitive cost of rail from the Northern Mines and Goonyella mines being unable to switch to DBT at the time of contract negotiation due to capacity constraints at DBT ([3.5.1], p 59-60);
- (j) the “[t]he terms of the legacy user agreements do not give existing northern mine users who wish to renew any significant degree of countervailing market power — they are effectively captive users of the Terminal, [REDACTED] does not provide any meaningful mitigation of NQXT’s market power” ([3.5.1], p 60);
- (k) “the ability for NQXT to discriminate in the terms and conditions offered to different users may limit the effectiveness of this constraint [countervailing market power] to users without a credible threat of switching”, such as the QCoal Users ([3.5.2], p 61);
- (l) it was not “evident that the threat of declaration has been an effective constraint on NQXT’s conduct to date, and it is therefore unlikely to impose an effective constraint on NQXT in the future without declaration” ([3.5.4], p 62);
- (m) “NQXT has no legal obligation to offer access to new access seekers - it can outright refuse to negotiate and provide access”, as well as offering “‘take it or leave it’ terms of access”. This means that “new access seekers that are seeking to develop tenements have no certainty that they will have any ability to negotiate access or the terms of that access” ([3.6.1], p 65);
- (n) the combination of the fact that some users, such as the QCoal Users, have no “ability to switch terminals” and the “information asymmetry that exists between NQXT and third parties” means that in the absence of a declaration, “third party access seekers are therefore at a disadvantage in the negotiation process” ([3.6.1], p 65);
- (o) the imbalance in negotiation power and control without declaration is exacerbated by access seekers having “no recourse to dispute resolution over the terms of access should the parties be unable to reach agreement, either for renewing users or new access seekers” ([3.6.1], p 65);
- (p) “declaration aids and facilitates effective negotiation, thereby potentially reducing the scope for disputes” ([5.4.1], p 95);
- (q) NQXT “faces relatively limited constraint on its ability to exercise market power in setting prices as demand elasticity of the service is likely to be quite low” ([3.6.1], p 67) and enforcement tools, such as the threat of liability under s 46 of the CCA, are

not an effective mechanism for ensuring access on reasonable terms ([3.5.3], p 63); and

- (r) a number of the terms of the new standard agreement, such as contract renewal, termination and governance and transparency terms being offered by NQXT “may reflect the exercise of market power by NQXT if imposed on users” and “reflect an imbalance in the rights and obligations of the parties” ([3.6.1], p 67).

9 Despite those findings, the QCA’s preliminary view is that a declaration would not promote a material increase in competition in any dependent market. As summarised at p 85, this view in respect of the coal tenements market appears to be based on two central factors, namely that:

- (a) the QCA does not have sufficient evidence to suggest “that hold-up risk is a relevant consideration for participants or that specific projects in the Newlands-Galilee catchment have been abandoned, deferred or delayed as a result of a real or perceived risk of hold-up” ([3.12] p 85); and
- (b) Adani has an incentive to increase and maximise throughput in the Terminal and ultimately secure “additional contracted capacity” to maximise profit, such that it will not set terms and access charges that would prevent new entrants to the market ([3.12] p 85).

10 In respect of the coal export markets, the QCA’s preliminary view at p 43 was that “coal export markets are workably competitive and *any* restriction of access at the Terminal is unlikely to materially impact competition in these markets”.

11 While the Draft Recommendation also formed the view that criterion (d) was not satisfied, this in large part followed from the QCA’s view in respect of criterion (a). As recorded on p 3 of the Draft Recommendation, the QCA’s preliminary view was that (emphasis added) “[g]iven we are not satisfied that declaration would promote a material increase in competition in a dependent market, we are not satisfied at this time that there would be investment in facilities in dependent markets as a result of declaration” and it is “not evident that declaration would promote investment in the Terminal, given the existence of spare capacity and the apparent lack of any incentives for NQXT to deny access to the Terminal”.

12 As is addressed in more detail below, the QCoal Users submit that those views should not be adopted in the QCA’s final recommendation because: (a) they are based on an incorrect legal framework; and (b) the entirety of the evidence before the QCA, including the additional evidence provided by the QCoal Users, does not support those conclusions.

13 To the contrary, the evidence before the QCA provides a proper basis for it to conclude that:

- (a) the conditions for hold-up risk in the late-stage tenement market exist, given the QCA’s acceptance that NQXT has the capacity and incentive to exercise its market power to extract monopoly profits from users, the uncertainty as to how it will exercise that power, and its capacity for self-preferencing;
- (b) NQXT is unlikely to be incentivised to contract in a way that limits the risk of hold-up for participants in the market because it does not have an unambiguous incentive to maximise throughput and there is unlikely to be spare capacity, particularly at the end of the proposed declaration period;
- (c) in those circumstances, the hold-up risk associated with investment in the late-stage tenement market is likely to be significant, and therefore prohibitive, for all market participants in a future without declaration; and
- (d) while there is limited direct evidence of that risk affecting decisions in the market, other potential impediments to transactions such as commodity prices, regulatory approvals, operating costs, financing conditions, ESG and broader market dynamics do not render the risk of hold-up irrelevant to market participants. This is indicated by an analysis of those other potential impediments and, in particular, historical activity in the Hay Point catchment and the Newlands-Galilee catchment and Adani’s recent activity in the Newlands-Galilee catchment.

- 14 That being the case, particularly given the severity of the hold-up risk, the QCA ought to conclude that declaration is likely to result in a material improvement to the opportunities and environment for competition for both existing and new entrants to the late-stage tenement market. As such, competitive outcomes are materially more likely to occur in a future with declaration compared to a future without declaration.
- 15 The QCoal Users submit that the evidence presently before the QCA is sufficient to satisfy criterion (a). However, to the extent the QCA considers that further direct evidence is required, some of the further evidence requested concerns factual matters outside the control of the QCoal Users. Those requests for information suggest that the QCA should use its investigative powers under Part 6 of the Act, which apply by reason of s 83 of the Act, to gather the further evidence it has identified. Under those powers in Part 6, the QCA can:
- (a) require a person to attend before the QCA at a stated time and place to give evidence or produce a document at a hearing of the QCA (Div 3 of Part 6 and s 181); and
  - (b) give a written notice to any person requiring that person to give a statement setting out stated information to the QCA and/or to produce a stated document to the QCA (s 185).
- 16 The QCoal Users submit that where the QCA's Draft Recommendation on criterion (a) is premised on a lack of evidence ([3.12], p 85) which is not within the control of the QCoal Users as proponent of a declaration or other stakeholders supporting the declaration, it is incumbent on the QCA to use its investigative powers to obtain relevant evidence where possible. This includes, for example:
- (a) the questions raised by the QCA concerning the operation of the Adani Group, such as the extent to which the directors of NQXT can have regard to the interests of the broader Adani Group ([3.4.2], p 57); and
  - (b) evidence of hold-up risk being a material factor in investment decision-making (pp 76 and 84).
- 17 In relation to (a), that question can only be answered by reference to the internal workings of the Adani Group, which will be affected (but not necessarily determined by) constitutional documents solely within the possession of the Adani Group and which are not publicly available. In relation to (b), the QCoal Users are obviously not in a position to provide evidence as to the investment decision-making of other tenement holders or potential entrants to that market.
- 18 In the context of the matters set out above, the QCoal Users' response to the Draft Recommendation focuses upon criterion (a) and (d) (noting that in respect of criterion (a), issues with the methodology applied by the QCA to forecast demand for the purpose of criterion (b) are also highly material to the QCA's findings on throughput maximisation). In doing so, it will address the requests for further information, to the extent that information is within the control of the QCoal Users.
- 19 The QCoal Users continue to request that the QCA recommend that a service be declared in relation to the coal handling services at the North Queensland Export Terminal at Abbot Point for the reasons set out in their original application, their further submissions dated 21 October 2025 and these submissions.

### **3 Criterion (a) as it applies to the coal tenements market**

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- 3.1 The assessment of criterion (a) does not depend on evidence of historical "hold-up"**
- 20 The Draft Recommendation contains extensive factual findings which strongly support the conclusion that declaration of the Terminal service would promote a material increase in competition in dependent markets, particularly the coal tenements market in the Newlands-Galilee catchment.
- 21 In particular, the QCA has accepted that:
- (a) the "market for later-stage coal tenements may not be workably competitive and shows limited evidence of rivalry and competition" (p 41, see also p 74);

- (b) there is a distinct market for later-stage coal tenements in the Newlands-Galilee catchment (pp 50-54);
  - (c) the value of those tenements is “in part, driven by access to the Terminal” and that those markets involve “site specific and substantial sunk costs in developing tenements” (p 50);
  - (d) “given the uncertainty of access [to NQXT] on reasonable terms and conditions, buyers from outside of the region [Newlands-Galilee catchment] are unlikely to substitute to tenements in the catchment if prices for coal tenements fell” (p 54);
  - (e) the Terminal has “natural monopoly characteristics” and there is an “enduring lack of competition in the market for the coal handling service” (p 59);
  - (f) the northern mines, including those operated by QCoal, do not possess meaningful countervailing market power because they cannot credibly switch to an alternative terminal and are “effectively captive users of the Terminal” (p 60);
  - (g) NQXT, as a vertically integrated service provider, has both the ability and incentive to favour related entities, including through discriminatory access terms, operational arrangements and the handling of confidential information; (p 57-59);
  - (h) the “risk of possible future discriminatory conduct by NQXT increases risk and uncertainty for third party users compared to Adani Group entities” (p 59);
  - (i) NQXT has no legal obligation to provide access to new access seekers and may offer “take it or leave it” terms of access (p 65);
  - (j) the threat of declaration has not materially constrained NQXT’s conduct to date and is unlikely to do so in future absent declaration (p 62);
  - (k) NQXT faces “relatively limited constraint on its ability to exercise market power in setting prices” (p 67); and
  - (l) the terms proposed by NQXT in its standard form agreement “may reflect the exercise of market power” and “reflect an imbalance in the rights and obligation of the parties” (p 67).
- 22 Those findings collectively establish the structural conditions which Part 5 of the Act is directed towards addressing. The Explanatory Notes to the Queensland Competition Authority Bill 1997 explain that the Part 5 regime was established to ensure that “competitive forces are not unduly stifled in industries which rely upon a natural monopoly at some stage in the production process”, particularly where “ownership or control of significant infrastructure is vertically integrated with upstream or downstream operations”. The Explanatory Notes further recognise the risk that a natural monopoly infrastructure owner may “extract excessive profits through exercising market power”, especially where the monopoly infrastructure owner also has a commercial interest in dependent markets. The circumstances here, in which NQXT forms part of a vertically integrated corporate group and operates a natural monopoly facility servicing captive users, are precisely those which the third-party access regime is directed towards addressing.
- 23 Despite accepting those matters, the QCA nevertheless reached the preliminary conclusion that declaration would not promote a material increase in competition in the coal tenements market because there was “insufficient evidence” that hold-up risk had caused projects to be abandoned, deferred or delayed (p 85).
- 24 That approach imposes an unduly narrow and elevated evidentiary threshold for criterion (a), which is inconsistent with the statutory text and principles identified by the Australian Competition Tribunal in *Application by New South Wales Minerals Council (No 3)* [2021] ACompT 4 (to which reference is made at p 85 of the Draft Recommendation) and *DBCT Management Pty Ltd v Treasurer and Minister for Infrastructure and Planning (Qld) & Ors* [2021] QSC 335 at [107], [111]-[112]. It treats the absence of direct evidence of hold-up as dispositive, rather than asking whether the conditions for competition are likely to be materially improved by access on reasonable terms.
- 25 In *Minerals Council (No 3)*, the Tribunal reaffirmed that criterion (a) is concerned with whether declaration enhances “the conditions or environment for competition” in a dependent market,

rather than requiring proof of completed foreclosure or market exit (at [133] to [136]). In particular, the Tribunal explained that the notion of “promoting” competition refers to enhancing conditions or the environment for competition through access on reasonable terms and conditions (at [134]). The Tribunal also reaffirmed that that criterion (a) requires a forward-looking comparison between the future with declaration and the future without declaration (at [51(c)], [128], [163]-[164]).

- 26 The Tribunal further recognised that the effects of access terms upon competition in dependent markets may arise over the medium term through their impact upon future investment incentives and entry conditions (at [154]). In particular, the Tribunal observed that changes in access terms may “decrease the existing firms’ incentives to undertake further investment” and “deter entry by new firms” (at [151]). The Tribunal also recognised that declaration may be warranted where prevailing access terms are “so poor that they disrupt competition in another market” (at [158]).
- 27 Applying those principles, the QCA’s findings strongly support the conclusion that declaration would materially improve the conditions and environment for competition in the coal tenements market. The QCA has already accepted that absent declaration:
- (a) users remain exposed to monopoly bargaining power following substantial sunk investment;
  - (b) NQXT may engage in discriminatory conduct and self-preferencing;
  - (c) access may be provided on “take it or leave it” terms;
  - (d) users face material uncertainty regarding future access terms and pricing; and
  - (e) NQXT is subject to limited commercial constraint in exercising market power.
- 28 Those are precisely the types of structural conditions capable of adversely affecting future investment incentives, entry conditions and competitive rivalry in dependent markets over the medium term.
- 29 The QCA’s analysis in the Draft Recommendation instead over-emphasises whether there is presently direct evidence of abandoned projects or completed examples of hold-up. As recognised by the Tribunal in *New South Wales Minerals Council*, the relevant inquiry is forward-looking and directed to the effect of access conditions on future investment incentives and the environment for competition over the medium term. Hold-up risk operates ex ante. Its effects are likely to be reflected in valuation assessments, transaction appetite and willingness to incur sunk costs before any anti-competitive outcomes become directly observable.
- 30 Further, it may not be possible, at present, to identify direct evidence of hold-up because existing users have had access to the Terminal on terms that approximated a regulated environment, and the interest of potential users in the market is unknown to the QCoal Users (and is not readily observable because they have not in fact engaged in transactions). That is not a deficiency in the QCoal Users’ request for a declaration. It is a feature of the way in which hold-up risk affects investment decisions: it is ordinarily reflected in decisions not to bid, not to develop, to discount value or to preserve optionality, rather than in observable market exits or express statements that a project was abandoned because of hold-up risk. But that does not change the fact that the removal of the factors set out in paragraph 27 above in a world with declaration is likely to promote materially more competitive outcomes in the relevant coal tenement markets. That is so, even if matters like commodity prices, regulatory approvals, operating costs, financing conditions, ESG and broader market dynamics are affecting the competitive process in the coal tenement markets, as the QCA considers at [3.12] of its Draft Recommendation. Those factors have been insufficient to deter the development of the Carmichael Mine—and its proposed expansion to 27.5mtpa over the proposed declaration period. That tends to suggest that the price of access, and certainty of access, is capable of having a significant impact on investment decisions and competition in the relevant coal tenements market for users who are not members of the Adani Group.

### 3.2 The QCA's assessment of forecast demand during the proposed declaration period in assessing criterion (b)

31 In Section 2.6 of the Draft Recommendation, the QCA made preliminary findings as to total foreseeable demand over the proposed declaration period. The QCA formed the view that the market for assessing that demand includes the northern mines as well as those mines in the Goonyella system that are unable to rail to DBT because of capacity constraints but would rail to the Terminal instead (p 33).

32 In conducting that assessment of forecasted demand, the QCA first estimated production from the northern mines. The QCoal Users submit that assessment materially understated forecast production from the Carmichael Mine [REDACTED]. As section 2.1 of the Further HK Report demonstrates, ramp up of production at the Carmichael Mine has progressed much more quickly than the Wood Mackenzie production forecasts anticipated. Wood Mackenzie now forecasts that the Carmichael Mine will reach [REDACTED]

[REDACTED] the QCA should therefore use the upper bound of its assessment of production from the Carmichael Mine. [REDACTED]

33 To calculate foreseeable demand, the QCA then adopted an assumption that throughput accounted for approximately 90% of contracted volumes. Or, in other words, that producers were over-contracting by 10% (p 34). That assumption was adopted from the QCA's DBT declaration review.

34 Alternatively, the first Houston Kemp report at [195]-[200], relying on estimates of actual contracted capacity for FY23 and FY24 at NQXT, determined that throughput was equal to 84% and 87% for those financial years. Adopting an 85% figure, the Further HK Report at section 2.3 concludes that forecast demand may reach [REDACTED] within the declaration period.

35 Regardless of which figure is used (90% or 85%), the Terminal is likely to operate at or close to nameplate capacity within the declaration period. That level of throughput is functionally equivalent to the Terminal being fully contracted, because nameplate capacity is not equivalent to a reasonable working capacity once routine maintenance allowances, unplanned outage risk, vessel scheduling, berth occupancy, stockyard capacity, product segregation and cargo assembly requirements are taken into account.<sup>1</sup> As discussed below, that level of utilisation of the Terminal has significant implications for the QCA's analysis on NQXT's incentive to maximise throughput.

36 This matters in determining whether criterion (a) is satisfied because the QCA's conclusion on NQXT's incentives depends materially upon the premise that spare capacity will persist over the proposed declaration period. If, instead, the Terminal is likely to operate at or close to capacity, the commercial value of preserving discretionary capacity favouring affiliated production, and extracting monopoly rents from captive users becomes materially greater. In those circumstances, spare capacity cannot be treated as a sufficient constraint on NQXT's conduct.

### 3.3 NQXT's directors are likely to be able to have regard to interests of broader Adani Group

37 On p 57 of the Draft Recommendation, the QCA observed that the "ability of NQXT to make decisions to maximise the profits of the Adani Group is potentially limited" by directors' duties and therefore that the QCA's assessment would benefit from submissions on "the ability of

<sup>1</sup> Annexure 2 – Wood Mackenzie, Competition Declaration – North Queensland Export Terminal Facility – Report, June 2026 (Wood Mackenzie Forecast) at p 10.

NQXT's directors to take into account the interests of the broader Adani Group, and the circumstances in which it is not permitted to do so".

- 38 It is trite that NQXT's directors cannot disregard the interests of NQXT at the expense of the broader Adani Group. They must have regard to the specific interests of NQXT.<sup>2</sup> However, NQXT's directors are not prevented from having regard to broader group interests where those interests align with that of NQXT.
- 39 It is well-recognised that a "transaction benefiting one company in a group may have derivative benefits for another company in the group other than via a shareholding": *Linton v Telnet Pty Ltd* (1999) 30 ACSR 465 at [24] and the cases cited therein (Giles JA, Beazley JA and Sheppard AJA agreeing).<sup>3</sup> Therefore, as held by Giles J in *Equiticorp Financial Services Ltd (NSW) v Equiticorp Financial Services Ltd (NZ)* (1992) 29 NSWLR 260 at 304-305,<sup>4</sup> "a transaction undertaken for the benefit of the group, or some other member of the group, may be upheld if in the circumstances it is for the benefit of the particular company that the group or the other members of the group (even with outside shareholders), should be assisted by the transaction". To similar effect, in *Maronis Holdings Ltd v Nippon Credit Australia Pty Ltd* (2001) 38 ACSR 404 at [185], Bryson J stated that "[i]f directors take a company into a transaction in the interests of a group of which it was part, or of a parent company, or of a subsidiary company and what they did was, objectively viewed, in the interests of the company, they incurred no liability".<sup>5</sup> In a passage quoted with approval by White J in *Termite Resources NL (in liq) v Meadows* (2019) 370 ALR 191 at [213], in *Ford, Austin and Ramsay's Principles of Corporations Law* (16<sup>th</sup> ed), the authors summarised the position as follows:
- (a) The powers of directors of a company must be used for the purposes of that company.
  - (b) This does not preclude the exercise of a power with a view to an advantage to be received by another company if the transaction is one for the benefit of the company entering into it. The benefit need not be direct and immediate; it may arise indirectly.
  - (c) The purpose of obtaining an advantage for a related company does not necessarily result in a breach of duty. There would not be a breach of duty where a benefit is derived from a transaction by two or more companies or if the company entering into the transaction receives some indirect benefit. Considering the interests of the group does not automatically result in a breach of duty. What does result in a breach of duty is lack of regard for the interests of the company entering into the transaction.
- 40 In other words, to the extent that NQXT's interests are aligned with the interests of the Adani Group, it is permissible for directors to pursue transactions in support of that group objective. And in forming that view, the directors are not limited to having regard to NQXT's short-term interests (such as profit maximisation) but may legitimately place reliance on NQXT's long-term interests as part of a vertically integrated group.
- 41 Thus, in making decisions about the access of an existing or new user to the Terminal, NQXT could have regard to the interests of not only its immediate parent company, but also the "derivative benefits" that might flow from particular transactions to other corporate entities within the Adani Group, so long as those directors formed a good faith view that such action was also in the best interests of NQXT. Given the vertically integrated nature of the Adani Group's interests in the Newlands-Galilee system, it will inevitably be the case that NQXT will have regard to the interests of its related parties in determining what is in the best interests of NQXT. The QCA has already correctly formed that view in the Draft Recommendation at p 58, stating "the vertically integrated nature of the Adani Group may still result in incentives to exercise market power for the purpose of preferencing NQXT's related entities which use the Terminal, potentially to the detriment of other users".

<sup>2</sup> *Walker v Wimborne* (1976) 137 CLR 1 at 6-7; see also *Industrial Equity Ltd v Blackburn* (1977) 137 CLR 567; *Qintex Australia Finance Ltd v Schroders Australia Ltd* (1990) 3 ACSR 267 at 269.

<sup>3</sup> See also *Lewis (as liquidator of Doran Constructions Pty Ltd (in liq)) v Doran* [2005] NSWCA 243 at [148]-[149] (Giles JA, Beazley JA and Sheppard AJA agreeing).

<sup>4</sup> Affirmed on appeal: *Equiticorp Finance Ltd v Bank of New Zealand* (1993) 32 NSWLR 50 at 146-149 (Clark and Cripps JJA, Kirby P dissenting).

<sup>5</sup> Quoted with approval by Black J in *Vanguard Financial Planners Pty Ltd v Ale* (2018) 354 ALR 711 at [142].

- 42 Section 187 of the *Corporations Act 2001* (Cth) also expressly provides that a director of a corporation that is a wholly owned subsidiary of a body corporate is taken to act in good faith in the best interests of the subsidiary if:
- (a) the constitution of the subsidiary expressly authorises the director to act in the best interests of the holding company;
  - (b) the director acts in good faith in the best interests of the holding company; and
  - (c) the subsidiary is not insolvent at the time the director acts and does not become insolvent because of the director's act.
- 43 This reflects the position stated by McHugh, Hayne and Callinan JJ in *Neat Domestic Trading Pty Ltd v AWB Ltd* (2003) 216 CLR 277 at [47], who observed that the central duty of the board of a wholly-owned subsidiary (AWBI) "was to observe its constitution and to pursue the interests of the company as expressed in that document. As a wholly owned subsidiary of AWB those duties would, no doubt, have required the board of AWBI to pursue the interests of its parent (and thus, its parent's shareholders) to the extent that those interests were compatible with other obligations of AWBI".
- 44 Section 187 and *Neat Domestic* provide another compelling reason why the QCA should exercise its information gathering powers to require NQXT and other Australian Adani Group entities within the vertically integrated structure to provide their respective constitutions and evidence of their decision-making process. As each of those entities are private companies established after 1990, the company constitutions are not publicly available. Those constitutions may reveal an express authorisation of the directors of NQXT and the other entities to have regard to the interests of their parent companies, and therefore any related parties of those parent companies. An investigation may also reveal a tendency of NQXT to act in the interests of related parties, or to have regard to those interests in making decisions.

### 3.4 The QCA should not place reliance on NQXT's throughput maximisation incentive

- 45 Throughout its Draft Recommendation, the QCA has relied upon NQXT's incentive to increase throughput for the purpose of profit maximisation as a countervailing factor to NQXT's monopolistic use of market power. The QCA relied on this overarching view to form the preliminary views that:
- (a) NQXT "does not have a commercial incentive to restrict access or offer terms to third parties, which would compromise the development of tenements that could be a source of future throughput at the Terminal", and therefore that "NQXT's ability and incentive to exercise its market power to extract profits from miners will lead to outcomes that materially impact competition in the later-stage tenements market as this would not lead to increased Terminal throughput, which is in the interests of the Adani Group" (pp 2, 41);
  - (b) in respect of non-price terms, that "given the presence of spare capacity at the Terminal, our view is that NQXT is incentivised to maximise throughput and profits and so would seek to renew access agreements" (p 68);
  - (c) in respect of the QCA's analysis of competition in the coal tenements market, that NQXT "is incentivised to support future throughput rather than discourage tenement activity, particular in the context that the coal export market is workably competitive, and we expect it to remain so" (p 76);
  - (d) in relation to hold-up risk, that "while NQXT may extract additional rents in a future without declaration, given spare capacity at the Terminal and NQXT's incentives to maximise throughput, we do not consider NQXT is incentivised to increase prices or include terms to the extent that such actions would restrict tenement market development" (p 80);
  - (e) in relation to whether contracting could mitigate hold-up risk, that "NQXT would have an incentive to renew contracts and to mitigate any uncertainty for the tenement holder ex ante", because of the incentive to maximise Terminal throughput (p 81); and

- (f) in relation to whether access with a declaration would promote competition, that “irrespective of declaration, NQXT has an incentive to maximise Terminal throughput given the spare capacity that will prevail over the proposed declaration period and investment hold-up is not in NQXT’s interests. In light of NQXT’s commercial incentives, it is unlikely that the Adani Group or NQXT would act in a manner such that competition would be stymied in a future without declaration” (p 84).

46 The fact that NQXT will seek to profit maximise through throughput maximisation is evidently a critical view supporting the QCA’s position on criterion (a) in the Draft Recommendation. The QCoal Users submits that the QCA should reconsider this preliminary view because:

- (a) *First*, there is new evidence presented by the QCoal Users which shows that the QCA has underestimated the extent of uncontracted capacity over the proposed declaration period. As explained above in section 3.2, by the end of the proposed declaration period, there is likely to be less than ██████ of spare capacity at the Terminal, reflecting an upward trend where demand is likely to exceed the nameplate capacity of the Terminal.<sup>6</sup>
- (b) *Second*, and in any event, it is incorrect to equate throughput maximisation with profit maximisation. That is because:
- (i) as a matter of principle, the two concepts are not equivalent;
  - (ii) NQXT’s own conduct establishes that while it may not always prefer outcomes other than throughput maximisation, its incentives are more complex than the Draft Recommendation assumes, and that the existence of spare capacity is not, of itself, a sufficient constraint on NQXT’s conduct;
  - (iii) NQXT has incentives to restrict access (as opposed to denying access) given its vertically integrated structure; and
  - (iv) the QCA’s preliminary view does not take into account the ‘option value’ of spare capacity at NQXT, which is of real value to the Adani Group.

#### *The Underestimate of Uncontracted Capacity*

47 For the reasons explained above in section 3.2, the QCA’s preliminary view on the risk of uncontracted capacity was based on incorrect factual findings as to the extent of uncontracted capacity in the absence of an extension of the Terminal. For that reason alone, the QCA ought not to proceed on the footing that NQXT has an incentive not to raise prices to maximise throughput and therefore maximise profit.

48 From the perspective of an actual or potential access seeker, the prospect of another attempt at seeking declaration in the future, once capacity constraints arise,<sup>7</sup> is not sufficient certainty to make a significant sunk investment (see further below).

#### *Conflation of Throughput Maximisation and Profit Maximisation*

49 However, there are also principled and practical difficulties in conflating profit maximisation with throughput maximisation.

50 In this respect, the QCA’s Draft Recommendation departs from the approach adopted by the QCA in the DBT declaration review. As the QCA observed at p 81 of its final recommendation, “as there is no close substitute for the DBT service, DBT Management would have an incentive to maximise profits by charging more, which would not necessarily align with maximising throughput. For instance, in the absence of the access framework, DBT Management could impose a high enough access charge that may maximise profits even if some projects become potentially unviable”.

51 Those observations apply equally to NQXT, particularly in circumstances where there is likely to be very minimal spare capacity over the declaration period, because throughput maximisation and profit maximisation are not equivalent.

<sup>6</sup> Annexure 1 - HoustonKemp Economists – Review of QCA draft recommendation for declaration of NQXT – Greg Houston dated 12 June 2026 (Further HK Report) at [79]-[80].

<sup>7</sup> Queensland Competition Authority – Draft Recommendation dated March 2026 (Draft Recommendation) at p 91.

- 52 *First*, NQXT's economic incentive, like any monopolist, is to provide supply at a level that extracts the most economic rent for itself so as to maximise profit. As a matter of economic theory, it is not correct to assume that NQXT would maximise its profit by matching supply of access to the Terminal to the Terminal's maximum throughput capacity. To the contrary, a monopolist will ordinarily supply less than the efficient level of supply and in doing so, charge higher prices so as to profit maximise.
- 53 *Second*, NQXT's conduct in seeking to renegotiate access reveals a preference in favour of charging rates that may be prohibitive for the viability of coal tenements. As outlined by the QCA at [3.6.2] of its Draft Recommendation, NQXT is offering a price for access that is [REDACTED] at a level that the QCA recognises "is likely to exceed the efficient cost of provision". In circumstances where criterion (b) is satisfied, by definition, this result tends to suggest that the price of access set will not maximise throughput and will instead be set at a price that maximises profit.
- 54 *Third*, as a practical matter, two examples of NQXT's past conduct illustrate the difficulty with assuming that NQXT's commercial incentives are equivalent to maximising third party throughput.
- 55 In October 2016, an Adani Group entity entered into arrangements with a Rio Tinto subsidiary (Rio User) concerning 9.3 mtpa of contracted capacity at the Terminal.
- (a) The arrangements had two temporal aspects. *First*, the Rio User's access rights to that 9.3 mtpa were cancelled for FY17 to FY22. *Second*, access rights to 9.3 mtpa for FY23 to FY28 were novated to Bravus Mining, an Adani Group entity, to coincide with the anticipated commencement of the Carmichael Mine. In connection with those arrangements, the Rio User paid \$255 million, comprising a \$117 million termination payment to NQXT and a \$138 million novation payment to Bravus Mining, which was subsequently paid to NQXT under a security deposit agreement.
  - (b) One practical effect of those arrangements was that 9.3 mtpa contracted capacity was removed from practical third-party use for FY18 to FY22. That is important because the capacity could not realistically be taken up by other users for that limited period, particularly at the short notice required to take up the capacity. Byerwen sought additional access for 5 mtpa from 1 July 2017 to 30 June 2020 and a further 5 mtpa from 1 July 2020 to 30 June 2029. NQXT only offered 5 mtpa for a two-year period from 1 July 2018 to 30 June 2020. Byerwen rejected that offer because such a short-term access right could not justify the capital investment required to increase production.
  - (c) That example is difficult to reconcile with the QCA's assumption that NQXT's commercial incentives can be treated as equivalent to throughput maximisation. NQXT received substantial financial value from the transaction and preserved future access for Bravus Mining from FY23. It did so in circumstances where 9.3 mtpa of capacity was, in practical terms, unavailable for third-party use during the intervening FY18 to FY22 period.
  - (d) The example therefore illustrates that NQXT, particularly when having regard to the interests of the Adani group, may rationally prefer outcomes other than immediate third-party throughput maximisation, including where those outcomes preserve future affiliated access, generate financial value, or maintain discretion over capacity. It also demonstrates why spare capacity cannot be treated as an automatic constraint on NQXT's conduct. The relevant question is not merely whether capacity exists in a technical sense, but whether NQXT has sufficient incentive and ability to make that capacity available to third parties on terms which allow it to be practically and commercially utilised. This is addressed further below in the context of the option value to NQXT of spare capacity.

[REDACTED]

[REDACTED]

[REDACTED]

60 Yet another example relates to the secondary capacity market. In the Draft Recommendation (p 45), the QCA accepted that short-term capacity transfers could form a secondary market but considered there was insufficient evidence on actual or potential trades to assess whether it is a relevant dependent market or whether declaration would promote a material increase in competition. In its response to QCoal referred to above,<sup>9</sup> Aurizon confirmed that there is regular secondary trading in rail capacity, including on the Newlands System (paragraph 15). It should therefore be expected that, similarly, there would be secondary trading for access rights at the Terminal and, if NQXT had a reliable incentive to encourage throughput, it would welcome such arrangements.

61 However, when the QCoal Users corresponded with NQXT regarding NQXT's proposed new access term [REDACTED]

62 To the extent that the QCA considers further evidence is required from other industry participants about secondary trading, the QCoal Users repeat their previous submission about the necessity and importance of the QCA exercising its statutory powers to obtain such evidence from the relevant persons who hold that evidence.

63 These examples show that the existence of spare capacity is not, of itself, a sufficient reason to conclude that NQXT will not engage in conduct capable of adversely affecting competition in dependent markets. NQXT may have commercial incentives to preserve discretion over capacity, rely on strict contractual positions, extract value through alternative arrangements, or prefer the interests of related entities. Those possibilities are directly relevant to criterion (a), because they affect the conditions and environment for competition in dependent markets, including by increasing uncertainty for existing and prospective users in relation to future access, renewal, pricing and non-price terms.

64 *Fourth*, even if NQXT's only goal was maximising its own profit (as opposed to the Adani Group's), it does not follow that contracting all spare capacity is necessarily consistent with that goal. For example, NQXT emphasised in its submissions [REDACTED]

<sup>8</sup> See Annexures 5 to 10 (correspondence between QCoal and NQXT regarding request for additional term).

<sup>9</sup> See Annexure 14 – Aurizon Network Responses to QCoal Users Questions dated 19 May 2026 (Aurizon Network Responses).

<sup>10</sup> See Annexure 11 – Letter from NQXT to QCoal Group dated 28 February 2025 at p 8.

[REDACTED] This additional cost [REDACTED] may in fact be a material factor NQXT considers when assessing the financial viability of making uncontracted capacity available to third party users. This is particularly so when any increased costs associated with metallurgical coal will not improve efficiency of unloading of thermal coal from the Carmichael Mine and therefore this additional expenditure will not indirectly benefit the Adani Group.<sup>11</sup>

#### *Option Value*

- 65 Further, the assumption that any spare capacity at the Terminal creates a strong incentive for NQXT to maximise third party throughput at all times overlooks the strategic and economic value to NQXT, and the broader Adani Group (which as identified above NQXT may have regard to), of preserving uncontracted or discretionary capacity at the Terminal.
- 66 Spare capacity at a natural monopoly export terminal is not only valuable because it can immediately be sold to third party users where an exporter has the capacity to utilise additional production. It also has substantial option value.<sup>12</sup>
- 67 That option value arises because preserving discretionary capacity may provide NQXT and the broader Adani Group with:
- (a) flexibility to respond to future changes in coal market conditions. For example, spare capacity would enable the Adani Group to increase profits during periods of elevated coal prices by exporting additional stockpiled coal from the Carmichael Mine or by generally increasing the quantity of production at the Carmichael mine.<sup>13</sup> The returns potentially available to the Adani Group from its own use of NQXT may in fact exceed the returns from providing a third party access to uncontracted capacity, in circumstances where terminal charges are a relatively small component of a coal producer's total costs. The profit margins the New Hope Group, Stanmore and Whitehaven reported in 2025 for the sale of export coal far exceed any revenue NQXT would derive from terminal access charges.<sup>14</sup> Spare capacity therefore provides the Adani Group with coal production flexibility that is intrinsically valuable.<sup>15</sup> That is particularly so in conditions where, as Wood Mackenzie has demonstrated, reductions in supply can dramatically increase the price of coal well above the long-term rate of access.
  - (b) the ability to accommodate future affiliated expansion opportunities, including by Bravus;
  - (c) bargaining leverage in future access negotiations with existing and prospective third-party users; and
  - (d) operational flexibility during periods of disruption, constrained rail capacity or fluctuating export demand.
- 68 Given the Adani Group's vertically integrated structure and the long-term significance of the Terminal to the Adani Group's operations within the Newlands-Galilee catchment, those incentives are significant. A rational profit-maximising monopolist may prefer to preserve some degree of discretionary capacity or pricing flexibility rather than fully contract all available capacity on long-term terms which constrain future optionality. Indeed, Adani's current actions of seeking to significantly increase the price of access and to reduce the quality of access, including as it relates to the certainty over terms of access, is consistent with seeking to preserve the option value for it to self-preference either through the use of uncontracted capacity or ability to frustrate or further degrade the quality of access for third party users.<sup>16</sup> It can engage in this conduct knowing that the substantial coal reserves present

<sup>11</sup> Annexure 1 - Further HK Report at section 4.3.1.

<sup>12</sup> Annexure 1 - Further HK Report at section 4.1.

<sup>13</sup> Annexure 1 - Further HK Report at section 4.1, [131]-[133].

<sup>14</sup> Annexure 1 - Further HK Report at [124]-[130].

<sup>15</sup> Annexure 1 - Further HK Report at [131]-[133], [173]-176].

<sup>16</sup> Annexure 1 - Further HK Report at [145]-[152], [199]-[204].

at the Carmichael mine are sufficient to maximise throughput and therefore ensure the long-term viability of NQXT.<sup>17</sup>

- 69 The Draft Recommendation recognises that demand for the Terminal over the proposed declaration period is uncertain and dependent upon future developments in the Newlands-Galilee catchment, including forecast production from the northern mines. However, the critical impact on capacity is likely to be the development of the Carmichael Mine, which on Wood Mackenzie's forecasts will dramatically exceed the [REDACTED] base case relied upon by the QCA within the declaration period, and may at the end of the period exceed half the Terminal's nameplate capacity. In those circumstances, NQXT may become capacity constrained during the proposed declaration period and is likely to become capacity constrained immediately after the proposed declaration period.
- 70 That prospect materially undermines the QCA's reliance on spare capacity as a sufficient constraint on NQXT's conduct. Where there is a real prospect of future capacity scarcity, uncontracted capacity has substantial strategic value. It enables NQXT and the broader Adani Group to preserve flexibility for future affiliated expansion, to manage uncertainty in future production levels and to retain bargaining leverage over third party users seeking renewal, expansion or new access. In those circumstances, NQXT may rationally prefer to preserve discretionary capacity rather than contract all available capacity to third parties on long-term terms which constrain future optionality.
- 71 This conclusion is reinforced by Aurizon Network's responses to questions QCoal asked it following the release of the Draft Recommendation.<sup>18</sup> Aurizon Network has confirmed that, as at ACAR 2026, the Newlands/GAPE System has an Existing Capacity Deficit of 8.7 mt in FY27, forecast to reduce to 1.9 mt by FY29, and that no new or additional access rights to the shared rail corridor have been granted since the ICAR was published in October 2021. That evidence confirms that Terminal capacity cannot be assessed in isolation. Even if nominal spare capacity exists at the Terminal, the commercial utility of that capacity depends upon the availability of below-rail capacity, train paths, above-rail capability and associated supply chain rights.<sup>19</sup>
- 72 Aurizon Network has also confirmed that, where capacity becomes available through non-renewal of existing access rights or transitional arrangements, allocation will occur through a queue process and will have regard to the access seeker's ability to demonstrate associated supply chain rights, including terminal capacity rights.<sup>20</sup> That evidence reinforces the circularity of access uncertainty: a party seeking rail capacity may need to demonstrate terminal rights, while a party seeking terminal access must also have confidence that rail capacity will be available.
- 73 That analysis is also consistent with the QCA's own recognition that if below-rail capacity constraints in the Newlands system persist during the proposed declaration period, this may provide a disincentive for NQXT to provide access to third parties at the Terminal (at p 58). That view rightly reinforces the notion that spare Terminal capacity cannot be considered in isolation. The commercial value of that capacity depends upon broader supply chain constraints and the strategic interest of the vertically integrated group.
- 74 Accordingly, the existence of spare capacity at the Terminal does not support the conclusion that NQXT lacks incentives to engage in conduct capable of adversely affecting investment incentives or competitive conditions in dependent markets. To the contrary, the preservation of strategic flexibility and optionality may itself create incentives for NQXT to avoid fully constraining its future conduct through long-term access arrangements with third party users.

### 3.5 Evidence of actual or prospective sale of coal tenements

- 75 In the last paragraph on p 47 of the Draft Recommendation, the QCA recognised that 60% of EPCs and 50% of MDLs within the Newlands-Galilee catchment are held by firms that do not mine coal and it is unlikely that they will all become coal miners over the proposed declaration period. The QCA also considered that a "substantial proportion of tenements held by non-

<sup>17</sup> Annexure 1 - Further HK Report at [190], [251].

<sup>18</sup> Annexure 14 – Aurizon Network Responses.

<sup>19</sup> Annexure 14 – Aurizon Network Responses at p 3.

<sup>20</sup> Annexure 14 – Aurizon Network Responses at pp 1,3.

mining firms suggests that some coal tenements, given the right environment, could be sold in the future and be regarded as potential future transactions”.

- 76 Despite recognising the potential for those transactions over the proposed declaration period, the QCA at p 75 noted that it was not “aware of a comparable level of activity involving coal tenements in the Newlands-Galilee region” compared to Queensland coal catchments. It therefore welcomed further stakeholder comment on actual and potential transactions in the tenements market.
- 77 The QCoal Users are not aware of actual and potential transactions in the tenements markets. Knowledge of such actual or potential transactions is inherently commercially sensitive information held by the tenement holders. In those circumstances, the QCoal Users:
- (a) repeat their submission that the lack of activity involving coal tenements in the Newlands-Galilee region is itself evidence of the very hold-up risk that the QCA has expressed concerns about. It reflects potential entrants’ assessment that long-term access to proximate coal terminal infrastructure to be able to export coal is subject to a vertically integrated monopoly service provider who is not the subject of a declaration. The prospect of becoming a captive user to NQXT, with its capacity to extract monopolist rent, is a strong disincentive to consider purchasing and developing later stage coal tenements. This may be contrasted to the level of activity recorded in the DBT decision and acknowledged in the Draft Recommendation, where there was a greater level of activity in circumstances where DBT was the subject of a declaration. Again, the contrast in activity of the respective coal tenement markets serviced by NQXT and DBT in circumstances where one is and one is not subject to a declaration is itself evidence of the impact of hold-up risk;
  - (b) reiterate this is a matter which the QCA should investigate further. It is within the QCA’s power to seek information from tenement holders and potential investors as to whether hold-up risk has impacted the sale of or development of tenements within the Newlands-Galilee system.

### **3.6 Adani’s incentives to acquire in-catchment tenements**

- 78 At page 75 of the Draft Recommendation, the QCA formed the preliminary view that the “Adani Group is unlikely to require further tenements to maximise supply chain throughput at current capacity” and that the “existence of substantial reserves” at the Carmichael mine “reduces the risk of active foreclosure of the tenements market by the Adani Group”.
- 79 This analysis overlooks the significant capital costs associated with expanding the Carmichael mine, which has been noted by Adani Group itself, as well as the risks. Having regard to those costs and risks, it is certainly possible that the Adani Group forms the view that it is more profitable to acquire in-catchment, late-stage coal tenements, including operating mines. This is particularly so where those mines produce more valuable coal than that produced at the Carmichael mine (metallurgical coal or higher-grade thermal coal). The acquisition of operating mines, where spare contracting capacity at NQXT exists, would also enable the Adani Group to reap the benefits of increased production capability during periods of higher coal prices.<sup>21</sup>
- 80 The QCA should therefore not assume that the Adani Group will not engage in active foreclosure of the tenements market to facilitate the purchase of such tenements at a lesser price.

### **3.7 Failure to emphasise the impact of self-preferencing risk and non-price terms**

- 81 The uncertainty of access without a declaration is not only material in relation to price-related terms. Given NQXT’s vertical integration, there is a clear risk of self-preferencing in respect of the non-price terms offered by NQXT to users and their exercise of rights pursuant to those terms.

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<sup>21</sup> Annexure 1 - Further HK Report at [190]-[198].

suspension and curtailment of rail operations, disruption to coal haulage services, reduced train movements, interruption to vessel scheduling and constraints on throughput through the Terminal. Consequently, access to the Terminal during those times became dependent on the exercise of operational and contractual discretions concerning matters such as train scheduling, allocation of unloading windows, stockpile allocation, cargo assembly, throughput allocation and sequencing of coal handling operations.

84 In circumstances where NQXT forms part of a vertically integrated group which includes Bravus as a user of the Terminal, there is an obvious risk that those non-price discretions may be exercised in a manner which preferences Bravus during disruption events or periods of constrained capacity. For example, NQXT could allocate scarce unloading slots, stockpile capacity or vessel loading windows preferentially to Bravus cargoes, such as sequencing coal handling operations so as to minimise disruption to Bravus exports or administer operational provisions more favourably to Bravus than third-party users. Such conduct may be difficult for third-party users to detect or challenge in real time, but may nevertheless have very substantial commercial consequences, including export delays, disruption to mine production schedules and impairment of customer delivery obligations.

85 As has already been explained, the fact that NQXT is likely to act in Bravus' interests is confirmed by the example given at paragraph 55 above. Had it not been for Bravus' related company status, NQXT would have been disincentivised from entering into such a transaction. It had the effect of sterilising that 9.3 mtpa of throughput (or at least a substantial proportion of it) for a period of five years.

[REDACTED]

86 This example also clearly demonstrates that NQXT is not solely motivated to increase total short-term throughput through the Terminal. There are much broader economic considerations that factor into its decision by reason of the vertically-integrated structure of the Adani Group in Newlands-Galilee catchment.

87 This example did not feature prominently in the Draft Recommendation – with the only mention of the novation of the Rio User's rights in a footnote in the section dealing with falling demand from Goonyella NQXT users (p 24, fn 63). The QCA should give weight to this example in its Final Recommendation when considering the likelihood that NQXT will self-preference the Adani Group without a declaration.

### 3.8 Rail capacity constraints in the Newlands system

88 At p 58 of the Draft Recommendation, the QCA recognised that if "below-rail capacity constraints in the Newlands system persist during the proposed declaration period, this may in fact be a disincentive for NQXT to provide access to third parties at the Terminal". However, the QCA's preliminary view was that this was not a material risk to third parties continuing to have access to the service, including because the "existing rail capacity deficit has not prevented NQXT from entering into new agreements with some renewing users to date".

89 The renewal of some existing user agreements by NQXT does not mean there is not a material risk to third parties of self-preferencing behaviour by NQXT. This is particularly so where the Newlands system approaches its presently available capacity and Bravus is seeking to increase its production at the Carmichael Mine. In such circumstances, the Adani Group would have a strong incentive to foreclose rivals' use of NQXT in order to obtain for itself the remaining available capacity on the Newlands system to avoid bringing forward

<sup>22</sup> Annexure 3 - Letter from Byerwen Coal to NQXT dated 15 December 2016 (notice of demand for access).

<sup>23</sup> Annexure 4 - Letter from NQXT to Byerwen Coal dated 16 January 2017 (response to notice of demand for access).

<sup>24</sup> Annexure 12 – Confidential Affidavit of Deborah Silver affirmed 29 April 2019 at [64]-[70].

has not prevented NQXT from entering into new agreements with some renewing users to date”.

- 89 The renewal of some existing user agreements by NQXT does not mean there is not a material risk to third parties of self-preferencing behaviour by NQXT. This is particularly so where the Newlands system approaches its presently available capacity and Bravus is seeking to increase its production at the Carmichael Mine. In such circumstances, the Adani Group would have a strong incentive to foreclose rivals’ use of NQXT in order to obtain for itself the remaining available capacity on the Newlands system to avoid bringing forward substantial capital costs needed for a material increase in rail capacity or otherwise remain dependent on ad hoc capacity.<sup>25</sup>
- 90 At p 58 of the Draft Recommendation, the QCA also formed the preliminary view that “the fact the Newlands system is currently capacity-constrained is not an enduring constraint on the future development of tenements and mine expansions, as below-rail capacity would likely be developed in response to customer demand”.
- 91 Aurizon Network’s responses confirm that rail capacity constraints are not merely theoretical (see paragraph 71 above).
- 92 Those matters materially undermine the proposition that the existence of spare capacity at the Terminal is likely to act as a sufficient constraint on NQXT’s conduct. Throughput at the Terminal depends upon the broader integrated supply chain, including below-rail capacity, above-rail haulage, load-out capacity, train path allocation, terminal inloading, stockpile capacity and vessel loading. Nominal spare capacity at the Terminal does not necessarily mean that additional third-party throughput can be practically or commercially achieved.
- 93 Further, Aurizon Network has confirmed that, where rail capacity becomes available through non-renewal of existing access rights or transitional arrangements, capacity will be allocated under the Access Undertaking having regard to, among other matters, the ability of the access seeker to demonstrate associated supply chain rights, including terminal capacity rights. That creates a material practical interdependence between terminal access and rail access.
- 94 In those circumstances, uncertainty regarding access to the Terminal may itself affect access to rail capacity. A potential entrant or expanding producer that cannot obtain sufficient certainty of terminal access on reasonable terms may be disadvantaged in obtaining or justifying below-rail access rights. Conversely, uncertainty regarding rail capacity may increase the strategic value to NQXT of preserving discretionary terminal capacity for affiliated users or future affiliated expansion.
- 95 Aurizon Network’s responses also confirm that ad hoc services are prioritised below contracted orders in the daily planning process, with contested allocations determined under the Contested Train Path Principles in Schedule G of the Access Undertaking. Aurizon Network’s internal planning outcomes indicate that contracted orders have generally achieved at a higher rate than ad hoc orders in the Newlands/GAPE Systems. That evidence is important because it demonstrates that long-term contracted access rights have practical commercial significance, particularly in constrained periods.
- 96 For these reasons, the assumption that spare Terminal capacity will necessarily be converted into additional third-party throughput may not be sound. The relevant question is whether, in the future without declaration, access seekers and renewing users will have sufficient certainty across the integrated supply chain to support investment, acquisition and expansion decisions in the coal tenements market. The evidence from Aurizon Network supports the conclusion that they will not.
- 97 Declaration would not remove all supply chain constraints, but it would materially reduce one of the central uncertainties affecting that chain: whether terminal access will be available on

<sup>25</sup> Annexure 1 - Further HK Report at section 4.3.3.

<sup>26</sup> Statement of Brendan Lane dated 22 August 2025 at [39] and [41].

reasonable terms and conditions, supported by the statutory framework for access negotiations and dispute resolution.

98 It may be accepted that below-rail capacity is not necessarily an enduring constraint because of the capacity to develop further capacity in response to customer demand. However, Aurizon Network's responses also support the conclusion that access uncertainty at the Terminal is relevant to investment and efficient operation of the broader supply chain. Aurizon Network has confirmed that asset renewals expenditure is determined through the customer-approved renewals strategy and budget process, having regard to Committed Capacity and longer-term demand expectations. Aurizon Network has also confirmed that a reduction in Committed Capacity may reduce or defer asset renewal activities, depending on the nature of the volume change and the condition of the relevant assets.

99 Given these uncertainties, unless there are unforeseen changes to demand for coal, it is unlikely that below-rail users would engage with the network providers to develop below-rail capacity.<sup>27</sup>

100 Those matters are directly relevant to both criterion (a) and criterion (d). If uncertainty regarding Terminal access causes users to reduce volumes, decline to renew capacity, defer expansion or avoid investment in the Newlands-Galilee catchment, that may in turn affect below-rail renewal planning, asset utilisation and broader supply chain efficiency. The public interest assessment should therefore take into account not only investment in the Terminal itself, but also the efficient operation and renewal of rail infrastructure that depends upon confidence in long-term terminal access.

### **3.9 The future without declaration is materially different to the historical contractual environment**

101 The QCA's assessment of the future without declaration is materially affected by the fact that the existing contractual environment at the Terminal has operated under conditions materially different from those likely to prevail once the legacy user agreements expire.

102 As the QCA recognised at p 65 of the Draft Recommendation, the legacy user agreements were originally entered into with NQBP, a government-owned corporation, and were subsequently transferred to NQXT as part of the Adani Group's lease of the Terminal in 2011. The QCA observed that NQXT has therefore 'been bound by legacy agreement terms to date, with contract renewal negotiations being its first opportunity to establish new contract terms for incumbent users' (p 65).

103 In practical terms, the legacy user agreements have operated as a significant practical constraint upon NQXT's ability to exercise market power. Those arrangements have historically constrained the extent to which NQXT could exercise monopoly pricing power or impose unfair contractual terms upon incumbent users. They have also provided incumbent users with a substantial degree of certainty regarding:

- (a) long-term access rights;
- (b) capacity entitlements;
- (c) pricing outcomes;
- (d) renewal expectations; and
- (e) the broader framework governing access rights and commercial dealings at the Terminal.

104 Importantly, although not necessarily in all respects, the pricing provisions in those agreements are reflective of the type of terms that might be imposed in an access regime given by way of undertaking, or imposed by arbitration, in a future with declaration.

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<sup>27</sup> Annexure 1 - Further HK Report at [292]-[297].

- 105 However, the QCA also recognised that the current transition away from those legacy arrangements materially changes the relevant future without declaration. In particular, the QCA has found that:
- (a) with the expiry of the legacy user agreements, NQXT is in a position to offer “take it or leave it terms” to renewing users (p 65);
  - (b) NQXT has developed a new standard agreement in 2024 for renewing and new users (pp 64-65);
  - (c) there is “no certainty that any contract will be renewed” and “no meaningful constraint on the terms and conditions offered by NQXT” (p 68);
  - (d) NQXT has not established any binding access framework, pricing principles, capacity allocation principles or dispute resolution framework absent declaration (pp 64-65); and
  - (e) a number of the terms contained in the new standard agreement “may reflect the exercise of market power” and “reflect an imbalance in the rights and obligations of the parties” (p 67).
- 106 The future without declaration must therefore be assessed by reference to a materially altered contractual environment, rather than as a continuation of the historical position. It is a materially different environment in which:
- (a) NQXT possesses substantially greater pricing and contractual discretion;
  - (b) existing users are exposed to materially greater renewal uncertainty;
  - (c) access seekers may be subject to “take it or leave it” negotiations; and
  - (d) users have no recourse to arbitration or independent dispute resolution absent declaration.
- 107 While that position is not materially different to the position that potential entrants have faced in the market since NQXT became the owner of the Terminal, all users will now face the same barriers to effective competition in the market.
- 108 This distinction is critical to the proper application of criterion (a). The absence of historical examples of hold-up or foreclosure under the legacy contractual regime does not demonstrate that hold-up risk will not materially affect investment incentives absent declaration. The relevant competitive concern arises because, following expiry of the legacy agreements, NQXT will enjoy substantially greater discretion in relation to pricing, renewal terms, operational decisions and conditions of access, thereby creating materially greater uncertainty for users making long-term upstream and downstream investments.
- 109 Further, because of the legacy agreements, it cannot be assumed that dependent markets that the QCA considers are currently “workably competitive” will remain so, after the expiry of those agreements, without declaration. Even in dependent markets where an access regime is in place (such as for above rail, coal haulage),<sup>28</sup> access would be hindered or deterred by the risk of hold-up, as explained in the following section. This also applies in dependent markets where there is no access regime (such as for port services at the Port, shipping services at the Port and mining services)<sup>29</sup>, and other users would be hindered or deterred from competing against Bravus/the Adani Group, because of the risk of hold-up.
- 3.10 Price uncertainty and the impact of hold-up risk on competition**
- 110 At p 76 of the Draft Recommendation, while recognising hold-up risk, the QCA’s current view is that it has “found no clear evidence that it is influencing decisions in the coal tenements market or causing projects in the Newlands-Galilee catchment to be abandoned or delayed”. It has also concluded that it “remains unclear whether hold-up is a material factor for market participants” having regard to other commercial risks. The QCA invited further submissions on:

<sup>28</sup> See Draft Recommendation at p 44.

<sup>29</sup> See Draft Recommendation at p 43.

- (a) whether hold-up is a relevant matter in determining whether declaration would lead to a material increase in competition in the tenements markets; and
- (b) in particular, evidence on “whether hold-up risk has affected investment decisions or is a consideration for parties looking to invest in the coal tenements market within the Newlands Galilee catchments or indeed in any other mining precincts”.
- 111 The difficulty with such submissions being provided *directly* by the QCoal Users is that they are only a subset of potential participants in the market, and the time horizon over which the risk of hold-up applies (at least for existing users who have had access to the Terminal pursuant to long term contracts) has been relatively limited. As section 3.5 above indicates, for other users, without the benefit of the legacy agreements, the environment in which they have been operating is not likely to be workably competitive, which is at least in part a reflection of the supply of tenements in the market. For the reasons set out above at [16], if the QCA proposed to act on the basis that it required direct market evidence of hold-up concern being a cause of the present lack of competition, it should exercise its statutory power to obtain that evidence, in order to ensure that the objectives of the legislation are served and competition is appropriately protected, rather than making a conclusion based on a lack of evidence that the QCA should obtain.
- 112 However, the QCA ought to infer that hold-up risk, in the context of NQXT’s monopoly over coal handling services, is very likely to materially impact the investment decisions of both existing and new entrants in the coal tenements markets in the Newlands-Galilee system in a future without declaration, such that declaration is likely to promote a material increase in competition.
- 113 *First*, it is uncontroversial that coal mining projects require major sunk investment in mining equipment and infrastructure. Former ACCC Chair Rod Sims’ observations recorded at pp 77-78 of the Draft Recommendation are directly on point: “what miner would invest in its mines knowing that the benefits of that investment could be expropriated by a monopoly somewhere else in the supply chain?”. So too were the then-Treasurer’s observations in the context of the renewal of the DBT declaration recorded on p 58:
- In my view, given the significant sunk costs involved in acquiring and developing a mine, the uncertainty for New Users as to the pricing that will apply after 2030 is likely to give rise to concerns on the part of those New Users about the risk of hold-up.*
- 114 While the QCA took a different view on hold-up risk in respect of DBT, that was because of the particular conduct of DBI in offering access undertakings.
- 115 As the QCA acknowledged in the Draft Recommendation at p 79, this was on the basis that “DBI’s actions to constrain its ability to increase prices demonstrated that the threat of declaration was sufficient to constrain DBI’s conduct beyond 2030”. More specifically, DBI had agreed to an access framework for the term in response to the threat of a continued declaration which hard-coded a pricing difference cap to the effect that the TIC would be no more than \$3 per tonne higher than the price that would apply under a QCA-administered pricing regime for the existing terminal.<sup>30</sup> Amendments were also made to that framework following the draft recommendation by the QCA, including “to ensure it is enforceable for the term; restrictions on unfair differentiation; and to the capacity allocation process”.<sup>31</sup>
- 116 But any long-term investment, particularly those that involve substantial sunk costs and are subject to unregulated contracting in the future, give rise to the risk of hold-up for participants in the market.
- 117 *Second*, where NQXT has the capacity to exercise market power, whether a declaration would promote a material increase in competition is heavily affected by the perception of existing and potential entrants in the market of NQXT’s ability to exert monopoly power – either by foreclosing access to NQXT’s competitors on reasonable terms or self-preferencing the Adani Group. If those perceptions lead existing and potential entrants to relevant markets, such as the late-stage coal tenements markets, either: (1) to decide against investing in that market; or (2) dampen their view on the price of particular coal tenements or existing coal

<sup>30</sup> QCA - Part C DBCT declaration review - Final Recommendation dated March 2020 (DBT Recommendation) at pp 83, 106.

<sup>31</sup> DBT Determination at p 88.

mining operations, that will have a material effect on competition in that market, ordinarily depressing price.<sup>32</sup> It is the perceptions of those existing and potential entrants that will inform the effect of a declaration on competition in the market.<sup>33</sup>

118 There will necessarily be a paucity of primary evidence concerning those perceptions, as they arise, by their nature, in relation to courses of action that do not proceed (e.g. a decision by a prospective buyer not to enter the market).<sup>34</sup> There is even less likely to be evidence where the market has been subject to capacity constraints or hold-up risk for some time. That is evidently the case in the Newlands-Galilee Catchment Area as:

- (a) the Terminal was fully contracted prior to NQXT acquiring the Terminal in 2011, while it was under the control of a government-owned corporation;
- (b) after NQXT acquired the Terminal, it remained fully contracted and remained that way until 2016 (when the agreements referred to in [55] were entered into releasing 9.3mtpa of capacity); and
- (c) since that point, participants in the market have been subject to hold-up risk by reason of NQXT's control of the Terminal.

119 But the QCA's own consideration of the throughput maximisation incentive—which accepts that NQXT is likely to charge “prices in excess of efficient costs” and “setting the price as high as is achievable, subject to the user still being willing to execute an agreement (i.e. not exiting the market)” (pp 66-67)—is sufficient evidence that hold-up risk exists in, and is material to, the late stage tenement market in the Newlands-Galilee catchment area. That is because even a price in excess of efficient costs, while falling short of resulting in existing users deciding to shut down operation, still undermines the competitive process in the market.

120 For example, it will reduce the capacity of existing users to either expend or obtain funding to expend on later stage exploration and the development of coal mining activity. It would also disincentivise both existing users and potential entrants from investing the substantial sunk costs required to develop later stage coal tenements in the Newlands-Galilee catchment or to purchase existing mining operations, in circumstances where they know NQXT, in the absence of a declaration, will have an unfettered ability to extract premium rents such that the potential profit margins are not economically worthwhile.

121 Similarly, prospective entrants are likely to be apprehensive of NQXT's ability to use contractual terms or operational decisions to self-preference its related party operations. While NQXT may fall short of refusing access, the terms of access provided by NQXT are likely to have a deleterious impact on the value of later-stage tenements.<sup>35</sup> In so acting, NQXT may not seek to intentionally harm rivals – such harm may be a necessary consequence of the act of self-preferencing a related party, a risk that existing and potential entrants would have regard to in making investment decisions.

122 *Third*, for the reasons set out above in sections 3.2 and 3.4 above, the potential spare capacity at the Terminal and NQXT's potential incentive to maximise expected profits over the life of the lease through throughput are not effective constraints which are likely to mitigate the risk of hold-up in any meaningful way.

123 Without those constraints, the QCA ought to conclude that there are very limited constraints on NQXT exercising its market power and appropriating a greater share of the economic value of late-stage coal tenements, should they be acquired and (where necessary) developed into productive mines so as to create demand at the Terminal.

124 That is particularly so where none of the mitigating factors that arose with respect to DBI's conduct apply with respect to NQXT. As the QCA recorded in the Draft Recommendation at p 62, “NQXT has not offered any effective and binding access policy or framework applying for third party access to the Terminal, any transparency or commitments around pricing principles or constraints on pricing”. Nor has NQXT taken any steps to make amendments to its standard new user agreement in response to the threat of declaration. The QCoal Users

<sup>32</sup> Annexure 1 - Further HK Report at [215]-[220], section 5.23.

<sup>33</sup> Annexure 1 - Further HK Report at [215]-[220], section 5.23

<sup>34</sup> Annexure 1 - Further HK Report at [214(a)], [242]-[244], [269]-[271].

<sup>35</sup> Annexure 1 - Further HK Report at [217]-[231], [233]-[237].

agree with the QCA's preliminary view at p 62 that the threat of a declaration is "unlikely to impose an effective constraint on NQXT in the future without declaration".

- 125 That being the case, there is no reason for any current or prospective entrant to the market to consider that, in a world without declaration, NQXT would not seek to impose a price for access to the Terminal that would seek to expropriate for itself all the profit that might otherwise be obtainable from the development of a tenement. Indeed, any rational market participant would expect NQXT to do so.<sup>36</sup> The only question for such participants will be, "how much will NQXT seek to appropriate"?
- 126 The QCoal Users respectfully submit that, in those circumstances, it is not safe to assume that NQXT will not seek an access price that would significantly reduce demand. That is so even if terminal access charges are usually a "*relatively small proportion of a coal producer's total cash costs*",<sup>37</sup> and demand is relatively inelastic.<sup>38</sup> The charge may still be a relatively small proportion of total costs even if it is set to 100% of net profit (or more).
- 127 Nor can it be safely assumed that a price offered by NQXT in a past commercial negotiation with one user represents a likely "*upper bound*" on the price that might be imposed by NQXT in other commercial negotiations, and yet the QCA relies on this notion repeatedly.<sup>39</sup>
- 128 Although there may be other impediments to the late-stage tenement market in the Newlands-Galilee Basin being workably competitive, while NQXT is incentivised to act in this way and is not constrained from doing so, it is difficult to perceive that any improvement in competition *could* occur in the market as the incentive to do so is very limited. Potential entrants or existing users cannot assess the likely profitability of a project without taking into account the risk of hold-up, as there is no certainty of the cost of access to the Terminal and a real likelihood that any access will only be able to be negotiated on terms that extract monopolistic profits for NQXT.
- 129 By contrast, if the Terminal were declared, whatever other constraints exist on the development of new mines and the trading of other late-stage tenements, participants in the market would not have to factor into the assessment of the value of tenements the uncertainty as to the price of access or uncertainty brought about by an access regime not on reasonable terms.<sup>40</sup>
- 130 The QCA should not treat the mere existence of other commercial risks as sufficient to displace the significance of hold-up risk. The relevant question is not whether commodity prices, regulatory approvals, operating costs, financing conditions, ESG considerations and broader market dynamics may affect investment decisions. They plainly may. The question is whether those matters are likely to be so significant that the mitigation of hold-up risk through declaration would not materially improve the opportunities and environment for competition. The evidence does not support that conclusion.
- 131 *Fourth*, the extent to which hold-up is a relevant matter in determining whether declaration would lead to a material increase in competition in the tenements markets, or has affected investment decisions, can be tested by asking whether there is evidence that the other factors identified by the QCA at [3.12] of the Draft Recommendation (commodity prices, regulatory approvals, operating costs, financing conditions, ESG and broader market dynamics) are likely to be affecting the competitive process so substantially that the risk of hold-up is immaterial to investment decisions in the market.
- 132 There is no direct evidence to the effect that these factors are substantially affecting the competitive process. To the contrary, there are several reasons to conclude that notwithstanding the potential effect of these other factors, the risk of hold-up *is material* to investment decisions in the market:
- (a) As the QCA noted at [3.10.4], despite occasions of high commodity prices at various points in time, there has been limited activity in the late-stage coal tenements market

<sup>36</sup> Annexure 1 - Further HK Report at [219]-[225], [248]-[253].

<sup>37</sup> Draft Recommendation at p 81.

<sup>38</sup> Draft Recommendation at p 58.

<sup>39</sup> Draft Recommendation at pp 66, 82 and 84.

<sup>40</sup> Annexure 1 - Further HK Report at [255]-[259], [262]-[271].

in the Newlands-Galilee Basin. That tends to suggest that the price of coal is not a factor that is negatively impacting competition in the market.

- (b) As for the other factors in [3.12], the QCA has not identified any reasons why such factors would *disproportionately* affect the market in the Newlands-Galilee Basin. That is important because, at the time of the DBT decision, the QCA accepted that the market for late-stage coal tenements in the Hay Point catchment was workably competitive. Given that none of the factors identified at [3.12] of the Draft Recommendation have an obvious geographic element, it is unlikely that all of those factors could:
- (i) have such a significant impact on the competitiveness of the market in the Newlands-Galilee Basin to render the risk of hold-up an immaterial consideration for potential participants in that market; but
  - (ii) at the same time, have an insufficient effect on the market in the Hay Point catchment that it was workably competitive.
- (c) Although the QCoal Users acknowledge that the analysis now being undertaken in respect of the Hay Point catchment occurred at a slightly earlier point in time (2020), the evidence before the QCA now suggests that the market for late-stage coal tenements in the Newlands-Galilee Basin has not been workably competitive since at least 2013 (there being only two relevant transactions since that time).<sup>41</sup> But a comparison over time assists in the analysis:
- (i) At all times relevant to the DBT decision, access to DBT was regulated by access undertakings given by DBI to the QCA, which provided certainty of access terms and price to market participants in the Hay Point catchment.
  - (ii) Conversely, existing and potential entrants to the Newlands-Galilee catchment have faced a very different investment environment since at least 2011, as explained at paragraph 118 above.
- (d) In those circumstances, since at least 2011, potential entrants or participants in the late-stage coal tenement market in the Newlands-Galilee catchment have been subject to the constraint that:
- (i) the only economically viable terminal for export has been fully contracted; or
  - (ii) when it has not been fully contracted, the risk of hold-up and self-preferencing by a vertically integrated monopolist has been present for:
    - (A) any existing user considering investments in the market with lifespans beyond their existing user agreements; and
    - (B) all potential entrants into the market.
- (e) In the absence of any other evidence explaining the absence of workable competition in the market, this suggests that the risk of hold-up is likely to have been *the* ongoing, significant problem for competition in the Newlands-Galilee catchment since at least 2011. Given that the geographically proximate, but functionally distinct, market for late-stage development tenements in the Hay Point Catchment has been workably competitive at that same time, the QCoal Users submit that the QCA:
- (i) ought not to proceed on the premise that matters like commodity prices, regulatory approvals, operating costs, financing conditions, ESG and broader market dynamics are together potentially so influential in the competitive process that the risk of hold-up is immaterial; and
  - (ii) instead, infer that the risk of hold-up (being a significant distinguishing feature between the markets in the Hay Point and Newlands-Galilee catchments) is likely to be material to the competitive process in the market in the Newlands-Galilee catchment.

<sup>41</sup> Houston Kemp Economists – Expert Report of Greg Houston – Criterion (a) (HK Report (Criterion (a))) at [173].

- (f) Further support for this conclusion can be drawn from the Adani Group's own conduct in opening—and proposing to expand production dramatically at—the Carmichael Mine. That conduct suggests that the development of tenements from late-stage to operating mine is possible in the Newlands-Galilee catchment, notwithstanding whatever effects the considerations identified at [3.12] of the Draft Recommendation may be having. Given that the market for late-stage development tenements includes the market for operating mines, that significant, recent investment by the Adani Group in an operating mine is *at least* indirect evidence that the considerations identified at [3.12] of the Draft Recommendation are not sufficient to impede the competitive process in the market to a degree that the risk of hold-up would be immaterial.
- (g) Indeed, as the Adani Group is the only owner of an operating mine or late-stage development tenement that also controls access to an export terminal that can service the Newlands-Galilee catchment, the related-party operator of that mine could be confident that it would have access to the Terminal without the risk of hold-up. That provides a powerful reason for the QCA to conclude, contrary to its preliminary conclusions at [3.12], that where the risk of hold-up does not exist (because NQXT had participated in the transaction described at [55] above), the matters it identified at [3.12] of the Draft Recommendation are unlikely to be sufficiently deleterious to competition that the risk of hold-up is irrelevant to participants in the late-stage development tenement market.
- 133 As the Treasurer identified in the DBT decision, in considering the risk of hold-up for the purposes of criterion (a), the critical question is whether by making a declaration “there is an improvement in the opportunities and environment for competition, such that competitive outcomes are materially more likely to occur in a future with declaration compared to a future without declaration”.<sup>42</sup>
- 134 For the reasons set out above:
- (a) given the QCA's acceptance that NQXT has the capacity and incentive to exercise its market power to extract monopoly profits from users, the conditions for hold-up risk in the late-stage tenement market exist;
- (b) NQXT is unlikely to be incentivised to contract in a way that limits the risk of hold-up for participants in the market because it does not have an unambiguous incentive to maximise throughput and there is unlikely to be spare capacity, particularly at the end of the proposed declaration period;
- (c) in those circumstances, the hold-up risk associated with investment in the late-stage tenement market is likely to be significant, and therefore prohibitive, for all market participants in a future without declaration; and
- (d) while there is limited direct evidence of that risk affecting decisions in the market, an analysis of the other potential impediments to transactions (particularly by having regard to historical activity in the Hay Point catchment and the Newlands-Galilee catchment and the Adani Group's recent activity in the Newlands-Galilee catchment) indicates that it is unlikely that commodity prices, regulatory approvals, operating costs, financing conditions, ESG and broader market dynamics are sufficiently powerful factors to render the risk of hold-up irrelevant to market participants. To the contrary, where hold-up risk does not exist, there is evidence of significant investment in operating mines.
- 135 Further, the other potential impediments identified should be distinguished as qualitatively different from the risk of hold-up. Commodity prices, for example, may increase or decrease over time and correspondingly increase or decrease the profitability of a mining operation. The types of risks referred to apply across the mining industry and, indeed, many businesses in other industries too. That is very different to the risk of hold-up, in which NQXT has the ability and incentive to extract any profit that might otherwise be made by the Terminal user, on a targeted and specific basis, after those other risks have been managed.

<sup>42</sup> Treasurer (Qld), Queensland Competition Authority Act 1997 - Notice of a decision to declare a service under sections 84-87, Queensland Government Gazette, No 31, 1 June 2020, 267, para 4.7.16.

136 That being the case, the answer to the critical question is “yes”. Declaration is likely to result in a material improvement to the opportunities and environment for competition for both existing and new entrants to the late-stage tenement market, and thereby competitive outcomes are materially more likely to occur in a future with declaration compared to a future without declaration. Therefore, in its final recommendation, the QCA ought to conclude that criterion (a) is satisfied.

## 4 Criterion (d)

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### 4.1 Criterion (d) follows from criterion (a)

137 As noted at the outset, the QCA’s position on criterion (d) largely appears to flow from its views on criterion (a). It must follow that if, having regard to the further submissions and evidence provided by QCoal and other stakeholders, the QCA changes its view on criterion (a), it should also change its view on criterion (d). The balance of this section therefore only addresses one additional matter relevant specifically to criterion (d).

138 In any event, the matters addressed above are also directly relevant to the public interest. Declaration would reduce the risk that monopoly pricing, renewal uncertainty and discriminatory non-price terms will deter efficient investment in mines and tenements dependent upon the Terminal. It would also support more efficient use and planning of the broader Newlands/GAPE supply chain by giving users greater confidence to contract for long-term rail and terminal capacity. Those benefits are particularly significant in circumstances where the Terminal has natural monopoly characteristics, is a significant facility for the Queensland economy, and is operated as part of a vertically integrated group with interests in dependent markets.

### 4.2 Royalties for the State with or without access

139 The QCoal Users submit that the QCA’s approach to the impact of the absence of a declaration on royalties on p 97 is incorrect.

140 The premises of the QCA’s conclusion on this issue are:

- (a) that because spare capacity is likely to persist over the period, NQXT is motivated to increase throughput through the Terminal; and
- (b) that the impact on “royalties is difficult to quantify, as while charges may be lower under declaration, the difference between any access charge with or without declaration cannot be established with any precision”.

141 The problems with the conclusion in (a) have already been addressed at length in the QCoal Users’ submissions on criterion (a).

142 As to (b), the QCA accepted throughout its Draft Recommendation that NQXT is likely to charge “prices in excess of efficient costs” and “setting the price as high as is achievable, subject to the user still being willing to execute an agreement (ie. not exiting the market)” (pp 66-67). It is undoubtedly the case that compared to the existing user agreements, NQXT will charge higher access charges. Indeed, the evidence recorded on p 66 of the Draft Recommendation is

██████████ An increase in the TIC on that scale would, when multiplied by even just the QCoal Users’ annual throughput, result in a reduction in royalties to Queensland in the millions of dollars every year. There is therefore more than a sufficient evidentiary foundation to find that royalties are likely to be lower in a future without declaration than in a future with declaration.