Queensland Competition Authority

File Ref: 1223412

2 February 2017

Mr Anthony Timbrell
Chief Executive Officer
DBCT Management Pty Ltd
GPO Box 7823 Waterfront Place
Brisbane Qld 4001

Dear Mr Timbrell

Re: DBCT 2015 DAU—QCA's final decision

Thank you for your letter of 22 December 2016 regarding the QCA's final decision on DBCT Management's (DBCTM's) 2015 draft access undertaking (the 2015 DAU), and the associated secondary undertaking notice issued by the QCA in accordance with section 134(2) of the *Queensland Competition Authority Act 1997* (the QCA Act).

Your letter raised concerns with two elements of the drafting of the marked-up 2015 DAU that constituted Appendix A of the QCA's final decision, which you describe as:

(1) 'the requirement to retain DBCT PL as Operator of the Terminal'

(2) 'the requirement that DBCTM ensures that none of its related bodies corporate acquires an interest in a business in a market upstream or downstream of the Terminal.'

Your letter indicates that you consider the drafting included in Appendix A to the QCA's final decision does not reflect the position that, if circumstances changed with regard to the two identified elements, DBCTM could seek to amend its access undertaking in accordance with the relevant provisions of the QCA Act. Further, you state that 'the current drafting suggests that the QCA has determined that these two requirements are essential to the regulation of services at the Terminal.'

I wish to clarify that the QCA does consider that the arrangements included in Appendix A to the QCA's final decision do provide for DBCTM to be able to seek to amend its access undertaking in response to changed circumstances (including with regard to the two elements identified in your letter). As noted at page 44 of the QCA's final decision 'If circumstances ever changed to the extent that DBCTM considers changes to the operational arrangements are warranted, DBCTM retains a right under the QCA Act to seek to have the undertaking amended to allow for those changes. The QCA can then reassess proposed changes in that context.'

More specifically, I note that section 142(1) of the QCA Act allows a responsible person for an approved access undertaking to give a draft amending access undertaking (DAAU) to the QCA at any time. Section 142(2) of the QCA Act requires the QCA to consider such a DAAU and either approve, or refuse to approve, the DAAU. Section 142(3) requires the QCA, if it refuses to approve the DAAU, to advise how it considers it appropriate for the DAAU to be amended. I would expect that, if circumstances changed with regard to the two elements identified in your letter, then DBCTM could pursue changes to its access undertaking via the section 142 mechanism.

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I also wish to clarify that the QCA does not consider the two elements identified in your letter essential to the regulation of services at the Terminal. Rather, in assessing the appropriateness of the terms of the 2015 DAU, having regard to the factors in section 138(2) of the QCA Act (which include the object of Part 5 of the Act), the QCA considered that the characteristics of the current Operator and the limited vertical integration held by DBCTM's related parties in the Terminal supply chain were both important considerations. The QCA's final decision should not be understood as suggesting the QCA considers these elements could not or should not change in the future—merely that if this was to occur it would be necessary for the QCA to reassess, in consultation with stakeholders, whether the terms of the 2015 DAU remained appropriate. The mechanism for doing this would be through the DAAU process in the QCA Act.

To be clear, the elements referred to are relevant to the scope and operation of the 2015 DAU in a number of respects, including (without limitation):

- the independence of the Operator is relevant to matters such as the treatment of operational costs (which are a pass-through to Users and are not included in DBCTM's Annual Revenue Requirement (ARR) or otherwise subject to regulatory oversight) and the limited oversight over, or reporting of, operational matters or performance standards at the Terminal. However, an access undertaking that was structured differently with regard to these matters would not necessarily require DBCT Pty Ltd to be the Operator. The access undertaking could be restructured appropriately through approval of a DAAU via the section 142 mechanism.
- the limited vertical integration of DBCTM's related entities means that detailed ring-fencing arrangements have not been found to be necessary, other than in a limited respect in terms of the Trading Supply Chain Business. An access undertaking that was structured differently in this regard (i.e. that did include detailed and appropriate ring-fencing arrangements) could provide for DBCTM or related entities to own or operate other Supply Chain Businesses. Again, the access undertaking could be restructured appropriately through approval of a DAAU via the section 142 mechanism.

Our approach in this regard is not new. I note that DBCTM's 2010 access undertaking similarly stipulates (under clause 9) that if DBCTM or its shareholders obtain an interest in a related market, the QCA could require DBCTM to prepare a DAAU (in accordance with the QCA Act) setting out DBCTM's obligations in relation to ring-fencing. However, the QCA considers the approach adopted in the final decision on the 2015 DAU is preferable to clause 9 of the 2010 access undertaking, including because it:

- ensures any consideration of changes required to the undertaking occurs before DBCTM (or its related entities) enter into new or varied commercial arrangements
- provides greater clarity around the scope of the obligation—specifically, DBCTM must ensure that any DAAU has been approved and associated changes put into effect, if required, rather than merely requiring DBCTM to 'prepare' or 'submit' a DAAU. This is especially the case given the right under the QCA Act for an owner or operator of a declared service to withdraw a DAAU at any time prior to its approval.
- provides improved incentives for DBCTM to progress any amendments to the access undertaking in a timely and efficient way.

With regard to the requirements relating to the Operator, your letter notes that the Operations and Maintenance Contract (OMC) provides for early termination in circumstances such as default by DBCT Pty Ltd or for breaches of safety obligations. You suggest that the mechanism in section 142 of the QCA Act is not suitably responsive to the circumstances that may arise from early termination, and to enable DBCTM to exercise its rights under the OMC without breach of the access undertaking.

I do not agree that the section 142 mechanism would not be suitably responsive to an early termination situation. The DAAU process is, and has proven to be, a remarkably flexible one. While the QCA is obligated to assess any DAAU submitted under section 142 of the QCA Act on its merits in accordance with the Act, I would expect that newly proposed arrangements intended to ensure the Terminal was able to continue operating without DBCTM being placed in breach of its access undertaking could be considered quickly (noting that an early termination of the OMC is clearly a relevant consideration under section 138(2)(c) and (d) of the QCA Act). This would particularly be the case if a DAAU related to urgent or interim arrangements designed to facilitate continued operation of the Terminal while longer term arrangements were developed.

It is likely that the type of interim arrangements described here could be developed and submitted with a high degree of stakeholder support. Past experience suggests that DAAUs that have a high degree of stakeholder support, particularly when they relate to interim arrangements, can be considered and finalised quickly. In the past, such stakeholder support has been a compelling factor in the QCA's consideration of DAAUs and DAUs. For example, recent 'extension' DAAUs (that have extended the term of access undertakings while new DAUs are being considered) for various service providers have been finalised in periods as short as three to four weeks from the submission date, while QR Network's resubmitted 2010 DAU was considered and approved in one week.

With regard to the requirements relating to Supply Chain Businesses, your letter states that the possibility of DBCTM applying for amendments to the undertaking is neither appropriate nor adequate to address the issue. You suggest that the:

- terms set out in the final decision are inappropriate to deal with events which may occur before the approval of any DAAU
- absence of explicit provisions for amendment to the prohibition on vertical integration will discourage commercial activity
- process of amendment is inevitably time consuming and opportunities may be lost during an extended period of uncertainty.

As indicated above, I consider your concerns underestimate the potential responsiveness of the undertaking amendment mechanisms in the QCA Act. Moreover, as noted above, the QCA considers an important feature of the approach reflected in the final decision is that any changes required to the regulatory framework to address heightened vertical integration concerns are assessed and put in place before the relevant commercial relationships are finalised—and not at some uncertain point in the future. I do not see this position as either unusual or controversial, but would expect that DBCTM and its related entities would address the need to ensure appropriate prior regulatory treatment of any vertical integration concerns as part of any relevant acquisition or similar process.

In relation to the issue of timing, I simply note the recent experience of the Brookfield bid for Asciano, which necessitated consideration of ring-fencing measures that may have needed to be incorporated into DBCTM's 2010 access undertaking. In that case, DBCTM submitted its November 2015 ring-fencing DAAU to the QCA on 10 November 2015, in accordance with section 142 of the QCA Act. On 29 February 2016, the QCA released a draft decision on DBCTM's November 2015 ring-fencing DAAU, which articulated the QCA's position in relation to the matters under consideration.

I consider that the ability for a position to be clearly articulated within a relatively quick timeframe in this circumstance, suggests that the negative implications you have suggested may be associated with the QCA's final decision on the 2015 DAU do not necessarily arise. This is also with the knowledge that, in practice, any proposed investment in a Supply Chain Business would be likely to take some time to reach financial close. Such investment

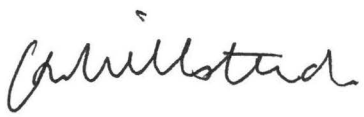
would be subject to market and/or other processes, and may also involve some level of scrutiny by the Australian Competition and Consumer Commission (ACCC)—as was the case with the Brookfield bid for Asciano.

I note your letter indicates an intention to submit a complying undertaking by 17 February 2017, in accordance with the extended period associated with the secondary undertaking notice issued by the QCA. Section 134(3) of the QCA Act provides that, if DBCTM complies with the secondary undertaking notice (i.e. gives the QCA a copy of a DAU amended in the way requested in the notice), the QCA may approve the DAU.

I also note that section 135 of the QCA Act provides that, if DBCTM does not comply with the secondary undertaking notice, the QCA may prepare, and approve, a DAU for the declared service. Such a DAU may differ in some aspects from the marked-up 2015 DAU (and Standard Access Agreement) that constituted Appendix A (and Appendix B) of the QCA's final decision. This would require additional consultation with stakeholders and may have timing implications for finalising approval of a new access undertaking.

Your letter concludes by stating that DBCTM's clear preference is to engage with the QCA to resolve your concerns by agreement. In that regard, QCA staff would be happy to discuss these matters with you further—however, any such discussions would necessarily be informal and non-binding. Should you wish to discuss these matters, please contact Leigh Spencer in the first instance on 07 3222 0532.

Yours sincerely



Charles Millsteed
Chief Executive Officer