
QCA CONSULTATION PAPER—DBCT MANAGEMENT'S EXECUTED DEED POLL

The matters in this document reflect some further issues that the QCA is considering as part of forming a view on whether or not the Dalrymple Bay Coal Terminal (DBCT) service satisfies the criterion in s. 76(2)(a), and on which stakeholder comments are sought. This document is not intended to indicate a draft or final view by the QCA on any issue. There should be no expectation that the matters raised in this paper either expressly or impliedly reflect the views of the QCA in respect of its review of the DBCT service.

We have received a broad range of submissions throughout the declaration review process to date on whether the Aurizon Network, Queensland Rail and the DBCT services should be declared, not declared, or declared in part, once the existing declarations expire.¹ We are now in the process of developing our final recommendations, which will be provided to the Treasurer in accordance with s. 87A of the *Queensland Competition Authority Act 1997* (QCA Act).

We now seek further submissions on one further aspect of the DBCT service as part of forming our view on whether or not the DBCT service satisfies s. 76(a) of the QCA Act (referred to hereinafter as 'criterion (a)'), namely that

access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service;

The matters of interest to us are outlined below. Submissions are not invited on any other matters relating to the DBCT service, nor any matters concerning the other services that are being reviewed by us for the purposes of making a recommendation pursuant to s. 87A.

Submissions are invited by no later than Monday 28 October 2019. No cross-submissions will be sought. Given the stage of our process, any submissions beyond this date will be treated as late submissions and will be subject to s. 168B of the QCA Act.

Background

In the draft recommendation, we identified that the key dependent market for the purpose of applying criterion (a) to the DBCT service² was the market for coal tenements.³

In the draft recommendation, we set out the preliminary view that the DBCT service would satisfy criterion (a). This was because access terms and conditions, in a future without declaration, would discourage entry of potential efficient entrants in the coal tenements market from acquiring tenements to eventually develop them into mining operations, relative to a future with declaration. Our view was based on, among other things, the following propositions:

- although DBCT Management had proposed a deed poll and an access framework to apply in the absence of declaration, at the time of the draft recommendation, it had not executed the deed poll

¹ The services being reviewed by the QCA are outlined in s. 250 of the QCA Act.

² The reference to the 'DBCT service' is a reference to the coal handling service described in s. 250(1)(c) of the *Queensland Competition Authority Act 1997* (QCA Act). The QCA's review of the DBCT service is required as per s. 87A of the QCA Act.

³ QCA, Draft Decision on the DBCT service, <https://www.qca.org.au/getattachment/f381d591-bfc6-4974-9d58-a5f47e32d0e3/Part-C-Draft-recommendation—the-DBCT-service.aspx>

- a future without declaration would result in asymmetric access terms and conditions between potential DBCT users (i.e. new coal miners, who would be exposed to DBCT Management's market power) and existing DBCT users (i.e. existing coal miners, who would be protected from DBCT Management's market power due to the terms set out in their existing 'evergreen' user agreements)
- DBCT Management would not be constrained from imposing an access charge that would appropriate all available rents from potential DBCT users⁴, which would in turn deter potential efficient entrants from participating in the coal tenements market, and competing with existing users.

The draft recommendation also observed that an access charge that exceeded the prevailing access charge by \$3.50 per tonne would not appear to have a material effect on competition in the coal tenements market in a future with declaration. This observation was based on the proposition that if, in a future with declaration, DBCT expansion costs were priced on an incremental differential basis, the resultant regulated terminal infrastructure charge (TIC) would likely be higher by that amount for new users relative to the TIC that would apply to existing users.⁵

Submissions post draft recommendation

Following the draft recommendation, DBCT Management:

- executed a deed poll in March 2019 which implements an access framework that it said will irrevocably apply in the absence of declaration (Deed Poll)
- made a number of changes to the version of the deed poll and access framework it had submitted before the draft recommendation, including the following:
 - the executed Deed Poll and access framework capping the access charge during the term of the access framework to no more than \$3.00 per tonne (real dollar value) above the access charge that would apply under a QCA administered pricing regime for access to the existing terminal. The \$3 cap is described as being 'hardwired' in the Deed Poll, with DBCT Management saying that:

the \$3 Cap prevents DBCTM from charging new users a TIC that is more than \$3.00 per tonne higher than the TIC that would be determined under a QCA administered pricing regime for the existing terminal component. The only circumstances where DBCTM could charge more than this is where the QCA administered TIC for the new terminal component would exceed the existing terminal Floor TIC + \$3.00 (i.e. in the case of an expensive and differentially priced expansion). In those circumstances, DBCTM could only charge up to the TIC determined under a QCA administered pricing regime for that terminal component.⁶
 - changes to the framework amendment process in the Deed Poll.

DBCT Management stated that it had made those changes to address the QCA's concerns in the draft recommendation⁷ and to avoid declaration, stating:

In practice, the threat of declaration will provide a real and credible constraint on DBCTM's incentive to increase access charges (notwithstanding the constraints under the Access Framework). Without declaration DBCTM is incentivised to pursue modest increases in charges rather than risk declaration by charging at levels which would foreclose efficient new entrants from entering the coal tenements market. (para 285)

⁴ The concept of DBCT Management appropriating all available rents can be alternatively described, in non-economic terms, as DBCT Management pricing terminal access to the point where a user will only be marginally profitable, and will not generate profits above this.

⁵ QCA draft recommendation, Part C: DBCT service, p. 86.

⁶ DBCT Management, April 2019, p. 12.

⁷ DBCT Management, 11 March 2019, para 333, 334.

...

The introduction of the \$3.00 cap comprehensively addresses the QCA's key concern, by ensuring that the access charges paid by new users are within the \$3.50 materiality threshold (which the QCA has already concluded would not appear to be material) of the QCA determined charges for the existing terminal. (para 13)⁸

Stakeholders made a range of submissions in response to DBCT Management's Deed Poll, including that:

- it is legally ineffective as it has not been 'delivered' in the sense that it has not been accepted or relied upon by a covenantee, and could be 'disclaimed' by access seekers in the future;⁹
- it is not an appropriate counterfactual,¹⁰ including because it is artificial and a contrived to attempt to circumvent criterion (a).^{11, 12}

In particular, detailed submissions and cross-submissions, supported by legal advice, were provided to the QCA by the DBCT User Group and DBCT Management. These issues were also raised at the public forum in July 2019.

QCA's request for stakeholder submissions

We acknowledge that there are divergent views on whether the Deed Poll is binding on DBCT Management and whether it is irrevocable.

At the same time, we note that DBCT Management has clearly expressed an intention to be legally bound by the Deed Poll and access framework, such that DBCT Management considers it to be irrevocable, albeit that it will not impose access obligations unless and until the service ceases to be declared (for example, see DBCT Management's letter of 11 March 2019).

Separately, we note that notwithstanding stakeholder submissions that the Deed Poll and access framework are 'artificial' or 'contrived', the Deed Poll has been executed.

We are carefully considering the arguments that have been put relating to the legal effect of the Deed Poll and have not reached a view on their respective merits. We do not intend to explore these matters further in this paper, and are not inviting further submissions on this topic.

If, however, it were accepted that the Deed Poll is an appropriate part of the counterfactual, it would be necessary to consider the effect of the Deed Poll on access to the DBCT service, and competition in dependant markets, in order to reach a conclusion on the application of criterion (a).

Solely for the purpose of this consultation paper, we have assumed that the Deed Poll is an appropriate part of the counterfactual for the purpose of applying criterion (a), to allow us to explore the following matters.

Operation of the Deed Poll and access framework including the \$3 price cap

We note that existing DBCT users are parties to 'evergreen' contracts which will continue to operate in a future without declaration to constrain DBCT Management's ability to exercise market power. However, if

⁸ DBCT Management submission, 11 March 2019. <http://www.qca.org.au/getattachment/b11ee566-c558-4eb6-b410-e36d2fbdefdf/DBCT-Management-Submission.aspx>

⁹ DBCT User Group, 26 April 2019, p. 80-84, Schedule 8 - O'Donnell QC advice, p. 3.

¹⁰ DBCT User Group, 11 March 2019, pp. 65-66; DBCT User Group, 26 April 2019, p. 76, Schedule 7; Peabody, 26 April 2019, p. 3; Glencore Coal, 26 April 2019, p. 2; Pacific National, 24 April 2019, p. 2.

¹¹ Peabody, 11 March 2019, p. 4; Peabody, 26 April 2019, p.3-5.

¹² DBCT User Group, 26 April 2019, p. 6.

the DBCT service is not declared, potential DBCT users (access seekers) will be compelled to seek access to the DBCT service under alternative arrangements.

DBCT Management has said that its executed Deed Poll and access framework will constrain its ability to exercise market power in respect of access seekers such that there would be no detrimental impact on competitive conditions in the coal tenements market. A key aspect of DBCT Management's contention rests on the operation of its \$3 price cap.¹³

We note that, in respect of the impact on competitive conditions in the coal tenements market, stakeholders have made a range of submissions on the \$3 price cap. Stakeholders have also commented on other aspects of the application of the Deed Poll/access framework, including in relation to:

- the ability to amend the access framework;¹⁴
- enforceability of the \$3 cap.¹⁵

We note that terms and conditions of access, in the absence of declaration, may be relevant for access seekers who wish to make long lived investments based on the terms of the Deed Poll and access framework or any other alternative arrangements DBCT Management may offer. Terms and conditions agreed under the Deed Poll may continue to govern access long after the current expiry date of the access framework.¹⁶

We now wish to explore further the effect of the Deed Poll and access framework, including the \$3 price cap, on competition in dependent markets and the extent to which the threat of declaration,¹⁷ either alone or together with the Deed Poll, will constrain DBCT Management's ability to exercise market power.

In particular, stakeholders are invited to comment on:

- whether the implementation of the Deed Poll and access framework on their terms, combined with the threat of declaration, would be sufficient to constrain DBCT Management's conduct in the absence of declaration—such that access (or increased access) as a result of declaration would not promote a material increase in competition in the coal tenements market; and
- whether DBCT Management has demonstrated by its actions following the draft recommendation, including by putting in place the \$3 price cap, that the threat of declaration is a constraint on DBCT Management's ability to exercise market power.

¹³ DBCT Management, April 2019, pp. 11-12.

¹⁴ Deed Poll, cl. 8.

¹⁵ Deed Poll, cl 6.

¹⁶ The Deed Poll provides that the access framework will remain in effect throughout the Term, which will end the earlier of 9 September 2030 and the date on, or after, 9 September 2020 on which use of the terminal is first taken to be a service declared under Part 5, Division 2 of the QCA Act. The Deed Poll also states that DBCT Management will not revoke or amend the Deed Poll until the expiry of the Term (see Deed Poll, Background (E), cl. 3.1).

¹⁷ With declaration either under Part 5 of the *QCA Act* or Part IIIA of the *Competition and Consumer Act 2010*.