Peabody Energy Australia

Submission in response to DBCT Management Initial Submission

Declaration Review

16 July 2018

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1 Executive summary

1 Peabody Energy Australia (Peabody) appreciates this opportunity to respond to the submission by DBCT Management dated 30 May 2018 (**DBCTM Initial Submission**) to the QCA in relation to the QCA's review of the declarations of the Dalrymple Bay Coal Terminal (**DBCT**).

2 Peabody is a member of the DBCT User Group and endorses and supports the detailed submission made by that group in reply to the DBCTM Initial Submission (**DBCT User Group Reply Submission**). This brief submission is intended to supplement that submission, as well as the initial submissions of the DBCT User Group and Peabody of 30 May 2018, in response to the QCA Staff Paper.

3 In the DBCTM Initial Submission, DBCTM raises three principal arguments against declaration of the coal handling service at DBCT (the **Declared Service**). DBCTM argues that the Declared Service does not satisfy:

- criterion (b), because DBCT is not a natural monopoly;
- criterion (a), because DBCTM will continue to provide open access on substantially the same terms as are currently offered to access seekers, pursuant to an Access Framework and with a pricing framework that maintains volumes at the same level as under QCA regulation; and
- criterion (d), because access to the DBCT Service as a result of declaration is likely to result in significant public detriments that materially outweigh any limited benefits.

4 Peabody does not agree with any of these assertions, and supports the position of the DBCT User Group that each of the access criteria are satisfied in respect of the Declared Service. Peabody considers that DBCT's analysis on each of these points is fundamentally flawed, including because:

- its conclusions that DBCT is not a natural monopoly rests on an approach to market definition that is conceptually and economically unsound and that ignores several decades of settled law as well as practical market realities;
- DBCTM's argument in relation to criterion (a) rests on the incorrect proposition that if overall volume of coal handled at DBCT is unchanged (from what it would be if declaration continued) then there can be no difference in competitive outcomes, an assertion that is incorrect as a matter of law and economics;
- the proposed Access Framework is an artificial device that cannot work commercially and is evidently contrived. It cannot be reasonably accepted by the QCA as the basis for determining a proper counterfactual;
- DBCTM overstates the impact of recent legislative changes to the weighing exercise required under the public interest criterion; and
- in any event, DBCTM significantly overstates the costs associated with continued declaration relative to the likely alternative and does not give sufficient regard to the substantial, industry-wide, benefits that arise from declaration.

5 Peabody contends that nothing in the DBCTM submission credibly addresses the fundamental point – that the declaration of DBCT over almost two decades has contributed substantially to the competitive environment and conditions in related markets such as the market for tenements within the Hay Point catchment and the market for above rail coal services. Indeed, the Goonyella system (to DBCT) has the highest penetration by competitive above rail providers of any system in the CQCN and DBCT supports a robust market for tenements and associated exploration and development.

6 The removal of declaration, in the circumstances (and regardless of the presence of any contrived alternative put in place by DBCTM) would have a material and adverse impact on this competitive environment, to the detriment of the Queensland coal industry and broader economy.

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2 Response to DBCTM Initial Submission

2.1 Statutory interpretation issues

7 The DBCTM Initial Submission is peppered with thinly-veiled threats of judicial review unless the QCA accepts and adopts DBCTM's preferred interpretation of the statutory language. Peabody does not propose to respond in detail to each of those statements, suffice to say that in almost all of them, DBCTM's interpretations are questionable and unsound and the related threats are hollow and should not influence the QCA in its task.

8 In this submission, Peabody intends to respond only to two such cases, which are of particular importance.

(a) Approach to the counterfactual

9 At paragraph 20 of the DBCT Initial Submission, DBCTM states:

> *If the QCA were to view its obligation under section 87A as an assessment of whether declaration should continue, the adoption of such an approach would involve error.*

10 On its terms, this statement is wrong. Peabody is prepared to charitably accept that DBCTM may have intended for the submission to be that the QCA should not view the existing declaration as introducing any kind of *presumption* that declaration continue. Peabody would accept that proposition.

11 However, in undertaking its task, the QCA is fundamentally considering the question of whether declaration should continue. To that end, in considering criterion (a) for example, the appropriate counterfactual is whether the removal of declaration may have a material and adverse effect on the conditions and environment for competition in related markets, compared with the world in which declaration remains in place. While past experience with declaration does not create any kind of legal presumption – it may (and does) provide strong evidence of the historical benefits of declaration which are clearly relevant and should inform the QCA in considering what may happen in the future.

(b) Approach to Re Sydney Airports and criterion (a)

12 The second important point of interpretation is the test to applied to the *promotion* of competition in related markets under criterion (a). In this regard, DBCTM argues that the QCA should discard almost two decades of settled law on the issue in favour of its own – narrower – interpretation. DBCTM contends at paragraph 287:

> *The QCA would therefore err if it sought to solely apply the Re Sydney Airports interpretation of criterion (a) and considered only whether declaration would create an enhanced competitive environment, without having regard to the actual words of the legislation and the requirement that it must be positively satisfied that declaration would promote a material increase in competition in a market.*

13 This submission appears to suggest that the test provided in *Re Sydney Airports* is not consistent with a proper interpretation of the statutory test under criterion (a) – and that developments since that decision have somehow altered the test to be applied. If that is DBCTM's submission, it is wrong. The approach applied by the Tribunal in *Re Sydney Airports* is intended to give meaning to what constitutes a promotion of competition, which is the same

statutory language in the QCA Act. The Tribunal in *Services Sydney* stated, at the same time as adopting the *Re Sydney Airports* test:

> *It is in this sense that the notion of promotion of competition involves a consideration that if the conditions or environment for improving competition are enhanced, then there is a likelihood of increased competition that is not trivial. We agree.*[1]

14 The manner in which the QCA originally formulated its task in the staff paper is therefore legally sound and consistent with the current and best legal principles under criterion (a). Indeed, the test for promotion of competition applied by the Tribunal and upheld by the Full Federal Court in *Re Sydney Airports* have been subject to review by the Productivity Commission, the Harper Committee and a number of subsequent Part IIIA decisions – and despite substantial amendment to other aspects of criterion (a), the test for how any 'promotion' of competition is to be understood has not been overturned, abandoned or amended.

In this regard, Peabody notes:

- The test has been adopted in a number of decisions since *Re Sydney Airports*, including most recently by both the Tribunal and Full Federal Court in *Port of Newcastle.*[2]
- The Tribunal in Fortescue also applied the *Re Sydney Airports* test – and this was not altered on appeal by either the Full Federal Court or the High Court.
- While criterion (a) was amended in 2006, after the *Re: Sydney Airports* decision, those amendments did not disturb the correct approach to assessing whether competition would be promoted. Indeed, the Explanatory Memorandum accompanying the 2006 amendment makes clear that it was not intended to alter the approach to assessing whether had been a change in competition. Rather, the amendments were directed at more clearly expressing the *magnitude* of expected changes to the competitive environment that were required – that is, such changes should be more than trivial changes.[3]
- Neither the recommendations and analysis of the Productivity Commission in 2013[4] nor the Harper Committee in 2015[5] altered the *Re Sydney Airports* test.

15 Given this strong precedent, Peabody maintains that the approach proposed at section 4.2 of the QCA staff paper on this issue is sound. In relation to criterion (a), the QCA should consider whether the removal of declaration at DBCT would be likely to have a material adverse effect upon the conditions or environment for competition in related markets, from what they would be if declaration continued. That is, will the opportunities and environment for competition given continued declaration be better than they would be without declaration?

2.2 Criterion (b) – natural monopoly

(a) DBCTM's approach to market definition is fundamentally flawed

16 Peabody agrees with DBCTM that criterion (b) is concerned with identifying natural monopoly facilities. Peabody also agrees that identification of the market in which the facility operates, and the likely foreseeable demand for services supplied in that market, is fundamental to the assessment of whether that facility operates as a natural monopoly.

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[1] Re Services Sydney Pty Limited [2005] ACompT 7

[2] *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal* [2017] FCAFC 124, [34], [182]

[3] The Tribunal Fortescue opined in relation to this change that "*The amendment brought no change to the existing law. The Tribunal had always taken the position that criterion (a) required a non-trivial increase in competition.*"; Fortescue Metals Group Limited [2010] ACompT 2 at [584]

[4] Productivity Commission 2013, *National Access Regime*, Inquiry Report no. 66 pages 167-173.

[5] Competition Policy Review, *Final Report,* March 2015 at pages 432-433.

17 However, Peabody does not agree with the highly unorthodox approach that DBCTM takes to identifying the relevant market. DBCTM begins its analysis with the startling suggestion that market definition is an exercise that can be undertaken without reference to substitution:

> *The definition of market in section 71 of the QCA Act is not exhaustive. The section provides that a market 'includes' a market for the goods or services and other goods and services that are able to be substituted for, or are otherwise competitive with, those goods or services. As such,* ***while a market is often defined by reference to substitution, the definition does not preclude other means of defining the market****.*[6]

18 This method of defining markets other than by reference to substitution is said to be justified by use of the phrase "*otherwise competitive with*" in section 72(2)(b) of the QCA Act. However, it is made clear by the very authorities subsequently cited by DBCTM[7] that this phrase is intended to capture degrees of substitutes in the market definition analysis, not to suggest that services that are not economic substitutes should be included within the relevant market.

19 Contrary to the approach taken by DBCTM, the ACCC and competition authorities in Australia and internationally stress the importance of substitution in market definition. In its merger guidelines the ACCC notes that "*identifying relevant substitutes is key to defining a market*"[8] and the International Competition Agency similarly notes that "*agencies should assess the extent to which products are substitutable from the point of view of customers*" in determining product markets.[9]

20 In identifying relevant substitutes for the purpose of market definition, it is well established in Australia and internationally, that it is appropriate to regard very distant competitors as offering such a weak competitive constraint that the products or services supplied by such competitors are not within the same economic market.[10] The hypothetical monopolist test is commonly used as a way of analysing which alternative goods or services should be regarded as sufficiently close constraints to be regarded as supplied within the same market.

21 DBCTM's flawed approach to market definition is central to their conclusions. DBCTM asserts – without any economic analysis of substitution – that all coal handling services purchased by parties within an arbitrarily defined geographic area are within the same market. This approach is in contrast to the analysis of the DBCT User Group in its Initial Submission which contained a detailed analysis, supported by economic evidence and the application of the hypothetical monopoly test to the services supplied from DBCT, of the economic substitutability of coal handling services provided by other Queensland ports for the services supplied from DBCT. This analysis concluded that there are significant economic and practical constraints to acquiring coal handling services from ports outside of Hay Point such that those services are not within the same economic market. These constraints include:

- alternative terminal costs;
- below rail costs;
- above rail costs;
- below rail network differences;

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[6] DBCTM Initial Submission, at [99]

[7] *Seven Network Ltd v News Ltd* (2009) 182 FCR 160 at [621]; Corones SG, *Competition Law in Australia* (6th ed, Lawbook Co, 2014) at [2.70], page 77

[8] ACCC Merger Guidelines, 2008 at 4.12

[9] ICN Recommended Practices for Merger Analysis, page 7 <http://www.internationalcompetitionnetwork.org/uploads/library/doc1107.pdf>

[10] See, for example, French J in *Singapore Airlines Ltd v Taprobane Tours WA Pty Ltd* [1991] FCA 621.

- a lack of available terminal capacity (including because the capacity of some ports is used by the owner of those ports as part of a vertically integrated supply chain);
- a lack of metallurgical coal co-shipping opportunities; and
- existing long term take or pay contracts.

22 The experience of Middlemount mine (which is currently 50% owned by Peabody) is a good example of the way in which the simplistic analysis of DBCTM ignores market realities. In the DBCTM Initial Submission it is asserted that the Middlemount mine had a choice of whether to transport product to DBCT or to Abbot Point Coal Terminal (**APCT**). DBCTM uses this as support for its contention that services offered by APCT are substitutable for those offered by DBCTM.

23 It is correct that Middlemount approached DBCTM about the possibility of access at the time it was developing its mine. However, it was provided with no clear pathway to expand by DBCTM, who would not commit to any expansion. Faced with a clear offer for supply by APCT, and no clear offer of supply by DBCT, it elected to ship its coal to APCT despite DBCT being a more proximate port and a significantly lower cost option in relation to coal shipped from other Peabody mines. This does not demonstrate economic substitution, it represents the Middlemount mine accepting the only firm offer of supply available to it at the relevant time.

(b) It is clear that DBCT is a natural monopoly in a properly-defined market

24 Peabody supports the analysis of foreseeable demand in the DBCT User Group Reply Submission. This analysis shows that DBCT is capable of servicing even the highest estimates of foreseeable demand in the relevant market at the lowest cost.

25 In particular, Peabody agrees that it would be highly artificial to include demand that is contracted to be supplied to other ports within the measure of foreseeable demand for the period in which it is so contracted. This includes the 3mtpa of capacity from Middlemount that it has contracted to supply to APCT until 2027; it is almost inconceivable that Middlemount would look to supply these tonnes through DBCT before the expiry of that contract.

26 Taking this and the other matters discussed in the DBCT User Group Reply Submission into account, Peabody considers that demand in the relevant market is able to be satisfied at the lowest cost by DBCT over the time frame for which declaration will be likely to apply.

2.3 Criterion (a) – promotion of competition

(a) The competitive environment in dependent markets is likely to be materially less favourable without declaration

27 As outlined in more detail in our initial submission, there are a number of elements of the DBCT Undertaking – which is underpinned by binding regulation by the QCA – that provide critical behavioural and structural constraints on the exercise of market power by DBCTM. These include:

- tariffs are regulated based on an orthodox building block model;
- DBCTM is prevented from vertically integrating into related markets;
- constraints on operational discrimination; and
- stable and transparent terms of access, with rights of renewal.

28 These features of the existing regulatory regime underpin the existing robust competition in dependent markets including those for mining tenements, rail haulage and the market for secondary DBCT capacity.

29 DBCTM argue that for the purpose of analysing criterion (a) it is necessary to establish that declaration would lead to higher volumes and/or increased quality being supplied in a dependent market, relative to the likely counterfactual.[11] Such an approach is an overly narrow view of competition and one that is inconsistent with the approach taken to criterion (a) by the NCC, Tribunal and the Federal Court.[12]

30 The approach to assessing criterion (a) outlined by the NCC in its recent guide is broader than the narrow measure of output and quality suggested by DBCTM. The NCC considers that the promotion of a material increase in competition involves:

> *an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.*[13]

31 This is consistent with the Tribunal in *Virgin Blue* where it held that to meet the requirements of criterion (a) it would need to be satisfied that if the service was declared:

> *there would be a significant, finite probability that an enhanced environment for competition and greater opportunities for competitive behaviour – in a non-trivial sense – would arise in the dependent market.*

32 An example of the way in which the approach to criterion (a) propounded by DBCTM is too narrow is in relation to conduct that discriminates against smaller providers or new entrants. If the approach suggested by DBCTM was adopted, then conduct by a service provider which favoured incumbent suppliers over potential of new entrants should not, on its own, be regarded as a competition problem.

33 However, this is in contrast to the NCC's April 2018 guide to declaration of services under Part IIIA which specifically describes monopoly prices that "*restrict entry or participation in a dependent market*" or actions which "*prevent new market entry*" as actions of a service provider that can adversely affect competition in a dependent market.[14]

34 In that case the Tribunal concluded that criterion (a) was satisfied primarily because the pricing structure adopted by Sydney Airport discriminated against low cost carriers, in favour of Qantas which was Sydney Airport's largest customer. It was this discriminatory conduct, which made new entry and expansion more difficult and reduced the opportunities for competitive behaviour that was critical to the Tribunal's findings. In contrast to the approach to criterion (a) suggested by DBCTM, the Tribunal did not even consider it necessary to analyse whether or not the conduct of Sydney Airport lessened the volume or quality of services supplied in the relevant dependent market; the discriminatory effect of the conduct on low cost carriers by Sydney Airport in the absence of declaration was sufficient to demonstrate that declaration would promote competition.

35 DBCTM's narrow approach to criterion (a) is fundamental to their conclusion that it is not satisfied. Peabody considers that this approach should be rejected, and that the QCA should properly adopt a broader view of what constitutes a relevant effect on competition. This will allow it to recognise that the positive features of the existing regulatory regime – underpinned by

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[11] DBCTM Initial Submission, [295]

[12] See the advice from Allens supporting the DBCT User Group's Initial Submission for a detailed analysis of the legal framework for assessing promotion of competition for the purpose of criterion (a)

[13] National Competition Council 2018, Declaration of Services: A guide to declaration of services under Part IIIA of the Competition and Consumer Act 2010 (Cth), at 3.23

[14] National Competition Council 2018, Declaration of Services: A guide to declaration of services under Part IIIA of the Competition and Consumer Act 2010 (Cth), at 3.30

declaration – are critical in supporting the competitive conditions that currently exist in the relevant dependent markets.

(b) The Access Framework is an artificial proposal that should not be considered an appropriate counterfactual

36 DBCTM's principal argument in relation to criterion (a) is that there will be no difference in competitive conditions with and without declaration because it "*will continue to provide open access on substantially the same terms as are currently offered to access seekers*". This is a startling assertion that should be rejected by the QCA.

37 In proposing that the Access Framework is able to replicate regulation by the QCA following declaration, DBCTM is in effect suggesting that economic regulation of a natural monopoly service is unnecessary because it will submit to a voluntary contractual regime under which it will agree to not exercise its market power. Such a position is not credible. In our initial submission we emphasised that in assessing the likely counterfactual without declaration, it is important for the QCA to consider the nature and extent of DBCT's significant power in the relevant market.

38 The ACCC, in its merger guidelines, warns that it will not take into account counterfactuals it considers have been manipulated for the purposes of making clearance more likely. The ACCC considers that one indication of a such a manipulated counterfactual is that it involves a "*course of action by the merger parties which cannot be demonstrated to be profit maximising and/or in the interests of shareholders*". DBCTM's claim that it will continue to supply services on substantially the same terms with and without the constraint of regulation cannot be said to be profit maximising, and should not be accepted as a matter of principle.

(c) Even if it were considered an appropriate counterfactual, the proposed Access Framework would not effectively constrain DBCTM's conduct

39 In addition to the conceptual problems associated with accepting an artificial arrangement such as the Access Framework as the relevant counterfactual, there are material differences between the proposed Access Framework and the Undertaking made under the existing Access Regime. These differences include that:

- pricing outcomes are subject to highly uncertain bilateral negotiation and arbitration, and will be subject to significant asymmetries as a result of a loss of the existing reporting requirements regarding cost matters;
- non-price terms of access are subject to individual negotiation (without provision for access to dispute resolution mechanisms), rather than being generally standardised across the industry;
- any extension to the Access Framework beyond 10 years is entirely at the discretion of DBCTM;
- there is no independent monitoring of compliance and limited enforcement options;
- the circumstances under which the terms of the Access Framework can be modified are substantially broader than the Undertaking;
- there is less certainty as to the terms of future funding agreements; and
- the existing undertaking is a statutory instalment that is clearly enforceable, while the proposed Deed Poll is reliant on less certain contractual rights.

40 The package of features in the existing Undertaking have provided a market structure that has contributed materially to the environment and conditions within which the coal industry in Queensland has grown and flourished over the last 20 years. A key reason for this is that the

Undertaking provides long term, transparent and stable (regulated) terms of access, with rights of renewal for users. The existing structural constraints on the exercise of market power by DBCTM will not be replicated by the Access Framework, which will lead to significantly less favourable conditions for competition across a range of dependent markets.

2.4 Criterion (d) – public interest

(a) Continued declaration would result in significant public benefits

41 As outlined in our initial submission, Peabody considers that there are clear and compelling public benefits in maintaining the existing declaration over DBCT. The Queensland coal industry, including Peabody, has made historical investment decisions on the expectation that DBCT would remain a regulated asset. Removal of declaration would result in a windfall gain to the owners of the asset, and have a chilling effect on future investment in the Queensland coal industry.

(b) DBCTM overstate the impact of recent legislative changes

42 The DBCTM Initial Submission overstates the impact of the recent changes to the wording of criterion (d) by suggesting that the QCA must be satisfied that declaration will result in "*substantial"*, or "*significant"* public benefit. DBCTM appears to reach the conclusion that the recent changes increased the threshold for the level of public benefit that must be demonstrated because of the inclusion of the word "*promote*" in the revised test.[15] However, such a reading is not justified by the background that lead to the current change in the public interest criterion; the change to this criterion was intended to reverse the onus of proof, and not to import a measure of the quantum of public benefit that would need to be established. The only requirement is that any public benefit not be trivial or ambiguous.

43 The change to the public interest criterion arose out of the Productivity Commission's 2013 inquiry into the national access regime. The PC recommended that the public interest test "*should be an affirmative test that requires the public interest to be promoted, rather than (as is currently the case) access being 'not contrary to the public interest'.*"[16] The PC went on to note that "*An affirmative public interest test could be achieved by changing the language from 'not contrary to the public interest' to a test of what would 'promote the public interest'.*"[17] The PC expressed that the public interest criterion should operate "*to deny declaration applications that would produce only trivial or ambiguous gains if successful*".

44 The PC's recommendation on the public interest criterion was endorsed by the Harper Review and subsequently incorporated into the legislative amendments.

45 Peabody considers that it is incorrect to suggest that the QCA must satisfy itself that declaration would lead to a public benefit of a "*substantial*" or "*significant*" quantum. In fact, the wording of criterion (d) is in contrast to criterion (a) which qualifies that any promotion of competition as a result of declaration must be "*material*". No such qualification accompanies the word "*promote*" in criterion (d).

(c) DBCTM overstate the administrative and compliance costs of the current regime, relative to any likely alternative

46 Section 76(5)(c) of the QCA Act requires that, in assessing whether to recommend declaration of a service, the QCA must have regard to the administrative and compliance costs that would be incurred by the provider of the service if the service were declared. Peabody does not disagree with DBCTM's analysis of the administrative and compliance costs associated with economic regulation of services supplied DBCT. However, in making an assessment about the overall public benefits associated with declaration it is important to put these costs into context

[15] DBCTM Initial Submission, at [412] – [414]

[16] Productivity Commission 2013, National Access Regime, Inquiry Report no. 66, Canberra, page 181

[17] Productivity Commission 2013, National Access Regime, Inquiry Report no. 66, Canberra, page 179

by considering administrative and transaction costs that would be borne by both DBCTM and access seekers. Such costs are appropriately taken into account by the QCA under section 76(5)(d) of the QCA Act.

47 As an alternative to regulation by the QCA, DBCTM propose that access seekers would have recourse to a binding and effective negotiate / arbitrate access framework. Past experience suggests that the administrative and transaction costs associated with such a framework in circumstances where there are a large number of access seekers for an essential facility are likely to be substantial.

48 Prior to 2009, Australia's telecommunication access regime operated under a negotiate / arbitrate framework. However, this framework was abolished and replaced with a procedure under which the ACCC set benchmark terms of access for each declared service. The reasons for this change were described in the explanatory memorandum as:

> *The negotiate-arbitrate model has proven to be complex and delay-prone. Each access dispute has to be arbitrated individually – even if it is very similar to disputes that have previously been arbitrated…*[18]

49 The EM also noted that 157 access disputes were notified in the 12 years following introduction of the access regime, and that the ACCC was considering 51 separate access disputes as of early 2009. DBCTM cannot point to costs associated with regulation, without properly considering the counterfactual – which would be an environment of heightened uncertainty and disputation between individual producers and DBCTM. In other sectors, such as telecommunications, this model has been seen to be a failure and substantially less efficient and effective than regulation.

50 Given this history, it cannot be assumed that the costs associated with a contrived negotiate / arbitrate access framework as proposed by DBCTM will be materially lower than those associated with the current regulatory arrangements; it is possible that they will be higher.

3 Conclusion

51 Peabody welcomes the opportunity to respond to the DBCT Initial Submission on the future declaration of services provided by DBCT:

- Peabody supports the further submissions made by the DBCT User Group in response to the DBCT Initial Submission;
- Peabody continues to firmly consider that the criteria for declaration are satisfied in respect of DBCT and that declaration should continue for a further period. The contentions raised by DBCTM in its initial submission rest on a flawed application of legal and economic principles, and numerous factual inaccuracies.
- We trust that the QCA will see through the flawed analysis of DBCTM and find that declaration for this important infrastructure should continue, which will help to underpin robust competitive conditions in a range of dependent markets and economic benefits for the state of Queensland.

52 If you have any queries or issues relating to this submission, please contact Mark Smith (Director Infrastructure) on +61 7 3333 5628.

[18] Telecommunications Legislation Amendment (Competition And Consumer Safeguards) Bill 2009, Replacement Explanatory Memorandum, page 46.