

28 October 2019

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Submitted via QCA online portal

Dear Mr. Millstead

QCA Consultation Paper - DBCT Management's Executed Deed Poll

Introduction

Pacific National (PN) welcomes the opportunity to provide a submission to the QCA Consultation Paper on DBCT Management's (DBCTM) executed Deed Poll. As strongly argued in our 24 April 2019 cross submission on the declarations review, we do not accept the Deed Poll to give effect to the DBCTM Access Framework is a relevant counterfactual to reach a conclusion on the application of criterion (a) under s. 76(2) of the *Queensland Competition Authority Act* (QCA Act).

Nevertheless, for consultation purposes only, the QCA requests consideration of *the effect* of the Deed Poll on access to the DBCT service - 'the handling of coal at Dalrymple Bay Coal Terminal (DBCT) by the terminal operator' in terms of a material increase in competition for the DBCT service and other dependent markets – which the QCA identifies as the coal tenements market. For the reasons articulated below, this consideration needs to include the other dependent market - the coal haulage market.

Coal haulage market relevant for criterion (a)

PN provided strong evidence that the coal haulage market is a dependent market where access (as a result of declaration) promotes a material increase in competition (criterion (a)). Declaration and effective regulation facilitated entry and strong business growth for PN in Queensland. We are a case study in how effective access regulation of a declared service can promote competition and create benefits in dependent markets and the broader economy. Our experience demonstrates the potential for future entry and further promotion of competition if declaration is to continue.

As the 'middle man' between the miners and the terminal, PN submits declaration of services at DBCT provides important structural and behavioural constraints on DBCTM, which have supported the growth of competition in dependent markets, including coal haulage markets. Benefits of declaration include certainty and transparency of access terms and conditions, including a standard access agreement facilitating negotiated agreements and importantly, terminal regulations for efficient scheduling of coal handling services for users at the Terminal and non-discriminatory provisions including ring-fencing.

PN's earlier submissions provided examples of how the transparency of regulated access terms and conditions (given by declaration) are superior to the non-regulatory approach of an Access Framework. In this submission we prove how the executed Deed Poll and Access Framework is insufficient to constrain DBCTM's conduct (or ability to exercise market power) in terms of the impact on the terminal regulations and non-discriminatory provisions.

Caul haulage contracts are impacted by DBCTM's management of the terminal – terminal regulations

It is important to recognise commercials underpinning coal haulage contracts are determined by reference to assets (rollingstock/labour), network and terminal availability and train operating modes, with all of these factors influenced by DBCTM's management of the terminal (as well as Aurizon Network's management of its network). Fortunately, PN is able to better control its business and regulatory risks as management of the terminal is subject to terminal regulations in an approved QCA undertaking.

Without regulatory oversight, our risk profile could increase as there may be an incentive for DBCTM and/or the terminal operator to, under the guise of 'good operating maintenance and practice', impose additional supply chain costs on above-rail coal haulage operators (which would either be absorbed by the haulage operator or passed through to an individual customer). DBCTM provides several rail specific terminal services including train scheduling and unloading but also uses rail to facilitate its stockpiling and blending terminal services. The protection given by the undertaking means the legitimate business interests of coal haulage providers are considered alongside the DBCT Service in respect of the management of the terminal.

As the QCA would be aware, there is significant complexity in the coal haulage supply chains supporting the coal industry to deliver coal from the mine to a coal terminal for export to their end customers. The undertakings for both DBCT and Aurizon Network recognise the inter-relationships and inter-dependencies within the coal transport supply chain with structural arrangements to efficiently manage coal movements from mine to port. The QCA approved regulatory processes (including the terminal regulations) are clear and transparent for all supply chain participants. No supply chain participant is disadvantaged over another.

Terminal regulations within the undertaking better mitigate coal haulage business and regulatory risk

The current undertaking includes the process for DBCTM (at the request of the terminal operator) to approve changes to the terminal regulations and is subject to QCA oversight in the event of a dispute. We understand the Access Framework will retain the process for changes to the terminal regulations, however we are concerned by the loss of oversight and decision by the current QCA in the event of a dispute between DBCTM and the terminal operator and the risks it may impose on coal haulage. In such circumstances, failure to reach agreement will mean DBCTM's decisions will not be challengeable in any meaningful way – potentially negatively impacting the commercials underpinning coal haulage contracts mentioned above.

We note that at the request of some users, the process for changes to the terminal regulations is a 'live' issue in the context of the QCA assessment of the draft DBCTM 2021 replacement access undertaking. PN asserts it is critical the terminal regulations remain under regulatory oversight to ensure any changes operate equitably among access holders, access seekers, expansion parties and above-rail coal haulage operators. As confirmed by the QCA in its draft decision on the DBCTM 2015 (ring-fencing) draft amending access undertaking:

'We consider it is appropriate for the QCA to retain a role in resolving disputes under the Terminal Regulations because in the absence of regulatory oversight, the development and operation of the Terminal Regulations could over time undermine the effectiveness of other commitments made by the DBCTM...for example, the non-discriminatory treatment provisions.'

Non-discrimination ringfencing provisions are more appropriately overseen by an economic regulator

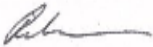
The current undertaking allows the QCA to handle complaints and undertake audits for suspected breaches of the non-discrimination ringfencing provisions. As ringfencing is a regulatory construct (albeit an important one), it is difficult for any other body other than the QCA to assess whether there may have been a ringfencing breach and instruct the auditor's investigation appropriately. QCA oversight is removed from the Access Framework.

Conclusion

Accordingly, PN considers removal of declaration (and the effect of replacement with an unregulated Access Framework) will be detrimental to competition in coal haulage markets which connect with DBCT. Furthermore, although terminal regulations and ring fencing provisions are in DBCTM's Access Framework, there would be the potential for DBCTM to amend or remove these protections. This risk could deter future entry and may ultimately be damaging to competition in coal haulage markets.

In conclusion, the Deed Poll which gives effect to the Access Framework if implemented will not constrain DBCTM's conduct. Conversely, access (or increased access) as a result of declaration will promote a material increase in competition in the coal haulage markets which satisfies s. 76(2)(a) of the QCA Act.

Yours sincerely



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