

COMMONWEALTH OF AUSTRALIA

Competition and Consumer Act 2010

**DECISION ON EFFECTIVENESS OF ACCESS REGIME
UNDER SECTION 44N**

I, the Hon David Bradbury MP, Parliamentary Secretary to the Treasurer, as designated Minister, hereby decide that the Queensland Dalrymple Bay Coal Terminal (DBCT) Access Regime is an effective access regime under section 44N of the *Competition and Consumer Act 2010*.

The DBCT Access Regime is established by the *Queensland Competition Authority Act 1997* (Qld), the *Queensland Competition Authority Regulation 2007* (Qld), the *Transport Infrastructure Act 1994* (Qld), the *Transport Operations (Marine Safety) Act 1994* (Qld) and the 2011 DBCT Access Undertaking.

My decision is to be in force for a period of 10 years.

Dated: 11th July 2011

A handwritten signature in black ink, appearing to read 'D. Bradbury', written over a horizontal dotted line. The signature is stylized and extends to the right with a long, sweeping flourish.

The Hon David Bradbury MP

Parliamentary Secretary to the Treasurer

STATEMENT OF REASONS – DECISION ON THE EFFECTIVENESS OF THE DALRYMPLE BAY COAL TERMINAL ACCESS REGIME

Competition and Consumer Act 2010 (Cth), section 44N

BACKGROUND

The certification of State and Territory access regimes

- Under Part IIIA of the *Competition and Consumer Act 2010 (Cth) (CCA)*, if a State or Territory that is a party to the Competition Principles Agreement (CPA) has established an access regime, the responsible Minister for the State or Territory may apply to the National Competition Council (NCC), asking the NCC to recommend that the Commonwealth Minister decide that the regime for access to the service is an effective access regime (subsections 44M(1) and (2) of the CCA).
- The NCC must recommend to the Commonwealth Minister that he or she decide that the access regime is either an effective access regime for the service, or not an effective access regime for the service.

Ministerial decision on effectiveness of access regime

- Section 44N of the CCA provides that on receiving a recommendation from the NCC in relation to the effectiveness of an access regime, the Commonwealth Minister must decide that the access regime is or is not an effective access regime for the service (subsection 44N(1)).
- Further, in making a decision, subsection 44N(2) requires that the Commonwealth Minister apply the relevant principles in the CPA, treating those principles as guidelines rather than binding rules, and not consider any other matters.
- The Minister's decision must specify the period for which it is in force (subsection 44N(3)).

HISTORY OF THE APPLICATION

- On 16 December 2010 the Queensland Premier, the Hon Anna Bligh MP, applied to the NCC under section 44M of the *Trade Practices Act 1974 (Cth)*¹ for a recommendation that the Dalrymple Bay Coal Terminal (DBCT) Access Regime be certified effective.
 - The NCC published the notice of application and invited and received two submissions in response.
- On 16 March 2011, the NCC released a draft recommendation that the DBCT Access Regime be certified as an effective access regime for a period of 10 years.
 - The NCC invited and received no submissions in response.

¹ The application was made under the *Trade Practices Act 1974 (Cth)*, which was renamed the *Competition and Consumer Act 2010* on 1 January 2011.

- On 10 May 2011 I received a recommendation from the NCC to certify the DBCT Access Regime as an effective access regime under Part IIIA of the *Trade Practices Act 1974* for a period of 10 years.

OVERVIEW OF THE DBCT ACCESS REGIME

- The DBCT is one of two terminals at the Port of Hay Point, 38 kilometres south of Mackay in Queensland. It processes coal from mines in the Bowen Basin.
- The DBCT is 'declared' for third party access under the *Queensland Competition Authority Act 1997* (QCA Act) with terms and conditions of access regulated by a Queensland Competition Authority (QCA) approved access undertaking.
- The DBCT Access Regime comprises:
 - the QCA Act;
 - the 2011 DBCT Access Undertaking (effective 1 January 2011 to 30 June 2016); and
 - the port safety regime established under the *Transport Infrastructure Act 1994* (Qld) and the *Transport Operations (Marine Safety) Act 1994* (Qld).
- Broadly, the Regime provides a framework for third party access to DBCT, and the terms on which access is provided.
- The DBCT, as it is declared for access under the QCA Act, is subject to regulation by the QCA.
 - The body of the DBCT Access Regime is contained in Part 5 of the QCA Act, which provides for:
 - : declaration of services – with applications subject to evaluation against access criteria by the QCA, a recommendation to and decision by the Premier and Treasurer of Queensland, who must also be satisfied of the criteria;
 - : a negotiation framework – whereby parties can negotiate an access agreement for a declared service;
 - : a formal dispute resolution framework – should the access provider and seeker be unable to agree upon access to a declared service, with the ability to determine binding conditions of access;
 - : access undertakings for declared and non declared services – whereby the access provider can submit, and the QCA approve, an undertaking to govern access to the network; and
 - : enforcement mechanisms – to compel the provision of information and adherence to behavioural provisions.
 - The *Transport Infrastructure Act 1994* contains provisions for governance of DBCT Management Pty Ltd and its related bodies corporate, providing for arms length arrangements.
 - The port safety regime which applies to the DBCT Access Regime is contained within the *Transport Operations (Marine Safety) Act 1994*.

DECISION

- I have considered each of the relevant principles from the CPA, as well as the objects of Part IIIA of the CCA, in assessing the DBCT Access Regime.
- The NCC considers – and I agree – that the DBCT Access Regime addresses all the relevant principles set out in the CPA, and accords with the objects of Part IIIA. I have therefore decided that all relevant matters for certification of the DBCT Access Regime as an effective access regime are satisfied.
- My decision to certify the DBCT Access Regime as an effective access regime is to apply for a period of 10 years.
- My consideration of the NCC’s final recommendation, and my conclusions on that recommendation, are described below. In making my decision I have drawn on the findings of the NCC.

CONSIDERATION OF THE DBCT ACCESS REGIME AGAINST THE RELEVANT CPA PRINCIPLES

- The NCC take the view that a logical framework for analysis of a regime’s incorporation of the guiding CPA principles is to consider matters into five categories as follows:
 - the scope of the access regime – 6(3)(a), 6(4)(d);
 - the treatment of interstate issues – 6(2), 6(4)(p);
 - the negotiation framework – 6(4)(a)–(c), (e), (f), (g)–(i), (m), (n), (o);
 - dispute resolution – 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c); and
 - efficiency promoting terms and conditions of access – 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).

: This approach assisted me to form a view on whether the relevant CPA principles are incorporated in the DBCT Access Regime.

Scope of the access regime – 6(3)(a), 6(4)(d)

- The CPA principles in 6(3)(a), 6(4)(d) deal with the scope of an effective access regime. It should:
 - apply to services provided by significant infrastructure facilities that are not economically feasible to duplicate, where access is necessary to permit effective competition and can be provided safely at a reasonable cost; and
 - provide for periodic review of the need for access regulation to apply to a particular service.
- I consider that the scope of the DBCT Access Regime is consistent with CPA principles.
 - The DBCT is a significant infrastructure facility, having regard to its size and importance to Queensland’s economy.

- The Regime applies to a port, an asset that exhibits natural monopoly characteristics and is unlikely to be economically feasible to duplicate.
- The ability of the access seeker to obtain safe use at an economically feasible cost is determined by the QCA when it sets the terms of access.
- The DBCT Access Regime contains adequate mechanisms for reviewing the right to negotiate access whilst ensuring that existing contractual rights under an access agreement are preserved.
- I note the NCC considers that the DBCT Access Regime satisfies clauses 6(3)(a) and 6(4)(d), and I agree with the NCC's findings.

Treatment of interstate issues – 6(2), 6(4)(p)

- The CPA indicates that an effective access regime will adequately provide for treatment of issues which may arise when a facility is subject to multiple access regimes. The NCC may determine a State or Territory regime to be ineffective if substantial difficulties arise from the regime being in one or more jurisdictions.
- I consider that the DBCT Access Regime deals with interstate issues in a manner consistent with CPA principles.
 - As the DBCT Access Regime does not apply to facilities outside Queensland, interstate issues do not arise.
 - I note the NCC considers that the DBCT Access Regime satisfies clauses 6(2) and 6(4)(p), and I agree with the NCC's findings.

Negotiation framework – 6(4)(a)–(c), (e), (f), (g)–(i), (m), (n), (o)

- The CPA indicates an effective regime will provide for a negotiation framework, allowing parties to negotiate access to significant infrastructure facilities while being able to resort to an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible.
- The CPA also sets out a number of features that should be included within a negotiation framework for the regime to be considered effective, including:
 - a requirement upon the service provider to make reasonable endeavours to accommodate the requirements of access seekers;
 - recognition that access need not be on exactly the same terms and conditions;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - provision for the dispute resolution body or relevant authority to have access to financial information relating to the service and requiring separate accounting arrangements for elements of a business covered by the access regime;
 - the prohibition of conduct with the purpose of hindering access.
- I consider that the negotiation framework provided by the DBCT Access Regime is consistent with CPA principles.

- The DBCT Access Regime establishes a right for parties to negotiate access for services, with negotiations to be in good faith, places a requirement upon the service provider to make all reasonable efforts to satisfy reasonable requirements of the access seeker, and provides for binding arbitration by the independent QCA where agreement cannot be reached (clauses 6(4)(a)–(c), (e), (g), (h)).
 - : Decisions made by the QCA (including access determinations, decisions about access undertakings and rulings) may be subject to judicial review in accordance with the *Judicial Review Act 1991* (Qld) (clause 6(4)(h)).
 - : The DBCT Access Regime also provides for funding of the dispute resolution body (clause 6(4)(g)).
- The DBCT Access Regime allows the access provider to treat access seekers differently where it is reasonably justified because of different circumstances. The DBCT Access Regime is structured so that a service provider cannot *unfairly* differentiate between access seekers in a way that has a material adverse effect on the ability of one or more of the access seekers to compete with other access seekers (clauses 6(4)(f) and (m)).
- The DBCT Access Regime provides principles of dispute resolution to guide the QCA, as the dispute resolution body, that substantially mirror the price and non-price terms and conditions of access set out in clause 6(4)(i) of the CPA.
- The DBCT Access Regime contains a number of provisions that operate to prevent an owner of a service engaging in conduct for the purpose of hindering access (clause 6(4)(m)).
- The DBCT Access Regime gives the QCA the capacity to require persons to attend and give evidence, produce information or documents and requires the access provider to keep accounting records for the service separately from accounting records relating to other operations of the access provider (clauses 6(4)(n) and (o)).
- I note the NCC considers that the DBCT Access Regime satisfies clauses 6(4)(a)–(c), (e), (f), (g)–(i), (m), (n) and (o), and I agree with the NCC's findings.

Dispute resolution – 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o), 6(5)(c)

- CPA clauses 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o) and 6(5)(c) provide guidance on the principles which should be contained in an effective access regime in relation to dispute resolution.
- An effective access regime should reasonably incorporate:
 - a dispute resolution procedure, providing for an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - an ability for the dispute resolution body to determine whether the access provider should extend or permit extensions of the service, subject to certain requirements;
 - the capacity for a party to an access determination to apply for the determination to be set aside or modified on account of a material change in circumstances;

- provision for the dispute resolution body to have access to financial information relating to the service;
- where merits review of a decision is provided, the review should be limited primarily to information submitted to the original decision maker.
- I consider that the dispute resolution framework provided by the DBCT Access Regime is consistent with CPA principles.
 - The DBCT Access Regime provides for binding arbitration by the QCA where agreement cannot be reached (clauses 6(4)(a)–(c)).
 - : The NCC note that the QCA is an independent dispute resolution body with appropriate policies to deal with its separate role of regulator and arbitrator (clause 6(4)(g)).
 - The DBCT Access Regime provides principles for dispute resolution to guide the QCA, as the dispute resolution body, that substantially mirror the price and non-price terms and conditions of access set out in clause 6(4)(i) of the CPA.
 - The DBCT Access Regime provides that the QCA may make an access determination that requires the access provider to extend, or permit the extension of, the facility. The provisions of the QCA Act substantially mirror that of CPA clause 6(4)(j).
 - The DBCT Access Regime provides capacity for a party to an access determination to apply to the QCA for the amendment or revocation of the determination if they reasonably believe that there has been a material change of circumstances since the determination. Further, the 2011 Access Undertaking may be amended with the approval of the QCA to deal with a material change in circumstances (clause 6(4)(k)).
 - The DBCT Access Regime gives the QCA the capacity to require persons to attend and give evidence and produce information or documents.
 - : Failure to comply with such investigative notices without reasonable excuse may result in fines or imprisonment (clause 6(4)(o)).
 - The DBCT Access Regime does not provide for merits review however decisions made by the QCA (including access determinations, decisions about access undertakings and rulings) may be subject to judicial review in accordance with the *Judicial Review Act 1991*.
 - : The CPA does not strictly require an effective access regime to include merits review. Rather, it provides that where merits review of decisions is provided, the review should be limited primarily to information before the decision maker.
 - : The NCC considers that certification of the DBCT Access Regime should occur despite the absence of merits review of arbitration determinations and of the QCA's regulatory decisions (clause 6(5)(c)).
 - I note the NCC considers that the DBCT Access Regime satisfies clauses 6(4)(a)–(c), (g), (h), (i), (j), (k), (l), (o) and 6(5)(c), and I agree with the NCC's findings.

Efficiency promoting terms and conditions of access – 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b).

- A fundamental premise of any effective access regime is that it promotes efficient use of and investment in significant infrastructure facilities. This is reflected in the objects of Part IIIA of the CCA and in clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b) of the CPA.
- An effective access regime should reasonably incorporate:
 - a negotiation framework, allowing parties to negotiate access to significant infrastructure facilities while being able to resort to an independent body to resolve the dispute, with binding outcomes, should commercial agreement not be possible;
 - a requirement upon the service provider to make reasonable endeavours to accommodate the requirements of access seekers;
 - recognition that access need not be on exactly the same terms and conditions;
 - certain price and non-price terms and conditions of access that the dispute resolution body should take into account in deciding the terms and conditions of access;
 - the capacity for a party to an access determination to apply for the determination to be set aside or modified on account of a material change in circumstances;
 - require separate accounting for elements of a business covered by the access regime;
 - objects clauses that promote economic efficiency in the operation, use and investment in infrastructure thereby promoting competition in upstream and downstream markets;
 - pricing principles that require regulated access prices to be set so as to cover costs, allow price discrimination when it aids efficiency, not allow discrimination by a vertically integrated firm unless justified by the cost of providing access, provide a return on investment that is commensurate with the risks involved and provide incentives to reduce costs or improve productivity.
- I consider that the DBCT Access Regime reasonably incorporates efficiency promoting terms and conditions of access, consistent with CPA principles.
 - The DBCT Access Regime establishes a right for parties to negotiate access for services, with negotiations to be in good faith, places a requirement upon the service provider to make all reasonable efforts to satisfy reasonable requirements of the access seeker, and provides for binding arbitration by the independent QCA where agreement cannot be reached (clauses 6(4)(a)–(c), (e)).
 - The DBCT Access Regime allows the access provider to treat access seekers differently where it is reasonably justified because of different circumstances (clause 6(4)(f)).
 - The DBCT Access Regime provides principles of dispute resolution to guide the QCA, as the dispute resolution body, that substantially mirror the price and non-price terms and conditions of access set out in clause 6(4)(i) of the CPA.
 - The DBCT Access Regime provides capacity for a party to an access determination to apply to the QCA for the amendment or revocation of the determination if they reasonably believe that there has been a material change of circumstances since the

determination. Further, the 2011 Access Undertaking may be amended with the approval of the QCA to deal with a material change in circumstances (clause 6(4)(k)).

- The DBCT Access Regime requires the access provider to keep accounting records for the service separately from accounting records relating to other operations of the access provider.
 - : In doing so it implements appropriate ring fencing requirements (clause 6(4)(n)).
- The objects clause in section 69E of the QCA Act satisfies clause 6(5)(a). Section 69E of the QCA provides the object of Part 5, which deals with access to services, is:
 - ‘to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.’
- The DBCT Access Regime contains pricing principles which restate the principles set out in clause 6(5)(b). The QCA must consider these principles when it makes an access determination and when it approves access undertakings for declared services. Further the QCA Act and *Transport Infrastructure Act 1994* operate in a way to give effect to these principles.
- I note the NCC considers that the DBCT Access Regime satisfies clauses 6(4)(a)–(c), (e), (f), (i), (k), (n), 6(5)(a) and (b), and I agree with the NCC’s findings.

CONSIDERATION OF THE DBCT ACCESS REGIME AGAINST THE OBJECTS OF PART IIIA

- In making a recommendation as to whether an access regime is an effective access regime, I must have regard to the objects of Part IIIA of the CCA.
- Section 44AA of the CCA outlines the objects of Part IIIA. The objects contain two limbs:
 - one, to promote the economically efficient operation of, use of and investment in the infrastructure by which services are provided, thereby promoting effective competition in upstream and downstream markets; and
 - two, to provide a framework and guiding principles to encourage a consistent approach to access regulation in each industry.
- I consider that the DBCT Access Regime accords with the objects of Part IIIA.
 - In relation to the first limb, the QCA Act contains provisions which promote the efficient use of and investment in significant infrastructure facilities and in doing so, competition in other markets. The DBCT Access Regime is guided by the objects of Part 5 of the QCA Act, section 69E, which substantially mirrors the first limb of section 44AA of the CCA.
 - : The objects of Part 5 of the QCA Act must be considered at key stages in the access process including whether to declare a service, approve an access agreement, make an access determination and whether to approve a draft access undertaking.

- : Further, the QCA Act ensures that services are only declared where access or increased access would promote a material increase in competition in a market other than for the service.
- In relation to the second limb, the QCA Act sets out a statutory framework and guiding principles for access which assist consistent decisions, regardless of the industry.
 - : The QCA Act is clear that applicants need to satisfy specified access criteria and the consequences if that occurs; the QCA will recommend declaration to the Premier and Treasurer of Queensland, and the Ministers, if satisfied, must declare the service (with some specified and limited exceptions).
 - : The DBCT Access Regime includes a requirement to consider the objects of Part 5 of the QCA Act at key stages of the access process.
 - : The ability to declare services via regulation, which did not require an assessment of the relevant services against any particular criteria or report from the QCA, has been removed from the DBCT Access Regime.
 - : In requiring declarations to follow the one statutory channel, with certainty as to the principles that will be applied in the decision making process, the DBCT Access Regime encourages a consistent approach to access regulation.
- I note that the NCC considered the intent and operation of the DBCT Access Regime as a whole, guided by its stated object in Part 5 of the QCA Act and found that it accords with the objects of Part IIIA. The NCC:
 - : acknowledged that the stated object of the DBCT Access Regime substantially reflects the objects of Part IIIA of the CCA;
 - : considered a decision as to the effectiveness of an access regime needed to be pragmatic and that there will be a range of approaches for addressing third party access issues;
 - : considered the DBCT Access Regime satisfactorily incorporates efficiency promoting terms and conditions of access.

DURATION OF THE CERTIFICATION

- Having reached the decision that the DBCT Access Regime is an effective access regime, I must specify the period for which the certification will be in force.
 - The period of certification may be extended, but there is no provision in the CCA for a certification to be revoked.
- The Queensland Government sought certification for a period of 10 years.
 - The NCC recommends a 10 year certification period.
- The period of certification needs to balance the need for regulatory certainty and stability with the likelihood of change in the market environment.
 - The NCC notes the relevant declarations under the DBCT Access Regime have effect for 10 years from 8 September 2010. It considered it logical that the duration of

certification be similar to the period for which the Regime is intended to apply to the relevant services.

- A certification duration of longer than 10 years would extend beyond the period for which there is certainty that access to the DBCT will be governed by substantially the same arrangements.
- I am of the view that a certification duration of 10 years is appropriate.

A handwritten signature in black ink, appearing to read 'D. Bradbury', written over a horizontal dotted line.

The Hon David Bradbury MP

Parliamentary Secretary to the Treasurer

Dated: 11th July 2011