

22 December 2016

Mr Charles Millstead
Chief Executive Officer
Queensland Competition Authority

Dear Mr Millstead

DBCT 2015 DAU – QCA’s final decision

DBCTM acknowledges the work by the QCA that has gone into the preparation of the final decision and the mark-up of the DAU annexed to the final decision, and thanks the QCA for the opportunity for its lawyers to discuss some drafting issues directly with the QCA’s adviser from Gilbert and Tobin. However, DBCTM has concerns with the drafting related to two aspects of the 2015 DAU as annexed to the QCA’s final decision (the **current drafting**), namely (1) the obligation to retain DBCT PL as Operator of the Terminal, and (2) the obligation to ensure that DBCTM and its related bodies corporate do not enter markets upstream or downstream of the Terminal.

DBCTM would appreciate the opportunity to discuss its concerns with the QCA, with a view to developing alternative drafting consistent with DBCTM’s understanding of the intent of the QCA’s final decision. This alternative drafting will enable DBCTM to submit a complying DAU by 17 February 2017.

Concerns with particular amendments

DBCTM considers that two elements of the current drafting do not meet the object of Part 5 of the QCA Act, and do not have proper regard to the factors required to be considered under s.138(2):

1. the requirement to retain DBCT PL as Operator of the Terminal; and
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.

DBCTM also does not believe that the current drafting reflects the QCA’s final decision on these two elements. DBCTM interprets the final decision to provide that if circumstances ever changed, DBCTM could, pursuant to its rights under s133-147 of the QCA Act, seek to amend the AU to allow for those changes. This process is referred to in the final decision (e.g. pp. 44-46, p. 188). However, DBCTM considers that the current drafting does not reflect this position. Rather, the current drafting suggests that the QCA has determined that these two requirements are essential to the regulation of services at the Terminal.

The current drafting was proposed by the QCA for the first time in its final decision. It was not proposed by the QCA in its draft decision or requested by DBCTM, the Users or other stakeholders in submissions in response to the draft decision or the subsequent QCA staff questions. As such, DBCTM has not had the opportunity to comment on the implications of the current drafting. In DBCTM’s view the drafting changes put forward in the final decision are very material and as DBCTM was not provided with an opportunity to comment as part of the DAU process, it could be construed that considerations of natural justice have been set aside.

As explained below, DBCTM believes the current drafting does not meet the object of promoting competition, and is incompatible with the legitimate business interests of DBCTM and the Operator. Further, DBCTM considers these amendments are in excess of reasonable and appropriate measures required to serve the interests of access holders and the public interest.

Entrenchment of the Operator

In accordance with the OMC, DBCT PL is the Operator of the Terminal until at least 1 July 2021. Importantly, the OMC provides for earlier termination in circumstances such as default by DBCT PL for breaches of safety obligations. The OMC also provides for the Operator itself to terminate for specific cause before 1 July 2021.

However, the current drafting requires DBCTM to undertake:

1. that the Operator will remain DBCT PL, in accordance with s.3.2(a); and
2. to maintain the OMC, in accordance with s.3.3(a).

There are no qualifications or exceptions in those sections, and their terms are inconsistent with the provisions of the OMC. DBCTM contends that these amendments are not rational, disregard the legitimate business interests of DBCTM and set aside DBCT PL's contractual rights as contemplated in the OMC.

In the event that DBCTM terminated the OMC for cause in accordance with its terms, without first obtaining an amendment to the AU, DBCTM would be exposed to an action by DBCT PL or Access Holders under s.158A of the QCA Act to enforce the terms of the AU. Further, DBCTM could not appoint another Operator and would be in breach of the AU and PSA, creating a material risk to its legitimate business interests.

While DBCTM has the opportunity to seek amendments to the AU pursuant to s.142 of the QCA Act, this provision is not suitably responsive to the circumstances which may arise for early termination, and to enable DBCTM to exercise its rights under the OMC without breach of the AU.

These inconsistencies are unacceptable to DBCTM and accordingly should be resolved by amending s.3.2 and s.3.3 to provide that they are subject to the terms of the OMC.

Further, DBCTM understands that the final decision seeks only to determine the appropriate terms of an undertaking applicable to the period up to 1 July 2021, and not to suggest entrenchment of the Operator for any subsequent regulatory period. To ensure that position is made clear by the terms of the undertaking, DBCTM seeks for clause 3.2 and 3.3 to state expressly that DBCTM's obligation is for the period covered by the undertaking.

Finally, DBCTM considers the amendment to s.1.1 to be inaccurate. In DBCTM's view, this drafting implies that a User-owned operator is essential and was a condition of the privatisation of the terminal. While it is true that DBCTM inherited the OMC from the State, that contract would have expired on 31 March 2014. The OMC only continues because it was substantially renegotiated and extended by agreement between DBCTM and DBCT PL in 2012.

Prohibition on vertical integration by DBCTM's related bodies corporate

The current drafting imposes on DBCTM an obligation under s.3.1(f) to procure that under s.9.1(a) its Related Bodies Corporate will not own or operate a Supply Chain Business (other than a Trading SCB) in any market that is related to or uses the Terminal.

This obligation, extended to control the activities of all Related Bodies Corporate, is beyond DBCTM's capability. In consequence, there is no proper basis for it to be imposed, and it has no regard for DBCTM's legitimate business interests. It also does not promote the objects of the legislation.

As the QCA has identified in the final decision, DBCTM is 100% owned by BHIP Pty Ltd, which is in turn owned by Brookfield Infrastructure Partners (**BIP**) which is 71% publicly traded on the NY and Toronto stock

exchanges, and 29% owned by Brookfield Asset Management (which is in turn 100% publicly owned). DBCTM is not in a position to control the activities or investment decisions of BIP.

Further, the prohibition is so expansive as to be inconsistent with the primary objects of the legislation to promote competition. DBCTM notes that the Supply Chain Businesses covered by the currently framed restraint include purchasing coal that has been produced anywhere in Australia.

DBCTM notes that the final decision contemplates the possibility of DBCTM applying for amendments to the undertaking. However, that is not fully appropriate nor adequate to meet the issue. First, the existing terms are inappropriate to deal with events which may occur before the approval of an amendment. Second, the absence of explicit provisions for amendment to the prohibition will discourage commercial activity (either by Brookfield entities, or parties with which they may seek to deal) that may serve the objects of the legislation. Third, the process of amendment is inevitably time consuming and opportunities may be lost during an extended period of uncertainty.

The current terms of the obligation are unacceptable to DBCTM. Accordingly, they should be amended to impose an obligation on DBCTM, in the event of a Related Body Corporate acquiring an interest in a Supply Chain Business, to notify the QCA and take steps to obtain any suitable ring fencing measures.

Conclusion

DBCTM requests the QCA's consideration of the concerns outlined above in relation to these discrete but significant issues, and the proposed amendments.

DBCTM's clear preference is to engage with the QCA to resolve these concerns by agreement.

Yours sincerely,



Anthony Timbrell
Chief Executive Officer
DBCT Management