SUPREME COURT OF QUEENSLAND

CITATION:	*DBCT Management Pty Ltd v Treasurer and Minister for Infrastructure and Planning (Qld) & Ors* [2021] QSC 335
PARTIES:	**DBCT MANAGEMENT PTY LIMITED** (applicant) **v** **TREASURER AND MINISTER FOR INFRASTRUCTURE AND PLANNING (QUEENSLAND)** (first respondent) **And** **ANGLO AMERICAN METALLURGICAL COAL PTY LTD** **BHP BILLITON MITSUI COAL PTY LTD** **BM ALLIANCE COAL OPERATIONS PTY LIMITED** **FOXLEIGH MANAGEMENT PTY LTD** **HAIL CREEK COAL HOLDINGS PTY LTD** **OAKY CREEK HOLDINGS PTY LTD** **PEABODY ENERGY AUSTRALIA PCI (C&M MANAGEMENT) PTY LTD** **PEMBROKE OLIVE DOWNS PTY LTD** **ROLLESTON COAL HOLDINGS PTY LTD** **SOUTH32 EAGLE DOWNS PTY LTD** **STANMORE IP COAL PTY LTD** (second respondents)
FILE NO/S:	BS No 7058 of 2020
DIVISION:	Trial Division
PROCEEDING:	Application
ORIGINATING COURT:	Supreme Court of Queensland at Brisbane
DELIVERED ON:	10 December 2021
DELIVERED AT:	Brisbane
HEARING DATE:	23, 24, 25 November 2020
JUDGE:	Davis J
ORDER:	**1. The application is dismissed.** **2. The applicant pay the first respondent's costs of the application.** **3. There be no order as to the costs of other respondents.**
CATCHWORDS:	TRADE AND COMMERCE - COMPETITION, FAIR TRADING AND CONSUMER PROTECTION -

SUPERVISION - OTHER BODIES - where the applicant is the operator of the Dalrymple Bay Coal Terminal (the facility) at Hay Point in North Queensland - where the facility provides port services to the mines in the Goonyella region - where the applicant enjoys a monopoly - where the service was declared or deemed declared pursuant to the *Queensland Competition Authority Act* 1997 (QCA Act) - where the declaration expired in 2020 - where the users of the service enjoyed contracts negotiated with approval of the Queensland Competition Authority (the Authority) - where to avoid declaration post-2020 the applicant offered terms to new users and existing users exceeding present capacity allotted to them - whether declaration would promote a material increase in competition in a market upstream or downstream from the market for the service - where there is a market for the development of new mining tenements (development stage tenements market) - where the Minister found that declaration of the service would promote a material increase in the development stage tenements market - where the Minister declared the mine - where the applicant alleges administrative error in making the declaration

ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - RELEVANT CONSIDERATIONS - where the applicant is the operator of the facility - where the Minister declared the service under the provisions of the QCA Act - whether the Minister failed to take into account relevant considerations - whether the Minister did take the considerations into account - whether the considerations were ones which the Minister was obliged to take into account

ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - ERROR OF LAW - where the applicant is the operator of the facility - where the Minister declared the service under the provisions of the QCA Act - whether the Minister made an error of law by misunderstanding the test of "would promote a material increase in competition" - where the Minister consistently stated the correct test in the reasons - whether the Minister has impermissibly considered likelihood of increased competition generally as the relevant test

ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - ERROR OF LAW - where the applicant is the operator of the facility - where the Minister declared the service under the provisions of the QCA Act - whether the Minister made an error of law in that there was no evidence to justify making the decision - whether there was such evidence - whether the Minister was required by law to reach the decision only if particular matters were

established - whether such matters were jurisdictional facts

ADMINISTRATIVE LAW - JUDICIAL REVIEW - GROUNDS OF REVIEW - ABUSE OF POWER - where the applicant is the operator of the facility - where the Minister declared the service under the provisions of the QCA Act - whether the making of the decision was an improper exercise of the power because the decision was so unreasonable that no reasonable person could make it - whether the decision was logical - whether there was evidence supporting the Minister's findings

Corones' Competition Law in Australia 7th ed 2019
Journal of Contract Law, vol 25 (2009) 1
Queensland Government Gazette No. 31; 1 June 2020

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Competition and Consumer Act 2010 (Cth), s 44CA
Competition Policy Reform Act 1995 (Cth)
Judicial Review Act 1991 (Qld), s 4, s 20, s 23, s 24, s 30
Motor Accident Insurance and Other Acts Amendment Act 2010 (Qld): Explanatory Memorandum
Motor Accident Insurance and Other Legislation Amendment Act 2010 (Qld)
Motor Accident Insurance and Other Legislation Amendment Bill 2010 (Qld)
Payment Systems (Regulation) Act 1998 (Cth)
Queensland Competition Authority Act 1997 (Qld), s 69E, s 70, s 71, s 72, s 73, s 76, s 79, s 80, s 84, s 86, s 87, s 87C, s 88, s 97, s 99, s 100, s 101, s 248, s 250
Queensland Competition Authority Amendment Regulation (No. 1) 2012 (Qld)
Queensland Competition Authority Bill 1997 (Qld)
Queensland Competition Authority Regulation 2007 (Qld)
Trade Practices Act 1974 (Cth), s 44H
Trade Practices Amendment (National Access Regime) Bill 2005 (Cth)

Abel Point Marina (Whitsundays) Pty Ltd v Uher & Anor [2006] QSC 295, followed
Antaios Compania Naviera SA v Salen Rederierna A.B. [1985] AC 191, cited
Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223, followed
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DTR Nominees Pty Ltd v Mona Homes Pty Ltd (1978) 138 CLR 423, cited
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Pacific Carriers Limited v BNP Paribas (2004) 218 CLR 451, cited
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Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd [2021] HCA 39, followed
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Re Application by Fortescue Metals Group Limited & Ors [2006] ACompT 6, followed
Re Application by Glencore Coal Pty Ltd [2016] ACompT 6, followed
Re Application by Services Sydney Pty Ltd (2005) 227 ALR 140, followed
Re Duke Eastern Gas Pipeline Pty Ltd (2001) 162 FLR 1, followed
Re Golden Key Ltd [2009] EWCA Civ 636, cited
Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam (2002) 214 CLR 1, cited
Re Sydney Airports Corporation (2000) 156 FLR 10, followed
Re Telstra Corporation Ltd (No 3) (2007) 242 ALR 482, cited
Re Virgin Blue Airlines (2005) 195 FLR 242, followed
Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen) [1976] 1 WLR 989, cited
SAAP v Minister for Immigration & Multicultural & Indigenous Affairs (2005) 228 CLR 294, cited
Spence v Queensland (2019) 367 ALR 587, cited
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Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission [2020] FCA 117, cited

Zhu v Treasurer of New South Wales (2004) 218 CLR 530, considered

COUNSEL: R Higgins SC with R Yezerski and N Derrington for the applicant
J McKenna QC with G del Villar QC, J O'Regan and D Bampton for the first respondent
D Clothier QC with S McCarthy for the second respondents

SOLICITORS: DLA Piper for the applicant
GR Cooper, Crown Solicitor for the first respondent
Allens for the second respondents

[1] The applicant, DBCT Management Pty Ltd (DBCTM), is the operator of the Dalrymple Bay Coal Terminal (the terminal) which is located at the Port of Hay Point south of Mackay.

[2] By decision published[1] 1 June 2020, the first respondent, the Treasurer and Minister for Infrastructure and Planning (Queensland) (the Minister), declared DBCTM's activities as operator of the terminal a "service" pursuant to s 84(1)(a) of the *Queensland Competition Authority Act* 1997 (the QCA Act). DBCTM seeks to judicially review that decision.

[3] The Minister is the first respondent to the application. The second respondents are all users of the terminal. They were joined to the proceedings on their own application on terms that they would not seek their costs and costs would not be sought against them.[2]

[4] All respondents oppose the application for judicial review.

Statutory context and history

[5] The QCA Act was the product of the passing of the *Queensland Competition Authority Bill* 1997. In the Explanatory Memorandum to that Bill, the objects of the legislation were described as:

> "**Policy Objectives of the Bill and the reasons for them**
>
> The policy objective of the Bill is to create an independent statutory body, the Queensland Competition Authority (QCA), to perform several functions associated with National Competition Policy. In particular, the QCA will:
>
> - undertake prices oversight of monopoly or near monopoly Government business activities;
> - act as a competitive neutrality complaints mechanism;
> - regulate third party access to infrastructure." (emphasis added)

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1 Queensland Government Gazette No 31; 1 June 2020.
2 Order of Dalton J, 18 August 2020.

[6] As the reference to "National Competition Policy" suggests, the QCA Act was intended to supplement a Commonwealth approach. The Commonwealth passed the *Competition Policy Reform Act* 1995 (the CPR Act). The CPR Act extensively amended the *Trade Practices Act* 1974 (Cth) (the TP Act). The CPR Act established the National Competition Council[3] and inserted into the TP Act "Part IIIA - Access to Services".

[7] The Queensland Parliament followed the lead of the Commonwealth and passed the QCA Act in 1997. The QCA Act established the Queensland Competition Authority (the QCA) and gave it various functions and powers.

[8] Part 5 of the QCA Act introduced a scheme similar to that of Part IIIA of the TP Act which regulated access to significant infrastructure. The rationale for such a scheme was described in the Explanatory Memorandum of the QCA Act as:

> "**(c) Third party access**
>
> The underlying rationale of creating third party access rights to significant infrastructure is to ensure that competitive forces are not unduly stifled in industries which rely upon a natural monopoly at some stage in the production process, especially where ownership or control of significant infrastructure is vertically integrated with upstream or downstream operations.[4]
>
> A key aspect of the market system is that an infrastructure owner is entitled to choose with whom it will deal. The threat of competitors providing substitutes constrains a seller's ability to charge excessive prices or otherwise restrict supply. However, in cases where these substitutes do not exist, a seller possesses significant market power. A seller may exercise its market power to increase its profit by restricting output because doing so enables the seller to increase its price.
>
> In cases of natural monopoly, one facility meets all of a market's demand more efficiently than a number of smaller and more specialised facilities. Accordingly, it is not socially desirable that the infrastructure comprising a natural monopoly be duplicated. At the same time, the absence of competition enables a natural monopoly infrastructure owner to extract excessive profits through exercising market power.
>
> This is especially the case where the business which operates the natural monopoly also has a commercial interest in upstream or downstream markets (for example a rail operator who also owns the track). Such a business may discriminate against its upstream or downstream competitors by offering access on more favourable terms and conditions than is offered to competitors. In this way, an owner of a natural monopoly is able to stifle competition in upstream or downstream markets.

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3 The Commonwealth equivalent to the Queensland Competition Authority.

4 DBCTM has no interest in any business in the chain of supply apart from the terminal.

> The purpose of third party access is therefore to provide a legislated right to use another person's infrastructure. This should prevent owners of natural monopolies charging excessive prices. It should also encourage the entry of new firms into the potentially competitive upstream and downstream markets which rely on a natural monopoly infrastructure in the production process, and thereby enable greater competition in those markets. This in turn would promote more efficient production and lower prices to consumers.
>
> The Bill provides for a streamlined approach to access, and incorporates mechanisms to increase certainty for infrastructure owners and prospective users alike." (emphasis added)

[9] Section 69E, which states the objects of Part 5 was inserted by later amendment. It provides:

> "**69E Object of pt 5**
>
> The object of this part 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."

[10] Critically, the terms "facility", "market" and "service" are defined, relevantly, as follows:

> "**70 Meaning of facility**
>
> (1) ***Facility*** includes—
>
> (a) rail transport infrastructure; and
>
> (b) port infrastructure; and
>
> (c) electricity, petroleum, gas or GHG stream transmission and distribution infrastructure; and
>
> (d) water and sewerage infrastructure, including treatment and distribution infrastructure. …" (emphasis added)
>
> **71 Meaning of market**
>
> (1) A ***market*** is a market in Australia or a foreign country.
>
> (2) If ***market*** is used in relation to goods or services, it includes a market for—
>
> (a) the goods or services; and
>
> (b) other goods or services that are able to be substituted for, or are otherwise competitive with, the goods or services mentioned in paragraph (a)."

72 Meaning of service

(1) ***Service*** is a service provided, or to be provided, by means of a facility and includes, for example—

(a) the use of a facility[5] (including, for example, a road or railway line); and

(b) the transporting of people; and

(c) the handling or transporting of goods or other things; and

(d) a communications service or similar service.

(2) However, ***service*** does not include—

(a) the supply of goods (except to the extent the supply is an integral, but subsidiary, part of the service); or

(b) the use of intellectual property or a production process (except to the extent the use is an integral, but subsidiary, part of the service); or

(c) a service—

(i) provided, or to be provided, by means of a facility for which a decision of the Australian Competition and Consumer Commission, approving a competitive tender process under the *Competition and Consumer Act* 2010 (Cwlth), section 44PA, is in force; and

(ii) that was stated under section 44PA(2) of that Act in the application for the approval. …" (emphasis added)

73 References to facilities

In this part, a reference to a facility in association with a reference to a service or part of a service is a reference to the facility used, or to be used, to provide the service or part of the service."

[11] Division 2 of Part 5 concerns the declaration of services. By this division, a process is established where the QCA makes a recommendation to the Minister that the service be or not be declared pursuant to the QCA Act.[6] In order to make that recommendation, the QCA may conduct an investigation.[7] Then the Minister, once the declaration recommendation is received, decides whether to declare or not declare the service.[8]

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5 Which includes use of a port; see s 70(1)(b).
6 Section 79.
7 See Part 5, Division 3.
8 Section 84.

[12] Critical to the process of the QCA, and the decision of the Minister, is s 76. In its present form, it is:

> "**76 Access criteria**
>
> (1) This section sets out the matters (the ***access criteria***) about which—
>
> (a) the authority is required to be satisfied for recommending that a service be declared by the Minister; and
>
> (b) the Minister is required to be satisfied for declaring a service.
>
> (2) The access criteria are as follows—
>
> (a) 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;
>
> (b) that the facility for the service could meet the total foreseeable demand in the market—
>
> (i) over the period for which the service would be declared; and
>
> (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service);
>
> (c) that the facility for the service is significant, having regard to its size or its importance to the Queensland economy;
>
> (d) that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.
>
> (3) For subsection (2)(b), if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, the authority and the Minister may have regard to the facility as if it had that expanded capacity.
>
> (4) Without limiting subsection (2)(b), the cost referred to in subsection (2)(b)(ii) includes all costs associated with having multiple users of the facility for the service, including costs that would be incurred if the service were declared.

(5) In considering the access criterion mentioned in subsection (2)(d), the authority and the Minister must have regard to the following matters—

(a) if the facility for the service extends outside Queensland—

(i) whether access to the service provided outside Queensland by means of the facility is regulated by another jurisdiction; and

(ii) the desirability of consistency in regulating access to the service;

(b) the effect that declaring the service would have on investment in—

(i) facilities; and

(ii) markets that depend on access to the service;

(c) the administrative and compliance costs that would be incurred by the provider of the service if the service were declared;

(d) any other matter the authority or Minister considers relevant." (emphasis added)

[13] Section 76 was amended to its present form in 2010 by s 23 of the *Motor Accident Insurance and Other Legislation Amendment Act* 2010. Section 76, in its form before the 2010 amendment, was:

"**76 Access criteria**

(1) This section sets out the matters (the '***access criteria***') about which—

(a) the authority is required to be satisfied for recommending that a candidate service be declared by the Ministers; and

(b) the Ministers are required to be satisfied for declaring a candidate service.

(2) The access criteria are as follows—

(a) that access (or increased access) to the service would promote competition in at least 1 market (whether or not in Australia), other than the market for the service;

(b) that it would be uneconomical to duplicate the facility for the service;

(c) that access (or increased access) to the service can be provided safely;

(d) that access (or increased access) to the service would not be contrary to the public interest.

(3) In considering the access criterion mentioned in subsection (2)(d), the authority and the Ministers must have regard to the following matters—

(a) legislation and government policies relating to ecologically sustainable development;

(b) social welfare and equity considerations including community service obligations and the availability of goods and services to consumers;

(c) legislation and government policies relating to occupational health and safety and industrial relations;

(d) economic and regional development issues, including employment and investment growth;

(e) the interests of consumers or any class of consumers;

(f) the need to promote competition;

(g) the efficient allocation of resources." (emphasis added)

[14] In these reasons:

1. the criterion defined by s 76(2)(a) is "Criterion A";
2. The criterion defined by s 76(2)(b) is "Criterion B";
3. the criterion defined by s 76(2)(c) is "Criterion C"; and
4. the criterion defined by s 76(2)(d) is Criterion D.

[15] The significant amendment to s 76 for present purposes is to s 76(2)(a). In its original form, the issue for Criterion A was whether access or increased access to the service "would promote competition in at least 1 market".[9] Post-amendment, the question is whether declaration of the service, "would promote a material increase in competition in at least 1 market".[10]

[16] Section 44H(4) of the TP Act, as originally enacted, was in identical terms as s 76 of the QCA Act, as originally enacted. Section 44H(4) was also amended in precisely the same way as s 76 of the QCA Act. The TP Act has been repealed and the scheme now sits in the *Competition and Consumer Act* 2010 (the CC Act). Section 44CA of the CC Act is in the same terms as s 76 of the QCA Act.

[17] The amendment to s 44H(4) of the TP Act was effected by the *Trade Practices Amendment (National Access Regime) Act* 2005. The revised Explanatory Memorandum to the Bill is in these terms, relevantly:

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9 Other than the market for the service. See *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39 at [24].

10 Other than the market for the service.

"Item 23- Paragraph 44H(4)(a)

1.38 Item 23 amends paragraph 44H(4)(a), to provide that the designated Minister cannot declare a service unless he or she is satisfied, *inter alia*, that access (or increased access) to the service would promote a material increase in competition in at least one market (whether or not in Australia), other than the market for the service. In responding to the Productivity Commission's report, the Government indicated that while the current declaration criteria (such as 'the national significance' test) preclude declaration where the relevant infrastructure and subsequent public benefits are not significant, this does not sufficiently address the situation where, irrespective of the significance of the infrastructure, declaration would only result in marginal increases in competition. The change will ensure access declarations are only sought where increases in competition are not trivial." (emphasis added)

[18] The Explanatory Memorandum to the *Motor Accident Insurance and Other Legislation Amendment Bill* 2010, which amended s 76 of the QCA Act is, relevantly, in these terms:

"amend section 76(2)(a) to clarify that access (or increased access) to the service should be expected to promote a material increase in competition in order for this criterion to be satisfied. This will prevent the declaration of services where only a trivial increase in competition is expected to result;" (emphasis added)

[19] Section 80 of the QCA Act provides for the QCA to make a recommendation to the Minister. It is in these terms:

"**80 Factors affecting making of recommendation**

(1) The authority must recommend that a service be declared by the Minister if the authority is satisfied about all of the access criteria for the service.

(2) The authority must recommend that a service not be declared by the Minister if the authority is not satisfied about all of the access criteria for the service.

(3) Despite subsection (1), the authority may recommend that a service not be declared by the Minister if the authority considers the request was not made in good faith or is frivolous.

(4) Subsection (3) does not apply to a request made by the Minister.

(5) Despite subsections (1) and (2), the authority may recommend that part of a service be declared by the Minister if the authority is satisfied about all of the access criteria for the part of the service." (emphasis added)

[20] Section 84 requires the Minister to take steps upon receipt of a recommendation of the QCA. That section provides, relevantly:

> "**84 Making declaration**
>
> (1) On receiving a declaration recommendation, the Minister must do 1 of the following—
>
> (a) declare the service;
>
> (b) declare part of the service, that is itself a service;
>
> (c) decide not to declare the service. …
>
> (4) If the Minister declares the service, or part of the service, the declaration must state the expiry date of the declaration.
>
> (5) If the Minister decides not to declare the service and the declaration recommendation was made under subdivision 4A, the decision does not affect the existing declaration for the service." (emphasis added)

[21] Importantly, s 86 is in these terms:

> "**86 Factors affecting making of declaration**
>
> (1) The Minister must declare a service if the Minister is satisfied about all of the access criteria for the service.
>
> (2) The Minister must decide not to declare a service if the Minister is not satisfied about all of the access criteria for the service.
>
> (3) Despite subsections (1) and (2), the Minister may declare part of a service if the Minister is satisfied about all of the access criteria for the part of the service." (emphasis added)

[22] Once a declaration is made, a person seeking access to the service has a right to negotiate an access agreement with the provider of the service.[11] Importantly, by s 100(2):

> "**100 Obligations of parties to negotiations**
>
> …
>
> (2) In negotiating access agreements, or amendments to access agreements, relating to the service, the access provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of 1 or more of the access seekers to compete with other access seekers."[12]

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11 Section 99.

12 Statutory note omitted.

[23] By s 101(1):

> "**101 Obligation of access provider to satisfy access seeker's requirements**
>
> (1) In negotiations between an access provider and access seeker for an access agreement, the access provider must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker. …"

[24] Division 4 of Part 5[13] regulates access agreements and the parties to them in various ways. It is not necessary to analyse those provisions. Division 5 of Part 5 concerns disputes about access to a service. Again, it is not necessary to analyse these provisions. Suffice to say that upon declaration, the service becomes subject to regulation.

[25] A declaration will expire. Section 84(a) requires the Minister to set an expiry date and s 87 provides:

> "**87 Duration of declaration**
>
> (1) A declaration starts to operate on—
>
> (a) the day notice of the decision to declare the service is published in the gazette; or
>
> (b) if a later day of operation is stated in the notice—the later day.
>
> (2) A declaration continues in operation until its expiry date, unless it is earlier revoked."

[26] Subdivision 4A of Part 5 concerns the review of a declaration. It effectively mirrors Subdivision 4. The QCA must make a recommendation to the Minister.[14] The access criteria are again picked up by s 87C, which is in these terms:

> "**87C Factors affecting making of recommendation**
>
> (1) The authority must make a recommendation under section 87A(1)(a)[15] if the authority is satisfied about all of the access criteria for the service.
>
> (2) The authority must make a recommendation under section 87A(1)(c)[16] if the authority is not satisfied about all of the access criteria for the service.
>
> (3) Despite subsections (1) and (2), the authority may make a recommendation under section 87A(1)(b) if the authority is satisfied about all of the access criteria for the part of the service." (emphasis added)

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13 Which contains ss 100 and 101. As to the operation of the access rights, see generally *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39.

14 Section 87A.

15 A recommendation to declare the service.

16 A recommendation not to declare the service.

[27] Section 88 provides as follows:

> "**88 Recommendation to revoke**
>
> (1) The authority may recommend to the Minister that a declaration of a service or part of a service be revoked.
>
> (2) Without limiting subsection (1), the owner of the declared service may ask the authority to recommend revocation of the declaration of the service or part of the service.
>
> (3) The authority may recommend revocation of a declaration of a service or part of a service only if it is satisfied that, at the time of the recommendation, section 86 would prevent the Minister from declaring the relevant service or the part of the relevant service."

[28] The term "declaration recommendation" is defined as:

> "***declaration recommendation*** means—
>
> (a) for part 5—a recommendation made by the authority under section 79 or 87A; or
>
> (b) for part 5A[17]—a recommendation made by the authority under section 170I."

[29] Therefore, upon receipt of a declaration recommendation relevant to the renewal of a declaration (under s 87A), ss 84 and 86 are engaged requiring the Minister to make a decision to declare or not declare the service.

General observations about the legislation

[30] The QCA must make a recommendation to either declare or not declare the service. That determination is governed by the access criteria.[18] A recommendation to declare the service can only be made if all the access criteria are present. That no doubt requires the exercise of some judgment.[19] However, if all access criteria are found to be present, then there is no discretion to refuse to make a recommendation to declare.[20]

[31] That determination by the QCA has no apparent legal effect other than its delivery to the Minister triggers s 84 and requires the Minister to make a decision. There is nothing in the QCA Act which obliges the Minister to follow or even consider the recommendation.

[32] *Pilbara Infrastructure Pty Ltd & Ors v Australian Competition Tribunal & Ors*[21] concerned a decision under the TP Act to declare services involving three train lines

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17 Which relates to water supply.
18 Section 76(2).
19 Of the type discussed in *Norbis v Norbis* (1986) 161 CLR 513.
20 *Pilbara Infrastructure Pty Ltd & Ors v Australian Competition Tribunal & Ors* (2012) 246 CLR 379 at [115]-[119].
21 (2012) 246 CLR 379.

and not to declare a fourth. The National Competition Council (NCC)[22] made recommendations for various services to be declared. By force of the TP Act, upon the Minister not making a decision, the services were declared. Those declarations were reviewed by the Australian Competition Tribunal who set them aside. Issues for the High Court included the nature of the review by the Tribunal and the proper construction of access criteria then appearing in the TP Act. The High Court considered the interplay between the recommendation by the NCC and the role of the Minister.

[33] It was observed:

1. the NCC had powers of investigation;[23]
2. the Minister had none;[24]
3. some of the criteria were of a technical kind (effect of competition on a particular market for example);
4. but some were of a political kind (the public interest for example);[25]
5. the Minister had only a short time (90 days) from receipt of the recommendation to make a decision to declare the service or not.

[34] Having made those observations, the High Court said this:

> "The content of those provisions of Pt IIIA to which reference has been made suggests that it was expected that, armed with a recommendation from an expert and non-partisan body (the NCC), the Minister would make a decision quickly and would do so according to not only the Minister's view of the public interest but also the expert advice given by the NCC about the more technical criteria of which the Minister had to be satisfied before a declaration could be made. And it is the Minister's decision, not the NCC's recommendation, that was the matter that was to be reviewed by the Tribunal."[26]

[35] In practice, as occurred in the present case, the QCA conducts an investigation which will involve the gathering of information and opinions. The recommendation is not a bare statement of satisfaction or otherwise of the access criteria, but is a full report for the consideration of the Minister. What is contemplated is that the Minister may have regard to any opinions (including the ultimate recommendation by the QCA) and may adopt or reject findings of fact made by the QCA. Ultimately though, the Minister's decision is unfettered by the view of the QCA as to the existence or otherwise of any of the access criteria.

[36] By s 79 of the QCA Act, the QCA "may consult with any person it considers appropriate". Section 79A recognises that persons with an interest in the making of a declaration (or the failure to make a declaration) are involved in the process. The

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22 Which performed the same role as does the Queensland Competition Authority under the *Queensland Competition Authority Act* 1997.
23 Paragraphs [39]-[40].
24 Paragraph [46].
25 Paragraph [43].
26 Paragraph [47].

existence or content of any obligations to afford procedural fairness[27] are not in issue. Submissions were directed to the Minister and there is no complaint about the process adopted.

[37] As later explained, the dispute here is whether the declaration "would promote a material increase in competition"[28] in only one of various markets affected by the terminal; the development stage tenements market.

[38] There was a substantial body of evidence before the QCA and the Minister as to the impact of making a declaration upon that market. There is no challenge to the existence of that market, although it is obvious that it is not the largest or most significant market in the chain of supply. The test is not whether the declaration promotes a material increase in competition throughout the chain of supply or whether the market affected is "material". Once a market is identified, the question is whether the declaration would promote a material increase in competition in that market.

[39] No provision is made in the QCA Act for any appeal from, or review of the Minister's decision to declare or not declare a service. Any challenge to what is clearly an exercise of executive power, must be mounted under the *Judicial Review Act* 1991 (the JR Act). That is what DBCTM has done.

Background

[40] DBCTM Holdings Pty Ltd (DBCTM Holdings) is the owner of the terminal. DBCTM Holdings is a Queensland Government entity. DBCTM is the operator of the terminal.

[41] Both the QCA and the Minister identified the "facility"[29] as:

> "3.3.1 I accept the QCA's recommendation for the reasons set out in the QCA analysis[30] that the relevant facility is the port infrastructure as currently defined in section 250 of the QCA Act, namely the port infrastructure located at the port of Hay Point owned by Ports Corporation of Queensland or the State, or a successor or assign of Ports Corporation of Queensland or the State, and known as DBCT and which includes the following which form part of the terminal:
>
> (a) loading and unloading equipment;
>
> (b) stacking, reclaiming, conveying and other handling equipment;
>
> (c) wharfs and piers;
>
> (d) deepwater berths;

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27 *Kioa v West* (1985) 159 CLR 550, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2002) 214 CLR 1 at [38], and see generally *TCL Air Conditioner (Zhongshan) Company Ltd v Castel Electronics Pty Ltd* (2014) 232 FCR 361 at [85]-[113].

28 *Queensland Competition Authority Act* 1997, s 76(2)(a).

29 *Queensland Competition Authority Act* 1997, s 70.

30 Part C, section 2.3.1 at page 8.

(e) ship loaders."[31] (emphasis added)

And the "service"[32] as:

"3.2.1 I accept the QCA's recommendation for the reasons set out in the QCA analysis[33] that, as currently defined in section 250[34] of the QCA Act:

(a) the relevant service is the handling of coal at DBCT by the terminal operator; and

(b) handling of coal includes unloading, storing, reclaiming and loading."[35] (emphasis added)

[42] The terminal services mines in the Goonyella region. There was some dispute during the QCA's consideration as to the relevant market for the service. This is directly relevant to Criterion B. Criterion A concerns markets other than the market for the service. However, identification of the market for the service is relevant to determining the impact of declaration of the service upon Criterion A markets.

[43] In a finding of the Minister's which does not now seem to be challenged:

"**3.4 Identify the market in which the service is provided**

3.4.1 I accept the QCA's recommendation that the relevant market for Criterion B is the market for DBCT coal handling services for mines connected to the Goonyella system and that in this market there are no close substitutes for DBCT. I do so for the reasons set out in the QCA analysis.[36] In particular, I note and accept that:

(a) the majority of demand for DBCT's contracted capacity comes from mines in the Goonyella coal chain;

(b) mines in the Goonyella coal chain are unlikely to seek coal handling services from terminals outside the Goonyella coal chain in response to price or quality incentives given the significant cost and non-cost advantages to them in using DBCT compared to other coal terminals;

(c) certain mines in the Goonyella system have been, or are, using terminals other than DBCT but this has been behaviour based on strategic and commercial considerations rather than in response to price or quality incentives; and

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31 Minister's reasons, 3.3.1.
32 *Queensland Competition Authority Act* 1997, s 72.
33 Part C, section 2.2.1 at page 7.
34 Section 250 deems the handling of coal at the terminal to be a declared service; see these reasons, paragraphs [52]-[54].
35 Minister's reasons, 3.2.1.
36 Part C, section 2.4.3 at pages 13-47; Part C, Appendix B at pages 264-269.

(d) mines outside the Goonyella system are unlikely to seek to use DBCT on price or quality grounds.

3.4.2 In addition, Hay Point Coal Terminal (HPCT) has to date not been operated as a common user terminal. I accept the submission provided by BHP to the effect that BMA has no incentive or intention to operate HPCT as a common user facility in the future.[37]

3.4.3 Accordingly, I do not accept the market definition proposed by DBCTM, that the relevant market is the market for coal handling services for mines that are proximate to the Port of Hay Point. This is particularly because:

(a) while mines within the Goonyella system may use other terminals, as set out above, I accept the QCA's conclusion that this is based on strategic and commercial considerations rather than in response to price or quality incentives—this is not evidence of close substitutability between terminals;

(b) HPCT is not in the relevant market, given it is not currently operated as a common user facility and I accept BHP's evidence that BMA has no incentive or intention to operate HPCT as a common user facility in the future."

[44] The facility is, practically speaking, a natural monopoly in the market. There are no other coal terminals servicing the mines connected to the Goonyella system except as explained in the Minister's reasons and set out at paragraph [43] of these reasons.

[45] Of some significance to the consideration to declare or not declare the service:

(a) the terminal has a name plate capacity of 85 million tonnes of coal per annum;[38]

(b) DBCTM is not vertically integrated[39] in the supply chain which means that other than as operator of the terminal, DBCTM has no interest in any other business concerned in the supply of coal to end users.

[46] Vertical integration is a theme mentioned in the Explanatory Memorandum to the QCA Act.[40] Criterion A concerns competition in markets other than the market for the service, that is, markets upstream and downstream from the market for the service.

[47] As Criterion A requires a consideration of markets other than the market for the service, what needs to be considered is the impact of declaration of the service on markets upstream or downstream of the market for handling coal at the terminal.

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37 BHP submissions, 26 April 2019, section 2 at pages 2-3.

38 See paragraphs [73]-[75] and [182]-[188] of these reasons where capacity of the terminal is considered in depth.

39 As to the significance on competition on vertical integration, see *Boral Besser Masonry Ltd v Australian Competition and Consumer Commission* (2003) 215 CLR 374.

40 See paragraph [8] of these reasons.

[48] In the QCA's report, the Under Treasurer's briefing note and the Minister's reasons, three separate and distinct markets for coal tenements were identified:

(a) exploration stage tenements - the market for the supply and acquisition of new or early stage exploration permits of coal in the Central Queensland region;

(b) development stage tenements - the market for the supply and acquisition of late stage exploration and development tenements for metallurgical coal in the Hay Point catchment; and

(c) operating mines - the market for the supply and acquisition of operating mines in relation to the metallurgical coal in the Hay Point catchment.

[49] Markets for coal tenements are not markets for the service, but are "other" markets and therefore relevant to Criterion A.

[50] Prior to amendments made to the QCA Act by the *Motor Accident Insurance and Other Legislation Amendment Act* 2010, a declaration concerning a service might be made by the making of a regulation.[41]

[51] That occurred. On 22 March 2001, the *Queensland Competition Authority Amendment Regulation (No 1)* was made which declared the terminal pursuant to s 97 of the QCA Act. On 23 August 2007, the *Queensland Competition Authority Regulation* 2007 was made which continued the declaration of the terminal.

[52] When the *Motor Accident Insurance and Other Legislation Amendment Act* 2010 was passed, the process of declaration by regulation was abolished and s 250 of the QCA Act was enacted. Section 250 is, relevantly, in these terms:

> "**250 Saving of declarations of particular services**
>
> (1) Each of the following services is taken to be a service declared by the Ministers under part 5, division 2—
>
> (a) the use of a coal system for providing transportation by rail;
>
> (b) the use of rail transport infrastructure for providing transportation by rail if the infrastructure is used for operating a railway for which Queensland Rail Limited, or a successor, assign or subsidiary of Queensland Rail Limited, is the railway manager;
>
> (c) the handling of coal at Dalrymple Bay Coal Terminal by the terminal operator.
>
> (2) Subsection (1) stops having effect in relation to a service, or part of a service—
>
> (a) at the end of the expiry day; or

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41 *Queensland Competition Authority Act* 1997, s 97.

> (b) if the declaration of the service or part of the service is revoked under part 5, division 2, subdivision 5—when the revocation takes effect. …"[42] (emphasis added)

[53] Section 250(2) of the QCA Act refers to the "expiry date". This is defined by s 248 in these terms:

> "**248 Definition for pt 12**
>
> In this part—
>
> ***expiry day*** means the day that is 10 years from the day this section commences."

[54] Therefore, by force of ss 248 and 250, the declaration deemed to have been made by the Minister expired on 8 September 2020 and the process of review under Sub-Division 4A of Part 5 applies to the declaration.

[55] During the time the service was declared, various access agreements were entered into between DBCTM and users. The QCA may approve access agreements entered into between an access provider and an access seeker. That occurred. Relevantly here, access agreements (the 2017 Access Agreements) were entered into pursuant to an access undertaking made in 2017 (the 2017 Access Undertaking). The 2017 Access Agreements were approved by the QCA. The 2017 Access Undertaking expires on 1 July 2021. However, the 2017 Access Agreements continue in force and can be renewed by users pursuant to what the parties have called an "evergreen clause".

[56] The review process was commenced by the QCA in April 2018.[43] In December 2018, the QCA recommended that the service be declared from 8 September 2020.

[57] DBCTM entered into a deed poll (the Deed Poll) where it undertook to give access on terms for the next 10 years. The Deed Poll[44] referred to two documents which together were intended to contain the terms of access to the service by users. Those documents were the Access Framework and the Standard Access Agreements (together with the Deed Poll, "the New Access Documents").

[58] There can be no doubt that the making of the Deed Poll by DBCTM was an attempt to implement a scheme of access to the terminal so as to avoid declaration post 8 September 2020. While users of the service, in their submissions to the QCA, displayed some cynicism towards the New Access Documents, there is in my view no legal or commercial reason why a provider of a service might not offer terms to users even if motivated by an intention to avoid declaration.

[59] The QCA considered the effect of the Deed Poll and in March 2020 issued a final recommendation to the Minister. That recommendation was that the terminal not be declared as, given the Deed Poll, neither Criterion A nor Criterion D were satisfied. As already observed, Criterion A is that the "declaration of the service would

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42 Legislative notes omitted.

43 *Queensland Competition Authority Act* 1997, Part 5, Division 2, subdivision 4A.

44 An amended Deed Poll is now contemplated but that issue is really only relevant to the discretionary granting of relief, see paragraphs [310]-[321] of these reasons.

promote a material increase in competition in at least 1 market".[45] Having been satisfied that the effect of the Deed Poll was that the declaration would not promote such an increase in competition, it was then also, in the QCA's view, not in the public interest for the declaration to be made (Criterion D).

[60] The Under Treasurer provided a briefing note to the Minister on 23 May 2020. The Under Treasurer recommended that the terminal not be declared but advised the Minister it was reasonably open to him to find that all criteria had been fulfilled.

[61] The Minister found that the service satisfied all of the access criteria and on 31 May 2020 declared it. Reasons for the decision were delivered.

[62] In finding that Criterion A was satisfied, the Minister found that the declaration would promote a material increase in competition in only one market being the development stage tenements market.

[63] Having been satisfied that Criterion A was fulfilled, the Minister found that the making of a declaration promoted the public interest and consequently Criterion D was satisfied. Both the QCA and the Under Treasurer recommended that Criteria B and C were satisfied and the Minister accepted those opinions.

The 2017 Access Agreements

[64] As already observed, during the period over which the terminal was declared, various access agreements were entered into. In order to meet the concerns in the draft report of the QCA, the Deed Poll was executed which, primarily, benefits new users as existing users continue to enjoy the benefits of the 2017 Access Agreements which continue to operate due to the "evergreen clause" contained in those agreements. Users who have the benefit of the 2017 Access Agreements are subject to a limit of coal they can process through the terminal. Any user who wishes to process coal through the terminal beyond the limit set in the relevant 2017 Access Agreement is (in relation to the extra coal) in the same position as any new user who does not have a 2017 Access Agreement.

[65] It is unnecessary to analyse the 2017 Access Agreements in any great depth because there are only a few features which are relevant. Clause 20 of the 2017 Access Agreement is the evergreen clause. It is in these terms:

> "**20. OPTIONS**
>
> If the period during which Coal is to be Shipped during the Term is 10 years or more, the following clauses apply:
>
> (a) The User has an option to extend the Term for 5 years or more (or a lesser period, if it coincides with an expected end-of-mine-life), as nominated by the User at the time of exercise, exercisable at any time up to 12 months prior to the end of the Term (including the Term as already extended by the exercise of an option under this clause 20(a) for 5 years or more).
>
> (b) If DBCT Management receives an Access Application for additional capacity which cannot be met without a Terminal

[45] Other than the market for the service.

Capacity Expansion if the option in clause 20(a) and other relevant options are exercised, it may notify the User, requiring it to respond within 90 days, either exercising the option in clause 20(a) in respect of all or part of an extended Term and/or tonnage the subject of the option, or waiving it.

(c) DBCT Management must give notices under clause 20(a)[46] to relevant Access Holders with options, in order of the earliest expiring User Agreement, for the purposes of deciding which option date is to be accelerated first. Where an Access Holder/s with the earliest expiring date exercise/s its/their option by the accelerated date, DBCT Management may then go to the next Access Holder/s in order of expiring agreements until there has been a waiver of sufficient options to ensure that the bona fide request can be accepted without the necessity for a Terminal Capacity Expansion. Access Holders whose terms expire within 6 months of each other will, for the purposes of this clause 20, be deemed to have terms which expire on the same date, and must be given notices at the same time.

(d) Where more than one Access Holder has tonnages which expire (or which are deemed to expire) on the same date, those Access Holders which do not exercise their accelerated option will lose the amount of tonnes the subject of the option proportionately with their respective annual contract tonnages immediately prior to the end of the current term. (For example, if a bona fide request for 5 Mtpa is received and Access Holders with 10, 5, 2 and 3 Mtpa of contracted tonnages do not exercise their options, then the options for those Access Holders will be reduced by 2.5, 1.25, 0.5 and 0.75 Mtpa respectively).

(e) If the Access Application referred to in clause 20(a) is not converted into a User Agreement within 3 months after the above process is completed, the status quo existing before notice from DBCT Management will be re-instated (i.e. options will not be taken to have been forfeited merely because the accelerated date for exercise has not been complied with, and any accelerated exercise of an option will be taken not to have occurred)."

[66] The effect of clause 20 is that users who are parties to the 2017 Access Agreements can perpetually renew those agreements even if the terminal ceases to be declared and even though the 2017 Access Undertaking has expired. In other words, they continue to obtain the benefit of the QCA approved access conditions.

[67] By the terms of the 2017 Access Agreements, parties pay, relevantly here, two charges,[47] a capital charge and an "operation maintenance charge".[48] The operation

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46 Should be a referral to clause 20(b).
47 Clause 11.3(a).
48 Clause 11.3(b).

maintenance charge represents the cost to DBCTM of operating the terminal which is then, through a formula, passed on to the users.

[68] The capital charge is calculated by reference to a formula which results in a dollar figure per tonne of coal which is then passed on to the users. It is also called a "terminal infrastructure charge" or "TIC". The QCA must approve all the components to the formula by which the TIC is from time to time arrived at. Even though, by force of the evergreen clause the 2017 Access Agreements are perpetual, on the expiry of each undertaking there is a "agreement revision date" and all of the charges are subject to review, but again, subject to approval by the QCA.

[69] New users, those who are not subject to the 2017 Access Undertaking and the 2017 Access Agreements, are, in practical terms, the parties to be accommodated by the Deed Poll.[49] The Deed Poll exhibits the Access Framework. The Access Framework contemplates new users entering into Standard Access Agreements.

[70] The Deed Poll is designed to operate in an environment where the terminal is not declared. Instead of any dispute being determined by the QCA, disputes are determined by private arbitration. Apart from that, the key difference between the 2017 Standard Access Agreements on the one hand, and the 2017 Access Framework and the 2017 Access Agreements on the other, is in relation to the calculation of the TIC. If the TIC cannot be agreed, then an arbitrator must determine the TIC which is effectively at market value, being the figure that would be agreed between a willing but not anxious buyer and a willing but not anxious seller of the service.

[71] There is a ceiling on the TIC in that it cannot exceed $3.00 per tonne more than the TIC calculated under the 2017 Access Agreements. The effect of this is that new users[50] may pay up to but not in excess of $3.00 more per tonne of coal than the existing users who have the benefit of the 2017 Access Agreements and which contain the evergreen clause.

[72] The Standard Access Agreements also contain an evergreen clause. The Minister assumed[51] that the Deed Poll and the Access Framework will expire in 2030 and cease to regulate access to the service.

Capacity of the terminal

[73] As previously observed, the current capacity of the terminal is 85 million tonnes of coal per annum. The current holders of contracts have, between them, contractual rights to move 85 million tonnes of coal per annum through the terminal. In other words, the terminal is presently at capacity. Access Criterion B[52] is that the facility can meet the total foreseeable demand in the market over the period the service would be declared. The Minister made such a finding. The Minister's finding that Criterion B is satisfied is not challenged. The Minister found:

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49 Although see paragraphs [64] and [182]-[188] of these reasons. Existing users must compete for access beyond the tonnage convered by existing contracts.

50 And existing users acquiring capacity beyond that covered by their 2017 Access Agreements.

51 See paragraphs [210]-[214] of these reasons.

52 Section 76(2)(b) and (3).

"3.5.1 I accept the QCA's recommendation that the appropriate period for assessing foreseeable demand is 10 years, for the reasons given in the QCA analysis.

3.5.2 The QCA arrived at its estimate of total foreseeable demand over the 10 year period by reconciling various estimates provided by stakeholders. The QCA's reconciliation is outlined in detail in Appendix D of Part C and section 2.6.3 at pages 44-54 of Part C. I consider the approach adopted by the QCA in estimating total foreseeable demand to be a reasonable and objective one, and I accept the QCA's estimate of foreseeable demand for the 10 years from 2021, being demand over the period in a range from 80 mtpa[53] to 96 mtpa on a throughput basis and 89 mtpa to 107 mtpa on a contract entitlements basis.

3.6.1 I accept DBCT currently has a capacity of 85 mtpa, for the reasons given in the QCA analysis.

3.6.2 The estimate of total foreseeable demand within the declaration period that I have accepted (89 mtpa to 107 mtpa on a contract entitlement basis) exceeds the current capacity of DBCT (85 mtpa). However, I am satisfied that incremental expansions of DBCT are reasonably possible which would enable DBCT to meet the total foreseeable demand. In this regard, for the reasons given in the QCA analysis, I note and accept the following.

(a) it is reasonably possible to expand DBCT to at least 102 mtpa within the declaration period (ie 10 years);

(b) DBCT, expanded to a capacity of 102 mtpa, would be able to meet foreseeable demand. This is because, while total demand for contract entitlements is estimated to exceed 102 mtpa (by at most 5.1 mtpa) for a period of five years during the proposed declaration period (2022-2026):

(i) in this five years period the estimated throughput demand ranges between 92 mtpa to 96 mtpa, which is well below DBCT's expanded capacity of 102 mtpa; and

(ii) users may acquire capacity in the secondary trading market to meet those limited and short-term capacity requirements; and

(c) if, contrary to the conclusion in subparagraph (b) above, DBCT does require additional capacity beyond 102 mtpa to meet the foreseeable demand, it would be reasonably possible to further expand DBCT's

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53 Millions tonnes per annum.

capacity within the declaration period to meet that additional demand.

3.6.3 I have considered, but do not accept, DBCTM's submission to the effect that there is an implicit timing aspect to section 76(3) of the QCA Act, namely that the Minister cannot treat a facility as having an expanded capacity for the entire declaration period, unless it is reasonably possible to expand the facility to that capacity by the *commandment* of the declaration period. I agree with and accept the QCA's approach to section 76(3) of the QCA Act as set out in the QCA Approach.

3.6.4 Accordingly, I am satisfied that DBCT (having regard to it as if it had such expanded capacity as is reasonably possible to obtain within the declaration period) could meet total foreseeable demand in the market."

[74] The finding by the Minister as to the availability of capacity to users without a 2017 Access Agreement was:

"4.7.12 I accept that in order for New Users[54] to compete for development stage tenements, New Users require capacity to be available at DBCT.

(a) I accept the QCA's finding that DBCT is fully contracted. Therefore capacity that can be obtained by a New User, would arise from one of the following:

(i) capacity at the existing terminal becoming available from DBCTM (eg relinquishment by an Existing User at the end of a mine life);

(ii) Existing Users allowing a third party to use their capacity (for example, assigning their capacity on a temporary or permanent basis);

(iii) capacity becoming available through terminal expansion, with the cost either being shared between all users (ie socialised expansion) or only charged to users of the expansion capacity (ie differentiated expansion).

(b) In light of the QCA's recommendations (which I have accepted) in relation to Criterion B (namely that DBCT has capacity of 85 mtpa, and the foreseeable demand for the terminal over the declaration period is 80 mtpa to 96 mtpa (on a throughput basis) or 89 mtpa to 107 mtpa (on a contract entitlements basis)), while it is possible for New Users to obtain capacity through any of the mechanisms set out above, it

54 Those without 2017 Access Agreements.

> appears most likely that New Users will obtain capacity from expansions of DBCT."

[75] The availability of capacity to meet future demand is relevant to the question of competition and was the subject of argument before me. That issue is considered later.[55]

The Minister's train of reasoning

[76] As already observed, the Minister identified the "service" as the handling of coal at the terminal by DBCTM.[56] He also identified the market for the service being mines connected to the Goonyella system. The Minister found that the relevant facility is the port infrastructure at the port of Hay Point.[57]

[77] Criterion A requires identification of at least one market "other than the market for the service". As previously observed, the Minister identified three markets for coal tenements[58] and ultimately the market which attracted the declaration was the development stage coal tenements market,[59] which the Minister concluded was a relevant dependent market for the assessment of Criterion A.[60]

[78] It was accepted by the Minister that DBCTM possessed market power[61] and that power would not be constrained by competition or other commercial considerations.[62]

[79] Although there were submissions made to the QCA to the contrary, the Minister considered that the existence of the Deed Poll and Access Framework should be taken into account in the consideration of Criterion A. The Minister found:

> "4.5.8 I accept the QCA's recommendation that it is not necessary to form a concluded view on these arguments,[63] because:
>
> (a) I accept the conclusion of the QCA that it is not a realistic scenario that DBCTM will change its mind and in effect repudiate its obligations under the Deed Poll prior to acceptance or reliance. DBCTM has asserted on numerous occasions during the course of the QCA's declaration review process that it is bound by the deed Poll it executed. Were it to simply reverse this position, after the declaration of the DBCT service has lapsed, it would face the prospect of a fresh application for declaration, which would be founded, in part at least, on the ability of the service provider to repudiate commitments given

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55 Considered at paragraphs [182]-[188] of these reasons.
56 Minister's reasons, paragraph 3.2.
57 Minister's reasons, paragraph 3.3.
58 Minister's reasons, paragraph 4.4.2.
59 Minister's reasons, paragraph 4.8.1.
60 Minister's reasons, paragraphs 4.4.1 and 4.4.2.
61 Minister's reasons, paragraph 4.6.1.
62 Minister's reasons, paragraph 4.6.2.
63 Agreements about whether the Deed Poll is binding on DBCTM; Minister's reasons, paragraph 4.5.7.

> in a deed to prospective users apparently entered into in good faith. I agree with the QCA's conclusion that this is highly unlikely to occur even if, as a matter of law, it is permitted; and
>
> (b) I also accept the conclusion of the QCA that the deed Poll, by its terms, will apply to access seekers only where those parties complete required forms specified in the Access Framework. Where this is done, the factual foundation for the proposition that there is no acceptance or delivery will fall away."

[80] The Minister accepted that because of the evergreen clauses in the 2017 Access Agreements, existing users had the continued benefit of the 2017 Access Agreements and therefore they will not face materially different pricing past 2020 whether or not a declaration is made.[64]

[81] Criterion A requires a comparison of two hypotheticals, namely the competitive environment within the relevant market[65] assuming the declaration is made, to the competitive environment assuming that there was no declaration. The Minister adopted that approach.[66] No party complains about that.

[82] The Minister then found that the development stage tenements market is currently workably competitive.[67]

[83] However, in relation to the period after 2030, that is after the Deed Poll has expired, the Minister found there was uncertainty as to what DBCTM would charge under the New Access Documents.[68]

[84] The Minister then considered the "sunk costs" which is the capital which has to be invested in order for a party to enter the market. The Minister found that sunk costs involved in mine development are high, the duration of the mining activity long, and the uncertainty of the pricing from DBCTM created a risk of "hold-up".

[85] As the Minister explained:

> "4.7.48 The QCA described the hold-up problem in detail in the Queensland Rail Final Recommendation at Part B, Appendix A where the QCA stated the following:
>
> ''Hold-up' is an economic problem that occurs where the value of an economic agent's relationship-specific investment is potentially appropriable by that agent's trading partner(s). Relationship-specific investments are, by definition, particular to a given business relationship. For example, a supplier's purchase of specialised equipment or machinery to produce inputs

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64 Minister's reasons, paragraph 4.6.10.
65 Development stage tenements market.
66 Minister's reasons, paragraph 4.5.1.
67 Minister's reasons, paragraph 4.7.17.
68 Minister's reasons, paragraph 4.7.40.

specific to a buyer represents a relationship-specific investment.

A relevant feature of this type of investment is that, once made (sunk) its value in alternative uses is lower than its value in the current trading relationship. Further, the more specific the assets are to the current relationship, the more difficult it becomes for the investor to redeploy them to other uses. As a result, exist from the relationship is costly.

Accordingly, at the time of the initial investment decision, both parties have an incentive to make the relationship 'work'. However, once the investment is made (ie costs are sunk), the incentives of the parties change. This is because the gains from trade are only realised after the initial investment occurs. As such, the parties have an incentive post-investment to behave strategically - should an opportunity arise - in order to appropriate a great share of the gains from trade. The risk of this type of opportunistic behaviour is known as the hold-up problem.'"

[86] The reasoning then was to consider the risk of hold-up with or without a declaration and then consider whether, in that context, the making of the declaration would promote a material increase in competition.

[87] Ultimately, the Minister found:

"4.7.50 In a future without declaration, with access conditions in the 2020-2030 period governed by the deed Poll and Access Framework, for the post-2030 period:

(a) Existing Users will be protected by the terms of their evergreen agreements and will likely have minimal concern regarding the risk of hold-up in the post-2030 period.

(b) For New Users, although the QCA concluded (as set out in paragraph 4.6.16 above) that contractual constraints and the threat of declaration would constrain DBCTM such that it is likely that DBCTM, post-2030, would retain the pricing arrangements (or some variation of them) in the Deed Poll and Access Framework beyond 2030, I have determined that is not so. That is because:

(i) DBCTM is under no obligation to renew the Deed Poll and Access Framework beyond 2030. Accordingly, the only factors that would cause DBCTM to do so are the threat of declaration and a desire to avoid the uncertainty that would result in the absence of the Deed Poll and Access Framework. I have

already determined that if DBCTM is not declared as a result of the current declaration review process, the threat of declaration is unlikely to be a significant constraint on DBCTM in the future.

(ii) Given DBCTM's profit maximising incentive, post-2030 (as accepted by the QCA) it would be in DBCTM's interests to seek to increase its prices, either by not renewing the Deed Poll and Access Framework or renewing them in an amended version that imposed a price difference cap of greater than $3 per tonne or otherwise increased prices.

(iii) I do not think that the user agreements entered into by New Users in the period 2020-2030 will impose a material pricing constraint on DBCTM post-2030 if the Deed Poll and Access Framework are not renewed. This is because it is proposed that those user agreements will prescribe the use of the pricing methodology in the Deed Poll and Access Framework, but the Deed Poll and Access Framework do not set out the pricing mechanisms that are to apply in the period post 2030.

(iv) Further, if DBCTM were to renew the Deed Poll and Access Framework, it is likely to want to do so in an amended form that allows it to charge a higher price. In this scenario, the only constraints on DBCTM are, first, the threat of declaration and, secondly, the ability of users (via arbitration and litigation, if necessary) to prevent the changes taking effect on the basis they contravene the amendment provisions of the Deed Poll and Access Framework. I have already determined these are only limited constraints.

(v) Accordingly, a New User considering entering a user agreement under the Access Framework in the period 2020-2030 would face considerable uncertainty as the pricing regime to which it will be subject after 2030.

4.7.51 In considering these issues, I have considered DBCTM's submissions, based on HoustonKemp's[69] analysis, that if New Users were likely to be deterred from entering the development stage tenements market because of uncertainty

69 A consultant who provided a report.

about terms of access in the absence of declaration, this would have been seen in the period leading up to 2020. However, I am not persuaded by this submission because:

(a) given declaration already exists the competitive nature of the market does not indicate that declaration would not promote material increase in competition; and

(b) as discussed earlier, it assumes that market participants regard there as being a material risk that DBCT will not be declared, but it is not known that participants had this expectation. Indeed, given the focus of the access regime on natural monopolies, it seems probable that market participants have been operating an assumption that DBCT will continue to be regulated until there is a competitive option in the market (that is, until DBCT is no longer a natural monopoly).

4.7.52 In my view, given the significant sunk costs involved in acquiring and developing a mine, the uncertainty for New Users as to the pricing that will apply after 2030 is likely to give rise to concerns on the part of those New Users about the risk of hold-up.

4.7.53 I am of the view that the risk of hold-up for New Users is sufficient to discourage New Users from entering the development stage tenements market. In particular, given the concern of users expressed in the various stakeholder submissions regarding the impact on investment decisions of an increase in pricing (or uncertainty in pricing) and uncertainty in other terms of access, I regard it as reasonable to conclude, and do conclude, that New Users' decisions to invest in the development stage tenements market will be materially impacted by that uncertainty beyond 2030.

4.7.54 In addition, the presence of hold-up risk for New Users is likely to create a further asymmetry in the market. This is because for Existing Users, the evergreen nature of their existing user agreements (including the pricing provisions) mean that they do not face the risk of hold-up in respect of capacity governed by those existing user agreements. To the extent that Existing Users have spare capacity under their user agreements which they can apply to a new tenement, this will provide those Existing Users with a risk (and hence cost) advantage over New Users when competing for the acquisition of tenements.

4.7.55 The question then is whether declaration would remove this risk of hold-up, or at least do so to an extent such that it would lead to access or increased access that would promote a material increase in competition. I have determined that it

> would. Declaration is unlikely to completely remove the risk of hold-up. This is because declaration is only for a finite period-in the current case, 10 years is proposed-and potential users will face some uncertainty during the declaration period as to the access regime that will apply after that period (that is, after the then-current declaration is due to expire). However, I have determined that declaration will substantially reduce the risk of hold-up. This is because access agreements entered into under the declaration are likely to be evergreen agreements. As such, New Users entering the development stage tenements market in the period 2020-2030 will know they will get the protection of an evergreen user agreement that will continue to apply after 2030. New Users therefore will likely have significantly less concern regarding the risk of hold-up in the post-2030 period. The adverse competition effects resulting from the risk of hold-up, discussed above, would thereby largely if not entirely be avoided.
>
> 4.7.56 As a result, by reducing the risk of hold-up, I am satisfied that access (or increased access) as a result of declaration of the DBCT service would promote a material increase in competition in the development stage tenements market." (emphasis added)

The application for judicial review

[88] The Minister has reasoned that those users who have the benefit of a 2017 Access Agreement will have certainty in pricing of the service beyond 2030 but those who enter into Standard Access Agreements between 2020 and 2030 will not. That affects any decision by those seeking to invest in development stage tenements in the period 2020 and 2030. Declaration, the Minister found, would promote a material increase in competition in that market.

[89] DBCTM brings its application under Part 3 of the JR Act. Section 20(1) provides:

> "**20 Application for review of decision**
>
> (1) A person who is aggrieved by a decision to which this Act applies may apply to the court for a statutory order of review in relation to the decision. …"

[90] There is no doubt that the decision of the Minister to declare the service is "a decision of an administrative character made … under an enactment".[70] It was made pursuant to legislative authority and affected rights.[71] It was therefore a decision to which the JR Act applied.[72] There is also no doubt that DBCTM was aggrieved by the Minister's decision as it places controls over its commercial activities.

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70 *Judicial Review Act* 1991, s 4(a).
71 *Griffith University v Tang* (2005) 221 CLR 99.
72 Section 20(1).

[91] There are four grounds alleged, within which there are various sub-grounds. I set out each later. Grounds 1, 2 and 3 all attack the Minister's finding that Criterion A was satisfied. Ground 4 attacks the Minister's decision that Criterion D was satisfied. However, DBCTM accepts that if it fails in all of grounds 1, 2 and 3 so that the Minister did not err in finding Criterion A satisfied, then it cannot succeed on its attack on the finding that Criterion D was satisfied.

[92] Therefore, the question is whether in declaring the service on the basis that the declaration "would promote a material increase in competition in the development stage tenements market", DBCTM can establish one of the administrative errors identified in s 20(2) of the JR Act and alleged in its application.

[93] In its various grounds, DBCTM alleges errors of law (s 20(2)(f)), no evidence to justify making the decision (s 20(2)(h)) and an improper exercise of power (s 20(2)(e)).

[94] The meaning of "improper exercise of power" in s 20(2)(e)" is defined by s 23. DBCTM relies on ss 23(b) and 23(g). Section 23 is, relevantly, as follows:

> "**23 Meaning of improper exercise of power (ss 20(2)(e) and 21(2)(e))**
>
> In sections 20(2)(e) and 21(2)(e),[73] a reference to an improper exercise of a power includes a reference to—
>
> (a) …
>
> (b) failing to take a relevant consideration into account in the exercise of a power; and …
>
> (g) an exercise of a power that is so unreasonable that no reasonable person could so exercise the power …"

[95] The ground created by s 20(2)(h) (no evidence to justify making the decision) is governed by s 24 which provides:

> "**24 Decisions without justification—establishing ground (ss 20(2)(h) and 21(2)(h))**
>
> The ground mentioned in sections 20(2)(h) and 21(2)(h) is not to be taken to be made out—
>
> (a) unless—
>
> (i) the person who made, or proposed to make, the decision was required by law to reach the decision only if a particular matter was or is established; and
>
> (ii) there was no evidence or other material (including facts of which the person was or is entitled to take notice) from which the person could or can reasonably be satisfied that the matter was or is established; or

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73 Not relevant here.

(b) unless—

(i) the person who made, or proposes to make, the decision based, or proposes to base, the decision on the existence of a particular fact; and

(ii) the fact did not or does not exist."

[96] The parties have agreed on a list of issues to which I will refer when dealing with each ground of review.

Consideration of the grounds

Ground 1(a)

[97] This ground is:

"1 The Decision, in finding that declaration would reduce the risk of hold-up for New Users which were potential acquirers in the development stage coal tenements market, and consequently promote a material increase in competition in the development stage coal tenements market:

(a) was predicated upon an error of law (JR Act, section 20(2)(f)) in that:

(i) on the proper construction of section 76(2)(a) of the QCA Act, criterion (a) would only be satisfied where 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, relevantly, the development stage coal tenements market;

(ii) the circumstance that the risk of hold-up might create uncertainty or asymmetry for some potential acquirers in the development stage coal tenements market was an insufficient basis to conclude that such uncertainty or asymmetry would materially affect competition in that market;

(iii) the Respondent failed to consider the extent (if any) to which the identified risk of hold-up and asymmetry would affect competition in the development stage coal tenements market; and

(iv) the Respondent instead assumed that criterion (a) would be satisfied if declaration reduced the risk of hold-up or asymmetry in the development stage coal tenements market, even in the absence of any analysis of the significance of those matters to competition in that market;"

[98] The issues identified in the agreed list of issues concerning ground 1(a) is as follows:

> "**Ground 1(a)**
>
> 1 Ground 1(a) of the application raises as an issue whether the Minister erred in law by failing to consider whether the removal of the risk of hold-up was sufficient to materially affect competition in the Development Stage Tenements Market."

[99] As the case was actually argued, the issues can be more accurately identified as follows:

1. Did the Minister err in the identification of the appropriate legal test? (the first issue)?
2. Did the minister erroneously consider the effect of declaration on certain competitors rather than on competition? (the second issue)

[100] Before turning to the issues, it is necessary to make further observations about s 76(2)(a) of the QCA Act.

[101] The phrase "would promote a material increase in competition" is, as already observed, the product of some statutory evolution.

[102] In *Re Application by Services Sydney Pty Ltd*,[74] the Australian Competition Tribunal observed that in order to be satisfied that access would "promote competition", it was not necessary for the decision-maker to be satisfied that there would "necessarily or immediately be a measurable increase in competition". See also *Re Sydney Airports Corporation*.[75]

[103] That approach has been consistently followed by the Australian Competition Tribunal.[76] The Tribunal consists of a judge of the Federal Court of Australia sitting with other members. There is no reason not to follow these decisions noting of course that they were all decided before the relevant amendment which introduced materiality as a consideration.

[104] The amendment introduced the notion of "materiality". However, Criterion A does not require satisfaction that the declaration would result in "a material increase in competition". It requires that the declaration "would promote a material increase in competition". The notion of "would promote" was considered in *Re Sydney Airports Corporation*.[77] There, this was said:

> "The Tribunal does not consider that the notion of 'promoting' competition in s 44H(4)(a)[78] requires it to be satisfied that there would be an advance in competition in the sense that competition would be increased. Rather, the Tribunal considers that the notion

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74 (2005) 227 ALR 140.
75 (2000) 156 FLR 10 at [106].
76 *Re Duke Eastern Gas Pipeline Pty Ltd* (2001) 162 FLR 1 at [75] and *Re Virgin Blue Airlines* (2005) 195 FLR 242 at [146].
77 (2000) 156 FLR 10.
78 The Commonwealth Criterion A.

> of 'promoting' competition in s 44H(4) involves the idea of creating the conditions or environment for improving competition from what it would be otherwise. That is to say, the opportunities and environment for competition given declaration, will be better than they would be without declaration.
>
> We have reached this conclusion having had regard, in particular, to the two stage process of the Pt IIIA access regime. The purpose of an access declaration is to unlock a bottleneck so that competition can be promoted in a market other than the market for the service. The emphasis is on 'access', which leads us to the view that s 44H(4)(a) is concerned with the fostering of competition, that is to say it is concerned with the removal of barriers to entry which inhibit the opportunity for competition in the relevant downstream market. It is in this sense that the Tribunal considers that the 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."[79] (emphasis added)

[105] DBCTM notes in its submission that before amendment there was no reference in Criterion A to an "increase in competition". Rather, the requirement was that declaration "would promote competition".

[106] That submission has some significance to DBCTM's position as to the proper construction of Criterion A. DBCTM submits that a finding that declaration "would promote a material increase in competition" requires more than just creating an environment for competition as explained in *Re Sydney Airports Corporation*. It was submitted by DBCTM:

> "DR HIGGINS: So in short, your Honour, in determining whether criterion (a) was satisfied in this case, the Treasurer was required to assess whether declaration would promote a material increase in competition in the development stage tenements market. It was not sufficient for the Treasurer to identify respects in which the opportunities and environment for competition might be improved by declaration. And in truth, the respondents contend that the phrase 'promote a material increase in competition' requires only a material improvement in the conditions for competition, or that competitive outcomes are materially more likely to occur, and your Honour sees that in paragraphs 107 and 108 of the Treasurer's submissions - which your Honour may still have open - in particular, the first sentence of 108, your Honour."[80]

[107] The first sentence of paragraph 108 of the Minister's written submissions is as below. What follows that sentence is the passage from *Re Sydney Airports Corporation* which I have set out above:

> "108. The concept of promoting an increase in competition requires an improvement in the conditions for competition such that

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79 *Re Sydney Airports Corporation* (2000) 156 FLR 10 at [107].

80 Transcript 1-19 lines 1-13.

> competitive outcomes are more likely to occur, but does not require an effect on the actual level of competition to be demonstrated."

[108] To "promote" is:

> "to further the growth, development, progress. etc, of; encourage."[81]

[109] There is no practical difference between promoting competition and promoting an increase in competition. To promote is to advance and in the context of a part of a statute (here, Part 5) whose clear object (even though s 69E was inserted by later amendment) is to encourage competition in markets affected by a monopoly in another market,[82] "promote competition" means to seek to increase competition.

[110] It follows that the statements of principle in *Re Sydney Airports Corporation*[83] and the cases which follow are equally applicable to s 76 post amendment.

[111] Both before and after the 2006 amendment, the test is and remained concentrated on "competition" being "promoted". The change, relevantly here,[84] was to introduce a quantum consideration as to the "increase in competition" which "would" be "promote[d]" by the declaration. It must be a "material" increase in competition which is "promoted" by the declaration. "Promotion" of a "material increase in competition" means creating the conditions and environment for increasing competition in a material way.

[112] These conclusions are supported by decisions of the Australian Competition Tribunal after the amendment.[85] In *Re Application by Glencore Coal Pty Ltd*,[86] this was observed:

> "83 The Tribunal does not consider that the reasoning of the Full Court in *Sydney Airport FC* becomes inapplicable or less appropriate to the present issues by reason of any of those amendments.
>
> 84 The introduction of the objects of Pt IIIA expresses objects which are consistent with the approach of the Full Court in *Sydney Airport FC*.
>
> 85 The amendment to s 44H(4)(a) means that the declaration will only occur (if the criteria are all met) where the promotion of competition in the dependent market is material, or non-trivial. The Explanatory Memorandum to the *Trade Practices Amendment (National Access Regime) Bill 2005* (Cth) at Item 16 (p 21) records that the amendment is to be made so that declaration will only occur where the promotion of

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81 Macquarie Dictionary, 8th Edition.

82 Explanatory Memorandum to the *Queensland Competition Authority Act* 1997; see paragraph [8] of these reasons.

83 As set out at paragraph [104] of these reasons.

84 See the further analysis in *Port of Newcastle Operations Pty Ltd v Glencore Coal Assets Australia Pty Ltd* [2021] HCA 39 at [24].

85 *Re Application by Fortescue Metals Groups Limited & Ors* (2010) 271 ALR 456 at [584] and *Re Application by Glencore Coal Pty Ltd* [2016] ACompT 6.

86 [2016] ACompT 6.

competition in the dependent market is non-trivial. The Explanatory Memorandum states that the original drafting of criterion (a) did:

> '… not sufficiently address situation where … declaration would only result in marginal increases in competition. The change will ensure access declarations are only sought where increases in competition are not trivial.'

86 It did not propose any change to the expression 'access (or increased access)' or to the word 'promote'. It may require a more robust, rather than a merely technical, measure of whether access (or increased access) would promote competition in a dependent market. It does not, by refining that measure, undermine or suggest that the reasoning of the Full Court in *Sydney Airport FC* is no longer apt and/or that that decision should not be followed by the Tribunal." (emphasis added)

[113] The notion of "material" increase means a more than trivial increase. This is clear from *Glencore*, *Re Virgin Blue Airlines*[87] and is supported by the Explanatory Memoranda to both the Commonwealth and Queensland amendments.[88]

[114] Criterion A provides that it is necessary for the Minister to be satisfied that the declaration "would" promote a material increase in competition. DBCTM's submission that the word "would" signifies a strong causal nexus between the making of the declaration and the promotion of a material increase in competition must be considered in the context that the judgment to be made by the Minister is as to a future matter. He is judging how declaration will affect the relevant market. It cannot be that the provision empowers the Minister to only declare the service where a particular result is certain.

[115] This question was considered in *Re Virgin Blue Airlines Pty Ltd*[89] where this was said:

> "In our view, we need to be satisfied that if the Airside Service is 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."[90] (emphasis added)

The first issue: misunderstanding the test

[116] Putting aside for a moment paragraph 4.7.16 of the Minister's reasons, which DBCTM criticises, there is nothing in the reasons to suggest that the Minister has not directed himself correctly to the test.

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87 (2005) 195 FLR 242.
88 See these reasons at paragraphs [17] and [18].
89 (2005) 195 FLR 242.
90 At [162].

[117] In paragraph 1.2.7 of the reasons, the Minister referred to the finding of the QCA that the declaration would not promote a material increase in competition. DBCTM accepts that the QCA turned its mind to the correct test.

[118] At paragraph 4.1.1, the Minister directed himself to s 76(2)(a) of the QCA Act and noted its terms. At paragraph 4.5.1, he observed this:

> "4.5.1 I accept that the approach to assessing the service under Criterion A taken by the QCA, that is, by considering whether access (or increased access) on reasonable terms as a result of declaration would promote a material increase in competition in a dependent market compared to a scenario without declaration (that is, a future with and without approach)." (emphasis added)

[119] There is no, and there could not be, any complaint about that observation.

[120] The Minister directed himself to the correct test at each of paragraphs 4.6.21, 4.7.4, 4.7.6, 4.7.9, 4.7.44 and 4.7.51 of the reasons.

[121] At 4.7.55 the Minister observed:

> "4.7.55 The question then is whether declaration would remove this risk of hold-up, or at least do so to an extent such that it would lead to access or increased access that would promote a material increase in competition. I have determined that it would. Declaration is unlikely to completely remove the risk of hold-up. This is because declaration is only for a finite period—in the current case, 10 years is proposed—and potential users will face some uncertainty during the declaration period as to the access regime that will apply after that period (that is, after the then-current declaration is due to expire). However, I have determined that declaration will substantially reduce the risk of hold-up. This is because access agreements entered into under the declaration are likely to be evergreen agreements. As such, New Users entering the development stage tenements market in the period 2020-2030 will know they will get the protection of an evergreen user agreement that will continue to apply after 2030. New Users therefore will likely have significantly less concern regarding the risk of hold-up in the post-2030 period. The adverse competition effects resulting from the risk of hold-up, discussed above, would thereby largely if not entirely be avoided."

[122] The Minister refers to the correct test again in 4.7.56, 4.7.59, 4.7.61, 4.7.62, 4.7.63, 4.7.64, 4.7.65, 4.7.66, 4.7.67, 4.7.68, 4.7.70 and ultimately in 4.8.1 says as follows:

> "4.8.1 For the foregoing reasons, I have determined that access (or increased access) to the DBCT service, on reasonable terms and conditions, as a result of declaration of the service would promote a material increase in competition in a

> dependent market (ie the development stage tenements market).” (emphasis added)

[123] The passage the subject of criticism is paragraph 4.7.16. There, the Minister said this:

> “4.7.16 In light of the above, I have assessed whether access (or increased access) to the service, on reasonable terms and conditions as a result of declaration would promote a *material increase* in competition in the development stage tenements market. This involves consideration of whether there is an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur in a future with declaration compared to a future without declaration.” (emphasis added)

[124] DBCTM seizes upon the use of the term “materially more likely to occur” and submits that phrase evidences a departure from the statutory test which requires an assessment of the degree of competition rather than the likelihood that competition might occur. The submission was that “on the Minister’s reformulation, it might suffice that declaration would materially increase the likelihood that some marginal trivial increase in competition should occur”.

[125] In *Collector of Customs v Pozzolanic Enterprises Pty Ltd*,[91] the Full Federal Court heard an appeal from a judgment setting aside an executive decision. The Full Court said this about the correct approach to the assessment of reasons given for an administrative decision:

> “As the Full Court said in *Repatriation Commission v Thompson* (1988) 9 AAR 199 at 204:
>
> > ‘… the nature of the task of this Court is clear. It is to leave to the tribunal of fact decisions as to the facts and to interfere only when the identified error is one of law.’
>
> This translates to a practical as well as principled restraint. The Court will not be concerned with looseness in the language of the Tribunal nor with unhappy phrasing of the Tribunal’s thoughts: *Lennell v Repatriation Commission* (1982) 4 ALN N 54 (Northrop and Sheppard JJ); *Freeman v Defence Force Retirement and Death Benefits Authority* (1985) 5 AAR 156 at 164 (Sheppard J); *Repatriation Commission v Bushell* (1991) 13 AAR 176 at 183 (Morling and Neaves JJ). The reasons for the decision under review are not to be construed minutely and finely with an eye keenly attuned to the perception of error: *Politis v Commissioner of Taxation (Cth)* (1988) 16 ALD 707 at 708 (Lockhart J).”[92]

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91 (1993) 43 FCR 280.

92 At 287.

[126] *Pozzolanic* was followed by the High Court in *Minister for Immigration and Ethnic Affairs v Wu Shan Liang*.[93] After citing the passage I have quoted above, Brennan CJ, Toohey, McHugh and Gummow JJ observed:

> "These propositions are well settled. They recognise the reality that the reasons of an administrative decision-maker are meant to inform and not to be scrutinised upon over-zealous judicial review by seeking to discern whether some inadequacy may be gleaned from the way in which the reasons are expressed.[94] In the present context, any court reviewing a decision upon refugee status must beware of turning a review of the reasons of the decision-maker upon proper principles into a reconsideration of the merits of the decision. This has been made clear many times in this Court. For example, it was said by Brennen J in *Attorney-General (NSW) v Quin*:[95]
>
> > 'The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from legality, are for the repository of the relevant power and, subject to political control, for the repository alone.'"[96]

[127] Even viewed through the most critical eye, there is no error shown in paragraph 4.7.16 of the Minister's reasons. In the very sentence before that which is being criticised, the Minister referred to the correct test. The sentence which is criticised identifies the factual inquiry necessary in the consideration of the legal test. That inquiry involves a consideration of future matters, namely the hypothetical position with and without declaration and necessarily involves an assessment of "likelihood". This was acknowledged in DBCTM's own written submissions. When considering the term "would promote a material increase", it was said:

> "The language signifies a strong causal nexus, ie a consequence that it is extremely <u>likely</u> or near certain to occur."[97] (emphasis added)

[128] Therefore, the Minister was correct to understand that the application of the legal test required an assessment and comparison of the likelihood of competitive outcomes with a declaration compared to a future without a declaration. There is nothing in paragraph 4.7.16, or elsewhere for that matter, to suggest that the Minister was considering the likelihood of "some marginal or trivial increase in competition". As the Minister said in the reasons, on various occasions, he was considering whether declaration of the service "<u>would</u> promote a <u>material increase</u> in competition".

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93 (1996) 185 CLR 259.

94 See *McAuliffe v Secretary, Department of Social Security* (1992) 28 ALD 609 at 616.

95 (1990) 170 CLR 1 at 35-36.

96 At 272 and followed in *Plaintiff M64/2015 v Minister for Immigration and Border Protection* (2016) 258 CLR 173 at [59]-[60].

97 Written submissions of the applicant, paragraph 75.

[129] The submission of DBCTM quoted in paragraph [127] above is wrong in my view. The emphasis in s 76(1)(a) is not upon materially increasing competition, but "promoting" a material increase in competition. It concerns the creation of a commercial environment which "is expected to promote a material increase in competition".[98] That is what the Minister explained in paragraph 4.7.16 of the reasons.

[130] The first issue fails.

The second issue

[131] At 4.7.53 of his reasons, the Minister states:

> "4.7.53 I am of the view that the risk of hold-up for New Users is sufficient to discourage New Users from entering the development stage tenements market. In particular, given the concern of users expressed in the various stakeholder submissions regarding the impact on investment decisions of an increase in pricing (or uncertainty in pricing) and uncertainty in other terms of access, I regard it as reasonable to conclude, and do conclude, that New Users' decision to invest in the development stage tenements market will be materially impacted by that uncertainty beyond 2030."

[132] That paragraph shows error, so DBCTM submits. It is not sufficient, they say, to identify users who may not enter the market in the absence of a declaration. They cite the author of *Corones' Competition Law in Australia*[99] in these terms:

> "It is important to note that the [*Competition and Consumer Act 2010* (Cth)] is concerned with competition as a process rather than the ability of individual sellers to compete. If the position in the market of an individual seller is being adversely affected by the conduct of a competitor, it is unlikely that there will be a contravention of the CCA unless the conduct substantially lessens competition in the market as whole.
>
> A common misconception is to confuse, or invalidly equate, the 'competitiveness' of individual buyers or sellers with the 'competitiveness' of the market. The [*Competition and Consumer Act 2010* (Cth)], as a principal objective, seeks to foster competitiveness of markets. The courts reject, in general, the suggestion of any necessary correlation between competition in the market and individual competitive strength."

[133] They also rely on what the Australian Competition Tribunal said in *Re Telstra Corporation Ltd (No 3)*:[100]

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98 *Motor Accident Insurance and Other Act Amendment Acts* 2010: Explanatory Memorandum. see *Re Telstra Corporation Ltd (No 3)* (2007) 242 ALR 482 at [96] citing *Re Sydney Airports Corporation* (2000) 156 FLR 10.

99 7th edition 2019.

100 (2007) 242 ALR 482.

> "Accordingly, we believe it is important not to confuse the objective of promoting competition with the outcome of ensuring the greatest number of competitors. That is, the Act aims to promote competition because of the benefits that result from the process of competition, such as lower prices for consumers and the displacement of inefficient suppliers by efficient suppliers of services. As the tribunal observed in *Re Sydney International Airport* at [108]:
>
> > '[108] …The Tribunal is concerned with furthering competition in a forward looking way, not furthering a particular type or number of competitors.'"[101]

[134] In the absence, DBCTM says, of evidence that the additional TIC would render the tenements unprofitable, no material increase in competition by declaration is proved. DBCTM says that the QCA's view on this topic is the correct one. In particular, the QCA said:

> "[While] it is possible that lower prices for access to a service may arise in a future with declaration of a service compared to a future without declaration, this does not necessarily mean that competition will be promoted in a related market. To the extent that a lower price for access would lead to little (if any) change in consumption or production decisions by participants in related markets, the lower price may merely have the effect of redistributing the economic surplus generated within a supply chain. It is also possible that lower prices for access to a service do not materially impact on the ability of market participants in related markets to compete against each other on their merits. This is especially the case if prices were not significantly lower, and were set at broadly equivalent levels for all access seekers."

And later:

> "The QCA's view is that an assessment of a material increase in competition in this market requires considering whether a future without declaration would materially impact on the ability of market participants to compete against each other in developing tenements on their merits, compared to a future with declaration, all other considerations remaining unchanged.
>
> For instance, the QCA's view is that in a future without declaration, potential DBCT users (new users) would face a less favourable access environment (including a higher TIC) than existing users, which would not arise in a future with declaration. The 'materiality' threshold requires the QCA to consider whether, for instance, the higher TIC faced by new users would have the effect of making some tenements developed by new users unprofitable - that is, would it have a detrimental impact on the ability of new users to develop some tenements, relative to those developed by existing

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[101] At [99]. And see also Middleton J in *Vodafone Hutchison Australia Pty Ltd v Australian Competition and Consumer Commission* [2020] FCA 117 at [11].

> users, and compared to if they were developed in a future with declaration, all other things being equal. If the TIC new users would be subject to in a future without declaration would necessarily be at a level to have that effect, the QCA can be satisfied that declaration would promote a material increase in competition in this market. Otherwise, the QCA cannot be satisfied that declaration would promote a material increase in competition in this market. In the latter case, a higher TIC may represent a redistribution of the economic surplus generated within a supply chain."

And:

> "The QCA's view is that it is possible that the prospect of paying a higher charge (at most $3 per tonne higher) than an existing user may lessen the value of a tenement to a potential DBCT user, all other things being equal. However, this does not necessarily means that the absence of declaration would materially impact on the ability of new users to develop tenements into mining operations. As long as mining projects are expected to remain profitable, it is not evident that there would be a material difference in the investment decisions of potential DBCT users with or without declaration. The higher charge may merely have the effect of redistributing the economic surplus generated within a supply chain.
>
> The NCC expressed a similar view in the PNO declaration revocation matter:
>
> > '[While] higher charges for the Service in a future without declaration may reduce the expected net present value of a mining project to which a tenement relates, this does not mean it would reduce the ability of individual miners to compete against each other for that tenement on their merits.'
>
> Indeed, the QCA's analysis shows that a DBCT TIC of up to $3 per tonne above the current DBCT TIC would be unlikely to have a detrimental impact on the economic viability of mining projects by new users. All other things being equal, the profit market estimates of those projects would likely be lower in a future without declaration than in a future with declaration, but that would represent a transfer of economic rents."

[135] The Minister disagreed with the QCA. The Minister, not the QCA, is the decision-maker. The Minister has not committed an error of law but has just drawn different factual conclusions to that of the QCA. Whereas the QCA was not prepared to draw the conclusion that a material increase in competition was promoted by declaration unless the declaration rendered tenements profitable which would be unprofitable without declaration, the Minister concluded otherwise. It does not follow that the Minister was considering the position of individual (or a class of) players in the market rather than considering the market itself.

[136] At paragraph 4.7.11, the Minister concluded that both new users and existing users would compete for development stage tenements. At 4.7.13, he concluded that without declaration there was asymmetry between existing users and new users as

the new users would potentially pay up to $3.00 per tonne more for access to the service. At 4.7.14, the Minister concluded that the declaration would reduce the asymmetry.

[137] The Minister did not equate reducing the asymmetry with a "material increase in competition". Rather, he went on to consider how the reduction in asymmetry would promote a material increase in competition. Indeed, a heading which appears before paragraph 4.7.17 reads "Material increase in competition in development stage tenements". The Minister asked himself this question:

> "4.7.18 I first consider whether the arrangements provided for in the Deed Poll and Access Framework, if continued over the economic life of a mine, would materially impact on the ability of New Users to acquire tenements relative to Existing Users and compared to a future with declaration. As the Deed Poll and Access Framework have a term of 10 years and will prima facie expire in 2030, I then consider likely pricing arrangements beyond 2030 in a future without declaration, and whether these arrangements would materially impact on the ability of New Users to acquire and develop tenements relative to Existing Users and compared to a future with declaration."

[138] What followed was an analysis of some of the evidence and findings by the QCA and then at 4.7.31:

> "4.7.31 In my view, there are limitations to the analysis undertaken by the QCA. As noted earlier, while New Users' assessment of the profitability (or viability) of potential projects is relevant, the more pertinent question is whether the pricing differential is likely to cause New Users to access a tenement as having a value materially below that assessed by Existing Users. Where it does, I agree with the DBCT Users' submission that the pricing differential may act as a barrier to entry for New Users, even in circumstances where New Users assess a tenement as being profitable. This is because the higher valuation arrived at by Existing Users will tend to result in Existing Users offering higher prices for tenements, thus effectively outbidding the potential new entrants."

[139] It is this reasoning which then leads to the conclusion at 4.7.53. The findings which are obviously made by the Minister are:

1. The lack of a declaration will cause asymmetry between existing users and new users wishing to acquire new tenements.
2. That asymmetry results in the new tenements being:
   (a) less profitable; and
   (b) less valuable to new users.
3. That then materially decreases competition for the new tenements.

4. The declaration will lead to a reduction in asymmetry which will promote a material increase in competition for development stage tenements.

[140] That is a logical approach which is not inconsistent with the test prescribed as Criterion A.

Ground 1(b)

[141] Ground 1(b) alleges that the decision:[102]

> "(b) was based upon findings for which there was no evidence or other material to justify the making of the decision (JR Act, section 20(2)(h)), or upon findings that were illogical or so unreasonable that no reasonable person could have exercised the power conferred on the Respondent to make them (JR Act, sections 20(2)(e) and 23(g)), namely:
>
> (i) that, without a declaration, the risk of price uncertainty in the period post-2030 for New Users which were potential acquirers in the development stage coal tenements market would materially affect competition in that market;
>
> (ii) that, notwithstanding that there was no evidence that the risk of hold-up was having any effect on competition in the development stage coal tenements market at present, the absence of such evidence was explained by the circumstance that market participants in the development stage tenements market have been operating on an assumption that DBCT will continue to be declared; and, or alternatively,"

[142] The issues said to arise here are:

> "(a) whether there was any evidence or other material to support, or whether there was a logical basis for, the Minister's finding that removing the risk of hold-up would promote a material increase in competition in the Development Stage Tenements Market;[103] and
>
> (b) if there was no evidence or other material to support those findings, whether, by reason of s 24 of the JR Act, the ground mentioned in s 20(2)(h) of the JR Act is not to be taken to be made out." (emphasis added)

[143] There is no doubt that the Minister made the finding the subject of the ground. It is crucial to the decision.

[144] DBCTM relies on s 20(2)(h), 20(2)(e) and 23(g) of the JR Act.

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102 More properly identified in ground 1.

103 The finding the subject of ground 1(b).

[145] Section 20(2)(e), together with s 23(g), is a statutory embodiment of the *Wednesbury* unreasonableness ground. The first issue identified in relation to ground 1(b) is *Wednesbury* unreasonableness.

[146] The second issue is the one that concerns s 20(2)(h). Section 20(2)(h) must be read with s 24 of the JR Act. All these provisions appear at paragraphs [94] and [95] of these reasons.

[147] Section 24(b) can be ignored as DBCTM does not rely upon it. Section 24(a) confines the operation of s 21(2)(h) to jurisdictional facts.

[148] In construing ss 5(1)(h) and 5(3) of the *Administrative Decisions (Judicial Review) Act* 1997 (Cth) (the ADJR Act), which sections are equivalent to ss 20(2)(h) and 24 of the JR Act, Weinberg J in *Australian Retailers Association & Ors v Reserve Bank of Australia*,[104] held:

> "Under s 39B of the *Judiciary Act* (which reflects the common law), the 'no evidence' ground requires that there be simply no evidence, or other material, to justify the findings of fact made. Aronson suggests, at 239, that 'no evidence' means 'not a skerrick of evidence'. If there is some evidence, no matter how unconvincing, and no matter how overwhelming the evidence to the contrary may be, the traditional approach is to treat the complaint as factual, and not legal. According to Mason CJ in *Bond* (at 356):
>
> > 'So long as there is some basis for an inference - in other words, the particular inference is reasonably open - even if that inference appears to have been drawn as a result of illogical reasoning, there is no place for judicial review because no error of law has taken place.'
>
> The position under the ADJR Act[105] is more complex. Aronson suggests that it provides for a more relaxed version of the no evidence ground. Section 5(1)(h) provides for review on the ground 'that there was no evidence or other material to justify the making of the decision'. However, that section is qualified by s 5(3) which provides as follows:
>
> > 'The ground specified in paragraph l(h) shall not be taken to be made out unless:
> >
> > (a) the person who made the decision is required by law to reach that decision only if a particular matter is established, and there was no evidence or other material (including facts of which he or she is entitled to take notice) from which he or she could reasonably be satisfied that the matter was established; or
> >
> > (b) the person who made the decision based the decision on the basis of the existence of a particular fact, and that fact does not exist.

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104 (2005) 148 FCR 446.

105 *Administrative Decisions (Judicial Review Act)* 1977 (Cth).

> Section 5(3)(a), in substance, seems merely to restate the doctrine of jurisdictional fact. However, as the RBA[106] correctly submitted, s 8 of the PSR Act,[107] which sets out the matters to which the RBA must have regard in determining whether a particular action is or would be in the public interest, does not specify any particular matter that must be 'established' before the RBA can designate a payment system. Rather, the section requires the RBA, in determining whether or not designation would be in the public interest, to have regard to the desirability of payment systems being, in its opinion, 'efficient' and 'competitive'. A provision couched in such subjective terms does not leave much scope for the operation of s 5(3)(a).[108]

[149] His Honour's reference to the doctrine of jurisdictional fact is a reference to the principle that the usual restraint expressed by courts in interfering with a decision-maker's finding of fact is not exercised where the fact is "jurisdictional". A jurisdictional fact is one which must be objectively established if the administrative power sought to be exercised arises. Whether a fact is a jurisdictional fact is ultimately a question of construction of the statute.[109]

[150] The relationship between the doctrine of jurisdictional fact and *Wednesbury* unreasonableness was explained by Spigelman CJ in *Timbarra Protection Coalition Inc v Ross Mining NL*:[110]

> "Where the process of construction leads to the conclusion that parliament intended that the factual reference can only be satisfied by the actual existence (or non-existence) of the fact or facts, then the rule of law requires a court with a judicial review jurisdiction to give effect to that intention by inquiry into the existence of the fact or facts.
>
> Where the process of construction leads to the conclusion that parliament intended that the primary decision-maker could authoritatively determine the existence or non-existence of the fact then, either as a rule of the law of statutory interpretation as to the intent of parliament, or as the application of a rule of the common law to the exercise of a statutory power - it is not necessary to determine which, for present purposes - a court with a judicial review jurisdiction will inquire into the reasonableness of the decision by the primary decision-maker (in the *Wednesbury* sense *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223), but not itself determine the actual existence or non-existence of the relevant facts."[111]

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106 Reserve Bank of Australia.
107 *Payment Systems (Regulation) Act* 1998 (Cth).
108 At [557]-[577], page 587.
109 *Timbarra Protection Coalition Inc v Ross Mining NL* (1999) 46 NSWLR 55 at [36]-[39], *City of Enfield v Development Assessment Commission* (2000) 199 CLR 135.
110 (1999) 46 NSWLR 55.
111 At [40]-41].

[151] In *Abel Point Marina (Whitsundays) Pty Ltd v Uher & Anor*,[112] Wilson J held that ss 20(2)(h) and 24 of the JR Act, like the equivalent sections in the ADJR Act, applied only to jurisdictional facts,[113] following *Australian Retailers Association & Ors v Reserve Bank of Australia*.[114]

[152] The disputed findings do not concern a jurisdictional fact. Ground 1(b) is therefore limited to *Wednesbury* unreasonableness.

[153] Although now statutorily provided as a ground in both State and Commonwealth administrative review legislation, unreasonableness was always a common law basis of judicial intervention.[115] In *Wednesbury* itself,[116] the test was expressed that judicial review was authorised where the decision was "so unreasonable that no reasonable authority could ever have come to it".[117] Before *Minister for Immigration and Citizenship v Li*,[118] that test was the sole basis of various Australian decisions.

[154] In *Li*, French CJ said:

> "[30] The requirement of reasonableness is not a vehicle for challenging a decision on the basis that the decision-maker has given insufficient or excessive consideration to some matters or has made an evaluative judgment with which a court disagrees even though that judgment is rationally open to the decisionmaker. Gleeson CJ and McHugh J made the point in *Eshetu* that the characterisation of somebody's reasoning as illogical or unreasonable, as an emphatic way of expressing disagreement with it, 'may have no particular legal consequence. As Professor Galligan wrote:
>
> > 'The general point is that the canons of rational action constitute constraints on discretionary decisions, but they are in the nature of threshold constraints above which there remains room for official judgment and choice both as to substantive and procedural matters. In other words, within the bounds of such constraints, different modes of decision-making may be employed.'
>
> A distinction may arguably be drawn between rationality and reasonableness on the basis that not every rational decision is reasonable. It is not necessary for present purposes to undertake a general consideration of that distinction which might be thought to invite a kind of proportionality analysis to bridge a propounded gap between the two concepts. Be that as it may, a disproportionate exercise of an administrative discretion, taking a sledgehammer to crack a nut, may be

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112 [2006] QSC 295.
113 At [22]-[23].
114 (2005) 148 FCR 446.
115 *East Australian Pipeline Pty Ltd v Australian Competition and Consumer Commission* (2007) 233 CLR 229 at [80].
116 *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.
117 At page 230.
118 (2013) 249 CLR 332.

characterised as irrational and also as unreasonable simply on the basis that it exceeds what, on any view, is necessary for the purpose it serves. That approach is an application of the principles discussed above and within the limitations they would impose on curial review of administrative discretions."[119] (underlining deleted)

[155] And in the joint judgment of Hayne, Kiefel[120] and Bell JJ:

"[68] Lord Greene MR's oft-quoted formulation of unreasonableness in *Wednesbury* has been criticised for circularity and vagueness', as have subsequent attempts to clarify it. However, as has been noted, *Wednesbury* is not the starting point for the standard of reasonableness, nor should it be considered the end point. The legal standard of unreasonableness should not be considered as limited to what is in effect an irrational, if not bizarre, decision - which is to say one that is so unreasonable that no reasonable person could have arrived at it - nor should Lord Greene MR be taken to have limited unreasonableness in this way in his judgment in Wednesbury. This aspect of his Lordship's judgment may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified. This is recognised by the principles governing the review of a judicial discretion, which, it may be observed, were settled in Australia by *House v The King*,[121] before *Wednesbury* was decided. And the same principles evidently informed what was said by Dixon J about review of an administrative decision in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*,[122] which was decided less than two years after *Wednesbury*, at a time when it was the practice of the High Court to follow decisions of the Court of Appeal in England which appeared to have settled the law in a particular area. …

[74] In the present case, regard might be had to the scope and purpose of the power to adjourn in s 363(l)(b), as connected to the purpose of s 360(1). With that in mind, consideration could be given to whether the Tribunal gave excessive weight - more than was reasonably necessary - to the fact that Ms Li had had an opportunity to present her case. So understood, an obviously disproportionate response is one path by which a conclusion of unreasonableness may be reached. However, the submissions in this case do not draw upon such an analysis."[123] (emphasis added)

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119 At [30].
120 As her Honour then was.
121 (1936) 55 CLR 499.
122 (1949) 78 CLR 353 at 360.
123 At [68] and [74].

[156] The doctrine of proportionality[124] conceptually underpins the observations of French CJ, Hayne, Kiefel and Bell JJ as quoted above. Proportionality has, since *McCloy v New South Wales*,[125] been the subject of consideration in the High Court in various constitutional cases, especially those involving the implied constitutional right of freedom of political expression.[126] Proportionality as an independent ground of administrative review has not gained a foothold.[127]

[157] There is no discretion to be exercised by the Minister. If the four criteria are made out, he must make the declaration. If any are not made out, the Minister must not make the declaration. What is critical is the Minister's satisfaction that the criteria are established.[128] That "satisfaction" is a matter of judgment for the Minister.[129]

[158] In *Buck v Bavone*,[130] Gibbs J (as his Honour then was) observed:

> "It is not uncommon for statutes to provide that a board or other authority shall or may take certain action if it is satisfied of the existence of certain matters specified in the statute. Whether the decision of the authority under such a statute can be effectively reviewed by the courts will often largely depend on the nature of the matters of which the authority is required to be satisfied. In all such cases the authority must act in good faith; it cannot act merely arbitrarily or capriciously. Moreover, a person affected will obtain relief from the courts if he can show that the authority has misdirected itself in law or that it has failed to consider matters that it was required to consider or has taken irrelevant matters into account. Even if none of these things can be established, the courts will interfere if the decision reached by the authority appears so unreasonable that no reasonable authority could properly have arrived at it. However, where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts."[131] (emphasis added)

[159] The judgment reposed in the Minister cannot be displaced by the judgment of either the QCA or the court.[132]

[160] DBCTM made two submissions under this ground. Firstly:

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124 Gageler J in strong disagreement; at [108]-[113].

125 (2015) 257 CLR 178.

126 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, *Brown v Tasmania* (2017) 261 CLR 328, *Burns v Corbett* (2018) 265 CLR 304, *Club v Edwards; Preston v Avery* (2019) 267 CLR 171 and *Spence v Queensland* (2019) 367 ALR 587.

127 *DPB16 v Minister for Home Affairs* [2020] FCA 781 and *Ogawa v Carter of the Department of Home Affairs (as the Second Delegate of the Finance Minister)* [2021] FCAFC 16; although generally see *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1.

128 *Queensland Competition Authority Act* 1997, s 86.

129 *Norbis v Norbis* (1986) 161 CLR 513 and *Buck v Bavone* (1976) 153 CLR 110.

130 (1976) 153 CLR 110.

131 At 118-119. And see *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1995) 185 CLR 259 at [275].

132 See generally *Minister for Immigration and Border Protection v Stretton* (2016) 237 FCR 1 at [12].

1. The entire analysis of the Minister of the effective risk of hold-up is that contained in paragraph 4.7.52 of the reasons:

> "4.7.52 In my view, given the significant sunk costs involved in acquiring and developing a mine, the uncertainty for New Users as to the pricing that will apply after 2030 is likely to give rise to concerns on the part of those New Users about the risk of hold-up."

2. The fact of a price increase in the future without declaration is not of itself evidence that declaration would promote an increase in competition, let alone a material increase. DBCTM relied upon *Re Application by Glencore Coal Pty Ltd*.[133]

3. The Minister identified the risk of hold-up as the asymmetry between existing users and new users (competing for the development stage tenements) as affecting decisions of potential acquirers of those new tenements.

4. But the Minister did not conduct any analysis as to how the risk of hold-up would affect competition for development stage tenements.

5. The Minister assumed that any asymmetry would affect competition in development tenements market even though, without declaration, those tenements would still be profitable for new users post-2030.

6. Any proper analysis by the Minister required a consideration of the following:

> "(a) how such investment decisions are made in the Development Stage Tenements Market;
>
> (b) the characteristics of and barriers to entry into the Development Stage Tenements Market and whether there are other impediments to entering this market which declaration would not overcome;
>
> (c) how the increased risk of hold-up, if any, might affect the profitability of development stage tenements for New Users;
>
> (d) how the increased risk of hold-up, if any, would affect the prices that New Users would offer to acquire development stage tenements in a future without declaration;
>
> (e) how frequently there would be meaningful price disparity between the prices offered by New Users and existing Users for development stage tenements in a future without declaration; and
>
> (f) whether demand for development stage tenements would reduce overall in the future without declaration relative to the future with declaration."

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133 [2016] ACompT 6.

The Minister did not consider these things and therefore the decision is unreasonable in *Wednesbury* terms. (the first submission)

[161] Secondly, DBCTM submits that had the Minister conducted the analysis which DBCTM must say is mandatory "he could not have been satisfied that the increased hold-up risk, in the future without declaration was sufficient to materially affect investment decisions and competition in the development stage tenements market".[134]

[162] DBCTM says this is so for three reasons:

1. There is no actual asymmetry. This is because existing users could only apply capacity to new tenements if they had surplus capacity. Otherwise, they would be in the same position as new users.

2. Uncertainty of the future price for access to the service is but one uncertainty inherent in investment in new tenements and would not impact decisions any more than those other factors.

3. If uncertainty of price was a material factor in investment decisions for development stage tenements, that uncertainty should have already manifested itself, but the Houston Kemp Report[135] shows no drop-off in demand for new tenements. (the second submissions)

The first submission

[163] The assertion that the complete analysis of the effective hold-up risk is found in paragraph 4.7.52 of the Minister's reasons is another example of DBCTM reading selective portions of the reasons out of context.

[164] Paragraph 4.7.52 is a conclusion based on findings made elsewhere in the reasons.

[165] Paragraph 4.7.52 of the reasons has three parts:

1. A finding that the acquisition and development of a mine involves significant sunk costs.

2. A finding that there is uncertainty as to pricing for new users after 2030.

3. A conclusion that those two factors are "likely to give rise to concerns on the part of those new users about the risk of hold-up".

[166] The reasons deal with the issue of sunk costs.[136] The reasons deal with the issue of price uncertainty for new users after 2030.[137] Once those two factors are accepted, as the Minister was open to accept them, a finding of "concern" about the risk of hold-up is all but inevitable. In any event, it was clearly reasonably open to him.

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134 DBCTM submissions, paragraph [105].

135 Houston Kemp are consultants who prepared a report.

136 Paragraphs 3.7.3, which refers back to the QCA recommendation, as does 4.7.36, 4.7.47, 4.7.48 which refers to the QCA's recommendation, 4.7.52, 6.7.3.

137 Paragraphs 4.6.9, 4.6.15, 4.6.16, 4.7.3, 4.7.8, 4.7.26, 4.7.41, 4.7.45, 4.7.47, 4.7.50, 4.7.51, 4.7.51, 4.7.52, 4.7.53, 4.7.55.

[167] After making the finding at paragraph 4.7.52, the Minister then considered asymmetry at 4.7.53 and materiality at 4.7.55 and 4.7.56.

[168] The Minister's approach is logical and open to him. As he explains in paragraph 4.7.52 to 4.7.56 of the reasons:

1. there are significant sunk costs involved in acquiring and developing a mine;[138]
2. there is uncertainty for new users as to pricing after 2030;[139]
3. the price uncertainty after 2030 gives concern to new users about the risk of hold-up;[140]
4. new users' decisions to invest in development stage tenements will be affected by the uncertainty;[141]
5. asymmetry is caused by existing users having the benefit of evergreen contracts which don't suffer from pricing uncertainty post-2030;[142]
6. declaration will lead to new users obtaining evergreen contracts without pricing uncertainty post-2030;[143]
7. therefore, new users entering into contracts under declaration between 2020 and 2030 will have the certainty which evergreen contracts (on the 2017 Access Agreement terms, not the terms of the Standard Access Agreements) provide;[144]
8. that will lessen concern of new users;[145]
9. the declaration will materially promote an increase in competition in the development stage tenement market.[146]

[169] There are evidentiary bases for the various findings upon which the Minister relied to draw the conclusions which he did.

[170] Significant sunk costs:[147] It can hardly be contentious that mining is an expensive endeavour and significant sunk costs are necessary. That finding by the Minister was not challenged.

[171] Uncertainty for new users about post-2030 pricing:[148] This relates to the proper construction and operation of the Deed Poll, framework and access agreements and is considered under ground 2(a).[149]

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138 Reasons, paragraph 4.7.52.
139 Reasons, paragraph 4.7.52.
140 Reasons, paragraph 4.7.52.
141 Reasons, paragraph 4.7.53.
142 Reasons, paragraph 4.7.54.
143 Reasons, paragraph 4.7.55.
144 Reasons, paragraph 4.7.55.
145 Reasons, paragraph 4.7.55.
146 Reasons, paragraph 4.7.56.
147 Reasons, paragraphs 4.7.42 and 4.7.52.
148 Reasons, paragraph 4.7.52.
149 Paragraphs [207]-[276] of these reasons.

[172] The price uncertainty after 2030 gives concern to new users about the risk of hold-up: The Minister had before him various submissions and reports made by users of the facility. In those reports, uncertainty was expressed.

[173] One example submission is:

> "**Promotion of Competition - Hay Point catchment Coal Tenements Market**
>
> The principal issue in the Hay Point catchment coal tenements market is that, declaration (through the undertaking), currently creates conditions and an environment which facilitates competition in the tenements market.
>
> In particular, the DBCT User Group notes that those members of the DBCT User Group that have invested in the Hay Point catchment tenements market in the last few years have confirmed that the declaration (and resulting protections in the DBCT access undertaking referred to in section 8.4 - principally regulated efficient pricing, standard terms of access, a transparent queue, and long term regulatory certainty) were a critically important part of their investment decision.
>
> Whereas, the absence of declaration will materially impact on competition in the Hay Point catchment coal tenements market due to the differential way it would impact on potential acquirers of coal tenements in that market.
>
> In particular:
>
> (a) BMA/BMC will not be materially adversely impacted (to the extent future production would be able to be accommodated at HPCT) as potential acquirers of tenements in the catchment by the declaration ceasing - as they will continue to have access to HPCT (and, which due to the coal handling services being supplied by an affiliate, will be provided at an efficient cost);
>
> (b) existing DBCT access holders will have the protection of the existing user agreements continuing, which provides certainty of access for as long as the renewal rights are exercised, and some arrangement in relation to future pricing through the contractual price review and rights for commercial arbitration (albeit one that will put them at a disadvantage to BMA/BHP Mitsui); and
>
> (c) all other potential buyers of tenements will be at a material disadvantage to both BMA/BHP Mitsui and the existing DBCT access holders due to being highly exposed to DBCT Management's conduct, with no certainty of access, pricing or other access terms, where DBCT Management will have the power and economic incentives to act as a monopolist.
>
> It is clear from that alone, that the result of the declaration ceasing would be to severely disadvantage the very type of company that

> has more recently been active in buying exploration / development projects in the Hay Point catchment coal tenements market."[150]

[174] The Minister was entitled to have regard to the views of persons seeking to access the development tenements market. Section 87A(2) of the QCA Act anticipates such persons making submissions.[151] The Minister specifically took that evidence into account at paragraph 7.4.53 of his reasons.

[175] New users' decisions to invest in the development stage tenements will be affected by the uncertainty: That is the effect of much of the evidence which the Minister received and he was entitled to accept it.[152]

[176] Asymmetry is caused by existing users having the benefit of evergreen contracts: There is no doubt that the existing users have the benefit of evergreen contracts. New users will also obtain evergreen contracts. However, their evergreen contracts are underpinned by the Deed Poll and Access Framework which expire in 2030. As to the effect of the Deed Poll, the Access Framework and the Access Agreements, see the analysis conducted in these reasons in relation to ground 2(a).[153]

[177] Declaration will lead to new users obtaining evergreen contracts: No submission was made against the proposition that in the event of declaration, access arrangements would be offered to new users on the same terms as existing users and therefore without the price uncertainty caused by the expiry of the Access Framework and Deed Poll.

[178] New users entering into contracts under declaration between 2020 and 2030 all have the certainty evergreen contracts provide: That is an obvious inference to be drawn.

[179] That will lessen "concern" of new users: That is a reasonable inference to draw from the material submitted by the various user groups and other interested parties to which I have already referred.

[180] Declaration will materially promote an increase in competition in the development stage tenements market: If it is open to the Minister to draw the conclusions that I have identified, it is open to him to then determine that declaration will materially promote an increase in competition in the development stage tenement market. It must be remembered that it is not a question of promoting a material increase in competition across the supply chain, but only in the development stage tenement market.

Second submission

[181] The second submission is a thinly veiled invitation to conduct a merits review of the Minister's decision. All three of the issues raised in the second submission are factual conclusions which DBCTM seek to draw from the material which was before the Minister. The Minister though has drawn different conclusions. They were clearly open to him as explained in the analysis of the first submission.

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150 DBCT Users submission, 30 May 2018, page 83.

151 *Australian Competition and Consumer Commission v Pacific National Pty Ltd (No 2)* [2019] FCA 669 at [922].

152 See paragraph [173] of these reasons.

153 See paragraphs [207]-[276] of these reasons.

[182] There is no actual asymmetry: This assumes that the existing users will have no surplus capacity to devote to new tenement acquisitions.

[183] The Minister found:

> "4.7.11 I accept that both New Users and Existing Users will seek to compete for development stage tenements for which capacity will be required at the DBCT terminal:
>
> (a) I agree with the QCA that Existing Users have the option of using their terminal access rights for another mine in their portfolio as long as the tonnage is not in excess of the tonnage allowed for under their evergreen user agreement. In circumstances where DBCT is fully contracted, Existing Users have an incentive to preserve those access rights for future mining operations. In circumstances where there is approximately 23 mtpa of coal handling throughput at DBCT relating to mines operated by Existing Users that are expected to reach the end of their economic life over the next 10 years, I consider that within the proposed declaration period it is likely that Existing Users with spare capacity under their existing user agreements will be participants in the market for development stage tenements.
>
> (b) For New Users, I consider that New Users will participate in the market for development stage tenements (as detailed below)."

[184] DBCTM addressed this issue in their written submissions:

> "110. The Treasurer did note that approximately 23 mtpa of DBCT's current coal handling throughput related to mines that were expected to reach the end of their economic life over the next 10 years: D[4.7.11]. While that number is not insignificant, it suggests that over 70% of DBCT's current throughput will remain committed to mines that already use the DBCT Service. It follows that 70% of DBCT's current capacity could not be reallocated to new development stage tenements. Even assuming that the remaining 30% of current capacity was redeployed by Existing Users between 2020 and 2030, it is far from obvious that the effect would be to materially affect competition to acquire development stage tenements. Indeed, much may turn on the time at which that capacity would become available to Existing Users and, again, the Treasurer did not explore that question." (emphasis added)

[185] The Minister made specific findings about the capacity available to existing users at paragraph 4.7.11 of his reasons.

[186] It takes DBCTM's challenge to the Minister's decision nowhere to observe that 70 per cent of existing users' capacity will not become available for new tenements. It

was for the Minister to determine the impact upon the market of 30 per cent of the service's capacity being available to existing users on evergreen contracts as opposed to capacity being available to new users on the terms and conditions of the New Access Documents. It may be "far from obvious" to DBCTM "that the effect would be to materially affect competition to acquire development stage tenements",[154] but the QCA Act has left that decision to the Minister. As already observed, the Minister adopted reasoning which is solid and reasonable and is supported by evidence which was before him.

[187] As Crennan and Bell JJ observed in *Minister for Immigration v SZMDS*:[155]

> "If probative evidence can give rise to different processes of reasoning and if logical or rational or reasonable minds might differ in respect of the conclusions to be drawn from that evidence, a decision cannot be said by a reviewing court to be illogical or irrational or unreasonable, simply because one conclusion has been preferred to another possible conclusion."[156]

[188] As earlier observed, the Minister reasoned logically to the conclusions he reached. This submission should be rejected.

[189] Uncertainty of the future price for access to the services is only one uncertainty in investing in new tenements: The Minister noted the submission in his reasons:

> "4.7.26 DBCTM made further submissions that:
>
> (a) uncertainty of access to coal handling services, not the price of that access, is the fundamental drive of differences in the valuation of coal projects between parties with existing access to DBCT and those without;
>
> (b) more generally, uncertainty regarding terminal access is only a small fraction of overall uncertainty (geological, political and regulatory, coal price) relevant to a decision to invest in a coal tenement. For example, DBCTM submitted that uncertainty associated with a $3 per tonne change in DBCT costs is unlikely to be a material factor in decisions to enter the coal tenements market when considered against the volatility in the metallurgical coal price which varied between $US278 per tonne and $US76 per tonne between 2011 and 2018. Despite this volatility, entrants have continued to acquired tenements in the Goonyella;
>
> (c) access holders' rights to use the coal handling services at DBCT at existing charges are limited to the tonnages specified under the existing user agreements. Existing users wishing to ship greater tonnages of coal

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154 Written submissions, paragraph 110.
155 (2010) 240 CLR 611.
156 At [131].

> will be subject to the same terms of access as new users. This means that any increase in the TIC paid under the Access Framework would affect equally the valuation of any tenements that are traded at the margin;
>
> (d) users without access to DBCT can develop tenements and on-sell them to existing users with capacity at DBCT to operate, meaning they do not need access to DBCT to enter the exploration and development markets; and
>
> (e) in the unlikely circumstances where a potential entrant to the coal tenements market was deterred from entering by a $3 per tonne cost increase, that entrant would be inefficient in any event. As a result, this will not materially impact competition in the coal tenements markets."

[190] The Minister also noted the submissions made by the DBCT users that pricing uncertainty would harm the environment for competition in the development stage tenements market.[157]

[191] The Minister was not obliged to deal in depth with the submissions or make specific findings about them.[158] Conscious of the competing views on this and other issues, the Minister considered whether declaring the service would lead to greater price certainty for new users which would then remove asymmetry between the position of new users and existing users which would then promote a material increase in competition for development stage tenements.

[192] As already observed, the logic by which the Minister reasoned to the conclusions that he reached was sound and the fact that there may be viable alternative reasoning is not to the point. The decision was one for the Minister.

[193] This submission should be rejected.

[194] <u>If uncertainty of price was a material factor in investment decisions for development stage tenements, that uncertainty should have already manifested itself but the HoustonKemp report shows no drop-off in demand for new tenements</u>: Again, this was specifically considered by the Minister.

[195] At paragraph 4.7.51 of the Minister's reasons, he notes the submission and rejects it. He gives two reasons for so doing. The first is that the service had been declared so commercial activity in acquiring development stage tenements was conducted in an environment where DBCTM's monopoly was controlled by declaration.

[196] Secondly, no inference can be drawn from HoustonKemp's analysis as to the future acquisition of development stage tenements unless it is assumed that the acquirers of those tenements up to 2020 assumed that the service would not be declared after that time. The Minister observed that it was more probable that an assumption

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157 Minister's reasons, paragraph 4.7.41.

158 *Minister for Immigration v Yusuf* (2001) 206 CLR 323 at [89].

would have been made that declaration would continue given that DBCTM's monopoly position continues.

[197] Again, the Minister's logic is sound, the decision is his, and it matters not that some other person could have drawn different inferences and conclusions. This submission ought to be rejected.

Ground 1(c)

[198] Ground 1(c) alleged that the decision:[159]

> "(c) was an improper exercise of the power conferred by Subdivision 4 of Division 2 of Part 5 of the QCA Act, in that the Respondent failed to have regard to the following relevant considerations (JR Act, sections 20(2)(e) and 23(b)):
>
> (i) the extent to which, in the absence of a declaration of the DBCT service, the risk of hold-up would affect the prices New Users were willing to pay for development stage coal tenements relative to existing users of the DBCT service (Existing Users);
>
> (ii) the frequency with which, in the absence of a declaration of the DBCT service, there would be a meaningful price disparity between the prices New Users were willing to pay for development stage coal tenements relative to Existing Users; and
>
> (iii) whether the risk of hold-up was such that its removal would result in a material and non-trivial change to the conditions of competition in the development stage coal tenements market."

[199] The issues raised by this ground were agreed as:

> "(a) whether the Treasurer failed to have regard to the following matters in assessing whether the removal of the risk of hold-up for New Users would promote a material increase in competition:
>
> (i) the extent to which, in the absence of a declaration of the DBCT Service, the risk of hold-up would affect the prices New Uses were willing to pay for development stage coal tenements relative to Existing Users;
>
> (ii) the frequency with which, in the absence of a declaration of the DBCT Service, there would be a meaningful price disparity between the prices New Users were willing to pay for development stage coal tenements relative to Existing Users; and
>
> (iii) whether the risk of hold-up and any resultant asymmetry in the market was such that its removal would result in a

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159 More properly defined in ground 1.

material and non-trivial change to the conditions of competition in the development Stage Market; and

(b) whether the Treasurer was required by law to consider the matters set out in paragraph (a)."

[200] As earlier explained, consideration of these issues is relevant to ground 1(b), the *Wednesbury* ground. For reasons which follow, ground 1(c) as a separate ground is not made out.

[201] Ground 1(c) engages ss 20(2)(e) and 23(b) of the JR Act.[160] Section 23(b) is set out at paragraph [94] of these reasons.

[202] The starting point is that it is for a decision-maker to determine the factors to be taken into account in exercising a discretion or reaching a judgment on a matter and also to determine the weight to be attributed to those factors.[161] A decision-maker's determination of the relevance or otherwise of factors is, though, reviewable on *Wednesbury* unreasonableness grounds.

[203] However, a statute may require particular factors to be taken into account or may require a decision-maker to refrain from taking certain matters into account[162] or may require a decision-maker to make particular findings before exercising a discretion or reaching a judgment.[163]

[204] Section 76 of the QCA identifies the "access criteria". There is no discretion if the Minister is satisfied about all of the access criteria for the service.[164] However, satisfaction of the various criteria clearly involves the making of a judgment.[165] In making that judgment about the access criteria, the Minister must have regarded the matters contained in s 765 but there is nothing compelling the Minister to consider or take into account the matters identified in ground 1(c). Ground 1(c) fails.

Ground 2(a)

[205] Ground 2(a) alleged:

"2 The Decision, in finding that the presence of a risk of hold-up for New Users which were potential acquirers in the development stage coal tenements market is likely to create a further asymmetry in the development stage tenements market between New Users and Existing Users:

(a) involved an error of law (JR Act, section 20(2)(f)) because the Respondent found that:

(i) in the absence of a declaration of the DBCT service, the pricing methodology in the Access Framework can or will cease to be applicable to

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160 See paragraphs [93]-[95] of these reasons.

161 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 41.

162 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 39-41.

163 *Minister for Immigration and Multicultural Affairs v Singh* (2000) 98 FCR 469 and *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 at [62]-[65].

164 *Queensland Competition Authority Act* 1997, s 86.

165 *Norbis v Norbis* (1986) 161 CLR 513.

AF SAAs entered into by New Users in the period post-2030; and

(ii) in the absence of a declaration of the DBCT service, the pricing methodology in the Access Framework is capable of being amended by the Applicant, so as to change the pricing methodology applicable to the AF SAAs for New Users in the period post 2030; and"

[206] The issues identified in relation to this ground are:

"(a) whether the Minister erred in law in:

(i) construing the terms of the Access Framework Standard Access Agreement (AF SAA)[166]; and

(ii) finding that New Users would assess that there was uncertainty over pricing and other terms after the expiry of the Access Framework term in 2030, regardless of the proper construction of the AF SAA; and

(b) whether, if the Minister did err as alleged, the error was material."

[207] The Minister made specific findings in relation to pricing arrangements beyond 2030:

"*Pricing arrangements beyond 3030*

4.7.35 As to the second issue, the Deed Poll and Access Framework have an express term of 10 years. As such, *prima facie* they will expire in 10 years, ie in 2030, whereas the economic life of a coal mine typically lasts longer (about 30 years). In these circumstances I agree with the QCA that it is necessary to consider likely pricing arrangements beyond 2030 in a future without declaration, and whether these arrangements would materially impact on the ability of New Users to acquire development stage tenements.

4.7.36 I accept the QCA's recommendations that:

(a) DBCTM has market power, as DBCT is a 'bottleneck' or essential service for mines in the Goonyella, and it is not constrained by any close substitutes;

(b) as a business DBCTM has an incentive to maximise profits by seeking to achieve as high an access charge as possible. Given this, and without regard to other potential constraints, DBCTM would have the ability and incentive to exercise market power in the absence of declaration;

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166 Which I have called the "Standard Access Agreements".

(c) prospective mine investors make long term investment decisions (over the length of the mine life over approximately 30 years) requiring the commitment of sunk investment; and

(d) mine owners seeking to invest in the 2020-2030 period would need to consider DBCTM's conduct over the economic life of the mine.

4.7.37 Accordingly, I accept the QCA's recommendation that a New User's view when considering investing during the period 2020-2030, of what DBCTM will do at and beyond 2030, will have an impact on the New User's decision to enter the development stage tenements market in 2020-2030.

4.7.38 In the scenario where DBCT is not declared as a result of the current declaration review process, and the Deed Poll and Access Framework govern the access conditions for New Users investing in the coal tenements market in the period 2020-2030, I agree with the QCA's recommendation that the pricing mechanism that may apply beyond 2030 would depend on DBCTM's action at that time.

4.7.39 It is not evident that DBCTM would voluntarily submit an access undertaking under the QCA Act or under Part IIIA of the CCA in 2030, as DBCT has an incentive to maximise profit and an access undertaking would likely lead to a reduction in rents that DBCTM receives.

4.7.40 Rather, for the period post 2030, I agree with the QCA that:

(a) DBCTM could renew the Deed Poll and Access Framework beyond 2030, and thereby retain the pricing arrangements (or some variation of them); or

(b) DBCTM could decide not to renew the Deed Poll and Access Framework, and instead attempt to put in place an entirely new form of pricing arrangement beyond 2030.

4.7.41 DBCT Users submitted that this uncertainty over pricing terms after expiry of the Access Framework term in 2030 would harm the environment for competition in the development stage tenements market in the period 2020-2030.

4.7.42 This submission was addressed by DBCTM in its submissions of 26 April 2019. DBCTM understood the DBCT User Group's theory of harm to be:

(a) New Users will have no certainty as to the terms of access beyond the expiration of the Access Framework in 2030;

(b) this means there will be an asymmetry in the valuations of development stage tenements by New and Existing Users leading up to the expiry of the Access Framework;

(c) as a result, efficient New Users will be deterred from entering the development stage tenements market a number of years before those users would seek access to DBCT; and

(d) therefore, this will result in a material impact on competition during the declaration period.

4.7.43 In particular, DBCTM submitted that if the effect referred to by the User Group were valid, then it would be observable now, given DBCT's declaration status post-2O2O is uncertain as the declaration expires in 2020. DBCTM presented analysis by HoustonKemp which is said shows that there is no evidence of new entrants to the coal tenements market being deterred as argued by the User Group.

4.7.44 DBCTM submitted that if the User Group's theory was valid, one would expect to see a material increase in the proportion of acquisitions involving Existing Users (who would value tenements more highly given their evergreen rights to access post-2O2O), and a decrease in the proportion of tenements acquired by New Users (given the purported reduction in valuation and deterrent effect cited by the User Group), leading up to the expiry of declaration at DBCT. Instead what is shown is a thriving tenements market, with significant acquisitions by miners who are not Existing Users with capacity at DBCT.

4.7.45 DBCTM submitted that in 2018 (the year in which the declaration review process began and DBCT's impending declaration expiry was made clear to stakeholders), tenement acquisitions by miners without existing capacity at DBCT were at a historic high. DBCTM stated that this is clear evidence that the User Group's theory of harm (that an asymmetry in terms and conditions of access will deter efficient new entrants from entering the coal tenements markets, including the purported uncertainty that exists from access being required after the possible expiry of the Access Framework in 2030) is nothing more than assertion.

4.7.46 DBCTM submitted that Criterion A requires a comparison of the with and without declaration. In both scenarios, the declaration/Access Framework will expire in 2030. To presume that the 10-year declaration period was ongoing would be erroneous. DBCTM will likely renew the operation of the Framework for a further term prior to expiration. The Deed Poll sets out this process and requires DBCTM to

> notify its intention to renew or not renew the Access Framework 12 months before it expires. DBCTM stated that if DBCTM chose not to renew the Access Framework before its expiration it would be at risk of being declared. As such, DBCTM considers it highly likely that it will renew the term of the Access Framework, beyond 2030. If DBCTM did not renew the Access Framework and the QCA found that DBCTM was not constrained by other factors, access seekers would be able to successfully apply for declaration, and access charges post-2030 would be determined by the QCA."

[208] That passage was followed by the Minister's findings which are paragraphs 4.7.47 to 4.7.56, which are set out[167] at paragraph [87] of these reasons.

[209] This passage concerns users who have entered into access agreements in the period 2020-2030 and their rights after the expiry of the Deed Poll and Access Framework in 2030. The rights of parties post-2030 arising from Standard Access Agreements entered into pursuant to the New Access Documents turns on the proper construction of the New Access Documents, none of which, surprisingly, contain express provisions on this topic.

[210] It is submitted by DBCTM that the Minister, in the passage above, made findings, or at least made assumptions, as to the operation of the documents post-2030 and those assumptions constitute an error of law. The assumption said to be erroneous is that if the Deed Poll and Access Framework are not renewed in 2030, then the Access Framework ceases to apply to the Standard Access Agreements which have been entered into.

[211] The Minister submits that no such assumption was made. He did not set upon a final concluded construction of the documents, but rather, he considered that there would be uncertainty past 2030 which would impact the decisions of new users to enter the relevant market.

[212] Paragraph 4.7.50(b)(v) of the reasons[168] records the conclusion reached by the Minister from the matters viewed in the preceding subparagraphs. The "considerable uncertainty as to the pricing regime to which it would be subject after 2030"[169] is based on the following assumptions:

1. the Deed Poll and Access Framework expires in 2030;[170]
2. there is no obligation to renew the Deed Poll and Access Framework;[171]
3. in the event the Deed Poll and Access Framework are not renewed, they cease to apply to new user Standard Access Agreements entered into between 2020 and 2030;[172] therefore

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167 Except for paragraphs 4.7.47, 4.7.48 and 4.7.59.
168 Set out at paragraph [87] of these reasons.
169 Paragraph 4.7.50(v).
170 Paragraph 4.7.50(i).
171 Paragraph 4.7.50(i).
172 Paragraph 4.7.50(iii).

4. DBCTM may impose a regime charging higher prices after the expiry of the Deed Poll and the Access Framework.[173]

[213] DBCTM criticises the reasoning in paragraph 4.7.50 on the basis that the reasons do not disclose any relevant analysis of the New Access Documents. That criticism is not valid. A decision-maker is under no obligation to justify the legal construction he places upon documents relevant to the decision made. What is required is a transparent explanation of the reasoning for the ultimate decision. Here, that explanation includes the recording of the Minister's understanding of the obligations upon DBCTM past 2030.

[214] In my view, DBCTM is correct in its submission that the Minister has based his decision, at least in part, upon the assumption that the Deed Poll and Access Framework are not operative past 2030.

[215] It is unsurprising that the Minister took the view that he did given that the position of DBCTM before the QCA was that the Access Framework did not apply to access agreements made between 2020 and 2030 once the Access Framework and Deed Poll had expired. The Minister recorded these submissions at paragraphs 4.7.40 to 4.7.46 of the reasons which I have set out at paragraph [207] above.

[216] This reflected the submissions made by DBCTM to the QCA. In answering a specific question posed by the QCA, DBCTM replied:

> "How would prices in the 5 yearly reviews under the standard user agreement (under the proposed Access Framework) be determined after this time?
>
> 75 When the Framework is renewed then the 5 yearly reviews will proceed as they did in the initial term of the Framework:
>
> 75.1 The parties will endeavour to negotiate and agree, as early as practicable, the basis and amount of new charges to apply for the next pricing period; and
>
> 75.2 if the parties have not reached an agreement 6 months prior to the start of the relevant pricing period, either party can refer the matter for determination by an arbitrator in accordance with the renewed Framework.
>
> 76 In the unlikely circumstances that DBCTM did not renew the Framework, a similar process would be followed:
>
> 76.1 The parties would endeavour to negotiate and agree as early as practicable the basis and amount of new charges to apply for the next pricing period; and
>
> 76.2 To the extent that the parties could not agree on these matters, the matter would be resolved under clause 15 of the SAA, and ultimately be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules, under clause 15.4.

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[173] Paragraph 4.7.50(iv).

> 77 Following the cessation of the Framework, the arbitration would operate as a normal commercial arbitration. However, as discussed above, in practice, DBCTM would only not renew the Framework if it was confident that there was no risk of re-declaration.
>
> …
>
> 86 Even if the User Group's theory were valid, this effect would occur both with declaration (at the end of the declaration period), and without declaration (at the end of the Framework term (assuming that the Framework is not renewed))."

[217] The Minister cannot be said to have committed an error of law by accepting the construction of the documents as was common ground between the parties; that the Access Framework did not apply to access agreements reached between 2020 and 2030 if the Deed Poll and the Framework expired.

[218] That is sufficient to dispose of the ground. However, I should consider the construction of the New Access Documents, but before doing so deal with an issue which arose in argument concerning the materiality of any error of law.

[219] The Minister made findings of fact based on what was then common ground that the Access Framework did not apply post-2030. Those findings of fact are those recorded at paragraphs 4.7.50, 4.7.51 and 4.7.52 of the Minister's reasons. Those factual findings were based on evidence before the Minister, including the common ground between the parties as to the effect of the New Access Documents. As I have said, that is sufficient to reject ground 2(a).

[220] The respondents submit that if the Minister has construed the New Access Documents and has done so wrongly, the error of law is not material to the decision to declare the facility and therefore the decision would not fall even if the error of law was made out.

[221] Various decisions have explored the question of when an error of law by a decision-maker constitutes jurisdictional error.[174]

[222] In *Hossain v Minister for Immigration and Border Protection*,[175] it was held that whether a particular breach of the statute granting executive power to make a decision was or was not sufficient to render a decision beyond power was a question of construction of the statute granting the power and "[the] statute is ordinarily to be interpreted as incorporating a threshold of materiality in the event of non-compliance".[176] The threshold of non-compliance necessary to constitute jurisdictional error will not usually be reached where the failure was "so insignificant that the [error] could not have materially affected [the decision]".[177]

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174 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 at [29]-[30], *Probuild Constructions (Aust) v Shade Systems Pty Ltd* (2017) 264 CLR 1 and *SAAP v Minister for Immigration & Multicultural & Indigenous Affairs* (2005) 228 CLR 294.

175 (2018) 264 CLR 123.

176 At [29].

177 At [30] following *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40 and *Martincevic v Commonwealth* (2007) 164 FCR 45 at [67].

[223] There is also always a discretion to refuse relief, although in *SAAP v Minister for Immigration and Multicultural and Indigenous Affairs*,[178] McHugh J considered that where the error is jurisdictional in nature such that the decision is a nullity, there will usually be no reason to refuse relief.[179]

[224] In *Australian Pacific LNG Pty Ltd & Ors v The Treasurer, Minister for Aboriginal and Torres Strait Islander Partnership and Minister for Sport*,[180] Bond J considered materiality in the context of the exercise of discretion to grant relief.

[225] When dealing with an argument that the decision-maker took into account an irrelevant consideration, his Honour said this:

> "[192] If a decision-maker relies on irrelevant material in a way that affects the exercise of power the decision-maker makes an error of law, and doing so results in the decision-maker exceeding the authority or powers given by the relevant statute: *Minister for Immigration and Multicultural Affairs v Yusuf* (2001) 206 CLR 323 per McHugh, Gummow and Hayne JJ at [82].
>
> [193] An issue of materiality may arise, such that relief could be refused on discretionary grounds. In *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 Mason J observed (at 40, citations omitted):
>
> > 'Not every consideration that a decision-maker is bound to take into account but fails to take into account will justify the court setting aside the impugned decision and ordering that the discretion be re-exercised according to law. A factor might be so insignificant that the failure to take it into account could not have materially affected the decision: […] A similar principle has been enunciated in cases where regard has been had to irrelevant considerations in the making of an administrative decision: […]
>
> [194] And, in this regard, Burchett J noted in *Australian Conservation Foundation Inc v Forestry Commission of Tasmania* (1988) 19 FCR 127 at 135:
>
> > 'It is true that a decision-maker may not take account of an irrelevant consideration; but I think he may pick up a red herring, turn it over and examine it, and then put it down, so long as he does not allow it to affect his decision […] If an insignificant irrelevant factor may not vitiate a decision (*Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24 at 40; 66 ALR 299), one that plays no part at all in the decision need not do so.

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178 (2005) 228 CLR 294.
179 At [82]-[84].
180 [2019] QSC 124.

[195] It follows that in order to obtain the relief which they seek in respect of this ground, the applicants must demonstrate:

(a) first, the alleged irrelevant consideration was, as a matter of law, to be regarded as an irrelevant to the exercise of power;

(b) second, the decision-maker relied on the alleged irrelevant consideration in a way which affected the exercise of power;

(c) third, the proper exercise of discretion would be to set aside the decision and to order it to be re-exercised."

[226] The Minister found that the New Access Documents led to uncertainty as to the pricing arrangements post-2030. It was the uncertainty which the Minister found critical. If the construction of the New Access Documents which was assumed is incorrect, and there is no uncertainty as to their operation, then that may materially affect the decision and relief ought be given.[181] However, the crux of the Minister's finding is "uncertainty". The documents are complex. If, after an analysis of them there is doubt as to their operation, the analysis may not remove the relevant uncertainty.

[227] DBCTM makes the submission that the New Access Documents makes the post-2030 pricing clear because the Access Framework continues to govern the Access Agreements. That submission was made in the face of the submission made to the QCA that the 2017 Access Framework ceased to have effect in 2030. Notwithstanding, I turn to a consideration of the New Access Documents.

[228] The Deed Poll, the Access Framework and any Access Agreements together form a scheme of contractual documents and therefore must be read and construed together.

[229] When pressing its submissions as to the construction of the New Access Documents, DBCTM relied upon the joint judgment in *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor*[182] in particular:

"48 Ordinarily, this process of construction is possible by reference to the contract alone. Indeed, if an expression in a contract is unambiguous or susceptible of only one meaning, evidence of surrounding circumstances (events, circumstances and things external to the contract) cannot be adduced to contradict its plain meaning.[183]

49 However, sometimes, recourse to events, circumstances and things external to the contract is necessary. It may be necessary in identifying the commercial purpose or objects of the contract where that task is facilitated by an understanding 'of the genesis of the transaction, the background, the context

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181 Subject to what I said at paragraphs [217] and [218].

182 (2015) 256 CLR 104.

183 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352. See also Sir Anthony Mason, "Opening Address", *Journal of Contract Law*, vol 25 (2009) 1, at p 3.

> [and] the market in which the parties are operating'.[184] It may be necessary in determining the proper construction where there is a constructional choice. The question whether events, circumstances and things external to the contract may be resorted to, in order to identify the existence of a constructional choice, does not arise in these appeals.
>
> 50 Each of the events, circumstances and things external to the contract to which recourse may be had is objective. What may be referred to are events, circumstances and things external to the contract which are known to the parties or which assist in identifying the purpose or object of the transaction, which may include its history, background and context and the market in which the parties were operating. What is inadmissible is evidence of the parties' statements and actions reflecting their actual intentions and expectations.[185]
>
> 51 Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption 'that the parties … intended to produce a commercial result'.[186] Put another way, a commercial contract should be construed so as to avoid it 'making commercial nonsense or working commercial inconvenience'[187]."

[230] *Mount Bruce* is one of a number of cases where the High Court has considered the approach to the construction of commercial documents. Consistently, an objective assessment of the meaning of the words of the document has been sought rather than a determination of what the parties actually subjectively intended. In *Codelfa Constructions Pty Ltd v State Rail Authority (NSW)*,[188] Mason J (as his Honour then was), in a judgment consistently followed in later decisions of the High Court, cited with approval Lord Wilberforce's judgment in *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen)*,[189] where his Lordship said:

> "It is often said that, in order to be admissible in aid of construction, these extrinsic facts must be within the knowledge of both parties to the contract, but this requirement should not be stated in too narrow a sense. When one speaks of the intention of the parties to the contract, one is speaking objectively - the parties cannot themselves

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184 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35], citing *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 350, in turn citing *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen)* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574.

185 *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 352; *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen)* [1976] 1 WLR 989 at 995-996; [1976] 3 All ER 570 at 574.

186 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35], citing *Re Golden Key Ltd* [2009] EWCA Civ 636 at [28].

187 *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 at 657 [35], citing *Zhu v Treasurer of New South Wales* (2004) 218 CLR 530 at 559 [82].

188 (1982) 149 CLR 337.

189 [1976] 1 WLR 989.

> give direct evidence of what their intention was - and what must be ascertained is what is to be taken as the intention which reasonable people would have had if placed in the situation of the parties. Similarly when one is speaking of aim, or object, or commercial purpose, one is speaking objectively of what reasonable persons would have in mind in the situation of the parties."[190]

[231] Through the authorities it is consistently observed that a relevant factor to construction is the purpose of the contractual agreement[191] and "an appreciation of the commercial purpose of the contract calls for an understanding of the genesis of the transaction, the background and the market".[192] The purpose of a contract is assessed against the background of parties at arms length taking the benefit of covenants and in turn accepting obligations upon consideration of their respective commercial interests.

[232] Both *Intel Corporation v Unwired Group Ltd*[193] and *Zhu v Treasurer of New South Wales*[194] concerned the construction of deed polls. In both cases, the principles of construction of multi-party agreements was held to apply to the construction of deed polls.[195] However, in both cases, the deed polls were executed pursuant to contractual arrangements entered into between arms length contracting parties.

[233] It is artificial for DBCTM to speak in terms of the intention of the parties (plural), and the commercial purpose of the Access Agreements as if they were a contract. None of the users have entered into the Access Agreements. The terms of the draft access agreements are effectively being forced upon new users as a proposal through which DBCTM seeks to avoid declaration under the QCA Act. It is an exercise of market power, just one tempered by the threat of declaration.

[234] DBCTM controls the facility. The users require access to it. There is no arms-length negotiation whereby the Access Agreements can be said to be the product of commercial bargaining. The purpose of the arrangements from DBCTM's point of view is to protect its own commercial interests the best it can while offering sufficiently beneficial terms to new users to avoid declaration. Against that background, by submission by DBCTM that the Access Agreements must be construed so that if they were entered into by new users, they would make commercial sense and not cause commercial inconvenience is odd.[196] It may be assumed that the Standard Access Agreements are intended to make sense to

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190 *Reardon Smith Line Ltd v Yngvar Hansen-Tangen (Trading as HE Hansen-Tangen)* [1976] 1 WLR 989 at 996, cited and followed in *Codelfa Construction Pty Ltd v State Rail Authority (NSW)* (1982) 149 CLR 337 at 351 and see *DTR Nominees Pty Ltd v Mona Homes Pty Ltd* (1978) 138 CLR 423 at 429, *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451 at [22].

191 *Toll (FGCT) Pty Ltd v Alphafarms Pty Ltd* (2004) 219 CLR 165 at [40] following *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 451.

192 *International Air Transport Association v Ansett Australia Holdings Ltd* (2008) 234 CLR 151 at [8] following *Pacific Carriers Limited v BNP Paribas* (2004) 218 CLR 165 at [22] and *Electricity Generation Corporation t/as Verve Energy v Woodside Energy Ltd* (2014) 251 CLR 640 at [35].

193 [2008] FCA 1927.

194 (2004) 218 CLR 530.

195 *Intel Corporation v Unwired Group Ltd* [2008] FCA 1927 at [32]-[33] and *Zhu v Treasurer of New South Wales* [2004] 218 CLR 530 at [82].

196 *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd & Anor* (2004) 251 CLR 104 at [51] and see *Antaios Compania Naviera SA v Salen Rederierna AB* [1985] 1 AC 191 at 201 and *Elderslie Property Investments No 2 Pty Ltd v Dunn* [2008] QCA 158 at [21].

DBCTM and its commercial interests, but it is difficult to make any other assumptions.

[235] There is no doubt that the Access Framework will expire, and no doubt that it can be renewed. DBCTM submits that once an access agreement is entered into, it incorporates the Access Framework then in existence and the Standard Access Agreements continue in force subject to that version of the framework. As explained by DBCTM in its written submissions:

> "170. On this construction, the words 'applying … from time to time' are important because they account for the possibility that amendments might be made to the framework implemented under the Deed Poll, *prior* to a New User entering into the AF SAA. Such amendments would be incorporated into an AF SAA entered into *after* those amendments take effect, because such amendments are part of the framework that in fact applies at the time that DBCTM and the New User enter into the agreement. But any subsequent amendments to the framework do not have any effect on the terms applicable to the New User under that user's agreement."

[236] That submission should be rejected.

[237] By the Deed Poll, DBCTM puts in place the "Access Framework". The Access Framework is intended to fulfil the objectives in s 69E of the QCA Act. That is set out at paragraph [9] of these reasons:

[238] The "Access Framework" is defined as the Access Framework "as may be amended from time to time".[197]

[239] The beneficiaries of the Deed Poll include those who seek or obtain access to the facility.[198]

[240] The Deed Poll has a "Term". That is defined as:

> "E. The Framework <u>will remain in effect and continue to apply to the use of the Terminal</u> (including Access to the Services) through the Term, which will end on the earlier of:
>
> a. 9 September 2030 (being the date that is ten years from the Framework's Commencement Date of 9 September 2020); and
>
> b. 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." (emphasis added)

[241] By clause 4.1 of the Deed Poll, DBCTM covenants for the framework to remain in effect during the term:

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197 Clause 1.1.

198 Clause 2.

"**4. Framework to remain in effect and compliance with Framework**

4.1. Subject to any amendments permitted in accordance with clauses 7 and 8 of this Deed Poll, DBCT Management covenants in favour of the Covenantees that the Framework will remain in effect for, and continue to apply to the use of the Terminal (including Access to the Services) throughout, the Term.

4.2. DBCT Management covenants in favour of the Covenantees that it will comply with the Framework for the Term." (emphasis added)

[242] The term "Covenantees" is defined by clause 2.1, but the whole of clause 2 is significant. It provides:

"2.1. Subject to clause 2.2, DBCT Management makes all of the covenants in this Deed Poll in favour of, and only for the benefit of:

2.1.1. Access Seekers who have signed an Access Application Form or Access Renewal Form as set out at Schedule A to the Framework, or who are a party to a Conditional Access Agreement (**Confirmed Access Seekers**);

2.1.2. Access Applicants;

2.1.3. Access Holders;

2.1.4. DBCT Holdings; and

2.1.5. The State,

(together, **Covenantees**).

2.2. DBCT Management makes the covenants in clause 8 of this Deed Poll in favour of, and only for the benefit of, the Covenantees and the Third Parties.

2.3. DBCT Management makes the covenants in this Deed Poll on the date of this Deed, and then each day until the end of the Term.

2.4. DBCT Management makes the covenants to the Covenantees and the Third Parties in this Deed Poll subject to the conditions set out at clauses 8, 9, 10 and 11 of this Deed Poll."

[243] The term "Access Holders" in clause 2.1.3 is not defined in the Deed Poll save for clause 1.1 which provides:

"1.1. In this Deed Poll, capitalised terms not defined in this Deed Poll will have the same meaning as the meaning given to those terms in Schedule G - Definitions and Interpretation - of the Framework."

[244] The term "Access Holders" is a capitalised term in the Deed Poll, so the definition in the Access Framework is incorporated into the Deed Poll. The definitions in the Access Framework provide:

> "**Access Holder** means a party who has an entitlement to Access under an Access Agreement.
>
> **Access Agreement** means an access agreement between DBCT Management and an Access Holder negotiated under Section 5 of this Framework (or otherwise entered into during the Term)."

[245] By other clauses in the Deed Poll:

1. the covenants in the Deed Poll are made "until the end of the Term";[199]
2. the Deed Poll is irrevocable "until the expiry of the Term";[200]
3. the TIC imposed "during the Term" is governed by clause 6.1.

[246] Clause 4 provides:

> "**4. Framework to remain in effect and compliance with Framework**
>
> 4.1. Subject to any amendments permitted in accordance with clauses 7 and 8 of this Deed Poll, DBCT Management covenants in favour of the Covenantees that the Framework will remain in effect for and continue to apply to the use of the Terminal (including Access to the Services) throughout, the Term.
>
> 4.2. DBCT Management covenants in favour of the Covenantees that it will comply with the Framework for the Term." (emphasis added)

[247] Clause 5 concerns renewal of the framework. It provides:

> "**5. Notice of intention to renew or not renew**
>
> 5.1. At least 12 months before the tenth anniversary of the Commencement Date, DBCT Management will publish the following on its website:
>
> 5.1.1. notice of its intention to renew, or not renew, the operation of the Framework for a further term; and
>
> 5.1.2. where operation of the Framework is being renewed for a further term, details of the term and a copy of the Framework with any amendment(s)."

[248] The Covenantees include those who have entered into a Standard Access Agreement. Notwithstanding the existence of a contract between DBCTM and an Access Holder, DBCTM, by the Deed Poll, only covenants that the Access Framework will:

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199 Clause 2.3.
200 Clause 3.1.

1. remain in effect during the term;

2. "continue to apply to the use of the Terminal" during the term.[201]

[249] At least by those provisions of the Deed Poll it is clear that it is not intended by DBCTM that the Access Framework will apply to the Standard Access Documents after the expiry of the term.

[250] Clause 8 of the Deed Poll provides for the amendment of the Access Framework. Clauses 8.1, 8.2 and 8.3 provide:

> "**8. Amendments to Framework**
>
> 8.1. The Framework can only be amended in accordance with this clause 8.
>
> 8.2. DBCT Management can amend the Framework, from time to time, so long as the amendment(s):
>
> 8.2.1. promote the Framework Objective; and
>
> 8.2.2. are appropriate having regard to each of the mandatory considerations set out in clause 8.3.
>
> 8.3. DBCT Management covenants in favour of the Covenantees that if, and when, it amends the Framework it will have regard to each of the following mandatory considerations:
>
> 8.3.1. the legitimate business interests of DBCT Holdings in its capacity as the owner of the Terminal;
>
> 8.3.2. the legitimate business interests of DBCT Management in its capacity as the operator of the Terminal;
>
> 8.3.3. public interest, including the public interest in having competition in markets (whether or not in Australia);
>
> 8.3.4. the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users are adversely affected;
>
> 8.3.5. the effect of excluding existing assets for pricing purposes;
>
> 8.3.6. the following pricing principles in relation to the price of access to the Terminal:
>
> 8.3.6.1. the price should generate expected revenue for the Terminal that is at least enough to meet the efficient costs of providing access to the Terminal and include a return on investment commensurate with the regulatory and commercial risks involved;
>
> 8.3.6.2. the price should allow for multi-part pricing and price discrimination when it aids efficiency;

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201 Deed Poll, clause 4.

> 8.3.6.3. the price should not allow DBCT Management to set terms and conditions that discriminate in favour of the downstream operations of DBCT Management or a related body corporate of DBCT Management, except to the extent the cost of providing Access to other operators is higher; and
>
> 8.3.6.4. the price should provide incentives to reduce costs or otherwise improve productivity."

[251] Clauses 8.4, 8.5, 8.6 and 8.7 provide a mechanism for consultation about any amendments and a process for the resolution of any dispute. Clause 9 concerns remedy for breach of the Deed Poll and clause 10 concerns the governing law of the Deed Poll.[202]

[252] When the Deed Poll is read as a whole, there is nothing suggesting that the amendment of the Access Framework does not affect Access Agreements then in existence. Those holding Access Agreements must be consulted about amendment. It is obvious that amendments to the Access Framework effectively alters the contractual arrangements with those who hold Standard Access Agreements.

[253] As already observed, the Access Framework is a schedule to the Deed Poll. The framework defines as its object and scope:

> "This Framework provides for:
>
> (a) the negotiation and provision of Access to the Services at the Terminal; and
>
> (b) measures to mitigate potential adverse effects on competition which could arise out of the ownership of a related Supply Chain Business."

[254] The duration of the framework is:

> "This Framework will apply on and from the Commencement Date. It will apply until the Terminating Date."[203] (emphasis added)

[255] The "Terminating Date" is the tenth anniversary from the "Commencement Date". The "Commencement Date" is the day after the "Expiry Date" which is 8 September 2020, making the Commencement Date 9 September 2020. The "Term" means the period between (and including each of) the Commencement Date and the Terminating Date".

[256] "Framework" is defined as "means this Access Framework (including its schedules) as amended from time to time".

[257] "Pricing Period means the period commencing on the Commencement Date and ending on 30 June 2026 and each subsequent five year period during the term".

[258] By other clauses of the Access Framework:

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202 Clause 8.4. Those who hold Standard Access Agreements are "Covenantees".

203 Clause 1.4.

1. DBCTM covenants that the operator of the service will be Dalrymple Bay Coal Terminal Pty Ltd[204] "during the term of the framework";[205]

2. DBCTM warrants to comply with the operation and maintenance contract "during the term of the framework";[206]

3. terminal capacity will "be reassessed during the term of this framework".[207]

[259] Clause 10 of the Access Framework provides for the pricing arrangements which apply under the Standard Access Agreements and provides for the arbitration of disputes.

[260] There is no suggestion that these provisions apply to the Standard Access Agreements once the Deed Poll and Access Framework have expired.

[261] What is contemplated is that each user of the facility will enter into a Standard Access Agreement. The Access Framework and the Deed Poll are incorporated into the agreement between DBCTM and any particular user. Clause 3.1 of the standard Access Agreement provides:

> "**3.1. Agreement to provide Access**
>
> (a) DBCT Management:
>
> (i) grants Access to the User on the terms of this Agreement; and
>
> (ii) unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in the Access Framework.
>
> (b) The User unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in:
>
> (i) the Access Framework; and
>
> (ii) the Deed Poll, including the conditions set out in clause 8, 9, 10 and 11 of the Deed Poll."

[262] The Access Agreement defines "Access Framework" as:

> "'**Access Framework**' means the access framework (including its schedules) applying to DBCT Management from time to time relating to provision of the Services by it, as U." (emphasis added)

[263] Clause 7 of the Access Agreement provides:

> "**7.1. Amendments to TIC**
>
> Subject to clause 7.2, the TIC will be amended from time to time throughout the Term in accordance with Schedule 2.

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204 And other warranties.
205 Clause 3.2.
206 Clause 3.3.
207 Clause 11.1(k).

7.2. 5 year review of charges

(a) At the request of either party by notice to the other party no later than 18 months prior to the start of a Pricing Period, all charges under this Agreement and the method of calculating, paying and reconciling them (including the terms of Schedule 2) and any consequential changes in drafting of provisions will be reviewed in their entirety, effective from the start of each Pricing Period, in accordance with the following provisions of this clause 7.2.

(b) Each review pursuant to clause 7.2(a) will determine the types, calculation, payment and reconciliation of charges payable by the User pursuant to this Agreement, and may have regard to the terms of the Access Framework effective at the time of the review.

(c) DBCT Management and the User must commence each review pursuant to clause 7.2(a) no later than 18 months prior to the start of a Pricing Period, and:

(i) the parties must endeavour to agree as early as it is practicable to do so (if possible, by no later than the start of the relevant Pricing Period) on the basis and amount of new charges to apply from the start of that Pricing Period;

(ii) if the parties do not reach agreement by the date 6 months prior to the start of the relevant Pricing Period, either party may refer the determination of the issues to arbitration in accordance with the Access Framework;

(iii) if there is no agreement or determination by the start of the Pricing Period then:

(A) the charges (and method of paying and reconciling them) applying prior to that Pricing Period will continue to apply until otherwise agreed or determined; and

(B) any determination or agreement will (unless the parties otherwise agree) operate retrospectively from the start of the relevant Pricing Period and, as soon as practicable after the determination or agreement, an adjustment will be paid by the relevant party (based on the amounts which have been paid to that date on an interim basis and the amounts which are agreed or determined to be payable from the start of the relevant Pricing Period to the date the adjustment is paid) together with interest on the amount of the adjustment at the No Fault Interest Rate. The amount of interest will be determined by reconciling the amounts and timings of payments made on an interim basis

with amounts payable and timing of those payments which would have applied in accordance with the agreement or determination.

(d) If a matter is referred to arbitration under clause 7.2(c)(ii), the arbitration must be conducted in accordance with the Access Framework.

(e) If a party requests a review under clause 7.2(a), the parties will, at the request of either party and in addition to reviewing the charges under this clause 7.2, meet together in good faith to negotiate any amendments to this Agreement which they consider to be relevant as a result of the changed circumstances following the start of the relevant Pricing Period. Neither party will have any obligation to reach agreement on any revised terms."

[264] Clause 15 of the Access Agreement which contains clause 15.4, a provision referred to by DBCTM in its submissions to the QCA, provides:

"**15. GOVERNING LAW AND DISPUTE RESOLUTION**

15.1. Governing Law

This Agreement is governed by the laws in force in the State of Queensland.

15.2. Disputes

(a) (**Disputes under this Agreement**) If a dispute between DBCT Management and the User arises out of or in connection with the Agreement, then, unless otherwise specified by the Access Framework or agreed by the parties in writing, such dispute will be resolved in accordance with this clause 15. Either party may give to the other party a notice of dispute in writing identifying and providing details of the dispute.

(b) (**Disputes under the Access Framework**) If any dispute or question arises under or in relation to the Access Framework, including (without limitation) a dispute in relation to the negotiation of Access between an Access Seeker or Access Holder and DBCT Management, such dispute will be resolved in the manner specified in the Access Framework.

(c) (**Dispute under Deed Poll**) Subject to clause 9.2.5 of the Deed Poll, the courts of Queensland have exclusive jurisdiction to determine any dispute arising under the Deed Poll.

15.3. Further steps required before arbitration

(a) Subject to clause 15.5, no party may commence arbitration in respect of any dispute notified or notifiable under this clause 15 until that party has complied with the requirements of this clause 15.3.

(b) Within 14 days after service of a notice of dispute, the senior executives of DBCT Management and the User (or people for the time being acting in that role) must confer at least once to attempt to resolve the dispute, and failing resolution of the dispute to consider and if possible agree on methods of resolving the dispute by other means.

(c) If the dispute cannot be so resolved after a further period of 14 days or if at any time either DBCT Management or the User considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer such dispute to arbitration in accordance with clause 15.4.

15.4. Arbitration procedure

(a) Any disputes that are not otherwise resolved in accordance with this clause 15 or the Access Framework will be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules (Rules).

(b) The arbitration must be effected by a single suitably qualified and experienced arbitrator who is either;

(i) agreed upon between the parties; or

(ii) in default of such agreement within 10 days after the dispute is referred to arbitration, nominated by the Resolution Institute.

(c) Any party to the arbitration may be represented before the arbitrator by a member of the legal profession without the need for leave of the arbitrator.

(d) Any arbitration commenced under this Agreement may be consolidated with any other arbitration commenced under:

(i) this Agreement; and / or

(ii) the Access Framework (or any agreement entered into in accordance with the Access Framework),

provided that the issue(s) which each arbitrator has been asked to determine concern common questions of fact or law. Such consolidated arbitration shall be determined by the arbitrator appointed for the arbitration proceeding that was commenced first in time.

(e) The venue for any arbitration will be Brisbane, Queensland.

(f) Unless otherwise determined by the arbitrator, the costs of the arbitration shall be paid by the unsuccessful party.

15.5. Interlocutory relief

This clause 15 does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction.

15.6. Dispute not to affect performance of obligations

The parties are not relieved from performing their obligations under this Agreement because of the existence of a dispute."

[265] Clause 20 of the Access Agreement is an evergreen provision. It provides:

"**20. OPTIONS**

If the period during which Coal is to be Shipped during the Term is 10 years or more, the following clauses apply:

(a) The User has an option to extend the Term for 5 years or more (or a lesser period, if it coincides with an expected end-of-mine-life), as nominated by the User at the time of exercise, exercisable at any time up to 12 months prior to the end of the Term (including the Term as already extended by the exercise of an option under this clause 20(a) for 5 years or more).

(b) If DBCT Management receives an Access Application for additional capacity which cannot be met without a Terminal Capacity Expansion if the option in clause 20(a) and other relevant options are exercised, it may notify the User, requiring it to respond within 90 days, either exercising the option in clause 20(a) in respect of all or part of an extended Term and/or tonnage the subject of the option, or waiving it.

(c) DBCT Management must give notices under clause 20(b) and any equivalent provision of another Access Agreement or Existing User Agreement to relevant Access Holders or Existing Users with options, in order of the earliest expiring Access Agreement or Existing User Agreement, for the purposes of deciding which option date is to be accelerated first. Where an Access Holder/s or Existing User/s with the earliest expiring date exercise/s its/their option by the accelerated date, DBCT Management may then go to the next Access Holder/s or Existing User/s in order of expiring agreements until there has been a waiver of sufficient options to ensure that the bona fide request can be accepted without the necessity for a Terminal Capacity Expansion. Access Holders or Existing Users whose terms expire within 6 months of each other will, for the purposes of this clause 20, be deemed to have terms which expire on the same date, and must be given notices at the same time.

(d) Where more than one Access Holder or Existing User has tonnages which expire (or which are deemed to expire) on the same date, those Access Holders/Existing Users which do not exercise their accelerated option will lose the amount of tonnes the subject of the option proportionately with their respective annual contract tonnages immediately prior to the end of the current term. (For example, if a bona fide request for 5 Mtpa is received and Access Holders/Existing Users with 10, 5, 2 and 3 Mtpa of contracted tonnages do not exercise their options,

then the options for those Access Holders/Existing Users will be reduced by 2.5, 1.25, 0.5 and 0.75 Mtpa respectively).

(e) If the Access Application referred to in clause 20(b) is not converted into an Access Agreement within 3 months after the above process is completed, the status quo existing before notice from DBCT Management will be re-instated (i.e. options will not be taken to have been forfeited merely because the accelerated date for exercise has not been complied with, and any accelerated exercise of an option will be taken not to have occurred)."

[266] The Access Framework and the Deed Poll cease to have effect in 2030 unless renewed. That creates a tension with various provisions in the Access Agreements which suggest that the terms of those agreements will extend past 2030. Clause 20 is an obvious example.

[267] I cannot accept that the Access Framework continues to govern Standard Access Agreements beyond 2030 when the Access Framework and the Deed Poll have expired. The applicant's obligations under the Access Framework is sourced in the Deed Poll. The Deed Poll only obliges DBCTM to maintain the Access Framework during "the term", which expires in 2030. As observed, various provisions in the Deed Poll and the Access Framework expressly limit DBCTM's obligations to "the term".

[268] DBCTM submits that if, when the Deed Poll and the Access Framework expire, the Access Framework ceases to apply to Standard Access Agreements, then various provisions of the Standard Access Agreements become unworkable. Clause 7.2 is an example. There is no Access Framework upon which to calculate prices. There is no Access Framework under which to conduct an arbitration.

[269] The Minister and the user group put forward two alternative submissions:

1. The Standard Access Agreements terminate with the Deed Poll and the Access Framework; or

2. The Deed Poll and the Standard Access Framework fall leaving the parties to negotiate pursuant to clause 7.2(a), (b), (c)(i) and (g) of the Standard Access Agreement. If agreement is not reached the Access Agreements would terminate.

[270] The first consequence is unlikely. The Standard Access Agreements are contemplated to continue past 2030. There are, for instance, the evergreen clauses.

[271] DBCTM supports its submissions as to the proper construction of the Access Agreements by reference to the relative commercial common sense or otherwise of the various alternative constructions argued. It submits:

"175. *First*, as explained above, it is clear that the AF SAA is intended to operate as a long term, evergreen agreement. In circumstances where many of the terms of the AF SAA require that there be an identifiable Access Framework in respect of that AF SAA, the parties would be taken to have intended that

> any Access Framework would operate for so long as the renewal rights in the AF SAA operate. Commercial parties would not have intended to confer evergreen rights in the AF SAA while denuding those rights of any force by limiting the operation by reference to the termination date of the Access Framework. The more commercial construction is therefore that the parties intend the Access Framework in operation as at the date a user executes an AF SAA to govern for the life of that agreement."

[272] As I am now construing the draft Standard Access Agreement, it is not a contract. It does not reflect a bargain which has been forged from the heat of commercial negotiation. It is a product of DBCTM exercising its market power tempered by the threat of declaration.

[273] In *Byrnes v Kendle*,[208] a question arose as to the proper construction of a declaration of trust. Heydon and Crennan JJ explained that the construction of statutes, constitutions, contracts or instruments of trust all involve a similar approach. What is required is an interpretation of the actual words used against the context of the document. That approach is equally valid to the construction of the Standard Access Agreement contemplated to be entered into pursuant to the Deed Poll and the Access Framework.

[274] The relevant context here includes:

1. DBCTM provides the service;
2. DBCTM enjoys an effective monopoly in relation to the market of the service;
3. DBCTM wishes to avoid declaration under the QCA Act;
4. the New Access Documents are designed to voluntarily curb its market power to an extent which will avoid declaration.

[275] The Deed Poll and the Access Framework provide the effective limitations upon DBCTM as it relates to its market power. While the Standard Access Agreements once entered into will constitute a binding agreement between the user and DBCTM, the Deed Poll and Access Framework are incorporated into that contract. As the analysis shows, it is clear that the Deed Poll and Access Framework cease to operate in 2030. It is unnecessary in those circumstances to consider further how the Standard Access Agreements operate post that point. They won't operate by reference to the Access Framework and Deed Poll.

[276] The Minister was therefore, in my view, correct to assume as he did that the Deed Poll and Access Framework do not apply post-2030. The pricing position post-2030 is, therefore, uncertain as the Minister found it to be.

Ground 2(b)

[277] Ground 2(b) alleges that the decision:[209]

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208 (2011) 243 CLR 253.

209 More properly defined in ground 2.

"(b) was an improper exercise of the power conferred by Subdivision 4 of Division 2 of Part 5 of the QCA Act, in that the Respondent failed to have regard to the following relevant considerations (JR Act, sections 20(2)(e) and 23(b)):

(i) that, in the absence of a declaration of the DBCT service, the risk of hold-up to New Users in the period post-2030 (if any) will not be materially different to the risk of hold-up to Existing Users in the period post-2030; and

(ii) that, in the absence of a declaration of the DBCT service, the contractual restrictions on the Applicant seeking to amend the pricing provisions of the Access Framework to enable it to charge New Users a Terminal Infrastructure Charge (TIC) in excess of what was provided for in the Access Framework in the period post-2030, are not materially different to the restrictions imposed upon the Applicant seeking to charge Existing Users a TIC in excess of what they will be charged in the period 2020 to 2030 in the period post-2030; and, or in the alternative,

[278] The issues raised by ground 2(b) are:

"(a) whether the Treasurer failed to have regard to the following matters:

(i) in the absence of a declaration of the DBCT Service, whether the risk of hold-up to New Users in the period post-2030 (if any) would not be materially different to the risk of hold-up to Existing Users in the period post-2030; and

(ii) in the absence of a declaration of the DBCT Service, whether the contractual restrictions on DBCTM seeking to amend the pricing provisions of the Access Framework to enable it to charge New Users a TIC in excess of what was provided for in the Access Framework in the period post-2030, would not be materially different to the restrictions imposed upon DBCTM seeking to charge Existing Users a TIC in the period post-2030, in excess of what they will be charged in the period 2020 to 2030; and

(b) whether the Treasurer was required by law to consider the matters set out in paragraph (a) above."

[279] This ground is intertwined with ground 2(a). Whether, as a matter of fact, the risk of hold-up is not materially different as between new users and existing users post-2030 depends upon the proper construction of the Deed Poll, Access Framework and Standard Access Agreements, and the proper construction of the 2017 Access Agreements with the evergreen clauses.

[280] DBCTM accepts that ground 2(b) is dependent upon it making out ground 2(a). It says in its written submissions:

> "202. It follows that, in concluding that the contractual pricing constraints on DBCTM would cease to be binding upon it in 2030 in an undeclared world, and that amendments to the Access Framework post-2030 could affect New Users, the Treasurer misconstrued the effect of the Deed Poll, the Access Framework and the AF SAA and thereby made errors of law within the meaning of s 20(2)(f) of the JRA. Ground 2(a) is therefore made out. Equally, Ground 2(b) is made out."

[281] As explained in the analysis of ground 2(a), the Minister considered in depth the respective conditions of new users and existing users post-2030. The Minister did in fact take into account the considerations identified. As ground 2(a) fails, so must ground 2(b).

[282] Ground 2(b) fails.

Ground 2(c)

[283] Ground 2(c) alleges that the "decision":[210]

> "(c) was based upon findings for which there was no evidence or other material to justify the making of the Decision (JR Act, section 20(2)(h)), or upon findings that were illogical or so unreasonable that no reasonable person could have exercised the power conferred on the Respondent to make them (JR Act, sections 20(2)(e) and 23(g)), namely:
>
> (i) that, in the absence of a declaration of the DBCT service, Existing Users would not face a risk of hold-up in the period post-2030; and
>
> (ii) that, in the period post-2030, in the absence of a declaration of the DBCT service, there will be a material difference between the uncertainty of the price of the TIC faced by New Users and Existing Users."

[284] The issues raised by this ground are:

> "(a) whether the Treasurer made findings that:
>
> (i) in the absence of a declaration of the DBCT Service, Existing Users would not face a risk of hold-up in the period post-2030; and
>
> (ii) in the period post-2030, in the absence of declaration of the DBCT Service, there would be a material difference between the uncertainty of the price of the RIC faced by New Users and Existing Users; and

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210 As more properly defined in the introductory words to ground 2.

(b) to the extent the Treasurer made the findings in paragraph (a), whether there was any evidence or material to support, or whether there was a logical basis for, those findings; and

(c) if there was no evidence or other material to support those findings, whether, by reason of s 24 of the JR Act, the ground mentioned in s 20(2)(h) of the JR Act is not to be taken to be made out."

[285] The factual findings identified by this ground are not jurisdictional facts. Therefore, for the reasons previously explained, s 20(2)(h) is not made out.

[286] Again, this ground is intertwined with ground 1(a). In its written submissions, DBCTM put its case this way:

"203. These errors[211] can also be characterised as a failure to take into account relevant considerations, and a decision made without evidence or which was so illogical or unreasonable that no reasonable person could have exercised the power in making the decision.

204. That is because it follows obviously, from examination of the SAAs, that Existing Users do in fact face a risk of hold-up in the post-2030 period in an undeclared world, and that the Treasurer ignored that or did not take into account the terms of the SAAs when making the finding that 'Existing Users ... will likely have minimal concern regarding the risk of hold-up in the post-2030 period'. Not only could that finding not be supported on the material or have been made by any reasonable person (Ground 2(c)(i)), the Treasurer did not actually compare that risk of hold-up with the risk of hold-up that New Users faced.

205. A *fortiori*, the Treasurer:

(a) did not take into account the fact that:

(i) in the absence of a declaration of the DBCT Service, any risk of hold-up to New Users in the period post-2030 will not be materially different to the risk of hold-up to Existing Users in the period post-2030 (Ground 2(b)(i)); and

(ii) in the absence of a declaration of the DBCT Service, the contractual restrictions on DBCTM seeking to amend the pricing provisions of the Access Framework to enable it to charge New Users a TIC in excess of what was provided for in the Access Framework in the period post-2030, would not be materially different to the restrictions imposed upon DBCTM seeking to charge Existing Users a TIC the period post-2030

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211 In the construction of the various agreements.

in excess of what they will be charged in the period 2020 to 2030 (Ground 2(b)(ii)); and

(b) had no logical basis for making the finding that there would be a material difference between the uncertainty of the price of the TIC faced by New Users and Existing Users in the post-2030 period (Ground (2)(c)(ii)).”

[287] As ground 2(a) has failed, ground 2(c) suffers the same fate.

[288] If ground 2(c) was to succeed, *Wednesbury* unreasonableness must be established. As earlier explained, the approach taken and the conclusions reached by the Minister were logical and rational.

[289] Ground 2(c) fails.

Ground 3

[290] Ground 3 alleges:

“3 The Decision, in finding that the identified risk of hold-up might affect investment decisions by New Users which were potential acquirers in the development stage coal tenements market in the period 2020-2030:

(a) was based upon findings for which there was no evidence or other material to justify the making of the decision (JR Act, section 20(2)(h)), or upon findings that were illogical or so unreasonable that no reasonable person could have exercised the power conferred on the Respondent to make it (JR Act, sections 20(2)(e) and 23(g)), namely that:

(i) there would be sufficient available capacity for the DBCT service to accommodate the demand of such New Users;

(ii) the ‘9X expansion’ of the DBCT service was reasonably possible in the period 2020-2030; and

(b) was an improper exercise of the power conferred by Subdivision 4 of Division 2 of Part 5 of the QCA Act, in that the Respondent failed to have regard to the following relevant considerations (JR Act, sections 20(2)(e) and 23(b)):

(i) whether there would be available capacity in the DBCT service for such New Users;

(ii) the extent to which any expanded capacity in the DBCT service was already committed to other access seekers; and

(iii) the extent to which there could be a risk of hold-up for New Users which were potential acquirers

in the development stage coal tenements market, in circumstances where there was no prospect of such users obtaining access to the DBCT service in the period 2020-2030."

[291] "The agreed issues are:

"7 The issues raised by Ground 3(a) are:

(a) whether the Treasurer made the following findings:

(i) there would be sufficient available capacity for the DBCT Service to accommodate the demand of New Users;

(ii) the '9X expansion' of the DBCT service was reasonably possible in the period 2020-2030;

(b) to the extent the Treasurer found the matters set out in paragraph 7(a), whether there was evidence or other materials to justify the making of such findings, or whether such findings were illogical or so unreasonable that no reasonable person could have made them;

(c) whether the findings of the Treasurer with respect to the '9X expansion' of the DBCT service were material to his Decision; and.

(d) if there was no evidence or other material to support those findings, whether, by reason of s 24 of the JR Act, the ground mentioned in s 20(2)(h) of the JR Act is not to be taken to be made out.

Ground 3(b)

8 The issues raised by Ground 3(b) are:

(a) whether the Treasurer failed to have regard to the following matters in finding that the risk of hold-up might affect investment decisions by New Users which were potential acquirers in the Development Stage Tenements Market:

(b) to the extent the Treasurer made the findings in paragraph 6(a), whether there was any evidence or material to support, or whether there was a logical basis for, those findings; and

(c) if there was no evidence or other material to support those findings, whether, by reason of s 24 of the JR Act, the ground mentioned in s 20(2)(h) of the JR Act is not to be taken to be made out.

Ground 3(a)

7 The issues raised by Ground 3(a) are:

(a) whether the Treasurer made the following findings:

(i) there would be sufficient available capacity for the DBCT Service to accommodate the demand of New Users;

(ii) the '9X expansion' of the DBCT service was reasonably possible in the period 2020-2030;

(b) to the extent the Treasurer found the matters set out in paragraph 7(a), whether there was evidence or other materials to justify the making of such findings, or whether such findings were illogical or so unreasonable that no reasonable person could have made them;

(c) whether the findings of the Treasurer with respect to the '9X expansion' of the DBCT service were material to his Decision; and.

(d) if there was no evidence or other material to support those findings, whether; by reason of s 24 of the JR Act, the ground mentioned in s 20(2)(h) of the JR Act is not to be taken to be made out.

Ground 3(b)

8 The issues raised by Ground 3(b) are:

(a) whether the Treasurer failed to have regard to the following matters in finding that the risk of hold-up might affect investment decisions by New Users which were potential acquirers in the Development Stage Tenements Market:

(i) whether there would be available capacity at DBCT for new acquirers in the dependent tenements services market in the period 2020-2030;

(ii) the extent to which any expanded capacity at DBCT was already committed to access seekers who were not relevantly potential acquirers in the dependent tenements services market; and

(iii) the extent to which there could be a risk of hold-up for acquirers in the Development Stage Tenements Market in circumstances where there was no prospect of such users obtaining access to the DBCT Service in the period 2020-2030; and

(b) whether the Treasurer was required by law to consider the matters set out in paragraph 9(a)."

[292] DBCTM submits that the evidence shows that new users, being those seeking access to the facility between 2020 and 2030 have no hope of obtaining access

because the facility is at capacity. If that proposition is accepted, then DBCTM says:

1. new users would not suffer hold-up in the period 2020-2030 or face higher prices post-2030 as there is no service to obtain and compete for;

2. therefore, investment decisions couldn't be affected;

3. therefore, Criterion A cannot be satisfied.

[293] While DBCTM accepts that the capacity of the service may increase, that additional capacity would be available not to new users, but to existing users under the terms of the 2017 Access Agreements, so DBCTM submits.

[294] The 2017 Access Agreements provide that where capacity does not meet demand, an access queue is formed.

[295] Clause 5.2 of the 2017 Access Undertaking provides for users to make application for access. By that process, an applicant must demonstrate that it currently has marketable coal reserves and coal resources. Where there are competing access applications and an insufficient capacity to meet all of them, clause 5.4 relevantly provides:

> "**5.4 Priority of Access Applications and execution of Access Agreements**
>
> (a) **(Formation of Queue)** If at any time there are two or more current Access Applications and there is or will be insufficient Available System capacity associated with Socialised Terminal Capacity at any relevant time to accommodate an increase in Handling of coal applied for in all of those Access Applications, a queue (the **Queue**) will be formed.
>
> (b) **(General rules for priority in Queue)** Subject to any other provision in Section 5, the priority of an Access Seeker in the Queue will be determined by their Access Application Date, with an earlier Access Application Date having priority in the Queue over any later Access Application Date. An Access Seeker may be removed from the Queue once their Access Application is no longer current in accordance with the terms of Sections 5.3, 5.4, 5.6, 5.7(a)(2), 5.7(a)(4), 5.8, 5.9 or 5.10 of this Undertaking. An Access Seeker may lose priority in the Queue pursuant to Sections 5.4 or 5.10. The Queue will cease to exist if Available System Capacity at all relevant times subsequently exceeds the amount of capacity requested in all the then current Access Applications."

[296] It was then submitted, in reliance upon a statutory declaration of Anthony Timbrell, DBCTM's Chief Executive Officer, dated 7 March 2019,[212] that even if the

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212 Which was before both the QCA and the Minister.

expansion of the facility was achieved, demand by existing users would still vouch for capacity.

[297] It was submitted that, even if there was some prospect that capacity would be available to new users, that possibility was so unlikely that it would not adversely affect decisions of new users to enter the market. The impact of that uncertainty was such that the making of the declaration would not promote a material increase in competition.

[298] An immediately obvious obstacle to such a submission is that the Minister did not find that new users could not obtain access to the facility in 2020-2030. In what was clearly a factual finding, the Minister found that there would be capacity available to new users. In order to overcome that difficulty, grounds 3(a) and 3(b) allege that the finding was unreasonable and involved a failure to take into account relevant considerations.

[299] By paragraph 4.7.12 of the Minister's reasons, the Minister accepted that for new users to compete for development stage tenements, they require capacity and that the facility is presently fully contracted. He then identified three sources of capacity available to new users:

1. existing users relinquishing capacity;
2. existing users allowing a third party to use their capacity;
3. terminal expansion.

[300] The Minister then went on to hold that, while new users may obtain capacity through any of the three mechanisms identified, it was most likely that new users would obtain capacity from expansion of the facility.

[301] Paragraph 4.7.12 of the Minister's reasons is set out in full at paragraph [74] of these reasons. Footnoted to paragraph 4.7.12 are references to evidence and findings of the QCA supporting the three mechanisms identified for access.

[302] The QCA considered the capacity of the facility to meet expanding demand. It was required to do so in considering Criterion B. Both the QCA and the Minister found that the facility could meet demand and found Criterion B fulfilled. There is no challenge to that finding.

[303] In relation to capacity, the QCA made the following findings:

> "DBCT capacity is currently fully contracted. Nevertheless, coal mining investors would expect capacity at DBCT to become available.
>
> First, some mines operated by existing users are expected to reach the end of their economic life over the next 10 years (about 23 mtpa). To the extent relevant existing users of an expired mine do not intend to use the associated access rights for another coal mining operation, those rights would revert to DBCT Management and would potentially be available for use by other users. Alternatively, existing users could transfer the associated rights to another user on a permanent basis. The QCA's understanding is that

permanent capacity transfers have occurred in relation to the sale of an existing mine. Effectively, there is the potential for redistribution of existing terminal capacity.

Second, DBCT Management's master plans canvass the expansion options at DBCT to meet increased demand for the coal handling service at DBCT. Relevantly, infrastructure expansions, port as well as rail, have been undertaken to meet additional demand from coal mining when existing infrastructure capacity was inadequate to meet increasing demand.

For instance, DBCT Management's 2018 Master Plan describes past expansions and mentions future expansion plans:

> 'The Bowen Basin experienced strong production and demand growth for coal in the first decade of the 2000s. In order to accommodate this demand, DBCT Management Pty Limited ('DBCTM') responded by undertaking numerous capacity expansions. The DBCT 7X project was the most recent expansion and lifted terminal capacity to 85 million tonnes per annum (Mtpa), underwritten by long term take or pay contracts with the world's biggest mining companies.
>
> …
>
> DBCT Management is obliged by the Port Services Agreement (PSA) and the Access Undertaking (AU) to accommodate the actual and reasonably anticipated future demand for the use of DBCT's Users and access seekers. Accordingly, DBCTM has continued to plan post 85 Mtpa expansions to take DBCT's nameplate capacity up to a maximum of 136 Mtpa.

DBCT Management also stated that it is 'primarily the demand for capacity that determines expansion requirements'.

Similarly, rail network expansions have been associated with port investments. For instance, Aurizon Network's 2016-17 Network Development Plan (NDP) identifies network expansion options to align with forecast port expansions. For the Goonyella system, the NDP identifies five future expansion scenarios, all of which are driven by port developments:

- An initial 4 mtpa from, the North Goonyella branch to DBCT in 2020, corresponding to the DBCT Zone 4 project.
- This is followed in 2021 by DBCT 8X with 13 mtpa from the Blair Athol and North Goonyella branches.
- In 2023 and 2024, 20 mtpa of capacity is provided for HPX4 from the South Goonyella and North Goonyella branches.
- In 2025, 10 mtpa of capacity is provided for the Bowen Basin Terminal from the South Goonyella branch.

- 34 mtpa of capacity is provided from the North Goonyella and South Goonyella branches for DBCT 9X, ramping up in 2026 and 2027.

Accordingly, the fact that DBCT is currently capacity-constrained is not a binding constraint for the development of tenements into mining operations, and it is unlikely to discourage the development of coal mining projects. Rather, the potential demand from coal mining projects would trigger the need to expand DBCT capacity and rail infrastructure capacity.

Therefore, the QCA's view is that coal mining investors would expect capacity at DBCT to become available, and that expectation would remain unchanged in a future with and without declaration."

[304] In particular, in relation to the queue, the QCA found:

> "The QCA considers that despite tightening of provisions and some increased certainty around those participants who will contract capacity at DBCT - due to the removal of access seekers who do not wish to commit to capacity from the queue - the nature of the queue and the way it operates suggest that the volumes and timing reported in the queue are not accurate so as to represent a reliable estimate of demand at DBCT.
>
> The QCA considers that the non-binding nature of access applications in the access queue means the queue cannot be relied upon as an accurate estimate of demand. The 2017 access undertaking provisions outline that in a notifying access seeker process, access seekers in the queue may provide signed access agreements for a 'lower tonnage, shorter term or earlier date of commencement' than requested in their access application, which DBCT Management can then choose to execute. The QCA considers that this ability to contract for a revised tonnage, term or date of commencement encourages access seekers to strategically provide more optimistic tonnage requests than if they were obligated to contract for those volumes."

[305] The Minister adopted those findings.[213]

[306] Ground 3(a)(ii) has been abandoned in the sense that it was not separately argued. That tactic is explained in DBCTM's written submissions in these terms:

> "213. The Applicant does not challenge the Treasurer's ultimate conclusion with respect to Criterion (b).
>
> 214. Ground 3(a)(ii) of the Application identifies reviewable error in respect of one aspect of the Treasurer's findings with respect to Criterion (b), which is also relevant to Criterion (a). The Treasurer concluded that it was 'reasonably possible' that the so-called '9X' expansion of DBCT would occur in the period 2020 to 2030, or at least so much of that expansion as

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213 Reasons, paragraph 4.7.11-4.7.13.

necessary to meet a capacity of 107 mtpa. Ground 3(a)(ii) contends that that finding was not supported by evidence or other material to justify it.

215. Ultimately, it is not necessary to pursue that Ground because, as set out below, the Treasurer erred even if the capacity of DBCT could expand to 107 mtpa by 2030."

Ground 4

[307] Ground 4 alleges:

"Criterion (d)

4 The Decision, in finding that criterion (d) was satisfied:

(a) was based upon substantively the same reasoning and findings that were susceptible to challenge for the reasons set out in Grounds 1 to 3; and

(b) was in error for substantially the same reasons as set out in Grounds 1 to 3."

[308] The agreed issues here are:

"Ground 4:

(a) raises the issue of whether, if Ground 3(a)(ii) is made out, Ground 4 would be made out;

(b) otherwise raises no distinct issue."

[309] It is not suggested that if the Minister did not err in finding Criterion A proved, then he still erred in finding Criterion D proved. As all the other grounds, which all attack the finding in relation to Criterion A, have failed, ground 4 also fails.

Dispute about the appropriate relief

[310] Had DBCTM succeeded on any of its grounds of review, s 30 of the JR Act would be engaged, which provides, relevantly:

"**30 Powers of the court in relation to applications for order of review**

(1) On an application for a statutory order of review in relation to a decision, the court may make all or any of the following orders—

(a) an order quashing or setting aside the decision, or a part of the decision, with effect from—

(i) the day of the making of the order; or

(ii) if the court specifies the day of effect—the day specified by the court (which may be before or after the day of the making of the order);

(b) an order referring the matter to which the decision relates to the person who made the decision for further consideration, subject to such directions (including the setting of time limits for the further consideration, and for preparatory steps in the further consideration) as the court determines;

(c) an order declaring the rights of the parties in relation to any matter to which the decision relates;

(d) an order directing any of the parties to do, or to refrain from doing, anything that the court considers necessary to do justice between the parties. …"

[311] Had any grounds been established, an order setting aside the decision[214] would probably be appropriate. DBCTM though sought declarations that:

"(a) Criterion (a) was not satisfied in respect of the DBCT Service in the period 9 September 2020 to 8 September 2030; and

(b) the Treasurer was not empowered to declare the DBCT Service by reason that the Treasurer could not properly be satisfied of the access criteria in section 76(2) of the QCA Act as required by section 76(1)(b) of the QCA Act."

[312] The effect of the declarations would be to finally determine the question of declaration of the facility in favour of DBCTM.

[313] The respondents submitted that in the event a ground of review was established, no relief ought to be given. That is because by the terms of the Deed Poll, the Access Framework does not operate.

[314] Alternatively, the respondents submitted that in the event of the Minister's decision falling, the matter should be remitted back to him.

[315] Usually, in case the matter goes on appeal, it is desirable to determine all issues between the parties, including the exercise of any discretion concerning relief which may have been given had the decision of the Minister been successfully challenged. Here, however, the matters that have been argued allege a range of different legal errors. It is artificial and, frankly, not productive to engage in a theoretical exercise of discretion based on all the different permutations that are raised.

[316] There is one aspect with which I should deal and that is that the respondents' submission that the Access Framework does not now operate so all relief should be refused.

[317] By clause E of the Deed Poll, which is set out at paragraph [240] of these reasons. The respondents submit that once the service is declared, the Access Framework ceases to have effect by clause E(b) and is not revived by the setting aside of the

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214 Section 30(1)(a).

declaration. Therefore, any "no declaration" scenario does not include the New Access Documents.

[318] As the terminal has been declared, the Access Framework is not "in effect" and does not "continue to apply to the use of the Terminal". Therefore, even if the Deed Poll and Access Framework could be taken to form part of the post-2020 future before the Minister declared the service, that is not now the case. It follows, so the respondents submit, that even if the Minister erred in any of the respects alleged, relief should be denied because the Deed Poll and Access Framework are not now in effect.

[319] Anthony Paul Timbrell is the Chief Executive Officer of DBCTM. He swore an affidavit on 6 November 2020 exhibiting an amended deed poll and identifying it as a document "which DBCTM is willing to execute in circumstances where the DBCT service ceases to be a declared service under Part 5, Division 2 of the *Queensland Competition Authority Act* 1997 (Qld)". The amended deed poll provides:

> "E. The Framework will remain in effect and continue to apply to the use of the Terminal (including Access to the Services) throughout the Term, which will commence on the first date, after execution of the deed Poll, on which use of the Terminal is not a service declared under Part 5, Division 2 of the QCA Act and end on the earlier of:
>
> a. the date that is ten years from the Commencement Date; and
>
> b. the date on, or after the Commencement Date from which coal handling services at the Terminal are a service declared under Part 5, Division 2 of the QCA Act.
>
> However, notwithstanding (a) and (b), the Terminating Date will not occur if the decision of the Treasurer made on 31 May 2020 to declare coal handling services at the Terminal under Part 5, Division 2 of the Queensland Competition Authority Act 1997 (Qld) is set aside by a court, later reinstated, and then subsequently set aside."

[320] In the circumstances, there was, in my view, no reasonable prospect of DBCTM failing to execute the amended deed poll if it had been successful in the application for judicial review of the Minister's decision to declare the service under the QCA Act. If the Minister's decision was set aside and DBCTM did not enter into the amended deed poll, the Minister could declare the service. That threat of declaration would no doubt effectively commercially compel the execution of the amended deed poll.

[321] Had DBCTM made out any of its grounds of review, I would not have refused relief based solely on the fact that the Access Framework as executed was no longer operative.

Conclusions

[322] All the grounds of review have failed and the application must be dismissed.

[323] DBCTM conceded that if unsuccessful in its application, then it should pay the Minister's costs. As already observed, the other respondents joined the litigation on terms that they would neither seek nor pay costs.

[324] I therefore order:

1. The application is dismissed.

2. The applicant pay the first respondent's costs of the application.

3. There be no order as to the costs of the other respondents.