

# **Dalrymple Bay Coal Terminal Access Undertaking**

**Submitted by  
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# 1 Introduction

## 1.1 Purpose of this document

The Terminal is a common user coal port. The Terminal includes in-loading, stockpiling, reclaiming, out-loading, and associated facilities for the handling of coal. The Terminal is located at the Port of Hay Point, south of Mackay in Queensland.

In March of 2001 the State passed a regulation under which the handling of coal at the Terminal was made a “declared service” for the purposes of the QCA Act. Access providers of declared services have an obligation under the QCA Act to negotiate with, and in certain circumstances provide access to, third parties seeking access to that service. The regulator under the QCA Act is the QCA.

The QCA Act has provisions that allow the owner or operator of a declared service to voluntarily submit a draft access undertaking to the QCA which sets out the terms and conditions upon which access will be granted to Access Seekers. If the draft access undertaking meets certain criteria set out under the QCA Act and is approved by the QCA, it will regulate third party access to the service.

On 14 September 2001 the DBCT Trustee as trustee of the BBI (DBCT) Trust, and DBCT Management entered into a number of agreements with DBCT Holdings and PCQ (both wholly owned by the State) under which DBCT Trustee and DBCT Management were granted a 50 year lease (with an option for a further 49 years) of the Terminal.

One of the agreements referred to above, the Port Services Agreement, requires DBCT Trustee to prepare a draft access undertaking on behalf of DBCT Holdings (which as the owner of the Terminal was formally responsible for submitting the draft access undertaking) for submission to the QCA for approval under the QCA Act. The Port Services Agreement also specifies a number of issues the draft access undertaking must address above and beyond the requirements of the QCA Act.

This Undertaking was originally prepared by DBCT Management on behalf of DBCT Trustee and DBCT Holdings and submitted to the QCA on 20 June 2003 for the purposes of the Port Services Agreement and to set out the terms and conditions on which DBCT Management undertakes to provide access to the declared services provided by the Terminal (as set out in Part 4 of this Undertaking). After a comprehensive public consultation process, the QCA published a decision in relation to DBCT Management’s draft access undertaking in April of 2005. Subsequently, section 136(1) of the QCA Act was amended to enable an owner or an operator of a declared service to voluntarily submit a draft access undertaking to the QCA. DBCT Holdings was therefore no longer required to be a party to the Undertaking.

DBCT Holdings has agreed to relieve DBCT Trustee and DBCT Management of their obligations under the Port Services Agreement to the extent necessary to allow DBCT Management as operator (within the meaning of that term in the QCA Act), to lodge the Undertaking in its own right, and not on behalf of DBCT Holdings.

On 3 January 2006 DBCT Management re-submitted this Undertaking to the QCA in its own right as the operator (within the meaning of that term in the QCA Act) of the declared service.

The QCA approved the Undertaking on **[insert]**.

This Undertaking has been prepared to assist Access Seekers in reaching negotiated outcomes on the terms and conditions of access to the Services at the Terminal.

## **1.2 Scope of Undertaking**

This Undertaking provides for the negotiation of Access to the Services at the Terminal.

## **1.3 Duration of Undertaking**

This Undertaking will come into operation on the Commencement Date. It will apply until the Terminating Date unless withdrawn as provided for in the QCA Act.

## **1.4 Review of Undertaking**

DBCT Management and the QCA will meet approximately one and three years after the Commencement Date to review the operation of this Undertaking. These reviews will identify any provisions of the Undertaking that are not operating to the satisfaction of either DBCT Management or the QCA. If as a result of this review, DBCT Management and the QCA agree that amendments are required to the Undertaking, DBCT Management will submit a draft amending undertaking to the QCA for approval under the QCA Act.

## **1.5 Access Agreements and effect on Existing User Agreements**

This Undertaking applies only to the negotiation of new Access Agreements or the negotiation of additional Access rights in addition to those already the subject of an Access Agreement or Existing User Agreement. Nothing in this Undertaking requires a party to an Existing User Agreement to vary a term or provision of that Existing User Agreement.

## **1.6 Obligation to Renegotiate Operation & Maintenance Contract**

DBCT Management will, in good faith, take all reasonable steps to negotiate relevant amendments to the Operation & Maintenance Contract to allow DBCT Management to comply with all its obligations under this Undertaking. In particular, DBCT Management will seek to negotiate relevant amendments to the Operation & Maintenance Contract to:

- (a) specifically provide in that contract that DBCT Management and the Operator will both comply, in all respects, with the Terminal Regulations as in force from time to time; and
- (b) require the provision at the Terminal of the Services as set out in Schedule E of this Undertaking.

## **1.7 Amendment to Undertaking**

Any amendment to this Undertaking will be prepared and submitted to the QCA by DBCT Management in accordance with the QCA Act.

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## **2 Definitions and Interpretation**

### **2.1 Definitions**

Unless the subject or context is inconsistent, each of the capitalised terms used in the Undertaking has the meaning assigned to it in Schedule G.

### **2.2 Interpretation**

The rules set out in Schedule G apply to and govern the interpretation of this Undertaking.

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## **3 Role of DBCT Management**

Under Section 136(1) of the QCA Act, the owner or operator of a declared service may voluntarily submit a draft access undertaking to the QCA.

The owner of the Terminal (and consequently the declared service) is DBCT Holdings.

DBCT Trustee and DBCT Management, under the Leases, are the lessee and sublessee of the Terminal. Under the terms of the leases and the Port Services Agreement, DBCT Management is solely responsible for providing Access to Access Holders and Access Seekers during the Lease Term. Accordingly, DBCT Management is the operator (within the meaning of that term in the QCA Act) of the declared service.

DBCT Management will comply with and give effect to this Undertaking and any applicable laws relating to the provision of Access as the operator.

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## **4 Services to be provided**

DBCT Management must provide the Services at the Terminal.

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## **5 Negotiation arrangements**

### **5.1 Framework for negotiation**

This Part of the Undertaking outlines the process which will be followed to enable Access Seekers to obtain Access. It deals with:

- (a) an Access Application by an Access Seeker;
- (b) provision of an Indicative Access Proposal by DBCT Management;
- (c) negotiations to develop an Access Agreement; and

- (d) dispute resolution procedures.

DBCT Management will take all reasonable steps to progress each Access Application and any negotiations to develop an Access Agreement with an Access Seeker in a timely manner and will complete each relevant step as soon as is practicable.

## 5.2 Application for Access and information to be provided

Any application for Access must be in writing and, where reasonably practicable, contain the information set out in Schedule A.

DBCT Management acknowledges that, at the time an Access Application is made, some information provided in the Access Application may be a forecast only. The Access Seeker will, however, use its best endeavours to ensure that any information contained in an Access Application is as accurate as possible.

Prior to submitting an Access Application, an Access Seeker may request from DBCT Management (and DBCT Management must provide):

- (a) reasonably available preliminary information relating to the Access Application (including copies of the then current Standard Access Agreement and Terminal Regulations) which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request;
- (b) where there is a Reference Tariff, the information set out in sections 101(2)(d) to (h) of the QCA Act which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request;
- (c) where there is no Reference Tariff, the information set out in sections 101(2)(a) to (h) of the QCA Act which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request; and
- (d) initial meetings to discuss the proposed Access Application and the requirements set out in Schedule A.

## 5.3 Acknowledgment

Upon receiving an Access Application under Section 5.2, DBCT Management must, as soon as practicable, acknowledge in writing to the Access Seeker receipt of the Access Application and in any event do so within 10 Business Days of its receipt.

DBCT Management may request from the Access Seeker additional information where DBCT Management can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal, or clarification of information provided, including (but not limited to) obtaining further information to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, a Security provider. Upon receiving the required information or clarification from the Access Seeker, DBCT Management must provide written acknowledgment of the receipt of this further information as soon as practicable and, in any event, within 10 Business Days of receipt of the further information.

The Access Seeker must provide any information reasonably requested by DBCT Management under this Section 5.3 within 20 Business Days of receipt of the request from DBCT Management (or such later date as DBCT Management agrees to, it being required to act reasonably in agreeing to extend the period if the Access Seeker demonstrates good grounds for a longer period applying). If the Access Seeker does not provide the requested information within that period, its Access Application will be deemed to have expired and it may apply again for Access in accordance with Section 5.2. If an Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to acknowledgement under this Section 5.3 of the Access Application.

#### 5.4 Priority of Access Applications

- (a) If at any time DBCT Management has before it more than one Access Application and there is or will be (based on the Terminal as it is constructed at the time and any relevant expansion to which DBCT Management or a Related Party has committed) insufficient Available Capacity at any relevant time to accommodate all of the Access Applications lodged with DBCT Management which are still current, a queue (the **Queue**) will be formed.
- (b) Subject to any other provision in section 5, the priority of an Access Seeker in the Queue will be determined by the Access Application, with an earlier Access Application Date having priority in the Queue over any later Access Application Date. An Access Seeker will lose their position in the Queue once their Access Application is no longer current in accordance with the terms of Sections 5.3, 5.6, 5.7(b), 5.7(d), 5.8 or 5.9 of this Undertaking. The Queue will cease to exist if Available Capacity at all relevant times subsequently exceeds the amount of capacity requested in all the then current Access Applications.
- (c) If an Access Seeker who is not first in the Queue (the **Notifying Access Seeker**) gives notice to DBCT Management, in writing, that it is prepared to enter into an Access Agreement consistent with its Access Application (except that it may be for a lower tonnage or shorter term than originally requested providing there is bona fide commercial reason for seeking such lower tonnage or shorter term) on the terms of the Standard Access Agreement or on any other terms which DBCT Management has notified the Access Seeker would be acceptable to DBCT Management, then on receiving such notice from the Notifying Access Seeker, DBCT Management must notify, in writing, all other Access Seekers that are ahead of the Notifying Access Seeker in the Queue (each a **Notified Access Seeker**) of this development (but not the identity of the Notifying Access Seeker) and allow 20 Business Days from the date when such notice is given by DBCT Management for Notified Access Seekers to deliver to DBCT Management two signed copies of an Access Agreement consistent with their respective Access Applications (except that it may be for a lower tonnage or shorter term than originally requested providing there is a bona fide commercial reason for seeking such lower tonnage or shorter term) and on the terms of the Standard Access Agreement or on other terms acceptable to DBCT Management (acting consistently with this Undertaking).

- (d) If, during the above 20 Business Day period, one or more of the Notified Access Seekers delivers to DBCT Management such signed copies of an Access Agreement, and also provides any Security required by DBCT Management, then DBCT Management will then give priority to the Notified Access Seeker that has the highest ranking in the Queue and (subject to there being sufficient Available Capacity at the relevant time) will execute those copies of the Access Agreement and re-deliver one signed copy to the relevant Notified Access Seeker. DBCT Management will then repeat that process down the Queue with each successive Notified Access Seeker (if any) which has delivered such a signed Access Agreement. If a Notified Access Seeker is unable to provide any Security required by DBCT Management within the abovementioned 20 Business Days (or, by the fifth Business Day of the 20 Business Day period referred to above, disputes DBCT Management's entitlement to the Security required), the Access Agreement to be executed will be modified so that it is a condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, any alternative Security is provided within 20 Business Days after the QCA determines it to be fair), and the "Effective Date" will be adjusted accordingly.
- (e) If, after all Access Agreements with all Notified Access Seekers referred to in Section 5.4(d) which have delivered signed documents (and Security if relevant) have been executed (or negotiations have ceased pursuant to section 5.8), there is still sufficient Available Capacity available, then DBCT Management may conclude an Access Agreement with the Notifying Access Seeker for that Available Capacity.
- (f) For clarity:
- (1) any Notified Access Seeker that does not within the above 20 Business Day period deliver to DBCT Management a signed Access Agreement, does not then lose its place in the Queue (except by ceding priority to the Notifying Access Seeker if the Notifying Access Seeker executes an Access Agreement pursuant to this Section 5.4) and the Access Application negotiation process for that Access Seeker will otherwise continue in accordance with Part 5 of this Undertaking.
  - (2) DBCT Management need not offer to enter into an Access Agreement for tonnage which would exceed the Available Capacity at a relevant time, except to the extent that Section 12 requires it to make that Available Capacity available by that relevant time (and then on the basis that the Services will be provided and Access Charges payable from the first day of the month after the date of completion (including commissioning) of the applicable Capacity Expansion);
  - (3) Where the process in sub-paragraphs (c), (d) and (e) of Section 5.4 would have the effect of giving an Access Seeker a right to enter into an Access Agreement, except for the fact that there is insufficient Available Capacity to meet that Access Seeker's Access Application in full, the Access Seeker may elect to require

an Access Agreement for a lesser tonnage consistent with Available Capacity (subject to the other terms of this Undertaking).

- (g) DBCT Management may at any time, when there is a Queue and insufficient Available Capacity to meet any Access Application in the Queue, invite an offer from each Applicant in the Queue to enter into an Access Agreement which is subject to a condition precedent which relates to the triggering of an obligation by DBCT Management to perform a specified Capacity Expansion with a specified estimated cost within a specified estimated timeframe. The following provisions relate to any such offer:
- (1) DBCT Management must give the same notice at the same time to each Access Seeker in the Queue, inviting them to submit to DBCT Management (by way of offer to DBCT Management) two signed copies of such a conditional Access Agreement consistent with their Access Application (except that it may be for a lower tonnage or shorter term than originally requested provided there is a bona fide commercial reason for seeking such lower tonnage or shorter term) on the terms of the Standard Access Agreement or on any other terms which DBCT Management has notified the Access Seeker would be acceptable to DBCT Management, and subject to the condition precedent referred to above.
  - (2) If, during the 20 Business Day period following the giving of that notice one or more of the Access Seekers in the Queue delivers to DBCT Management such signed copies of an Access Agreement and provides any Security required by DBCT Management, DBCT Management will then give priority to the Access Seeker so doing which has the highest ranking in the Queue and (subject to there being sufficient Available Capacity should the Capacity Expansion the subject of the condition precedent proceed) will execute their conditional Access Agreement. DBCT Management will then repeat the process down the Queue with each successive Access Seeker (if any) which has delivered such a signed conditional Access Agreement and any relevant Security. If an Access Seeker is unable to provide any Security required by DBCT Management within the abovementioned 20 Business Days (or, by the fifth Business Day of the 20 Business Day period referred to above, disputes DBCT Management's entitlement to the Security required), the Access Agreement to be executed will be modified so that it is a further condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, any alternative Security is provided within 20 Business Days after the QCA determines it to be fair), and the "Effective Date" will be adjusted accordingly.
  - (3) Each such Access Agreement must be on the basis that it will terminate if the condition precedent in it relating to the triggering of an obligation by DBCT Management to perform a Capacity Expansion is not fulfilled within 3 months from the date of execution of the Access Agreement. However, DBCT

Management and an Access Seeker can agree to extend this period from time to time, as long as an extension for the same period has been offered by DBCT Management to all Access Seekers who have such condition precedent.

- (4) If such an Access Agreement terminates because a condition precedent has not been fulfilled within the 3 month period (or any extended period as agreed between DBCT Management and the relevant Access Seeker), the Access Seeker will resume its position in the Queue as if the Access Seeker had never signed the conditional Access Agreement.
- (h) Despite any other provision of this Section 5.4;
- (1) Any notice given by an Access Seeker pursuant to Section 5.4(c) on or before the day 20 Business Days after the Commencement Date will be deemed to have been given at 12 noon on the twentieth Business Day after the Commencement Date, and be responded to accordingly by DBCT Management;
  - (2) Any Access Application made on or before the date 40 Business Days after the Commencement Date to replace an Existing User Agreement with an Access Agreement which has a term that expires after the original expiry date of the Existing User Agreement will (to the extent that it does not increase the relevant Annual Contract Tonnage) receive priority over any Access Application in respect of new tonnage;
  - (3) An Access Application to extend the term of an Access Agreement (to the extent that it does not increase the relevant Annual Contract Tonnage) to accord with a bona fide re-estimation of the life of a mine will have precedence over an Access Application for new tonnage; and
  - (4) If, in a particular case, the strict application of the process set out in this section 5.4 would result in a materially greater proportion of Available Capacity not being taken up than could otherwise be the case if an alternative process is followed, then (in the interests of maximising coal exports from Queensland) DBCT Management may, with the approval of the QCA (which must not be unreasonably withheld), enter into Access Agreements in accordance with that alternative process.
- (i) For the purpose of this Section 5.4, an Access Holder which has an option to extend the term of its Access Agreement or Existing User Agreement will initially be deemed to have exercised that option, when determining whether or not a Queue exists or needs to be formed in relation to a new Access Application. However, if DBCT Management has the right to do so, it will, on each occasion in which a Queue is formed or re-formed, endeavour to have the exercise of that option brought forward or waived (in the latter case with the intention that one or more waivers may result in the Queue no longer existing).
- (j) Nothing in this Section 5.4 will be taken to limit:
- (1) any right DBCT Management has pursuant to Section 5.8; or

- (2) any rights or obligations of DBCT Management in Part 12 relating to the expansion of the Terminal.

## 5.5 Indicative Access Proposal

As soon as practicable and in any event within 20 Business Days following receipt of an Access Application (or, if additional information has been requested by DBCT Management under Section 5.3, within 20 Business Days of receipt of all of the additional information requested), DBCT Management must use its reasonable endeavours to provide the relevant Access Seeker with a response containing proposed terms and conditions of Access (**Indicative Access Proposal**).

If it is not reasonable to provide an Indicative Access Proposal within 20 Business Days of receipt of an Access Application (or, if applicable, the additional information requested under Section 5.3), DBCT Management must, as soon as practicable, but in any event, within 20 Business Days, advise the relevant Access Seeker of its estimate of the extra time required to deliver the Indicative Access Proposal.

If the Access Seeker is of the opinion that the estimate of extra time for preparation of the Indicative Access Proposal is excessive, then the Access Seeker may refer the matter for dispute resolution in accordance with Section 5.10 of this Undertaking. DBCT Management must use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by DBCT Management or as otherwise determined by the QCA.

The Indicative Access Proposal must set out:

- (a) an indicative assessment as to whether there is sufficient Available Capacity at all relevant times (having regard amongst other things to outstanding Access Applications in a Queue) to accommodate the Access Application;
- (b) advice in respect of the existence of (but not the identity of) other Access Seekers who have submitted an Access Application;
- (c) the Standard Access Agreement or a draft access agreement where the Access Application contemplates Access on non-Reference Terms;
- (d) the expiry date of the Indicative Access Proposal which will be 30 Business Days following the date the Access Seeker receives the Indicative Access Proposal (should there be no notification by the Access Seeker pursuant to Section 5.6 that the Indicative Access Proposal has not been prepared in accordance with the Undertaking);
- (e) if there is sufficient Available Capacity to accommodate the Access Application, advice to that effect, and:
  - (1) an initial estimate of the Access Charge, including an estimate of current and, where reasonable to provide such estimate, prospective Access Charges, for the requested services in the Access Application based on the pricing arrangements set out in Section 11 of this Undertaking;
  - (2) the current Master Plan;

- (3) details of any additional information required by DBCT Management to progress the Access Application and develop the terms and conditions for acceptance; and
  - (4) details of any security, guarantee, other support or other information required by DBCT Management to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, its guarantor; and
- (f) if there is not sufficient Available Capacity to accommodate the Access Application, advice to that effect, and:
- (1) reasonable particulars as to why this circumstance prevails;
  - (2) an estimate of what the Available Capacity is at relevant times;
  - (3) whether a Queue has been formed in accordance with Section 5.4 of this Undertaking (including as a result of the relevant Access Application);
  - (4) where reasonable, an estimate of prospective Access Charges for the requested services in the Access Application based on the pricing arrangements set out in Section 11 of this Undertaking; and
  - (5) a copy of the Master Plan and an indicative timetable for any Capacity Expansion which may be undertaken (if any).

The Indicative Access Proposal will, unless it contains specific conditions to the contrary, contain indicative arrangements only and does not oblige DBCT Management to provide Access.

If, after 20 Business Days following DBCT Management's acknowledgment of the Access Application, the Access Seeker believes that DBCT Management is not making reasonable progress in the preparation of the Indicative Access Proposal, the Access Seeker may refer the matter for dispute resolution in accordance with Section 5.10 of this Undertaking.

Where there is not sufficient Available Capacity to accommodate the Access Application and the Access Seeker wishes to continue the negotiation process provided for in this Part 5, such negotiations may continue on the basis that a Capacity Expansion may be undertaken in accordance with Part 12 of this Undertaking. In this case, if DBCT Management is unable to comply with the timeframes specified in Part 5 of this Undertaking, it will advise the Access Seeker of the estimated timeframes. If the Access Seeker does not believe the proposed timetable is reasonable or that DBCT Management is not making reasonable progress, it may refer the matter to dispute resolution in accordance with Section 5.10 of this Undertaking.

## **5.6 Response to Indicative Access Proposal**

If the Access Seeker intends to progress its Access Application on the basis of the arrangements set out in the Indicative Access Proposal, it must notify DBCT Management of its intention to do so within 30 Business Days of the date it receives the Indicative Access Proposal. If the Access Seeker does not notify DBCT Management of its intention before the expiry date of the Indicative Access Proposal, its Access Application will be deemed to have expired and it

may apply again for Access in accordance with Section 5.2 (unless a longer period for notification is agreed between the parties).

If an Indicative Access Proposal lapses but the Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to the issue of a new Indicative Access Proposal.

If the Access Seeker considers that the Indicative Access Proposal has not been prepared in accordance with Section 5.5 of this Undertaking, it must notify DBCT Management in writing within 20 Business Days of receipt of the Indicative Access Proposal, notice to that effect, setting out the reasons why the Access Seeker believes that the Indicative Access Proposal is inconsistent with Section 5.5 of this Undertaking.

DBCT Management must use all reasonable efforts to respond to this notice, including, where appropriate, the making of revisions to the Indicative Access Proposal, within 20 Business Days of the notification under this Section 5.6. If DBCT Management is unable to respond within this time period, it must notify the Access Seeker of the date on which it expects to be able to respond.

If the Access Seeker is not satisfied with:

- (a) the response to the notice given under this Section; or
- (b) DBCT Management's estimated date to respond to the notice,

the Access Seeker may seek to resolve the dispute in accordance with the dispute resolution procedure in Section 5.10.

## **5.7 Negotiation process**

If the Access Seeker indicates its willingness to progress its Access Application under Section 5.6 (or otherwise, in the case of an Access Application of the type referred to in Paragraph (b) of the definition of that term), then both parties must commence negotiations as soon as reasonably possible to progress towards an Access Agreement. The period for negotiation will commence on the date notified by the Access Seeker under Section 5.6 (or the date 5 Business Days after the commencement of the Term in the case of an Access Application referred to in Paragraph (b) of the definition of that term, even if there have been discussions prior to that date) and end upon any of the following events:

- (a) execution of an Access Agreement in respect of Access sought by the Access Seeker;
  - (b) written notification by the Access Seeker that it no longer wishes to proceed with its Access Application;
  - (c) DBCT Management issuing a Negotiation Cessation Notice to the Access Seeker in accordance with Section 5.8;
  - (d) the expiration of 6 months from the commencement of the negotiation period or, if both parties agree to an extension of the negotiation period, the expiration of the agreed extended term, provided that agreement to extend the negotiation period is not unreasonably withheld by either party;
- or

- (e) a reduction in Available Capacity due to another Access Seeker finalising an Access Agreement, where that reduction in Available Capacity adversely affects DBCT Management's ability to offer Access to the Access Seeker under the terms of the Indicative Access Proposal.

In the event that the negotiation period ceases for the reason set out in Section 5.7(e) above, DBCT Management must review the Indicative Access Proposal and prepare a revised Indicative Access Proposal in accordance with Section 5.5 and the negotiation process will recommence from the date this is provided to the Access Seeker.

During the negotiation period, the Access Seeker may review and revise the information provided to DBCT Management in the Access Application, provided that such revision does not substantially alter the nature of the Access rights sought by the Access Seeker. If DBCT Management is reasonably of the view that an Access Seeker's revision of information provided to DBCT Management in the Access Application has substantially altered the nature of the Access rights sought by the Access Seeker, then subject to the following paragraph, DBCT Management will treat the revised information as a new Access Application, and the process set out in this Part 5 will recommence from that point. If the revision is for an increase in the annual tonnage required or a longer term, then only the additional annual tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.

If, in the case of an Access Application referred to in Paragraph (b) of the definition of that term, the revision is for an increase in the term from 5 or more years to 10 or more years, then the extended term will be treated as part of the original Access Application.

A reduction in tonnage or term will not, of itself, constitute a new Access Application pursuant to this Paragraph providing there is a bona fide commercial reason for such reduction.

If at any time during the negotiation period a dispute arises between the parties that, after reasonable negotiations, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process set out in Section 5.10.

To remove any doubt, the negotiation process and the obligations of the parties in that regard are to continue notwithstanding the commencement of a dispute resolution process pursuant to Section 5.10 of this Undertaking.

## 5.8 Negotiation Cessation Notice

At any time during the negotiation process under Section 5.7, DBCT Management may give notice to an Access Seeker that it does not intend to enter into an Access Agreement with the Access Seeker (such notice being a **Negotiation Cessation Notice**), if:

- (a) an Access Seeker does not comply with all of its material obligations contained in this Undertaking;
- (b) DBCT Management is reasonably of the opinion that there is no reasonable likelihood that the Access Seeker will comply with the material terms and conditions of an Access Agreement;

- (c) DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access, at the level of capacity sought, from a specific mine to which the Access Application relates;
- (d) DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not or is likely not to be reputable or of good financial standing;
- (e) except where the expert is in manifest error, the Access Seeker does not materially comply with a decision of an expert pursuant to Section 5.10; or
- (f) an Access Seeker does not materially comply with a decision of the QCA pursuant to Section 5.10.

A Negotiation Cessation Notice must identify the reasons for DBCT Management's decision not to enter into an Access Agreement with the Access Seeker.

Without limitation, it will be reasonable for DBCT Management to form the view that circumstances in Section 5.8(b) or (d) apply if:

- (1) the Access Seeker is Insolvent;
- (2) the Access Seeker, or a Related Party of the Access Seeker, is currently or has in the previous two years been in material default of any Access Agreement (which has not been promptly rectified), Existing User Agreement or any other agreement where its performance under that agreement is relevant to its likely performance under an Access Agreement; or
- (3) the Access Seeker or a proposed provider of Security fail to establish their solvency and creditworthiness in accordance with Section 5.9.

If the Access Seeker reasonably considers that DBCT Management has improperly given it a Negotiation Cessation Notice, then the Access Seeker may refer the matter to dispute resolution in accordance with Section 5.10. If the resolution of the dispute is in favour of the Access Seeker, DBCT Management must re-commence negotiations with that Access Seeker.

Subject to any dispute on the matter being otherwise determined, DBCT Management may recover its reasonable costs incurred in negotiations with the Access Seeker where it ceases negotiations in accordance with a Negotiation Cessation Notice validly issued under Section 5.8(c). The Access Seeker may refer a Dispute about the recovery of these costs to dispute resolution in accordance with Section 5.10 of this Undertaking.

## **5.9 Creditworthiness of Access Seeker**

- (a) DBCT Management will not be required to enter into an Access Agreement or proceed with an Access Application with an Access Seeker which is or has become Insolvent or which, after DBCT Management's reasonable request, fails within a reasonable period to establish or confirm its likely creditworthiness for the term of the Access Agreement required, or to provide adequate Security from another entity which establishes or

confirms its likely creditworthiness for the term of the Access Agreement required.

- (b) To confirm the solvency and creditworthiness of an Access Seeker and, where DBCT Management requires, the provider of a Security, the Access Seeker will provide such information as may be reasonably requested by DBCT Management to establish that solvency and creditworthiness.
- (c) If an Access Seeker or, where DBCT Management requires, its Security provider, is unable to establish their solvency and creditworthiness in their own right, creditworthiness may be established by the Access Seeker and Security provider by providing further Security (as reasonably required by DBCT Management), for example (but not limited to) any one or more of:
  - (1) letters of credit;
  - (2) tripartite agreements with project financiers; and
  - (3) guarantees or security from entities with a Standard and Poors or Moodys rating of not less than investment grade.
- (d) An Access Holder entering into an Access Agreement for the same Annual Contract Tonnage as that which applied under an Existing User Agreement that is terminated from the commencement of that Access Agreement (even if the new Access Agreement is for a longer term than the balance of the term of the Existing User Agreement) will not be required at the commencement of that Access Agreement to provide any greater security than had been provided under the Existing User Agreement unless its financial circumstances have materially deteriorated.
- (e) For clarification, nothing in this Section 5.9 limits the rights of DBCT Management under an Access Agreement to require Security (or additional Security) after the commencement of an Access Agreement in accordance with the terms of that Access Agreement.

## 5.10 Dispute resolution

### (a) Disputes

If any dispute or question arises under this Undertaking or in relation to the negotiation of Access between an Access Seeker and DBCT Management (**Dispute**) then, unless otherwise expressly agreed by both parties, such Dispute will be resolved in accordance with this Section 5.10 and either party may give to the other party to the Dispute notice in writing (**Dispute Notice**) specifying the Dispute and requiring that it be dealt with in the manner set out in this Section 5.10.

Unless otherwise agreed by the parties, Disputes under an executed Access Agreement will be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Undertaking.

### (b) Chief Executive resolution

Unless otherwise agreed by both parties or provided for in this Undertaking, any Dispute will be referred in the first instance and in any event within 10 Business Days of the giving of the Dispute Notice to the Chief Executive of DBCT Management (or his or her nominee) and the

Chief Executive of the Access Seeker (or his or her nominee) for resolution.

In the event that:

- (1) resolution is not reached within 10 Business Days of referral; or
- (2) either Chief Executive appoints a nominee in accordance with this Section 5.10(b) that is unacceptable to the other party;

the relevant Dispute may, by agreement between DBCT Management and the Access Seeker, be referred for resolution by an expert in accordance with Section 5.10(c). Failing such agreement, either party may refer the Dispute to the QCA in accordance with Section 5.10(d).

(c) **Expert determination**

Where a matter is referred to an expert in accordance with Section 5.10(b) or as otherwise specified in accordance with this Undertaking, then the following will apply:

- (1) An expert may be appointed by the parties, or where agreement cannot be reached by the parties within 20 Business Days, in the case of financial matters, by the President for the time being of the Australian Society of Certified Practising Accountants and, in the case of non-financial matters, the President for the time being of the Institution of Engineers, Australia;
- (2) In any event the expert must:
  - (A) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
  - (B) have no interest or duty which conflicts or may conflict with his or her function as expert, he or she being required to fully disclose any such interest or duty before his or her appointment; and
  - (C) not be a current or immediate past employee of the Access Seeker or DBCT Management or of a Related Party of either of them;
- (3) The expert appointed pursuant to this Section 5.10(c) must not act until the expert has given written notice of the acceptance of his or her appointment to both parties;
- (4) The parties must upon request by the expert, provide or make available to the expert:
  - (A) all information in their possession or control (other than Confidential Information);
  - (B) all Confidential Information, subject to entry into arrangements to preserve confidentiality which are acceptable to all relevant parties, acting reasonably; and
  - (C) all other assistance,

that the expert may reasonably require. Any such information or assistance must be provided as soon as reasonably practicable. Any

determination made by an expert in relation to a Dispute must be consistent with the provisions of this Undertaking;

- (5) The expert will provide both parties with a copy of the determination in relation to the Dispute within a reasonable time after his or her appointment;
- (6) The expert appointed pursuant to this Section 5.10(c) is required to undertake to the parties in writing to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her duties;
- (7) Any person nominated as an expert pursuant to this Section 5.10(c) is deemed to be and must act as an expert and not as an arbitrator. The law relating to arbitration including, without limitation, the Commercial Arbitration Act 1990 (Qld) as amended, does not apply to the expert or to the determination or to the procedures by which the expert may reach that determination;
- (8) In the absence of manifest error, the decision of the expert is final and binding upon the parties. If a party believes that there was a manifest error it may refer the matter to the QCA for a determination. If the QCA determines that there was a manifest error, then the parties may agree to refer the Dispute to another expert in accordance with this Section 5.10(c), or failing such agreement, either party may refer the Dispute to the QCA for resolution in accordance with Section 5.10(d);
- (9) The costs of the expert and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the expert. If two or more Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.

(d) **Determination by the QCA**

If a Dispute is referred to the QCA in accordance with this Undertaking, then Division 5 of Part 5 of the QCA Act will apply. The QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).

If an issue is referred to the QCA for determination as specified in accordance with this Undertaking but does not constitute a Dispute for the purposes of Division 5 of Part 5 of the QCA Act, then the QCA will make a determination through any process that it considers appropriate, provided that:

- (1) prior to considering the issue, the QCA advises both parties of the process that it will use to make the determination and both parties are given the opportunity to advise the QCA of any concerns they may have with that process and receive a response from the QCA as to how it will deal with such concerns, if at all; and

- (2) the QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).

The costs of the QCA and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the QCA. If two or more Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.

### 5.11 Existing Agreement Process

If an Access Agreement or an Existing User Agreement provides a mechanism for applications for additional capacity to be made by the relevant Access Holder under that agreement, those provisions may be utilised by that Access Holder in respect of additional capacity sought under that agreement, but such application will be treated as an Access Application for the purposes of Section 5.4, and any other Section in Part 5 which is not inconsistent with the terms of that agreement will apply.

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## 6 Terminal Regulations

- (a) DBCT Management must comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time. The obligation imposed on DBCT Management to comply with and ensure that the Operator complies with the Terminal Regulations is subject to the Operation & Maintenance Contract allowing DBCT Management to enforce this obligation against the Operator<sup>1</sup>.
- (b) DBCT Management must not implement or consent to a proposed amendment to the Terminal Regulations without reasonable consultation with Access Holders and Access Seekers. DBCT Management will only give its consent to an amendment of the Terminal Regulations if it reasonably considers that the Terminal Regulations, as a whole, will operate equitably amongst Access Holders and Access Seekers (should they become Access Holders).
- (c) DBCT Management must notify Access Holders, Access Seekers and the QCA of any amendments to the Terminal Regulations and will provide a copy of the amended Terminal Regulations to these parties.
- (d) If an Access Holder or an Access Seeker reasonably considers that an amendment to the Terminal Regulations, as a whole, does not operate equitably among Access Holders and Access Seekers (should they become Access Holders), then the Access Holder or Access Seeker may request DBCT Management not to consent to it. If that request has been made and DBCT Management nevertheless consents to the amendment, then the Access Holder or the Access Seeker may, within 30 days after being

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<sup>1</sup> See also the obligation imposed in Section 1.6 of this Undertaking.

notified of DBCT Management's consent, refer the matter to the QCA for its consideration. If the Access Holder or Access Seeker has duly exercised its right to refer the matter to the QCA, DBCT Management will be taken to have implemented the amendments to the Terminal Regulations on an interim basis until the objection is resolved. If pursuant to an objection by the Access Holder or the Access Seeker (whether under this Undertaking or an Access Agreement), the QCA determines that any part of the Terminal Regulations does not as far as is practicable operate equitably amongst Access Holders and Access Seekers (should they become Access Holders), then the amendment will lapse. The Operator may implement any transitional arrangements which may be needed as a consequence of that lapsing.

- (e) DBCT Management will not be liable to the QCA or Access Seekers (and the Standard Access Agreement will provide that DBCT Management will have no liability to an Access Holder which executes it) as a result of DBCT Management consenting to an amendment to the Terminal Regulations (on an interim basis) or the due implementation and observance of an amendment to the Terminal Regulations (whether on an interim or final basis), as long as DBCT Management (acting in good faith) had formed the opinion that the relevant amendment to the Terminal Regulations, as a whole and as far as is practicable, would operate equitably amongst Access Holders and Access Seekers (should they become Access Holders).

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## 7 Information provision

The QCA has the right, by written notice, to request that DBCT Management provide to the QCA any information or documents that the QCA reasonably requires for the purpose of performing its obligations and functions in accordance with either this Undertaking or an Access Agreement developed pursuant to this Undertaking. The notice must include a description of the information or document required, the purpose for which it is required, and the date it is required (with such date to allow DBCT Management reasonable time to comply with the notice).

DBCT Management will comply with any such request by the date stated in the notice, unless there is a reasonable reason for non-compliance.

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## 8 Confidentiality requirements

The Access Seeker and DBCT Management will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged under the negotiation arrangements in Part 5 of this Undertaking or any other part of this Undertaking, except:

- (a) where any disclosure is required by law; and/or
- (b) where disclosure is to the recipient's advisors who are under a duty of confidentiality.

If required by either party, the parties will enter into a confidentiality deed substantially in the form set out in Schedule D of this Undertaking.

Both the Access Seeker and DBCT Management must only use Confidential Information provided by the other party for the purposes for which it was provided.

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## 9 Ring-fencing arrangements

DBCT Management does not presently have any interests in markets upstream or downstream from the Services. However, if such interests arise in future then DBCT Management will inform the QCA and prepare a draft amending access undertaking in accordance with the QCA Act setting out its obligations in relation to ring fencing.

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## 10 Reporting by DBCT Management

### 10.1 Regulatory accounts

DBCT Management will report to the QCA on an annual and confidential basis, (with a copy to each Access Holder), within four (4) months of the close of the relevant Financial Year, information relating to:

- (a) the opening regulated asset base value for the relevant Financial Year — by asset class/type consistent with the asset class/types used to determine the initial capital base;
- (b) the amount of indexation of the regulated asset base calculated for the relevant Financial Year — by asset class/type;
- (c) the amount of depreciation calculated for the relevant Financial Year — by asset class/type;
- (d) DBCT Management's corporate overheads for the relevant Financial Year;
- (e) the value of any new assets (capital expenditure) acquired during the relevant Financial Year — by asset class/type. Capital expenditure is to be identified as either replacement or expansionary capital expenditure, and is to include information relating to the estimated life of each new asset;
- (f) asset disposals for the relevant Financial Year — by asset class/type;
- (g) the actual operating and maintenance costs incurred for the relevant Financial Year – at a level of detail to be determined by the QCA. This should separately identify any minor capital recovered through the Operation & Maintenance Charge; and
- (h) an explanation for any significant variance in actual capital expenditure and/or operating and maintenance costs, and forecast capital expenditure and/or operating and maintenance costs for the relevant Financial Year.

### 10.2 Indicators relating to compliance with this Undertaking

DBCT Management will publicly report on an annual basis the following information:

- (a) the number and percentage of total Indicative Access Proposals provided within the applicable timeframe;
- (b) the number and percentage of Access Applications received for which an extension of time for provision of an Indicative Access Proposal was sought by DBCT Management;
- (c) the average delay (in days) taken to provide an Indicative Access Proposal not provided within the applicable timeframe;
- (d) the number of instances where a Dispute has been referred to dispute resolution in accordance with Section 5.10;
- (e) the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (f) the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of any reason other than the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (g) the number of instances where a negotiation period that had commenced, ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker; and
- (h) any other performance measure requested by the QCA.

### **10.3 Indicators relating to service quality**

DBCT Management is required to publicly report on such service quality key performance indicators for the Terminal as agreed between DBCT Management, Access Holders, and the QCA from time to time.

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## **11 Pricing arrangements**

### **11.1 Pricing objectives**

In developing Access Charges, DBCT Management's objectives are to:

- (a) achieve the ARR in each Financial Year in accordance with this Undertaking;
- (b) achieve the Revenue Cap plus any Additional Tonnage Amount in each Financial Year in accordance with this Undertaking;
- (c) provide incentives for efficient utilisation of Terminal Capacity;
- (d) ensure equitable treatment of Access Holders and Access Seekers;
- (e) encourage efficient future investment in the Terminal;
- (f) ensure full recovery (but not over-recovery) from Access Holders of Terminal Operating Costs; and
- (g) ensure efficient Terminal Operating Costs.

## 11.2 Access Charges

Access Charges will comprise two components:

- (a) a Capital Charge, being:
  - (1) in respect of Reference Tonnage, the Reference Tariff;
  - (2) in respect of any Excess Tonnage, the Excess Charge;
  - (3) where applicable, the Year End Adjustment and the Provisional Increment Repayment; or
  - (4) in respect of Non-Reference Tonnage, such tariff as is agreed between DBCT Management and an Access Holder (subject to Section 11.10); and
- (b) an Operation & Maintenance Charge.

## 11.3 Reference Tariff

- (a) The Reference Tariff will apply to all Reference Tonnage.
- (b) The Reference Tariff will be set such that, in each Financial Year, the Revenue Cap will be recovered by DBCT Management over the Aggregate Reference Tonnage. (A proportionate recovery will occur over a part of a Financial Year, where relevant.)
- (c) The Reference Tariff will comprise a single component Terminal Infrastructure Charge (**TIC**), being an amount per tonne payable by an Access Holder at a relevant time, calculated (and adjusted as required) in accordance with Schedule C, Part A.
- (d) On each occasion referred to in Schedule C, Part A, Section 4(c) and (g), DBCT Management will submit to the QCA a request for the QCA to approve an appropriate amendment of the ARR, Revenue Cap and Reference Tariff, in accordance with Schedule C, Part A. They will be amended (effective from the relevant date in Schedule C, Part A, Section 4) when that approval is given by the QCA.
- (e) Where a Reference Tariff has been calculated from the ARR, that Reference Tariff will be an acceptable means by which DBCT Management provides Access Seekers with information about the matters listed in Sections 101(2)(a) to (c) of the QCA Act (as provided for in accordance with Section 101(4) of the QCA Act).

## 11.4 Excess Charge

- (a) The Excess Charge will apply to all Excess Tonnage.
- (b) The Excess Charge will be calculated in accordance with Schedule C Part B, Section 3.

## 11.5 Year End Adjustment

- (a) The Year End Adjustment (if any) will apply where any Excess Tonnage is Handled in a Financial Year.
- (b) The Year End Adjustment will be calculated in accordance with Schedule C Part B, Section 1.

## 11.6 Increment

DBCT Management is entitled to add an Increment to the Revenue Cap otherwise applying, in the circumstances outlined in Schedule C, Part B, Section 4. It may retain a Provisional Increment pending the outcome of an application for the Increment. The Provisional Increment will be calculated in accordance with Schedule C, Part B, Sub-Section 4(b).

## 11.7 Provisional Increment Repayment

The Provisional Increment Repayment (if any) will apply where DBCT Management has retained an amount in accordance with Schedule C, Part B, Sub-Section 4(a) (the **Provisional Increment**) but that amount must subsequently be repaid to Access Holders pursuant to Schedule C, Part B, Sub-Section 4(e) (the **Provisional Increment Repayment**).

## 11.8 Payment and adjustment of Capital Charges

- (a) Each Access Holder will pay to DBCT Management a payment in each Month of each Financial Year during the term of its Access Agreement (the **Monthly Payment**) calculated (and adjusted as required) in accordance with Schedule C, Part A.
- (b) After the end of each Financial Year:
  - (1) each Access Holder will pay any Excess Charge applicable to it in respect of the Financial Year (or the balance of the Excess Charge if any prepayment has been made).
  - (2) DBCT Management will pay any Year End Adjustment in respect of the Financial Year, due to each Access Holder; and
  - (3) DBCT Management will pay any Provisional Increment Repayment in respect of the Financial Year, due to each Access Holder.

## 11.9 Operation & Maintenance Charge

- (a) Terminal Operating Costs will be recovered from each Access Holder through the Operation & Maintenance Charge. The Operation & Maintenance Charge for each Access Holder will be calculated on the basis outlined in the Standard Access Agreement.
- (b) DBCT Management will:
  - (1) notify Access Holders of estimated Terminal Operating Costs annually in advance;
  - (2) recover such estimated costs monthly; and
  - (3) notify Access Holders of any applicable adjustment at the end of each Financial Year - to recover any shortfall or to reimburse Access Holders in the event of over-recovery by DBCT Management.

### 11.10 Limits on price differentiation

DBCT Management will not differentiate Access Charges between Access Seekers or between Access Seekers and Access Holders, other than to reflect differences in costs (direct or indirect) or risks to DBCT Management of providing Access. Where DBCT Management is proposing a Capital Charge to apply to an Access Seeker that varies from the Capital Charge applied in respect of Reference Tonnage, it must demonstrate to the Access Seeker that the divergence is justified. In doing so, DBCT Management must provide sufficient information to adequately explain the reasons for the divergence.

### 11.11 Amendments to the Access Charge Framework

If DBCT Management, acting reasonably, believes that the Access Charge framework set out in Sections 11.2 to 11.9 and Schedule C no longer satisfies the pricing objectives set out in Section 11.1, or could be structured to more effectively achieve them or is creating a manifest error, it will submit a draft amending access undertaking incorporating an amended Reference Tariff framework to the QCA for approval in accordance with the QCA Act. The QCA may approve such a draft amending access undertaking only if it considers it appropriate having regard to the pricing objectives in Part 11.1.

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## 12 Capacity Expansion

### 12.1 Procedure for determining Terminal Capacity

- (a) DBCT Management will, from time to time, acting reasonably and after taking advice from an independent expert appointed by DBCT Management, determine (after consulting with the Operator, Access Holders and any Access Seekers) the maximum reasonably achievable throughput capacity (measured in tonnes of coal per Financial Year for any relevant Financial Year) of the Terminal (the Terminal Capacity), having regard to:
- (1) DBCT Management's obligations and Access Holders' entitlements under Existing User Agreements and Access Agreements (including taking into account historical and reasonably estimated rates of utilisation of the Terminal's capacity but also having regard to reasonably foreseeable future changes);
  - (2) DBCT Management's requirement to comply with Good Operating and Maintenance Practice;
  - (3) the Terminal Regulations;
  - (4) an objective of maximum reasonably achievable throughput capacity for the Terminal without unduly escalating Demurrage Costs;
  - (5) rail and vessel interfaces with the Terminal;
  - (6) the estimated additional capacity which it is anticipated will become available in a relevant Financial Year as a result of any proposed Capacity Expansion; and

- (7) any other matter DBCT Management reasonably considers appropriate.

DBCT Management must disclose to the QCA, Access Holders, Access Seekers and the Operator its decision making process in relation to its determination of Terminal Capacity and provide them with a copy of any independent expert report that DBCT Management receives in relation to determining Terminal Capacity.

- (b) Where a group of Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 40% of the Aggregate Annual Contract Tonnage for that Financial Year, dispute the determination of Terminal Capacity under Section 12.1(a), those Access Holders may refer the matter for expert determination under the provisions of Section 5.10(c). If a dispute is so referred, the provisions of Section 5.10(c) shall apply to the dispute, except that if DBCT Management's determination of Terminal Capacity under Section 12.1(a) has been made in good faith, then the Access Holders initiating the dispute must (severally, in the proportions of their respective entitlements to have tonnages of coal Handled at the time the dispute commences) pay the expert's costs and all of DBCT Management's reasonable costs of participating in the expert determination process.
- (c) The capacity of the Terminal determined under Section 12.1(a) (or, if applicable Section 12.1(b)) above will constitute Terminal Capacity until it is next reassessed.
- (d) Terminal Capacity will be assessed by DBCT Management in accordance with Section 12.1(a) at or about the Commencement Date, and reassessed:
- (1) upon completion of each Capacity Expansion; or
  - (2) if a Capacity Expansion has not occurred, at DBCT Management's discretion, but in any event at least once per Financial Year.
- (e) DBCT Management must promptly notify the QCA, DBCT Holdings and each Access Holder and Access Seeker of each assessment under this Section 12.1.
- (f) DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage proposed under the new Access Agreement) exceed the Terminal Capacity (as determined for a relevant time), unless required to do so by the Access Undertaking, statute, or an agreement relating to its tenure of the Terminal as it exists at 1 July 2005, including the Framework Agreement or the Port Services Agreement.
- (g) If DBCT Management complies with the provisions of this Section 12.1, DBCT Management will not be liable to the QCA or any Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder which executes it) for any delay which arises as a result of the Aggregate Annual Contract Tonnage subsequently exceeding the Terminal Capacity for any reason external to the Terminal (for example, rail or shipping) or because any one or more factors related to utilisation of capacity of the Terminal subsequently change (for example, changes in service levels required, the nature of coal

Handled, an Access Holder's use of the Terminal, vessel mix or any other relevant factor).

## 12.2 Capacity Expansion consultation

DBCT Management will hold meetings with Access Holders not less than twice per Financial Year to consult with Access Holders in good faith upon the following issues:

- (a) current Terminal Capacity;
- (b) constraints on current Terminal Capacity including the impact on Demurrage Costs and Access Holder transport costs;
- (c) future contracts/forecasts that may impact on Terminal Capacity;
- (d) significant issues relevant to Terminal Capacity;
- (e) the timing and nature of the next Capacity Expansion (if any) and the impact on current capacity requirements, pricing and the Master Plan; and
- (f) any proposed changes to the Terminal Regulations.

DBCT Management will distribute in a timely manner agendas, detailed briefing material and a copy of the minutes of each of these meetings to all Access Holders, DBCT Holdings and the QCA.

## 12.3 Expansion of Terminal Capacity

Subject to Sections 12.7 and 12.8 of this Undertaking, DBCT Management will undertake Capacity Expansions at the Terminal as are necessary to:

- (a) accommodate the actual and reasonably anticipated future growth of demand for the use of the Terminal by Access Holders and Access Seekers;
- (b) ensure that the Terminal complies with best practice in respect of quality standards for such facilities, environmental best practice and applicable environmental standards;
- (c) comply with Approvals and applicable laws; and
- (d) be consistent with Good Operating and Maintenance Practice.

## 12.4 Accommodation of Capacity

- (a) Subject to Sections 12.7 and 12.8 of this Undertaking, and without limiting Section 12.3, DBCT Management will use its best endeavours to ensure that:

- (1) as soon as practical after; and
- (2) in any event within 12 months after,

DBCT Management receives from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement that, on acceptance, will be unconditional and legally binding to obtain Handling of coal at the Terminal for a period in excess of 5 years (or 10 years or more Handling of coal if acceptance of the offer would require a Capacity

Expansion), the Terminal is able to Handle that coal without a material and sustained increase in:

- (A) Demurrage Costs; or
- (B) the average net costs (after taking into account any discounts or rebates available to Access Holders) across all Access Holders of transporting coal from the rail loading points at mine sites to the Terminal for Handling, over any period of three consecutive months,

attributable to delays caused by the provision of Services in respect of the additional volume. DBCT Management will disclose to all Access Holders, Access Seekers and the QCA its process for so calculating Demurrage Costs and average net costs to Access Holders.

- (b) Without limiting the circumstances in which DBCT Management may be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement, if:
  - (1) DBCT Management receives an offer from an Access Seeker to enter into an Access Agreement on the terms of the Standard Access Agreement, or receives an offer from an Access Seeker to enter into an Access Agreement where any departure of the terms of that offer from the terms of a Standard Access Agreement is not likely to increase cost (direct or indirect) or risks to DBCT Management; and
  - (2) the Access Seeker has satisfied DBCT Management (acting reasonably) in accordance with Section 5.9 that the Access Seeker (or any relevant Security provider) has the financial and other relevant resources to enable it to discharge its obligations under the relevant Access Agreement,

then for the purpose of Section 12.4, DBCT Management will be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement.

## 12.5 Capacity Expansion

- (a) If DBCT Management proposes to expand the Terminal during the term of the undertaking, it will submit to the QCA, a Capacity Expansion application, which must include the following information:
  - (1) details of the scope of the proposed Capacity Expansion;
  - (2) details of how the Capacity Expansion complies with the current Master Plan (and any variations to the Master Plan approved by DBCT Holdings);
  - (3) the estimated cost of the proposed Capacity Expansion categorised into:
    - (A) works that are proposed to be managed under the TCMP (**Contract Costs**); and
    - (B) Other Costs (**Other Costs**);
  - (4) the timetable for the proposed Capacity Expansion;

- (5) a high level project execution strategy, which will, among other things, identify risks and risk mitigation;
  - (6) either:
    - (A) evidence that the 60/60 Requirement has been complied with; or
    - (B) DBCT Management's justification for the Capacity Expansion without the 60/60 Requirement having been complied with;
  - (7) the process for the tendering and awarding of contracts, standard form contract terms, and the contract management process for the management of contracts post award (these processes together constitute the Tender and Contract Management Processes (TCMP)); and
  - (8) the process by which costs will be expended, tracked and managed if they are not covered by the TCMP.
- (b) DBCT Management will also submit to the QCA (with a copy to each Access Holder) a 6 monthly report setting out:
- (1) the status of each Contract awarded under the TCMP, including the degree of completion and the anticipated final cost inclusive of actual and provisioned variations;
  - (2) the status of each element of the Other Costs, including the costs incurred, the degree of completion and the anticipated final costs; and
  - (3) if anticipated final costs vary from the costs initially forecast, details of and the reasons for the variation.
- (c) If requested by DBCT Management, an Access Seeker or an Access Holder, the QCA will provide an indication of the Reference Tariff that might apply after the Capacity Expansion has been completed. Any indicative Reference Tariff provided will be based on the estimates supplied by DBCT Management when submitting the Capacity Expansion application which may not have been reviewed or may not eventually be accepted by the QCA.
- (d) DBCT Management will provide all information required by the QCA or any advisor to the QCA to enable the QCA to assess the prudence of any proposed or actual capital expenditure. Any information provided by DBCT Management and nominated as confidential will be handled by the QCA in accordance with the confidentiality provisions of the QCA Act.
- (e) **Prudence of Contract Costs**
- (1) The QCA will accept that capital expenditure is prudent and will include it into the regulated asset base if DBCT Management can demonstrate and the QCA is satisfied that:
    - (A) the scope of the proposed works is consistent with the current Master Plan (and any variations to the Master Plan approved by DBCT Holdings) and applicable laws, as provided in section (f) of this Section 12.5;

- (B) the standard and specifications of the works is appropriate, as provided for in section (g) of this Section 12.5;
  - (C) the 60/60 Requirement has been complied with or the QCA accepts that the Terminal should be expanded in accordance with the proposed works, as provided for in section (h) of this Section 12.5; and
  - (D) the capital works were undertaken in accordance with the approved TCMP or were otherwise reasonable, as provided for in sections (i), (j), (k) and (l) of this Section 12.5.
- (2) In the event that the QCA considers that any elements specified in section (e)(1) of this Section 12.5 are not satisfactorily met, the QCA will undertake an assessment of the prudence of the capital expenditure as if the works were Other Costs, as provided for in section (m) of this Section 12.5. In undertaking this assessment, the QCA will take into account the extent to which DBCT Management has achieved compliance with the expansion approval process outlined in this Section 12.5.
- (f) **Scope of works**
- (1) The QCA will accept the scope of the proposed Capacity Expansion if it is satisfied it is consistent with the current approved Master Plan (or any variations to the Master Plan approved by DBCT Holdings) and applicable laws.
  - (2) The QCA will accept or not accept the scope within 20 Business Days of being provided with all of the information it requires to assess the proposed works. If the QCA does not accept the scope of the proposed works, it will give reasons in writing.
- (g) **Standard and specifications of works**
- (1) The QCA will review the standard and specifications of the works and all relevant contract terms to ensure that the proposed works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Section 12.1 of the Port Services Agreement, or, in the case of contract terms, are not likely to materially adversely impact on a prudent balance between price and risk.
  - (2) The QCA will accept or not accept on a contract by contract basis the standard, specifications, and contract terms for the works within 20 Business Days of receipt of the technical specifications, design drawings and contract terms for the works and any other information needed by the QCA to review the standard, specifications and contract terms for the works. If the QCA does not accept the standard, specifications and contract terms of the works, it will give reasons in writing.
  - (3) If DBCT Management amends the submitted technical specifications and/or design drawings and/or material contract terms after an approval by the QCA, DBCT Management will immediately advise the QCA of the changes. The QCA will accept or not accept the changes.

**(h) 60/60 Requirement**

- (1) In this Section 12.5, the "60/60 Requirement" is satisfied when:
- (A) DBCT Management has secured from Access Seekers firm contracts, each of which provides for the Handling of coal for a period of at least 10 years duration, for at least 60% of the proposed Terminal Capacity increment; and
  - (B) 60% of existing Access Holders (as determined by their Annual Contract Tonnages reduced by the relevant exclusions set out in Section 12.5(h)(1)(C) below) do not oppose the Capacity Expansion, having been given the information and notice in Section 12.5(h)(2) for at least 15 Business Days before it is determined whether or not the 60/60 Requirement has been complied with;
  - (C) The relevant exclusions are the tonnages of any Access Holder of existing capacity at the Terminal where the Access Holder is, legally and beneficially, the same entity as or a related body corporate of an Access Holder that is, legally and beneficially, the same entity as, an Access Seeker that is within Section 12.5(h)(1)(A).
- (2) DBCT Management will provide Access Holders with the following information, for the purposes of determining whether the 60/60 Requirement can be complied with:
- (A) outline details of the scope of the proposed Capacity Expansion works;
  - (B) details of how the Capacity Expansion complies with the current Master Plan (and any variations to the Master Plan approved by DBCT Holdings);
  - (C) cost estimates for the proposed Capacity Expansion and each element of the Capacity Expansion, including contingency, financing and escalation allowances;
  - (D) a schedule of each element of the proposed Capacity Expansion;
  - (E) the projected incremental capacity provided by the Capacity Expansion and subsequent total Terminal capacity;
  - (F) high level project execution strategy, which strategy will, among other things, identify risks and risk mitigation;
  - (G) outline of Existing User Agreement tonnages, Access Agreement tonnages, Access Application tonnages and any other contracted tonnages (including provisionally contracted tonnages) and contract periods;
  - (H) a notice that the above information is being expressly provided in contemplation of the 60/60 Requirement (even if the notice was given prior to the Commencement Date).

For clarification, the information may have been provided before the Commencement Date.

- (3) Once evidence of compliance with the 60/60 Requirement has been provided and accepted by the QCA it will not be subject to further review (provided that the evidence presented was not misleading or deceptive and there has been no manifest error).
  - (4) If Section 12.5(a)(6)(A) applies, the QCA will confirm the sufficiency (or sufficiencies) of evidence of the 60/60 Requirement within 20 Business Days of receipt of the Capacity Expansion application. If the QCA provides such confirmation, it will be deemed to have accepted the need for the Capacity Expansion.
  - (5) If Section 12.5(a)(6)(B) applies, the QCA will, as soon as is practicable, review whether the Terminal should be expanded in the way proposed by DBCT Management. If the QCA does not accept that the Terminal should be expanded in the way proposed by DBCT Management, it will give reasons in writing.
- (i) **Tender and Contract Management Processes**
- (1) The QCA will approve DBCT Management's TCMP if it is satisfied that it is consistent with the following general principles, namely that the TCMP:
    - (A) is in accordance with good industry practice;
    - (B) will generate an efficient and competitive outcome;
    - (C) will avoid conflict of interest or collusion amongst tenderers;
    - (D) is prudent in the circumstances of the Capacity Expansion project; and
    - (E) will avoid unreasonable exposure to contract variation claims.
  - (2) In particular, in considering whether or not to approve DBCT Management's TCMP, the QCA will consider whether, inter alia:
    - (A) there is a clear process for the calling of tenders, including having clear specifications for tenders, and processes for mitigating conflicts of interest (except when it is assessed that calling tenders is likely to be less advantageous than an alternative means of negotiating a contract);
    - (B) there is a tender assessment process which contains clear and appropriate processes for determining the successful tender, with any decisions to approve a tender that is not the lowest tender being appropriately justified and documented;
    - (C) the basis of payment for works is clearly specified and the basis for undertaking the works is in accordance with good commercial practice;
    - (D) there is a process for managing contracts before and after award that accords with good commercial practice for a project of the type and scale of the Capacity Expansion and provides appropriate guidance on the criteria that DBCT Management should apply to decisions regarding the

management of the Capacity Expansion, including but not limited to:

- (i) safety during construction and operation;
  - (ii) compliance with environmental requirements during construction and operation;
  - (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodation of the reasonable requests of Users of DBCT to change the scope and sequence of construction to suit their needs;
  - (v) a prudent balance between:
    - (A) a higher price in return for more certainty as to final cost;
    - (B) a lower price accepting that final cost may be less certain; and
    - (C) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs;
  - (vii) minimising total project cost which may at times not be consistent with minimisation of individual contract costs;
- (E) there is a process for managing contract variations and/or escalation that occurs post award of a contract, requiring that reasonable consideration be given to managing the risk of contract variations and/or escalation and the allocation of potential risks during the management of the contract and requiring the provision of clear documentary evidence regarding the nature and reasonableness of any variation and/or escalation; and
- (F) DBCT Management has engaged an auditor in accordance with section (1) of this Section 12.5 to monitor compliance with the TCMP.
- (3) If the QCA decides not to approve DBCT Management's TCMP, the QCA will give DBCT Management a notice in writing within 20 Business Days of the QCA receiving all the information it requires to assess the TCMP. The QCA will provide:
- (A) reasons for its refusal; and
  - (B) the way the processes should be amended.
- (j) The QCA will accept that the value of a contract as awarded is prudent and will include it into the regulated asset base if:
- (1) the QCA has approved DBCT Management's TCMP in accordance with section (i) of this Section 12.5;

- (2) the QCA is satisfied that contract provisions regarding contract variations and escalation accord with good commercial practice; and
  - (3) the auditor engaged in accordance with section (1) of this Section 12.5 certifies that the tender has been conducted in accordance with the approved TCMP.
- (k) The QCA will accept that contract variations and/or escalations post award of a contract are prudent and will include them into the regulated asset base if:
- (1) a contract which has been accepted as prudent under section (j) of this Section 12.5 has been managed in accordance with the approved TCMP;
  - (2) the auditor engaged in accordance with section (1) of this Section 12.5 has certified that contract variations and/or escalations have been handled in a manner consistent with the relevant contract provisions; and
  - (3) the QCA is satisfied that the cost of contract variations and/or escalations is otherwise appropriate, having regard to the following:
    - (A) whether adequate consideration was given to properly managing the risk of contract variations and/or escalation or the allocation of potential risks during the awarding and management of the contract;
    - (B) whether the contract has been appropriately managed when regard is had for matters outlined in Section 12.5(i)(2)(D);
    - (C) whether the contract variations and/or escalations are appropriately justified; and
    - (D) whether the contract has been managed with a regard to a prudent balance between costs, schedule and minimising disruption to operating capacity during construction
- (l) As part of the implementation of the approved TCMP, DBCT Management will engage an independent external auditor to audit the compliance of DBCT Management's tender and contract management processes with the TCMP approved under this Section 12.5. The process in this regard will be as follows:
- (1) DBCT Management will appoint the auditor, subject to obtaining the QCA's prior approval of the selection of the auditor and the QCA's prior approval of the terms and conditions of the engagement of the auditor;
  - (2) the auditor will be required to acknowledge and accept that the auditor owes a separate contractual duty of care to the QCA in the provision of the audit and, in the event of a conflict between the auditor's obligations to DBCT Management and its duty of care to the QCA, the auditor's duty of care to the QCA will take precedence;

- (3) the auditor must agree the processes for conducting an audit with DBCT Management and obtain the QCA's approval of the audit process. The audit process will consist of a proposed work program, including audit costs (which shall be payable by DBCT Management and included in the regulated asset base), for the execution of the audit;
  - (4) DBCT Management will, within a nominated timeframe that is determined by the auditor to be reasonable after consultation with DBCT Management, provide any relevant information the auditor reasonably requires for the purpose of conducting the audit;
  - (5) if required by DBCT Management, the auditor will enter into a confidentiality deed with DBCT Management in relation to any information provided by DBCT Management to the effect that it must keep the information confidential and only use that information for the purpose of conducting the audit and completing the audit report detailed below;
  - (6) the auditor will compile an audit report identifying whether DBCT Management has complied in all material respects with the approved TCMP including in relation to contract variations and/or escalation. If the auditor identifies that DBCT Management has not complied in all material respects with the approved TCMP, then the audit report is also to contain details on the relevant non-compliance, any reasons stated by DBCT Management for the relevant non-compliance, and whether the non-compliance was reasonable in the circumstances;
  - (7) the auditor will provide progress reports on the audit process every 6 months as part of the information requirement in section (b) of this Section 12.5. The auditor will also provide a copy of the audit report to DBCT Management and the QCA upon completion of the audit. The QCA may publish the audit report if it considers it appropriate; and
  - (8) if the QCA forms the view that any of the auditor's reports (whether progress reports or a final report) are lacking in detail or otherwise deficient, the QCA may direct DBCT Management to instruct the auditor to review their report and, in doing so, to address the concerns of the QCA.
- (m) **Prudency of Other Costs**
- (1) The QCA will undertake an assessment of the prudency of Other Costs, and costs to which section (e)(2) of this Section 12.5 applies, after the relevant costs have been expended, in accordance with its usual practice for the assessment of the prudency of capital expenditure undertaken by regulated entities.
  - (2) In assessing whether actual capital expenditure is prudent, the QCA will have regard for the scope of the works undertaken, the standard of the works undertaken and the reasonableness of the cost of works undertaken.

- (3) In assessing the scope of the works and any associated ancillary services undertaken, the QCA will have regard for, inter alia;
- (A) the scope of the proposed Capacity Expansion;
  - (B) the current Master Plan (and any variations to the Master Plan approved by DBCT Holdings);
  - (C) the extent of current contracted demand, likely future demand and any spare capacity considered appropriate, and the need for capital works to accommodate that demand;
  - (D) the appropriateness of DBCT Management's processes to evaluate and select proposed capital works, including the extent to which alternatives are evaluated as part of the process;
  - (E) the extent to which capital projects that were undertaken were subjected to DBCT Management's evaluation and selection process; and
  - (F) the extent to which consultation has occurred with relevant stakeholders about the proposed capital works.
- (4) In assessing the standard and specifications of the works undertaken, the QCA will ensure that the proposed works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Section 12.1 of the Port Services Agreement.
- (5) In assessing the reasonableness of the cost of works undertaken, the QCA will have regard for, inter alia:
- (A) the level of such costs relative to the scale, nature, cost and complexity of the project;
  - (B) the circumstances prevailing in the markets for engineering, equipment supply and construction;
  - (C) the manner in which the Capacity Expansion has been managed, including but not limited to the manner in which DBCT Management has balanced the needs of:
    - (i) safety during construction and operation;
    - (ii) compliance with environmental requirements during construction and operation;
    - (iii) minimising disruption to operating capacity during construction;
    - (iv) accommodating the reasonable requests of Access Holders to change the scope and sequence of the works undertaken to suit their needs;
    - (v) a prudent balance between:
      - (A) a higher price in return for more certainty as to final cost;

- (B) a lower price accepting that final cost may be less certain; and
- (C) costs, schedule and minimising disruption to operating capacity during construction;
- (vi) minimising whole of asset life costs including future maintenance and operating costs; and
- (vii) minimising the total cost of the Capacity Expansion which may at times not be consistent with minimisation of individual costs.
- (6) In assessing the prudence of capital expenditure undertaken, the QCA will take advice as necessary from independent advisors using appropriate benchmarks and experience, and consult as necessary with relevant stakeholders.
- (7) The QCA will include all prudent capital expenditure into the regulated asset base.
- (n) If requested by DBCT Management, the QCA will undertake a preliminary assessment of the reasonableness of the Other Costs and shall advise DBCT Management of the results of such assessment. The QCA will not be bound by this assessment when determining the prudence of actual capital expenditure and whether the capital expenditure should be included in the regulated asset base.
- (o) Upon, or as near as practicable to, completion of commissioning of the proposed Capacity Expansion, DBCT Management must submit a draft amending access undertaking in accordance with Schedule C, Part A, Section 4 of the Undertaking.

## 12.6 Return on capital applicable to Capacity Expansion

- (a) In the event of a Capacity Expansion, costs incurred in the Capacity Expansion and approved by the QCA pursuant to Section 12.5 above, including construction related financing costs, (which will include a return on capital over the construction period on the Capacity Expansion expenditure incurred), will be included in the regulated asset base upon which the ARR and Reference Tariff are determined. The return on capital over the construction period to be included in the regulated asset base will be calculated at the WACC(2) Rate.
- (b) The return on capital to apply to a Capacity Expansion component of the regulated asset base, when calculating the ARR and Reference Tariffs to apply from the first day of the Month following commissioning of the Capacity Expansion, will be calculated at the WACC(3) Rate.
- (c) The return on capital to apply to each other components of the regulated asset base will continue to be calculated at the rate previously approved by the QCA to apply for that component (for example, the return on capital to apply to the regulated asset base as at the Commencement Date will be calculated at the WACC(1) Rate).

## 12.7 Unreasonable and uneconomic

If, having regard to:

- (a) the actual or anticipated long-term demand for the Services;
- (b) the extent to which a Capacity Expansion under the relevant stage of the Master Plan would produce capacity in excess of demand;
- (c) the cost of the Capacity Expansion;
- (d) the extent to which DBCT Management can demonstrate on reasonable evidence that the costs of the Capacity Expansion would be unlikely to be accepted by the QCA as forming part of the cost base for the purposes of determining Access Charges; and
- (e) the long-term nature of DBCT Management's investment in the Terminal, the cost to DBCT Management of complying with Sections 12.3 and 12.4 would be unreasonable and uneconomic, DBCT Management may submit to DBCT Holdings a written proposal that:
  - (f) provides details of the above matters; and
  - (g) proposes a modification to or temporary delay in the Capacity Expansion that would otherwise be required to be undertaken under this Part 12, on terms and conditions that are not inconsistent with the objectives in Clause 2.2 of the Ports Services Agreement,

and DBCT Management and DBCT Holdings will consult with one another, the State and Access Holders, in good faith in respect of the proposal. DBCT Holdings will not unreasonably withhold or delay its agreement to such modification or delay. DBCT Management will be relieved of its obligations under this Part 12 to the extent that DBCT Holdings agrees to modify or delay a Capacity Expansion (whether such agreement is given under the Undertaking or the Port Services Agreement).

## 12.8 Inability to proceed with Capacity Expansion

If DBCT Management would otherwise be required to proceed with a Capacity Expansion but, despite its best endeavours, is:

- (a) unable to procure a relevant tenure to or interest in land;
- (b) unable to procure an approval in respect of the occupation or operation of the Terminal, that is required for DBCT Management to lawfully undertake any construction or development otherwise required by a Capacity Expansion under this Part 12; or
- (c) reasonably of the view that it is not possible to increase Terminal Capacity,

then the obligations of DBCT Management under this Part 12 will be suspended to the extent affected by that inability while that inability continues. DBCT Management will continue to use its best endeavours to (as applicable) procure that approval (including amending, resubmitting or substituting the application and amending the relevant design or work program for the construction or development to procure the approval), procure the interest or tenure, or identify a means of increasing Terminal Capacity.

## 12.9 Master Plan

If DBCT Management decides to undertake a Capacity Expansion of the Terminal under this Part 12, it will (except where it is considered by DBCT Management to be generally in the interests of Access Holders and Access Seekers to do otherwise, and DBCT Holdings and the QCA give their approval) do so by undertaking the next applicable stage or stages of development contemplated by the Master Plan that are necessary to at least provide the necessary relevant additional Handling capacity.

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## 13 Terms and conditions of Access

### 13.1 Access Agreements

- (a) The granting of Access will be underpinned by the Standard Access Agreement.
- (b) The parties to each Access Agreement will include DBCT Management, DBCT Trustee and the relevant Access Holder.
- (c) If the Access Seeker so requires (although DBCT Management and the Access Seeker are able to agree otherwise), the Access Agreement will, in all material respects be consistent with the Standard Access Agreement.
- (d) An Access Seeker may seek Access on terms which are different (**Different Terms**) from the Standard Access Agreement, but if it does so:
  - (1) DBCT Management may, acting reasonably, decline to agree to any such Different Term (for example if accepting the Different Term would create obligations which would be impractical for it to comply with or incur unreasonable expense which it could not recoup from the Access Seeker or cause it to breach another Access Agreement or Existing User Agreement or materially disadvantage other Access Holders); and
  - (2) DBCT Management may require that charges other than the Reference Tariff apply if the Different Terms result in a risk profile or costs (direct or indirect) to it different from those that would have applied under the Standard Access Agreement,

and if the parties cannot agree on any such matter, it may be referred to the QCA for determination.
- (e) For Access required on terms other than the Standard Access Agreement, the terms of the Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement.
- (f) Once an Access Seeker has notified DBCT Management that it is satisfied with the terms and conditions of the Access Agreement as drafted, DBCT Management will, as soon as reasonably practicable, provide a final Access Agreement to the Access Seeker for execution.
- (g) The parties will use reasonable efforts to duly execute the final Access Agreement as soon as practicable after negotiations are finalised.

## 13.2 Minimum Term of Access Agreements

- (a) An Access Agreement which, if entered into by DBCT Management, will require a Capacity Expansion of the Terminal (unless the requirement for that Capacity Expansion has already been caused by other Access Applications), must provide for the Handling of coal for a minimum term of 10 years (with no right on the part of the User to voluntarily reduce the Annual Contract Tonnage from a date earlier than the end of that 10 year period, except any right to terminate for default by DBCT Management).
- (b) An Access Agreement in respect of an existing mine for which there is already an Access Agreement or Existing User Agreement may be for any term, but:
  - (1) if it is for less than 5 years that term and the relevant tonnages must correspond with the expected remaining life of that mine; and
  - (2) no option to extend the term may be granted under it if the term is for less than 10 years.
- (c) The term of an Access Agreement relating to a new mine (including a mine where production is being resumed after a full closure or a sustained period of dormancy), may be for any term, but
  - (1) if it is for a term of less than 5 years, DBCT Management may reserve the right to terminate it on not less than 12 months notice if:
    - (A) DBCT Management executes an Access Agreement for a period in excess of 5 years, commencing during that term; and
    - (B) DBCT Management would have been unable to execute that new Access Agreement without a Capacity Expansion of the Terminal, had the first mentioned Access Agreement not been terminated at that time; and
  - (2) no option to extend the term may be granted under it if the agreement provides for the Handling of coal for a term of less than 10 years.
- (d) For clarification, increasing the term of or Annual Contract Tonnage under, an Access Agreement or Existing User Agreement will be taken to constitute a separate Access Agreement in respect of the increased term or tonnage for the purposes of this Section 13.2 (except to the extent that an Access Holder under an Existing User Agreement has a contractual right to require the increase, on terms which are inconsistent with this paragraph).

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## 14 Whole of supply chain efficiency

- (a) DBCT Management will, on a “best endeavours” basis, engage with other stakeholders to develop and implement mechanisms to improve the overall efficiency of the Goonyella export coal supply chain.
- (b) DBCT Management will participate in any body established to reasonably facilitate the organisation, data and information collection and collation,

funding and reporting of the more broadly based initiatives in relation to improving the overall efficiency of the Goonyella export coal supply chain.

- (c) Nothing in this Part 14 will oblige DBCT Management to enter into any new arrangements with Access Holders not already provided for in this Undertaking.

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## **15 Transitional arrangements**

Nothing in this Undertaking requires a party to an Existing User Agreement to vary a term or provision of that Existing User Agreement.

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## Schedule A – Information required as part of an Access Application

- 1 Information to the satisfaction of DBCT Management, acting reasonably, including Access Seeker's name and contact details
- 2 Stockpiling requirements
- 3 Blending requirements
- 4 Number of products
- 5 Required term of Access Agreement
- 6 Date of commencement of delivery of coal to the Terminal
- 7 Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, "stickiness", and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes)
- 8 Net tonnes of coal per annum for each Financial Year
- 9 Origin of coal (e.g. mine origin)
- 10 Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year
- 11 Proposed gross tonnes per wagon
- 12 To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker's coal from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments
- 13 Evidence of the solvency and creditworthiness of the Access Seeker and its guarantor.
- 14 Requirements for trial shipments (if any)
- 15 Any other information reasonably required by DBCT Management or the Operator.

## **Schedule B – Standard Access Agreement**

[Standard Access Agreement attached separately]

## Schedule C – Revenue Cap/Pricing Structure (Reference Tonnage only)

### Part A – Rules for calculating Terminal Infrastructure Charge and Monthly Payment

#### 1 Monthly Payment (MP)

Each Access Holder “u” with Reference Tonnage (RTAHu) must pay to DBCT Management a Monthly Payment in respect of that Reference Tonnage in each Month “m” of each Financial Year ( $MP_{u,m}$ ), calculated as follows:-

$$MP_{u,m} = TIC \times MRT_{u,m}$$

where:-

**TIC** is the Terminal Infrastructure Charge applicable for a relevant Financial Year as calculated under Schedule C, Part A, Section 2; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Reference Tonnage applicable to each RTAHu in each Month “m” of a Financial Year. Where the rate of the Reference Tonnage for an Access Holder does not vary in a Financial Year and applies to the full Financial Year, the MRT<sub>u,m</sub> for the RTAHu will be one-twelfth of the their Reference Tonnage for the relevant Financial Year. Where the rate of the Reference Tonnage for the RTAHu varies during a Financial Year, the MRT<sub>u,m</sub> will vary from Month to Month to reflect one-twelfth of the annualised rate of the Reference Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is adjusted in accordance with Schedule C, Part A, Section 4

#### 2 Terminal Infrastructure Charge

- (a) Where no Review Event occurs after 1 July in a Financial Year, the Terminal Infrastructure Charge (TIC) for that Financial Year (being a charge per tonne for Reference Tonnage) be calculated as follows:-

$$TIC = \frac{RC}{ART}$$

where:-

**RC** is the Revenue Cap; and

**ART** is the Aggregate Reference Tonnage.

- (b) Where a Review Event occurs after 1 July in a Financial Year, the Terminal Infrastructure Charge (per tonne of Annual Contract Tonnage) to apply for each period i in that Financial Year (TIC<sub>i</sub>) will be calculated as follows:-

$$TIC_i = \frac{RC_i}{ART_i}$$

where:-

**RC<sub>i</sub>** is the relevant portion of the Revenue Cap to apply for period *i* in the Financial Year; and

**ART<sub>i</sub>** is the relevant portion of the Aggregate Reference Tonnage applying to the relevant period *i* in the Financial Year.

### 3 Determination of Revenue Cap

The Revenue Cap (RC) for each Financial Year (or where there is a Review Event, for each period “*i*” in the Financial Year) is calculated as follows:

$$RC = \frac{ARR \times ART}{NCT} + INCR$$

where:

**ARR** is the Annual Revenue Requirement;

**ART** is the Aggregate Reference Tonnage;

**NCT** is the Notional Contracted Tonnage; and

**INCR** is any relevant increment approved by the QCA in respect of prior Financial Years pursuant to Schedule C, Part B, Sub-Section 4(d); and

### 4 Determination of ARR

- (a) The ARR that would have applied for the Financial Year commencing 1 July 2004 had the Commencement Date been 1 July 2004 is \$86,818,000.
- (b) The ARR that would have applied or will apply in each Financial Year subsequent to the Financial Year referred to in Sub-Section 4(a) above will be calculated based on:
  - (1) the ARR and principles set out by the QCA in its Final Decision on the Dalrymple Bay Coal Terminal Draft Access Undertaking dated April 2005 (as amended by the QCA prior to the Commencement Date, if so amended); and
  - (2) any amendment to the Access Undertaking made pursuant to Sub-Section 4(g) below.

#### Annual amendment of the ARR, Revenue Cap and Reference Tariff

- (c) By each 15 May after the Commencement Date, DBCT Management, after consultation with Access Holders, will submit the ARR to apply for the next Financial Year to the QCA for approval.
- (d) The QCA must approve the ARR submitted by DBCT Management if it considers it has been calculated in accordance with Sub-Section 4(b) above.
- (e) The Reference Tariff will be amended annually on 1 July to reflect the new ARR and any variation to reflect the relevant Increment, the Aggregate Reference Tonnage and the Notional Contract Tonnage applicable for that Financial Year.
- (f) Any amendment made pursuant to Sub-Section 4(e) above will be effective from the relevant 1 July.

**Amendment of the ARR, Revenue Cap and Reference Tariff if a Review Event occurs**

- (g) If a Review Event occurs, DBCT Management will promptly submit to the QCA for approval, in accordance with the QCA Act, a draft amending access undertaking to make any necessary amendments to any one or more of the ARR, the Revenue Cap and the Reference Tariff to the extent required because of the Review Event. The QCA may approve a draft amending access undertaking seeking to amend any one or more of the ARR, the Revenue Cap and the Reference Tariff in accordance with this Sub-Section only if it considers it appropriate having regard to the pricing objectives in Section 11.1 of this Undertaking.
- (h) Any amendment made pursuant to Sub-Section 4(g) above will be effective from the first day of the Month following the Month in which the Review Event occurs, except for those Review Events of the kind described at part (e) of the Review Event definition, which will be effective from the relevant 1 July.
- (i) For clarification, if a review under Sub-Section 4(e) above occurs simultaneously with a review under Sub-Section 4(g) they will be reviewed together and become effective on the relevant 1 July.

**Part B – End of Year Adjustments****1 Year End Adjustment (YEA)**

The Year End Adjustment (if any) payable to each Access Holder “u” with Reference Tonnage (YEA<sub>u</sub>) will be calculated in respect of each Financial Year as follows:-

$$YEA_u = \frac{RT_u}{ART} \times RP$$

where:-

**RT<sub>u</sub>** is the Reference Tonnage for the Access Holder for the Financial Year;

**ART** is the Aggregate Reference Tonnage for the Financial Year; and

**RP** is the Rebate Pool for the Financial Year calculated at Schedule C, Part B, Section 2.

**2 Rebate Pool**

The Rebate Pool (RP) for each Financial Year will be calculated as follows:-

$$RP = (\max(\sum_{u=1}^n EC_u - PI - ATA, 0))$$

where:-

**EC<sub>u</sub>** is the Excess Charge (if any) for each RTAH<sub>u</sub> for the Financial Year calculated at Schedule C, Part B, Section 3;

**n** is the number of RTAHs which together hold all ART for the Financial Year;

**PI** is the Provisional Increment calculated at Schedule C, Part B, Sub-Section 4 (b) for the Financial Year; and

**ATA** is the Additional Tonnage Amount calculated at Schedule C, Part B, Section 5 for the Financial Year.

### 3 Excess Charge (EC)

- (a) Where no Review Event occurs after 1 July in a Financial Year, the Excess Charge (if any) payable by each RTAHu ( $EC_u$ ) shall be calculated as follows:-

$$EC_u = \left\{ \begin{array}{l} TIC \times \max[(TS_u - RT_u), 0] + \\ TIC \times 25\% \times \max[(TS_u - RT_u \times 110\%), 0] + \\ TIC \times 25\% \times \max[(TS_u - RT_u \times 125\%), 0] \end{array} \right\}$$

where:-

**TIC** is the Terminal Infrastructure Charge for that Financial Year calculated at Schedule C, Part A, Section 2;

**TS<sub>u</sub>** is the actual tonnes of coal shipped through the Terminal by a RTAHu during the Financial Year that are Reference Tonnage or Excess Tonnage; and

**RT<sub>u</sub>** is the Reference Tonnage for the RTAHu for the Financial Year.

- (b) Where a Review Event occurs after 1 July in a Financial Year, the Excess Charge (if any) payable by each RTAHu ( $EC_u$ ) shall be calculated as follows:-

$$EC_u = \left\{ \begin{array}{l} TIC_A \times \max[(TS_u - RT_u), 0] + \\ TIC_A \times 25\% \times \max[(TS_u - RT_u \times 110\%), 0] + \\ TIC_A \times 25\% \times \max[(TS_u - RT_u \times 125\%), 0] \end{array} \right\}$$

where:-

**TIC<sub>A</sub>** is the annualised Terminal Infrastructure Charge for that Financial Year calculated at Schedule C, Part B, Section 6;

**TS<sub>u</sub>** is the actual tonnes of coal shipped through the Terminal by a RTAHu during the Financial Year that are Reference Tonnage or Excess Tonnage; and

**RT<sub>u</sub>** is the Reference Tonnage for the RTAHu for the Financial Year.

### 4 Increment

- (a) If the Reference Tonnage Handled for all Access Holders plus the Excess Tonnage Handled for all Access Holders in a Financial Year exceeds the Aggregate Reference Tonnage (**Over-shipment**), DBCT Management will initially hold (or be entitled to hold – if it has not actually been paid the relevant amount) a portion of the revenue attributable to the Over-shipment of up to and including 2% of the Revenue Cap (the **Provisional Increment**) calculated in accordance with Sub-Section 4(b) below.

## (b) Where:-

- (1) there has been no Review Event after 1 July during the Financial Year the Provisional Increment is calculated as follows:

$$PI = \max(\min(TIC \times TRTS - RC, 2\% \times RC), 0)$$

where:-

**TIC** is the Terminal Infrastructure Charge for the Financial Year calculated at Schedule C, Part A, Section 2;

**TRTS** is the Reference Tonnage Handled for all Access Holders plus the Excess Tonnage Handled for all Access Holders in the Financial Year (and is the sum of all  $TS_u$  for each RTAHu); and

**RC** is the Revenue Cap for the Financial Year.

- (2) there has been a Review Event after 1 July during the Financial Year the Provisional Increment is calculated as follows:

$$PI = \max(\min(TIC_A \times TRTS - RC, 2\% \times RC), 0)$$

where:-

**TIC<sub>A</sub>** is the annualised Terminal Infrastructure Charge for the Financial Year calculated at Schedule C, Part B, Section 6;

**TRTS** is the Reference Tonnage Handled for all Access Holders plus the Excess Tonnage Handled for all Access Holders in the Financial Year (and is the sum of all  $TS_u$  for each RTAHu); and

**RC** is the Revenue Cap for the Financial Year.

For clarification, DBCT Management may elect not to make a claim for an Increment in respect of a Financial Year, and to treat the Provisional Increment as nil.

- (c) DBCT Management may submit an application to the QCA seeking to permanently retain the Provisional Increment, within 60 days of Financial Year end. If the QCA is reasonably satisfied that some or all of the over recovery is a direct result of DBCT Management itself or through its contractors (other than the Operator) engaging in activities which have improved capital productivity of the Terminal then the QCA may approve the retention by DBCT Management of all or part of the Provisional Increment (the amount so approved being the **Increment**).
- (d) If the QCA approves an Increment, the Revenue Cap otherwise applicable will be increased commencing from the next Financial Year and for each Financial Year (or part thereof) thereafter until the Terminating Date by the amount of the Increment (or a proportion of it, if the final period in the Term is not a whole Financial Year);
- (e) If the QCA does not approve DBCT Management's application (in whole or in part) or DBCT Management does not submit an application to the QCA as outlined above, DBCT Management will distribute any retained portion of the Provisional Increment (the **Provisional Increment Repayment**) to Reference Tonnage Access Holders within 14 days of the QCA's decision (or, if no application is made, then no later than 14 days

after the last date on which the application could have been made), in proportion to their respective Reference Tonnages for the relevant Financial Year.

## 5 Additional Tonnage Amount (ATA)

- (a) Where no Review Event occurs after 1 July in a Financial Year, the Additional Tonnage Amount (ATA) will be calculated as follows:

$$ATA = TIC \times AT$$

where:-

**TIC** is the Terminal Infrastructure Charge for the Financial Year calculated at Schedule C, Part A, Section 2; and

**AT** is the Additional Tonnage for the Financial Year

- (b) Where a Review Event occurs after 1 July in a Financial Year, the Additional Tonnage Amount (ATA) will be calculated as follows:

$$ATA = TIC_A \times AT$$

where:-

**TIC<sub>A</sub>** is the annualised Terminal Infrastructure Charge for the Financial Year calculated at Schedule C, Part B, Section 6; and

**AT** is the Additional Tonnage for the Financial Year.

## 6 Annualised Terminal Infrastructure Charge (TIC<sub>A</sub>)

If there is a Review Event after 1 July in a Financial Year, the annualised Terminal Infrastructure Charge (TIC<sub>A</sub>) for that Financial Year will be calculated as follows:-

$$TIC_A = \sum_{i=1}^{i=n} \left( \frac{TIC_i \times RTP_i}{ART} \right)$$

where:

**TIC<sub>i</sub>** is the Terminal Infrastructure Charge for each period *i* in the Financial Year calculated at Schedule C, Part A, Section 2;

**RTP<sub>i</sub>** is that part of the Reference Tonnage for all RTA<sub>H</sub> relating to each period *i* in the Financial Year (for example, if the Aggregate Reference Tonnage rate in period “*i*” is 50Mtpa and the period “*i*” is of 6 Months duration then RTP<sub>i</sub> would be 25 Mt);

**ART** is the Aggregate Reference Tonnage for the Financial Year (for example, if there are two periods “*i*” in a Financial Year, each of 6 Months duration, and the Aggregate Reference Tonnage rate in each of the periods is 50 Mtpa and 60 Mtpa respectively, then the ART for the Financial Year would be 55Mt); and

**n** is the number of periods “*i*” in the Financial Year.

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## Schedule D – Confidentiality deed

### This confidentiality deed

is made on \_\_\_\_\_ between the following parties:

1. **BBI (DBCT) Management Pty Limited**  
ACN 097 098 916  
of Level 25, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000  
(**DBCT Management**)
2. [insert name of receiving party]  
[insert ABN/ACN/ARBN]  
of [insert address]  
(**Access Seeker**)

### Recitals

- A. DBCT Management and the Access Seeker wish to negotiate the terms of an Access Agreement under which DBCT Management will provide Access to the Services.
- B. The parties have agreed to the disclosure of certain Confidential Information to each other in order to assist them to reach a negotiated outcome on the terms and conditions of Access to the Services.
- C. The parties have agreed that any Confidential Information is provided on the terms of this deed and that they will not use or disclose the Confidential Information except as provided in this deed.

### This deed witnesses

that in consideration of, among other things, the mutual promises contained in this deed, the parties agree:

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## 1 Definitions and interpretation

### 1.1 Definitions

In this deed:

**Access Undertaking** means the Dalrymple Bay Coal Terminal Access Undertaking prepared in accordance with the requirements of the *Queensland Competition Authority Act 1997* (Qld) and approved on [ ] as varied or replaced from time to time;

**Confidential Information** means any information, data or other matter disclosed to a party by or on behalf of another party where:

- (a) the disclosure of the information, data or other matter by the Recipient might reasonably be expected to affect the commercial affairs of the owner of the Confidential Information; or

- (b) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed, provided that such information, data or other matter:
- (1) is not already in the public domain;
  - (2) does not become available to the public through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Undertaking;
  - (3) was not in the other party's lawful possession prior to such disclosure; or
  - (4) is not received by the other party independently from a third party free to disclose such information, data or other matter,

and provided further that the information, data or other matter will cease to be Confidential Information if the information has ceased to retain its confidential nature, for example:

- (5) the disclosure of the information, data or other matter by the Recipient would no longer reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter;
- (6) the information, data or other matter is now in the public domain through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Undertaking; or
- (7) the information, data or other matter has been received by the Recipient independently from a third party free to disclose the information, data or other matter.

**Corporations Act** means the *Corporations Act 2001* (Cth);

**Discloser** means a person who discloses Confidential Information to a Recipient pursuant to negotiations for Access to the Services under Part 5 of the Access Undertaking;

**Document** includes any note, memorandum, record, report, financial information, summary, analysis, calculation, strategic assessment, market survey, business plan, computer program, computer record, circuit, circuit layout, drawing, specification, material or any other means by which information may be stored or reproduced;

**Express Purpose** means to assist the Recipient to reach a negotiated outcome with the Discloser as to the terms and conditions of Access;

**Recipient** means a person who receives Confidential Information pursuant to negotiations for Access to the Services under Part 5 of the Access Undertaking; and

**Specified Person** means:

- (a) an officer or employee of a Recipient;
- (b) a professional adviser to a Recipient;
- (c) a financier of a Recipient;
- (d) a professional adviser to a financier of a Recipient;

- (e) an officer, employee, or a professional adviser to a related body corporate of a Recipient; or
  - (f) an officer or employee of the Operator,
- who has a specific need to have access to the Confidential Information for the Express Purpose.

## 1.2 Interpretation

- (a) Terms defined in the Access Undertaking have the same meaning in this deed unless otherwise defined.
- (b) Headings are for convenience only and do not affect interpretation.
- (c) In this deed, unless the context otherwise requires:
  - (1) words importing the singular include the plural and vice versa;
  - (2) a reference to any thing (including, but not limited to, any right) includes a part of that thing but nothing in this Clause 1.2(c)(2) implies that performance of part of an obligation constitutes performance of the obligation;
  - (3) the term “related body corporate” has the meaning given to that term under the Corporations Act;
  - (4) the term “associate” has the meaning given to that term in Section 15 of the Corporations Act;
  - (5) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and
  - (6) a reference to a person includes that person’s successors and legal personal representatives.

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## 2 Confidentiality

The Recipient must:

- (a) hold the Confidential Information in strict confidence and not disclose, or cause or permit the disclosure of, the Confidential Information, except as permitted under this deed or with the prior written consent of the Discloser;
- (b) not disclose, or cause or permit the disclosure to any person of, any opinion in respect of the Confidential Information or a Document created in accordance with Clause 3(c), except as permitted under this deed;
- (c) keep the Confidential Information and any Documents created in accordance with Clause 3(c) in a way such that it is reasonably protected from any use, disclosure or access which is inconsistent with this deed;
- (d) promptly notify the Discloser if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information;

- (e) do anything reasonably required by the Discloser to prevent or stop a breach or threatened breach of this deed or an infringement or threatened infringement of the Discloser's rights arising out of this deed by any person, whether by court proceedings or otherwise; and
- (f) maintain such procedures as are reasonably necessary to ensure compliance with this deed by the Recipient and each Specified Person and, upon request, provide the Discloser details of the procedures adopted.

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### 3 Permitted use and disclosure

The Recipient may:

- (a) only use the Confidential Information for the Express Purpose;
- (b) not make use of the Confidential Information to the commercial, financial or competitive disadvantage of the Discloser (but this does not preclude the Recipient from using the Confidential Information in negotiations with the Discloser or in any dispute proceedings, submissions to the Queensland Competition Authority or other proceeding contemplated in the Access Undertaking or the Queensland Competition Authority Act 1997 (Qld));
- (c) create, or cause or permit to be created, a Document which reproduces, is based on, utilises or relates to Confidential Information only if that creation is solely for the Express Purpose; and
- (d) only disclose Confidential Information (including as contained in a Document created in accordance with Clause 3(c)) to a Specified Person, and may only make such disclosure solely for the Express Purpose.

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### 4 Return and destruction of information

- (a) If requested by the Discloser, the Recipient must promptly return to the Discloser, or destroy or delete as the Discloser directs, all original Documents and copies which:
  - (1) are or contain Confidential Information; and
  - (2) reproduce, are based on, utilise or relate to Confidential Information.
- (b) If a Document or a copy referred to in Clause 4(a) contains information which is Confidential Information of the Recipient, then the Recipient is not required to return that Document but must destroy or delete the portion of the Document containing the Confidential Information of the Discloser.

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## 5 Operation of this deed

- (a) This deed continues without limitation in time but, subject to Clause 5(b), does not apply to any Confidential Information that:
  - (1) the Recipient or a Specified Person is required to disclose by any applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator;
  - (2) is in the public domain other than as a result of a breach of this deed;
  - (3) was at the time of disclosure already in the lawful possession of the Recipient; or
  - (4) is received by the Recipient from a person (other than a Discloser or any employee, officer, agent or adviser of a Discloser) legally entitled to possess that information and provide it to the Recipient.
- (b) If the Recipient or a Specified Person must make a disclosure referred to in Clause 5(a)(1):
  - (1) the Recipient must only disclose, and must ensure that the Specified Person only discloses the minimum Confidential Information required to comply with the applicable law, order or requirement; and
  - (2) before making such disclosure, the Recipient must:
    - (A) give the Discloser reasonable written notice of:
      - (i) the full circumstances of the required disclosure; and
      - (ii) the Confidential Information which it, or the Specified Person, proposes to disclose; and
    - (B) consult with the Discloser as to the form of the disclosure.

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## 6 Acknowledgment

The Recipient acknowledges that:

- (a) the Confidential Information is secret and highly confidential to the Discloser;
- (b) this deed does not convey any proprietary or other interest in the Confidential Information to the Recipient or any Specified Person;
- (c) disclosure of Confidential Information in breach of this deed could cause considerable commercial and financial detriment to the Discloser;
- (d) damages may be inadequate compensation for breach of this deed and, subject to the court's discretion, the Discloser may restrain by an injunction or similar remedy, any conduct or threatened conduct which is or would be a breach of this deed; and
- (e) some or all of the Confidential Information may be relevant to the price or value of securities of the Discloser. The Recipient undertakes that it will

not deal in those securities in breach of the insider trading provisions of the Corporations Act.

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## 7 Recipient to ensure others comply

The Recipient must:

- (a) inform each Specified Person of the Recipient's obligations under this deed;
- (b) procure that each Specified Person strictly observes all of the Recipient's obligations under this deed as if those obligations were imposed on that person; and
- (c) generally ensure that no officer, employee, adviser or agent of the Recipient does anything which, if done by the Recipient, would be inconsistent with this deed.

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## 8 Indemnity

The Recipient indemnifies the Discloser in respect of any claim, action, damage, loss, cost, charge, expense, outgoing or payment which the Discloser suffers, incurs or is liable for in respect of:

- (a) any breach of this deed by the Recipient;
- (b) any failure by the Recipient to ensure compliance by any Specified Person with the terms of this deed; or
- (c) any infringement of the Discloser's rights in respect of the Confidential Information by the Recipient or a Specified Person.

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## 9 Disclaimer

- (a) Neither the Discloser, nor any of its related bodies corporate nor any of their respective officers, employees or advisers:
  - (1) makes any representation or warranty:
    - (A) as to the accuracy or completeness of the Confidential Information;
    - (B) that the Confidential Information has been audited, verified or prepared with reasonable care; or
    - (C) that the Confidential Information is the totality of the information that a prospective Access Seeker may require in order to negotiate an Access Agreement;
    - (D) accepts any responsibility for any interpretation, opinion or conclusion that the Recipient or a Specified Person may form as a result of examining the Confidential Information;
    - (E) accepts any responsibility to inform the Recipient of any matter arising or coming to the Discloser's notice which

may affect or qualify any Confidential Information which the Discloser provides to the Recipient; and

- (F) is liable, and the Recipient covenants not to make any claim or commence or pursue any proceedings against any of them, for any loss of any kind (including, without limitation, damages, costs, interest, loss of profits, or special loss or damage) arising from:
  - (i) an error, inaccuracy, incompleteness or similar defect in the Confidential Information; or
  - (ii) any default, negligence or lack of care in relation to the preparation or provision of the Confidential Information.
- (2) The Recipient acknowledges that it is making an independent assessment of the Confidential Information and that it will carry out, and rely solely on, its own investigation and analyses in relation to the Confidential Information.
- (3) Any reliance by the Recipient, or any Specified Person, on any Confidential Information, or any use of any Confidential Information, is solely at its own risk.

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## 10 Governing law and jurisdiction

- (a) This deed is governed by the laws of Queensland.
- (b) The parties irrevocably submit to the exclusive jurisdiction of the courts of Queensland.

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## 11 Waivers

- (a) Waiver of any right, power, authority, discretion or remedy arising on default under this deed must be in writing and signed by the party granting the waiver.
- (b) A failure or delay in exercise, or partial exercise, of a right, power, authority, discretion or remedy created or arising on default under this deed does not result in a waiver of that right, power, authority, discretion or remedy.

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## 12 Variation

Any variation of this deed must be in writing and signed by the parties.

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## 13 Entire agreement

This deed is the entire agreement between the parties in respect of its subject matter.

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**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management**

by:

\_\_\_\_\_  
Director/Secretary

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)

\_\_\_\_\_  
Name (please print)

**Signed sealed and delivered by  
[insert Access Seeker]**

by:

\_\_\_\_\_  
Director/Secretary

\_\_\_\_\_  
Director

\_\_\_\_\_  
Name (please print)    Name (please print)

\_\_\_\_\_

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## Schedule E - Services

### 1 Train scheduling

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate the scheduling of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of coal in each Financial Year.

### 2 Train unloading

If a train carrying an Access Holder's coal arrives at the Terminal as scheduled (or within a reasonable time before or after it is scheduled, where it can reasonably be unloaded at that time), DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the coal) consistent with achieving Handling of the Annual Contract Tonnage of coal for an Access Holder.

### 3 Reclaiming and vessel loading

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive coal) nominated by each Access Holder, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management on behalf of that Access Holder in each Financial Year (as long as the vessel mix required by the Access Holder does not unreasonably impact on the efficiency of the Terminal). It is agreed that historical vessel mixes prior to 30 June 2005 will be taken generally not to have unreasonably impacted on efficiency.
- (b) load each Access Holder's coal into a vessel which is nominated by the Access Holder and is available for loading so as to achieve the objective in paragraph (a).

### 4 Incidental services

DBCT Management must provide the following services incidental to coal Handling (unless provided directly by the Operator):

- sampling and survey services
- vessel monitoring
- coordination with ships' agents, masters, customers and other relevant entities
- crew disembarkation assistance
- wharfage and line services.

### 5 Miscellaneous services

If required by an Access Holder, DBCT Management must, in accordance with Good Operating and Maintenance Practice, provide the following Miscellaneous Services to the Access Holder:

- moisture adding
- compacting
- surfactant adding
- dozing

- blending (subject to Clause 6(d) below)
- any other services reasonably requested from time to time in writing by an Access Holder to DBCT Management, provided that such services will not unreasonably impact on the efficiency of the Terminal.

## **6 Stockpiling and blending**

- (a) DBCT Management must provide to each Access Holder sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the Access Holder's coal is to be loaded.
- (b) If the Operator determines that there are significant areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal, then DBCT Management must ensure that the each Access Holder is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the Aggregate Annual Contract Tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in paragraphs (a) and (b) are subject to any other obligation of DBCT Management under a User Agreement with another Access Holder entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend coal (as a miscellaneous service) if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:
  - (1) require coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (2) require coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (3) limit the proportions in which coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer each Access Holder's coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile an Access Holder's coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## **7 Prevention of contamination**

DBCT Management must take all practicable measures to maintain the integrity of each Access Holder's coal at the Terminal, including (without limitation) by:

- (a) avoiding contamination of the Access Holder's coal, including (without limitation) contamination with other coal or waste material; and
- (b) minimising handling and associated degradation of the Access Holder's coal.

## **8 Data provision**

DBCT Management must provide such information and access to systems as are reasonable to inform Access Holders of relevant data relating to handling of their coal.

## 9 Co-ordination

Subject to the Access Holder providing relevant information to DBCT Management within a reasonable time, DBCT Management must ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the Access Holder's reasonable quality plans, shipping programs and contracts as notified to DBCT Management or the Operator from time to time consistent with Terminal Regulations, and (having regard to equity amongst Access Holders) to use its best endeavours to minimise the aggregate cost to the Access Holder arising out of Handling at the Terminal (including demurrage and rail freight).

## 10 Terminal Regulation, Force Majeure, Operation & Maintenance Contract and laws

The provision of each the above Services by DBCT Management is subject to (and DBCT Management's obligations are modified to the extent of):

- (a) any relevant provisions of the Terminal Regulations in so far as they:
  - (1) require scheduling of Access Holder's railing in and shipment of coal in ways which promote Terminal efficiency and endeavours to achieve the objective of even shipments;
  - (2) temporarily reduce the tonnage of coal which may be Handled or Services provided, during such periods as capacity of the Terminal or relevant Services becomes restricted, provided that such reductions and restrictions affect all Access Holders equitably (but this does not relieve the Access Holder or DBCT Management respectively from any liability which they might have in respect of causing capacity or Services to have become restricted);
  - (3) prescribe requirements for trains, unloading of trains, stockpiling and cargo assembly, vessels, arrival of vessels, loading of vessels, pre-loading requirements and order of loading and unloading and other matters (including matters of the type dealt with in the Terminal Regulations as at the Commencement Date) which promote the efficient, safe and equitable utilisation of Terminal Capacity and Services;
  - (4) require Access Holders to co-operate with the Operator and other Access Holders in relation to scheduling, loading, unloading, priorities and other matters relating to the operation of the Terminal; and
  - (5) allow the exercise of discretions on the part of the Operator in limited cases, where it is reasonable to do so, to optimise Terminal efficiency and the power is required to be exercised in good faith and in a non-discriminatory way; and
- (b) in respect of an Access Holder, any specific provision of their Access Agreement or Existing User Agreement including any event of force majeure;
- (c) DBCT Management being able to require the Operator under the Operation & Maintenance Contract to provide such services.

The provision of the above Services by DBCT Management must be carried out in accordance with Good Operating and Maintenance Practice and all applicable laws.

## **Schedule F – Master Plan**

Contained separately as Volume 2

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## Schedule G – Definitions and Interpretation

### Definitions

In this Undertaking:

**Access** means access under an Access Agreement or Existing User Agreement to the Services to be provided by DBCT Management at the Terminal.

**Access Agreement** means an access agreement between DBCT Management and an Access Holder negotiated under Part 5 of this Undertaking (or otherwise entered into during the Term).

**Access Application** means:

- (a) an application for Access made under Section 5.2 of this Undertaking;
- (b) for the purposes of Sections 5.4, 5.7, 5.8, 5.9, and 5.10 only – an application (in such a form as is acceptable to DBCT Management (in its absolute discretion)) which was submitted in writing to DBCT Management prior to the Commencement Date and in respect of which the Access Seeker has also submitted to DBCT Management the information set out in Schedule A. For clarification, the time of the submission of the Schedule A information (before or after the Commencement Date) will not affect the date on which the application is taken to have been received by DBCT Management; and
- (c) for the purposes of Section 5.4 only – an application of the kind referred to in Section 5.11 which is made after the Commencement Date.

**Access Application Date** means:

- (a) where paragraph (a) does not apply, the date that the Access Application was received by DBCT Management; or
- (b) the date that the Access Application was deemed to be made if the Access Application was substantially altered in accordance with Section 5.7.

**Access Charges** means amounts payable by an Access Holder under an Access Agreement or Existing User Agreement for the Services.

**Access Holder** means a party who has an entitlement to Access under an Access Agreement or an Existing User Agreement.

**Access Seeker** means a party seeking Access, or increased Access, to the Services.

**Additional Tonnage** means, in respect of all Access Holders in a relevant Financial Year, the aggregate of all Excess Tonnage in that Financial Year which, because of Terminal Capacity, could not have been Handled unless there had been an Early Termination. For clarification, the Additional Tonnage cannot exceed the relevant annual tonnages the subject of Early Termination.

**Additional Tonnage Amount** or ATA has the meaning given in Schedule C, Part B, Section 5.

**Aggregate Reference Tonnage** means, in respect of a relevant Financial Year, the sum of the Reference Tonnages for all Access Holders in that Financial Year.

**Aggregate Annual Contract Tonnage** means, in respect of a relevant Financial Year, the sum of the Annual Contract Tonnages for all Access Holders in that Financial Year.

**Annual Contract Tonnage** means, for an Access Holder in a relevant Financial Year, the number of tonnes of coal in that Financial Year that the Access Holder is entitled to have Handled under its Access Agreement or Existing User Agreement:

- (a) including tonnage which an Access Holder is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations; but
- (b) excluding ad-hoc over shipments which may be permitted subject to available capacity.

**Annual Revenue Requirement** or **ARR** means, in respect of a relevant Financial Year, the amount of revenue which the QCA determines that DBCT Management is entitled to earn in that Financial Year to fully recover the costs incurred in providing Access to the Services (including an adequate rate of return on the value of assets employed but excluding Terminal Operating Costs), assuming that the Aggregate Annual Contract Tonnage for that Financial Year was all contracted as Reference Tonnage.

**Approval** means any and all licence, approvals, consent or permits required from any Government Agency or third party for the construction, occupation, development or operation of the Terminal for the provision of the Services, performance of the Leases, or the Port Services Agreement, including but not limited to:

- (a) environmental approvals and licences;
- (b) planning and development approvals and licences; and
- (c) local government approvals and licences.

**Available Capacity** means DBCT Management's prediction of the amount of Terminal Capacity not contracted to be Handled at a time relevant to an Access Application. It is derived by subtracting the Aggregate Annual Contract Tonnage as at the relevant time from DBCT Management's prediction of the Terminal Capacity at that time (including Terminal Capacity expected to arise out of a scheduled Capacity Expansion).

**Business Day** means a day on which banks (as defined in the Banking Act 1959 (Cth)) are open for general banking business in Queensland excluding Saturdays and Sundays.

**Capacity Expansion** means the construction, purchase, installation or erection of new works intended to increase the Terminal Capacity.

**Capacity Expansion Risk Free Rate** means the rate calculated by averaging the yield of the 10 year Commonwealth Government bond over the 20 Business Days preceding the date of commissioning and handover to the Operator of the relevant Capacity Expansion.

**Capital Charge** means the components of Access Charges that are not an Operation & Maintenance Charge.

**Capital Expenditure** means expenditure (incurred by DBCT Management) which:

- (a) relates to replacement or expansion of any part of the Terminal;
- (b) relates to refurbishment or upgrade of any part of the Terminal which can reasonably be expected to extend the life of the relevant part beyond its original useful life; and
- (c) otherwise relates to the refurbishment or upgrade of Terminal plant and/or infrastructure which is reasonably expected to improve whole of life cost or is incurred with the agreement of the Operator,

but not expenditure recovered through HCF or HCV (as those terms are defined in the Standard Access Agreement).

**Commencement Date** means the date this Undertaking is approved by the QCA.

**Confidential Information** means any information, data or other matter disclosed to a person by, or on behalf of, another person where:

- (a) the disclosure of the information, data or other matter by the recipient might reasonably be expected to affect the commercial affairs of the owner of the information; or
- (b) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed;

provided that such information, data or other matter:

- (c) is not already in the public domain;
- (d) does not become available to the public through means other than a breach of the confidentiality provisions in this Undertaking or a breach of any confidentiality deed contemplated in Part 8 of this Undertaking;
- (e) was not in the other party's lawful possession prior to such disclosure; or
- (f) is not received by the other party independently from a third party free to disclose such information, data or other matter;

and provided further that the information, data or other matter will cease to be Confidential Information if the information, data or other matter has ceased to retain its confidential nature, for example because:

- (g) the disclosure of the information, data or other matter by the recipient would no longer reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter;
- (h) the information, data or other matter has entered in the public domain through means other than a breach of the confidentiality provisions in this Undertaking or a breach of any confidentiality deed contemplated in Part 8 of this Undertaking; or
- (i) the information, data or other matter has been received by the recipient independently from a third party free to disclose the information, data or other matter.

**Construction Period Risk Free Rate** means the rate calculated by averaging the yield of the 10 year Commonwealth Government bond over the 20 Business Days preceding the earlier of:

- (a) the first draw down date on floating rate construction debt financing; or
- (b) the interest rate set date on a fixed rate construction debt financing;

effected by DBCT Management in respect of a relevant Capacity Expansion.

**DBCT Holdings** means DBCT Holdings Pty Limited ACN 096 395 783 and its successors and assigns, including persons taking by way of novation.

**DBCT Management** means BBI (DBCT) Management Pty Limited ACN 097 698 916 and its successors and permitted assigns, including persons taking by way of novation.

**DBCT Trustee** means BBI (DBCT) Investor Services Pty Ltd ACN 052 156 082 as trustee of the BBI (DBCT) Trust.

**Demurrage Costs** means the average cost across all Access Holders of demurrage in respect of the loading of coal on vessels at the Terminal over any period of 3 consecutive months (as estimated by the Operator in accordance with its historical practice of estimating notional demurrage costs).

**Different Terms** has the meaning given in Section 13.1(d)

**Dispute** has the meaning given to that term in Section 5.10(a).

**Dispute Notice** has the meaning given to that term in Section 5.10(a).

**Early Termination** means the termination of an Access Agreement or Existing User Agreement (Terminated Agreement) before its originally scheduled expiry date (but not where that occurred as a result of the exercise of a contractual right to terminate which was included in the Terminated Agreement when it was entered into, other than a right to do so for default in payment or insolvency of the Access Holder or default by DBCT Management. For the purpose of this definition, termination for default in payment or insolvency will be taken to have occurred if DBCT Management terminates the Terminated Agreement on other grounds but in circumstances where a default in payment or the insolvency of the Access Holder could have been reasonably expected within a reasonably short time thereafter had that termination not occurred).

**Effective Date** has the meaning given in the Standard Access Agreement.

**Excess Charge** has the meaning given in Section 11.4.

**Excess Tonnage** means, in respect of an Access Holder, the number of tonnes of the Access Holder's coal (excluding Non-Reference Tonnage) Handled in a Financial Year which is more than the Access Holder's Reference Tonnage for that Financial Year.

**Execution Date** has the meaning given in the Standard Access Agreement.

**Existing User Agreement** means an agreement which is in force as at the Commencement Date by which DBCT Management has granted an Access Holder an entitlement to have coal Handled through the Terminal.

**Financial Year** means 1 July in a calendar year to 30 June in the next following calendar year. Where the context allows, it also includes a period shorter than 12 months – from the Commencement Date to the next 30 June, inclusive, and from the last 1 July during the Term to the Terminating Date inclusive, but where that period is less than 12 months, any provision of this Undertaking which, in respect of a Financial Year, assumes a full 12 months period, will be taken to be modified proportionately.

**Framework Agreement** means the framework agreement between DBCT Holdings, the State, PCQ, DBCT Trustee, DBCT Management and others dated 31 August 2001.

**Good Operating and Maintenance Practice** means adherence to a standard of practice which includes the exercise of that degree of skill, diligence, prudence and foresight which would reasonably be expected from a competent, experienced and qualified operator of a facility comparable with the Terminal.

**Government Agency** means a minister, government, government department or another government body, a governmental, semi-governmental or judicial person or a person (whether autonomous or not) charged with the administration of any applicable law.

**Handle** means the receiving by rail, unloading, stacking, storing, reclaiming and loading of vessels with coal and any other relevant Services required by the Access Holder using any of the infrastructure at the Terminal.

**Increment** has the meaning given in Schedule C, Part B, Sub-Section 4 (c).

**Indicative Access Proposal** has the meaning given to that term in Section 5.5.

**Insolvent** means, for an Access Seeker, where one of the following events has happened in relation to the Access Seeker:

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the Corporations Act 2001 (Cth);
- (b) a meeting is convened to place it in voluntary liquidation or to appoint an administrator, unless the resolution is withdrawn within 14 days or the resolution fails to pass;
- (c) an application is made to a court for it to be wound up and the application is not dismissed within 14 days;
- (d) the appointment of a controller (as defined in the Corporations Act 2001 (Cth)) of any of its assets, if that appointment is made and not revoked within 14 days after it is made; or
- (e) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement.

**Leases** means the Primary Leases and the Secondary Leases.

**Lease Term** has the meaning ascribed to that term in the Framework Agreement.

**Master Plan** (a copy of the version which was current at the Commencement Date is attached at Schedule F) means the Master Plan approved by DBCT Holdings under the Port Services Agreement, and related engineering and other reports, as amended from time to time with the approval of DBCT Holdings under the Port Services Agreement.

**Month** means a calendar month.

**Monthly Payment** has the meaning given to it in Section 11.7 (a)

**Negotiation Cessation Notice** means a notice given in accordance with the provisions of Section 5.8.

**Non-Reference Tonnage** means, for an Access Holder, that portion of the Access Holder's Annual Contract Tonnage that is not Reference Tonnage.

**Notified Access Seeker** has the meaning given to that term in Section 5.4.

**Notifying Access Seeker** has the meaning given to that term in Section 5.4.

**Notional Contracted Tonnage** or **NCT** means, in respect of a Financial Year:

- (a) the Aggregate Annual Contract Tonnage; plus
- (b) Annual Contract Tonnage which an Access Holder had been entitled to have Handled in that Financial Year under an Access Agreement or Existing User Agreement but which it is no longer entitled to have Handled as a result of an Early Termination (Terminated Agreement) , but only until one or more of the following events occur:
  - (1) the Terminating Date; or
  - (2) the date that the Terminated Agreement would have expired (had the Early Termination not occurred); or
  - (3) the date that the tonnage under the Terminated Agreement is replaced with tonnage under a new Access Agreement which tonnage, because of Terminal Capacity, could not have been granted unless the Terminated Agreement had been terminated.

**Operation & Maintenance Charge** means the component of Access Charges under which DBCT Management recovers the Terminal Operating Costs from Access Holders and is calculated in accordance with Section 11.9.

**Operation & Maintenance Contract** means any contract in force between DBCT Management and the Operator under which the Operator is appointed by DBCT Management to operate and maintain the Terminal on a day to day basis.

**Operator** means Dalrymple Bay Coal Terminal Pty Limited ACN 010 268 167.

**Over-shipment** has the meaning given in Schedule C, Part B, Sub-Section 4(a).

**PCQ** means Ports Corporation of Queensland.

**Port Services Agreement** has the meaning ascribed to that term in the Framework Agreement.

**Primary Leases** has the meaning ascribed to that term in the Framework Agreement.

**Provisional Increment** has the meaning given in Schedule C, Part B, Sub-Section 4(a)

**Provisional Increment Repayment** has the meaning given in Schedule C, Part B, Sub-Section 4(e)

**QCA** means the Queensland Competition Authority, a statutory authority established under the QCA Act.

**QCA Act** means the Queensland Competition Authority Act 1997 (Qld).

**Queue** has the meaning given in Section 5.4(a).

**Reference Tariff** has the meaning given in Section 11.3.

**Reference Terms** means terms and conditions which are in all material respects the same as the terms and conditions in the Standard Access Agreement relating to the calculation of charges. (For clarification, it is expected that Reference Terms will usually only apply under an Access Agreement where the terms of that Access Agreement are, in respect of the risk profile and costs (direct and indirect) to DBCT Management, the same as the terms of the Standard Access Agreement).

**Reference Tonnage** means:

- (a) for an Access Holder under an Existing User Agreement, that portion of the Access Holder's Annual Contract Tonnage that is charged on the basis of terms that have been modified to align with the Reference Terms; and
- (b) for an Access Holder under an Access Agreement, that portion of the Access Holder's Annual Contract Tonnage which is charged in accordance with the Reference Terms.

**Related Party** has the meaning given to that term in the Corporations Act 2001 (Cth).

**Revenue Cap** is the amount DBCT Management is entitled to earn from Reference Tonnage and is calculated in accordance with Schedule C Part A, Section 3.

**Review Event** means any one or more of the following events :

- (a) a change in Reference Tonnage;
- (b) a change in Non-Reference Tonnage;
- (c) commissioning and handover to the Operator of the whole of a discrete phase of a Capacity Expansion;
- (d) receipt of insurance proceeds, damages or other compensation for loss, damage or destruction of an asset comprised in the Terminal, to the extent that those moneys are not applied in repair, reinstatement or replacement; or
- (e) annually on 1 July in respect of:

- (1) Capital Expenditure incurred during the preceding 12 months which do not relate to a Capacity Expansion (or which relate to a Capacity Expansion and are paid by DBCT Management after commissioning of the relevant phase); and
- (2) sale of assets comprised in the Terminal during the preceding 12 months.

**Secondary Leases** has the meaning ascribed to that term in the Framework Agreement.

**Security** means any form of security or guarantee required to be provided by an Access Seeker or Access Holder to DBCT Management pursuant to section 5.9.

**Services** means the services set out in Schedule E of this Undertaking.

**Standard Access Agreement** means the standard access agreement set out in Schedule B of this Undertaking.

**State** means the State of Queensland.

**Term** means the period between (and including each of) the Commencement Date and the Terminating Date.

**Terminal** means the land and port infrastructure located at the Port of Hay Point which is owned by DBCT Holdings or the State and leased to DBCT Trustee and/or DBCT Management, and known as the Dalrymple Bay Coal Terminal, and includes the following:

- (a) loading and unloading equipment;
- (b) stacking, reclaiming, conveying and other handling equipment;
- (c) wharves and piers;
- (d) deepwater berths; and
- (e) shiploaders.

**Terminal Capacity** means the maximum reasonably achievable throughput capacity of the Terminal (measured in tonnes per Financial Year) as determined pursuant to Section 12.1 of this Undertaking.

**Terminal Infrastructure Charge** or **TIC** has the meaning given in Section 11.3(c)

**Terminal Operating Costs** means any amounts:

- (a) reasonably incurred or charged by the Operator (including any margin payable to the Operator under the Operation & Maintenance Contract);
- (b) reasonably incurred or charged by DBCT Management with the express written consent of not less than 66% of Access Holders by contract tonnage; and
- (c) reasonably incurred by DBCT Management in exercising its rights under the Operation & Maintenance Contract to step in or take work out of the hands of the Operator (as a result of a default by the Operator),

but excluding Capital Expenditure other than minor capital expenditure not exceeding \$3million per Financial Year.

**Terminal Regulations** means regulations in force from time to time governing procedures for the operation of the Terminal and provision of the Services.

**Terminating Date** means 31 December 2009 or when the Operator changes, whichever is earlier.

**Undertaking** means this Access Undertaking (as amended from time to time) which is an access undertaking for the purposes of the QCA Act.

**WACC(1) Rate** means 9.02%, being the weighted average cost of capital set by the QCA in its Final Decision on the Dalrymple Bay Coal Terminal Draft Access Undertaking dated April 2005.

**WACC(2) Rate** means a rate equivalent to the Construction Period Risk Free Rate plus 3.18%.

**WACC(3) Rate** means a rate equivalent to the Capacity Expansion Risk Free Rate plus 3.18%.

**Year End Adjustment** or **YEA** has the meaning given in Section 11.5.

## Interpretation

In this Undertaking unless the context otherwise requires:

- (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
- (b) words denoting the singular include the plural and vice versa;
- (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
- (d) words denoting any gender include all genders;
- (e) references to parties, Parts, Sections, Annexures and Schedules are references to parties, Parts, Sections, Annexures and Schedules to this Undertaking as modified or varied from time to time;
- (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (g) references to any party to this Undertaking or any other document, deed or agreement include its successors or permitted assigns;
- (h) all references to dates and times are to Brisbane time;
- (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
- (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
- (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
- (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning; and
- (m) where there is a requirement under this Undertaking to consider whether Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holders' respective Annual Contract Tonnages.
- (n) Where measurement of coal "Handled" is being made in respect of a period, the tonnage loaded into vessels will be taken to be the tonnage Handled in that period.

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