DBCT MANAGEMENT

DBCT Management

2019 DAU Submission

1 July 2019

DBCT Management
Level 15 Waterfront Place, Brisbane QLD 4001
PO Box 7823, Waterfront Place QLD 4001
(07) 3002 3100
www.dbctm.com.au

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1 Executive Summary

1 The QCA issued an Initial Undertaking Notice (**IUN**) pursuant to s133(1)(b) of the *Queensland Competition Authority Act 1997* (**QCA Act** or **Act**), requiring DBCT Management (**DBCTM**) to give the QCA a draft access undertaking (the **2019 DAU**) for the period starting 1 July 2021 for the coal handling service at DBCT (**DBCT service**). The DBCT service is currently declared under s250(1)(c) of the QCA Act. However, the QCA is currently reviewing the declaration for the purposes of making a recommendation under s87A of the QCA Act to the Minister before expiry of the declaration on 8 September 2020. If the QCA is not satisfied about all the access criteria for the DBCT service, the QCA must recommend to the Minister that the DBCT service not be declared, with effect from expiry of the current declaration.

2 DBCTM considers that it has demonstrated the DBCT service does not satisfy the access criteria and therefore should not be declared after the current declaration expires. Under those circumstances, the 2019 DAU would not take effect as the QCA can only require an access undertaking to be given in respect of a declared service, and the term of the 2019 DAU is after the expiry of the current declaration. Even so, DBCTM provides this 2019 DAU in accordance with the requirements of the IUN.

3 While DBCTM acknowledges that the declaration review is a separate process, a number of issues investigated during the declaration review process are relevant to the access undertaking process. DBCTM's 2019 DAU has been informed by the QCA's Draft Recommendation[1] and the submissions of the DBCT User Group (and individual users) and DBCTM in the declaration review process.

4 In order for a service to be declared, the access criteria in s76(2) of the QCA Act must be satisfied. For access criterion (a) to be satisfied, a competition problem in an upstream or downstream market must be identified. Declaration enlivens Part 5 of the QCA Act which has the object of promoting the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets. That object will be advanced where the form of access regulation is designed to address the competition problem identified in the criterion (a) enquiry, and where it promotes the efficient operation of, use of and investment in the facility. Further, the form of access regulation must be proportionate to the extent or size of the competition problem.

5 In the QCA's Draft Recommendation, the QCA found that the competition problem which the declaration of the DBCT service would address is the potential for asymmetric terms of access between existing users and new users in the absence of declaration, and the impact those asymmetric terms may have on competition in the tenements market(s).

6 The identification of the competition problem means that the form of access regulation can be tailored to addressing that problem, and can be proportionate to the extent or size of that problem. In such circumstances, it would not be appropriate for the QCA to retain the status quo form of regulation by default. The 2019 DAU is designed to address the specific competition problem without the unintended consequences of regulatory overreach.

7 A heavy-handed price setting approach to DBCTM's access undertaking, whereby prices in the access undertaking are set by the QCA on an ex ante basis, is not appropriate to address the competition problem identified by the QCA and the User Group in the declaration review. Nor is such an approach appropriate where DBCT offers different services to different access seekers above the base coal handling service. Further, such an approach increases the risk of regulatory error – creating a disincentive for investment at a time when significant investment is required for the existing terminal and for terminal or system expansion.

8 The 2019 DAU allows for access prices to be agreed by commercial negotiation, with recourse to QCA arbitration where agreement cannot be reached. Providing for a meaningful opportunity for prices to be agreed will ensure that the access undertaking is fit-for-purpose and a proportionate regulatory response to the competition problem at hand. This will allow existing users' Access Agreements to operate as

[1] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018.

intended, and place new users on the same footing as existing users (having regard to the negotiate/arbitrate price review mechanism in existing users' Access Agreements).

9 The negotiate/arbitrate process in the 2019 DAU replaces ex ante regulation with ex post regulation. It does not remove regulatory oversight of access prices and other terms and conditions. This is an accepted approach in access undertakings and is consistent with the primacy given to commercial negotiations in the access regime provisions in the QCA Act, the Competition Principles Agreement and the Competition and Infrastructure Reform Agreement, and statements by the Productivity Commission in its review of the National Access Regime and recent enquiry into the regulation of airports.

10 Further, as explained in this submission, the 2019 DAU is consistent with the statutory criteria in s138 of the QCA Act for the approval of an access undertaking.

11 This submission is structured as follows:

11.1 Section 2 sets out the relevant legislative framework, summarises the QCA's previous approach to DBCTM's approved access undertakings, introduces the 2019 DAU, and explains why the 2019 DAU is appropriate having regard to the statutory criteria for the approval of access undertakings.

11.2 Section 3 provides important context for the 2019 DAU, including the competitive harm which declaration is intended to address, and the environment in which the terminal operates, where significant sustaining capital expenditure is required and where expenditure on expansions is required to provide capacity for new users.

11.3 Section 4 explains why lighter-handed regulation, in the form of a genuine negotiate/arbitrate regime, is the most appropriate way to address the identified competition problem, and is an accepted regulatory approach to access undertakings.

11.4 Section 5 describes the negotiate/arbitrate framework for the TIC in the 2019 DAU.

11.5 Section 6 describes the non-price related drafting in the 2019 DAU, which (with reference to the existing access undertaking) primarily relates to access queuing mechanisms.

2 Introduction

2.1 Overview

12 DBCTM's 2019 DAU is designed to best address the competition issues identified to date in the declaration review with regard to the DBCT service, and to create an environment to facilitate negotiations between DBCTM (as the access provider) and access seekers, consistent with the premise of the access provisions in Part 5 of the QCA Act.

13 This section:

13.1 sets out the legislative framework in the QCA Act and its relevance to the QCA's approval of this 2019 DAU;

13.2 summarises the QCA's previous approach to DBCTM's approved access undertakings;[2]

13.3 introduces DBCTM's 2019 DAU; and

13.4 explains why the 2019 DAU is appropriate having regard to the statutory criteria for the approval of access undertakings.

2.2 Background to DBCT

14 DBCT is a multi-user coal export facility located 38 kilometres south of Mackay at the Port of Hay Point. There are two coal terminals at the Port of Hay Point – DBCT and Hay Point Coal Terminal (**HPCT**).

15 DBCT is owned by the Queensland Government through its wholly-owned entity DBCT Holdings Pty Ltd. DBCT is leased to DBCT Investor Services Pty Ltd (**DBCT Trustee**) as trustee for the DBCT Trust which sub-leases it to DBCTM.[3]

16 The day to day operation and maintenance of DBCT is subcontracted to Dalrymple Bay Coal Terminal Pty Ltd (**DBCT Pty Ltd** or **the Operator**[4]) as the operator under the Operation and Maintenance Contract (**OMC**). The Operator is owned by a majority of the existing users of DBCT. Existing users comprise Anglo American, BHP Mitsubishi Alliance, BHP Mitsui Coal, Fitzroy Australia Resources, Glencore, Stanmore Coal, Middlemount Coal, Middlemount South, Peabody Energy and Terracom. Neither Brookfield nor DBCTM has any ownership interest in the Operator.

17 Prior to granting the lease to DBCTM, the Queensland Government declared the coal handling service at the Terminal for third party access under Part 5 of the QCA Act.

18 In April 2018 the QCA commenced its review of the declaration status of the DBCT service. While DBCTM considers there is clearly no basis for redeclaration, this submission and DAU is made in compliance with the requirements of the IUN.

2.3 Part 5 of the QCA Act – the provisions applying to declared services

19 Part 5 of the QCA Act sets out the regulatory regime that applies to services that have been declared under the Act. Importantly, it sets out the negotiation/arbitration framework that applies to provision of access

[2] Including the 2006 Access Undertaking (**2006 AU**), 2010 Access Undertaking (**2010 AU**), and 2017 Access Undertaking (**2017 AU**)

[3] DBCTM is 100 percent legally owned by its Australian parent, BPIH Pty Limited. BPIH Pty Limited is in turn 100 percent owned (through a number of interposed entities) by Brookfield Infrastructure Partners L.P. (BIP), with 29.8 percent of BIP held by Brookfield Asset Management Inc. (BAM) and 70.2 percent publicly listed on the New York and Toronto stock exchanges. BAM is 100 percent publicly listed on the New York and Toronto stock exchanges. This submission refers to the lessee entities of the terminal collectively as "DBCTM", and to DBCTM's ownership simply as "Brookfield"

[4] Note that the terminal operator for the purposes of the Access Undertaking (DBCT Pty Ltd), is different to the terminal operator for the purposes of the QCA Act (DBCTM). In this submission any references to Operator are to the user-owned DBCT Pty Ltd.

to the service for access seekers, as well as a process under which the QCA can approve an access undertaking to apply to the access provider.

Negotiation/arbitration framework

20 The default form of regulation applicable to declared services is the negotiate/arbitrate framework set out in Divisions 4 and 5 of Part 5 of the QCA Act.

Negotiation

21 Under this framework, access seekers and DBCTM are first required to attempt to reach a negotiated agreement for access to the declared service. To facilitate this, the Act requires that:

21.1 the access provider must, if required by an access seeker, negotiate with the access seeker for making an access agreement relating to the service;[5]

21.2 the access provider and access seeker must negotiate in good faith for reaching an access agreement;[6]

21.3 the access provider must not unfairly differentiate between access seekers in a way that has a material adverse effect on the ability of one or more of the access seekers to compete with other access seekers.[7] However, this does not prevent the access provider treating access seekers differently to the extent the different treatment is:

21.3.1 reasonably justified because of the different circumstances, relating to access to the declared service, applicable to the access provider or any of the access seekers; or

21.3.2 expressly required or permitted by an approved access undertaking or an access determination;[8]

21.4 in negotiations, the access provider must make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker;[9] and

21.5 the access provider must give the access seeker significant information, including for example; cost and asset value information, information about the price of access and how prices are calculated, estimates of spare capacity and other facility information.[10]

22 These negotiation obligations are intended to, where possible, facilitate agreed commercial access arrangements between access seekers and access providers without QCA involvement. The obligation to negotiate is consistent with the Competition Principles Agreement which provides that State or Territory access regimes should incorporate the principle that:[11]

> Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

23 In the event that an access provider and an access seeker cannot agree on an aspect of access to a declared service, and there is no access agreement in place, either party may notify the QCA that an access dispute exists.[12]

[5] QCA Act, s99
[6] QCA Act, s100(1)
[7] QCA Act, s100(2)
[8] QCA Act, s100(3)
[9] QCA Act, s101(1)
[10] QCA Act, s101(2)
[11] Competition Principles Agreement 11 April 1995 (as amended 13 April 2007) clause 4(a)
[12] QCA Act, s112

24 The QCA may then refer the matter to mediation if there has been no previous attempt to solve the matter by mediation and the QCA considers that a mediated resolution of the dispute can be achieved.[13] Otherwise, if the access dispute notice states that the dispute is to be dealt with by arbitration, the matter will be referred to the QCA for arbitration.[14]

Arbitration

25 Once a matter has been referred to arbitration, the QCA must use best endeavours to make an access determination within 6 months.[15] An access determination may deal with any matter relating to access to the service by the access seeker,[16] except for the specific matters set out in s119 of the QCA Act. Before making an access determination the QCA must give a draft determination to the parties and when making an access determination the QCA must give reasons for its determination.[17]

26 Section 120 of the Act sets out the mandatory considerations which the QCA must have regard to in making an access determination.

Access Undertakings

27 The QCA Act also provides for a process by which the QCA may either request a provider of a declared service to submit a draft access undertaking (i.e. the current process pursuant to which DBCTM submits the 2019 DAU), or a service provider may do so voluntarily. The protections set out in the legislative negotiate/arbitrate regime are available to access seekers for declared services, regardless of whether an access undertaking is in place (though any access determination is subject to an approved access undertaking).

Contents of access undertakings

28 The permitted contents of access undertakings are set out in s137 of the QCA Act. The only mandatory requirement, for present purposes, is an expiry date for the undertaking.[18] Section 137(2) lists a number of other discretionary details that may be included in an access undertaking.

29 These may include (inter alia): how charges for the service are calculated; information to be given to access seekers; how the spare capacity of the service is to be worked out; terms relating to extending the facility; requirements for the safe operation of the facility; and the review of the undertaking.

Factors to be considered in deciding whether to approve a DAU

30 The QCA may only approve a DAU (including one prepared by itself) if it considers it appropriate to do so having regard to the mandatory considerations set out in s138(2) of the Act. The considerations are closely aligned with those which the QCA must have regard to in making an access determination under s120, but reflect that the task for the QCA in these circumstances is to approve an access undertaking, not necessarily set a price for the service. Specifically, the s138(2) considerations include:

30.1 the object of Part 5 of the QCA Act;

30.2 the legitimate business interests of the owner or operator of the service;

30.3 if the owner and operator of the service are different entities—the legitimate business interests of the operator of the service are protected;

[13] QCA Act, s115A
[14] QCA Act, s116
[15] QCA Act, s117A
[16] QCA Act, s117(3)
[17] QCA Act, ss117(5) and (7)
[18] The contents set out in s 137(1A) are not relevant for present purposes as they only related to services owned or operated by a related access provider. Given that DBCTM is not vertically integrated it does not meet the definition of a related service provider under the Act.

30.4 the public interest, including the public interest in having competition in markets (whether or not in Australia);

30.5 the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;

30.6 the effect of excluding existing assets for pricing purposes;

30.7 the pricing principles mentioned in s168A;

30.8 any other issues the QCA considers relevant.

31 Under s138(2) the QCA must have regard to Part 5 of the QCA Act. The object of Part 5 is set out in s69E of the QCA Act:

> The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

32 Section 138(2) of the Act also requires the QCA to have regard to the pricing principles set out in s168A. The relevant pricing principles in relation to the price of access to a service are that the price should:[19]

32.1 generate expected revenue for the service that is **at least** enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and

32.2 allow for multi-part pricing and price discrimination when it aids efficiency; and

32.3 not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider, except to the extent the cost of providing access to other operators is higher (this is not relevant for present purposes); and

32.4 provide incentives to reduce costs or otherwise improve productivity.

33 DBCTM observes that the statutory criteria in s138 are not concerned with advancing the rights of existing users who have access under existing contracts, or setting charges for those users. Rather, s138 is concerned with promoting efficient operation of, use of and investment in the service, promoting effective competition in related markets, the legitimate business interests of the owner/operator, the public interest and the interest of persons who may seek access to the service.

2.4 DBCTM's historical access undertakings

Timeline of access undertakings

34 Since the DBCT service was initially declared, the QCA has approved three access undertakings in 2006, 2010 and 2017. A number of amendments have also been made to the AUs over time.

34.1 In June 2006, the QCA approved the first access undertaking for the DBCT service (**2006 AU**). This followed a consultation and assessment process that included the submission of two DAUs by DBCTM, and the release of draft and final decisions by the QCA.

34.2 In September 2010, the QCA approved the second access undertaking for the DBCT service (**2010 AU**). This access undertaking replaced the 2006 AU and took effect from 1 January 2011. The 2010 AU reflected a package of arrangements that had been agreed between DBCTM and the DBCT User Group. The QCA's assessment of the 2010 AU thus focused on the public interest and the interests of access seekers that were not members of the DBCT User Group and, therefore, not a party to the agreed package of arrangements.

[19] s168A(c) is not relevant to DBCTM as it only applies to "related access providers"

34.3 In February 2017, the QCA approved DBCTM's amended 2015 DAU (the **2017 AU**). The 2017 AU is currently in effect and terminates on the earliest of 1 July 2021 or the date that the DBCT service ceases to be declared.

Approach to previous undertakings

35 The access undertakings previously approved by the QCA have been extensive documents with a significant level of detail and prescription as to how DBCTM must provide access to the DBCT service.

36 While the previously approved access undertakings have purported to retain the negotiate/arbitrate framework set out in the Act, they have all mandated a highly prescriptive methodology for determining the charges that DBCTM may receive for its coal handling services. This has occurred by way of a QCA-determined revenue cap, from which a terminal infrastructure charge (**TIC**) is derived. The TIC is then published as a reference tariff, and has (inadvertently) negated the opportunity for negotiations to take place in accordance with the Act.

37 The QCA has previously determined DBCT's revenue cap using the "building blocks" methodology – a common approach used by Australian economic regulators to determine the prices that can be charged for services that are subject to full price regulation. Under this approach, the approved revenue cap is the sum of the various building block components, and includes: a return on capital; a return of capital; allowances for corporate overheads, remediation and tax; and adjustments for inflation.

38 The determination of the TIC is a highly complex process, requiring a number of annual updates to be approved by the QCA, including (inter alia) for; non-expansion capital expenditure (**NECAP**), indexation, depreciation, changes in contracted tonnage, QCA fee forecasts and true ups, minor model updates, and a range of other adjustments.

39 The effect of these pricing provisions in the previously approved access undertakings is that DBCTM has been subject to a highly prescriptive and heavy-handed form of regulation, much more akin to full price regulation rather than the fit-for-purpose negotiate/arbitrate regime contemplated in Part 5 of the QCA Act.

Previous access undertakings have left no room for real negotiations

40 Heavily prescribed access charges in the form of a formulaic building blocks methodology and a published reference tariff, along with the other terms and conditions of access that DBCTM must offer access seekers (which are set out in the standard access agreement (**SAA**) that DBCTM must offer to access seekers), means that under the previous access undertakings DBCTM and access seekers have not had a real or meaningful opportunity to negotiate to reach a commercial access arrangement.

41 In reality, access charges have been set by the QCA at the minimum possible level which is permissible under the pricing principles – the perceived efficient costs of providing the service.[20] This means that there is no scope for negotiation as access seekers have no incentive to negotiate. Parties are unable to take into account other relevant factors that would be considered in an arbitration, such as the quality of the service, the types of service on offer, or the value of the service to the access seeker. Further, the non-price terms and conditions have been pre-set under the SAA which DBCTM must offer under the access undertaking. Since the first reference tariff published by the QCA circa 2005, there have been **no** negotiations for agreements that depart from the reference tariff. This empirically demonstrates that the current heavy-handed price setting approach has not created an environment for negotiation. DBCT's entire capacity is fully contracted, with no existing contract departing from the standard terms in any material way, and all defaulting to the QCA determined reference tariff.

42 As explained above, apart from the date the access undertaking expires, there are no mandatory contents that must be included in an access undertaking – indeed, there is no requirement under the legislation for an access undertaking for a declared service to be in place at all. This means both the requirement to give an access undertaking, and the requirement for the access undertaking to specify the method for

[20] The Act requires that access charges provide for *at least* the efficient costs of providing the service.

calculating prices or indeed to publish a reference tariff, are at the discretion of the QCA. It is of note that DBCTM's previous access undertakings have provided for ***all*** the possible discretionary contents of an access undertaking. As discussed later in this submission, DBCTM's view is that this is not a proportionate regulatory response in light of the competition problem that declaration is intended to address – identified in the QCA's Draft Recommendation as the potential for asymmetric terms of access between existing users and new users in the absence of declaration, and the impact those asymmetric terms may have on competition in the tenements market(s). DBCTM will refer to regulatory precedent in Australia which demonstrates a lighter-handed approach is appropriate in the case of DBCT.

2.5 2019 Draft Access Undertaking

43 On 12 October 2017 the QCA issued an IUN pursuant to s133(1)(b) of the QCA Act, requiring DBCTM to give the QCA a draft access undertaking for the services declared under s250(1)(c) of the QCA Act by 1 July 2019. If approved by the QCA, and the DBCT service remains declared, the 2019 DAU will replace the 2017 AU when it expires.

44 Notwithstanding that DBCTM strongly submits that the access criteria are not satisfied and the DBCT service should not be redeclared, under the circumstances DBCTM considers that the 2019 DAU process provides an opportunity to revisit the competition problem that regulation of the DBCT services is intended to address, and to develop an access undertaking that is fit-for-purpose and proportionate in light of this.

45 DBCTM considers that in light of the competition problem identified in the QCA's Draft Recommendation on the declaration review, the fact it is fully contracted for existing capacity, and the current expansionary environment at DBCT, a less prescriptive access undertaking which provides for a real opportunity to negotiate commercial agreements is appropriate, having regard to the factors in s138 of the QCA Act.

46 The remainder of this submission explains DBCTM's 2019 DAU, which is more reflective of the negotiate/arbitrate framework in Divisions 4 and 5 of Part 5 of the QCA Act.

47 DBCTM's 2019 DAU includes substantially similar provisions to previous access undertakings in most respects, but does not include a prescriptive approach for determining the TIC that will apply to access seekers. Rather, the 2019 DAU leverages off the negotiation/arbitration framework set out in the QCA Act, in order that access seekers may negotiate the TIC with DBCTM, with recourse to QCA administered arbitration in the event that an agreement cannot be reached. The 2019 DAU includes matters that the QCA must have regard to in determining access disputes in order to provide greater certainty to access seekers of how an access dispute will be determined.

48 DBCTM considers that this approach is appropriate in circumstances where the competition issue, identified by the QCA in its Draft Recommendation, is narrow, as it ensures that new entrants (like incumbents) have the benefit of QCA arbitration as a protection in circumstances where a commercial agreement cannot be made. Further, it removes the risk of regulatory error and deterrence to investment in the terminal at a time where DBCT is in an expansionary phase, given that DBCT is at full capacity and will require a terminal expansion in the near future.

49 The negotiate/arbitrate process in the 2019 DAU substitutes ex post regulation for ex ante regulation.[21] It does not remove regulatory oversight of access prices and other terms and conditions. The 2019 DAU combines aspects of both heavy and light-handed regulation as it provides for prices to be determined by negotiation (with arbitration as a recourse), however, it provides a detailed framework for access to the DBCT service consistent with that in previous access undertakings.

[21] See NCC, Application by Allgas Energy Pty Ltd for Light Regulation of the Allgas Gas Distribution Network Final Decision, 28 April 2015 at [3.4]

2.6 2019 DAU is consistent with statutory criteria

50 The 2019 DAU sets out terms and conditions relating to: the negotiation of access; compliance with terminal regulations; the continuation of the User-owned operator of the terminal (DBCT Pty Ltd); the treatment of confidential information; reporting by DBCTM; pricing arrangements; terminal capacity expansions; master plans; and dispute resolution. The pricing arrangements have been formulated to facilitate commercially agreed outcomes through private negotiations between individual access seekers and DBCTM, with the ability for QCA arbitration where the parties are unable to reach a commercial agreement.

51 The following table summarises how the 2019 DAU is consistent with the mandatory requirement in s137(1) of the QCA Act in respect of the content of an access undertaking, and the statutory criteria in s138 of the QCA Act for the approval of access undertakings. This is explained further in relevant parts of this submission.

Figure 1 – Summary of 2019 DAU consistency with statutory criteria

QCA Act section	Description	2019 DAU consistent with statutory criteria
137(1)	An access undertaking must state the expiry date of the undertaking	The terminating date of the undertaking is set out in clause 1.3 of the undertaking and the definition of 'Terminating Date' in Schedule G.
138(2)(a)	the object of Part 5 of the QCA Act is 'to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.'	The 2019 DAU accords with the object of Part 5 of the QCA Act as it: • ensures the economically efficient operation of DBCT by retaining DBCT Pty Ltd as the majority user-owned Operator. This provides the users with transparency and operational involvement as the Operator is an independent service provider owned by a majority of the existing users of the Terminal; • promotes the economically efficient use of DBCT by: ○ giving users the opportunity to agree prices that are reflective of competitive market outcomes; ○ including access queuing provisions which require DBCTM to allocate any access rights according to the queue; ○ including a Standard Access Agreement containing standard provisions for use of DBCT; ○ requiring DBCTM, DBCT Pty Ltd and access holders to comply with the Terminal Regulations; • promotes the economically efficient investment in DBCT by facilitating pricing that generates expected revenue for the DBCT service that is at least enough to meet the efficient costs of providing access to the service and includes a return on investment commensurate with the regulatory and commercial risks involved; • allows for prices to be set on a negotiate/arbitrate basis which allows for commercial negotiation where both parties have some negotiating leverage (given that users have recourse to arbitration where negotiations fail) and facilitates outcomes that would be expected to be achieved in a competitive market environment; • enables the varied combinations of additional service offerings available at DBCT, above the standard service of handling coal, to be taken into account in setting price, thus facilitating efficient use of and investment in DBCT; • removes the risk of regulatory error in setting prices (where DBCTM and users are able to agree price) and promotes investment in the terminal at a time where DBCT is in an expansionary phase;

QCA Act section	Description	2019 DAU consistent with statutory criteria
		• addresses the competition concern in the tenements market identified in the declaration review process; • provides appropriate protections of the interests of access seekers and access holders, including in respect of confidentiality, disputes and access rights; • prevents DBCTM from engaging in conduct for the purpose of preventing or hindering an access holder's or access seeker's access; or unfairly differentiating between access seekers, access holders, or rail operators; • prevents DBCTM and its related bodies corporate from owning or operating a supply chain business in any market that is related to, or uses, DBCT.
138(2)(b)	the legitimate business interests of the owner or operator of the service	The 2019 DAU is consistent with DBCTM's legitimate business interests as it enables DBCTM and access seekers to negotiate access charges that provide DBCTM with an opportunity to recover the efficient costs for providing the DBCT service and to earn a commercial return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service. The 2019 DAU also: • promotes incentives to maintain, improve and invest in DBCT and the efficient provision of the declared services • enables DBCTM to meet its contractual obligations to existing users • enables DBCTM to attract and contract for additional tonnage from new and existing coal producers within the relevant region • enables DBCTM to ensure the Terminal is maintained and operating to meet legal requirements, including providing for its safe operation
138(2)(c)	if the owner and operator of the service are different entities–the legitimate business interests of the operator of the service are protected	The QCA has previously found that DBCT Holdings is the owner of the service and DBCTM is the operator of the service.[22] The 2019 DAU protects the legitimate business interests of DBCTM as set out above.
138(2)(d)	the public interest, including the public interest in having competition in markets (whether or not in Australia)	The 2019 DAU serves the public interest as it promotes the sustainable and efficient development of the Queensland coal industry, which in turn, provides a stimulus to the Queensland economy and local employment.[23] The QCA has noted that when the coal market is experiencing a period of growth, it may be that the public interest requires particular attention be paid to facilitating efficient investment in new or expanded capacity.[24] The market environment for this DAU is an expansionary environment where it is critical to facilitate efficient investment in new or expanded capacity. Further, the ageing infrastructure of DBCT is at the point where large replacement/refurbishment decisions are required on significant assets. The investment in large-scale capex is one that must be balanced against increasing maintenance costs. The 2019 DAU promotes the public interest by providing for the terms and conditions on which access seekers can seek access to DBCT and by facilitating the negotiation between DBCTM and access seekers of access prices. The ability for DBCTM and access seekers to reach commercial agreement as to price removes the risk of regulatory error in setting prices, and promotes

[22] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, page 24
[23] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, page 25
[24] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, page 25

QCA Act section	Description	2019 DAU consistent with statutory criteria
		economically efficient investment in the terminal at a time where DBCT is in an expansionary phase and requires significant capital expenditure on existing assets to continue operating the terminal at high utilisation rates in a period of high demand.
138(2)(e)	the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected	The 2019 DAU is consistent with the interests of access seekers as it: • facilitates the provision of access on reasonable commercial terms. The DAU includes provisions relating to access negotiations and queuing (to ensure access is provided fairly to access seekers) and incorporates a Standard Access Agreement; • allows new access seekers to negotiate access prices with DBCTM, with recourse to QCA arbitration where negotiations fail. This is consistent with the mechanism for price reviews available to existing access holders under their existing user agreements; • enables prices to be agreed based on the service acquired by the access seeker and taking into account the value to the access seeker of the particular services; • protects existing contractual entitlements as to capacity; • contains a fair and non-discriminatory process for obtaining access to terminal capacity; • contains a non-discrimination provision preventing DBCTM from engaging in conduct for the purpose of preventing or hindering an access holder's or access seeker's access; or unfairly differentiating between access seekers, access holders, or rail operators; • facilitates the provision of clear and transparent information about access to and use of the declared service to support a principled negotiation framework and an effective dispute resolution process; • includes a clear framework for capacity expansion decision-making; • provides for the reasonable protection of access seekers' confidential information; • retains DBCT Pty Ltd as the majority user-owned Operator. This provides the users with transparency and operational involvement as the operator is an independent service provider owned by a majority of the existing users of the Terminal.[25]
138(2)(f)	the effect of excluding existing assets for pricing purposes	DBCTM does not consider that the QCA should give this factor weight in deciding whether to approve the 2019 DAU, given the 2019 DAU adopts a negotiate/arbitrate approach to pricing.
138(2)(g) and 168A	The pricing principles in s168A being: - generate expected revenue for the service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and	The negotiate/arbitrate framework in the DAU will enable prices to be set that generate expected revenue for the DBCT service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved. The negotiation framework will take into account the types of services provided by DBCT to the relevant access seeker, as well as the overall efficiency impacts of those services. This may allow for multi-part pricing and/or price discrimination where it aids efficiency. The 2019 DAU provides that DBCTM and its Related Bodies Corporate will not own or operate a Supply Chain Business in any market that is related to, or uses, the Terminal. Accordingly, it does not allow a related access provider to set terms and conditions that discriminate in favour of the downstream

[25] Access seekers have the right to become part-owners of the operator DBCT Pty Ltd upon becoming an access holder

QCA Act section	Description	2019 DAU consistent with statutory criteria
	- allow for multi-part pricing and price discrimination when it aids efficiency; and - not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider…; and - provide incentives to reduce costs or otherwise improve productivity	operations of the access provider or a related body corporate of the access provider. The negotiation framework will include a consideration of incentives to reduce costs or otherwise improve productivity.

3 Context for the 2021 access undertaking

3.1 Overview

52 This section explains important context from the declaration review process that is relevant to the QCA's consideration of DBCTM's 2019 DAU. In particular, it explains the narrow competitive harm identified by the QCA in its Draft Recommendation, which it considered justified a recommendation that the DBCT service be declared. The section also provides context as to the current market environment for the DBCT service.

3.2 Summary

53 In regard to the DBCT declaration review and the access criteria in s76(2) of the QCA Act, the only relevant market regarding criterion (a) that has been identified by the QCA is the coal tenements market(s). DBCTM has demonstrated that competition is not materially impacted by declaration, however to date the User Group has argued to the contrary – based solely on the view that without declaration there would be an asymmetry of terms for new users versus the protected incumbents. In its Draft Recommendation, the QCA agreed that this potential asymmetry was problematic.

54 The limited and narrow competition problem which declaration is intended to address in the case of DBCT is to ensure that potential efficient new entrants to the coal tenements markets do not face a material asymmetry in the terms of access to the extent that they would be deterred from entering the coal tenements markets.

55 The narrow scope of the competition problem must inform the QCA's assessment of DBCTM's 2019 DAU and should be used by the QCA to ensure that the final 2021 AU is a proportionate and fit-for-purpose regulatory response.

56 It is also important that the QCA's assessment of the 2019 DAU has regard to the fact that DBCT is now fully contracted and has a substantial access queue, and is therefore in an expansionary environment. In this context, it is particularly important that the access undertaking does not introduce unnecessary regulatory burdens which would put at risk the efficient investment in the terminal, so as to ensure that new entrants to the coal tenements markets will be able to gain capacity at DBCT.

3.3 Problem definition – the competition issue that declaration needs to address

The competitive harm identified by the QCA

57 In order to recommend that a service be declared, the QCA must be satisfied about the access criteria set out in s76 of the QCA Act. Access criterion (a) is concerned with identifying that competitive harm would occur in dependent markets without declaration, and that declaration would materially improve competition in this relevant market. It provides[26]:

> that access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service would promote a material increase in competition in at least 1 market (whether or not in Australia), other than the market for the service

58 Criterion (a) must be satisfied in order for a service to be declared. As such, a competition problem in an upstream or downstream market must be identified in the declaration process. Declaration enlivens Part 5 of the QCA Act which has the object of promoting the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets. That object will be advanced where the form

[26] QCA Act, s76(2)(a)

of access regulation is designed to address the competition problem identified in the criterion (a) enquiry. Further, the form of access regulation must be proportionate to the extent or size of the competition problem.

59 The reason for the QCA's Draft Recommendation that criterion (a) was satisfied and that the DBCT service should be declared, was summarised by the QCA in the following paragraph from its Draft Recommendation:[27]

> The QCA's view is that access to the DBCT service in a future without declaration would likely create a materially uneven playing field between existing users and potential entrants in the market for coal tenements in the Hay Point catchment region. In an environment where existing users would likely seek coal tenements to continue to benefit from their existing user rights, this asymmetry would be material enough to likely deter more efficient entrants that may have higher valuation than incumbents but that is unlikely to be sufficiently high to overcome the materially favourable access terms and conditions that incumbents would enjoy accessing the DBCT service. Therefore the environment for competition in the coal tenements market in Hay Point catchment region would be materially adversely affected in a future without declaration.

60 In other words, the QCA considered that if incumbents of DBCT have access on materially better terms than potential new entrants to the coal tenements market (by virtue of existing 'evergreen' contracts), then this asymmetry will deter those potential new entrants from entering the coal tenements market – resulting in a material adverse impact on competition in that market.

61 Based on the analysis in the QCA's Draft Recommendation, it is clear that the identified competition problem that declaration is intended to rectify, is narrow. This is because:

61.1 The competitive harm is limited to the coal tenements markets;

61.2 The coal tenements markets, by the QCA's reasoning, are geographically narrow, being limited to Hay Point catchment region;

61.3 All existing users are protected under their existing user agreements; and

61.4 The asymmetry in access terms is the only competitive concern identified by the QCA[28].

Harm was limited to the coal tenements markets in the Hay Point catchment

62 The QCA examined the impact of declaration on the environment for competition in four key markets:

62.1 The coal tenements markets;

62.2 The DBCT secondary capacity trading market;

62.3 The coal haulage services market; and

62.4 The coal export market.

63 In all markets except for the coal tenements markets the QCA found that it was not apparent that the environment for competition would be materially better with declaration.[29] This conclusion means that the competitive harm that declaration is intended to address is limited to the coal tenements markets in the Hay Point catchment region.[30]

[27] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 94

[28] With respect to criterion (a) which concerns competition in upstream and downstream markets

[29] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, pages 52-54, Table 10 Summary of key positions

[30] DBCTM notes that while the QCA's Draft Recommendation acknowledged separate markets for exploration and development tenements, and production tenements, it did not specify from which of the markets it considered the harm was likely to arise.

Existing users are protected under evergreen contracts, with or without declaration

64 The QCA's Draft Recommendation was clear that DBCTM's market power, with respect to existing users, was adequately constrained by the existence of the evergreen existing users agreements. The potential for DBCTM to exercise market power was limited to potential *new* users:[31]

> …existing DBCT users are protected from DBCT Management's exercise of market power in the absence of declaration, due to the evergreen nature of their existing user agreements. However, potential new users would be exposed to DBCT Management's exercise of market power in the absence of declaration.

65 The DBCT User Group agreed, on a number of occasions, with this proposition that the existing user agreements were sufficient protection for existing users:[32]

> …it is now a commonly agreed position that existing users would continue to enjoy the benefit of their user agreements (including how they deal with pricing in the absence of an access undertaking)…

66 This is the case both with and without declaration. The existing user agreements contain provisions which provide for the review of capital charges on each agreement revision date, which is defined as:

66.1 the commencement of each access undertaking;

66.2 the date that a Price Ruling is made that an expansion will be differentiated; or

66.3 if an access undertaking ceases to be relevant, the date 5 years after the previous agreement revision date.

67 As explained in the User Group submission to the QCA on the declaration review:[33]

> While the User Agreements involve charging at the TIC provided by the QCA while the declaration continues, as discussed in detail in the Allens Advice (see Schedule 1 of the Access Framework) they contain a pricing regime that will continue to apply **in the absence of** declaration or **a QCA approved TIC**. *(emphasis added)*

68 When a review event occurs, a negotiate/arbitrate mechanism begins under the existing users' agreements where the parties must first endeavour to agree as early as practicable on the basis and amount of new charges.[34] Where agreement is not possible, either party may ultimately refer the matter to arbitration – which will be conducted by the QCA unless the QCA is unwilling or unable to act.[35]

69 This review mechanism exists outside the access undertaking mechanism and is based in the contractual obligation in the existing user agreements. In fact, the current and previous versions of the access undertaking expressly excluded the application of the undertaking to disputes under existing Access Agreements. Those undertakings provide that unless otherwise agreed, disputes under an Access Agreement or Existing User Agreement will be dealt with in accordance with the provisions of that Agreement and are not dealt with under the undertaking.[36]

70 These contractual protections for existing users mean that the competitive harm is narrowed even further to focus on the terms and conditions of access that are applicable to new users. This is consistent with the scheme of Part 5 of the QCA Act under which access undertakings are directed at facilitating access by new access seekers, not access holders.

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[31] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 37

[32] DBCT User Group July 2018 Submission on the declaration review, page 71; DBCT User Group March 2019 Submission on the declaration review, page 64

[33] DBCT User Group July 2018 Submission on the declaration review, page 72

[34] Clause 7.2(a) and (c) of the Standard Access Undertaking at Schedule B of the 2017 AU

[35] Clause 7.2(c) and (d) of the Standard Access Undertaking at Schedule B of the 2017 AU

[36] 2017 AU, section 17.1; 2010 AU, section 17.1 and 2006 AU, section 5.10(a)

The task for regulation under Part 5

71 The asymmetry in the terms and conditions of access for incumbents versus potential new entrants to the coal tenements markets is at the core of the alleged competitive harm that declaration of the DBCT service is intended to address.

72 The QCA explains in its Draft Recommendation that where declaration ensures that there is no material difference in the access terms for incumbents and new entrants there will be no competition problem:[37]

> All other things being equal, access as a result of declaration would not create a **material** difference in access terms between incumbents and new entrants; so, more efficient entrants would not be discouraged from participating in the coal tenements market in the Hay Point catchment region. Therefore, competitive conditions in the coal tenements market in the Hay Point catchment region would be materially better than they would be without declaration. *(emphasis added)*

73 This, therefore, is the task that an appropriate access undertaking for DBCTM is to achieve – the removal of any material asymmetry in the terms and conditions of access. Providing access under the access undertaking ensures that there is not a material difference in access terms between incumbents and new entrants, efficient new entrants will not be discouraged from entering the coal tenements markets in the Hay Point catchment region, the competitive harm that declaration is intended to address will be remedied, and the object of Part 5 will be promoted.

What this means for the design of any access undertaking for DBCTM

74 The competition problem that is derived from the QCA's analysis of criterion (a) must inform the QCA's consideration of an appropriate access undertaking in two key ways:

74.1 The QCA must ensure that the competition problem identified in its analysis of criterion (a) is remedied through the undertaking (if it is not already through simply being declared) – i.e. the access undertaking must be fit-for-purpose; and

74.2 The level of prescription or intervention of regulation under the access undertaking should be informed by the extent/size of the competition problem, such that the regulatory response is proportionate to the problem that regulation/declaration is intended to address.

75 This is consistent with the COAG Guide to Best Practice Regulation which sets out the importance of:[38]

75.1 establishing a case for action before addressing a problem; and

75.2 ensuring that government action is effective and proportional to the issue being addressed.

What is a fit-for-purpose access undertaking?

76 It is a fundamental premise of regulatory good practice that regulation should be designed to address the specific problem at hand, in the least burdensome way. As Productivity Commissioner Paul Lindwall noted in a recent speech:[39]

> Ideally regulation should be carefully designed for a particular purpose — and it should be calibrated to meet that objective in the least burdensome way.

77 This principle is also acknowledged by the QCA on its website (in the context of Queensland's regulatory impact statement system) where it states:[40]

> Regulation can impose costs that are excessive or unnecessary, and have unintended or undesirable effects.

[37] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 91
[38] COAG, Best Practice Regulation, A Guide for Ministerial Councils and National Standard Setting Bodies, October 2007, pages 5 and 6
[39] Commissioner Paul Lidwell Speech delivered to the Infrastructure Partnerships Australia Industry Lunch in Sydney (19 March 2019)
[40] http://www.qca.org.au/Other-Sectors/Red-Tape-Reduction accessed 6 June 2019

> It is therefore important for regulation to be subjected to a systematic process that ensures, in the first instance, that the regulation is necessary, and that if it is, that it is efficient and effective in achieving policy objectives without imposing unnecessary burdens on Queensland business, community and government.

78 As such it is important that in approving an appropriate access undertaking, the QCA has proper regard to the competition problem that declaration is intended to address, and approves an undertaking which addresses this problem in the least burdensome way possible. As discussed below, this is particularly relevant in the current context of DBCT being fully contracted and in an expansionary phase, with DBCTM requiring incentives to invest in terminal expansions to support the continued growth of the Goonyella coal industry.

What is a proportionate regulatory response to the competitive problem?

79 It is also important that the QCA's approach to the regulation of the DBCT service takes into account the proportionality principle – that is, the level of prescription or intervention of the regulation should be commensurate with the complexity and significance of the problem and the size of potential adverse impact on competition.

80 In this case, the competition problem identified in the QCA's Draft Recommendation is limited to the coal tenements markets within the Hay Point catchment region and to the terms and conditions of access available to new users of the DBCT service.

What is sufficient to address the regulatory problem in the current circumstances

81 In this case, a proportionate and fit-for-purpose access undertaking will ensure that there is no material asymmetry between the terms and conditions of access for new and existing users. This can be achieved by giving new users a right to QCA administered arbitration, in circumstances where terms of access (including with respect to price) cannot be agreed through commercial negotiations. This would align the terms and conditions of access for new users with those of incumbents under their existing user agreements.

82 As discussed in the following section, the negotiate/arbitrate framework set out in DBCTM's 2019 DAU provides for this right to arbitration and ensures that there is no material asymmetry in the terms and conditions of access available to new and existing users of DBCTM. Further, the 2019 DAU facilitates access to the DBCT service for new users. It includes access queuing provisions which require DBCTM to allocate any access rights according to the queue and ensure that there is a fair and transparent process for gaining access to capacity at DBCT.

3.4 Market environment

83 It is important to provide the context of the market environment faced by DBCTM in the upcoming access undertaking period. Much common ground has already been established through the declaration review process which informs DBCTM's submissions in this regard.

84 The declaration review has resulted in a number of issues of common ground:

- 84.1 that DBCT is currently at capacity and will need to be expanded to meet additional demand;
- 84.2 existing contracts for all incumbents (up to 100% of current system capacity) provide protections with regard to pricing; and
- 84.3 that current users, and indeed all users in the Bowen Basin, prefer to use DBCT rather than other terminals – for a range of *non-price* reasons (superior service).

Demand for the DBCT service

85 DBCTM is currently fully contracted long term to the System Capacity of 84.2Mtpa[41], which is the maximum tonnage that can be contracted under the 2017 AU.

86 In its Draft Recommendation[42] the QCA concluded (based on analysis done by MMI) that DBCT's total foreseeable demand during the declaration period is ~93Mtpa (occurring in this relevant regulation period) and that DBCT would have to expand to be able to meet total foreseeable demand.

> The QCA's estimate of the total foreseeable demand over the declaration period is approximately **93 mtpa**. However, DBCT's nameplate capacity is 85 mtpa, which means **DBCT would need to be expanded to meet the total foreseeable demand**. The QCA's view is that for total foreseeable demand in the market to be met by DBCT, **the Zone 4 and 8X Phase 1 expansion projects would be required** (see Part C, Appendix A). Additionally, as per Aurizon Network's 2016–17 Network Development Plan (NDP), DBCT Zone 4 and 8X expansions will require expanding the capacity of the Goonyella system to accommodate the higher tonnage. (*emphasis added*)

87 The fact that DBCT is currently at capacity (on a System Capacity basis) and will have to expand to accommodate future demand was also acknowledged by the DBCT User Group in its cross submission[43] to the QCA:

> If the QCA takes the view that 'System Capacity' is the appropriate measure, then it is clear that the facility is currently at capacity, such that the only questions the QCA is required to answer for the purposes of section 76(3) QCA Act are whether it is reasonably possible to expand DBCT's capacity and, if so, to what extent.
>
> The answer to that question is clearly yes.
>
> Based on previous planning that 'reasonably possible' expanded capacity would include each of the Zone 4, 8X and 9X expansions.

88 The DBCT User Group relied on a Wood Mackenzie forecast of utilisation of DBCT which had utilisation of 86.9Mtpa in 2025 (being greater than system capacity of 84.2Mtpa) and with a peak of 93.1Mtpa in 2028.[44] To deliver that capacity in the required timeframe means that an expansion process needs to commence now, and as explained below, it has in fact commenced.

89 While the demand forecasts relied on by DBCTM in the declaration review were forecasts of demand in the market in which the DBCT service is provided, consistent with access criterion (b) in s76(2) of the QCA Act, and therefore included demand serviced by other terminals, they nonetheless also revealed that DBCT would have to expand to service foreseeable demand.[45]

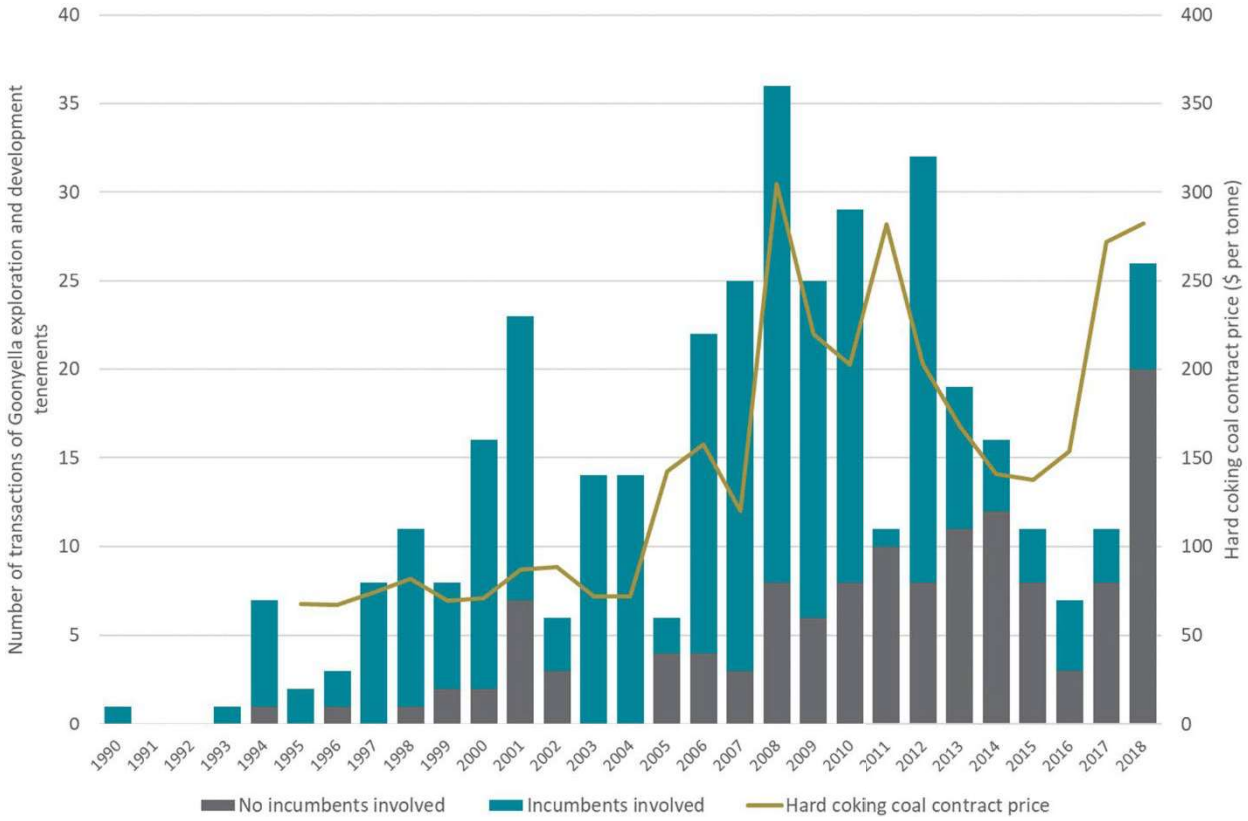
90 The access queue also demonstrates that demand for DBCT is greater than DBCT's capacity and DBCT would have to expand to service that demand. The current DBCT access queue ramps up to a peak of 44Mtpa from July 2024 onwards. The queue has recently been refreshed. As part of the Notifying Access Seeker (NAS) process in late 2018, access seekers which did not submit signed access agreements were removed. A number of these access seekers disputed their removal from the queue. Some have been reinstated and others withdrew their Access Applications, with some ongoing disputes at the time of this submission. The queue includes new Access Applications received since late 2018 totalling 35 Mtpa. The current queue therefore comprises the reinstated applications and new Access Applications that joined the queue in the last 12-18 months.

91 Some of the new Access Applications were from new entrants in the coal market, which recently concluded purchases of coal tenements in the Goonyella market. The number of tenement transactions in 2018 (for

[41] The final 0.13Mtpa of the 84.2Mtpa (which became available in June 2019) is expected to be contracted imminently
[42] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 51
[43] DBCT User Group April 2019 Submission on the declaration review, page 46
[44] DBCT User Group April 2019 Submission on the declaration review, page 35
[45] DBCTM May 2018 Submission on the declaration review at [222]; DBCTM March 2019 Submission on the declaration review at [122]

both exploration and development tenements) was the highest in 6 years, as illustrated in the figure below from the DBCTM April 2019 Submission[46] in the declaration review.

Figure 2 – Goonyella system tenements transactions[47]



92 Of the 26 coal tenements transactions in 2018, 20 were made by new entrants to the coal market. A number of these entrants have demonstrated genuine interest in access to DBCT, with the submission of bona fide Access Applications to secure their places in the DBCTM access queue for future releases of capacity. This indicates real demand currently in the queue.

93 In support of this demand (above the current fully contracted capacity), DBCTM made numerous submissions as part of the declaration review in relation to current demand, including new mine developments and current users expanding[48]. Below are some examples of recent evidence relating to mine developments:[49]

93.1 Olive Downs (Pembroke Resources): It was reported in an article in May 2019 that Queensland has approved one of the country's biggest coal mines, Olive Downs to produce 15Mtpa[50]. [redacted]. In the same article it was stated that:

> The mine is expected to be in the lowest quartile of global mines in terms of operating costs with exports to be shipped out of Dalrymple Bay Coal Terminal.

[46] DBCTM April 2019 Submission on the declaration review, Appendix 2 – HoustonKemp report on Goonyella System Tenement Transactions, page 16

[47] HoustonKemp, Transactions of coal tenements in the Goonyella system, April 2019, page 16, Figure 4.1

[48] Declaration review submissions: DBCTM July 2018 Cross Submission, paragraphs 216-217, pages 43-44; DBCTM March 2019 submission, Appendix 4 – DBCT Foreseeable Demand Analysis

[49] See also, the discussion of the access queue for DBCT in the DBCTM March 2019 Submission on the declaration review at [129] to [141] and Appendix 4 - DBCT Foreseeable Demand Analysis.

[50] https://www.theaustralian.com.au/business/mining-energy/queensland-approves-pembrokes-giant-1bn-coal-mine-at-olive-downs/news-story/d61e27be686b04fc6b19988e10fad453 (accessed on 23 May 2019)

93.2 Gregory Crinum (Sojitz): [redacted]. In March 2019 it was reported that an initial truck and shovel fleet will start work in May, drawing on workers brought across from Sojitz's Minerva operation – which is also in the Emerald area. A second fleet and dragline are expected to come online in June/July and Sojitz hopes to have the Gregory wash plant running in July. Mr Vorias (CEO & MD of Sojitz) said Sojitz was anticipating first coking coal exports from the restarted operation in the last quarter of 2019.[51] The company further said that[52] "Sojitz plans to recommence operations at Gregory Crinum as soon as completion of the acquisition process". The completion of the acquisition was communicated in March 2019.

93.3 Burton/ New Lenton (New Hope): [redacted]

93.4 Winchester South Project (Whitehaven): The project has recently been declared as a Coordinated Project[53], which has strategic significance to the area of the State because of the potentially significant economic and employment benefits it brings. Whitehaven proposed a mine that could produce up to 8Mtpa of coal for 30 years with a production start date of 2023.[54]

93.5 Eagle Downs[55]: In September 2018, South32 completed the acquisition of a 50% interest in the Eagle Downs metallurgical coal project. South32 stated that the project is an 'attractive development option within our growing portfolio' and that they 'will now commence the final feasibility study which will seek to optimise the mine's design and development'. [redacted]

Expansion process

94 The fact that DBCTM is fully contracted[56] and the high demand in the queue, has led DBCTM to commence the expansion process.

95 As discussed in detail in DBCTM's Cross Submission[57] as part of the Declaration Review, DBCTM commenced the expansion process in early 2018 when it became evident that all available capacity at DBCT would likely be contracted. DBCTM engaged the Independent Logistics Company (**ILC**) to conduct a capacity assessment as part of the 2019 Master Plan (**MP 2019**) to determine DBCT's expansion opportunities. MP 2019 was issued to DBCT Holdings in June 2019, with DBCT Holdings' approval expected in July 2019.[58]

96 In parallel to the work on MP 2019, DBCTM is also developing a Standard Underwriting Agreement and expects to submit a draft to the QCA for review in the next few months as the next step toward commencing with expansion studies.

[51] https://www.i-q.net.au/main/sojitz-gears-up-to-restart-gregory-mine (accessed on 23 May 2019)
[52] https://www.sojitz.com/jp/news/docs/180530e.pdf (accessed on 23 May 2019)
[53] http://www.whitehavencoal.com.au/winchester-south-project-declaration/ (accessed on 18 April 2019)
[54] https://www.townsvillebulletin.com.au/news/townsville/950-mining-jobs-a-step-closer-after-government-announcement/newsstory/56d7c52825e7a95ca03b35844003ed82 (accessed on 18 April 2019);
https://www.australianmining.com.au/news/whitehavens-1bn-winchester-south-coal-mine-moves-forward/ (accessed on 23 April 2019)
[55] https://www.south32.net/what-we-do/places-we-work/eagle-downs-metallurgical-coal (accessed on 28 June 2019)
[56] Final available capacity of 0.13Mtpa expected to be contracted imminently
[57] DBCTM April 2019 Submission on the declaration review, Appendix 7 – DBCT Expansion Activity
[58] Note that at the time of submission of the 2019 DAU, the most recent approved Master Plan is the 2018 Master Plan, attached to this submission as Appendix 5

Previous Access Undertaking precedent

97 As illustrated in Figure 2, the high number of coal tenements transactions in 2018 is similar to those between 2006 and 2010, when coal prices (as now) were high (between US$200 and US$300 per tonne).

98 Further, the fact that the QCA and User Group have confirmed that DBCT would have to expand to meet the demand corresponds to the 2006 and 2010 regulatory reset environment where DBCTM, the QCA and the User Group all contemplated high demand growth and concurred that DBCT would need to expand.

99 The QCA previously provided higher rate of returns in periods where demand was high and expansions were either underway or being assessed. The higher rates were given to ensure that the infrastructure provider is sufficiently incentivised to undertake the expansion for the increased level of risk. Below is a list of such instances:

99.1 An incentive beta for DBCT in order to ensure that it has sufficient incentive to undertake timely investment in new infrastructure. The expansions occurred during the 2005 and 2010 periods.

99.2 Under the 2006 AU[59], the QCA provided DBCTM with a WACC of 9.02%, which was higher than the 8.54% it regarded as sufficient for the existing terminal at the time. The QCA stated that:

> the proposed major expansion added to the level of risk, particularly in the light of the uncertainty about the long term outlook for demand.[60]

and that:

> The Authority, however, accepts that the proposed expansion to DBCT beyond 60 mtpa involves an **increase in overall risk**, notwithstanding the measures put in place by the Authority to mitigate the risk. Therefore, the Authority proposes to accept the equity beta of 1.0 proposed by DBCT Management in its response to the Authority's draft decision.[61]
>
> In reaching this decision, the Authority considered adopting a 'two-tier' approach to DBCT's rate of return, under which the 8.54% would apply until DBCT is substantively expanded, at which point the **WACC would increase to 9.02% (equity beta of 1.0) for the entire terminal**. *(emphasis added)*

100 As noted above, the QCA approved an equity beta of 1 having regard to the expansions that were contemplated at the time and the inherent risks in undertaking the investment in what was a more buoyant market. DBCTM committed to those investments based on the expectation that an equity beta of 1 would continue to be applied and its risk profile would not materially increase. It did not contemplate that this beta might subsequently be lowered after the capital had been committed and the investment became a sunk cost. However, subsequent to investing in those major expansions, the QCA reduced the equity beta in the 2017 AU process. This has heightened the regulatory risk inherent in future expansions as it demonstrates that incentive returns can be removed not long after the investment has been made.

What this means for the design of any access undertaking for DBCTM

101 As explained above, it is clear that DBCT is in an expansionary environment and requires significant capital expenditure in a period of high demand. It is therefore imperative that, consistent with the object of Part 5, the access undertaking is not so restrictive that it interferes with DBCTM's incentive to efficiently invest in the development and expansion of the terminal, and it should ensure that the potential for regulatory risk interfering with investment incentives is limited.

102 If the access undertaking does adversely affect DBCTM's incentive to invest in the development and expansion of the terminal, *this will create the competitive harm that declaration is intended to prevent*. If

[59] QCA 2005 Decision re: DBCT Draft Access Undertaking, 15 April 2005
[60] QCA 2005 Decision re: DBCT Draft Access Undertaking, 15 April 2005, page *i*
[61] QCA 2005 Decision re: DBCT Draft Access Undertaking, 15 April 2005, page 139

DBCT is not expanded, then efficient new entrants to the coal tenements market will not be able to gain access to DBCT and would be deterred from entering the coal tenements markets.

3.5 Additional services offered by DBCT

Additional services

103 DBCT provides additional services to users above the standard service of handling coal. These services impact on the terminal's overall efficiency (or capacity).

104 During the declaration review process, the User Group identified that the DBCT service has different and distinct characteristics which other coal terminal services do not have, including:

- 104.1 unique co-shipping opportunities;
- 104.2 unique blending opportunities;
- 104.3 DBCTM promoting the ease of trade of metallurgical coal of similar grades or quality between parties, such that a train or trimming stockpile may be provided from one party to another;
- 104.4 DBCTM providing remnant stockpiles to certain users;
- 104.5 other services in the access undertaking that DBCTM provides in accordance with Good Operating and Maintenance Practice, including:
  - 104.5.1 moisture adding;
  - 104.5.2 compacting;
  - 104.5.3 surfactant adding;
  - 104.5.4 dozing; and
- 104.6 any other services reasonably requested by an access holder.

105 These additional services are described further in section 5 of this submission.

What this means for the design of any access undertaking for DBCTM

106 The design of the access undertaking should take into account the varied combinations of additional service offerings available at DBCT, above the standard coal handling service. In practice, different users require different combinations of services and value those combinations differently. In this context a one-size-fits all approach to setting access charges will not be fit-for-purpose.

3.6 Conclusion

107 The declaration review has provided important context for the QCA's assessment of DBCTM's 2019 DAU. In particular:

- 107.1 in its Draft Recommendation the QCA identified the narrow competition problem which declaration is intended to address, and found that existing users are already protected by virtue of their existing user agreements;
- 107.2 it was established in the declaration review process that DBCT is at full capacity and will require an expansion in order to meet future demand for this service; and
- 107.3 users have identified distinct service offerings at DBCT.

108 The competition problem identified in the QCA's analysis of criterion (a) should inform the QCA's consideration of an appropriate access undertaking in two key ways:

- 108.1 the QCA should ensure that the undertaking addresses the competition problem (if it is not already addressed by the DBCT service simply being declared), i.e. that it is fit-for-purpose; and

108.2 the level of prescription or intervention of the regulation under the access undertaking should be informed by the extent or size of the competition problem, such that the regulatory response is proportionate to the problem that regulation/declaration is intended to address.

109 In addition, the access undertaking should be designed to encourage efficient investment in the infrastructure. It is imperative that declaration does not unintentionally create the competitive harm that it is intended to address by setting regulated returns at a level that discourages investment in DBCT with the result that new entrants are unable to gain capacity at DBCT.

110 Further, pricing under the access undertaking should take into account the distinct services provided at DBCT above the standard or base service of handling coal.

4 Negotiate/arbitrate framework is appropriate

4.1 Overview

111 This section explains why the 2019 DAU, which includes a negotiate/arbitrate framework for determining prices, is appropriate in the circumstances and is a proportionate regulatory imposition to address the nature of competitive harm which the declaration of the DBCT service seeks to address.

4.2 Summary

112 As explained above, in its Draft Recommendation on the declaration review, the QCA found that the competition issue which the declaration of the DBCT service would address is the potential for asymmetric terms of access between existing users and new users in the absence of declaration, and the impact those asymmetric terms may have on competition in the tenements market.

113 It follows from the QCA and User Group's analysis of competition in the tenements market (absent declaration) that the identified competition concern can be addressed by providing for a negotiate/ arbitrate framework for setting prices in the Access Undertaking. In its Draft Recommendation, the QCA found that, effectively, for users with existing Access Agreements there is likely to be no material difference in access terms and conditions with and without declaration.[62] This is because, without declaration, the existing user agreements provide for periodic reviews of access charges, and include a dispute resolution mechanism for the determination of charges which is intended to produce an outcome similar to that which the QCA would have been expected to determine. However, this would not be the case for new users.

114 By providing for QCA arbitration where price negotiations fail, the 2019 DAU addresses the competition concern and places new users on the same footing as existing users because it means that, like existing users, new users will have recourse to QCA arbitration where price negotiations fail. Further, new users will have similar non-price terms of access by virtue of a substantially similar Standard Access Agreement.

115 It is appropriate that regulation of the DBCT service moves away from heavy-handed regulation where access prices are set on an ex ante basis, to lighter-handed regulation where primacy is given to commercial negotiations, consistent with the scheme of the access regime in the QCA Act. This approach is also consistent with the primacy given to commercial negotiations in the Competition Principles Agreement and the Competition and Infrastructure Reform Agreement and statements by the Productivity Commission in its review of the National Access Regime and recent enquiry into the regulation of airports.

116 Heavy-handed regulation where access prices are set on an ex ante basis is not appropriate or required in circumstances where:

116.1 the access regime in the QCA Act is predicated on giving primacy to commercial negotiations, with the threat of arbitrated terms of access providing an incentive for infrastructure providers and access seekers to reach private agreement. However, in practice, price setting by the QCA has fostered no environment for negotiation - contrary to the premise of the QCA Act access regime;

116.2 ex ante price setting has the potential for regulatory error;

116.3 the price review mechanisms in Access Agreements (comprising the full capacity of the existing terminal) that users have willingly executed are "negotiate-first", with recourse to arbitration where negotiations fail. These Access Agreements should be permitted to operate in accordance with their terms;

116.4 the competition concern can be addressed by a negotiate/arbitrate framework. This will put new users on the same footing as existing users;

[62] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 83

116.5 denial of access is not an issue – in fact DBCTM has an incentive to provide access;

116.6 different services are offered to different users; and

116.7 there is no requirement in the QCA Act for an access undertaking to include a price and the negotiate/arbitrate model for determining access prices is an accepted approach in access undertakings.

117 DBCTM's 2019 DAU is designed to reflect the intent of the access regime provisions in the QCA Act and the executed Access Agreements, while ensuring any competition issue in respect of new entrants is addressed. This provides the opportunity for agreement to be reached through commercial processes, minimises the potential for regulatory error, and creates an environment for more economically efficient investment in the infrastructure by which the DBCT service is provided.

118 Accordingly, in section 5 DBCTM proposes a negotiate/arbitrate framework to enable DBCTM and access seekers to negotiate access prices first, with recourse to QCA arbitration if required.

4.3 QCA Act gives primacy to negotiations

119 The access regime in the QCA Act, which is based on that in Part IIIA of the *Competition and Consumer Act 2010* (**CCA**), gives primacy to private negotiation, with the threat of arbitrated terms of access providing an incentive for infrastructure providers and access seekers to reach private agreement.

120 Providing for ex ante approved pricing supplants the opportunity for negotiation between the parties.

121 The access provisions in Part 5 of the QCA Act were formulated to be consistent with the Competition Principles Agreement. Clause 6(4)(a) of the Competition Principles Agreement provides that one of the principles a State access regime should incorporate is:[63]

> Wherever possible third party access to a service provided by means of a facility should be on the basis of terms and conditions agreed between the owner of the facility and the person seeking access.

122 In particular, this principle is reflected in Divisions 4 and 5 of Part 5 of the QCA Act which establish a regime whereby access providers and access seekers negotiate access to declared services and where, if access negotiations fail, disputes can be referred to mediation or arbitrated by the QCA.

123 The principle is also contained in the Competition and Infrastructure Reform Agreement agreed at the February 2006 meeting of COAG, which sets out commitments for consistent regulation of infrastructure across the States and Territories. Clause 2.2 of that Agreement provides:

> The parties agree that, in the first instance, terms and conditions for third party access to services provided by means of significant infrastructure facilities should be on the basis of terms and conditions commercially agreed between the access seeker and the operator of the infrastructure

124 This principle recognises that it is preferable to determine the prices and other terms and conditions by means of commercial negotiation.[64] The negotiate/arbitrate framework facilitates outcomes that would be expected to be achieved in a competitive market environment. This is because it allows for a commercial negotiation where both parties have some negotiating leverage, given that users have recourse to arbitration where negotiations fail.

125 The Explanatory Notes to the Queensland Competition Authority Bill 1997 states:[65]

> The Bill achieves the policy objectives of third party access by establishing a two step process for third party access. The first step involves a declaration process. The purpose of the declaration process is to ensure third party access is only available for a limited class of infrastructure, which

[63] Competition Principles Agreement 11 April 1995 (as amended 13 April 2007) clause 6(4)(a)

[64] Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, pages 48, 66 and 109. See also, NCC, Access to Monopoly Infrastructure in Australia, National Third Party Access Regime, December 2017, page 2

[65] Explanatory Notes, Queensland Competition Authority Bill 1997, page 6

> can broadly be described as natural monopoly infrastructure. The second step of the process is the compulsory dispute resolution process which can only be invoked once negotiations in good faith fail to produce an agreement between the parties. The regime provides for dispute resolution through recourse to the QCA as arbitrator (although parties are free to arrange for private arbitration of a dispute).

126 It further states:[66]

> In addition, the QCA has the power to require the owners of declared services (ie. those services which are declared by the Ministers either by regulation or after receiving advice from the Authority in response to an application) to provide it with an undertaking, which would set out the broad terms and conditions upon which access is to be provided to third parties.

127 It was therefore envisaged that an access undertaking would set out the broad terms and conditions upon which access would be provided. That is, it was not envisaged that an undertaking would have to be prescriptive as to all of the terms and conditions of access.

128 Consistent with this, Division 7 of Part 5 of the QCA Act does not contain many requirements for what an undertaking must set out. In fact, in this case the only matter the 2019 DAU must state is its expiry date (s137(1) of the Act). There is no requirement in Part 5 of the QCA Act that an access undertaking include a price.

129 The access regime in the QCA Act is comparable to the national access regime in Part IIIA of the CCA.[67] The Productivity Commission has recognised in the context of the national access regime the scope for regulatory error where regulators set access prices:[68]

> Given that regulators are unable to set optimal access prices (prices that would maximise overall economic efficiency) with precision, there is scope for regulatory error in the setting of access terms and conditions.

130 The Productivity Commission has further recognised that negotiated outcomes resolving the terms and conditions of access are preferable to regulated outcomes and negotiation can limit the potential for regulatory error.[69]

> The declaration of an infrastructure service establishes a right for an access seeker to negotiate with the provider of the service on the price and terms of access. This right extends to any access seeker, not just the declaration applicant. Negotiated outcomes resolving the terms and conditions of access are preferable to regulated outcomes because the parties to a dispute will know more about their claims and the costs and benefits of gaining or providing access than a regulator could. Negotiation can thus limit the potential for regulatory error.

131 The Productivity Commission made similar observations in its recent draft report on the economic regulation of airports. The Productivity Commission observed that:[70]

> The goal of moving to light-handed regulation was to facilitate commercial negotiation between airport operators and airport users, and promote efficient investment. Reducing regulatory intervention in price setting was intended to remove the opportunity for regulatory error and consequent distortions in investment, and to lower compliance costs.

132 In its Draft Recommendation on the declaration review of the DBCT service, the QCA recognised the potential for the approval and operation of access undertakings to lead to regulatory error, which could impact on investment incentives.[71] While the QCA observed that Part 5 provides controls on the QCA's

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[66] Explanatory Notes, Queensland Competition Authority Bill 1997, page 6

[67] Parliamentary Committees, Queensland Competition Authority Amendment Bill 2018, Report No 2, 56th Parliament Economics and Governance Committee, March 2018, page 3 states: "Queensland's third party access regime is comparable to the national access regime, a similar regulatory framework through which third parties may seek access to nationally significant infrastructure services".

[68] Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, page 112

[69] Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, page 115

[70] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, page 49

[71] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 112

approval of access undertakings, the risk for regulatory error in setting prices nonetheless exists and can be limited where parties are able to negotiate and agree access prices.

133 Accordingly, DBCTM's 2019 DAU contains a negotiate/arbitrate approach to pricing whereby prices are negotiated between individual access seekers and DBCTM with the ability for prices to be determined by arbitration by the QCA where negotiations fail.

4.4 Ex ante price setting precludes commercial negotiation

134 The setting of a revenue cap by the QCA from which access charges are derived, and the publication of reference tariffs, creates an environment in which commercial access negotiations are precluded, contrary to the premise of Part 5 of the QCA Act. It removes all incentives for access seekers and existing users to negotiate price or reach commercial agreement with DBCTM because they simply take the QCA determined price. As the Productivity Commission has observed, this prescriptive approach to price setting increases the risk of regulatory error. Further, this approach to price setting is not fit-for-purpose in circumstances where DBCT provides different services to different users.

135 As explained in sections 3 and 5 of this submission, DBCT provides additional services to users which go beyond the standard coal handling service. A negotiate/arbitrate regime for agreeing terms and conditions of access (including price) is appropriate where different services are offered to different users. This is because it enables different prices to be agreed having regard to the quality of the service, the types of service on offer and the value of the service to the access seeker.

136 An approach where the access undertaking sets the price prevents DBCTM from negotiating with users based on the quality of the service provided and the value of that service to access seekers. These are factors that s120 of the QCA Act requires the QCA to take into account in making an access determination. That provision recognises that these are factors that are relevant to access agreements and accordingly, access negotiations.

137 Further, as explained below, the current practice where the prices are set by the QCA during the access undertaking process operates to override the contractual terms of the existing Access Agreements, contrary to the negotiate/arbitrate process for price reviews provided for in those Agreements.

4.5 Existing contracts

138 As noted in section 3, in the declaration review, the QCA, User Group and DBCTM agreed that as a result of their Access Agreements, existing users would not be affected by the de-regulation of DBCT. DBCT's entire existing capacity is contracted on those terms. Further, those Access Agreements are evergreen, as existing users have the option to extend their agreements and continue to access DBCT based on the terms of access and volumes set out in those agreements. Secondary market transfers and assignments of capacity are typical, such that it is foreseeable that all of the existing capacity of the terminal will remain under the terms of existing Access Agreements.

139 The existing Access Agreements that users have willingly executed reflect the negotiate/arbitrate premise in the QCA Act access regime with respect to price setting. They mandate a negotiate/arbitrate process for reviewing access charges to apply for each 5-year period of the evergreen contracts, and effectively from the date of commencement of each access undertaking. They do not provide for an ex ante price determined in an access undertaking process to automatically apply from the date of commencement of the undertaking.

140 Existing Access Agreements provide for a review of access charges prior to each 'Agreement Revision Date' under which DBCTM and the user must endeavour to agree the basis of and amount of new charges to apply from the 'Agreement Revision Date', with recourse to arbitration where the parties do not reach agreement.[72]

[72] Clause 7.2 of the Standard User Agreement

141 'Agreement Revision Date' is defined in Schedule 9 of the current Standard Access Agreement (which is on substantially similar terms to Access Agreements signed by existing users) as:

141.1 the date of commencement of each Access Undertaking for the Terminal after the first Access Undertaking;

141.2 the date a Price Ruling is made that a Current Expansion will be a Differentiated Expansion Component under section 5.12(c) of the Access Undertaking; and

141.3 if an Access Undertaking ceases to be relevant to the Terminal, then the date five years after the immediately previous Agreement Revision Date but if two such dates would otherwise occur within 12 months of each other, the parties may agree that one will be disregarded.

142 Clause 7.2(a) of the Standard Access Agreement provides:

> All charges under this Agreement and the method of calculating, paying and reconciling them (including the terms of Schedule 2) and any consequential changes in drafting of provisions will be reviewed **in their entirety**, effective from each Agreement Revision Date (*emphasis added*)

143 Clause 7.2(b) of the Standard Access Agreement continues:

> Each review pursuant to clause 7.2(a) will determine the types, calculation, payment and reconciliation of charges payable by the User pursuant to this Agreement, and may have regard to (amongst other things):
>
> (i) the terms of the Access Undertaking (if any) effective from the relevant Agreement Revision Date;
>
> (ii) the relevant Reference Tariff (if any) effective from the relevant Agreement Revision Date; and
>
> (iii) if relevant, the differences in risk profile and cost to DBCT Management (direct and indirect) between the terms and conditions of this Agreement and the terms and conditions of the Standard Access Agreement at the relevant Agreement Revision Date

144 Clause 7.2(c) provides that DBCTM and the user must commence each review no later than 18 months prior to the Agreement Revision Date.

144.1 The parties are required to endeavour to reach agreement as early as it is practicable to do so and if possible by no later than the Agreement Revision Date (clause 7.2(c)(i));

144.2 If the parties do not reach agreement by the date 6 months prior to the Agreement Revision Date, either party may refer the determination of the issues to arbitration. If the arbitrator is the QCA, the parties must request the QCA to progress the arbitration in conjunction with the process at that time for the development of a new access undertaking (clause 7.2(c)(ii));

144.3 If there is no agreement or determination by the relevant Agreement Revision Date then (clause 7.2(c)(iii)):

144.3.1 The charges (and method of paying and reconciling them) applying prior to that Agreement Revision Date will continue to apply until otherwise agreed or determined; and

144.3.2 Any determination or agreement will (unless the parties otherwise agree) operate retrospectively from the relevant Agreement Revision Date and, as soon as practicable after the determination or agreement, an adjustment will be paid by the relevant party (based on the amounts which have been paid to that date on an interim basis and the amounts which are agreed or determined to be payable from the Agreement Revision date to the date the adjustment is paid) together with interest on the amount of the adjustment at the no fault interest Rate.

145 The Standard Access Agreement provides that the arbitration must be effected:

145.1 by the QCA in such manner as it sees fit, after consultation with the parties; or

145.2 if the QCA is unwilling or unable to act, by a single arbitrator agreed upon between the parties; or

145.3 in default of agreement under paragraph (ii) within 10 days after the matter is referred to arbitration, by a single arbitrator selected by the Chair of the Queensland Chapter of the Institute of Arbitrators and Mediators, Australia.

146 Where the QCA is not the arbitrator, clause 7.2(e) of the current Standard Access Agreement sets out the matters to which an arbitrator must have regard.

147 The current Standard Access Agreement further provides that if an Agreement Revision Date occurs, the parties will, in addition to reviewing the charges under clause 7.2, meet together in good faith to negotiate any amendments to the Agreement they consider to be relevant as a result of the changed circumstances following the Agreement Revision Date (clause 7.2(g)).

148 Accordingly, existing user agreements mandate a negotiate/arbitrate process for reviewing access charges to apply from the date of commencement of the DAU.

149 These Access Agreements should be permitted to operate in accordance with their terms. Instead, the current practice where prices are set by the QCA ex ante during the access undertaking process has operated to override the contractual terms of the Access Agreements, contrary to the negotiate/arbitrate process provided for in clause 7 of those Agreements.

4.6 Negotiate/arbitrate framework addresses competition concern

150 As explained in section 3, in the QCA's Draft Recommendation the QCA found that the potential competition issue which declaration of the DBCT service would address, is the potential for asymmetric terms of access between existing users and new users in the absence of declaration, and the impact those asymmetric terms may have on competition in the tenements market.

151 As explained above, existing Access Agreements mandate a negotiate/arbitrate process for reviewing access charges to apply from the date of commencement of the 2019 DAU. The negotiate/arbitrate regime for pricing under the 2019 DAU will provide new access seekers with a right to negotiate prices and is supported by a right of arbitration that is consistent with those subject to the existing Access Agreements.

152 Further, the Standard Access Agreement under the 2019 DAU gives new users the same non-price terms of access as existing users. It therefore places new users on the same footing as existing users as it means that, like existing users, new users have recourse to QCA arbitration should price negotiations fail and have the same non-price terms of access.

153 The 2019 DAU therefore addresses the competition concern in the tenements market identified in the QCA's Draft Recommendation.

4.7 Negotiate/arbitrate framework is appropriate where denial of access is not an issue

154 In addition to the reasons explained above as to why a negotiate/arbitrate framework for setting prices is appropriate, such a lighter-handed form of regulation is appropriate in circumstances where denial of access is not an issue. In fact, not only does DBCTM lack the *ability* to hinder or deny access, it has a strong *incentive* to provide access and maximise demand for use of its services.

155 DBCTM does not have the ability to unreasonably deny access to the DBCT service. The QCA Act requires DBCT to negotiate access to the DBCT service with an access seeker in good faith and to make all reasonable efforts to try to satisfy the reasonable requirements of the access seeker.[73] Further, the QCA Act provides

[73] QCA Act, ss 99, 100(1) and 101

that DBCTM must not engage in conduct for the purpose of preventing or hindering a user's access to the declared service under an access agreement.[74] This is also prohibited under clause 9.2(a) of the 2019 AU.

156 DBCTM does not have an incentive to deny access. DBCTM is not vertically integrated into any other aspect of the coal supply chain. The 2019 DAU specifically precludes DBCTM and its related bodies corporate from owning or operating any supply chain business in any market that is related to or uses DBCT.[75] As a result, DBCTM does not have any vertically related entity in dependent markets that it could seek to advantage through the operation of DBCT, and therefore does not have any incentive to hinder third party access or have a related entity that it could seek to advantage through the operation of DBCT. That is, DBCTM has no ability or incentive to operate DBCT to advantage a vertically related affiliate or harm competition in a dependent market.

157 The Productivity Commission has recognised that:[76]

> Incentives to deny access to some or all access seekers will be heightened where infrastructure service providers are vertically integrated — that is, where service providers also operate in markets upstream or downstream of the facility. Under these circumstances, denial of access can be used to protect a monopoly position in an upstream or downstream market, in particular where that allows the service provider to increase total profits across its operations.

158 The recourse to arbitration, especially that by the QCA, where negotiations fail addresses any concern that DBCTM could use its market power for any purpose in access negotiations with users or access seekers.

4.8 Negotiate/arbitrate framework is accepted regulatory approach to access undertakings

159 DBCTM further observes that the negotiate/arbitrate model for determining access prices is an accepted approach in access undertakings. It has been used in access undertakings accepted by the Australian Competition and Consumer Commission (ACCC) under Division 6 of Part IIIA of the CCA. Negotiate/arbitrate regulation is also the form of light-handed regulation applied to some covered pipelines under the National Gas Law (**NGL**). DBCTM also describes below the regulation to which major airports are subject which is lighter handed than that to which the DBCT service is subject.

ACCC use of negotiate/arbitrate model in wheat access undertakings

160 The ACCC accepted access undertakings related to the provision of access to port terminal services to accredited wheat exporters for the export of bulk wheat which contained a negotiate/arbitrate model for price terms.

161 The ACCC accepted access undertakings with a negotiate/arbitrate model for price terms provided by Co-operative Bulk Handling, GrainCorp Operations Ltd, Viterra which operated from the period September 2009 to September 2014 and Emerald Logistics (previously Australian Bulk Alliance) from September 2011 to September 2013 to 30 September 2014.[77] Further, these companies had vertically integrated operations, however, the ACCC was satisfied of the non-discrimination provisions and transparency measures.

162 When the undertakings where initially accepted they were for short, two-period terms, and the industry was still transitioning from having a single desk responsible for the export of wheat in mid-2008 to there

[74] QCA Act, s104(1). See also s153 of the QCA Act regarding orders to enforce prohibitions on hindering access

[75] 2019 DAU, section 9

[76] Productivity Commission Inquiry Report, National Access Regime, No. 66, 25 October 2013, page 84

[77] ACCC, Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking, Decision to Accept, 29 September 2009; ACCC, AusBulk Limited Port Terminal Services Access Undertaking, Decision to Accept, 29 September 2009; ACCC, Viterra Operations Limited (previously AusBulk) Port Terminal Services Access Undertaking Decision to accept, 29 September 2011; ACCC, GrainCorp Operations Limited Port Terminal Services Access Undertaking, Decision to Accept, 29 September 2009; ACCC, GrainCorp Operations Limited Port Terminal Services Access Undertaking, Decision to Accept, 22 June 2011; ACCC, Australian Bulk Alliance Pty Ltd Port Terminal Services Access Undertaking Decision to accept, 28 September 2011; ACCC, Emerald Logistics Pty Ltd's Application to extend and vary its 2013 Port Terminal Services Access Undertaking Decision to accept, 4 September 2014

being 23 wheat exporters.[78] The ACCC noted these factors in deciding to accept the initial undertakings. However, the terminal operators ended up having undertakings in place for five years and, in accepting further undertakings, the ACCC remained of the view that the negotiate/arbitrate framework for setting prices was appropriate.

163 For example, in its 2014 decision accepting Viterra's access undertakings with a negotiate/arbitrate framework, the ACCC noted that the approach balanced the legitimate business interests of Viterra with the interests of access seekers. The ACCC stated:[79]

> The ACCC considers that this framework continues to enable Viterra and exporters to negotiate commercial terms and conditions that allow for the efficient operation of its business of providing port terminal services, while also promoting fair access to port terminal services for access seekers.

164 The ACCC further observed:[80]

> The ACCC notes that during the four years this model has been operating, no arbitrations have been necessary. Although there has not been any actual arbitration activity under Viterra's 2011 Undertaking, the ACCC does not consider this to mean that the negotiate-arbitrate framework has been unsuccessful. To the contrary, the ACCC considers that the threat of arbitration by the ACCC appears to be effective in encouraging parties to reach commercially negotiated outcomes.

Negotiate/arbitrate regulation under National Gas Laws

165 Under the NGL there are two forms of regulation available for a covered pipeline – full regulation or light regulation. Full regulation requires the service provider to submit an access arrangement to the regulator and have it approved by the regulator. Total revenue is set by the regulator taking into account the revenue and pricing principles and using a building block approach to economic regulation. Light regulation provides a light-handed approach, removing price regulation and the requirement for an ex ante access arrangement. Instead it adopts a negotiate/arbitrate model for third party access, with arbitration by the regulator in the event of an access dispute. Further, a service provider can submit for approval a limited access arrangement governing only non-price terms and conditions if it chooses to do so.

166 In deciding whether to make a light handed determination in respect of a covered pipeline, the NGL requires the National Competition Council (**NCC**) to consider (s122 of the NGL):

- 166.1 the likely effectiveness of the forms of regulation provided for under the NGL and the National Gas Rules (**NGR**) to regulate the provision of the pipeline services (the subject of the application) to promote access to pipeline services; and
- 166.2 the effect of the forms of regulation provided for under the NGL and the NGR on—
  - 166.2.1 the likely costs that may be incurred by an efficient service provider; and
  - 166.2.2 the likely costs that may be incurred by efficient users and efficient prospective users; and
  - 166.2.3 the likely costs of end users.

167 In making determinations that pipelines should be subject to light-handed regulation, the NCC has observed that:[81]

> Light regulation does not free a service provider to increase tariffs or change terms and conditions at will. The negotiate/arbitrate process that operates under light regulation substitutes ex post

[78] For example, ACCC, Co-operative Bulk Handling Limited Port Terminal Services Access Undertaking, Decision to Accept, 29 September 2009, pages 138 to 140

[79] ACCC, Final Decision to accept Viterra Operations Limited's Application to extend and vary 2011 Port Terminal Services Access Undertaking, 30 January 2014, page 13

[80] ACCC, Final Decision to accept Viterra Operations Limited's Application to extend and vary 2011 Port Terminal Services Access Undertaking, 30 January 2014, page 14

[81] NCC, Application by Allgas Energy Pty Ltd for Light Regulation of the Allgas Gas Distribution Network Final decision, 28 April 2015 at [3.4]

> regulation for ex ante regulation. It does not remove regulatory oversight of access prices and other terms and conditions.

168 The NCC has further stated that:[82]

> The critical issues in an application for light regulation are: whether light regulation is likely to be as effective as full regulation in constraining the use of market power and promoting access to pipeline services; and the relative costs of the two approaches. If light regulation is similarly effective as full regulation but involves lower costs, light regulation is the more appropriate form of regulation.

169 In this paragraph the NCC is referring to the statutory criteria in the NGL in respect of determining the services provided by a covered pipeline to be light regulation services. Nonetheless, similar considerations may be relevant in deciding whether the negotiation/arbitration framework for setting price in the 2019 DAU is appropriate having regard to the statutory criteria in s138(2) of the QCA Act.

Airports

170 Major airports are an example of infrastructure services that exhibit characteristics of market power and are subject to a form of light handed regulation. In fact, the regulation to which major airports at Sydney, Melbourne, Brisbane and Perth are subject is lighter handed than that to which the DBCT service is subject. This is because airports are not declared under Part IIIA of the CCA and are not subject to a negotiate/arbitrate framework whereby disputes can be resolved by arbitration where commercial negotiations in respect of access fail. Rather, the terms of access are commercially agreed between airports and airlines and those airports are subject to price and quality of service monitoring by the ACCC.[83]

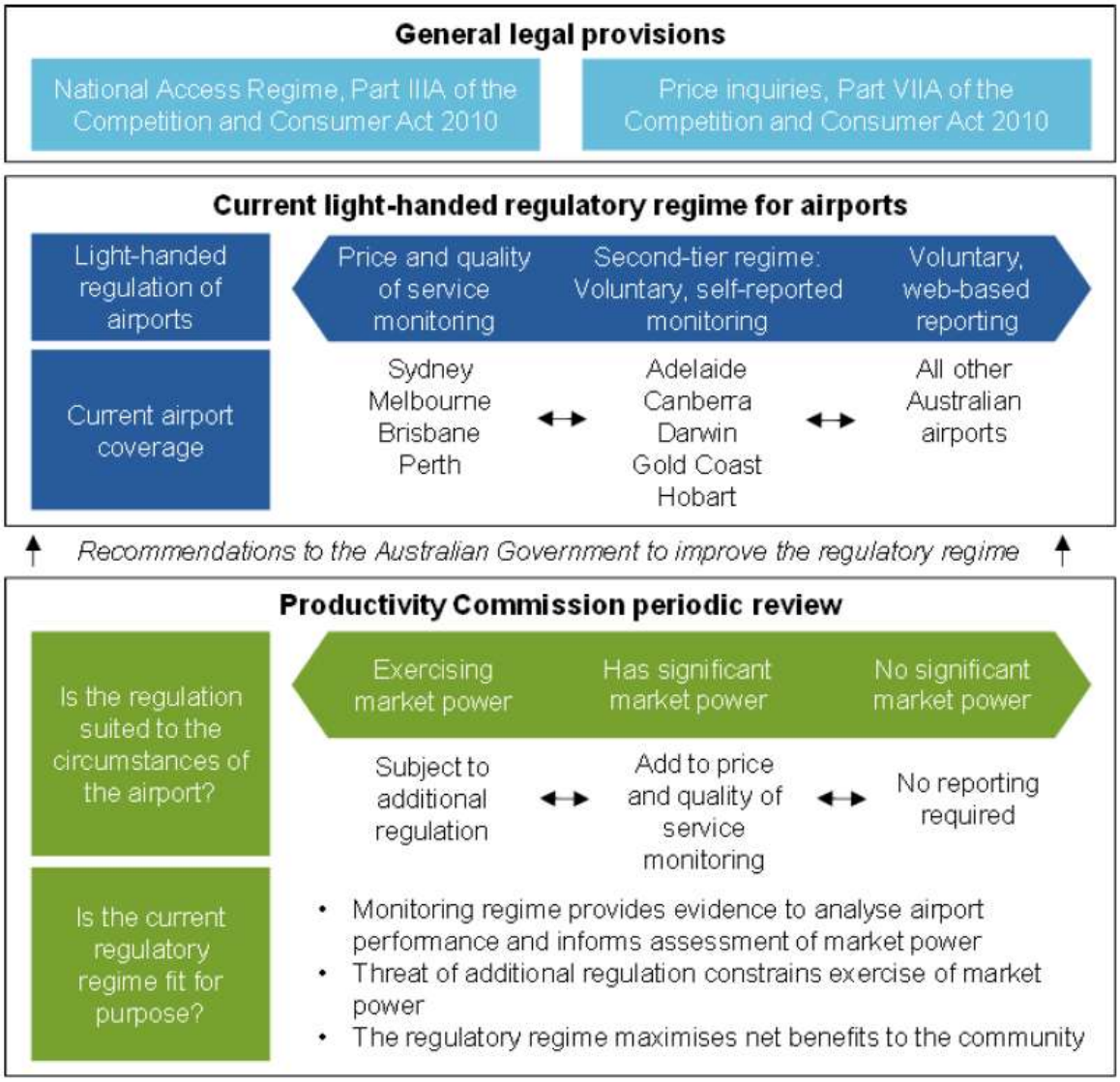
171 In its draft report on its recent review of the economic regulation of airports, the Productivity Commission summarised the light-handed regulatory regime applying to airports in the following figure in its report.[84] This figure also shows the framework for the Productivity Commission's review, which includes enquiring as to whether the form of regulation is suited to the circumstances of the airport and whether the current regulatory regime is fit for purpose. That is the kind of enquiry the QCA should make in assessing the 2019 DAU.

[82] NCC, Application by Allgas Energy Pty Ltd for Light Regulation of the Allgas Gas Distribution Network Final decision, 28 April 2015 at [3.8]

[83] Note there are unique arrangements at Sydney Airport to facilitate access for airlines servicing destinations in regional New South Wales. In particular, there is a price cap and notification regime under which Sydney Airport must notify the ACCC before it can change its prices for aeronautical services and facilities provided to airlines operating flights servicing NSW regions. The ACCC can object to a price increase proposed in a price notification if it considers the increase would exceed the price cap, or if the increase is not required to recover the costs for the provision of aeronautical services to airlines operating regional flights. The Productivity Commission recommended that the price notification regime at Sydney Airport should be updated to apply only to prices for regional aeronautical services that are not covered in commercial agreements between Sydney Airport and airlines operating NSW regional air transport services: Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, pages 27 and 35

[84] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, Figure 1.3 page 46

Figure 3 – The light-handed regulatory regime



172 The Productivity Commission rejected the submission from airlines and the ACCC that the existing regime be replaced by a much more interventionist approach whereby airport services were deemed to be declared and subject to a negotiate/arbitrate framework.

173 The Productivity Commission concluded in its draft report that:

173.1 Sydney, Melbourne, Brisbane and Perth airports exhibit characteristics of market power in domestic and international aeronautical services at a level that creates a prima facie case for regulatory intervention;[85]

173.2 the light handed approach to regulation has performed well and those airports have not systematically exercised their market power in commercial negotiations with airlines to the detriment of the community;[86]

173.3 there was no justification for significant change to the current form of regulation of aeronautical services, however, some changes to the monitoring regime are recommended;[87]

[85] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, pages 10 and 104
[86] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, pages 23 and 276
[87] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, pages 20, 34 and 175

173.4 a new regulatory framework such as the negotiate/arbitrate framework proposed by airlines and the ACCC would have few benefits and many risks.[88]

174 The Productivity Commission observed that commercial negotiations produce less distortion of investment incentives compared with the price cap arrangements previously in place with respect to airports. The Productivity Commission stated:[89]

> Commercial negotiations have been a central feature of the Australian light-handed regulatory regime since 2002. Commercial negotiations provide direct investment incentives and link the interests of airport users to airport operations, with less distortion of incentives compared with, for example, the price cap arrangements that were in place in Australia prior to 2002 (Littlechild 2009; PC 2012). Under the light-handed regulatory regime, airports and airport users typically engage in commercial negotiations to secure airfield and terminal agreements on prices, type of service provided, service quality and future capital investments.

175 As noted previously in this submission, the Productivity Commission observed that:[90]

> The goal of moving to light-handed regulation was to facilitate commercial negotiation between airport operators and airport users, and promote efficient investment. Reducing regulatory intervention in price setting was intended to remove the opportunity for regulatory error and consequent distortions in investment, and to lower compliance costs.

176 Further, the Productivity Commission stated that:[91]

> Commercial negotiation between airports and airport users is the most flexible and efficient approach to setting aeronautical charges and other terms.

177 The Productivity Commission also noted that despite disagreements as to the effectiveness of the current regulation regime, both airports and airlines have stated that they prefer commercial negotiation to determine price and other terms of access to infrastructure services rather than the price cap regulation to which major airports were previously subject to from 1997 to 2001:[92]

> Participants in this inquiry have intensely debated the effectiveness of the current regulatory regime. Airports have broadly supported the existing regime. Some airport users, however, argue that airports are not sufficiently constrained from exercising their market power and, consequently, airports are earning excessively high profits and rates of return, and making inefficient investments.
>
> Despite these disagreements, it is notable that participants in the inquiry have not called for a return to price caps — both airports and airlines have stated that they prefer commercial negotiation to determine price and other terms of access to infrastructure services. Airport users and the ACCC have suggested regulation to 'level the playing field' in their negotiations with airports. Participants have called for airports to be obliged to provide more information on their investment plans and how they determine their charges. Some have suggested that airlines should have automatic access to arbitration if they cannot reach agreement with airports.

178 The negotiate/arbitrate framework in the 2019 DAU is a heavier handed form of regulation than that applying to major airports as access seekers have recourse to QCA arbitration where the parties are unable to reach agreement.

[88] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, pages 25 and 316
[89] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, page 77
[90] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, page 49
[91] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, page 309
[92] Productivity Commission Draft Report, Economic Regulation of Airports, February 2019, page 7

4.9 Conclusion

179 A negotiate/arbitrate model for determining access prices is an accepted approach in access undertakings. This approach is consistent with the premise of the access regime provisions in the QCA Act and limits the scope for regulatory error in setting prices.

180 The approach is also consistent with the negotiate/arbitrate mechanism for price reviews in existing user agreements. It is the preferable approach for addressing the competition concern in the tenements market identified by the QCA and User Group in the declaration review process as it will place new users on the same footing as existing users. Further, as noted by the Productivity Commission, it is the most flexible approach to setting terms of access – which is relevant to the fact DBCT offers a variety of additional services to various users, which impact terminal efficiency and can best be captured in negotiations rather than a 'one-size-fits-all' reference tariff.

181 In the next section, DBCTM explains in more detail the negotiate/arbitrate approach in the 2019 DAU and how it is consistent with the statutory criteria for the approval of access undertakings.

5 Negotiate/arbitrate pricing framework in 2019 DAU

5.1 Overview

182 This section describes the negotiate/arbitrate framework in DBCTM's 2019 DAU. In particular, it describes the matters the QCA must take into account in determining access charges where an access dispute is referred to it for determination, and how the framework is consistent with the statutory criteria for the approval of access undertakings. The section explores how the factors to be considered in arbitration will also necessarily form the basis of price negotiations.[93]

5.2 Summary

183 The 2019 DAU provides for the TIC to be the amount agreed between DBCTM and the access holder. [94]

184 To ensure that access seekers are provided with an appropriate level of information to enable them to negotiate from an informed position, the 2019 DAU includes provisions for access seekers to request from DBCTM the information in s101(2)(a)-(h) of the QCA Act (this includes information about the price at which DBCTM provides the service and the costs of providing the service).

185 Where DBCTM and an access seeker are unable to agree the access charges, the 2019 DAU enables the dispute regarding those charges to be determined by the QCA. The 2019 DAU sets out the matters the QCA must have regard to in determining the TIC.

5.3 Negotiate/Arbitrate framework for TIC

186 The 2019 DAU includes similar provisions to previous access undertakings in many respects, but does not include a prescriptive approach for determining the TIC that will apply to access seekers. Rather, the 2019 DAU provides for the TIC to be the amount agreed between DBCTM and the access holder. Thus the 2019 DAU enables the TIC to be agreed during access negotiations under section 5 of the DAU. Where DBCTM and an access seeker are unable to agree they have recourse to arbitration by the QCA.

187 To ensure that access seekers are provided with an appropriate level of information to enable access seekers to negotiate from an informed position, the 2019 DAU (section 5.2(c)(2)) provides that prior to submitting an access application, an access seeker may request from DBCTM the information set out in s101(2)(a)-(h) of the QCA Act, which DBCTM must provide within 10 business days of receiving the request (subject to s101(3)(a) and (b) of the QCA Act). The information set out in s101(2)(a)-(h) of the QCA Act is:

187.1 information about the price at which the access provider provides the service, including the way in which the price is calculated;

187.2 information about the costs of providing the service, including the capital, operation and maintenance costs;

187.3 information about the value of the access provider's assets, including the way in which the value is calculated;

187.4 an estimate of the spare capacity of the service, including the way in which the spare capacity is calculated;

187.5 a diagram or map of the facility used to provide the service;

187.6 information about the operation of the facility;

[93] Any elements relevant to arbitration are necessarily relevant to negotiation. Therefore, reference to either can apply to both, as relevant

[94] This section applies to all negotiation/arbitration – both for Access Seekers, and for Access Holders (to the extent arbitration is under the AU and not under an Access Agreement). Any reference to access seeker, access holder, user or producer applies as relevant

187.7 information about the safety system for the facility;

187.8 if the authority makes a determination in an arbitration about access to the service under Division 5, Subdivision 3 – information about the determination.

188 Where DBCTM and an access seeker are unable to agree the access charges, the 2019 DAU enables the dispute regarding those charges to be determined by arbitration by the QCA. In any such arbitration, the 2019 DAU provides that the QCA must have regard to the following matters in determining the Initial TIC:

188.1 the TIC that would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point;

188.2 the expected future tonnages of Coal anticipated to be Handled through the relevant Terminal Component during the relevant Pricing Period;

188.3 the expected capital expenditure requirements for the relevant Terminal Component during the relevant Pricing Period;

188.4 the types of services to be provided to the Access Seeker;

188.5 the obligation in the Port Services Agreement to rehabilitate the site on which the services are provided;

188.6 any other TIC agreed between DBCTM and a different access holder for a similar service level; and

188.7 the factors in s120(1) of the QCA Act, being:

188.7.1 the object of Part 5 of the QCA Act;

188.7.2 the access provider's legitimate business interests and investment in the facility;

188.7.3 the legitimate business interests of persons who have, or may acquire, rights to use the service;

188.7.4 the public interest, including the benefit to the public in having competitive markets;

188.7.5 the value of the service to the access seeker or a class of access seekers or users;

188.7.6 the direct costs to the access provider of providing access to the service, including any costs of extending the facility, but not costs associated with losses arising from increased competition;

188.7.7 the economic value to the access provider of any extensions to, or other additional investment in, the facility that the access provider or access seeker has undertaken or agreed to undertake;

188.7.8 the quality of the service;

188.7.9 the operational and technical requirements necessary for the safe and reliable operation of the facility;

188.7.10 the economically efficient operation of the facility;

188.7.11 the effect of excluding existing assets for pricing purposes;

188.7.12 the pricing principles mentioned in section 168A;

189 The QCA may also take into account any other matter, relating to the matters above, it considers appropriate.

190 These factors will also form the basis of the price negotiations.

5.4 Arbitration (and negotiation) factors

191 The factors the QCA must take into account in determining the TIC in an arbitration are described in more detail below. Consistent with the arbitration rules in the 2019 DAU, the factors to be taken into account during price negotiations include:

191.1 A 'willing but not anxious' threshold, to provide a boundary of reasonableness to negotiations;

191.2 A base service, which informs a base tariff (as a $/tonne value) applicable to all users. This takes into account:

191.2.1 the expected future tonnages of Coal anticipated to be Handled through the relevant Terminal Component during the relevant Pricing Period

191.2.2 the expected capital expenditure requirements for the relevant Terminal Component during the relevant Pricing Period (both for the existing terminal and relating to expansions);

191.2.3 the obligation to rehabilitate the site on which the Services are provided.

191.3 The additional types of service to be provided, which may inform additional service tariffs. These services are valued by producers but their provision impacts the overall efficiency of the terminal.

191.4 All negotiations are informed by any other TIC agreed between DBCTM and a different access holder for a similar service level.

191.5 All negotiations are informed by the matters set out as relevant in the QCA Act under s120 and s168A.

192 When commencing confidential negotiations with each access seeker, DBCTM will offer a base tariff plus tariffs pertaining to the additional services (if any) required by the access seeker.

'Willing but not anxious' standard

193 One of the factors the QCA must have regard to in determining the TIC in an access arbitration is the TIC that would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point.

194 The application of the 'willing but not anxious' buyer/seller principle seeks to achieve arbitrated price outcomes that have close regard to the price paid in arms' length transactions for similar services.

195 The 'willing but not anxious' standard is in common use in Australia as a valuation concept in circumstances where an independent means of arriving at a market value is required. For example, the International Valuation Standards Council defines market value as:[95]

> The estimated amount for which an asset or liability should exchange on the valuation date between a willing buyer and a willing seller in an arm's length transaction, after proper marketing and where the parties had each acted knowledgeably, prudently and without compulsion.

196 Similarly, the Australian Tax Office cites typical practice by Australian business valuers to defining market value as:[96]

[95] International Valuation Standards Council website, https://www.ivsc.org/standards/glossary, accessed 3 February 2019. See also, HoustonKemp, Assessment of the QCA's Draft Recommendation to declare the DBCT service - criterion (a), March 2019, pages 11 to 12 (Appendix 2 to DBCTM March 2019 Submission on the declaration review)

[96] Australian Tax Office website, https://www.ato.gov.au/general/capital-gains-tax/in-detail/market-valuations/market-valuation-for-tax-purposes/?page=6

> the price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length.

197 The 'willing but not anxious' standard is a means of determining market value that is now well accepted by the Australian courts. For example, the New South Wales Court of Appeal has noted:[97]

> …the settled meaning at general law of the concept of, and test for, market value as articulated in Spencer v The Commonwealth [1907] HCA 82; (1907) 5 CLR 418, namely that which a willing and knowledgeable but not anxious purchaser would pay a willing and knowledgeable but not anxious vendor in an arm's length transaction…

198 The standard has also been accepted by Australian regulators.

199 The ACCC, in its recent draft copyright guidelines, seeks to develop a framework that focuses on countering market power held by collecting societies and providing guidance with the objective of reducing the number of cases taken to the Copyright Tribunal. One of its two preferred approaches is the construction of a hypothetical bargain by applying an economic model to construct an appropriate licence fee level and structure. The ACCC explains that this approach, due to its symmetry, reduces the effect of any market power that may be held by the collecting society.[98] In seeking to implement this concept, the ACCC estimates a price that effectively shares the economic surplus that is generated from a transaction between the parties on an equal basis. It does this by requiring the arbitrator to assess the price that would be agreed by a buyer and seller if they were on equal footing. This is explained in the ACCC's Draft Copyright Guidelines:[99]

> The hypothetical bargain approach refers to a hypothetical bargain between a willing but not anxious licensor and a willing but not anxious licensee. This description is symmetrical and implies that neither party has particular power over the other. In this sense it reduces the effect of any market power held by the collecting society. It does so by assuming symmetry in power between the parties.

200 Importantly, the concept has commercial usage in coal projects and legal precedent in Queensland. For example, in 2012 in a case[100] successfully defended by Brian O'Donnell QC, the Supreme Court made a judgement in relation to fair market value of the Belvedere Coal Project in the Bowen Basin, referencing the 'willing but not anxious' principles included in the Joint Venture Agreement.

Concept of a base tariff

201 As defined in the QCA Act[101], and agreed by the QCA[102], the DBCT User Group and DBCTM, the declared DBCT service is that for "the handling of coal at Dalrymple Bay Coal Terminal by the Terminal operator."[103] It is important to establish exactly what service at DBCT should be considered a 'base service' – i.e. that to which the access regime is intended to apply. It is uncontroversial that the other coal terminals in Queensland offer "coal handling services". Therefore, attention should be turned to what additional or superior services are offered at DBCT. The User Group has unequivocally concluded that the DBCT service is a distinct service and that it has different and distinct characteristics which other coal terminal services do not have.[104] Indeed, as has been determined so far in the declaration review process, DBCT offers a

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[97] *International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea* [2015] NSWCA 363 (26 November 2015) at [67]

[98] ACCC, *Draft copyright guidelines*, October 2018, page 23

[99] Australian Competition and Consumer Commission "*Draft ACCC Guidelines - to assist the Copyright Tribunal in the determination of copyright remuneration"* 23 October 2018, page 23

[100] Supreme Court of Queensland March 2012 *Vale Belvedere Pty Ltd v BD Coal Pty Ltd*; Australian Mining 28-Sep-10 Second joint venture dispute sends Vale and Aquila back to court; Mining Weekly 02-Apr-12 Queensland court dismisses Vale's Belvedere appeal

[101] QCA Act, s250(1)(c)

[102] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 7

[103] For the purposes of the QCA Act, the operator is DBCTM

[104] DBCT User Group submission to the QCA, 26 April 2019, Page 29

range of services above and beyond simply the handling of coal at DBCT. These additional services are valued by producers. An important element in pricing considerations is therefore to distinguish the base service offered at DBCT so that it may inform a base tariff. This is especially relevant where the additional services on offer impact the overall efficiency of the terminal. These additional services consume terminal capacity that would otherwise be available for other producers to use.

202 The base service that DBCT offers is the service which maximises the throughput efficiency of the terminal. This service is the most optimal use of the terminal as it minimises or eliminates delays. The principles in 2019 remain consistent with Master Plan 2004[105], which stated that:

> the highest theoretical efficiency for DBCT is possible under conditions when the service demands reflect the following:
>
> - All ships to be of a standard Panamax size with no ships gear[[106]];
> - Single product shipments; and
> - No blending.

203 DBCT offers a service of coal handling to each contracted user, with the most efficient user [redacted] mostly loading coal onto a single vessel, which doesn't require blending, and has a high performing train loadout and railing capability that maximises the efficient use of the DBCT stockyard. This constitutes a base service and reflects the most optimal use of the terminal. The base tariff (applicable to a base service) is informed by a number of factors, described in more detail below. The concept of a "base tonne" (referred to as a base service in this submission) was first introduced in DBCT's Master Plan 2005.

204 Producers have unique service demands. Master Plan 2009[107] (MP2009) stated:

> Because of Producer product diversification catering for specific steel making blends, DBCT is required to meet varying service requirements. This creates specialised demands within the terminal operation as different coal types present different handling characteristics which require a variety of handling strategies to preserve product identity. Any reduction to normal equipment speeds to cater for these requirements will impact terminal capacity. While users pay a common tariff per tonne of coal shipped, different handling requirements will impact the terminal's performance (e.g. sticky coal, blending, loading small ships). As a result, some coal types and product blends consume more terminal capacity than others. This applies similarly to the rest of the supply chain.

205 The users have in the past recognised the effect of their service demands on the terminal capacity. MP2009[108] noted:

> The terminal Producers have recognised that service provision does cause capacity erosion and through the LTS working group, are developing a process to allocate accountability for errant capacity consumption.

206 The service demands (above and beyond the base service) have increased the operating complexity and in turn have eroded terminal capacity. Under favourable operating conditions and minimal variability in service demands, the terminal is able to achieve a throughput that is significantly higher than under current operating conditions (which is driven by higher user service demands).

207 As noted above, DBCT provides additional services to users which have an impact on the terminal's overall efficiency (or capacity), and which are ascribed value by the terminal's users. These services should be separately accounted for in price negotiations. Below is a list of the additional services typically offered,

[105] DBCT Master Plan 2004, page 64
[106] As of 2019, this would be "All ships to be of a standard Cape-size with no ships gear, and superior deballasting capability"
[107] DBCT Master Plan 2009, page 21
[108] DBCT Master Plan 2009, page 21

some of which the User Group has previously referred to as being distinct to DBCT and not offered by other terminals:

207.1 Co-shipping arrangements;

207.2 Blending of coal;

207.3 DBCTM promotes the ease of trade of metallurgical coal of similar grades or quality between parties, such that a train or a trimming stockpile may be provided from one party to another;

207.4 DBCTM provides remnant stockpiles to certain users;

207.5 Product sampling; and

207.6 Other services in the AU that DBCTM provides in accordance with Good Operating and Maintenance Practice, which include:

207.6.1 moisture adding;

207.6.2 compacting;

207.6.3 surfactant adding;

207.6.4 dozing; and

207.6.5 any other services reasonably requested by an Access Holder.

208 The QCA Act (s168A(b)) allows multi-part pricing and price discrimination when it aids efficiency, and requires the promotion of the economically efficient use of DBCT. By taking into consideration additional services, opportunity may arise to incentivise better operational practices among access holders. Negotiations may include discounts or incentives for operational and logistical improvements (e.g. improved handleability of coal deliveries to DBCT, increasing mine stockpile space, improving rail contracts, etc.). This could ultimately lead to greater throughput from existing infrastructure – i.e. promoting efficient use of the infrastructure.

Types of services

209 The 2019 DAU specifically includes the types of services provided to the access seeker as a factor the QCA must take into account in determining the TIC. The level of the service required by the access seeker, the value of the service to the access seeker, and the impact on overall efficiency of the terminal should be taken into account in determining the price paid by the access seeker. The ILC has indicated its willingness to assist in modelling the impacts on terminal efficiency resulting from specific user service requests.

210 The standard or base service at DBCT is single product vessel loading, onto Cape-size vessels, without blending. As noted above, DBCT provides a range of additional services above and beyond this base service. Each of these services are described below. Different users require different combinations of services and value those combinations differently.

Co-shipping

211 Co-shipping is where coal from different producers is shipped to the same customer in different holds of the same vessel. This service is highly sought after by metallurgical coal producers.

212 The fact that DBCT's predominant export product is metallurgical coal and that DBCT users produce a range of metallurgical coal qualities, makes shipping through DBCT highly desirable. The same multi-cargo options are not available through other export terminals.[109] The QCA noted in its Draft Recommendation on the DBCT declaration review[110]:

[109] DBCT User Group submission to the QCA, 30 May 2018, pages 28 - 29

[110] QCA Draft Recommendation, Part C: DBCT declaration review, December 2018, page 19

> The QCA is satisfied that co-shipment opportunities at DBCT are a material reason why DBCT users prefer the coal handling service at DBCT to that provided at other terminals which are located further away, all other factors remaining unchanged…

213 The User Group noted that this[111]

> has been supported by specific evidence from both the DBCT User Group and individual users

214 The User Group cited Glencore's submission which itself noted[112]

> One significant advantage of using DBCT is the opportunity for co-shipping arrangements from the terminal… Co-shipping from DBCT allows these customers to obtain a specific mix of metallurgical coal from different producers from the one terminal onto the one ship and as a result can provide producers with access to sales to customers which otherwise may not be available.

215 According to the User Group[113]

> The DBCT User Group confirm that metallurgical coal co-shipping opportunities are:
>
> > **Valuable to customers** (both by way of higher sales prices that can be obtained for a user's coal and by being able to make sales to customers which the user would not otherwise be able to sell to) … *(emphasis added)*

216 And this benefit may be particularly important for some users, as the User Group explained[114]

> A number of individual DBCT User Group members, have privately confirmed to the DBCT User Group's advisers that this aspect of the DBCT service is a particular benefit for producers of lower grade or PCI coal where steel mill customers are less likely to want a full cargo of that coal type, but are happy to buy that coal in combination with a higher grade / premium hard coking coal.

217 Co-shipping or multi-parcelling of vessels erodes outloading capacity at DBCT as it takes time to allow for a product change, and during this time outloading remains idle. There can be up to 3 or 4 product changes per vessel, and the time taken to complete a product change varies between 20 and 60 minutes.

218 In summary, co-shipping is a valuable service offered at DBCT (with the value ascribed being specific to individual users of the terminal), and impacts on the overall efficiency of the terminal. As such the service should inform negotiations.

Blending of coal

219 DBCT's stockyard supports the processing of three commercial coal categories which can be blended into a possible 58 registered coal products. There is no existing or proposed terminal which offers the same stockyard space with a similar ability to process coal.[115] Blending of coal is allowed up to a maximum divergence of 60/40.

220 In its submissions to the QCA as part of the declaration review, the User Group detailed the value of this service offered at DBCT, in explaining it to be a reason as to why Goonyella system users prefer to use DBCT. For example, the User Group cross-submission summarised other submissions noting[116]:

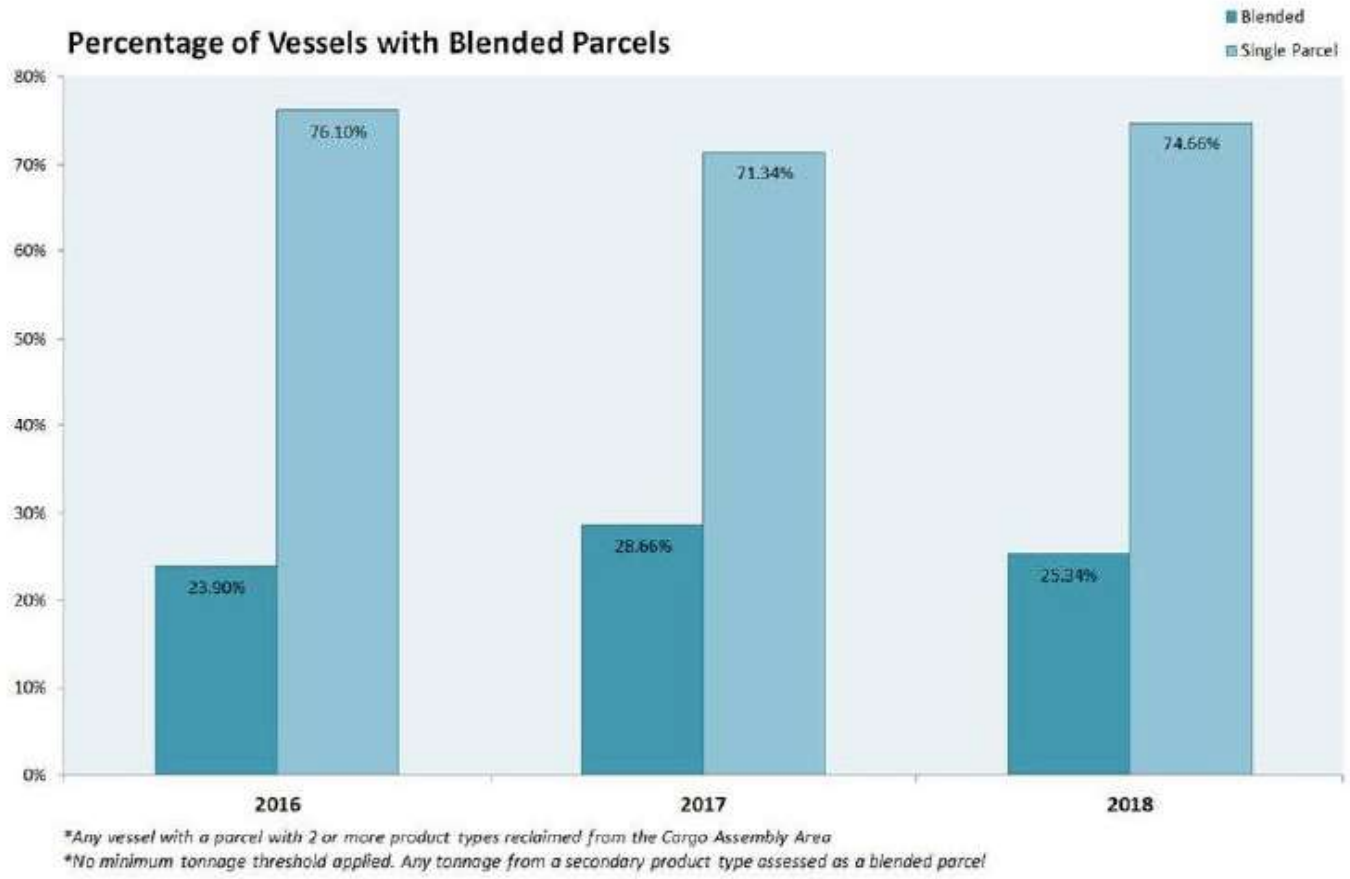
> The greater range of metallurgical coal products available for blending at DBCT (which cannot be replicated by other terminals…

[111] DBCT User Group submission to the QCA, 26 April 2019, page 17
[112] Glencore Coal Submission to the QCA, 13 March 2019
[113] DBCT User group Submission to the QCA, 13 March 2019, page 24
[114] DBCT User group Submission to the QCA, 13 March 2019, page 24
[115] DBCT User Group submission to the QCA, 30 May 2018. PwC Report, page 17
[116] DBCT User Group submission to the QCA, 26 April 2019, page 25

Differences in the facilities at DBCT relative to other coal terminals – which mean that DBCT can create a homogenous coal blend to meet customer specifications where the other terminals that DBCTM asserts are substitutes cannot; and

The high proportion of vessels shipping blended parcels from DBCT (ranging from 23.9%-28.66% over the last 3 full financial years)

Figure 4 – Blending at DBCT[117]



221 The User group also noted that[118]

Some users have indicated that **they place a particularly high value on blending opportunities** at DBCT due to concerns with product quality and saleability of some of their coal production in the absence of blending. *(emphasis added)*

222 Peabody noted the following in respect of DBCT's blending services[119]

DBCT offers homogenous blending on a consistent basis that caters to a wide variety of end customer requirements, and **allows users to increase the value and saleability of their product range**. *(emphasis added)*

223 Blending erodes outloading capacity when reclaimers are set to reclaim below their optimum performance level. Strict blends (where at all times during shiploading a reclaim ratio must be maintained) have a more detrimental effect than mixes (where the ratio is only measured at the end of the parcel load).

224 Blending is a valued service offered at DBCT to those users who require it, which impacts on the overall efficiency of the terminal, and should therefore inform negotiations.

[117] DBCT User Group submission to the QCA, 13 March 2019, page 26
[118] DBCT User group Submission to the QCA, 13 March 2019, page 25
[119] Peabody Submission to the QCA, 11 March 2019, page 9

Train or trimming stockpile flexibility

225 DBCTM promotes the ease of trade of metallurgical coal of similar grades or quality between parties, such that a train or a trimming stockpile may be provided from one party to another. This feature is reportedly unique to DBCT.[120]

Remnant stockpiles

226 DBCTM provides remnant stockpiles to certain users, which are used to stack any "remnant" product after filling the main stockpiles. These are then used to "top-up" vessels that have available capacity after the main stockpiles have been depleted during outloading. Reclaiming from remnant stockpiles erodes terminal capacity, due to the reclaimers being used below optimum operating levels.

Product sampling

227 Some users request that their product be sampled during inloading to test the quality of the product. This service is performed by an external party that collects and delivers the sample to the laboratory. The additional product sampling on offer at DBCT is a valuable service, and can impact on the overall efficiency of the terminal. As such the service should inform negotiations.

Type and quality of vessel

228 DBCT can accommodate small to very large vessels and users are allowed to make use of any type and quality of ship. The typical ships, which differ in terms of load rates, are:

228.1 Handy (average load rate of 3,320 tph);

228.2 Panamax (average load rate of 4,363 tph);

228.3 Japmax (average load rate of 4,759 tph);

228.4 Cape (average load rate of 4,802 tph); and

228.5 VLC (average load rate of 4,974 tph).

229 As evident from the load rates above, the ship types can erode terminal capacity if the optimal mix is not maintained. The majority of users typically load coal onto Japmax and VLC ships (~78%) and if this mix reduces, i.e. more coal is loaded onto the smaller vessels, it would reduce terminal capacity. Further to the mix of types of ships, geared vessels further erode terminal capacity because the shiploaders must luff over the cranes during hatch changes. Geared vessels are ships that are equipped with equipment for loading and off-loading.

230 In summary, DBCT allows users to load coal onto any type of vessel, geared or ungeared, and depending on the mix it can negatively impact on the overall efficiency of the terminal. As such the service should inform negotiations.

Other services

231 In accordance with the 2019 DAU and Good Operating and Maintenance Practice, DBCTM is also obliged to deliver any of the following services if required by an access holder or any Approval or statutory authority notified to DBCTM: moisture adding; compacting; surfactant adding; dozing; and any other services reasonably requested from time to time in writing by an access holder to DBCTM, **provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal**. While many of these services constitute what could be expected in a base service, they are nonetheless noted as relevant to informing a base tariff for the terminal. To the extent individual users require a different service (or variation from the norm), that may further inform negotiations.

[120] DBCT User Group submission to the QCA, 30 May 2018. PwC Report, page 17

Factors relevant to demand, NECAP and expansions

232 Included in the object of Part 5 of the QCA Act is the promotion of economically efficient use of and investment in the infrastructure. As such, the factors the QCA must have regard to in determining the TIC in an access arbitration include an assessment of the requirements for investment in *existing* and *expanded* infrastructure. To inform this assessment, the 2019 DAU includes a requirement for the QCA to have regard to:

232.1 the expected future tonnages of Coal anticipated to be Handled through the relevant Terminal Component during the relevant Pricing Period; ('use of') and

232.2 the expected capital expenditure requirements for the relevant Terminal Component during the relevant Pricing Period. ('investment in')

233 The expected coal handling requirements at DBCT (or the "use of" the facility) are at historic highs. As explained below, this (amongst other factors) directly correlates to the NECAP requirements at the terminal. It is also the basis for forming a view as to the likely expansion requirements at the terminal.

NECAP – expected capital expenditure requirements

234 Since commencing operations in 1983, DBCT had been in a state of continuous expansion during which any required sustaining capital works (which did not increase terminal capacity) were completed as part of the expansion works. However, as no expansion has been undertaken since the completion of the 7X project in 2009, it was necessary to establish the NECAP Program – a standalone program to facilitate the ongoing sustaining capital works required by the terminal operator. The key features of the NECAP Program are:

234.1 The works ensure that the terminal complies with Good Operations and Maintenance Practices, and that DBCTM complies with its obligations under the PSA.

234.2 The works are necessary – for example, to maintain the terminal at its nameplate capacity, to ensure compliance with any relevant regulations (such as safety and environment), to improve throughput, or to reduce operating and maintenance costs to the benefit of all users.

234.3 The expenditure is prudent – the works are recommended by the independent Operator and unanimously approved by access holders before commencement, and after the works have been handed over into operation, access holders have another opportunity to object to the expenditure.

235 To date, DBCTM has committed more than $325m[121] to the NECAP Program to support the future of the terminal operations. Even so, the terminal assets will continue to deteriorate over time, and a much higher level of expenditure will be required to replace assets such as shiploaders, yard machines and other major structures. Consequently the NECAP Program promotes economically efficient investment in significant infrastructure at the terminal, which is ongoing for the duration of the operating life of the terminal.

236 Accordingly, to inform the base tariff, it is relevant to consider the investment requirements in infrastructure at the existing terminal over the regulatory period. In periods of low NECAP expenditure, it is possible that a lower base tariff (or incentive) may be sufficient to promote investment in the terminal. Likewise, in periods of high NECAP expenditure, a higher base tariff will meet the objective of promoting investment in the terminal. This approach will promote an economically efficient trade-off between increasing maintenance costs and NECAP.

237 NECAP expectations over the Pricing Period, in this case 2021-2026, can be informed by a range of factors. The most objective and instructive being the views and advice of the independent (user-owned) terminal Operator. The Operator is in turn informed by the utilisation advice received from the individual users of the facility, forecasting their requirements for coal handling over the relevant period. Also, the Operator has a deep understanding of the state of existing infrastructure and is therefore best placed to determine the NECAP requirements of major infrastructure over the relevant period. In order to enable throughput to

[121] Total forecast expenditure of $327.8m including NECAP P approved by DBCT Access Holders in June 2019.

achieve terminal nameplate capacity and therefore service the users' contracted capacity, the Operator may recommend the installation of additional assets, or the refurbishment or replacement of existing assets.

238 In its current 5-year Operation Maintenance and Capital Plan (**OMCP**), the Operator forecasts record levels of NECAP expenditure will be required. The increasing NECAP requirement is to facilitate higher forecast throughput and is a reflection of the age of the equipment and the corrosive marine environment in which the terminal is located. Increased NECAP expenditure is also required for a number of major assets which will exceed their design lives during the period.

239 Appendix 5 contains extracts from the Operator's 5-year OMCP which reveal that the NECAP requirements, being the "investment in infrastructure" contemplated by Part 5 of the QCA Act, are expected to be at record highs over the upcoming Pricing Period. This should inform the base tariff for negotiations.

Expansions - expected capital expenditure requirements

240 As explained in section 3 of this submission, DBCT is in a period of high demand for its coal handling service and is in an expansionary environment.

241 It is appropriate that in any arbitration to determine the TIC, the QCA take into account the expected future tonnages of coal anticipated to be handled through the relevant terminal component during the relevant pricing period and the expected capital expenditure requirements for the relevant terminal component during that period.

242 In high price environments, such as are expected over the Pricing Period, demand for the DBCT service is high. The strong coal price (ranging between US$200 to US$300/t over the past two to three years for hard coking coal) and high consensus forecasts (ranging between US$150 to US$180/t for the next five years and US$135/t from 2024 onwards in real 2019 terms) have driven the substantial demand for coal handling services at DBCT.

243 As set out in section 3 of this submission, DBCT is now in an expansionary phase. This is borne out in the evidence of the access queue, which has been thoroughly tested in late 2018 and remains significant. It is consistent with public announcements from incumbents, new entrants, and indeed consensus coal price expectations. The existing terminal is contracted to full capacity, so any new demand will require an expansion of DBCT. DBCTM has therefore begun the initial stages of work on the next expansion. As a result, the TIC should be informed by the fact there is a high degree of likelihood an expansion is required, and should ensure it promotes further efficient investment in the facility.

244 An expansion of the terminal would increase DBCTM's risk profile and in exchange investors would require a higher return. DBCTM will be subject to the following risks (inter alia) relating to terminal expansions:

244.1 An expansion would attract a smaller user base compared to the current terminal. That is, fewer users would sign up to the additional capacity than are contracted for current terminal capacity. If the expansion is differentially priced (being the default pricing mechanism in the AU) and in the event that one or more of these users default on their obligations, it would place severe pressure on the remaining (if any) expanding users to carry the financial burden. This increases the risk that DBCTM could not recover its investment from the expanded capacity.

244.2 Higher capital investment vs. expansion capacity released. Incrementally it is more expensive (on a per tonne basis) to implement the expansion projects proposed in the Master Plan. This would increase the risk that new users could not fulfil their obligations under an Access Agreement.

244.3 Uncertainty in long term coal price. An expansion project consists of significant capital investment over a number of years. The uncertainty in the coal price during these years increases DBCTM's risk profile due to capital being invested now (when prices are high), but revenue (return on invested capital) is only earned over the subsequent decades, after the expansion has been concluded. During this time the coal price could change to the extent that

profitability and financial positions of expansion parties are negatively impacted. In its April 2005 decision[122] (in approving DBCT's 2006 AU), the QCA agreed that this is a real risk in relation to expansions:

> Even though the economics of expansion appear fundamentally sound given the currently buoyant coal market, the Authority notes that coal prices have been volatile in the past, and therefore, the volume risk for significant new capacity is real. As a consequence, the Authority's view is that investors in a major expansion of the terminal would likely require relatively higher compensation for it

244.4 New capacity at DBCT would have limited long run contract protection, as its asset life would significantly exceed the contract term. This risk was confirmed by the QCA's consultants (ACG) during the 2006 AU, which informed the approved higher rate of return provided to DBCT.

245 During previous regulatory periods when DBCTM was either undergoing or studying expansions, the QCA approved a higher rate of return to account for the increased risk of expansions.

245.1 In the 2006 AU, DBCTM was given an equity beta of 1 for the entire terminal to incentivise expansions of the terminal in order to accommodate the high demand for coal.

245.2 In the 2010 AU, DBCTM was able to negotiate a pricing arrangement with the User Group which was mainly based on high demand from access seekers which resulted in DBCT having to expand. This incentivised DBCTM to spend capital on expanding the terminal.

245.3 The 2017 AU did not contemplate any expansions at DBCT during that regulatory period and therefore didn't include a higher rate of return to account for such risks.[123]

246 The QCA in the 2006 AU referred to the following comments from the Productivity Commission and the Queensland Government to the effect that regulatory bodies should err toward the high side on the basis that the impact on the economy of under-investment exceeds the impact on the economy of higher than warranted prices being paid by customers:[124]

246.1 The Productivity Commission previously stated that there might be asymmetry as a result of over-compensating versus under-compensating infrastructure providers, with the latter being the worse outcome.

246.2 The Queensland Government stated that the rate of return should not only provide investors with an adequate return but a sufficient return to attract investors to invest in such assets in Queensland.

247 DBCT is currently experiencing the same levels of demand from access seekers (requiring expansions of the terminal) as was the case during the 2006 and 2010 AUs.

DBCTM's obligation to rehabilitate

248 Another of the factors the QCA must have regard to in determining the TIC in an access arbitration (and therefore, that will inform negotiations) is the obligation in the Port Services Agreement (**PSA**) to rehabilitate the site on which the Services are provided.

249 The PSA, which sets out the terms and conditions applicable to the leasehold of DBCT, obligates DBCTM to rehabilitate the site at the expiry of the long term lease in accordance with the following specifications, subject to applicable laws and to DBCT Holdings' reasonable requirements:

[122] 2005 Decision re: DBCT Draft Access Undertaking, page 148

[123] As noted in section 3, this has heightened the regulatory risk inherent in future expansions as it demonstrates that incentive returns can be removed not long after the investment has been made

[124] QCA, Final Decision DBCT Draft Access Undertaking, April 2005, page 149

249.1 The **scope** of the rehabilitation must be in accordance with a Rehabilitation Plan;

249.2 The **standard** of rehabilitation must be to remediate onshore and offshore land "to its natural state and condition as existed prior to any development or construction activity having occurred";

249.3 In terms of **timing**, the rehabilitation may be started "before the end of the [lease] to the extent that doing so does not adversely affect its performance of any Project Document, User Agreement or the OMC" and must be completed "within 3 years after the end of the [lease]";

249.4 The **cost** of the rehabilitation must be borne by DBCTM "at its cost".

The DBCT Rehabilitation Plan

250 To facilitate negotiations during the 2019 DAU process and inform related discussions, DBCTM's consultant GHD has developed a Rehabilitation Plan[125] consistent with the requirements of the PSA. This document and the associated cost estimate consolidate all information currently available to DBCTM, referencing the current laws applicable to such a rehabilitation project.

251 DBCTM submits that this level of detail and quality of estimate is a significant improvement over all previous estimates, for example those developed during the 2017 AU process.

252 The Rehabilitation Plan and Estimate are structured so they may be refreshed from time to time as required, for example if the applicable laws change, or if additional plant is installed at the terminal, new technology is developed, or more detailed quantities become available. The Rehabilitation Plan is published in full, and the detailed working estimate will be made available to stakeholders for review.

Standard

253 In its final decision on the 2017 AU, the QCA accepted that DBCT Holdings' reasonable requirements would not reduce the standard to which DBCTM must rehabilitate the terminal.[126] Therefore, it is appropriate to interpret the PSA's obligation as rehabilitating the site to its natural state and condition as existed prior to any development.

254 DBCTM expects that the applicable laws for rehabilitation will be significantly more onerous at the end of the lease term than currently, with the required standard of rehabilitation likely to equal or exceed the standard of rehabilitation as contemplated by the PSA. The Rehabilitation Plan provides some evidence for this, but more recently, DBCTM commenced development of a sustainability strategy for DBCT aligned with the United Nations Sustainable Development Goals (**SDG**s), which have been adopted by some other coal terminals and some of DBCTM's customers.[127] SDGs 14 and 15 relating to Life Below Water[128] and Life On Land[129] respectively are particularly relevant to rehabilitation. While this adoption of the UN SDGs by private organisations is currently voluntary, a Senate committee[130] has recently recommended implementation of the SDGs throughout the Australian Government. Such recommendations are highly reflective of the public interest, unlike the typically narrower scope of public interest identified in a DAU process. This is strong evidence that the trajectory of environmental regulation is toward an increasing level of public interest, difficulty and cost.

[125] Refer Appendix 1 - Rehabilitation Plan
[126] Refer QCA final decision on the DBCT 2017 AU 21-Nov-16, page 144
[127] Refer UN Sustainable Development Goals Knowledge Platform, DBCTM website Sustainability, PWCS Sustainable Development, Glencore Approach to Sustainability, Peabody 2018 ESG Report, Anglo American Our Commitment to the SDGs, BHP Our Approach
[128] Refer https://sustainabledevelopment.un.org/sdg14
[129] Refer https://sustainabledevelopment.un.org/sdg15
[130] Senate Standing Committee on Foreign Affairs Defence & Trade United Nations SDGs 14 February 2019

Cost

255 GHD's estimate for the rehabilitation of the terminal is $1.22 billion (in October 2018 terms). A detailed risk analysis was not undertaken, however a 20% contingency was applied to direct and indirect costs in view of the level of definition of the scope and quantities, and the long term outlook of the project.

256 A detailed risk analysis would assess risks to the project cost that may occur in the intervening 30 years, which may include some of the following risks as examples.

256.1 DBCTM agrees with the QCA that it was not appropriate to discount the cost of the rehabilitation project for technological advances in the absence of robust evidence.[131] In DBCTM's view, it is possible that technological advances may actually increase costs by enabling work which had previously been impossible (or at least prohibitively expensive). Such examples could include reinstatement of coral reefs by transplant, artificial rock pools, and rebuilding platforms for barnacle growth.[132]

256.2 Assumptions relating to offshore (i.e. low cost) recycling of materials are also tentative, due to recent reluctance from China and Malaysia to continue as recyclers. In future, it may only be possible to recycle or dispose of materials onshore, at a significant cost increase rather than a reduction. Recycling steelwork may also represent a significant cost to the project, if recyclers need to be paid to dispose of scrap metal.

256.3 The rehabilitation of DBCT is expected to occur at the end of the economic life of the Bowen Basin. As such it is reasonable to expect that all mines, rail and terminals in the entire Central Queensland Coal Network (**CQCN**) will be rehabilitating at the same time. The market for recycled materials as well as for services and construction capability may not be favourable for the project at the time.

256.4 The costs of labour, safety requirements and mitigating impacts on the community are likely also to increase along with the increasing protections provided by legislation and voluntary sustainable development programs. For example, the dismantling of the offshore assets might require a level of effort similar to their original construction, to ensure safety for those working on it and to mitigate the risk of overbalancing and collapsing of the structure.

256.5 Therefore, DBCTM submits the cost of $1.22 billion is conservative, and as such is prudent and efficient for the purposes of informing arbitration (and negotiations).

Timing

257 DBCTM's rehabilitation obligation under the PSA is triggered by the end of the term of the initial lease in 2051, or if DBCTM chooses to extend the lease, in 2100. The QCA has determined that the economic life of the Bowen Basin ends in 2054. Under those circumstances it would represent a considerable risk for DBCTM to extend the lease for another 50 years to recover only 3 years of trailing revenues, and therefore 2051 should reasonably be considered the relevant date with regard to remediation of DBCT.

Funding the rehabilitation obligation

258 DBCTM does not propose a process or specific value for the remediation allowance as in previous AUs. However, the detailed Rehabilitation Plan and resultant cost estimate of $1.22 billion should inform price negotiations and any arbitration of a dispute regarding price.

[131] Refer QCA final decision on the DBCT 2017 AU 21-Nov-16, page 146

[132] See for example: https://www.pacificmarinegroup.com.au/projects/diving-projects/pomssup-coral-relocation-p24vhm/ ; https://www.reefdesignlab.com/all/

Commercially agreed TICs

259 Another of the factors the QCA must have regard to in determining the TIC in an access arbitration is any other TIC agreed between DBCTM and a different Access Holder for a similar service level. DBCTM considers that it is appropriate for the QCA to have regard to TICs that have been commercially agreed with other users for the same service offerings in determining a TIC in an access arbitration. This will facilitate the determination of a TIC that is reflective of prices that would prevail in a workably competitive market. As is the case for all of the arbitration factors, this will also inform negotiations between DBCTM and access holders.

Section 120 Factors

260 Division 5 of Part 5 of the QCA Act provides a framework for the determination of access disputes in respect of declared services. This includes providing for QCA arbitration of access disputes. The matters to be considered by the QCA in making an access determination in an arbitration of an access dispute in respect of a declared service are set out in s120 of the QCA Act. Given the legislature has determined that these are appropriate factors to take into account in an arbitration of an access dispute in respect of a declared service, DBCTM has included these factors in the access undertaking as factors the QCA must take into account in an arbitration determination in respect of the TIC.

261 DBCTM observes that those factors go beyond the costs to the access provider of providing access to the service and include:

261.1 the value of the service to the access seeker or a class of access seekers or users; and

261.2 the quality of the service.

262 Accordingly, these are factors the 2019 DAU requires the QCA to take into account in any arbitration determination in respect of the TIC.

263 As noted above, the 2019 DAU also specifically includes the types of services provided to the access seeker as a factor the QCA must take into account in any arbitration determination in respect of the TIC.

5.5 Approach is consistent with statutory criteria

264 This negotiate/arbitrate approach to setting access charges provides new access seekers with a right to negotiate prices supported by a right of arbitration where negotiations fail that is consistent with the price review mechanism in existing Access Agreements. It therefore places new users on the same footing as existing users as it means that, like existing users, new users would have recourse to QCA arbitration where price negotiations fail. Further, new users would have substantially similar non-price terms of access as existing users.

265 It is therefore a proportional response that addresses the competition concern identified in the QCA's Draft Recommendation of the potential for asymmetric terms of access between existing users and new users in the absence of declaration and the impact those asymmetric terms may have on competition in the tenements market.

266 It also takes into account the varied combinations of additional service offerings available at DBCT, above the standard service of handling coal. In practice, different users require different combinations of services and value those combinations differently. In this context a one-size-fits all approach to setting access charges is not fit-for-purpose. The 2019 DAU facilitates negotiations between DBCTM and users to reach agreement on the price for these services. If agreement cannot be reached, then the considerations the arbitrator will have regard to include the value of the service to the access seeker and the quality of the service.

267 Price negotiations will be conducted in the knowledge that either party can seek QCA arbitration if negotiations fail. They will therefore be constrained by the threat of a QCA arbitrated price. As such, it is likely that commercial agreement will be able to be reached without resort to arbitration. Should the matter proceed to arbitration, the 2019 DAU sets out the factors the QCA must take into account in determining a

price. Further, the QCA Act (Subdivision 3 of Division 5 of Part 5 and Part 7)[133] contains clear provisions for the arbitration process, which include a timeframe for the arbitration.

268 The negotiate/arbitrate approach to setting access charges is consistent with the statutory criteria for the approval of access undertakings in s138 of the QCA Act as explained below. DBCTM reiterates that the statutory criteria in s138 are not concerned with advancing the rights of existing users who have access under existing contracts, or setting charges for those users. Rather, those criteria are concerned with promoting efficient operation of, use of and investment in the service, promoting effective competition in related markets, the legitimate business interests of the owner/operator, the public interest and the interest of persons who may seek access to the service.

Object of Part 5

269 The negotiate/arbitrate approach to setting access charges is consistent with the object of Part 5 of the QCA Act being to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.

270 The Productivity Commission has recognised that it is preferable to determine prices by commercial negotiation.[134] This principle is reflected in the Competition Principles Agreement. The Productivity Commission has further recognised that negotiated outcomes resolving the terms and conditions of access are preferable to regulated outcomes and can limit the potential for regulatory error.[135]

271 Allowing for prices to be set on a negotiate/arbitrate basis:

271.1 provides for commercial negotiation where both parties have some negotiating leverage and facilitates outcomes that would be expected to be achieved in a competitive market environment;

271.2 promotes the economically efficient use of DBCT by giving users the opportunity to agree prices that are reflective of competitive market outcomes;

271.3 promotes the economically efficient investment in DBCT by facilitating pricing that generates expected revenue for the DBCT service that is at least enough to meet the efficient costs of providing access to the service and includes a return on investment commensurate with the regulatory and commercial risks involved;

271.4 enables the varied combinations of additional service offerings available at DBCT, above the standard service of handling coal, to be taken into account in setting price, thus facilitating efficient use of and investment in DBCT;

271.5 removes the risk of regulatory error in setting prices (where DBCTM and users are able to agree price) and fosters investment in the terminal at a time where DBCT is in an expansionary phase and requires substantial non-expansionary capital investment; and

271.6 addresses the competition concern in the tenements market identified in the declaration review process.

DBCTM's legitimate business interests

272 The QCA has previously stated that:[136]

> 'Legitimate business interests' is not a defined term under the QCA Act.

[133] Note section 121 provides that Part 7 applies to an arbitration under Subdivision 3 of Division 5 of Part 5 of the QCA Act.
[134] Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, pages 48, 66, 109, 112 and 115
[135] Productivity Commission Inquiry Report, National Access Regime, 25 October 2013, page 115
[136] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, pages 24 to 25

We consider the 'legitimate business interests' of DBCTM include the commercial interest in having an opportunity to recover the efficient costs for providing the relevant service and in earning a commercial return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service.

273 The negotiate/arbitrate approach to setting access charges is consistent with DBCTM's legitimate business interests as it enables DBCTM and access seekers to negotiate access charges that provide DBCTM with an opportunity to recover the efficient costs for providing the DBCT service and to earn a commercial return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service.

The public interest

274 The QCA has previously considered that the public interest will be served by an access undertaking that promotes the sustainable and efficient development of the Queensland coal industry.[137] The QCA has noted that this continued investment will, in turn, provide a stimulus to the Queensland economy and local employment.

275 The QCA has noted that when the coal market is experiencing a period of growth, it may be that the public interest requires particular attention be paid to facilitating efficient investment in new or expanded capacity.[138]

276 The 2019 DAU promotes the public interest by providing for the terms and conditions on which access seekers can seek access to DBCT and by facilitating the negotiation between DBCTM and access seekers of access prices. The ability for DBCTM and access seekers to reach commercial agreement as to price removes the risk of regulatory error in setting prices, and promotes economically efficient investment in the terminal at a time when DBCT is in an expansionary phase and requires significant sustaining capital expenditure to continue operating the terminal at high utilisation rates in a period of high demand.

277 The 2019 DAU further promotes the public interest by addressing the competition concern identified in the QCA's Draft Recommendation in the declaration review, without regulatory overreach.

The interest of access seekers

278 The negotiate/arbitrate approach to price setting in the 2019 DAU is consistent with the interests of access seekers as it:

278.1 facilitates the provision of clear and transparent information about access to, and use of, the declared service to support a principled negotiation framework and an effective dispute resolution process;

278.2 allows new access seekers to negotiate access prices with DBCTM having regard to the services they require, with an ability for QCA arbitration where negotiations fail. This is consistent with the mechanism for price reviews available to existing users under their Access Agreements.

279 Further, the 2019 DAU contains a non-discrimination provision preventing DBCTM from engaging in conduct for the purpose of preventing or hindering an access holder's or access seeker's access; or unfairly differentiating between access seekers, access holders, or rail operators;

[137] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, page 25
[138] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, page 25

Pricing Principles

280 The negotiate/arbitrate framework in the 2019 DAU is consistent with the pricing principles in section 168A of the QCA Act. It will enable prices to be set that generate expected revenue for the DBCT service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved.

281 The negotiation framework will take into account the types of services provided by DBCT to the relevant access seeker, as well as the overall efficiency impacts of those services. This may allow for multi-part pricing and/or price discrimination in the case that it aids efficiency.

5.6 Adjustments to TIC

282 The 2019 DAU and the Standard Access Agreement provides for the TIC to be adjusted in accordance with section 11 and Schedule C of the DAU:

282.1 annually based on CPI escalation; and

282.2 if a 'Review Event' Occurs'.

283 'Review Events' relate to changes in aggregate annual contract tonnage, non-expansion capex and socialised expansions. A user or DBCTM may refer a dispute regarding a review event to arbitration by the QCA.

284 Providing for the TIC to be adjusted for review events ensures that the cost impost of the event is spread across users. It also enables DBCTM to earn a return on investment commensurate with the regulatory and commercial risks involved, consistent with the legitimate business interests of DBCTM and the pricing principles in section 168A of the QCA Act.

5.7 Conclusion

285 The 2019 DAU facilitates the commercial agreement of prices through negotiations. Price negotiations will be conducted in the knowledge that either party can seek QCA arbitration if negotiations fail. They will therefore be constrained by the threat of a QCA arbitrated price. As such, it is likely that commercial agreement will be able to be reached without resort to arbitration. Should the matter proceed to arbitration, the factors the QCA must take into account in any arbitration are set out in the 2019 DAU and the QCA Act contains clear provisions for the arbitration process, which include a timeframe for the arbitration.

286 The negotiate/arbitrate approach to setting access charges is a proportional response that addresses the competition concern identified in the QCA's Draft Recommendation on the declaration review of the DBCT service. It places new users on the same footing as existing users as it means that, like existing users, new users have recourse to QCA arbitration where price negotiations fail. Further, new users have substantially similar non-price terms of access as existing users.

287 This approach also enables the varied combinations of additional service offerings available at DBCT, above the standard service of handling coal, to be taken into account in setting price thus facilitating efficient use of, and investment in, DBCT.

288 The negotiate/arbitrate approach to setting access charges is consistent with the statutory criteria for the approval of access undertakings in s138 of the QCA Act.

6 Non-price terms of access

6.1 Overview

290 DBCTM is submitting a new DAU for approval which must be evaluated against the statutory criteria for the approval of access undertakings in s138 of the QCA Act, rather than by reference to the 2017 AU. However, given the non-price terms in the 2019 DAU are similar to those in the 2017 AU, to facilitate the QCA's consideration of those terms, DBCTM explains those provisions by reference to the 2017 AU in this section of the submission and Appendix 2.

291 This section also comments on drafting in the 2019 DAU in respect of expansion processes. Those provisions are not summarised in Appendix 2, but rather are summarised in the text below for ease of reference.

6.2 Amendments to the 2017 AU made prior to commencement of new DAU

292 DBCTM notes that this 2019 DAU is being submitted two years prior to the expiry date of the 2017 AU. It is DBCTM's intention that any amendments to the 2017 AU approved by the QCA prior to the commencement of this new 2019 DAU will be captured in the 2019 DAU prior to its final approval by the QCA. DBCTM has made note of this intent in clause 1.6 of the 2019 DAU.

6.3 Operation and Maintenance Contract (section 3.3)

293 The 2019 DAU does not include the 2017 AU's section 3.3, as DBCTM considers that section 3.2 provides adequate protection to the Access Holders. The role and nature of the Operator is set out in section 3.2 of the Access Undertaking. In accordance with section 3.2 the Operator is, and will remain DBCT Pty Ltd. Given that any amendments to the Operations and Maintenance Contract will need to be negotiated and agreed with the Operator, DBCTM considers this affords the Access Holders adequate protection.

294 In the event that DBCTM wishes to change operator to a non-user owned operator, it will need to submit a draft amending access undertaking. Any changes to the form of the contract (including any consequential changes to the pass through of operating costs under the standard access agreement and Access Undertaking) will necessarily be addressed in any DAAU at this point.

6.4 Access Applications (section 5.3)

295 The 2019 DAU has removed the transitional provisions around the expiration of access applications that existed at the commencement of the 2017 AU. Under the 2019 DAU, all Access Applications will expire on the 31st August each year, regardless of when they are submitted. DBCTM requires a single, uniform date for expiry of access applications to allow efficient administration of the access application process.

296 Further, and in line with moving to a uniform expiry date, the 2019 DAU does not require DBCTM to provide Access Seekers with a notice of expiry for their Access Application. By the date that the 2019 DAU commences, the renewal requirement will have been in place for a number of years and Access Seekers will be used to the annual renewal of Access Applications. If an Access Seeker has a legitimate interest in seeking access, that Access Seeker will progress their Access Application as required including submitting renewals when necessary. Access Seekers will be familiar with the annual date of expiry of their Access Application and are to be responsible for the renewal of their Access Application.

6.5 Renewal Applications (section 5.3A)

297 Section 5.3(A)(a) now requires a renewal application to include an updated date for the commencement of access if the date previously nominated by the Access Seeker now occurs in the past. This improvement ensures that Access Applications remain up to date, and also ensures that the Notifying Access Seeker process can operate as intended. Practically, if the Access Seeker that is first in the Queue has nominated dates for the commencement of Access that occurs in the past, it is not possible for an Access Seeker who is placed lower in the queue to use the process described in section 5.4(e) of the 2019 DAU.

6.6 Short Term Available Capacity (section 5.4)

298 In order to promote the efficient allocation of short-term parcels of capacity which may become available from time to time, the 2019 DAU includes a Notifying Access Seeker (**NAS**) process for 'Short-Term Available Capacity' within section 5.4. DBCTM has defined 'Short-Term Available Capacity' as "Available System Capacity which is available commencing within the next 12 months and that is not able to be renewed". Such short term tonnage occurs, for example, where DBCTM has accepted a ramp up tonnage profile for a new mine or has accepted an Access Application with a slightly later start date than the end date of an expiring Access Agreement. In these circumstances there could be short term Available System Capacity which would ordinarily be unused. The 'Short-Term Available Capacity' process is designed to match immediately Available System Capacity with Access Seekers who require immediate but short term access.

299 By introducing a NAS process for 'Short-Term Available Capacity' DBCTM intends to provide an equitable process for Access Seekers to take advantage of uncontracted and immediately available capacity.

300 The NAS process for 'Short-Term Available Capacity' operates in the same way as the NAS process for regular Capacity except that the timeframes for notification, negotiation and acceptance have been shortened to accommodate an expedited process. The expedited process is consistent with the nature of 'Short-Term Available Capacity' as Capacity which is available commencing within the next 12 months and is not renewable. Each Access Seeker, including those below the NAS in the Queue (in accordance with section 5.4(e)(1) of the 2019 DAU) will be notified of the 'Short-Term Available Capacity' and have the chance to submit a draft Access Agreement.

301 The only difference between the two NAS processes is that there is no risk of removal from the Queue if an Access Seeker does not take up 'Short-Term Available Capacity'. DBCTM recognises that not all Access Seekers in the Queue will want or need 'Short-Term Available Capacity' and there should be no consequence for an Access Seeker who does not take-up an offer of 'Short-Term Available Capacity'. This will safeguard those Access Seekers only seeking long term renewable Capacity.

302 DBCTM submits that a process for 'Short-Term Available Capacity' will increase the efficient allocation of Available System Capacity and allow all Access Seekers additional and equitable access opportunities.

6.7 Notifying Access Seeker (section 5.4)

Commencement date for Access

303 To promote the efficient allocation of Available System Capacity to Access Seekers in the Queue, the 2019 DAU has removed the requirement in section 5.4(e)(1) for a NAS to seek Access at a date which is 6 months earlier than that of the Access Seeker who is first in the Queue. A NAS need only seek Access from a date that is earlier than that of the Access Seeker who is first in the Queue.

All Access Seekers in Queue to be Notified Access Seekers

304 Each Notified Access Seeker will then have the opportunity to submit a conforming Access Application with a date for commencement that is the same as or earlier than that submitted by the NAS. Removing the 6 month requirement will ensure that Available System Capacity is contracted from the earliest possible date. Access Seekers are not disadvantaged by the 2019 DAU provisions as the NAS process allows each Access

Seeker the opportunity to submit an Access Agreement with an Access Date that is the same as or earlier (but not earlier than the date of the Notice given by the NAS) than the date of Access specified in NAS Notice. Further, an Access Seeker first, or higher in the Queue than the NAS, is entitled to submit an Access Agreement for revised (lower) Tonnage and a shorter term giving it the flexibility it may require in order to gain Access from the earlier Access date.

305 The 2019 DAU also requires all Access Seekers in the Queue to be notified when a Notifying Access Seeker requests Access. This will mean that all Access Seekers in the Queue (and not just those ahead of the NAS) will be 'Notified Access Seekers' and must comply with the obligations of a Notified Access Seeker.

Removal from Queue

306 To promote the efficient allocation of Capacity, the 2019 DAU includes objective criteria for the decision as to whether DBCTM is to remove a Notified Access Seeker who did not respond to the NAS process from the Queue. Under the 2019 DAU, all Notified Access Seekers:

306.1 with a commencement date that is within 2 years of the Notifying Access Seeker's nominated start date; and

306.2 who do not respond with a signed Access Agreement within the 3 month notification period,

may be removed from the Queue.

307 The 2019 DAU has removed the considerations DBCTM was previously required to consider under section 5.4(h)(2) in favour of the more objective criteria set out above. If there is a bona fide dispute about the purported removal from the Queue that Notified Access Seeker will retain their position in Queue until the dispute is resolved, however, DBCTM is not obliged to conclude an Access Agreement with the Access Seeker until the dispute is resolved. DBCTM has removed considerations regarding removal from the Queue to provide certainty to the process.

Negotiation cessation provisions apply

308 The 2019 DAU clarifies that DBCTM is not obliged to enter into an Access Agreement with a Notified Access Seeker in circumstances where, had the normal Indicative Access Proposal process been followed in accordance with sections 5.6-5.8, DBCTM would be entitled to cease negotiations under section 5.8. DBCTM considers this reflects the intent of the 2017 AU. As an Access Seeker's circumstances may have changed between the time it submitted its Access Application (and was accepted into the Queue) and the time when any NAS process is undertaken, DBCTM should not lose any right to cease negotiations purely because DBTCM was not required to issue the standard Indicative Access Proposal to the Access Seekers responding to the NAS process.

Pricing for Access Agreements entered into as a result of the Notifying Access Seeker process

309 Given that the 2019 DAU removes the concept of a QCA-determined reference tariff, additional provisions have been added to the Notifying Access Seeker process (as new subclauses 5.4(j) and (k)) to allow each Notified Access Seeker and DBCTM to agree on the TIC to be applied under any Access Agreement entered into as a result of the Notifying Access Seeker process, or failing agreement, for the determination of the TIC to be referred to the dispute resolution process in Section 17 of the 2019 DAU.

310 The provisions have been formulated to implement the negotiate/arbitrate approach with as few changes to the Notifying Access Seeker process as possible, while ensuring there is a genuine opportunity for negotiation and that Access Seekers who are prepared to enter into contracts for Available Capacity have a recourse to arbitration during the contracting process. The provisions ensure that no allegations may arise as to DBCTM's ability to "auction off" capacity when Access Seekers offer to enter into Access Agreements.[139] Because the process for agreeing the TIC occurs after the 3 month Notifying Access Seeker

[139] Noting that the QCA Act under s104 prohibits any attempt to deny or hinder access, and includes penalties for such conduct

process and after determination by DBCTM of the order in which it must contract any Available Capacity, the 2019 DAU includes a shorter time frame for negotiation of the TIC (30 days) before the matter is referred to dispute resolution.

6.8 Pricing for Conditional Access Agreements

311 Given that the 2019 DAU removes the concept of a QCA-determined reference tariff, the 2019 DAU incorporates some consequential changes to the process for entering into Conditional Access Agreements with Access Seekers.

312 The "Expansion Pricing Approach" provisions in the 2019 DAU have been formulated to implement the negotiate/arbitrate framework when DBCTM offers to enter into Conditional Access Agreements with Access Seekers who are willing to enter contracts conditional on completion of a Capacity Expansion. The process ensures that there is a genuine opportunity for negotiation and that Access Seekers who are prepared to enter into contracts for expansion capacity have recourse to arbitration at key stages of the contracting process. The provisions ensure that no allegations may arise as to DBCTM's ability to "auction off" capacity when users enter into conditional access agreements.[140]

313 The 2019 DAU provisions are largely the same as under the 2017 AU. The key provisions which give effect to the negotiate/arbitrate framework are:

313.1 In conjunction with providing an "Expansion Notice" to all Access Seekers in the Queue offering to enter into an access agreement conditional upon an expansion, DBCTM may propose an "Expansion Pricing Approach" which will be the formula for calculation of the TIC following completion of the Expansion. The Expansion Pricing Approach proposed by DBCTM must be consistent with the QCA's Price Ruling on whether the costs of the Expansion are to be socialised or differentiated and must be the same for each Access Seeker, unless differentiation is reasonably justified because of different circumstances relating to the Services at the Terminal. There is no prohibition on an Access Seeker referring any dispute in relation to the Expansion Pricing Approach for determination in accordance with Section 17 of the 2019 AU.

313.2 Alternatively, if DBCTM does not propose an Expansion Pricing Approach in conjunction with an Expansion Notice, Access Seekers may sign Conditional Access Agreements that do not yet specify a basis for the determination of the Initial TIC. If this occurs, Section 5.4(l)(15) now includes an additional step that requires DBCTM and each Access Seeker to agree the Expansion Pricing Approach that will be applied to determine the TIC following the completion of the expansion. In the absence of agreement, DBCTM and each Access Seeker will have recourse to dispute resolution under Section 17 at this stage, to provide comfort to both DBCTM and Access Seekers.

313.3 Principles to be applied by the QCA in relation to any arbitration of a dispute regarding the Expansion Pricing Approach have been included in Section 11.9 of the 2019 DAU.

313.4 Following the completion of the expansion, DBCTM will determine the Initial TIC in line with the Expansion Pricing Approach, agreed by the parties or determined by the QCA. Any disputes regarding this process will be arbitrated by the QCA in line with the Expansion Pricing Approach set out in the conditional access agreement.

314 More generally, DBCTM notes that the existing expansion provisions present considerable opportunity to further streamline the process in order to ensure that the regulatory processes do not present an obstacle to expansions. As DBCTM progresses with an expansion, it is possible that DBCTM will seek to improve the efficiency of expansion process, in collaboration with Access Seekers and existing Users and subject to QCA approval, in order to reduce unnecessary cost and complexity. These changes would be implemented through the submission of a draft amending access undertaking.

[140] Noting that the QCA Act under s104 prohibits any attempt to deny or hinder access, and includes penalties for such conduct

6.9 Introduction and reduction of timeframes

315 As explained below, the 2019 DAU includes a number of new time period stipulations.

Disputes regarding requested Security

316 To promote the timely negotiation and conclusion of Access Agreements, section 5.4(g) of the 2019 DAU requires a Notified Access Seeker that wishes to dispute the Security requested by DBCTM to raise the dispute within 14 days of receiving notice of such Security requirement. Given the nature of the NAS process, which contains a three month period during which interested Notified Access Seekers are to deliver sign Access Agreements to DBCTM, with DBCTM required to contract Available System Capacity at the conclusion of the process, DBCTM considers that it is reasonable for any Dispute in relation to requested Security to be required to be raised in a timely manner. The imposition of the time limit for raising any Dispute will assist to avoid delays in contracting Available System Capacity, as DBCTM is required to wait until resolution of the Dispute to determine whether a Notified Access Seeker who does not provide the Security requested by DBCTM can be excluded from the outcome of the NAS process when tonnage is contracted. If Disputes as to any Security requested are raised promptly, it is possible the Dispute could be resolved during the three month NAS process without further extending the time line for the entry into Access Agreements by DBCTM.

Acceptance of tonnage by Notifying Access Seeker (section 5.4(h))

317 The 2019 DAU includes a timeframe under section 5.4(h) for the NAS to elect whether it will enter into an agreement where sufficient Available System Capacity remains at the end of the NAS process to satisfy the NAS's original Access request. This is because the 2017 AU is silent on the time line for concluding an Access Agreement with the NAS itself (whereas all Notified Access Seekers are required to deliver signed Access Agreements with their response to the NAS process).

318 DBCTM considers 30 Business Days to be an appropriate timeframe to conclude an Access Agreement, consistent with the timeframe for a response to an Indicative Access Proposal. The 30 Business Day timeframe provides structure to the negotiation process and gives certainty to both the NAS and those further down the Queue.

Acceptance of lesser tonnage than applied for by Access Seeker (section 5.4(i)(5))

319 The 2019 DAU includes a time period for an Access Seeker to accept an offer and enter into an Access Agreement for capacity if the Available System Capacity at the conclusion of the processes in sections 5.4(c), 5.4(e) and 5.4(f) is less than that required in the Access Seeker's Access Application in full. Without such a time period, DBCTM has found that Access Seekers can delay their decision as to whether to enter into an Access Agreement for any capacity that remains. This does not promote the efficient operation of the Terminal and prevents DBCTM from offering the capacity to the next Access Seeker in the Queue.

320 DBCTM considers 30 Business Days to be an appropriate timeframe to conclude an Access Agreement, consistent with the timeframe for a response to an Indicative Access Proposal. The 30 Business Day timeframe provides structure to the negotiation process and gives certainty to those further down the Queue.

Queue (section 5.4)

321 The 2019 DAU requires any dispute in relation to the re-ordering of a Queue under section 5.4(w) (in respect of Socialised and Differentiated Queues) to be raised by an Access Seeker within 15 Business Days of receiving notice of the re-ordering. This will allow any Dispute to be raised and resolved in a timely manner which is to the benefit of all Access Seekers. Queuing disputes are of increased importance to all stakeholders and should be raised by the relevant Access Seeker as soon as possible. If no Dispute is raised

within the 15 Business Day timeframe, the re-ordering of the Queue is finalised to allow DBCTM to administer the Queue and give certainty to all Access Seekers.

Response to Indicative Access Proposal for Short Term Available Capacity (section 5.6)

322 The 2019 DAU requires Access Seekers to commence negotiations within 14 days after indicating an intention to progress an Access Application on the basis of an Indicative Access Proposal relating to Short Term Available Capacity. Having a hard timeframe will ensure that negotiations and Access Applications progress expeditiously to ensure that Short Term Available Capacity can be utilised. DBCTM considers the shorter timeframe than the 30 Business Day timeframe generally applicable to a response to an Indicative Access Proposal is appropriate when considering the nature of Short Term Available Capacity (being Available System Capacity with a commencement date for Access within the next 12 month period). DBCTM seeks to ensure it is possible to run through the Queue quickly in offering this capacity, to give the greatest likelihood that such capacity can be utilised.

Commencing negotiations (section 5.7)

323 The 2019 DAU requires Access Seekers to commence negotiations within 14 days of indicating an intention to progress an Access Application on the basis of an Indicative Access Proposal (whether for Short Term Available Capacity or longer term tonnage). Having a hard timeframe, in lieu of "as soon as reasonably practicable" will ensure that negotiations progress in a timely manner.

6.10 Ceasing negotiations (section 5.8)

324 The 2019 DAU includes two extensions to the current grounds for ceasing negotiations with Access Seekers.

325 The first extension has been added to section 5.8(a)(3). DBCTM can currently stop negotiations where an Access Seeker has no genuine interest in utilising Access at the level of capacity which is sought. DBCTM has extended this provision to allow it to cease negotiations with Access Seekers who have no reasonable likelihood of utilising capacity from the nominated commencement date. The additional discretion for DBCTM to consider the commencement date from which Access is sought will prevent Access Seekers who do not have viable producing projects from engaging DBCTM in the negotiation process in an attempt to reserve capacity for future operations which are unlikely to eventuate in the timeframe submitted by the Access Seeker and which cause inefficient contracting of Terminal capacity (both in respect of future capacity and Available System Capacity). DBCTM views this provision as consistent with the grounds for which DBCTM may reject an Access Application under section 5.3(d) in the first instance; if the Access Seeker's circumstances have changed since its Access Application was submitted or the details of its Access Application later turn out to be incorrect, it is reasonable that DBCTM can cease negotiations for the same reasons.

326 DBCTM will also cease negotiations with Access Seekers who are not willing or able to provide the Security reasonably requested by DBCTM in accordance with section 5.9. This is a qualification on DBCTM's current right to cease negotiations where the Access Seeker or its guarantor is not of good financial standing under section 5.8(a)(4) and is the practical outcome of concerns regarding the financial standing of an Access Seeker.

327 Finally, the 2019 DAU adopts a broad definition of "Related Entities" (as opposed to the 2017 AU's "Related Bodies Corporate") in section 5.8(c), and has removed the two year timeframe restriction. The broader definition will allow DBCTM to look further at an Access Seeker's owners and guarantors and take into account all prior dealings in considering whether the Access Seeker is reputable or of good financial standing. For example, this change will capture the relevant 'track record' considerations for individual directors of Access Seekers.

6.11 Reporting of aggregated information (section 8.4)

328 The 2019 DAU includes under section 8.4(c) a right for DBCTM to share with the 'below rail' railway infrastructure provider details of changes in Aggregate Annual Tonnage, including notifying the railway infrastructure provider when an Access Holder does not exercise an option to renew all or part of its Annual Contract Tonnage.

329 DBCTM requires the ability to provide Aurizon Network with notice when an Access Holder does not renew its Annual Contract Tonnage in whole or in part (noting that exercise of options to extend generally occur 1 year out from the expiry date) in order to promote the efficient operation of the rail network and the Terminal. Because each Access Holder's use or otherwise of Annual Contract Tonnage impacts all Access Holders and Access Seekers, for DBCTM to be able to share this information is beneficial for forward planning purposes in the event the Access Holder has not notified the railway infrastructure provider itself. Notifying the railway infrastructure provider of any non-renewal of contracted capacity will also assist Access Seekers who might take up that capacity to obtain necessary commitments from the railway infrastructure provider that the Access Seeker will be able to obtain rail access to match its Access Application.

6.12 Cessation of activities by Trading SCB (section 9)

330 In light of the decision to cease the activities of the Trading SCB from 1 September 2018, the 2019 DAU removes the provisions that specifically related to this entity from section 9. The Trading SCB will be deregistered by the date of commencement of this 2019 DAU.

6.13 Independent expert (section 12.1)

331 DBCTM requires further certainty surrounding the process for independent expert assessment. If the independent expert is the Integrated Logistics Company (**ILC**), DBCTM should be entitled to assume the membership of the ILC (including the Operator, Access Holders, and other Service Providers) will have been consulted as necessary for the ILC to make a determination of System Capacity.

332 Further, the right to object to a determination made by the independent expert should be limited to those instances where there has been a breach of the 2019 DAU, a breach of an Access Agreement or manifest error. Any dispute with a capacity assessment undertaken in accordance with the requirements of the 2019 DAU must be made within 30 days after the estimate is released. These provisions provide cost and time certainty to the process for estimating Available System Capacity and will therefore benefit the user group.

6.14 Access Application (Schedule A)

333 The 2019 DAU includes a number of changes in the template form of Access Application and Renewal Application contained in Schedule A.

Date for commencement

334 For clarity, the 2019 DAU has noted on the template Access Application form the requirement in section 5.3(d)(2)(A) that the date of commencement of delivery of coal is not to be later than five years from the date of an Access Application.

Ramp-up profiles

335 To ensure appropriate allocation of Available System Capacity DBCTM will only permit ramp-up profiles for the first four years in which Access is sought. DBCTM recognises the need for Access Seekers to have ramp-up profiles but is seeking to ensure Available System Capacity is properly utilised. The 'Short-Term Available Capacity' process will complement the use of ramp-up profile.

336 A requirement that delivery commences within five years from the date of the Access Application and a restriction on the use of ramp-up profiles will mean that only Access Seekers with viable projects submit Access Applications for consideration ensuring efficient utilisation of Available System Capacity and efficient Queue management.

Environmental status

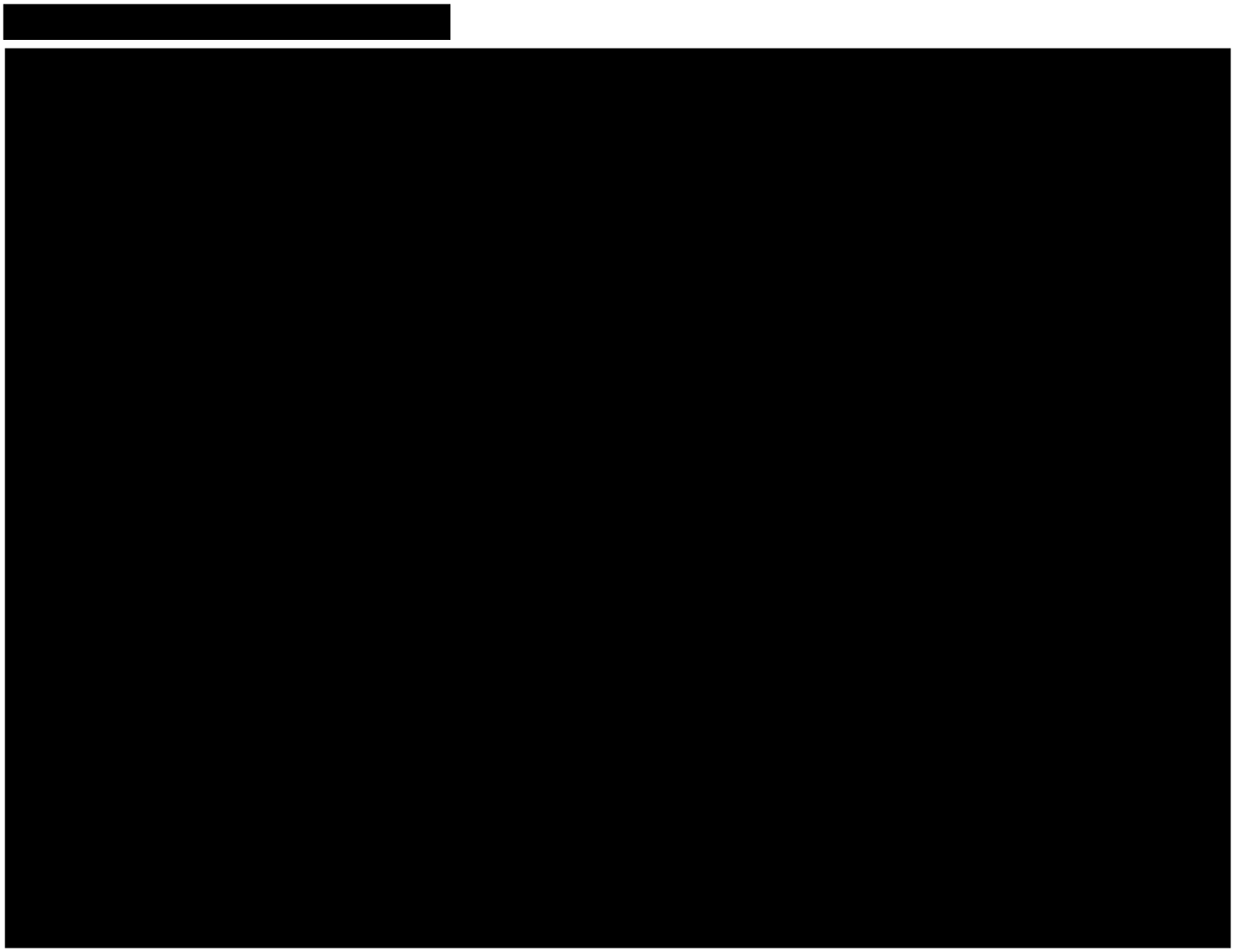
337 It is in both DBCTM and the user group's interests that any Queue for access formed is a "real" Queue, comprised of genuine Access Seekers. To aid in DBCTM's assessment of the relevant project in accordance with section 5.3(d)(2)(A) of the 2019 DAU, DBCTM requires details as to the status of the project's Environmental Approvals. This will assist DBCTM in determining whether an Access Seeker is likely to have an operating mine at the nominated commencement date for Access nominated in the Access Application. Section 5.2(b) of the 2019 DAU contains an acknowledgment by DBCTM that any information may be forecast only.

6.15 Standard Access Agreement

338 The 2019 DAU introduces clause 15.7 to the Standard Access Agreement. Clause 15.7 is designed to ensure continuity of the Access Agreement during any dispute which might arise between DBCTM and the User during the course of the Access Agreement. The obligation to continue to perform the Access Agreement arises in respect of both DBCTM and the User. DBCTM considers this to be a market standard clause for dispute frameworks.

Appendix 5 Operator's charts

[redacted]



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