



11 March 2019

Professor Flavio Menezes  
Chair  
Queensland Competition Authority

Dear Professor Menezes

**DBCT Declaration Review - Response to Initial Submissions**

1. I am pleased to attach DBCT Management's (**DBCTM**) response to the QCA's Draft Recommendation in relation to the coal handling service at Dalrymple Bay Coal Terminal dated December 2018 (**Draft Recommendation**).
2. The DBCTM submission identifies fundamental errors in the Draft Recommendation. Once these errors are corrected, it becomes clear that the coal handling service at DBCT does not satisfy the declaration criteria. Many of the fundamental errors arise from the QCA mischaracterising, and in some cases ignoring, key provisions of the DBCT 2020 Access Framework (**Access Framework**).
3. The QCA's approach to assessing the Access Framework has denied DBCTM the benefit of responding in an informed way to the QCA's preliminary assessment of its merits. At the time of initial submissions in May 2018, DBCTM made repeated offers to the QCA to meet to ensure that the QCA fully understood the Access Framework. All such requests were rejected. DBCTM expects that the QCA will now correctly assess the operation of the Access Framework to ensure that its final recommendation is made on the basis of facts, rather than fundamental errors. A significant opportunity for the QCA Board to ensure that it correctly understands the operation of the Access Framework is the public forum on 20 March 2019. We look forward to addressing the Board's questions at that time.
4. The DBCTM submission also updates some of the critical facts relevant to the QCA's application of the declaration criteria. In particular, the QCA must accept that the terminal is fully contracted through to 2030. Further, current requests for capacity in the QCA approved access queue materially exceed any likely expanded capacity of the terminal in this period. Accordingly, the terminal cannot meet existing users' and access seekers' demand for coal handling services at the terminal through to 2030. Any new entrant seeking capacity will have to go to the back of queue and is therefore highly unlikely to obtain access in this period. On the basis of these unequivocal facts, criterion (b) and (a) cannot be satisfied.
5. To put beyond doubt that DBCTM cannot act in any way that will adversely impact competition in relevant markets if the relevant service is not declared, DBCTM has executed an irrevocable Deed Poll. As a result, the Access Framework will automatically become operational and binding upon the relevant services not being declared. DBCTM is now bound to provide services on terms substantively the same as under the current QCA approved access undertaking, with the agreed or arbitrated price for services being subject to a binding \$3 cap. Given the enforceable nature of the Access Framework, DBCTM considers that there can be no further reason to conclude that the terms and conditions of access, including price, in an unregulated environment could materially impact the tenements market.
6. We look forward to your further consideration of DBCTM's positions herein.

Yours sincerely

Anthony Timbrell  
Chief Executive Officer  
**DBCT Management**

Attachment 1: DBCTM response to QCA Draft Recommendation

DBCT MANAGEMENT



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## **DBCT declaration review**

**DBCT Management response to QCA draft recommendation**

**11 March 2019**

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## 1 Executive Summary

- 1 DBCT Management Pty Ltd (**DBCTM**) provides this submission in response to the Queensland Competition Authority's (**QCA's**) draft recommendation on its review of the declared service at Dalrymple Bay Coal Terminal (**DBCT**) under the *Queensland Competition Authority Act 1997* (**QCA Act**).

### Key facts

- 2 The QCA must make its recommendation on the basis of the following unequivocal key facts.
- 2.1 DBCTM is now fully contracted from 2023 to 2030 and near fully contracted in 2021 and 2022.
- 2.2 Up to 56.1Mtpa is requested by access seekers, in addition to the current 84.2Mtpa capacity of the terminal, in the formal access queue.
- 2.3 The execution of access applications by access seekers in the access queue under the QCA approved 2017 Access Undertaking must constitute the most probative evidence of the minimum current unmet demand at DBCT. Such applications are made by access seekers and are not hypothetical forecasts by third parties. Further, this unmet demand is the minimum demand as it does not include mines in the region in which it is physically feasible and financially preferable to use coal handling services at the port of Hay Point who are not already users or access seekers at DBCT.
- 2.4 On the most aggressive expansion profile feasible, where an expansion commences in March 2019, immediately following execution of binding access agreements by access seekers for the expansion capacity, the earliest that expanded capacity will be commissioned is as follows: Zone 4 (4Mtpa) by September 2023, 8X Phase 1 (5Mtpa) by September 2025 and 8X Phase 2 (8Mtpa) by February 2027, at which point the maximum capacity of the terminal is 102Mtpa. Expansion beyond 102Mtpa is not feasible before 2030, if at all.
- 2.5 On the basis that the current system capacity is 84.2Mtpa and the maximum expanded capacity of the terminal is 102Mtpa, the terminal cannot meet current indicated minimum demand - being the total contracted capacity under binding user agreements plus the total tonnage in the access queue - at any time between now and 2030. Further, on this basis it is highly unlikely that any new entrant to the tenements market (not already in the queue) could obtain capacity at DBCTM, either with declaration or without declaration, in the period up to 2030.
- 3 DBCTM's submissions on access criteria (b), (a) and (d) are summarised below.

### Criterion (b)

- 4 The QCA has erred in its assessment of whether the DBCT service satisfies criterion (b). In addition, DBCTM presents new, recent information that supports a conclusion that criterion (b) is not satisfied.
- 5 The QCA's approach to market definition conflates the distinct concepts of 'demand for' and 'use of' a service. The QCA's approach assumes that demand in the market cannot include volumes that are served by other terminals. As a result, the QCA incorrectly dismisses evidence of substitution between terminals actually occurring in the market and fails to correctly identify total foreseeable demand in the market as required by section 76(2)(b) of the QCA Act.
- 6 The QCA's errors in respect of market definition have the result that, in estimating total foreseeable demand in the market:
- 6.1 for customers that the QCA considers are in the market, the QCA estimates those customers' use of the DBCT service, rather than their total demand; and
- 6.2 the QCA understates the number of customers in the market because it underestimates the scope of the market for the DBCT service.

- 7 On any reasonable view of total foreseeable demand in the market, demand exceeds DBCTM's reasonably possible maximum coal handling capacity over the declaration period. Accordingly, the DBCT service fails the first limb of criterion (b).
- 8 Further, the QCA has made fundamental errors in its least cost assessment. DBCTM demonstrates that after correcting for those errors, and even on the QCA's assessment of demand, it is not least cost for DBCT to meet total foreseeable demand in the market over the period for which its services would be declared.
- 9 The only reasonable conclusion is that the DBCT service does not satisfy criterion (b) and therefore the QCA cannot recommend that the DBCT service be declared.

### Criterion (a)

- 10 The QCA has erred in its assessment of whether the DBCT service satisfies criterion (a). Many of the fundamental errors arise from the QCA mischaracterising, and in some cases totally ignoring, key provisions of the DBCT Access Framework (**Access Framework** or **Framework**).
- 11 The QCA's assessment that criterion (a) is satisfied for the DBCT service is based on a fundamental misapprehension that there were significant asymmetries in the terms and conditions of access between new and existing users, such that potential efficient new entrants would be deterred from entering the coal tenements market. The key premise of this is, without declaration, there would be a substantial price differential between new and existing users in the order of \$15 per tonne. However, if the Access Framework had been correctly applied by the QCA there would have been no material price differential and accordingly criterion (a) would not have been satisfied.
- 12 Even so, DBCTM has now executed the Deed Poll to provide absolute certainty as to the terms of access without declaration. Furthermore, and most significantly under the Deed Poll, DBCTM is prevented from charging new users a TIC that is more than \$3.00 per tonne greater than what the QCA would determine for the existing terminal. The only circumstances where DBCTM can charge more than this is where the QCA would determine a TIC for a new terminal component that exceeds the existing Floor TIC + \$3.00 (i.e. in the case of an expensive and differentially priced expansion). In those circumstances, DBCTM could only charge up to the equivalent of a QCA determined TIC for that terminal component.
- 13 The introduction of the \$3.00 cap comprehensively addresses the QCA's key concern, by ensuring that the access charges paid by new users are within the \$3.50 materiality threshold (which the QCA has already concluded would not appear to be material)<sup>1</sup> of the QCA determined charges for the existing terminal.
- 14 Therefore, in comparing the future with declaration to the future without declaration, it is clear that there are no material differences in the environment for investment, efficiency, and competition in the coal tenements market or any other dependent market of the DBCT service.
- 15 Further, a significant recent change in circumstances provides new information which strongly supports a recommendation that the DBCT service cannot satisfy criterion (a). Importantly, in this submission DBCTM explains:
  - 15.1 amendments made to the final, now executed, Framework which comprehensively address the issues raised by the QCA and User Group; and
  - 15.2 new information regarding contracted capacity and the access queue at DBCT, which shows that it is highly unlikely that new entrants to the coal tenements market would gain access to DBCT, with or without declaration.
- 16 For the reasons set out in this submission the QCA cannot be affirmatively satisfied that the relevant service satisfies criterion (a).

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<sup>1</sup> QCA Draft Recommendation, pages 86 and 87

**Criterion (d)**

- 17 Thorough analysis does not support the QCA's draft recommendation that criterion (d) is satisfied for the DBCT service. On the basis of new information concerning DBCTM's contractual status and significant updates to the Access Framework, DBCTM submits that declaration does not promote the public interest because, *inter alia*:
- 17.1 Declaration does not result in material economic benefits which would not otherwise be promoted without declaration because:
- 17.1.1 The vast majority of capacity is contracted with evergreen renewal clauses ensuring that existing price and non-price terms of access will remain the same with or without declaration.
- 17.1.2 The effect of declaration on a narrowly defined tenements market is extremely limited once the lack of available capacity for new entrants and the incumbent demand for coal tenements are examined. Accordingly, any economic benefits (including the promotion of investment) said to flow from declaration are not of sufficient significance to be relevant to the public interest.
- 17.2 Declaration does not result in a materially different environment for investment because:
- 17.2.1 In respect of existing users, evergreen renewal clauses ensure that existing price and non-price terms of access will remain the same with or without declaration meaning that there is no change in incentives to invest with or without declaration;
- 17.2.2 Regarding potential new entrants, the only effect on incentives to invest relate to the decision to acquire coal tenements, and this effect is limited with regard to the amount and staggered nature of incumbents' demand as well as the Access Framework, which provides pricing certainty with 'hard-coded' price caps, such that there is no material difference in the environment for investment with or without declaration;
- 17.2.3 Unregulated port access charges are not a significant determinant of investment in global coal markets;
- 17.2.4 DBCTM has strong incentives to maximise demand for the use of its services and promote efficient investment irrespective of declaration;
- 17.2.5 Declaration introduces the risk of regulatory error which diminishes DBCTM's incentives to invest in the DBCT facility; and
- 17.2.6 Claims that increased investment resulting from declaration gives rise to broad economic benefits fails to apply a 'with and without test' to ascertain if the investment would occur in any event irrespective of declaration.
- 17.3 Declaration is associated with significant compliance and administrative costs.
- 18 For the reasons set out in this submission, the QCA cannot be affirmatively satisfied that the relevant service satisfies criterion (d). Indeed, the future without declaration will promote the public interest by preserving regulatory certainty while substantially reducing regulatory costs and promoting incentives to invest in DBCT itself.

**2 Criterion (b)**

**2.1 Summary**

- 19 The QCA has fundamentally erred in its assessment of whether the DBCT service satisfies criterion (b). When the QCA's errors are corrected the only reasonable conclusion is that the DBCT service does not satisfy criterion (b) and therefore the QCA cannot recommend that the DBCT service be declared.
- 20 DBCTM engaged HoustonKemp to review and respond to the QCA's draft recommendation on criterion (b). HoustonKemp's Report is referred to in this submission as the **HoustonKemp March 2019 Report on (b)**.<sup>2</sup>
- 21 The following table summarises the primary positions of DBCTM and the QCA on criterion (b) and identifies the QCA's principal errors in its draft recommendation on criterion (b).

**Figure 1: Summary of key positions and QCA errors - criterion (b)**

Issue	DBCTM	QCA draft recommendation	QCA's errors
The service	As per section 250(1)(c)	As per section 250(1)(c)	None
The facility	As per section 250(5)	As per section 250(5)	None
The market	The market for coal handling services for mines that are proximate to the Port of Hay Point	The market for DBCT's coal handling services in the Goonyella coal system	<ul style="list-style-type: none"> <li>• The QCA makes a fundamental error in its approach to market definition.</li> <li>• The QCA's approach to market definition assumes that demand in the market cannot include volumes that are served by other terminals, such that it does not exceed the existing use of DBCT.</li> <li>• As a result, the QCA focuses on the degree of substitutability between the existing capacity of DBCT and coal handling services provided by other facilities and fails to consider the degree of substitutability between the expanded capacity of DBCT and coal handling services provided by other facilities.</li> <li>• The QCA's framework for analysis leads the QCA to the incorrect conclusion that DBCT is the only supplier in the relevant market, discounting evidence that there has been, and continues to be, close competition between the supply of expanded capacity at DBCT and other coal terminals for Goonyella system users.</li> </ul>

<sup>2</sup> The HoustonKemp March 2019 Report on (b) is included as Appendix 1

Issue	DBCTM	QCA draft recommendation	QCA's errors
Period for assessing total foreseeable demand	While the DBCT service should not be declared for any period, DBCTM assessed whether DBCT can meet total foreseeable demand in the market at least cost over a 10 year period	The QCA assessed whether the DBCT service can meet total foreseeable demand in the market at least cost over a 10 year period. The QCA also stated its view that the appropriate period for declaration is 10 years.	<ul style="list-style-type: none"> <li>The QCA has fallen into error in concluding the DBCT service should be declared for 10 years in circumstances where the QCA cannot reasonably be satisfied of criteria (a), (b) or (d).</li> </ul>
Total foreseeable demand	Total foreseeable demand in the market is the total demand arising from customers in the market. Peak total foreseeable demand in the market in the declaration period is at least 188Mtpa.	Total foreseeable demand ranges from 93Mtpa to 85Mtpa over the declaration period	<ul style="list-style-type: none"> <li>As a consequence of the QCA's flawed approach to market definition, the QCA fails to identify total foreseeable demand in the market in which the DBCT service is supplied, contrary to section 76(2)(b) of the QCA Act:                             <ul style="list-style-type: none"> <li>for customers that the QCA considers are in the market, the QCA estimates those customers' use of the DBCT service, rather than their total demand; and</li> <li>the QCA understates the number of customers in the market because it underestimates the scope of the market for the service.</li> </ul> </li> <li>The QCA erroneously excludes from estimated demand:                             <ul style="list-style-type: none"> <li>demand from BMA mines (as it conflates supply with demand);</li> <li>demand from BMC mines in excess of existing contracts at DBCT;</li> <li>volumes contracted to other terminals; and</li> <li>volumes from mines outside the Goonyella system which on economic considerations would prefer to use DBCT</li> </ul> </li> <li>DBCT's contracted capacity and access queue further demonstrates that DBCT cannot service total foreseeable demand in the market alone over the declaration period.</li> </ul>
DBCT cannot meet total foreseeable demand	Even on the QCA's approach to market definition and estimating total foreseeable demand, the DBCT service does not satisfy criterion (b) because DBCT cannot meet total foreseeable demand over the declaration period.	The QCA treats DBCT as having capacity of 94Mtpa to service total foreseeable demand of 93Mtpa in 2021.	<ul style="list-style-type: none"> <li>The QCA has misconstrued and misapplied section 76(3) of the QCA Act.</li> <li>The QCA cannot reasonably treat DBCT as having capacity of 94Mtpa until September 2025, at the very earliest and in any scenario.</li> </ul>

Issue	DBCTM	QCA draft recommendation	QCA's errors
At the least cost	DBCT cannot satisfy total foreseeable demand at least cost compared to any 2 or more facilities	DBCT can satisfy total foreseeable demand at least cost compared to any 2 or more facilities	<ul style="list-style-type: none"> <li>• The QCA's treatment of sunk costs in its least cost analysis is contrary to commonly understood microeconomic principles and the Tribunal's decision in the Pilbara rail matter.</li> <li>• The price of alternative terminals and rail transport includes sunk costs that the QCA includes as part of total cost in assessing the costs of meeting demand at alternative terminals but not when assessing the cost of expanding DBCT.</li> <li>• The QCA's calculations for implementing its preferred approach in the draft recommendation are incorrect and not consistent with the QCA's worked example in Appendix B of its Issues Paper. Properly applying the QCA's own methodology, the DBCT service does not satisfy criterion (b).</li> </ul>

22 The QCA's errors are explained in this submission and its Appendices and the HoustonKemp March 2019 Report on (b).

23 In addition to explaining how the QCA has erred in its approach to and its application of criterion (b), this submission presents new information to support DBCTM's position that criterion (b) is not satisfied, including evidence:

- 23.1 that DBCT is contracted to 84.07Mtpa and there is a queue of access seekers with unmet capacity requirements;<sup>3</sup>
- 23.2 that BMA's contracts with, and use of, DBCT supports DBCTM's position that production from all BMA mines should be included in total foreseeable demand in the market;
- 23.3 that Anglo American's Moranbah South mine should be included in total foreseeable demand in the market;<sup>4</sup>
- 23.4 that RGTCT has spare capacity;<sup>5</sup>
- 23.5 that DBCT cannot expand in time to service total foreseeable demand as estimated by the QCA in its draft recommendation.<sup>6</sup>

## 2.2 The service

24 DBCTM agrees that the relevant service for the purpose of the QCA's declaration review is the service described in section 250(1)(c) of the QCA Act being the handling of coal at DBCT by the terminal operator (**DBCT service**).

## 2.3 The facility for the service

25 DBCTM agrees that the facility for the service for purpose of the QCA's declaration review is the facility defined in section 250(5) of the QCA Act.

<sup>3</sup> Appendix 3 - Statutory Declaration of Anthony Timbrell (**Timbrell Declaration**); Appendix 4 - DBCT Foreseeable Demand Analysis

<sup>4</sup> Appendix 5 - Moranbah South Project

<sup>5</sup> Appendix 7 - GHD Advisory, Review of the QCA's least-cost calculations and approach for criterion (b) (**GHD Report**)

<sup>6</sup> Appendix 6 - DBCT Expansion Schedule and Assumptions

**2.4 Market in which the service is provided**

- 26 DBCTM maintains its position that the DBCT service is provided in the market for coal handling services for mines that are proximate to the Port of Hay Point.<sup>7</sup> Further, forecast demand from all mines within the geographic scope of that market should be included in total foreseeable demand in the market.
- 27 The QCA makes a fundamental error in its approach to market definition for the purposes of criterion (b). The QCA's approach to market definition assumes that demand in the market cannot include volumes that are served by other terminals, such that it does not exceed the existing use of DBCT. As a result, the QCA focuses on the degree of substitutability between the existing capacity of DBCT and coal handling services provided by other facilities and fails to consider the degree of substitutability between the expanded capacity of DBCT and coal handling services provided by other facilities. The QCA's framework for analysis leads the QCA to the incorrect conclusion that DBCT is the only supplier in the relevant market, discounting evidence that there has been, and continues to be, close competition between the supply of *expanded capacity* at DBCT and existing capacity at other coal terminals for Goonyella system users.
- 28 The QCA incorrectly dismisses evidence of substitution between terminals actually occurring in the market in which the DBCT service is supplied and the fact that other terminals in addition to DBCT are currently serving demand in that market.
- 29 As a consequence of the QCA's errors with respect to market definition the QCA fails to identify total foreseeable demand in the market in which the DBCT service is supplied. This is contrary to section 76(2)(b) of the QCA Act which requires a determination of 'total foreseeable demand in the market'. One of the QCA's key criticisms of the User Group's preferred market definition is that it only focuses on demand for coal handling services at DBCT, rather than demand in the market.<sup>8</sup> However, this is exactly the error inherent in the QCA's market definition. The following table sets out the key errors of the QCA with respect to market definition.

**Figure 2: Summary of key QCA errors in defining the market**

DBCTM	QCA draft recommendation	QCA's errors
<p>The relevant market is the market for coal handling services for mines that are proximate to the Port of Hay Point</p>	<p>The relevant market is the market for DBCT's coal handling services in the Goonyella coal system</p>	<ul style="list-style-type: none"> <li>• The QCA's market definition has the result that it measures <i>demand for the service</i> rather than <i>demand in the market</i></li> <li>• The QCA's approach to market definition assumes that demand in the market cannot include volumes that are served by other terminals, such that it does not exceed the existing use of DBCT</li> <li>• As a result, the QCA focuses on the degree of substitutability between the existing capacity of DBCT and coal handling services provided by other facilities and fails to consider the degree of substitutability between the expanded capacity of DBCT and coal handling services provided by other facilities.</li> <li>• The QCA's framework for analysis leads the QCA to the incorrect conclusion that DBCT is the only supplier in the relevant market, discounting evidence that there has been, and continues to be, close competition between the supply of expanded capacity at DBCT and other coal terminals for Goonyella system users.</li> <li>• The QCA incorrectly dismisses evidence of substitution between terminals actually occurring in the market in which the DBCT service is supplied and the fact that other terminals in addition to DBCT are currently serving demand in that market.</li> </ul>

<sup>7</sup> DBCTM May 2018 Submission at [112] to [125]

<sup>8</sup> QCA Draft Recommendation, page 34

## The QCA's approach to market definition is in error

- 30 The QCA's approach to market definition fails to give proper regard to the purpose of defining the market for the criterion (b) analysis. DBCT, the User Group and the QCA all agree that market definition is purposive, however there is disagreement as to the purpose of defining the market in the context of criterion (b).<sup>9</sup> The QCA incorrectly views the market definition process in the criterion (b) analysis as being designed to determine whether other terminals provide a competitive constraint to DBCTM by virtue of providing a substitutable service to the DBCT service.<sup>10</sup> This is not the purpose of defining a market for criterion (b). In the case of criterion (b), market definition is directed to assessing whether DBCT can meet total foreseeable demand in the market over the declaration period and at least cost.<sup>11</sup>
- 31 Critically, given this purpose, market definition needs to facilitate the identification of customers in the market - that is, which mines should be included as contributing to total foreseeable demand in the market in which DBCT operates. This requires a *demand* side focus.
- 32 By focusing on the extent of competition between terminals, the QCA focuses on the *supply* side of the market - that is, on what alternative terminals are available to existing and potential DBCT users and the costs of using the alternatives relative to the costs of using DBCT. The QCA's approach leads it to further error as it seeks to apply a SSNIP-type analysis by considering the consequences of price variations from the regulated TIC, rather than the market clearing price.

*QCA assumes that demand in the market cannot include volumes that are served by other terminals*

- 33 The QCA's approach to market definition assumes that demand in the market cannot include volumes that are served by other terminals.<sup>12</sup> This means that the QCA embarks on its analysis of market definition under the assumption that demand in the market is equal to demand for the DBCT service.
- 34 The QCA's approach has the result that it fails to identify total foreseeable demand in the market in which the DBCT service is supplied. This is contrary to section 76(2)(b) of the QCA Act which requires a determination of 'total foreseeable demand in the market'.
- 35 HoustonKemp explains in its March 2019 Report on (b) that in defining the market in which the DBCT service is provided:<sup>13</sup>
- 35.1 the QCA considers that only substitution due to changes in price or quality is relevant to defining the boundaries of the market<sup>14</sup> and in implementing this approach:<sup>15</sup>
    - 35.1.1 considers only the price and quality of the existing capacity at DBCT in this assessment, rather than the price and quality of expanded capacity at DBCT; and
    - 35.1.2 considers substitutability of coal handling services in very coarse terms by reference to representative users in the Goonyella system and elsewhere, rather than by reference to the costs and incentives faced by each mine; and
  - 35.2 the QCA considers that only transactions involving long term contracts are relevant to defining the boundaries of the market, and that transactions for throughput can be discounted from this assessment

<sup>9</sup> QCA Draft Determination, page C11; User Group, Submission to QCA, 30 May 2018 page 14

<sup>10</sup> QCA Draft Recommendation, page C11

<sup>11</sup> DBCTM July 2018 Submission at [60].

<sup>12</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>13</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>14</sup> QCA Draft Recommendation, page 12

<sup>15</sup> QCA Draft Recommendation, pages C15 to C17

- 36 Underpinning the QCA's analysis is a conflation of the distinct concepts of 'demand in the market' and 'use of the DBCT service'.<sup>16</sup> This approach assumes that demand in the market cannot include volumes that are served by other terminals. The QCA's approach has the result that the QCA estimates total foreseeable demand in the market based on its projected use of DBCT.<sup>17</sup>
- 37 However, contrary to the QCA's assumptions, demand by an individual for a product reflects the maximum quantity that the individual is willing to consume at any given price of that product.<sup>18</sup> Demand in the market may exceed use of the DBCT service if DBCT is at capacity such that other suppliers are meeting the demand of consumers in the market.
- 38 There is clear evidence that the level of demand in the market exceeds the existing capacity of DBCT. In particular:
- 38.1 DBCT is contracted to 84.07Mtpa and there is a queue of access seekers with unmet capacity requirements;<sup>19</sup>
- 38.2 Lake Vermont, Middlemount, Capcoal, Oaky Creek, South Walker Creek and Poitrel are all examples of mines that are located within the Goonyella system but have contracts to export coal through either AAPT or RGTCT.<sup>20</sup>
- 39 HoustonKemp explains that the QCA's approach to market definition has the consequence that it assumes a price in the market that is lower than the competitive price in the market.<sup>21</sup>
- 40 The QCA's erroneous assumption that demand cannot include volumes that are served by other terminals, and therefore cannot exceed the existing capacity of DBCT, manifests in the QCA's focus on the degree of substitutability between the existing capacity of DBCT and coal handling services at other facilities.<sup>22</sup> However, in circumstances where demand in the market exceeds the capacity of DBCT, it is relevant to consider the degree of substitutability between the *expanded* capacity of DBCT and coal handling services provided by other facilities. The QCA fails to do this.
- 41 As a result of the QCA's erroneous assumption that demand cannot include volumes that are served by other terminals, the QCA fails to recognise that the regulated TIC is below the market clearing price, i.e. that at the regulated TIC there is excess demand for DBCT's existing capacity. That is, in applying the SSNIP test, the QCA proceeds on the basis that the price which clears the market is the regulated TIC determined by the QCA for the existing capacity of DBCT, and the potential charges associated with expanded capacity at DBCT or available capacity at other terminals do not inform this price.<sup>23</sup> This leads the QCA to focus narrowly on the differences between the charges that Goonyella system users would incur to use *existing* capacity at DBCT as against the capacity of other coal terminals. Consequently, the QCA incorrectly concludes that DBCT is the only supplier in the relevant market. The QCA impermissibly discounts evidence that there has been, and continues to be, close competition between the supply of *expanded* capacity at DBCT and other coal terminals for Goonyella system users.
- 42 It is not reasonable for the QCA to assume that the price charged for existing capacity at DBCT reflects the price that would be determined in the market by rivalrous interactions between coal terminals. HoustonKemp explains by reference to established economic principles and case law that there are strong

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<sup>16</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>17</sup> HoustonKemp March 2019 Report on (b), section 2.2

<sup>18</sup> HoustonKemp March 2019 Report on (b), section 3.1; Morgan, W, Katz, M and Rosen H, *Microeconomics*, McGraw-Hill: Maidenhead, 2006, p 62.

<sup>19</sup> Appendix 3 - Timbrell Declaration

<sup>20</sup> HoustonKemp March 2019 Report on (b), section 2; HoustonKemp May 2018 Report on (b), pages 14 to 15

<sup>21</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>22</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>23</sup> HoustonKemp March 2019 Report on (b), section 2

reasons to believe that the price for coal handling services in a workably competitive market would be substantially higher than the TIC determined by the QCA for DBCT because:

- 42.1 the regulated TIC reflects the costs of providing coal handling services at DBCT; whereas
- 42.2 the price in a workably competitive market reflects the marginal costs of providing coal handling services in the relevant market.

43 Given that DBCT is at capacity and that incremental volumes in the market must be met by expanding capacity at DBCT or using existing capacity at other terminals, it is the potential charges associated with these options that defines the price that clears the market.<sup>24</sup>

44 As a result of this error, the QCA defines the market for the service in an artificially narrow manner so as to include only a single supplier (DBCT) and excludes from total foreseeable demand in the market demand from mines in the market that use other terminals. This is an example of the reverse cellophane fallacy.<sup>25</sup> HoustonKemp explains:<sup>26</sup>

It follows that the QCA's approach to market definition begins with a price that may be lower than would result from competitive rivalry between firms in the market. As a result, it tends to define the market too narrowly – an example of the reverse cellophane fallacy.

The QCA highlights the extent to which charges associated with using existing capacity at DBCT are lower than charges associated with using existing capacity at other terminals. It suggests that this is indicative of a lack of substitutability between the services and concludes that other services are not in the same market as the DBCT service. However, when the process of market definition begins at prices that reflect competitive levels, other coal handling services provided at AAPT and RGTCT may be identified as close substitutes to the DBCT service.

*HoustonKemp's approach allows for demand to exceed DBCT's capacity*

45 In contrast to the QCA's approach to market definition, HoustonKemp considers substitutability by reference to what miners revealed in their choice of coal handling services, either at the present time or in the recent past.<sup>27</sup> This is consistent with the standard approach to market definition as described in economic literature and Australian case law. Under this framework, any factor that provides value to users is relevant to substitutability.

46 HoustonKemp's approach to market definition allows for the prospect that demand in the market may exceed demand for the DBCT service and encompass volumes that are served by other terminals. This approach facilitates the identification of total foreseeable demand in the market and accordingly is consistent with section 76(2)(b) of the QCA Act.

47 It follows from HoustonKemp's approach that:<sup>28</sup>

- 47.1 the price which clears the market is not the regulated TIC determined by the QCA for the existing capacity of DBCT and instead reflects the price of the best alternative option to customers associated with providing additional capacity to meet demand above this level; and
- 47.2 evidence that miners which would prefer to use existing capacity at DBCT but ultimately use available capacity at other terminals in preference to expanded capacity at DBCT is probative

<sup>24</sup> HoustonKemp March 2019 Report on (b), section 2.4

<sup>25</sup> HoustonKemp March 2019 Report on (b), 2.4 and Appendix A2 of that Report

<sup>26</sup> HoustonKemp March 2019 Report on (b), section 2.4.2

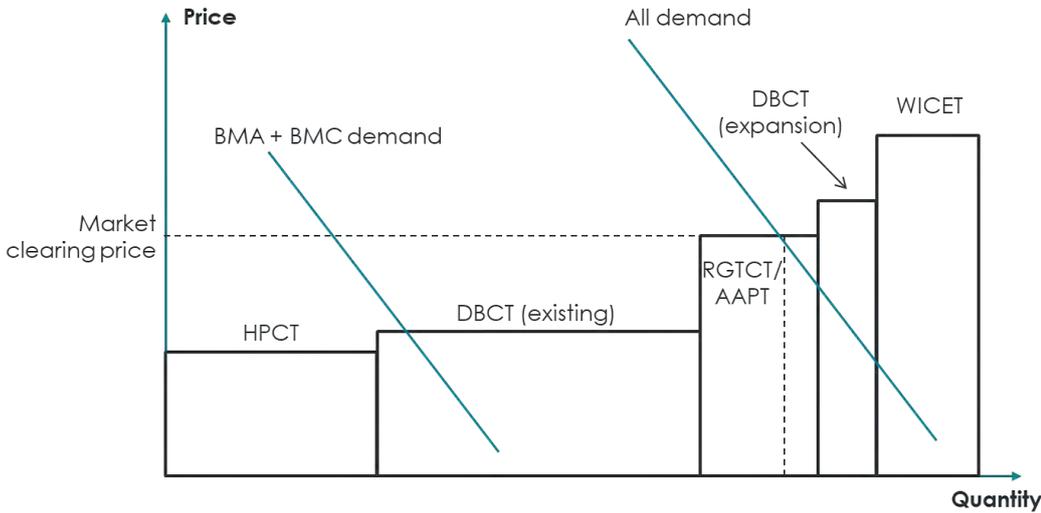
<sup>27</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>28</sup> HoustonKemp March 2019 Report on (b), section 2

evidence that these alternative facilities are in the market, as are the miners and their demand which is met at these alternative facilities.

48 HoustonKemp demonstrates this conception of the market in the following figure from the HoustonKemp March 2019 Report on (b).<sup>29</sup> HoustonKemp depicts a market for coal terminal services provided to Goonyella mines. The supply curve reflects the increasing cost of options as they appear to Goonyella mines, with WICET being the most expensive. The chart also differentiates between demand by BMA/BMC mines and other demand. It assumes that BMA/BMC mines prefer to use HPCT over any other terminal and has regard to the fact that demand for HPCT by BMA/BMC mines exceeds HPCT's capacity.<sup>30</sup>

**Figure 3: Market for coal terminal services provided to Goonyella mines (HoustonKemp market)**



49 The figure shows that, because demand for coal terminal services exceeds DBCT’s existing capacity, capacity of other coal terminals is drawn into the market, and the market clearing price is determined by reference to the price for coal delivered to those terminals.<sup>31</sup>

50 The figure also highlights the difference between the "use" of DBCT and demand in the market within which the DBCT service is provided. HoustonKemp observes that when the analysis of the market leaves open the prospect that there may be more than one supplier in the market, it is evident that these concepts differ materially.<sup>32</sup>

*QCA impermissibly discounts evidence of substitution*

51 The QCA's approach to market definition has the result that the QCA impermissibly discounts evidence of actual choices made by miners in the Goonyella system which demonstrate substitutability between the DBCT service and other terminal services.<sup>33</sup>

52 In its previous submissions, DBCT set out evidence of mines in the Goonyella system which use AAPT, RGTCT and HPCT in addition to DBCT.<sup>34</sup>

53 The QCA seeks to dismiss this evidence on the (incorrect) basis that:<sup>35</sup>

<sup>29</sup> HoustonKemp March 2019 Report on (b), section 2.2.1

<sup>30</sup> BHP, Submission to the QCA on the Declaration Review of DBCT, 16 July 2018 (**BHP Submission**) at [5.4] and [5.9(b)]

<sup>31</sup> HoustonKemp March 2019 Report on (b), section 2.2.1

<sup>32</sup> HoustonKemp March 2019 Report on (b), section 2.2.1

<sup>33</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>34</sup> DBCT May 2018 Submission at [126] to [146]; DBCT July 2018 Submission at [127]

<sup>35</sup> QCA Draft Recommendation, pages C29 to C30

- 53.1 some DBCT users (namely Lake Vermont and Middlemount) contracted with AAPT or RGTCT because access to DBCT was not available at the time and therefore they did not switch from DBCT to AAPT in response to a price change;
- 53.2 the use by mines in the Goonyella system of terminals other than DBCT does not represent strong substitution but rather enables the miners to optimise their business operations;
- 53.3 it is materially more costly for a Goonyella system mine to switch from DBCT to an alternative terminal; and
- 53.4 it is not evident that Goonyella system users have switched from DBCT in response to price or non-price incentives.
- 54 Each of the QCA's reasons is addressed below.

#### *Lake Vermont and Middlemount*

- 55 The QCA dismisses Lake Vermont and Middlemount's use of AAPT instead of DBCT as being examples of substitution on the basis that it does not have evidence that these mines switched from DBCT to AAPT in response to a price change, but rather they sought capacity at AAPT because they were unable to access additional capacity at DBCT.<sup>36</sup> The QCA's treatment of this clear example of substitution is incorrect.
- 56 The QCA's frame of reference for considering the potential for substitution between DBCT and other coal terminals is limited to consideration of the substitutability between *existing* capacity at DBCT and other terminals.<sup>37</sup> The QCA does not consider what this evidence has to say about the substitutability between expanded capacity at DBCT and other facilities.
- 57 Given that there was not sufficient existing capacity at DBCT to serve Lake Vermont and Middlemount, the choices made by Lake Vermont and Middlemount discloses that, for them, the use of capacity at other facilities was preferable to the use of expanded capacity at DBCT.<sup>38</sup>
- 58 As explained in DBCT's initial submission, Lake Vermont and Middlemount chose to use AAPT because it could expand to accommodate those mines within a shorter timeframe than DBCT. Miners incur significant opportunity costs (e.g. deferred profits) if coal sales are delayed for any reason, including delays to availability of terminal capacity.<sup>39</sup> The miners had a choice between which terminal expansion would better suit their commercial requirements - either wait for DBCT to expand (the timing and approvals for which were uncertain) or utilise the GAPE and AAPT expansion (the timing and approvals for which were certain and aligned with the mines' commissioning plans). Rather than delaying their mine development processes to wait for DBCT to expand, the miners chose to use the coal handling services at AAPT. If there were no close substitutes to DBCT, Lake Vermont and Middlemount mines would have had to extend their mine development timeframes to align with the completion of a DBCT expansion beyond 85Mtpa.
- 59 Lake Vermont and Middlemount chose AAPT over DBCT after comparing the cost to them of using the two terminals. The cost of using DBCT was substantially greater than the regulated TIC.
- 60 By assuming demand in the market does not include volumes served by other terminals, the QCA did not have regard to evidence of substitutability between expanded capacity at DBCT and capacity at other terminals that would have caused it to conclude that AAPT and RGTCT were both suppliers in the relevant market.<sup>40</sup>
- 61 The QCA's consideration of the extent of substitution possibilities for Goonyella mines only addresses the circumstances of Lake Vermont and Middlemount. It does not address Oaky Creek, Capcoal, South Walker

<sup>36</sup> QCA Draft Determination, page C29

<sup>37</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>38</sup> QCA Draft Determination, page C29

<sup>39</sup> DBCT May 2018 Submission at [141] to [143]

<sup>40</sup> HoustonKemp March 2019 Report on (b), section 2.2

Creek or Poitrel, which were also identified by HoustonKemp as mines in the Goonyella system that may have contracts with AAPT or RGTCT.<sup>41</sup>

*Use of alternate terminals to optimise business operations*

- 62 The QCA seeks to dismiss evidence of the use of other terminals by BHP, Glencore and Anglo American on the basis that it does not represent strong substitution but rather represents 'actions to optimise their business operations'.<sup>42</sup>
- 63 Even if BHP, Glencore and Anglo American are using other terminals to optimise their business operations, this shows that these miners consider terminals other than DBCT to be viable substitutes to DBCT.
- 64 In its July 2018 Submission, Anglo American referred to mines proximate to Hay Point holding contracts with both DBCT and HPCT. Anglo American sought to discount that use on the basis that it was for "non-cost reasons".<sup>43</sup> Anglo American suggested that miners:
- 64.1 may contract surplus capacity across multiple terminals as part of an "uneconomic" risk mitigation strategy to protect against system disruptions; and
  - 64.2 may export Goonyella coal from terminals other than DBCT in order to defray take-or-pay obligations incurred at those terminals.
- 65 HoustonKemp observes that neither of these rationales indicates that the DBCT service may not be substitutable with other coal handling services.<sup>44</sup> The "acquisition" of surplus capacity is not "uneconomic" but is justified by the expected benefits of contracting elsewhere. This may serve to increase a mine's demand for coal terminal services but does not indicate a lack of substitutability between them.
- 66 In addition, HoustonKemp observes that to the extent that miners operate a geographically dispersed portfolio of mines and a corresponding portfolio of terminal contracts, this supports their ability to substitute the DBCT service for other coal handling services at the margin within their portfolio.<sup>45</sup> Such miners have the ability to switch away from DBCT both:
- 66.1 in the short term, by sending more coal to other terminals in their portfolio; and
  - 66.2 in the medium term, based on their ability to renegotiate the contracts that underpin this portfolio.
- 67 DBCTM notes that in the case of BHP:
- 67.1 BMA contracted capacity from FY14 to FY16 at AAPT in order to provide an 'option to export an increasing volume of BMA coal production during that period' and due to 'capacity constraints at HPCT and DBCT. Since that time BMA has used some capacity at AAPT instead of DBCT or HPCT where it faced capacity constraints, including when HPCT was being upgraded.'<sup>46</sup> This shows that BMA saw utilising capacity at AAPT as a substitute to expanding HPCT or expanded capacity at DBCT.
  - 67.2 BMC has contracted capacity available at AAPT.<sup>47</sup> It is difficult to see why BMC would take up contracted capacity at AAPT which it is required to pay for on a take or pay basis if it did not see AAPT as a viable substitute terminal to DBCT.
  - 67.3 BHP supported the development of the GAPE.<sup>48</sup> This is clear evidence that BHP considers AAPT as a viable substitute terminal to DBCT.

<sup>41</sup> HoustonKemp June 2018 Report on (b), pages 14 to 15

<sup>42</sup> QCA Draft Recommendation, pages C29 to C30

<sup>43</sup> Anglo American, Anglo American's submission in response to initial submissions, 17 July 2018 (**Anglo American Submission**), pages 7 to 8

<sup>44</sup> HoustonKemp Report on (b), section 2.3

<sup>45</sup> HoustonKemp Report on (b), section 2.3

<sup>46</sup> BHP Submission at [5.4] and [5.9(b)]

<sup>47</sup> BHP Submission at [5.5]

<sup>48</sup> BHP Submission at [5.7]

- 67.4 BHP mines substituted to RGTCT when the Goonyella system was closed for repair work.<sup>49</sup>
- 67.5 BMA's Caval Ridge mine has sent coal to RGTCT to be blended with coal from Blackwater since 2016.<sup>50</sup>
- 68 The facts are that BHP mines substitute between HPCT, DBCT, AAPT and RGTCT as it suits its operations. BHP's justification of its use of each of these coal terminals on the basis that they are complements not substitutes cannot be accepted.<sup>51</sup> By interchanging its use of HPCT, DBCT, AAPT and RGTCT in order 'to maximise throughput across the available supply chain, to ensure reliability, manage risk and to optimise capability'<sup>52</sup> BHP is not using those terminals as complements, but rather is using those terminals as substitutes.<sup>53</sup> Further, BHP accepts that the services at DBCT *may be "able to be substituted" for the services provided at HPCT*.<sup>54</sup> In any event, whether or not BMA/BMC regard DBCT and HPCT as complements or substitutes is a semantic point which should not exclude BMA/BMC demand from total foreseeable demand in the market given the clear evidence that they use DBCT.
- 69 Further, in dismissing the use of alternative terminals on the basis that it is not switching for price or non-price incentives (e.g. co-shipping opportunities),<sup>55</sup> the QCA also ignored Anglo American's statement that in its experience, in deciding whether to contract with alternative terminals to DBCT, users consider whether alternative terminals offer opportunities for co-shipping that would not otherwise be available at the principal terminal.<sup>56</sup>
- 70 In addition, as noted below, the kind of substitution referred to by Anglo American and BHP involves long-term, significant and inescapable financial commitments to alternative terminals. Those terminals must be treated as substitutes in the QCA's analysis of criterion (b).

#### *Costs of using alternative terminals*

- 71 The QCA's conclusion that it is materially more costly for a Goonyella system user to switch to an alternative terminal is made on the incorrect assumption that demand in the market cannot include volumes that are served at other terminals. Where it is acknowledged that demand in the market may exceed the existing capacity of DBCT to meet that demand, the price which clears the market reflects the best alternative option to customers associated with providing additional capacity to meet demand above that level.
- 72 In any event, the terminal and rail costs of users accessing DBCT as compared with alternative coal handling terminals are properly accounted for in DBCTM's and HoustonKemp's approach to market definition. HoustonKemp's analysis of the geographic scope of the market takes into account below and above rail costs of using alternative terminals and coal terminal charges associated with using alternative terminals. HoustonKemp identifies the geographic area from which future customers of DBCT may be drawn by reference to economic considerations, namely that a mine would prefer to use coal handling services provided at the Port of Hay Point, absent contractual constraints, when its total below rail, above rail and coal terminal charges associated with using these services are expected to be lower than those associated with any other option available to it.<sup>57</sup>

#### *Marginal switching*

- 73 The QCA's rejection of evidence of switching on the basis that it is low level or marginal switching is also unreasonable.<sup>58</sup> This approach to market definition suggests that services provided by other terminals are

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<sup>49</sup> BHP Submission at [5.12]

<sup>50</sup> BHP Submission at [5.12]

<sup>51</sup> BHP Submission at [5.19]

<sup>52</sup> BHP Submission at [5.18]

<sup>53</sup> HoustonKemp Report on (b), section 2.3

<sup>54</sup> BHP Submission at [4.7]

<sup>55</sup> QCA Draft Recommendation, page 31

<sup>56</sup> Anglo American Submission, page 7

<sup>57</sup> HoustonKemp May 2018 Report on (b), pages 26 to 32; DBCTM July 2018 Submission at [119]

<sup>58</sup> QCA Draft Recommendation, page C30

only in the relevant market if they represent a viable option for all customers in the market. HoustonKemp has explained that this is not consistent with any generally accepted framework for market definition.<sup>59</sup> The relevant market may include a significant number of customers for which the DBCT service is the only viable coal handling service. However, this does not mean that the other coal handling services (and mines that use them) should be excluded from the relevant market.

- 74 In this case miners' use of alternative terminals generally means engaging in long term take or pay contracts with those terminals, in addition to rail contracts. This can be contrasted to the kind of consumption referred to in the *Arnotts Ltd v TPC* case (referred to by the QCA and the User Group) where on some occasions consumer may elect to serve corn crisps with savoury dip rather than dry biscuits.<sup>60</sup> The kind of substitution evidenced by mines proximate to DBCT involves long-term, significant and inescapable financial commitments to alternative terminals. Those terminals must be treated as substitutes in the QCA's analysis of criterion (b).
- 75 As noted in DBCTM's July 2018 submission.<sup>61</sup>
- 75.1 At least 13Mtpa from Goonyella system mines is contracted for capacity at AAPT.<sup>62</sup> This is approximately 15% of DBCT's nameplate capacity of 85Mtpa – hardly marginal;<sup>63</sup> and
- 75.2 While DBCTM does not have coal tonnage figures for Goonyella system mines contracting at the Port of Gladstone's coal terminals, the information it does have shows they are not marginal amounts. The DBCTM May 2018 Submission refers to examples of Jellinbah's Lake Vermont mine, Glencore's Oaky Creek mine, Anglo American's German Creek mine, some BMA mines and the now-shut Gregory and Norwich Park mines exporting coal through RGTCT.<sup>64</sup> The articles and news alerts referenced in the DBCTM Submission reveal that Jellinbah's Lake Vermont mine has an agreement for 4Mtpa at RGTCT and Anglo American has an agreement with Pacific National to send throughput of 10.9Mtpa from its German Creek mine to either Dalrymple Bay or Gladstone.
- 76 In conclusion, in its approach to market definition the QCA cannot reasonably discount the evidence of substitution between terminals actually occurring in the market which demonstrates that there are a number of terminals currently serving demand in the market.

## Hay Point Coal Terminal

- 77 Any consideration of whether the DBCT service satisfies criterion (b) must be undertaken on the basis that total foreseeable demand in the market includes all foreseeable production from BMA and BMC mines. To do otherwise would be to fail to take into account a relevant consideration. The unequivocal market evidence is that BMA and BMC mines that utilise HPCT also utilise DBCT and therefore perceive DBCT to be a close substitute to HPCT. It follows that their entire foreseeable demand must logically be in the same market as the market in which the DBCT service is supplied.
- 78 As set out in DBCTM's previous submissions and also in the BHP's submission, there are a number of BMA and BMC mines which use HPCT and also use the DBCT service.<sup>65</sup> This is strong evidence that those mines' usage of coal handling services should be considered part of total foreseeable demand in the market in which the DBCT service is offered.<sup>66</sup>
- 79 In failing to include all foreseeable production from BMA and BMC mines in its estimate of total foreseeable demand in the market, the QCA has focused on the supply side of the market and whether DBCT is a substitute for non-BMA/BMC mines.<sup>67</sup>

<sup>59</sup> HoustonKemp July 2018 Report on (b), page 8; DBCTM July 2018 Submission at [91]

<sup>60</sup> *Arnotts Ltd v TPC* (1990) 24 FCR 313, page 332

<sup>61</sup> DBCTM July 2018 Submission at [92]

<sup>62</sup> DBCTM May 2018 Submission at [132]

<sup>63</sup> DBCTM May 2018 Submission at [132]

<sup>64</sup> DBCTM May 2018 Submission at [136]

<sup>65</sup> DBCTM July 2018 Submission at [127]; DBCTM letter to QCA, 7 November 2018; BHP Submission, page 5

<sup>66</sup> See also HoustonKemp March 2019 Report on (b), pages 18 to 19

<sup>67</sup> QCA Draft Recommendation, page C23



- 87 In its draft recommendation, the QCA failed to give sufficient regard to BHP's own submission that *"for BMA and BMC, the services at DBCT may be 'able to be substituted for' services provided at HPCT"*.<sup>73</sup> In addition, the BHP submission acknowledges that DBCT is and will continue to be an *"alternative source of coal loading services for BMA and BMC, in relation to coal produced at the BMA and BMC mines on the Goonyella system, in the context of capacity constraints at HPCT"*.<sup>74</sup> BHP states in this regard that:<sup>75</sup>
- 87.1 DBCT is immediately adjacent to HPCT and both terminals are similarly connected to the Goonyella rail system;
  - 87.2 the above rail operating parameters remain the same for delivery to each of HPCT and DBCT, and the rail operators are able to use the same rolling stock fleets for delivery to each terminal;
  - 87.3 the metallurgical coal produced at BMA and BMC mines can be readily handled and loaded at DBCT operations.
- 88 The User Group also acknowledges that *"coal loading services at DBCT may be substitutable (from the perspective of BMA/BMC) for the coal loading services at HPCT which are currently used by BMA"*.<sup>76</sup>
- 89 The QCA acknowledges that where BMA or BMC require additional capacity, the QCA would expect them to seek access from DBCT.<sup>77</sup> It is illogical for the QCA to make this statement and still conclude that BMA and BMC do not perceive DBCT as a substitute to HPCT.
- 90 It is clear from the facts that BMA and BMC readily substitute services between HPCT and DBCT. It is this substitution which means that the market definition for the analysis of whether the DBCT satisfies criterion (b) must not preclude BMA and BMC volumes being included in total foreseeable demand in the market in which the DBCT service is supplied.

### Substitutability factors

- 91 The QCA sets out its view of a number of matters raised by the User Group as being relevant to substitution.<sup>78</sup> DBCTM has previously responded to these factors in its July 2018 Submission.<sup>79</sup> With the exception of above and below rail costs which are taken into account in HoustonKemp's assessment of the geographic scope of the market, those factors are not determinative of market definition.<sup>80</sup>
- 92 In addition, the QCA's approach to those of the factors that are 'non-price factors' is inconsistent with its approach to dealing with actual examples of substitution in the market. The QCA dismisses actual examples of substitution in the market on the basis that they are not examples of users switching from DBCT to an alternative terminal in response to a price change.<sup>81</sup> However, illogically, the QCA rejects DBCTM's market definition in part because it does not adequately take into account non-price factors relevant to assessing substitutability.<sup>82</sup> It is in fact the QCA that erroneously discards evidence of substitution for non-price reasons, including:
- 92.1 the availability of capacity at DBCT at the time required by the miner (e.g. Middlemount and Lake Vermont);

<sup>73</sup> BHP Submission at [4.7]. DBCTM observes that BHP's reference to "able to be substituted" in this quote comes from section 71(2)(b) of the QCA Act

<sup>74</sup> BHP Submission, page 5

<sup>75</sup> BHP Submission, page 5

<sup>76</sup> User Group, Submission to QCA, 30 May 2018, page 31

<sup>77</sup> QCA Draft Recommendation, page C25

<sup>78</sup> QCA Draft Recommendation, pages C14 to C22

<sup>79</sup> DBCTM July 2018 Submission at [62] to [89]

<sup>80</sup> HoustonKemp May 2018 Report on (b), pages 26 to 32; DBCTM July 2018 Submission at [119]

<sup>81</sup> QCA Draft Recommendation, page C29

<sup>82</sup> QCA Draft Recommendation, page C34

- 92.2 BHP's use of HPCT, DBCT, AAPT and RGTCT to suit their operational purposes.
- 92.3 other miners use of alternate coal terminals,<sup>83</sup> such as Glencore's use of terminals at Gladstone and Anglo American's use of RGTCT.<sup>84</sup>
- 93 Significantly, the QCA's assessment of these factors flows from the QCA's focus on the substitutability between the DBCT service and the coal handling services of other coal terminals on the Central Queensland Coal Network (**CQCN**) on the basis of the assumption that demand in the market cannot exceed the existing use of DBCT. As explained above, in making this assumption the QCA makes a fundamental error in its approach to market definition.
- 94 Nonetheless, for completeness, in the following table DBCTM summarises the QCA's and DBCTM's position on the factors referred to by the QCA in considering the substitutability of coal handling terminals in Queensland.

**Figure 4: Factors referred to by QCA in considering substitutability**

Factor	QCA determination	DBCT response
Below rail costs Above rail costs	Having regard to above and below rail costs, in the absence of declaration DBCTM could significantly increase the terminal charge for accessing DBCT and it would still be cheaper for a miner to continue to access DBCT. <sup>85</sup>	Above and below rail costs are taken into account in HoustonKemp's analysis of the narrowest reasonable market and conclusions that the market should be defined as the market for coal handling services for mines that are proximate to the Port of Hay Point and suppliers of coal handling services in that market are DBCT, HPCT, AAPT and RGTCT. <sup>86</sup>
Below and above rail network differences	The ability of Newlands line to only accommodate diesel trains may impact on the incentive and ability of Goonyella system users to switch from DBCT to AAPT. This restriction does not apply on the Blackwater system. <sup>87</sup>	The QCA does not have regard to relevant evidence of use of the Newlands line and substitution between AAPT and DBCT. The network differences on the Newlands line have not stopped mines proximate to DBCT utilising AAPT, including BHP mines, Lake Vermont and Middlemount. The GAPE expansion was underwritten by mines subject to the GAPE Deed. Those mines are predominately located proximate to Hay Point and rail to AAPT. <sup>88</sup> Further, BHP acknowledges that it supported the proposal to construct the GAPE. <sup>89</sup> In addition, below and above rail network differences are taken into account in the charges used by HoustonKemp in its approach to market definition. <sup>90</sup>
Terminal and rail capacity	Whether there is spare capacity at alternative terminals or on the below rail network is relevant to the ability of a DBCT user to switch from DBCT when	<ul style="list-style-type: none"> <li>In defining the market the QCA does not have regard to relevant evidence of mines proximate to DBCT that already using alternative terminals and rail tracks servicing those alternative terminals. Those mines and the terminals they use must fall within the narrowest reasonable market.</li> <li>While the QCA states that it is considering the market over the 10 year declaration period, the QCA does not make any allowance for rail or terminal capacity constraints to change in that period. Rather, it has</li> </ul>

<sup>83</sup> Anglo American Submission, pages 7 to 8

<sup>84</sup> DBCTM May 2018 Submission at [136]

<sup>85</sup> QCA Draft Recommendation, page C16

<sup>86</sup> HoustonKemp May 2018 Report on (b), page 27

<sup>87</sup> QCA Draft Recommendation, pages C16 to C17

<sup>88</sup> Aurizon Network Draft Amendment Access Undertaking Reference Tariff for the GAPE System, April 2013, page 12; Aurizon Network - Response to Submissions on the Review of Declared Services, 16 July 2018, page 29

<sup>89</sup> BHP Submission at [5.7]

<sup>90</sup> HoustonKemp May 2018 Report on (b), page 27 and Appendix 3 of that Report

Factor	QCA determination	DBCT response
	<p>faced with price or non-price incentives<sup>91</sup></p> <p>There is spare capacity of 11Mtpa at WICET.</p> <p>There are considerable uncertainties regarding the construction of the Carmichael Coal Mine and Rail project, including if it will be built. However, existing unused capacity at AAPT is unlikely to be contracted until the details of the Carmichael Coal Mine and Rail project are clarified. Accordingly, there is no spare capacity at AAPT.</p> <p>RGTCT is fully contracted.</p> <p>User Group and Peabody said the below rail network is capacity constrained.</p> <p>The lack of alternative coal handling and rail capacity are a commercial reality for entities that may otherwise consider a switch away from DBCT.<sup>92</sup> This reality is likely to be relevant to defining the relevant market.</p>	<p>regard to rail and terminal capacity constraints on the basis of current information. As a result, in assessing the impact of terminal and rail capacity constraints the QCA focuses on a short term horizon - the period within which mines are bound by existing infrastructure constraints. Within a long term period (i.e. the period of declaration) terminal capacity may change in order to meet demands from customers and users may switch terminals (for example following the expiry of long term contracts) making capacity available at the terminals they switch from.<sup>93</sup> When a long term approach is taken to market definition it is clear that capacity constraints at terminals and on railways are not relevant to an assessment of the market in which the DBCT service is supplied.</p> <ul style="list-style-type: none"> <li>• The QCA's assessment of capacity at terminals and on railways is confined to an assessment of available uncontracted capacity. The QCA's analysis fails to take into account that capacity at both terminals and on railways can be obtained by transfers of underutilised capacity from third parties.<sup>94</sup></li> <li>• While Aurizon's 2016 Baseline Capacity Assessment Report showed capacity on the Newlands/GAPE systems to be 53.7 and committed capacity to be 51.4,<sup>95</sup> Aurizon's 2018 Network Development Plan showed actual throughput on the Newlands/GAPE systems to be 25.3 in FY2017 and 29.2 in FY2018.<sup>96</sup></li> <li>• Further, the QCA's conclusion that there is no spare capacity at AAPT or RGTCT is incorrect.</li> <li>• The User Group's Submission of July 2018 states that there continues to be substantial unutilised capacity at AAPT, RGTCT and WICET.<sup>97</sup></li> <li>• BHP notes in its submission that one of its reasons for utilising AAPT was due to 'a reduction in throughput at the APCT since BMA's contracted commitment has fallen away'.<sup>98</sup></li> <li>• It is not reasonable for the QCA to acknowledge the uncertainties regarding the Carmichael project but then conclude that spare capacity at AAPT is unlikely to be contracted until the details of the project are clarified. Even if Carmichael mine proceeds it will take years to deliver and then slowly ramp up. It is appropriate to assume that in the meantime surplus capacity exists at AAPT that would satisfy the unmet demand for at DBCT.</li> <li>• The QCA has failed to consider publicly available information that demonstrates that there is spare capacity at RGTCT.<sup>99</sup> Published throughput figures for RGTCT demonstrates that it has available capacity. RGTCT shipped the following coal volumes in the last three years:<sup>100</sup></li> </ul>

<sup>91</sup> QCA Draft Recommendation, page C17

<sup>92</sup> QCA Draft Recommendation, pages C17 to C18

<sup>93</sup> DBCT July 2018 Submission at [86] to [88]; HoustonKemp July 2018 Report on (b), pages 14 to 16

<sup>94</sup> As noted in DBCTM's letter to the QCA of 27 June 2018 submitting its Trading SCB DAAU (page 1 and Appendix 1) capacity transfers are frequently transacted between access holders and access seekers. Further, the QCA accepted in its Final Decision, DBCTM's Trading SCB DAAU, September 2018 (page 4) that direct transfers of capacity between users, new and existing could be executed by assignment or by 'permission to ship'.

<sup>95</sup> Aurizon Network Baseline Capacity Assessment Report, Public Release, 2016, page 8

<sup>96</sup> Aurizon Network Development Plan 2018, page 4

<sup>97</sup> User Group, Submission in response, 16 July 2018, pages 13 and 34

<sup>98</sup> BHP Submission at [5.9(b)(iii)]

<sup>99</sup> Appendix 7 - GHD Report, section 5

<sup>100</sup> Appendix 7 - GHD Report, section 5

Factor	QCA determination	DBCT response
		<ul style="list-style-type: none"> <li>• 57.4 Mt in 2017-18</li> <li>• 59.8 Mt in 2016-17</li> <li>• 62.6 Mt in 2015-16</li> <li>• On average, over the last three financial years RGCT has shipped 59.9Mtpa of throughput. Using the QCA's assumption that throughput is on average 90% of contracted entitlements,<sup>101</sup> a reasonable estimate of contracted throughput at RGCT is 66.6Mtpa. As the QCA estimates that capacity at RGCT is 75Mtpa,<sup>102</sup> spare capacity at RGCT would be approximately 8.4Mtpa.</li> </ul>
Metallurgical coal co-shipping opportunities	To the extent users value the co-shipment opportunities at DBCT such that they would not switch away from DBCT in response to a SSNIP, the QCA's view is that this is a relevant matter in defining a market. <sup>103</sup>	<ul style="list-style-type: none"> <li>• Metallurgical coal co-shipping opportunities are not features of the DBCT service, but rather it is a feature of DBCT's customer mix.<sup>104</sup> As such, these opportunities would be equally available at other terminals should those miners use alternative coal handling services.</li> <li>• Nonetheless, accepting co-shipping opportunities are features of the DBCT service, contrary to narrowing the market these opportunities at DBCT would make the boundaries of the market broader than they would be if those opportunities did not exist.<sup>105</sup> Since these factors make DBCT preferable to a wider range of mines, their effect will be to expand the area from which its potential customers may be drawn, across all dimensions of the market. This would draw demand from potential customers away from other terminals that, although in the same market, are said not to offer those services.</li> </ul>
Blending	While the QCA is of the view that blending capabilities at a terminal are important to meet the specifications of particular end users, detailed submissions have not been received that demonstrate that the blending capabilities at DBCT are superior to those at other terminals, or that is a material consideration for users accessing the DBCT service. <sup>106</sup>	<ul style="list-style-type: none"> <li>• DBCTM agrees that there is no evidence that the blending capabilities at DBCT are superior to those at other terminals, or that it is a material consideration for users accessing the DBCT service. DBCTM has previously noted that users value a variety of services from CQCN terminals and that it considers that blending services at HPCT, RGCT and WICET and dedicated stockpiling services at HPCT, RGCT, WICET and AAPT are superior to those at DBCT.<sup>107</sup></li> <li>• Even if there was evidence of superior blending capabilities at DBCT, contrary to narrowing the market these opportunities at DBCT would make the boundaries of the market broader than they would be if those opportunities did not exist.<sup>108</sup> Since these factors make DBCT preferable to a wider range of mines, their effect will be to expand the area from which its potential customers may be drawn, across all dimensions of the market.</li> </ul>
Long term take or pay contracts	The QCA does not consider that the cost of exiting a contract before its expiry is the type of 'switching cost' that is relevant to assessing the existence of substitutes. If a user would be willing to switch from the DBCT	<ul style="list-style-type: none"> <li>• DBCTM agrees that the costs of exiting contracts prior to their expiry are not relevant to market definition.</li> <li>• The time dimension of the market is the long term (i.e. a 10 year declaration period) not the short term. Over that time long term contracts will expire, terminal and rail capacity will change and users may switch terminals.<sup>110</sup></li> </ul>

<sup>101</sup> QCA Draft Recommendation, page C45

<sup>102</sup> QCA Draft Recommendation, pages C10, C104

<sup>103</sup> QCA Draft Recommendation, page C19

<sup>104</sup> DBCTM July 2018 Submission at [82]; HoustonKemp July 2018 Report on (b), page 11

<sup>105</sup> DBCTM July 2018 Submission at [84]; HoustonKemp July 2018 Report on (b), page 11

<sup>106</sup> QCA Draft Recommendation, page C20

<sup>107</sup> DBCTM July 2018 Submission at [68]

<sup>108</sup> DBCTM July 2018 Submission at [84]; HoustonKemp July 2018 Report on (b), page 11

<sup>110</sup> DBCTM July 2018 Submission at [88]; HoustonKemp July 2018 Report on (b), pages 14 to 16

Factor	QCA determination	DBCT response
	<p>service to another service (e.g. if an existing contract was reaching its end) and if that switch was non-marginal, it would suggest that the services are substitutable. Rather, existing contractual constraints are properly taken into account in assessing the strength of competition within a market, and are relevant to assessing foreseeable demand in a given year.<sup>109</sup></p>	<ul style="list-style-type: none"> <li>• Further, the purpose of defining the market in the criterion (b) assessment is to determine whether a facility can meet total foreseeable demand in the market at least cost. If the market is defined by reference to contractual arrangements, this would incorrectly constrain the identification of demand in the market with the likely result that estimated demand is confined to demand for the service (or serviced by the facility), contrary to the text of section 76(2)(b) of the QCA Act, and the Productivity Commission's recommendation.<sup>111</sup></li> <li>• The identification of total foreseeable demand must include all potential sources of demand. Accordingly, the proper approach to defining the geographic scope of the market is to assume there are no constraints from existing supply contracts. HoustonKemp's analysis which estimates the geographic area from which DBCT's future customers may be drawn by reference to economic considerations properly facilitates the identification of demand in the market and has the result that demand is not confined to demand serviced by the facility.<sup>112</sup></li> </ul>
<p>Mine infrastructure investment</p>	<p>The infrastructure upgrades to enable a switch to an alternative terminal have the potential to be incurred, and depending on the configuration of the existing mine and related infrastructure, the costs of the upgrades could be material.<sup>113</sup> Mine infrastructure investment is therefore relevant to an analysis of the boundaries of the market. The ability of a mine in the Goonyella system to switch to an alternative terminal is integral to assessing the boundaries of the market, and infrastructure costs to facilitate switching are necessarily a matter to consider.</p>	<p>There are a number of mines that use terminals other than DBCT. Presumably those mines have the infrastructure to enable them to use alternative terminals. Those mines are in the narrowest reasonable market in which the DBCT service is supplied, as are the terminals those mines use.<sup>114</sup></p>

## 2.5 Period for assessing demand

95 In its draft recommendation, the QCA concludes that the appropriate period for declaration is 10 years.<sup>115</sup>

96 It is DBCTM's position that the DBCT service should not be declared for any further period following expiry of the existing declaration in September 2020 because it does not satisfy the access criteria. Nonetheless, DBCTM acknowledges that in order to assess whether the DBCT service satisfies criterion (b), it is necessary

<sup>109</sup> QCA Draft Recommendation, page C20

<sup>111</sup> DBCTM July 2018 Submission at [89]

<sup>112</sup> HoustonKemp May 2018 Report on (b), pages 26 to 27; HoustonKemp March 2019 Report on (b), section 2

<sup>113</sup> QCA Draft Recommendation, page C21

<sup>114</sup> HoustonKemp July 2018 Report on (b), page 10; HoustonKemp May 2018 Report on (b), pages 23 to 35

<sup>115</sup> QCA Draft Recommendation, page C35

to consider the period over which the service provided by DBCT would be declared assuming it does satisfy the access criteria. This is because section 76(2)(b) involves an assessment of whether DBCT can meet the total foreseeable demand in the market in which its service is supplied *over the period for which the service would be declared*.<sup>116</sup> DBCT assumed for the purposes of its submission on criterion (b) that the period of any further declaration of DBCT would be 10 years from the time at which the current period of declaration expires.<sup>117</sup>

### No basis for QCA's decision to declare the DBCT service for 10 years

- 97 The QCA's conclusion that DBCT should be declared for 10 years is based on its assessment of criterion (a) and erroneous view that "*in the absence of declaration, DBCTM would have the incentive to contract with new users on a willingness to pay basis, rather than based on the costs of service provision, which, in the presence of existing user agreements, would likely discourage efficient entry*".<sup>118</sup> DBCTM explains the errors in this view in its response to the QCA's Draft Recommendation on criterion (a) below.
- 98 Users have already had an opportunity to execute access agreements "*under the aegis of declaration*".<sup>119</sup> The access regime in Part 5 of the QCA Act does not contemplate that declared services will be declared forever, but rather for a period of time.<sup>120</sup> Declaration is intended to facilitate access to infrastructure in order to promote a material increase in competition in a dependent market.<sup>121</sup> By the time the DBCT declaration expires on 8 September 2020, the DBCT service will have been declared for 19½ years.<sup>122</sup> There has already been a sufficient period of time for any promotion of competition in dependent markets achieved through declaration to occur. Further, as discussed in DBCTM's submissions on criterion (a), DBCT will continue to provide access to DBCT on reasonable terms and conditions in the absence of declaration. As such, access to DBCT will continue to be available to allow third parties to compete effectively in dependent markets.
- 99 The QCA's reasoning on criterion (a) reveals that the key basis the QCA has for asserting that re-declaration of the DBCT service will promote a material increase in competition in a dependent market is because regulation has resulted in evergreen user agreements which will continue post expiry of the declaration and result in asymmetry between existing users and potential new users in their dealings in the coal tenements market.<sup>123</sup> This perverse reasoning means that the QCA's own regulated terms of access under declaration have the consequence of adversely impacting competition in a dependent market in the absence of declaration. Further, it has the result that there will likely always be a basis for claiming that declaration promotes a material increase in competition in the tenements market where post regulation existing access seekers would have access on different terms to new access seekers. The QCA's reasoning supports a view that services such as the DBCT service should never be declared because the QCA's regulation has caused distortions in the tenements market which would not have occurred in the absence of declaration.
- 100 The QCA's reasoning is contrary to the scheme of Part 5 of the QCA Act under which it is not intended that declared services will be declared forever and which contemplates that users of the service will have access on different terms and conditions, including as to price, during and post declaration of a service. For example, Part 5 of the QCA Act provides for access agreements to be negotiated and arbitrated between

<sup>116</sup> DBCTM May 2018 Submission at [89]

<sup>117</sup> DBCTM May 2018 Submission at [93]

<sup>118</sup> QCA Draft Recommendation, page C36

<sup>119</sup> QCA Draft Recommendation, page C36

<sup>120</sup> This is seen, for example, in section 84(4) which provides that if the Minister declares the services, the declaration must state the expiry date of the declaration, section 87(2) which provides that a declaration continues in operation until its expiry date, unless it is earlier revoked. No services declared under Part IIIA of the *Competition and Consumer Act 2010* (or its predecessor the *Trade Practices Act 1974*) have been re-declared following expiry of the declaration.

<sup>121</sup> Explanatory Memorandum, Competition and Consumer Amendment (Competition Policy Review) Bill 2017 at [12.1] to [12.5]

<sup>122</sup> The DBCT service was first declared by the Queensland Competition Authority Amendment Regulation (No 1) 2001 (Qld) which amended the Queensland Competition Authority Regulation 1997 (Qld). The amendment was notified in the Government Gazette on 23 March 2001.

<sup>123</sup> QCA Draft Recommendation, page C37

individual access seekers and the access provider (which may be on different terms and conditions to other users) and for access determinations by the QCA to stand, notwithstanding the expiry of the declaration.<sup>124</sup>

- 101 The QCA's reasoning does not support the declaration of the DBCT service for any further period, let alone 10 years.
- 102 Nonetheless, if the QCA does determine that the DBCTM service be declared, as the QCA suggests in its Draft Recommendation a shorter period of declaration would be appropriate given the QCA's conclusion that demand forecasts beyond five years are uncertain.<sup>125</sup> It is not appropriate for the QCA to rely on the existence of the revocation process to support a 10 year declaration period in circumstances where the QCA has concluded that there is uncertainty with respect to forecasting demand beyond five years and, accordingly, discounted MMI Advisory's (**MMI's**) demand forecast on that basis (which demand forecast would otherwise clearly result in the conclusion that the DBCT service failed criterion (b)).<sup>126</sup>

## 2.6 Total foreseeable demand in the market

- 103 The QCA's approach to market definition causes it to commit an error of law in that it fails to identify total foreseeable demand in the market, contrary to the text of 76(2)(b) of the QCA Act.
- 104 The QCA's errors in respect of market definition have the result that in estimating total foreseeable demand in the market:<sup>127</sup>
- 104.1 for customers that the QCA considers are in the market, the QCA estimates those customers' use of the DBCT service, rather than their total demand; and
  - 104.2 the QCA understates the number of customers in that market because it underestimates the scope of the market for the service.
- 105 The QCA's approach to market definition causes it incorrectly to exclude mines that should properly be included within the market, namely:
- 105.1 mines operated by BMA, which use DBCT or the functionally identical service at HPCT;
  - 105.2 mines within the Goonyella system that use terminals other than DBCT; and
  - 105.3 mines outside the Goonyella system that nonetheless either use DBCT, prefer to use DBCT or might reasonably be expected to do so.
- 106 Regard to DBCTM's contracted capacity and access queue further demonstrates that DBCT cannot service total foreseeable demand in the market alone over the declaration period.

<sup>124</sup> Section 95 and Divisions 4 and 5 of the QCA Act

<sup>125</sup> QCA Draft Recommendation, page C37

<sup>126</sup> QCA Draft Recommendation, page C45

<sup>127</sup> HoustonKemp March 2019 Report on (b), page (ii)

**Figure 5: Summary of key QCA errors in determining total foreseeable demand in the market**

DBCTM	QCA draft recommendation	QCA's errors
<ul style="list-style-type: none"> <li>The requirement under section 76(2)(b) of the QCA is not to estimate total foreseeable demand for the DBCT service, but rather total foreseeable demand in the market in which the DBCT service is supplied over the period of declaration.<sup>128</sup></li> <li>Total foreseeable demand should be estimated as the total requirement for coal handling services arising for production (or expected production) of coal at locations that are within the geographic dimension of the market.<sup>129</sup></li> <li>Given that for BMA and BMC mines, DBCT is a close substitute to HPCT, their entire coal volumes must logically be in the same market as the market in which the DBCT service is supplied.<sup>130</sup></li> <li>Contractual or other arrangements mines (such as BMA and BMC's arrangements at HPCT) have to export coal through other terminals are not grounds for excluding the demand covered by those arrangements from the level of total foreseeable demand for coal handling services in the market.<sup>131</sup></li> <li>Peak total foreseeable demand in the market in the declaration period is at least 188Mt.<sup>132</sup></li> </ul>	<p>In estimating demand, the QCA excludes:<sup>133</sup></p> <ul style="list-style-type: none"> <li>demand from BMA mines;</li> <li>demand from BMC mines in excess of existing contracts at DBCT;</li> <li>demand from mines within the Goonyella system that contract at other terminals;</li> <li>demand from mines outside the Goonyella system that use DBCT.</li> </ul> <p>The QCA estimates peak total foreseeable demand in the market to be 94Mtpa.</p>	<ul style="list-style-type: none"> <li>As a consequence of the QCA's flawed approach to market definition, the QCA fails to identify total foreseeable demand in the market in which the DBCT service is supplied, contrary to section 76(2)(b) of the QCA Act: <ul style="list-style-type: none"> <li>for customers that the QCA considers are in the market, the QCA estimates those customers' use of the DBCT service, rather than their total demand; and</li> <li>the QCA understates the number of customers in the market because it underestimates the scope of the market for the service.</li> </ul> </li> <li>Using a correct approach to market definition, peak total foreseeable demand in the market in the declaration period is at least 188Mt.</li> <li>Regard to DBCT's contracted capacity and access queue further demonstrates that DBCT cannot service total foreseeable demand in the market alone over the declaration period. A failure to take into account DBCTM's evidence of demand by reference to its contracted capacity and access queue would be a failure to take into account a relevant consideration.</li> </ul>

<sup>128</sup> DBCTM May 2018 Submission at [144]

<sup>129</sup> DBCTM July 2018 Submission at [61]; HoustonKemp May 2018 Report on (b), page 19

<sup>130</sup> DBCTM May 2018 Submission at [150] to [167]; DBCTM July 2018 Submission at [125] to [128] and [166] to [168]

<sup>131</sup> DBCTM July 2018 Submission, page 33

<sup>132</sup> As set out in the DBCTM July 2018 Submission, HoustonKemp estimated peak total foreseeable demand of ~207Mt in the declaration period and AME estimated peak total foreseeable demand of ~213Mt in the declaration period (DBCTM May 2018 Submission at [202.1]; DBCTM Addendum to May 2018 Submission, 18 June 2018, Attachment 1 at [3]). Adjusting the QCA's demand estimates for the QCA's errors with respect to market definition (primarily using data in the MMI Report) reveals that peak total foreseeable demand in the market is ~188Mt. Having regard to this demand estimate and those in the DBCTM July 2018 Submission, peak total foreseeable demand in the market is at least 188Mt.

<sup>133</sup> QCA Draft Recommendation, page C43; MMI Advisory Pty Ltd, Reconciliation of DBCT Demand Forecasts Submitted by Stakeholders, December 2018 (**MMI Report**)

## QCA fails to estimate demand in the market

- 107 In estimating demand, the QCA:<sup>134</sup>
- 107.1 excludes demand from BMA mines;
  - 107.2 excludes demand from mines within the Goonyella system that contract at other terminals. While the QCA states that this demand is excluded for the duration over which the mines have current contracted capacity at those terminals, as explained below, the QCA in fact wholly excludes this demand from its estimation of total foreseeable demand;
  - 107.3 excludes mines outside the Goonyella system which use or have recently used DBCT and/or for which HoustonKemp's analysis demonstrates it would be lower cost for those mines to access DBCT and therefore they should be included in the market.

### QCA erred in excluding demand from BMA mines

- 108 As explained above, given that for BMA and BMC mines in the Goonyella system, DBCT is a close substitute to HPCT, their entire coal volumes must logically be in the same market as the market in which the DBCT service is supplied.<sup>135</sup>
- 109 DBCTM observes that in deciding to exclude all demand from BMA mines from demand in the market the QCA has:
- 109.1 focused on the supply side of the market and whether DBCT is a substitute for non-BMA/BMC mines. The QCA has failed to give sufficient regard to the demand side of the market the indisputable fact that DBCT is a substitute for BMA and BMC mines that are permitted to use HPCT;
  - 109.2 failed to take into account BHP's acknowledgement that DBCT may be a substitute for HPCT;<sup>136</sup>
  - 109.3 failed to apply the QCA's own rule which was to only exclude demand for HPCT.<sup>137</sup> In this regard DBCTM observes that demand from BMA mines exceeds the capacity of HPCT of 55Mt.<sup>138</sup> However, rather than excluding 55Mt of demand, the QCA excluded all BMA demand.
- 110 In addition, as set out above, in this submission DBCTM provides new evidence of BMA's use of DBCT, including contracts with DBCT and the fact that BMA mines utilised [REDACTED] Mtpa of DBCT's capacity in 2018. Notably, as recently as 6 March 2019, [REDACTED]  
[REDACTED] This is recent probative evidence that BMA demand definitely forms part of the demand in the market in which the DBCT service is supplied.
- 111 For the reasons discussed below, it is also incorrect for the QCA to only include BMC's contractual entitlement in total foreseeable demand in the market.

### QCA erred in excluding demand from mines contracted at other terminals

- 112 The QCA has further erred in excluding demand from mines within the Goonyella system that is served by other terminals.<sup>139</sup> Contractual or other arrangements mines have to export coal through other terminals are not grounds for excluding them from the level of total foreseeable demand for coal handling services in the market.<sup>140</sup>

<sup>134</sup> QCA Draft Recommendation, page C43; MMI Report

<sup>135</sup> DBCTM July 2018 Submission at [166]; DBCTM May 2018 Submission at [157]

<sup>136</sup> BHP Submission at [4.7]

<sup>137</sup> QCA Draft Recommendation, page 43

<sup>138</sup> BHP Submission at [2.4]

<sup>139</sup> HoustonKemp March 2019 Report, section 2

<sup>140</sup> DBCTM July 2018 Submission at [160] to [165]

- 113 Section 76(2)(b) requires criterion (b) to be a test of whether one facility can meet total foreseeable demand in the *market* and at least cost. The determination of total foreseeable demand in the market should not be constrained by whether mines actually use (or will use) the DBCT service - it is a determination of demand in the market and must not be confined to demand served by the facility. Demand in the market includes demand within the geographic scope of the market in which the DBCT service is supplied that is serviced by other facilities. This means that total foreseeable demand should be estimated as the total requirement for coal handling services arising for production (or expected production) of coal at locations that are within the geographic dimension of the market.<sup>141</sup>
- 114 Put another way, the total foreseeable demand in the market is the total demand arising from customers who are in the market.<sup>142</sup> The fact that some of these volumes may currently, or in the future, be served by a facility that is not DBCT is not relevant to the calculation of total foreseeable demand in the market.
- 115 The approach the QCA adopts is equivalent to assuming that only volumes served within the capacity of DBCT are in the market. HoustonKemp explained in its criterion (b) report why this approach is conceptually incorrect and may result in a facility inaccurately being identified as a natural monopoly.<sup>143</sup>
- 116 Foreseeable demand in the market encompasses coal volumes that, by preference, would be served by coal handling services at the Port of Hay Point. Some of those volumes may in fact be served by terminals other than DBCT, or by other terminals together with DBCT. All of those volumes form part of total foreseeable demand in the *market* in which the DBCT service is supplied.
- 117 Any approach that limits foreseeable demand in the market to that served by the facility of interest will typically find that the facility satisfies criterion (b), irrespective of the degree of substitution between any two facilities. The Productivity Commission also recognised this in recommending a market based approach to criterion (b). The Productivity Commission said:<sup>144</sup>
- ... by only considering the demand for the facility's own service — rather than total demand in the market in which the service is supplied — the natural monopoly test could be satisfied for any location-specific facility with its output defined sufficiently narrowly, with enough spare (or expandable) capacity to accommodate a third party.
- 118 To ignore demand from mines proximate to DBCT which use other terminals (through contractual or other arrangements) in determining foreseeable demand means that only current and estimated future throughput at DBCT is considered in the criterion (b) analysis. That is, the analysis fails to account for total demand in the market in which the DBCT service is supplied. This is contrary to the Productivity Commission's recommendation in respect of criterion (b) and the text of section 76(2)(b) of the QCA Act.
- 119 The QCA purports to exclude demand from mines within the Goonyella system that contract at other terminals for the duration over which those mines have current contracted capacity at those terminals (i.e. Middlemount and Lake Vermont). In fact, the QCA's analysis excludes demand from Middlemount and Lake Vermont over the entire declaration period. This is because while MMI assumes that 3Mtpa of Middlemount volumes contracted to AAPT until 2027 will be recontracted to DBCT from 2028 and 6Mtpa of Lake Vermont volumes contracted to AAPT until 2028 will be contracted to DBCT from 2029,<sup>145</sup> the QCA's analysis does not take these volumes into account in determining total foreseeable demand. This follows from the QCA's decision to maintain MMI's 2026 forecast of 82.54Mtpa from 2026 to 2030.<sup>146</sup>
- 120 The QCA's decision to maintain the 2026 MMI forecast of 82.54Mt is arbitrary and inappropriate and leads the QCA to exclude demand that MMI determines would form part of total foreseeable demand. This decision has the effect of biasing the demand forecast down to a level that makes it more likely that DBCT

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<sup>141</sup> HoustonKemp May 2018 Report on (b), page 19; HoustonKemp March 2019 Report, section 3

<sup>142</sup> HoustonKemp March 2019 Report on (b), section 3

<sup>143</sup> HoustonKemp March 2019 Report on (b), section 3; HoustonKemp May 2018 Report on (b), page 34. See also HoustonKemp July 2018 Report on (b), page 18

<sup>144</sup> Productivity Commission Inquiry Report, National Access Regime, No. 66, 25 October 2013, page 155; DBCTM Submission at [97]

<sup>145</sup> MMI Report, pages 7 and 13

<sup>146</sup> QCA Draft Determination, page 45

will satisfy criterion (b). There is no reasonable basis for the QCA to make this adjustment to MMI's 'high case' forecast.

### *QCA erred in excluding demand from mines outside the Goonyella system*

- 121 The QCA's analysis also erroneously excludes mines outside the Goonyella system which use or have recently used DBCT. HoustonKemp's analysis demonstrates it would be lower cost for those mines to access DBCT and therefore they should be included in the market.<sup>147</sup>

### **Adjusting QCA demand estimates for QCA's errors with respect to market definition**

- 122 DBCTM maintains that the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Further, DBCTM stands by the demand estimates prepared by HoustonKemp and AME presented in its May 2018 Submission. As set out in that submission, HoustonKemp estimated peak total foreseeable demand of approximately 207Mtpa in the declaration period and AME estimated peak total foreseeable demand of approximately 213Mtpa in the declaration period.<sup>148</sup>
- 123 However, to demonstrate the effect of correcting for the QCA's errors with respect to market definition, in its report in response to the QCA's Draft Recommendation, HoustonKemp presents estimates of total foreseeable demand that adjust for the errors the QCA makes with respect to market definition but otherwise accepts.<sup>149</sup>
- 123.1 the base and high case forecasts of demand made by MMI supplemented by AME data; and
- 123.2 the approach adopted by the QCA to adopt the high case forecasts, truncated at 2026 levels, and scaled up to reflect a 10 per cent difference between demand for throughput and demand for contracted capacity (notwithstanding that, as explained above, DBCTM considers the QCA's truncation of demand at 2026 levels to be arbitrary and inappropriate).
- 124 The following table from HoustonKemp's report shows:<sup>150</sup>
- 124.1 total foreseeable demand in the market using the QCA's market definition; and
- 124.2 total foreseeable demand in the market using HoustonKemp's market definition.
- 125 HoustonKemp used MMI's data to estimate total foreseeable demand in the market. However, since MMI did not provide forecasts of foreseeable demand from Kestrel, Teresa and BMA mines, HoustonKemp supplemented these with forecasts from AME.<sup>151</sup> HoustonKemp assumed base case and high case forecasts to be the same, except for the Teresa project for which HoustonKemp assumed base case volumes of zero to reflect MMI's stated view about the prospects for the project.

<sup>147</sup> HoustonKemp March 2019 Report on (b), section 2

<sup>148</sup> DBCTM May 2018 Submission at [202.1]; DBCTM Addendum to May 2018 Submission, 18 June 2018, Attachment 1 at [3].

<sup>149</sup> HoustonKemp March 2019 Report on (b), section 3

<sup>150</sup> HoustonKemp March 2019 Report on (b), Table 3.2

<sup>151</sup> HoustonKemp March 2019 Report on (b), section 3; HoustonKemp May 2018 Report on (b), Table A1.1

**Figure 6: Estimates of total foreseeable demand in the market (HoustonKemp)**

Year	QCA's market definition	HoustonKemp market definition
2021	102.99	164.67
2022	99.14	163.04
2023	99.10	163.94
2024	94.68	161.17
2025	97.14	168.71
2026	101.71	174.94
2027	101.71	174.94
2028	101.71	174.94
2029	101.71	174.94
2030	101.71	174.94

126 This table shows that employing HoustonKemp's correct approach to market definition, total foreseeable demand in the market estimated on the basis described above peaks at approximately 175Mt.

127 Further, as set out in the Timbrell Declaration<sup>152</sup> and Appendix 3, [REDACTED]

128 The above table, which assumes MMI's high case forecast truncated from 2026, [REDACTED]  
 [REDACTED] This has the result that under the QCA's market definition, peak total foreseeable demand reaches approximately 118Mtpa [REDACTED] in 2021 and under HoustonKemp's market definition, peak total foreseeable demand reaches approximately 188Mtpa from 2026 onwards [REDACTED]

**DBCTM demand analysis**

129 As explained in Appendix 4, to demonstrate that on any view total foreseeable demand will exceed the reasonably possible maximum coal handling capacity of DBCT in the declaration period, which is 102Mtpa,<sup>155</sup> DBCTM has prepared an estimate of foreseeable demand which:<sup>156</sup>

- 129.1 starts with the mines and production forecasts included in MMI's base forecast;<sup>157</sup>
- 129.2 adjusts MMI's base case assessment of demand:
  - 129.2.1 for mines with contracts at DBCT in the amount of the contract;
  - 129.2.2 to add mines that MMI excluded, which have current long term contracts at DBCT with evergreen extension rights; and

<sup>152</sup> Appendix 3 - Timbrell Declaration at [27]

<sup>153</sup> MMI Report, page 10

<sup>154</sup> MMI Report, page 4

<sup>155</sup> DBCTM May 2018 Submission at [191] to [199] and Appendix 18 to that Submission

<sup>156</sup> Appendix 4 - DBCTM Foreseeable Demand Analysis

<sup>157</sup> MMI Report

129.2.3 to add mines in the queue for access to DBCT, which includes access applications submitted within the last twelve months and access applications that are being disputed at the time of this submission (in the amounts queued);<sup>158</sup>

130 In preparing this estimate, DBCTM has assumed that mines with evergreen contracts at DBCT will renew until at least 2030.<sup>159</sup> This assumption has been made having regard to the QCA's conclusions that:<sup>160</sup>

... existing users are likely to perpetually exercise the evergreen renewal right in their existing user agreements in a future without declaration.<sup>161</sup>

and:<sup>162</sup>

Incumbents would be able to use their existing capacity rights at DBCT for another mining operation. Further about a quarter of DBCT's nameplate capacity is accessed by miners that have mines in the Goonyella system which are expected to reach the end of their economic life over the recommended declaration period, and the relevant miners have, based on publicly available material, expressed an interest in continuing their mining operations.<sup>163</sup>

131 DBCTM also prepared an estimate on the same basis, however, which also includes MMI's high case demand assessment.

132 These estimates are set out and further explained in Appendix 4.

133 DBCTM maintains that:

133.1 the mines included in MMI's base case demand assessment do not reflect all of the mines in the market in which the DBCT service is provided because MMI only included mines consistent with the QCA's definition of the market. As described in DBCTM's submission on criterion (b), the QCA's approach to market definition is in error with the result that the QCA and MMI fail to include mines in market demand which should properly be included in that demand; and

133.2 the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand.

134 Nonetheless, this analysis demonstrates that on a narrow view of the market and having regard to DBCTM's contracted volumes and access queue, peak total foreseeable demand reaches:

134.1 150.4Mtpa in 2025 and 2026 (on the basis of MMI's base case production with adjustment for contracts and the access queue);

134.2 175.5Mtpa in 2028 (on the basis of MMI's high case production with adjustment for contracts and the access queue).

135 As set out in DBCTM's May 2018 Submission, the reasonably possible maximum coal handling capacity of DBCT is 102Mtpa.<sup>164</sup> Further Appendix 6 demonstrates that under (unrealistically) aggressive assumptions, including that the expansions commence in March 2019 (the day of this submission), the earliest DBCT could be expanded to 102Mtpa is February 2027. Accordingly, even on a narrow view of the market, DBCT cannot serve total foreseeable demand over the period of declaration.

<sup>158</sup> Note this is with the exception of [REDACTED] in which case DBCTM has used the production forecast in the MMI Report as explained in Figure 3. As noted in the Timbrell Declaration, DBCTM has included in this analysis access seekers who have disputed their removal from the access queue (Timbrell Declaration at [27]). Mr Timbrell considers that even if ultimately those access seekers are removed from the queue, it is reasonable that all such access seekers would subsequently make a new application to join the queue for the same quantities as currently sought

<sup>159</sup> Refer to Appendix 3 - Timbrell Declaration at [23].

<sup>160</sup> QCA Draft Recommendation, page 87

<sup>161</sup> QCA Draft Recommendation, page 87

<sup>162</sup> QCA Draft Recommendation, page 91

<sup>163</sup> QCA Draft Recommendation, page 91

<sup>164</sup> DBCTM May 2018 Submission at [191] to [200] and [220]

**DBCTM's access queue demonstrates demand materially exceeds DBCT's capacity**

136 Regard to DBCTM's contracted capacity and access queue demonstrates that demand materially exceeds DBCT's capacity over the declaration period, such that DBCT cannot service that demand alone. A failure to take into account DBCTM's evidence of demand by reference to its contracted capacity and access queue would be a failure to take into account a relevant consideration.

137 As stated in the Timbrell Declaration:

137.1 on the basis of the expert advice of Integrated Logistics DBCTM can only contract terminal capacity up to the limit of system capacity of 84.2Mtpa (from FY22 onwards);<sup>165</sup>

137.2 as at the date of Timbrell Declaration (7 March 2019) DBCTM is contracted to 84.07Mtpa long term;<sup>166</sup>

137.3 there are a number of mines in the access queue seeking access to DBCT capacity. The access queue reaches a peak total demand of 56.1Mtpa in 2025;<sup>167</sup>

137.4 the current total contracted plus access queue demand for coal handling services at DBCT reaches 140.2Mtpa from 2025 to 2028 (contracted capacity plus queue) and never drops below 115Mtpa.<sup>168</sup>

138 DBCTM maintains that its contracted capacity and access queue do not reflect *total* foreseeable demand *in the market* because they do not include volumes from mines in the market that could use DBCT but instead use other terminals. Nonetheless, DBCTM's contacted capacity and the access queue represent incontrovertible evidence of foreseeable demand for the DBCT service. As such any measure of total foreseeable demand in the market must be higher than DBCTM's contracted capacity and the access queue.

139 The submission by the User Group in May 2018 that the access queue does not provide a genuine reflection of demand must be rejected.<sup>169</sup> Each of the mines currently in the access queue have current applications for capacity. Further, the genuineness of the applications for capacity of mines in the access queue was recently tested in the capacity allocation process referred to in the Timbrell Declaration.

140 As explained in the Timbrell Declaration, following the capacity allocation process:

140.1 there was 1.87Mtpa of immediate demand for DBCT capacity in the form of signed access applications that could not be met;<sup>170</sup> and

140.2 DBCTM removed Access Seekers from the queue who had not signed access agreements during that process in accordance with the Access Undertaking. However, the following Access Seekers have disputed their removal from the access queue and referred the dispute to dispute resolution under section 17 of the Access Undertaking:<sup>171</sup>

[REDACTED]

<sup>165</sup> Appendix 3 - Timbrell Declaration at [16]

<sup>166</sup> Appendix 3 - Timbrell Declaration at [21]

<sup>167</sup> Appendix 3 - Timbrell Declaration at [24]

<sup>168</sup> Appendix 3 - Timbrell Declaration at [25]

<sup>169</sup> User Group, Submission to QCA, 30 May 2018 pages 64 to 66

<sup>170</sup> Appendix 3 - Timbrell Declaration at [20]

<sup>171</sup> Appendix 3 - Timbrell Declaration at [27]



141 Accordingly, having regard to amounts contracted at DBCT and the access queue, peak foreseeable demand for capacity at DBCT in the declaration period is at least 140.2Mtpa.

**2.7 DBCT cannot meet total foreseeable demand in the market**

142 The QCA has erred in concluding that the DBCT service satisfied criterion (b) in circumstances where even on the QCA's approach to market definition and estimating total foreseeable demand in its draft recommendation, the DBCT service cannot satisfy total foreseeable demand in the market over the declaration period.

143 The QCA has erred in its least cost assessment by treating DBCT as having capacity of 94Mtpa to service total foreseeable demand of 93Mtpa in 2021. The QCA cannot reasonably treat DBCT as having capacity of 94Mtpa until September 2025, at the very earliest. Accordingly, it is impossible for the DBCT service to meet total foreseeable demand in the market over the declaration period.

144 Criterion (b) is not satisfied where the facility for the service cannot meet the total foreseeable demand in the market over the period for which the service would be declared (section 76(2)(b)(i) of the QCA Act). For a facility to satisfy criterion (b) it must be able to meet total foreseeable demand at all times over the declaration period. In considering whether it is reasonably possible to expand a facility to meet total foreseeable demand (section 76(3) of the QCA Act), the timing of capacity expansions within the declaration period are relevant considerations and must be taken into account.

145 The QCA's key errors in applying sections 76(2)(b)(i) and 76(3) of the QCA Act are set out in the following table.

**Figure 7: Summary of key QCA errors applying sections 76(2)(b)(i) and 76(3) of the QCA Act**

DBCTM	QCA draft recommendation	QCA's errors
<ul style="list-style-type: none"> <li>To satisfy criterion (b) the facility for the service must be able to meet total foreseeable demand at all times over the period for which the service would be declared.</li> <li>In determining whether it is reasonably possible to expand the capacity of a facility having regard to section 76(3) of the QCA Act, the timing of capacity expansions within the declaration period are relevant.</li> <li>Where it is not reasonably possible to expand a facility within time to service foreseeable demand, the service for the facility fails criterion (b).</li> </ul>	<ul style="list-style-type: none"> <li>DBCT has capacity to service total foreseeable demand of 93Mtpa in 2021.</li> <li>Section 76(3) of the QCA Act means that the QCA should consider the costs of providing the service by the entire facility as expanded.</li> </ul>	<ul style="list-style-type: none"> <li>The QCA has erred in its least cost assessment by treating DBCT as having capacity of 94Mtpa to service total foreseeable demand of 93Mtpa in 2021.</li> <li>The QCA cannot reasonably treat DBCT as having capacity of 94Mtpa until September 2025, at the very earliest.</li> <li>The QCA has misconstrued and misapplied section 76(3) of the QCA Act.</li> <li>Even on the QCA's approach to market definition and estimating total foreseeable demand, the DBCT service does not satisfy criterion (b) because it cannot meet total foreseeable demand over the declaration period.</li> </ul>

## Interpretation and application of sections 76(2)(b)(i) and 76(3)

- 146 To be satisfied of criterion (b), the QCA must be satisfied both that: (1) the facility for the service could meet the total foreseeable demand in the market over the period for which the service would be declared; and (2) the facility could meet that demand at the least cost compared to any 2 or more facilities (which could include the facility for the service). Where the QCA cannot be satisfied of the matter in (1), criterion (b) will not be satisfied. In addition, criterion (b) will not be satisfied where the QCA cannot be satisfied of the matter in (2). This is clear from the use of the conjunction 'and' between the matters in subparagraph (i) of section 76(2)(b) of the QCA Act and those in subparagraph (ii) of that section.<sup>172</sup>
- 147 Accordingly, a service will fail criterion (b) in circumstances where the QCA cannot be satisfied that the facility for the service could meet total foreseeable demand in the market over the declaration period.<sup>173</sup> Where a facility is not able to meet total foreseeable demand in the market over the declaration period, it is not necessary to consider whether the service could meet that demand at least cost compared to any two or more facilities.
- 148 The requirement in section 76(2)(b)(i) of the QCA Act that the facility meet total foreseeable demand in the market *over the period for which the service would be declared* means that if the facility cannot meet total foreseeable demand in the market at any stage over the declaration period, then criterion (b) is not satisfied.<sup>174</sup>
- 149 The QCA has erred in its least cost analysis in its draft recommendation by assuming the DBCT has expanded capacity from the start of the declaration period.<sup>175</sup> In doing so, it appears that the QCA has misconstrued and misapplied section 76(3) of the QCA Act.
- 150 Section 76(3) of the QCA Act provides that:
- For subsection (2)(b), if the facility for the service is currently at capacity, and it is reasonably possible to expand that capacity, the authority and the Minister may have regard to the facility as if it had that expanded capacity.
- 151 Section 76(3) does not mean that the QCA and the Minister should conduct the least cost assessment for criterion (b) on the basis that the facility has expanded to its reasonably possible expanded capacity at the start of the declaration period. Section 76(3) does not apply unless a facility is 'currently at capacity' - that is, at capacity at the time of the QCA's and the Minister's assessment. The purpose of section 76(3) of the QCA Act is to clarify that a facility that is at capacity can still be declared if it is reasonably possible for the facility to be expanded and the matters in section 76(2) are otherwise satisfied. This section reflects section 44CA(2)(a) of the CCA. The Explanatory Memorandum for the CCA (Competition Policy Review) Bill 2017, states at [12.30]:
- Paragraph 44CA(2)(a) contemplates that a facility, which is at capacity, can be declared if it is reasonably possible for it to be extended or expanded. However, it is not necessary for the Council and the Minister to have regard to a facility at capacity as if it had expanded capacity, if it is not reasonably possible for that facility to be expanded or extended.
- 152 This purpose is reflected in the words 'currently at capacity' in section 76(3).
- 153 Where a service is at capacity at the time of the QCA's assessment, the QCA and the Minister can declare that facility if it is reasonably possible for it to be expanded and the matters in section 76(2) are otherwise satisfied. For a facility that is 'currently at capacity' to be subject to declaration, the timing element of the

<sup>172</sup> DBCTM May 2018 Submission at [71]

<sup>173</sup> DBCTM May 2018 Submission at [72]

<sup>174</sup> DBCTM May 2018 Submission at [80]; DBCTM July 2018 Submission at [36]

<sup>175</sup> QCA Draft Recommendation, page C50

capacity expansion within the declaration period must also be taken into account in the criterion (b) assessment.

- 154 Whether it is reasonably possible for a facility to be expanded involves a timing element as to when within the declaration period the facility can be expanded. The timing of the capacity expansion to service total foreseeable demand within the declaration period must also be 'reasonably possible' - that is, reasonably capable of occurring and not merely theoretical.<sup>176</sup> If not, the capacity expansion cannot be said to be reasonably possible because it would be based on an unrealistic and impossible assumption as to timing.
- 155 The QCA and the Minister cannot treat a facility that is 'currently at capacity' as having expanded capacity for the entire declaration period, unless it is reasonably possible to expand the facility to that capacity by the commencement of the declaration period.

**DBCT cannot meet total foreseeable demand**

*DBCT service fails criterion (b) on QCA's own approach to market definition and demand*

- 156 The QCA has erred in its least cost assessment by treating DBCT as having capacity of 94Mtpa to service total foreseeable demand of 93Mtpa in 2021. The QCA cannot reasonably treat DBCT as having capacity of 94Mtpa until September 2025, at the very earliest. Accordingly, on the QCA's own approach the DBCT service fails criterion (b) as it cannot meet total foreseeable demand in the market over the period for which it would be declared.
- 157 The QCA estimates total foreseeable demand (on a capacity entitlement basis) to be as follows:

**Figure 8: QCA's estimates of total foreseeable demand**

2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
92.99	89.14	89.20	84.68	87.14	91.71	91.71	91.71	91.71	91.71

- 158 DBCT's current capacity is 84.2Mtpa.<sup>177</sup> DBCT would have to expand to service the QCA's estimated total foreseeable demand. This would require implementation of at least the Zone 4 Expansion and 8X Phase 1 Expansion referred to in DBCT's Master Plan. The Zone 4 Expansion would take DBCT's capacity to 89Mtpa. The 8X Phase 1 Expansion would take DBCT's capacity to 94Mtpa.
- 159 However, each of the Zone 4 and 8X Phase 1 expansion projects require considerable lead times. In Appendix 6 to this submission, DBCTM sets out the timing for completing the Zone 4, 8X Phase 1 and 8X Phase 2 expansions and the assumptions for that expansion timing. Appendix 6 demonstrates that under (unrealistically) aggressive assumptions for expansion timing, and absent any requirements concerning expansions imposed by the 2017 Access Undertaking or Access Framework, and assuming DBCT proceeded with those two expansions in March 2019 (the day of this submission), the Zone 4 Expansion could not be completed until September 2023 at the earliest, and the 8X Phase 1 Expansion could not be completed until September 2025, at the earliest. While the 8X Phase 2 expansion is not required in order to service the QCA's estimated total foreseeable demand, Appendix 6 shows that expansion could not be completed until February 2027, also assuming it commenced in March 2019. If requirements with respect to expansions imposed by the 2017 Access Undertaking or Access Framework are taken into account, the timing for completion of the 8X Phase 1 and 2 Expansions would be almost a year later in each case (assuming no disputes).

<sup>176</sup> As noted in the DBCTM May 2018 Submission at [75] to [78]: 'reasonably possible' is not defined in the QCA Act, the relevant definition of 'possible' in the Macquarie Online Dictionary is 'capable of existing, happening, being done, being used' and for a capacity expansion to be 'reasonably possible' it cannot be merely theoretical. The QCA observed in its Draft Recommendation (at page 14) that for an expansion to be 'reasonably possible' it cannot be merely theoretical or fanciful.

<sup>177</sup> Appendix 3 - Timbrell Declaration

160 The QCA estimates total foreseeable demand of 93Mtpa in 2021. Given DBCT is not able to expand to 94Mtpa until September 2025, the DBCT service is not able to meet total foreseeable demand in the market over the period of declaration (section 76(2)(b)(i)). In fact, DBCT would not be able to meet foreseeable demand for at least half of the declaration period (being the years ending 2021-2025). Accordingly, even on the QCA's own approach to market definition and estimating total foreseeable demand, the DBCT service fails criterion (b).

*DBCT service fails criterion (b) where total foreseeable demand is estimated correctly*

161 Further, the QCA's incorrect approach to the market means that it underestimates total foreseeable demand in the market. In circumstances where section 76(2)(b) is correctly applied, the DBCT service fails criterion (b) because it cannot satisfy total foreseeable demand over the period for which the DBCT service would be declared.

162 As explained in the DBCTM May 2018 Submission, it is not reasonably possible to expand DBCT's capacity beyond 102Mtpa during the declaration period and there is considerable uncertainty as to whether expanding beyond 102Mtpa will ever be viable.<sup>178</sup> Where the QCA correctly identifies customers in the market for the DBCT service, peak total foreseeable demand in the market over the declaration period is at least 188Mt. Accordingly, DBCT cannot meet the total foreseeable demand in the market over the declaration period. It follows that the DBCT service does not satisfy criterion (b).

163 Since DBCT cannot service total foreseeable demand in the market over the declaration period, the DBCT service does not satisfy criterion (b). It is therefore not necessary for the QCA to consider whether DBCT could meet that demand at least cost compared to any two or more facilities. Despite this, DBCTM also responds to the QCA's draft least cost analysis below.

## **2.8 DBCT cannot meet total foreseeable demand at least cost**

164 As explained above, the DBCT service does not satisfy criterion (b) because it cannot service total foreseeable demand in the market over the declaration period. Nonetheless, assuming the DBCT can service total foreseeable demand in the market over the declaration period, the DBCT service does not satisfy criterion (b) because it cannot meet that demand at least cost.

165 DBCTM explains below that:

165.1 The QCA makes a fundamental error in its least cost assessment. The QCA assumes that an 'average cost' standard is the same as a 'total cost' standard. As a result of the QCA's error, the QCA understates the total costs of meeting all foreseeable demand at DBCT, or overstates the incremental costs of meeting some of this demand at the alternative terminal. Where the QCA's assessment of least cost is corrected so that it is expressed on an incremental cost basis (or, equivalently, a consistent total cost basis) the DBCT service does not satisfy criterion (b).

165.2 The QCA has made a material error in its least cost assessment by applying a methodology that is different to its stated approach. When the QCA's approach is correctly applied, the DBCT service does not satisfy criterion (b).

166 The QCA's key errors in its least cost analysis of the DBCT service are set out in the following table.

<sup>178</sup> DBCTM May 2018 Submission at [191] to [199] and Appendix 18

**Figure 9: Summary of key QCA errors in least cost analysis**

DBCTM	QCA draft recommendation	QCA's errors
DBCT cannot satisfy total foreseeable demand in the market over the period for which the DBCT service would be declared; and at the least cost compared to any 2 or more facilities	DBCT can satisfy total foreseeable demand at least cost compared to any 2 or more facilities	<ul style="list-style-type: none"> <li>• The QCA departs from a total cost standard when it uses the price of alternative terminals and rail transport to those terminals to compare to the cost of expanding DBCT.</li> <li>• The price of alternative terminals and rail transport includes sunk costs that the QCA assesses as part of total cost in assessing the costs of meeting demand at alternative terminals but not when assessing the cost of expanding DBCT.</li> <li>• The QCA's approach is contrary to commonly understood microeconomic principles and the Tribunal's decision in the Pilbara rail matter.</li> <li>• The QCA's calculations for implementing its preferred approach in the draft recommendation are incorrect and not consistent with the QCA's worked example in Appendix B of its Issues Paper. Applying the QCA's own methodology the DBCT service does not satisfy criterion (b).</li> </ul>

### QCA's least cost assessment departs from a 'total cost' standard

- 167 The QCA's least cost assessment is illogical and involves a fundamental error.
- 168 The QCA purports to adopt a 'total cost' standard for its least cost analysis. However, its least cost analysis employs an 'average unit cost' standard. The QCA makes a fundamental error in assuming that an 'average cost' standard is the same as a 'total cost' standard. As a result, the QCA's least cost analysis proceeds on an illogical basis with an incorrect and unreasonable conclusion.
- 169 The QCA's analysis is contrary to commonly understood microeconomic principles and the Tribunal's approach to the least cost assessment in the Pilbara rail matter.<sup>179</sup>
- 170 The QCA's assumption that the 'average cost' standard is the same as a 'total cost' standard causes the QCA's assessment of least cost to be distorted because it:<sup>180</sup>
- 170.1 ignores the sunk costs associated with other terminals when considering scenarios under which DBCT meets all foreseeable demand, even though the sunk costs of those other terminals will continue to be incurred in these scenarios; but
  - 170.2 takes into account these same sunk costs when considering scenarios under which some foreseeable demand is met at those terminals.
- 171 As a result of this mistake, the QCA understates the total costs of meeting all foreseeable demand at DBCT and overstates the incremental costs of meeting some of this demand at the alternative terminal. The QCA's preferred total cost standard can only be applied correctly if costs that cannot be avoided are counted in all scenarios.
- 172 The QCA's error is explained in detail in HoustonKemp's March 2019 Report on (b).<sup>181</sup> As HoustonKemp demonstrates, where this significant error in the QCA's assessment of least cost is corrected so that it is expressed on an incremental cost basis (or, equivalently, a consistent total cost basis), the DBCT service fails criterion (b)

<sup>179</sup> HoustonKemp March 2019 Report on (b), section 4; *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [906] to [907], [917] to [923] and [938] to [944]

<sup>180</sup> HoustonKemp March 2019 Report on (b), section 4

<sup>181</sup> HoustonKemp March 2019 Report on (b), section 4

173 The following table from HoustonKemp's March 2019 Report on (b) shows that on the QCA's own approach to market definition and estimation of total foreseeable demand but where the QCA's error in its assessment of least cost is corrected, it is lower cost to meet some part of total foreseeable demand above the existing capacity of DBCT at any of AAPT, RGTCT or WICET, than it is to meet all demand using expanded capacity at DBCT. As explained in Figure 4 in the market definition section above, there is existing capacity at AAPT, RGTCT and WICET to service part of total foreseeable demand above the existing capacity at DBCT.<sup>182</sup>

**Figure 10: Incremental cost assessment based on costs to society<sup>183</sup>**

Cost components	Expanded capacity at DBCT	Existing capacity at AAPT	Existing capacity at RGTCT	Existing capacity at WICET
Below-rail cost	\$0.62	\$1.82	\$1.23	\$1.23
Above-rail cost	\$1.63	\$2.52	\$2.27	\$2.27
Coal handling cost	\$8.50	\$1.54	\$1.14	\$1.23
Supply chain cost	\$10.74	\$5.87	\$4.64	\$6.73
<i>Cost difference relative to accessing DBCT</i>		<i>\$4.87 less (45%)</i>	<i>\$6.10 less (57%)</i>	<i>\$4.01 less (37%)</i>

174 This table demonstrates that with a comparison of costs between scenarios that is consistent with commonly understood microeconomic principles and the Tribunal's decision in Pilbara rail, the DBCT service does not satisfy criterion (b).

175 The QCA's least cost assessment includes the costs of above and below rail services that are used to facilitate coal handling services. This is consistent with an assessment on the basis of least cost to society. HoustonKemp explains that if the QCA were to propose a different basis for the inclusion of costs, such as 'production costs' in the relevant market for coal handling services, it would not include the costs of above and below rail services.<sup>184</sup> HoustonKemp shows that, under this alternative assumption, it is lower cost to meet some part of total foreseeable demand above the existing capacity of DBCT at any of AAPT, RGTCT or WICET, than it is to meet all demand using expanded capacity at DBCT.

**Figure 11: Incremental cost assessment based on production costs<sup>185</sup>**

Cost components	Expanded capacity at DBCT	Existing capacity at AAPT	Existing capacity at RGTCT	Existing capacity at WICET
Below-rail cost	n/a	n/a	n/a	n/a
Above-rail cost	n/a	n/a	n/a	n/a
Coal handling cost	\$8.50	\$1.54	\$1.14	\$1.23
Supply chain cost	\$8.50	\$1.54	\$1.14	\$1.23
<i>Cost difference relative to accessing DBCT</i>		<i>\$6.96 less (82%)</i>	<i>\$7.36 less (87%)</i>	<i>\$7.27 less (86%)</i>

### QCA's least cost calculations are inconsistent with its stated approach

176 The QCA has made a material error in its least cost assessment by applying a methodology that is different to its stated approach. When the QCA's approach is correctly applied, the DBCT service does not satisfy criterion (b).<sup>186</sup>

<sup>182</sup> See the 'terminal and rail capacity row' in figure 4 in section 2.4 above and the GHD Report (Appendix 7), section 5 which concludes there is spare capacity at RGTCT. In addition, the QCA concluded that there was spare capacity of 11Mtpa at WICET - QCA Draft Recommendation, page 10. The User Group also stated that there was substantial unutilised capacity at AAPT, RGTCT and WICET - User Group, Submission in response, 16 July 2018, pages 13 and 34

<sup>183</sup> HoustonKemp March 2019 Report on (b), Table 4.3

<sup>184</sup> HoustonKemp March 2019 Report on (b), section 4.4

<sup>185</sup> HoustonKemp March 2019 Report on (b), Table 4.4

<sup>186</sup> Appendix 7 - GHD Report, section 4

- 177 GHD explains that in its assessment of least cost, the QCA evaluated the average cost per unit of DBCT alone (expanded) compared to DBCT (unexpanded) used in combination with another facility.<sup>187</sup> The QCA considered that its reasoning on this approach to be consistent with the worked example in Appendix B of the Staff Issues Paper. To the contrary, GHD finds that the QCA's approach in the draft recommendation is inconsistent with that in the Staff Issues Paper. Instead of comparing:
- 177.1 the average supply chain cost of DBCT meeting 93Mtpa of demand with the average supply chain cost of meeting demand with a combination of DBCTM meeting 85Mtpa and another terminal (in GHD's analysis RGTCT) meeting 8Mtpa,
- the QCA compares:
- 177.2 the average supply chain cost of DBCT meeting 93Mtpa of demand with the average supply chain cost of a Goonyella mine using RGTCT.
- 178 Based on the corrected application of the QCA's own methodology, GHD finds that the cost of DBCT (expanded) servicing 93Mtpa of demand is higher than a combination of RGTCT and DBCT (unexpanded) meeting that demand (\$12.05 per tonne compared to \$11.90 per tonne).<sup>188</sup> Accordingly, when the QCA's methodology is correctly applied, criterion (b) is not satisfied.
- 179 In its Report, GHD also:
- 179.1 identifies errors in the QCA's approach for determining the lower and upper bound estimates of below rail average costs;<sup>189</sup> and
- 179.2 explains why, conforming to the QCA's own framework for analysis, GHD considers the QCA's estimate of the cost impacts of below-rail expansions in the Goonyella system and expansions at DBCT are not overstated.<sup>190</sup>

## 2.9 Conclusion on criterion (b)

- 180 As demonstrated above:
- 180.1 the QCA has erred in its approach to market definition by conflating the distinct concepts of 'demand for' and 'use of' a service. As a result, the QCA assumes that demand in the market cannot include volumes that are served by other terminals;
- 180.2 the QCA's framework for analysis leads the QCA to the incorrect conclusion that DBCT is the only supplier in the relevant market, discounting evidence that there has been, and continues to be, close competition between the supply of expanded capacity at DBCT and other coal terminals for Goonyella system users;
- 180.3 as a consequence, the QCA fails to identify total foreseeable demand in the market contrary to section 76(2)(b) of the QCA Act:
- 180.3.1 for customers that the QCA considers are in the market, the QCA estimates those customers' use of the DBCT service, rather than their total demand; and
- 180.3.2 the QCA understates the number of customers in the market because it underestimates the scope of the market for the service.
- 180.4 peak total foreseeable demand in the market in the declaration period is estimated to be at least 188Mtpa;
- 180.5 the DBCT service cannot meet total foreseeable demand in the market over the declaration period. This is the case even on the QCA's definition of the market and estimation of total foreseeable

<sup>187</sup> Appendix 7 - GHD Report, section 4; QCA Draft Recommendation, page C50

<sup>188</sup> Appendix 7 - GHD Report, section 4.3

<sup>189</sup> Appendix 7 - GHD Report, section 6

<sup>190</sup> Appendix 7 - GHD Report, section 7

demand, because it is not reasonably possible for DBCT to expand in time to meet total foreseeable demand over the declaration period. Further, on DBCTM's and HoustonKemp's approach to market definition total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT in the declaration period.

180.6 the QCA has made material errors in its least cost assessment by:

180.6.1 assuming that an 'average cost' standard is the same as a 'total cost' standard; and

180.6.2 applying a methodology that is different to its stated approach.

180.7 Where the QCA's errors in its least cost assessment are corrected, it is not least cost for DBCT to service total foreseeable demand in the market over the declaration period alone.

181 Accordingly, the only reasonable conclusion for the QCA to make is that the DBCT service does not satisfy criterion (b).

### 3 Criterion (a)

#### 3.1 Summary

- 182 The QCA has fundamentally erred in its assessment of whether the DBCT service satisfies criterion (a). When the QCA's errors are corrected, and the new information provided in this submission is taken into account, the only reasonable conclusion is that the DBCT service does not satisfy criterion (a) and therefore the QCA cannot recommend that the DBCT service be declared.
- 183 DBCTM has engaged HoustonKemp to review and respond to the QCA's draft recommendation on criterion (a). HoustonKemp's report is referred to in this submission as the HoustonKemp March 2019 Report on (a).<sup>191</sup> The expert opinions contained in the report establish that criterion (a) cannot be satisfied for the DBCT Service, and should be treated as part of DBCTM's submission.

#### **Under the executed Access Framework new entrants cannot be charged more than \$3 per tonne more than existing users**

- 184 The fundamental basis of the QCA's draft recommendation that criterion (a) is satisfied for the DBCT service is that there significant asymmetries in the terms and conditions of access between new and existing users, such that potential efficient new entrants will be deterred from entering the coal tenements market. The key premise of this is that, without declaration, there would be a substantial price differential between new and existing users in the order of \$15 per tonne.
- 185 Without such a price differential, the QCA's concern falls away. This is evident in the QCA's draft recommendation where it assesses the likely outcome if differentiated expansion pricing was applied for a new terminal component with declaration. The QCA assesses that a decision to differentiate expansion costs would result in a price differential in the order of \$3.50 between new and existing users.<sup>192</sup> In this case the QCA concluded that the charges applying to new users in these circumstances would not appear to be materially different from the charges applying to existing users.<sup>193</sup>
- 186 While DBCTM firmly maintains its position that the previously submitted versions of the Deed Poll and Framework would ensure that there could be no material impact on competition in dependent markets without declaration, in order to provide greater clarity of pricing under the Framework, and to increase certainty for Access Seekers, DBCTM has introduced a further limit on access charges.
- 187 Under the executed Deed Poll, DBCTM is prevented from charging new users a TIC that is more than \$3.00 per tonne higher than the TIC the QCA would determine for the existing terminal component. The only circumstances where DBCTM can charge more than this is where the QCA determined TIC for the new terminal component would exceed the existing Floor TIC + \$3.00 (i.e. in the case of an expensive and differentially priced expansion). In those circumstances, DBCTM could only charge up to the equivalent of a QCA determined TIC for that terminal component. The remainder of this submission refers to these provisions as the '\$3 Cap'.
- 188 This protection has been 'hard-coded' into the executed Deed Poll. This means that it cannot be amended under any circumstances, and access seekers will have certainty over the declaration period of the maximum charge at which they will be able to gain access to DBCT.
- 189 As such, DBCTM has comprehensively addressed the QCA's primary concern regarding the asymmetry of pricing for new users and existing users. The prospect that a \$3 per tonne price differential could result in a *material* adverse impact on competition in the coal tenements market would be absurd. The QCA's theory

<sup>191</sup> The HoustonKemp March 2019 Report on (a) is included as Appendix 2 to this submission

<sup>192</sup> The QCA identifies that the coal handling charge with a differentiated TIC would be at most \$8.50 per tonne, page 86

<sup>193</sup> QCA Draft Recommendation, page 86

of harm to competition cannot hold with regard to the pricing of access and the only reasonable conclusion available to the QCA is that criterion (a) cannot be satisfied. Further, the actual charges faced by access seekers will likely be lower as they will be determined under the 'willing but not anxious' test.

### Errors in the QCA's draft recommendation

- 190 As explained in this submission, the QCA has made four key errors in undertaking its assessment of criterion (a):
- 190.1 The QCA has did not take into account the full drafting of DBCTM's proposed Access Framework (**Framework**). The QCA concluded, incorrectly, that the charges to "*potential DBCT users*" applicable under the Framework would be at least \$20 per tonne. This error has permeated through the QCA's analysis and led it to wrongly conclude that the price difference between new and existing users (without declaration), would "*likely discourage efficient new entry in the coal tenements market*". Consequently, the QCA has wrongly concluded that there would be a material adverse effect on competition in the coal tenements market if the DBCT service was not declared and therefore criterion (a) is satisfied.
  - 190.2 The QCA also asserts that DBCTM would have the *incentive*, despite no longer being vertically integrated, to exercise its market power to increase access charges for new users to levels that would foreclose potential efficient new entrants from entering the coal tenements market. The QCA has not provided any evidence to support this assertion.
  - 190.3 The QCA has made fundamental errors in its definition of the dependent coal tenements market. Specifically, the QCA erroneously asserts that differences in the value of tenements in different regions will automatically result in different markets for those tenements. This leap in logic results in the QCA defining the market for coal tenements too narrowly, leading to the erroneous conclusion that there would be a material adverse impact on competition in the coal tenements market without declaration.
  - 190.4 The QCA makes an error in concluding that without declaration, uncertainty regarding the terms and conditions of access at DBCT would be so significant it would deter potentially efficient new entrants from entering the coal tenements market and harm competition. This does not accord with commercial reality in which miners face far greater uncertainty from a number of more significant factors. Compared to other factors, any uncertainty regarding charges at the DBCTM is likely to be insignificant.
- 191 When these errors in the QCA's draft recommendation are addressed, the only reasonable conclusion left for the QCA is that criterion (a) is not satisfied for the DBCT service.

### New information relevant to the QCA's final recommendation

- 192 Notwithstanding the QCA's errors, DBCTM has also made a number of other changes to the final version of the Framework to address the QCA's concerns and ensure that criterion (a) is not met.
- 193 In its draft recommendation the QCA explained its concerns that DBCTM's proposed Framework may not operate to effectively constrain DBCTM's ability to exercise market power. Specifically the QCA noted that that:
- 193.1 DBCTM had not executed the Deed Poll under which DBCTM has proposed to apply the access framework;<sup>194</sup> and
  - 193.2 the discretion that DBCTM would have in amending the Framework may create uncertainty.<sup>195</sup>
- 194 DBCTM has now addressed those concerns by:

<sup>194</sup> QCA Draft Recommendation, page C68

<sup>195</sup> QCA Draft Recommendation, page C69

- 194.1 executing the binding and irrevocable Deed Poll, which gives effect to the Framework;
- 194.2 adding further safeguards to the executed Deed Poll to ensure that the Framework can only be amended when it will promote the Framework Objective,<sup>196</sup> which is linked to the Object of Part 5 in the QCA Act (these safeguards include new consultation requirements and provisions designed to remove barriers to challenging amendments); and
- 194.3 'hard-coding' the Framework objective so that it cannot be amended.
- 195 Given that DBCTM has now comprehensively addressed the QCA's concerns regarding the operation of the Framework, the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied.
- 196 Notwithstanding this new information, DBCTM's key positions on criterion (a) outlined in its submissions to date remain unchanged, as the QCA's draft recommendation has failed to properly account for the primary bases upon which they relied. As such, DBCTM continues to rely on the arguments made in its prior submissions, and the QCA is required to take these arguments into account, and in light of the updated facts, in making its final recommendation.

### Structure of this chapter

- 197 This chapter:
- 197.1 Briefly lays out the relevant assessment framework for criterion (a);
- 197.2 Identifies the core errors in the QCA's draft recommendation and explains why, correcting for these errors the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied;
- 197.3 Sets out new information relevant to the QCA's final recommendation, including changes DBCTM has made to the its final Framework, which support a conclusion that criterion (a) is not satisfied; and
- 197.4 Concludes that the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied.

## 3.2 Assessment framework for criterion (a)

- 198 Criterion (a) provides as follows:

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.

- 199 In order to recommend that a service be declared by the Minister under section 87A of the QCA Act, the QCA must be affirmatively satisfied 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 one market, other than the market for the service (sections 76(1) and 87C(1) of the QCA Act).<sup>197</sup>
- 200 Conversely, the QCA must recommend that a service not be declared if it is not affirmatively satisfied that access (or increased access) as a result of a declaration of the service would promote a material increase in competition in a market (section 87C(2) of the QCA Act).

<sup>196</sup> The Framework Objective is defined in the Deed Poll and cannot be amended. It refers directly to the QCA Act s69E, and 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"

<sup>197</sup> For example, in NCC, Final recommendation - Declaration of the shipping channel service at the Port of Newcastle, 2 November 2015 at [4.107], the NCC noted that the requirement is an 'affirmative test'

## Two step assessment process

201 HoustonKemp, in its May 2018 Report on (a), explains the approach to assessing criterion (a) taken by the National Competition Council in its statement of preliminary views on the revocation of the declaration of the shipping channel service at the Port of Newcastle. The NCC follows a two step process:<sup>198</sup>

**Step 1: Assess the effect of declaration on the terms and conditions of access.** This requires an assessment of whether, without declaration, the provider would have the ability and incentive to restrict supply or charge monopoly prices (exercise market power), as compared to with declaration.

**Step 2: Assess whether this effect on access would materially affect competition in a dependent market.** This requires an assessment of whether changed access as a result of declaration will result in an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

202 The QCA adopts a similar two-step approach:<sup>199</sup>

The focus of the QCA's assessment of criterion (a) in respect of the DBCT service is whether, in a future without declaration, DBCT Management (the access provider of the service) would have an ability and incentive to exert market power such that it would adversely affect the environment for competition in at least one dependent market. If so, the next issue to consider is whether declaration of the service would improve the environment for competition in the dependent market by constraining DBCT Management's ability and incentive to exert market power such that opportunities or conditions for competition in the dependent market would be materially better with declaration than they would be without declaration.

203 In its March 2019 Report on (a) HoustonKemp explains the importance that:<sup>200</sup>

in the first step, it needs to be *established*, rather than *assumed*, that an ability and incentive to exert market power would adversely affect the environment for competition in at least one dependent market; and

in the second step, it needs to be *established*, rather than *assumed*, that the effect of declaration in constraining the access provider's ability and incentive to exert market power would render the opportunities or conditions for competition in the dependent market materially better than they would be without declaration.

204 DBCTM emphasises that the QCA's stated test requires it to establish that a service provider has both an ability **and** incentive to exercise its market power, such that it would adversely affect the environment for competition in at least one dependent market. This holds as a matter of common sense, as market power:

204.1 could not be exerted unless a service provider has the ability to do so; and

204.2 would not be exerted, unless a service provider has the incentive to do so.

205 As such, if the QCA cannot establish that DBCTM has both an ability and incentive to exercise market power, criterion (a) cannot be satisfied.

<sup>198</sup> NCC statement of preliminary views at [6.16]

<sup>199</sup> QCA Draft Recommendation, page C52

<sup>200</sup> HoustonKemp March 2019 Report on (a), section 2.2

## Promotion of a material increase in competition

206 The second step of the test outlined above requires an assessment of whether access as a result of declaration will result in an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

207 As noted in DBCTM's May 2018 Submission, the threshold for satisfying criterion (a) has increased through legislative amendments since criterion (a) was initially enacted.<sup>201</sup> Significantly, in 2010, criterion (a) was amended to require that declaration must promote a 'material increase' in competition.<sup>202</sup>

208 The change to the QCA Act followed a review by the Productivity Commission and changes to criterion (a) under the *Trade Practices Act 1974* (Cth) (now the CCA) to address concerns that the Tribunal's decision in *Re Sydney Airports* set a threshold for criterion (a) that was too low.<sup>203</sup> The Productivity Commission's inquiry into the National Access Regime in 2001, for example, noted that:<sup>204</sup>

If as a result of mandated access there were only a minor improvement in competition, declaration would be of little practical benefit and, given the potential costs of intervention, could be damaging for the economy. It might seem unlikely that the regulator or the courts would regard a marginal increase in competition as sufficient for declaration. Yet the Sydney Airport case indicated that criterion (a) could be interpreted in this way. The Commission therefore felt that shifting the balance to require a material effect would be desirable.

209 While DBCTM does not repeat the analysis in this submission, DBCTM emphasises the points made in its May 2018 submission in [284] to [288] regarding the materiality threshold that is applied in assessing criterion (a).

210 The QCA's draft recommendation discusses how when efficient firms are discouraged from entering dependent markets it could result in a material impact on competition:<sup>205</sup>

In other words, in undertaking the analysis the QCA has considered aspects such as the likely entry condition in a dependent market in a future with and without declaration—for example, whether the service provider's conduct in the market for the service would discourage entry or restrict participation in a dependent market. In that respect, the QCA's view is that what matters in terms of a material impact on competition is not necessarily the number of potential entrants that would be discouraged, but the possibility that more efficient firms would be discouraged from entering a dependent market in a future without declaration compared to a future with declaration. If so, it would indicate that access as a result of declaration would promote an increase in competition that is material.

211 While the deterrence to entry may in some cases mean that there is a material impact on competition in a dependent market, it is important that this is not applied as a *de facto* presumption. To presume that the possibility that more efficient firms would be discouraged from entering a dependent market without declaration indicates that access as a result of declaration would promote an increase in competition that is material, would be to bypass the test that is required under statute.

212 Rather, criterion (a) requires the QCA to carefully assess the state of competition with and without declaration and, determine whether access as a result of declaration would promote a *material* increase in

<sup>201</sup> DBCTM May 2018 Submission at [284] to [288]

<sup>202</sup> Motor Accident Insurance and Other Legislation Amendment Act 2010 (Qld)

<sup>203</sup> See also *Port of Newcastle Operations Pty Ltd v Australian Competition Tribunal and others* (2017) 346 ALR 669 at [121]; NCC, Final recommendation - Declaration of the shipping channel service at the Port of Newcastle, 2 November 2015 at [4.86]

<sup>204</sup> Productivity Commission, Review of the National Access Regime - Inquiry Report, Report No. 17, 28 September 2001, page 171

<sup>205</sup> QCA Draft Recommendation, page C80

competition in a dependent market. This assessment will need to be undertaken on the facts of the specific case and involves a three-limb assessment of:

- 212.1 the *likelihood* that more efficient firms would be discouraged from entering a dependent market, such that they would not enter that market, in a future without declaration as compared to with declaration; and
  - 212.2 the *impact* that those efficient firms would have on competition in a dependent market in a future without declaration as compared to with declaration; and
  - 212.3 whether the impact with declaration compared to without declaration promotes a *material increase* in competition in that dependent market.
- 213 The QCA appears to suggest that if (on the first limb) it concludes that there is a possibility that potential entrants would be discouraged from entering a dependent market, then an assessment of the following two limbs is redundant. This does not accord with the statutory test which clearly requires an assessment of the impact that access would have on competition in a dependent market, and an assessment of the materiality of that impact. As such, an application of the QCA's interpretation would result in an error of law.
- 214 Criterion (a) requires an assessment of competition in the dependent market without declaration. In circumstances where the dependent market is workably competitive without declaration, declaration is unlikely to promote a material increase in competition. For example, in a large, workably competitive, market with many existing efficient firms, the deterrence of a small group of users is unlikely to have a material impact on competition.
- 215 Likewise, if there is only a remote possibility that a more efficient firm would be discouraged from entering a dependent market, it would be inappropriate for the QCA to conclude that access as a result declaration would promote a material increase in competition in a dependent market. HoustonKemp in its March 2019 Report on (a), further explains how the QCA's comments, outlined above, do not appear to accord with the materiality threshold established by the legislation:<sup>206</sup>

The concept that lowering barriers to entry may promote the environment for competition is unremarkable. However, the unequivocal nature of the QCA's contention – that the 'possibility' of more efficient firms being discouraged from entering a dependent market is sufficient to conclude that 'access as a result of declaration would promote an increase in competition that is material' – is surprising, because:

the 'possibility' of more efficient firms being discouraged sets a low qualitative hurdle for the establishment of a 'material' increase in competition; and

the QCA's approach does not invite an empirical assessment of the implied increase in competition in the dependent market – for example, an increase in either output or quality – that would be required to be considered material.

### 3.3 Fundamental errors in the QCA's assessment of criterion (a)

- 216 The QCA has fundamentally erred in its assessment of whether the DBCT service satisfies criterion (a). When the QCA's errors are corrected the only reasonable conclusion is that the DBCT service does not satisfy criterion (a) and therefore the QCA cannot recommend that the DBCT service be declared.
- 217 This section explains:
- 217.1 the QCA's key errors;

<sup>206</sup> HoustonKemp March 2019 Report on (a), section 2.3

- 217.2 the impact the QCA's errors have had on the conclusions drawn by the QCA;
- 217.3 how the errors should be corrected; and
- 217.4 why, once corrected, the only reasonable conclusion available to the QCA is that the DBCT service does not satisfy criterion (a).

218 The following table sets out the key errors the QCA made in its assessment of criterion (a).

**Figure 12: Summary of the QCA's Key Criterion (a) Errors**

Issue	DBCTM	QCA draft recommendation	QCA's errors
DBCTM's ability and incentive to exercise market power: with and without declaration			
<b>1. DBCTM's ability to exercise market power</b>	Without declaration DBCTM's ability to exert market power will be constrained by the binding Framework.	Without declaration DBCTM will have the ability to exercise market power and would not be constrained by the Framework.	<ul style="list-style-type: none"> <li>The QCA's characterisation of the Framework does not accord with the provisions that were put before it.</li> <li>Consequently, the QCA erroneously concludes that access charges set under the Framework would be based on the cost of access to the next available terminal and would be at least \$20 per tonne.</li> <li>The QCA's errors in assessing the terms and conditions of access that would apply under the Framework permeate into its analysis of the impact that declaration would have on competition in the coal tenements market, and the QCA conclusion that there would be a material adverse impact on competition without declaration.</li> </ul>
<b>2. DBCTM's Incentive to exercise market power</b>	DBCTM has no incentive to charge at a level that would foreclose new entrants from entering the coal tenements market	DBCTM has an incentive to charge at a level that would foreclose new entrants from entering the coal tenements market	<ul style="list-style-type: none"> <li>The QCA has not reasonably established that DBCTM would have an incentive to charge at levels that would foreclose potential new entrants to the coal tenements market. The QCA has not identified any evidence to support the existence of such an incentive.</li> </ul>
Definition of dependent markets			
<b>3. Definition of coal tenements market</b>	The relevant geographic dimension of the market for coal tenements is the Queensland region or wider.	The relevant geographic dimension of the market for coal tenements is limited to the Hay Point catchment region.	<ul style="list-style-type: none"> <li>The QCA makes a fundamental error in its approach to defining the geographic dimension of the tenements market.</li> <li>The QCA bases its approach on the premise that a difference in tenement prices between regions implies a lack of substitutability. The QCA fails to appreciate that the <i>return</i> offered by a tenement will determine its substitutability, not its price.</li> <li>As a result, the QCA erroneously concludes that the relevant coal tenements market is limited to the Hay Point catchment region.</li> </ul>
Impact on competition in dependent markets			
<b>4. Impact on competition in the coal tenements market</b>	Under the Access Framework, access to DBCT without declaration will be provided on substantially the	Access to the DBCT service in a future without declaration would likely create a materially uneven playing field. This asymmetry would	<ul style="list-style-type: none"> <li>The QCA's analysis of the impact on competition in the coal tenements market is based on an erroneous application of DBCTM's Framework resulting in the QCA wrongly concluding that existing and new users would face a ~\$17.50 price differential which would have the effect of deterring potential efficient new entrants from entering the coal tenements market.</li> </ul>

Issue	DBCTM	QCA draft recommendation	QCA's errors
	same terms as with declaration. Therefore competition in the coal tenements market (even if restricted to the Hay Point catchment), cannot be impacted.	be material enough to likely deter more efficient entrants from entering the coal tenements market resulting in a materially adverse impact on competition.	<ul style="list-style-type: none"> <li>• The QCA errs in concluding that access charge uncertainty for the DBCT service, without declaration, would be significant enough to deter potentially efficient new entrants from the coal tenements market to the extent that this would have a material adverse impact on the coal tenements market.</li> <li>• This does not accord with commercial reality in which miners face significant uncertainty resulting from the magnitude and timing of potential future changes in a number of other factors including coal prices, labour costs and taxes. Compared to these other factors, any uncertainty about charges at the DBCT is likely to insignificant.</li> <li>• Even if new entrants were deterred from entering the coal tenements market, the QCA has identified no evidence to suggest that this would have a <i>material</i> impact on competition in this market and has not identified that the coal tenements market would not be workably competitive without declaration.</li> <li>• The QCA erroneously relies on the Balance Advisory July Report which has no probative value.</li> </ul>

### Error 1: The QCA has not taken into account the Access Framework in determining DBCTM's ability to exercise market power

- 219 In DBCTM's initial submission to the QCA, DBCTM explained its intention to execute a binding Framework. The proposed Framework had been carefully designed to constrain DBCTM's ability to exercise market power without declaration, so that access seekers would have certainty of access to DBCT on reasonable terms.
- 220 DBCTM maintains its position that the proposed Framework would effectively constrain DBCTM's ability to exercise market power in a future without declaration.
- 221 In its draft recommendation, the QCA makes a number of fundamental errors in its assessment of the terms and conditions of access that would apply under DBCTM's proposed Framework, which leads it to conclude that it would not constrain DBCTM's ability to exercise market power in the absence of declaration.<sup>207</sup>
- 222 Most pertinently, the QCA characterises the charges that DBCTM could charge under the Framework as being based solely on a user's 'willingness to pay'. As a result, the QCA erroneously concludes that access charges set under the Framework would be based on the cost of access to the next available terminal. Applying this alternative test, the QCA assesses that the charges applying under the Framework would be at least \$20 per tonne.
- 223 Notwithstanding the introduction of the \$3 Cap, under a correct application of the proposed Framework, HoustonKemp estimates that the maximum TIC that could apply would be \$7.44.<sup>208</sup>
- 224 The QCA's errors in assessing the terms and conditions of access that would apply under the Framework permeate its analysis of the impact that declaration would have on competition in the coal tenements market. This leads the QCA to erroneously conclude that there would be a significant price differential, and level of uncertainty, between new and existing users, such that potential new entrants to the coal

<sup>207</sup> QCA Draft Recommendation, page C73

<sup>208</sup> HoustonKemp March 2019 Report on (a), section 3.5.2

tenements market may be deterred from entering that market, and competition in that market would be materially adversely affected.

225 The following table sets out the key errors with the QCA’s interpretation of the Access Framework.

**Figure 13: Summary of key QCA errors in assessing DBCTM’s access charges under the Framework**

DBCTM	QCA draft recommendation	QCA's errors
<p>Without declaration DBCTM’s ability and incentive to exert market power would be constrained by the binding Framework.</p>	<p>DBCTM would have the ability an incentive to exercise market power without declaration and would not be constrained by the Framework which would allow DBCTM to charge new users a TIC in the order of \$17.50.</p>	<ul style="list-style-type: none"> <li>• The QCA’s characterisation of the provisions of the Framework does not accord with the provisions that were put before it.</li> <li>• Consequently, the QCA erroneously concludes that access charges set under the Framework would be based on the cost of access to the next available terminal and would be at least \$20 per tonne.</li> <li>• The QCA’s errors in assessing the terms and conditions of access that would apply under the Framework permeate its analysis of the impact that declaration would have on competition in the coal tenements market and conclusion that there would be a material adverse impact on competition without declaration.</li> <li>• Further, the QCA has not engaged with HoustonKemp’s analysis that concludes that given access charges under the ceiling TIC cannot result in a change in volumes served at DBCT, there can be no resulting impact on competition in dependent markets.</li> <li>• Notwithstanding the QCA’s errors , DBCTM is now bound to charge within the \$3 Cap.</li> </ul>

*Interpretation of the pricing provisions of the Framework*

226 In its draft recommendation the QCA notes that it does not consider that the application of criterion (a) requires a detailed comparison of the terms that would be anticipated either if the service was declared, or if it was not declared.<sup>209</sup>

227 While it may not be necessary for the QCA to reach a conclusion on the likely operation of every specific term, with and without declaration, the QCA has an obligation to engage with the material that has been put before it. The QCA has not done so in this case, as evidenced by the fundamental mischaracterisations of the Framework set out in the draft recommendation. The QCA has misunderstood the operation of the core provisions of the Framework which has resulted in the erroneous conclusion being drawn that criterion (a) is satisfied for the DBCT service.

228 Throughout the QCA’s draft recommendation the QCA describes the pricing applicable without declaration as being based on “users’ willingness to pay”, for example at page 70:<sup>210</sup>

The QCA’s understanding is that DBCT Management has, in its access framework, stated its intent to provide access to terminal based on user’s willingness to pay.

<sup>209</sup> QCA Draft Recommendation, page C69

<sup>210</sup> QCA Draft Recommendation, page C70

229 Further, the QCA frequently implies that DBCTM has the ability or discretion to unilaterally determine access charges. For example, at page 85:

Additionally, in a future without declaration, potential entrants would face the risk of negotiating access in an environment where DBCT Management **would have the discretion to set** access terms and conditions... [Emphasis added].

230 This characterisation is incorrect and does not have proper regard to the actual pricing provisions (and price setting process) applicable under DBCTM's proposed Framework. These provisions were explained in detail in DBCTM's May 2018 Submission, with full drafting provided to the QCA in June 2018.

231 Coal handling charges under the Access Frameworks are broken down into two key components:

231.1 A terminal infrastructure charge (**TIC**); and

231.2 A charge to recoup the costs of operation and maintenance of the Terminal, being the Handling Charge-Fixed, Handling Charge-Variable and, where applicable, charges for Miscellaneous Services (on the same basis currently provided for under clauses 4.8-4.10 of the Standard Access Agreement and section 11.10 of the 2017 AU).

232 Under the Framework, DBCTM has no discretion to set access charges. Rather the Framework provides for an initial TIC to be set through a process based on the current, QCA approved, Access Undertaking. In essence, the initial TIC will be:

232.1 negotiated and agreed between a potential user and DBCTM; and

232.2 if agreement cannot be reached between the parties, determined by an independent arbitrator.

233 The pricing provisions that must be applied by an arbitrator to determine an initial TIC (and which will inform the basis for any negotiations) were explained in appendix 7 of DBCTM's May 2018 Submission:<sup>211</sup>

An arbitrator must determine an initial TIC for the relevant Terminal Component that:

- Reflects 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 that are proximate to the Port of Hay Point;
- Is no less than the Floor TIC calculated in accordance with the Framework; and
- Is no greater than the Ceiling TIC calculated in accordance with the Framework.

The Floor TIC is the TIC that would apply under a QCA administered pricing regime.

The Ceiling TIC is the highest price at which coal volumes served at DBCT would be the same as if the Floor TIC applied, with this assessment being made without reference to any contractual limitations on volumes that are able to be delivered to DBCT or any other terminal.

234 On proper examination of the provisions of the Framework, it is clear that charges are not simply determined based on a user's willingness to pay. Rather, the primary test under the Framework requires an arbitrator to determine the TIC that would be agreed by a willing but not anxious buyer **and a willing but not anxious seller**. The QCA's focus on the users' willingness to pay is unfounded.

235 As explained by HoustonKemp in its March 2019 Report on (a), 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.<sup>212</sup> HoustonKemp demonstrates that the approach is well accepted by the

<sup>211</sup> DBCTM May 2018 Submission, page 132

<sup>212</sup> HoustonKemp March 2019 Report on (a), section 3.1

courts and is used by a number of commercial and government agencies including the ACCC and the Australian Tax Office.<sup>213</sup>

- 236 A key benefit of the “willingness but not anxious” test is that it requires the arbitrator to assume that DBCTM does not have particular power over users in order to assess a fair market value for the service. 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:<sup>214</sup>

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.

- 237 The ‘willing but not anxious’ test provides potential users certainty that access charges will be determined at a fair market value. However, potential users also have the additional protection of the ceiling. The ceiling is not the primary test applied by an arbitrator, but will function to cap the maximum TIC that can be determined by the arbitrator.
- 238 The ceiling TIC provisions specify that the maximum TIC that can be charged by DBCTM for a terminal component is the highest TIC that could be charged while serving the same coal volumes as at the floor TIC.<sup>215</sup> HoustonKemp explains in its March 2019 Report on (a) that so long as the TIC is constrained to be between the floor and the ceiling, the utilisation of DBCT without declaration will be the same as it would be with declaration.<sup>216</sup>

#### *Application of the pricing provisions of the Framework*

- 239 Based on its misinterpretation of the pricing provisions of the Framework, the QCA goes on to erroneously conclude that access charges set under the Framework would be based on the cost of access to the next available terminal.

To summarise, the QCA’s view is that in a future without declaration, access seekers would face the risk of negotiating access in an environment where DBCT Management would have the discretion to set access terms and conditions, the risk of paying a materially higher access charge reflecting the cost of accessing WICET as well as the uncertainty as to whether and when they would obtain access to the terminal.

- 240 Consequentially, the QCA evaluates the access charges that would apply under the Framework as being at least \$20 per tonne (implying a TIC of approximately \$17.50):<sup>217</sup>
- 241 HoustonKemp explains in its March 2019 Report on (a) that the QCA’s analysis of access charges amounts to a *worst case* assessment of the alternatives available to miners, under a scenario where DBCTM *does not commit* to any access framework.<sup>218</sup> HoustonKemp points out that by adopting this stance the QCA’s assessment appears to assume that the terms and conditions of DBCTM’s Access Framework would have no effect on DBCTM’s ability to set prices without declaration.

<sup>213</sup> HoustonKemp March 2019 Report on (a), section 3.1

<sup>214</sup> Australian Competition and Consumer Commission “Draft ACCC Guidelines - to assist the Copyright Tribunal in the determination of copyright remuneration” 23 October 2018, page 23

<sup>215</sup> DBCTM final Access Framework – Schedule C – The Terminal Infrastructure Charge

<sup>216</sup> Houston Kemp March 2019 Report on (a) section 3.2

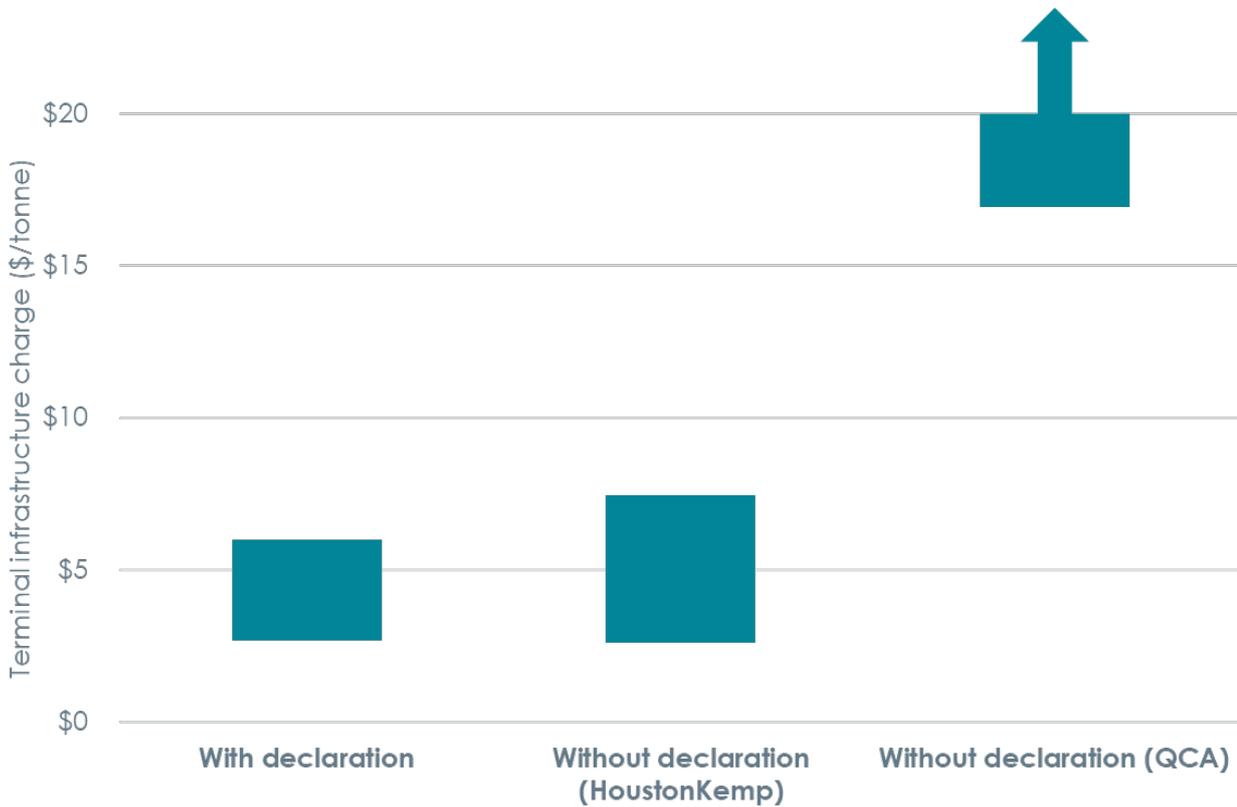
<sup>217</sup> QCA Draft Recommendation, page C71

<sup>218</sup> HoustonKemp March 2019 Report on (a), section 4.2.2

242 Under a proper application of the Access Framework HoustonKemp calculates that the maximum ceiling TIC that DBCTM could charge new entrants would be \$7.44, which would result in a total coal handling charge of approximately \$9.94 – well below the QCA’s estimate.<sup>219</sup> Further, this is only a cap on what an arbitrator could determine access charges to be. In practice, charges will likely be less than this under the ‘willing but not anxious’ test.

243 The table below shows the potential ranges for the TIC with declaration and under the Access Framework, compared with the QCA’s assessment of the TIC under the Access Framework. As such, it highlights the magnitude of the QCA’s error.

**Figure 14: Comparison of potential ranges for the terminal infrastructure charge<sup>220</sup>**



*Impact of the QCA’s error on subsequent analysis*

244 As a result of the QCA’s erroneous assessment of the charges that would apply under the Framework, the QCA’s subsequent analysis of competition in the coal tenements market without declaration is incorrect.<sup>221</sup> Operating under the flawed assumption that access charges without declaration would be at least \$20 per tonne , the QCA concludes that without declaration there would be a material difference between the charges for new and existing users, such that potential new entrants to the coal tenements market may be deterred from entering that market, and competition in that market would be materially adversely affected.

245 Correcting for this error, and applying HoustonKemp’s assessment of the maximum charges that could apply under the Framework, it is clear that the QCA’s analysis does not hold. Access charges will be similar with and without declaration, meaning that potential efficient new entrants will not be deterred from entering the coal tenements market.

<sup>219</sup> HoustonKemp March 2019 Report on (a), section 3.5.2

<sup>220</sup> HoustonKemp March 2019 Report on (a), figure 6.2

<sup>221</sup> HoustonKemp March 2019 Report on (b), section 2

*Under the ceiling TIC DBCTM cannot charge at levels which would foreclose new entrants from entering the coal tenements market*

- 246 In addition, DBCTM maintains its position (as explained in DBCTM’s May 2018 Submission), that the design of the ceiling TIC means that it is impossible that DBCTM’s charges would have an adverse impact on competition in a dependent market without declaration.
- 247 The QCA has not engaged with DBCTM and HoustonKemp’s reasoning on this point.
- 248 The ceiling TIC provisions specify that the maximum TIC that can be charged by DBCTM for a terminal component is the highest TIC that could be charged while serving the same coal volumes as at the floor TIC.<sup>222</sup>
- 249 In order to determine the ceiling TIC:
- 249.1 The arbitrator will identify the “marginal user”. The marginal user is the user with the lowest willingness to pay that would be served at the terminal component, at the floor price, when users are served in order of their willingness to pay (taking into account the capacity of that terminal component).
- 249.2 In other words, the marginal user is the first user that would cease to contract for capacity at DBCT in response to an increase in access charges – either because it would substitute to another terminal, or because that user would no longer be able to operate profitably. In assessing substitutability under this test, the arbitrator is required only to consider whether an alternative terminal is technically capable of serving a user (meaning the arbitrator must disregard any contractual or capacity constraints at the terminal).
- 249.3 The arbitrator is then required to determine the maximum TIC that could be charged at DBCT without preventing that marginal user from contracting for capacity at DBCT. This TIC is the ceiling TIC and will operate to cap the initial TIC that can apply to *any* user of that terminal component (not just the marginal user).
- 250 This design means that even the marginal user (the user who is most likely to stop using DBCTM’s service due to a price increase) will still use the service, even at the ceiling TIC.
- 251 As explained by HoustonKemp, this means that there can be no change in utilisation of DCBT without declaration.<sup>223</sup> This means that any efficient new entrants that would contract for access to DBCT with declaration (at the floor price), will continue to do so at access charges up to the ceiling TIC. The corollary is that these efficient new entrants would also continue to participate in the coal tenements market, and provide competition in that market.
- 252 With or without declaration, existing users are likely to continue to use DBCT.<sup>224</sup> If, as suggested by the QCA, efficient new entrants would be deterred by high access charges at DBCT, then those charges would violate the ceiling TIC as they would cause a reduction in volumes served at DBCT. Therefore, charges at DBCT must be set at a level that does not allow any efficient new entrant to be priced out of the coal tenements market.
- 253 As a result, DBCTM cannot provide access to DBCT at charges that would have an adverse impact on competition in dependent markets, and therefore criterion (a) cannot be satisfied.

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<sup>222</sup> DBCTM final Access Framework – Schedule C – The Terminal Infrastructure Charge

<sup>223</sup> HoustonKemp March 2019 Report on (a), section 3.2

<sup>224</sup> The QCA’s Draft Recommendation identifies that the vast majority of existing users are looking to replace their existing mines which are reaching the end of their economic life; HoustonKemp also identifies in its March 2019 Report on (a) that incumbents already place a higher value on tenements than new entrants, page 37

- 254 We note that the User Group made criticisms of the ceiling TIC in July 2018 Submission, suggesting that the ceiling would require complete omniscience to determine.<sup>225</sup> It is evident that these concerns are misplaced. The Framework sets out clear steps for how the ceiling TIC is to be determined, including the requirement for the arbitrator to use data from an independent third party data provider to determine the ceiling TIC.<sup>226</sup> As discussed above, HoustonKemp has demonstrated that the ceiling TIC can be readily calculated.

#### *Conclusion on DBCTM's proposed Framework*

- 255 The vast majority of capacity is provided under evergreen existing user agreements. As such, under the QCA's demand forecasts approximately 9% of DBCT users are likely to have their charges determined under the Framework.<sup>227</sup>
- 256 Properly applied DBCTM's proposed Framework provides a strong constraint on DBCTM's ability to exercise market power in relation to these new users without declaration.
- 257 As previously submitted, the Framework maintains the open access approach contained under the current QCA approved access undertaking (**Access Undertaking**). To ensure consistency and continuity, the Framework also maintains the features of the Access Undertaking set out in the box below.<sup>228</sup>

#### **Figure 15: Key features of DBCTM's Framework**

**Negotiate/arbitrate model:** A negotiate/arbitrate model, which provides a right for access seekers to negotiate access and a binding dispute resolution mechanism if a dispute arises in relation to such negotiations.

**Operation and maintenance provisions:** Terms relating to the Operator and Operation & Maintenance Contract contained in section 3 of the current Access Undertaking.

**Services:** The obligation for DBCTM to provide the Services at the Terminal in accordance with the Framework consistent with section 4 of the current Access Undertaking.

**Negotiation framework:** The process under section 5 of the current Access Undertaking for access negotiations, including detailed access request and negotiation processes and reasonable timeframes for such processes (subject to amendments necessary to reflect that the service would not be declared so the QCA will not have an approval, determination or dispute resolution role and price rulings and disputes will be determined by an independent expert or arbitrator, and consequential changes based on changes relating to pricing discussed below). The Framework also maintains the general requirement for DBCTM to take all reasonable steps to progress each access application and any negotiations to develop an access agreement with an access seeker in a timely manner and will complete each relevant step as soon as is practicable.

**Terminal Regulations:** The current requirements relating to compliance with the Terminal Regulations and process for amending the Terminal Regulations under section 6 of the current Access Undertaking (save that an independent expert will perform the functions that the QCA previously performed).

**Confidentiality:** The current requirements relating to confidentiality of information under section 8 of the current Access Undertaking (with amendments to reflect that an independent expert or arbitrator will perform the functions that the QCA previously performed).

**Ring-fencing:** The ring-fencing arrangements in section 9 of the current Access Undertaking, other than that Trading SCB (the supply chain business in the Brookfield Group that engages in the trading of secondary capacity at DBCT) is no longer specifically referred to as DBCTM has closed that business to address any potential perceived vertical integration concerns relating to that business. The ring-fencing arrangements include restrictions on DBCTM and its related bodies corporate owning or operating a supply chain business in a market related to the Terminal, and require that DBCTM will not engage in conduct for the purpose of preventing or

<sup>225</sup> User Group July 2018 Submission, page 64, bold text

<sup>226</sup> Section 10.4(h) of the Framework.

<sup>227</sup> This is applying the QCA's assumptions that existing users will likely perpetually exercise their evergreen renewal right and that demand for capacity at DBCT will peak at around 93Mtpa. See: QCA Draft Recommendation, page C87 and table C8

<sup>228</sup> DBCTM June 2018 Submission at [308]

hindering an access holder's or access seeker's access or unfairly differentiate between access seekers, access holders or rail operators.

**Reporting:** Requirements for DBCTM to report on matters relating to compliance with the Access Framework and service quality key performance indicators for the Terminal consistent with section 10 of the current Access Undertaking.

**Expansions:** An arbitrator will be appointed (rather than the QCA) to determine whether an expansion will result in socialised or differentiated pricing. The principles to be applied in such a determination will be similar to the expansion pricing principles in the current Access Undertaking, but it will be clarified that the arbitrator will also be required to give consideration to the financeability of any proposed expansion pricing arrangement (including, in particular, by reason of the risk of differentially priced access holders switching between high- and low-priced terminal capacity that otherwise has identical functionality). The retained provisions include general obligations to accommodate capacity and Terminal capacity expansions, consistent with the current Access Undertaking.

**Standard Access Agreement:** The requirement for a Standard Access Agreement as a guide for negotiations in section 13 of the current Access Undertaking, and the ability for an access seeker to require that the access agreement be in all material respects consistent with the Standard Access Agreement. The form of the Standard Access Agreement in the DBCT Access Framework is materially consistent with the current Standard Access Agreement that is included as Schedule B to the current Access Undertaking, with necessary changes made to reflect the fact that the services provided by DBCT would no longer be declared and therefore that the QCA would have no ongoing role in the regulation of access at the Terminal.

**Whole of supply chain efficiency:** The requirement for DBCTM to engage with other stakeholders to develop and implement mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain under section 14 of the current Access Undertaking. The Deed Poll also provides that, if DBCTM and each Access Holder reach agreement on mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain and subject to clause 8 of the Deed Poll, DBCTM will consult with the access holders regarding the amendment(s) to the Access Framework reasonably required to implement the agreed mechanisms (to the extent relevant to the Services, the Terminal or the Access Framework) and will amend the Access Framework accordingly, consistent with section 14.2 of the current Access Undertaking.

**Master plans:** Provisions relating to Terminal and System master planning under section 15 of the current Access Undertaking (with amendments to reflect that an independent expert or arbitrator will perform the functions that the QCA previously performed).

**Dispute resolution:** The ability for disputes under the Access Framework to be referred to an independent expert and provisions relating to such expert determination under section 17 of the current Access Undertaking. The Framework also provides for some disputes to be referred to arbitration in accordance with the Resolution Institute Arbitration Rules and *Commercial Arbitration Act 2013* (Qld), rather than disputes being referred to the QCA. The dispute resolution provisions in the DBCT Access Framework are consistent with standard commercial practice and principles under the current Access Undertaking and QCA Act, which will ensure that any disputes are effectively and fairly resolved.

- 258 Under the Framework, potential efficient new entrants to the coal tenements market will have certainty of access to DBCTM on substantially the same terms as they would with declaration. As such, they would not be deterred from entering the coal tenements market and the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied for the DBCT service.

## **Error 2: QCA has not provided any evidence to suggest DBCTM has an incentive to exercise market power in the way described by the QCA**

- 259 As explained above, the DBCT service does not satisfy criterion (a) because DBCTM would be constrained from exercising market power under the binding Framework. Nonetheless, even assuming that the Framework operated as contemplated in the QCA's draft recommendation, the DBCT service would still not satisfy criterion (a) because the QCA has not established that DBCTM would have an incentive to exercise market power to the extent that potential new entrants to the coal tenements market would be foreclosed
- 260 In order to recommend declaration the QCA must establish that without declaration DBCTM will have an ability **and incentive** to exercise market power, such that access as a result of declaration would promote a material increase in competition in a dependent market. The QCA cannot simply assert that such an incentive exists, it must identify evidence to support such a finding.

**Figure 16: Summary of key QCA errors in assessing DBCTM’s incentive to exercise market power**

DBCTM	QCA draft recommendation	QCA's errors
DBCTM has no incentive to charge at a level that would foreclose new entrants from entering the coal tenements market	DBCTM has an incentive to charge at a level that would foreclose new entrants from entering the coal tenements market	<ul style="list-style-type: none"> <li>• The QCA has provided no evidence to suggest that DBCTM would have an incentive to charge at levels that would foreclose potential new entrants to the coal tenements market.</li> <li>• Rather the QCA relies on mere assertion that this would be the case.</li> <li>• As a result, the QCA erroneously concludes that without declaration DBCTM would have an incentive to increase its TIC by 600% to ~\$17.50, foreclosing potential new entrants (and customers of DBCTM) from the coal tenements market. This does not hold as a matter of common sense.</li> <li>• The QCA also misinterprets that nature of the constraint that the threat of declaration provides to DBCTM.</li> </ul>

*The QCA accepts that DBCTM is not vertically integrated*

261 DBCTM is no longer vertically integrated. The Access Framework will prohibit any future vertical integration.<sup>229</sup> The QCA acknowledges this in its draft recommendation, and agrees that this may mean DBCTM has little incentive to exert market power in providing access to the service:<sup>230</sup>

Following cessation of BPC's capacity trading activity, it can be said that DBCT Management is not vertically integrated; therefore, an argument may be made that as a vertically separated infrastructure service provider DBCT Management may have little incentive to exert market power in providing access to the DBCT service.

262 However, despite these acknowledgements the QCA jumps to conclude that DBCTM would have an ability **and incentive** to exert market power, in the absence of declaration, in a way that would have a material adverse effect on competition in the coal tenements market:<sup>231</sup>

Under the above conditions, DBCT Management, despite not being vertically integrated, would have the ability and incentive to exert market power in the absence of declaration in a manner such that it would have a material adverse effect on the environment for competition in the coal tenements market (section 3.4).

263 This conclusion by the QCA is mere assertion. The QCA provides no evidence to explain why DBCTM would have any incentive to charge at a level which would foreclose potential efficient new entrants from the coal tenements market.

264 Based on this assertion, the QCA makes the assumption that without declaration DBCTM would have an incentive to increase access charges to at least \$20 per tonne, leading it to conclude that without declaration there would be a material adverse impact on competition in the coal tenements market.

265 In reality, the fact that DBCTM is not vertically integrated means that there is **no** incentive for DBCTM to exercise its market power in the way described. This is evident as a matter of common sense, and is supported by literature on the matter.

<sup>229</sup> DBCTM final Access Framework, section 8.1

<sup>230</sup> QCA Draft Recommendation, page 76

<sup>231</sup> QCA Draft Recommendation, page 76

*Why is the lack of vertical integration important?*

- 266 It is well recognised that a vertically integrated infrastructure provider may have a commercial incentive to deny access to potential entrants in order to protect its operations in dependent markets. In these circumstances, an infrastructure provider may forego revenue from providing access to its infrastructure service (by either formally denying access, or constructively denying access by pricing at unreasonable levels), in order to protect its monopoly position in dependent markets, such that the service provider's total profits across both operations are maximised.
- 267 The fact that DBCTM is not vertically integrated means that this incentive to foreclose competition in a dependent market does not exist.

*DBCTM has a disincentive to foreclose efficient new entrants from the tenements market*

- 268 In the absence of vertical integration DBCTM has an incentive to encourage, not deter, efficient new entrants into the market for both terminal capacity and coal tenements (notwithstanding that it could not deter new entrants in any case under the Framework).
- 269 More efficient entrants will have lower cost bases, and therefore greater rents. It is in DBCTM's interest to encourage these efficiencies so that it can attempt to share in those rents.
- 270 On the other hand, if DBCTM were to increase access charges to a point where efficient new entrants were excluded from the coal tenements market as proposed by the QCA – then this would result in lost revenue for DBCTM, as those efficient new entrants would no longer be able to purchase terminal capacity from DBCTM. Rather, without the Framework, DBCTM would have an incentive to offer the efficient new entrant the highest charges that it could, *without* deterring the efficient new entrant from entering the coal tenements market.
- 271 In circumstances where tenements which would have been purchased by efficient new entrants are still purchased, but by a less efficient incumbent with spare capacity at DBCT, DBCTM would only be able to charge the lower rates secured under the existing user agreement. This would clearly not be in DBCTM's commercial interests.
- 272 Further, even if DBCTM were not constrained by the existing user agreements and the Framework, then it would still be able to charge less to the inefficient incumbents than it could to an efficient new entrant (as an efficient new entrant would have a higher capacity to pay, due to its efficiencies).
- 273 In the absence of any evidence of a competing incentive for DBCTM to charge at a level that would foreclose efficient new entrants, there can be no reasonable basis for the QCA's assertion that DBCTM would behave in this way without declaration, and criterion (a) cannot be satisfied.

*Impacts of errors in assessing DBCTM's incentives on subsequent analysis*

- 274 The QCA's unsubstantiated assertion that DBCTM would have an incentive to charge at least \$20 per tonne, leads the QCA to erroneously conclude that without declaration there would be a material price differential, which would foreclose potential efficient new entrants from entering the coal tenements market. This leads the QCA to conclude that there would be a material adverse impact on competition without declaration, and as a result criterion (a) is satisfied for the DBCT service.
- 275 Correcting for this, even without the Framework, DBCTM would have an incentive to charge at levels which would allow efficient new entrants (who would have a higher capacity to pay than inefficient incumbents) to enter the coal tenements market. In this case, those entrants would not be deterred from entering the coal tenements market, and the only reasonable conclusion available to the QCA is that criterion (a) cannot be satisfied.

**Error 3: the QCA has misunderstood the nature of the “threat of declaration” constraint**

276 DBCTM maintains its position that the threat of declaration would constrain its market power without declaration.<sup>232</sup>

277 In its draft recommendation the QCA concluded that the threat of declaration is unlikely to constrain DBCTM’s conduct in the absence of declaration:<sup>233</sup>

The QCA’s view is that since declaration does not apply retrospectively, re-declaration will not remedy the adverse effect on competitive conditions in the coal tenements market that would have occurred in the absence of declaration of the DBCT services. This means the threat of declaration would not deter DBCT Management from exercising market power in a manner such that it would adversely affect competitive conditions in the coal tenements market.

278 This reasoning is flawed and shows a misunderstanding of the nature of the constraint.

279 The QCA’s analysis jumps to an adverse impact on competition in the tenements market and considers whether this impact could be remedied retrospectively through re-declaration. The QCA concludes that subsequent re-declaration of the service may not fully remedy a reduction in competition in the tenements market. However, by focussing on this the QCA overlooks the nature of the *constraint* that the threat of regulation will have on DBCTM.

280 DBCTM’s position is not that the threat of declaration could rectify an adverse impact on competition in a dependent market. Rather, it is that the threat of regulation provides a strong disincentive for DBCTM to act in a way that would not harm competition in a dependent market in the first place.

281 This is because any short-term gains that could be achieved by increasing charges in a way that would harm competition (notwithstanding the inability and disincentive to do so), would be outweighed by the significant harm of being declared in the future.

282 For example, DBCTM has a much greater incentive to seek reasonable access charges that are only marginally higher than they would be under declaration, but over the long term. This is preferable to markedly higher charges (notwithstanding the constraints under the Access Framework) in the short term, which would harm competition in dependent markets and quickly lead to re-declaration.

283 As such, DBCTM has no incentive to seek access charges at a level which would harm competition in a dependent market and would not charge at levels which would do so, even if it were not constrained by the Access Framework.

*DBCTM has no incentive to specifically harm competition*

284 The QCA’s position could be interpreted to be that DBCTM would gain some ongoing advantage from competition being irreversibly damaged in the coal tenements market. However, as discussed above, given DBCTM is not vertically integrated there is no basis on which to argue this.

*Conclusion on threat of declaration*

285 In practice, the threat of declaration will provide a real and credible constraint on DBCTM’s incentive to increase access charges (notwithstanding the constraints under the Access Framework). Without declaration DBCTM is incentivised to pursue modest increases in charges rather than risk declaration by charging at levels which would foreclose efficient new entrants from entering the coal tenements market.

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<sup>232</sup> DBCTM May 2018 Submission, pages 85 and 86

<sup>233</sup> QCA Draft Recommendation, page C77

**Error 4: QCA has erred in its approach to market definition for coal tenements**

- 286 DBCTM maintains its position that the geographic dimension for the relevant coal tenements market is the Queensland region or broader.<sup>234</sup>
- 287 The QCA makes a fundamental error in its approach to market definition for the purposes of criterion (a). The QCA's key error is its contention that a difference in tenement *prices* between regions implies a lack of substitutability. The QCA fails to appreciate that the *return* offered by a tenement will determine its substitutability, not its price. Consequently, the QCA erroneously concludes that the relevant coal tenements market is limited to the Hay Point catchment region.
- 288 As a result of the QCA's error with respect to the coal tenement market definition, the QCA incorrectly concludes that without declaration potential efficient new entrants would be deterred from entering the coal tenements market. When the geographic scope of the market is correctly defined as the Queensland region or wider, it is clear that a new entrant in the market would be able to select between tenements from different regions served by different coal terminals. It would follow that any asymmetry in pricing of capacity at DBCT between existing and new users would not deter efficient new entrants from entering the market, as new entrants faced with such an increase could choose to acquire tenements in regions in which other coal terminals may be more cost effective. As such, criterion (a) could not be satisfied.
- 289 The following table sets out the key errors of the QCA with respect to market definition.

**Figure 17: Summary of key QCA errors in determining scope of coal tenements market**

DBCTM	QCA draft recommendation	QCA's errors
The relevant geographic dimension of the market for coal tenements is the Queensland region or wider.	The relevant geographic dimension of the market for coal tenements is limited to the Hay Point catchment region.	<ul style="list-style-type: none"> <li>The QCA makes a fundamental error in its approach to market definition.</li> <li>The QCA bases its approach on the premise that a difference in tenement prices between regions implies a lack of substitutability. The QCA fails to appreciate that the <i>return</i> offered by a tenement will determine its substitutability, not its price.</li> <li>As a result, the QCA erroneously concludes that the relevant coal tenements market is limited to the Hay Point catchment region.</li> </ul>

**Errors in the QCA's assessment of substitutability lead to flawed market definition for coal tenements**

- 290 The QCA's approach to market definition for the coal tenements market includes fundamental errors of logic.
- 291 The QCA's key error is its reliance on the erroneous assumption that a difference in the value of coal tenements between the Goonyella system and other regions would mean that tenements in the Goonyella system are unlikely to be a close substitute for tenements in other parts of Queensland:<sup>235</sup>

Given significant difference in infrastructure costs between the Goonyella coal supply chain and other coal supply chains across below-rail, above-rail and port charges (in the order of 47 to 130 per cent), the valuation of coal tenements in the Goonyella system would likely be different from other regions. Therefore, coal tenements in the Hay Point catchment region are unlikely to be a close substitute for tenements in other parts of central Queensland. This leads the QCA to agree

<sup>234</sup> DBCTM July 2018 Submission, pages 84 and 85; HoustonKemp July 2018 Report on (a), section 3.3.1

<sup>235</sup> QCA Draft Recommendation, pages C57 and C58

with the DBCT User Group's view that the geographic dimension would likely be the Hay Point catchment region. Balance agreed with this view.

292 There is no basis for this error in logic. HoustonKemp in its March 2019 Report on (a) observes that the *price* of a tenement says nothing about its substitutability with tenements in other areas.<sup>236</sup> Rather, all other things being equal, a buyer of coal tenements will prefer to buy a tenement that provides the *greatest return*. This is not the same as the tenement with the *lowest price*.

293 HoustonKemp identifies that the critical consideration for the degree of substitutability between tenements in one geographic region and another is the ability of buyers to re-deploy capital and relevant expertise from one region to another, so as to bring about an equalisation of expected returns.<sup>237</sup> HoustonKemp explains that it is inevitable that tenements in the same market *will* have different values:

...there are many reasons to expect the price of two tenements from within the same geographic region not to be the same. Any two tenements may differ according to the ease with which coal may be extracted, the quality of the coal resource, or the distance to the nearest port terminal(s). The fact and inevitability of such price differences provides no information as to their degree of substitutability, from the perspective of potential buyers.

294 The correct approach to defining the geographic dimension of the market for coal tenements is to ask "is it reasonable to expect that buyers of tenements in one region can redirect a sufficient proportion of their financial and technical resources to another region in the face of a SSNIP by a hypothetical monopolist supplier of tenements?"<sup>238</sup> It is not correct to ask whether tenements in different regions have different values.

295 In any event, the QCA does not identify any evidence that tenement values in the Goonyella region differ from those in other regions in Queensland.

#### *Impact of QCA's market definition error on assessment of impact of declaration on competition*

296 As a consequence of the QCA's error with respect to market definition, the QCA incorrectly concludes that, without declaration, potential efficient new entrants would be deterred from entering the coal tenements market due to asymmetry in pricing at DBCT between new and existing users. As a result, the QCA concludes that this would result in a material adverse effect on competition in the coal tenements market without competition.

297 Applying the correct approach for market definition, HoustonKemp concludes that the geographic scope of the market for tenements is greater than the Hay Point catchment and likely extends to Queensland or beyond.<sup>239</sup>

298 Under an appropriate market definition, HoustonKemp explains that a new entrant in the market would be able to select between tenements from different regions served by different coal terminals. It would follow that any asymmetry in pricing of capacity at DBCT between existing and new users would not deter efficient new entrants from entering the market, as new entrants faced with such an increase could choose to acquire tenements in regions in which other coal terminals may be more cost effective.<sup>240</sup>

299 Accordingly, where the geographic scope of the coal tenements market is correctly identified, the QCA's theory of harm regarding the coal tenements market cannot hold, as any asymmetry in pricing between

<sup>236</sup> HoustonKemp March 2019 Report on (a), section 5.2

<sup>237</sup> HoustonKemp March 2019 Report on (a), section 5.2

<sup>238</sup> HoustonKemp March 2019 Report on (a), section 5.2

<sup>239</sup> HoustonKemp March 2019 Report on (a), section 5.6.1

<sup>240</sup> HoustonKemp March 2019 Report on (a), section 6.1

new and existing users at DBCT would not result in efficient new entrants being deterred from entering the market. As such, criterion (a) could not be satisfied.

**Error 5: QCA has not recognised the more material risks facing miners such that access charges at DBCTM would not be determinative as to a new entrants entry into the coal tenements market**

300 The QCA concludes that the risks from uncertainty regarding access charges faced by new users of DBCT would be unmanageable, such that efficient new entrants would be deterred from entering the coal tenements market. This assessment does not accord with commercial reality or the recent decision of the National Competition Council (NCC) on the declaration of the Port of Newcastle.

**Figure 18: Summary of key QCA errors in assessing risks faced by miners**

DBCTM	QCA draft recommendation	QCA's errors
<p>Uncertainty regarding access charges at DBCT is minimal compared to the other uncertainties facing miners, and is unlikely to be determinative in a miners decision whether or not to enter the coal tenements market.</p>	<p>This risks facing miners without declaration would be unmanageable and fundamental considering the essential nature of the DBCT service for mining operations in the Goonyella system, and is over and above the normal uncertainties miners would face in conducting their operations.</p>	<ul style="list-style-type: none"> <li>• The QCA makes an error in concluding that access charge uncertainty for the DBCT service, without declaration, would be significant enough to deter potentially efficient new entrants from the coal tenements market to the extent that this would have a material adverse impact on the coal tenements market.</li> <li>• The QCA errs because this does not accord with commercial reality in which miners face significant uncertainty resulting from the magnitude and timing of potential future changes in a number of other factors including coal prices, labour costs, environmental laws and taxes, etc. Compared to these other factors, any uncertainty about charges at DBCT is likely to be minimal.</li> </ul>

301 In its draft recommendation the QCA makes an assessment of the likely risks that would be faced by access seekers without declaration:<sup>241</sup>

To summarise, the QCA’s view is that in a future without declaration, access seekers would face the risk of negotiating access in an environment where DBCT Management would have the discretion to set access terms and conditions, the risk of paying a materially higher access charge reflecting the cost of accessing WICET as well as the uncertainty as to whether and when they would obtain access to the terminal. **This risk would be unmanageable and fundamental considering the essential nature of the DBCT service for mining operations in the Goonyella system, and is over and above the normal uncertainties miners would face in conducting their operations.** [Emphasis added]

302 Putting aside that when properly characterised the Access Framework would address the risks identified, the QCA’s assessment of the materiality of the risks posed by the terms and conditions of access to DBCT is not consistent with the commercial reality that miners face. As a result the QCA errs in determining that uncertainty regarding access charges at DBCT would likely deter efficient new entrants from entering the coal tenements market.

303 In practice, terminal charges make up only a fraction of the costs (and risks) considered by a miner deciding whether to invest in a coal tenement. The National Competition Council (NCC) recently considered the risks facing miners in the context of access charges at the Port of Newcastle.<sup>242</sup> It is important to note that the Port of Newcastle, unlike DBCTM, did not propose to put in place a binding Access Framework in the future

<sup>241</sup> QCA Draft Recommendation, page C71

<sup>242</sup> National Competition Council “Revocation of the declaration of the shipping channel service at the Port of Newcastle – Statement of Preliminary Views” 19 December 2018

without declaration. The NCC concluded that the uncertainty relating to cost of access was so small that was not likely to impact competition in dependent markets:<sup>243</sup>

...the Council considers that any uncertainty about port charges is likely to be relatively small compared to uncertainty about other factors such as coal prices, labour costs and taxes. Accordingly, the Council considers that the reduction in uncertainty associated with port charges in a future with the Service declared, as compared to a future where there is no declaration of the Service, is so small that it is not likely to promote a material increase in competition in the tenements market.

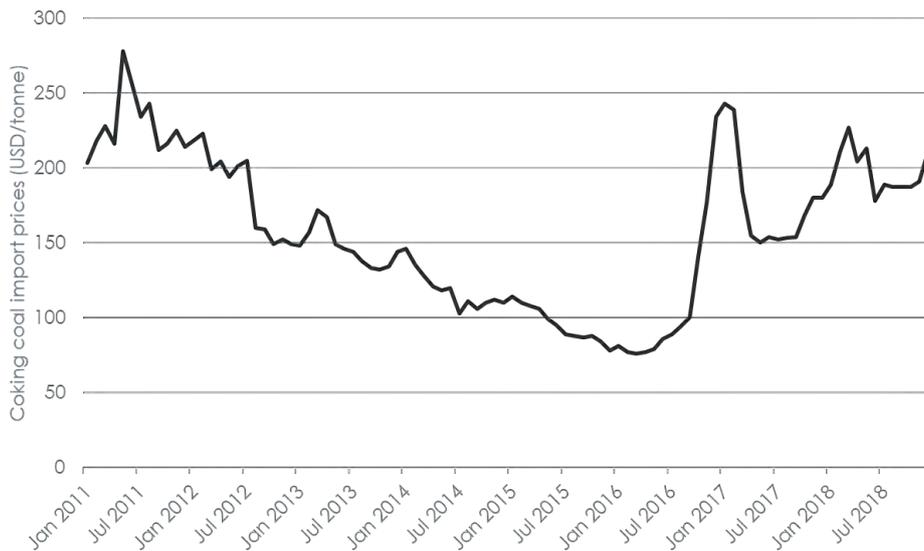
304 These statements are equally applicable to DBCTM. Miners in the Goonyella catchment face significant uncertainty from a number of factors, including coal prices, labour costs and taxes.

305 The QCA makes an error by concluding that access charge uncertainty for the DBCT service, without declaration, would be significant enough to deter potential efficient new entrants from the coal tenements market to the extent that this would have a material adverse impact on the coal tenements market.

*Uncertainty from global coal prices*

306 HoustonKemp explains that the uncertainty with global coal prices far exceeds the potential effect of higher charges for coal handling at DBCT.<sup>244</sup> Figure 19, below is replicated from HoustonKemp’s March 2019 Report on (a), shows Chinese customs statistics for monthly average import prices of Australian coking coal, collated by Bloomberg, since the beginning of 2011.<sup>245</sup>

**Figure 19: China import prices for Australian coking coal, USD per tonne**



Source: Bloomberg

307 Figure 19 clearly demonstrates indicates the high levels of volatility in traded coal prices, with the highest price over this period being US\$278 per tonne and the lowest price being US\$76 per tonne. Coal prices are the source of revenue from which a tenement’s value is derived and represent the most significant risk to acquirers of tenements. Yet, miners can and do manage these risks – in fact, it is a core part of their business.

<sup>243</sup> National Competition Council “Revocation of the declaration of the shipping channel service at the Port of Newcastle – Statement of Preliminary Views” 19 December 2018 at [6.153], see also [6.103] and [6.105]

<sup>244</sup> HoustonKemp March 2019 Report on (a), section 6.2.1

<sup>245</sup> HoustonKemp March 2019 Report on (a), figure 6.1

308 Correctly calculating the ceiling TIC provides a maximum access charge of A\$7.44 that could apply at DBCT. This represents a charge of less than 3% of forecast metallurgical coal prices. The prospect that a *potential* increase in this order represents an unmanageable risk has no grounding in commercial reality. It is implausible that this small level of uncertainty, would be determinative in an efficient new entrant's decision whether or not to enter into the coal tenements market, in what is inherently a volatile industry. As acknowledged by the NCC, the uncertainty regarding access charges is insignificant, when compared to other factors.<sup>246</sup>

309 Similarly, HoustonKemp concludes with regards to \$3 cap:

Against the level of volatility in coal prices, the potential for coal handling charges at DBCT to increase by up to A\$3.00 per tonne cannot be described as an 'unmanageable' risk. Consistent with the NCC's view, a small difference in coal handling charges under declaration is not likely to be a determinative factor in a decision on whether to enter the coal tenements market.

310 The only circumstances where a decision might be impacted by an increase in Terminal charges may be where that decision was on a "knife-edge" in any case. Indeed, if this were the case it would not follow that that new entrant was significantly more efficient than existing users. In these cases, the participation of the new entrant in the coal tenements market would be highly unlikely to promote a material increase in competition in that market in any case.

#### *Uncertainty of access at DBCTM with and without declaration*

311 DBCT is now fully contracted at 84.2Mtpa.<sup>247</sup> This means that even with declaration, access to DBCT for potential users will not be guaranteed. Therefore considerable uncertainty regarding access is already present in any event.

312 With and without declaration a potential user must demonstrate that it has the requisite coal reserves and resources in order to have its access application accepted by DBCTM.<sup>248</sup> This means that a miner must acquire tenements from the coal tenements market before it can even apply for access at DBCT. HoustonKemp explains in its March 2019 Report on (a) that this means new entrants in the market for tenements can have no certainty about the availability of access to the DBCT service, or potentially other infrastructure services.<sup>249</sup>

313 Despite DBCT being declared, potential new entrants to the market for coal tenements face significant uncertainty regarding access to DBCT, now that DBCT is fully contracted. DBCTM would have to build additional capacity at DBCT to serve new entrants. This would involve:

313.1 Establishing that the project is commercially and economically feasible;

313.2 Extensive feasibility studies to improve certainty of the project cost; and

313.3 Approval of the expansion by the QCA (or expansion arbitrator under the Framework).

314 Under the QCA approved access process, there is a significant time lag between when tenements are acquired and when a user gains certainty of access charges under the Access Undertaking with declaration.

315 The result of this is significant uncertainty for miners as to the availability of access at DBCT. This will create a significant barrier to entry which will exist both with and without declaration. As explained by HoustonKemp:<sup>250</sup>

<sup>246</sup> National Competition Council "Revocation of the declaration of the shipping channel service at the Port of Newcastle – Statement of Preliminary Views" 19 December 2018 at [6.153]; see also [6.103] and [6.105]

<sup>247</sup> Appendix 3 - Timbrell Declaration (on the basis that the final 0.13Mtpa is taken up imminently)

<sup>248</sup> See section 5.3(d) of the Access Undertaking and DBCTM's final Framework

<sup>249</sup> HoustonKemp Report on (a), section 6.2.1

<sup>250</sup> HoustonKemp March 2019 Report on (a), section 6.1

It follows that, with or without declaration, new entrants in the market for tenements can have no certainty about the availability of access to the DBCT service, or potentially other infrastructure services over the period for which the DBCT service would be declared. In other words, an investment in a tenement is required before a new entrant can enter the access queue and begin to form expectations about when, and on what terms, they may be able to obtain access to the DBCT service. This is a significant barrier to entry that will persist whether the DBCT is declared or otherwise.

316 As discussed in section 4.4, this uncertainty is severely compounded by new information outlined in the Timbrell Declaration that the queue for capacity at DBCT now exceeds the capacity of all viable future expansions.

**Error 6: The Balance Report has no probative value**

317 In its draft recommendation the QCA relies on a report provided by Balance Advisory (**Balance**) on 31 August 2018 (**Balance Report**). After examination it is clear that the Balance Report has no probative value.

**Figure 20: Summary of key flaws in report by Balance Advisory**

DBCTM	QCA draft recommendation	QCA's errors
<p>The Balance Report has not probative value and should be given no weight by the QCA.</p>	<p>The QCA has relied on the Balance Report in reaching its draft recommendation.</p>	<ul style="list-style-type: none"> <li>• DBCTM was not provided the QCA analysis upon which the Balance Report provided a view. As such, if the QCA seeks to rely on this report it must publish the QCA analysis referred to, or DBCTM will be denied natural justice.</li> <li>• The QCA has also erred in relying on the Balance Report despite Balance not providing any evidentiary basis for a number of its conclusions.</li> <li>• Further Balance does not take into account the provisions of the Framework as asked to in its terms of reference.</li> <li>• The Balance Report does not address the key factor in the valuation of coal tenements – future coal prices.</li> </ul>

318 The Balance Report does not set out the "QCA's analysis" upon which Balance is requested to provide an opinion.<sup>251</sup> Balance is requested to "provide an independent commercial review of the QCA's analysis in the forthcoming draft recommendation". The "QCA analysis" has not been provided to DBCTM, accordingly if the QCA seeks to rely upon the Balance Report DBCTM will have been denied natural justice.

319 Further, Balance was expressly instructed *"In undertaking the above tasks, the consultant will have particular regard to the impact, if any, of DBCT Management's proposed access framework on competition in the coal tenements, or related, markets"*.<sup>252</sup> Such an instruction requires Balance to review and consider the terms of the proposed Framework. However, the Balance Report does not disclose that it reviewed the terms of the proposed Framework. Rather the footnotes in the Balance Report refer to summaries of the proposed Framework and not to clauses of the proposed Framework. Accordingly, Balance appears to have failed to implement an express instruction of the QCA. On this basis the QCA cannot place any weight on the Balance Report.

<sup>251</sup> QCA Terms of Reference 6 August 2018, page 1

<sup>252</sup> QCA Terms of Reference 6 August 2018, page 2

320 The failure of Balance to have regard to the actual terms of the proposed Framework can be clearly demonstrated by how Balance describes how the TIC is set. The Balance Report proceeds on a fundamentally incorrect premise that:

“...the terminal access charge (TIC) will be set based on buyers' and sellers' willingness to pay”<sup>253</sup>

is effectively the

“willingness to pay' of users”.<sup>254</sup>

321 DBCTM's May 2018 Submission clearly states the TIC is set by reference to *"the price that would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines that are proximate to the Port of Hay Point"*.<sup>255</sup> Balance's conclusion is illogical when taking into account that, failing negotiation, the TIC under the Framework will be set by an independent arbitrator. Balance's conclusions reveal that it has no relevant experience in the application of the clearly prescribed test for how the TIC is to be set under the Framework. For these reasons alone the QCA must have no regard for the views expressed by Balance in its report.

322 The Balance Report does not disclose that Balance has had any regard to the terms of the existing approved Access Undertaking and in particular section 5 in relation to access. Without assessing the impacts of the queue mechanism, which is the same under the Access Undertaking and Framework, Balance has failed to have regard to a material fact and accordingly its "views" are superficial and cannot be relied upon.

323 Balance does not set out the facts and reasoning to support key views. As a result the Balance Report is superficial and cannot be relied upon. For example at page [12] the report states:

In addition, we agree with QCA staff's analysis that:

- existing users would place a higher value on coal tenements than potential users and would ultimately have the potential to discourage future users from participating in the tenements market and the environment for competition in the coal tenements market (and particularly thermal coal tenements) would be adversely affected;
- the prospect of facing a TIC that would result in economic rents being transferred to DBCTM would create extra risks (as outlined in section 3.3 above) for new entrants attempting to acquire coal tenements in the Hay Point “catchment area” and is likely to discourage them from participating in the tenements market; (sic)

324 The Balance Report also sets out risks involved in the development of a coal mine and the factors influencing the values of coal tenements. None of the factors identified by Balance includes the price of coal. The fact that Balance omits to mention the single most determinant factor in the valuation of coal tenements gives credence to the fact that the QCA can have no confidence in the conclusions that Balance draws from its analysis.

325 No evidentiary basis nor reasoning is provided to support this view and others. Accordingly the QCA must have no regard for this superficial report.

**Error 7: The QCA has not established that the if new entrants were discouraged from entering the coal tenements market that this would have a material impact on competition in that market**

326 Even if new entrants would be deterred from entering the coal tenements market without declaration, the QCA has not identified any evidence, or provided analysis, to suggest that this would have a *material* impact

<sup>253</sup> Balance Report, page 9

<sup>254</sup> Balance Report, page 10, et al

<sup>255</sup> DBCTM May 2018 Submission at [311]

on competition, such that access as a result of declaration would promote a material increase in competition.

327 Criterion (a) requires an assessment of whether access as a result of declaration will promote a material increase in competition in a dependent market.

328 In order to establish this the QCA must compare the state of competition in the dependent market, here being the coal tenements market, with and without declaration. The QCA has produced no evidence to suggest that the coal tenements market would not be workably competitive without new entrants, or that the *possibility* of new entry would promote a material increase in competition.

### **Conclusion – correcting for errors in the QCA’s draft recommendation, criterion (a) cannot be satisfied**

329 As demonstrated above:

329.1 Without declaration DBCTM’s ability to exercise market power would be effectively constrained, even by the originally proposed version of DBCTM’s Framework;

329.2 DBCTM has no incentive to charge users at a level which would deter efficient new entrants from entering the coal tenements market;

329.3 The coal tenements market is at least Queensland-wide, and potentially wider; and

329.4 Uncertainty regarding access charges at DBCTM would not be determinative in an efficient new entrants decision whether to enter the coal tenements market.

330 Accordingly, correcting for any one of the errors identified in this section, the only reasonable conclusion for the QCA to make is that the DBCT service does not satisfy criterion (a).

### **3.4 New information that supports DBCTM’s position that criterion (a) cannot be satisfied**

331 DBCTM’s maintains that correcting for the errors in the QCA’s draft recommendation, the only conclusion available to the QCA is that criterion (a) is not satisfied for the DBCT service.

332 Notwithstanding this, this section sets out further information that was not available at the time of DBCTM’s previous submissions, which supports DBCTM’s position that criterion (a) cannot be met for the DBCT service.

333 Most importantly, DBCTM has now executed an irrevocable, binding Deed Poll, which will give effect to the final Framework. The final Deed Poll and Framework include a number of changes to address concerns raised by the QCA in its draft recommendation, and concerns raised by the User Group in its submissions.

334 Taking these changes into account, DBCTM has comprehensively addressed the concerns raised by the QCA regarding the operation of the Framework to constrain DBCTM’s ability to exercise market power without declaration. As a result, the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied for the DBCT service.

335 The table below sets out the key concerns expressed by the QCA or User Group with the Framework and the changes that have been made to the Framework to address these concerns.

**Figure 21: Summary of new information**

QCA/ User Group concern	How DBCTM has addressed the concern
DBCTM has not executed the Deed Poll	On 11 March 2019 DBCTM duly executed the binding and irrevocable Deed Poll, requiring DBCTM to comply with the Access Framework.
Significant differences in access charges between new and existing users without declaration will cause potential efficient new users to be deterred from entering the coal tenements market	The final executed version of the Deed Poll includes provisions which will prevent DBCTM from charging new users, more than \$3 per tonne more than the charges that would be determined by the QCA for the existing terminal (maximum spread). In circumstances where a costly expansion would result in differentiated expansion costs for a terminal component which would exceed the maximum spread, DBCTM will be limited to charging the charges that would be determined by the QCA for that terminal component.
The Framework objective itself can be changed which would undermine the amendment process protections	DBCTM's final Deed Poll operates to 'hard-code' the Framework Objective, as well as the \$3 maximum spread provisions. These provisions cannot be amended in any circumstances.
The Framework can effectively be changed however DBCTM chooses	DBCTM has introduced further protections into the executed Deed Poll to ensure that any amendments to the Framework are appropriate. These include amendments to: <ul style="list-style-type: none"> <li>• increase the transparency of the amendment process;</li> <li>• lengthen timeframes for appeals;</li> <li>• reduce barriers to challenging amendments, and</li> <li>• require DBCTM to have proper regard to mandatory considerations.</li> </ul> DBCTM has also 'hard-coded' key provisions in the Deed Poll as referred to above.
DBCTM would be able to unfairly differentiate between users	DBCTM has replicated the same restrictions on unfairly differentiating between users that are in place under the QCA approved Access Undertaking.
Access to terminal capacity would be subject to an access seeker's willingness to pay relative to other access seekers	DBCTM has made changes to the Framework to ensure that the process for determining access charges operates completely independently from the process for allocating capacity, by allowing for access charges to be determined through the negotiate/arbitrate process, <i>after</i> capacity has been allocated through the queuing mechanism.

336 Also relevant to the QCA's final recommendation is the fact that capacity at DBCT is now fully contracted. This will have an impact on the QCA's assessment of the likely state of access to DBCT 'with and without' declaration as new entrants to the coal tenements market will not be able to gain access to DBCT in any event.

337 A table laying out the changes that DBCTM has made to the Framework, Deed Poll and Standard Access Agreement to address the concerns of the QCA and User Group is set out in Appendix 8 of this submission.

### **DBCTM has now executed the binding deed poll which requires compliance with the Framework**

#### *Concerns raised by the QCA and the User Group*

338 In its draft recommendation the QCA noted that at that stage DBCTM had not executed the deed poll under which DBCTM has proposed to apply the Framework.<sup>256</sup> The QCA also referenced submissions by the User Group which claim that the Access Framework is not an appropriate counterfactual, as it has not been executed and has never been implemented.<sup>257</sup>

<sup>256</sup> QCA Draft Recommendation, page C68

<sup>257</sup> QCA Draft Recommendation, page C67

339 While it is unclear from the draft recommendation what weight the QCA has placed on these propositions in reaching its conclusions on criterion (a), these are not relevant considerations in determining whether criterion (a) is satisfied. This is because:

- 339.1 DBCTM clearly stated its intention to execute the deed poll prior to any declaration ceasing; and
- 339.2 That such an approach may have never been implemented before is irrelevant to the matter at hand. As part of its assessment of criterion (a), the QCA is required to consider what terms of access will be available without declaration. Now that the QCA has evidence that DBCTM has duly executed the deed poll, the relevant question for the QCA is what effect will the Framework have on the terms and conditions of access available to access seekers without declaration, and would access as a result of declaration promote a material increase in competition in a dependent market?

340 As part of its declaration review Queensland Rail also proposed to comply with a binding access framework. In its draft recommendation to declare Queensland Rail's service, the QCA explained that it did not consider that the proposed access framework was an appropriate alternative scenario on which to base the assessment of the likely state of the market in a future without declaration.<sup>258</sup> This was on the basis that without declaration the existence of the access framework would be speculative and not guaranteed because Queensland Rail had not provided evidence showing that the proposed access framework:

- 340.1 had been duly executed by Queensland Rail, with substantially the same terms and conditions as under the proposed access framework; and
- 340.2 would actually come into force upon the expiry of the declaration (for example, through a 'condition precedent' mechanism where, upon the expiry of the Queensland Rail declaration, the access framework will automatically come into force).

341 The QCA further noted that:

The QCA would be willing to reconsider this position if evidence is provided that the proposed access framework has been duly executed by Queensland Rail, including with a certain commencement date. This will ensure that all stakeholders are provided with a set of finalised, legally enforceable terms and conditions (including terms regarding amendments to the existing terms), which will apply immediately upon the expiry of the declaration.

*DBCTM has now executed the irrevocable binding Deed Poll*

342 On 11 March 2019 DBCTM duly executed the binding Deed Poll, attached at Appendix 9 (extract) and Appendix 15 (in full), which will come into force the day that DBCTM's current declaration expires, for a period of ten years. The Deed Poll is irrevocable, and only subject to the condition precedent that DBCTM is not re-declared. This means that, without declaration DBCTM will be subject to the binding Framework, and as such should be taken to represent the terms and conditions of access that are available to access seekers without declaration.

**Under the executed Access Framework new entrants cannot be charged more than \$3 per tonne more than existing users**

343 The fundamental basis of the QCA's draft recommendation that criterion (a) is satisfied for the DBCT service is that there will be a significant price differential between new and existing users (in the order of \$15), such that potential efficient new entrants will be deterred from entering the coal tenements market.

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<sup>258</sup> QCA Draft Recommendation - Part B: Queensland Rail declaration review, page B29

- 344 Without such a price differential, the QCA's concern falls away. This is evident in the QCA's draft recommendation where it assesses the likely outcome if differentiated expansion pricing was applied for a new terminal component with declaration. The QCA assesses that a decision to differentiate expansion costs would result in a price differential in the order of \$3.50 between new and existing users.<sup>259</sup> In this case the QCA concluded that the charges applying to new users in these circumstances would not appear to be materially different from the charges applying to existing users.<sup>260</sup>
- 345 DBCTM firmly maintains its position that the previously submitted versions of the Deed Poll and Framework would ensure that there could be no material impact on competition in dependent markets without declaration. However, to provide greater clarity of pricing under the Framework, and to increase certainty for Access Seekers, DBCTM has introduced a further limit on access charges.
- 346 Under the executed Deed Poll, DBCTM is prevented from charging new users a TIC that is more than \$3.00 per tonne higher than what the QCA would determine for the existing terminal component. The only circumstances where DBCTM can charge more than this is where the QCA determined TIC for the new terminal component would exceed the existing Floor TIC + \$3.00 (i.e. in the case of an expensive and differentially priced expansion). In those circumstances DBCTM could only charge up to the equivalent of a QCA determined TIC for that terminal component. This protection has been 'hard-coded' into the executed deed poll. This means that it cannot be amended under any circumstances, and access seekers will have certainty of the charges at which they will be able to gain access to DBCT.
- 347 As such, DBCTM has comprehensively addressed the QCA's primary concern regarding the asymmetry of pricing for new users and existing users. The prospect that a \$3 per tonne price differential could result in a *material* adverse impact on competition in the coal tenements market is absurd. The QCA's theory of harm to competition cannot hold and the only reasonable conclusion available to the QCA is that criterion (a) cannot be satisfied.

### Key provisions of the Framework have now been 'hard-coded' into the Deed Poll

- 348 The User Group submits in its July 2018 Submission that DBCTM's ability to amend the Framework Objective with the consent of the State undermines the protection that requires that amendments to the Framework will promote the Framework Objective.<sup>261</sup>
- 349 To address this concern DBCTM has 'hard-coded' the Framework Objective into the Deed Poll so that it cannot be amended in any circumstances.
- 350 In order to 'future-proof' the Framework Objective, the final wording of the Framework Objective has changed to link it directly to section 69E<sup>262</sup> of the QCA Act and will be updated along with any amendments to the legislature. If the QCA Act or section 69E is repealed, the Framework Objective will have the same meaning as section 69E immediately prior to the repeal.
- 351 As mentioned above DBCTM has also 'hard-coded' the \$3 Cap on access charges into the Deed Poll. This is to provide certainty to potential access seekers of the charges that will apply at DBCT.
- 352 Amendments to the remaining provisions of the Framework will still be possible, as some flexibility is needed to future-proof the Framework. However, DBCTM has also introduced additional protections to the Framework amendment process in the final version of the Deed Poll, as discussed below.

<sup>259</sup> The QCA identifies that the coal handling charge with a differentiated TIC would be at most \$8.50 per tonne, page 86

<sup>260</sup> QCA Draft Recommendation, page 86

<sup>261</sup> User Group July 2018 Submission, page 60

<sup>262</sup> Section 69E of the QCA Act provides "*The object of this part is to promote the economically efficient operation of, use of land investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets*"

## DBCTM has introduced additional protections to the Framework amendment process

- 353 In its draft recommendation the QCA expressed concerns with DBCTM’s ability to amend the Framework, despite the requirement that any amendments must promote the Framework Objective.<sup>263</sup>
- 354 The QCA explained that where the issue was the approval of an Access Undertaking for a declared service, the judgement about the outcome that would *best* promote the Part 5 Objective was a matter for the QCA.<sup>264</sup> In the QCA’s view, the ability for DBCTM to select *one of a range* of proposed amendments that satisfy the relevant criteria (and which could only be challenged in court if the amendment did not fall within this range) was a crucial difference when compared with the outcomes that could be anticipated with declaration.<sup>265</sup>
- 355 The QCA was also concerned that the ability to amend the Framework may create uncertainty as to the scope of the Framework, which would be counterproductive to conducting negotiations in a timely and cost effective manner.<sup>266</sup>

### *Why did DBCTM include an ability to amend the Framework?*

- 356 The ability to amend the Framework (in a way that promotes the Framework Objective) was included in the Deed Poll in order to protect against unintended consequences of the drafting of the Access Framework. While the Framework is based on the existing Access Undertaking that is currently in operation, DBCTM considered it prudent to include provisions in the Deed Poll that would allow it and other stakeholders to find solutions in the unlikely event that an unintended issue arose with the Framework - for example, when circumstances change in the future.
- 357 The ability to amend the Access Framework was intended to operate as a safeguard – not to allow DBCTM to undermine the Access Framework at the expense of the negotiation process. DBCTM envisaged that the discretion would be exercised rarely, if at all, over the declaration period.
- 358 Access seekers, or potential access seekers, would still have certainty that any amendments to the Framework must be consistent with the object of the Framework, which includes promoting the economically efficient operation of, use of and investment in the terminal. Therefore DBCTM disagrees with the QCA’s conclusion that DBCTM’s ability to modify its Framework would be counterproductive to conducting negotiations in a timely and cost effective manner.

### *Changes to ensure a robust framework amendment process*

- 359 Notwithstanding DBCTM’s position that the ability to modify the Framework will not create a *bona fide* risk for potential access seekers, the final executed Deed Poll includes a number of additional protections, designed to:
- 359.1 increase the transparency of any amendments;
  - 359.2 ensure a meaningful consultation;
  - 359.3 decrease barriers to challenging amendments to the Framework; and
  - 359.4 require DBCTM to take into account mandatory considerations in making any amendments.
- 360 The table below summarises these new protections and explains the concerns that they address.

<sup>263</sup> QCA Draft Recommendation, pages 68 and 69

<sup>264</sup> QCA Draft Recommendation, page 68, final paragraph

<sup>265</sup> QCA Draft Recommendation, page 69, first paragraph

<sup>266</sup> QCA Draft Recommendation, page 69, second and third paragraphs

**Figure 22: New protections in Framework and concerns they address**

New protection	Concerns addressed
<p>Enhanced consultation requirements for amendments of the framework including:</p> <ul style="list-style-type: none"> <li>• a requirement to provide notice to Confirmed Access Seekers, Access Applicants and Access Holders of draft amendments and consultation process;</li> <li>• a requirement to advertise the intention to make an amendment in a nationally distributed newspaper;</li> <li>• a requirement to publish a draft of any amendments; and</li> <li>• a minimum specified period for consultation on draft amendments of 45 days.</li> </ul>	<p>Ensures that amendments are fully considered by stakeholders and do not to 'slip through' without consideration.</p>
<p>Amendments can now only take effect after the amendment procedure is fully completed (i.e. once the period for Court challenge elapsed without challenge or Court challenge heard and determined).</p>	<p>Ensures that amendments are fully considered by stakeholders and do not to 'slip through' without consideration.</p>
<p>Amendments must be appropriate having regard to the mandatory considerations set out in clause 8.5 of Deed Poll, in addition to the requirement that they promote the Framework objective.</p> <p>These new provisions operate to confer power on the Court to consider and determine the appropriateness of the amendments, i.e. to review DBCTM's exercise of discretion as to the choice of amendments from the range of options that promote the Framework objective.</p>	<p>This addresses the QCA concern that DBCTM will have no independent check on its exercise of discretion as to selection of amendments from a range of outcomes that promote Framework the objective.</p> <p>This change will also more closely align the requirements for amendment of the Access Framework under the Deed Poll with the requirement for QCA approval of an AU.</p>
<p>The timeframe for commencing Court challenge has been extended to 120 days.</p>	<p>This ensures that stakeholders have an adequate opportunity to assess any potential amendments, before deciding whether to challenge them.</p>
<p>DBCTM is now restricted from seeking an award of adverse costs for challenges to a Framework amendment</p>	<p>This decreases the barriers to challenging potential amendments.</p>

### *Enhancements to the amendment consultation and challenge process*

361 In its July 2018 Submission the User Group raised concerns that:<sup>267</sup>

361.1 users would have insufficient time to consider proposed amendments and commence court proceedings, such that amendments will be 'slipped through' without consideration by users; and

361.2 amendments may be made to the detriment of future access seekers.

362 The Deed Poll now requires DBCTM to follow a thorough consultation process before any proposed amendments to the Framework will become operative. The consultation process allows **any** person to comment on proposed amendments to the Framework and challenge those amendments through the courts.

363 The amendment process under the final executed Deed Poll is as follows:

<sup>267</sup> User Group July 2018 Submission, page 59

- 363.1 all Covenantees and the world at large are notified of proposed amendments to the Framework. DBCTM must notify Covenantees, and publish a notice in a national newspaper, directing interested parties to view proposed amendments on its website;
- 363.2 those parties are given the opportunity to make any written comments on the proposed amendments;
- 363.3 DBCTM will consider any comments received and then publish the final version of its proposed amendment to the Framework on its website (and notify the Covenantees and Third Parties that it has done so);
- 363.4 if any Covenantee or Third Party (being a person who has made a written comment on the proposed amendment) does not agree with the proposed final amendments, they may commence proceedings against DBCTM in the Supreme Court of Queensland, for a declaration about the legality of the final proposed amendments. Any such proceeding must be commenced within 120 days of a notice advising of the final proposed amendments; and
- 363.5 the final proposed amendments will not become operational until after the expiry of the 120 days - or, if proceedings have commenced, after the legal proceedings have been concluded in DBCTM's favour.

*Amendments must be appropriate having regard to mandatory considerations*

- 364 The QCA raised concerns in its draft recommendation that in making amendments to the Framework, DBCTM would have an unchecked discretion to select from a range of amendments that would promote the Framework Objective.<sup>268</sup> Likewise the User Group noted that 'having regard to' specified factors was not a protection against adverse amendments.<sup>269</sup>

While DBCTM is required to have regard to the matters in clause 8.5, that should be seen for what it is – an attempt to provide a thin veneer of credibility to the amendment process – that will actually provide no constraints on the type of amendment that DBCTM can make.

The amendments are not required to be appropriate having had to regard to them (in the way the QCA's approval of a draft amending access undertaking process would work under the QCA Act)...

- 365 The Deed Poll now includes provisions requiring that any amendments be *appropriate* having regard to the mandatory considerations set out in clause 7.3 (which are derived from sections 138<sup>270</sup> and 168A<sup>271</sup> of the QCA Act).
- 366 The new wording more closely aligns the requirements for amendments to the Framework with the requirement for the QCA's approval of amendments to an Access Undertaking, and addresses the concern raised by the QCA and User Group.
- 367 These new provisions will operate to confer power on the Court to consider and determine the appropriateness of the amendments, i.e. to review DBCTM's discretion as to the choice of amendments from the range of options that promote the Framework Objective.

<sup>268</sup> QCA Draft Recommendation, page 69 and 69

<sup>269</sup> User Group July 2018 Submission, page 59

<sup>270</sup> Section 138 of the QCA Act provides that the QCA may approve a draft Access Undertaking given to it only if it considers it appropriate to do so having regard to the factors listed in that section

<sup>271</sup> Section 168A sets out principles applicable to the price for access to services. The QCA must have regard to these pricing principles when deciding whether to approve an access undertaking

*DBCTM is unable to seek an award of adverse costs*

- 368 In its July 2018 Submission the User Group noted that it could be expensive to test whether any particular proposed amendment meets the threshold of promoting the Framework Objective.<sup>272</sup>
- 369 In order to remove barriers to challenging amendments the final Deed Poll includes provisions which prevent DBCTM from seeking an award of adverse costs for challenges to a Framework amendment.
- 370 This will decrease the risk faced by a party seeking to challenge an amendment, and will help ensure that any amendments receive appropriate scrutiny.

**The Framework prevents DBCTM from unfairly differentiating between users**

- 371 In its draft recommendation the QCA notes:<sup>273</sup>

In a future with declaration, the capacity allocation mechanism, among other things, prohibits an access provider from unfairly differentiating between users of the service in a way that has a material adverse effect on the ability of users to compete with other users (s. 168C) and from engaging in conduct for the purposes of preventing or hindering access to the declared service.

- 372 In order to ensure that this benefit is continued without declaration, DBCTM has included a provision in its Access Framework that replicates these provisions in the Act.<sup>274</sup> DBCTM appreciates that these provisions were first introduced in the updated version of the Access Framework provided to the QCA on 29 June 2018, so may not have been taken into account by the QCA in making its draft recommendation. However, DBCTM notes that it explained that this provision had been included DBCTM's July 2018 Submission, in response to the QCA's questions on the operation of the deed poll and framework in a paper dated 6 June 2018, *Declaration reviews: Submissions on initial submission – Staff Questions*.<sup>275</sup>

**The Framework ensures that capacity is allocated on a first-come first-served basis***QCA's characterisation of capacity allocation without declaration under the Access Framework*

- 373 The QCA's draft recommendation mischaracterises the approach to allocating capacity under the access framework as being based on a users' willingness to pay. For example the QCA states:<sup>276</sup>

Additionally, a mechanism to allocate capacity based on users' willingness to pay would mean that the degree of willingness to pay has a determining role. Consequently, access seekers would face uncertainty about whether and when they would obtain terminal access to support their planned mining operations. This is because access to terminal capacity would be subject to, among other things, an access seeker's willingness to pay relative to other access seekers and there being sufficient capacity available to meet access seekers' requirements.

...

- 374 In a footnote the QCA acknowledges that the DBCTM has included a capacity allocation mechanism as part of its access framework, however makes unfounded logic leaps in order to fit the provisions of the Framework to its conception that capacity is allocated based on users' willingness to pay<sup>277</sup>

DBCT Management's proposed access framework includes a queuing mechanism, whereby access seekers at the back of queue could obtain access to terminal capacity if they are willing to execute

<sup>272</sup> User Group July 2018 Submission, page 60

<sup>273</sup> QCA Draft Recommendation, page 71

<sup>274</sup> DBCTM final Access Framework, section 8.2

<sup>275</sup> DBCTM July 2018 Submission at [360]

<sup>276</sup> QCA Draft Recommendation, page 71

<sup>277</sup> QCA Draft Recommendation, page 72, footnote 250

an access agreement albeit and presumably with a different pricing structure i.e. the access charge would reflect their willingness to pay relative to those at the front of the queue (DBCT Management, sub. 1, appendix 1, cl. 5.4 and appendix 7).

375 The QCA goes on to suggest that DBCTM would be able to auction capacity under the Framework:

Under the above conditions, DBCT Management will presumably have the ability and incentive to provide access to capacity in a manner that will maximise its profits/returns, such as by auctioning terminal capacity to extract economic rents<sup>242</sup> from access seekers (for example, potential DBCT users).

376 There is no basis for the QCA's presumption that different access seekers in the queue would face different pricing structures and that the access charge would simply reflect their willingness to pay relative to those at the front of the queue. Nor, that DBCTM would have the ability to auction terminal capacity.

*DBCTM's capacity allocation mechanism is nearly identical to that under the Access Undertaking*

377 Section 5.4 of DBCTM's proposed access framework sets out the approach to allocating capacity that applies under the Framework:<sup>278</sup>

...subject to any other provision in section 5 the priority of an access seeker in the queue will be determined by their access application date with an earlier access application date having priority in the Queue over any access application date...

378 For all practical purposes, this process is **identical** to the process under the current Access Undertaking (including the access queuing mechanism), which the QCA acknowledges provides an orderly, transparent and predictable process for allocating capacity, based on users' willingness to execute an access agreement subject to their position in the queue.<sup>279</sup> As such, there appears to be no basis for the QCA's concerns.

*Changes to the Framework to ensure that capacity is allocated appropriately*

379 To remove doubt and ensure the correct operation of the queuing system (based on users' willingness to execute an access agreement subject to their position in the queue), DBCTM has included provisions in the final Framework which make it clear that the queuing system is able to operate independently from the negotiation and arbitration of the initial TIC.

380 The queuing provisions of the Framework now provide that access seekers may execute a binding access agreement in the form of the Standard Access Agreement or Conditional Access Agreement for the purposes of determining the queue, notwithstanding that the agreement does not have a completed value for the Initial TIC. In these circumstances, the Initial TIC will be negotiated and/or arbitrated only after any binding access agreement(s) are entered into and thus the capacity allocation process is complete.

381 Except where an access seeker elects to negotiate the Initial TIC with DBCTM before or during the capacity allocation process, DBCTM will negotiate the Initial TIC with the access seeker only after it enters into a binding access agreement and is thus allocated capacity. Whether the access seeker elects to negotiate the Initial TIC with DBCTM before or during the capacity allocation process will have no bearing on whether it obtains access.

382 These amendments ensure that capacity is allocated on the basis of an access seekers' willingness to execute an access agreement subject to their position in the queue, with the result that access seekers

<sup>278</sup> Final Access Framework, section 5.4

<sup>279</sup>

know the requirements for obtaining access, and the willingness to pay of an access seeker relative to other access seekers can have no bearing on the process.

### Capacity at DBCT is now fully contracted

- 383 On 7 November 2018 DBCTM wrote to the QCA to advise that DBCTM has recently completed a process of offering remaining capacity to the access queue. And, as a result, existing capacity at DBCT is now fully contracted from [2023].
- 384 DBCTM also attaches the statutory declaration of Anthony Timbrell, CEO of DBCTM, at Appendix 3. This statutory declaration sets out further information regarding DBCTM's contractual position and the access queue at DBCT.
- 385 This information is of particular relevance to the QCA's final recommendation, as it relates to the state of access both with and without declaration.

### *New entrants will not be able to gain capacity in any event*

- 386 In its draft recommendation the QCA concludes that without declaration the material asymmetry in the terms of access between new and existing users will result in potential efficient new entrants being deterred from entering the coal tenements market. As a consequence the QCA considers that there will be a material adverse impact on competition in the coal tenement market without declaration, and criterion (a) is therefore satisfied.<sup>280</sup>
- 387 A key premise of the QCA's theory of harm to competition is that:
- 387.1 with declaration, efficient new entrants would enter the market for coal tenements, and would contract for capacity at DBCT; and
- 387.2 without declaration, those potential efficient new entrants would be deterred from entering the coal tenements market, because of higher access charges at DBCT (compared with incumbents).
- 388 The information contained in the Timbrell Declaration, unequivocally demonstrates that the first limb of this premise cannot be established, as future entrants to the coal tenements market will not be able to gain access to capacity at DBCT, in any event. This is because existing demonstrable demand for capacity at DBCT over the proposed declaration period (incorporating the total existing contracted capacity and the queue) exceeds the total capacity of DBCT of 84.2Mtpa, as well as the maximum capacity of DBCT including any viable expansions over the proposed declaration period of 102Mtpa. This is clear from the table below which sets out contracted and queue capacity over the declaration period.<sup>281</sup>

**Figure 23: Timbrell Declaration – Contracted and access queue demand (including contract renewals)**

Total Contracted + Queue (Mtpa)	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
DBCTM Contracted	81.77	82.67	84.07	84.07	84.07	84.07	84.07	84.07	84.07	84.07
DBCTM Access Queue	35.13	35.93	35.10	51.10	56.10	56.10	56.10	56.10	46.20	31.70
<b>Total Contracted + Queue</b>	<b>116.90</b>	<b>118.60</b>	<b>119.17</b>	<b>135.17</b>	<b>140.17</b>	<b>140.17</b>	<b>140.17</b>	<b>140.17</b>	<b>130.27</b>	<b>115.77</b>

<sup>280</sup> QCA Draft Recommendation, pages 93 and 94

<sup>281</sup> Appendix 3 - Timbrell Declaration, Table B

- 389 This means that at no point, over the proposed declaration period would a potential entrant to the coal tenements market have any certainty as to access at DBCT, either with or without declaration. This is because:
- 389.1 Existing users will continue to contract for existing capacity at DBCT.
    - 389.1.1 In its Draft Recommendation the QCA acknowledges that, with declaration, existing users will likely perpetually exercise their evergreen renewal right.<sup>282</sup>
    - 389.1.2 A similar effect could be expected when demand is likely to exceed terminal capacity as shown above, and access seekers are faced with the possibility of accessing an alternative terminal, due to a lack of capacity at DBCT.
    - 389.1.3 The QCA also identifies evidence to support the proposition that existing users of DBCT will seek to acquire new tenements to continue their mining operations (and use of DBCT) once their current mines reach the end of their economic life.<sup>283</sup>
  - 389.2 Any expansion capacity will be acquired by access seekers currently in the access queue.
    - 389.2.1 Under both the Access Undertaking and the Framework, access seekers currently in the queue will have priority of access to DBCT over access seekers who are not yet in the queue.
    - 389.2.2 There are no future entrants to the coal tenements market in the current queue. This is because access seekers in the current queue already possess coal tenements, as it is a prerequisite to entering the queue (under the Access Undertaking) that an access seeker must prove that it has the requisite coal reserves.
    - 389.2.3 As shown above the current queue already exceeds the maximum viable expansion capacity at DBCT.
- 390 As such, there is no prospect that a potential new entrant to the coal tenements market (which will not enter the queue until it acquires a tenement) could gain access to DBCT, with or without declaration. This means that the QCA's theory of harm to competition cannot hold, as any asymmetry in the terms and conditions of access between new and existing users without declaration will have no impact on competition in the coal tenements market. As such, the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied for the DBCT service.

### Conclusion on new information

- 391 DBCTM has comprehensively addressed the concerns raised by the QCA regarding the ability of the Framework to constrain DBCTM's market power without declaration.
- 392 Further, as evidenced by the information in the Timbrell Declaration, it is highly unlikely that a potential new entrant to the coal tenements market could gain access to DBCT either with or without declaration, meaning access as a result of declaration could have no impact on competition in any dependent market.
- 393 Taking account of the new information set out in this section, the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied for the DBCT service.

<sup>282</sup> QCA Draft Recommendation, page 87

<sup>283</sup> QCA Draft Recommendation, page 89 and 90

### 3.5 Conclusion on criterion (a)

- 394 The fundamental basis of the QCA's draft recommendation that criterion (a) is satisfied for the DBCT service is that there are significant asymmetries in the terms and conditions of access between new and existing users, such that potential efficient new entrants will be deterred from entering the coal tenements market. The key premise of this is that, without declaration, there would be a substantial price differential between new and existing users in the order of \$15 per tonne.
- 395 Without such a price differential, the QCA's concern falls away.
- 396 The introduction of the \$3 Cap comprehensively addresses the QCA's key concern, by ensuring that the access charges paid by new users are within the \$3.50 materiality threshold of the QCA determined charges for the existing terminal.
- 397 Notwithstanding this, even without the \$3 Cap, the Framework would function to ensure that there would be no material impact on competition in dependent markets without declaration. Correcting for any of the errors in the QCA's Draft Recommendation, which are identified in this submission, it is clear that criterion (a) cannot be satisfied for the DBCT service, even without the changes that have been made to the Framework.
- 398 Further, there is significant new information which strongly supports a recommendation that the DBCT Service cannot satisfy criterion (a):
- 398.1 DBCTM has made amendments to comprehensively address the issues raised by the QCA and User Group (these include clarifications to ensure that the capacity allocation mechanism operates so that users' are served based on their willingness *to execute an access agreement*, not price); and
  - 398.2 New information regarding contracted capacity and the access queue at DBCT show that it is highly unlikely that new entrants to the coal tenements market would gain access to DBCT, with or without declaration.
- 399 In conclusion, there is a wealth of evidence to suggest that criterion (a) cannot be satisfied for the DCBT service, on a number of grounds. As such, the only reasonable conclusion available to the QCA is that criterion (a) is not satisfied for the DBCT Service.

## 4 Criterion (d)

### 4.1 Summary

- 400 The QCA can only recommend that the DBCT service be declared by the Minister if it is satisfied that access (or increased access) to the relevant service, on reasonable terms and conditions, as a result of a declaration of the service would promote the public interest.<sup>284</sup>
- 401 DBCTM disagrees with the QCA's Draft Recommendation that criterion (d) is satisfied for the DBCT service.<sup>285</sup> On the basis of new information concerning DBCTM's contractual status and significant updates to the Access Framework, not previously considered by the QCA, DBCTM submits that declaration does not promote the public interest because, *inter alia*:<sup>286</sup>
- 401.1 **Declaration does not result in material economic benefits** which would not otherwise be promoted without declaration. The vast majority of capacity is contracted with evergreen renewal clauses ensuring that existing price and non-price terms of access will remain the same with or without declaration. In particular, even if criterion (a) is satisfied (which DBCTM has comprehensively demonstrated it is not), it follows that on the QCA's own analysis, any promotion of competition occurs in an extremely narrowly defined mining tenements market, as a result of hypothetical new entrants facing asymmetric disadvantages to existing users in this market.<sup>287</sup> The purported promotion of competition applies to an excessively narrow, hypothetical market and cannot be said to promote material economic benefits (including the promotion of investment) relevant to the public interest.
- 401.2 **Declaration does not result in a materially different environment for investment in dependent markets** because:
- 401.2.1 In respect of existing users, evergreen renewal clauses ensure that existing price and non-price terms of access will remain the same with or without declaration meaning that there is no change in incentives to invest with or without declaration;
  - 401.2.2 Regarding potential new entrants, the Access Framework preserves regulatory certainty including pricing certainty associated with 'hard-coded' price caps, such that there is no material difference in the environment for investment with or without declaration;
  - 401.2.3 Unregulated terminal access charges are not a significant determinant of investment in global coal markets;
  - 401.2.4 DBCTM has strong incentives to maximise demand for the use of its services and promote efficient investment irrespective of declaration; and,
  - 401.2.5 Declaration introduces the risk of regulatory error which diminishes DBCTM's incentives to invest relative to the future without declaration with no equivalent risk.

Comparing the future with and without declaration it is clear that there are no material differences in the environment for investment in dependent markets. If anything, the future

<sup>284</sup> Sections 76(2)(d) and 87C(2) of the QCA Act

<sup>285</sup> QCA Draft Recommendation, page C108

<sup>286</sup> DBCTM's May 2018 submission outlined the reasons that declaration does not promote the public interest. Those positions form part of this submission, and should be considered by the QCA in light of the new information contained within this submission (e.g. executed Access Framework, DBCTM's contract status)

<sup>287</sup> QCA Draft Recommendation, page C120, C126

without declaration promotes the public interest by preserving regulatory certainty, and promoting incentives to invest in DBCT itself.

#### 401.3 Declaration is associated with significant compliance and administrative costs.

## 4.2 Application and Interpretation of Criterion (d)

402 The statutory provisions of criterion (d) require that:<sup>288</sup>

access (or increased access) to the service, on reasonable terms and conditions, as a result of **declaration** of the service would **promote** the public interest.

403 Further, section 76(5) of the QCA Act requires the QCA to have regard to the following matters when assessing whether criterion (d) is satisfied:<sup>289</sup>

403.1 the effect that declaring the service would have on investment in:

403.1.1 facilities; and

403.1.2 markets that depend on access to the service;

403.2 the administrative and compliance costs that would be incurred by the provider of the service if the service is declared; and

403.3 any other matter the QCA considers relevant.

### Comments on the QCA's application of criterion (d)

404 Despite the QCA repeatedly stating that criterion (d) is *'an additional positive criterion that the QCA must be satisfied of'*,<sup>290</sup> the QCA's application of criterion (d) does little more than replicate its criterion (a) analysis, with little regard to the significant March 2018 legislative amendments. Specifically, the amendments require:

404.1 The QCA to be positively satisfied that declaration promotes the public interest. This is in stark contrast to the former test, which merely required that declaration 'not be contrary' to the public interest. This changes the onus, requiring the QCA to be positively satisfied that, when accounting for the overall costs and benefits of declaration, there will be a meaningful net public benefit;

404.2 That benefits and costs must be shown to have resulted from declaration. This requires the application of a 'with and without' test to ascertain the effect of declaration. As a matter of logic, the QCA must establish that there is a causal link between declaration and any flow on benefits said to arise from other public benefits that are said to result from declaration; and,

404.3 The legislation expressly requires the QCA to have regard to the administrative and compliance costs of declaration to the service provider. To dismiss this factor as 'not sufficiently material to have an impact on the public interest'<sup>291</sup> is to subvert the Parliament's clear intent that the regulatory costs associated with access regulation should be considered under criterion (d).

405 These amendments are more than mere semantics. They fundamentally change the nature of the test and the QCA's analysis in its draft recommendation does not afford sufficient regard to the amended test.

<sup>288</sup> Section 76(2)(d) of the QCA Act

<sup>289</sup> Section 76(5)(b)-(d) of the QCA Act – the factor in paragraph (a) is relevant only where the facility for the service extends outside Queensland

<sup>290</sup> QCA Issues Paper, page 23; see also QCA Draft Recommendation – Introduction QCA's approach to the access criteria and References, page 28

<sup>291</sup> QCA Draft Recommendation, page C118

### Criterion (d) requires a 'with and without' test

406 Pursuant to the March 2018 amendments to the QCA Act, criterion (d), like criterion (a), now focuses on the effect of *declaration*, rather than simply access.<sup>292</sup> Thus, to apply criterion (d) accurately, the claimed benefits and costs must be shown to flow from *access as a result of declaration* and the appropriate test to ascertain this is the well-established 'with and without' test used for criterion (a) and frequently deployed in competition analysis. Consistent with this, the QCA's Draft Recommendation provides that:<sup>293</sup>

It would be appropriate to use a 'future with and without' approach in order to identify those costs and benefits that can be expected to result from access (or increased access) to the service, on reasonable terms and conditions, as a result of declaration (as opposed to costs and benefits that may be expected anyway)(emphasis added).

407 This is significant in the present context because in the future without declaration:

407.1 The vast majority of contracted capacity will continue to be supplied on the terms that apply today for existing users, under their evergreen contracts; and

407.2 DBCTM will continue to provide open access to its services in the future without declaration on substantially similar terms at substantially similar prices for users under the Access Framework with a 'hard-coded' cap on the relevant TIC.

408 Accordingly, any difference in the future with and without declaration, to assess the public interest, relates to a very small proportion of capacity which equals the capacity of an existing user which no longer has mine production.

409 Thus, applying a future 'with and without' test, it simply cannot be maintained that declaration results in a relevantly different environment for economic efficiency, competition or investment because the promotion of benefits in a narrowly defined coal tenements market relating to hypothetical new entrants' acquisition of coal tenements is unlikely to be sufficiently material to impact on any assessment of the public interest.

### 4.3 Application of criterion (d) to DBCT's service

410 This submission's analysis of criterion (d) is structured as follows:

410.1 Economic effects of declaration

410.2 The effect of declaration on investment

410.3 Administrative, compliance and regulatory costs

410.4 Other considerations

### 4.4 Economic effects

#### Declaration does not promote competition in dependent markets

411 As discussed in relation to criterion (a), declaration of the DBCT service does not promote a material increase in competition in any dependent market, because DBCTM has no ability or incentive to exercise market power due to the presence of binding market, contractual, commercial and regulatory constraints

<sup>292</sup> See *Virgin Blue Airlines Pty Limited* [2005] ACompT 5 at [148]-[153]; c.f. *Sydney Airport Corporation Limited v Australian Competition Tribunal* [2006] FCAFC 146 at [81]

<sup>293</sup> QCA Draft Recommendation, page 29; See also Productivity Commission, *National Access Regime*, Report No. 66 (25-Oct-13), page 21

including the Framework which apply without declaration.<sup>294</sup> Accordingly, there can be no impact on competition in dependent markets as a result of declaration.

### Even if criterion (a) is satisfied, the benefit of increased competition resulting from declaration is trivial in the assessment of the public interest

- 412 The significance of any benefits from declaration are highly relevant in assessing whether declaration relevantly promotes the public interest. That is, in the criterion (d) context, for the QCA to conclude that declaration 'generates overall gains to the community'<sup>295</sup> and that 'the community as a whole is better off as a result of declaration',<sup>296</sup> the benefits from declaration must be shown to result in sufficiently meaningful economic benefits to overcome the inevitable costs and frictions of regulation.<sup>297</sup> To this end, the NCC has previously raised concerns that criterion (a) may be satisfied where the market in which competition will be promoted is of limited size and importance, however that in such a situation, criterion (d) is 'unlikely to be satisfied because the competitive benefits of access are likely to be outweighed by the costs of regulation'.<sup>298</sup>
- 413 Thus even if, contrary to DBCTM's submissions, the QCA in its final recommendation determines that criterion (a) is satisfied, DBCTM submits that the coal tenements market in which the QCA finds declaration would promote a material increase in competition, is so narrowly defined that any benefits arising from a promotion of competition would be so insubstantial that it would be of no relevance to determining the impact of declaration on the public interest.<sup>299</sup>
- 414 It is apparent that the relevant effect on competition resulting from declaration is extremely limited, resulting in alleged benefits of no relevance to the public interest, for the following reasons.
- 415 First, the relevant theory of harm for criterion (a) relates to DBCTM having an incentive and ability to act in a way that deters entry and efficient investment by **hypothetical new entrants acquiring mining tenements** who are not currently protected by existing contractual rights. As the total of contracted tonnage and the total of tonnage in the access queue currently materially exceeds current capacity of 84Mtpa (and even expanded capacity of 92Mtpa) it is most likely that any hypothetical new entrant will not obtain access to DBCTM, with or without declaration. Accordingly, there cannot be any promotion of competition arising from declaration as new entrants face a material barrier to entry to the tenements market by not having a right to access. As a result, the asserted economic benefits flowing from declaration are non-existent, and there cannot be any public benefits arising from declaration.
- 416 Second, in any event, even if a potential new entrant could access capacity (which it cannot as demand exceeds capacity for the entirety of the declaration period), benefits of access would be trivial as it would only apply to a small subset of potential DBCT users.

<sup>294</sup> See also DBCTM May 2018 Submission at [424]

<sup>295</sup> QCA Approach to the Access Criteria Paper, December 2018, page 28

<sup>296</sup> Productivity Commission, *National Access Regime*, Report No. 66 (25 October 2013), page 176. Also see *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2 at [1161]

<sup>297</sup> The NCC has previously recognised that the costs of regulation may outweigh the benefits, including criterion (a) and criterion (b) benefits of declaration in previous matters including NCC, Coverage, revocation and classification of pipelines: A guide to the function and powers of the National Competition Council Under the National Gas Law Part B - Coverage, revocation of coverage and classification of pipelines, [5.158]; NCC, No coverage determination for the proposed QCLNG Pipeline: Application for a 15 year no coverage determination for the proposed QCLNG Pipeline, 2010, [6.94]; NCC, APLNG no-coverage application: Application for a 15 year no-coverage determination for the proposed APLNG Pipeline, 2012, [9.8] to [9.13]; NCC, Herbert River cane railway, 2010, [10.50]

<sup>298</sup> NCC, *Submission to Productivity Commission inquiry*, 8 February 2013, page 21; DBCTM May 2018 Submission at [420]

<sup>299</sup> DBCTM May 2018 Submission at [421], citing NCC, Coverage, revocation and classification of pipelines: A guide to the function and powers of the National Competition Council Under the National Gas Law Part B - Coverage, revocation of coverage and classification of pipelines, [5.158]; NCC, No coverage determination for the proposed QCLNG Pipeline: Application for a 15 year no coverage determination for the proposed QCLNG Pipeline, 2010, [6.94]; NCC, APLNG no-coverage application: Application for a 15 year no-coverage determination for the proposed APLNG Pipeline, 2012, [9.8] to [9.13]; NCC, Herbert River cane railway, 2010, [10.50]

- 417 Third, the Access Framework provides regulatory certainty for new and existing users that access will continue to be provided on reasonable terms and conditions (with hard-coded caps on pricing), to ensure that the future without declaration is substantially similar to the future with declaration. That is, new entrants are protected by the Access Framework which provides this small subset of potential customers of DBCT with regulatory and pricing certainty such that there is no material difference in the opportunities and environment for competition and investment with or without declaration.
- 418 Fourth, independently of, and in addition to, the material constraints on DBCTM's market power imposed by existing evergreen contracts and the Access Framework, compelling market and regulatory constraints discipline DBCTM's market power to protect existing and new users.<sup>300</sup> These constraints ensure that there is no material difference in the opportunities and environment for investment in related markets with or without declaration.
- 419 On any view, even if criterion (a) is satisfied, any purported economic benefits flowing from declaration are extremely limited (if not non-existent) with regard to:
- 419.1 The inescapable fact that total demand for capacity materially exceeds capacity demonstrating that there is no capacity available for hypothetical new users either with or without declaration;
  - 419.2 The immateriality of the exceedingly narrow geographic definition of the coal tenements market relating to the acquisition of mining tenements by hypothetical new users;
  - 419.3 The extent to which existing users are insulated from purported price or regulatory uncertainty due to evergreen contracts;
  - 419.4 The extent to which new users are protected under the Access Framework with hard-coded pricing protections; and
  - 419.5 The binding competitive, contractual and regulatory constraints which discipline DBCTM irrespective of declaration.
- 420 DBCTM considers that this irrefutably establishes that criterion (d) cannot be satisfied if a 'with and without' approach is appropriately applied as there is no material difference in the opportunities and environment for investment in coal tenements or coal haulage infrastructure markets with or without declaration. The inevitable conclusion, when weighing up the costs and benefits of the future with declaration against the future without declaration, is that declaration does not promote the public interest.

### **The purported effect of declaration applies to a market in which no capacity exists**

- 421 In its draft recommendation the QCA concludes that without declaration the alleged asymmetry in the terms of access between new and existing users will result in potential efficient new entrants being deterred from entering the coal tenements market. As a consequence of this the QCA considers that there will be a material adverse impact on competition in the coal tenement market without declaration.<sup>301</sup>
- 422 As explained above in the discussion of criterion (a), the information contained in the Timbrell Declaration unequivocally demonstrates that future entrants to the coal tenements market will not be able to gain access to capacity at DBCT, in any event. This is because existing, demonstrable demand for capacity at DBCT over the declaration period (incorporating the total existing contracted capacity and the queue) exceeds the total capacity of DBCT of 84.2Mtpa, as well as the maximum capacity of DBCT of 102Mtpa including any viable expansions over the proposed declaration period.
- 423 This means that at no point over the proposed declaration period would a potential entrant to the coal tenements market have any certainty as to access at DBCT, either with or without declaration. Hypothetical

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<sup>300</sup> DBCTM May 2018 Submission at [424]

<sup>301</sup> QCA Draft Recommendation, pages C93- and C94

new entrants are not 'crowded out' by existing users, they are simply highly unlikely to obtain access with or without declaration.

424 DBCTM submits that this evidence disposes of the QCA’s erroneous arguments, resulting in the inevitable conclusion that criterion (d) is not satisfied.

**The purported effect of declaration on the mining tenements market is immaterial**

425 The QCA finds, in its draft recommendation, that potential new entrants will be foreclosed from acquiring coal tenements in the Hay Point catchment without declaration, because incumbents with existing access to DBCT will have access on better terms than new entrants and will attach a greater valuation to Hay Point coal tenements. Even if it is accepted that this would result in an adverse impact on competition, it would apply only to competition for tenements that existing users might seek to develop to use capacity rights that will be freed up by the expiry of the economic lives of their existing mines. It is clear this impact on competition in such narrowly defined circumstances is so insignificant that any purported benefits of declaration will be negligible from a public-interest point of view.

426 This is borne out by evidence provided in the Timbrell Declaration which shows that the quantity of contracted coal capacity at DBCT, that existing users might seek to replace by developing new tenements (based on the expiry of economic life for relevant mines).<sup>302</sup>

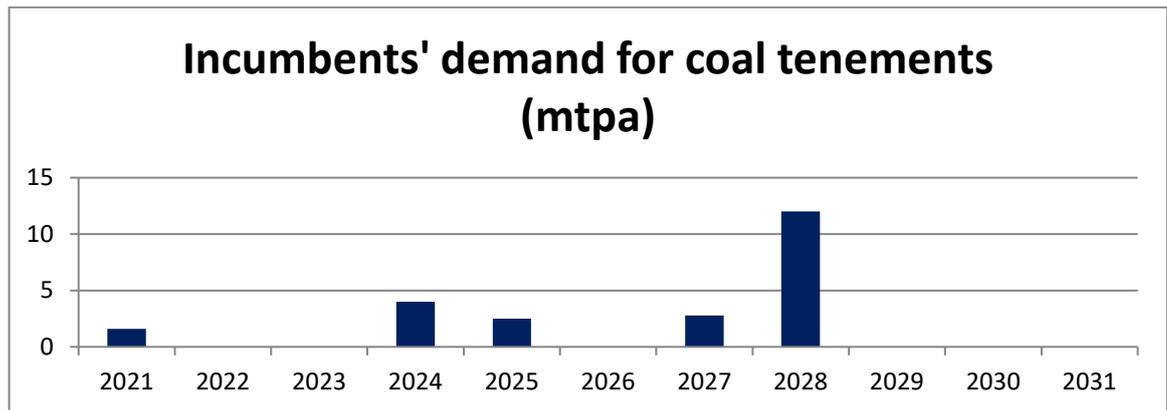
427 This incumbent demand and existing mine life is provided in the table below

**Figure 24: Capacity at DBCT allocated to mines reaching end of economic life in Declaration Period**

Miner and mine	Incumbent demand for coal tenements (mtpa)	Economic life ending

428 The implications of this for existing users’ demand for new coal tenements are shown in the following chart.

<sup>302</sup> Appendix 3, Timbrell Declaration, page 7

**Figure 25: Incumbents' demand for coal tenements**

429 The following observations can be made about this:

429.1 First, the incumbent demand for coal tenements is small;

429.2 Second, the timing of the demand is staggered;

429.3 Third, most years involve no incumbent demand for tenements; and,

429.4 Fourth, the most significant incumbent demand for tenements [REDACTED] which diminishes the immediacy of any material crowding out effect.

430 Notwithstanding DBCTM's evidence as to the inappropriateness of defining relevant harm to competition in relation to such a narrowly defined market, this hypothetical disadvantage that could be suffered by potential new entrants is simply **immaterial from a public-interest viewpoint**.

431 For example, adopting the QCA's analysis:

431.1 the first incumbent to compete for the acquisition of tenements is [REDACTED] of the total demand for DBCT capacity at this time; and

431.2 at its highest, [REDACTED] of the total demand for DBCT capacity at this time.

432 Accordingly, the competition which is said to be preserved is miniscule and of no relevance for the 'discretionary value judgment'<sup>303</sup> required of assessing if the imposition of access regulation of significant infrastructure promotes the public interest. It is simply not credible to maintain a position that this non-existent, and at most immaterial, purported positive effect on a hypothetical subset of the coal tenements market has a relevant bearing on the public interest.

433 Moreover, the relevant effect on investment for new entrants must apply the relevant counterfactual in which new users acquire access to DBCT on terms and conditions pursuant to the Access Framework. That is, even if a decision-maker concludes:

433.1 First, that there is available capacity for a new entrant over the period of declaration (which there is not); and

433.2 Second, that the relevant preservation of competition resulting from declaration is substantial enough to be of relevance to the public interest (which it is not),

<sup>303</sup> *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36 at [42]

the decision-maker must then compare this future with declaration (in which hypothetical new entrants could not be 'crowded out' by incumbents demand for coal tenements) against the future without declaration in which new users can acquire access to DBCT on reasonable price and non-price terms pursuant to the Access Framework with hard-coded caps on pricing. Finally, the decision-maker must then conclude that the difference in the environment and opportunities for competition, efficiency and investment is substantial enough for declaration to 'promote the public interest'.

- 434 On any view, a decision to this effect ignores compelling factual matters and would be wholly irrational and unreasonable.

## 4.5 Investment effects

### Declaration does not promote investment in dependent markets

- 435 In its Draft Recommendation, the QCA considered that declaration is likely to have a net positive impact on investment incentives in facilities because declaration 'would likely promote efficient entry in the coal tenements market, which is likely to result in efficient investment in mining operations that is likely to have an overall positive impact on the incentive to invest in the coal supply chain.'<sup>304</sup> Further, the QCA considered that declaration is likely to promote efficient investment in coal mining resulting in the promotion of:

- 435.1 Investment in the rail network;<sup>305</sup>
- 435.2 Investment in the haulage infrastructure;<sup>306</sup>
- 435.3 Increased demand for capacity to export coal;
- 435.4 Regional and state economies' exploration and development of coal resources;<sup>307</sup>
- 435.5 Higher coal export revenues;<sup>308</sup> and,
- 435.6 Higher coal royalties.<sup>309</sup>

- 436 Notwithstanding the direct challenge to the factual foundations presented above, DBCTM submits that this reasoning grossly overstates the effect of declaration on incentives to invest and fails to appropriately apply a 'with and without' test to ascertain the extent to which investment in coal tenements and coal infrastructure would occur irrespective of declaration.

- 436.1 First, for users with evergreen contracts, there is no relevant effect on incentives to invest with or without declaration as they are able to roll-over existing terms. This concerns 98% of contracted capacity.
- 436.2 Second, adopting the QCA's analysis, the sole effect of declaration for the environment and opportunities for investment in coal tenements concerns the acquisition of coal tenements by hypothetical new entrants who cannot avail themselves of evergreen renewal clauses contained in existing contracts. As noted above, there is no relevant capacity available for these entrants for the duration of the declaration period, and accordingly the effect does not exist. Further, as noted above any theoretical effect concerns the deterrence of new users by existing users which would only acquire coal tenements upon the exhaustion of existing mines' capacity which occurs on a staggered basis. Third, the relevant investment effect must be shown to flow from declaration, and the promotion of incentives to invest with declaration must not be likely to result in the future

<sup>304</sup> QCA Draft Recommendation, pages C111

<sup>305</sup> QCA Draft Recommendation, pages C115 and C127

<sup>306</sup> QCA Draft Recommendation, pages C115 and C127

<sup>307</sup> QCA Draft Recommendation, page C124

<sup>308</sup> QCA Draft Recommendation, page C127

<sup>309</sup> QCA Draft Recommendation, pages C125 and C127

- without declaration in which terms and conditions of access for new users are governed by the Access Framework, which preserves regulatory certainty for price and non-price terms of access.
- 436.3 Fourth, the QCA's reasoning inappropriately assumes that unregulated port access charges are a determinative consideration underpinning significant investment in coal tenements. Such a proposition is divorced from the commercial reality that unregulated port access charges are not (and will never be) a significant determinant of investment in global coal markets.
- 436.4 Fifth, the relevant investment effect must have regard to DBCTM's strong incentives to maximise demand for the use of its services and promote efficient investment irrespective of declaration;
- 436.5 Sixth, the 'overall positive impact' on incentives to invest must have regard to the adverse effect on incentives to invest in the DBCT facility itself, with regard to risks associated with regulatory error;
- 436.6 Finally, claims that increased investment resulting from declaration gives rise to a myriad of broad economic benefits, including increased coal mining investment, increased coal haulage infrastructure investment, regional and state economic growth and increased State royalties inappropriately fails to scrutinise the extent to which declaration results in flow-on benefits said to result from increased incentives for hypothetical new entrants to engage in efficient investment. That is, this unlimited 'but-for' analysis confuses benefits resulting from 'investment resulting from declaration' with benefits flowing from coal mining and coal infrastructure investment per se, which would occur with or without declaration of the coal handling service at DBCT.

We address each point in turn.

*Declaration has no effect on incentives to invest for existing users*

- 437 Existing users avail themselves of the same terms and conditions of access by rolling over evergreen contract renewal clauses, meaning that for existing users, there is no change in incentives to invest in tenements or haulage markets with or without the declaration of the DBCT coal handling service.

*The sole investment effect in any dependent market is extremely limited (if not non-existent)*

- 438 As noted above, the narrow dependent market in which competition might possibly be promoted by declaration is the market for coal tenements in the Hay Point catchment. To the extent that competition is promoted in this market, then investment is only promoted in this market. There are two fatal criticisms of this theory, namely that:
- 438.1 total demand for DBCT capacity exceeds available capacity over the period of declaration; and
- 438.2 that the extent of the 'crowding out' effect is extremely limited as existing mines' are scheduled to exhaust operational capacity on a staggered basis over the next 15 year period, leading to new demand for coal tenements from existing users that is miniscule compared to the total demand for capacity at DBCT.

*The future without declaration provides access on terms determined under the Access Framework*

- 439 With respect to new users, the criterion (d) analysis must consider the extent to which any incentive to invest with declaration differs compared to the incentive to invest which would prevail in the future without declaration in which new entrants access DBCT on price and non-price terms of access determined under the Access Framework.
- 440 In this context, the Framework preserves regulatory certainty, including pricing certainty, in which any potential price increase is capped.

- 441 Under the executed deed poll, DBCTM is prevented from charging new users a TIC that is more than \$3.00 per tonne greater than what the QCA would determine for the existing terminal component. The only circumstances where DBCTM can charge more than this is where the QCA would determine a TIC for the new terminal component which would exceed the existing terminal component TIC + \$3.00. In those circumstances, DBCTM can only charge up to the equivalent of a QCA determined TIC for that terminal component.
- 442 This means that access charges will be similar 'with and without' declaration – in most cases no greater than \$5.50 per tonne.<sup>310</sup> As noted above, the QCA concluded in its draft recommendation, charges of \$8.50 would not appear to be materially different from the charges applying to existing users.<sup>311</sup>
- 443 Accordingly, given that the sole investment effect concerns the promotion of incentives to invest for new entrants, and new entrants will not suffer adverse terms and conditions of access in the future without declaration, there is no basis to conclude that there is any positive effect on incentives to invest in dependent markets resulting from declaration which would not otherwise arise without declaration.

*Unregulated port access charges are not a significant determinant of investment in global coal markets*

- 444 As noted above, and in DBCTM's May 2018 Submission,<sup>312</sup> access charges are not a determinative factor in a miner's decision whether or not to enter the coal tenements market. As acknowledged by the National Competition Council in its recent preliminary view on revoking declaration at the Port of Newcastle, miners face much greater risks than those arising from unregulated port charges. As a result, the uncertainty relating to access charges with or without declaration is too small to play a determinative role in a decision whether or not to invest in the coal tenements market.<sup>313</sup>

*DBCTM has strong incentives to promote efficient investment*

- 445 Irrespective of declaration, DBCTM has strong incentives to maximise utilisation because it is not vertically integrated and it has no ability or incentive to deter efficient investment in and efficient entry into any market.

*Declaration has adverse effects on incentives to invest in the regulated facility*

- 446 The QCA acknowledged that declaration is associated with the risk of regulatory error and that the approval and operation of access undertakings, unless properly implemented, 'has the potential to lead to regulatory error, which could impact on investment incentives'.<sup>314</sup>
- 447 In the absence of merits review this risk is compounded,<sup>315</sup> and has an unequivocal adverse effect on incentives to invest in regulated facilities.<sup>316</sup> In this regulated environment, there is the 'ever-present'<sup>317</sup> risk that WACC determinations are inefficiently low, distorting allocative, productive and dynamic

<sup>310</sup> Based on the current regulated TIC for the existing terminal of ~\$2.50 plus the maximum possible spread of \$3.00/t. DBCTM notes that this is the ceiling TIC, and an arbitrator must determine a price between the floor and ceiling TIC

<sup>311</sup> QCA Draft Recommendation, page C86

<sup>312</sup> DBCTM May 2018 Submission at [482]

<sup>313</sup> HoustonKemp March 2019 Report on (a), section 6

<sup>314</sup> QCA Draft Recommendation, page C112

<sup>315</sup> DBCTM May 2018 Submission at [480]-[481]

<sup>316</sup> DBCTM May 2018 Submission at [460] to [463], and [466] to [468] and evidence of delayed, or otherwise insufficient investment at [475] to [479]

<sup>317</sup> Productivity Commission, *Productivity Commission Inquiry Report, Price Regulation of Airport Services*, No. 19, 23 January 2002, page 355

efficiency.<sup>318</sup> The adverse effect of investment in regulated facilities is well established and is the source of dynamic inefficiencies associated with declaration.<sup>319</sup>

- 448 DBCTM relies on its initial submissions on this point and sees no warrant for the QCA's view that heavy-handed regulation of the DBCT facility has a beneficial impact on investment in DBCT, a view that DBCTM as owner of the DBCT facility continues to disagree with.

#### *Flow-on 'wider economic benefits' of investment in infrastructure*

- 449 The QCA fails to consider the extent to which the increase in investment allegedly caused by declaration leads to flow-on benefits. Such benefits will arise from infrastructure investment *per se*, (i.e. investment in the CQCN infrastructure and mining tenements market that would have occurred in any event). Upon close scrutiny of the actual effect of declaration on incentives to invest in related markets (including proper regard to the existence of evergreen contracted capacity and the operation of the Access Framework), it is simply not the case that investment in coal haulage infrastructure and mining tenements by existing users are relevantly promoted, looking forward, by declaration of DBCT's coal handling services as existing users are beneficiaries of existing evergreen renewal clauses.
- 450 This 'but-for' analysis concludes that the form of economic regulation of the price and non-price terms of access to DBCT has a material effect on regional economic development, State royalties, and investment in Queensland's resource sector, and cannot be sustained with an appropriate application of the 'with and without' test.

#### **Conclusion on investment effects of declaration**

- 451 On balance, weighing up the adverse and positive effects on incentives to invest in related markets and DBCT itself, it is apparent that there is no relevant difference in the environment and opportunities for investment with or without declaration for existing users and new users. Further, declaration is associated with an unequivocal 'chilling effect' on incentives to invest in DBCT itself which would not arise under the Access Framework. On balance, there is no material positive effect on investment in dependent markets with or without declaration, and an unequivocal adverse effect on incentives to invest in DBCT with declaration, demonstrating that declaration does not promote the public interest.

#### **4.6 Administrative, compliance and regulatory costs**

- 452 The QCA considers that *'the administrative and compliance costs incurred by DBCT Management as a result of declaration are not sufficiently material to have an impact on the public interest'*.
- 453 In light of the clear statutory requirement to have regard to these costs, the QCA's basis for dismissing these costs is not clear. DBCTM notes that it is difficult to ascertain at what point 'regulatory costs' become 'sufficiently material to have an impact on the public interest'. Further, DBCTM submits that when compared against the limited, if any, benefits flowing from declaration upon hypothetical dependent markets discussed above, these quantified, tangible, compliance costs assume comparative significance.
- 454 DBCTM relies upon its forecast regulatory costs of approximately \$58 million over the 10 year declaration period<sup>320</sup> and its May 2018 Submission to submit that regulatory costs associated with declaration are

<sup>318</sup> DBCTM May 2018 Submission, [466]-[468] and [478] noting comments by the Chairman of the ACCC, the RBA and Commonwealth Treasury that WACC determinations concerning DBCT contributing to insufficient investment at DBCT

<sup>319</sup> DBCTM May 2018 Submission at [460] to [463], citing Productivity Commission, *National Access Regime*, Report No. 66, 25 October 2014, pages 28, and 179 to 181; *National Competition Policy Review Report* (Hilmer Report), 25 August 1993, page 251; NCC, *Declaration of Services - A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 at [6.11]; Harper et. Al *Competition Policy Review (Final Report)*, page 439

<sup>320</sup> DBCTM May 2018 Submission at [485] to [489]

significant. In particular the development and administration of its access undertakings impose significant resourcing costs in what has become a protracted and complex regulatory process.<sup>321</sup>

- 455 On any view, these costs, with regard to section 76(5)(c) are at the very least, a relevant factor to be taken into account in the holistic assessment of costs and benefits of the future 'with and without' declaration. To be fleetingly considered and dismissed as 'not sufficiently material' is unsatisfactory and does violence to Legislature's clear intent for decision-makers to consider regulatory costs under criterion (d) with the introduction of this specific mandatory factor. If administrative and compliance costs were to never have an impact on the public interest, section 76(5)(c) would be obsolete. This cannot be the intention of the provision as it is a fundamental principle of statutory interpretation that Parliament does not legislate redundancies.<sup>322</sup>
- 456 The administrative and compliance costs identified by DBCTM are substantial costs that are not faced by other comparable ports in the region, and are substantial even compared to the costs facing other regulated businesses. Indeed, given the significance of these costs, and the fact that the QCA has determined them to be immaterial, it is difficult to envisage what level of costs would be sufficient to be taken as having a material impact on the public interest, under the QCA's analysis.
- 457 Even if these costs are passed on to users, they nonetheless constitute economic costs impacting on the profitability of entities in the coal chain – i.e. the public interest. From a social welfare and efficiency perspective, required by the object of Part 5 and criterion (d) jurisprudence, regardless of the incidence of these costs, they are significant 'social costs' clearly associated with declaration.<sup>323</sup>
- 458 In addition to the regulatory costs incurred by DBCTM, the costs borne by the QCA and other stakeholders including costs of developing and administering access undertakings, and complying with regulatory expansion processes, are relevant to the assessment of regulatory costs imposed by declaration.<sup>324</sup>
- 459 In assessing the public interest, the regulatory costs of access regulation by the QCA must be considered as a material public detriment resulting from declaration likely to be avoided, to a significant extent, in the future without declaration under the Access Framework.

## 4.7 Other considerations

- 460 The QCA discusses a range of other matters including:
- 460.1 The impact of changes in access charges and redistribution of economic rents
  - 460.2 Costs incurred by access seekers and holders
  - 460.3 Environmental benefits alleged to result from declaration
  - 460.4 Other benefits

### Changes in access charges and the redistribution of economic rents

- 461 In its Draft Recommendation, the QCA considers that *'the relevant issue in assessing whether declaration will promote the public interest is not redistribution of economic rents per se, but the material and adverse*

<sup>321</sup> DBCT's 2006 Access Undertaking was developed over approximately 2 years; the 2010 Access Undertaking over approximately 3 years; the 2017 Access Undertaking over approximately 2 years and the 2021 Access Undertaking is similarly anticipated to be a multi-year regulatory process

<sup>322</sup> Project Blue Sky v Australian Broadcasting Authority [1998] HCA 28 at [71]

<sup>323</sup> *The Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* [2012] HCA 36, at [111] noted that "many if not all of those matters which can be described as "social costs" could be relevant to the [public interest criterion] assessment"

<sup>324</sup> NCC, *Declaration of Services - A guide to declaration under Part IIIA of the Competition and Consumer Act 2010 (Cth)*, April 2018 at [6.13]; DBCTM May 2018 Submission at [485] to [489]

*impact that not declaring the service could have on investment in the coal tenements market*.<sup>325</sup> To the extent that this implicitly agrees with the economic proposition that mere changes to the access price is neutral in public interest terms,<sup>326</sup> then DBCTM endorses this approach. To the extent that investment in the coal tenements market is possibly deterred by changes in the access charge applying to new entrants, then this issue is addressed extensively in criterion (a). For present purposes, DBCTM notes that in any event, the subset of DBCTM's customers this applies to is a small portion of the coal tenements market and is immaterial in the context of assessing the public interest, and further that any potential economic rents under assessment have been explicitly capped in the executed Access Framework.

### Costs incurred by access seekers and holders

462 The QCA correctly identified that *'there is insufficient evidence to support a conclusion that any reductions in compliance costs borne by access seekers and holders as a result of declaration would be material enough to promote the public interest'*. DBCTM endorses and agrees with this approach, noting that there are inevitable costs associated with negotiation of contracts in any market environment.<sup>327</sup> To the extent that Users seek to substantiate these costs in subsequent submissions, DBCTM relies on its initial submissions on this point and emphasises that these costs have not previously been considered by the NCC, are not referred to in section 76(5)(c), are clearly of limited materiality and any such *'compliance cost countervailing benefit'* must withstand scrutiny and be netted off against the likely costs incurred by users acquiring access under the Access Framework.<sup>328</sup>

### Environmental benefits

463 DBCTM agrees with the QCA that environmental management is already heavily regulated by Commonwealth and State governments, and by its lease.<sup>329</sup> Further, DBCTM agrees that there is no basis upon which to suggest that a future without declaration would lead to the development of smaller terminals resulting in environmental issues.

## 4.8 Conclusion on criterion (d)

464 This submission sets out compelling reasons as to why criterion (d) is not satisfied. In summary:

464.1 Declaration does not result in economic benefits which would not otherwise be promoted without declaration principally because the only relevant effect on a dependent market in the QCA's own analysis occurs in a market which has no relevant capacity, and is, in any event, not material from the perspective of the public interest.

464.2 Declaration does not result in a materially different environment for investment in dependent markets because the only relevant affected market has no capacity, and is in any event immaterial, and the vast majority of users' incentives to invest will remain unchanged with or without declaration. Further, the Access Framework preserves regulatory and pricing certainty, investment in mining is driven by global factors unrelated to the DBCT TIC, DBCTM has incentives to promote efficient investment irrespective of declaration, and declaration is associated with adverse effects on incentives to invest in the regulated facility.

464.3 Declaration is associated with significant compliance, administrative and regulatory costs.

465 Weighing up the likely benefits and costs of the future with and without declaration, demonstrates that access on reasonable terms and conditions as a result of declaration does not promote the public interest.

<sup>325</sup> QCA Draft Recommendation, section 5.5.1, pages C120 to C121

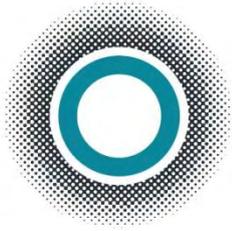
<sup>326</sup> DBCTM July 2018 Submission at [483] to [486]

<sup>327</sup> QCA Draft Recommendation, page C122

<sup>328</sup> DBCTM May 2018 Submission at [490]

<sup>329</sup> QCA Draft Recommendation, page C123

**Appendix 1 HoustonKemp report on (b)**



**HOUSTONKEMP**  
Economists

# Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (b)

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A report for DLA Piper

March 2019

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## Executive Summary

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We have been asked by DLA Piper (DLA), on behalf of DBCT Management Pty Limited (DBCTM), to review whether the coal handling service provided by the Dalrymple Bay Coal Terminal (DBCT) is likely to satisfy criterion (b) of section 76(2) of the *Queensland Competition Authority Act 1997* (QCA Act). The focus of our review is the draft recommendation published by the Queensland Competition Authority (QCA) on 18 December 2018 and the expert advice upon which it relies. Our report should be read in conjunction with two previous reports we have prepared similarly addressing whether the coal handling service provided by DBCT (the DBCT service) satisfies criterion (b).

The principal economic elements of criterion (b) are:

- ∂ the definition of the market within which the DBCT service is supplied;
- ∂ the estimation of total foreseeable demand in the market; and
- ∂ the assessment of whether total foreseeable demand in the market can be met at least cost by DBCT or by two or more facilities.

In relation to each of these elements, there are substantive differences between the approach applied to assess criterion (b) by the QCA in its draft recommendation as compared to our earlier advice.

### Defining the relevant market

There are important differences between the way in which we and the QCA assess the substitutability of services that are material to our conclusions in relation to the scope of the relevant market. In contrast to our views:

- ∂ the QCA considers that only substitution due to changes in price or quality is relevant to defining the boundaries of the market and in implementing this approach:
  - > considers only the price and quality of the *existing* capacity at DBCT in this assessment, rather than the price and quality of *expanded* capacity at DBCT; and
  - > considers substitutability of coal handling services in very coarse terms by reference to representative users in the Goonyella system and elsewhere, rather than by reference to the costs and incentives faced by each mine;
- ∂ the QCA considers that only transactions involving long term contracts are relevant to defining the boundaries of the market, and that transactions for throughput can be discounted from this assessment.

Underpinning the QCA's analysis is a conflation of the distinct concepts of 'demand for' and 'use of' a service. The QCA's approach assumes that demand in the market cannot include volumes that are served by other terminals.

These assumptions draw the QCA to the incorrect conclusion that DBCT is the only supplier in the relevant market. In other words, the QCA assumes what it sets out to show. This leads it to discount evidence that there has been, and continues to be, close competition between the supply of the DBCT service from *expanded* capacity and other coal handling services for Goonyella system users.

Our approach to defining the market differs from that of the QCA because we consider substitutability by reference to what miners have revealed in their choice of coal handling services, either at the present time or in the recent past. This is consistent with the standard approach to market definition as described in economic literature and Australian case law.

Under this framework, any factor that drives value to users is relevant to substitution. Importantly, this approach allows for the prospect that demand arising from customers in the market may exceed the capacity of DBCT to meet that demand either now or at any time in the future. If demand in the market meets or exceeds the capacity of DBCT, then it is relevant to consider the degree of substitutability between the *expanded* capacity of DBCT and coal handling services provided by other facilities. The QCA does not consider this substitutability question.

## Estimating total foreseeable demand in the market

The QCA's disallowance of demand in the market that exceeds the amount that can be supplied by DBCT causes it to underestimate total foreseeable demand in the market for the service.

Total foreseeable demand in the market is the total demand arising from customers who are in the market. The fact that some of these volumes may currently, or in the future, be served by a facility that is not DBCT is irrelevant to the calculation of total foreseeable demand in the market.

The QCA's approach appears to conflate the concepts of 'demand in the market' and 'use of the DBCT service'. Demand by an individual for a product reflects the maximum quantity that he or she is willing to consume at any given price. Demand in the market may exceed use of the DBCT service if DBCT is at capacity such that other suppliers are meeting some of the demand of consumers in the market.

The QCA's error manifests itself as:

- ∅ for customers that the QCA considers are in the market, the estimation of those customers' use of the DBCT service, rather than their total demand; and
- ∅ the understatement by the QCA of the number of customers in that market because it underestimates the scope of the market for the service.

The table below compares the QCA's estimates of total foreseeable demand to estimates of total foreseeable demand in the market, using MMI Advisory data where possible. The table shows that total demand in the market is higher than 93 mt, amounting to 103 mt using the QCA's proposed market and 175 mt with the corrections to this approach set out above.

### Estimates of total foreseeable demand with the QCA's market definition

Year	Total demand for the service (QCA's approach)	Total demand in the market (QCA's market definition)	Total demand in the market (HoustonKemp's market definition)
2021	92.99	102.99	164.67
2022	89.14	99.14	163.04
2023	89.10	99.10	163.94
2024	84.68	94.68	161.17
2025	87.14	97.14	168.71
2026	91.71	101.71	174.94
2027	91.71	101.71	174.94
2028	91.71	101.71	174.94
2029	91.71	101.71	174.94
2030	91.71	101.71	174.94

Source: MMI Advisory, AME

## Assessing the least cost facility or facilities

The QCA's approach to the assessment of least cost is undertaken by reference to total charges for coal handling, rail access and rail haulage. The rationale for this approach appears to be that the QCA:

- ∂ adopts a 'total cost' standard, which includes sunk costs;
- ∂ equates this to a 'average unit cost' standard; and
- ∂ concludes that price is a suitable proxy for this measure of cost.

We agree that the QCA's 'total cost' standard is a reasonable and appropriate basis to assess least cost. Our own analysis is conducted on the same basis since, as we explain below, properly considered, there is no difference between an assessment of least cost on a 'total cost' basis as compared to an assessment of least cost on an 'incremental cost' basis.

However, the QCA makes a fundamental error in assuming that an 'average cost' standard is the same as a 'total cost' standard. This assumption causes the QCA's assessment of least cost to be distorted, because it:

- ∂ ignores the sunk costs associated with other terminals when considering scenarios under which DBCT meets all foreseeable demand – even though the sunk costs of those other terminals will continue to be incurred in these scenarios; but
- ∂ takes into account these same sunk costs when considering scenarios under which some foreseeable demand is met at those other terminals.

The result of this distortion is to *understate the total costs* of meeting all foreseeable demand at DBCT, or to *overstate the incremental costs* of meeting some of this demand at the alternative terminal. Put another way, the QCA's preferred total cost standard must be applied with a consistent approach to costs, so that costs incurred in each scenario are counted in each scenario.

Alternatively, if the QCA's assessment of least cost is corrected so as to be expressed on an incremental cost basis (or, equivalently, a consistent total cost basis) then its conclusion that criterion (b) is satisfied is reversed.

Table 9 in Part C of the QCA's draft recommendation sets out its assessment of least cost. The table below corrects the QCA's analysis in table 9 by presenting it on a consistent incremental cost basis. These results indicate meeting total foreseeable demand in excess of the existing capacity of DBCT is substantially more costly at DBCT than it is at either AAPT, RGTCT or WICET. It follows that it is not least cost for total foreseeable demand in the market to be met at DBCT.

### An incremental cost assessment of supply chain cost, cost to society (\$ per tonne)

Cost components	Expanded capacity at DBCT	Existing capacity at AAPT	Existing capacity at RGTCT	Existing capacity at WICET
Below-rail cost	\$0.62	\$1.82	\$1.23	\$1.23
Above-rail cost	\$1.63	\$2.52	\$2.27	\$2.27
Coal handling cost	\$8.50	\$1.54	\$1.14	\$1.23
Supply chain cost	\$10.74	\$5.87	\$4.64	\$6.73
<i>Cost difference relative to accessing DBCT</i>		<i>\$4.87 less (45%)</i>	<i>\$6.10 less (57%)</i>	<i>\$4.01 less (37%)</i>

Source: QCA, HoustonKemp analysis

Further, even adopting the QCA's approach to assessing least cost, it would not be possible for DBCT to meet estimated total foreseeable demand of 93 mt in 2021. This is because, even if actions commenced now to provide the expansions required to meet this level of demand:

- o the Zone 4 expansion could only be placed into service in 2023; and
- o the 8X Phase 1 expansion could only be placed into service in 2025.

DBCT cannot meet total foreseeable demand in the market at least cost in 2021, compared to any two or more facilities, if it is unable to meet all demand at any cost.

## Conclusion

We find that the coal handling service provided at DBCT does not satisfy criterion (b) under Part 5, Division 2 of the QCA Act. We draw this conclusion because, on our assessment:

- o the relevant market contains customers that have the demonstrated ability to substitute between DBCT and other suppliers including AAPT, RGTCT and HPCT;
- o total foreseeable demand in the market is 175 mt and is underestimated by the QCA because it excludes demand from customers in the market and it assumes that BMA mines are not in the relevant market; and
- o the entirety of this demand cannot be met at least cost (or at all) by DBCT and it is least cost for at least some of this demand to be met at one of AAPT, RGTCT or WICET instead of at DBCT.

# 1. Introduction

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The Queensland Competition Authority (QCA) is reviewing whether the declared services specified in section 250 of the *Queensland Competition Authority Act 1997* (QCA Act) should be declared following the expiry of the existing declarations on 8 September 2020.

## 1.1 Scope of this report

We have been asked by DLA Piper (DLA), on behalf of DBCT Management Pty Limited (DBCTM), to review whether the coal handling service provided by the Dalrymple Bay Coal Terminal (DBCT) is likely to satisfy criterion (b) of section 76(2) of the *Queensland Competition Authority Act 1997* (QCA Act).

Criterion (b) reads:<sup>1</sup>

that the facility for the service could meet the total foreseeable demand in the market—

- (i) over the period for which the service would be declared; and
- (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service);

This report should be read in conjunction with two previous reports addressing whether the coal handling service provided by DBCT (the DBCT service) satisfies criterion (b), ie:

- ∅ in our first report, dated 28 May 2018,<sup>2</sup> we assessed the market for the DBCT service, estimated total foreseeable demand in that market and found that this would be met at least cost by two or more facilities, such that the DBCT service does not satisfy criterion (b); and
- ∅ in our second report, dated 13 July 2018,<sup>3</sup> we revisited this advice in light of submissions from the DBCT User Group and Peabody Energy, and expert advice prepared by PricewaterhouseCoopers (PwC), but did not revise our earlier conclusions.

On 18 December 2018, the QCA published its draft recommendation. At this time, it also published reply submissions made by parties in response to our first report.

The QCA concludes in respect of the DBCT service that:<sup>4</sup>

Criterion (b) is satisfied

The relevant market for criterion (b) is the market for DBCT's coal handling services in the Goonyella system

In this market, there are no viable substitutes to DBCT

DBCT is able to meet total foreseeable demand in the market at the least cost compared to any two or more facilities

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<sup>1</sup> QCA Act, section 76(2)(b).

<sup>2</sup> HoustonKemp, *Does DBCT's coal handling service satisfy criterion (b)?*, 28 May 2018 ('HoustonKemp first criterion (b) report').

<sup>3</sup> HoustonKemp, *A review of the economic issues raised in relation to criterion (b)*, 13 July 2018 ('HoustonKemp second criterion (b) report').

<sup>4</sup> QCA, *Draft recommendation | Part C: DBCT declaration review*, December 2018, p 5 ('QCA draft recommendation').

DLA has asked us to revisit our earlier conclusions in relation to whether the DBCT service satisfies criterion (b), or otherwise, in light of the draft recommendation made by the QCA and the expert advice upon which it relies.

## 1.2 Structure of this report

The remainder of this report is structured as follows:

- o section 2 describes the differences that underpin the diverging conclusions that we and the QCA draw on market definition and explain why our approach is consistent with well-accepted economic literature and case law;
- o section 3 estimates total foreseeable demand in the market, highlighting that the QCA's approach is to estimate demand for the existing DBCT service rather than demand in the market in which the service is provided;
- o section 4 assesses the least cost means of meeting total foreseeable demand in the market and explains how the QCA's approach diverges from the total cost standard that it purports to adopt, leading it to the incorrect conclusion that criterion (b) is satisfied; and
- o section 5 contains our declaration as to the basis on which we have prepared this report.



## 2. Defining the relevant market

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In this section, we review the QCA's approach to defining the market in which the DBCT service is provided and consider whether it causes us to change the views we formed in our previous criterion (b) reports.

We note at the outset that there are significant differences between the approach that the QCA takes to defining the market in which the DBCT service is provided and the approach that we implemented in our previous criterion (b) reports. For instance:

- ∅ we separately identify the product, geographic, functional and time dimensions of the market using the conventional approach;<sup>5</sup> whereas
- ∅ the QCA focuses on substitutability between the DBCT service and other coal handling services without explicit reference to the dimensions of the market.<sup>6</sup>

Some of these are differences of style, rather than of substance. However, there are important differences between the way in which we and the QCA assess the substitutability of services that are highly material to our respective conclusions in relation to the scope of the relevant market. In contrast to our views:

- ∅ the QCA considers that only substitution due to changes in price or quality is relevant to defining the boundaries of the market<sup>7</sup> and in implementing this approach:<sup>8</sup>
  - > considers only the price and quality of the *existing* capacity at DBCT in this assessment, rather than the price and quality of *expanded* capacity at DBCT; and
  - > considers substitutability of coal handling services in very coarse terms by reference to representative users in the Goonyella system and elsewhere, rather than by reference to the costs and incentives faced by each mine;
- ∅ the QCA considers that only transactions involving long term contracts are relevant to defining the boundaries of the market, and that transactions for throughput can be discounted from this assessment.

Underpinning the QCA's analysis is a conflation of the distinct concepts of 'demand for' and 'use of' a service. The QCA's approach assumes that demand in the market cannot include volumes that are served by other terminals.

These assumptions draw the QCA to the incorrect conclusion that DBCT is the only supplier in the relevant market. In other words, the QCA assumes what it sets out to show. This leads it to discount evidence that there has been, and continues to be, close competition between the supply of the DBCT service from *expanded* capacity and other coal handling services for Goonyella system users.

Our approach to defining the market differs from that of the QCA because we consider substitutability by reference to what miners have revealed in their choice of coal handling services, either at the present time or in the recent past. This is consistent with the standard approach to market definition as described in economic literature and Australian case law.

Under this framework, any factor that drives value to users is relevant to substitution. Importantly, this approach allows for the prospect that demand arising from customers in the market may exceed the capacity of DBCT to meet that demand either now or at any time in the future. If demand in the market meets or exceeds the capacity of DBCT, then it is relevant to consider the degree of substitutability between the

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<sup>5</sup> HoustonKemp first criterion (b) report, pp 16-19.

<sup>6</sup> QCA draft recommendation, pp C9-C35.

<sup>7</sup> QCA draft recommendation, p 12.

<sup>8</sup> QCA draft recommendation, pp C15-C17.

*expanded* capacity of DBCT and coal handling services provided by other facilities. The QCA does not consider this substitutability question.

The consequence of these fundamental differences in approach is that the QCA's draft recommendation finds that:

- ∅ the relevant market is 'the market for DBCT's coal handling service in the Goonyella system', in which DBCT is the only supplier,<sup>9</sup> whereas we identify more than one supplier in the relevant market;
- ∅ coal mines in the Goonyella system that use coal handling services outside the Goonyella system are in the market, but their use of other coal handling services is not in the market,<sup>10</sup> whereas we do not assume that demand in the market is capped at the existing capacity of DBCT;
- ∅ coal mines in the Goonyella system operated by BMA and BMC are either not in the market, or only in the market to the extent of their use of the DBCT service,<sup>11</sup> whereas we include these mines in the market and do not assume that their demand is capped at the existing capacity of DBCT; and
- ∅ coal mines outside the Goonyella system are not in the market,<sup>12</sup> whereas we assess this on an individualised basis for each mine based on its current and recent use of DBCT and the relative charges that it faces for using the DBCT service as against potential alternatives.

## 2.1 We and the QCA apply different approaches to market definition

In our first criterion (b) report, we identified that the relevant product was coal handling services and so the geographic dimension was the issue of greatest consequence to defining the market within which the DBCT service was provided. Our approach to defining the market is to use the hypothetical monopolist test, starting with a candidate market defined by the area over which the relevant service is currently being or will be supplied.<sup>13</sup>

This is the standard approach to market definition as set out in the economic literature and Australian case law. Our report identified evidence from Professor Maureen Brunt, the Australian Competition and Consumer Commission (ACCC) and the Australian Competition Tribunal (the Tribunal), all of which all note that the starting point for market definition is to examine the area over which the good or service under analysis is supplied.<sup>14</sup> This approach considers substitutability by reference to the observed actions of suppliers and customers.

Using this approach, we found that the geographic market extends across the Goonyella system and into the northern extremes of the Blackwater system – the region 'proximate' to the Port of Hay Point. We observed that customers located within the boundaries of this market either currently use, or have recently used, coal handling services provided by other coal terminals. On this basis, we concluded that the market within which the DBCT service is supplied is also supplied by other coal handling services.<sup>15</sup>

By contrast, in its draft recommendation the QCA's approach to defining the market starts with a focus on the substitutability between DBCT's coal handling service and the coal handling services of other coal terminals on the Central Queensland coal network.<sup>16</sup> It follows that the approach that the QCA takes to assessing the substitutability of coal handling services is critical to its view of the relevant market, and the suppliers and customers that are in that market.

<sup>9</sup> QCA draft recommendation, p C11.

<sup>10</sup> QCA draft recommendation, pp C28-C31, C43.

<sup>11</sup> QCA draft recommendation, pp C22-C28.

<sup>12</sup> QCA draft recommendation, pp C31, C34.

<sup>13</sup> HoustonKemp first criterion (b) report, p 23.

<sup>14</sup> See discussion in HoustonKemp first criterion (b) report, pp 18-19.

<sup>15</sup> HoustonKemp first criterion (b) report, p 35.

<sup>16</sup> QCA draft recommendation, p C11.

The QCA's approach to market definition focuses on substitution only for price and quality reasons. It states as a matter of principle that:<sup>17</sup>

Evidence of users switching between facilities may demonstrate that facilities are substitutes. However, it is also necessary to understand why users switch. Generally, products will be substitutable only where switching occurs (or would occur) as a result of price of quality incentives.

The market definition adopted by the QCA identifies the Goonyella system as the geographic boundary of the market. Several mines located in the Goonyella system have entered contracts with or otherwise use coal terminals outside the Goonyella system. These include Lake Vermont, Middlemount, South Walker Creek, Poitrel, Capcoal and Oaky Creek.<sup>18</sup>

For at least some of these users, the QCA does not regard their use of coal handling services at AAPT as indicating substitutability with the DBCT service because this does not represent substitution based on price or quality:<sup>19</sup>

...the QCA understands that some DBCT users (in the case of Lake Vermont and Middlemount) would have preferred to solely access DBCT, but that at the time of contracting, there was insufficient capacity at the terminal. Given commercial considerations, capacity was then sought at AAPT.

The QCA has not received evidence that these entities switched from DBCT to AAPT in response to a price change. Rather, it appears that both of them were unable to access additional capacity beyond their contracted entitlements at DBCT, and therefore sought additional capacity elsewhere.

The QCA goes on to conclude that, although these miners are within the relevant market, their use of other terminals is not part of total foreseeable demand in the market.

## 2.2 QCA assumes that demand is equal to the use of DBCT

The essential difference between our approach and that of the QCA that drives these differing conclusions is our respective consideration of the prospect for demand in the market to exceed the existing capacity of DBCT to provide coal handling services.

The QCA's approach assumes that demand in the market cannot include volumes that are served by other terminals. Put another way, the QCA's approach precludes the prospect that demand in the relevant market could meet or exceed the existing capacity of DBCT, and this in turn affects its view of which coal terminals supply this market.

In the quote above, the QCA discloses that its frame of reference for considering the potential for substitution between DBCT and other coal terminals is limited only to consideration of the substitutability between *existing* capacity at DBCT and other terminals. The QCA does not consider what this evidence has to say about the substitutability between *expanded* capacity at DBCT and other facilities.

Given that there was not sufficient existing capacity at DBCT to serve these customers, the choices made by Lake Vermont and Middlemount discloses that, for them, the use of capacity at other facilities was preferable to the use of expanded capacity at DBCT. DBCTM's submission noted that these mines:<sup>20</sup>

... chose to sign long term take or pay agreements to export their coal via AAPT in circumstances where DBCT would have been the preferred terminal from a proximity perspective.

<sup>17</sup> QCA draft recommendation, p 12.

<sup>18</sup> HoustonKemp first criterion (b) report, pp 14-15.

<sup>19</sup> QCA draft recommendation, p C29.

<sup>20</sup> DBCTM, *DBCT Management submission to the QCA*, 30 May 2018, paras 140-142.

Prior to signing those agreements Lake Vermont and Middlemount mines sought capacity from DBCT, however, at the time DBCT was fully contracted and would have required an expansion to its capacity to accommodate the miners' requirements. AAPT similarly needed to expand its capacity. However, this could occur within a shorter timeframe than any expansion to DBCT.

The miners had a choice between which terminal expansion would better suit their commercial requirements - either wait for DBCT to expand (the timing and approvals for which were uncertain) or utilise the GAPE and AAPT expansion (the timing and approvals for which were certain and aligned with the mines' commissioning plans). Rather than delaying their mine development processes to wait for DBCT to expand, the miners chose to use the coal handling services at AAPT. As noted above, Lake Vermont mine also exports coal through RGTCT. If there were no close substitutes to DBCT, Lake Vermont and Middlemount mines would have had to extend their mine development timeframes to align with the completion of a DBCT expansion beyond 85Mtpa.

It follows that the QCA, by assuming that demand in the market cannot include volumes served by other coal terminals, does not have regard to evidence of substitutability between expanded capacity at DBCT and existing or expanded capacity at other terminals that would have caused it to conclude that AAPT and RGTCT were both suppliers in the relevant market.

This view is suggested explicitly elsewhere in the QCA's draft recommendation. For example:

- ∅ the QCA accepts that BMC demand may be part of total foreseeable demand in the market, but only up to its contractual entitlements because:<sup>21</sup>

To do otherwise and also include the demand that is presently satisfied by other terminals would artificially inflate the estimate of total foreseeable demand (the calculation of which is ultimately central to criterion (b)).

- ∅ the QCA engaged MMI Advisory to prepare estimates of total foreseeable demand in the market that excluded the demand from mines outside the Goonyella system,<sup>22</sup> which MMI Advisory explains is because:<sup>23</sup>

...there is no evidence to support current or future material *redirection* of volumes from RG Tanna to DBCT. [emphasis added]

In other words, the QCA appears to estimate total foreseeable demand in the market based on its projected use of DBCT. Demand estimated on this basis precludes the inclusion of volumes that are currently served by other terminals.

### 2.2.1 Our approach to defining the market reflects demand that exceeds use of DBCT

Our approach to defining the market allows for the prospect that demand in the market may exceed the capacity of DBCT to meet that demand, either now or in the future. Under this approach:

- ∅ the price that clears this market will not necessarily be the regulated TIC determined by the QCA for the existing capacity of DBCT and instead reflects the best alternative option to customers associated with providing additional capacity to meet demand above this level; and
- ∅ evidence that miners prefer to use existing capacity at DBCT but ultimately use available capacity at other terminals in preference to expanded capacity at DBCT suggests that these alternative facilities are in the market, as are the miners and their demand that is met at these alternative facilities.

We demonstrate this conception of the market in figure 2.1 stylistically. We assume, for the purpose of the presentation, a market for coal terminal services provided to Goonyella mines. The supply curve reflects the increasing cost of options as they appear to Goonyella mines, with WICET being the most expensive. The

<sup>21</sup> QCA draft recommendation, p C27.

<sup>22</sup> QCA draft recommendation, p C43.

<sup>23</sup> MMI Advisory report, p 15.

chart also assumes a differentiation between demand by BMA and BMC mines, as compared to other demand, with the assumptions that:

- o BMA and BMC mines prefer to use HPCT to any other terminal; and
- o demand for HPCT by BMA and BMC mines exceeds its capacity.

Figure 2.1: Market for coal terminal services provided to Goonyella mines (HoustonKemp market)

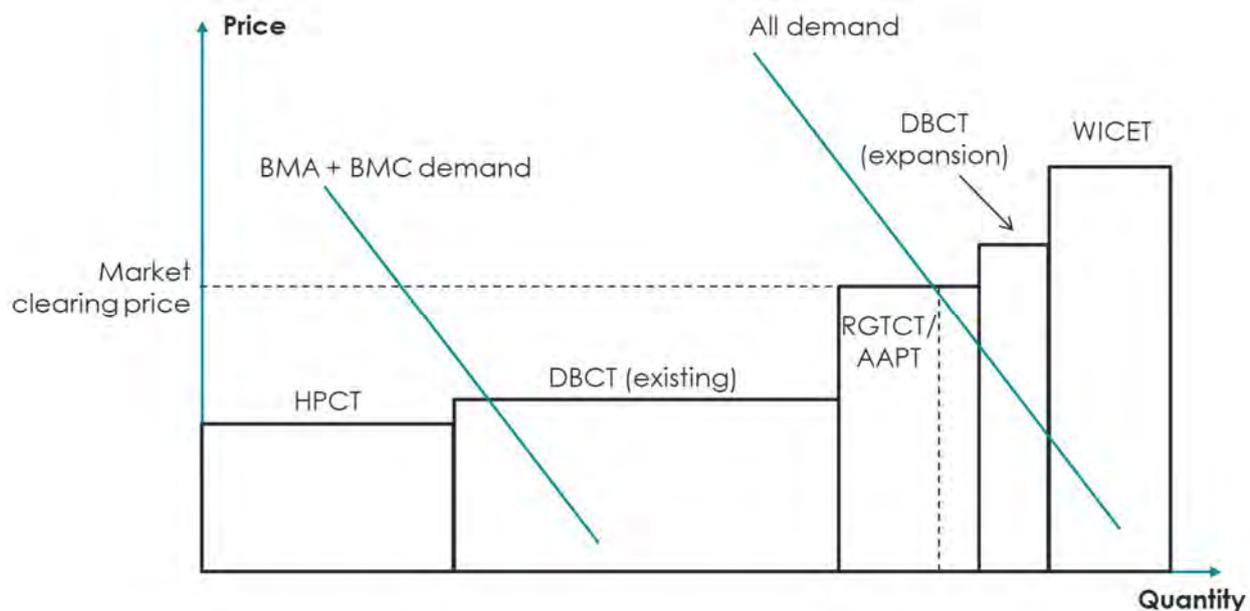


Figure 2.1 shows that, because demand for coal terminal services exceeds DBCT's existing capacity, capacity of other coal terminals is drawn into the market, and the market clearing price is determined by reference to the market clearing price for coal delivered to those terminals. In the diagram, nothing turns on an assumption of whether HPCT is a supplier in the market, or outside the market, since the effect of excluding HPCT would simply be to shift demand in the market inwards by the capacity of HPCT.

The figure also highlights the difference between the 'use' of DBCT and demand in the market within which the DBCT service is provided. When the analysis of the market leaves open the prospect that there may be more than one supplier in the market, it is evident that these concepts may differ materially.

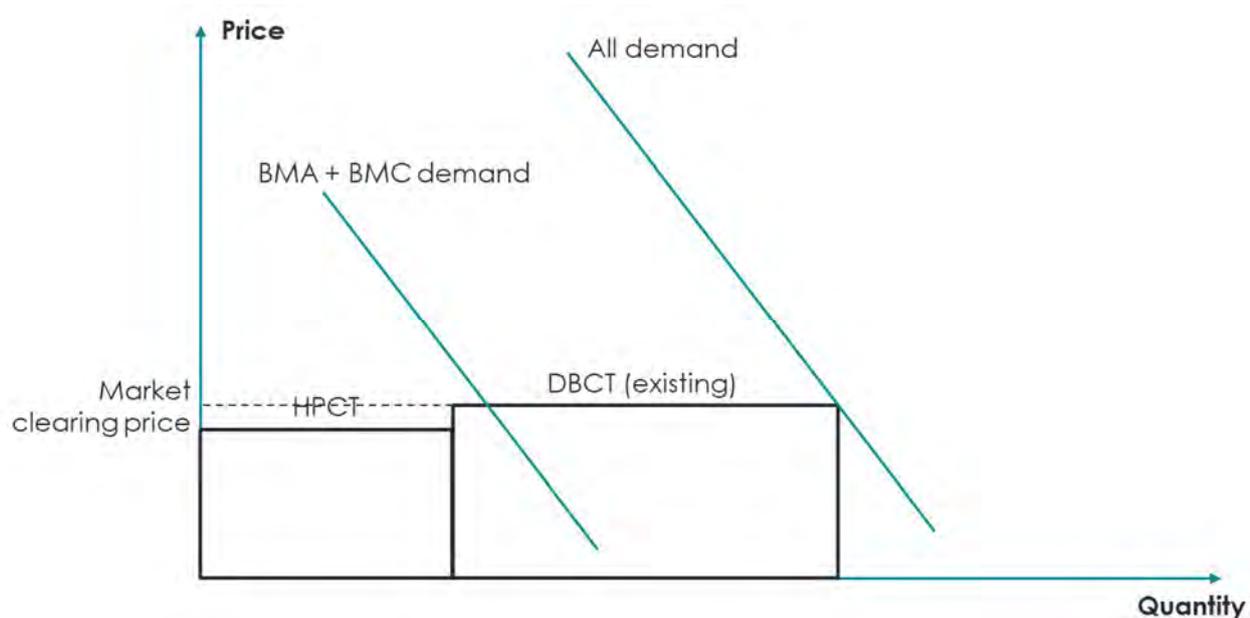
### 2.2.2 QCA's approach to defining the market reflects demand that is equal to use of DBCT

By contrast, at the market definition step, the QCA precludes the prospect that demand in the market may exceed the capacity of DBCT to meet that demand. Under the QCA's approach:

- o the price that clears this market is the regulated TIC determined by the QCA for the existing capacity of DBCT – the potential charges associated with expanded capacity at DBCT or available capacity at other terminals do not inform this price; and
- o evidence that miners prefer to use existing capacity at DBCT but ultimately use available capacity at other terminals in preference to expanded capacity at DBCT does not mean that these miners are in the market – because this does not demonstrate substitution between *existing* capacity at DBCT and available capacity at these alternative facilities.

The market hypothesised by the QCA's assumptions is shown at figure 2.2 below.

Figure 2.2: Market for coal terminal services provided to Goonyella mines (QCA assumptions)



As with figure 2.1, nothing turns on the inclusion of HPCT in figure 2.2, and the diagram could be redrawn without HPCT by shifting demand in the market inwards by the capacity of HPCT.

### 2.3 Evidence that demand in the market exceeds DBCT's capacity

We explain above that the potential for demand in the market to exceed the existing capacity of DBCT is critical to market definition.

There is clear evidence that the level of demand in the market exceeds the existing capacity of DBCT. Most importantly:

- o DBCT is fully contracted from July 2021 and there is a queue of access seekers with unmet capacity requirements;<sup>24</sup> and
- o Lake Vermont, Middlemount, Capcoal, Oaky Creek, South Walker Creek and Poitrel are all examples of mines that are located within the Goonyella system but have contracts to export coal through either AAPT or RGTCT.<sup>25</sup>

This suggests that there is competition between DBCT and other coal terminals to serve demand that can only be met by expanding capacity at DBCT, and that other coal handling services are regarded as being at least as preferable to the DBCT service for this demand.

Despite this evidence, the QCA does not accept that the coal handling services at these terminals are a substitute for users located in the Goonyella system. The QCA lists four reasons for its position:<sup>26</sup>

- o some DBCT users who have contracted with AAPT or RGTCT have done so because access to DBCT was not available at the time, such that this is not evidence of substitution in response to a price change;
- o the use of multiple terminals by miners with operations in multiple locations allows these businesses to optimise their operations by utilising, to the extent possible, their take-or-pay contracts;

<sup>24</sup> DBCTM, DBCT declaration review – update on contract profile, 7 November 2018.

<sup>25</sup> HoustonKemp first criterion (b) report, pp 14-15.

<sup>26</sup> QCA draft recommendation, pp C28-C31.

- ∅ it is expensive for a Goonyella coal mine to switch to an alternative terminal; and
- ∅ there is no evidence that Goonyella users have switched from DBCT in response to price or non-price incentives, and low-level switching does not demonstrate that another terminal is in the same market.

The first, third and fourth of these points are founded upon a view that evidence for substitution can only be found in switching between *existing* capacity at DBCT and capacity at another terminal. For example, the QCA addresses the use by Lake Vermont and Middlemount of capacity at other terminals by noting that these users would have preferred to access DBCT, but its capacity was not available to them at the time of contracting.<sup>27</sup> Once a broader perspective on substitution is adopted, these concerns fall away.

The second point originates from a perspective that some miners operate a portfolio of mines across multiple rail systems. It has been suggested that such miners:<sup>28</sup>

- ∅ may contract surplus capacity across multiple terminals as part of an 'uneconomic' risk mitigation strategy to protect against system disruptions; and
- ∅ may export Goonyella coal from coal terminals other than DBCT in order to defray take-or-pay obligations incurred at those terminals.

None of these rationales indicates that the DBCT service may not be substitutable with other coal handling services.

The acquisition of surplus capacity is not 'uneconomic' but is justified by the expected benefits of contracting elsewhere. This may serve to increase a mine's demand for coal terminal services but does not indicate a lack of substitutability between them.

To the extent that miners operate a geographically dispersed portfolio of mines and a corresponding portfolio of terminal contracts, this supports their ability to substitute the DBCT service for other coal handling services at the margin within their portfolio. Such miners have the ability to switch away from DBCT both:

- ∅ in the short term, by sending more coal to other terminals in their portfolio; and
- ∅ in the medium term, based on their ability to renegotiate the contracts that underpin this portfolio.

## 2.4 Regulated TIC at DBCT is not the market clearing price

One consequence of the QCA's approach to market definition, and its focus on the substitutability between *existing* capacity of DBCT and other terminals rather than *expanded* capacity at DBCT and other terminals, is that it assumes a market price in the market that is lower than the competitive price or market clearing price. This in turn leads it towards a definition of the market that is too narrow.

### 2.4.1 Cellophane fallacy

Underpinning the conventional approach to market definition is a necessary condition that observed prices reflect the outcomes of competitive rivalry between firms. The importance of this condition is demonstrated by the classic 'cellophane fallacy' – a widely accepted limitation of the traditional hypothetical monopolist test (HMT), prominently arising in the 1956 'cellophane case' nearly thirty years prior to the formal adoption of the HMT in the United States in 1982.<sup>29</sup>

At its conception, the cellophane fallacy referred to a situation in which, due to the market power of the incumbents, the prevailing market prices are above what they *would have been* in a workably competitive

<sup>27</sup> QCA draft recommendation, p C29.

<sup>28</sup> Anglo American Coal Australia, *Anglo America's submission in response to initial submissions*, 17 July 2018, pp 7-8.

<sup>29</sup> *United States v El du Pont & Co*, 351 US 377 (1956) (*du Pont*); United States Department of Justice, *Merger Guidelines*, reg 28.493, 1982;

market, leading to an erroneously wide market definition when the SSNIP is applied to the prevailing prices. Gene Schaerr summarised this idea in *The Yale Law Journal* as follows:<sup>30</sup>

In industries characterized by market power (e.g., because of collusion or monopoly) the prevailing price is usually higher than the competitive price." When applying the Guidelines to mergers in such industries, however, DOJ applies the five-percent test to the prevailing price rather than to the competitive price. As the previous discussion shows, both the product and geographic markets may be larger than if the competitive price were used; the overall market, therefore, may be substantially larger.

This original understanding of the cellophane fallacy has become well established in many countries, including the United States, United Kingdom and Australia, both in case law and academic literature, even receiving explicit mention in the United Kingdom's Competition Commission & Office of Fair Trading, *Merger Assessment Guidelines*.<sup>31</sup>

The cellophane fallacy and its accepted remedy in market definition also implicitly accommodates the possibility of prevailing prices being below the competitive level, and the relevant market thereby being defined too narrowly. Nevertheless, this possibility was explicitly formalised by Luke Froeb and Gregory Werden of the antitrust division of the United States Department of Justice, in their seminal paper *The Reverse Cellophane Fallacy in Market Delineation* in 1992. Froeb and Werden extend the concept of the cellophane fallacy in the context of competition analysis to what they coin 'the reverse cellophane fallacy', for which the relevant market is defined too narrowly on the basis of prevailing market conditions:

... markets delineated on the basis of prevailing demand elasticities are likely to be too small and the potential for the exercise of market power is likely to be overstated. This is precisely the opposite of the error in the Cellophane case, so we term it the reverse Cellophane fallacy.<sup>32</sup>

The idea that the cellophane fallacy can function in both directions and so has a counterpart in the case where prevailing prices are below what would have been observed in a competitive market is accepted in United States and Australian academic literature, being quoted in *The Journal of Competition Law and Economics* (U.S.) and *The Competition and Consumer Law Journal* (Australia).<sup>33</sup>

#### 2.4.2 Competitive prices in the market

In the assessment of criterion (b) for the DBCT service, the context within which the market must be defined is differentiated from typical circumstances because DBCT is a regulated facility, subject to administered pricing determined by the QCA.

There is no ready basis to assume that the price charged for existing capacity DBCT reflects the price that would be determined in the market by rivalrous interactions between coal terminals. Indeed, there are strong reasons to believe that the price for coal handling services in a competitive market would be substantially higher than the TIC determined by the QCA for DBCT.

First among those reasons is that, although a workably competitive market can be expected to give rise to cost-based prices, these may not be the costs of a particular supplier in the market. Rather, established economic principles and case law indicate that the measure of costs that constrains the pricing decisions of a firm in a workably competitive market is not its own costs, but the forward-looking costs of efficient actual or potential rivals. We set out these principles and case law at appendix A2 below.

<sup>30</sup> Schaerr, Gene, "The Cellophane Fallacy and the Justice Department's Guidelines for Horizontal Mergers", *The Yale Law Journal*, v 94(3), 1985, pp 676-677.

<sup>31</sup> Competition Commission & Office of Fair Trading, *Merger Assessment Guidelines*, OFT1254, 2010, p 31; *Seven Network Ltd v News Ltd*, (2009) 182 FCR 160, pp 241-242.

<sup>32</sup> Froeb, Luke and Werden, Gregory, "The Reverse Cellophane Fallacy in Market Delineation", *Review of Industrial Organization*, v 7, 1992, p 241.

<sup>33</sup> Smith, Rhonda, "Market Definition and Substitution Options", *Competition and Consumer Law Journal*, v 22(2), 2014; Savitski, David, "Market power analysis for oil pipelines facing excess demand", *Energy Economics*, v 34, 2012, pp 955-960.

By way of pertinent example, in the market for the export of seaborne metallurgical coal, South Walker Creek (operated by BMC) is understood to be one of the lowest cost suppliers.<sup>34</sup> Notwithstanding, the market for the export of seaborne metallurgical coal is understood to be workably competitive. The interaction of supply and demand in this market means that the price that BMC receives for coal from South Walker Creek is not based on its own operating costs but on the costs of marginal miners in the market.

Similarly, given that DBCT is at capacity, and that incremental volumes in the market must be met by either expanded capacity at DBCT or using existing capacity at other terminals, it is the potential costs and charges associated with these options that defines the price that clears the market. This is demonstrated using the example at figure 2.1 above.

It follows that the QCA's approach to market definition – and its associated analysis of substitutability – commences with a price that may be lower than would result from competitive rivalry between firms in the market. The consequence is that the QCA tends to define the market too narrowly – an example of the reverse cellophane fallacy.

The QCA highlights the extent to which charges associated with using existing capacity at DBCT are lower than charges associated with using existing capacity at other terminals. It suggests that this is indicative of a lack of substitutability between the services and concludes that other services are not in the same market as the DBCT service. However, when the process of market definition commences with prices that reflect competitive levels, other coal handling services provided at AAPT and RGTCT are much more likely to be identified as close substitutes to the DBCT service.

The result of this error is that the QCA defines the market for the service in an artificially narrow manner, so as to include only a single supplier – DBCT. This error is critical to its ultimate conclusion that DBCT satisfies criterion (b).

### 2.4.3 QCA's approach excludes substitute services from the market

Application of the QCA's approach, combined with application of a SSNIP to the price of the *existing* DBCT service, means that any functionally identical service that happens to provide services at prices that exceed the price of the *existing* DBCT service by more than the five to ten per cent that is usually applied in the context of a SSNIP will be excluded from the market.

The error in this approach can be seen by hypothesising that AAPT was instead located at the Port of Hay Point, with a coal handling charge established by user agreement such that the cost to miners of accessing AAPT was more than five to ten per cent higher than DBCT.

The QCA's approach to market definition, beginning with the DBCT service, would conclude that AAPT was not in the relevant market for the assessment of criterion (b) because:

- ⦿ it is significantly more expensive for mines to access AAPT than it is to access DBCT such that, faced with a SSNIP at DBCT, no miner receiving service at DBCT would substitute to AAPT; and
- ⦿ it is clear that any miners using AAPT must be doing so because they were unable to secure capacity at DBCT, since the terminals do not have closely similar charges, and so this does not provide evidence of substitution in response to a price change.

The QCA's approach to market definition would end with a conclusion that DBCT is the only supplier in the market. Further, in estimating total foreseeable demand in this market, the QCA would exclude all contracts for service at AAPT.

Of course, such a result would be nonsensical. Two firms located in the same place and supplying what is for all practical purposes an identical service, available to the same customers, clearly should both fall within the narrowest reasonable definition of the market. The fact that the administrative price determined by the

<sup>34</sup> See for example: HoustonKemp first criterion (b) report, pp 93-95.

QCA is lower than the price set by AAPT, in this example, is *prima facie* evidence that this regulated price is lower than the competitive market price.

It follows that two firms that are located some way apart (5km, 50km, 250km), but are both serving customers that fall within *the same* geographic envelope (as established by the first firm of interest):

- o are suppliers in that market; and
- o fall within the narrowest reasonable definition of the market.

#### 2.4.4 Evidence of substitution and substitutability at the market price

Conclusive evidence that AAPT and RGTCT are close substitutes to the DBCT service, and in the market in which the service is provided, is set out at section 2.3. This shows that miners in the Goonyella system use AAPT and/or RGTCT in preference to expanded capacity at DBCT.

By way of illustration of this difference, the QCA's assessment of the average supply chain cost to Goonyella system users finds that the total cost for Goonyella users of accessing *existing* capacity at DBCT is \$11.42 per tonne, considerably lower than the closest potential alternative, which is RGTCT at \$16.73 per tonne.<sup>35</sup> However, if the potential cost for Goonyella users of accessing *expanded* capacity at DBCT is instead considered, on a differentiated basis, then the comparison narrows materially, as shown in table 4.2 below.

Table 2.1: QCA's assessment of average supply chain cost to Goonyella system users (\$ per tonne)

Cost components	DBCT	AAPT	RG Tanna	WICET
Below-rail cost	\$2.62	\$9.23	\$6.33	\$6.33
Above-rail cost	\$3.70	\$5.73	\$5.17	\$5.17
Coal handling cost	\$8.50	\$7.01	\$5.18	\$14.67
Other port and shipping costs	\$0.05	\$0.05	\$0.05	\$0.05
Supply chain cost	\$14.87	\$22.02	\$16.73	\$26.22
<i>Cost difference relative to accessing DBCT</i>		at least \$7.15 (48%)	at least \$1.86 (13%)	at least \$11.35 (76%)

Source: QCA

These elementary changes to the QCA's assessment substantially change its comparison of cost difference – in the case of RGTCT from 47 per cent to 13 per cent, relative to DBCT. Of course, these changes do not account for other factors that may make other coal handling services preferable to the use of expanded capacity at DBCT, such as the time that would be incurred to make this capacity available to users. The QCA's comparison is also limited to an assessment of substitutability from the perspective of a representative user, rather than from the individual perspective of each mine in the Goonyella system. We discuss this assumption further at section 2.5 below.

The most determinative evidence is provided by the actual choices made by miners in the Goonyella system, which demonstrates a degree of substitutability between the DBCT service and other terminal services that is significantly closer than would be suggested by the figures in table 4.2 above.

## 2.5 Substitutability should be assessed on a mine by mine basis

The QCA's assessment of the substitutability between the DBCT service and other coal handling service is conducted from the perspective of a representative Goonyella system user. As such, the comparison of charges for accessing different coal terminal services is represented with a single snapshot of transport

<sup>35</sup> QCA draft recommendation, table 5, p C16.

charges, which glosses over the geographic variety in transport charges that is important to understanding the geographic bounds of the market within which the DBCT service is supplied.

The nature and significance of the error in this approach can be explained by reference to the very different purposes of the market definition step in a criterion (b) assessment, as compared with the conventional competition analysis. Unlike in a conventional competition analysis, the precision of the market definition step and the identification of customers and suppliers that are in the relevant market are crucial to the assessment of criterion (b).

It follows that an assessment of substitutability that ignores relevant information about the location of each mine and the variation in transport costs to each terminal is not capable of giving rise to a precise assessment of the market.

### 2.5.1 Assessment of criterion (b) requires a precise market definition

Market definition is often used for the purpose of organising and focusing the analysis of competitive conduct, and this is reflected in the common approach to market definition. Usually, the principal focus is the degree of constraint that other firms and/or customers impose on the firm or firms of interest. This assessment may not require any definitive conclusion as to the boundaries of the market, or as to whether particular firms or customers are 'in' or 'out' of a market.

For example, in respect of merger analysis, the ACCC's guidelines emphasise the distinction between market definition and competition analysis:<sup>36</sup>

While market definition is a useful tool for merger analysis, by itself it cannot determine or establish a merger's impact on competition. Accordingly, market definition should not obscure factors relevant to competition that fall outside the relevant markets. Similarly, there is no presumption that other firms within a relevant market necessarily provide an effective competitive constraint on the merged firm. Other factors also relevant to merger analysis are outlined in chapters 5, 6 and 7.

It is rarely possible to draw a clear line around fields of rivalry. Indeed, it is often possible to determine a merger's likely impact on competition without precisely defining the boundaries of the relevant market. For example, if the consolidation of the merger parties' activities is unlikely to substantially lessen competition in a narrow product and geographic area, then it is also unlikely to do so in a more broadly defined product and geographic area and, therefore, a conclusive view on the relevant market may not be necessary. Similarly, when a merger is likely to substantially lessen competition in any number of potential markets, it may be unnecessary to define the precise market boundaries.

The ACCC's commentary underlines that market definition is often not regarded as definitive in terms of capturing competitive constraints. Competitive constraints may emerge from outside the defined market, and suppliers within the market may not provide a close competitive constraint on the supplier of interest.

However, the absence of a precise market definition is not of great consequence in the context of competition analysis, since subsequent steps consider the nature of interaction between suppliers and/or customers and identify constraints on the exercise of market power. By way of example, the High Court in *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* noted that:<sup>37</sup>

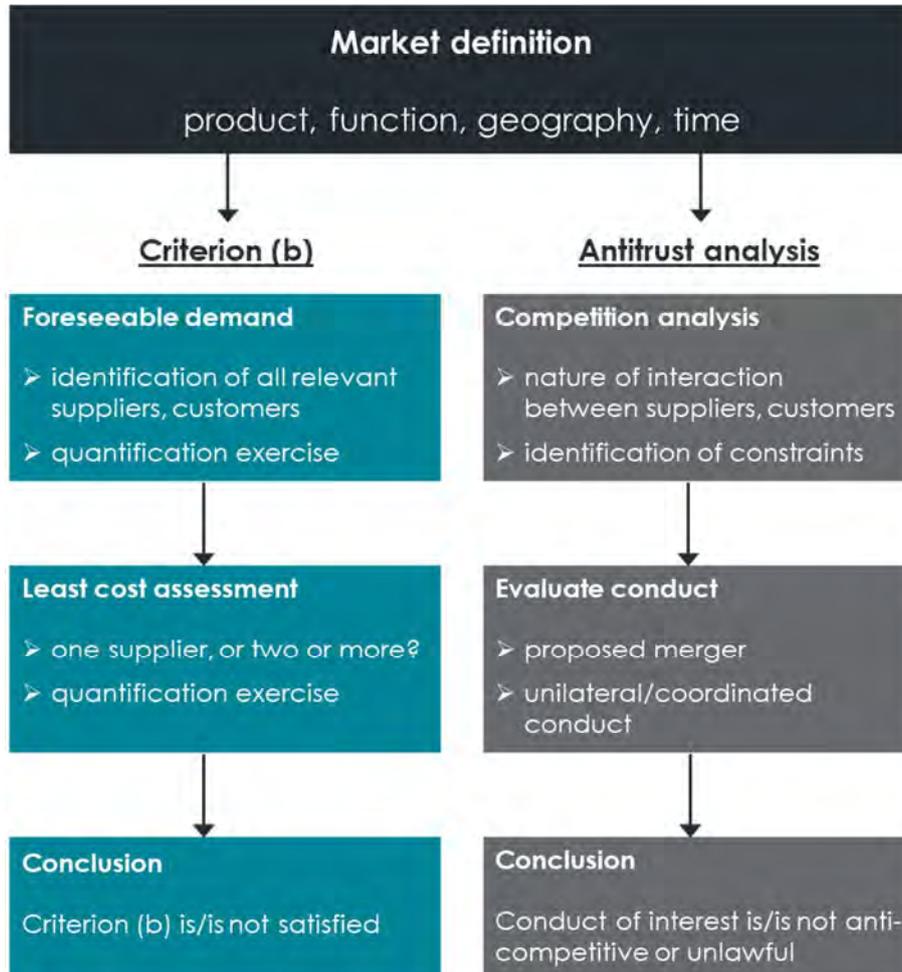
In identifying the relevant market, it must be borne in mind that the object is to discover the degree of the defendant's market power. Defining the market and evaluating the degree of power in that market are part of the same process, and it is for the sake of simplicity of analysis that the two are separated.

<sup>36</sup> ACCC, *Merger guidelines*, November 2008, paras 4.3-4.4.

<sup>37</sup> *Queensland Wire Industries Pty Ltd v Broken Hill Pty Co Ltd* ("Star Picket Fence Post case") [1989] HCA 6; (1989) 167 CLR 177 (8 February 1989), para 15.

Figure 2.3 below shows how market definition acts as an input into the assessment of criterion (b) compared to its use in an antitrust analysis.

Figure 2.3: The purpose for market definition



In sharp contrast, the assessment of criterion (b) requires a much more precise approach to the definition of a market. Given the purpose of performing the quantitative task of assessing total foreseeable demand in the market and determining whether that demand can be met at least cost by just one supplier, it is necessary to identify and state with precision those customers that are in the market and those that are not. To achieve this, the approach to market definition for the purpose of criterion (b) must have a much greater focus on the precise boundaries of the relevant market and the identity of customers within that market than is usually the case.

### 2.5.2 QCA adopts a system-wide approach to market definition

Our approach to market definition is underpinned by the purpose we describe above. In contrast, the QCA's approach is more focused on identifying suppliers that are in the market by reference to an examination of the extent of competition between terminals. This difference in focus means that our definition of the market reflects a more granular consideration of substitutability, from the perspective of users.

In its draft recommendation, the QCA states that it has focused on:<sup>38</sup>

...what is happening in the market as part of determining whether other terminals provide a competitive constraint to DBCT Management, by virtue of providing a substitutable service to the coal handling service at DBCT.

In other words, the QCA's focus is explicitly on the extent of competition between terminals. This is reflected in its approach to defining the market, in which it is always guided by whether the DBCT service is substitutable with other coal handling services.

This framework for analysis causes the QCA to undertake only a very coarse assessment of substitutability. It sets aside the unique geographic location of each mine that, in turn, gives rise to a potentially wide variation of transport charges that would be required to send coal to each terminal. An assessment of substitutability that glosses over this rich detail and treats all Goonyella system users as if they were all faced identical choices between terminals is not an appropriate basis upon which to define the market for the purpose of estimating total foreseeable demand in the market.

Our criterion (b) report, which considered analysis by PricewaterhouseCoopers that makes the same assumption, shows how taking into account the perspective of different miners makes a considerable difference to the analysis of substitutability of coal handling services.<sup>39</sup>

One pertinent example of how our approach gives rise to different conclusions from the QCA's is our consideration of the Kestrel mine and Teresa project, located in the north Blackwater system. We explain the basis for our different conclusions below.

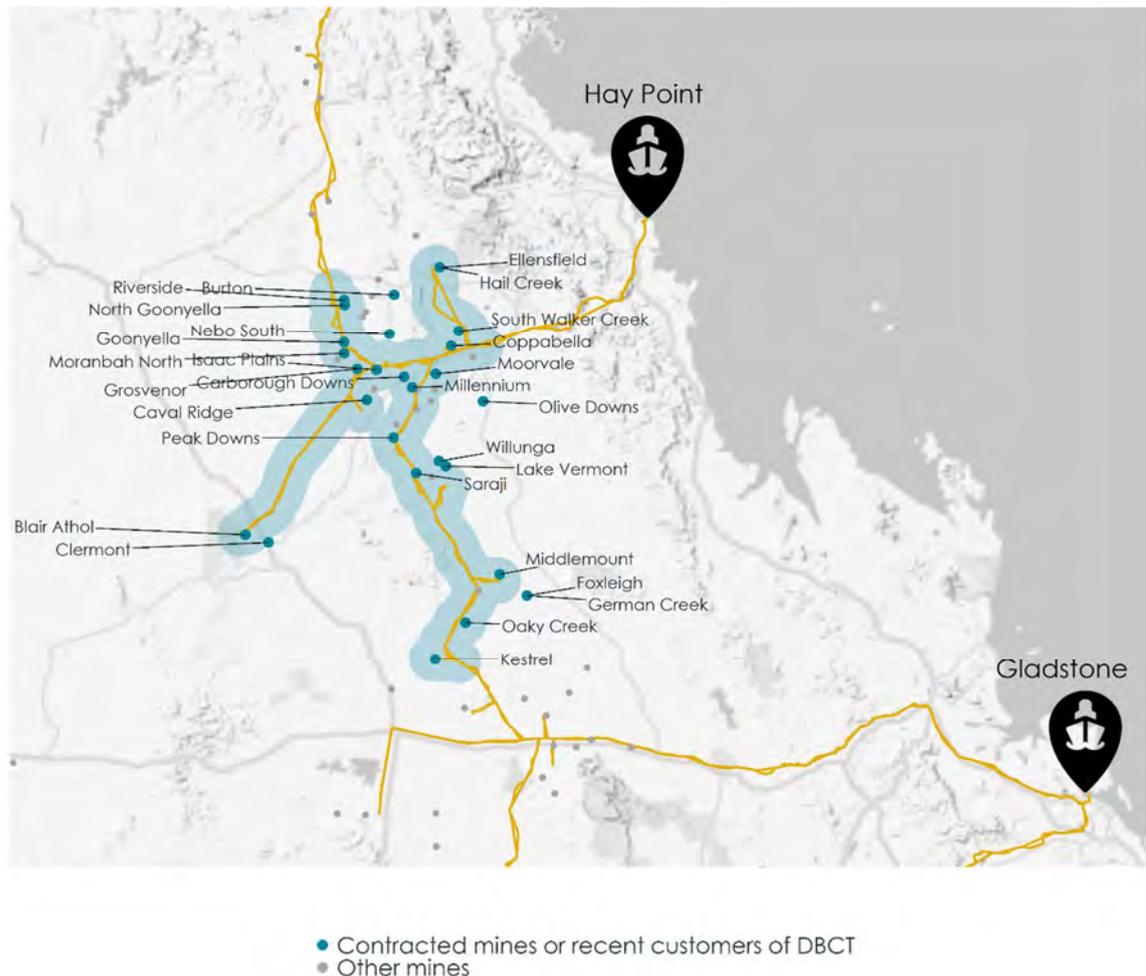
In our criterion (b) report, we explain that the geographic dimension of the market is the area over which the DBCT service is currently being or will be supplied – the area that encompasses all of DBCT's existing and potential customers. Our criterion (b) report addresses this required step of market definition by identifying the area of the Central Queensland Coal Network within which recent and current customers of DBCT are located. This was depicted in figure 4.1 of our criterion (b) report, which we replicate below.

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<sup>38</sup> QCA draft recommendation, p C26.

<sup>39</sup> HoustonKemp second criterion (b) report, pp 37-42.

Figure 2.4: Starting point for geographic market dimension using DBCT's current and recent customers



Source: DBCTM and AME data, HoustonKemp analysis

The shaded area in figure 2.4 above includes the entirety of the Goonyella system and also Kestrel mine. We separately show that the Teresa project would likely face lower charges to access DBCT than any other terminal. On this basis, we include Kestrel and Teresa in the geographic scope of the market for the DBCT service.<sup>40</sup>

However, the QCA assesses the geographic scope of the market as only the Goonyella system – which does not include Kestrel mine or the Teresa project.

Although the QCA agrees that volumes from Kestrel have been exported from DBCT<sup>41</sup> it does not agree that the market for the DBCT service extends outside the Goonyella system. The QCA characterises Kestrel's use of DBCT as "sporadic" and notes that it does not hold a contract for capacity. It concludes that:<sup>42</sup>

... the QCA does not consider that this demonstrates that for mines on rail systems (other than Goonyella), the coal handling services provided at DBCT are substitutable for other terminals, as

<sup>40</sup> HoustonKemp first criterion (b) report, figure 4.4, p 31.

<sup>41</sup> QCA draft recommendation, p C14, footnote 30.

<sup>42</sup> QCA draft recommendation, p C34.

a significant proportion of the users of those terminals would not switch to DBCT in response to a SSNIP for the relevant service.

This reasoning discloses the QCA's reliance on an approach to market definition that, in this case, focuses on its view of the aggregate degree of competition between DBCT and RGTCT rather than a close consideration of whether these services are substitutable from the perspective of individual mines. In particular, the QCA concludes that:<sup>43</sup>

- ∅ because Kestrel is primarily a user of RGTCT and a significant proportion of the users of RGTCT would not switch to DBCT in response to a SSNIP for the DBCT service; then
- ∅ it follows that Kestrel is not in the market in which the DBCT service is supplied.

The second point does not follow from the first. In considering whether Kestrel is a customer in the market within which the DBCT service is supplied, the relevant consideration is whether DBCT is a viable alternative service for Kestrel – not whether DBCT is a viable alternative service for a significant proportion of the users of RGTCT.

The result of this approach is that the QCA excludes Kestrel and Teresa from the market, based on their location in the Blackwater system, notwithstanding evidence that it is lower cost for these mines to access DBCT than it is for them to access RGTCT.

## 2.6 Substitutability of terminal services for mines without contracts

The QCA considers that only transactions involving long term contracts are relevant to defining the boundaries of the market, and that transactions for throughput can be discounted from this assessment. This assumption leads it to exclude the Kestrel mine and Teresa project from the market, as well as BMA mines. However, we explain below that, considered in the context of a principled framework for market definition, neither of these conclusions is justified.

Our criterion (b) report notes that a large number of mines have exported coal through DBCT since 2014. This includes mines that do not have contracts with DBCT, such as:<sup>44</sup>

- ∅ Caval Ridge, Saraji, Peak Downs, Riverside and Goonyella mines, all operated by BMA; and
- ∅ Kestrel mine, operated by Adaro Energy (and previously by Rio Tinto).

Our approach to defining the market identifies its boundaries by reference to the area over which the DBCT service is currently being or will be supplied. We did not seek to distinguish in this assessment between use of the DBCT service under long term take-or-pay contracts or on a throughput basis. In our view, both modes of use indicate that the mine considers the DBCT service a viable option (and a potential substitute) for its coal handling services.

However, the QCA seeks to distinguish between use of the DBCT service under contract as compared to use on a throughput basis. It states that:<sup>45</sup>

It is relevant to distinguish between mines that hold contract entitlements at DBCT and mines that use DBCT without a contract entitlement (presumably accessing the contract entitlements of another party).

Illustrating this distinction, the QCA contends that:

<sup>43</sup> QCA draft recommendation, p C34.

<sup>44</sup> HoustonKemp first criterion (b) report, p 23.

<sup>45</sup> QCA draft recommendation, p C26.

- o in respect of BMA mines, their use of DBCT is only occasional and opportunistic and does not indicate that it is a strong substitute to HPCT;<sup>46</sup> and
- o in respect of Kestrel mine, Rio Tinto did not hold a specific contract for coal handling capacity at DBCT for Kestrel, but rather used its portfolio contract entitlements to enable Kestrel to access DBCT on a 'sporadic' basis.<sup>47</sup>

Neither the relevance nor basis for the distinction drawn by the QCA is clear cut. Anglo American notes that many miners have access to a portfolio of terminal contracts and optimise their use of these contracts across their mining operations.<sup>48</sup> In this context, it does not appear relevant to distinguish (as the QCA seeks to do) the use of DBCT under a contract with Kestrel as compared to a contract with Kestrel's owner. Both forms of arrangement would indicate that the DBCT service is regarded as a viable alternative coal handling service for coal mined at Kestrel.

The absence of an organising principle underpinning this position is further exposed by the QCA's treatment of BMC and BMA mines. Noting the existence of a long term contract held by BMC with DBCT, the QCA observes that:<sup>49</sup>

...it is appropriate to include the contract entitlements held by BMC mines at DBCT as part of the market for coal handling services at DBCT. Mines that can access the BMC contract entitlements (whether it is a BMC mine or a mine of another entity) are necessarily part of the market of assessing total foreseeable demand (but only up to the level of the contract entitlements at DBCT).

A number of facts are relevant to understanding the use of DBCT by BMC and BMA.

BMA currently has total contractual entitlements with DBCT of [REDACTED]<sup>50</sup> [REDACTED].<sup>51</sup> However, notwithstanding its current access entitlements [REDACTED] BMA did not have any access entitlements at DBCT in 2018.

BMC currently has total contractual entitlements with DBCT of [REDACTED]<sup>52</sup> [REDACTED].

We understand that most of BMA's use of the DBCT service in 2018 was under BMC's contract entitlements. Exact attribution of the amounts is not straightforward because BHP nominates its tonnages at DBCT for BMA and BMC coal under a common login and does not notify the contractual basis for those tonnes. By way of example, [REDACTED]<sup>53</sup>

An approach to market definition that places BMC mines in the relevant market and BMA mines outside the relevant market is not grounded in the reality of how those mines utilise DBCT. This reality appears to reflect

<sup>46</sup> QCA draft recommendation, p C26.

<sup>47</sup> QCA draft recommendation, p C34.

<sup>48</sup> Anglo American submission, pp 7-8.

<sup>49</sup> QCA draft recommendation, p 26.

<sup>50</sup> [REDACTED]

<sup>51</sup> [REDACTED]

<sup>52</sup> Data provided by DBCTM.

<sup>53</sup> [REDACTED]

that BMC's contract entitlements at DBCT are shared with BMA, and that most of the tonnages shipped from BMA's mines utilise these entitlements.

In our view, the extensive use of DBCT by the BMA mines over recent years means that they can reasonably be assessed as being customers in the market within which the DBCT service is supplied.<sup>54</sup> However, even if the QCA's contention as to contractual entitlements were accepted, on its own assessment the BMA mines would be in the market since they access the BMC contract entitlements.<sup>55</sup>

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<sup>54</sup> HoustonKemp first criterion (b) report, p 28.

<sup>55</sup> The QCA's separate contention that total foreseeable demand should be assessed only up to those total contractual entitlements is addressed in section 3 below.

## 3. Estimating total foreseeable demand

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In our first criterion (b) report, we estimated total foreseeable demand in the market as the total foreseeable demand from customers who are in the market.<sup>56</sup>

The QCA's disallowance of demand in the market that exceeds the amount that can be supplied by DBCT causes it to underestimate total foreseeable demand in the market for the service. This error on the part of the QCA manifests itself as:

- ∅ for customers that the QCA considers are in the market, the estimation of those customers' use of the DBCT service, not their total demand; and
- ∅ the understatement by the QCA of the number of customers in that market because it underestimates the scope of the market for the service.

In this section, we present estimates of total foreseeable demand that adjust for these errors, but otherwise accept:

- ∅ the base and high case forecasts of demand made by MMI Advisory, supplemented by AME data (as explained in more detail below);
- ∅ the approach adopted by the QCA to adopt the high case forecasts, truncated at 2026 levels, and scaled up to reflect a 10 per cent difference between demand for throughput and demand for contracted capacity.

### 3.1 QCA estimates demand for the DBCT service, not demand in the market

Since the QCA excludes from the relevant market demand from Goonyella mines that is served at coal terminals other than DBCT, it has the effect of estimating total demand for the existing DBCT service rather than total demand in the market in which the DBCT service is provided.

This is revealed in the QCA's approach to estimating foreseeable demand from Lake Vermont and Middlemount, mines that hold contracts with DBCT as well as other terminals. The QCA states that:<sup>57</sup>

- ∅ these mines are in the market, for the purpose of market definition; but
- ∅ total foreseeable demand in the market should exclude that portion of demand from these mines that would be served by terminals other than DBCT.

Consistent with this approach, the QCA instructs MMI Advisory to deduct from total foreseeable demand:<sup>58</sup>

- ∅ 6 mtpa sent from Lake Vermont to AAPT under a contract applying until 2028; and
- ∅ 3 mtpa sent from Middlemount to AAPT under a contract applying until 2027.

There is no reasonable basis for this approach. Criterion (b) requires the QCA to assess whether:<sup>59</sup>

the facility for the service could meet the total foreseeable demand in the market—

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<sup>56</sup> HoustonKemp first criterion (b) report, p 36.

<sup>57</sup> QCA draft recommendation, p C43.

<sup>58</sup> MMI Advisory report, pp 13-14.

<sup>59</sup> Queensland Competition Authority Act, s. 76(2)(b)

- (i) over the period for which the service would be declared; and
- (ii) at the least cost compared to any 2 or more facilities (which could include the facility for the service);

Total foreseeable demand in the market is the total demand arising from customers who are in the market. The fact that some of these volumes may currently, or in the future, be served by a facility that is not DBCT is irrelevant to the calculation of total foreseeable demand in the market. The same applies to other customers that may be assessed to be in the market, such as BMA mines and Kestrel.

This approach conflates the distinct concepts of 'demand in the market' and 'use of the DBCT service'. Demand by an individual for a product reflects the maximum quantity that he or she is willing to consume at any given price of that product.<sup>60</sup> Demand in the market may exceed use of the DBCT service if DBCT is at capacity such that other suppliers are meeting the demand of consumers in the market.

The QCA's approach to exclude part of the demand of Lake Vermont and Middlemount from the market for the service appears to be founded on its view that, at the time that these contracts were entered, the DBCT service was not available and so this does not establish that other terminals are 'close substitutes' for the service.<sup>61</sup>

Notwithstanding the QCA's view that other coal handling services are not 'close substitutes' to the DBCT service, they clearly are substitutes to the service supplied using expanded capacity at DBCT, consistent with the discussion at section 2 above.

The approach that the QCA adopts to estimating total foreseeable demand is equivalent to assuming that only volumes served within the existing capacity of DBCT are in the market. We explain in our earlier criterion (b) report why this approach is conceptually incorrect and must in all cases result in a facility inaccurately being identified as a natural monopoly.<sup>62</sup>

We demonstrate the difference between total foreseeable demand, when either including or excluding Lake Vermont and Middlemount and using the QCA's market definition, in table 3.1 below. Table 3.1 shows that, even with the QCA's market definition, total foreseeable demand in the market is approximately 103 mt per annum.

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<sup>60</sup> Morgan, W, Katz, M and Rosen H, *Microeconomics*, McGraw-Hill: Maidenhead, 2006, p 62.

<sup>61</sup> See for example, QCA draft recommendation, p C29.

<sup>62</sup> HoustonKemp first criterion (b) report, pp 34-35.

Table 3.1: Estimates of total foreseeable demand with the QCA's market definition

Year	Total demand for the service (QCA's approach)	Total demand in the market
2021	92.99	102.99
2022	89.14	99.14
2023	89.10	99.10
2024	84.68	94.68
2025	87.14	97.14
2026	91.71	101.71
2027	91.71	101.71
2028	91.71	101.71
2029	91.71	101.71
2030	91.71	101.71

Source: MMI Advisory

### 3.2 QCA underestimates the number of customers in the market

We explain above that the QCA's approach to market definition causes it incorrectly to exclude demand arising from mines that should properly be included within the market, such as mines outside the Goonyella system that nonetheless either use DBCT, prefer to use DBCT or might reasonably be expected to do so – see section 2.5 above.

Table 3.2 below shows the effect of estimating total foreseeable demand in the market with these changes. The table shows:

- ∅ total foreseeable demand in the market using the QCA's market definition; and
- ∅ total foreseeable demand in the market using our preferred market definition.

We use MMI Advisory data to estimate total foreseeable demand in the market. However, since MMI Advisory does not provide forecasts of foreseeable demand from Kestrel, Teresa and BMA mines, we supplement its forecasts with estimates from AME.<sup>63</sup> We assume base case and high case forecasts are the same, except for the Teresa project, where we assume base case volumes of zero to reflect MMI's stated view about the prospects for the project.<sup>64</sup>

<sup>63</sup> HoustonKemp first criterion (b) report, table A1.1.

<sup>64</sup> MMI Advisory, *Reconciliation of DBCT demand forecasts submitted by stakeholders*, December 2018, p 15 ('MMI Advisory report').

Table 3.2: Estimates of total foreseeable demand in the market

Year	QCA's market definition	HoustonKemp market definition
2021	102.99	164.67
2022	99.14	163.04
2023	99.10	163.94
2024	94.68	161.17
2025	97.14	168.71
2026	101.71	174.94
2027	101.71	174.94
2028	101.71	174.94
2029	101.71	174.94
2030	101.71	174.94

Source: MMI Advisory, AME

Table 3.2 shows that total foreseeable demand in the market, based on the combined MMI Advisory and AME data, is approximately 175 mt.



## 4. Assessing the least cost facility or facilities

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In our earlier criterion (b) report, we assessed how total foreseeable demand in the market could be met at least cost, measured as the 'incremental cost to society'. A consequence of this approach is that our analysis:

- ∅ did not consider costs that would be incurred regardless of how total foreseeable demand is met, such as sunk costs; and
- ∅ included costs beyond those incurred at the terminal, since meeting total foreseeable demand in the market could be expected to drive additional rail access and haulage costs.

The QCA's approach to the assessment of least cost assesses total charges for coal handling, rail access and rail haulage. The rationale for this approach appears to be that the QCA:

- ∅ adopts a 'total cost' standard, which includes sunk costs;<sup>65</sup>
- ∅ equates this to a 'average unit cost' standard;<sup>66</sup> and
- ∅ concludes that price is a suitable proxy for this measure of cost.<sup>67</sup>

We agree with the QCA that a 'total cost' standard is a reasonable and appropriate basis to assess least cost. Our own analysis is conducted on the same basis since, as we explain below, properly considered, there is no difference between an assessment of least cost on a 'total cost' basis as compared to an assessment of least cost on an 'incremental cost' basis.

However, the QCA makes a fundamental error in assuming that an 'average cost' standard is the same as a 'total cost' standard. This assumption causes the QCA's assessment of least cost to be distorted, because it:

- ∅ ignores the sunk costs associated with other terminals when considering scenarios under which DBCT meets all foreseeable demand – even though the sunk costs of those other terminals will continue to be incurred in these scenarios; but
- ∅ takes into account these same sunk costs when considering scenarios under which some foreseeable demand is met at those other terminals.

The result of this distortion is to *understate the total costs* of meeting all foreseeable demand at DBCT, or to *overstate the incremental costs* of meeting some of this demand at the alternative terminal. Put another way, the QCA's preferred total cost standard must be applied with a consistent approach to costs, so that costs that are incurred in each scenario are counted in each scenario.

Alternatively, if the QCA's assessment of least cost is corrected so that it is expressed on an incremental cost basis (or, equivalently, a consistent total cost basis) then its conclusion that criterion (b) is satisfied is reversed.

Further, even on the QCA's approach to assessing least cost, it would not be possible for DBCT to meet estimated total foreseeable demand of 93 mt in 2021. This is because, even if actions commenced now to provide the expansions required to meet this level of demand:

- ∅ the Zone 4 expansion could only be placed into service in 2023; and
- ∅ the 8X Phase 1 expansion could only be placed into service in 2025.

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<sup>65</sup> QCA draft recommendation, pp C47-C48.

<sup>66</sup> QCA draft recommendation, p C50.

<sup>67</sup> QCA draft recommendation, p C50.

DBCT cannot meet total foreseeable demand in the market at least cost in 2021, compared to any two or more facilities, if it is unable to meet all demand at any cost.

## 4.1 Incremental and total cost standards are equivalent

Our criterion (b) report undertook the least cost assessment by reference to incremental costs to society. The incremental cost standard focuses the analysis on the *additional* costs that would be incurred in order to meet total foreseeable demand. In other words, it does not take into account costs that have already been incurred.

We stated that the incremental cost standard was appropriate because non-recurring costs (including sunk costs) that have already been incurred:<sup>68</sup>

- ∅ are not relevant to the assessment of least cost because they will not be incurred again over the period for which the service would be declared; and, in any case
- ∅ make no difference to the assessment of least cost because these costs will have been incurred regardless of how total foreseeable demand is met.

It follows from the second observation that nothing turns on the first. Any means of meeting total foreseeable demand that would be least cost under an incremental cost standard (which excludes non-recurring costs that have already been incurred) would also be least cost under a properly applied total cost standard (which includes non-recurring costs that have already been incurred).

This proposition is consistent with elementary principles that underpin economists' consideration of sunk costs. The key principle that defines sunk costs is that they cannot be avoided and so would be incurred regardless of any actions taken.

By way of example, the undergraduate textbook, *Microeconomics*, explains the basic principles of sunk costs:<sup>69</sup>

To analyze costs, we also need to distinguish between sunk and nonsunk costs. When assessing the costs of a decision, the decision maker should consider only those costs that the decision actually affects. Some costs have already been incurred and therefore cannot be avoided, no matter what decision is made. These are called **sunk costs**. By contrast, **nonsunk costs** are costs that will be incurred only if a particular decision is made and are thus avoided if the decision is not made (for this reason, nonsunk costs are also called *avoidable costs*). When evaluating alternative decisions, the decision maker should ignore sunk costs and consider only nonsunk costs. Why? Consider the following example.

You pay \$7.50 to go see a movie. Ten minutes into the movie, it is clear that the movie is awful. You face a choice: Should you leave or stay? The relevant cost of staying is that you could more valuably spend your time doing just about anything else. The relevant cost of leaving is the enjoyment that you might forgo if the movie proves to be better than the first 10 minutes suggest. The relevant cost of leaving *does not* include the \$7.50 price of admission. That cost is sunk. No matter what you decide to do, you've already paid the admission fee, and its amount should be irrelevant to your decision to leave. [Emphasis in original]

Sunk costs receive a similar treatment in another textbook, *Principles of Microeconomics*:<sup>70</sup>

Economists say that a cost is a sunk cost when it has already been committed and cannot be recovered. Once a cost is sunk, it is no longer an opportunity cost. Because nothing can be done

<sup>68</sup> HoustonKemp first criterion (b) report, p 21.

<sup>69</sup> Besanko, D. and Braeutigam, R., *Microeconomics*, Fourth edition: international student version, John Wiley & Sons, 2011.

<sup>70</sup> Gans, J, King, S and Mankiw, N.G., *Principles of Microeconomics*, Second edition, Nelson Australa Pty Ltd, 2003.

about sunk costs, you can ignore them when making decisions about various aspects of life, including business strategy.

Our analysis of the firm's shutdown decision is one example of the irrelevance of sunk costs. We assume that the firm cannot recover its fixed costs by temporarily stopping production. As a result, the firm's fixed costs are sunk in the short run, and the firm can safely ignore these costs when deciding the part of the marginal-cost curve that lies above average variable cost, and the size of the fixed cost does not matter for this supply decision.

These observations are consistent with the Tribunal's *Pilbara* decision, in which it states:<sup>71</sup>

In comparing the cost of "sharing" and "not sharing" a facility, some costs will be the same, ... the "original" costs – being the costs that would be incurred in any event, regardless of whether the existing line is shared or not – cancel out in either scenario. For the sake of simplicity, we do not include those costs. In the end, the differences should come down to:

- ∂ the difference between additional operating costs on the incumbents' line due to sharing versus the operating costs of the new line; and
- ∂ the difference between the capital costs of any necessary expansion to the incumbent's line versus the capital costs of developing another line.

Assessing the least cost means of meeting total foreseeable demand is directly analogous to any business decision. It is necessary to compare options that may involve either one or both of:

- ∂ the expansion of DBCT to provide additional capacity; as against
- ∂ the use of existing coal handling facilities at increased levels of intensity.

The widely accepted view in economics, and also accepted by the Tribunal, is that costs that are unavoidable, such that they would be incurred in both of these scenarios, are of no account to an assessment of which of these approaches is least cost.

## 4.2 QCA's approach is neither the total cost or incremental cost standard

The QCA states that it supports a 'total cost' standard and quotes the Tribunal's *Pilbara* decision in support of this view.<sup>72</sup> However, the approach that it adopts is neither a total cost standard nor an incremental cost standard.

The QCA expresses reservations about reliance upon an incremental cost standard, and states instead that a total cost standard is preferable because it better identifies whether the facility for the service has natural monopoly characteristics. In doing so, it draws a distinction between the total cost standard and the incremental cost standard:<sup>73</sup>

...criterion (b) is now clearly directed towards consideration of the cost of meeting total foreseeable demand in a variety of possible scenarios, which does not necessarily involve duplication of the facility for the service, and may or may not require consideration of sunk costs.

Where the nature of the least cost calculation results in the same sunk costs being considered under separate scenarios (thereby cancelling each other out), it may be simpler to exclude them, rather than to go through the process of quantifying those costs. The QCA considers this is consistent with the Tribunal's decision in *Pilbara*...

In other words, the QCA assumes that there may be some cases in which certain sunk costs would be:

<sup>71</sup> In the matter of *Fortescue Metals Group Limited* [2010] ACompT 2, paras 906-907.

<sup>72</sup> QCA draft recommendation, p C47.

<sup>73</sup> QCA draft recommendation, pp C47-C48.

- ∂ included in one scenario in which total foreseeable demand is met; but
- ∂ not included in another scenario in which total foreseeable demand is met.

We note at the outset that this contention appears to defy the very definition of sunk costs, which by their nature are *unavoidable*. If a cost is unavoidable, it must be incurred in both scenarios, not only one.

Nevertheless, the QCA explains that, under its preferred assumption, excluding sunk costs from the assessment of least cost could potentially affect its result. It demonstrates this difference by reference to a hypothetical example in which:<sup>74</sup>

- ∂ total foreseeable demand is 100 units;
- ∂ a regulated facility currently serves 90 units and can be expanded to 100 units; and
- ∂ an alternative facility has spare capacity of 10 units.

The QCA states that its assessment of least cost involves the following comparison, in which the costs that cancel out are in bold:

- ∂ **capital costs of the regulated facility at 90 units + operating costs of producing 90 units**  
+ incremental capital costs to expand the facility by 10 units + operating costs of producing 10 units

compared with

- ∂ **capital costs of the regulated facility at 90 units + operating costs of producing 90 units**  
+ capital and operating costs of the alternative facility in producing 10 units

This example is helpful in illuminating the difference between the QCA's approach and a total cost standard. In short, in its second of the two comparisons, the QCA includes the (sunk) capital costs of the alternative facility producing ten units, but these same costs are excluded from the first comparison. Put another way, the QCA's two scenarios are not comparing costs on a like with like basis.

For ease of comparison, we show all potential costs in the QCA's example in a tabular format at table 4.1 below. The shaded rows in the table identify categories of costs that would be incurred under both scenarios and are therefore *unavoidable*. The difference between the total cost standard and the incremental cost standard is that:

- ∂ the total cost standard includes *all* of these costs under each scenario; whereas
- ∂ the incremental cost standard includes *none* of these costs under each scenario.

It follows that the total cost standard and the incremental cost standard will give rise to the same outcome, both in this example and more generally.

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<sup>74</sup> QCA draft recommendation, p C49.

Table 4.1: Comparison of the total, incremental and QCA cost standards

Cost category	Total cost standard		Incremental cost standard		QCA's approach	
	Expand facility	Use alternative	Expand facility	Use alternative	Expand facility	Use alternative
Capital cost of the regulated facility at 90 units	Yes	Yes	No	No	Yes	Yes
Additional capital cost of the regulated facility to expand by 10 units	Yes	No	Yes	No	Yes	No
Operating costs of the regulated facility at 90 units	Yes	Yes	No	No	Yes	Yes
Additional operating costs of the regulated facility to produce 10 more units	Yes	No	Yes	No	Yes	No
Capital cost of the alternative facility	Yes	Yes	No	No	No	Yes
Operating costs of the alternative facility at its current use	Yes	Yes	No	No	No	No
Operating costs of the alternative facility to produce 10 more units	No	Yes	No	Yes	No	Yes

The QCA's approach is described in the rightmost two columns of table 4.1 above. The QCA's approach is similar to the total cost standard, except that it:

- o excludes the capital cost of the alternative facility when considering the cost of meeting all foreseeable demand using an expansion of the facility; but
- o includes at least part of the capital cost of the alternative facility when considering the cost of meeting some foreseeable demand using the alternative facility.

However, the alternative facility will be in place regardless of whether or not it meets the residual 10 units of demand. It follows that a reasonable assessment of total cost would either:

- o include the capital cost of the alternative facility under both scenarios in which total foreseeable demand is met – that is, the total cost standard; or
- o exclude the capital cost of the alternative facility under both scenarios in which total foreseeable demand is met – that is, the incremental cost standard.

The effect of the QCA's approach is to *understate the total costs* of meeting all foreseeable demand at the facility, or to *overstate the incremental costs* of meeting some of this demand at the alternative terminal.

The QCA relies on the Tribunal's decision in *Pilbara* to support its contention that a total cost standard is appropriate. We agree that it is, providing the total cost standard is applied correctly so that it is the same as the incremental cost standard (as the Tribunal and the Productivity Commission both observe).

However, the Tribunal's approach offers no support for the method that is actually applied by the QCA, which is not a total cost standard. Box 4.1 explains how the QCA's approach is different from and inconsistent with the Tribunal's decision, when considered in its entirety.

#### Box 4.1: The Tribunal's consideration of least cost in the matter of Fortescue Metals Group Limited

Throughout the Tribunal's considerations in *Pilbara*, it focused on the costs under two scenarios:

- ∂ meeting demand if access were provided; as against
- ∂ meeting demand if access were not provided.

In making this comparison, the Tribunal took as given the capacity and costs of existing facilities and sought to assess only the additional costs associated with meeting demand in each scenario.

Under the simplest example, for the eastern section of the Goldsworthy line, the Tribunal assessed BHPB demand as 2mtpa and third party demand as 20 mtpa. The Tribunal considered that:<sup>75</sup>

- ∂ if access were provided, the cost of meeting demand would be very low, since the existing track has ample capacity to serve these volumes; and
- ∂ if access were not provided, the cost of meeting demand would require the construction of a single track bypass, which would be substantially higher.

Under a more complex assessment, in respect of the Mt Newman line, the Tribunal considered that:<sup>76</sup>

- ∂ if access were provided, the cost of meeting demand would likely require the double-tracked section from Yandi to Port Hedland to be triple-tracked and the single-track section from Mindy-Mindy to Yandi would need to be double-tracked; and
- ∂ if access were not provided, demand might be met one of two ways:
  - > a single track railway from Mindy Mindy to Port Hedland, which the Tribunal assumed would be of similar cost to expanding the Newman line by an additional track over this distance; or
  - > construction of a spur line to the Chichester line and double-tracking bridges on the Chichester line (the rest of the line is already double-tracked), which the Tribunal assumed would be lower cost than expanding the Mt Newman line.

The Tribunal's assessment of least cost excludes the sunk costs of an alternative facility to the Mt Newman line, being the Chichester line, in *all* scenarios – on the basis that they would be incurred in any event and so would cancel out from the relevant comparison.

However, the QCA's approach applied to this scenario would include an allocation of the sunk costs of the Chichester line, including the double-tracked sections, *only* in the scenario in which the use of the Chichester line is considered. This is analogous to its approach of considering the potential charges associated with using existing capacity at AAPT, which include recovery of the sunk costs of the terminal, *only* in the scenario in which AAPT is used to serve foreseeable demand.

The Tribunal's approach is the correct one, since it takes into account the fact that the sunk costs of the Chichester line would be incurred in *all* scenarios. It follows that including a recovery of these sunk costs in only *one* scenario would give rise to a distorted comparison that may result in an incorrect identification of the least cost means of meeting total foreseeable demand in the market.

<sup>75</sup> In the matter of Fortescue Metals Group Limited [2010] ACompT 2, paras 917-923.

<sup>76</sup> In the matter of Fortescue Metals Group Limited [2010] ACompT 2, paras 938-944.

### 4.3 Criterion (b) is not satisfied under an appropriate least cost assessment

When the QCA's assessment of least cost is adjusted so that it is expressed on an incremental cost basis (or equivalently, a consistent total cost basis), its conclusion that criterion (b) is satisfied is reversed. In this section, we set out the changes that need to be made to the QCA's assessment of least cost to ensure that it is conducted on a basis that is consistent with both sound economic principles and the Tribunal's *Pilbara* test.

Table 9 in Part C of the QCA's draft recommendation sets out its assessment of least cost.<sup>77</sup> We reproduce this table below.

Table 4.2: QCA's assessment of supply chain cost, cost to society (\$ per tonne)

Cost components	DBCT	AAPT	RG Tanna	WICET
Below-rail cost	\$3.62	\$10.69	\$7.25	\$7.25
Above-rail cost	\$3.25	\$5.03	\$4.54	\$4.54
Coal handling cost	\$5.14	\$7.01	\$5.18	\$14.67
Other port and shipping costse	\$0.05	\$0.05	\$0.05	\$0.05
Supply chain cost	\$12.05	\$22.79	\$17.02	\$26.51
<i>Cost difference relative to accessing DBCT</i>		<i>at least \$10.73 (89%)</i>	<i>at least \$4.97 (41%)</i>	<i>at least \$14.46 (120%)</i>

Source: QCA

The QCA concludes that criterion (b) is satisfied because:

- ∅ the charges associated with meeting total foreseeable demand at an expanded DBCT are \$12.05 per tonne; which are lower than
- ∅ the charges associated with meeting some foreseeable demand at available capacity at other terminals, which are no lower than \$17.02 per tonne.

The comparison set out in table 4.2 above incorrectly assesses the least cost means of meeting total foreseeable demand because it:

- ∅ includes the sunk costs of existing terminal and rail services in the scenarios in which some foreseeable demand is met at terminals other than DBCT; but
- ∅ excludes the sunk costs of those same existing terminal and rail services in the scenario where all foreseeable demand is met at DBCT.

This problem arises because the QCA estimates the costs of meeting total foreseeable demand by reference to the *charges* associated with providing terminal and rail services. As the QCA notes, such charges will typically reflect average costs, including a return on and of sunk costs:<sup>78</sup>

...to the extent that a uniform access price reflects a building block methodology of all factors relevant in the provision of a service (including a return on sunk costs), the QCA considers that price is a suitable proxy for cost.

The consequence is that when the QCA considers the *charges* associated with using coal terminal and railway facilities, its analysis of costs overstates the extent to which *costs* (whether measured on an incremental or total basis) differ between serving demand at DBCT as against other terminals. For example,

<sup>77</sup> QCA draft recommendation, p C51.

<sup>78</sup> QCA draft recommendation, p C50.

by relying on the charges for using an expanded DBCT, the QCA has overlooked the necessity of continuing to take into account the sunk costs that continue to apply to the alternative facility (even though no charges are paid for that alternative facility). Criterion (b) directs the QCA towards the consideration of costs, not charges.

By way of example, the QCA cites the charges associated with WICET as being \$14.67 per tonne and assumes that these are incurred only when some foreseeable demand is met at WICET. However, it is likely that the large majority of these charges reflect the recovery of sunk costs, which are incurred irrespective of whether any foreseeable demand is served at WICET. It follows that if some demand in the market were to be served at WICET, the extent to which *total* costs increase will not be by \$14.67 per tonne, but a fraction of this amount. The QCA's approach to assessing *total* costs effectively *double-counts* the sunk costs that are recovered in the WICET charge.

In table 4.3 below, we re-express the QCA's comparison so that it is made on an incremental cost basis. We compare two scenarios, where:

- ∂ DBCT is expanded and meets total foreseeable demand; as against
- ∂ DBCT is not expanded and foreseeable demand in excess of its capacity is met using existing capacity at an alternative facility.

Since both scenarios assume that the current capacity of DBCT is fully utilised, we do not need to consider the costs associated with serving this demand – they will be the same in both scenarios. Instead, it is sufficient to compare the costs of serving total foreseeable demand that exceeds the current capacity of DBCT at either:

- ∂ expanded capacity at DBCT; or
- ∂ available capacity at alternative terminals.

The costs that differ between the scenarios are:

- ∂ the additional costs of expanding DBCT to meet total foreseeable demand; and
- ∂ the additional operating costs of meeting foreseeable demand with terminal, rail access and rail haulage services.

The QCA estimates that the additional costs of expanding DBCT amount to \$8.50 per tonne, expressed on a unitised basis.<sup>79</sup>

Consistent with the analysis in our criterion (b) report, we assume that the variable component of charges is:

- ∂ 22 per cent of the total coal handling charges for existing facilities – equal to the Handling Charge Variable (HCV) as a proportion of the total coal handling charges for 2017/18;
- ∂ 17 per cent of rail access charges for existing facilities – consistent with variable operating costs as a share of Aurizon's total access charges;<sup>80</sup> and
- ∂ 50 per cent of rail haulage charges for existing facilities.

The incremental cost comparison is set out at table 4.3 below. We exclude port and shipping costs from the comparison, since the QCA does not identify any differences in these costs between terminals.

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<sup>79</sup> QCA draft recommendation, p C86.

<sup>80</sup> We estimate the share of total operating and maintenance costs as a proportion of total costs as 40 per cent based on the QCA's analysis of building block costs in the UT5 draft decision. Separately, for the West Moreton coal network, the QCA estimated that the share of variable operating costs as 42.7 per cent. It follows that approximately 17 per cent of total charges are likely to reflect variable costs.

Table 4.3: An incremental cost assessment of supply chain cost, cost to society (\$ per tonne)

Cost components	Expanded capacity at DBCT	Existing capacity at AAPT	Existing capacity at RGTCT	Existing capacity at WICET
Below-rail cost	\$0.62	\$1.82	\$1.23	\$1.23
Above-rail cost	\$1.63	\$2.52	\$2.27	\$2.27
Coal handling cost	\$8.50	\$1.54	\$1.14	\$1.23
Supply chain cost	\$10.74	\$5.87	\$4.64	\$6.73
<i>Cost difference relative to accessing DBCT</i>		\$4.87 less (45%)	\$6.10 less (57%)	\$4.01 less (37%)

Source: QCA, HoustonKemp analysis

Table 4.3 shows that, assessed on an appropriate standard, it is lower cost to meet some part of total foreseeable demand above the existing capacity of DBCT at any of AAPT, RGTCT or WICET, than it is to meet all of this using expanded capacity at DBCT.

This finding is consistent with the observation that we made in our criterion (b) report:<sup>81</sup>

The evaluation of the resource costs of meeting foreseeable demand is likely to be significantly affected by the fact that the provision of rail and terminal infrastructure is capital intensive. It follows that the resource costs of meeting foreseeable demand using existing infrastructure (which does not require new capital investment) are likely to be significantly lower than the resource costs associated with the construction and use of new infrastructure.

The revised comparison in table 4.3 demonstrates that, with an appropriate comparison of costs between scenarios, criterion (b) is not satisfied. In other words, the facility for the service cannot meet total foreseeable demand in the market at least cost, over the period for which the service would be declared, compared to any two or more facilities.

#### 4.4 QCA's assessment is conducted on the basis of costs to society

In our criterion (b) report, we explicitly state our view that the relevant costs in the least cost assessment are the incremental costs to society.<sup>82</sup> By contrast, the QCA does not take an explicit position as to whose costs should relevantly be captured in the least cost assessment. We show below that the result of our assessment does not turn on this assumption.

Our inclusion of below and above rail costs as part of the least cost assessment was made on the understanding that the relevant costs were those incurred by society. We stated that:<sup>83</sup>

The costs referred to in criterion (b) should not be limited to those incurred by the provider of the facility for the service. To do so would overlook the fact that coal handling services are part of a supply network and that to meet foreseeable demand in the market requires costs to be incurred throughout that supply network. This is particularly relevant in the case of capacity expansions, which require that the system capacity is expanded to match, including below rail, above rail, terminal and port channels.

By contrast to this position, if a more limited view were taken as to whose costs were to be included in the assessment, other costs in the supply network would not be relevant to the assessment. It follows that the

<sup>81</sup> HoustonKemp first criterion (b) report, p 21.

<sup>82</sup> HoustonKemp first criterion (b) report, p 21.

<sup>83</sup> HoustonKemp first criterion (b) report, p 20.

QCA's assessment of least cost appears to be undertaken on the same basis as ours – on the basis of costs to society.

For example, if the relevant costs were assumed to be 'production costs' in the relevant market for coal handling services, these would not include the costs of above and below rail services, since providers of those services are not participants in this market.

Under this assumption, the assessment of least cost between providers of coal handling services would be significantly less involved. On an incremental cost basis (as with a total cost basis) the production costs associated with serving total foreseeable demand above the existing capacity of DBCT at other terminals are substantially lower than meeting this demand using expanded capacity at DBCT, as we show in table 4.4 below.

Table 4.4: An incremental cost assessment of supply chain cost, production cost (\$ per tonne)

Cost components	Expanded capacity at DBCT	Existing capacity at AAPT	Existing capacity at RGTCT	Existing capacity at WICET
Below-rail cost	n/a	n/a	n/a	n/a
Above-rail cost	n/a	n/a	n/a	n/a
Coal handling cost	\$8.50	\$1.54	\$1.14	\$1.23
Supply chain cost	\$8.50	\$1.54	\$1.14	\$1.23
<i>Cost difference relative to accessing DBCT</i>		\$6.96 less (82%)	\$7.36 less (87%)	\$7.27 less (86%)

In section 4.3 above we note the distinction between 'charges' and 'costs'. While terminal and rail charges represent costs to miners, they represent neither costs to society nor costs to terminal operators.

The issues associated with the use of charges in the least cost assessment are best understood by reference to the dichotomy between price for expansions on the basis of 'socialisation' as against 'differentiation'. We explain in Box 4.2 below that the use of socialised charges for the assessment of least cost may lead to incorrect conclusions.

Box 4.2: A comparison of socialised charges at DBCT with charges at other terminals is problematic

DBCT has a capacity of 84.2 mtpa and requires an expansion of 8.8 mtpa to meet total foreseeable demand in the market.

The charge for existing capacity at DBCT is \$2.60 per tonne – a total cost of \$218.9 million per annum. The incremental cost of undertaking the expansion is \$8.50 per tonne – a total incremental cost of \$74.8 million per annum.

By comparison, the tonnes could be served at RGTCT for an incremental cost of \$4.64 per tonne – a total incremental cost of \$40.8 million per annum.

It follows that the total cost of meeting total foreseeable demand at DBCT is \$293.7 million per annum, compared to the total cost of meeting total foreseeable demand across DBCT and RGTCT of \$259.7 million. It is least cost to service total foreseeable demand at two or more terminals, and so criterion (b) is not satisfied.

However, a comparison of a socialised charge at DBCT with the costs of accessing RGTCT at \$4.64 per tonne could lead to the erroneous conclusion that it is cheaper to expand DBCT than to meet 8.8 mtpa of foreseeable demand at RGTCT.

Although this would certainly be the case for miners that must otherwise incur the charges associated with accessing RGTCT to access DBCT on a socialised basis, it would not be the case for the miners that would otherwise have been able to access DBCT at the charge for existing capacity.

If the greater costs are eventually passed through to miners in charges, it is reasonable to conclude that the aggregate costs to miners of serving all volumes at DBCT would be higher than the use of RGTCT to meet demand that exceeds the existing capacity of DBCT.

The potential for this error is compounded by a discrepancy in the QCA's estimates of charges under a socialised expansion as against a differentiated expansion. Our understanding is that these approaches reflect different means of recovering the same quantum of costs. It follows that the annual revenue of the terminal should be the same with socialisation and with differentiation. However, this is not the case with the QCA's estimated charges, since:

- ∅ under socialisation, total revenue for the terminal is \$248.3 million, reflecting a TIC of \$2.67 per tonne applied over 93 mt; whereas
- ∅ under differentiation, total revenue for the terminal is \$271.7 million, reflecting a TIC of \$2.60 per tonne applied over 84.2 mt and a TIC of \$6.00 per tonne applied over 8.8 mt.

It is apparent that the average TIC with a differentiated expansion is \$2.92 per tonne, which is \$0.25 per tonne higher than the QCA's estimated charge under socialisation. This suggests that the QCA has either underestimated the socialised charge or overestimated the differentiated charge.

#### 4.5 DBCT is unable to meet total foreseeable demand in 2021

The QCA estimates that total foreseeable demand, over the period for which the service would be declared, will reach its greatest level in 2021, at 93mt. To meet this level of demand, the QCA assumes that DBCT would require the Zone 4 and 8X Phase 1 expansion projects.

However, each of the Zone 4 and 8X Phase 1 expansion projects would require considerable lead times in order to be placed into operation. We understand that, absent any requirements imposed by the access undertaking or the access framework:<sup>84</sup>

- ∅ the Zone 4 expansion could be delivered by September 2023; and
- ∅ the 8X Phase 1 expansion could be delivered by September 2025.

These estimates reflect the expected time associated with undertaking the following activities:

- ∅ negotiating and underwriting agreement for the expansion with access seekers;
- ∅ award engineering contracts for feasibility studies, including:
  - > a refresh of the existing feasibility studies for Zone 4; and
  - > new feasibility studies for 8X Phase 1 and consultation with access seekers;
- ∅ access seekers review and sign expansion agreements;
- ∅ secure environmental approvals;
- ∅ secure funding for the project;
- ∅ detailed design of the expansion; and

<sup>84</sup> We understand that this expansion schedule is attached as an appendix to DBCTM's submission in response to the QCA's draft recommendation.

o construction, commissioning and handover.

Since neither Zone 4 nor 8X Phase 1 can be delivered by 2021, these expansions (and other potential expansions of DBCT) cannot contribute to meeting total foreseeable demand in the market until such time as they can be completed. The best-case timeframes require expansion of below-rail capacity which is, for the purpose of the timeframes above, assumed to occur simultaneously.

It follows that, on the QCA's estimates of total foreseeable demand in the market, it must be least cost for any foreseeable demand above the existing 84.2 mt capacity of DBCT to be met at another coal terminal.

The QCA notes that WICET has available capacity of 11mt and the Blackwater system has available capacity of 18mt.<sup>85</sup> Since DBCT is unable to meet total foreseeable demand in 2021 using existing capacity, and cannot feasibly expand by that time, it would be lower cost, and feasible, for:

- o 84.2 mt of total foreseeable demand in the market to be met using existing capacity at DBCT; and
- o 8.8 mt of total foreseeable demand in the market to be met using existing capacity at WICET.

It would be cheaper still to use available capacity at AAPT and/or RGTCT.

It follows that, even on the QCA's analysis, criterion (b) is not satisfied, because total foreseeable demand in the market in 2021 is met at least cost using two or more facilities.

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<sup>85</sup> QCA draft recommendation, pp C70-C71.

## 5. Declaration

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We are pleased to confirm that in relation to the analysis presented and the conclusion drawn in our report:

- o the factual matters set out in our report are, as far as we know, true;
- o in preparing this report, we have made all enquiries we consider appropriate; and
- o that the opinions stated in our report are genuinely held by us and that our report contains reference to all the matters that we consider significant.

Greg Houston/Daniel Young

6 March 2019

## A1. Foundations of the reverse cellophane fallacy

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The cellophane fallacy is a widely accepted limitation of the traditional hypothetical monopolist test (HMT), prominently arising in the 1956 “cellophane case” – *United States v El du Pont & Co* – nearly thirty years prior to the formal adoption of the HMT in the United States in 1982.<sup>86</sup> At its conception, the cellophane fallacy referred to a situation in which, due to the market power of the incumbents, the prevailing market prices are above what they *would have been* in a workably competitive market, leading to an erroneously wide market definition when the SSNIP is applied to the prevailing prices. Gene Schaerr summarised this idea in *The Yale Law Journal* as follows:

In industries characterized by market power (e.g., because of collusion or monopoly) the prevailing price is usually higher than the competitive price." When applying the Guidelines to mergers in such industries, however, DOJ applies the five-percent test to the prevailing price rather than to the competitive price. As the previous discussion shows, both the product and geographic markets may be larger than if the competitive price were used; the overall market, therefore, may be substantially larger.<sup>87</sup>

This original understanding of the cellophane fallacy has become well established in many countries, including the United States, United Kingdom and Australia, both in case law and academic literature, even receiving explicit mention in the United Kingdom’s Competition Commission & Office of Fair Trading, *Merger Assessment Guidelines*.<sup>88</sup>

To remedy the implications of the cellophane fallacy when performing an HMT, the widely accepted solution is to apply a SSNIP to estimated competitive prices. In the words of the competition economist Massimo Motta:

... the appropriate market definition test should not ask whether the hypothetical monopolist can increase prices in a small but significant way relative to *current* prices, but rather relative to *competitive* prices.<sup>89</sup>

The use of this solution is upheld by Australian case law in *Seven Network Ltd v News Ltd*, in which the judge directly acknowledged both the cellophane fallacy and the validity of the solution:

The trial judge accepted that the SSNIP test must be applied to the competitive price not the monopoly price because otherwise that might give rise to the “cellophane fallacy”: *Cellophane Case (United States v El du Pont de Nemours & Company 351 US 377 (1956))*.<sup>90</sup>

The possibility of prevailing prices being below the competitive level, and the relevant market thereby being defined too narrowly, is implicitly accommodated for by both the cellophane fallacy and its accepted solution. Nevertheless, it was explicitly formalised by Luke Froeb and Gregory Werden of the antitrust division of the United States Department of Justice, in their seminal paper *The Reverse Cellophane Fallacy in Market Delineation* in 1992. Froeb and Werden extend the concept of the cellophane fallacy in the context of competition analysis to what they coin the reverse cellophane fallacy, for which the relevant market is defined too narrowly on the basis of prevailing market conditions:

<sup>86</sup> *United States v El du Pont & Co*, 351 US 377 (1956) (*du Pont*); United States Department of Justice, *Merger Guidelines*, reg 28.493, 1982;

<sup>87</sup> Schaerr, Gene, “The Cellophane Fallacy and the Justice Department’s Guidelines for Horizontal Mergers”, *The Yale Law Journal*, v 94(3), 1985, pp 676-677.

<sup>88</sup> Competition Commission & Office of Fair Trading, *Merger Assessment Guidelines*, OFT1254, 2010, p 31; *Seven Network Ltd v News Ltd*, (2009) 182 FCR 160, pp 241-242.

<sup>89</sup> Massimo Motta, *Competition Policy: Theory and Practice*, Cambridge University Press, Cambridge, 2004, p 105.

<sup>90</sup> *Seven Network Ltd v News Ltd*, (2009) 182 FCR 160, pp 241-242.

... markets delineated on the basis of prevailing demand elasticities are likely to be too small and the potential for the exercise of market power is likely to be overstated. This is precisely the opposite of the error in the Cellophane case, so we term it the reverse Cellophane fallacy.<sup>91</sup>

This idea, that the cellophane fallacy can function in both directions, and has a counterpart in the case where prevailing prices are below what would have been observed in a competitive market, is accepted in United States and Australian academic literature, being quoted in *The Journal of Competition Law and Economics* (U.S.) and *The Competition and Consumer Law Journal* (Australia).<sup>92</sup>

The case of a regulated business exhibiting prices below what would be observed in a competitive market is examined in-depth by Debra Aron and David Burnstein in their 2010 paper *Regulatory Policy and the Reverse Cellophane Fallacy* as an example of the reverse cellophane fallacy. Aron and Burnstein make three key points: first, that regulated businesses are by their nature susceptible to having lower than market prices and are therefore susceptible to the reverse cellophane fallacy when applying an HMT; second, that the reverse cellophane fallacy leads to an incorrectly narrow market definition, with the potential exclusion of what might have been substitutes in a competitive market; and third, that this mistakenly leads to the self-perpetuation of regulatory oversight:

... applying the “small but significant non-transitory increase in price” (SSNIP) test for market power that is defined in the Horizontal Merger Guidelines to firms in regulated industries can lead to the reverse of what is referred to in the antitrust literature as the “cellophane fallacy”.<sup>93</sup> ...

The uneconomically low prices cause other services to appear to be weaker substitutes than they would be at compensatory prices and therefore lead to improperly narrow market definitions and erroneous inferences of market power. This in turn leads to the self-perpetuation of regulation, in which regulators insist on finding that the incumbent lacks market power before deregulating prices, whereas the artificially restricted prices lead to an erroneous inference of market power.<sup>94</sup>

The principles extending the cellophane fallacy to include the reverse cellophane fallacy are brought into the context of Australian competition law by Rhonda Smith.<sup>95</sup> Smith notes that the artificially low price of flyash achieved by the defendant, Cement Australia, in *ACCC v Cement Australia* potentially leads to misspecification of the relevant market when using the HMT due to the reverse cellophane fallacy.<sup>96</sup> Smith also discusses practicable methods of overcoming the reverse cellophane fallacy when using an HMT, such as applying a SSNIP to a competitive price estimated using quantitative data, as was done by the ACCC’s economic expert, Greg Houston. Smith points out that, whilst Mr Houston’s approach was novel, it was nevertheless valid.

The validity of using quantitative estimation of the competitive price for the purposes of applying an HMT was first accepted in Australian case law in *Seven Network Ltd v News Ltd*:

The reliable application of the SSNIP test requires sufficient quantitative data to permit the calculation or assessment, in particular, of the competitive price for the product in question. As has been seen, it is the competitive price that provides the starting point for determining whether a hypothetical monopolist could profitably impose a SSNIP.<sup>97</sup>

<sup>91</sup> Froeb, Luke and Werden, Gregory, “The Reverse Cellophane Fallacy in Market Delineation”, *Review of Industrial Organization*, v 7, 1992, p 241.

<sup>92</sup> Smith, Rhonda, “Market Definition and Substitution Options”, *Competition and Consumer Law Journal*, v 22(2), 2014; Savitski, David, “Market power analysis for oil pipelines facing excess demand”, *Energy Economics*, v 34, 2012. pp 955–960.

<sup>93</sup> Aron, Debra and Burnstein, David, “Regulatory Policy and the Reverse Cellophane Fallacy”, *Journal of Competition Law and Economics*, v 6(4), 2010, p 975.

<sup>94</sup> Aron, Debra and Burnstein, David, “Regulatory Policy and the Reverse Cellophane Fallacy”, *Journal of Competition Law and Economics*, v 6(4), 2010, p 973.

<sup>95</sup> Smith, Rhonda, “Market Definition and Substitution Options”, *Competition and Consumer Law Journal*, v 22(2), 2014.

<sup>96</sup> *ACCC v Cement Australia Pty Ltd*, (2013) 210 ALR 165.

<sup>97</sup> *Seven Network Ltd v News Ltd*, (2009) 182 FCR 160, pp 241-242.

## A2. Outcomes of workably competitive markets

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'Workable competition' is an economic concept that describes a state of competition which, despite not being perfect, gives rise to outcomes that provide many of the socially desirable benefits of perfect competition over the long run.

A common theme that emerges from the economic literature is that workable competition is a process of rivalry in which no supplier can affect the market price on a sustained basis, because of the constraints posed by either existing suppliers or the threat of new entry.

In this appendix, we set out:

- ∂ the economic foundations of the term 'workable competition', both in its development in the economic literature and in its use by practitioners in the context of infrastructure regulation and pricing in Australia; and
- ∂ the implications of workable competition for limiting that the prices that suppliers are able to achieve in the market, by reference to the costs of efficient rivals, or efficient potential rivals.

These implications are at odds with the implicit view of the QCA that the outcomes of a workably competitive market are prices that are aligned with the costs of a particular supplier in the market.

Some markets contain suppliers with heterogeneous costs, consistent with an upward-sloping supply curve. Workable competition in these markets gives rise to prices that reflect the costs of only the marginal supplier required to meet demand.

### A2.1 Economic foundations of workable competition

The term 'workable competition' was first coined by John Clark in 1940 as a basis for describing competition in a market that is less extreme than the idealised benchmark of perfect competition but serves as a realistic standard against which monopoly power can be measured.<sup>98</sup>

Clark addresses considerations that may be relevant to identifying workable competition. He notes that, in favourable circumstances, existing and potential competitors may provide a check on the tendency of firms to exploit market power over the long run by increasing prices or reducing output.<sup>99</sup>

... there seems to be a tendency to regard the business-man as having too little foresight to anticipate the materializing of potential competition, and as following an unduly grasping policy in regard to price, and an unduly restrictive policy as to output, until potential competition becomes actual, and the industry is burdened with too many producers, whose individual output is restricted short of the optimum. This undoubtedly has some truth. It would be expecting a great deal of business-men that they should generally have perfect foresight of the emergence of potential competition, and on that account should avoid unduly restrictive policies. Nevertheless, there is apparently a tendency of somewhat similar effect on the part of some or many businesses, even if not guided by such impossibly perfect foresight. There is a tendency to strive to maintain and increase output, as if this were an end in itself, aside from the resulting net earnings and perhaps at a short-run sacrifice of net earnings which a more grasping policy might secure. In such cases, business, whether putting its reasoning in this form or not, acts as if it were governed by anticipations of potential competition, and by the desire to forestall its materializing.

<sup>98</sup> Clark, J.M., *Towards a concept of workable competition*, The American Economic Review, 30(2), June 1940, pp. 241-256.

<sup>99</sup> Clark, J.M., *Towards a concept of workable competition*, The American Economic Review, 30(2), June 1940, pp. 246-247

Workable competition is defined by Clark as that which is not perfect. Perfect competition is a theoretical construct that exists only under idealised assumptions, which include:<sup>100</sup>

- ∅ homogeneous and perfectly divisible outputs, such that consumers are indifferent between the products of various firms;
- ∅ perfect information, with all prices and outputs being known;
- ∅ neither buyers nor sellers incur transactions costs or fees to participate in the market;
- ∅ the absence of externalities so that each firm bears the full cost of the production process; and
- ∅ buyers and sellers cannot individually influence the price at which the product can be purchased or sold – the price is determined by the market, and each buyer or seller takes the price as given.

Under these conditions, competition drives economically efficient outcomes in both the short run and the long run. However, few (if any) markets in the real world satisfy the conditions for perfect competition.

Following Clark, later contributions to the literature focused on identifying the characteristics of workably competitive market. Stephen Sosnick put together an extensive list of these,<sup>101</sup> which was reorganised by Scherer and Ross into the ‘structure-conduct-performance’ paradigm.<sup>102</sup>

The concepts of ‘workable’ and ‘effective’ competition had sufficiently developed that they were described and equated by the United States Attorney-General’s National Committee in its study of anti-trust laws in 1955. The Committee adopted a more explicit definition, identifying that workable competition exists where competition is sufficiently strong to defeat a potential exercise of market power by any seller:

The concept of “workable” or “effective” competition can perhaps best be described as the economists’ attempt to identify the conditions which could provide appropriate leads for policy in assuring society the substance of the advantages that competition should provide...

The basic characteristic of effective competition in the economic sense is that no one seller, and no group of sellers acting in concert, has the power to choose its level of profits by giving less and charging more. Where there is workable competition, rival sellers, whether existing competitors, or new or potential entrants into the field, would keep this power in check by offering or threatening to offer effective inducements, so long as the profits to be anticipated in the industry are sufficiently attractive in comparison with those in other employment when all risks and other deterrents are taken into account. The result would be to force the seller who sought to increase his profits above this level by employing a high-price, limit-output monopoly policy either to give it up, or to lose ground to his rivals at a rate sufficient to reduce his profits, thus defeating the policy.

In Australia, the concept of workable competition as a guide for economic policy originated with the Hilmer Committee report on National Competition Policy. Consistent with Clark’s motivation, the Hilmer Committee report defined workable competition as a benchmark against which monopoly power could be measured, by reference to the level of prices that could be sustained:<sup>103</sup>

In markets characterised by workable competition, charging prices above the level of long run average costs will not be possible over a sustained period, for higher returns will attract new market entrants or lead customers to choose a rival supplier or product.

The Hilmer Committee report also implicitly defined the ‘long run average costs’ as an ‘efficient’ level of pricing, noting that where workable competition was absent, firms may be able to price above the efficient

<sup>100</sup> Carlton D.W. and Perloff, J M, *Modern industrial organization: fourth edition*, Pearson Education Limited: London, 2015, p 81.

<sup>101</sup> Sosnick, S.H., *A critique of concepts of workable competition*, *The Quarterly Journal of Economics*, 72(3), August 1958, pp 380-423.

<sup>102</sup> Scherer, F.M. and Ross, D.R., *Industrial market structure and economic performance*, Houghton Mifflin, Boston, 1990, pp 53-54.

<sup>103</sup> Independent Committee of Inquiry on National Competition Policy, *National Competition Policy Review*, 25 August 1993, p 269.

level. More generally, the report noted that the *'promotion of effective competition and the protection of the competitive process are generally consistent with maximising economic efficiency'*.<sup>104</sup>

Similarly, in a paper prepared for the National Competition Council in relation to whether coverage should be revoked for the Moomba to Sydney Pipeline, Janusz Ordovery and William Lehr linked workable (or effective) competition to the absence of monopoly power, and prices being driven towards 'economic costs'. In doing so, they noted the distinction between:<sup>105</sup>

- ∅ 'market power' – or the ability profitably to raise prices above marginal cost; and
- ∅ 'monopoly power' – or the possession of significant and durable market power leading to prices that substantially deviate from economic costs and which generate persistent returns in excess of competitive levels.

This understanding of workable competition is also reflected in decisions made by Australian courts. For example, in its decision on Metcash's proposed acquisition of Franklins, the Federal Court elegantly set out its understanding of workable competition and its outcomes, linking it towards the achievement of efficient outcomes over the long run:<sup>106</sup>

In a workably competitive market, some or even all participants may have some market power, in the sense that they all have some discretion over price, but no participant will have a substantial degree of market power. In such a workably competitive market, at any given time, prices might deviate from underlying costs and the deployed technologies might deviate from the most efficient ones currently available. Economic forces drive such a market towards efficient prices, outputs and costs, but not instantly.

To summarise, economists understand that the concept of a workably competitive market is one which:

- ∅ no supplier can affect the market price on a sustained basis, because of the constraints posed by other existing suppliers or the threat of new entry; and
- ∅ the price for a service is therefore constrained to recover at most the efficient costs of supplying the service over the long term.

## A2.2 Prices recover forward-looking efficient costs

In workably competitive markets, prices would be expected to recover only the forward-looking efficient costs of supplying the service over the long term. In this section, we explain what we mean by efficient costs in this context, and why only forward-looking costs are relevant to this assessment.

### A2.2.1 Efficient costs are those of rivals or potential rivals

We explain above that workable competition is a process of rivalry in which no supplier can affect the market price on a sustained basis, because of the constraint posed by other suppliers or the threat of new entry.

Over the long term, a firm in a workably competitive market is not able to set prices any higher than would be necessary to recover the costs of an efficient rival, or efficient potential rival. To do so would be self-defeating, since it would give rise to the erosion of its market share and profitability in favour of more efficient rivals.

It follows that the measure of costs that constrains the pricing decisions of a firm in a workably competitive market is not its own costs, but the costs of efficient actual or potential rivals. Put another way, in a workably competitive market, a firm with costs that are materially higher than those of its rivals (or potential rivals)

<sup>104</sup> Independent Committee of Inquiry on National Competition Policy, *National Competition Policy Review*, 25 August 1993, pp 4-5.

<sup>105</sup> Ordovery, J and Lehr, W, *Should coverage of the Moomba-Sydney Pipeline be revoked?* 22 November 2001, p 7.

<sup>106</sup> *Australian Competition and Consumer Commission v Metcash Trading Limited* [2011] FCA 967 (25 August 2011), para 163.

cannot expect to recover those costs from its customers over the long run, because it will be constrained from doing so by the process of competition.

### A2.2.2 Efficient costs are forward-looking

An assumption that underlies a large body of economic theory is that all actors in the economy – whether consumers or firms – are acting rationally to maximise their own utility or profit over time.

Consistent with this assumption, the only outcomes that affect a firm's decision making are those that can be expected to occur in the future.<sup>107</sup> This is because, at any point in time:

- ∂ decisions that were made in the past cannot be revisited – the only levers that a firm has available to influence its outcomes are decisions that it may make now or in the future; and
- ∂ outcomes that were achieved in the past cannot be affected by decisions that a firm may make now or in the future – these past outcomes are beyond the control of a firm.

It follows that a firm seeking to maximise its overall level of profits will do so by taking into account expectations of future outcomes and the actions that it could take now and in the future to influence those outcomes. For example, it is only expectations of future revenues and future costs that drive firms' decisions about whether to enter or exit, and to produce or not. Firms' decisions are fundamentally guided by whether they expect that the future revenues which result from their actions will meet or exceed the associated future costs.

In this sense, the only costs that are relevant to the outcomes of workably competitive markets are forward-looking costs. Indeed, this principle applies regardless of the extent of competition in a market, since it relies only on the assumption that firms act to maximise their profits.

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<sup>107</sup> However, the options that a firm has available to it may be affected by decisions that it has made in the past.



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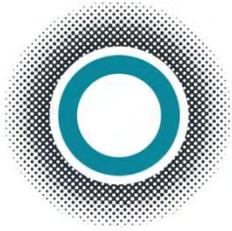
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## Appendix 2 HoustonKemp report on (a)



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# Assessment of the QCA's draft recommendation to declare the DBCT service – criterion (a)

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A report for DLA Piper

March 2019

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# Executive Summary

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We have been asked by DLA Piper (DLA), on behalf of DBCT Management Pty Limited (DBCTM), to review whether the coal handling service provided by the Dalrymple Bay Coal Terminal (DBCT) is likely to satisfy criterion (a) of section 76(2) of the *Queensland Competition Authority Act 1997* (QCA Act). The focus of our review is the draft recommendation published by the Queensland Competition Authority (QCA) on 18 December 2018 and the expert advice upon which it relies. Our report should be read in conjunction with two previous reports we have prepared similarly addressing whether the coal handling service provided by DBCT (the DBCT service) satisfies criterion (a).

## Assessment of criterion (a)

There are three crucial aspects to assessing criterion (a) in the case of DBCT, ie:

1. The criterion (a) test is a with and without declaration test that compares the state of competition in a world where DBCT is declared, against a world in which it is not.
2. There is a two-step framework that must be applied to determine whether DBCT satisfies the criterion (a) test, requiring the assessment of:
  - > the effect of declaration on the terms and conditions of access to the DBCT service; and
  - > whether this effect on access would materially affect competition in a dependent market service.
3. The promotion of a material increase in competition requires there to be a material enhancement of the competitive process, and the volume and/or quality of output in the market must be expected to increase.

While there is substantial agreement on the approach to the first two of these aspects, there remains disagreement on how to identify whether a promotion of competition is material.

## DBCTM's access framework

An assessment of criterion (a) requires active consideration of the terms and conditions of access without declaration, under the two-step assessment framework that we set out at section 2 above. Acknowledging the importance of this consideration, DBCTM has executed a binding access framework that determines the terms and conditions of access if the DBCT service were not declared.

DBCTM's access framework adopts many of the terms and conditions that would apply under declaration. Its structure provides that the terminal infrastructure charge (TIC) is to be negotiated between DBCTM and the access seeker, with an arbitration process to apply if the parties are unable to reach agreement.

In the event agreement is not able to be reached, the access framework directs the arbitrator to determine a 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 that are proximate to the Port of Hay Point; but
- notwithstanding this direction:
  - > is not less than the floor TIC, being that which would have prevailed had a QCA-administered regime continued to be applied; and
  - > is not greater than the ceiling TIC, being:
    - the highest price at which coal volumes served at DBCT would be the same as if the floor TIC applied – with this assessment being made without reference to any contractual limitations on volumes that are able to be delivered to DBCT or any other coal terminal; but
    - no higher than \$3.00 per tonne above the floor TIC, expressed in real terms of 2020-21.

The 'willing but not anxious' standard referenced in the pricing principles above is a commonly applied commercial standard for determining prices that reflect market value in Australia. Beyond this, the floor and ceiling ensure that prices cannot change to levels that would affect volumes served at the terminal, as compared to those that would be the case with declaration.

On our assessment, the expected ceiling TIC is unlikely to exceed \$7.44 per tonne at any point over the period for which the DBCT service would otherwise be declared. The ceiling TIC may be less than this if:

- the floor TIC remains at or near its current level of \$2.60 per tonne, in which case the constraint posed by the maximum spread between the floor and ceiling TIC of \$3.00 (in 2020-2021 price terms) will be binding; or
- coal prices fall short of expectations at the current time, reducing the willingness of coal mines to pay for the DBCT service.

### Effect of declaration on access

The first step in an assessment of whether DBCT satisfies the criterion (a) test is to evaluate the effect of declaration on the terms and conditions of access to the DBCT service. In making our evaluation, we use the only reasonable counterfactual without declaration – a world where DBCT is bound by its executed access framework – and perform the analysis by reference to the ability and incentive of DBCTM to exert market power given this constraint.

The effect of declaration on access is expected to vary depending upon whether access to coal handling services is provided:

- under existing DBCT standard user agreements, which apply to the entire current capacity of the terminal; or
- under new DBCT user agreements, which would apply to expanded capacity at the terminal.

The table below organises this assessment and highlights the key areas in which our assessment differs from that of the QCA.



## Access terms between incumbents and potential entrants with and without declaration

	Existing user agreements	Potential user agreements	Outcome
Future with declaration	<p>Access terms as per existing user agreements, including access charge as approved by the QCA under an approved access undertaking.</p> <p>Presently, a TIC of approximately \$2.60 per tonne, representing one to two per cent of forecast metallurgical coal prices.</p>	<p>Access terms governed by the QCA Act; access terms and charges approved by the QCA under an approved access undertaking.</p> <p>An expected TIC of approximately \$2.67 per tonne if expansion is socialised and, at most, \$6.00 per tonne if expansion is differentiated – representing one to four per cent of metallurgical coal prices.</p>	<p>With declaration, the price for access under potential user agreements is likely to be higher than under existing user agreements.</p>
Future without declaration	<p>Access terms as per existing user agreements, with access charges expected to be similar to those that the QCA would determine.</p> <p>Presently, as TIC of approximately \$2.60 per tonne.</p>	<p>Access terms determined under DBCTM's access framework, which applies the same terms as those approved by the QCA at prices that would be agreed between a willing but not anxious buyer and a willing but not anxious seller.</p> <p>A TIC not to be less than a QCA determined charge and not greater than a ceiling that is expected no more than \$7.44 per tonne and may be less in periods of low demand and/or low prices.</p>	<p>Without declaration, the price for access under potential user agreements is likely to be higher than under existing user agreements.</p>
Outcome	<p>Under existing user agreements, the price for access is likely to be the same, or similar, with and without declaration.</p>	<p>Under potential user agreements, prices for access may be higher without declaration than with declaration. The extent of this difference depends upon the price that would be agreed between a willing but not anxious buyer and a willing but not anxious seller, as determined under binding arbitration.</p>	

## Effect on competition in the tenements market

The second step that we apply in our assessment of criterion (a) is to determine whether the effect of declaration on access would materially improve competition in at least one dependent market.

The QCA considers that declaration will promote a material increase in competition in the market for coal tenements. This conclusion follows from its contentions that:

- differences in terms and conditions of access, as between users under existing user agreements and those under new user agreements would arise without declaration; and

- these differences would distort competition in the market for coal tenements under the access framework.

Underpinning the QCA's view are three critical assumptions:

- the market for tenements is no wider than the market in which the DBCT service is provided, such that a new entrant in the market;
  - > would be negatively affected by an asymmetry in the terms of access at DBCT; and
  - > would not be able to seek to utilise capacity at other terminals;
- the differences in terms and conditions faced by new entrants without declaration are such that;
  - > a number of them would be deterred, as compared to the prospects for new entrants with declaration; and
  - > the quantum of the deterred new entrants would be sufficiently great that, with declaration, the otherwise deterred new entrants would give rise to a material promotion of competition; and
- there is not a well-functioning secondary market for capacity that would provide the means for any new entrants that were more efficient than incumbents to secure DBCT capacity.

For the QCA to reach its conclusion, each of these assumptions must be made out. However, in our opinion, none of them can be justified.

#### Tenements market is broader than the Hay Point catchment

The QCA contends that different infrastructure costs between the Goonyella coal supply chain and other coal supply chains would give rise to a relatively narrow geographic market for coal tenements because:<sup>1</sup>

...the value of coal tenements in the Goonyella system would likely be different from other regions. Therefore, coal tenements in the Hay Point catchment region are unlikely to be a close substitute for tenements in other parts of Queensland.

The step in the QCA's analysis where it falls into error is its contention that differences in tenement prices between regions imply a lack of substitutability. This is not correct. The price of a tenement says nothing about its substitutability with tenements in other areas. Other things being equal, a buyer of coal tenements will prefer to buy a tenement that provides it the *greatest return*. This is not the same as the tenement with the *lowest price*. Similarly, there are many reasons to expect the price of two tenements from within the same geographic region not to be the same.

Rather, the critical consideration for the degree of substitutability between tenements in one geographic region and another is the ability of buyers to re-deploy capital and relevant expertise from one region to another, so as to bring about this equalisation of expected returns. It follows that there is no basis to conclude that the geographic scope of the coal tenements market is limited to the Hay Point catchment. Rather, the coal tenements market likely extends across Central Queensland or beyond.

#### Barriers to entry and prices are similar with and without declaration

The QCA contends that the promotion of a material increase in competition under declaration would arise because existing users (with access to lower charges at DBCT) would value tenements more than new users (with access to higher charges at DBCT) and that this could deter the entry of more efficient firms into the tenements market.

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<sup>1</sup> QCA draft recommendation, p 57.

However, even if the tenements market was assumed to be limited to the Hay Point catchment, there are strong reasons to believe that the effect cited by the QCA would not give rise to the promotion of a material increase in competition.

A thorough assessment of the barriers to entry faced by new entrants in a tenements market limited to the Hay Point catchment would most likely conclude that the level of difference in prices for the DBCT service cited by the QCA is neither an 'unmanageable' nor 'fundamental' risk factor faced by a potential new entrant to the tenements market. Once the range of factors and uncertainties that a firm would need to consider in acquiring a tenement are taken into account, the prospect of the charge at DBCT increasing seems most unlikely to be critical to whether or not a tenement would be developed.

Rather, two risk factors that would play a much greater role in decisions of whether or not to enter the tenements market are likely to be:

- uncertainty associated with global coal prices that would be earned on coal produced from the tenement; and
- uncertainty associated with the ability to obtain access to coal supply chain infrastructure in Queensland, including DBCT.

When set against the level of volatility in coal prices, the potential for coal handling charges at DBCT to increase by up to A\$3.00 per tonne cannot be described as an 'unmanageable' risk. Consistent with the view of the National Competition Council (NCC), a small difference in coal handling charges under declaration is not likely to be a determinative factor in a decision on whether to enter the coal tenements market.

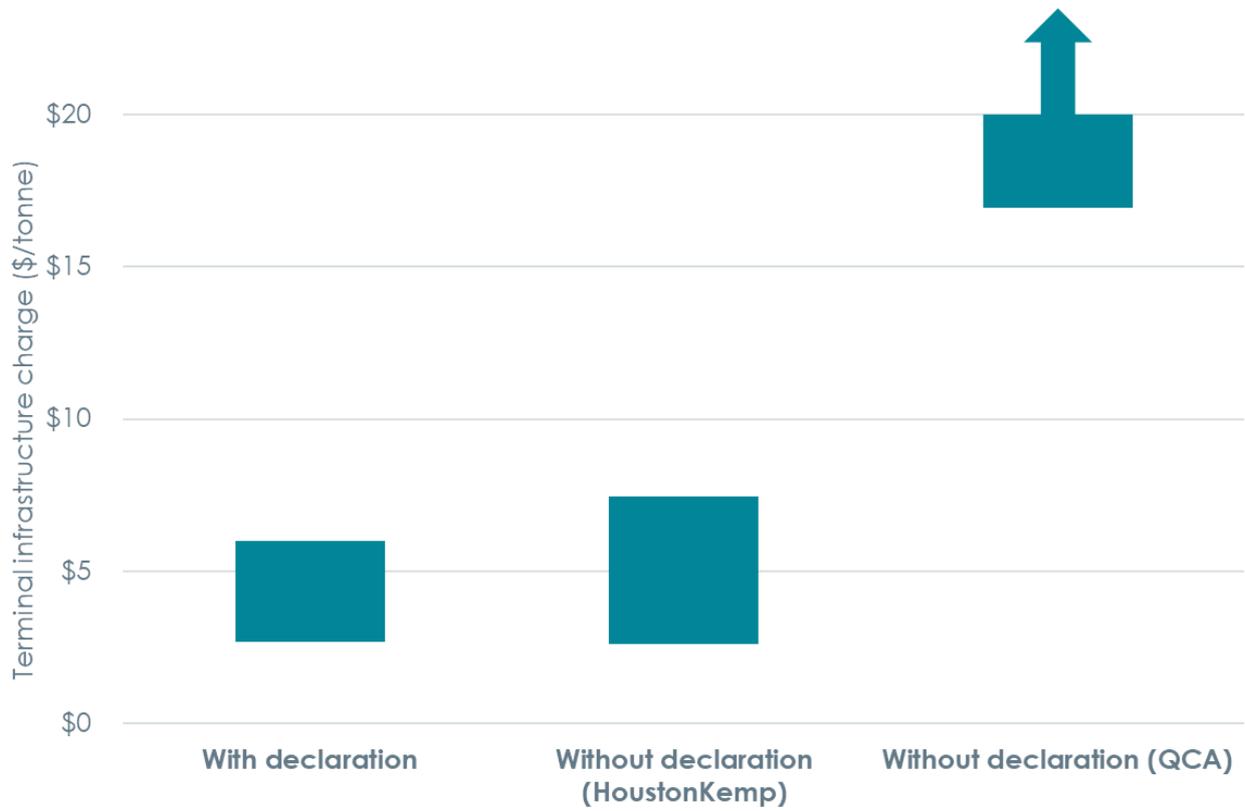
The level of charges for the DBCT service is also likely to be less material to a decision to enter the market than the question of whether access to the DBCT service (and other infrastructure services) would be available to facilitate new entry. As the QCA correctly states, uncertainty as to 'whether or when' new entrants would be able to access the DBCT service is fundamental for access seekers. With or without declaration, new entrants in the market for tenements can have no certainty about the availability of access to the DBCT service, or potentially other infrastructure services over the period for which the DBCT service would be declared. This is a significant barrier to entry that will persist whether the DBCT service is declared or otherwise.

The QCA's consideration of DBCTM's access framework causes it to overestimate considerably the charges that would be likely to apply to access under new user agreements without declaration.

The QCA describes the effect of the access framework as giving rise to prices 'based on willingness to pay'. In its view, these would be commensurate with the charges associated with accessing the Wiggins Island Coal Export Terminal (WICET) of \$26.51 per tonne (implying a TIC of at least \$16.99 per tonne). This is considerably more than the costs of accessing expanded capacity at DBCT, which the QCA assesses at \$12.05 per tonne if the expansion is socialised or \$15.41 per tonne if it is differentiated.

Given a thorough consideration of the terms of the access framework, the potential range of outcomes for the TIC without declaration overlaps substantially with the outcomes that the QCA expects with declaration. Both these ranges differ substantially from the potential charges suggested by the QCA without declaration, in line with or above charges at WICET. We depict these three potential ranges in the figure below.

Comparison of potential ranges for the terminal infrastructure charge



This analysis shows that the QCA has significantly overstated the materiality of any consequential effect on competition in the tenements market. It follows that, given the market for tenements preferred by the QCA, and given the access framework executed by DBCTM, it is not possible for declaration to promote an increase in competition in the market for tenements.

More efficient entrants can acquire capacity in the secondary market

Even with the QCA's geographic market for tenements and setting aside its treatment of barriers to entry and prices, the most efficient operators will still be able to acquire and operate coal tenements.

If there were potential new acquirers of tenements (who do not hold DBCT capacity) that were more efficient than incumbent holders of DBCT capacity, then these more efficient new entrants have the ability to engage in secondary market trades with miners holding existing user agreements at DBCT. By definition, more efficient potential acquirers of new tenements would have a higher willingness to pay for these existing capacity rights than a less efficient incumbent holder of DBCT capacity, who planned to bid for the same tenement. The result of the potential for such trades is that the more efficient entrants will, in fact, prevail and be most likely to enter.

Even if this were not possible, trading in tenements themselves should also provide for a similar result. The activities undertaken by holders of tenements are the exploration and development of tenements. More efficient potential new acquirers of tenements (who do not hold DBCT capacity) will not be deterred from acquiring tenements and exploring and developing them so long as they have the ability to on-sell these tenements (for an expected capital gain) to a miner with existing user agreements at DBCT.

## Conclusion

We find that the coal handling service provided at DBCT does not satisfy criterion (a) under Part 5, Division 2 of the QCA Act. We draw this conclusion because, on our assessment:

- the market for coal tenements is wider than the market in which the DBCT service is provided, such that a change in the terms of access at DBCT without declaration would not be expected to affect the opportunities and environment for competition in this market;
- new entrants would not be deterred from entering the coal tenements market without declaration, as compared to with declaration, because the uncertainty as to whether and when they would gain access to DBCT is not addressed by declaration, and prices for DBCT capacity will not be significantly affected by declaration as compared to access under DBCTM's access framework; and
- there is a well-functioning secondary market for capacity that provides the means for any new entrants that are more efficient than incumbents to secure DBCT capacity.

# 1. Introduction

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The Queensland Competition Authority (QCA) is reviewing whether the declared services specified in section 250 of the *Queensland Competition Authority Act 1997* (QCA Act) should be declared following the expiry of the existing declarations on 8 September 2020.

## 1.1 Scope of this report

We have been asked by DLA Piper (DLA), on behalf of DBCT Management Pty Limited (DBCTM), to review whether the coal handling service provided by the Dalrymple Bay Coal Terminal (DBCT) is likely to satisfy criterion (a) of section 76(2) of the *Queensland Competition Authority Act 1997* (QCA Act).

Criterion (a) reads:<sup>2</sup>

...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.

Our report should be read in conjunction with two previous reports we have prepared similarly addressing whether the coal handling service provided by DBCT (the DBCT service) satisfies criterion (a):

- in our first report, dated 29 May 2018,<sup>3</sup> we set out a framework for analysis and found that the use of all infrastructure across the relevant supply networks will remain unchanged, with or without declaration, and therefore that declaration of the DBCT service would not promote an increase in competition in any dependent markets; and;
- in our second report, dated 13 July 2018,<sup>4</sup> we revisited this advice in light of submissions from the DBCT User Group and expert advice prepared by Castalia, and affirmed our earlier conclusions.

On 18 December 2018, the QCA published its draft recommendation. At this time, it also published reply submissions made by parties in response to our first report.

The QCA concludes in respect of the DBCT service that:<sup>5</sup>

Criterion (a) is satisfied

DBCT Management has an ability and incentive to exercise market power, such that in the absence of declaration, efficient entry to the coal tenements market would be discouraged and there will be a material impact on competition in that market

Access (or increased access) to the DBCT service on reasonable terms and conditions as a result of declaration would promote a material increase in competition in the coal tenements market

DLA has asked us to revisit our earlier conclusions in relation to whether the DBCT service satisfies criterion (a), or otherwise. The focus of our review is the draft recommendation published by the Queensland Competition Authority (QCA) on 18 December 2018 and the expert advice upon which it relies.

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<sup>2</sup> QCA Act, section 76(2)(a).

<sup>3</sup> HoustonKemp, *Does DBCT's coal handling service satisfy criterion (a)?*, 29 May 2018 ('HoustonKemp first criterion (a) report').

<sup>4</sup> HoustonKemp, *A review of the economic issues raised in relation to criterion (a)*, 13 July 2018 ('HoustonKemp second criterion (a) report').

<sup>5</sup> QCA, *Draft recommendation | Part C: DBCT declaration review*, December 2018, p 5 ('QCA draft recommendation').

## 1.2 Structure of this report

The remainder of this report is structured as follows:

- in section 2 we set out the framework that we use in the application of criterion (a) to the DBCT service in this report;
- in section 3 we summarise the essential economic features of DBCTM's access framework and undertakes an assessment of the outcomes which it would be expected to promote;
- in section 4 we assess the effect of declaration on the terms and conditions of access to the DBCT service;
- in section 5 we describe the market for coal tenements and define its scope;
- in section 6 we assess whether any effect on access would materially affect competition in the market for coal tenements; and
- in section 7 we declare the basis on which we have prepared this report.

## 2. Assessment framework for criterion (a)

To clarify our approach to determining whether DBCT is likely to satisfy criterion (a), in this section we set out the framework that we use in the application of criterion (a) to the DBCT service in this report. There are three crucial aspects to assessing criterion (a) in the case of DBCT, ie:

1. The criterion (a) test is a with and without declaration test that compares the state of competition in a world where DBCT is declared, against a world in which it is not.
2. There is a two-step framework that must be applied to determine whether DBCT satisfies the criterion (a) test, requiring the assessment of:
  - > the effect of declaration on the terms and conditions of access to the DBCT service; and
  - > whether this effect on access would materially affect competition in a dependent market service.
3. The promotion of a material increase in competition requires there to be a material enhancement of the competitive process, and the volume and/or quality of output in the market must be expected to increase.

Although there is substantial agreement on the approach to the first two of these aspects, there remains disagreement on how to identify whether a promotion of competition is material.

Table 2.1 below summarises different views about each of these aspects of the assessment of criterion (a) as they have been expressed to date. The remainder of this section assesses these views and sets out the approach to the assessment of criterion (b) that we adopt in the remainder of this report.

Table 2.1: Comparison of views on the framework for the application of criterion (a)

Assessment of criterion (a)	DBCTM / HoustonKemp	DBCT User Group / Castalia	National Competition Council	Queensland Competition Authority
The criterion (a) test	<p>A with and without declaration test, that compares the state of competition as between two states of the world, ie:</p> <ul style="list-style-type: none"> <li>• with access (or increased access) to the service, on reasonable terms and conditions that will apply, as a result of declaration; and</li> <li>• with access to the services on terms that would apply if the service was not declared.</li> </ul>	Not stated.	This requires a comparison of two future scenarios: one in which the Service is declared and access to the Service is through declaration on reasonable terms and conditions, and one in which the Service is not declared and any access to the Service is in the absence of declaration.	If, in a scenario without declaration, the QCA finds there would still be access on reasonable terms for a reason other than declaration (eg, because of constraints imposed by competition or some other regulatory regime), such that there would be no material increase in competition in a dependent market, it would follow that criterion (a) is not satisfied.

Assessment of criterion (a)	DBCTM / HoustonKemp	DBCT User Group / Castalia	National Competition Council	Queensland Competition Authority
The assessment framework	<p>An examination of the dynamic process of competition, and whether declaration is likely to lead to higher output or better quality products/services.</p> <p>The definition of relevant markets, which are areas of close competition, by identifying the competitive constraints that are likely to have a material effect on a product or service, assisted by use of the hypothetical monopolist test where this can aid the analysis.</p>	<p>It only requires that there would be a 'significant finite possibility' of an enhanced environment for competition and greater opportunities for competitive behaviour arising from declaration.</p> <p>It does not require satisfaction that, if the declaration was to cease there would definitely or even probably be an immediate and material decline in competition levels.</p>	<p>Would the provider have the ability and incentive to deny access to a relevant service or restrict output and charge monopoly prices? And secondly, if the provider has that ability and incentive, would such conduct materially affect competition in a dependent market?</p>	<p>Whether, in a future without declaration, the access provider of the service would have an ability and incentive to exert market power such that it would adversely affect the environment for competition in at least one dependent market.</p> <p>If so, the next issue to consider is whether declaration of the service would improve the environment for competition in the dependent market by constraining the access provider's ability and incentive to exert market power such that opportunities or conditions for competition in the dependent market would be materially better with declaration than they would be without declaration.</p>
The promotion of a material increase in competition	<p>Requires that:</p> <ul style="list-style-type: none"> <li>the structure of the market or conduct of firms is changed in a way that can be expected to bring about a material enhancement of the competitive process; and</li> <li>the volume and/or quality of output in the market is expected to increase.</li> </ul>	<p>Requires:</p> <ul style="list-style-type: none"> <li>an enhanced environment for competition and greater opportunities for competitive behaviour than there would be otherwise; and</li> <li>the improvement in competition need merely be more than trivial or marginal.</li> </ul>	<p>The promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.</p>	<p>The promotion of a material increase in competition involves an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.</p> <p>In so doing, the QCA has considered the extent to which the service provider for the relevant service would, in both a factual and counterfactual scenario, have the ability and incentive to exert market power such that, in the absence of declaration, it could restrict access or unreasonably increase its access price, thereby materially impacting on competition in markets that are dependent on access to the service.</p>

Source: HoustonKemp, DBCT User Group, National Competition Council, Queensland Competition Authority

## 2.1 Criterion (a) test

In our first criterion (a) report, we stated that criterion (a) is a with and without declaration test, such that the two states of the world to be compared are those:<sup>6</sup>

- with access (or increased access) to the service, on reasonable terms and conditions that will apply, as a result of declaration; and
- with access to the services on terms that would apply if the service was not declared.

In its draft recommendation, the QCA expresses the same fundamental understanding of criterion (a).<sup>7</sup>

## 2.2 Criterion (a) assessment framework

In its statement of preliminary views on the revocation of the declaration of the shipping channel service at the Port of Newcastle, the NCC set out a two-step assessment framework for criterion (a), ie:<sup>8</sup>

- **Step 1: Assess the effect of declaration on the terms and conditions of access.** This requires an assessment of whether, without declaration, the provider would have the ability and incentive to restrict supply or charge monopoly prices, as compared to with declaration.
- **Step 2: Assess whether this effect on access would materially affect competition in a dependent market.** This requires an assessment of whether changed access as a result of declaration will result in an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

The importance of the two-step framework to the NCC's assessment of criterion (a) is revealed in its findings that:

- the Port of Newcastle may have both the ability and incentive to earn monopoly profits by restricting supply or increasing prices for access to the shipping channel service;<sup>9</sup> but
- despite this ability and incentive, the price for access to the shipping channel service is a very small component of overall costs in the coal supply chain, and the potential increase in access prices would have a minimal effect on access and consequently no material effect on dependent markets.<sup>10</sup>

The QCA's statement of its approach appears to adopt a two-step framework, similar to that of the NCC. The QCA introduces its assessment framework for criterion (a), as applied to the DBCT service, as follows:<sup>11</sup>

The focus of the QCA's assessment of criterion (a) in respect of the DBCT service is whether, in a future without declaration, DBCT Management (the access provider of the service) would have an ability and incentive to exert market power such that it would adversely affect the environment for competition in at least one dependent market. If so, the next issue to consider is whether declaration of the service would improve the environment for competition in the dependent market by constraining DBCT Management's ability and incentive to exert market power such that opportunities or conditions for competition in the dependent market would be materially better with declaration than they would be without declaration.

Our understanding of the QCA's framework is that:

<sup>6</sup> HoustonKemp first criterion (a) report, p 2.

<sup>7</sup> QCA draft recommendation, p 20;

<sup>8</sup> National Competition Council, *Revocation of the declaration of the shipping channel service at the Port of Newcastle – statement of preliminary views*, 19 December 2018, para 6.16 ('NCC statement of preliminary views').

<sup>9</sup> NCC statement of preliminary views, paras 6.26-6.43.

<sup>10</sup> NCC statement of preliminary views, paras 6.93-6.99;

<sup>11</sup> QCA draft recommendation, p C52.

- in the first step, it needs to be *established*, rather than *assumed*, that an ability and incentive to exert market power would adversely affect the environment for competition in at least one dependent market; and
- in the second step, it needs to be *established*, rather than *assumed*, that the effect of declaration in constraining the access provider's ability and incentive to exert market power would render the opportunities or conditions for competition in the dependent market materially better than they would be without declaration.

The significance of establishing rather than assuming these outcomes is reinforced by the NCC, which states that, to satisfy criterion (a), it is not sufficient to show that declaration will simply result in lower prices, giving rise to a redistribution of wealth because:<sup>12</sup>

While access (or increased access), on reasonable terms and conditions as a result of declaration may change the distribution of gains as between the port and its users, this is not in itself sufficient to satisfy criterion (a).

Put another way, the NCC draws a distinction between an ability and incentive to increase prices and a finding that declaration would increase competition.

## 2.3 Promotion of a material increase in competition

The approach adopted in our first criterion (a) report was that the promotion of a material increase in competition requires that:<sup>13</sup>

- the structure of the market or conduct of firms be changed in a way that can be expected to bring about a material enhancement of the competitive process; and
- the volume and/or quality of output in the market would be expected to increase.

Our assessment framework was derived in light of careful consideration of the economic literature and the published views of the NCC and the Australian Competition Tribunal.

### 2.3.1 Structure and conduct

It is common ground that the promotion of a 'material increase' in competition in a dependent market requires an improvement in the structure of the market or conduct within the market.

The NCC expresses this requirement by stating that the promotion of a material increase in competition:<sup>14</sup>

Requires an improvement in the opportunities and environment for competition such that competitive outcomes are materially more likely to occur.

The QCA endorses this approach. However, the QCA's proposed approach involves subtleties that amount to a variation from the approach we and the NCC have described.

For example, the QCA clarifies its reference to what would be required to improve the opportunities and environment for competition as follows:<sup>15</sup>

...what matters in terms of a material impact on competition is not necessarily the number of potential entrants that would be discouraged, but the possibility that more efficient firms would be discouraged from entering a dependent market in a future without declaration compared to a future

<sup>12</sup> NCC statement of preliminary views, para 6.55.

<sup>13</sup> HoustonKemp first criterion (a) report, p 18.

<sup>14</sup> NCC statement of preliminary views, para 6.51.

<sup>15</sup> QCA draft recommendation, p C80.

with declaration. If so, it would indicate that access as a result of declaration would promote an increase in competition that is material.

By this statement, the QCA appears to conclude that an improvement in the opportunities and environment for competition may be established by a lowering of barriers that might increase the prospect that more efficient firms would enter the market, whereas otherwise they could be discouraged.

The concept that lowering barriers to entry may promote the environment for competition is unremarkable. However, the unequivocal nature of the QCA's contention – that the 'possibility' of more efficient firms being discouraged from entering a dependent market is sufficient to conclude that 'access as a result of declaration would promote an increase in competition that is material' – is surprising, because:

- the 'possibility' of more efficient firms being discouraged sets a low qualitative hurdle for the establishment of a 'material' increase in competition; and
- the QCA's approach does not invite an empirical assessment of the implied increase in competition in the dependent market – for example, an increase in either output or quality – that would be required to be considered material.

The QCA's statement of its framework also appears to raise the prospect that a material effect on competition in dependent markets may be triggered by an 'unreasonable' increase in the access price in a scenario without declaration. This approach is reflected in the QCA's application of its framework, where it refers to the 'materiality' or otherwise of potential price changes without a clear standard for this assessment.<sup>16</sup>

Criterion (a) does not imply the need for an intermediate assessment of the materiality of price changes as a result of declaration. The relevant test is whether the changes to terms and conditions, as a result of declaration of the service, would promote a material increase in competition in at least one dependent market for the service. It follows that a reasonable basis for assessing a 'material' change in access terms or prices, for the purpose of criterion (a), is to show that this change in terms or would give rise to a material change in competition in at least one dependent market.

This understanding is reflected in the two-step assessment framework that is endorsed by both the QCA and the NCC. The first step involves no materiality threshold in its assessment of the effect of declaration on terms and conditions of access. Rather, the materiality threshold contained in the second step – whether the effect on access from the first step would materially affect competition in a dependent market – is derived directly from criterion (a).

### 2.3.2 Volume supplied in the market

The QCA does not appear to consider it necessary to expect that volumes and/or quality will increase for competition to be promoted. Rather, the QCA appears to consider it sufficient to show that there is some prospect that a more efficient firm might be discouraged from entering the market. It follows that the QCA would find a promotion in competition in circumstances in which, relative to a counterfactual:

- the same volumes and quality were provided in the market; but
- some of those volumes were provided by firms that were more efficient.

We disagree. In our first criterion (a) report, we cited extensive findings of both the NCC and the Tribunal that unequivocally support the view that a promotion of competition requires that the volume and/or quality of output be expected to increase.<sup>17</sup>

<sup>16</sup> See for example, QCA draft recommendation, pp C82-C97.

<sup>17</sup> HoustonKemp first criterion (a) report, pp 17-18.

The QCA does not directly engage with this material. However, the prospect of increased volume and/or quality outcomes in one or more dependent markets is of considerable importance for understanding the relevance of DBCTM's access framework. For this reason, we reiterate below the key references from the Tribunal and the NCC. We note that while these references do not refer specifically to the coal tenements market, they illustrate the principle that underpins our assessment of criterion (a) in relation to the coal tenements and other dependent markets.

The NCC has explained that higher prices for access to a port would not affect competition in coal production if the total volume of coal produced did not change, ie:<sup>18</sup>

PNO could therefore price (or aim to price) its services in a way that maintains throughput volumes and maximises profits, for instance by bargaining directly with producers with mines at risk of closure, or their shippers. Consequently, it does not necessarily follow from an ability to increase prices that there will be a reduction in coal production that impacts competition in a market.

In the same matter, the Tribunal also stated that there was no effect on competition in the coal export market if volumes in that market would remain the same, ie:<sup>19,20</sup>

Either a price rise would have an impact on coal export volumes, in which case the estimates are of questionable value, or it would not, in which case the claim of any competitive impact is seen to be empty.

Consequently, it does not necessary follow from an ability to increase prices that there will be a reduction in coal production that impacts competition in the coal export market because PNO has the commercial motivation to ensure that the Service supports the ongoing coal export market and its expansion.

The NCC has also said that increases in volumes in a dependent market need to be material for competition to be promoted, eg:<sup>21,22</sup>

The Applicant submits that it will produce additional ethanol from sugar by-products, including all of the molasses it produces and lignocellulosic material. It submits that the higher fibre content of 'energy canes' can be used to increase ethanol production. However, the Council is not satisfied, at least in the short to medium term, that any additional ethanol produced from sugar by-products in the Herbert River **will be sufficient to have a material impact on the national market for ethanol**. The Council considers that access would not promote a material increase in competition in the ethanol market.

The Council is not satisfied that access will promote a material increase in competition in any dependent electricity market. The Federal Court found that the market for electricity was NEM-wide when it considered the acquisition by AGL of an interest in the Loy Yang A power station. In the NEM, electricity is traded through a central pool. **An additional 50-55MW in North Queensland would have virtually no effect in a market based on the NEM...** The Applicant argues that the relevant market for the Council to consider is a North Queensland market. However, even to the extent that it may offset increases in marginal loss factors or demand growth in North Queensland, the Council considers that the Applicant's claimed additional generation capacity will not be sufficient to have any material effect on electricity prices in North Queensland. [emphasis added]

<sup>18</sup> NCC, *Declaration of the shipping channel service at the Port of Newcastle – Final recommendation*, 2 November 2015, p 38, para 4.93.

<sup>19</sup> *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, para 137.

<sup>20</sup> *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, para 155.

<sup>21</sup> NCC, *Herbert River cane railway: Application for declaration of a service under section 44F of the Trade Practices Act 1974 (Cth) – Final recommendation*, 16 July 2010, p 26, paras 5.40-5.41.

<sup>22</sup> NCC, *Herbert River cane railway: Application for declaration of a service under section 44F of the Trade Practices Act 1974 (Cth) – Final recommendation*, 16 July 2010, p 27, paras 5.45-5.48.

The NCC has stated that any effect of a service not being declared would need to lead to such a material impact on demand as to lead to a possible exit or contraction in the number of services offered in the dependent market, for competition to be promoted by declaration.<sup>23</sup>

Finally, the Productivity Commission examined the national access regime in 2013, including whether competition should be said to be promoted in a dependent market for the purpose of criterion (a) when a firm sets a monopoly price for a service. It said that poor terms and conditions for a service can affect competition in dependent markets, but only when they disrupted competition in the dependent market.<sup>24</sup> In other words, criterion (a) would not apply to all situations in which declaration improved the terms and conditions offered for access to a service.

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<sup>23</sup> NCC, *Application by Virgin Blue for Declaration of Airside Services at Sydney Airport – Final recommendation*, November 2003, p 99.

<sup>24</sup> Productivity Commission, *National Access Regime*, 25 October 2013, p 173.

### 3. DBCTM's access framework

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An assessment of criterion (a) requires active consideration of the terms and conditions of access without declaration, under the two-step assessment framework that we describe at section 2 above. Acknowledging the importance of this consideration, DBCTM has executed a binding access framework that determines the terms and conditions of access if the DBCT service were not declared.

DBCTM's access framework adopts many of the terms and conditions that would apply under declaration. Its structure provides that the terminal infrastructure charge (TIC) is to be negotiated between DBCTM and the access seeker, with access to arbitration if the parties are unable to reach agreement.

In the event that agreement is not able to be reached, the access framework directs the arbitrator to determine a TIC that:<sup>25</sup>

- would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines that are proximate to the Port of Hay Point; but
- notwithstanding this direction:
  - > is not less than the floor TIC, being that which would have prevailed had a QCA-administered regime continued to be applied; and
  - > is not greater than the ceiling TIC, being:
    - the highest price at which coal volumes served at DBCT would be the same as if the floor TIC applied – with this assessment being made without reference to any contractual limitations on volumes that are able to be delivered to either DBCT or any other coal terminal; but
    - no higher than \$3.00 per tonne above the floor TIC, expressed in real terms of 2020-21.

The 'willing but not anxious' standard referenced in the pricing principles above is a commonly applied commercial standard for determining prices that reflect market value in Australia. Beyond this, the floor and ceiling ensure that prices cannot reach levels that would affect volumes served at the terminal, as compared to those that would be the case with declaration.

In this section we explain the relevance of the access framework to an assessment of criterion (a). In particular, we explain:

- the provenance of the 'willing but not anxious' standard and some examples of its use in Australia as a commercial standard for market value;
- why the presence of the floor and ceiling parameters ensures that volumes served at DBCT will be the same with and without declaration;
- why the design of the access framework means that declaration could not give rise to an increase in volumes or quality in any dependent market; and
- why an improvement in competition requires an increase in volumes or quality.

We also explain how the access framework would be applied, both at a principled level and in practice. On our assessment, the expected ceiling TIC is unlikely to exceed \$7.44 per tonne at any point over the period for which the DBCT service would otherwise be declared. The ceiling TIC may be less than this if:

- the floor TIC remains at or near its current level of \$2.60 per tonne, in which case the constraint posed by the maximum spread between the floor and ceiling TIC of \$3.00 (in 2020-2021 price terms) will be binding; or

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<sup>25</sup> DBCTM access framework, schedule C2(b) and (c).

- coal prices fall short of expectations at the current time, reducing the willingness of coal mines to pay for the DBCT service.

### 3.1 'Willing but not anxious' standard

In the event that DBCTM and an access seeker are unable to agree on the terms and conditions of access, the access framework provides for the dispute to go to commercial arbitration.

The access framework directs the arbitrator to determine a price that '*would be agreed between a willing but not anxious buyer and a willing but not anxious seller*'. This is the primary guidance supplied to the arbitrator, and is constrained only by the resulting price being bounded below and above by a price floor and a price ceiling. The QCA's consideration of the access framework previously presented by DBCTM as being that which would apply in the absence of declaration appears to disregard the 'willing but not anxious' standard. Rather, the QCA's consideration focusing only on its interpretation that charges would be based on 'willingness to pay' – a point that we discuss in greater detail in section 4.2.2 below.

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:<sup>26</sup>

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.

Similarly, the Australian Tax Office cites typical practice by Australian business valuers to defining market value as:<sup>27</sup>

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.

The origins of the term arise from a decision of the High Court of Australia in 1907, on appeal in respect of the value of land located in North Fremantle that had been compulsorily acquired by the Commonwealth for the construction of a fort.<sup>28</sup>

In the initial hearing, Justice Higgins accepted the view of witnesses for the Commonwealth that, as at January 1905, the greatest value that could be obtained for the land was subdivision for lots into workmen's dwellings. On that basis, he determined the value of the land at 2,250 pounds.

On appeal, Chief Justice Griffiths adopted these findings of fact but found that the value of the land was not concluded by them. He found instead that:

...the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but by inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?"

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:<sup>29</sup>

<sup>26</sup> International Valuation Standards Council website, <https://www.ivsc.org/standards/glossary>, accessed 3 February 2019.

<sup>27</sup> Australian Tax Office website, <https://www.ato.gov.au/general/capital-gains-tax/in-detail/market-valuations/market-valuation-for-tax-purposes/?page=6>, accessed 3 February 2019.

<sup>28</sup> *Spencer v. The Commonwealth of Australia* (1907) 5 CLR 418.

<sup>29</sup> *International Petroleum Investment Company v Independent Public Business Corporation of Papua New Guinea* [2015] NSWCA 363 (26 November 2015), para 67.

...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...

The courts also acknowledge the potential hurdles associated with the 'willing but not anxious' standard. For example, the High Court has noted that:<sup>30</sup>

[T]here may be no readily identifiable market, or the market may be controlled or for some other reason artificial. There may be room for argument as to the nature of the relevant market. It is necessary to make the hypothesis of a sale between a willing but not anxious vendor and a willing but not anxious purchaser. A decision as to what price would be achieved in such a sale involves a factual judgment, and may be made by reference to comparable sales, or a capitalization of profits formula, or, in certain circumstances, by reference to costs of reinstatement or other criteria.

The standard has also been accepted by Australian regulators. The Australian Competition and Consumer Commission (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:<sup>31</sup>

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.

### 3.2 No effect on access under DBCTM's access framework

In our criterion (a) report, we found that implementation of DBCTM's access framework would mean that declaration of the DBCT service:

- would not give rise to increases in output from any mine, as compared to the output that would arise if the DBCT service was not declared; and
- would not give rise to changes in the use of any coal terminal or railway facility, as compared to that which would arise if the DBCT service was not declared.

These conclusions rest upon the key terms of the access framework – which ensure that the TIC:

- is not less than the floor TIC, being that which would have prevailed had a QCA-administered regime continued to be applied; and
- is not greater than the highest price at which coal volumes served at DBCT would be the same as if the floor TIC applied – with this assessment being made without reference to any contractual limitations on volumes that are able to be delivered to DBCT or any other coal terminal.

If the TIC is no less than the price that would have prevailed under a QCA-administered regime, it must follow that, without declaration, the volumes served at DBCT cannot exceed the volumes that would be served with declaration. The ceiling prevents the TIC increasing to a level that would result in the volumes served at DBCT falling below the volumes that would be served with declaration.

<sup>30</sup> *Boland v Yates Property Corporation Pty Limited* [1999] HCA 64; 74 ALJR 209; 167 ALR 575 (9 December 1999), para 79.

<sup>31</sup> ACCC, *Draft copyright guidelines*, October 2018, p 23.

In other words, so long as the TIC is constrained to be between the floor and the ceiling, the utilisation of DBCT without declaration will be the same as it would be with declaration.

Furthermore, the particular mines that utilise DBCT will not be affected by declaration. Both with and without declaration, the mines that place the greatest value on coal handling services at DBCT can be expected to use the DBCT service.

If this were not the case, implying that there was a firm not taking the DBCT service that valued it at materially higher levels than a firm that did take the service, there would be a potential trade of capacity between the parties in the secondary market that would benefit them both. We explain in section 6.3 below that there is no significant restriction on the ability of parties with access rights at DBCT to assign these rights to other parties.

It follows from these observations that, under the access framework, there can be no difference in the utilisation of tenements, mines and supply chain infrastructure – including with and without declaration, since all mines would continue to use the same coal terminal.

### 3.3 No effect on competition under DBCTM's access framework

In light of the considerations set out above, we concluded that declaration of the DBCT service will not result in a material increase in competition in any coal export market.<sup>32</sup> The essential reasoning is that:

- declaration would not change the structure of any coal export market or the conduct of mines, since:
  - > prices will still be determined in the same way by the Asia-Pacific or global seaborne coal market; and
  - > the volume transported by each miner will not be affected, so there will be no change in the structure of the market, including the likelihood of entry; and
- declaration would not affect the total volume or quality of coal supplied in any coal export market because:
  - > no mine would change the quantity of coal that it sends to any terminal as a result of declaration; and
  - > neither the quality of coal itself will change as a result of declaration nor will the mix of coal at each terminal due to the resources available at each coal tenement; while
  - > the non-price terms and conditions for accessing DBCT will remain substantively the same, and so the level of service provided to coal miners will not change.

Since the volumes supplied in each of the other dependent markets depend on the volumes in the coal export market, those dependent markets also will not change as a result of declaration. There is also no reason for the quality of the services in other dependent markets to be affected by declaration of the DBCT service. As such, there is no reason for either the structure of any derivative market or the conduct of firms in those markets to change. It follows that declaration will also not promote a material increase in competition in those markets.

Specifically, in respect of the market for tenements (which we have also referred to as the market for mining authorities) we noted that:<sup>33</sup>

...the volumes of coal that is mined and exported will not change as a result of declaration of the DBCT service. Therefore, the number of mining authorities sought will not change.

<sup>32</sup> HoustonKemp first criterion (a) report, p 30.

<sup>33</sup> HoustonKemp first criterion (a) report, p 38.

Tenements are an essential input to mining operations.<sup>34</sup> Since no mine would change the quantity or quality of coal that it sends to any terminal as a result of declaration, it follows that there will be no change in the use of tenements without declaration.

Our assessment is consistent with the NCC's assessment of those dependent markets it took to be 'derivative' of the coal export markets relevant for shipments from the Port of Newcastle<sup>35</sup> – a point originally made by the Tribunal in its decision on Glencore's application for declaration of the shipping channel service at the Port of Newcastle:<sup>36</sup>

The Tribunal does not consider it necessary to address the impacts asserted in relation to derivative markets. If the impact of increased access on the coal export market is not such as to satisfy the Tribunal that it would promote a material increase in competition in that market, it is difficult to see how there would be the flow-on effects on the derivative markets as noted above. The Tribunal was not taken to material specifically concerning those derivative markets or any of them which would indicate a material increase in competition by increased access independently of the coal export market (and the asserted consequences to competition in that market) if the declaration was made. Senior counsel for Glencore in oral submissions, whilst not abandoning the relevance of the derivative markets, focused largely on the coal export market itself.

The QCA and Castalia have indicated views that suggest a different perspective from that of the NCC and the Tribunal about this relationship, at least in respect of the market for tenements. We address these concerns in detail at section 5.2 below.

### 3.4 QCA's consideration of DBCTM's access framework

It follows from our observations in the previous section that consideration of DBCTM's access framework is a requirement for the assessment of criterion (a). However, the QCA does not assess DBCTM's access framework in detail, and states that it is not required to do so.<sup>37</sup>

Nevertheless, we explain at section 4.2.2 below that in the assessment of the terms and conditions of access without declaration that the QCA does undertake, its application of the highest prices that could feasibly be set for access *without* the constraints imposed by DBCTM's access framework. This follows from the QCA's summary of the terms of the access framework as giving rise to prices:

...based on users' willingness to pay.<sup>38</sup>

By contrast, we explain in section 3.2 and section 3.3 above how the pricing principles under the access framework can be expected to operate. The large increase in the TIC cited by the QCA based on the willingness to pay of a mine that can only access WICET in the alternative to DBCT could not occur under DBCTM's access framework because:

- the ceiling TIC is calculated by reference to the lowest willingness to pay amongst miners using the terminal without regard to contractual limitations and capped at \$3.00 per tonne above the floor TIC (in 2020-21 terms); and
- the TIC determined by an arbitrator would in any case not be the ceiling TIC, but rather would likely be a lower value determined by reference to the 'willing but not anxious' standard.

Consistent with these observations, there is no reasonable basis on which to conclude that these principles give rise to a TIC 'based on users' willingness to pay'. In section 3.5 below we undertake a calculation of the

<sup>34</sup> Section 5.1 below sets out some relevant context for the coal tenements market.

<sup>35</sup> NCC statement of preliminary views, para 6.70.

<sup>36</sup> *Application by Glencore Coal Pty Ltd* [2016] ACompT 6, para 139.

<sup>37</sup> QCA draft recommendation p C69.

<sup>38</sup> QCA draft recommendation, p C70.

ceiling TIC that confirms the QCA's consideration of the TIC that would result without declaration is substantially in error.

### 3.5 Calculation of the ceiling TIC

We establish estimates of the ceiling TIC over the declaration period using:

- the production forecasts supplied by MMI Advisory and AME; and
- coal prices, mine operating costs and rail and terminal charges supplied by AME.

In the sub-section below we describe the specification of the ceiling TIC set out in DBCTM's access framework and our approach to its estimation.

#### 3.5.1 Specification of the ceiling TIC

The formulation for the ceiling TIC is set out at schedule C2 of DBCTM's access framework. The essential elements of the calculation are that the ceiling TIC is not to exceed the floor TIC by more than \$3.00 per tonne (in 2020-21 price terms) and, subject to this:<sup>39</sup>

...set equal to the lowest 'willingness to pay' (as defined in paragraph (d) below) to be served at the relevant Terminal Component of those mines expected to be served at the Terminal Component, where:

- (1) mines are served at the Terminal Component in the order of their 'willingness to pay' to be served at that Terminal Component, with those with higher 'willingness to pay' served before those with lower 'willingness to pay'; and
- (2) the coal volumes to be served at the Terminal Component are the same as if the Floor TIC in respect of that Terminal Component applied and do not exceed the capacity of that Terminal Component to serve those coal volumes.

In this calculation, willingness to pay is assessed as:<sup>40</sup>

- (A) the Floor TIC for the relevant Terminal Component; plus
- (B) the expected profit per tonne where the mine's coal volumes are served at the relevant Terminal Component at the Floor TIC for that Terminal Component; less
- (C) either:
  - (i) the highest expected profit per tonne where the mine's coal volumes are served at a coal terminal other than the Terminal that is technically capable of taking delivery of those coal volumes (in that the mine is connected to that terminal by rail), if this expected profit per tonne is greater than zero; or
  - (ii) zero, if there is either no coal terminal other than the Terminal that is technically capable of taking delivery of the mine's coal volumes or no coal terminal other than the Terminal that provides an expected profit per tonne greater than zero.

However, a mines' willingness to pay for terminal capacity is taken to be zero if the coal volumes of that mine either:<sup>41</sup>

- cannot technically be delivered to that terminal; or
- can be more profitably delivered to any other coal terminal; or

<sup>39</sup> DBCTM access framework, schedule C2(b) and (c).

<sup>40</sup> DBCTM access framework, schedule C2(d)(3).

<sup>41</sup> DBCTM access framework, schedule C2(d)(2).

- do not give rise to a profit of more than zero when delivered to the terminal.

In the assessment of willingness to pay, profits per tonne are to be assessed as:<sup>42</sup>

- (1) the FOB coal price;
- less
- (2) mine costs, being the sum of operating costs, royalty payments, depreciation and a reasonable return on the capital costs of developing and operating the mine;
  - (3) rail transport charges for delivering coal to the coal terminal; and
  - (4) applicable infrastructure and handling charges for using port infrastructure including the coal terminal;

Profits must be assessed on the assumption that miners make terminal usage decisions without reference to any contractual constraints.

### 3.5.2 Estimates of the ceiling TIC

We calculate the ceiling TIC using:

- production volumes estimated by MMI Advisory, consistent with those used by the QCA to assess total foreseeable demand in the market in its assessment of criterion (a);<sup>43</sup> and
- coal prices, mine costs, rail transport charges and coal terminal charges as set out in appendix A3 of our first criterion (b) report.<sup>44</sup>

MMI Advisory provides production forecasts only for coal mines that it assesses as being in the relevant market in which the DBCT service is provided. This is likely to be sufficient for a robust calculation of the ceiling TIC because it includes almost all mines that are likely to prefer DBCT to other terminals, noting that:

- MMI Advisory does not accept the result of our calculation that shows that Kestrel would have lower costs to access DBCT than RG Tanna Coal Terminal (RGCT); and
- BMA and BMC mines have the alternative option of using Hay Point Coal Terminal (HPCT) and we do not included them in the assessment of the ceiling price at DBCT.

In contrast to the QCA, we do not seek to truncate MMI Advisory's forecasts of production to remain constant from 2026. The calculation of the ceiling TIC requires the production, prices and costs for individual mines, whereas the QCA's basis for forecasting total foreseeable demand, by capping total mine production, is unable to inform these inputs beyond 2026. Our use of unadjusted MMI Advisory 'high case' forecasts means that we assume higher total foreseeable demand than the QCA, giving rise to potentially higher ceiling TICs (prior to application of the constraint that the ceiling TIC cannot exceed the floor TIC by more than \$3.00).

Table 3.1 below sets out a calculation of the willingness of these mines to pay for DBCT's TIC in 2021.<sup>45</sup> In the table, consistent with schedule C2 of DBCTM's access framework:

- mines with no alternative but to use DBCT have a relatively high willingness to pay for the terminal, since otherwise they have no means of sending coal to market; whereas

<sup>42</sup> DBCTM access framework, schedule C2(e).

<sup>43</sup> MMI Advisory, *Reconciliation of DBCT demand forecasts submitted by stakeholders*, December 2018.

<sup>44</sup> HoustonKemp first criterion (a) report, pp 71-102.

<sup>45</sup> MMI estimates production for Moorvale of 1.5mt in 2021. However, we do not have information about the costs attributable to Moorvale in 2021, since AME does not forecast production for that time.

- mines that have the option of using other terminals have relatively low willingness to pay, reflecting their alternative options.

Table 3.1: Calculation of willingness to pay for DBCT, 2021

Mine	Production (mt)	Average price (\$/t)	Operating cost (\$/t)	Transport and terminal charges (\$/t)			Profit (\$/t)			Willingness to pay for DBCT (\$/t)
				DBCT	AAPT	RGTCT	DBCT	AAPT	RGTCT	
Ironbark No. 1	2.10	147.81	84.83	13.81			49.17			51.77
Hail Creek	10.00	139.65	95.18	15.96			28.51			31.11
Hillalong	3.60	119.57	76.82	15.96			26.79			29.39
Middlemount	3.80	136.06	88.60	19.61	40.60		27.85	6.86		23.59
Isaac Plains	1.20	128.04	87.74	15.10		24.26	25.20		16.04	11.76
Coppabella	4.00	155.14	131.35	14.90			8.89			11.49
Grosvenor	5.00	174.22	104.26	16.23		24.74	53.73		45.22	11.11
Moranbah North	5.80	174.13	89.07	16.64		24.74	68.42		60.32	10.70
North Goonyella	2.00	197.34	128.43	18.45		25.18	50.46		43.73	9.33
Olive Downs North	1.00	165.11	75.74	15.49	21.35		73.88	68.02		8.46
Eagle Downs	3.50	177.70	125.53	16.03	21.89	22.91	36.14	30.28	29.26	8.46
Lake Vermont	9.30	167.32	88.66	17.38	23.23	22.13	61.28	55.43	56.53	7.35
Clermont	13.00	108.79	46.79	18.22	22.68	26.52	43.78	39.32	35.48	7.06
Blair Athol	2.00	98.69	73.13	18.23	22.68	26.53	7.33	2.88	-0.97	7.05
Capcoal	7.93	162.66	85.90	18.07	23.92	20.94	58.69	52.84	55.82	5.47
Foxleigh	3.30	155.60	96.63	18.56	23.92	20.94	40.41	35.05	38.03	4.98
Oaky Creek	5.11	181.64	100.64	18.48	24.33	20.52	62.52	56.67	60.48	4.64

Source: MMI Advisory, AME

The ceiling TIC is the lowest willingness to pay to be served, given the current capacity of the terminal. In 2021 this is the willingness to pay of Oaky Creek, at \$4.64 per tonne. This estimate is based on our AME data indicating that Oaky Creek can earn gross profits of:

- \$62.52 per tonne exported through DBCT, at a TIC of \$2.60 per tonne; and
- \$60.48 per tonne exported through RGTCT, its cheapest alternative coal terminal.

It follows that Oaky Creek's maximum willingness to pay for the DBCT service is \$4.64 per tonne, being \$2.60 per tonne plus the additional \$2.04 per tonne it would incur to export through RGTCT.

We assume terminal capacity for throughput of 75.78 mtpa, consistent with capacity for contracts of 84.2 mtpa.<sup>46</sup>

For the purpose of the calculation, we assume a floor TIC of \$2.60 per tonne. However, except in relation to the constraint imposed by the maximum spread, the calculation of the ceiling TIC is not affected by the floor TIC assumption because:

- for mines that have no alternative to DBCT, a higher floor TIC gives rise to a commensurately lower profit and therefore lower willingness to pay; and

<sup>46</sup> HoustonKemp first criterion (a) report, p 37.

- for mines that do have alternatives to DBCT, a higher floor TIC at DBCT, with no change to charges at other terminals, gives rise to a commensurately lower willingness to pay.

If DBCT were to be expanded, then the ceiling TIC for the expanded terminal (if it were socialised) would be evaluated at the higher capacity and would likely be lower than our estimate above.

Table 3.2 below sets out estimates of the ceiling TIC, calculated using the process described above, for each year in the declaration period, with estimates based on MMI Advisory production forecasts placed alongside those based on AME production forecasts. The table shows that the ceiling TIC has some sensitivity to production forecasts, being lower under the more pessimistic forecasts prepared by MMI Advisory prior to 2028. Notwithstanding this, the estimates of the ceiling TIC fall within a similar range, being from:

- \$4.64 per tonne in 2021 to \$7.42 in 2029, based on MMI Advisory forecasts; and
- \$5.47 per tonne to 2021 to \$7.44 per tonne in 2027, based on AME forecasts.

Table 3.2: Estimates of ceiling TIC for DBCT

Year	Ceiling TIC using MMI production forecasts (\$/t)	Ceiling TIC using AME production forecasts (\$/t)
2021	4.64	5.47
2022	4.64	5.47
2023	4.64	7.05
2024	4.64	7.35
2025	4.64	7.35
2026	5.47	7.35
2027	5.47	7.44
2028	7.35	7.44
2029	7.42	7.42
2030	7.41	7.41

Source: MMI Advisory, AME

All of the estimates of the ceiling TIC set out above are subject to the additional constraint that they cannot exceed the floor TIC by more than \$3.00 per tonne. It follows that a ceiling TIC of \$7.44 per tonne could only apply in a context in which the floor TIC was at least \$4.44 per tonne.

We also examine the sensitivity of the ceiling TIC to forecasts of coal prices. Table 3.3 shows how the ceiling TIC, calculated on the basis of MMI Advisory production forecasts, is affected by different coal pricing scenarios. The table suggests that the ceiling TIC may fall to the level of the floor TIC under low coal price assumptions.



Table 3.3: Sensitivity of the ceiling TIC for DBCT to changes in coal prices

Year	Coal prices lower by 20%	Coal prices lower by 10%	Base case	Coal prices higher by 10%	Coal prices higher by 20%
2021	2.60	2.60	4.64	4.98	4.98
2022	2.60	2.60	4.64	4.64	4.64
2023	2.60	4.22	4.64	4.64	4.64
2024	2.60	3.94	4.64	4.64	4.64
2025	2.60	4.64	4.64	4.64	4.64
2026	2.60	5.47	5.47	5.47	5.47
2027	2.60	5.47	5.47	5.47	5.47
2028	3.96	7.35	7.35	7.35	7.35
2029	4.64	7.42	7.42	7.42	7.42
2030	4.64	7.41	7.41	7.41	7.41

Source: MMI Advisory, AME

## 4. Effect of declaration on access

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The first step in applying the analytical framework laid out in section 2 to determine whether DBCT satisfies the criterion (a) test is to assess the effect of declaration on the terms and conditions of access to the DBCT service. To do this, we use the only reasonable counterfactual without declaration – a world where DBCT is bound by its executed access framework – and perform the analysis by reference to the ability and incentive of DBCTM to exert market power given this constraint.

The effect of declaration on access is expected to vary depending upon whether access to coal handling services is provided:

- under existing DBCT standard user agreements, which apply to the entire current capacity of the terminal; or
- under new DBCT user agreements, which would apply to expanded capacity at the terminal.

The QCA has highlighted the importance of the constraints that the DBCT standard user agreements impose on the ability of DBCTM to alter materially the terms and conditions of access.<sup>47</sup> We agree that the presence of any such constraints would be an important feature of the market structure, both with and without declaration, and can be expected to affect the conduct of market participants. This view is also expressed by the DBCT User Group.<sup>48</sup>

Consistent with this position, the QCA frames its assessment of the effect of declaration on access by reference to that provided under existing DBCT standard user agreements and under new DBCT user agreements. In this section, we adopt a similar framework.

Table 4.1 below organises this assessment, and closely follows the format and content of Table 11 in the QCA's draft recommendation. This highlights the key areas in which our assessment differs from that of the QCA. The remainder of this section sets out the basis for our assessment.

In this section we do not take the second step in the analytical framework by drawing any conclusion as to whether the effect of declaration on access at DBCT would be likely to promote a material increase in competition in any dependent market. Rather, we undertake that assessment, in respect of the market for tenements, in section 6 below.

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<sup>47</sup> QCA draft recommendation, pp C66-C68.

<sup>48</sup> Dalrymple Bay Coal Terminal User Group, *Declaration review regarding Dalrymple Bay Coal Terminal*, 16 July 2018, pp 71-72.

Table 4.1: Access terms between incumbents and potential entrants with and without declaration

	Existing user agreements	Potential user agreements	Outcome
Future with declaration	<p>Access terms as per existing user agreements, including access charge as approved by the QCA under an approved access undertaking.</p> <p>Presently, a TIC of approximately \$2.60 per tonne, representing one to two per cent of forecast metallurgical coal prices.</p>	<p>Access terms governed by the QCA Act; access terms and charges approved by the QCA under an approved access undertaking.</p> <p>An expected TIC of approximately \$2.67 per tonne if expansion is socialised and, at most, \$6.00 per tonne if expansion is differentiated – representing one to four per cent of metallurgical coal prices.<sup>49</sup></p>	<p>With declaration, the price for access under potential user agreements is likely to be higher than under existing user agreements.</p>
Future without declaration	<p>Access terms as per existing user agreements, with access charges expected to be similar to those that the QCA would determine.</p> <p>Presently, as TIC of approximately \$2.60 per tonne.</p>	<p>Access terms determined under DBCTM's access framework, which applies the same terms as those approved by the QCA at prices that would be agreed between a willing but not anxious buyer and a willing but not anxious seller.</p> <p>A TIC not to be less than a QCA determined charge and not greater than a ceiling that is expected no more than \$7.44 per tonne (or \$3.00 per tonne above the floor TIC if this is lower) and may be less in periods of low demand and/or low prices.</p>	<p>Without declaration, the price for access under potential user agreements is likely to be higher than under existing user agreements.</p>
Outcome	<p>Under existing user agreements, the price for access is likely to be the same, or similar, with and without declaration.</p>	<p>Under potential user agreements, prices for access may be higher without declaration than with declaration. The extent of this difference depends upon the price that would be agreed between a willing but not anxious buyer and a willing but not anxious seller, as determined under binding arbitration.</p>	

One important difference in inputs between our assessment and that of the QCA is the assumed level of utilisation of the terminal. The QCA assumes that existing user agreements account for 77 mtpa of terminal capacity. However, from July 2021 DBCT will be contracted to its full capacity of 84.2 mtpa, as noted in DBCTM's submission to the QCA in December 2018,<sup>50</sup> and we adopt this parameter as the starting point for our analysis.

<sup>49</sup> QCA draft recommendation, pp C85-C86.

<sup>50</sup> DBCTM, *DBCT declaration review – update on contract profile*, p 1.

## 4.1 Declaration will not affect access for existing user agreements

Declaration is not likely to affect access provided under existing user agreements.

Existing user agreements with terms of more than 10 years are evergreen, meaning that users have the option to extend the terms by five years or more any time up to 12 months prior to the term of the agreement. Users may continue to extend this term in perpetuity.<sup>51</sup>

Under existing user agreements, the TIC is revisited at the date of commencement of each DBCT access undertaking or otherwise each five years. If there is no agreement as to the revised TIC at this date, the matter must go to arbitration. The arbitrator must have regard to the following matters:<sup>52</sup>

- (i) an appropriate asset valuation of the Terminal and the relevant Terminal Component;
- (ii) an appropriate rate of return for DBCT Management;
- (iii) the terms of this Agreement;
- (iv) the expected future tonnages of Coal anticipated to be Handled through the Terminal and the relevant Terminal Component;
- (v) any other matter agreed to by the User and DBCT Management and notified by them in writing to the arbitrator;
- (vi) any other matter which is submitted by either the User or DBCT Management and accepted by the arbitrator as being relevant; and
- (vii) the then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that arbitration should produce an outcome similar to that which might have been expected had the QCA determined it).

On this information, the QCA concludes that existing user agreements provide an effective constraint on DBCTM's exercise of market power, up to the volumes specified in those agreements. The QCA also observes that existing users have an incentive to continue to access DBCT up to the volumes in their agreement rather than switch to another terminal.<sup>53</sup>

DBCT will be contracted to its full capacity of 84.2 mtpa from July 2021.<sup>54</sup> Given excess demand for the DBCT service at the current time, it is reasonable to assume that these agreements will be renewed over the declaration period.

It follows that declaration cannot be expected to affect access for volumes served by DBCT's existing capacity. The QCA estimates total foreseeable demand in the market for the DBCT service to be 93 mtpa, which is reached in 2021. Of this, only 8.8 mtpa (or 9.5 per cent) of demand in the market could possibly be supplied under new user agreements, and only if DBCT was expanded to meet this demand – as opposed to it being satisfied by available or expanded capacity at other terminals.

## 4.2 Declaration may affect access for new user agreements

Declaration may affect access provided under new user agreements because DBCTM and users may agree, or an arbitrator may impose, prices that exceed those that the QCA would have otherwise determined had the DBCT service been declared, ie;

<sup>51</sup> 2016 Access Undertaking DBCT Standard User Agreement, clause 20.

<sup>52</sup> 2016 Access Undertaking DBCT Standard User Agreement, clause 7.2(e).

<sup>53</sup> QCA draft recommendation, p C66.

<sup>54</sup> DBCTM, *DBCT declaration review – update on contract profile*, p 1.

- with declaration, the QCA estimates that access would be at a TIC of between \$2.67 per tonne and \$6.00 per tonne, depending upon whether expansions of DBCT were socialised or differentiated; whereas
- without declaration, we estimate that under the access frameworks, the TIC would not be expected to exceed \$7.44 per tonne, could not exceed the floor TIC by more than \$3.00 per tonne in any case, and would be less than this to the extent that a lower price reflects the price that would be agreed between a willing but not anxious seller and a willing but not anxious buyer.

#### 4.2.1 Access for new user agreements with declaration

With declaration, access under the terms of new user agreements would require DBCT to be expanded. It is not clear whether DBCT would be expanded in this scenario.

If DBCT were to expand to provide access to additional coal volumes served under new user agreements, the terms and conditions for access would be determined by the QCA under the QCA Act.

The QCA states that, given estimates of the capital costs for expansion projects provided in our report, the expansions would likely be socialised with a new TIC in 2018-19 of \$2.67 per tonne, up from \$2.60 per tonne without expansions. This would result in a total coal handling charge of \$5.20 per tonne.<sup>55</sup>

By contrast, the QCA notes that, if these expansions were instead prices on a differentiated basis, the TIC for the expanded capacity would, at most, be \$6.00 per tonne, implying a total coal handling charge of at most \$8.50 per tonne. On the QCA's assessment, a coal handling charge of this magnitude:<sup>56</sup>

...would be about 3 to 5 per cent of the forecast metallurgical coal price, all other things remaining unchanged. Considering the possibility that this estimate would be an overestimate, a coal handling charge of this order would not appear to be materially different from the 2 to 3 per cent for existing users.

There appears to be a discrepancy in the QCA's estimates of charges under a socialised expansion as against a differentiated expansion. Our understanding is that these approaches reflect different means of recovering the same quantum of costs. It follows that the annual revenue of the terminal should be the same with socialisation and with differentiation. However, this is not the case with the QCA's estimated charges, since:

- under socialisation, total revenue for the terminal is \$248.3 million, reflecting a TIC of \$2.67 per tonne applied over 93 mt; whereas
- under differentiation, total revenue for the terminal is \$271.7 million, reflecting a TIC of \$2.60 per tonne applied over 84.2 mt and a TIC of \$6.00 per tonne applied over 8.8 mt.

It is apparent that the average TIC with a differentiated expansion is \$2.92 per tonne, which is \$0.25 per tonne higher than the QCA's estimated charge under socialisation. This suggests that the QCA has either underestimated the socialised charge or overestimated the differentiated charge.

#### 4.2.2 Access for new user agreements without declaration

Without declaration, access under the terms of new user agreements would require DBCT to be expanded.

If DBCT were to expand to provide access to volume under new user agreements, the terms and conditions for access would be determined under DBCTM's access framework. The essential features of this framework are:

- five year pricing periods with a review of the TIC able to be triggered at the discretion of either party with effect from the start of each period;

<sup>55</sup> QCA draft recommendation, p C137.

<sup>56</sup> QCA draft recommendation, p C86.

- for the TIC to be adjusted during a pricing period if a review event occurs, such as changes to tonnage at the terminal or in the event of a socialised expansion;
- all review event adjustments subject to a floor and ceiling, with the TIC not to fall below the floor or above the ceiling;
- arrangements for the TIC to be increased at the start of each financial year by the change in the consumer price index over the previous year; and
- in the event of a dispute as to price, an arbitrator must determine a TIC that reflects the price that would be agreed between a willing but not anxious buyer and a willing but not anxious seller, while also at a level that is not less than the floor TIC and not greater than the ceiling TIC.

Importantly, apart from the pricing conditions we summarise above, the terms and conditions of access would be substantively the same with and without declaration.

The QCA does not seek to assess DBCTM's access framework in detail and states that it was not required to do so.<sup>57</sup> In practice, the QCA seems not to have had close regard to the basis on which pricing would be determined, and access would be facilitated, under the access framework.

For example, the QCA states that the access framework would:<sup>58</sup>

...provide access to terminal capacity based on users' willingness to pay...

On the QCA's assessment, the willingness to pay for the DBCT service would likely reflect the charges associated with accessing an alternative terminal. In its view, the only available alternative to DBCT for mines located in the Goonyella system is WICET. However, the total terminal and rail charges associated with sending coal to WICET would be materially greater than the charges involved with sending coal to DBCT. The QCA estimates these as \$26 per tonne as compared to \$11 per tonne.<sup>59</sup>

This assessment amounts to a *worst case* assessment of the alternative for miners, under a scenario where the DBCTM *does not commit* to any access framework. By adopting this stance, the QCA's assessment appears to assume that the terms and conditions of DBCTM's access framework would have no effect on DBCTM's ability to set prices without declaration.

The assessment is also a *worst case* because it assumes there is no available capacity at either AAPT or RGTCT over the entire declaration period. The QCA adopts this assumption despite evidence that both terminals continue to negotiate new contracts with miners located in the Goonyella systems.

The QCA's assessment effectively assumes that:

- DBCTM *does not commit* to an access framework;
- WICET is the only option that is available to Goonyella miners with or without the access framework; and
- therefore, the charges associated with sending Goonyella coal to WICET are the only form of constraint on the level of charges that DBCTM can obtain from new users.

The terms of DBCTM's access framework impose substantially greater constraints on DBCTM's ability to increase prices than those assessed by the QCA. Further, WICET is likely to represent one of several alternative non-DBCT coal terminals available to Goonyella mines.

A reasonable assessment of the effect of DBCTM's access framework on access for miners would need to consider that the framework:

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<sup>57</sup> QCA draft recommendation, p C69.

<sup>58</sup> QCA draft recommendation, p C70.

<sup>59</sup> QCA draft recommendation, pp C70-C71.

- gives rise to a TIC that reflects the price that would be agreed between a willing but not anxious buyer and a willing but not anxious seller; and
- specifies the ceiling price to be determined as if there were no contractual limitations on volumes able to be delivered to DBCT or any other coal terminal.

Charges determined on these terms and conditions would not be based on willingness to pay. Furthermore, they would be determined without regard to any contractual constraints on the ability of AAPT or RGTCT to serve mines located in the Goonyella system.

Our assessment, set out in section 3.5 above, is that the applicable ceiling TIC, being the outer-most constraint on the TIC under DBCTM's access framework, would be at most \$7.44 per tonne (or \$3.00 per tonne above the floor TIC if this is lower). These estimates are based on the data disclosed in our first criterion (b) report, taking into account the estimates of demand prepared for the QCA by MMI Advisory.

### 4.3 Materiality of price changes depends on their effect on competition

In table 11 of its draft recommendation, the QCA summarises the effect of potential price changes for existing user agreements and new user agreements, with and without declaration, in terms of their 'materiality' on the terms and conditions of access. For example, the QCA concludes that:<sup>60</sup>

- total coal handling charges of at most \$8.50 per tonne for new user agreements, with declaration, were not materially different from those for existing user agreements; whereas
- total coal handling charges of at least \$20 per tonne for new user agreements, without declaration, would give rise to material cost and risk disadvantages for potential entrants.

The QCA summarised its analysis as follows:<sup>61</sup>

Therefore, incumbents (existing users) would have materially more favourable access conditions and terms than potential DBCT users in a future without declaration which would unlikely exist in a future with declaration.

The basis upon which the QCA made its assessment that coal handling charges of at most \$8.50 per tonne would not be material, whereas coal handling charges of at least \$20 per tonne would not, is unclear from its analysis.

We note in section 2.2 above that criterion (a) contains only one materiality standard – in relation to the effect of access (or improved access) on the promotion of competition in a dependent market. It follows that the only reasonable basis for assessing a 'material' change in access terms or prices, for the purpose of criterion (a), is to show that this change in terms would give rise to a material change in competition in at least one dependent market.

<sup>60</sup> QCA draft recommendation, p C86.

<sup>61</sup> QCA draft recommendation, p C86.

## 5. Market for coal tenements

In order to determine whether the effect of declaration on access would materially affect competition in at least one dependent market – the second step of the analytical framework for assessing criterion (a) – it is important to establish the facts of a given potential dependent market as they pertain to the effect of declaration on access to DBCT.

The QCA's draft recommendation, and reports by Castalia, identify a market for tenements as a potential dependent market in which increased access due to the declaration of DBCT is expected to promote a material increase in competition. These conclusions differ from those drawn in our first criterion (a) report, and in our second report, that the market for tenements would not be affected by declaration of the DBCT service. Consequently, in the remainder of this report, we narrow our focus of competition in dependent markets to that for the market for tenements.

In this section, we set out some contextual information about tenements and our assessment of the scope of the market for tenements.

### 5.1 Context for the tenements market

The *Mineral Resources Act 1989* (Qld) defines a coal exploration tenement as:<sup>62</sup>

...an exploration permit or mineral development licence granted for coal.

New coal exploration permits are only available through a successful tender submitted in the context of a competitive process managed by the Queensland government. Tender applications are typically assessed on financial and technical capabilities as well as community engagement measures.<sup>63</sup> At present, there is an open tender process under way for five coal exploration tenements in Queensland. Another tender process is due to open later in 2019.<sup>64</sup>

Existing exploration permits may be transferred to a third party, subject to ministerial consent. Existing permits may also be obtained by merger or acquisition.

In each of these scenarios, each prospective buyer of a tenement can be expected to assess its willingness to pay (WTP) by reference to the principal variables we set out below, expressed in present value terms, ie:

$WTP = E[\textit{profit from investment}]$ , ie, the expectation of the present value of profits

$WTP = E[\textit{revenue} - \textit{costs}]$

$WTP = E[f(\textit{coal price, quantity, quality, etc}) - f(\textit{mining costs, logistics costs, cost of capital, etc})]$

It follows that willingness to pay for a coal tenement increases with its expected revenue (eg, higher coal price) and falls with expected costs, eg, expected logistics costs. However, it is important not to conflate changes in willingness to pay with the degree of competition between or the competitive environment as it affects prospective buyers of a tenement (or the likely supply of new tenements).

Prospective buyers of coal tenements weigh up a range of factors including their:

<sup>62</sup> *Mineral Resources Act 1989*, section 318AE(1).

<sup>63</sup> See <https://www.business.qld.gov.au/industries/mining-energy-water/resources/geoscience-information/exploration-incentives/competitive-tendering> accessed 5 February 2019.

<sup>64</sup> See <https://www.business.qld.gov.au/industries/mining-energy-water/resources/geoscience-information/exploration-incentives/exploration-program>, accessed 5 February 2019.

- assessment of the (intrinsically uncertain) extent and quality of the potential coal resource;
- perceived ability to extract that resource efficiently;
- expectations as to future export coal market prices;
- prospects of access to the infrastructure necessary to export their product; and
- total supply chain costs, including the cost of capital associated with exploration and development of a mine.

An important property of the competitive tender process is that the willingness to pay of any one bidder is likely to differ materially from its rivals, according to the numerous factors that make up the total strength of its tender.

## 5.2 Scope of the market for tenements

In this section, we explain that the application of a conventional approach to market definition gives rise to a market that extends substantially beyond the geographic confines of the Goonyella system – and likely extends to Central Queensland or beyond. The establishment of the bounds of the relevant dependent market is a necessary first step to an assessment of whether declaration of the DBCT service could be expected to promote a material increase in competition in that market.

The dimensions of a market are commonly assessed by reference to product, geography, function and time. However, for a tenements market, the most consequential dimension is likely to be its geographic extent. Although there appear to be some differences between our assessment and the QCA's conclusion in relation to the product and functional dimensions of this market, little turns on these differences.<sup>65</sup>

The geographic scope of the market for tenements is important because, if this market was to extend beyond the Hay Point catchment, there is little reason to expect that a change in the terms of access at DBCT could have a material effect on competition in a dependent market for any form of tenements.

In our second criterion (a) report, we concluded that the geographic scope of the market for tenements is likely to extend beyond the Hay Point catchment, to Central Queensland or potentially beyond.<sup>66</sup> The rationale underpinning this conclusion, consistent with the Tribunal's reasoning in *Fortescue Metals*,<sup>67</sup> is that:

- a monopoly seller of tenements in the Hay Point catchment could not profitably apply a price increase because buyers would substitute to other tenements; and
- a monopsony buyer of tenements in the Hay Point catchment could not profitably impose a price reduction because sellers would easily find a purchaser from outside this geographic area.

It follows that a SSNIP test, applied to a candidate market for tenements restricted to the Hay Point catchment, would be defeated by the availability of coal tenements from other locations. Or if a SSNIP was applied as a price reduction by a hypothetical monopsonist buyer of coal tenements in the Hay Point catchment, it too would be defeated by buyers of coal tenements emerging from outside the catchment.

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<sup>65</sup> We agree with the QCA that the relevant market will be for coal tenements, but do not consider that there is merit in further narrowing the market definition to tenements with predominantly metallurgical coal, since buyers of tenements appear to be able to substitute between the two.

Further, although the QCA appears to identify separate markets for exploration and development tenements, as compared to production tenements, we did not address whether separate markets exist for these functions and do not consider it necessary to do so.

<sup>66</sup> HoustonKemp second criterion (a) report, p 9.

<sup>67</sup> *In the matter of Fortescue Metals Group Limited* [2010] ACompT 2, 30 June 2010, p 258, paras 1118-1119. This decision relates to iron ore, a similar commodity resource.

The QCA contends that different infrastructure costs between the Goonyella coal supply chain and other coal supply chains would give rise to a narrow geographic market for coal tenements because:<sup>68</sup>

...the value of coal tenements in the Goonyella system would likely be different from other regions. Therefore, coal tenements in the Hay Point catchment region are unlikely to be a close substitute for tenements in other parts of Queensland.

The QCA's conclusion does not follow from its analysis. Put another way:

- although we agree that different prices for infrastructure access in the Hay Point catchment may mean that tenements in this region are valued at different levels from those in other regions;
- we disagree that this provides any information that is relevant to an assessment of the geographic scope of the market for tenements.

The fundamental value of tenements follows from the expectation that they will eventually operate as profitable mines. It follows that if the costs of operating those mines increase, the potential value of a tenement will fall. Any such change will have a one-off effect on holders of existing tenements and the Queensland government, who holds the right to sell new tenements.

However, there is no reason to expect that such a change would give rise to any change in the structure of the market or the conduct of its participants.

The step where the QCA's analysis falls into error is its contention that differences in tenement prices between regions imply a lack of substitutability. This is not correct. The price of a tenement says nothing about its substitutability with tenements in other areas. Other things being equal, a buyer of coal tenements will prefer to buy a tenement that provides it the *greatest return*. This is not the same as the tenement with the *lowest price*.

By way of example, a tenement in the Gladstone catchment might cost twice as much as an identical tenement in the Hay Point catchment yet provide exactly the same expected return to a buyer given differences in infrastructure costs. From the buyers' perspective, these tenements would be closely substitutable. It follows that, even if infrastructure costs in the Hay Point catchment were substantially different from those in other regions, this does not affect the substitutability of tenements from the perspective of buyers. Rather, it simply alters the price of those tenements (to the extent that port charges are relevant in the context of coal prices and mine costs).

Similarly, there are many reasons to expect the price of two tenements from within the same geographic region not to be the same. Any two tenements may differ according to the ease with which coal may be extracted, the quality of the coal resource, or the distance to the nearest port terminal(s). The fact and inevitability of such price differences provides no information as to their degree of substitutability, from the perspective of potential buyers.

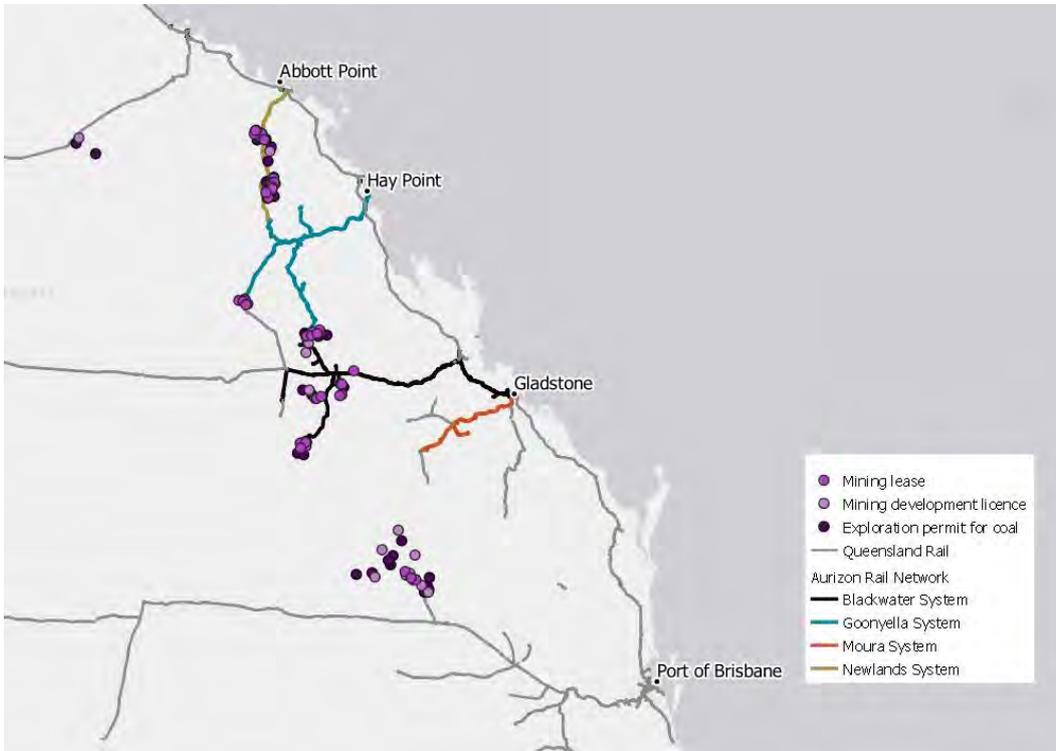
Rather, the critical consideration for the degree of substitutability between tenements in one geographic region and another is the ability of buyers to re-deploy capital and relevant expertise from one region to another, so as to bring about this equalisation of expected returns. In other words, is it reasonable to expect that buyers of tenements in one region can redirect a sufficient proportion of their financial and technical resources to another region in the face of a SSNIP by a hypothetical monopolist supplier of tenements?

The answer to this question can be informed by the geographic spread of tenements held by miners in Queensland. We have prepared this information both for miners who hold access rights at DBCT and for those who do not, and present this in the figures below.

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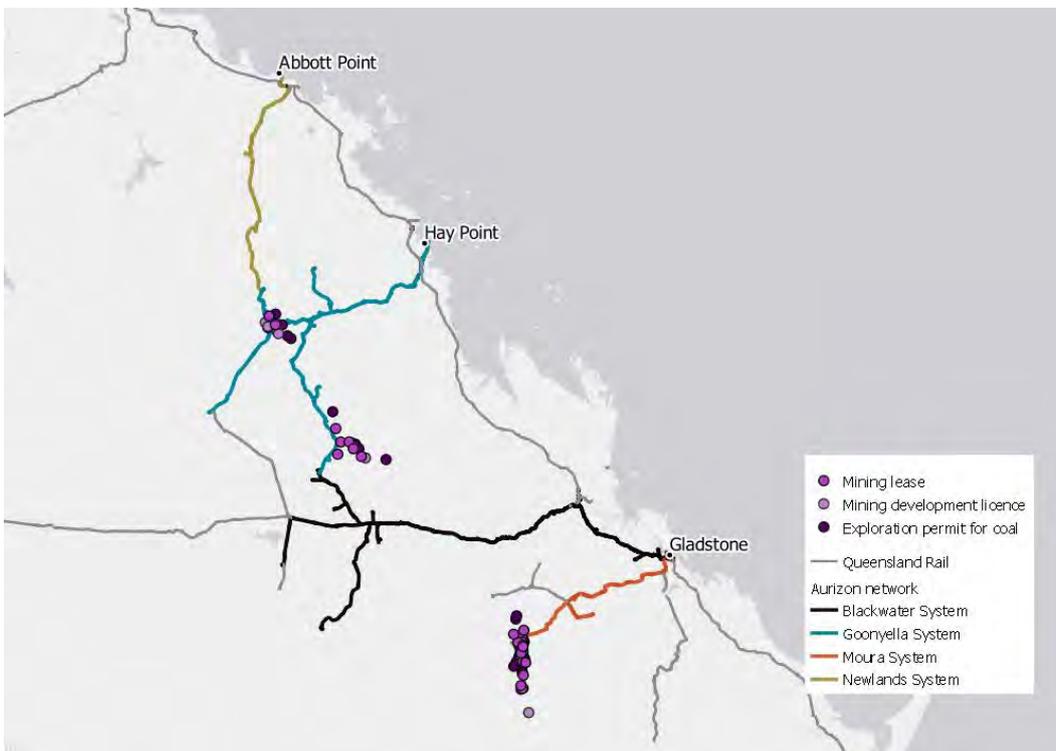
<sup>68</sup> QCA draft recommendation, p 57.

Figure 5.1: Coal tenements in Queensland held by Glencore



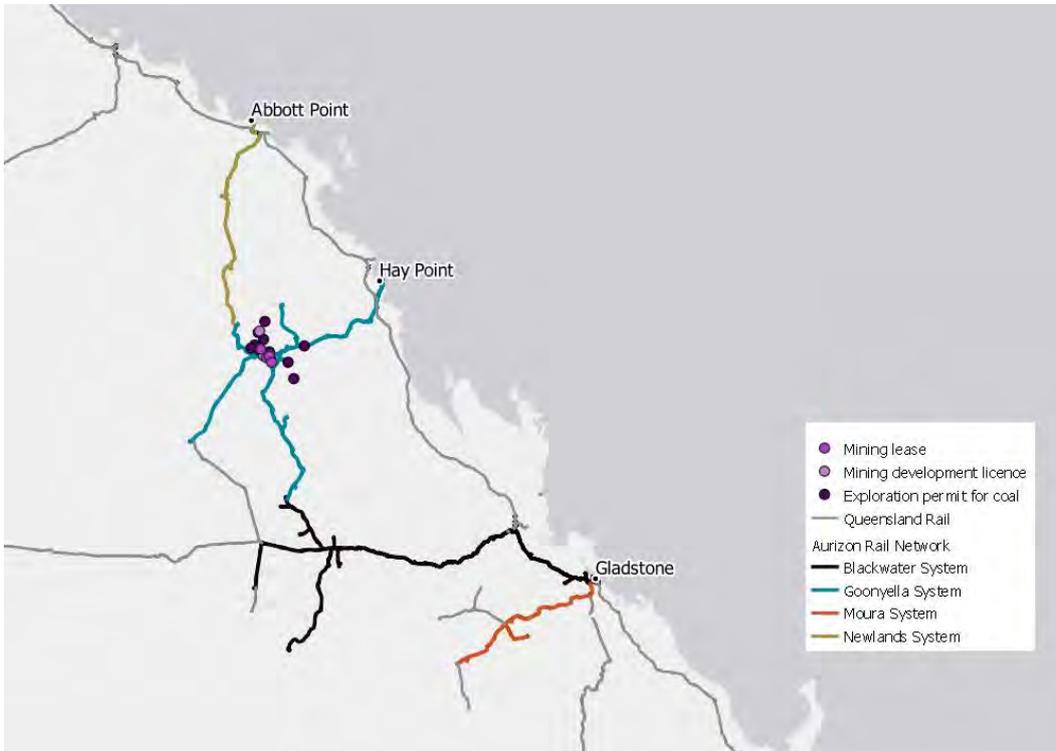
Source: Queensland government

Figure 5.2: Coal tenements in Queensland held by Anglo American



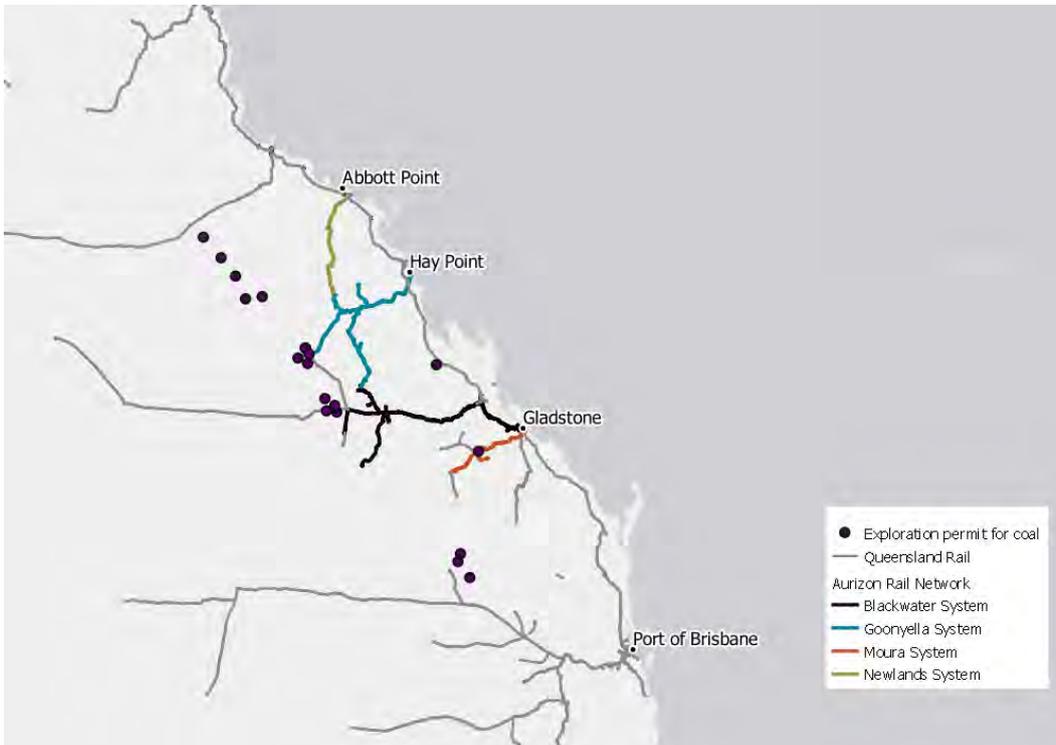
Source: Queensland government

Figure 5.3: Coal tenements in Queensland held by Fitzroy Resources



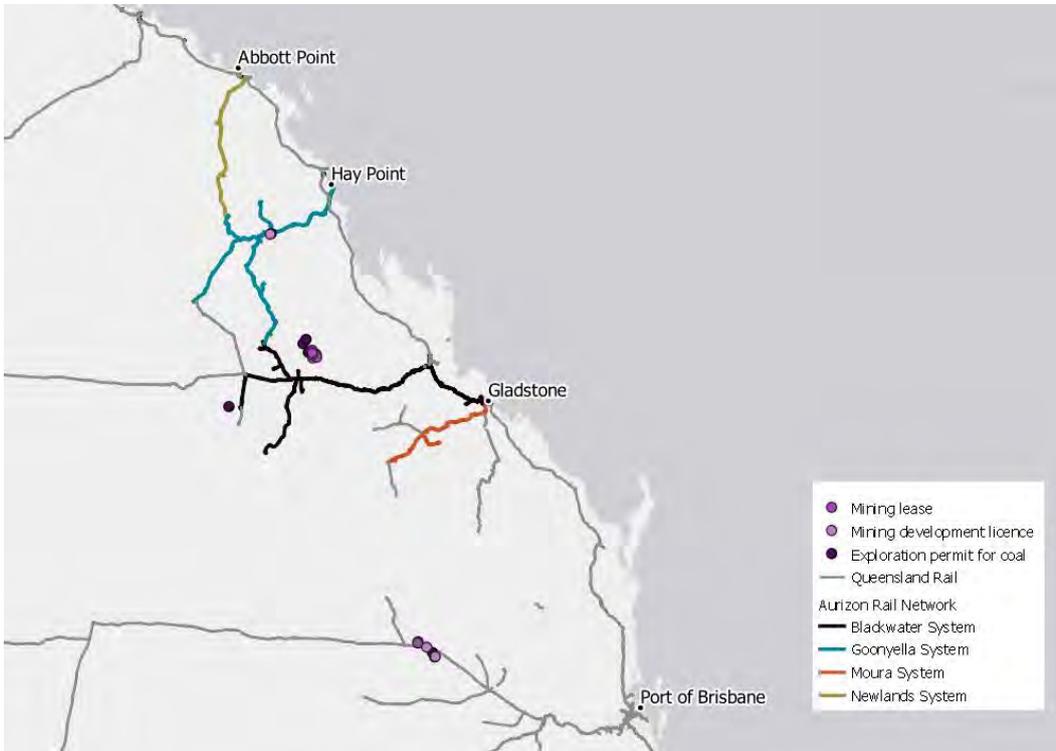
Source: Queensland government

Figure 5.4: Coal tenements in Queensland held by Cuesta Coal



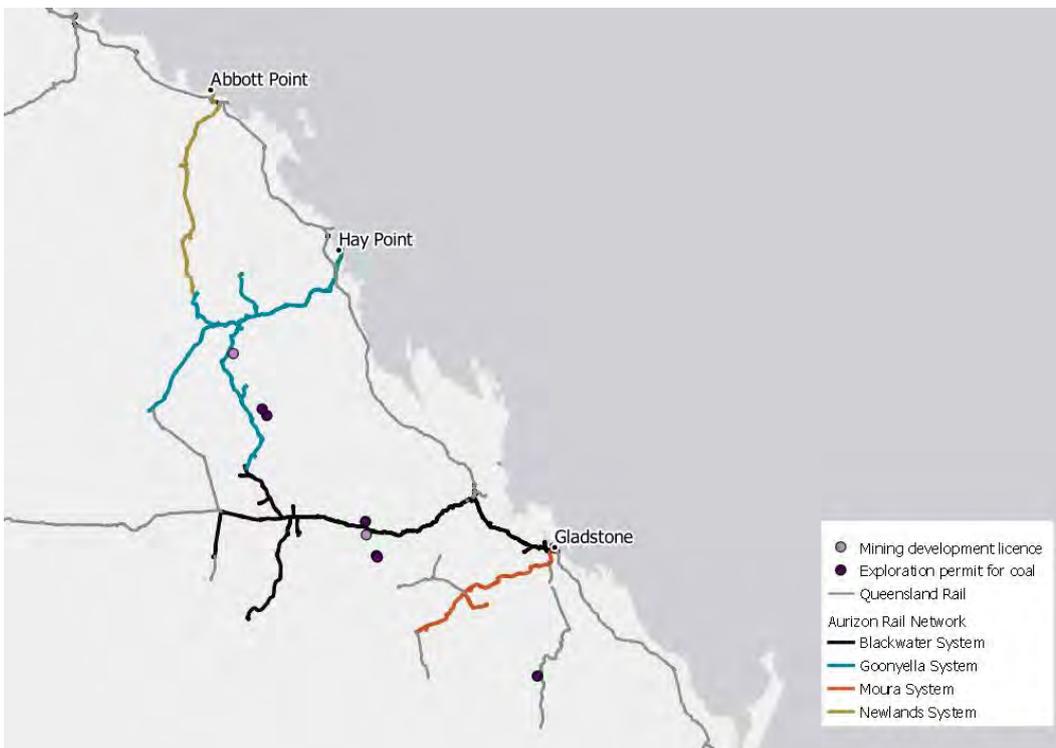
Source: Queensland government

Figure 5.5: Coal tenements in Queensland held by Yancoal



Source: Queensland government

Figure 5.6: Coal tenements in Queensland held by Whitehaven



Source: Queensland government

The pattern disclosed by this information is not consistent with a contention that tenement markets are delineated by port catchment areas, such as the Hay Point catchment (or the Goonyella system).

If this were the case, such that there were strong substitution possibilities within these areas but not outside them, the evidence would be much more likely to show coal tenement ownership patterns that were strongly defined by port catchment area. This is not the case.

The information in the figures above shows that there is a diversity to the ownership of tenements by miner, ie:

- many miners, such as Glencore, Anglo American, Cuesta Coal, Yancoal and Whitehaven, own tenements distributed across two or more Queensland port catchments; whereas
- some miners, including Fitzroy sources, own tenements in only one Queensland catchment area.

The most notable conclusion to be drawn from the charts is that proximity to coal rail infrastructure is the most important driver for the location of tenements. Beyond this, most miners tend to own clusters of tenements concentrated in one or more narrow areas. This is consistent with the most important economies in the ownership of and development of tenements being those related to local mine site infrastructure.

However, miners that own tenements away from one cluster may often have other clusters located in other port catchments. The data disclosed in the maps does not suggest strong economies related to the ownership of or development of mines within a port catchment that extends beyond the mine site economies identified above. Rather, it appears that miners develop mine sites (and acquire tenements to underpin those mine sites) across a range of port catchment areas. This is not consistent with a pattern of conduct that suggests a lack of substitutability between Hay Point catchment tenements and those in other locations, at least for many businesses.

## 6. Effect on competition in the tenements market

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The second step of the analytical framework, laid out in section 2, that we apply in our assessment of criterion (a) is to determine whether the effect of declaration on access would materially improve competition in at least one dependent market.

We explain in section 2 that our approach is to assess whether:

- the structure of the market or conduct of firms is changed in a way that can be expected to bring about a material enhancement of the competitive process; and
- the volume and/or quality of output in the market is expected to increase.

In this section, we consider whether access (or increased access) as a result of declaration would promote a material increase in competition in the tenements market. Our analysis focuses on this market because it is the only dependent market for which there are substantive differences of view as to whether declaration would give rise to the promotion of a material increase in competition.

The QCA considers that declaration will promote a material increase in competition in the market for coal tenements. This conclusion follows from its contentions that:

- differences in terms and conditions of access, as between users under existing user agreements and those under new user agreements would arise without declaration; and
- these differences would distort competition in the market for coal tenements under the access framework.

The QCA summarises its view as follows:<sup>69</sup>

...the QCA's view is that given existing evergreen user agreements, DBCT Management's stated intent to provide access to terminal capacity to potential DBCT users based on their willingness to pay will result in a material asymmetry between existing DBCT users and potential DBCT users over the access terms and conditions that would apply in a future without declaration. In an environment where existing users would likely seek coal tenements to continue to benefit from their existing user rights, this asymmetry would have a material adverse effect on potential DBCT users' ability to compete with existing users in the coal tenements market, which would likely discourage efficient entry in the coal tenements market, and so competitive conditions in that market would be adversely affected in a material way...

Underpinning the QCA's view are three critical assumptions:

- the market for tenements is no wider than the market in which the DBCT service is provided, such that a new entrant in the market;
  - > would be negatively affected by an asymmetry in the terms of access at DBCT; and
  - > would not be able to seek to utilise capacity at other terminals;
- the differences in terms and conditions faced by new entrants without declaration are such that;
  - > a number of them would be deterred, as compared to the prospects for new entrants with declaration;
  - > the quantum of the deterred new entrants would be sufficiently great that, with declaration, the otherwise deterred new entrants would give rise to a material promotion of competition; and

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<sup>69</sup> QCA draft recommendation, p C71.

- there is not a well-functioning secondary market for capacity that would provide the means for any new entrants that were more efficient than incumbents to secure DBCT capacity.

For the QCA to reach its conclusion, each of these assumptions must be made out. However, in our opinion, none of them can be justified. In the remainder of this section we set out the basis for this conclusion.

## 6.1 Tenements market is wider than the Hay Point catchment

In section 5.2 above, we explain that the geographic scope of the market for tenements is greater than the Hay Point catchment, and likely extends to Queensland or beyond.

If the market is wider than the Hay Point catchment, then a new entrant in the market would be able to select between tenements from different regions, served by different coal terminals. It follows that any increase in the asymmetry of terms of access to DBCT as between new entrants and incumbents without declaration:

- would not be determinative in raising the possibility that more efficient new entrants could be deterred from entering the market; since
- new entrants faced with such an increase in asymmetry in pricing of capacity at DBCT could simply choose to acquire tenements in regions in which other coal terminals may be more cost effective.

In other words, it is highly unlikely that access as a result of declaration would promote a material increase in competition in the market for coal tenements market if that market is wider than the Hay Point catchment suggested by the QCA.

## 6.2 Barriers to entry and prices are similar with and without declaration

The QCA states that the extent of the differential effect of price changes for the DBCT service on new entrants in the market for tenements, as compared to incumbent users of the DBCT service, means that declaration will promote a material increase in competition.

The QCA contends that this effect would arise because existing users (with access to lower charges at DBCT) would value tenements more than new users (with access to higher charges at DBCT) and that this could deter the entry of more efficient firms into the tenements market.

However, even if the tenements market was assumed to be limited to the Hay Point catchment, there are strong reasons to believe that the effect cited by the QCA would not give rise to the promotion of a material increase in competition. In particular:

- the principal barriers to entry faced by new entrants in the market for tenements are risks associated with variability in the price of coal and uncertainty about the right of access to (as opposed to the terms of access to) infrastructure services – these risks will not be affected by declaration under DBCTM's access framework; and
- the TICs that apply with and without declaration will be sufficiently similar that the expected usage of DBCT is not affected by declaration.

### 6.2.1 New entrants face substantial barriers to entry that will not be alleviated by declaration

The QCA's contentions rest on an assumption that, without declaration, the barriers to new entry in the market for tenements are significantly higher than would be the case with declaration such that new entry would be promoted by declaration. Barriers to entry raise the possibility that new entrants that are more efficient than incumbents would be excluded from the market. On the presumption that this was a realistic prospect, over time, lower barriers to entry would allow for the entry of more efficient new entrants, promoting an increase in the environment for competition.

We note in section 2.3 above that that the 'possibility' of more efficient firms being discouraged from entering a dependent market appears unlikely to be sufficient to conclude that 'access as a result of declaration would promote an increase in competition that is material'. This is unsurprising, because:

- the 'possibility' of more efficient firms being discouraged sets a low qualitative hurdle for the establishment of a 'material' increase in competition; and
- the QCA's approach does not invite an empirical assessment of either:
  - > the structural likelihood that firms not already present in the Goonyella catchment may be more efficient developers of tenements than incumbent tenement holders; or
  - > the likelihood that the implied increase in competition in the dependent market – through, for example, an increase in either output or quality – would be sufficient to be considered material.

Other factors weigh more heavily on decisions to enter than difference in access terms

The QCA gives considerable weight to the potential effect of uncertainty imposed by the DBCTM's access framework on users. For example:<sup>70</sup>

...the QCA's view is that in a future without declaration, access seekers would face the risk of negotiating access in an environment where DBCT Management would have the discretion to set access terms and conditions, the risk of paying a materially higher access charge reflecting the cost of accessing WICET as well as the uncertainty as to whether and when they would obtain access to the terminal. This risk would be unmanageable and fundamental, considering the essential nature of the DBCT service for mining operations in the Goonyella system, and is over and above the normal uncertainties miners would face in conducting their operations.

However, a thorough assessment of the barriers to entry faced by new entrants in a tenements market limited to the Hay Point catchment would likely conclude that the level of difference in prices for the DBCT service cited by the QCA is not an 'unmanageable and fundamental' risk factor faced by a potential new entrant to the tenements market. Once the range of factors and uncertainties that a firm would need to consider in acquiring a tenement are taken into account, the prospect of the charge at DBCT increasing is unlikely to be critical to whether or not a tenement would be developed.

Rather, two risk factors that would play a much greater role in decisions of whether to enter or not are likely to be:

- uncertainty associated with global coal prices that would be earned on coal produced from the tenement; and
- uncertainty associated with the ability to obtain access to coal supply chain infrastructure in Queensland, including DBCT.

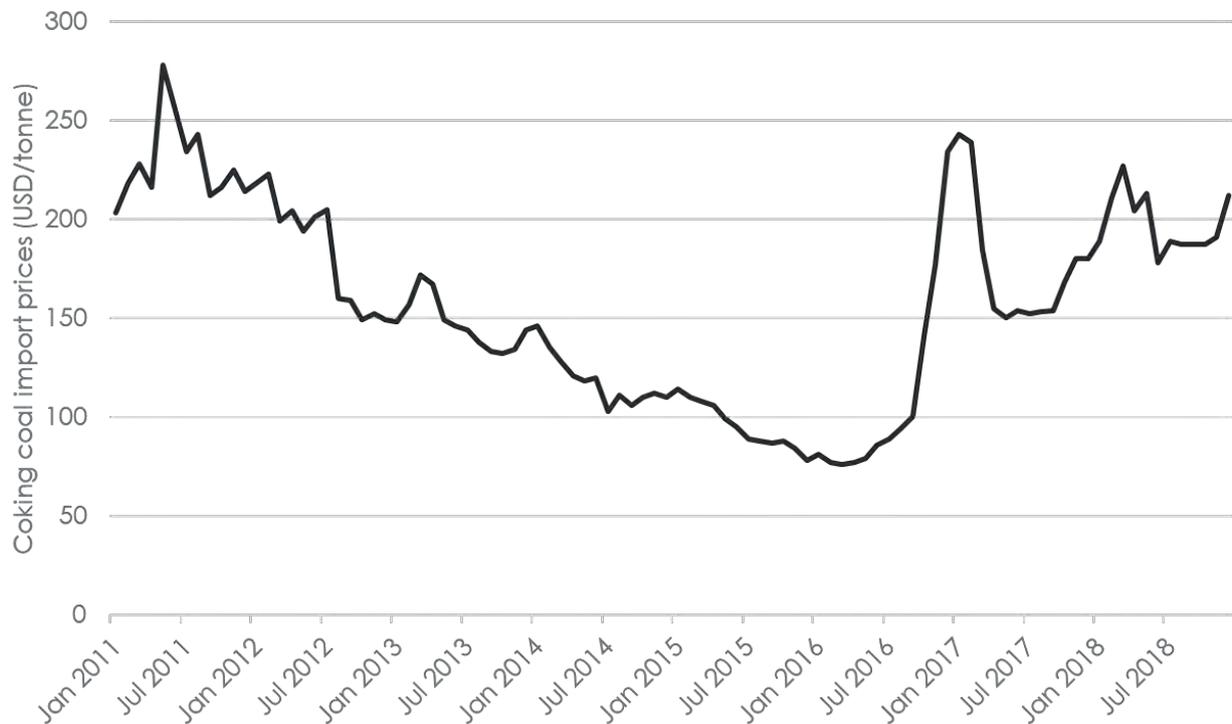
The uncertainty associated with global coal prices far exceeds the potential effect of higher charges for coal handling at DBCT. The NCC similarly noted in respect of the tenements market that:

...any uncertainty about port charges is likely to be relatively small compared to uncertainty about other factors such as coal prices, labour costs and taxes. Accordingly, the Council considers that the reduction in uncertainty associated with port charges in a future with the Service declared, as compared to a future where there is no declaration of the Service, is so small that it is not likely to promote a material increase in competition in the tenements market.

Demonstrating this, figure 6.1 shows Chinese customs statistics for monthly average import prices of Australian coking coal, collated by Bloomberg, since the beginning of 2011. The figure indicates the high levels of volatility in traded coal prices, with the highest price over this period being US\$278 per tonne and the lowest price being US\$76 per tonne.

<sup>70</sup> QCA draft recommendation, p C71.

Figure 6.1: China import prices for Australian coking coal, USD per tonne



Source: Bloomberg

Against this level of volatility, the potential for coal handling charges at DBCT to increase by up to A\$3.00 per tonne, consistent with DBCTM's access framework, cannot be described as an 'unmanageable' risk.<sup>71</sup> Consistent with the NCC's view, a small difference in coal handling charges under declaration is not likely to be a determinative factor in a decision on whether to enter the coal tenements market.

Similarly, the level of charges for the DBCT service is likely to be less material to a decision to enter the market than whether access to the DBCT service (and other infrastructure services) would be available to facilitate new entry. As the QCA correctly states, uncertainty as to 'whether or when' new entrants would be able to access the DBCT service is fundamental for access seekers. However, this fundamental uncertainty is not affected by declaration of the DBCT service.

Under the 2017 DBCT access undertaking, DBCTM may reject an access application where:<sup>72</sup>

- it does not demonstrate that the access seeker is reasonably likely to commence delivery of coal to the terminal at the commencement date; or
- it does not demonstrate that the access seeker has marketable coal reserves sufficient to cover its proposed tonnages for the first five years of its application and total coal reserves sufficient to cover all proposed tonnages.

Furthermore, DBCT will be at full capacity from July 2021.

It follows that, with or without declaration, new entrants in the market for tenements can have no certainty about the availability of access to the DBCT service, or potentially other infrastructure services over the period for which the DBCT service would be declared. In other words, an investment in a tenement is

<sup>71</sup> We note that the QCA has not yet considered the addition of the maximum spread component to DBCTM's access framework.

<sup>72</sup> Dalrymple Bay Coal Terminal Access Undertaking (approved 16 February 2017), 5.3(d).

required before a new entrant can enter the access queue and begin to form expectations about when, and on what terms, they may be able to obtain access to the DBCT service. This is a significant barrier to entry that will persist whether the DBCT is declared or otherwise.

The QCA appears to contend that the capacity allocation mechanism under the access framework would not be as predictable or transparent as under declaration.<sup>73</sup> However, our understanding is that the mechanism for capacity allocation under the access framework is the same as applies under declaration.

Incumbents already place a higher value on tenements than new entrants

The QCA concludes that, without declaration, existing users would value tenements more highly than existing users – but that this would not be the case with declaration:<sup>74</sup>

In an environment where existing users would likely seek coal tenements to continue to benefit from their existing user rights, this adverse effect on potential DBCT users would likely discourage efficient entry in the coal tenements market. **In contrast, in a future with declaration, efficient entry in the coal tenements market would not be discouraged**, and so the competitive conditions in the coal tenements market would be materially better with declaration than they would be without declaration. [Emphasis added]

However, there are good reasons to believe that, under declaration, existing users would also have a higher valuation for tenements than existing users such that, on the QCA's reasoning, efficient entry in the coal tenements market would in any case be discouraged.

Existing users face strong incentives to retain the use of their existing agreement since, if they were to relinquish them, they may face the prospect that:

- they would be unable to regain them at the same or similar price, for example, if DBCT were to be expanded with a differential price; or
- they would be unable to regain them at all, if DBCT were at capacity but did not expand.

In other words, even if the access framework gives rise to the discriminatory effect suggested by the QCA, a similar effect already exists under declaration.

It follows that it is not sufficient for the QCA to show that the effect of DBCT's access framework is discriminatory, because the access regime currently administered by the QCA similarly discourages new entry as set out above. Rather, for the QCA's theory of competitive harm to be valid, it must show that the effect of DBCTM's access framework would give rise to changes in the structure of the market or the conduct of participants to a sufficient extent that declaration would promote a material increase in competition. It does not do so.

Indeed, the QCA presents evidence that is inconsistent with these contentions. For example, the QCA notes that, of those incumbents with mines that are expected to reach the end of their economic life during the declaration period, Peabody has already secured sufficient tenements to replace these volumes and other incumbents have expressed interest in doing so.<sup>75</sup> This amounts to *prima facie* evidence that incumbent miners already have strong incentives to seek out tenements under the status quo with declaration, including because there is no reason to expect them to be less efficient than new entrants. The QCA's analysis does not show that outcomes can be expected to be different without declaration.

The QCA's analysis also shows that, even with strong incentives for incumbents to seek out tenements to retain their existing access rights, there have been examples of transactions for tenements involving new

<sup>73</sup> QCA draft recommendation, pp C71-C73.

<sup>74</sup> QCA draft recommendation, p C73.

<sup>75</sup> QCA draft recommendation, pp C89-C90.

entrants. This suggests that the mere existence of these incentives does not raise insuperable barriers for new entry in the market for tenements.

### 6.2.2 Prices without declaration will be similar to those with declaration

The QCA's analysis assumes that the difference in prices for DBCT capacity without declaration, as opposed to those with declaration, would be sufficient to give rise to a material effect on competition. However, the QCA's consideration of DBCTM's access framework causes it to overestimate considerably the charges that would be likely to apply to access under new user agreements without declaration.

The QCA describes the effect of the access framework as giving rise to prices 'based on willingness to pay'. In its view, these would be commensurate with the charges associated with accessing WICET of \$26.51 per tonne (implying a TIC of at least \$16.99 per tonne). This is considerably more than the costs of accessing expanded capacity at DBCT, which the QCA assesses at \$12.05 per tonne if the expansion is socialised<sup>76</sup> or \$15.41 per tonne if it is differentiated.<sup>77</sup>

Our analysis of the key terms of DBCTM's executed access framework presented at sections 3.1 and 4.2.2 above suggests that likely coal handling charges would be much lower than assessed by the QCA. This is because:

- the 'willing but not anxious' standard would – by design – be expected to reduce the ability of DBCTM to exert any market power that it may retain; and
- the ceiling imposed on the TIC determination process constrains these prices to be at most \$7.44 per tonne, and less during periods in which demand and/or price is lower than the assumptions underpinning this upper bound.

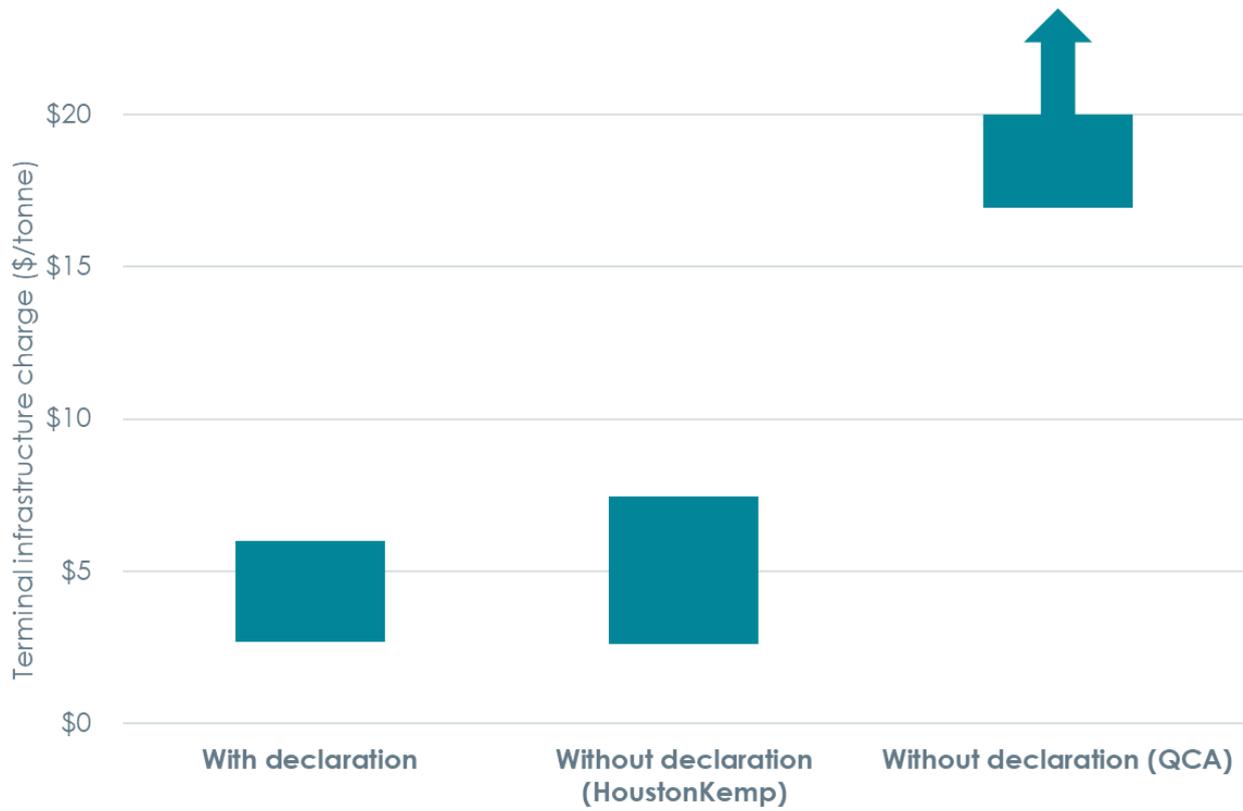
Given the floor and ceiling bands, the total cost of access to DBCT under the executed access framework could be between \$12.05 per tonne and \$16.82 per tonne.

Given a thorough consideration of the terms of the access framework, the potential range of outcomes for the TIC without declaration overlaps substantially with the outcomes that the QCA expects with declaration. Both these ranges differ substantially from the potential charges suggested by the QCA without declaration, in line with or above charges at WICET. We depict these three potential ranges at figure 6.2 below.

<sup>76</sup> QCA draft recommendation, p C51.

<sup>77</sup> QCA draft recommendation, p C86. We calculate the higher charges as  $\$12.05 + (\$8.50 - \$5.14)$ .

Figure 6.2: Comparison of potential ranges for the terminal infrastructure charge



This analysis shows that the QCA has significantly overstated the materiality of any consequential effect on competition in the tenements market.

We explain the features and effects of DBCTM's access framework at section 3.2 above. The access framework provides that, without declaration, the utilisation of DBCT and other coal chain infrastructure in Queensland is the same as it otherwise would be with declaration. Furthermore, the mines that utilise DBCT would not be affected by declaration. Both with and without declaration, we would expect the mines that place the greatest value on coal handling services at DBCT to use the DBCT service.

It follows that, given the market for tenements preferred by the QCA, and given the access framework executed by DBCTM, it is not possible for declaration to promote an increase in competition in the market for tenements. This is because:

- the environment for competition would remain the same with and without declaration, with the same tenements being developed into mines and using the DBCT service; and
- the quantity and quality of tenements bought and sold would be the same with and without declaration.

### 6.3 More efficient entrants can acquire capacity in the secondary market

The QCA's theory of harm without declaration turns on the premise that there exist potential new acquirers of tenements that are 'more efficient' than existing holders of tenements who do not hold DBCT capacity, who plan to exploit this superior efficiency by means of exploration and development of new tenements.

However, it does not follow that more efficient new acquirers of tenements would be deterred from obtaining new tenements, whether access to DBCT export capacity is declared, or managed by the access framework.

The QCA's analysis of the secondary market for DBCT capacity concludes that the ability under existing user agreements to trade capacity directly between users would be maintained without declaration. It follows that if there were potential new acquirers of tenements (who do not hold DBCT capacity) that were more efficient than incumbent holders of DBCT capacity, then these more efficient new entrants have the ability to engage in secondary market trades with miners holding existing user agreements at DBCT. By definition, more efficient potential acquirers of new tenements would have a higher willingness to pay for these existing capacity rights than a less efficient incumbent holder of DBCT capacity, who planned to bid for the same tenement. The result of the potential for such trades is that the more efficient entrants will, in fact, prevail and be most likely to enter.

Even if this were not possible, trading in tenements themselves should also provide for a similar result. The activities undertaken by holders of tenements are the exploration and development of tenements. More efficient potential new acquirers of tenements (who do not hold DBCT capacity) will not be deterred from acquiring tenements and exploring and developing them so long as they have the ability to on-sell these tenements (for an expected capital gain) to a miner with existing user agreements at DBCT. This result follows from the QCA's assumption that the incumbent miner (by virtue of its entitlement to lower price DBCT capacity) has a higher willingness to pay for tenements.

Consistent with the QCA appearing to have overlooked this likely outcome, we note that its draft recommendation addresses the potential implications of secondary trading of capacity only in respect of the ability of potential DBCT users to transfer their access rights to other users.<sup>78</sup> The QCA does not appear to take account of the more important consequence of secondary trading – being the ability of incumbent DBCT users to transfer their access rights to other users.<sup>79</sup>

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<sup>78</sup> QCA draft recommendation, p C82.

<sup>79</sup> QCA draft recommendation, p C92.

## 7. Declaration

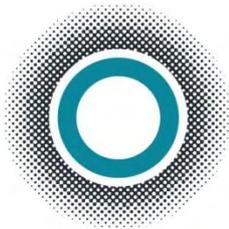
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We are pleased to confirm that in relation to the analysis presented and the conclusion drawn in our report:

- the factual matters set out in our report are, as far as we know, true;
- in preparing this report, we have made all enquiries we consider appropriate; and
- that the opinions stated in our report are genuinely held by us and that our report contains reference to all the matters that we consider significant.

Greg Houston/Daniel Young

10 March 2019



# HOUSTONKEMP

Economists

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## Appendix 3 Timbrell Declaration

OATHS ACT 1867

STATUTORY DECLARATION

QUEENSLAND

TO WIT

I, Anthony Paul Timbrell of Level 15 Waterfront Place, 1 Eagle Street Brisbane QLD 4001, Chief Executive Officer, do solemnly and sincerely declare that:

- 1 I am the Chief Executive Officer of DBCT Management Pty Ltd (**DBCTM**).
- 2 DBCTM is the lessee of the Dalrymple Bay Coal Terminal (**DBCT**) located at the port of Hay Point.
- 3 DBCTM is responsible for providing access to the service of the handling of coal at DBCT (**DBCT service**).

**ACCESS TO DBCT SERVICE**

- 4 DBCTM is subject to the obligations outlined in the 2017 Access Undertaking (**Access Undertaking**). Exhibit **AT-1** to this statutory declaration is a true copy of the Access Undertaking.
- 5 The Access Undertaking was approved by the Queensland Competition Authority under section 134(3) of the *Queensland Competition Authority Act 1997* on 9 February 2017. The most recent amendment to the Access Undertaking was approved by the Queensland Competition Authority on 20 September 2018.
- 6 Section 5 of the Access Undertaking details the process to be followed to enable users wanting to access the DBCT service (**Access Seekers**) to obtain access to that service.

**Access applications**

- 7 Applications for access must be made in accordance with clause 5.2 of the Access Undertaking and the form in Schedule A of the Access Undertaking. The information which Access Seekers are required to provide in accordance with Schedule A of the Access Undertaking includes details of the Access Seeker's marketable coal reserves and resources proposed to be allocated for shipment through DBCT. Some of the details required of an Access Seeker making an application include:
  - 7.1 the net tonnes of coal per annum requested;
  - 7.2 the date of commencement of delivery of coal to DBCT;
  - 7.3 a report in accordance with the JORC Code and Coal Guidelines which provides an estimate of marketable coal reserves and coal resources as at the date of the report which are to be allocated for shipment under the Access Seeker's access agreement;
  - 7.4 an explanation of how the estimate of marketable coal reserves and coal resources in the report is consistent with having sufficient:
    - 7.4.1 marketable coal reserves for the net tonnes of coal per annum requested for each of the first 5 financial years in respect of which access is applied for; and

- 7.4.2 coal resources, together with the marketable coal reserves, for the net tonnes of coal per annum requested for each financial year;
- 7.5 a description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to DBCT (**Source Mine Project**);
- 7.6 the project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project;
- 7.7 an explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project;
- 7.8 an explanation of how the project timeline is consistent with the date for commencement of delivery of coal to DBCT;
- 7.9 an assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase; and
- 7.10 the Access Seeker's progress in obtaining the necessary approvals for the Source Mine Project.

**Access queue**

- 8 If at any time there are two or more current access applications and there is or will be insufficient available system capacity to accommodate an increase in handling of coal applied for in all of those access applications, a queue is formed (clause 5.4(a) of the Access Undertaking).
- 9 The details of the operation of the queue are set out in Section 5 of the Access Undertaking including the allocation of available capacity and the entry into access agreements. The DBCT Access Framework replicates the operation of the queue under the Access Undertaking and accordingly there is no substantive difference between how the queue operates under the Access Undertaking and DBCT Access Framework.

**System capacity**

- 10 DBCTM cannot offer to enter into an access agreement for annual contract tonnage which would result in aggregate annual contract tonnage of all access holders exceeding the available 'system capacity' at a relevant time (clause 5.4(i)(4) of the Access Undertaking).
- 11 The 'system capacity' is the maximum reasonably achievable estimated capacity of the 'system' determined in accordance with the Access Undertaking (definition of 'system capacity' in Schedule G of the Access Undertaking).
- 12 Under the Access Undertaking, the 'system' is the following components of infrastructure relating to the transport of coal from mines whose coal is handled by DBCT:
  - 12.1 rail loading facility of mines whose coal is handled by DBCT;
  - 12.2 railway infrastructure in the 'Dalrymple Bay Coal Chain';

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12.3 railway locomotives and rolling stock used in the 'Dalrymple Bay Coal Chain'; and

12.4 terminal unloading, stacking, loading and other handling facilities, and all interfaces between such components (definition of 'system' in Schedule G of the Access Undertaking).

13 Under the Access Undertaking 'Dalrymple Bay Coal Chain' means 'all infrastructure relating to railing and shipping of coal (from mine outloaders to terminal shiploaders and adjacent infrastructure), excluding Hay Point, generally referred to as the *Dalrymple Bay Coal Chain*, (unless all relevant stakeholders otherwise agree)' (definition of 'Dalrymple Bay Coal Chain' in Schedule G of the Access Undertaking).

#### **Estimated system capacity**

14 Given DBCTM cannot contract above system capacity, DBCTM engaged Integrated Logistics Company Pty Ltd (**Integrated Logistics**) on 3 September 2018 as an independent expert to provide an estimate of the system capacity.

15 Integrated Logistics produced a report dated 19 October 2018 and titled "DBCT Capacity Estimates" containing its conclusions on estimated system capacity measured in Mtpa (**Integrated Logistics Report**). Exhibit AT-2 to this statutory declaration is a true copy of the Integrated Logistics Report. Integrated Logistics' conclusions of estimated system capacity measured in Mtpa for each of FY19, FY20, FY21 and FY22 onwards were summarised on pages 1 and 14 of the Integrated Logistics Report and are reproduced in the table below:

**Table A - System capacity**

<b>Financial Year</b>	<b>System Capacity Estimate (Mtpa)</b>
FY19	81.9±1
FY20	82.3±1
FY21	84.4±1
FY22 onwards	84.2±1

16 If no expansions are made to the system, the estimated system capacity for the years between FY22 to FY29 will be the same as the estimated system capacity for FY22. As such, the long term system capacity determined by Integrated Logistics is 84.2Mtpa.

#### **Contracted capacity**

17 On the basis of the expert advice of Integrated Logistics DBCTM can only contract terminal capacity up to the limit of system capacity of 84.2 Mtpa (from FY22 onwards).

18 In May 2018 DBCTM's long term contracted position was 77.35Mtpa and accordingly DBCTM notified applicants in the queue at that time of available capacity.

- 19 Following completion of a process to allocate available capacity in August 2018, DBCTM received signed access agreements totalling 8.22Mtpa of long term DBCT capacity. In addition, during this process DBCTM received a notification from an Access Seeker seeking 0.5Mtpa of capacity. Accordingly, the total tonnages seeking capacity during the allocation process totalled 8.72Mtpa.
- 20 Having regard to system capacity and capacity that was already subject to contract, DBCTM could only countersign access agreements totalling 6.85Mtpa of the total 8.72Mtpa sought by applicants in the queue. Therefore, demand of 1.87Mtpa could not be met.
- 21 As at the date of this statutory declaration, DBCTM is contracted to 84.07Mtpa long term.

**CURRENT CONTRACTED CAPACITY AND ACCESS QUEUE**

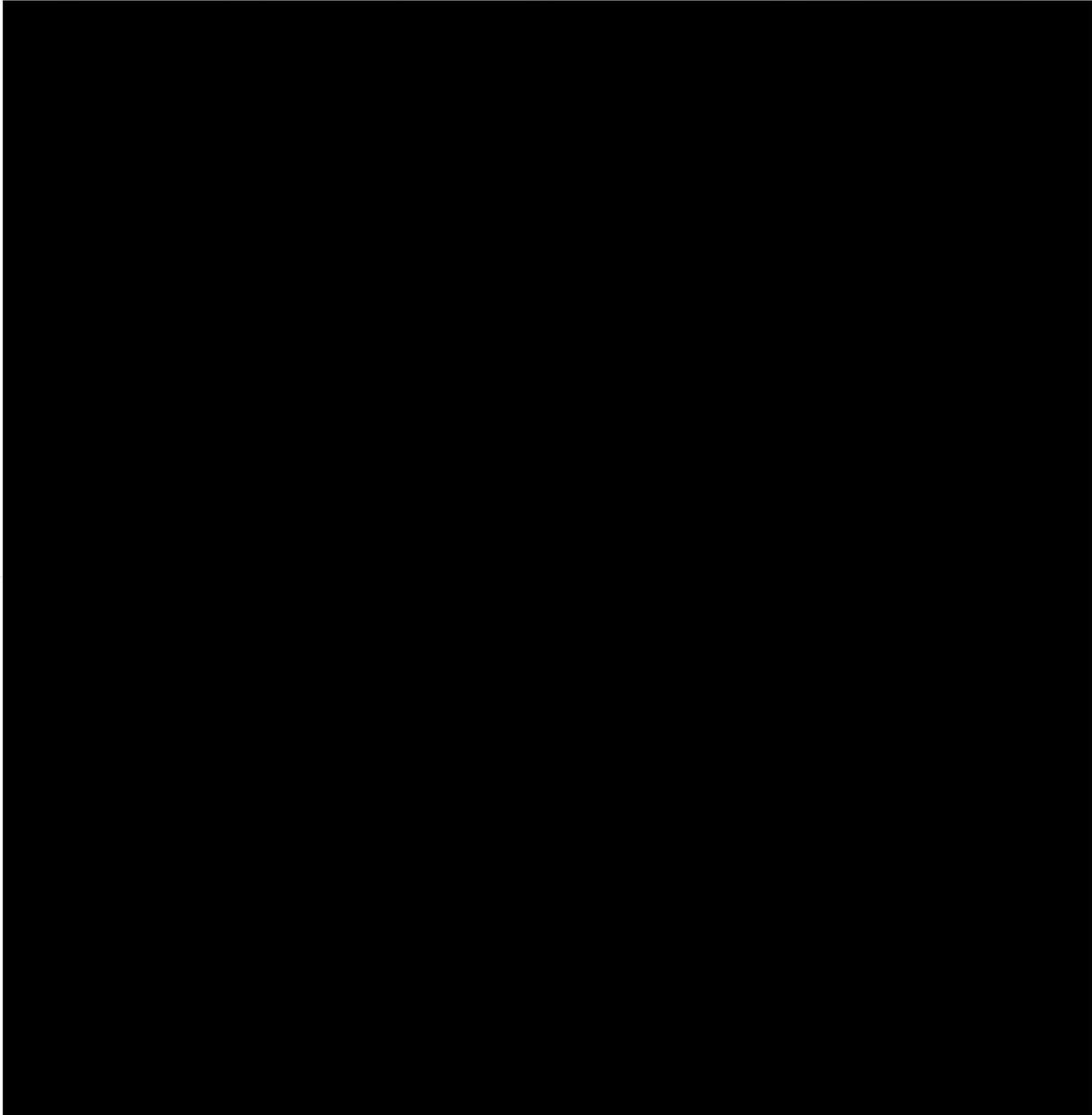
- 22 Tables B to E below set out details of all current contracts for capacity and all requests for capacity currently in the access queue (years in all tables are Financial Years, ending 30 June).
- 23 All existing contracts, - other than [Confidential - ██████████], are 'evergreen' in that the user has a perpetual option to renew. Tables B and C set out contracted capacity (in Mtpa) for the period 2021 to 2030 on the basis of the QCA's conclusion that "existing users are likely to perpetually exercise the evergreen renewal right in their existing user agreements." [See - QCA Draft Recommendation page 87]. This table establishes that from the period 2023 to 2030 DBCTM is contracted to 84.07Mtpa. [Confidential - ██████████].
- 24 Further, tables B and C sets out the capacity in the queue over the period. The queue ramps-up to total demand of 56.1Mtpa in 2025.
- 25 In summary, the current total contracted plus queue demand for coal handling services at DBCT (shown in the table below) reaches 140.2Mtpa from 2025 to 2028 (contracted capacity plus queue) and never drops below 115Mtpa:

**Table B - Contracted and access queue demand (including contract renewals)**

Total Contracted + Queue (Mtpa)	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
DBCTM Contracted	81.77	82.67	84.07	84.07	84.07	84.07	84.07	84.07	84.07	84.07
DBCTM Access Queue	35.13	35.93	35.10	51.10	56.10	56.10	56.10	56.10	46.20	31.70
<b>Total Contracted + Queue</b>	<b>116.90</b>	<b>118.60</b>	<b>119.17</b>	<b>135.17</b>	<b>140.17</b>	<b>140.17</b>	<b>140.17</b>	<b>140.17</b>	<b>130.27</b>	<b>115.77</b>

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27 In relation to the Tables B to E, I provide the following explanations:

[Confidential -

27.1 [Redacted text block]

27.1.1 [Redacted text block]

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27.1.2	[Redacted]
27.1.3	[Redacted]
27.1.4	[Redacted]
27.2	[Redacted]
27.3	[Redacted]
27.4	[Redacted]
27.5	[Redacted]
27.6	[Redacted]

**Total demand excluding mines reaching end of their life prior to 2030**

28 Tables D and E assume that all evergreen contracts are extended, save for mines reaching the end of their life between 2020 and 2030. For such mines that reach the end of their life I have assumed on a conservative basis that the user will cease shipping through DBCT the year after the relevant mine ceases production.

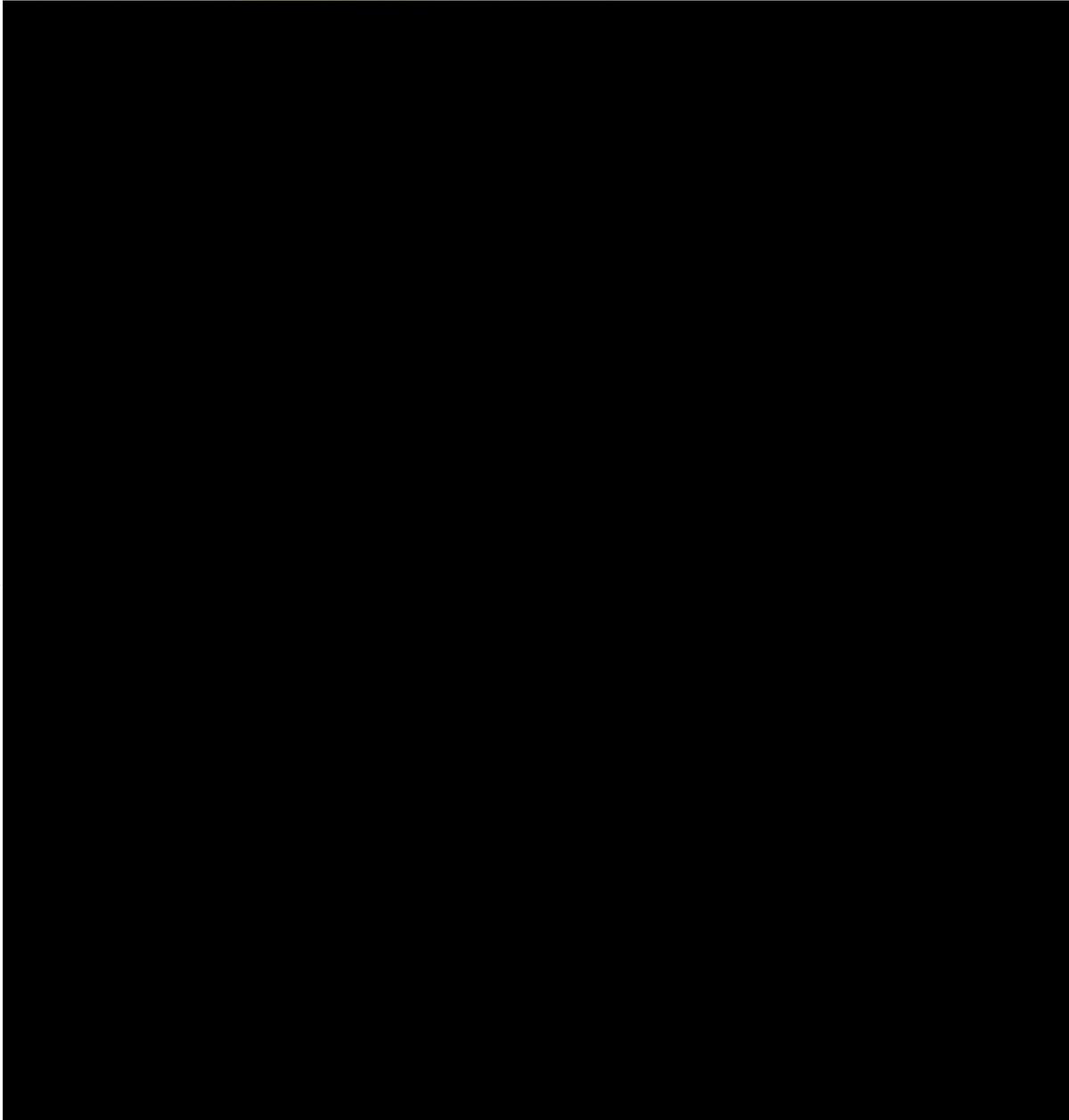
29 In summary, Table E establishes that the current total demand for coal handling services at DBCT over the period (contracted capacity plus queue) is:

**Table D - Contracted and access queue demand (including mine life adjustments)**

Total Contracted + Queue (Mtpa)	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
DBCTM Contracted	81.77	82.67	84.07	84.07	80.07	77.57	77.57	74.77	62.77	62.77
DBCTM Access Queue	35.13	35.93	35.10	51.10	56.10	56.10	56.10	56.10	46.20	31.70
<b>Total Contracted + Queue</b>	<b>116.90</b>	<b>118.60</b>	<b>119.17</b>	<b>135.17</b>	<b>136.17</b>	<b>133.67</b>	<b>133.67</b>	<b>130.87</b>	<b>108.97</b>	<b>94.47</b>

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31 Specifically, in relation to each mine reaching the end of its life I have assumed in preparing Table E the following: [Confidential -

31.1 [Redacted text block]

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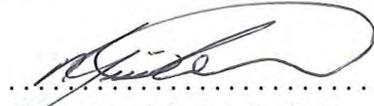
31.3

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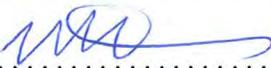
31.4

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- 32 All the facts and circumstances herein deposed to are within my knowledge, save such as are deposed to from information only, and my means of knowledge and sources of information appear on the face of this statutory declaration.
- 33 I make this solemn declaration conscientiously believing the same to be true, and by virtue of the provisions of the *Oaths Act 1867*.

  
 .....  
 Signature of declarant, Anthony Paul Timbrell

Taken and declared before me at Brisbane this 7th day of March 2019

  
 .....  
 Justice of the Peace/Commissioner for Declarations/Solicitor

## INDEX TO EXHIBITS

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<b>AT-1</b>	Dalrymple Bay Coal Terminal Access Undertaking (DAAU to amend 2017 Access Undertaking)	9-143
<b>AT-2</b>	Integrated Logistics Company Pty Ltd, DBCT Capacity Estimates, 19 October 2018	144-160

**CERTIFICATE OF EXHIBIT**

Exhibit **AT-1** referred to in the statutory declaration of Anthony Paul Timbrell.

Dated this 7th day of March 2019



.....

Commissioner for Declarations/Solicitor/Justice of the Peace

# **Dalrymple Bay Coal Terminal Access Undertaking**

## **DAAU to amend 2017 Access Undertaking**

### **Submitted by DBCT Management Pty Ltd**

Level 15  
Waterfront Place  
1 Eagle Street  
Brisbane QLD 4000  
Tel: 07 3002 3100

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## 1 Introduction

### 1.1 Purpose of this document

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

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

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

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

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

**(Operator)** An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract. The Operator of the Terminal has historically been user-owned and independent of the lessee.

**(Previous access undertakings)** The first access undertaking for the Terminal was approved by the QCA in June 2006. That undertaking was superseded by a further access undertaking for the Terminal that was approved by the QCA in September 2010 (**2010 Access Undertaking**). The 2010 Access Undertaking was due to expire on 30 June 2016 but was extended by an extension DAAU approved by the QCA on 16 June 2016 until the earlier of 30 June 2017 and the approval date of this Undertaking.

**(Background to this Undertaking)** On 23 June 2015 the QCA issued an initial undertaking notice under the QCA Act. In response to that Notice, DBCT Management submitted an Undertaking to the QCA on 9 October 2015, to replace the 2010 Access Undertaking and to establish a new term.

**(Approval of this Undertaking)** After a public consultation process, the QCA approved this Undertaking on 16 February 2017.

### 1.2 Scope of Undertaking

This Undertaking provides for:

- (a) the negotiation and provision of Access to the Services at the Terminal; and

- (b) measures to mitigate potential adverse effects on competition which could arise out of the common ownership within the Brookfield Group of both DBCT Management and the Trading SCB.

### **1.3 Duration of Undertaking**

This Undertaking will apply on and from the Approval Date. It will apply until the Terminating Date unless withdrawn as provided for in the QCA Act.

### **1.4 Reviews of Undertaking**

- (a) **(General reviews)** If:

- (1) as a result of any review of this Undertaking by DBCT Management, the Access Holders and the QCA, DBCT Management, the Access Holders and the QCA agree that amendment of the Undertaking is desirable; or
- (2) the QCA considers it necessary that the Undertaking be amended so as to rectify a significant inequity or significant unfairness suffered by an Access Seeker, Access Holder or DBCT Management, which inequity or unfairness was not generally foreseen or intended at the Approval Date,

then DBCT Management will submit to the QCA a draft amending access undertaking addressing the relevant issue or issues, for approval under the QCA Act.

- (b) **(Undertaking includes Standard Access Agreement)** For clarification, an amendment to this Undertaking may include an amendment to the Standard Access Agreement.

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

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

### **1.6 Amendment to Undertaking**

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

### **1.7 Implementation of Differentiation in Existing User Agreements**

Following a Price Ruling that a Terminal Capacity Expansion will be a Differentiated Expansion Component, DBCT Management will:

- (a) calculate Access Charges under each Access Agreement in accordance with the provisions of this Undertaking; and
- (b) in good faith, take all reasonable steps to negotiate any necessary amendments to any Access Agreement executed prior to Pricing Ruling, including Existing User Agreements, to ensure that they are consistent with the Access Charges being calculated in accordance with the provisions of this Undertaking in relation to the application of Differentiation to a Terminal Capacity Expansion and the allocation of costs relating to it. For clarity, DBCT Management must use best endeavours to ensure that such amendments are equitable and non-discriminatory as between the relevant executed Access Agreements.

---

## 2 Definitions and Interpretation

### 2.1 Definitions

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

### 2.2 Interpretation

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

---

## 3 Role of DBCT Management and the Operator

### 3.1 Role of DBCT Management

- (a) The owner or operator of a declared service may voluntarily submit a draft access undertaking to the QCA under section 136(1) of the QCA Act or be required to do so under section 133(1) or 134(2) of the QCA Act.
- (b) The owner of the Terminal (and consequently the declared service) is DBCT Holdings.
- (c) DBCT Trustee and DBCT Management, under the Leases, are the lessee and sublessee of the Terminal. Under the terms of the leases and the Port Services Agreement, DBCT Management is solely responsible for providing Access to Access Holders and Access Seekers during the Lease Term. Accordingly, DBCT Management is the operator (within the meaning of that term in the QCA Act) of the declared service.
- (d) DBCT Management will comply with and give effect to this Undertaking and any applicable laws relating to the provision of Access as the operator.
- (e) DBCT Management will ensure that employees, subcontractors and agents of subcontractors comply with the requirements of this Undertaking, except as otherwise provided for under an Access Agreement.
- (f) Where the performance of an obligation under this Undertaking requires a Related Body Corporate of DBCT Management (including Trading SCB) to take or refrain from taking some action, DBCT Management must procure that the Related Body Corporate takes or refrains from taking that action.
- (g) DBCT Management must procure that any Related Body Corporate provides all necessary assistance and information so that it is in a position to comply with this Undertaking, including (without limitation) with any direction from the QCA under this Undertaking.

### 3.2 Role of the Operator

During the term of the Undertaking, DBCT Management acknowledges and agrees that:

- (a) the Operator is and will remain Dalrymple Bay Coal Terminal Pty Limited ACN 010 268 167 (**DBCT PL**) and that DBCT PL is majority owned or wholly owned by Access Holders;
- (b) each Access Holder has a right under the constitution of DBCT PL to become a shareholder of DBCT PL;
- (c) if an Access Holder is not a shareholder of DBCT PL but wishes to become a shareholder of DBCT PL then that Access Holder may, in accordance with the constitution of DBCT PL, apply to become a shareholder of DBCT PL by making an application to DBCT PL at the following address:

Dalrymple Bay Coal Terminal Pty Limited  
 M.S. F283  
 Mackay, Queensland, 4740  
 Attention: Chief Executive and General Manager;

- (d) the Operator carries out its obligations under the Operation & Maintenance Contract and Terminal Regulations independently of DBCT Management.

### 3.3 Operation and Maintenance Contract

During the term of the Undertaking, DBCT Management undertakes to:

- (a) maintain the Operation & Maintenance Contract; and  
 (b) ensure that the terms of the Operation and Maintenance Contract, if amended at any time, remain substantially consistent with the terms set out in Schedule I.

## 4 Services to be provided

DBCT Management must provide the Services at the Terminal in accordance with this Undertaking and each Access Agreement, including in compliance with the Terminal Regulations (and, without limitation, in accordance with the level of service set out in Schedule E of this Undertaking).

## 5 Negotiation arrangements

### 5.1 Framework for negotiation

**(Outline)** This Section 5 of this Undertaking outlines the process which will be followed to enable Access Seekers to obtain Access. It deals with:

- (a) an Access Application by an Access Seeker and a Renewal Application by an Access Applicant;  
 (b) provision of an Indicative Access Proposal by DBCT Management;  
 (c) negotiations to develop an Access Agreement;  
 (d) principles for the entering into of Access Agreements where it is conditional upon a Terminal Capacity Expansion; and  
 (e) various other provisions relating to when and the basis on which Access Agreements may be entered into pursuant to Access Applications.

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

### 5.2 Application for Access and information to be provided

**(Form of Access Application)** Any application for Access must be in the form specified in Schedule A and include:

- (a) a warranty in the form specified in; and  
 (b) such other information that may be required by, Schedule A.

**(Forecasts in Access Application)** DBCT Management acknowledges that, at the time an Access Application is made, some information provided in the Access Application may be a

forecast only. The Access Seeker must, however, use its best endeavours to ensure that any such information contained in an Access Application is as accurate as possible.

**(Information sought by Access Seeker prior to Access Application)** Prior to submitting an Access Application, an Access Seeker may request from DBCT Management:

- (c) reasonably available preliminary information relating to the Access Application (including copies of the then current Standard Access Agreement and Terminal Regulations) – which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request;
- (d) where there is a Reference Tariff in respect of the Existing Terminal or any Differentiated Expansion Component, the information set out in sections 101(2)(d) to (h) of the QCA Act - which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request. For clarification, if one or more Expansion Components exist, DBCT Management is to provide this information in respect of the Existing Terminal and each Differentiated Expansion Component;
- (e) where there is no relevant Reference Tariff, the information set out in sections 101(2)(a) to (h) of the QCA Act - which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request; and
- (f) initial meetings to discuss the proposed Access Application and the requirements of the Access Application Form set out in Schedule A – which DBCT Management must facilitate within a reasonable time after being requested to do so.

**(Revisions to Access Application)**

- (g) At any time after an Access Seeker submits an Access Application to DBCT Management but prior to the commencement of the negotiation period referred to in Section 5.7 in respect of the Access Application, an Access Seeker may notify DBCT Management that it wishes to revise certain information specified in its Access Application.
- (h) In considering whether to allow an Access Seeker to revise certain information specified in its Access Application, DBCT Management will have regard to the impact of the proposed revision, if allowed by DBCT Management, on other Access Seekers and Access Holders.
- (i) Without otherwise limiting DBCT Management’s discretion to allow an Access Seeker to revise information specified in its Access Application, DBCT Management will allow an Access Seeker to revise information specified in its Access Application in accordance with Section 5.4(c) or if DBCT Management is reasonably of the opinion that the proposed revision:
  - (1) if allowed by DBCT Management, would not substantially alter the nature of the Access rights sought by the Access Seeker in its Access Application prior to the revision;
  - (2) if allowed by DBCT Management, would not adversely impact on other Access Seekers or Access Holders; and
  - (3) is not otherwise prohibited under Section 5.4(i)(3), 5.4(j)(7) or 5.10(h).
- (j) For the avoidance of doubt, any revision of information specified in an Access Application which would, if allowed by DBCT Management, increase the annual Tonnage specified in the Access Application or extend the term specified in the Access Application will be taken to be a substantial alteration of the Access rights sought by the Access Seeker in its Access Application.

### 5.3 What happens after lodgement of Access Application

- (a) **(Acknowledgement by DBCT Management)** Upon receiving a purported Access Application under Section 5.2, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Seeker receipt of the application and confirm whether the application is an Access Application complying with Section 5.2.
- (b) **(Request by DBCT Management for further information)** DBCT Management may request from the Access Seeker additional information where DBCT Management can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal, or clarification of information provided, including (but not limited to) obtaining further information to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, a Security provider. Upon receiving the required information or clarification from the Access Seeker, DBCT Management must provide written acknowledgment of the receipt of this further information as soon as practicable and, in any event, within 10 Business Days of receipt of the further information.
- (c) **(Provision of further information by Access Seeker)** The Access Seeker must provide any information reasonably requested by DBCT Management under this Section 5.3 within 20 Business Days of receipt of the request from DBCT Management (or such later date as DBCT Management agrees to, it being required to act reasonably in agreeing to extend the period if the Access Seeker demonstrates good grounds for a longer period applying). If the Access Seeker does not provide the requested information within that period, its Access Application will be deemed to have been rejected, but it may apply again for Access in accordance with Section 5.2. If an Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to acknowledgement under this Section 5.3 of the Access Application.
- (d) **(Rejection if Access Seeker fails to provide information or demonstrate application criteria)** If:
- (1) an Access Application fails to comply with Section 5.2 (including where the Access Seeker fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
  - (2) DBCT Management, acting reasonably, is of the opinion that an Access Application:
    - (A) does not demonstrate that the Access Seeker is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Access Application (which must be no more than 5 years from the date of the Access Application); or
    - (B) does not demonstrate that the Access Seeker has:
      - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Access Application in respect of the first five Financial Years of Access applied for; and
      - (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Seeker, consistent with the total net tonnes specified in item 7 of the Access Application,

then DBCT Management may reject the Access Application. Where DBCT Management rejects an Access Application in accordance with this Section

5.3 the Access Application will be deemed not to have been received, for the purposes of the Queue, unless Section 5.3(e) applies.

- (e) **(Disputed rejection of Access Application)** If DBCT Management rejects an Access Application submitted by an Access Seeker and the Access Seeker, acting reasonably, is of the opinion that its Access Application should have been accepted by DBCT Management in accordance with this Undertaking, then the Access Seeker may refer the matter for dispute resolution in accordance with Section 17 of this Undertaking within 15 Business Days of receiving the notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect of the Access sought in the relevant Access Application, unless and until the dispute is resolved in favour of DBCT Management.
- (f) **(Expiry of Access Application)** Subject to an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT Management in accordance with this Undertaking before the relevant expiry date:
- (1) an Access Application submitted to DBCT Management before the Commencement Date will, unless the Access Application is renewed under Section 5.3A, expire on the date which is eight weeks after the Commencement Date;
  - (2) an Access Application submitted to DBCT Management on or after the Commencement Date but before 28 February 2017 will, unless the Access Application is renewed under Section 5.3A, expire on 31 August 2017;
  - (3) any Access Application submitted to DBCT Management on or after 1 March 2017 will, unless the Application is renewed under Section 5.3A, expire on the next occurring 31 August; and
  - (4) an Access Application which has been renewed in accordance with Section 5.3A, will, unless the Access Application is further renewed under Section 5.3A, expire on the next 31 August occurring after the 31 August on which the Access Application was to expire immediately prior to the Renewal Application being accepted.
- (g) **(Notice of Expiry)** DBCT Management will give notice of the timing of expiry to all Access Seekers with a current Access Application (including those which remain current due to a previous Renewal Application being accepted):
- (1) for Access Applications for which the expiry date is set by Section 5.3(f)(1), on the Commencement Date;
  - (2) for Access Applications for which the expiry date is set by Section 5.3(f)(2), 5.3(f)(3) or 5.3(f)(4), at least 1 month and no more than 3 months prior to expiry date of the Access Application.

### 5.3A Renewal Applications

- (a) **(Renewal Application)** An Access Applicant that wishes to renew its Access Application must submit to DBCT Management a renewal application in the form specified in Schedule A and include:
- (1) the warranty in the form specified in Schedule A; and
  - (2) such other information that may be required, as specified in Schedule A,

not later than 15 Business Days before the date that its Access Application is due to expire.

- (b) **(Forecasts in Access Application)** DBCT Management acknowledges that, at the time a Renewal Application is made, some information provided in the Renewal Application may be a forecast only. The Access Applicant must, however, use its best endeavours to ensure that any such information contained in a Renewal Application is as accurate as reasonably possible.
- (c) **(Acknowledgement by DBCT Management)** Upon receiving a purported Renewal Application under this Section 5.3A, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Applicant receipt of the renewal application and confirm whether the application is a Renewal Application complying with this Section 5.3A.
- (d) **(Rejection if Access Seeker fails to provide information or demonstrate renewal criteria)** If:
  - (1) an Access Applicant fails to comply with Section 5.2 in respect of a Renewal Application (including where the Access Applicant fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
  - (2) DBCT Management, acting reasonably, is of the opinion that a Renewal Application submitted by an Access Applicant:
    - (A) does not demonstrate that the Access Applicant is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Renewal Application (which must be no more than 5 years from the date of the Renewal Application); or
    - (B) does not demonstrate that the Access Applicant has:
      - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Renewal Application in respect of the first five Financial Years of Access applied for; and
      - (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Applicant, consistent with the total net tonnes specified in item 7 of the Renewal Application,

then DBCT Management may reject the Renewal Application. If DBCT Management rejects a Renewal Application or the Access Applicant fails to submit a Renewal Application to DBCT Management within the timeframe required in Section 5.3A(a), then the Access Applicant's current Access Application will expire on its expiry date (as determined in accordance with Section 5.3(f)) and the Access Applicant will be removed from the Queue on the date the Access Application expires, unless Section 5.3A(e) applies.

- (e) **(Disputed rejection of Renewal Application)** If DBCT Management rejects a Renewal Application submitted by an Access Applicant and the Access Applicant, acting reasonably, is of the opinion that its Renewal Application should have been accepted by DBCT Management in accordance with this Undertaking, then the Access Applicant may refer the matter for dispute resolution in accordance with Section 17 of this Undertaking within 15 Business Days of receiving the notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect

of the Access sought in the relevant Renewal Application, unless and until the dispute is resolved in favour of DBCT Management.

- (f) **(New Access Application if renewal is substantially different)** If DBCT Management, acting reasonably, is of the view that a Renewal Application is substantially different to the Access Seeker's current Access Application, then subject to the following paragraph, DBCT Management will treat the Renewal Application as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the difference is an increase in the annual Tonnage required or a longer term, then only the additional annual Tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.
- (g) With respect to the renewal of an Access Application referred to in paragraph (b) of the definition of 'Access Application', if the first Renewal Application after the Commencement Date is for an increase in the term from 5 or more years, then the extended term will not be taken to constitute the subject of a new Access Application and will instead be considered as part of the Renewal Application.
- (h) **(Renewed Access Application)** To the extent that a Renewal Application is confirmed by DBCT Management as a Renewal Application complying with Section 5.3A (or is determined as complying with Section 5.3A in a dispute referred by the Access Applicant in accordance with Section 5.3A):
  - (1) the Access Applicant's current Access Application will be taken to have been renewed;
  - (2) the content of the Renewal Application will be taken to be the Access Applicant's Access Application for the purposes of this Undertaking; and
  - (3) the priority of Access Applicant in the Queue will continue to be determined by the Access Application Date.

#### 5.4 Priority of Access Applications and execution of Access Agreements

- (a) **(Formation of Queue)** If at any time there are two or more current Access Applications and there is or will be insufficient Available System Capacity associated with Socialised Terminal Capacity at any relevant time to accommodate an increase in Handling of coal applied for in all of those Access Applications, a queue (the **Queue**) will be formed.
- (b) **(General rules for priority in Queue)** Subject to any other provision in Section 5, the priority of an Access Seeker in the Queue will be determined by their Access Application Date, with an earlier Access Application Date having priority in the Queue over any later Access Application Date. An Access Seeker may be removed from the Queue once their Access Application is no longer current in accordance with the terms of Sections 5.3, 5.4, 5.6, 5.7(a)(2), 5.7(a)(4), 5.8, 5.9 or 5.10 of this Undertaking. An Access Seeker may lose priority in the Queue pursuant to Sections 5.4 or 5.10. The Queue will cease to exist if Available System Capacity at all relevant times subsequently exceeds the amount of capacity requested in all the then current Access Applications.
- (c) **(Notice of formation of or change in Queue)** Promptly after a Queue is first formed and promptly after each occasion that the Annual Contract Tonnage applied for in the Queue is increased or decreased, DBCT Management must notify each Access Seeker in the Queue of:
  - (1) the Annual Contract Tonnage applied for in priority to that Access Seeker in the Queue;

- (2) the total Annual Contract Tonnage applied for in the Queue at that time; and
- (3) a breakdown of the Annual Contract Tonnage applied for in the Queue by the dates for commencement of Access and Annual Contract Tonnage applied for in each Access Application (without any identification of the Access Seeker which made each Access Application but with identification of the dates for commencement of Access).

**(Access Agreements for Available System Capacity from the Existing Terminal)**

- (d) **(Entry into Access Agreement for Available System Capacity)** Promptly upon being advised in writing by an Access Holder that Annual Contract Tonnage in respect of the Existing Terminal will become available, DBCT Management will:
  - (1) notify each Access Seeker in the Queue of the date for the commencement of such Access and the relevant Tonnage; and
  - (2) issue an Indicative Access Proposal for Available System Capacity in respect of the relevant Tonnage to the Access Seeker who is first in the Queue.
- (e) **(Entry into Access Agreement not conditional on Terminal Capacity Expansion by Access Seekers not first in the Queue but seeking Access at an earlier date)** The following process will apply in relation to Access Seekers who are not first in the Queue but are ready to enter into an Access Agreement that is not conditional on a Terminal Capacity Expansion:
  - (1) An Access Seeker who is not first in the Queue (the Notifying Access Seeker) but is seeking access from existing Available System Capacity at a date that is at least 6 months earlier than the date for commencement of Access applied for in the Access Application which is first in the Queue, may give notice in writing to DBCT Management in accordance with Section 5.4(e)(2) (**Notice**).
  - (2) The Notice is to state that the Notifying Access Seeker is prepared to enter into an Access Agreement consistent (subject to the next sub-section) with its Access Application on the terms of the Standard Access Agreement or on any other terms agreed between DBCT Management and the Access Seeker.
  - (3) The Notice may state that the Notifying Access Seeker wishes to enter into an Access Agreement for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice.

If DBCT Management receives such Notice from the Notifying Access Seeker, it must promptly:

- (4) notify, in writing, all other Access Seekers that are ahead of the Notifying Access Seeker in the Queue (each a **Notified Access Seeker**) of this development (including the requested date for commencement of Access, but not the identity of the Notifying Access Seeker); and
- (5) allow 3 months from the date when such notice is given by DBCT Management for each Notified Access Seeker to:
  - (A) deliver to DBCT Management two signed copies of an Access Agreement consistent with its Access Application (except that it may be for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice and on the

terms of the Standard Access Agreement or on other terms agreed between DBCT Management and a Notified Access Seeker); and

(B) deliver to DBCT Management any Security required by DBCT Management (acting consistently with this Undertaking).

(f) **(Execution of Access Agreements in order of Access Seekers in Queue which commit)** If, during the above 3 month period, one or more of the Notified Access Seekers:

(1) delivers to DBCT Management such signed copies of an Access Agreement for Access to commence on a date which is the same as or earlier than the date for commencement of Access referred to in section 5.4(e)(3) (which, for clarification, may be a retrospective date, provided that any revised Access commencement date must not precede the date of the Notice); and

(2) also provides any Security reasonably required by DBCT Management (or does not provide such Security but the circumstances in Section 5.4(g) apply),

then DBCT Management must:

(3) give priority to such of those Notified Access Seekers that are seeking Access on the earliest date for commencement of Access (provided that, if there are two or more Notified Access Seekers each seeking Access commencing on the same date, priority will be given to the Notified Access Seekers in order of their position in the Queue);

(4) (subject to there being sufficient Available System Capacity at the relevant time) execute those copies of the Access Agreement;

(A) re-deliver one signed copy to such Notified Access Seeker; and

(B) repeat that process in order of the date for commencement of the access that they are seeking with each successive Notified Access Seeker (if any) which has delivered during the 3 month period such a signed Access Agreement and any Security required by DBCT Management (acting consistently with this Undertaking).

(g) **(Issues with provision of requested Security)** If a Notified Access Seeker is unable to provide any Security reasonably required by DBCT Management within the 3 month period referred to in Section 5.4(f), (or if, by the end of the first month of that 3 month period, the Access Seeker disputes DBCT Management's entitlement to the Security requested), the Access Agreement to be executed and delivered by the relevant Notified Access Seeker in that period will be modified so that it is a condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, Security which the QCA determines to be fair is provided within 20 Business Days after the QCA makes that determination), and the "Effective Date" will be adjusted accordingly.

(h) **(Execution of Access Agreement with Notifying Access Seeker, if sufficient remaining Capacity)** If, after all Access Agreements with all Notified Access Seekers referred to in Section 5.4(e)(5) who have duly delivered signed documents (and provided Security if relevant) have been executed (or negotiations have ceased pursuant to Section 5.8), there is still sufficient Available System Capacity, then DBCT Management will conclude an Access Agreement with the Notifying Access Seeker for that Available System Capacity (or that part of it which the Notifying Access Seeker requires).

(i) **(Clarifications)** For clarity:

- (1) **(Position in Queue may be lost by not executing Access Agreement)** any Notified Access Seeker that does not within the above 3 month period deliver to DBCT Management a signed Access Agreement:
  - (A) may be removed by DBCT Management from the Queue, in which case the Notified Access Seeker's Access Application will be taken to have been rejected and the Access Application negotiation process for that Notified Access Seeker will be discontinued, unless a bona fide dispute in relation to the removal is referred under Section 17 – in which case, the Notified Access Seeker will maintain its position in the Queue until that dispute is resolved; or
  - (B) will not, if DBCT Management does not remove the Notified Access Seeker from the Queue, lose its place in the Queue (although a Notifying Access Seeker which does execute an Access Agreement pursuant to this Section 5.4 will no longer be in the Queue in respect of the tonnage the subject of that Access Agreement) and the Access Application negotiation process for that Access Seeker will otherwise continue in accordance with Section 5 of this Undertaking;
- (2) **(Considerations regarding removal from Queue)** in considering whether to remove an Access Seeker from the Queue under Section 5.4(i)(1), DBCT Management will have regard to:
  - (A) the date that the Access Seeker proposes to commence delivering coal to the Terminal in comparison with the date that the Notifying Access Seeker proposes to commence delivering coal to the Terminal;
  - (B) the tonnes that the Access Seeker requires to commence delivering coal to the Terminal in comparison with the tonnes that the Notifying Access Seeker proposes to commence delivering to the Terminal; and
  - (C) the likelihood of future Access becoming available at the Terminal on or prior to the date for commencement of Access sought by the Access Seeker that DBCT Management is considering whether to remove from the Queue;
- (3) **(Amendments to Access Application)** except as provided for in Section 5.4(f)(1), an Access Seeker may not amend the date for commencement of delivery of coal to the Terminal specified in its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.4(e)(4);
- (4) **(Offers of Access Agreement not to exceed Available System Capacity)** unless otherwise required by the Port Services Agreement or Section 12 of this Undertaking, DBCT Management must not offer to enter into an Access Agreement for Annual Contract Tonnage which would result in Aggregate Annual Contract Tonnage of all Access Holders exceeding the Available System Capacity at a relevant time; and
- (5) **(Access Seeker may accept lesser tonnage if insufficient capacity for tonnage applied for)** where the process in Sections 5.4(c), 5.4(e) and 5.4(f) would have the effect of giving an Access Seeker a right to enter into an Access Agreement, except for the fact that there is insufficient Available System Capacity to meet that Access Seeker's Access Application in full, DBCT Management must inform that Access Seeker to that effect, and the Access Seeker may elect to require an Access Agreement for a lesser tonnage consistent with Available System Capacity

from time to time during the period originally applied for (subject to the other terms of this Undertaking), with the balance of the Annual Contract Tonnage originally applied for remaining the subject of the Access Application.

**(Conditional Access Agreements)**

- (j) **(Entry into an Access Agreement conditional on Terminal Capacity Expansion)** The following process will apply in relation to the entry into Access Agreements that are conditional, wholly or partly, on a Terminal Capacity Expansion (**Conditional Access Agreement**):
- (1) When the Aggregate Annual Contract Tonnage sought within the next 5 years by Applicants in a Queue cannot be met from Available System Capacity, such that a Terminal Capacity Expansion may be justified, DBCT Management will invite an offer from each Applicant in the Queue to enter into a Conditional Access Agreement.
  - (2) Unless otherwise specified in a Conditional Access Agreement, the date for commencement of Access under a Conditional Access Agreement will be the date on which the Terminal Capacity Expansion is Complete and operating, and DBCT Management notifies Access Seekers in accordance with Section 12.1(l) or 12.1(q), as applicable, on which date the Conditional Access Agreement will take effect as an Access Agreement.
  - (3) In response to an invitation from DBCT Management given under Section 5.4(j)(1), any Access Seeker may make an offer to enter into a Conditional Access Agreement that may be (but need not be) subject to a condition precedent which relates to:
    - (A) **(Conditional on Terminal Capacity Expansion)** the triggering of an obligation by DBCT Management to perform a specified Terminal Capacity Expansion with a specified estimated cost within a specified estimated timeframe;
    - (B) **(Conditional on other System elements)** DBCT Management being reasonably satisfied that a Service Provider (other than DBCT Management), Access Holder, Access Seeker or other relevant entity has committed or will commit, subject only to conditions which are customary for that Service Provider and an expansion of that nature, to providing an expansion of a relevant part of the System which is necessary to create sufficient Available System Capacity; and/or
    - (C) **(Conditional on Section 5.4(o) being satisfied)** DBCT Management being reasonably satisfied that the Access Seeker's Access Rights are matched by an entitlement held by the Access Holder or a person on its behalf to rail infrastructure access rights relating to the coal the subject of the Conditional Access Agreement.

The following provisions relate to any such offer:

- (4) **(Invitation to each Access Seeker)** DBCT Management must give the same notice (**Expansion Notice**) at the same time to each Access Seeker in the Queue, inviting them to submit to DBCT Management (by way of offer to DBCT Management) two signed copies of such a Conditional Access Agreement consistent with their Access Application (except that it may be for a lower tonnage or shorter term than originally requested provided there is a bona fide commercial reason for seeking such lower tonnage or shorter term) on the terms of the Standard Access

Agreement or on any other terms which DBCT Management has notified the Access Seeker would be acceptable to DBCT Management, and subject to the condition precedent referred to above.

- (5) **(Position in Queue may be lost by not offering a Conditional Access Agreement)** Any Access Seeker that does not, within 3 months after DBCT Management gives the Access Seeker an Expansion Notice, deliver to DBCT Management a signed Conditional Access Agreement in accordance with the Expansion Notice:
- (A) may, subject to Section 5.4(j)(6), be removed by DBCT Management from the Queue, in which case the Access Seeker's Access Application will be taken to have been rejected and the Access Application negotiation process for that Access Seeker will be discontinued; or
  - (B) will not, if DBCT Management does not remove the Access Seeker from the Queue, lose its place in the Queue (although if DBCT Management executes a Conditional Access Agreement offered by any other Access Seeker pursuant to this Section 5.4(j), that Access Seeker will, subject to Section 5.4(j)(11), no longer be in the Queue in respect of the Tonnage the subject of that Conditional Access Agreement) and the Access Application negotiation process for the Access Seeker will otherwise continue in accordance with Section 5 of this Undertaking.
- (6) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under section 5.4(j)(5)(A), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (7) **(Amendments to Access Application)** Except as provided in Section 5.4(k)(5), an Access Seeker may not amend its Access Application during the 40 Business Day period which commences on the date the Access Seeker receives an Expansion Notice.
- (8) **(Acceptance of offers in order of priority in Queue)** If, during the 3 month period following the giving of an Expansion Notice one or more of the Access Seekers in the Queue:
- (A) delivers to DBCT Management such signed copies of a Conditional Access Agreement; and
  - (B) provides any Security required by DBCT Management (or the circumstances in Section 5.4(j)(9) apply),

DBCT Management will then give priority to the Access Seeker so doing which has the highest ranking in the Queue and (subject to there being sufficient Available System Capacity should the Terminal Capacity Expansion the subject of the condition precedent proceed) will execute their Conditional Access Agreement. DBCT Management will then repeat the process down the Queue with each successive Access Seeker (if any) which has delivered such a signed Conditional Access Agreement and any relevant Security during the 3 month period.

- (9) **(Issues with provision of Security requested)** If an Access Seeker is unable to provide the Security required by DBCT Management within the 3 month period referred to in Section 5.4(j)(8) (or, by the fifth Business Day of the 3

month period referred to in Section 5.4(j)(8), the Access Seeker disputes DBCT Management's entitlement to the Security requested), the Conditional Access Agreement to be executed will be modified so that it is a further condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, a Security which the QCA determines to be fair is provided within 20 Business Days after the QCA makes that determination), and the "Effective Date" will be adjusted accordingly.

- (10) **(Termination if condition precedent not fulfilled)** Each Conditional Access Agreement referred to in Section 5.4(j)(4) and 5.4(j)(8) (as applicable) must be on the basis that it will terminate if a relevant condition precedent referred to in Section 5.4(j)(3)(A) or 5.4(j)(3)(B) is not fulfilled within a reasonable period from the date of execution of the Conditional Access Agreement (which will not be less than 3 months). However, DBCT Management and an Access Seeker can agree to extend this period from time to time, as long as an extension for the same period has been offered by DBCT Management to all Access Seekers who have such condition precedent.
- (11) **(Access Seeker rejoins Queue if Conditional Access Agreements terminate)** If a Conditional Access Agreement referred to in Section 5.4(j)(8) terminates because:
- (A) a condition precedent referred to in Section 5.4(j)(3)(A) or 5.4(j)(3)(B) has not been fulfilled within the reasonable period nominated (or any extended period as agreed between DBCT Management and each Access Seeker in accordance with Section 5.4(j)(10)), the relevant Access Seekers will resume their respective positions in the Queue as if the Access Seekers had never signed the Conditional Access Agreements; or
  - (B) a condition precedent that requires the Access Seeker to provide Security (as referred to in Section 5.4(j)(9)) is not fulfilled, DBCT Management may exercise its discretion to remove that Access Seeker from the Queue in accordance with Sections 5.4(j)(5) and 5.4(j)(6) and, if so removed, the negotiation process for that Access Seeker in respect of the Terminal Capacity Expansion will be discontinued.
- (12) **(Reductions in contracted tonnage if estimated expansion of Terminal Capacity not achieved)** Each Conditional Access Agreement will include a provision entitling DBCT Management to re-determine Terminal Capacity and Expansion Component Capacity in accordance with Section 12.1(k) and to proportionately reduce the Annual Contract Tonnage allocated under the Conditional Access Agreement to the Access Seeker, subject to the following rules:
- (A) in relation to Socialised Terminal Capacity, if the capacity at the Existing Terminal determined by DBCT Management in accordance with Section 12.1(k)(2) is less than the estimation of aggregate (expanded) capacity at the Existing Terminal made at the time of entry into the Conditional Access Agreement, then DBCT Management will proportionately reduce the Annual Contract Tonnage in all Conditional Access Agreements so that the aggregate Tonnage of all Conditional Access Agreements is equal to the additional capacity at the Existing Terminal determined in accordance with Section 12.1(k) after the deduction of capacity required to eliminate any shortfall between aggregate Annual Contract Tonnages and capacity at the

Existing Terminal which existed prior to the Terminal Capacity Expansion (see Section 5.4(k)(3)).

- (B) unless otherwise agreed with participating Access Seekers, in relation to a Differentiated Expansion Component, any Differentially Priced Capacity will be allocated to meet the full entitlements of Access Seekers as set out under relevant Conditional Access Agreements.
- (13) **(Reduced Tonnages revert to Queue)** If DBCT Management reduces the Annual Contract Tonnage allocated under a Conditional Access Agreement in accordance with Section 5.4(j)(12), then - in respect of those number of Tonnes which are reduced - an Access Seeker which has had its Tonnes reduced will be:
- (A) placed equal first in the Queue with any other Access Seekers whose Tonnes have been reduced following the Terminal Capacity Expansion; and
  - (B) taken not to have signed the relevant Conditional Access Agreement in respect of those Tonnes.
- (14) **(Section 5.4(o) not affected)** Nothing in this Section 5.4(j) is to be construed as limiting or in any way being contrary to the principle of Handling of Annual Contract Tonnage only being able to be availed of to the extent of matching rail access entitlement, in Section 5.4(o).

**(Overriding principles)**

- (k) Despite any other provision of this Section 5.4:
- (1) **(Existing Access Applications transitioned)** Any outstanding Access Application lodged by an Access Seeker under the access undertaking which applied prior to this Undertaking will (for the purpose only of determining priority of lodgement and therefore priority in the Queue) be deemed to have been an Access Application lodged under this Undertaking, as if this Undertaking had commenced on the date that the first such Access Application was lodged;
  - (2) **(Application for extension of term has priority)** An Access Application to extend the term of an Access Agreement (to the extent that it does not increase the relevant Annual Contract Tonnage) to accord with a bona fide re-estimation of the life of a mine will have precedence over an Access Application for new tonnage;
  - (3) **(Terminal Capacity Expansion allocated first to eliminate shortfalls in capacity below already contracted tonnage)** If a Terminal Capacity Expansion is being Socialised, then the additional Terminal Capacity which results from that Terminal Capacity Expansion (determined in accordance with Section 12.1(k)) will be:
    - (A) firstly utilised to eliminate shortfalls in Annual Contract Tonnages under existing Access Agreements; and
    - (B) only thereafter allocated to Annual Contract Tonnages under Conditional Access Agreements entered into in respect of that Terminal Capacity Expansion and proportionately reduced in accordance with Section 5.4(j)(12).
  - (4) **(Allocation of Differentially Priced Capacity)** Differentially Priced Capacity will be utilised to meet Annual Contract Tonnages under Access Agreements entered into by the Access Seekers in respect of the relevant Differentiated Expansion Component. Consequently, Access Seekers who are not Differentially Priced

Access Seekers in respect of that Differentiated Expansion Component will have no entitlement to have that Differentially Priced Capacity utilised to eliminate shortfalls in Annual Contract Tonnages under their Access Agreements.

- (5) **(Alternative arrangements in some cases if they achieve greater utilisation)** If, in a particular case, the strict application of the process set out in this Section 5.4 would result in a materially greater amount of Available System Capacity not being able to be utilised than could otherwise be the case if an alternative process is followed, then (in the interests of maximising coal exports from Queensland) DBCT Management may, with the approval of the QCA, enter into one or more Access Agreements in accordance with that alternative process.
- (l) **(Options to extend term taken into account)** For the purpose of this Section 5.4, an Access Holder which has an option to extend the term of its Access Agreement or Existing User Agreement will initially be deemed to have exercised that option, when determining whether or not a Queue exists or needs to be formed in relation to a new Access Application. However, if DBCT Management has the right to do so, it may, on each occasion in which a Queue is formed or re-formed, endeavour to have the exercise of that option brought forward or waived (in the latter case with the intention that one or more waivers may result in the Queue no longer existing).
- (m) **(Other provisions of Undertaking not limited)** Nothing in this Section 5.4 will be taken to limit or be contrary to:
- (1) any right DBCT Management has pursuant to Section 5.8; or
  - (2) any rights or obligations of DBCT Management in Section 12 relating to the expansion of the Terminal (in particular the principle of new Access Agreements only being entered into consistently with anticipated System Capacity).
- (n) **(Disclosure of certain Access Application details)** DBCT Management may at any time and from time to time disclose to any person the aggregate tonnage which is the subject of Access Applications but, except as:
- (1) required by law;
  - (2) consented to by the relevant Access Seeker;
  - (3) reasonably necessary or desirable in relation to planning for operation of the Terminal; or
  - (4) reasonably required to be disclosed to a rail infrastructure provider to assist in development of the System Master Plan,
- DBCT Management will not disclose details of an Access Application (including details of the Access Seeker).
- (o) **(Entitlement to have Annual Contract Tonnage Handled must be matched by below rail access)** Despite any other provision in this Undertaking, DBCT Management must not enter into an Access Agreement with an Access Seeker unless it contains Clause 11.5 of the Standard Access Agreement (under which the Access Holder is not entitled to have its Annual Contract Tonnage Handled at the Terminal, to the extent and for such period as, the Access Holder has not demonstrated to the reasonable satisfaction of DBCT Management that that Annual Contract Tonnage is matched by an entitlement held by the Access Holder or a person on its behalf to railway track access relating to the coal the subject of the Access Agreement).

- (p) **(Notification of Differentially Priced Capacity)** Promptly following Completion of a Differentiated Expansion Component, DBCT Management will notify all Expansion Parties, Access Seekers in the Queue and all Access Holders of the following:
- (1) the date of Completion;
  - (2) the Differentially Priced Capacity; and
  - (3) if any Tonnage associated with the Differentiated Expansion Component is uncontracted and, if so, the Tonnage which is available for Access Seekers.
- (q) **(Formation of a Differentiated Queue)** If at any time there are two or more current Access Applications received in respect of Differentially Priced Capacity and there is or will be insufficient System Capacity associated with Differentially Priced Capacity which is available at any relevant time to accommodate an increase in Handling of coal applied for in all of those Access Applications, a new queue will form in respect of the Differentially Priced Capacity (the **Differentiated Queue**).
- (r) **(Queuing Principles for a Differentiated Queue)** DBCT Management will manage any Differentiated Queue in accordance with the following principles:
- (1) DBCT Management will apply the same general rules for priority as apply with respect to the Queue, under this Section 5.4.
  - (2) Access Seekers must specify which queue they wish to join when applying for Access (the Queue or a Differentiated Queue).
  - (3) Access Seekers may be in both the Queue and a Differentiated Queue separately and simultaneously under different Access Applications.
  - (4) Where capacity becomes available in either the Queue or a Differentiated Queue (but not both queues), DBCT Management will invite all Access Seekers in the relevant queue to submit a signed Access Agreement in the priority order of the relevant queue.
- (s) **(Commercial discretion of DBCT Management where Access Application involves both queues)** Where Available System Capacity relies on Terminal Capacity that comprises both Socialised Capacity and Differentially Priced Capacity, DBCT Management will invite Access Seekers in both the Queue and the Differentiated Queue to submit a relevant signed Access Agreement in accordance with the queuing principles in this Section 5.4.
- (t) **(Reordering of queues applying commercial discretion)** If, having obtained signed Access Agreements from Access Seekers in respect of Available System Capacity under Section 5.4(s), DBCT Management determines that the most efficient use of Available System Capacity is to contract with the same Access Seeker in respect of both Socialised Terminal Capacity and Differentially Priced Capacity, it may accept a signed Access Agreement other than in the order of the relevant queue, provided that, prior to accepting such signed Access Agreement and subject to Section 5.4(u), DBCT Management:
- (1) has notified all other Access Seekers in each Queue of:
    - (A) its intention to reorder one or both queues; and
    - (B) any commercial principles which it intends to apply when reordering one or both queues; and
  - (2) has provided all Access Seekers with a reasonable opportunity to respond; and

- (3) is satisfied (acting reasonably), based on any responses received from Access Seekers and applying those commercial principles, that there is no Access Seeker which is higher in either queue that is prepared to contract on an equivalent basis.

For this purpose, any commercial principles must operate as between Access Seekers strictly on a non-discriminatory basis.

(u) **(Dispute in relation to reordering of a queue)**

- (1) An Access Seeker may refer any dispute in relation to reordering of a queue under Section 5.4(t) as a Dispute under Section 17.
- (2) If a Dispute is raised in respect of any reordering of a queue, DBCT Management will not enter into any relevant Access Agreement under Section 5.4(t) unless and until the Dispute is withdrawn or determined and in accordance with any such determination.

## 5.5 Indicative Access Proposal

- (a) **(Timing for Indicative Access Proposal)** As soon as practicable and in any event within 20 Business Days following receipt of an Access Application (or, if additional information has been requested by DBCT Management under Section 5.3, within 20 Business Days of receipt of all of the additional information requested), DBCT Management must use its reasonable endeavours to provide the relevant Access Seeker with a response containing proposed terms and conditions of Access (**Indicative Access Proposal**).
- (b) **(Notice of additional time needed by DBCT Management)** If it is not reasonable to provide an Indicative Access Proposal within 20 Business Days of receipt of an Access Application (or, if applicable, the additional information requested under Section 5.3), DBCT Management must, as soon as practicable, but in any event, within 20 Business Days, advise the relevant Access Seeker of its estimate of the extra time required to deliver the Indicative Access Proposal.
- (c) **(Dispute by Access Seeker as to need for additional time)** If the Access Seeker is of the opinion that the estimate of extra time for preparation of the Indicative Access Proposal is excessive, then the Access Seeker may refer the matter for dispute resolution in accordance with Section 17 of this Undertaking. DBCT Management must use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by DBCT Management or as otherwise determined by the QCA.
- (d) **(Content of Indicative Access Proposal)** The Indicative Access Proposal must set out:
- (1) an indicative assessment as to whether there is sufficient Available System Capacity at all relevant times (having regard amongst other things to outstanding Access Applications in a Queue) to accommodate the Access Application;
  - (2) advice in respect of the existence of (but not the identity of) other Access Seekers who have already submitted an Access Application and the aggregate tonnage profile(s) requested in those Access Applications;
  - (3) the Standard Access Agreement or a draft access agreement where the Access Application contemplates Access on non-Reference Terms;
  - (4) the expiry date of the Indicative Access Proposal, which will be 30 Business Days following the date the Access Seeker receives the Indicative Access Proposal (should there be no notification by the Access Seeker pursuant to Section 5.6

that the Indicative Access Proposal has not been prepared in accordance with the Undertaking);

- (5) if there is sufficient Available System Capacity to accommodate the Access Application, advice to that effect, and:
- (A) an initial assessment of the Pricing Method applicable to the Access sought (including reasons), having regard to any planned or reasonably expected Terminal Capacity Expansion that is required, relevant QCA rulings and the Expansion Pricing Principles;
  - (B) an initial (alternative) estimate(s) of the Access Charge(s), including an estimate of current and, where reasonable to provide such estimate, prospective Access Charges, for the requested Services in the Access Application based on:
    - (i) the initial assessment of the applicable Pricing Method; and
    - (ii) where provision of any of the Access sought depends upon completion of a Terminal Capacity Expansion, the Pricing Method for which has not yet been determined by the QCA, the alternative Pricing Method,
 with the Non-Expansion Costs being allocated in accordance with Section 11.11 for any estimates related to a Differentiated Expansion Component;
  - (C) the current Terminal Master Plan and System Master Plan;
  - (D) details of any additional information required by DBCT Management to progress the Access Application and develop the terms and conditions for acceptance; and
  - (E) details of any security, guarantee, other support or other information required by DBCT Management to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, its guarantor; and
- (6) if there is insufficient Available System Capacity (as determined by reference to the assessment of System Capacity undertaken prior to the time of giving the indicative assessment) to accommodate the Access Application, advice to that effect, and:
- (A) reasonable particulars as to why this circumstance prevails;
  - (B) an estimate of what the Available System Capacity is at relevant times;
  - (C) whether a Queue has been formed in accordance with Section 5.4 of this Undertaking (including as a result of the relevant Access Application);
  - (D) an initial assessment of the Pricing Method applicable to the Access sought (including reasons) having regard to any planned or reasonably expected Terminal Capacity Expansions, relevant QCA rulings and the Expansion Pricing Principles;
  - (E) where reasonable, an estimate of prospective Access Charges for the requested Services in the Access Application based on:
    - (i) the initial assessment of the applicable Pricing Method; and
    - (ii) the alternative Pricing Method,

with the Non-Expansion Costs being allocated in accordance with Section 11.11 for any estimates related to a Differentiated Expansion Component; and

- (F) a copy of the System Master Plan and an indicative timetable for any expansion of System Capacity which may be undertaken (if any).
- (e) **(Best Endeavours estimate of Access Charges)** In estimating the applicable Pricing Method(s) and resulting Access Charges for the purpose of this Section 5, DBCT Management shall use its best endeavours to provide an accurate assessment, having regard to all available information.
- (f) **(Indicative Access Proposal not binding on DBCT Management)** The Indicative Access Proposal will, unless it contains specific conditions to the contrary, contain indicative arrangements only and does not oblige DBCT Management to provide Access.
- (g) **(Access Seeker may dispute time-frame)** If, after 20 Business Days following DBCT Management's acknowledgment of the Access Application, the Access Seeker believes that DBCT Management is not making reasonable progress in the preparation of the Indicative Access Proposal, the Access Seeker may refer the matter for dispute resolution in accordance with Section 17 of this Undertaking.
- (h) **(Where Terminal Capacity Expansion is needed to satisfy an Access Application)** Where there is not sufficient Available System Capacity to accommodate the Access Application and the Access Seeker wishes to continue the negotiation process provided for in this Section 5, such negotiations may continue on the basis that a Terminal Capacity Expansion may be undertaken in accordance with Section 12 of this Undertaking which (whether with or without any relevant expansion of other components of the System) is estimated to provide sufficient Available System Capacity. In this case, if DBCT Management is unable to comply with the timeframes specified in Section 5 of this Undertaking, it will advise the Access Seeker of the estimated timeframes. If the Access Seeker does not believe the proposed timetable is reasonable or that DBCT Management is not making reasonable progress, it may refer the matter to dispute resolution in accordance with Section 17 of this Undertaking.

## 5.6 Response to Indicative Access Proposal

- (a) **(Access Seeker's response)** If the Access Seeker intends to progress its Access Application on the basis of the arrangements set out in the Indicative Access Proposal, it must notify DBCT Management of its intention to do so within 30 Business Days of the date it receives the Indicative Access Proposal. If the Access Seeker does not notify DBCT Management of its intention before the expiry date of the Indicative Access Proposal, its Access Application will be deemed to have lapsed and it may apply again for Access in accordance with Section 5.2 (unless a longer period for notification is agreed between the parties).
- (b) **(DBCT Management to expedite any replacement Access Application)** If an Access Application lapses but the Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to the issue of a new Indicative Access Proposal.
- (c) **(Notice of non-complying Indicative Access Proposal)** If the Access Seeker considers that the Indicative Access Proposal has not been prepared in accordance with Section 5.5 of this Undertaking, it must notify DBCT Management in writing within 20 Business Days of receipt of the Indicative Access Proposal, notice to that effect, setting out the

reasons why the Access Seeker believes that the Indicative Access Proposal is inconsistent with Section 5.5 of this Undertaking.

- (d) **(Response to notice of non-compliance)** DBCT Management must use all reasonable efforts to respond to this notice, including, where appropriate, the making of revisions to the Indicative Access Proposal, within 20 Business Days of the notification under this Section 5.6. If DBCT Management is unable to respond within this time period, it must notify the Access Seeker of the date on which it expects to be able to respond.
- (e) **(Dispute relating to Indicative Access Proposal)** If the Access Seeker is not satisfied with:
  - (1) the response to the notice given under this Section; or
  - (2) DBCT Management's estimated date to respond to the notice,
 the Access Seeker may seek to resolve the dispute in accordance with the dispute resolution procedure in Section 17.

## 5.7 Negotiation process

- (a) **(Parties to negotiate if Access Seeker wishes to)** If the Access Seeker indicates its willingness to progress its Access Application under Section 5.6 (or otherwise, in the case of an Access Application of the type referred to in paragraph (b) of the definition of that term), then both parties must commence negotiations as soon as reasonably possible to progress towards an Access Agreement or a Conditional Access Agreement. The period for negotiation will commence on the date notified by the Access Seeker under Section 5.6 (or the date 5 Business Days after the commencement of the Term in the case of an Access Application referred to in paragraph (b) of the definition of that term, even if there have been discussions prior to that date) and end upon any of the following events:
  - (1) execution of an Access Agreement or Conditional Access Agreement in respect of Access sought by the Access Seeker;
  - (2) written notification by the Access Seeker that it no longer wishes to proceed with its Access Application (at which time its Access Application will be deemed to have lapsed);
  - (3) DBCT Management issuing a Negotiation Cessation Notice to the Access Seeker in accordance with Section 5.8;
  - (4) the expiration of 6 months from the commencement of the negotiation period or, if both parties agree to an extension of the negotiation period, the expiration of the agreed extended term, provided that agreement to extend the negotiation period is not unreasonably withheld by either party;
  - (5) a reduction in Available System Capacity due to:
    - (A) another Access Seeker finalising an Access Agreement in accordance with this Undertaking, where that reduction in Available System Capacity adversely affects DBCT Management's ability to offer Access to the Access Seeker under the terms of the Indicative Access Proposal; or
    - (B) a sustained change in the System operating assumptions of one or more components of the Dalrymple Bay Coal Chain requiring re-determination of System Capacity under Section 12.1, where that reduction in Available System Capacity adversely affects DBCT Management's ability to provide

Access to the Access Seeker under the terms of the Indicative Access Proposal; or

- (6) DBCT Management receiving Notice from a Notifying Access Seeker in accordance with section 5.4(e), for the process contemplated by Section 5.4(f) to occur.
- (b) **(Review of Indicative Access Proposal)** In the event that the negotiation period is suspended for the reasons set out in Section 5.7(a)(5) or Section 5.7(a)(6), (and once the process contemplated by Section 5.4(f) to Section 5.4(h) is complete, if applicable) DBCT Management must review the Indicative Access Proposal and prepare a revised Indicative Access Proposal in accordance with Section 5.5 and the negotiation process will recommence from the date this is provided to the Access Seeker.
- (c) **(Revisions to Access Application)** During the negotiation period, the Access Seeker may review and revise the information provided to DBCT Management in the Access Application, provided that such revision does not substantially alter the nature of the Access rights sought by the Access Seeker and is not otherwise prohibited under Section 5.4(i)(3), 5.4(j)(7) or 5.10(h). If DBCT Management is reasonably of the view that an Access Seeker's revision of information provided to DBCT Management in the Access Application has substantially altered the nature of the Access rights sought by the Access Seeker, then subject to the following paragraph, DBCT Management will treat the revised information as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the revision is for an increase in the annual tonnage required or a longer term, then only the additional annual tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.
- (d) **(Certain extensions of term do not create new Access Application)** If, in the case of an Access Application referred to in paragraph (b) of the definition of that term, the revision is for an increase in the term from 5 or more years, then the extended term will be treated as part of the original Access Application.
- (e) **(Reduction in tonnage applied for does not create new Access Application)** A reduction in tonnage or term will not, of itself, constitute a new Access Application pursuant to this paragraph if there is a bona fide commercial reason for such reduction.
- (f) **(Dispute relating to negotiation)** If at any time during the negotiation period a dispute arises between the parties that, after reasonable negotiations, the parties are unable to resolve to their mutual satisfaction, then either party may seek to resolve the dispute in accordance with the dispute resolution process set out in Section 17.
- (g) **(Negotiations to continue despite dispute)** To remove any doubt, the negotiation process and the obligations of the parties in that regard are to continue notwithstanding the commencement of a dispute resolution process pursuant to Section 17 of this Undertaking.

## 5.8 Negotiation Cessation Notice

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

- (1) an Access Seeker does not comply with all of its material obligations contained in this Undertaking;
  - (2) DBCT Management is reasonably of the opinion that there is no reasonable likelihood that the Access Seeker will comply with the material terms and conditions of an Access Agreement;
  - (3) DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access, at the level of capacity sought;
  - (4) DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not or is likely not to be reputable or of good financial standing;
  - (5) except where the expert is in manifest error, the Access Seeker does not materially comply with a decision of an expert pursuant to Section 17.3; or
  - (6) an Access Seeker does not materially comply with a decision of the QCA pursuant to Section 17.4.
- (b) **(Negotiation Cessation Notice to include reasons)** A Negotiation Cessation Notice must identify the reasons for DBCT Management's decision not to enter into an Access Agreement with the Access Seeker.
- (c) **(Examples of no reasonable likelihood of compliance)** Without limitation, it will be reasonable for DBCT Management to form the view that circumstances in Section 5.8(a)(2) or 5.8(a)(4) apply if:
- (1) the Access Seeker is Insolvent;
  - (2) the Access Seeker, or a Related Body Corporate of the Access Seeker, is currently or has in the previous two years been in material default of any Access Agreement (which has not been promptly rectified), Existing User Agreement or any other agreement where its performance under that agreement is relevant to the Access Seeker's likely performance under an Access Agreement; or
  - (3) the Access Seeker or a proposed provider of Security fail to establish their solvency and creditworthiness in accordance with Section 5.9.
- (d) **(Dispute as to Negotiation Cessation Notice)** If the Access Seeker reasonably considers that DBCT Management has improperly given it a Negotiation Cessation Notice, then (provided that Section 5.8(c)(1), 5.8(c)(2) or 5.8(c)(3) do not apply) the Access Seeker may refer the matter to dispute resolution in accordance with Section 17. If the resolution of the dispute is in favour of the Access Seeker, DBCT Management must recommence negotiations with that Access Seeker.
- (e) **(Recovery of costs of DBCT Management)** Subject to any dispute on the matter being otherwise determined, DBCT Management may recover its reasonable costs incurred in negotiations with the Access Seeker where it ceases negotiations in accordance with a Negotiation Cessation Notice validly issued under this Section 5.8. The Access Seeker may refer a Dispute about the recovery of these costs to dispute resolution in accordance with Section 17 of this Undertaking.

## 5.9 Creditworthiness of Access Seeker

- (a) **(Access Seeker to be creditworthy)** DBCT Management:
- (1) may remove from the Queue; and

- (2) regardless of whether the relevant Access Seeker has been removed from the Queue by DBCT Management, will not be required to enter into an Access Agreement or proceed with an Access Application with,
- an Access Seeker which is or has become Insolvent or which, after DBCT Management's reasonable request, fails within a reasonable period to establish or confirm its likely creditworthiness for the term of the Access Agreement required, or to provide adequate Security from another entity which establishes or confirms its likely creditworthiness for the term of the Access Agreement required.
- (b) **(Information as to solvency)** To confirm the solvency and creditworthiness of an Access Seeker and, where DBCT Management requires, the provider of a Security, the Access Seeker will provide such information as may be reasonably requested by DBCT Management to establish that solvency and creditworthiness.
- (c) **(Provision of Security)** If an Access Seeker or, where DBCT Management requires, its Security provider, is unable to establish their solvency and creditworthiness in their own right, creditworthiness may be established by the Access Seeker and Security provider by providing further Security (as reasonably required by DBCT Management), for example (but not limited to) any one or more of:
- (1) letters of credit;
  - (2) tripartite agreements with project financiers; and
  - (3) guarantees or security from entities with a Standard and Poors or Moodys rating of not less than investment grade.
- (d) **(Access Agreement may permit Security to be required)** For clarification, nothing in this Section 5.9 limits the rights of DBCT Management under an Access Agreement to require Security (or additional Security) after the commencement of an Access Agreement in accordance with the terms of that Access Agreement.

### 5.10 Funding of feasibility studies

- (a) **(Funding of System Capacity studies)** If DBCT Management is required to undertake a System Capacity assessment under Section 12.1 which is not otherwise funded as part of feasibility studies for an Expansion Component under this Section 5.10, DBCT Management may recover the reasonable costs of such assessment as attributable to the Existing Terminal through NECAP. DBCT Management will consult with and make available the results of all capacity assessments undertaken in accordance with Section 12.1 to all Access Holders and Expansion Parties, including separately identifying:
- (1) the assessed capacity of the Existing Terminal;
  - (2) the projected capacity of a Terminal Capacity Expansion, including, if relevant, the projected capacity of a Differentiated Expansion Component; and
  - (3) the Expansion Component options being considered in any feasibility studies under this Section 5.10.
- (b) **(Request for Access Applicants to Fund Feasibility Studies)** If DBCT Management, acting reasonably, concludes that the Aggregate Annual Contract Tonnages applied for in Access Applications lodged with it, together with all other relevant circumstances, justify the undertaking of a study to determine the feasibility of a relevant Terminal Capacity Expansion then DBCT Management may, subject to Section 5.10(c), give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management. DBCT Management may not make such a request unless a Funding Agreement or Underwriting Agreement

(as applicable) has been made and published on the QCA's website in accordance with Section 5.10(q)(9)(A).

- (c) **(Notices will be given simultaneously)** DBCT Management will, in giving notices under Section 5.10(a), give such notices to all Access Applicants in the Queue, as relevant to the contemplated increase in Annual Contract Tonnage which would be facilitated by the Terminal Capacity Expansion under consideration, on or about the same date.
- (d) **(Requests to be proportionate to tonnages applied for)** DBCT Management will request that any funding or underwriting of the feasibility study or feasibility studies referred to in Section 5.10(a) pursuant to a Funding Agreement or Underwriting Agreement (as applicable) be proportionate amongst the relevant participating Access Applicants, according to the respective Aggregate Annual Contract Tonnages requested in their Access Applications over the first 10 years of Handling under the Conditional Access Agreement applied for by them.
- (e) **(Order of responses to notices)** DBCT Management must, in dealing with responses from Access Applicants to notices given by DBCT Management under Section 5.10(a), start with the response given by the Access Applicant that has the highest ranking in the Queue and proceed to the response given by each successive Access Applicant in order of their respective ranking in the Queue.
- (f) **(Position in Queue may be lost to subsequent Applicants)** If an Access Applicant is requested by DBCT Management to enter into a Funding Agreement or Underwriting Agreement but the Access Applicant:
  - (1) declines to do so;
  - (2) fails to enter into a Funding Agreement or Underwriting Agreement (as applicable) with DBCT Management on such terms as DBCT Management reasonably requires within 3 months after being requested by DBCT Management to do so; or
  - (3) does not provide security required by DBCT Management in connection with the Funding Agreement or Underwriting Agreement (as applicable) within 3 months after being requested by DBCT Management to do so,
 (such an Access Applicant being a **Non-Funding Access Applicant**) then:
  - (4) DBCT Management may, subject to Section 5.10(g), remove the Non-Funding Access Applicant from the Queue, in which case the Non-Funding Access Applicant's Access Application will be taken to have been rejected; or
  - (5) if DBCT Management does not remove the Non-Funding Access Applicant from the Queue, then to the extent that any Access Applicant after the Non-Funding Access Applicant in the Queue within 3 months thereafter:
    - (A) enters into a Funding Agreement or Underwriting Agreement with DBCT Management; and
    - (B) provides security required by DBCT Management in relation to the Funding Agreement or Underwriting Agreement (as applicable) of at least the aggregate amount that is required by DBCT Management to fund or underwrite the study referred to in Section 5.10(a) in the proportion to which the tonnage applied for by an Access Applicant bears to the aggregate additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion,

those subsequent Access Applicants will, from the date on which they are legally committed to provide or underwrite such feasibility funding and provide security under the Funding Agreement or Underwriting Agreement (as applicable), have priority in the Queue ahead of the Non-Funding Access Applicant.

- (g) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under section 5.10(f)(4), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (h) **(Amendments to Access Application)** An Access Seeker may not amend its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.10(b).
- (i) **(Priorities restored if feasibility study does not proceed)** If an Access Applicant obtains a higher priority in the Queue as a result of Section 5.10(f), and DBCT Management elects not to proceed with the relevant feasibility study, then the relevant Access Applicant will again have the same priority in the Queue as it had as if Section 5.10(f) did not apply.
- (j) **(Clarifications)** Nothing in this Section 5.10:
- (1) requires DBCT Management to proceed with a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study (as the case may be) unless it secures a Funding Agreement or Underwriting Agreement in respect of the full cost of that feasibility study from one or more Access Seekers;
  - (2) prohibits an Access Seeker from providing more than its required proportion in respect of any funding or underwriting requested for Feasibility Studies (but providing a greater proportion does not in itself entitle that Access Seeker to any additional tonnage under an Access Agreement); or
  - (3) is to be taken as limiting the obligations of DBCT Management in Section 12.
- (k) **(Disputes relating to requests for Feasibility Funding)** If any Access Applicant considers that the terms of the Funding Agreement, Underwriting Agreement or the amount or type of security required in connection with the Funding Agreement or Underwriting Agreement requested by DBCT Management pursuant to Sections 5.10(b) and 5.10(d) are not reasonable, it may within 3 months after being requested to enter into a Funding Agreement or Underwriting Agreement and to provide security, make application to the QCA to determine what is reasonable, and in such event:
- (1) the determination of the QCA as to what is reasonable will apply in respect of what DBCT Management can require from each Access Applicant; and
  - (2) the period of 3 months in Section 5.10(f) will become a period ending 15 days after the QCA notifies its determination.
- The terms of a Funding Agreement or Underwriting Agreement will be reasonable to the extent that they are consistent with the terms of the Funding Agreement or Underwriting Agreement (as applicable), or is otherwise approved by the QCA in accordance with Section 5.10(q).
- (l) **(FEL 3 Feasibility Funding)** If DBCT Management having completed a FEL 1 Feasibility Study and FEL 2 Feasibility Study, acting reasonably and consistently with prudent business practice concludes that Aggregate Annual Contract Tonnage applied for in

one or more Access Applications lodged with it, together with all other relevant circumstances, justify it undertaking a FEL 3 Feasibility Study, DBCT Management may, at its own cost, undertake a FEL 3 Feasibility Study. For clarity, if DBCT Management undertakes to independently fund a FEL 3 Feasibility Study this will not affect the entitlement of any Funding Access Seekers (which funded the relevant FEL 1 Feasibility Study and FEL 2 Feasibility Study) to continue to participate in any subsequent Expansion Component.

- (m) **(Transitional arrangements for previous funding)** If at the Commencement Date DBCT Management is undertaking a FEL 1 Feasibility Study or FEL 2 Feasibility Study in respect of a relevant proposed Terminal Capacity Expansion, DBCT Management may (by giving not less than 14 days written notice) give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management in which case:
- (1) Sections 5.10(d), 5.10(e), 5.10(f), 5.10(g), 5.10(i) and 5.10(k) apply (with such modifications as the circumstances require); and
  - (2) if the Feasibility Study being undertaken at the Commencement Date is a FEL 2 Feasibility Study, the Funding Agreement and Underwriting Agreement will apply to the FEL 2 Feasibility Study and the FEL 1 Feasibility Study which preceded the FEL 2 Feasibility Study.
- (n) **(Credit for prior Funding, and refunds)** If an Access Seeker has provided funding for a Feasibility Study referred to in Section 5.10(m) prior to the Commencement Date, the amount funded will be deemed to be a contribution to the funding requested under Section 5.10(m). To the extent that an Access Seeker has contributed funds (as opposed to underwriting the funding) prior to the Commencement Date in excess of the funds required to be contributed under Section 5.10(m) DBCT Management may elect to refund to that Access Seeker such excess funding or credit it towards any further contribution to a Feasibility Study required or agreed to be paid by that Access Seeker.
- (o) **(Contributions to Funding of Feasibility Studies by DBCT Management)** DBCT Management may at its discretion elect to itself bear, or be required under law or by the Port Services Agreement to itself fund, all or part of the costs of a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study which one or more Access Applicants do not fund or underwrite in accordance with a Funding Agreement or Underwriting Agreement (as applicable). Nothing in this Section 5.10(o) affects:
- (1) DBCT Management's rights to apply to have such sum included in the relevant Regulated Asset Base if the relevant proposed Terminal Capacity Expansion proceeds;
  - (2) DBCT Management's right to apply to have such sum (but not exceeding 20% of the prudent cost of the FEL 1 Feasibility Study or FEL 2 Feasibility Study (as relevant)) included in the relevant Regulated Asset Base on a Review Event if the proposed Terminal Capacity Expansion does not proceed;
  - (3) DBCT Management's rights to apply to have such sum included in the relevant Regulated Asset Base if DBCT Management is required by Section 12 of this Undertaking to investigate or undertake a Terminal Capacity Expansion; or
  - (4) DBCT Management's obligation to fund a FEL 3 Feasibility Study.
- (p) **(Refund of FEL1, FEL 2 and FEL 3 contributions if Terminal Capacity Expansion proceeds)** In the event that the Terminal Capacity Expansion the subject of a FEL 1

Feasibility Study and FEL 2 Feasibility Study and FEL 3 Feasibility Study proceeds and substantial site works commence, DBCT Management will promptly following the commencement of substantial site works:

- (1) refund to each Funding Access Seeker who contributed funds (as opposed to underwriting the funding) under Section 5.10(b) for that Terminal Capacity Expansion the funds provided by that Access Seeker; and
  - (2) release any underwriting commitment made by each Funding Access Seeker in respect of that Terminal Capacity Expansion.
- (q) **(Preparation and approval of Standard Funding Agreement or Standard Underwriting Agreement)**
- (1) DBCT Management must prepare a proposed Standard Funding Agreement or proposed **Standard Underwriting Agreement** (as applicable) (**Proposed Standard Funding/Underwriting Agreement**) where:
    - (A) DBCT Management considers there to be reasonable likelihood that the Aggregate Annual Contract Tonnage applied for in an Access Application or Conditional Access Agreement may justify undertaking Feasibility Studies during the term of the Access Undertaking; or
    - (B) DBCT Management receives a written notice from an Access Seeker or Access Holder requesting DBCT Management develops a Proposed Standard Funding/Underwriting Agreement.
  - (2) In preparing a Proposed Standard Funding/Underwriting Agreement DBCT Management must consult with Access Seekers, Expansion Parties and Access Holders.
  - (3) A Proposed Standard Funding/Underwriting Agreement must be reasonable in all of the circumstances having regard to terms of the Undertaking and s 138(2) of the QCA Act.
  - (4) DBCT Management must provide the QCA with its Proposed Standard Funding/Underwriting Agreement for the QCA to publish it on its website and must separately notify all Access Holders and Access Seekers promptly following the QCA's publication of DBCT Management's Proposed Standard Funding/Underwriting Agreement on the QCA website.
  - (5) An Access Seeker or Access Holder may, within 3 months after receiving the notice from DBCT Management, give the QCA and DBCT Management a Section 17.4 notice of a dispute regarding whether the Proposed Standard Funding/Underwriting Agreement is consistent with Section 5.10(q)(3). Such notice must specify the way in which the Access Seeker or Access Holder considers that the Proposed Standard Funding/Underwriting Agreement fails to satisfy Section 5.10(q)(3) and, if necessary, any amendments which the Access Seeker or Access Holder considers are necessary to satisfy Section 5.10(q)(3).
  - (6) If notice is given and within the time required by Section 5.10(q)(5), such dispute is to be resolved in accordance with Section 17.4.
  - (7) In accordance with Section 17.4, the QCA is to decide whether the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3). If the QCA decides that the Proposed Standard Funding/Underwriting Agreement does not satisfy Section 5.10(q)(3) it is to decide the terms of an alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting

Agreement (as applicable) (Alternative Proposed Standard Funding/Underwriting Agreement) that it considers will satisfy Section 5.10(q)(3), provided that the QCA must give DBCT Management a reasonable opportunity to consider and comment on the draft. The QCA will take into account any comments made by DBCT Management in relation to the QCA's draft.

- (8) Notwithstanding any notice being given under Section 5.10(q)(5), the QCA may approve the Proposed Standard Funding/Underwriting Agreement, if QCA considers it reasonable in all of the circumstances having regard to terms of the Undertaking and s 138(2) of the QCA Act.
- (9) If no notice is given under Section 5.10(q)(5); or if the QCA decides that the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3); or if the QCA decides that an Alternative Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3), then
  - (A) the Proposed Standard Funding/Underwriting Agreement (or the Alternative Proposed Standard Funding/Underwriting Agreement as the case may be) will become the approved Standard Funding Agreement or the approved Standard Underwriting Agreement (as applicable), which is to be published on the QCA's website; and
  - (B) DBCT Management will, if requested by Access Seekers or Access Holders, enter into agreements with Access Seekers or Access Holders, on the terms of the approved Standard Funding Agreement or approved Standard Underwriting Agreement (as applicable), unless otherwise agreed between DBCT Management and the relevant Access Seeker or Access Holder.
- (10) For clarity, nothing in this Section 5.10(q) limits or restricts DBCT Management or an Access Seeker or Access Holder from referring as a Dispute any failure to agree reasonable amendments to a Standard Funding Agreement/Underwriting Agreement where it is being used in respect of a specific Terminal Capacity Expansion.

### 5.11 Existing User Agreement Process

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

### 5.12 Review of Pricing Method and Indicative Access Charges

- (a) **(Review of estimated Access Charges)** Where an Indicative Access Proposal has been prepared on the basis that a Terminal Capacity Expansion would be required in order to accommodate the relevant Access Application:
  - (1) as soon as practicable and in any event within 20 Business Days following completion of a FEL 1 Feasibility Study, DBCT Management must review the Indicative Access Proposal and provide the Access Seeker with a revised assessment of the applicable Pricing Method and estimated Access Charges for the Services requested in the Access Application (a Revised Pricing Proposal);
  - (2) as soon as practicable and in any event within 20 Business Days following completion of a FEL 2 Feasibility Study which supports proceeding to a FEL 3

Feasibility Study (including where that support is conditional on whether an Expansion Component will be priced Differentially or Socialised), DBCT Management must (unless it has already done so pursuant to Section 12.5(a)) review the Revised Pricing Proposal and apply to the QCA in accordance with s150D of the QCA Act for a ruling as to how the QCA intends to treat the following matters for the purpose of any draft amending access undertaking to be submitted by DBCT Management in respect of the Terminal Capacity Expansion under Section 12.5:

- (A) the applicable Pricing Method for the Terminal Capacity Expansion;
  - (B) if the applicable Pricing Method is determined by the QCA to be Differential, what Access Charges should apply to the Expansion Component, (a **Price Ruling**); and
  - (C) any Different Terms for an Access Agreement in respect of the Terminal Capacity Expansion, agreed or determined in accordance with Section 13.1(f); and
- if Different Terms are approved by the QCA, the approved Different Terms will be included in any Access Agreement that applies to the Price Ruling.

- (b) **(Application for Price Ruling)** An application for a Price Ruling shall include:
- (1) information about the nature and amount of Capital Expenditure forecast to carry out the Terminal Capacity Expansion, as assessed in any Feasibility Studies;
  - (2) information about any Different Terms that will have been agreed or required in accordance with Section 13.1(f);
  - (3) a justification as to why the Access Agreement (incorporating any Different Terms) does not, and need not, comply with the Standard Access Agreement, but will nevertheless be economically and operationally prudent and result in DBCT Management achieving a regulated return that is commensurate with the cost and risks involved with the Terminal Capacity Expansion;
  - (4) information about the increase in Terminal Capacity expected to arise from the Terminal Capacity Expansion (and expected increases to System Capacity);
  - (5) information about positive or negative impacts on existing users of the Terminal or existing operations of the Terminal;
  - (6) information about the forecast demand for Access to the increased Terminal Capacity;
  - (7) an assessment of the Pricing Method applicable to the Terminal Capacity Expansion, applying the Expansion Pricing Principles;
  - (8) information about the anticipated impact on Non-Expansion Costs for the Terminal; and
  - (9) an estimate of the Reference Tariff that will apply to the Terminal Component the subject of the Terminal Capacity Expansion, if it was Differentiated and if it was Socialised, having regard to the information referred to above and the other pricing arrangements set out in Section 11.
- (c) **(QCA to provide Price Ruling)** In response to an application for a Price Ruling, the QCA shall, after conducting an investigation pursuant to Part 5, Subdivision 3 of the QCA Act:
- (1) determine the application in accordance s150F of the QCA Act; and

- (2) determine whether the Terminal Capacity Expansion should be Socialised or Differentiated, applying the Expansion Pricing Principles.

### 5.13 Access Transfers

- (a) In processing any request by an Access Holder or Access Seeker for a transfer of rights or entitlements under an Access Agreement (whether by way of assignment or novation), DBCT Management must consent to any such proposed transfer unless DBCT Management (acting reasonably) is satisfied that:
  - (1) the assignor is in material breach of its Access Agreement;
  - (2) the assignee:
    - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement or the assignee has not otherwise provided security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;
    - (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; and
    - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf; and
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in Section 5.13(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.
- (d) Without limitation to Section 17, an Access Holder or an Access Seeker may refer to the QCA as a dispute under this Undertaking:
  - (1) any refusal by DBCT Management to consent to a transfer;
  - (2) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer;
  - (3) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

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## 6 Terminal Regulations

### 6.1 Compliance with Terminal Regulations

- (a) **(Compliance by DBCT Management and Operator)** DBCT Management acknowledges that under the Operation & Maintenance Contract DBCT Management and the Operator must comply with the Terminal Regulations. DBCT Management must comply with, and will procure that the Operator complies with, the Terminal Regulations in force from time to time.

- (b) **(Compliance by Access Holders is condition of access)** Each Access Holder must observe the Terminal Regulations, in force from time to time, as a condition of access to and the right to have its coal Handled at the Terminal.

## 6.2 Amendment of Terminal Regulations

- (a) **(Process for amending Terminal Regulations)** The Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues. If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:
- (1) conduct reasonable consultation with Access Holders, Access Seekers, Expansion Parties and/or Rail Operators in relation to the proposed amendment; and
  - (2) following the completion of such reasonable consultation, notify the Access Holders, Access Seekers, Expansion Parties and Rail Operators of:
    - (A) the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) the detailed reasons for its decision to give (or not give) consent to the proposed amendment;
    - (D) except in the case of notification to Rail Operators, that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (b) **(Implementation of amended Terminal Regulations)** A proposed amendment to the Terminal Regulations will not be implemented unless:
- (1) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1); and
  - (2) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;
    - (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, the QCA has rejected that objection; or
    - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided, and the QCA has upheld that objection.
- (c) **(Consent of DBCT Management)** DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under Section 6.2(b)(2)(A) or 6.2(b)(2)(B) if it has conducted reasonable consultation with Access Holders, Access

Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1) and, taking into account the results of such consultation, it reasonably considers that:

- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Undertaking, and any Access Agreements; and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (d) **(Criteria for disputing refusal to provide consent)** If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, an Access Holder, Access Seeker or Expansion Party may object to DBCT Management's refusal to provide consent if they reasonably consider that:
- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Undertaking and any Access Agreements; and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (e) **(Notice of amendments to Terminal Regulations)** DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved by the QCA and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with Section 6.2(i)).
- (f) **(Objection to DBCT Management decision to approve amendment of Terminal Regulations)**
- (1) If:
    - (A) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and
    - (B) an Access Holder, Access Seeker or Expansion Party objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied,
 then the Access Holder, Access Seeker or Expansion Party may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management and the QCA of its objection to the consent to the proposed amendment.

- (2) If, in response to an objection notified to the QCA by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(f)(1) of this Undertaking or any corresponding provision of an Access Agreement), the QCA determines in accordance with the process under Section 17.4 that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied then:
- (A) the proposed amendment and DBCT Management's consent to the proposed amendment will be taken to have been withdrawn; and
  - (B) the proposed amendment will not be made.
- (g) **(Objection to DBCT Management decision to reject amendment of Terminal Regulations)**
- (1) If:
- (A) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and
  - (B) an Access Holder, Access Seeker or Expansion Party objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied,
- then the Access Holder, Access Seeker or Expansion Party may within 30 days of being notified of DBCT Management's refusal to give its consent to a proposed amendment to the Terminal Regulations, notify DBCT Management and the QCA of its objection to DBCT Management not providing consent for the proposed amendment.
- (2) If, in response to an objection notified to the QCA by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(g)(1) of this Undertaking or any corresponding provision of an Access Agreement), the QCA determines that the criteria in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied, then:
- (A) DBCT Management's consent to the proposed amendment will be deemed to have been given; and
  - (B) the proposed amendment will be made.
- (h) **(Protection of DBCT Management)** Subject to DBCT Management complying with Section 6.2(b), DBCT Management will not be liable to the QCA, Rail Operators or Access Seekers (and the Standard Access Agreement will provide that DBCT Management will have no liability (on any basis whatsoever) to an Access Holder which executes it) as a result of DBCT Management consenting to an amendment to the Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by Section 6.2(c). For clarification, this does not affect DBCT Management's obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Undertaking or a relevant Access Agreement.
- (i) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Regulations available to each Access Holder, Access Seeker, Rail Operator and the QCA (which may be by displaying it on DBCT Management's website).

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## 7 Information provision

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

DBCT Management will comply with any such request by the date stated in the notice, unless there is a reasonable reason for non-compliance. Information or documents provided to the QCA may be subject to obligations of confidence in accordance with section 239 of the QCA Act.

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## 8 Confidentiality requirements

### 8.1 Confidential Information to be kept confidential

Subject to Section 5.4(c) each relevant Access Seeker, Access Holder and DBCT Management will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged under the negotiation arrangements in Section 5 of this Undertaking or any other part of this Undertaking, except:

- (a) where disclosure is required by any law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or requirement of a stock exchange or regulator;
- (b) with the prior written consent of the relevant Access Seeker or DBCT Management, as applicable;
- (c) where disclosure is to the recipient's professional advisors provided that such professional advisors are under a duty of confidentiality;
- (d) to the extent disclosure is necessary for notifications to financiers, brokers, insurers or claims assessors or reasonably necessary in connection with seeking financing from a bona fide financier, provided that the broker, insurer, claims assessor or financier to whom the disclosure is made is under a legal obligation to keep the information confidential;
- (e) where disclosure is made to any person or body established to provide coordination in the Dalrymple Bay Coal Chain;
- (f) where disclosure is to an expert or the QCA to the extent necessary for resolving a Dispute provided that DBCT Management does not disclose the Confidential Information of one Access Seeker to another Access Seeker without the first Access Seeker's consent, unless directed to by the QCA; or
- (g) to the extent disclosure is required to protect the safety or security of persons or property or in connection with an accident or emergency.

### 8.2 Confidentiality deed

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

### **8.3 Use of Confidential Information**

Without limiting the circumstances specified in this Section 8 in which Confidential Information may be used or disclosed, both the Access Seeker and DBCT Management must otherwise only use Confidential Information provided by the other party for the purposes for which it was provided.

### **8.4 Reporting of aggregated information**

For the avoidance of doubt, nothing in this Section 8 prevents DBCT Management from:

- (a) complying with its obligations under Sections 10.2 and 10.3; or
- (b) disclosing, in the ordinary course of business, financial reporting information which has been aggregated with other information of a similar nature such that it cannot reasonably be, and is not reasonably capable of being, identified with, attributed to or used to identify, any Access Seeker, Access Holder, or Rail Operator.

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## **9 Ring-fencing arrangements**

### **9.1 No related Supply Chain Businesses**

- (a) DBCT Management and its Related Bodies Corporate will not own or operate a Supply Chain Business (other than a Trading SCB) in any market that is related to or uses the Terminal.
- (b) The Trading SCB engages solely in the trading of secondary capacity at the Terminal and any access rights held by the Trading SCB, from time to time, are intended to be held by it as an intermediary in order to facilitate the transfer of such access rights between third parties.
- (c) DBCT Management must procure that the Trading SCB executes the undertaking in the form set out in Schedule H and will provide an executed copy of the undertaking to the QCA before the Trading SCB commences any activities related to the trading of capacity at the Terminal under this Undertaking.

### **9.2 Non-discrimination**

DBCT Management will not:

- (a) engage in conduct for the purpose of preventing or hindering an Access Holder's or Access Seeker's Access;
- (b) unfairly differentiate between Access Seekers, Access Holders, or Rail Operators;
- (c) provide Access to the Trading SCB on more favourable terms than the terms on which DBCT Management provides Access to other Access Seekers or Access Holders; or
- (d) exercise a right or a power (including a right to withhold consent or in respect of the timeliness of any assessment) under an Access Agreement in relation to an assignment or transfer of Access rights or an Access Agreement in a manner that discriminates in favour of, or otherwise unfairly benefits, the Trading SCB relative to other Access Seekers or Access Holders.

### **9.3 Confidentiality undertaking by board members**

DBCT Management will ensure that each of its directors executes a confidentiality deed pursuant to which the relevant director agrees to only use and disclose Confidential Information obtained as a director of DBCT Management in connection with its role as a director of DBCT Management.

## 9.4 Complaint handling

If an Access Holder, Access Seeker, Rail Operator or other affected party considers that DBCT Management may have breached one or more of its obligations under this Section 9 they may raise a dispute in respect of such complaint in accordance with Section 17 of this Undertaking.

## 10 Reporting by DBCT Management

### 10.1 Regulatory accounts

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

- (a) **(Asset base details)** the opening Regulated Asset Base value for the relevant Financial Year — by asset class/type consistent with the asset class/types used to determine the initial capital base;
- (b) **(Indexation of asset base)** the amount of indexation of the Regulated Asset Base calculated for the relevant Financial Year — by asset class/type;
- (c) **(Depreciation)** the amount of depreciation calculated for the relevant Financial Year — by asset class/type;
- (d) **(Corporate overheads)** DBCT Management’s aggregate permitted corporate overheads for the relevant Financial Year and its allocation of them to each Terminal Component;
- (e) **(New assets)** the value of any new assets (capital expenditure) acquired during the relevant Financial Year — by asset class/type. Capital Expenditure is to be identified as either replacement or expansionary Capital Expenditure, and is to include information relating to the estimated life of each new asset;
- (f) **(Disposals)** asset disposals for the relevant Financial Year — by asset class/type;
- (g) **(Operating and maintenance costs)** the actual operating and maintenance costs incurred for the relevant Financial Year including minor capital expenditure not exceeding \$3 million for the Financial Year – at a level of detail to be determined by the QCA. This should separately identify any minor Capital Expenditure recovered through the Operation & Maintenance Charge;
- (h) **(Variances)** an explanation for any significant variance in actual capital expenditure and/or operating and maintenance costs, and forecast capital expenditure and/or operating and maintenance costs for the relevant Financial Year; and
- (i) **(Apportionment)** where a cost for the Terminal Component has been apportioned among multiple Terminal Components, details of the relevant apportionments and the basis of the allocation, and how that is consistent with the Cost Allocation Manual (or, where none exists, the Cost Allocation Principles).

### 10.2 Indicators relating to compliance with this Undertaking

DBCT Management will Publicly Report on an annual basis the following information:

- (a) **(Indicative Access Proposals)** the number and percentage of total Indicative Access Proposals provided within the applicable timeframe;

- (b) **(Access Applications)** the number and percentage of Access Applications received for which an extension of time for provision of an Indicative Access Proposal was sought by DBCT Management;
- (c) **(Response times)** the average delay (in days) taken to provide an Indicative Access Proposal not provided within the applicable timeframe;
- (d) **(Disputes)** the number of instances where a Dispute has been referred to dispute resolution in accordance with Section 17;
- (e) **(Negotiation periods for successful outcomes)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (f) **(Negotiation periods where no Access Agreement signed)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of any reason other than the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (g) **(Access Transfer Applications)** in respect of the Access Transfer processes set out in Section 5.13, the following:
  - (1) the number of requests received for a transfer of rights or entitlements; and
  - (2) the period taken to resolve each transfer, being in each case the period from the date of receipt of the request and ending on the earliest of the date that:
    - (A) an Access Agreement facilitating the transfer was executed by DBCT Management;
    - (B) DBCT Management gave notice to the transferor that consent for the transfer was refused; or
    - (C) any notice was given to the QCA of a dispute in relation to the purported transfer.
- (h) **(Access Agreements concluded)** the number of instances where a negotiation period that had commenced, ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (i) **(Complaints)** written complaints received by DBCT Management in relation to its compliance with this Undertaking; and
- (j) **(Other)** any other performance measure requested by the QCA, provided that DBCT Management is not required to Publicly Report any information which the QCA accepts it would not disclose in the same circumstances under section 239 of the QCA Act (although, in such cases, the QCA may require DBCT Management to comply with alternative publication arrangements).

### 10.3 Indicators relating to service quality

DBCT Management is required to Publicly Report on the following service quality key performance indicators for the Terminal on a quarterly basis:

- (a) **(System delivery):**
  - (1) number of trains requested by the Operator and scheduled by the rail providers to arrive at the Terminal;
  - (2) actual number of trains completing unloading at the Terminal;
  - (3) number of tonnes of coal scheduled to be delivered to the Terminal; and

- (4) number of tonnes of coal actually delivered to the Terminal,  
for each month of the quarter.
- (b) **(Inloading performance):**
- (1) average train unloading time at the Terminal (on a Terminal job-open to job-close basis); and
  - (2) average train unload time (from permission to unload the train until unloading of the last wagon is complete),  
for each month of the quarter.
- (c) **(Stockyard performance):**
- (1) average stock-build time per parcel; and
  - (2) average stock-residence time per parcel,  
for each month of the quarter.
- (d) **(Out-loading performance):**  
in respect of each outloading conveyor:
- (1) average gross load rate per vessel class – first coal to last coal; and
  - (2) average utilisation of out-load conveyors,  
for each month of the quarter.
- (e) **(Vessel performance):**
- (1) number of vessels (by class);
  - (2) average number of parcels per vessel (by class);
  - (3) total tonnes per vessel (by class); and
  - (4) total tonnes shipped,  
for each month of the quarter.
- (f) **(Vessel queuing)** (vessels which have arrived and are awaiting berthing to load):
- (1) average daily total vessels in queue;
  - (2) average daily number of vessels in queue where relevant coal is not yet available to be railed to the Terminal (“dead ships”);
  - (3) vessel queuing times;
  - (4) queue ordering; and
  - (5) average waiting time to berth at anchor,  
for each month of the quarter.
- (g) **(Operating efficiency)** inloading and outloading.
- (h) **(Environmental performance):**
- (1) number of times during each month of the quarter that the “management objective” (as provided for in the Terminal’s environmental licence and approvals) in dust deposition was exceeded; and
  - (2) number of times during each month of the quarter that the “acoustic quality objective” (as provided for in the Terminal’s environmental licence and approvals) was exceeded.
- (i) **(Other)** any additional or alternative service quality key performance indicators that the QCA, DBCT Management and Access Holders agree from time to time.

## 10.4 Review of reporting provisions

The QCA may:

- (a) review the operation of Section 10.3 from time to time; and
- (b) if, as a result of the review, the QCA considers that any additional or alternative service quality key performance indicators should be specified in Section 10.3, the QCA may, notwithstanding Section 10.3(i), require the additional or alternative service quality key performance indicators to be specified.

## 11 Pricing arrangements

### 11.1 Interpretation of Pricing Provisions

In this undertaking, the following principles of interpretation shall apply:

- (a) **(Single meaning where only Socialisation applies)** for so long as Access to the Terminal continues to be priced on a Socialised basis, such that there is a single Annual Revenue Requirement for the entire Terminal, the Terms and definitions of this Undertaking relevant to pricing apply to all Access collectively; and
- (b) **(Alternative meanings where Differentiation applies)** where, pursuant to Section 11.13, Access to the Terminal is charged to one or more Access Holders on a Differentiation basis, such that multiple Regulated Asset Bases, and Annual Revenue Requirements exist in respect of various Terminal Components, the terms and definitions of this Undertaking relevant to pricing apply to each Terminal Component separately.

### 11.2 Pricing objectives

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

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

### 11.3 Access Charges

Access Charges for each Terminal Component will comprise two parts:

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

- (b) an Operation & Maintenance Charge.

#### 11.4 Reference Tariff

- (a) **(Applies to Reference Tonnage)** A Reference Tariff will apply to all Reference Tonnage, or where Section 11.1(b) applies, a different Reference Tariff for the Reference Tonnage in respect of each Terminal Component.
- (b) **(Revenue Cap)** Each Reference Tariff for each Terminal Component will be set such that, in each Financial Year, the Revenue Cap for that Terminal Component will be recovered by DBCT Management over the Aggregate Reference Tonnage for that Terminal Component.
- (c) **(TIC)** Each Reference Tariff will comprise a single component Terminal Infrastructure Charge (TIC), being an amount per tonne payable by a relevant Access Holder at a relevant time, calculated (and adjusted as required) in accordance with Schedule C, Part A.
- (d) **(Reviews of Reference Tariff, etc)** On each occasion referred to in Schedule C, Part A, Sections 4(c), 4(e) and 4(h), DBCT Management will (and, on each occasion mentioned in Section 12.5(o), DBCT Management may, but is not obliged to) submit to the QCA a request for the QCA to approve an appropriate amendment of each relevant ARR, Revenue Cap and Reference Tariff, to the extent that they are affected by the occasion referred to in Schedule C, Part A, Sections 4(c) and 4(f) or Section 12.5(o) (as the case may be), in accordance with Schedule C, Part A. They will be amended (effective from the relevant date in Schedule C, Part A, Section 4) when that approval is given by the QCA.
- (e) **(ARR notified to Access Seekers)** Where a Reference Tariff has been calculated from the ARR, that Reference Tariff will be an acceptable means by which DBCT Management provides Access Seekers with information about the matters listed in Sections 101(2)(a) to (c) of the QCA Act (as provided for in accordance with Section 101(4) of the QCA Act).

#### 11.5 Excess Charge

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

#### 11.6 Year End Adjustment

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

#### 11.7 Increment

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

#### 11.8 Provisional Increment Repayment

The Provisional Increment Repayment (if any) will apply where DBCT Management has retained an amount in accordance with Schedule C, Part B, Sub-Section 4(a) (the Provisional

Increment) but that amount must subsequently be repaid to relevant Access Holders pursuant to Schedule C, Part B Sub-Section 4(e).

### 11.9 Payment and adjustment of Capital Charges

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

### 11.10 Operation & Maintenance Charge

- (a) **(Terminal Operating Costs recovery)** Terminal Operating Costs will be recovered from each Access Holder through the Operation & Maintenance Charge. The Operation & Maintenance Charge for each Access Holder will be calculated on the basis outlined in the Standard Access Agreement and otherwise in accordance with the Operations & Maintenance Contract.
- (b) Where a Differentiated Expansion Component exists and Terminal Operating Costs are required to be allocated between different Terminal Components, then the Operation & Maintenance Charge for each Access Holder will be calculated in accordance with the following procedure:
  - (1) the quantum of Terminal Operating Costs, and the proposed allocation among Terminal Components, will be advised to DBCT Management by the Operator. The Operator will determine the allocation in accordance with Section 11.11(a); and
  - (2) DBCT Management will review the quantum and allocation proposed by the Operator and submit the proposed quantum and allocation to the QCA annually for approval, indicating, where relevant, any variation it considers necessary to comply with Section 11.10(c)(3);
  - (3) DBCT Management will recover the Operation & Maintenance Charge from Access Holders in accordance with the QCA's decision.
- (c) **(Notifications, payments and adjustments)** DBCT Management will:
  - (1) notify Access Holders of estimated Terminal Operating Costs annually in advance;
  - (2) recover such estimated costs monthly;
  - (3) notify Access Holders of any applicable adjustment at the end of each Financial Year – to recover any shortfall or to reimburse Access Holders in the event of over-recovery by DBCT Management; and

- (4) recover or reimburse at the end of each quarter and at the end of a Financial Year (as the case may be), such amount (if any) as referred to in Section 11.10(c)(3).

### 11.11 Cost Allocation

- (a) **(Cost allocation as per Cost Allocation Manual)** Where this undertaking provides for:
- (1) allocation of Terminal Operating Costs among multiple Terminal Components; or
  - (2) the inclusion in a Regulated Asset Base of Capital Expenditure not related to a Terminal Capacity Expansion, and there are multiple Terminal Components,
- the cost in question is to be allocated in accordance with the Cost Allocation Manual or, if no Cost Allocation Manual exists, in accordance with the Cost Allocation Principles. Any dispute as to the allocation of costs in accordance with the Cost Allocation Manual may be referred under Section 17 of the Undertaking.
- (b) **(Request for Cost Allocation Manual)** When the first Price Ruling is made, the QCA shall request that DBCT Management prepare a draft Cost Allocation Manual pursuant to section 159 of the QCA Act.
- (c) **(Preparation of draft Cost Allocation Manual)** DBCT Management will prepare and submit to the QCA for approval a draft Cost Allocation Manual within 60 days of a request from the QCA to do so.
- (d) **(Preparation of revised draft Cost Allocation Manual)** DBCT Management shall, if so requested by the QCA, prepare and submit within 60 days of such request, a revised draft Cost Allocation Manual that satisfies the requirements of the QCA.
- (e) **(Consulting in good faith with the Operator)** DBCT Management shall consult in good faith with the Operator in preparing the Cost Allocation Manual and updating it, from time to time.
- (f) **(Approval of Cost Allocation Manual)** The QCA shall prepare the final Cost Allocation Manual in accordance with section 159 of the QCA Act and publish the Cost Allocation Manual in accordance with section 160 of the QCA Act.
- (g) **(Cost Allocation Manual requirements)** The Cost Allocation Manual should:
- (1) provide a transparent basis for assigning costs to separate Terminal Components in different circumstances; and
  - (2) be consistent with the Cost Allocation Principles.
- (h) **(Cost Allocation Principles):**
- (1) Where costs of a Terminal Capacity Expansion should be Socialised, other Non-Expansion Costs should be included in the Existing Terminal's Regulated Asset Base.
  - (2) Where costs of a Terminal Capacity Expansion should not be Socialised, other Non-Expansion Costs should be allocated:
    - (A) **(Identifiable cost)** if the cost is uniquely identified or directly incurred in relation to a particular Terminal Component, to that Terminal Component's Regulated Asset Base;
    - (B) **(Attributable cost)** if the cost is not an identifiable cost, but there is a reasonable causal relationship between the cost and one or more Terminal Components, to the Regulated Asset Bases for those Terminal Components, in proportion to their reasonably estimated cost drivers; and

- (C) **(Non-identifiable and non-attributable cost)** if the cost is neither identifiable nor attributable to a particular Terminal Component, on a reasonable basis between the Regulated Asset Bases for the Terminal Components.

### 11.12 Limits on price differentiation

- (a) Subject to paragraph 11.12(b), DBCT Management will not differentiate Access Charges between Access Seekers or between Access Seekers and Access Holders of a Terminal Component, other than to reflect differences in costs (direct or indirect) or risks to DBCT Management of providing Access. Where DBCT Management proposes a Capital Charge that varies from the Capital Charge applied in respect of Reference Tonnage for that Terminal Component, it must demonstrate to the Access Seeker that the divergence is justified. In doing so, DBCT Management must provide sufficient information to adequately explain the reasons for the divergence.
- (b) For the avoidance of doubt, DBCT Management may differentiate Access Charges applicable to a Differentiated Expansion Components in accordance with an applicable Price Ruling and associated draft amending access undertaking pursuant to Section 12.5(o) and 12.5(q).

### 11.13 Expansion Pricing Principles

In assessing whether or not Differentiation should apply in respect of a proposed Terminal Capacity Expansion, the following principles shall apply:

- (a) where Socialisation of a Terminal Capacity Expansion would decrease the Reference Tariff for users of the Existing Terminal, the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal, such that a single Reference Tariff and Annual Revenue Requirement shall apply to the Existing Terminal (including the Terminal Capacity Expansion) (a **Socialised Expansion**).
- (b) where Socialisation of a Terminal Capacity Expansion would increase the Reference Tariff for users of the Existing Terminal (a **Cost Sensitive Expansion**), subject to Section 11.13(c), the Terminal Capacity Expansion should be treated as a separate Terminal Component, with its own Regulated Asset Base, Reference Tariff and Annual Revenue Requirement (a Differentiated Expansion Component).
- (c) A Cost Sensitive Expansion may be treated as forming part of the Existing Terminal (and therefore, not treated as a Differentiated Expansion Component) where circumstances exist that justify Socialisation. In determining whether there are circumstances that warrant Socialisation, consideration shall be given to:
- (1) the materiality of the increase in the Existing Terminal's Reference Tariff that would be affected by socialising the Cost Sensitive Expansion;
  - (2) the extent to which assets or infrastructure the subject of the Cost Sensitive Expansion will operate wholly or partly, in an integrated way with the Existing Terminal or as a stand-alone development;
  - (3) the extent to which the Cost Sensitive Expansion is likely to benefit users of the Existing Terminal (for example, such as through higher efficiency, reliability or flexibility of the Existing Terminal);
  - (4) any differences in the risks of providing Access to users of the Existing Terminal in respect of additional Terminal Capacity created by the Cost Sensitive Expansion; and
  - (5) any other factor that the QCA considers relevant.

It is acknowledged that there may be circumstances in which parts and not the whole of a Cost Sensitive Expansion may be Socialised.

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## 12 Terminal Capacity Expansion

### 12.1 Procedure for determining Terminal Capacity and System Capacity

- (a) DBCT Management will, at each time required in Section 12.1(k), either:
- (1) **(Estimate capacities)** accept an estimation that has been accepted by the expert as provided for in Section 12.1(m)(3) of the maximum reasonably achievable capacity (measured in tonnes of coal per Financial Year) of:
    - (A) the Terminal (on a “name-plate capacity” basis) (**Terminal Capacity**), including separately identifying the capacity of:
      - (i) the Existing Terminal (on a “name-plate capacity” basis) (**Existing Terminal Capacity**); and
      - (ii) each Expansion Component (on a “name-plate capacity” basis) (**Expansion Component Capacity**), which for clarity may constitute either Socialised Capacity or Differentially Priced Capacity depending upon the nature of the relevant Expansion Component; and
    - (B) the System (**System Capacity**); or
  - (2) **(Determine capacities after advice and consultation)** (to the extent that there is no estimation as provided for in Section 12.1(m)(3) in that regard at the time) acting reasonably and after:
    - (A) taking advice from an independent expert appointed by DBCT Management; and
    - (B) consultation by DBCT Management and that expert with the Operator, Access Holders, any Expansion Parties, and other Service Providers or their respective nominees,
 

determine Terminal Capacity, Expansion Component Capacity and System Capacity (as applicable) having regard to:
    - (C) **(Terminal operating assumptions)** in respect of Terminal Capacity – the following Terminal operating assumptions:
      - (i) DBCT Management’s obligations and Access Holders’ entitlements under Access Agreements (including taking into account historical and reasonably estimated rates of utilisation of the Terminal's capacity, but also having regard to reasonably foreseeable future changes in capacity utilisation rates);
      - (ii) DBCT Management’s requirement to comply with Good Operating and Maintenance Practice;
      - (iii) the Terminal Regulations;
      - (iv) an objective of maximum reasonably achievable capacity for the Terminal without unduly increasing vessel waiting times as a result of the operation of the Terminal;
      - (v) rail and vessel interfaces with the Terminal;

- (vi) the estimated additional capacity which it is anticipated will become available in a relevant Financial Year as a result of any proposed Terminal Capacity Expansion; and
  - (vii) any other matter DBCT Management reasonably considers appropriate;
- (D) **(Terminal operating assumptions – Differentiated Expansion Component)** in respect of Expansion Component Capacity – the Terminal operating assumptions set out at Section 12.1(a)(2)(C), to the extent applicable solely to the Differentiated Expansion Component; and
- (E) **(System operating assumptions)** in respect of System Capacity – the following System operating assumptions (to the extent that such information is available to DBCT Management):
- (i) operating modes of the System;
  - (ii) rail infrastructure characteristics (e.g. single track, double track, passing loops and speed restraints);
  - (iii) the tonnes to be loaded by or on behalf of an Access Holder at each relevant train load out facility;
  - (iv) Terminal Capacity as assessed in accordance with Section 12.1(a)(2)(C) and the capacity and performance implications arising out of Terminal interfaces with rail unloading and vessel loading;
  - (v) quantity, configuration and performance characteristics of locomotives and rolling stock;
  - (vi) capacity and performance of mine loading facilities;
  - (vii) the System Master Plan; and
  - (viii) any other matter DBCT Management reasonably considers appropriate.
- (b) **(Additional assumptions)** For clarification, Terminal Capacity, Expansion Component Capacity and System Capacity are to be:
- (1) estimated making a projected allowance (as applicable to either Terminal Capacity and/or Expansion Component Capacity alone or to System Capacity) for interruptions or loss of capacity from maintenance, repairs, inclement weather, breakdowns, derailments, cancellations, loading and unloading issues (including sticky coal), vessel-types (based on a historical analysis);
  - (2) estimated as at the date of estimation and for the Financial Year in which that date falls and for each of the following two Financial Years; and
  - (3) assumed to continue at no lesser rate indefinitely after the periods referred to in Section 12.1(b)(2), except to the extent that (at the time of making the estimation) DBCT Management or the independent expert are actually aware of a reasonably certain future material decrease in capacity (for example, where DBCT Management is aware of a decrease in capacity caused by a planned shutdown in another part of the System).
- (c) **(Disclosure of process and advice)** Subject to any confidentiality restrictions applying to DBCT Management, DBCT Management must disclose to the QCA, Access Holders, Access Seekers, Expansion Parties, the Operator and other Service Providers its decision making process in relation to its estimations of Terminal Capacity, Expansion

Component Capacity and System Capacity and provide them with a copy of any independent expert report that DBCT Management receives in relation to estimating those capacities. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 12.1(c) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information.

- (d) **(Independent expert)** Any independent expert to be appointed by DBCT Management under this Section 12.1 will be:
- (1) where a group of Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage for that Financial Year object (in accordance with Section 12.1(g)) to the independent expert nominated by DBCT Management, an independent expert appointed by the QCA in accordance with Section 12.1(g); or
  - (2) where a majority of the group of Expansion Parties for an Expansion Component object (in accordance with Section 12.1(g)) to the independent expert nominated by DBCT Management, an independent expert appointed by the QCA in accordance with Section 12.1(g).
  - (3) where Section 12.1(d)(1) and (2) do not apply - an independent expert nominated by DBCT Management.
- (e) **(Notice of proposed independent expert)** DBCT Management will advise all Access Holders (and, where relevant, Expansion Parties) as to the identity of any independent expert it proposes appointing pursuant to Section 12.1(a)(2) and request that any objection to that independent expert be given in writing to DBCT Management within 14 days after receipt of DBCT Management's notice.
- (f) **(Appointment if no objection)** If no Access Holder (and, where relevant, if no Funding Access Seeker) objects in writing to the independent expert nominated by DBCT Management within the 14 day period referred to in Section 12.1(e), DBCT Management will promptly appoint the independent expert nominated by it.
- (g) **(Procedure if objection to proposed independent expert)** If a group of Access Holders or Expansion Parties determined in accordance with Section 12.1(d) objects within the 14 day period provided for in Section 12.1(e):
- (1) DBCT Management will promptly request the QCA to nominate an independent expert, and it will engage the independent expert nominated by the QCA; and
  - (2) the 6 month period referred to in Section 12.1(k)(1) will not commence until the independent expert has been nominated by the QCA.
- (h) **(Independent expert to consult)** DBCT Management must require its independent expert to consult (as far as is practicable, and to the extent that consultation has not already occurred in respect of a relevant estimation of Terminal Capacity, Expansion Component Capacity or System Capacity (as applicable)) with the Operator, Access Holders, any Access Seekers and other Service Providers, or their respective nominees with respect to the factors referred to in Sections 12.1(a)(2)(C), and.12.1(a)(2)(E).
- (i) **(Objection to estimation by independent expert)** Despite Section 17, DBCT Management's estimation of Terminal Capacity, Expansion Component Capacity and System Capacity under Section 12.1(a) may not be disputed or challenged or otherwise subject to review by or on behalf of Access Holders or Access Seekers:

- (1) except on the basis that it has been determined in bad faith, in breach of the Undertaking or an Access Agreement, or on the basis of a manifest error;
  - (2) unless Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage for that Financial Year each object on the same or similar grounds; or
  - (3) unless Expansion Parties whose combined projected Annual Contract Tonnage would amount to greater than 50% of the projected Expansion Component Capacity, each object on the same or similar grounds.
- (j) **(Determination of Capacity conclusive)** The capacity of the Terminal, Differentiated Expansion Component and System Capacity estimated under Section 12.1(a) (or, if applicable, Section 17) will constitute Terminal Capacity, Expansion Component Capacity or System Capacity (as relevant) for the purposes of this Undertaking until it is next reassessed.
- (k) **(Times for re-determination of Capacity)** Terminal Capacity, Expansion Component Capacity and System Capacity will be assessed by DBCT Management in accordance with Section 12.1(a) and will be reassessed during the Term of this Undertaking:
- (1) during each stage of a Feasibility Study being conducted by DBCT Management in accordance with Section 5.10;
  - (2) (subject to Section 12.1(g)(2)) not later than 6 months, or such time as otherwise agreed by the parties, after each of the following:
    - (A) the Completion of each Terminal Capacity Expansion; and
    - (B) the time at which DBCT Management becomes aware of the completion of each material and discrete expansion (such materiality to be determined by DBCT Management acting reasonably) of any other component of the System; or
  - (3) otherwise at DBCT Management's discretion.
- (l) **(Notification of assessments of Terminal Capacity, Expansion Component Capacity and System Capacity)** DBCT Management must promptly notify the QCA, DBCT Holdings, each Access Holder and Access Seeker of each capacity assessment undertaken in accordance with this Section 12.1.
- (m) **(Requirements for expert report process)** The following will apply to an expert report for the purposes of Section 12.1(a):
- (1) subject to confidentiality restrictions applying to DBCT Management, DBCT Management must provide to the expert all relevant information which DBCT Management has or to which it has access, to assist the expert to reach their estimation. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 12.1(m) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information;
  - (2) DBCT Management must, as far as practicable, use reasonable endeavours to work cooperatively with each other Service Provider (for example by regularly providing information relevant to System Capacity) and, as far as practicable, using reasonable endeavours to agree on the joint engagement of experts for the purposes of both this Undertaking and in respect of similar obligations by other Service Providers; and

- (3) if the expert reasonably considers that there is either agreement or broad consensus amongst stakeholders in the Dalrymple Bay Coal Chain as to **Existing Terminal Capacity**, Expansion Component Capacity or System Capacity (such agreement or consensus having been reached having regard to expert reports), the expert must accept that agreement or broad consensus as evidence of **Existing Terminal Capacity**, Expansion Component Capacity or System Capacity (as the case may be) except to the extent that the expert reasonably forms the opinion that there is compelling evidence to the contrary.
- (n) **(Tonnes under Access Agreements must not exceed System Capacity)** DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new Access Agreement) exceed the System Capacity (as determined for a relevant time), unless otherwise required to do so by the Access Undertaking (including pursuant to Section 12.3), statute, or an agreement relating to its tenure of the Terminal including the Framework Agreement or the Port Services Agreement. For clarification:
- (1) **(Access Agreements can be conditional on capacity resulting from a Terminal Capacity Expansion)** this does not prohibit DBCT Management from entering into a Conditional Access Agreement as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on the Completion of the relevant Terminal Capacity Expansion will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the completion of the relevant expansion); and
- (2) **(Undertaking not breached if System Capacity exceeded after good faith reasonable efforts)** DBCT Management will not be in breach of this Undertaking if it has complied with this Undertaking (or made good faith and reasonable attempts to comply) but the re-determination of System Capacity in accordance with Section 12.1(k) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (o) **(Protection of DBCT Management)** Notwithstanding any other provision of this Undertaking, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this Section 12.1, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) to the QCA or any Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder which executes it) for any:
- (1) breach of this Section 12.1;
- (2) delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity, Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
- (3) one or more factors related to utilisation of capacity of the Terminal, or any other part of the System subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under a Standard Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor (provided that such factor is not a

- breach by DBCT Management of any other part of this Undertaking or an Access Agreement); or
- (4) any defect, error or omission on the part of the independent expert appointed under Section 12.1.
- (p) **(Recovery of independent expert's costs)** The costs of an independent expert appointed under Section 12.1(d):
- (1) following the Completion of and handover to the Operator of a Terminal Capacity Expansion will be borne by DBCT Management, and may be included in the Regulated Asset Base (of the Existing Terminal or Differentiated Expansion Component, as relevant) as an Other Cost in accordance with Section 12.5(a)(3)(B); and
  - (2) in all circumstances other than as described in Section 12.1(p)(1), be borne by DBCT Management.
- (q) **(Provisional allocation pending determination of Capacity)** Notwithstanding any other provision of this Undertaking, DBCT Management may, on a provisional basis, allocate after the Completion of a Terminal Capacity Expansion the anticipated increase in Terminal Capacity and Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) until Terminal Capacity, Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) and System Capacity is determined in accordance with Section 12.1(k).

## 12.2 Terminal Capacity Expansion consultation

- (a) **(Meeting agendas)** DBCT Management will hold meetings with Access Holders and, where they exist, Expansion Parties not less than twice per Financial Year to consult in good faith upon the following issues:
- (1) current Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (2) constraints on current Terminal Capacity, Expansion Component Capacity and System Capacity including the impact on vessel waiting times and Access Holder transport costs;
  - (3) future contracts/forecasts that may impact on Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (4) significant issues relevant to Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (5) the timing and nature of the next Terminal Capacity Expansion (if any) and the impact on current capacity requirements, pricing and the Terminal Master Plan and System Master Plan; and
  - (6) any proposed changes to the Terminal Regulations.
- (b) DBCT Management will also hold such meetings to consult in good faith upon these issues in respect of Expansion Component Capacity with Differentially Priced Access Holders for the relevant Expansion Component.
- (c) **(Meeting administration)** DBCT Management will distribute, in a timely manner, agendas, detailed briefing material and a copy of the minutes of each of these meetings to all Access Holders, Expansion Parties, DBCT Holdings and the QCA.
- (d) **(Separate meetings with Expansion Parties)** For the avoidance of doubt, nothing in this Section 12.2 limits or restricts DBCT Management from meeting separately with

Expansion Parties to the extent that the matters raised relate only to a Differentiated Expansion Component.

### 12.3 General obligation to undertake Terminal Capacity Expansions

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

- (1) **(Accommodate growth)** accommodate the actual and reasonably anticipated future growth of demand (having regard to Access Applications received by DBCT Management and other relevant factors) for the use of the Terminal by Access Holders and Access Seekers;
- (2) **(Eliminate shortfalls in Terminal Capacity)** eliminate sustained shortfalls in actual Terminal Capacity below the aggregate of Annual Contract Tonnages of Access Holders, whatever the reason for such shortfalls;
- (3) **(Good Operating and Maintenance Practices)** ensure that the Terminal complies with Good Operating and Maintenance Practice in respect of quality standards for such facilities, good environmental practice and applicable environmental standards; and
- (4) **(Laws)** comply with Approvals and applicable laws,

provided that DBCT Management will nevertheless have regard to the System Master Plan and the expected capacity of other components of the System, with the intention that the capacity of the Terminal will (as far as practicable and economic and can reasonably be anticipated) not significantly and disproportionately exceed System Capacity for more than 12 months after the Completion of a Terminal Capacity Expansion.

(b) **(Factors to be taken into account)** It is recognised that:

- (1) the name-plate capacity of each individual component of the System will, on a "stand alone" basis at all times, be likely to exceed the aggregate System Capacity to some extent; and
- (2) DBCT Management does not have any control over any part of the System other than the Terminal, and DBCT Management's estimate of expected capacity of the other components of the System will have limited accuracy (for example, because of changes in or operation of the System or the operation of any upstream components of the System in relation to the Terminal, delays in expansions of other parts of the System (including in the circumstance in which another Service Provider delays an expansion which was provided for in a System Master Plan) and other differences to DBCT Management's assumptions).

(c) **(Protection of DBCT Management)** Accordingly DBCT Management will not have any liability to the QCA or an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 12.3, even if it does not actually comply with this Section 12.3.

### 12.4 Accommodation of Capacity

(a) **(General obligation to accommodate Access Applications)** Subject to Sections 5.4(j), 12.7 and 12.8 of this Undertaking, and the proviso in Section 12.3(a), DBCT Management will use best endeavours to ensure that as soon as reasonably practical after DBCT Management receives from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement that will be unconditional and

legally binding and require the Access Seeker to obtain Handling of coal at the Terminal for a period in excess of 5 years (or 10 years or more Handling of coal if acceptance of the offer would require a Capacity Expansion).

- (b) DBCT Management will use its best endeavours to ensure that the Terminal is able to Handle that coal without a material and sustained increase in:

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

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

- (c) **(Bona fide offers and reasonably creditworthy Access Seekers)** Without limiting the circumstances in which DBCT Management may be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement, if:

- (1) DBCT Management receives an offer from an Access Seeker to enter into an Access Agreement on the terms of the Standard Access Agreement, or receives an offer from an Access Seeker to enter into an Access Agreement where any departure of the terms of that offer from the terms of a Standard Access Agreement is not likely to increase cost (direct or indirect) or risks to DBCT Management; and
- (2) the Access Seeker has satisfied DBCT Management (acting reasonably) in accordance with Section 5.9 that the Access Seeker (or any relevant Security provider) has the financial and other relevant resources to enable it to discharge its obligations under the relevant Access Agreement,

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

## 12.5 Undertaking Terminal Capacity Expansions

- (a) **(Terminal Capacity Expansion application to be lodged with QCA)** If DBCT Management proposes to expand the Terminal during the Term of the Undertaking (either because it is obliged to do so under this Undertaking or wishes to do so without being obliged to do so), it will submit to the QCA a Terminal Capacity Expansion application, which must include the following information:

- (1) details of the scope of the proposed Terminal Capacity Expansion, including:
  - (A) confirmation of Terminal operating assumptions and System operating assumptions in the FEL 3 Feasibility Study, including confirmation of the capacity of the Existing Terminal and System Capacity prior to the proposed Terminal Capacity Expansion and the proposed Expansion Component Capacity; and either

- (B) confirmation that, and details of how, the Terminal Capacity Expansion complies with both the current Terminal Master Plan and System Master Plan; or
  - (C) a justification acceptable to the QCA as to why it does not, and need not, comply with the Terminal Master Plan or System Master Plan, but will nevertheless be economically and operationally prudent;
- (2) The terms and conditions of any Access Agreements that are conditional on the Terminal Capacity Expansion, including:
- (A) confirmation that, and details of how, the Conditional Access Agreement complies with the Standard Access Agreement; and
  - (B) a justification acceptable to the QCA as to why the Conditional Access Agreement does not, and need not, comply with the Standard Access Agreement, but will nevertheless be economically and operationally prudent and result in DBCT Management achieving a regulated return that is commensurate with the cost and risks involved with the Terminal Capacity Expansion.
- (3) the estimated cost of the proposed Terminal Capacity Expansion categorised into:
- (A) works that are proposed to be managed under the Tender and Contract Management Process (**TCMP**) (**Contract Costs**); and
  - (B) work and costs which are not to be managed under the TCMP (**Other Costs**);
- (4) the estimated timetable for the proposed Terminal Capacity Expansion;
- (5) a high level project execution strategy, which will, among other things, identify risks and risk mitigation;
- (6) either:
- (A) evidence that the 60/60 Requirement has been complied with; or
  - (B) DBCT Management's justification for the Terminal Capacity Expansion without the 60/60 Requirement having been complied with;
- (7) the process for the tendering and awarding of contracts, standard form contract terms, and the contract management process for the management of contracts post award (these processes together constitute the TCMP);
- (8) the process by which costs will be expended, tracked and managed if they are not covered by the TCMP; and
- (9) an application for a Price Ruling in respect of the Terminal Capacity Expansion, if one has not already been made.
- (b) (**Monthly reporting to QCA**) DBCT Management will also submit to the QCA (with a copy to each Access Holder) a monthly report setting out:
- (1) the status of each contract awarded under the TCMP, including the degree of completion and the anticipated final cost inclusive of actual and provisioned variations;
  - (2) the status of each element of the Other Costs, including the costs incurred, the degree of completion and the anticipated final costs; and

- (3) if anticipated final costs vary from the costs initially forecast, details of and the reasons for the variation.
- (c) **(QCA to confirm Price Ruling following application for Expansion)** Following receipt of an application under 5.12(a)(2), the QCA will provide to DBCT Management and each Expansion Party notice of, in respect of a relevant Expansion Component:
- (1) where a Price Ruling has been made in accordance with Section 5.12(c), the content of the QCA's ruling and details of any material changes apparent in the application which may require a new or varied ruling to be made, including the extent to which the circumstances of the Expansion Component vary from the assumptions made in the original Price Ruling;
- (2) where a Price Ruling has not been made in accordance with 5.12(c), but a Price Ruling Application has been made under Section 5.12(a)(2) or 12.5(a)(9), a copy of the Price Ruling Application and information on the QCA's process for determining a Price Ruling for that Terminal Capacity Expansion.
- (d) **(DBCT Management to provide information to QCA)** DBCT Management will provide all information required by the QCA or any advisor to the QCA to enable the QCA to assess the prudence of any proposed or actual Capital Expenditure and Different Terms. Any information provided by DBCT Management and nominated as confidential will be handled by the QCA in accordance with the confidentiality provisions of the QCA Act.
- (e) **(QCA's acceptance of prudence of contract costs)**
- (1) Subject to 12.5(e)(3), the QCA will accept that capital expenditure in respect of a proposed Expansion Component is prudent and will include it into the Regulated Asset Base (of the Existing Terminal, or Differentiated Expansion Component, as applicable) following Completion of the Terminal Capacity Expansion if DBCT Management can demonstrate and the QCA is satisfied that:
- (A) the scope of the works complies with Section 12.5(f) and the requirements of that Section have been met; and
- (B) the standard and specifications of the works is appropriate, as provided for in Section 12.5(g) and the requirements of that Section have been met; and
- (C) the works were undertaken in accordance with the approved TCMP or were otherwise reasonable, as provided for in Sections 12.5(i), 12.5(j), 12.5(k) and 12.5(l) and the requirements of those Sections have been met.
- (2) In the event that the QCA considers that any elements specified in Section 12.5(e)(1) are not satisfactorily met, the QCA will undertake an assessment of the prudence of the capital expenditure as if the works were Other Costs, as provided for in Section 12.5(m). In undertaking this assessment, the QCA will take into account the extent to which DBCT Management has achieved compliance with the expansion approval process outlined in this Section 12.5, including consistency with any assumptions associated with a Price Ruling.
- (3) Any dispute in relation to whether the QCA should be satisfied as to any of the elements specified in Section 12.5(e)(1) is to be resolved in accordance with Section 17.4.
- (f) **(QCA's acceptance of scope of works)**

- (1) The QCA will accept the scope of the proposed Terminal Capacity Expansion if it is satisfied that:
    - (A) the scope is consistent with the current Terminal Master Plan and System Master Plan and applicable laws;
    - (B) the 60/60 Requirement has been complied with; and
    - (C) (together with any other relevant expansions of one or more components of the System) the Terminal Capacity Expansion will result in an increase in System Capacity and will not be expected to result in Terminal Capacity significantly and disproportionately exceeding System Capacity for more than 12 months after Completion of a Terminal Capacity Expansion.
  - (2) The QCA will accept or not accept the scope within 20 Business Days of being provided with all of the information it requires to assess the proposed works and the criteria listed in Section 12.5(f)(1). If the QCA does not accept the scope of the proposed works, it will give reasons in writing.
- (g) **(QCA's acceptance of standard and specifications of works)**
- (1) The QCA will review the standard and specifications of works relating to a Terminal Capacity Expansion and all relevant contract terms to ensure that the works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement, or, in the case of contract terms, are not likely to materially adversely impact on a prudent balance between price and risk.
  - (2) The QCA will accept or not accept on a contract by contract basis the standard, specifications, and contract terms for the works within 20 Business Days of receipt of the technical specifications, design drawings and contract terms for the works and any other information needed by the QCA to review the standard, specifications and contract terms for the works. If the QCA does not accept the standard, specifications and contract terms of the works, it will give reasons in writing.
  - (3) If DBCT Management amends the submitted technical specifications and/or design drawings and/or material contract terms after an approval by the QCA, DBCT Management will immediately advise the QCA of the changes. The QCA will accept or not accept the changes.
- (h) **(60/60 Requirement)**
- (1) **(What is the 60/60 Requirement)** In this Section 12.5, the "60/60 Requirement" is satisfied when:
    - (A) DBCT Management has executed Access Agreements from Access Holders, each of which provides for the Handling of coal for a period of at least 10 years duration for at least 60% of the proposed Terminal Capacity increment; and
    - (B) 60% of all Access Holders and Expansion Parties (as determined by their Annual Contract Tonnages reduced by the relevant exclusions set out in Section 12.5(h)(1)(C)) do not oppose the Terminal Capacity Expansion, having been given the information and notice in Section 12.5(h)(2) at least 15 Business Days before it is determined whether or not the 60/60 Requirement has been satisfied.

- (C) The relevant exclusions are the tonnages of any Access Holder of existing capacity at the Terminal where the Access Holder is:
- (i) legally and beneficially, the same entity as; or
  - (ii) a related body corporate of an Access Holder that is legally and beneficially, the same entity as,
 

an Expansion Party that is within Section 12.5(h)(1)(A). For clarification, where an Expansion Party or Access Holder is, or acts on behalf of, a joint venture, the Expansion Party or Access Holder will only be "legally and beneficially" the same, in respect of both an Access Agreement (or Existing User Agreement) and an Access Application or two or more Access Agreements (or Existing User Agreements) and Access Applications, where each of the entities comprising the joint venture relating to each relevant Access Agreement (or Existing User Agreement) and Access Application is the same (or a related body corporate of the same) entity in each context.
- (2) **(DBCT Management to provide information for 60/60 Requirement process)**  
 DBCT Management will provide the Access Holders and Expansion Parties referred to in Section 12.5(h)(1)(B) relevant to a proposed Terminal Capacity Expansion with the following information, for the purposes of determining whether the 60/60 Requirement can be complied with in respect of a proposed Terminal Capacity Expansion:
- (A) outline details of the scope of the proposed Terminal Capacity Expansion works;
  - (B) details of how the Terminal Capacity Expansion complies with the current Terminal Master Plan and System Master Plan;
  - (C) without limitation to Section 5.10, provide a copy of the capacity assessment undertaken in accordance with Section 12.1 which separately identifies the capacity of the Existing Terminal and the proposed Expansion Component Capacity;
  - (D) cost estimates for the proposed Terminal Capacity Expansion and each element of the Terminal Capacity Expansion, including contingency, financing and escalation allowances;
  - (E) a schedule of each element of the proposed Terminal Capacity Expansion;
  - (F) the projected total Terminal Capacity and System Capacity following the Terminal Capacity Expansion;
  - (G) a high level project execution strategy, which strategy will, among other things, identify risks and risk mitigation;
  - (H) a schedule of likely reductions in Terminal Capacity and System Capacity during construction;
  - (I) an outline of Existing User Agreement tonnages, Access Agreement tonnages, Conditional Access Agreement tonnages and Access Application tonnages and contract periods;
  - (J) an estimate of what effect the proposed Terminal Capacity Expansion will have on each Terminal Component's Capital Charges and Operation and Maintenance Charges;

- (K) a notice that the above information is being expressly provided in contemplation of the 60/60 Requirement (even if the notice was given prior to the Commencement Date)
  - (L) where a Price Ruling has been made in respect of a relevant Terminal Capacity Expansion, the content of the QCA's ruling; and
  - (M) where a Price Ruling has not yet been made in respect of a relevant Terminal Capacity Expansion, the application for a Price Ruling filed with the QCA under Section 12.5(a)(9).
- (3) **(60/60 Requirement conclusive)** Once evidence of compliance with the 60/60 Requirement has been provided and accepted by the QCA it will not be subject to further review (provided that the evidence presented was not misleading or deceptive and there has been no dishonesty or manifest error).
- (4) **(60/60 Requirement determines deemed need for Terminal Capacity Expansion)** If Section 12.5(a)(6)(A) applies, the QCA will confirm the sufficiency (or sufficiencies) of evidence of the 60/60 Requirement within 20 Business Days of receipt of the Terminal Capacity Expansion application. If the QCA provides such confirmation, it will be deemed to have accepted the need for the Terminal Capacity Expansion.
- (5) **(QCA review if 60/60 Requirement not met)** If Section 12.5(a)(6)(B) applies, the QCA will, within 3 months of receipt of the Terminal Capacity Expansion application, review whether the Terminal should be expanded in the way proposed by DBCT Management. If the QCA does not accept that the Terminal should be expanded in the way proposed by DBCT Management, it will give reasons in writing.
- (i) **(Tender and Contract Management Processes)**
- (1) **(General principles for QCA approval)** The QCA will approve DBCT Management's TCMP if it is satisfied that it is consistent with the following general principles, namely that the TCMP:
- (A) is in accordance with good industry practice;
  - (B) will generate an efficient and competitive outcome;
  - (C) will avoid conflict of interest or collusion amongst tenderers;
  - (D) is prudent in the circumstances of the Terminal Capacity Expansion project; and
  - (E) will avoid unreasonable exposure to contract variation claims.
- (2) **(Detailed considerations for QCA approval)** In particular, in considering whether or not to approve DBCT Management's TCMP, the QCA will consider whether, (amongst other things):
- (A) there is a clear process for the calling of tenders, including having clear specifications for tenders, and processes for mitigating conflicts of interest (except when it is assessed that calling tenders is likely to be less advantageous than an alternative means of negotiating a contract);
  - (B) (where applicable) there is a tender assessment process which contains clear and appropriate processes for determining the successful tender,

- with any decisions to approve a tender that is not the lowest tender being appropriately justified and documented;
- (C) the basis of payment for works is clearly specified and the basis for undertaking the works is in accordance with good commercial practice;
- (D) there is a process for managing contracts before and after award that accords with good commercial practice for a project of the type and scale of the Terminal Capacity Expansion and provides appropriate guidance on the criteria that DBCT Management should apply to decisions regarding the management of the Terminal Capacity Expansion, including but not limited to:
- (i) safety during construction and operation;
  - (ii) compliance with environmental requirements during construction and operation;
  - (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodation of the reasonable requests of Access Holders and Expansion Parties to change the scope and sequence of construction to suit their needs;
  - (v) a prudent balance between:
    - (A) a higher price in return for more certainty as to final cost;
    - (B) a lower price accepting that final cost may be less certain; and
    - (C) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs; and
  - (vii) minimising total project cost which may at times not be consistent with minimisation of individual contract costs;
- (E) there is a process for managing contract variations and/or escalation that occurs post award of a contract, requiring that reasonable consideration be given to managing the risk of contract variations and/or escalation and the allocation of potential risks during the management of the contract and requiring the provision of clear documentary evidence regarding the nature and reasonableness of any variation and/or escalation; and
- (F) DBCT Management has engaged an auditor in accordance with Section 12.5(l) to monitor compliance with the TCMP.
- (3) **(Notification of TCMP decision by QCA)** The QCA will within 20 Business Days of the QCA receiving all the information it requires to assess the TCMP give DBCT Management a notice in writing whether it will approve or not approve the TCMP, setting out:
- (A) reasons for its decision; and
  - (B) if requested, the way the TCMP should be amended.
- (4) **(Amendment of TCMP)** DBCT Management may at any time and from time to time request amendments to an approved TCMP by giving written notice to the

QCA. Promptly following receipt of a request to amend the TCMP the QCA will approve or not approve the amendments. In considering such amendments the QCA will apply Sections 12.5(i)(1), 12.5(i)(2) and 12.5(i)(3).

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

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

- (A) the scope of the proposed Terminal Capacity Expansion;
  - (B) the current Terminal Master Plan and System Master Plan (or to the extent that there is no current System Master Plan, the considerations DBCT Management is required to have regard to under Section 15.2(c);
  - (C) the extent of current contracted demand, likely future demand and any spare capacity considered appropriate, and the need for capital works to accommodate that demand;
  - (D) the appropriateness of DBCT Management's processes to evaluate and select proposed capital works, including the extent to which alternatives are evaluated as part of the process;
  - (E) the extent to which capital projects that were undertaken were subjected to DBCT Management's evaluation and selection process; and
  - (F) the extent to which consultation has occurred with relevant stakeholders about the proposed capital works.
- (4) **(Factors relevant to standard and specifications)** In assessing the standard and specifications of the works undertaken, the QCA will ensure that the proposed works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement and section 11, Schedule E of this Undertaking.
- (5) **(Factors relevant to reasonableness)** In assessing the reasonableness of the cost of works undertaken, the QCA will have regard to, (among other things):
- (A) the level of such costs and risks relative to the scale, nature, cost and complexity of the project;
  - (B) the circumstances prevailing in the markets for engineering, equipment supply and construction;
  - (C) the manner in which the Terminal Capacity Expansion has been managed, including but not limited to the manner in which DBCT Management has balanced the needs of:
    - (i) safety during construction and operation;
    - (ii) compliance with environmental requirements during construction and operation;
    - (iii) minimising disruption to operating capacity during construction;
    - (iv) accommodating the reasonable requests of Access Holders to change the scope and sequence of the works undertaken to suit their needs;
    - (v) a prudent balance between:
      - (A) a higher price in return for more certainty as to final cost;
      - (B) a lower price, accepting that final cost may be less certain; and
      - (C) costs, schedule and minimising disruption to operating capacity during construction;
    - (vi) minimising whole of asset life costs including future maintenance and operating costs; and

- (vii) minimising the total cost of the Terminal Capacity Expansion which may at times not be consistent with minimisation of individual costs.
- (6) **(Assessing capital expenditure)** In assessing the prudence of capital expenditure undertaken, the QCA will take advice as necessary from independent advisors using appropriate benchmarks and experience, and consult as necessary with relevant stakeholders (the cost of which advisors will be borne by DBCT Management at the discretion of the QCA).
- (7) **(Audit costs)** The costs of the external auditor referred to in Section 12.5(l) and the advisers referred to in Section 12.5(m)(6) (where payable by DBCT Management) will form part of the Other Costs.
- (8) **(Inclusion in asset base)** The QCA will include all prudent capital expenditure into the Regulated Asset Base (of the Existing Terminal if Socialised, or Differentiated Expansion Component if Differentiated).
- (n) **(Preliminary assessment of Other Costs)** If requested by DBCT Management, the QCA will undertake a preliminary assessment of the reasonableness of the Other Costs and shall advise DBCT Management of the results of such assessment. The QCA will not be bound by this assessment when determining the prudence of actual capital expenditure and whether the capital expenditure should be included in the Regulated Asset Base (of the Existing Terminal, or Differentiated Expansion Component as applicable).
- (o) **(Interim Reference Tariffs determined before Completion of Terminal Capacity Expansion)** Prior to the Completion of a Terminal Capacity Expansion DBCT Management must submit a draft amending access undertaking in accordance with Schedule C, Part A, Section 5 of the Undertaking to provide for:
- (1) an interim ARR, Revenue Cap and Reference Tariff (which interim ARR, Revenue Cap and Reference Tariff is based on forecast costs) to apply to the Expansion Component from the first day of the Month following the Month in which a Terminal Capacity Expansion is Completed and handed over to the Operator, until approval by the QCA of an amended ARR, Revenue Cap and Reference Tariff for the Expansion Component which are based on the actual costs of the Terminal Capacity Expansion; and
  - (2) a mechanism for the adjustment of Access Charges for the Expansion Component (to the extent that they are affected by a Terminal Capacity Expansion) so as to reconcile the difference between Access Charges which are based on forecast costs and Access Charges which are based on actual costs, with the purpose that DBCT Management and Reference Tonnage Access Holders will be placed in the same position they would have been in had the Access Charges which were payable in respect of the Expansion Component were originally based on the actual costs of the Terminal Capacity Expansion and not the forecast costs.
- (p) **(Consistency of Interim Reference Tariff with earlier pricing reviews)** Where a draft amending access undertaking is submitted in accordance with Section 12.5(o)(1) above, the interim ARR, Revenue Cap, Reference Tariff and Access Charges to apply to the Expansion Component shall:
- (1) be calculated in accordance with Schedule C, Part A, Section 5 of the Undertaking;
  - (2) include any information about queuing and how the relevant queue is to be managed; and

- (3) be consistent with any relevant Price Ruling.
- (q) **(Adjustment of Interim Reference Tariff etc following Completion and determination of actual costs)** Promptly following the Completion of a Terminal Capacity Expansion and the determination of the actual costs of that Capacity Expansion, DBCT Management must submit a draft amending access undertaking which shall:
  - (1) be calculated in accordance with Schedule C, Part A, Section 5 of the Undertaking;
  - (2) include any updated information as required by section 12.5(o);
  - (3) be consistent with any applicable Price Ruling,
 and which draft amending access undertaking may take the form of a variation to any draft submitted pursuant to Section 12.5(o) if it is not yet approved by the QCA.

### 12.6 Return on capital applicable to Terminal Capacity Expansions

- (a) **(WACC(2))** In the event of a Terminal Capacity Expansion, costs incurred in the Terminal Capacity Expansion and approved by the QCA pursuant to Section 12.5, including construction related financing costs, (which will include a return on capital over the construction period on the Terminal Capacity Expansion expenditure incurred), will be included in the Expansion Component's Regulated Asset Base upon which the ARR and Reference Tariff are determined. The return on capital over the construction period to be included in the Regulated Asset Base (of the Existing Terminal if Socialised, or Differentiated Expansion Component if Differentiated) will be calculated at the WACC(2) Rate.
- (b) **(WACC(3))** The return on capital to apply to the Regulated Asset Base (of the Existing Terminal if Socialised, or Differentiated Expansion Component if Differentiated), when calculating the ARR and Reference Tariffs to apply from the first day of the Month following the Completion and handover to the Operator of the Terminal Capacity Expansion, will be calculated at the WACC(3) Rate.
- (c) **(WACC(1))** The return on capital to apply to other components of the Regulated Asset Base (of the Existing Terminal if Socialised, or Differentiated Expansion Component if Differentiated) will continue to be calculated at the WACC(1) Rate.

### 12.7 Unreasonable and uneconomic proposed Terminal Capacity Expansions

If, having regard to:

- (a) the actual or anticipated long-term demand for the Services;
- (b) the extent to which a Terminal Capacity Expansion under the relevant stage of the Terminal Master Plan would produce capacity in excess of demand;
- (c) the cost of the Terminal Capacity Expansion;
- (d) the extent to which DBCT Management can demonstrate on reasonable evidence that the costs of the Terminal Capacity Expansion would be unlikely to be accepted by the QCA as forming part of the cost base for the purposes of determining Access Charges in respect of that Terminal Capacity Expansion; and
- (e) the long-term nature of DBCT Management's investment in the Terminal,

the cost to DBCT Management of complying with Sections 12.3, 12.4 and 12.5 would be unreasonable and uneconomic, DBCT Management may submit to DBCT Holdings a written proposal that:

- (f) provides details of the above matters; and

- (g) proposes a modification to or temporary delay in the Terminal Capacity Expansion that would otherwise be required to be undertaken under this Section 12, on terms and conditions that are not inconsistent with the objectives in Clause 2.2 of the Port Services Agreement,

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

### **12.8 Inability to proceed with a proposed Terminal Capacity Expansion**

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

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

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

### **12.9 Terminal Capacity Expansions to comply with Terminal Master Plan**

If DBCT Management wishes to undertake a Terminal Capacity Expansion under this Section 12, it will do so by undertaking the next applicable stage or stages of development contemplated by the Terminal Master Plan (which is intended to be integrated with the System Master Plan) that are necessary to at least provide the necessary relevant additional Handling capacity.

### **12.10 Non-expansion Capital Expenditure**

- (a) **(Good Operating and Maintenance Practice and Port Services Agreement)** DBCT Management will incur Capital Expenditure which does not relate to a Capacity Expansion as is necessary to ensure:
- (1) that the Terminal complies with Good Operating and Maintenance Practice; and
  - (2) that DBCT Management complies with its obligations under the Port Services Agreement.
- (b) **(Streamlined approval of Capital Expenditure)** The QCA will be obliged to accept that Capital Expenditure (which does not relate to a Terminal Capacity Expansion) is prudent and include it in the relevant Regulated Asset Base:
- (1) provided that DBCT Management confirms, to the reasonable satisfaction of the QCA, that the expenditure incurred falls within the definition of Capital Expenditure;

- (2) if:
  - (A) the Capital Expenditure is unanimously approved by all Access Holders whose Reference Tariff is calculated by reference to the relevant Regulated Asset Base(s); or
  - (B) no Access Holder at the relevant time objected to the Capital Expenditure within 20 Business Days after receiving written notice of the estimated Capital Expenditure from DBCT Management which expressly drew their attention to this Section; and
- (3) if the Operator has recommended in writing the incurring of the Capital Expenditure.
- (c) **(Inclusion of Capital Expenditure where specific criteria satisfied)** The QCA will accept into the relevant Regulated Asset Base Capital Expenditure which:
  - (1) does not relate to a Terminal Capacity Expansion; and
  - (2) does not comply with all the conditions in Section 12.10(b), if the QCA forms the view that such expenditure is prudent having regard to (among other things):
    - (3) the need for the work to be undertaken for the efficient operation and use of the Terminal having regard to demand, cost benefit and other relevant factors;
    - (4) the scope of the work undertaken;
    - (5) the standard of the work undertaken;
    - (6) the circumstances prevailing in the markets for engineering, equipment supply and construction;
    - (7) safety during construction and operation;
    - (8) compliance with environmental requirements during construction and operation;
    - (9) minimising whole of asset life costs; and
    - (10) the advice of independent advisors using appropriate benchmarks and experience and which advisors are appointed (and paid for) by the QCA or paid for by DBCT Management.

## 13 Terms and conditions of Access

### 13.1 Access Agreements

- (a) **(Standard Access Agreement guide for all access)** The granting of Access will be underpinned by the Standard Access Agreement.
- (b) **(Parties to Access Agreements)** The parties to each Access Agreement will include DBCT Management, DBCT Trustee and the relevant Access Holder.
- (c) **(Consistency with Standard Access Agreement)** If the Access Seeker so requires (although DBCT Management and the Access Seeker are able to agree otherwise), the Access Agreement will, in all material respects be consistent with the Standard Access Agreement.
- (d) **(Different terms)** DBCT Management or an Access Seeker may seek Access on terms which are different (Different Terms) from the Standard Access Agreement, but if either does so:
  - (1) DBCT Management may, acting reasonably:

- (A) decline to agree to any such Different Term (for example if accepting the Different Term would create obligations which would be impractical for it to comply with or incur unreasonable expense which it could not recoup from the Access Seeker or cause it to breach another Access Agreement or Existing User Agreement or materially disadvantage other Access Holders); and
  - (B) require that charges other than the Reference Tariff apply if the Different Terms result in a risk profile or costs (direct or indirect) to it different from those that would have applied under the Standard Access Agreement; or
- (2) an Access Seeker may, acting reasonably:
- (A) decline to agree to any such Different Term (for example, if accepting the Different Term would result in a material and adverse risk or cost position that is inconsistent with an appropriate and symmetrical risk and cost allocation between the contracting parties; and
  - (B) require that charges other than the Reference Tariff apply if the Different Terms result in a risk profile or costs (direct or indirect) to it different from those that would have applied under the Standard Access Agreement.

and if the parties cannot agree on any such matter, it may be referred to the QCA for determination.

- (e) **(Standard Access Agreement is guide for access negotiations)** For Access required on terms other than the Standard Access Agreement, the terms of the Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement.
- (f) **(Different Terms in a Conditional Access Agreement)** If an Access Seeker is unwilling to agree to any Different Terms required by DBCT Management in respect of the Conditional Access Agreement and DBCT Management or the Access Seeker Disputes the Different Terms, the Conditional Access Agreement to be executed will take effect subject to any new or amended Different Terms which the QCA determines or approves arising out of the Dispute.
- (g) **(Execution copies to be prepared)** Once an Access Seeker has notified DBCT Management that it is satisfied, subject to Section 13.1(f), with the terms and conditions of the Access Agreement as drafted, DBCT Management will, as soon as reasonably practicable, provide a final Access Agreement to the Access Seeker for execution.
- (h) **(Prompt execution)** The parties will use reasonable efforts to duly execute the final Access Agreement as soon as practicable after negotiations are finalised.

### 13.2 Minimum Term of Access Agreements

- (a) **(10 years where Terminal Capacity Expansion required)**
  - (1) An Access Agreement which will, if entered into by DBCT Management, require a Terminal Capacity Expansion, must:
    - (A) provide for the Handling of coal for a minimum term of 10 years; and
    - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage earlier than the end of that 10 year period, except for any right of DBCT Management to terminate for default.

- (2) A series of Access Agreements which will, if entered into by DBCT Management with an Access Seeker, require a Terminal Capacity Expansion must:
- (A) provide for the Handling of coal for a minimum Weighted Average Term of 10 years; and
  - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage under any Access Agreement in the series earlier than the tenth anniversary of commencement of the term of the latest-dated Access Agreement in the series, except for any right of DBCT Management to terminate for default.
- (b) **(Replacement Agreements for existing mines)** An Access Agreement in respect of an existing mine for which there is already an Access Agreement or Existing User Agreement may be for any term, but:
- (1) if it is for less than 5 years that term and the relevant tonnages must correspond with the expected remaining life of that mine; and
  - (2) no option to extend the term may be granted under it if the term is for less than 10 years.
- (c) **(Constraints on term for new mine)** The term of an Access Agreement relating to a new mine (including a mine where production is being resumed after a full closure or a sustained period of dormancy), may be for any term, but
- (1) if it is for a term of less than 5 years, DBCT Management may reserve the right to terminate it on not less than 12 months' notice if:
    - (A) DBCT Management executes an Access Agreement for a period in excess of 5 years, commencing during that term; and
    - (B) DBCT Management would have been unable to execute that new Access Agreement without a Terminal Capacity Expansion of the Terminal, had the first mentioned Access Agreement not been terminated at that time; and
  - (2) no option to extend the term may be granted under it if the agreement provides for the Handling of coal for a term of less than 10 years.
- (d) **(Increased Tonnage or term is deemed new Access Agreement)** For clarification, increasing the term of, or Annual Contract Tonnage under, an Access Agreement or Existing User Agreement will be taken to constitute a separate Access Agreement in respect of the increased term or tonnage for the purposes of this Section 13.2 (except to the extent that an Access Holder under an Existing User Agreement has a contractual right to require the increase, on terms which are inconsistent with this paragraph).
- (e) **(Clarification re options)** Reference to an Access Agreement in this Section 13.2 does not include an Access Agreement resulting from the exercise of an option to renew or extend the term under a previous access agreement.

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## 14 Whole of supply chain efficiency

### 14.1 Engagement in Dalrymple Bay Coal Chain efficiency improvement

DBCT Management will, on a “best endeavours” basis, engage with other stakeholders to develop and implement mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain (including forums established pursuant to or arising out of a Memorandum of

Understanding dated 1 April 2008 between stakeholders in the DBCT Coal Chain or any subsequent agreement or arrangement replacing or pursuant to that Memorandum of Understanding).

#### **14.2 Amend Undertaking to comply with Agreed Supply Chain Outcome**

If DBCT Management and each Access Holder reach agreement on mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain, DBCT Management will:

- (a) consult with the Access Holders regarding the amendments to this Undertaking reasonably required to implement the agreed mechanisms (to the extent relevant to the Services, the Terminal or this Undertaking); and
- (b) submit to the QCA for approval a draft amending access undertaking incorporating the amendments to this Undertaking which are reasonably required to implement the agreed mechanisms (to the extent relevant to the Services, the Terminal or this Undertaking).

## **15 Master plans**

### **15.1 Terminal Master Plan**

- (a) **(What the Terminal Master Plan is)** The Terminal Master Plan is the framework and reasoning for the expansion of the Terminal in the most logical and efficient way. It is intended to be a part of, and integrated with, the System Master Plan (and to the extent that at any time there is no System Master Plan, having regard to DBCT Management's knowledge of the System and System Capacity for the relevant period).
- (b) **(Schedule F)** Until changed pursuant to the Undertaking and the Port Services Agreement, the Terminal Master Plan is the Terminal Master Plan in Schedule F.
- (c) **(Annual review)** DBCT Management must review the Terminal Master Plan at least annually and otherwise in accordance with its obligations under the Port Services Agreement.
- (d) **(Consultation)** Without limiting Section 15.1(c) DBCT Management must consult with all other Service Providers, Access Holders, Access Seekers and the Operator in respect of any proposed amendment to the Terminal Master Plan.
- (e) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Master Plan available to each other Service Provider and to each Access Holder and Access Seeker, the Operator and the QCA (which may be by way of reference to a website) promptly after each amendment of the Terminal Master Plan.

### **15.2 System Master Plan**

- (a) **(Participate in System Master Planning)** DBCT Management must use its reasonable endeavours to:
  - (1) (to the extent that it has not already occurred at the Commencement Date) reach agreement with each other Service Provider and DBCT Holdings (after consultation with those stakeholders and with all Access Holders and Access Seekers and the Operator) on a System Master Plan; and
  - (2) review (and if necessary revise) that System Master Plan by agreement with each other Service Provider, following ongoing consultation with all the above mentioned stakeholders.

- (b) **(Withdrawal from System Master Planning)** DBCT Management may at any time, acting reasonably propose amendments to an existing or proposed System Master Plan. If after a reasonable time each other Service Provider does not agree to the amendments proposed by DBCT Management, DBCT Management may withdraw its agreement in respect of that System Master Plan in which case there will be assumed to be no System Master Plan for the purposes of this Undertaking. DBCT Management will publish on its website its reasons for withdrawing its agreement to a System Master Plan.
- (c) **(If no System Master Plan)** If at any time for any reason there is (or is deemed to be) no System Master Plan in force, where a provision of this Undertaking requires DBCT Management (or the QCA) to have regard to a System Plan, DBCT Management (or the QCA, as relevant) will have regard to the Terminal Master Plan together with what it reasonably considers to be the present and likely future state of the other relevant components of the System and what DBCT Management (or the QCA, as relevant) reasonably understands to be generally accepted System operating assumptions.
- (d) **(Protection of DBCT Management)** DBCT Management will not be liable to the QCA or an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 15.
- (e) **(DBCT Management's obligations in System Master Planning process)** The following apply to DBCT Management in relation to its endeavours to agree a System Master Plan pursuant to Section 15.2(a) and 15.2(b):
- (1) DBCT Management must fully and promptly provide to all other relevant Stakeholders all information (to the extent that it is available to DBCT Management) which might reasonably be considered to be relevant for the purpose of determining a System Master Plan (but this does not require DBCT Management to disclose any information which could reasonably be considered to be commercially sensitive to it or any Access Holder or Access Seeker); and
  - (2) DBCT Management must, as far as practicable, work cooperatively with each other Service Provider (for example regularly provide information relevant to System Capacity and, as far as practicable, using reasonable endeavours to agree on the joint engagement of experts for the purpose of the Undertaking and similar obligations by other Service Providers).

## 16 Transitional arrangements

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

## 17 Dispute resolution

### 17.1 Disputes

- (a) **(Disputes under this Undertaking)** If any dispute or question arises under this Undertaking or in relation to the negotiation of Access between an Access Seeker or Access Holder and DBCT Management (**Dispute**) then, unless otherwise expressly agreed by both parties, such Dispute will be resolved in accordance with this Section

17 and either party may give to the other party to the Dispute notice in writing (**Dispute Notice**) specifying the Dispute and requiring that it be dealt with in the manner set out in this Section 17.

- (b) (**Disputes under Access Agreements**) Unless otherwise agreed by the parties, Disputes under an Access Agreement or Existing User Agreement will be dealt with in accordance with the provisions of that Access Agreement or Existing User Agreement and are not dealt with under this Undertaking.

### 17.2 Chief Executive resolution

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

- (b) (**Reference to expert**) In the event that:

- (1) resolution is not reached within 10 Business Days of referral; or
- (2) either Chief Executive appoints a nominee in accordance with this Section 17 that is unacceptable to the other party,

the relevant Dispute may, by agreement between DBCT Management and the Access Seeker or Access Holder, be referred for resolution by an expert in accordance with Section 17. Failing such agreement, either party may refer the Dispute to the QCA in accordance with Section 17.

### 17.3 Expert determination

Where a matter is referred to an expert in accordance with Section 17.2 or as otherwise specified in accordance with this Undertaking, then the following will apply:

- (a) (**Appointment**) An expert may be appointed by the parties, or where agreement cannot be reached by the parties within 20 Business Days, in the case of financial matters, by the President for the time being of the Australian Society of Certified Practising Accountants and, in the case of non-financial matters, the President for the time being of the Institution of Engineers, Australia;
- (b) (**Criteria for expert**) In any event the expert must:
- (1) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
  - (2) have no interest or duty which conflicts or may conflict with his or her function as expert, he or she being required to fully disclose any such interest or duty before his or her appointment; and
  - (3) not be a current or immediate past employee of the Access Seeker or DBCT Management or of a Related Body Corporate of either of them;
- (c) (**Acceptance of appointment**) The expert appointed pursuant to this Section 17.3 must not act until the expert has given written notice of the acceptance of his or her appointment to both parties;
- (d) (**Provision of information to expert**) The parties must upon request by the expert, provide or make available to the expert:
- (1) all information in their possession or control (other than Confidential Information);

- (2) all Confidential Information (subject to entry into arrangements to preserve confidentiality which are acceptable to all relevant parties, acting reasonably); and
- (3) all other assistance,
  - that the expert may reasonably require. Any such information or assistance must be provided as soon as reasonably practicable. Any determination made by an expert in relation to a Dispute must be consistent with the provisions of this Undertaking;
- (e) **(Determination to be given to each party)** The expert will provide both parties with a copy of the determination in relation to the Dispute within a reasonable time after his or her appointment;
- (f) **(Confidentiality)** The expert appointed pursuant to this Section 17.3 is required to undertake to the parties in writing to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her duties;
- (g) **(Not arbitration)** Any person nominated as an expert pursuant to this Section 17.3 is deemed to be and must act as an expert and not as an arbitrator. The law relating to arbitration including, without limitation, the Commercial Arbitration Act 2013 (Qld) as it may be amended from time to time, does not apply to the expert or to the determination or to the procedures by which the expert may reach that determination;
- (h) **(Expert's decision final)** In the absence of manifest error, the decision of the expert is final and binding upon the parties. If a party believes that there was a manifest error it may refer the matter to the QCA for a determination. If the QCA determines that there was a manifest error, then the parties may agree to refer the Dispute to another expert in accordance with this Section 17.3, or failing such agreement, either party may refer the Dispute to the QCA for resolution in accordance with Section 17.4; and
- (i) **(Costs of expert)** The costs of the expert and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the expert. If two or more Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.

#### 17.4 Determination by the QCA

- (a) **(Division 5 Part 5 process)** If a Dispute is referred to the QCA in accordance with this Undertaking, then Division 5 of Part 5 of the QCA Act will apply. The QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).
- (b) **(Process in other cases)** If an issue is referred to the QCA for determination as specified in accordance with this Undertaking but does not constitute a Dispute for the purposes of Division 5 of Part 5 of the QCA Act, then the QCA will make a determination through any process that it considers appropriate, provided that:
  - (1) prior to considering the issue, the QCA advises both parties of the process that it will use to make the determination and both parties are given the opportunity to advise the QCA of any concerns they may have with that process and receive a response from the QCA as to how it will deal with such concerns, if at all; and

- (2) the QCA must not make an access determination that is inconsistent with this Undertaking (unless all parties agree and no other relevant stakeholder is adversely affected).
- (c) **(Costs awarded as QCA determines)** The costs of the QCA and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the QCA. If two or more Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.

## Schedule A – Access Application Form and Renewal Application Form

### Access Application Form

[Note: this form to be issued on Access Seeker’s letterhead]

To: Chief Executive Officer  
DBCT Management

### DBCT Access Application

**TAKE NOTICE** that the Access Seeker named below applies for Access to the Services at Dalrymple Bay Coal Terminal pursuant to section 5.2 of the Access Undertaking.

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Access Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Access Application.

<b>Category of Access Application:</b>	
A	A new Access Seeker <i>(please (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness).</i> <input type="checkbox"/>
B	An existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Undertaking). <input type="checkbox"/>
C	An existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by 5.11 of the Access Undertaking. <input type="checkbox"/> <i>For existing Access Holders making a category B or C application, please complete the declaration below or Schedule A attached:</i>
	I confirm that all details required by Schedule A attached in relation to the Services required at DBCT, and any Security required, will be as per our existing Access Agreement <i>[tick box at right]</i> . <input type="checkbox"/> <i>[Note: If box is not ticked, please complete Schedule A attached]</i>
<b>Name</b>	DBCT Management use only Received Date:    Access Application Date: <i>[per section 5.4(b) of the Access Undertaking]</i>
<b>Position</b>	
<b>Signed</b>	
<b>Date</b>	

**Schedule A to the Access Application of [insert name]**

(Note – where the Access Seeker is an Existing Access Holder and the details are relevantly the same as the Services being provided under the Access Agreement, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	<b>Year Mtpa</b>
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year:	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments.	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Access Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient: <ul style="list-style-type: none"> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for each of the first 5 Financial Years in item 7 in respect of which Access is applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul> </li> </ul>	
13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	

<b>Name</b>	<b>Signed</b>
<b>Position</b>	
<b>Date</b>	

**Access Renewal Form**

[Note: this form to be issued on Access Seeker’s letterhead]

To: Chief Executive Officer  
DBCT Management

**DBCT Renewal Application**

**TAKE NOTICE** that the Access Seeker named below applies to renew its Access Application for Access to the Services at Dalrymple Bay Coal Terminal pursuant to section 5.3A of the Access Undertaking.

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Renewal Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Renewal Application.

<b>Category of Renewal Application</b>	
<p>A A renewal of an Access Application which was submitted by a new Access Seeker <i>(please complete the declaration below or (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness)</i>. <input type="checkbox"/></p> <p>I confirm that all details required by Schedule A attached in relation to the Services required at DBCT, and any Security required, will be as per our current Access Application <i>[tick box at right]</i>. <i>[Note: If box is not ticked, please complete Schedule A attached]</i> <input type="checkbox"/></p>	
<p>B A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Undertaking). <input type="checkbox"/></p>	
<p>C A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by 5.11 of the Access Undertaking. <input type="checkbox"/></p> <p><i>For existing Access Holders making a category B or C Renewal Application, please complete the declaration below or Schedule A attached:</i></p> <p>I confirm that all details required by Schedule A attached in relation to the Services required at DBCT, and any Security required, will be as per our current Access Application and existing Access Agreement <i>[tick box at right]</i>. <input type="checkbox"/></p> <p style="text-align: right;"><i>[Note: If box is not ticked, please complete Schedule A attached]</i></p>	
<b>Name</b>	DBCT Management use only Received Date:
<b>Position</b>	
<b>Signed</b>	
<b>Date</b>	

**Schedule A to the Renewal Application of [insert name]**

(Note – where the Access Seeker is an Existing Access Holder and the details are relevantly the same as the Services being provided under the Access Agreement, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.)

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	Year Mtpa
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Renewal Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Coal Resources in the report is consistent with being able to economically extract the net tonnes of coal per annum requested for each Financial Year in item 7 by the relevant Financial Years (including the proportion which is 'Marketable Coal Reserves' as defined in the JORC Code, and the Access Seeker's approach to converting those Coal Resources to Marketable Coal Reserves).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient:</li> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for the first five Financial Year in item 7 in respect of which Access applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul>	
13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	

<b>Name</b>	<b>Signed</b>
<b>Position</b>	
<b>Date</b>	

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

[Standard Access Agreement attached separately]

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

For the avoidance of doubt, the terms and provisions of this Schedule should be interpreted in accordance with Section 11.1 of the Undertaking.

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

#### 1 Monthly Payment (MP)

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

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

where:-

**TIC** is the Terminal Infrastructure Charge applicable for a relevant Financial Year to the Existing Terminal or Differentiated Expansion Component (as relevant) as calculated under Section 3, Part A, Schedule C; and

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

The Monthly Payment will be adjusted during a Financial Year where the TIC is adjusted in accordance with Schedule C, Part A, Sections 4 and 5.

#### 2 Determination of Revenue Cap

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

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

where:

**ARR** is the Annual Revenue Requirement;

**ART** is the Aggregate Reference Tonnage;

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

**INCR** is the sum of any relevant increments approved by the QCA in respect of prior Financial Years pursuant to Schedule C, Part B, Sub-Section 4(d), in each case, in respect of the Existing Terminal or Differentiated Expansion Component (as relevant).

**ETS** is, where the Revenue Cap is being altered by a Review Event resulting from an Early Termination of an Access Agreement, the value of security which was held by DBCT Management in respect of that Access Agreement at the time of Early Termination, to the extent that DBCT Management is entitled under that Access Agreement to call on that security.

### 3 Terminal Infrastructure Charge

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

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

where:-

**RC** is the relevant Revenue Cap; and

**ART** is the relevant Aggregate Reference Tonnage.

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

$$\text{TIC}_i = \frac{RC_i}{ART_i}$$

where:-

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

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

### 4 Determination of ARR

- (a) The ARR that will apply in each Financial Year will be calculated based on:
- (1) principles set out by the QCA in its Final Decision on the Dalrymple Bay Coal Terminal Draft Access Undertaking dated 21 November 2016 and the Cost Allocation Manual (or where none exists, the Cost Allocation Principles);
  - (2) any amendment to the Access Undertaking or the relevant ARR, Revenue Cap or Reference Tariff made pursuant to Sub-Sections 4(c) and (e) below; and
  - (3) any amendment to the relevant ARR, Revenue Cap and Reference Tariff required to reflect the fees charged to DBCT Management by the QCA in respect of that or any prior period (to the extent not previously recovered) pursuant to the Queensland Competition Authority Regulation 2007 or section 150L of the QCA Act in providing regulatory services in connection with the Terminal. An amendment under this Sub-Section may be submitted to the QCA at the same time as the relevant ARR, Revenue Cap and Reference Tariff under Sub-Section 4(b) below, or effected as a later amendment to the relevant ARR, Revenue Cap and Reference Tariff during the relevant Financial Year under Sub-Sections 4(h) or (i) below.

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

- (b) By each 15 May after the Commencement Date, DBCT Management, after consultation with Access Holders, will submit each relevant ARR to apply for the next Financial Year to the QCA for approval.
- (c) The QCA must approve each relevant ARR submitted by DBCT Management if it considers it has been calculated in accordance with Sub-Section 4(a) above.

- (d) Each Reference Tariff will be amended annually on 1 July to reflect the new relevant ARR and any variation to reflect the relevant Increment, Aggregate Reference Tonnage and the Notional Contract Tonnage applicable for that Financial Year.

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

- (e) If a Review Event occurs, and where described in Section 12.5(o), DBCT Management will submit to the QCA for approval:
- (1) in the case of a Review Event referred to in paragraphs (a), (b) or (e)(1)(A) of the definition of Review Event, a request to amend; or
  - (2) in the case of a Review Event referred to in paragraphs (c), (d) or (e) other than (e)(1)(A) of the definition of Review Event or in the case of Section 12.5(o), a draft amending access undertaking to make any necessary amendments to, any one or more of each relevant ARR, Revenue Cap and Reference Tariff to the extent required because of the Review Event. The QCA may approve a request to amend any one or more of each relevant ARR, the Revenue Cap and the Reference Tariff or the draft amending access undertaking (as the case may be) in accordance with this Sub-Section only if it considers it appropriate having regard to the pricing objectives in Section 11.2 of this Undertaking.
- (f) Any amendment made pursuant to Sub-Section 4(e) above will be effective from the first day of the Month following the Month in which the Review Event occurs, except for those Review Events of the kind described at paragraph (e) of the Review Event definition, which will be effective from the relevant 1 July.
- (g) For clarification, if a review under Sub-Section 4(c) above occurs simultaneously with a review under Sub-Section 4(e) they will be reviewed together and become effective on the relevant 1 July.

**Amendment of the ARR, Revenue Cap and Reference Tariff to include fees for regulatory services**

- (h) DBCT Management may submit to the QCA a request to amend the relevant ARR, Revenue Cap and Reference Tariff to the extent required pursuant to Sub-Section 4(a)(3) above. The QCA may approve a request to amend in accordance with this Sub-Section if the amendment is in accordance with Sub-Section 4(a)(3) above. Any amendment made pursuant to this Sub-Section will be effective from the first day of the Month following the Month in which the request to amend is submitted to the QCA.
- (i) In the event that DBCT Management does not submit a request to the QCA pursuant to Sub-Section 4(h) above, in circumstances where the QCA deems amendment to the relevant ARR, Revenue Cap and Reference Tariff are required pursuant to Sub-Section 4(a)(3) above, the QCA may give notice to DBCT Management requiring it to submit a request pursuant to Sub-Section 4(h). If DBCT Management does not submit a request (pursuant to Sub-Section 4(h)) within 14 days of said notice, the QCA may effect amendment to the relevant ARR, Revenue Cap and Reference Tariff in accordance with Sub-Section 4(a)(3). Any amendment made pursuant to this Sub-Section will be effective from the first day of the Month following the Month in which notice is given to DBCT Management requiring it to submit a request pursuant to Sub-Section 4(h).

## **5 Reconciliation of ARR, Revenue Cap and Reference Tariff between the forecast costs of a Terminal Capacity Expansion and the actual costs of a Terminal Capacity Expansion**

- (a) The objects of Sub-Sections 5(b) to 5(f) are:
- (1) to provide for an interim ARR, Revenue Cap and Reference Tariff (which interim ARR, Revenue Cap and Reference Tariff is based on forecast costs) to apply to an Expansion Component from the first day of the Month following the Month in which a Terminal Capacity Expansion is Completed until approval by the QCA of an amended ARR, Revenue Cap and Reference Tariff for the Expansion Component which are based on the actual costs of the relevant Terminal Capacity Expansion;
  - (2) to provide a mechanism for additional actual costs of a Terminal Capacity Expansion to be incorporated into the relevant Regulated Asset Base where those additional actual costs are not determined as at the date of submission (based on actual costs) of a draft amending access undertaking for the Terminal Capacity Expansion; and
  - (3) to provide a mechanism for the adjustment of Access Charges for the Expansion Component (to the extent that they are affected by a Terminal Capacity Expansion) so as to reconcile, in respect of a Terminal Capacity Expansion, the difference between Access Charges which include forecast costs and Access Charges which include the actual costs of a Terminal Capacity Expansion with the purpose that DBCT Management and Reference Tonnage Access Holders will (subject to the interest calculation provided for in Sub-Section 5(e)(2) be placed in the same position they would have been in had the Access Charges for the Expansion Component which were payable were originally based on the actual costs of the Terminal Capacity Expansion and not the forecast costs.
- (b) In accordance with Section 12.5(o), DBCT Management must submit a draft amending access undertaking promptly prior to Completion of a Terminal Capacity Expansion that proposes amendments to the:
- (1) ARR;
  - (2) Revenue Cap; and
  - (3) Reference Tariff,
- for the Expansion Component, on an interim basis so as to incorporate the reasonable forecast costs of the Terminal Capacity Expansion and reflect the QCA's Price Ruling.
- (c) In accordance with Section 12.5(q), DBCT Management will submit a further draft amending access undertaking within such time as is approved by the QCA. That draft amending access undertaking will propose amendments to the:
- (1) ARR;
  - (2) Revenue Cap; and
  - (3) Reference Tariff,
- for the Expansion Component consistent with Sections 11.1, 11.11 and 11.13 of this Undertaking, where necessary to:
- (4) reverse the effects of the amendments referred to in Sub-Section 5(b), that incorporated the reasonable forecast costs of the relevant Terminal Capacity Expansion; and

- (5) (subject to Sub-Section 5(e) and Section 12.5(e) of the Undertaking) instead incorporate the actual costs of the relevant Terminal Capacity Expansion.
- (d) Promptly, and in any event within sixty days, after approval by the QCA of a draft amending access undertaking referred to in Sub-Sections 5(c), DBCT Management will, for each relevant Reference Tonnage Access Holder, and in consultation with the QCA, calculate for the relevant Terminal Capacity Expansion the difference between:
- (1) the Access Charges payable in the Interim Reference Tariff Period, which Access Charges are calculated using the reasonable forecast costs of the Terminal Capacity Expansion referred to in Sub-Section 5(b); and
  - (2) the Access Charges payable in the Interim Reference Tariff Period, which Access Charges are calculated using the actual costs of the Terminal Capacity Expansion referred to in Sub-Sections 5(c),
- where “Interim Reference Tariff Period” means the period on and from the first day of the Month following the Month in which the relevant Terminal Capacity Expansion is Completed to (but excluding) the first day of the Month following the Month in which the QCA approves the Reference Tariff referred to in Sub-Sections 5(c).

DBCT Management will advise each relevant Reference Tonnage Access Holder and the QCA of the calculation referred to in Sub-Section 5(d), promptly, and in any event within one hundred and twenty days, after each date on which the QCA approves the Reference Tariff referred to in Sub-Sections 5(c).

- (e) DBCT Management will, in the Month following the Month in which the calculation referred to in Sub-Section 5(d) (as the case may be) is advised to the QCA, recover or repay in a single payment:
- (1) the difference referred to in Sub-Section 5(d) (as the case may be); and
  - (2) interest on the difference calculated on a Monthly basis from the date the applicable portion of the difference would have been payable under the relevant Access Agreement (had the amended Reference Tariff referred to in Sub-Sections 5(c) applied) to the date of payment of the difference referred to in Sub-Section 5(d) by DBCT Management or the relevant Reference Tonnage Access Holder (as applicable) calculated at a rate equal to a WACC(3) Rate compounded Monthly.
- (f) Where Sub-Sections 5(c) or 5(d) specify a time period by which DBCT Management will do something, the QCA may, on one or more occasions, at its discretion, grant an extension to any time period or due date that applies provided that an application for that extension has been received by the QCA before the expiration of the time period in question.

## Part B – End of Year Adjustments

### 1 Year End Adjustment (YEA)

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

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

where:-

**RT<sub>u</sub>** is the Reference Tonnage for the Access Holder for the Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant);

**ART** is the Aggregate Reference Tonnage for the Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant); and

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

### 2 Rebate Pool

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

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

where:-

**EC<sub>u</sub>** is the Excess Charge (if any) for each RTAH<sub>u</sub> for the Financial Year calculated at Schedule C, Part B, Section 3 in respect of the Existing Terminal or Differentiated Expansion Component (as relevant);

**n** is the number of RTAHs which together hold all ART for the Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant);

**PI** is the Provisional Increment calculated at Schedule C, Part B, Sub-Section 4(b) for the Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant); and

**ATA** is the Additional Tonnage Amount calculated at Schedule C, Part B, Section 5 for the Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant).

### 3 Excess Charge (EC)

(a) Where no Review Event occurs after 1 July in a Financial Year, the Excess Charge (if any) payable by each RTAH<sub>u</sub> (EC<sub>u</sub>) shall be calculated as follows:-

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

where:-

**TIC** is the Terminal Infrastructure Charge in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for that Financial Year calculated at Schedule C, Part A, Section 3;

**TS<sub>u</sub>** is the actual tonnes of coal shipped through the Terminal by a RTAHu during the Financial Year that are Reference Tonnage or Excess Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant); and

**RT<sub>u</sub>** is the Reference Tonnage for the RTAHu for the Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant).

- (b) Where a Review Event occurs after 1 July in a Financial Year, the Excess Charge (if any) payable by each RTAHu (**EC<sub>u</sub>**) in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) shall be calculated as follows:-

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

where:-

- (c) **TIC<sub>A</sub>** is the annualised Terminal Infrastructure Charge in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for that Financial Year calculated at Schedule C, Part B, Section 6;

**TS<sub>u</sub>** is the actual tonnes of coal shipped through the Terminal by a RTAHu during the Financial Year that are Reference Tonnage or Excess Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant); and

**RT<sub>u</sub>** is the Reference Tonnage for the RTAHu in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year.

## 4 Increment

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

- (b) Where:-

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

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

where:-

**TIC** is the Terminal Infrastructure Charge in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year calculated at Schedule C, Part A, Section 3;

**TRTS** is the Reference Tonnage Handled for all Access Holders plus the Excess Tonnage Handled for all Access Holders in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) in the Financial Year (and is the sum of all TS<sub>u</sub> for each RTAHu); and

**RC** is the Revenue Cap in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year.

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

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

where:-

**TIC<sub>A</sub>** is the annualised Terminal Infrastructure Charge in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year calculated at Schedule C, Part B, Section 6;

**TRTS** is the Reference Tonnage Handled for all Access Holders plus the Excess Tonnage Handled for all Access Holders in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) in the Financial Year (and is the sum of all TS<sub>u</sub> for each RTAHu); and

**RC** is the Revenue Cap in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year.

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

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

## 5 Additional Tonnage Amount (ATA)

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

$$ATA = TIC \times AT$$

where:-

**TIC** is the Terminal Infrastructure Charge in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year calculated at Schedule C , Part A, Section 3; and

**AT** is the Additional Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year

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

$$ATA = TIC_A \times AT$$

where:-

**TIC<sub>A</sub>** is the annualised Terminal Infrastructure Charge in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year calculated at Schedule C, Part B, Section 6; and

**AT** is the Additional Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for the Financial Year.

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

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

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

where:

**TIC<sub>i</sub>** is the Terminal Infrastructure Charge in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for each period *i* in the Financial Year calculated at Schedule C, Part A, Section 3;

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

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

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

## Part C Transitional charges from 2010AU

For the avoidance of doubt, and without limitation to Section 11.11 of the 2010 access undertaking, promptly following the Commencement Date, DBCT Management must undertake the reconciliation of Capital Charges and determine a final true up amount as contemplated by Section 11.11 and Part C of that undertaking.

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## Schedule D – Confidentiality deed

### This confidentiality deed

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

1. **DBCT Management Pty Limited**  
ACN 097 698 916  
of Level 15, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000  
(DBCT Management)
2. **[insert name of receiving party]**  
[insert ABN/ACN/ARBN]  
of [insert address]  
(Access Seeker)

### Recitals

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

### This deed witnesses

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

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## 1 Definitions and interpretation

### 1.1 Definitions

In this deed:

**Access Undertaking** means the Dalrymple Bay Coal Terminal Access Undertaking prepared in accordance with the requirements of the *Queensland Competition Authority Act 1997* (Qld) and approved on 16 February 2017 as varied or replaced from time to time;

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

- (a) the disclosure of the information, data or other matter by the Recipient might reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter; or
- (b) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed,  
provided that such information, data or other matter:
- (c) is not already in the public domain;
- (d) does not become available to the public through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Undertaking;

- (e) was not in the other party's lawful possession prior to such disclosure; or
- (f) is not received by the other party independently from a third party free to disclose such information, data or other matter,

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

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

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

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

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

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

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

**Specified Person** means:

- (a) an officer or employee of a Recipient;
- (b) a professional adviser to a Recipient;
- (c) a financier of a Recipient;
- (d) a professional adviser to a financier of a Recipient;
- (e) an officer, employee, or a professional adviser to a related body corporate of a Recipient; or
- (f) an officer or employee of the Operator,

who has a specific need to have access to the Confidential Information for the Express Purpose.

## 1.2 Interpretation

- (a) Terms defined in the Access Undertaking have the same meaning in this deed unless otherwise defined.
- (b) Headings are for convenience only and do not affect interpretation.
- (c) In this deed, unless the context otherwise requires:
  - (1) words importing the singular include the plural and vice versa;

- (2) a reference to any thing (including, but not limited to, any right) includes a part of that thing but nothing in this Clause 1.2(c)(2) implies that performance of part of an obligation constitutes performance of the obligation;
- (3) the term “related body corporate” has the meaning given to that term under the Corporations Act;
- (4) the term “associate” has the meaning given to that term in Section 15 of the Corporations Act;
- (5) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and
- (6) a reference to a person includes that person’s successors and legal personal representatives.

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## 2 Confidentiality

The Recipient must:

- (a) hold the Confidential Information in strict confidence and not disclose, or cause or permit the disclosure of, the Confidential Information, except as permitted under this deed or with the prior written consent of the Discloser;
- (b) not disclose, or cause or permit the disclosure to any person of, any opinion in respect of the Confidential Information or a Document created in accordance with Clause 3(c), except as permitted under this deed;
- (c) keep the Confidential Information and any Documents created in accordance with Clause 3(c) in a way such that it is reasonably protected from any use, disclosure or access which is inconsistent with this deed;
- (d) promptly notify the Discloser if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information;
- (e) do anything reasonably required by the Discloser to prevent or stop a breach or threatened breach of this deed or an infringement or threatened infringement of the Discloser’s rights arising out of this deed by any person, whether by court proceedings or otherwise; and
- (f) maintain such procedures as are reasonably necessary to ensure compliance with this deed by the Recipient and each Specified Person and, upon request, provide the Discloser details of the procedures adopted.

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## 3 Permitted use and disclosure

The Recipient may:

- (a) only use the Confidential Information for the Express Purpose;
- (b) not make use of the Confidential Information to the commercial, financial or competitive disadvantage of the Discloser (but this does not preclude the Recipient from using the Confidential Information in negotiations with the Discloser or in any dispute proceedings, submissions to the Queensland Competition Authority or other proceeding contemplated in the Access Undertaking or the *Queensland Competition Authority Act 1997 (Qld)*);

- (c) create, or cause or permit to be created, a Document which reproduces, is based on, utilises or relates to Confidential Information only if that creation is solely for the Express Purpose; and
- (d) only disclose Confidential Information (including as contained in a Document created in accordance with Clause 3(c)) to a Specified Person, and may only make such disclosure solely for the Express Purpose.

#### **4 Return and destruction of information**

- (a) If requested by the Discloser, the Recipient must promptly return to the Discloser, or destroy or delete as the Discloser directs, all original Documents and copies which:
  - (1) are or contain Confidential Information; and
  - (2) reproduce, are based on, utilise or relate to Confidential Information.
- (b) If a Document or a copy referred to in Clause 4(a) contains information which is Confidential Information of the Recipient, then the Recipient is not required to return that Document but must destroy or delete the portion of the Document containing the Confidential Information of the Discloser.
- (c) Nothing in this clause 4 requires the destruction or return of documentation contained in any board papers or information retained by a professional adviser in accordance with usual professional practice.

#### **5 Operation of this deed**

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

- (ii) the Confidential Information which it, or the Specified Person, proposes to disclose; and
- (B) consult with the Discloser as to the form of the disclosure.

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## 6 Acknowledgment

The Recipient acknowledges that:

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

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## 7 Recipient to ensure others comply

The Recipient must:

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

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## 8 Indemnity

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

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

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## 9 Disclaimer

- (a) Neither the Discloser, nor any of its related bodies corporate nor any of their respective officers, employees or advisers:
  - (1) makes any representation or warranty:
    - (A) as to the accuracy or completeness of the Confidential Information;

- (B) that the Confidential Information has been audited, verified or prepared with reasonable care; or
  - (C) that the Confidential Information is the totality of the information that a prospective Access Seeker may require in order to negotiate an Access Agreement;
- (2) accepts any responsibility for any interpretation, opinion or conclusion that the Recipient or a Specified Person may form as a result of examining the Confidential Information;
- (3) accepts any responsibility to inform the Recipient of any matter arising or coming to the Discloser's notice which may affect or qualify any Confidential Information which the Discloser provides to the Recipient; and
- (4) is liable, and the Recipient covenants not to make any claim or commence or pursue any proceedings against any of them, for any loss of any kind (including, without limitation, damages, costs, interest, loss of profits, or special loss or damage) arising from:
  - (A) an error, inaccuracy, incompleteness or similar defect in the Confidential Information; or
  - (B) any default, negligence or lack of care in relation to the preparation or provision of the Confidential Information.
- (b) The Recipient acknowledges that it is making an independent assessment of the Confidential Information and that it will carry out, and rely solely on, its own investigation and analyses in relation to the Confidential Information.
- (c) Any reliance by the Recipient, or any Specified Person, on any Confidential Information, or any use of any Confidential Information, is solely at its own risk.

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## 10 Governing law and jurisdiction

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

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## 11 Waivers

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

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## 12 Variation

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

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## 13 Entire agreement

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

**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management**

by:

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

\_\_\_\_\_  
Director

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

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

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

by:

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

\_\_\_\_\_  
Director

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

\_\_\_\_\_

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## Schedule E – Services

### 1 Train scheduling

DBCT Management must (subject to availability of trains and factors beyond its control) coordinate cargo assembly windows at the terminal to receive coal parcels and provide train operators and Access Holders with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of coal in each Financial Year.

### 2 Train unloading

If a train carrying an Access Holder's coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the coal) consistent with achieving Handling of the Annual Contract Tonnage of coal for an Access Holder.

### 3 Reclaiming and vessel loading

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive coal) nominated by each Access Holder, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management on behalf of that Access Holder in each Financial Year (as long as the vessel and/or cargo mix required by the Access Holder (or its customer) does not unreasonably impact on the efficiency of the Terminal). It is agreed that historical vessel or cargo mixes prior to 30 June 2005 will be taken generally not to have unreasonably impacted on efficiency; and
- (b) load each Access Holder's coal into a vessel which is nominated by the Access Holder and is available for loading so as to achieve the objective in paragraph 3(a).

### 4 Incidental services

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

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

### 5 Miscellaneous services

If required by an Access Holder or any Approval or statutory authority notified to DBCT Management, DBCT Management must, in accordance with Good Operating and Maintenance Practice, provide the following miscellaneous services to the Access Holder:

- moisture adding;
- compacting;
- surfactant adding;
- dozing;

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

## 6 Stockpiling and blending

- (a) DBCT Management must provide to each Access Holder sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the Access Holder's coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that each Access Holder is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the Aggregate Annual Contract Tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in Section 6(a) and 6(b) are subject to any other obligation of DBCT Management under any Access Agreement or Existing User Agreement with another Access Holder entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:
  - (1) require coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (2) require coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (3) limit the proportions in which coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer each Access Holder's coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile an Access Holder's coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## 7 Prevention of contamination

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

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

## 8 Data provision

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

## 9 Co-ordination

Subject to the Access Holder providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

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

## 10 Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract

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

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

- (2) without limiting Section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

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

#### 11 Standard for Services

- (a) The provision of the above Services by DBCT Management must be carried out with due skill, care and diligence in accordance with this Undertaking, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (1) lowest total whole of life cost;
  - (2) reliability and economy of performance;
  - (3) maximising the effective life of the Terminal; and
  - (4) DBCT Management's non-discrimination obligations under this Undertaking.

## **Schedule F – Terminal Master Plan**

[Terminal Master Plan attached separately]

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## Schedule G – Definitions and Interpretation

### 1. Definitions

In this Undertaking:

**60/60 Requirement** has the meaning given in Section 12.5(h).

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

**Access Agreement** means an access agreement between DBCT Management and an Access Holder negotiated under Section 5 of this Undertaking (or otherwise entered into during the Term) including an Existing User Agreement, and a Differentially Priced Access Agreement, as the context provides.

**Access Applicant** means a person who has submitted to DBCT Management a valid Access Application that has been confirmed by DBCT Management as compliant with Section 5.2 and has not lapsed, expired or otherwise been validly rejected by DBCT Management.

**Access Application** means:

- (a) an application for Access made or deemed to have been made under Section 5.2 of this Undertaking;
- (b) for the purposes of Sections 5.3A, 5.4, 5.7, 5.8, 5.9, and Section 17 only – an Access Application which was duly submitted to DBCT Management prior to the Commencement Date under and in accordance with a previous access undertaking for the Terminal and which has not been dealt with on the Commencement Date. For clarification, the time of the submission of the Schedule A information (before or after the Commencement Date) will not affect the date on which the application is taken to have been received by DBCT Management; and
- (c) for the purposes of Section 5.4 only – an application of the kind referred to in Section 5.10(q)(9)(B) which is made after the Commencement Date,

as renewed from time to time in accordance with this Undertaking.

**Access Application Date** means:

- (a) where paragraph (b) of this definition does not apply, the date that the Access Application was received by DBCT Management; or
- (b) the date that the Access Application was deemed to be made if the Access Application was substantially altered in accordance with Section 5.3A or 5.7.

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

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

**Access Seeker** means a party seeking Access, or increased Access, to the Services and includes a party to a Conditional Access Agreement.

**Access Transfer** has the meaning given in Section 5.13 of this Undertaking.

**Additional Tonnage** means, in respect of a relevant Financial Year, the aggregate of all Excess Tonnage of all Access Holders in that Financial Year which, because of Terminal Capacity, could not

have been Handled unless there had been an Early Termination. For clarification, the Additional Tonnage cannot exceed the relevant annual tonnages the subject of Early Termination.

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

**Aggregate Annual Contract Tonnage** means, in respect of a relevant Financial Year:

- (a) in respect of an Expansion Component, the sum of the Annual Contract Tonnages for only the Differentially Priced Access Holders in respect of that Expansion Component; and
- (b) in respect of the Base Terminal, the sum of the Annual Contract Tonnages for all Access Holders other than Differentially Priced Access Holders in that Financial Year.

**Aggregate Reference Tonnage** means, in respect of a relevant Financial Year:

- (a) in respect of an Expansion Component, the sum of the Reference Tonnages for only the Differentially Priced Access Holders in respect of that Expansion Component; and
- (b) in respect of the Base Terminal, the sum of the Reference Tonnages for all Access Holders other than Differentially Priced Access Holders in that Financial Year.

**Alternative Proposed Standard Funding/Underwriting Agreement** means the alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting Agreement as specified by the QCA under Section 5.10(q)(7).

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

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

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

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

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

**Approval Date** means 16 February 2017.

**Available System Capacity** means, in respect of a relevant time, the amount of System Capacity at that time not contracted to be Handled. It is derived by subtracting the Aggregate Annual Contract Tonnage as at the relevant time from System Capacity at that time. Where that subtraction results in a negative number, it will be taken to be "nil". Where Available System Capacity is to be determined in respect of a future time DBCT Management will estimate it taking

all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**Brookfield Group** means the group of companies that are Controlled by Brookfield Asset Management Inc.

**Business Day** means a day other than a Saturday, a Sunday, or a public holiday in Brisbane.

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

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

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

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

**Coal Guidelines** means the 'Australian Guidelines for Estimating and Reporting of Inventory Coal, Coal Resources and Coal Reserves' published by the Coalfields Geology Council of New South Wales and the Queensland Resources Council or its successor document, as updated from time to time.

**Coal Resources** has the meaning given to it in the JORC Code.

**Commencement Date** means 1 July 2016.

**Completion** means, in respect of relevant works comprising a Terminal Capacity Expansion:

- (a) the works are electrically and mechanically complete; and
- (b) testing and commissioning has been satisfactorily completed (including load commissioning), but where punchlist items (being items intended to be carried out after practical completion and commencement of full operation of the relevant items) are not necessarily complete, and **Complete** and **Completed** have corresponding meanings.

**Conditional Access Agreement** has the meaning given to it in Section 5.4(j) of this Undertaking.

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

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

provided that such information, data or other matter:

- (c) is not already in the public domain;

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

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

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

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

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

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

**Control** has the meaning given to that term in the *Corporations Act 2001* (Cth) and **Controlled** has a corresponding meaning.

**Cost Allocation Manual** means a cost allocation manual prepared by the QCA under s159 of the QCA Act for use by DBCT Management.

**Cost Allocation Principles** has the meaning given in Section 11.11(h).

**Cost Sensitive Expansion** has the meaning given in Section 11.13(c).

**Dalrymple Bay Coal Chain** means all infrastructure relating to raiing and shipping of coal (from mine outloaders to Terminal shiploaders and adjacent infrastructure), excluding Hay Point, generally referred to as the *Dalrymple Bay Coal Chain*, (unless all relevant stakeholders otherwise agree).

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

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

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

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

**Differentiation**, in respect of a Terminal Capacity Expansion, means the exclusion of costs associated with an expansion from an existing Terminal Component's Regulated Asset Base, so as to create a separate Regulated Asset Base, Annual Revenue Requirement and Reference Tariff for the purpose of calculating Capital Charges in respect of the Terminal Capacity Expansion. Where expansion costs are differentiated, they are not shared by the users of existing Terminal Components and **Differentiated** has a corresponding meaning.

**Differentiated Expansion Component** has the meaning giving in Section 11.13(b).

**Differentially Priced Access Agreement** means an Access Agreement under which the Access Charges are to be differentially priced and Services are to be provided by DBCT Management from capacity created by an Expansion Component.

**Differentially Priced Access Holder** means an Access Holder who is party to a Differentially Priced Access Agreement.

**Differentially Priced Capacity** means capacity associated with a Differentiated Expansion Component.

**Differentiated Queue** has the meaning set out in Section 5.4(q).

**Dispute** has the meaning given to that term in Section 17.1.

**Dispute Notice** has the meaning given to that term in Section 17.1.

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

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

**Excess Charge** has the meaning given in Section 11.5.

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

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

**Existing Terminal** means the Terminal as it exists at the Commencement Date together with each Socialised Expansion of that existing Terminal.

**Existing Terminal Capacity** has the meaning given in Section 12.1(a)(1).

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

**Expansion Component** means in respect of a Terminal Capacity Expansion, the Terminal Component the subject of the expansion, as determined in accordance with this Undertaking.

**Expansion Component Capacity** means, for an Expansion Component, the maximum reasonably achievable capacity of that Expansion Component (measured in tonnes per Financial Year) as estimated pursuant to Section 12.1.

**Expansion Parties** means, in respect of an Expansion Component, any Funding Access Seeker or any party to a Conditional Access Agreement associated with that Expansion Component.

**Expansion Pricing Principles** means the principles set out in Section 11.13.

**Feasibility Studies** means in relation to a proposed Terminal Capacity Expansion, a FEL 1 Feasibility Study, FEL 2 Feasibility Study and FEL 3 Feasibility Study.

**FEL 1 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) estimates Terminal Capacity and System Capacity in accordance with Section 12.1 of the Undertaking;
- (b) identifies possible Terminal Expansion Components that will create additional Terminal Capacity, including any potential system capacity expansions that may be required to create complementary additional System Capacity;
- (c) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal Expansion Components;
- (d) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal capacity expansion
- (e) unless otherwise agreed by DBCT Management and the relevant Funding Access Seeker, includes an indicative assessment of:
  - (1) project objectives in relation to the creation of additional Terminal Capacity; and
  - (2) the possible Terminal Expansion Components:
    - (A) a broad cost estimate with a +/- 50% accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
    - (B) a preliminary financial analysis and risk assessment; and
    - (C) indicative timeframes for developing and completing the possible Terminal Components; and
  - (3) includes a proposed scope, budget, duration and deliverables for a FEL 2 Feasibility Study including the reasons for selecting the possible Terminal Components that will be considered during that FEL 2 Feasibility Study.

**FEL 2 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 Feasibility Study and, if they differ from the previous study, re-estimates Terminal Capacity and System Capacity in accordance with Section 12.1 of the Undertaking
- (b) confirms the project objectives in relation to the creation of additional Terminal Capacity and the possible Terminal Expansion Components that will create the additional Terminal Capacity;
- (c) assesses each of the possible Terminal Components in respect of:
  - (1) the technical and operating requirements for that Terminal Capacity Expansion;
  - (2) an indicative assessment of the additional Capacity that might reasonably be expected by implementing that Terminal Capacity Expansion; and
  - (3) a preliminary risk assessment for that Terminal Capacity Expansion;
- (d) includes preliminary survey and geotechnical investigation to support the level of design and cost accuracy required for the study;
- (e) identifies the preferred Terminal Capacity Expansion to be studied under a FEL 3 Feasibility Study; and
- (f) provides:
  - (1) a high level engineering assessment of the preferred Terminal Capacity Expansion;
  - (2) analysis of the technical and economic feasibility of the preferred Terminal Capacity Expansion and identifies why it is preferred;

- (3) a project budget, with a +/-20% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
- (4) an indicative design and construct schedule for the preferred Terminal Capacity Expansion that includes time tolerances; and
- (5) potential benefits (including additional Terminal Capacity, maintenance and operating benefits) of the preferred Terminal Capacity Expansion; and
- (g) includes a proposed scope, budget, duration and deliverables for a FEL 3 Feasibility Study,
- (h) includes an assessment of the available Terminal Capacity that will be created by the Terminal Capacity Expansion; and
- (i) includes an assessment of the available Terminal Capacity that will be created by the preferred Terminal Expansion Component.

**FEL 3 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that, in relation to the preferred Terminal Capacity Expansion identified in a FEL 2 Feasibility Study :

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 or FEL2 Feasibility Study and, if they differ from the previous studies, re-estimates Terminal Capacity and System Capacity in accordance with Section 12.1 of the Undertaking
- (b) details the project objective for the preferred Terminal Capacity Expansion;
- (c) provides a detailed assessment of technical and operating requirements of the preferred Terminal Capacity Expansion;
- (d) includes survey and geotechnical investigations to support the level of design and cost accuracy;
- (e) provides a detailed design for the preferred Terminal Capacity Expansion;
- (f) provides the following details of the preferred Terminal Capacity Expansion's scope:
  - (1) an optimised project configuration that would provide the targeted additional Terminal Capacity to be created by the preferred Terminal Capacity Expansion;
  - (2) a detailed cost estimate with a +/-10% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
  - (3) a detailed design and construction project schedule;
  - (4) the basis on which the project contingency was determined;
  - (5) a financial evaluation, including (if applicable) the estimated impact on the relevant Reference Tariff;
  - (6) a procurement methodology and report on any previous approaches to the construction market that are relevant to the preferred Terminal Capacity Expansion;
  - (7) a project management plan comprised of:
    - (A) resource management plan;
    - (B) cost management plan;
    - (C) design management plan
    - (D) quality management plan;
    - (E) safety management plan;
    - (F) schedule management plan;
    - (G) risk management plan;

- (H) project packaging and delivery strategy;
  - (I) procurement management plan;
  - (J) interface management plan;
  - (K) change management plan;
  - (L) environmental management plan;
  - (M) project phases, milestones and deliverables;
  - (N) project risk assessment report; and
  - (O) regulators notification, if needed, and
- (8) provides a detailed capacity assessment on the available Terminal Capacity to be created by the preferred Terminal Expansion Component and the associated impact, if any, on the capacity rating of the base Terminal,

and including the outcomes of any analysis and decisions made in relation to the above matters (with reasons, where applicable).

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

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

**Funding Access Seeker** means an Access Seeker that has entered into a Funding Agreement or Underwriting Agreement with DBCT Management.

**Funding Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, pursuant to which an Access Applicant must fund the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study and a FEL 3 Feasibility Study, in respect of a proposed Terminal Capacity Expansion.

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

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

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

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

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

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

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

**Interim Reference Tariff Period** has the meaning given in Schedule C, Part A, Sub-Section 5(d).

**JORC Code** the ‘Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves’ prepared by the Joint Ore Reserves Committee of The Australasian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and the Minerals Council of Australia, as updated from time to time.

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

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

**Marketable Coal Reserves** has the meaning given to it in the JORC Code.

**Month** means a calendar month.

**Monthly Payment** has the meaning given to it in Section 11.9(a).

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

**Non-Expansion Costs** means Terminal Operating Costs and Capital Expenditure not related to the development of a Terminal Capacity Expansion.

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

**Notice** has the meaning given to that term in Section 5.4(e)(1).

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

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

**Notional Contracted Tonnage** or **NCT** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**Operation & Maintenance Charge** means the component of Access Charges under which DBCT Management recovers the Terminal Operating Costs from Access Holders and is calculated in accordance with Section 11.10.

**Operation & Maintenance Contract** or **OMC** means the contract between DBCT Management, the DBCT Trustee and the Operator under which the Operator is engaged by DBCT Management to operate and maintain the Terminal on a day to day basis. The terms of the OMC are summarised for convenience in Schedule I.

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

**Other Costs** has the meaning given in Section 12.5(a)(3)(B).

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

**PCQ** means Ports Corporation of Queensland Limited ACN 126 302 994.

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

**Price Ruling** has the meaning given in Section 5.12(a).

**Pricing Method** means the method of pricing Access created by a Terminal Capacity Expansion, being either Socialised or Differential.

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

**Proposed Standard Funding/Underwriting Agreement** means the proposed Standard Funding Agreement or proposed Standard Underwriting Agreement (as applicable) by DBCT Management under Section 5.10(q)(1).

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

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

**Publicly Report** means to upload information onto DBCT Management’s website so that it is publicly accessible.

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

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

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

**Rail Operator** means an entity that:

- (a) provides above rail services to an Access Holder for the purpose of transporting coal to the Terminal; or
- (b) is nominated by an Access Seeker as likely to provide above rail services to that Access Seeker for the purpose of transporting coal to the Terminal.

**Reference Tariff** means each reference tariff approved by the QCA for the purposes of this Undertaking, as amended from time to time, in accordance with this Undertaking.

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

**Reference Tonnage** means:

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

**Reference Tonnage Access Holder** or **RTAH** means an Access Holder to the extent that its Annual Contract Tonnage is Reference Tonnage.

**Regulated Asset Base** means, as relevant in respect of the any Terminal Component:

- (a) in respect of a Differentiated Expansion Component, the Regulated Asset Base for that Differentiated Expansion Component as approved by the QCA in accordance with this Undertaking; and
- (b) in respect of the Existing Terminal, the Regulated Asset Base for the Existing Terminal (which at the Commencement Date is the only Regulated Asset Base) as approved by the QCA in accordance with this Undertaking.

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

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

**Renewal Application** has the meaning given in Section 5.3A.

**Revenue Cap** is the amount DBCT Management is entitled to earn from Reference Tonnage and is calculated in accordance with Schedule C. Part A, Section 2.

**Review Event** means, for any Terminal Component, any one or more of the following events:

- (a) a change in Reference Tonnage;
- (b) a change in Non-Reference Tonnage;
- (c) Completion and handover to the Operator of the whole of a discrete phase of a Terminal Capacity Expansion;
- (d) receipt of insurance proceeds, damages or other compensation for loss, damage or destruction of an asset comprised in the Terminal Component, to the extent that those moneys are not applied in repair, reinstatement or replacement; and
- (e) each 1 July, in respect of:
  - (1) Capital Expenditure incurred in any prior period (including Capital Expenditure in any period preceding the Commencement Date provided such Capital Expenditure has not already been included in the relevant Regulated Asset Base) which does not relate to a Terminal Capacity Expansion and is paid by DBCT Management after Completion and handover of the relevant works, including:
    - (A) Capital Expenditure referred to in Section 12.10(b)
    - (B) Capital Expenditure referred to in Section 12.10(c);
  - (2) sale of assets comprised in the Terminal Component during the preceding 12 months;
  - (3) the prudent cost of a FEL 3 Feasibility Study to the extent not included in Capital Expenditure the subject of a Capacity Expansion;
  - (4) the cost of a Feasibility Study referred to in Section 5.10(m)(1) or 5.10(m)(2), to the extent not funded by Access Seekers; and
  - (5) the prudent cost of a Feasibility Study referred to in Section 5.10(o), to the extent not funded by Access Seekers (but limited to 20% of the prudent cost of the Feasibility Study if the proposed Terminal Capacity Expansion does not proceed).

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

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

**Service Provider** means:

- (a) DBCT Management, as the provider of Services at the Terminal;
- (b) each provider at a relevant time of railway infrastructure ("below rail") for any part of the System;
- (c) each provider at a relevant time of railway freight services ("above rail") for any part of the System.

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

**Socialisation**, in respect of a Terminal Capacity Expansion, means the inclusion of costs associated with the expansion in an existing Terminal Component's Regulated Asset Base (as determined by the QCA), so as to avoid the creation of a separate Regulated Asset Base, Annual Revenue

Requirement and Reference Tariff in respect of the expansion. Where expansion costs are socialised, they are shared by existing users of the Terminal Component into which the costs are socialised and **Socialised** has a corresponding meaning.

**Socialised Terminal Capacity** means capacity associated with a Socialised Expansion.

**Socialised Expansion** has the meaning given in Section 11.13(a)

**Standard Funding Agreement** means the standard Funding Agreement approved by the QCA in accordance with Section 5.10(q)

**Standard Underwriting Agreement** means the standard Underwriting Agreement approved by the QCA in accordance with Section 5.10(q).

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

**State** means the State of Queensland.

**Supply Chain Business** means an entity (or group of entities) which:

- (a) provides, or proposes to provide, above rail services in Queensland which access the Terminal;
- (b) owns or holds an interest in, or proposes to acquire such an interest in, coal-producing mines in Queensland that export coal via the Terminal;
- (c) purchases coal that has been produced in Australia and exports that coal via the Terminal;
- (d) provides shipping services from the Terminal; or
- (e) trades in capacity at the Terminal.

**System** means, in respect of the Dalrymple Bay Coal Chain, the following components of infrastructure relating to the transport of coal from mines whose coal is Handled by the Terminal:

- (a) rail loading facility of mines whose coal is Handled by the Terminal;
- (b) railway infrastructure in the Dalrymple Bay Coal Chain;
- (c) railway locomotives and rolling stock used in the Dalrymple Bay Coal Chain; and
- (d) Terminal unloading, stacking, loading and other Handling facilities,

and all interfaces between such components.

**System Capacity** means at a relevant time, the maximum reasonably achievable estimated capacity of the System (measured in tonnes per financial year) as determined pursuant to Section 12.1 in respect of that time. Where System Capacity is required to be estimated in respect of a future time (for example, for the purposes of Section 5.4) DBCT Management will estimate it taking all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**System Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the System Capacity.

**System Master Plan** means, at a relevant time, the master plan (if any) determined pursuant to Section 15.

**TCMP** has the meaning given in Section 12.5(a)(7).

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

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

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

and for the avoidance of doubt, includes the Existing Terminal and any Differentiated Expansion Component.

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

**Terminal Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the **Terminal Capacity**.

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

**Terminal Component** means each of:

- (a) the Existing Terminal; and
- (b) the Differentiated Expansion Component,

which shall each have their own Annual Revenue Requirement.

**Terminal Infrastructure Charge** or **TIC** has the meaning given in Section 11.4(c).

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

**Terminal Operating Costs** means any amounts:

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

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

**Terminal Regulations** means regulations in force from time to time governing procedures for the operation of the Terminal and provision of the Services under an Access Agreement or Existing User Agreement.

**Terminating Date** means the earliest of the following dates:

- (a) 1 July 2021; and

- (b) the date that the handling of coal at the Terminal ceases to be a “declared service” for the purposes of the QCA Act.

**Tonnage** means the volume of Access supplied under an Access Agreement, determined by reference to the volume of coal Handled or contracted to be Handled.

**Trading SCB** means a Supply Chain Business in the Brookfield Group that solely engages in the trading of secondary capacity at the Terminal and which includes, as at the Commencement Date, Brookfield Port Capacity Pty Ltd ACN 134 741 567.

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

**Underwriting Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, which gives DBCT Management the right to call for, and requires an Access Applicant to fund in response to such call, the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study, in respect of a proposed Terminal Capacity Expansion, if the proposed Terminal Capacity Expansion does not proceed.

**WACC(1) Rate** means 5.82%, being the weighted average cost of capital set by the QCA in its final decision on this Undertaking.

**WACC(2) Rate** means a rate equivalent to the Construction Period Risk Free Rate plus 4.00%.

**WACC(3) Rate** means a rate equivalent to the Terminal Capacity Expansion Risk Free Rate plus 4.00%.

**Year End Adjustment** or **YEA** has the meaning given in Section 11.6.

## 2. Interpretation

In this Undertaking unless the context otherwise requires:

- (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
- (b) words denoting the singular include the plural and vice versa;
- (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
- (d) words denoting any gender include all genders;
- (e) references to parties, Parts, Sections, Annexures and Schedules are references to parties, Parts, Sections, Annexures and Schedules to this Undertaking as modified or varied from time to time;
- (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (g) references to any party to this Undertaking or any other document, deed or agreement include its successors, permitted assigns, or permitted subcontractors and the obligations of any party extends to those persons;
- (h) all references to dates and times are to Brisbane time;
- (i) all references to "\$" and "dollars" are to the lawful currency of Australia;

- (j) a reference to “including” shall be construed as “including, but not limited to,” and “include” and “includes” shall be construed similarly;
- (k) where a provision provides that a party “may” do something, “may” shall be construed as discretionary and without obligation;
- (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;
- (m) where there is a requirement under this Undertaking to consider whether Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holders’ respective Annual Contract Tonnages and the extent to which (if at all) Differential Pricing applies to the Annual Contract Tonnages the subject of each Access Agreement; and
- (n) where measurement of coal “Handled” is being made in respect of a period, the tonnage loaded into vessels will be taken to be the tonnage Handled in that period.
- (o) Headings are for convenience only and do not affect interpretation of this Undertaking.

## Schedule H – Undertaking by Trading SCB

This deed poll is given on \_\_\_\_\_ by:

[Trading SCB name] ACN [number] of [address] (Trading SCB)

in favour of:

DBCT Management Pty Limited ACN 097 098 916 of Level 15, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000 (DBCT Management);

each Access Holder (as that term is defined in the Access Undertaking) from time to time;

each Access Seeker (as that term is defined in the Access Undertaking) from time to time;

each Rail Operator (as that term is defined in the Access Undertaking) from time to time; and

the Queensland Competition Authority

### Recitals

- A. Under the Access Undertaking, DBCT Management must procure an undertaking from Trading SCB in the form of this undertaking.
- B. At the request of DBCT Management, Trading SCB has agreed to enter into this deed poll to ensure that DBCT Management complies with the relevant provisions of the Access Undertaking.

**This deed witnesses** that the Trading SCB agrees to the following terms:

## 1 Ring-fencing

### 1.1 Non-discrimination

In carrying out Secondary Capacity Trading, Trading SCB will not:

- (a) engage in conduct for the purpose of preventing or hindering an Access Holder's or Access Seeker's Access;
- (b) unfairly differentiate between Access Seekers, Access Holders or Rail Operators.

### 1.2 Confidentiality

- (a) Trading SCB will enter into a confidentiality deed poll, substantially in the form specified in Annexure A, in favour of any Trading SCB Customer that discloses, or notifies Trading SCB that it intends to disclose, Confidential Information to Trading SCB.
- (b) Trading SCB will not disclose to a Trading SCB Customer that acquires Access from Trading SCB the identity of the Trading SCB Customer that assigned that Access (or any part thereof) to Trading SCB.
- (c) Trading SCB acknowledges that DBCT Management will not disclose Confidential Information of a Trading SCB Customer to Trading SCB without the prior written consent of the Trading SCB Customer.

## 2 Compliance

- (a) If an Access Holder, Access Seeker, the QCA or a Rail Operator considers that Trading SCB may have breached one or more of its obligations under this deed the relevant entity (**Complainant**) may lodge a written complaint with Trading SCB.
- (b) Unless otherwise notified in writing by the Complainant, the written complaint and any accompanying information (whether documentary or otherwise) will be Confidential Information until it ceases to be Confidential Information.
- (c) Trading SCB will provide to the QCA, as soon as practicable, a copy of any complaint it receives pursuant to clause 2.1(a) and identify the complaint as Confidential Information.
- (d) Trading SCB will:
  - (1) investigate complaints received pursuant to clause 2.1(a); and

- (2) advise the Complainant and the QCA in writing of the outcome of that investigation and Trading SCB's proposed response, if any, and use reasonable endeavours to do so within 20 Business Days after receiving such a complaint.
- (e) If the Complainant is not satisfied with the outcome of Trading SCB's investigation, the Complainant can apply to the QCA seeking an audit of the relevant subject of the complaint. The QCA will consider such a request and determine whether to require Trading SCB to conduct an audit.
- (f) If the QCA requires Trading SCB to conduct an audit in accordance with clause 2.1(e), Trading SCB must promptly engage the Auditor to carry out the audit and provide the QCA with a report on the outcomes of that audit within a reasonable period of time, identifying any information contained in that report which is Confidential Information.
- (g) If the QCA is of the view that the outcomes of the audit required under clause 2.1(e) show that Trading SCB has not complied with this deed, it may require Trading SCB to provide a rectification plan to address the issue and implement the rectification plan within a reasonable period of time.
- (h) The QCA may advise the Complainant of:
- (1) whether any audit referred to in clause 2.1(f) has demonstrated that Trading SCB has or has not complied with this deed; and
  - (2) whether Trading SCB has been required to provide a rectification plan to address the relevant issue in accordance with clause 2.1(g),
- provided that the QCA must not disclose any Confidential Information.
- (i) Trading SCB will bear the costs of the audit unless the QCA determines that the complaint made by the Complainant is vexatious or has not been made in good faith in which case:
- (1) Trading SCB will not be liable for the costs of the audit; and
  - (2) the Complainant will bear the costs of the audit.

### 3 Governing law and jurisdiction

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

### 4 Definitions and interpretation

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#### 4.1 Definitions

In this deed:

**Access Undertaking** means the Dalrymple Bay Coal Terminal Access Undertaking prepared in accordance with the requirements of the *Queensland Competition Authority Act 1997* (Qld) and approved on 16 February 2017 as varied or replaced from time to time.

**Secondary Capacity Trading** means the carrying out of any one or more of the following activities by Trading SCB:

- (a) acquiring contracted Access from Access Holders;
- (b) aggregating contracted Access which Trading SCB has acquired from Access Holders; and
- (c) selling the contracted Access which Trading SCB has acquired from Access Holders to Access Seekers or Access Holders.

**Trading SCB Customer** means a customer, or any person who is negotiating to become a customer, of Trading SCB in respect of Secondary Capacity Trading.

#### 4.2 Interpretation

- (a) Terms defined in the Access Undertaking have the same meaning in this deed unless otherwise defined.
- (b) Headings are for convenience only and do not affect interpretation.
- (c) In this deed, unless the context otherwise requires:

- (1) words importing the singular include the plural and vice versa;
- (2) a reference to anything (including, but not limited to, any right) includes a part of that thing but nothing in this clause 4.2(c)(2) implies that performance of part of an obligation constitutes performance of the obligation;
- (3) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and
- (4) a reference to a person includes that person's successors and legal personal representatives.

Executed as a deed poll

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Signed sealed and delivered by  
**[Trading SCB] [ACN]**  
By:

*sign here*



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

\_\_\_\_\_  
Director

*print  
name*

\_\_\_\_\_

\_\_\_\_\_

## **Annexure A – Confidentiality deed poll**

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## Deed poll

### Confidentiality deed poll

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[Trading SCB]

DBCT Management Pty Ltd

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## Confidentiality deed poll

Date ►

This deed poll is made  
by

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Recipient                    **[Trading SCB]**  
                                    ACN [number] of [address]  
                                    **(Trading SCB)**

---

and

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DBCT Management        **DBCT Management Pty Ltd**  
                                    ACN 097 698 916 of Level 15, 1 Eagle St, Brisbane QLD 4001  
                                    **(DBCT Management)**

---

in favour of

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Discloser                    **[User]**  
                                    ACN [number] of [address]  
                                    **([User alias])**

---

Recitals

- 1 The Discloser has consented to DBCT Management disclosing Confidential Information to the Recipient for the Express Purpose and for no other purpose.
- 2 The Discloser may disclose additional Confidential Information directly to the Recipient for the Express Purpose.
- 3 The Recipient agrees that the Confidential Information is provided to it on the terms of this deed poll and that it will not use or disclose the Confidential Information except as provided in this deed poll.

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This deed poll witnesses as follows:

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## 1 Definitions and interpretation

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### 1.1 Definitions

The meanings of the terms used in this deed poll are set out below.

Term	Meaning
<b>Capacity</b>	up to [ <i>insert</i> ] mtpa of capacity at Dalrymple Bay Coal Terminal
<b>Confidential Information</b>	all information which: <ol style="list-style-type: none"> <li>1 is disclosed to the Recipient or a Specified Person (whether before or after the date of this deed poll) by the Discloser or DBCT Management;</li> <li>2 relates directly or indirectly to the Discloser or its past, existing or future business, operations, administration or strategic plans; and</li> <li>3 is in oral or visual form, or is recorded or stored in a Document, and includes, without limitation, the fact that:               <ol style="list-style-type: none"> <li>4 Confidential Information is being made available by the Discloser to the Recipient or the Specified Persons; and</li> <li>5 discussions or negotiations have occurred, are occurring or may occur between the Recipient and the Discloser, or their respective advisers or representatives, in relation to a possible Capacity transfer.</li> </ol> </li> </ol>
<b>Corporations Act</b>	the <i>Corporations Act 2001</i> (Cth).
<b>Discloser</b>	[ <i>Insert User alias</i> ].
<b>Document</b>	includes any note, memorandum, record, report, financial information, summary, analysis, calculation, strategic assessment, market survey, business plan, computer program, computer record, circuit, circuit layout, drawing, specification, material or any other means by which information may be stored or reproduced.
<b>Express Purpose</b>	a possible transfer of all or part of the Capacity from the Discloser to the Recipient
<b>Recipient</b>	Trading SCB.
<b>Specified Person</b>	an officer, employee or adviser of the Recipient who has a specific need to have access to the Confidential Information for the Express Purpose.

### 1.2 Interpretation

- (a) Headings are for convenience only and do not affect interpretation.
- (b) In this deed poll, unless the context otherwise requires:
- (1) words importing the singular include the plural and vice versa;
  - (2) a reference to anything (including, but not limited to, any right) includes a part of that thing but nothing in this clause 1.2(b)(2) implies that performance of part of an obligation constitutes performance of the obligation;
  - (3) the term 'related body corporate' has the meaning given to that term under the Corporations Act;
  - (4) the term 'associate' has the meaning given to that term in section 15 of the Corporations Act;
  - (5) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and

- (6) a reference to a person includes that person's successors and legal personal representatives.

## **2 Confidentiality**

---

The Recipient must:

- (a) hold the Confidential Information in strict confidence and not disclose, or cause or permit the disclosure of, the Confidential Information, except as permitted under this deed poll or with the prior written consent of the Discloser (which may be withheld in the Discloser's ultimate discretion);
- (b) keep the Confidential Information secure and protected from any use, disclosure or access which is inconsistent with this deed poll;
- (c) promptly notify the Discloser if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information; and
- (d) maintain such procedures as are necessary to ensure compliance with this deed poll by the Recipient and each Specified Person and, upon request, provide the Discloser details of the procedures adopted.

## **3 Permitted use and disclosure**

---

- (a) The Recipient must only use the Confidential Information for the Express Purpose.
- (b) The Recipient may:
  - (1) only disclose Confidential Information to a Specified Person, and must only make such disclosure solely for the Express Purpose; and
  - (2) disclose Confidential Information to the Queensland Competition Authority.
- (c) DBCT Management must only disclose Confidential Information to the Recipient, and must only make such disclosure solely for the Express Purpose.

## **4 Benefit of this deed poll**

---

This deed poll is made by the Recipient and DBCT Management in favour of, and for the benefit of the Discloser.

## **5 Return and destruction of information**

---

If requested by the Discloser, the Recipient must, within 7 days, return to the Discloser, or destroy or delete as the Discloser directs, all original Documents and copies which:

- (a) are or contain Confidential Information; and
- (b) reproduce, are based on, utilise or relate to Confidential Information, provided however that the Recipient may keep one copy of the Confidential Information for its records.

## **6 Operation of this deed poll**

---

- (a) Subject to clause 6(c), this deed poll continues without limitation as to time.
- (b) This deed poll does not apply to any Confidential Information that:
  - (1) the Recipient or a Specified Person is required to disclose by any applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator (including the Queensland Competition Authority); or

- (2) is in the public domain other than as a result of a breach of this deed poll.
- (c) If the Recipient or a Specified Person must make a disclosure referred to in clause 6(b)(1):
- (1) the Recipient must disclose, and must ensure that the Specified Person discloses only the minimum Confidential Information required to comply with the applicable law, order or requirement; and
  - (2) before making such disclosure, the Recipient must give the Discloser reasonable written notice of the full circumstances of the required disclosure together with the Confidential Information which it, or the Specified Person, proposes to disclose and consult with the Discloser as to the form of the disclosure.
- (d) Nothing in this deed poll requires the Discloser to disclose Confidential Information to the Recipient.

## **7 Acknowledgment**

---

The Recipient acknowledges that:

- (a) the Confidential Information is secret and highly confidential to the Discloser;
- (b) disclosure of Confidential Information in breach of this deed poll could cause considerable commercial and financial detriment to the Discloser;
- (c) damages may be inadequate compensation for breach of this deed poll and, subject to the court's discretion, the Discloser may restrain by an injunction or similar remedy, any conduct or threatened conduct which is or would be a breach of this deed poll.

## **8 Recipient to ensure others comply**

---

The Recipient must:

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

## **9 Disclaimer**

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- (a) The Recipient acknowledges that neither the Discloser, nor any of its related bodies corporate nor any of their respective officers, employees or advisers:
  - (1) makes any representation or warranty as to the accuracy or completeness of the Confidential Information;
  - (2) accepts any responsibility for any interpretation, opinion or conclusion that the Recipient or a Specified Person may form as a result of examining the Confidential Information; and
  - (3) accepts any responsibility to inform the Recipient of any matter arising or coming to the Discloser's notice which may affect or qualify any Confidential Information which the Discloser provides to the Recipient.
- (b) The Recipient acknowledges that it is making an independent assessment of the Confidential Information and that it will:
  - (1) carry out, and rely solely on, its own investigation and analyses in relation to the Confidential Information; and
  - (2) verify all information on which it intends to rely to its own satisfaction.
- (c) The Recipient acknowledges that reliance by the Recipient, or any Specified Person, on any Confidential Information, or any use of any Confidential Information, is solely at its own risk.

**10 Governing law and jurisdiction**

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

**11 Waivers**

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

**Signing page**

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Executed as a deed poll

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Signed sealed and delivered by  
**[Trading SCB]**  
By:

*sign here*



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

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

*print  
name*

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Signed sealed and delivered by  
**DBCT Management Pty Ltd**  
By:

*sign here*



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Director/Secretary

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Director/Secretary

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name*

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## Schedule I – Terms of Operation and Maintenance Contract

Term	Summary of term
Parties	<p>DBCT Management Pty Ltd (<b>DBCTM</b>), DBCT Investor Services Pty Limited as trustee of the DBCT Trust (<b>DBCT Trustee</b>) and the operator, Dalrymple Bay Coal Terminal Pty Limited (<b>Operator</b>).</p> <p>The Operation and Maintenance Contract (<b>Contract</b>) defines the relationships between the parties and their rights and obligations.</p>
Term	<p>The Contract will expire on 30 June 2021 unless terminated earlier. Other than for default of DBCTM (refer further below), the Operator cannot terminate the Contract before this date.</p> <ul style="list-style-type: none"> <li>• If DBCTM wishes to terminate the Contract other than for the Operator's default, DBCTM must give 5 years' prior notice of termination; and</li> <li>• If an access undertaking is in place and the Operator wishes to terminate other than for DBCTM's default, the Operator can terminate by giving not less than two years notice to DBCTM. If the period of notice given will expire during the term of an access undertaking, the notice period will be extended and take on the from earlier of expiry of the access undertaking or 5 years after the date that a notice of termination is given.</li> </ul>
Intentions of the parties	<p>The parties' intentions include (among other things):</p> <ul style="list-style-type: none"> <li>• The Operator will be responsible for day-to-day operation and maintenance of the Terminal;</li> <li>• The Operator must ensure that its performance of services is coordinated in accordance with the relevant access undertaking in force at the time to the extent that no act or omission by the Operator would cause DBCTM to be in breach of a provision of the access undertaking; and</li> <li>• Subject to DBCTM's rights under the Contract (for example in relation to default by the Operator), DBCTM will not intervene in the day-to-day operation and maintenance of the Terminal.</li> </ul>
Operator's engagement	<p>DBCTM has engaged the Operator to perform the services. The Operator is an independent contractor and not an agent of DBCTM. The services include all things necessary for the operation, maintenance and management of the Terminal.</p>
Operational Services to be performed by the Operator	<p>Operation of the Terminal specifically includes the following services:</p> <ul style="list-style-type: none"> <li>• coordinate the ordering and scheduling of trains;</li> <li>• train unloading;</li> <li>• coal stockpile management, reclamation and handling;</li> <li>• coal blending if required by users of the Terminal;</li> <li>• vessel ordering; and</li> <li>• the loading of ships in accordance with the Terminal Regulations. In the absence of other applicable provisions in the Terminal Regulations, the Operator must normally load ships in order of arrival (subject to there being relevant coal at the Terminal and all prerequisites to loading having been complied with).</li> </ul> <p>These services must be provided in accordance with the approved access undertaking and user agreements and are to be further detailed in an Appendix to the specification included in the Contract.</p>
Maintenance Services to be performed by the Operator	<p>The Operator must maintain the Terminal and each component of the Terminal at its operating capacity as specified in the Contract. This specifically includes:</p> <ul style="list-style-type: none"> <li>• planned maintenance and repair in accordance with an annual operation, maintenance and capital plan (prepared by the Operator);</li> <li>• unplanned maintenance and repair as required (for example following equipment breakdown);</li> <li>• condition monitoring and maintenance management; and</li> <li>• upkeep of the Terminal, including activities such as maintenance of access roads and dust suppression.</li> </ul>

Term	Summary of term
Standard of Operator's performance	<p>The Operator must operate and maintain the Terminal in order to ensure it is capable of operating:</p> <ul style="list-style-type: none"> <li>• at its rated design capacity;</li> <li>• in accordance with good operating and maintenance practice; and</li> <li>• in good and substantial repair.</li> </ul> <p>The Operator must ensure that the Terminal is maintained and operated so as to achieve, as far as practical, the best and most cost effective outcome, taking account, as appropriate, of:</p> <ul style="list-style-type: none"> <li>• lowest total whole of life cost;</li> <li>• reliability and economy of performance;</li> <li>• maximising the effective life of the Terminal;</li> <li>• good operating and maintenance practice;</li> <li>• in the case of competing interests between users, fairness; and</li> <li>• the obligations of DBCT Management under the access undertaking and any user agreements. These obligations are subject to DBCTM having expended appropriate capital if relevant.</li> </ul> <p>The Operator must provide everything that is necessary for performance of the services, other than any things specified in the Contract as to be provided by DBCTM. The Operator's supply obligations include the supply of water and power to the Terminal. The Operator is also required to supply and maintain spares for the Terminal.</p> <p>The Operator can subcontract parts of the Services without DBCTM's consent, however remains liable for the standard of performance. The Operator is specifically required to supervise the execution of all Services.</p>
Annual operation, maintenance and capital plan	<p>The Operator must, in consultation with DBCTM, prepare and submit an annual operation, maintenance and capital plan by 15 May. The plan will identify the proposed budget for the next financial year and will foreshadow the likely plan and budget for the subsequent two years (i.e. provide a three year budget snapshot).</p>
Payments to the Operator	<p>DBCTM pays the Operator all reasonably incurred costs of performing the services (that is, operating and maintaining the Terminal in accordance with the Contract) plus a margin.</p> <p>The Operator is also entitled to be paid:</p> <ul style="list-style-type: none"> <li>• reimbursement of capital expended by the Operator, subject to certain conditions (outlined below in capital works);</li> <li>• consulting fees in respect of capital works (refer further below in relation to capital works); and</li> <li>• a project management commission if the Operator project manages a non-expansion capital project.</li> </ul> <p>The Contract acknowledges that it is intended that amounts paid to the Operator will be recovered by DBCTM from users under their user agreements. The Operator has obligations to assist DBCTM to facilitate this pass through.</p>
Terminal Regulations	<p>Both the Operator and DBCTM are required to comply with the Terminal Regulations.</p> <p>The Operator may propose amendments to the Terminal Regulations for DBCTM's consent, which DBCTM must not unreasonably withhold but which will be subject to the requirements of the access undertaking in relation to such amendments.</p> <p>DBCTM must require each Terminal user pursuant to their user agreement(s) to comply with the Terminal regulations as applicable from time to time.</p>
Access to the Terminal	<p>DBCTM has granted the Operator a licence to use, occupy and control the Terminal as is necessary to perform the services in accordance with the Contract.</p> <p>The Operator must give DBCTM and its personnel such access to the Terminal as they reasonably require from time to time. However, such access is subject to compliance with the Operator's applicable procedures (including safety requirements). DBCTM must also take reasonable measures not to impede the Operator's performance of the services.</p>

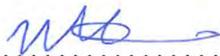
Term	Summary of term
Care of and risk in the Terminal	The Operator has care of the Terminal and assumes the risk of damage to the Terminal and all things located at it (including coal). The Operator must insure the Terminal in accordance with the insurance program detailed in the Contract.
Safety and environmental compliance	<p>The Operator has primary responsibility for the management of safety at the Terminal and for compliance with legal requirements with respect to safety at the Terminal.</p> <p>The Operator also has primary responsibility for the compliance of the Terminal with all relevant environmental laws and requirements. Among other things, the Operator is required to obtain and maintain all required approvals from authorities with respect to the performance of the services.</p>
Records and audits	<p>The Operator must maintain records (including financial records) relating to the services.</p> <p>From time to time, DBCTM may appoint a suitably qualified person to conduct an audit of the records maintained by the Operator and/or of the Operator's relevant systems and procedures.</p> <p>The Operator must work with DBCTM to ensure that DBCTM is able to comply with its reporting obligations under the approved access undertaking.</p>
Continuous improvement	The Operator must work with DBCTM in undertaking reviews to identify and develop options for improved efficiency of the Terminal as well as of the coal transport chain. The parties have coordination obligations in relation to the implementation of the findings of such reviews.
Capital works	<p>Either the Operator or DBCTM can propose that capital works are undertaken. The Operator has obligations to participate in planning for proposed capital works. The Operator is entitled to be paid consulting fees (which are separate and additional to its usual monthly payments) for this participation.</p> <p>If capital works are to proceed, DBCTM and the Operator may agree that the capital works will be implemented by the Operator, DBCTM or another contractor.</p> <p>There is a handover process which applies once capital works have been completed. From the time of handover, the capital works become part of the Terminal and the Operator's obligations to provide the services extend to include that part of the Terminal.</p>
Force majeure	The Contract defines events of force majeure. If a party is affected by such an event, it may be granted relief from performance of its affected obligations under the Contract, subject to compliance with certain requirements.
Dispute resolution	<p>The Contract specifies a dispute resolution procedure which includes the following provisions:</p> <ul style="list-style-type: none"> <li>• If a dispute between DBCTM and the Operator arises out of or in connection with the Contract, then either party may give the other party a notice of dispute.</li> <li>• Neither party may commence any court proceedings or arbitration in respect of any dispute which is the subject of a notice of dispute until the party has complied with the dispute resolution procedure specified in the Contract.</li> <li>• Within 14 days after service of a notice of dispute, the senior executives of each party must confer at least once to attempt to resolve the dispute and failing resolution, to consider and, if possible, agree on methods of resolving the dispute by other means.</li> <li>• If the dispute cannot be resolved by the senior executives after a further period of 14 days or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer the dispute to conciliation.</li> <li>• If the dispute is not resolved by conciliation within a period of 14 days after nomination of the conciliator, the parties may agree to refer the dispute to arbitration or either party may pursue any other means of dispute resolution including litigation.</li> <li>• The Contract will specify procedures with respect to conciliation and arbitration.</li> <li>• The dispute resolution procedure does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect its rights.</li> </ul>

Term	Summary of term
Change in control of the Operator	<p>There is a deemed assignment of the Contract if:</p> <ul style="list-style-type: none"> <li>• a person who is not a user or its related body corporate acquires an interest in the Operator; or</li> <li>• a user or its related body corporate acquires an interest in the Operator which exceeds its proportionate usage of the Terminal.</li> </ul> <p>The Contract may not be assigned without DBCTM's approval.</p>
Termination for default by either party	<p>Each party has termination rights if the other defaults under the Contract. The rights differ between the parties, but allow the non-defaulting party to require rectification or require the defaulting party to show cause, before the non-defaulting party may terminate the Contract.</p>

**CERTIFICATE OF EXHIBIT**

Exhibit **AT-2** referred to in the statutory declaration of Anthony Paul Timbrell.

Dated this 7th day of March 2019



.....

Commissioner for Declarations/Solicitor/Justice of the Peace



# DBCT Capacity Estimates

**Integrated Logistics**  
COMPANY PTY LTD



**Release Date:** 19 October 2018

**Report Version:** Revision 2

## Document and Quality Information

<b>Document Name:</b>	DBCT Capacity Estimates
<b>Contents</b>	Estimate of the Existing Terminal Capacity and System Capacity for DBCT
<b>Date:</b>	19 October 2018
<b>Prepared For:</b>	DBCT Management
<b>Prepared By:</b>	Integrated Logistics Company Pty Ltd (ILC) Level 20, HSBC Building, 300 Queen Street, Brisbane Qld 4000
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## Revision History

Revision	Revision Date	Details	Prepared by	
			Name	Position
0	18/10/2018	Issued for DBCTM use	Cameron Lock	Master Planning and Simulation
1	19/10/2018	Minor amendments	Cameron Lock	As above
2	19/10/2018	Minor amendments	Cameron Lock	As above

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## Executive Summary

DBCT Management is obliged under the DBCT Access Undertaking to provide estimates of Existing Terminal Capacity (on a “nameplate capacity” basis) and System Capacity, with the latter being the limit to which capacity can be contracted to Access Holders and Access Seekers. These capacity estimates are required for the current financial year and for each of the following two financial years.

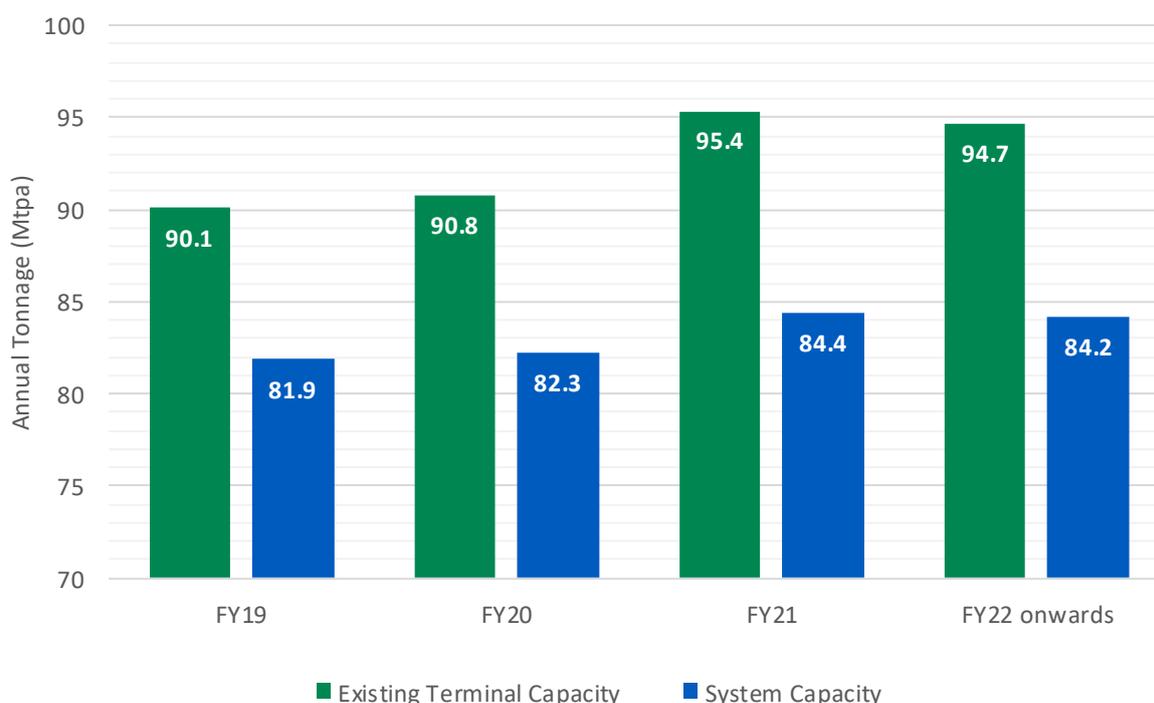
DBCT Management has appointed the Integrated Logistics Company (ILC) as its independent expert to provide these estimates using its Dynamic Simulation Model of the Dalrymple Bay Coal Chain.

Capacity estimates are provided here using contracted demand received by DBCT Management and forecast shiploader maintenance over the assessment periods of FY19, FY20 and FY21, and for FY22 and beyond.

**Table 1 Capacity Estimates over assessment period**

Financial Year	Contracted Demand (Mtpa)	Existing Terminal Capacity Estimate (Mtpa)	System Capacity Estimate (Mtpa)
FY19	79.3	90.1 ± 1	81.9 ± 1
FY20	81.1	90.8 ± 1	82.3 ± 1
FY21	83.6	95.4 ± 1	84.4 ± 1
FY22 onwards	86.1	94.7 ± 1	84.2 ± 1

**Figure 1 Capacity Estimates over assessment period**



## 1.0 Introduction

Over recent years the contracted volumes at Dalrymple Bay Coal Terminal (DBCT) have reduced from around 85 Mtpa to 76.3 Mtpa by mid 2018. New Access Seekers have made requests to take up contracted capacity, triggering the Access Undertaking's *Notifying Access Seeker* (NAS) process, whereby the queue of existing and new Access Seekers are given the opportunity to take up some contracted capacity.

As owners of the terminal, DBCT Management is obliged under the DBCT Access Undertaking to provide estimates of the Existing Terminal Capacity (on a "name-plate capacity" basis) and System Capacity, with the latter being an objective of maximum reasonably achievable capacity for the Terminal without unduly increasing vessel waiting times as a result of operation of the Terminal. This being the limit to which capacity can be contracted to Access Holders and Access Seekers. A further requirement of the Access Undertaking is that these capacity estimates are provided for the current financial year and for each of the following two financial years.

On the 3rd of September 2018, DBCT Management appointed the Integrated Logistics Company (ILC) as its independent expert to provide these estimates using its Dynamic Simulation Model of the Dalrymple Bay Coal Chain.

This model is used by the ILC for Master Planning, biannual Capacity Statements, monthly Capability Forecasts, shareholder studies, and identifying asset and operational mitigations to throughput losses, and is the only model capable of providing a fully integrated supply chain assessment.

This report documents the estimation of the Existing Terminal Capacity (on a "name-plate capacity" basis) and the System Capacity, and the assumptions and methods used by the ILC to provide these estimates.

## 2.0 ILC Dynamic Simulation Model

This section describes the ILC's Dynamic Simulation Model and its key assumptions and input settings.

### 2.1 Model

The ILC's Dynamic Simulation Model is a Discrete Event Simulation (DES) model that uses stochastic methods to generate the randomness of operational events occurring over time. The model is then capable of capturing the dynamic interactions within the system.

The model was developed through a rigorous approach including stakeholder consultation to understand current operating methodologies and planning practices, in order to determine and apply operating logic definition.

Input data has been sourced from various stakeholders, as well as the actual performance of the system as recorded in the Supply Chain Analytics (SCA) system.

The model logic and input data are continually checked and verified to confirm their validity and currency. Producers and Service Providers regularly provide updated information to the ILC for simulation modelling purposes. ILC model results are published monthly and discussed at industry forums.

The scope of the model is from the TLOs to the Port Channel, and includes DBCT, HPSCT and AAPT; the below rail infrastructure of the Goonyella and Newlands Systems; and additional traffic from Blackwater trains in the Goonyella System and non-coal traffic. This scope is described further in the following Section.

## 2.2 Model Extent

The extent of the ILC’s Dynamic Simulation Model is as follows:

- From the train load-outs at the mines for all mines exporting through DBCT, HPSCT and AAPT; and
- Rail transport for coal and non-coal trains arriving at, departing from and travelling within the network points of:

**Table 2 Extent of Rail Network Modelled**

Goonyella System	• DBCT to Jilalan; and	
	• HPSCT to Jilalan; and	
	• Jilalan to Coppabella; and	(the Trunk)
	• Coppabella to Wotonga; and	(the Trunk)
	• South Walker Junction to Hail Creek; and	
	• Coppabella to Burngrove; and	(the South Goonyella branch)
	• Wotonga to Blair Athol; and	(the West Goonyella branch)
	• Wotonga to North Goonyella; and	(the North Goonyella branch)
GAP System	• North Goonyella Junction to Newlands Junction; and	(formerly referred to as the Northern Missing Link)
	• Newlands to Pring; and	
	• Pring to Durroburra; and	
	• Durroburra to Kaili; and	(includes North Coast Line)
	• Kaili to AAPT.	

- All associated infrastructure and processes from the inloading circuit through to the vessel hatch at DBCT and AAPT;
- Higher level representation of the terminal operations at HPSCT; and
- The infrastructure and processes required to facilitate the movement of ships between the ship queue and the berths at DBCT, HPSCT and AAPT, and vice versa.

## 2.3 General Assumptions

The following assumptions have been made in general:

- All operations will operate 365 days a year unless otherwise specified.
- All figures in this document are on a wet basis (including moisture) unless otherwise indicated.
- There will be no additional transfer of moisture into the product within the supply chain.
- Coal is always available subject to the constraints of the Load Point Capability Statements.
- Stakeholder commercial/contractual arrangements are not considered.
- Each coal terminal will have its own ship queue.
- Catastrophic equipment and infrastructure failures will not be included in the model.
- Events that stop the production of the supply chain in multiple locations (whole system strike, popular uprising, war or act of God) will not be considered.
- Infrequent extreme weather events that disrupt operations in part or all of the supply chain (e.g., cyclones) will not be considered.
- Reference period settings for Payload, Inloading Rates and Outloading rates are selected from the Calendar year of 2016.

## 2.4 Key Input Settings

### General

- Impacts of seasonality are included, but extreme weather events are not included

### System Demand

- Port of Hay Point: DBCT as per Section 3.1 “Demand Profile”+ HPSCT 55 Mtpa
- Port of Abbot Point: AAPT(T1) 28 Mtpa, with 15.4 Mtpa being sourced from Goonyella System train load outs
- Demand is spread relatively uniformly throughout the year

### Train Load-outs

- Actual performance data, including reference period trends in train payloads
- Planned maintenance is aligned with network shutdowns

### Above rail

- Above Rail contracts and therefore consists to service Terminal contract volumes on a basis capable of servicing the Terminal operations
- Actual reference period performance data for payloads from existing Goonyella System mines, with light loading performance spread across all mines
- Crew rostering and availability is excluded
- Cancellations and diversions are not explicitly modelled but are accounted for in the Day of Operations losses
- Multiple above rail fleets

### Below rail

- Rail yards at Jilalan, Nebo, Coppabella and Pring
- 20 mins train separation for trains on the dual track trunk
- Reference train sectional run times for Goonyella System and GAP System
- Background traffic in the Goonyella System includes Blackwater trains and non-coal traffic
- Background traffic in the GAP System includes non-AAPT coal traffic, non-coal traffic, and NCL traffic between Kaili and Durroburra
- Speed restrictions, Failures and Faults included
- Track maintenance based on the April 2018 Capacity Statement for the 2018/19 financial year

### DBCT Inloading

- Pre- and post-unloading delays totalling 30 mins
- Actual reference period performance data for net unloading rates from Inloaders to Stackers
- Maintenance plan provided by DBCT PL

**DBCT Stockyard**

- Hybrid yard including Cargo Assembly and Dedicated Stockpile operation
- DBSCC operating methodology fully implemented
- Three zone dynamic stockyard (Zone 1 = Rows 1 & 2, Zone 2 = Rows 3 & 4, Zone 3 = Rows 5 & 6), with remnants area (Zone 4 = Rows 7 & 8)
- Vessel Selection planning is as described in DBCT Terminal Regulations

**DBCT Outloading**

- Zone 1 to OL2, Zone 2 to OL1, Zone 3 to OL3
- Activity delays based on actual performance
- Actual reference period performance data for net loading rates from Reclaimers to Shiploaders
- Maintenance plan provided by DBCT PL

**Harbours – Port of Hay Point and Port of Abbot Point**

- Modelled in detail
- 1 pair of tugs per terminal
- No pilot restrictions

**Ship Stems for DBCT, HPSCT and AAPT**

- Current trends in vessel mix, parcel sizes and co-shipping patterns included
- Co-shipping based on historical data

**AAPT (T1)**

- Modelled in detail
- Stockyard has 6 rows with 6 Stacker/Reclaimers on 3 bunds (two machines per bund)
- 2 Berths and 2 Shiploaders
- Inloading rates, Outloading rates and maintenance plan based on information provided by Abbot Point Bulk Coal P/L

**BMA and HPSCT**

- 55 Mtpa
- 2 Inloaders
- 3 Berths and 3 Shiploaders
- HPSCT modelled with the following parameters:
  - Inloading rate: [REDACTED] tph for each of 2 Inloaders
  - Stockyard volume: [REDACTED] Mt of usable space
  - Outloading rate: [REDACTED] tph (based on Japmax) for each of 3 Shiploaders
- Regular railings

## 3.0 Using the Model to Estimate Capacity

Given the model logic, extent, assumptions and input settings, the model is able to capture the behaviour of the Dalrymple Bay Coal Chain, and its response to the two primary drivers of **Demand Profile** and Equipment Availability, as governed by **Planned Maintenance**.

### 3.1 Demand Profile

The **Demand Profile**, or demand composition, influences the performance of the supply chain in several ways. The Demand Profile is used to generate the modelled ship arrivals. Ships then require particular cargos to be made up using either Cargo Assembly stockpiles or longer term Dedicated Stockpiles, and these piles require coal products to be railed to them. Thus the Demand Profile dictates the number of Train Load-outs (TLOs) from which coal is sourced, the total annual demand for each TLO, and the variation of demand over time. Note that for Capacity Estimates, demand is spread reasonably uniformly over time.

Demand profile influences include the following:

- Each TLO is limited in the number of trains that it can load per day. When there are few TLOs in the Demand Profile, the maximum trains per day summed across the number of TLOs may not provide sufficient utilisation of both Above Rail consists and Below Rail departure slots. When there are many TLOs in the Demand Profile, this demand diversity can provide more railing opportunities and hence higher utilisation of rail assets.
- Some TLOs share their availability between more than one terminal. When a TLO is providing cargos for say Abbot Point Coal Terminal, then DBCT cannot send trains to this TLO, limiting railing opportunities.
- The distribution of demand over distance can also influence supply chain capacity. The cargo build time for long haul TLOs is longer than for short haul TLOs.
- High demand TLOs with suitable product mix profiles may be serviced better by dedicated stockpiles than by cargo assembly stockpiles, affecting the use of stockyard space.

This Capacity Estimate uses contracted demand levels and profiles provided by DBCT Management, including existing Access Holder and Access Seeker tonnages.

Contracted demand for the current financial year (FY19) and the next two financial years are shown in Figure 2 below. The FY22 demand is representative of contracted demand for FY22 and beyond.

Generally, each of these contracted demand profiles are spread over the Goonyella System as shown in Figure 3 below, varying from year to year by  $\pm 1\%$ .

Figure 2 Growth in contracted demand over assessment period

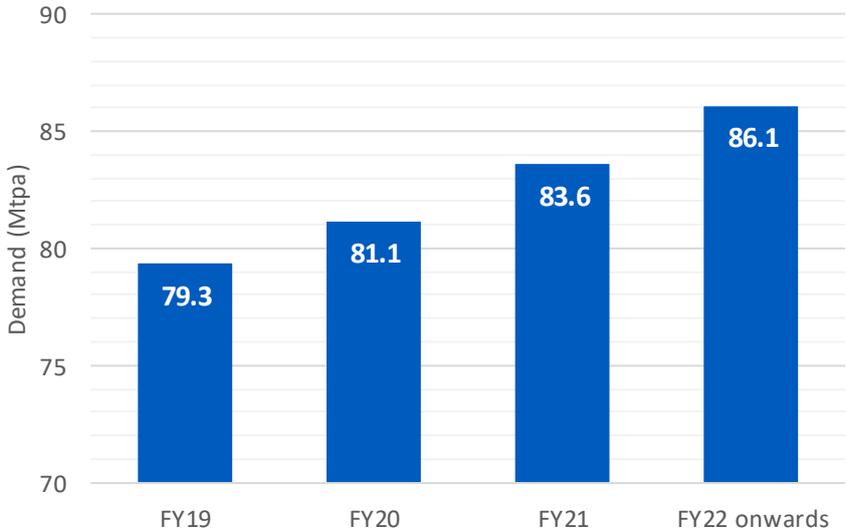
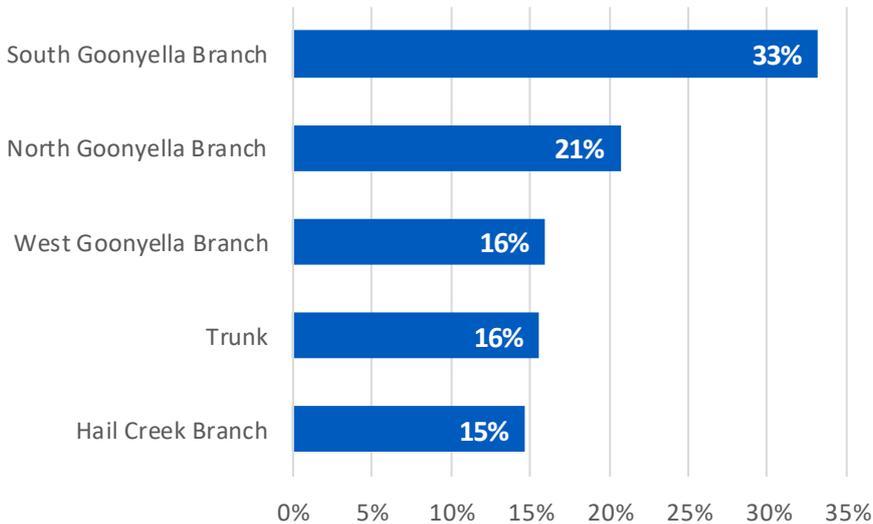


Figure 3 Typical composition of demand by Goonyella System branch



### 3.2 Planned Maintenance

**Planned Maintenance** causes equipment to be unavailable for periods of time. While the supply chain may have latent capacity to work around shorter equipment outages, larger outages can significantly disrupt the capacity of the supply chain, causing the supply chain to be constrained by Asset capability.

DBCT PL have provided the forecast Shiploader maintenance requirements across the assessment period. Shiploader maintenance load is higher in the first few financial years reflecting the lower contracted volumes for this period.

### 3.3 Estimating Capacity

The Existing Terminal Capacity (on a “nameplate capacity” basis) is a measure of the Terminal’s ability alone, **without** the interacting, constraining effects of the upstream supply chain of Above Rail, Below Rail and TLOs. The Terminal inloaders essentially need to be continually fed, and therefore the model inputs are set to allow trains to present to the inloaders as required without being constrained. To ensure that the capacity estimate is not demand constrained, a ship stem of 120 Mtpa is used in the model.

The **System Capacity** is a measure of the performance of the whole supply chain, **with** the interacting, constraining effects of the upstream supply chain of Above Rail, Below Rail and TLOs. Model inputs for Above Rail, Below Rail and TLOs therefore more closely represent real world conditions.

### 3.4 Estimate Precision

When the Dynamic Simulation Model is used to run a scenario, more than 20 replications of that scenario are performed, providing a statistical spread of all output parameters.

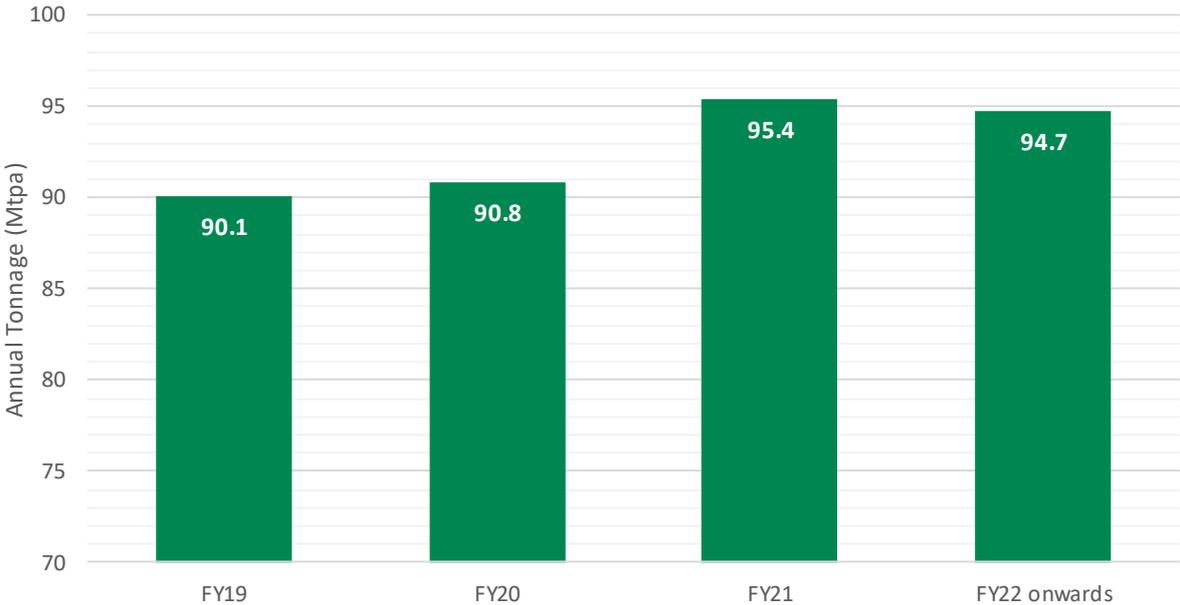
All capacity estimates provided here are average values with a precision of  $\pm 1$  Mtpa.

## 4.0 Capacity Estimates

### 4.1 Existing Terminal Capacity Estimates

When the upstream Rail and TLO performance is unconstrained, and a demand of 120 Mtpa is applied to the supply chain, the following terminal throughput responses are achieved. The throughputs represent the Existing Terminal Capacity estimates.

Figure 4 DBCT Existing Terminal Capacity Estimates<sup>1</sup>

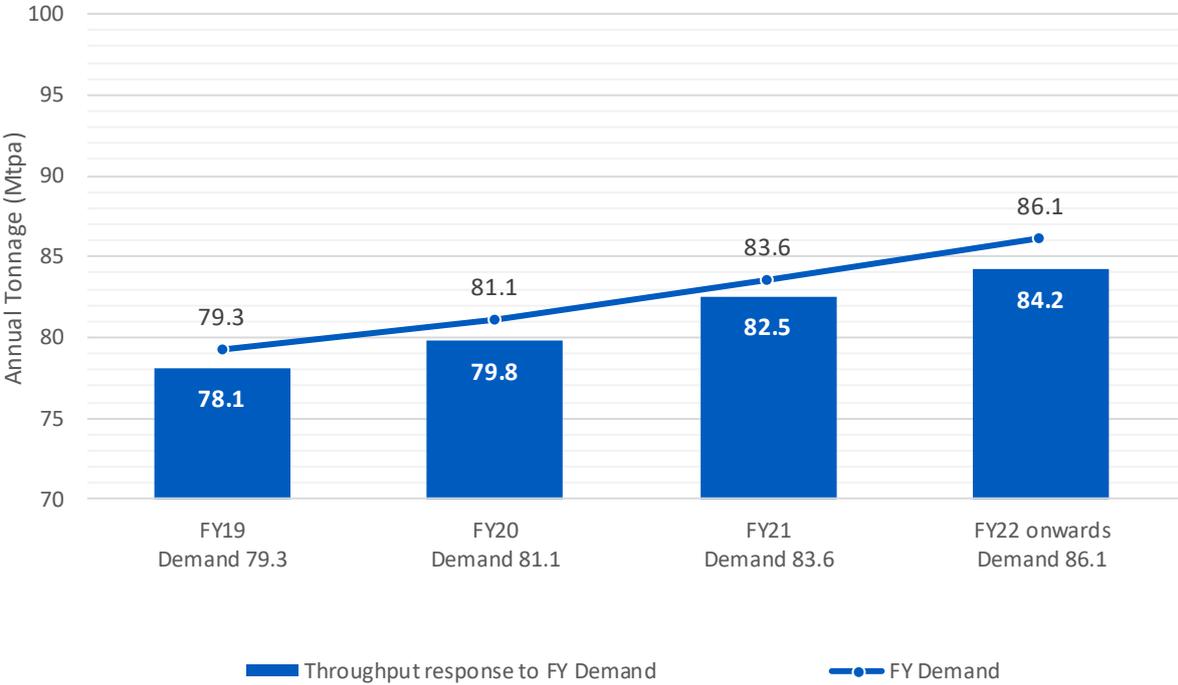


<sup>1</sup> All capacity estimates have a precision of ± 1 Mtpa.

### 4.2 System throughput response to FY Demand

Figure 5 shows the system throughput in response to the specified FY Contracted Demand. This throughput is an initial measure of System Capacity.

Figure 5 DBCT System Capacity Estimates<sup>2</sup>



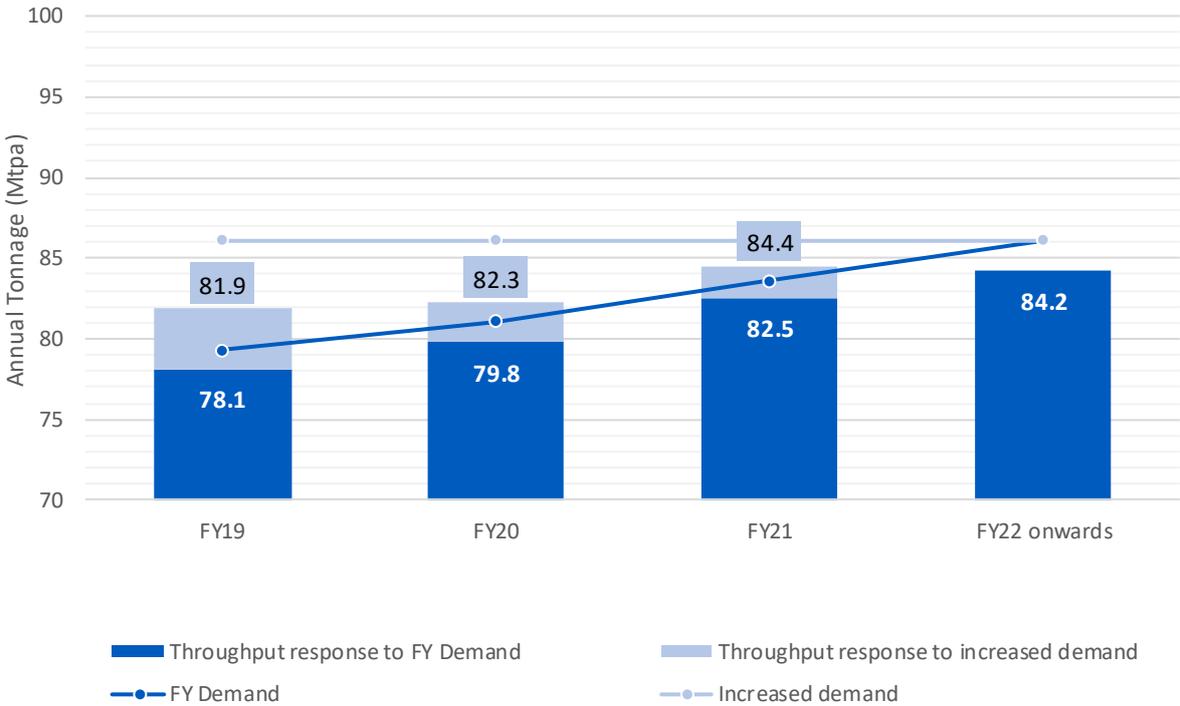
<sup>2</sup> All capacity estimates have a precision of ± 1 Mtpa.

### 4.3 Test for Demand Constraints

To test whether any of the scenarios in Section 4.2 above were Demand Constrained, a higher demand level was applied to each scenario, as shown in Figure 6.

The throughputs achieved here are considered to be the System Capacity Estimates, and are summarised in the following Section 4.4 “Capacity Estimates”.

Figure 6 DBCT System Capacity Estimates<sup>3</sup>



<sup>3</sup> All capacity estimates have a precision of ± 1 Mtpa.

## 4.4 Capacity Estimates

Existing Terminal Capacity and System Capacity estimates are summarised below.

**Table 3 Capacity Estimates over assessment period**

Financial Year	Contracted Demand (Mtpa)	Existing Terminal Capacity Estimate (Mtpa)	System Capacity Estimate (Mtpa)
FY19	79.3	90.1 ± 1	81.9 ± 1
FY20	81.1	90.8 ± 1	82.3 ± 1
FY21	83.6	95.4 ± 1	84.4 ± 1
FY22 onwards	86.1	94.7 ± 1	84.2 ± 1

## Appendix 4 DBCT Foreseeable Demand Analysis

## Appendix 4 DBCT foreseeable demand analysis

- 1 To demonstrate that on any view total foreseeable demand will exceed the reasonably possible maximum coal handling capacity of DBCT in the declaration period, which is 102Mtpa, DBCTM has prepared an estimate of foreseeable demand which:
  - 1.1 starts with the mines and production forecasts included in MMI Advisory Pty Ltd's (MMI's) base forecast;<sup>1</sup>
  - 1.2 adjusts MMI's base case assessment of demand:
    - 1.2.1 for mines with contracts at DBCT in the amount of the contract;
    - 1.2.2 to add mines that MMI excluded, which have current long term contracts at DBCT with evergreen extension rights; and
    - 1.2.3 to add mines in the queue for access to DBCT, which includes access applications submitted within the last twelve months and access applications that are being disputed at the time of this submission (in the amounts queued);<sup>2</sup>
- 2 In preparing this estimate, DBCTM has assumed that mines with evergreen contracts at DBCT will renew until at least 2030.<sup>3</sup> This assumption has been made having regard to the QCA's conclusions that:<sup>4</sup>

... existing users are likely to perpetually exercise the evergreen renewal right in their existing user agreements in a future without declaration.<sup>5</sup>

and:<sup>6</sup>

Incumbents would be able to use their existing capacity rights at DBCT for another mining operation. Further about a quarter of DBCT's nameplate capacity is accessed by miners that have mines in the Goonyella system which are expected to reach the end of their economic life over the recommended declaration period, and the relevant miners have, based on publicly available material, expressed an interest in continuing their mining operations.<sup>7</sup>
- 3 This estimate is set out in Figure 1 below.
- 4 DBCTM also prepared an estimate on the same basis as the estimate in Figure 1, however, which includes MMI's high case demand assessment. This estimate is set out in Figure 2 below.
- 5 In Figure 3 below, DBCTM comments on the mines included in Table 2 of the MMI Report and explains the basis for inclusion of each of the mines in Figures 1 and 2.
- 6 Figures 1 and 2 present demand on a contracted capacity basis. Accordingly, where MMI data is used, DBCTM scaled up that data to reflect a 10 per cent difference between demand for throughput and demand for contracted capacity as accepted by the QCA in its Draft Recommendation.<sup>8</sup>

<sup>1</sup> MMI Advisory Pty Ltd, Reconciliation of DBCT Demand Forecasts Submitted by Stakeholders, December 2018

<sup>2</sup> Note this is with the exception of [REDACTED] in which case DBCTM has used the production forecast in the MMI report as explained in Figure 3. As noted in the Statutory Declaration of Anthony Timbrell, DBCTM has included in this analysis access seekers who have disputed their removal from the access queue (Appendix 3 - Timbrell Declaration at [27]). Mr Timbrell considers that even if ultimately those access seekers are removed from the queue, it is reasonable that all such access seekers would subsequently make a new application to join the queue for the same quantities as currently sought, as [REDACTED] have already done.

<sup>3</sup> Note that [REDACTED].

<sup>4</sup> QCA Draft Recommendation, page 87

<sup>5</sup> QCA Draft Recommendation, page 87

<sup>6</sup> QCA Draft Recommendation, page 91

<sup>7</sup> QCA Draft Recommendation, page 91

<sup>8</sup> QCA Draft Recommendation, pages 41 and 45

7 DBCTM maintains that:

- 7.1 the mines included in MMI's base case demand assessment do not reflect all of the mines in the market in which the DBCT service is provided because MMI only included mines consistent with the QCA's definition of the market. As described in DBCTM's submission on criterion (b), the QCA's approach to market definition is in error with the result that the QCA and MMI fail to include mines in total foreseeable demand in the market which should properly be included; and
- 7.2 the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand.<sup>9</sup>

Nonetheless, this analysis demonstrates that on a narrow view of the market and having regard to DBCTM's contracted volumes and access queue, peak total foreseeable demand reaches:

- 150.4Mtpa in 2025 and 2026 (on the basis of MMI's base case production with adjustment for contracts and the access queue);
- 175.5Mtpa in 2028 (on the basis of MMI's high case production with adjustment for contracts and the access queue).

As set out in DBCTM's May 2018 Submission, the reasonably possible maximum coal handling capacity of DBCT is 102Mtpa.<sup>10</sup> Further Appendix 6 demonstrates that under (unrealistically) aggressive assumptions, including that the expansions commence in March 2019 (the day of this submission), the earliest DBCT could be expanded to 102Mtpa is February 2027. Accordingly, even on a narrow view of the market, DBCT cannot serve total foreseeable demand over the period of declaration.

**Figure 1: Foreseeable demand (including MMI base case production with adj. for contracts and access queue, years ending June, annualised (Mtpa))**

Mine	Owner	DBCT Contracted	Data	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
Mines/ Projects per MMI report													
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
Eagle Downs	Aquila	No	MMI demand	3.9	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
Hillalong	Shandong Energy	No	MMI demand	4.0	4.0	4.0	4.0	4.0	4.0	4.0	4.0	3.9	3.9
		Yes	Contracted										
		Yes	Contracted										
Lake Vermont	Jellinbah Group	No	MMI demand	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7	10.3	10.3
		Yes	Contracted										

<sup>9</sup> HoustonKemp May 2018 Report on (b)

<sup>10</sup> DBCTM May 2018 Submission at [191] to [200] and [220]

		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
<b>Mines/ Projects - not incl. by MMI but DBCT contracted</b>													
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
<b>Mines/ Projects in DBCT queue</b>													
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
<b>TOTALS</b>													
<b>Total DBCTM Contracted Mt</b>				<b>81.8</b>	<b>82.7</b>	<b>84.1</b>							
<b>Total MMI Mt (mines not contracted)</b>				<b>11.6</b>	<b>12.7</b>	<b>19.3</b>	<b>19.3</b>						
<b>Total DBCT Access Queue</b>				<b>35.1</b>	<b>35.9</b>	<b>32.6</b>	<b>48.6</b>	<b>53.6</b>	<b>53.6</b>	<b>53.6</b>	<b>53.6</b>	<b>43.7</b>	<b>29.2</b>
<b>TOTAL DEMAND</b>				<b>128.5</b>	<b>131.3</b>	<b>129.3</b>	<b>145.4</b>	<b>150.4</b>	<b>150.4</b>	<b>150.3</b>	<b>150.3</b>	<b>147.0</b>	<b>132.5</b>

**Figure 2: Foreseeable demand (including MMI high case production with adj. for contracts and access queue, years ending June, annualised (Mtpa))**

Mine	Owner	DBCT Contracted	Data	2021	2022	2023	2024	2025	2026	2027	2028	2029	2030
<b>Mines/ Projects per MMI report</b>													
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
Eagle Downs	Aquila	No	MMI demand	3.9	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0	5.0
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
Hillalong	Shandong Energy	No	MMI demand	4.0	4.0	4.0	4.0	4.0	4.0	4.0	4.0	3.9	3.9
		Yes	Contracted										
		Yes	Contracted										
Lake Vermont	Jellinbah Group	No	MMI demand	3.7	3.7	3.7	3.7	3.7	3.7	3.7	3.7	10.3	10.3
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
<b>Mines/ Projects - not incl. by MMI but DBCT contracted</b>													
		Yes	Contracted										
		Yes	Contracted										
		Yes	Contracted										
<b>MMI High Case</b>													
Codrilla High Case			MMI demand	-	-	-	-	1.0	2.0	3.6	3.6	3.6	3.6
Denham High Case			MMI demand	-	-	-	-	-	0.8	3.2	3.9	5.0	6.1
Grosvenor West High Case			MMI demand	-	-	-	-	-	1.7	2.9	4.2	4.2	4.2
Harrybrandt High Case			MMI demand	-	-	-	-	-	1.1	2.8	2.8	2.8	2.8

## Appendix 4

## DBCT foreseeable demand analysis

Moorvale West High Case			MMI demand	-	-	-	-	-	0.4	1.1	1.1	1.1	1.1
Talwood High Case			MMI demand	-	-	-	-	-	1.0	1.8	4.0	4.0	4.0
West/North Burton High Case			MMI demand	-	-	-	-	-	0.4	1.1	1.1	1.1	1.1
Winchester South High Case			MMI demand	-	-	-	-	-	2.0	4.0	4.4	4.4	4.4
Mines/ Projects in DBCT queue													
			Queue										
			Queue										
			Queue										
			Queue										
			Queue										
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			Queue										
<b>TOTALS</b>													
<b>Total DBCTM Contracted Mt</b>				<b>81.8</b>	<b>82.7</b>	<b>84.1</b>							
<b>Total MMI Mt (mines not contracted)</b>				<b>11.6</b>	<b>12.7</b>	<b>19.3</b>	<b>19.3</b>						
<b>Total projects incl. in MMI High Case</b>				-	-	-	-	<b>1.0</b>	<b>9.5</b>	<b>20.5</b>	<b>25.1</b>	<b>26.2</b>	<b>27.3</b>
<b>Total DBCT Access Queue</b>				<b>35.1</b>	<b>35.9</b>	<b>32.6</b>	<b>48.6</b>	<b>53.6</b>	<b>53.6</b>	<b>53.6</b>	<b>53.6</b>	<b>43.7</b>	<b>29.2</b>
<b>TOTAL DEMAND</b>				<b>128.5</b>	<b>131.3</b>	<b>129.3</b>	<b>145.4</b>	<b>151.4</b>	<b>159.8</b>	<b>170.8</b>	<b>175.5</b>	<b>173.3</b>	<b>159.9</b>

### Figure 3: Commentary on mines included in Figures 1 and 2

DBCTM makes the following comments on the mines set out in Table 2 of MMI's Report and those included in Figures 1 and 2 above. Whereas MMI grouped the mines by geographical location, the following table lists the mines in alphabetical order consistent with Figures 1 and 2.

Mine	Owner	Comments
Blair Athol	Terracom	Currently contracted at DBCT for [REDACTED]. This supports their extended mine life (plus contract allowance). <sup>11</sup> In Figures 1 and 2, [REDACTED].
German Creek	Anglo American	Not included in MMI report. Currently contracted at DBCT for [REDACTED].
Carborough Downs	Fitzroy	Not included in MMI report. Contracted at DBCT for [REDACTED].
Caval Ridge	BHP Mitsui Alliance	MMI excluded this mine on the basis that it utilises HPCT. Note that this mine exported approximately [REDACTED] through DBCT in 2018. DBCTM maintains that forecast production from this mine should be included in total foreseeable demand in the market. Nonetheless, consistent with MMI, DBCTM has not included forecast production from this mine in this analysis (except to the extent that DBCTM has included demand from BMA mines as described in the row labelled "various" below) as this analysis seeks to show that even on the QCA's narrow view of the market, total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT.
Clermont	Glencore	Currently contracted at DBCT for [REDACTED].
Codrilla	Peabody	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Coppabella	Peabody	Currently contracted at DBCT for [REDACTED].
Daunia	BHP Mitsui Alliance	MMI excluded this mine on the basis that it utilises HPCT. DBCTM maintains that forecast production from this mine should be included in total foreseeable demand in the market. Nonetheless, consistent with MMI DBCTM has not included forecast production from this mine in this analysis (except to the extent that DBCTM has included demand from BMA mines as described in the row labelled "various" below) as this analysis seeks to show that even on the QCA's narrow view of the market, total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT.
Denham	Peabody	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Dysart East	Bengal Coal Pty Ltd	[REDACTED]
Eagle Downs	Aquila / South 32	Eagle Downs is a joint venture between Aquila and South 32. [REDACTED] Given [REDACTED] DBCTM has included MMI's demand forecast for Eagle Downs in Figures 1 and 2 and, to allow for 100% demand from the mine [REDACTED] in Figures 1 and 2).
Foxleigh	Realm Resources	Currently contracted at DBCT for [REDACTED].
Goonyella	BHP Mitsui Alliance	MMI excluded this mine on the basis that it utilises HPCT. Note that this mine exported approximately [REDACTED] through DBCT in 2018. DBCTM maintains that forecast production from this mine should be included in total foreseeable demand in the market. Nonetheless,

<sup>11</sup> Australian Mining, TerraCom extends Blair Athol mine life, 13 February 2018, <https://www.australianmining.com.au/news/terra-com-extends-blair-athol-mine-life/>

Mine	Owner	Comments
		consistent with MMI DBCTM has not included forecast production from this mine in this analysis (except to the extent that DBCTM has included demand from BMA mines as described in the row labelled "various" below) as this analysis seeks to show that even on the QCA's narrow view of the market, total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT.
Gregory Crinum	Sojitz Coal Mining	[REDACTED]
Grosvenor	Anglo American	Currently contracted at DBCT for [REDACTED] In Figures 1 and 2, [REDACTED]
Grosvenor West	Wealth Mining Ltd	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Hail Creek	Glencore	Currently contracted at DBCT for [REDACTED]
Harrybrandt	Yanzhou	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Hillalong	Shandong Energy	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Ironbark No.1	Fitzroy Resources	Currently contracted at DBCT for [REDACTED], increasing to [REDACTED].
Isaac Plains	Stanmore Coal	Currently contracted at DBCT for [REDACTED].
Kestrel	Kestrel Coal Resources	DBCTM maintains that forecast production from this mine should be included in total foreseeable demand in the market. Nonetheless, consistent with MMI DBCTM has not included forecast production from this mine in this analysis as this analysis seeks to show that even on the QCA's narrow view of the market, total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT.
Lake Vermont	Jellinbah Group	DBCTM maintains that the entire forecast production of this mine should be included in total foreseeable demand in the market. Nonetheless, consistent with MMI, DBCTM has only included 3.67Mtpa of demand from this mine up to 2028 from which point DBCTM also includes an additional 6.67Mtpa (both based on throughput + contracted allowance).
Middlemount	Middlemount Coal	Currently contracted for [REDACTED].
Millennium	Peabody	Not included in MMI report. Currently contracted for [REDACTED]
Moorvale	Peabody	Currently contracted for [REDACTED].
Moorvale West	Peabody	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Moranbah North	Anglo American	Currently contracted at DBCT for [REDACTED]

Mine	Owner	Comments
Moranbah South	Anglo American	<p>[REDACTED] In Figures 1 and 2, [REDACTED]</p> <p>Note this evidence from Anglo is inconsistent with the User Group's statement that [REDACTED] should not be included in projected demand because it is not forecast to begin production until 2034.<sup>13</sup></p>
New Lenton	New Hope	[REDACTED]
North Goonyella	Peabody	Currently contracted at DBCT for [REDACTED].
Oaky Creek	Glencore	Currently contracted at DBCT for [REDACTED].
Olive Downs	Pembroke Resources	Currently contracted at DBCT for [REDACTED] in [REDACTED] increasing to [REDACTED] in [REDACTED] and then to [REDACTED] until [REDACTED]. Current contracted capacity is [REDACTED] production than MMI Report.
Peak Downs	BHP Mitsui Alliance	MMI excluded this mine on the basis that it utilises HPCT. Note that this mine exported approximately [REDACTED] through DBCT in 2018. DBCTM maintains that forecast production from this mine should be included in total foreseeable demand in the market. Nonetheless, consistent with MMI DBCTM has not included forecast production from this mine in this analysis (except to the extent that DBCTM has included demand from BMA mines as described in the row labelled "various" below) as this analysis seeks to show that even on the QCA's narrow view of the market, total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT.
Poitrel and South Walker Creek	BHP Mitsui Coal	BHP Mitsui Coal's mines (Poitrel and South Walker Creek) are currently contracted for a total of [REDACTED].
Saraji	BHP Mitsui Alliance	MMI excluded this mine on the basis that it utilises HPCT. Note that this mine exported approximately [REDACTED] through DBCT in 2018. DBCTM maintains that forecast production from this mine should be included in total foreseeable demand in the market. Nonetheless, consistent with MMI, DBCTM has not included forecast production from this mine in this analysis (except to the extent that DBCTM has included demand from BMA mines as described in the row labelled "various" below) as this analysis seeks to show that even on the QCA's narrow view of the market, total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT.
Saraji East	BHP Mitsui Alliance	MMI excluded this mine on the basis that it utilises HPCT. DBCTM maintains that forecast production from this mine should be included in total foreseeable demand in the market. Nonetheless, consistent with MMI, DBCTM has not included forecast production from this mine in this analysis (except to the extent that DBCTM has included demand from BMA mines as described in the row labelled "various" below) as this analysis seeks to show that even on the QCA's narrow view of the market, total foreseeable demand exceeds the reasonably possible maximum coal handling capacity of DBCT.
South Walker Creek	BHP Mitsui Coal	Refer to entry under "Poitrel" above.
Styx Basin (CQ Coal Project)	Mineralogy	[REDACTED]
Talwood	Aquila	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable

<sup>12</sup> Refer to Appendix 6.

<sup>13</sup> DBCT User Group, Submission in response, 16 July 2018, page 38

Mine	Owner	Comments
		demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Teresa	United Group Mining	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analyses of foreseeable demand in Figures 1 and 2.
Various	BMA	Not included in MMI's report. Currently contracted for [REDACTED]
West/North Burton	Peabody	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.
Willunga	Pembroke Resources	Contracted volumes from this mine are included in the contracted volumes from Olive Downs in Figures 1 and 2.
Winchester South	Rio Tinto	DBCTM maintains the AME mine production forecasts used in HoustonKemp's analysis of criterion (b) are the most credible and realistic forecasts of demand. Nonetheless, consistent with MMI, DBCTM excludes forecast production from this mine in the analysis of foreseeable demand in Figure 1, however, includes that production in the high case analysis of foreseeable demand in Figure 2.

**Appendix 5 Moranbah South Project**

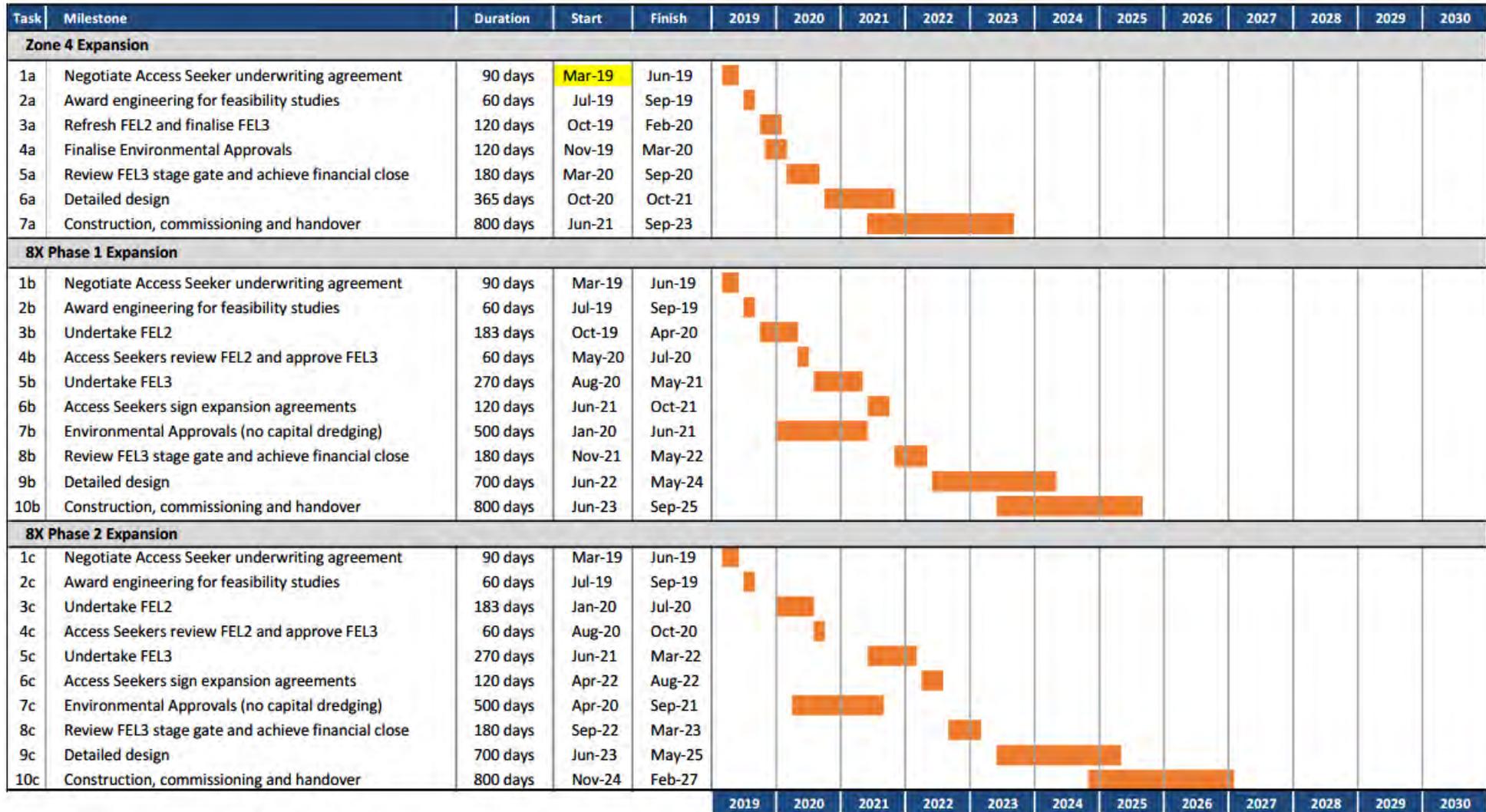
**REDACTED**

## Appendix 6 DBCT Expansion Schedule and Assumptions

## Appendix 6 DBCT Expansion Schedule and Assumptions

- 1 This Appendix sets out:
  - 1.1 the expansion schedule DBCTM has prepared setting out timing for completing the Zone 4, 8X Phase 1 and 8X Phase 2 expansions; and
  - 1.2 the assumptions for that expansion timing.
- 2 In preparing the schedule DBCTM has employed (unrealistically) aggressive assumptions, including that the expansions commence in March 2019 (the day of this submission). In addition, the schedule was prepared on the basis that requirements concerning expansions imposed by the 2017 Access Undertaking or Framework do not apply. If requirements with respect to expansions imposed by the 2017 Access Undertaking or Framework are taken into account, the timing for completion of the 8X Phase 1 and 2 Expansions would be almost a year later in each case (assuming no disputes).
- 3 This Appendix demonstrates that under aggressive assumptions for expansion timing the Zone 4 Expansion could not be completed until September 2023 at the earliest, and the 8X Phase 1 Expansion could not be completed until September 2025, at the earliest. While the 8X Phase 2 expansion is not required in order to service the QCA's estimated total foreseeable demand in its Draft Recommendation, this Appendix shows that expansion could not be completed until February 2027 (also assuming it commenced in March 2019).

Figure 1: Expansion schedule



## Explanation of each step including assumptions and duration

- 4 The expansion schedule is based on the following assumptions:
- 4.1 Demand exists for all three projects and therefore all are triggered for delivery as soon as practicable. As such, the first tasks in each schedule would commence in parallel.
  - 4.2 The construction activities for each of the phases cannot all happen concurrently and need to be staggered to minimise operational disruption and keep operational losses at acceptable levels.
  - 4.3 The engineering activities (especially FEL3 and detailed design) have been scheduled so as not to create large peaks and troughs in resource numbers. Instead, where practical, the resources are scheduled to move between projects and phases.
  - 4.4 There will not be a berth in any part of the 8X project. At the completion of FEL1, a Berth 2a to the south and a Berth 5 to the north had been identified as viable expansion elements that could provide some of the needed outloading capacity. Other possible combinations of expansion elements were identified but none were without unique technical challenges. If FEL2 determines that a berth is required, then capital dredging in the world heritage area will be required. This has not been done anywhere since the introduction of the *Sustainable Ports Development Act (2015)* (Qld) and would add a minimum of 2-3 years to the program as DBCTM finds environmental solutions and attempts to receive approvals to do capital dredging (if it is even possible).<sup>1</sup> It would also be likely to add at least another year to the construction program because marine works are more weather dependent and, for the first time, the dredge spoil would need to be brought onshore somewhere at Hay Point.
- 5 Each task in the expansion description is described in the following table.

**Figure 2: Description of each task**

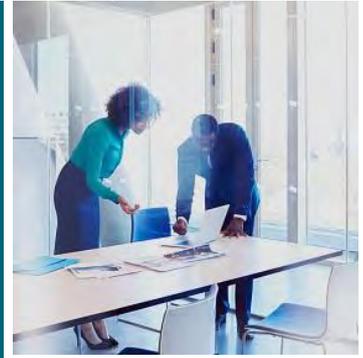
Task	Task Name	Description of activity and expected duration
1a,1b,1c	Negotiate Access Seeker underwriting agreements	It is anticipated that it would take at least 3 months to negotiate and agree a study underwriting agreement with Access Seekers. Note 1a, 1b and 1c are likely to be underwritten by different Access Seekers and mechanisms for tracking and splitting costs will need to be developed and agreed.
2a,2b,2c	Award engineering for feasibility studies	Engineering proposals need to be sought and negotiations completed for engineering services. Once an engineering company does the feasibility it is near impossible to change designers for any other phase. Therefore, the commercial framework, fee structure, change methodology and key resource allocation will need to be negotiated and agreed on the basis that the commissioning will likely flow from FEL2 to FEL3 to detailed design to construction phase design support. DBCTM has allowed only 2 months for all of this which is optimistic. In reality, it is likely that this activity will take much longer than 2 months but it would likely commence prior to the finalisation of the underwriting agreement so that it could be completed within the 2 months allowed.
<b>Zone 4</b>		
3a	Refresh FEL2 and finalise FEL3	For Zone 4, the FEL2 and most of FEL3 have already been completed. Most of the technical parts of the previous studies will be reused but many items will need to be checked and finalised. The FEL3 study that has been done will need to be updated to ensure that it is still accurate with respect to operational aspects and technical assumptions. The commercial parts of the feasibility study will need to be undertaken once the counterparty is finalised. The duration of 120 days is based on the fact that a new engineering team will need to be assembled and will need time to understand and verify the previous work, prepare gap analysis and then complete the work.

<sup>1</sup> The dredge spoil quantity from a single berth to the south is estimated to be approximately 100,000 cubic metres Finding an acceptable solution for onshore disposal for this quantity may be feasible but approvals will be difficult to achieve. In contrast, 9X requires a quantity of dredged spoil of 1.5m cubic metres.

Task	Task Name	Description of activity and expected duration
4a	Finalise Environmental approvals	The Port Development Approval for Zone 4 was obtained by DBCTM in 2015. It has a currency period of 6 years. An allowance has been made for any minor variations to this approval by the assessment manager, NQBP, should the scope need to vary slightly from the approved project. This is assumed to happen in parallel with task 3a and only extend 1 month beyond the completion of 3a.
5a	Review FEL3 stage gate and achieve financial close	The period allowed here is 180 days. This is required to get expansion tonnage agreements in place and sort out and finalise project finance once the expanding parties have signed agreements. It is assumed that toward the end of this period an engineering project office will be set up and a team of designers and project delivery people will be assembled ready for the detailed design and execution phases to commence.
6a	Detailed design	Only about 20-30% of the detailed design is completed in FEL3. This period is for the completion of the detailed design, the assembly of the project delivery team, the tendering and letting of the yard machine contract, principal supply contracts and early works contracts
7a	Construction, commissioning and handover	The construction duration of 800 days is approximately 10 months shorter than the duration determined in the Zone 4 FEL3 study. This tight timeframe assumes that DBCTM would be able to get a pre-financial close commitment for the yard machines to take them off the critical path. It requires Access Seekers to underwrite award and design of the yard machines as well as some other on site early civil works preparation for a relatively small commitment.
<b>8X Phase 1</b>		
3b	Undertake FEL2	The FEL1 study for 8X identified several terminal elements that could be combined to each give a targeted increase in capacity to either inloading, outloading or the stockyard. The actual combination of elements that make up 8X is not known at this stage. FEL2 is a significantly more detailed analysis of these options and will result in a single go forward option for 8X. While Phase 1 and Phase 2 may be committed as separate projects, the FEL2 study should necessarily be combined so that, overall, the benefit of each element is maximised under all expansion scenarios. The overall duration of the combined FEL2 study for 8X is estimated at 9 months. However, during the first 6 months, the detailed effort will be more focused on Phase 1, so that this task is complete within the 6 month period.
4b	Access Seekers review FEL2 and approve FEL3	An allowance of 2 months has been made for Access Seekers to understand FEL2 and then seek their respective internal approvals to proceed to FEL3. This is likely to be optimistic for some companies.
5b	Undertake FEL3	FEL 3 involves a much larger design team because in this phase, 20-30% of the detailed design is completed. This phase involves undertaking sufficient engineering to allow a detailed understanding of the total cost and schedule including the risks to both cost and schedule. Significant geotechnical studies and procurement analysis will be required to understand, with some certainty, the cost of materials and plant required. 9 months has been allowed for this phase, which is considered relatively tight.
6b	Access Seekers sign Expansion Agreements	120 days has been allowed for this activity. In this time, Access Seekers will review FEL3 and then go through a process of Q&A to ensure that they are sufficiently informed to answer internal questions as they seek their approvals to enter into Expansion Tonnage Agreements.
7b	Environmental Approvals	The process of obtaining all environmental and regulatory approvals is expected to take a minimum of 500 days (during FEL2 & FEL3) and is based on not needing to gain any approvals for marine construction or dredging. An EPBC referral would be made approximately midway through FEL2 once the 'single go forward option' is determined. The duration of 500 days is also based on the assumption that 8X will not be deemed to be a controlled action.
8b	Review FEL3 stage gate and achieve financial close	The assumed duration of 180 days may be the only generous duration in this overall schedule. It is assumed that finalising finance for an expansion for this project is likely to take this long. This task may be easier or harder depending upon the quality of the counterparty and the security that they can provide. This process can only be commenced once the counterparties have entered into Expansion Tonnage Agreements. Note, there is not any benefit in shortening this activity because it is not on the critical path. The scheduling of construction activities 10b with those of activity 7a means that there is no benefit in completing this activity earlier.
9b	Detailed design	It is assumed that the design team would be managed holistically to minimise the peaks and troughs which are not only expensive and disruptive, but also introduce quality risks if individuals are lost and then replaced with others throughout the project lifecycle. To achieve this, it is assumed that the design team working on task 5b would move to 5c then come back to Phase 1 and complete this task (9b), being the detailed design. This is dependent on how the demand materialises, but the program is based on Assumption 1 above. Note, once again there is no benefit in completing this task any

Task	Task Name	Description of activity and expected duration
		earlier because construction activities 10b must be delayed to follow on from activity 7a so that terminal throughput is not dramatically impacted.
10b	Construction, commissioning and handover	This activity is expected to have a duration similar to that of Zone 4. The vertical stockyard walls on Bunds 1&3 are relatively disruptive to operations and need to be constructed over an extended time to minimise this disturbance. This work cannot be started until Zone 4 construction (task 7a) is complete.
<b>8X Phase 2</b>		
3c	Undertake FEL2	This activity is assumed to be completed together with task 3b but, generally, will be completed in the last 6 months of that activity
4c	Access Seekers review FEL2 and approve FEL3	It is assumed that different Access Seekers will be underwriting 8X Phase 2 from those underwriting 8X Phase 1. This activity is the same as task 4b but starts a little later with different counterparties.
5c	Undertake FEL3	The most efficient outcome for 8X Phase 2 FEL3 is to move the bulk of the design team onto this task as task 5b winds up. In the absence of more detailed scope knowledge, it is assumed that this activity has the same duration as 5b.
6c	Access Seekers signs Expansion Agreements	This task is the same as 6b, but with different counterparties
7c	Environmental Approvals	This activity will be combined with 7b and remains well off the critical path. (based on the assumption that there ends up being no berth in the 8X scope)
8c	Review FEL3 stage gate and achieve financial close	This task is the same as 8b but with different counterparties. Once again, it is not on the critical path because of the operational constraints to activity 10c.
9c	Detailed design	It is assumed that the design team will be ramped up to take on this task midway through 9b. The duration is assumed the same as 9b. Once again, the critical path runs through the construction 10b to 10c not through the design.
10c	Construction, commissioning and handover	Once again the commencement of the construction on site would need to be delayed because of a need to minimise the operational disruption on site. The duration is assumed at 800 days despite not having a detailed understanding of the scope.

**Appendix 7 GHD report on (b)**



# Review of the QCA's least cost calculations and approach for criterion (b)

DBCT Management

8 March 2019

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# 1. Executive summary

DBCT Management Pty Ltd (**DBCTM**) engaged GHD Advisory (us) to review the Queensland Competition Authority's (**QCA's**) least cost calculations and approach under section 76(2)(b)(ii) of the *Queensland Competition Authority Act 1997* (Qld) (the **QCA Act**). In particular, we have been asked to prepare a report on whether the facility for the service, the Dalrymple Bay Coal Terminal (**DBCT**), can service total foreseeable demand in the market at least cost when compared to any two or more facilities (which could include DBCT).

This report addresses a number of errors we consider that the QCA has made in its approach and calculations in the *Part C: Draft Recommendation – the DBCT service* (the **Draft Recommendation**). We consider some of these errors to be material because they have led to the QCA incorrectly finding that criterion (b) is satisfied.

**Key finding one: the QCA has made a material error in its least cost assessment by applying a different approach than that stated in the Staff Issues Paper, which has resulted in the QCA erroneously concluding that criterion (b) is satisfied**

In its least cost assessment, the QCA evaluated the average cost per unit of DBCT alone (expanded) compared with DBCT (unexpanded) used in combination with another facility,<sup>1</sup> stating that this approach is consistent with the worked example in Appendix B of the Staff Issues Paper.<sup>2</sup> We have found that the QCA's approach in the Draft Recommendation is inconsistent with that in the Staff Issues Paper. Instead of comparing:

- the average supply chain cost of DBCT (expanded) meeting 93 million tonnes per annum (mtpa) of demand with the average supply chain cost of meeting demand with a combination of DBCT (unexpanded) meeting 85 mtpa and RG Tanna Coal Terminal (RGCT) meeting 8 mtpa

the QCA compares:

- the average supply chain cost of DBCT meeting 93 mtpa of demand with the average supply chain cost of a Goonyella mine using RGCT.

When the correct methodology is applied, the cost of DBCT (expanded) servicing the market is higher than a combination of DBCT (unexpanded) and RGCT meeting total foreseeable demand in the market (\$12.05 per tonne compared with \$11.90 per tonne). Hence, criterion (b) is not satisfied.

**Key finding two: the QCA has incorrectly assumed that RGCT is fully contracted. There is publicly available information to show that sufficient spare capacity exists within the RGCT supply chain to accommodate the demand exceedance of 8 mtpa at DBCT**

The QCA has not properly consider publicly available information that demonstrates there is spare capacity at RGCT and the Blackwater rail system to accommodate 8 mtpa of demand from Goonyella mines (i.e. the estimate of total foreseeable demand in the market of 93 mtpa minus DBCT's 85 mtpa nameplate capacity).

The QCA has not acknowledged evidence provided by its own consultant, Resource Management International (**RMI**), provided as part of the Aurizon Network UT5 process in May 2017 that estimated there

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<sup>1</sup> Draft Recommendation, Part C, p. 50

<sup>2</sup> Draft Recommendation, Part C, p. 50

was approximately 8-10 mtpa of spare capacity at RGTCT.<sup>3</sup> The QCA has also failed to apply the same assumptions it makes to transform its forecasts of total foreseeable demand in the market to reported actual coal throughput at RGTCT, as published by Gladstone Ports Corporation.<sup>4</sup>

Hence, we find that there are no capacity constraints that restrict RGTCT and DBCT (unexpanded) meeting total foreseeable demand in the market.

**Key finding three: criterion (b) is not satisfied even under an appropriately calculated upper-bound supply chain cost for a Goonyella mine accessing RGTCT**

The QCA has made errors in its calculation of the lower- and upper-bound supply chain costs for a Goonyella mine accessing RGTCT. Firstly, the QCA applies actual tonnes and gross tonne kilometres (gtks), instead of contracted tonnes and gtks, to determine the below-rail average costs. Actual tonnes and gtks are the incorrect metric as the QCA considers contracted capacity entitlements are the relevant measure of total foreseeable demand. The QCA's approach is also internally inconsistent, as it applies contracted tonnes as the relevant metric to derive the below-rail costs of expansion.

Finally, the QCA has over-estimated the upper-bound below-rail cost for a Goonyella mine accessing RGTCT because it has incorrectly incorporated the Goonyella AT2 tariff component in the calculation.

**Key finding four: the QCA's average supply chain cost to Goonyella mines using DBCT (expanded) of \$12.05 per tonne is not overstated**

The QCA said its cost-estimation approach for the least cost assessment is based on publicly available data.<sup>5</sup> The QCA also implies that, because of some conservative assumptions it has made,<sup>6</sup> its estimates of how the below-rail expansions in the Goonyella system and expansions at DBCT increase the average supply chain cost (\$12.05 per tonne up from \$11.42 per tonne) are likely to be overstated.

With a more appropriate method for determining the cost impact of the below-rail expansions, and an approach that uses publicly available information only for determining the cost impact of the port expansions, we find that the QCA's estimate of the DBCT (as expanded) average supply chain cost of \$12.05 per tonne is not overstated.

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<sup>3</sup> RMI (2017), *Assessment of Coal Volume Forecasts for Aurizon Network's 2017 Draft Access Undertaking, May 2017*, p. 34

<sup>4</sup> Page 16 of [https://www.gpcl.com.au/SiteAssets/Annual%20Reports/GPC\\_Annual\\_Report\\_2017-18.pdf](https://www.gpcl.com.au/SiteAssets/Annual%20Reports/GPC_Annual_Report_2017-18.pdf)

<sup>5</sup> Draft Recommendation, Part C, Appendix A, p. 128

<sup>6</sup> Draft Recommendation, Part C, Appendix A, pp. 136 and 138

## Summary of least cost analysis

The grey-shaded columns of the table below outline the least-cost findings that the QCA would have reached if it had applied the method set out in the worked example of its Staff Issues Paper. Under its lower-bound scenario for determining average supply chain costs, the QCA would have found that criterion (b) is not satisfied.

With our proposed adjustments (blue-shaded columns of the table) to several of the QCA's assumptions, criterion (b) would not have been satisfied under either the lower- and upper-bound scenarios.

Item	QCA (lower bound)		GHD (lower bound)		QCA (upper bound)		GHD (upper bound)	
	DBCT	DBCT + RGTCT						
Terminals								
85 mtpa	\$11.42	\$11.42	\$11.42	\$11.42	\$11.42	\$11.42	\$11.42	\$11.42
8 mtpa	\$18.74*	\$17.02	\$18.74*	\$16.44	\$18.74*	\$20.09	\$18.74*	\$18.67
<b>93 mtpa (average cost)</b>	<b>\$12.05</b>	<b>\$11.90*</b>	<b>\$12.05</b>	<b>\$11.85</b>	<b>\$12.05</b>	<b>\$12.17*</b>	<b>\$12.05</b>	<b>\$12.04</b>
<b>Difference</b>		<b>(\$0.15)</b>		<b>(\$0.20)</b>		<b>\$0.12</b>		<b>(\$0.01)</b>

\*Calculated by GHD using the QCA's own numbers

## 2. Disclaimer

This report has been prepared by GHD for DBCTM and may only be used and relied on by DBCTM for the purpose agreed between GHD and the DBCTM as set out in chapter 3 of this report.

GHD otherwise disclaims responsibility to any person other than DBCTM arising in connection with this report. GHD also excludes implied warranties and conditions, to the extent legally permissible.

The services undertaken by GHD in connection with preparing this report were limited to those specifically detailed in the report and are subject to the scope limitations set out in the report.

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The GHD authors of this report, Hires Devaser and Jacqui Marshall, acknowledge the contributions of Brian Parmenter of ACIL Allen Pty Ltd in the preparation of this report.

## 3. Background

DBCT is currently declared for third-party access under the QCA Act. Its declared status is due to expire on 8 September 2020. The QCA is currently assessing whether the coal handling service at DBCT satisfies the access criteria in section 76 of the QCA Act. On 18 December 2018, the QCA made a draft recommendation concluding that the coal handling service provided at DBCT satisfied the access criteria and should be declared for a further 10 years.

DBCTM engaged GHD Advisory (us) to review the QCA's least cost calculations and approach under section 76(2)(b)(ii) of the QCA Act, namely whether DBCT can service total foreseeable demand in the market at least cost when compared to any two or more facilities (which could include DBCT itself).

This report addresses a number of errors we consider the QCA has made in its approach and calculations in the *Part C: Draft Recommendation – the DBCT service* (the **Draft Recommendation**). We consider some of these errors to be material because rectifying them would have meant that the QCA would have reached a different conclusion on whether criterion (b) is satisfied.

This report also considers key material and information from the *Declaration Review - Staff Issues Paper* (the **Staff Issues Paper**) and *Part A: Draft recommendation – the Aurizon Network service* (the **Draft Recommendation on Aurizon Network**).

### 3.1 This report

This report is structured as follows:

- Chapter 4 summarises the material error made by the QCA in its least cost calculations in the Draft Recommendation. The chapter demonstrates how its approach in the Draft Recommendation is inconsistent with its stated approach from the Staff Issues Paper. We consider that this inconsistency has led to a material error, as when the approach from the Staff Issues Paper is correctly applied, criterion (b) is not satisfied.
- Chapter 5 summarises the publicly available evidence that demonstrates there is spare capacity at the RGTCT and within the Blackwater rail system to accommodate an additional 8 mtpa of capacity (the maximum demand exceedance over DBCT's nameplate capacity of 85 mtpa) over the draft declaration period.
- Chapter 6 explains other errors that we consider that the QCA has made in determining the lower- and upper-bound estimates of below-rail average costs.
- Chapter 7 provides further comments on the QCA's approach to deriving average supply chain costs.

## 4. Response to the QCA’s calculation approach for its least cost analysis

This chapter demonstrates that the QCA’s least cost calculations in the Draft Recommendation are inconsistent with the worked example in Appendix B of its Staff Issues Paper, which is the approach that the QCA claims to have applied in the Draft Recommendation. This inconsistency has led to a material error, as when the approach adopted in worked example of the Staff Issues Paper is correctly applied, criterion (b) is not satisfied.

### 4.1 The QCA’s reported approach for the least cost analysis

In its assessment of criterion (b), the QCA considers that “*the relevant matter is whether the average per unit cost at DBCT of satisfying total foreseeable demand (including expansion costs) is lower than the average per unit cost at DBCT and another facility*”.<sup>7</sup> To assess the average per unit cost of DBCT relative to DBCT and another facility servicing total foreseeable demand, the QCA states that it employs the same methodology as provided for in the worked example in its Staff Issues Paper.<sup>8</sup> We recreate this example in Table 1.

**Table 1: Hypothetical cost per widget, per QCA’s Staff Issues Paper**

Demand for widgets	Facility V (unit cost)	Facility V + W (unit cost)
180 widgets	\$1.00	\$1.00 (assumes Facility V services demand for initial 180 widgets)
20 widgets	\$1.20	\$1.10
<b>200 widgets (average cost)</b>	<b>\$1.02</b>	<b>\$1.01</b>

Source: Queensland Competition Authority (2018) *Staff Issues Paper*, pp. 31-32<sup>9</sup>

Facility V services 180 widgets at a unit cost of \$1.00. Total foreseeable demand in the market is 200 widgets, which represents an incremental demand of 20 widgets. Facility V can be expanded to meet the additional demand of 20 widgets at an incremental unit cost of \$1.20.

Therefore, Facility V’s (expanded) total cost of production to service total foreseeable demand in the market is \$204 ( $\$1.00 \times 180 + \$1.20 \times 20$ ), with **an average cost per widget of \$1.02** ( $\$204 / 200$ ).

If Facility V is not expanded, an alternative is for Facility W to service the incremental demand of 20 widgets. In this instance, Facility V will service the current 180 widgets at a cost of \$1.00 per widget and Facility W will service the incremental demand of 20 widgets at a unit cost of \$1.10.

<sup>7</sup> Draft Recommendation, Part C, p. 50

<sup>8</sup> Draft Recommendation, Part C, p. 50, fn.171.

<sup>9</sup> Available at: <http://www.qca.org.au/getattachment/3d21a810-6838-4492-b60e-e4a9d23f32ff/Declaration-Review-Staff-Issues-Paper.aspx>

Therefore, the total cost of production to service total demand in the market using both facilities is \$202 (\$1.00 x 180 + \$1.10 x 20), with **an average cost per widget of \$1.01**.

As the average cost of Facility W and V meeting total foreseeable demand in the market of 200 widgets (\$1.01 per widget) is lower than that of the expanded Facility V doing so (\$1.02 per widget), criterion (b) is not satisfied.

In reaching its conclusion about criterion (b) in the worked example, the QCA states:

*“As the incremental expansion cost (on a per widget basis) at Facility V is greater than the existing cost (on a per widget basis) of using Facility W, an expanded Facility V cannot satisfy total foreseeable demand at a lower cost than the two existing facilities. Criterion (b) is not satisfied”<sup>10</sup>*

In determining that criterion (b) is not satisfied, the QCA acknowledges that the incremental expansion cost of Facility V (\$1.20 per widget) is greater than the existing cost of Facility W (\$1.10 per widget) meeting the incremental demand of 20 widgets. Hence, the QCA’s analysis makes use of both average-cost and incremental-cost principles.

## 4.2 The QCA’s assumptions for the least cost analysis

The QCA’s assumptions for the least cost calculations are detailed in Appendix A of the Draft Recommendation. The QCA estimates the average supply chain cost of a Goonyella mine using the existing DBCT facility (85 mtpa capacity) to be \$11.42 per tonne.<sup>11</sup>

The QCA estimates peak total foreseeable demand in the market during the declaration period to be 93 mtpa of contracted capacity,<sup>12</sup> reflecting an excess of 8 mtpa over DBCT’s current nameplate capacity.

The QCA estimates the average supply chain cost to Goonyella mines of using the expanded DBCT facility to accommodate 93 mtpa to be \$12.05 per tonne.<sup>13</sup> The increase in the average supply chain cost from \$11.42 per tonne to \$12.05 per tonne is driven by the QCA’s view of the below-rail and port expansions that are required to accommodate the incremental 8 mtpa of additional contracted capacity at DBCT.<sup>14</sup>

According to the QCA’s calculations, the average supply chain cost for Goonyella mines to access Adani Abbot Point Coal Terminal (**AAPT**), Wiggins Island Coal Export Terminal (**WICET**) and RGTCT are all greater than the cost of accessing the expanded DBCT (\$12.05 per tonne), with RGTCT (average supply chain cost of at least \$17.02 per tonne) being the cheapest of these three alternatives.<sup>15</sup> The QCA noted the average supply chain costs to Goonyella mines of using alternative terminals were 41 per cent (RGTCT) to 120 per cent (AAPT) higher than the \$12.05 per tonne cost of using DBCT. On this basis, the QCA concluded that criterion (b) is satisfied.<sup>16</sup>

<sup>10</sup> Staff Issues Paper, Appendix B, p. 32

<sup>11</sup> Draft Recommendation, Part C, Appendix A, p. 135

<sup>12</sup> Draft Recommendation, Part C, p. 45

<sup>13</sup> Draft Recommendation, Part C, Appendix A, p. 138

<sup>14</sup> In particular, the expansions account for below-rail infrastructure investments in the Goonyella system (\$859.5 m in FY18) and DBCT investments for Zone 4 (\$487.5 m in FY18) and 8X Phase 1 (\$234.9 m in FY18).

<sup>15</sup> Draft Recommendation, Part C, p. 51

<sup>16</sup> Draft Recommendation, Part C, Appendix A, p. 138

The QCA's approach is inconsistent with the approach adopted in the Staff Issues Paper, as reported. Instead of comparing:

- the average supply chain cost of DBCT (expanded) meeting 93 mtpa of demand with the average supply chain cost of meeting demand with a combination of DBCT (unexpanded) meeting 85 mtpa and RGTCT meeting 8 mtpa

the QCA compares:

- the average supply chain cost of DBCT (expanded) meeting 93 mtpa of demand with the average supply chain cost of a Goonyella mine using RGTCT.

### 4.3 Our review of the QCA's least cost analysis

We replicate the QCA's approach to assessing the least cost in its Staff Issues Paper using the cost assumptions for meeting the 93 mtpa of demand by DBCT (expanded) only, or DBCT (unexpanded) in combination with RGTCT in Table 2. Our calculations mirror *exactly* the approach that the QCA adopted in Appendix B of its Staff Issues Paper.

**Table 2: Total supply chain cost assumptions, per the Draft Recommendation**

Coal tonnages	DBCT (unit cost)	DBCT + RGTCT (unit cost)
85 mtpa	\$11.42	\$11.42 (DBCT)
8 mtpa	\$18.74 (Inferred by GHD)* <sup>17</sup>	At least \$17.02 (RGTCT)
<b>93 mtpa (average cost)</b>	<b>\$12.05</b>	<b>\$11.90</b> (Inferred by GHD)

\*GHD has calculated this amount based on the figures published in the Draft Recommendation.

Under the QCA's cost assumptions, the total cost of DBCT (expanded) servicing 93 mtpa alone is \$1,120.7m (\$12.05 per tonne x 93 mt). By comparison, a combination of DBCT and RGTCT servicing the total foreseeable demand of 93 mtpa yields a total cost of \$1,106.8m (\$11.42 per tonne x 85 mt + \$17.02 per tonne x 8 mt). In this case, **the average cost to meet the 93 mtpa of demand, is \$11.90 per tonne** (\$1,106.8m / 93 mt); this is consistent with the approach that the QCA adopted in its worked example of the Staff Issues Paper.

Based on the corrected application of the QCA's methodology in the Staff Issues Paper, we note that the average cost of DBCT (expanded) meeting total foreseeable demand in the market (\$12.05 per tonne) is higher than the combination of DBCT and RGTCT doing so (\$11.90 per tonne). **Hence, criterion (b) is not satisfied.**

<sup>17</sup> The solution for y in [(\$11.42 per tonne x 85 mt) + (\$y per tonne x 8 mt)] / 93 mt = \$12.05 per tonne. This yields \$18.74 per tonne.

An alternative way of presenting the conclusion is to observe that the implied incremental per-tonne cost of DBCT meeting the 8 mtpa excess of demand is \$18.74 per tonne<sup>18</sup>, which is higher than the average cost of \$17.02 per tonne at RGTCT. This finding is consistent with the language in the conclusion of the worked example in the Staff Issues Paper:

*“As the incremental expansion cost (on a per widget basis) at Facility V is greater than the existing cost (on a per widget basis) of using Facility W, an expanded Facility V cannot satisfy total foreseeable demand at a lower cost than the two existing facilities. Criterion (b) is not satisfied”<sup>19</sup>*

Hence, the conclusion on criterion (b) that emerges from using an average-cost or incremental-cost approach under the QCA’s framework is the same. That is, criterion (b) is not satisfied.

## 4.4 Conclusion on the QCA’s least cost analysis

***Box 1: When the QCA’s own stated methodology to the least cost analysis is correctly applied, in accordance with the method in its Staff Issues Paper, criterion (b) is not satisfied***

The QCA has not undertaken the least cost analysis in accordance with the methodology adopted in the worked example in the Staff Issues Paper.

Instead of comparing the average supply chain cost of:

- 1 DBCT (expanded) meeting 93 mtpa of demand with a combination of DBCT (unexpanded) meeting 85 mtpa and RGTCT meeting 8 mtpa

the QCA compares:

- 2 the average supply chain cost of DBCT (expanded) meeting 93 mtpa of demand with the average supply chain cost of a Goonyella mine using RGTCT.

This is a material error that has led the QCA to incorrectly conclude that criterion (b) was satisfied.

When the error is corrected for, it is least cost for a combination of DBCT (unexpanded) and RGTCT to meet total foreseeable demand in the market. Hence, criterion (b) is not satisfied.

<sup>18</sup> See previous footnote for the relevant workings.

<sup>19</sup> Staff Issues Paper, Appendix B, p. 32

## 5. Response to the QCA’s calculation of spare capacity at RGTCT and in the Blackwater rail system

In chapter 4, we found that a combination of DBCT (unexpanded) meeting 85 mtpa and RGTCT meeting 8 mtpa, would allow for total foreseeable demand in the market of 93 mtpa to be met at least cost. In this chapter, we present our findings, based on publicly available information, which demonstrate that RGTCT and the Blackwater rail system have sufficient spare capacity to accommodate 8 mtpa of demand.

### 5.1 The QCA’s findings on spare capacity at Queensland’s coal export terminals

We present the QCA’s findings on the capacity status at Queensland’s coal terminals at Table 3. The QCA considers that throughput is, on average, 90 per cent of contract entitlements; The QCA states that this is consistent with HoustonKemp’s position that over the long term, on average, 10 per cent of contracted capacity is unused.<sup>20</sup> The QCA said RGTCT’s contract status is unknown and that stakeholders did not provide evidence of spare capacity at this terminal; on this basis, it said RGTCT has no spare capacity.<sup>21</sup>

**Table 3: Coal terminals in Queensland, nominal and contracted capacity**

Terminal	Nominal capacity (mtpa)	QCA’s assumptions on contracted capacity status (mtpa)
DBCT	85	76.9 mtpa
Hay Point Coal Terminal (HPCT)	55	Unknown. QCA assumes it is operating at, or near, full capacity
AAPT	50	Fully contracted
WICET	27	16 mtpa
RGTCT	75	Unknown. QCA assumes it is fully contracted.

Source: QCA (2018) *Draft Recommendation*, p. 10

<sup>20</sup> Draft Recommendation, Part C, p. 45

<sup>21</sup> Draft Recommendation, Part C, pp. 10, 17

## 5.2 Spare capacity at RGTCT

Gladstone Ports Corporation has, in its Annual Reports, published the following coal volumes for RGTCT over the last three financial years:

- 57.4 Mt in FY18<sup>22</sup>
- 59.8 Mt in FY17<sup>23</sup>
- 62.6 Mt in FY16.<sup>24</sup>

On average, over the last three financial years, RGTCT has serviced 59.9 mtpa of throughput. This is consistent with the DBCT User Group submission, which stated that the average annual throughput at RGTCT over the period FY16 and FY17 was 61.2 mtpa.<sup>25</sup>

Applying the QCA's assumption that throughput is on average 90 per cent of contracted entitlements,<sup>26</sup> an estimate of contracted capacity at RGTCT of 66.6 mtpa<sup>27</sup> is more appropriate than the QCA's view that RGTCT is fully contracted. In addition, information provided by the QCA's consultant, RMI, on the Aurizon UT5 process demonstrates that RGTCT is not fully contracted. RMI found that "there is currently a **spare capacity of only about 8-10Mtpa (12-14%) at the RGTCT**" (emphasis added).<sup>28</sup>

As the QCA estimates that capacity at RGTCT is 75 mtpa<sup>29</sup>, the current estimate of spare capacity at RGTCT must therefore be at least be 8.4 mtpa (i.e. 75 mtpa minus 66.6 mtpa). Publicly available information provides evidence that RGTCT has sufficient spare capacity to accommodate at least 8 mtpa of contracted capacity, which is the maximum demand exceedance over DBCT's nameplate capacity that the QCA expects over the declaration period.

## 5.3 Spare capacity in the Blackwater rail system

In its Draft Recommendation, the QCA found that there was spare capacity within the Blackwater system.<sup>30</sup> This finding is based on Aurizon Network's Baseline Capacity Assessment Report (**BCAR**), which was approved by the QCA in July 2018. The QCA-approved<sup>31</sup> BCAR indicates that the Blackwater system has available capacity of 17.9 mtpa.<sup>32</sup> This is sufficient to accommodate the entire demand exceedance of 8 mtpa at DBCT. Hence, there are no capacity constraints for Goonyella users to access capacity at RGTCT.

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<sup>22</sup> Page 16 of [https://www.gpcl.com.au/SiteAssets/Annual%20Reports/GPC\\_Annual\\_Report\\_2017-18.pdf](https://www.gpcl.com.au/SiteAssets/Annual%20Reports/GPC_Annual_Report_2017-18.pdf)

<sup>23</sup> Page 16 of [https://www.gpcl.com.au/SiteAssets/Annual%20Reports/GPC\\_Annual\\_Report\\_2017-18.pdf](https://www.gpcl.com.au/SiteAssets/Annual%20Reports/GPC_Annual_Report_2017-18.pdf)

<sup>24</sup> Page 15 of [http://gpcl.com.au/SiteAssets/Annual%20Reports/GPC\\_Annual\\_Report\\_2016-17.pdf](http://gpcl.com.au/SiteAssets/Annual%20Reports/GPC_Annual_Report_2016-17.pdf)

<sup>25</sup> PwC Report, Attachment A of DBCT User Group submission, p. 13

<sup>26</sup> Draft Recommendation, Part C, p. 45

<sup>27</sup> 59.9 mtpa divided by 0.9

<sup>28</sup> RMI (2017), *Assessment of Coal Volume Forecasts for Aurizon Network's 2017 Draft Access Undertaking*, May 2017, p. 34

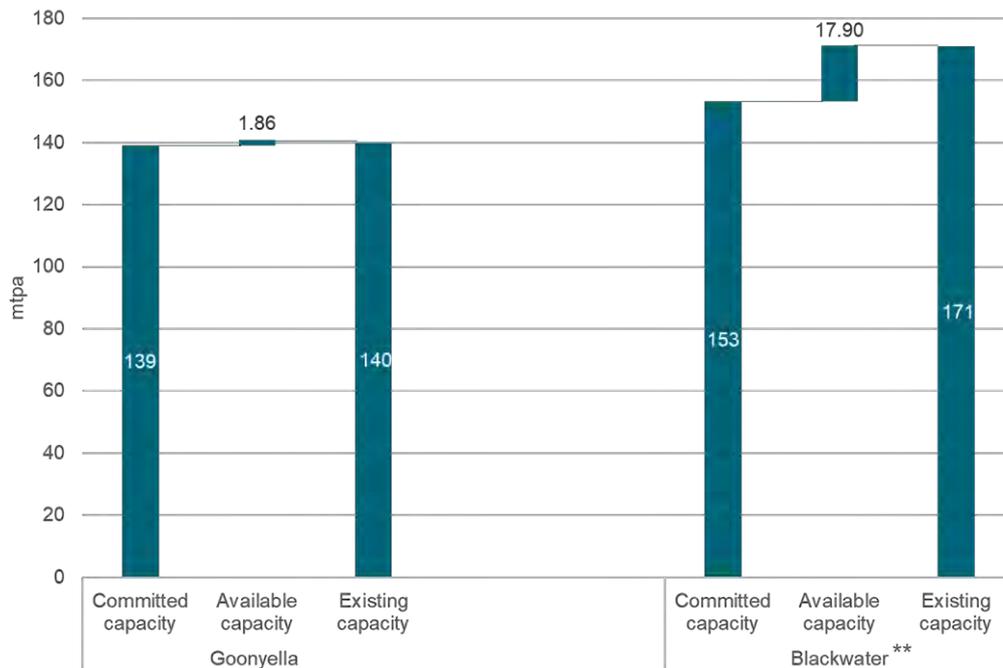
<sup>29</sup> Draft Recommendation, Part C, pp. 10, 104

<sup>30</sup> Draft Recommendation, Part A, p. 24

<sup>31</sup> The QCA agreed to Aurizon Network's BCAR submission. See Final Decision on Assessment of Aurizon Network baseline capacity assessment report, p. 19

<sup>32</sup> Draft Recommendation, Part A, p. 24

**Figure 1: Existing, committed and available capacity in Aurizon Network’s Central Queensland Coal Network infrastructure\***



Source: QCA (2018) *Draft Recommendation on Aurizon Network*, p. 24<sup>33</sup>

\*Note: figures may not sum due to rounding

\*\*Note that the existing capacity on the Blackwater system includes coal and non-coal capacity. The committed capacity on the Blackwater system includes 78.2 mtpa of coal and 75.1 mtpa of non-coal products.

## 5.4 Conclusion on the QCA’s findings on RGTCT and Blackwater rail system capacity

**Box 2: RGTCT and the Blackwater rail system have spare capacity to meet 8 mtpa of demand.**

The QCA has not had proper regard to publicly available evidence that demonstrates there is spare capacity at RGTCT to accommodate 8 mtpa of incremental demand. This led the QCA to incorrectly conclude that there is no spare capacity at RGTCT.

Publicly available evidence demonstrates that RGTCT and the Blackwater rail system can readily accommodate 8 mtpa of Goonyella users’ demand over the draft declaration period.

<sup>33</sup> Available at: <http://www.qca.org.au/Other-Sectors/Access/To/Infrastructure/DeclarationReviews/In-Progress/2020-Declaration-Review>

## 6. Response to the QCA's calculation of the lower- and upper-bound rail costs

This chapter sets out other errors that we have identified in the QCA's approach for determining the lower- and upper-bound estimates of below-rail average costs. We consider that these errors result in the QCA overstating the upper-bound average supply chain costs for a Goonyella mine accessing RGTCT in the Blackwater system. Supporting explanations for our position are provided below, in the context of the FY17 figures supplied by the QCA.

### 6.1 The QCA's lower-bound estimate for below- and above-rail average costs

The QCA estimates FY17 below-rail average costs using the following formula:<sup>34</sup>

$$\frac{AT2 \text{ to } AT4 \text{ Adjusted Allowable Revenues} + AT1 \text{ revenue (actual gtps)}}{\text{Actual tonnes}}$$

The QCA has adopted *actual* gross tonne kilometres (gtps) and tonnes as the measure for determining the FY17 below-rail average cost for each coal system. The QCA should have instead adopted the relevant *contracted* gtps and tonnes, based on the following observations made by the QCA in its Draft Recommendation:

- 1 The QCA's view is that **capacity entitlements are the relevant measure of total foreseeable demand** for the market relevant to DBCT (emphasis added).<sup>35</sup> This should also apply to Aurizon Network, where users contract for Train Service Entitlements (TSEs),<sup>36</sup> which are equivalent to capacity entitlements. Committed capacity reflects both what Aurizon Network is contractually obliged to deliver to users and what its network must be able to deliver to them. The approach<sup>37</sup> for calculating committed capacity in tonnage terms is by multiplying the number of TSEs across a coal system by the nominal train payload of that system.<sup>38</sup> For example, in the Goonyella system, the QCA noted in its Final Decision on Aurizon Network's BCAR that the estimate of committed capacity in FY17 was 139 mtpa.<sup>39</sup> Hence, the QCA's below-rail average cost calculations should employ contracted gtps and tonnes, not the actuals.
- 2 The QCA notes that **"to the extent that a uniform access price reflects a building block methodology** of all factors relevant in the provision of a service (including a return on sunk costs), the QCA considers that **price is a suitable proxy for cost** (emphasis added)".<sup>40</sup> Aurizon Network does not have a uniform pricing arrangement, as its access tariffs are distance- and tonnage-based. Absent a uniform pricing arrangement, it is important to consider the efficiency incentives the QCA considers Aurizon Network's pricing framework should be signalling to users. We note that in its Final Decision on

<sup>34</sup> Draft Recommendation, Part C, Appendix A, pp. 129-130

<sup>35</sup> Draft Recommendation, Part C, p. 45

<sup>36</sup> Aurizon Network's 2016 AU, pp. 293-294

<sup>37</sup> As the QCA agreed to Aurizon Network's BCAR (see Final Decision on Assessment of Aurizon Network baseline capacity assessment report, p. 19), we consider that the QCA agreed to Aurizon Network's calculation approach for committed capacity in tonnage terms.

<sup>38</sup> Defined as the portion of Aurizon Network's capacity required to meet, among other things, TSEs.

<sup>39</sup> Final Decision on Aurizon Network's BCAR, p. 5. We assume Aurizon Network has calculated this figure as:

*10,055 tonnes x 27,552 TSEs x 0.5 (reflecting that only one train path of the two-train-path journey is loaded)*

<sup>40</sup> Draft Recommendation, Part C, p. 50

Aurizon Network's UT5 proposal, the QCA stated that the take-or-pay pricing framework is anchored firmly to contracted TSEs:

*'Take-or-pay charges are an amount payable by an access holder for not using contracted train service entitlements in a year. They enable Aurizon Network to recover revenue that would otherwise be foregone, and are intended to provide a price signal to customers about efficient contracting and reduce the incentive to over-contract'.<sup>41</sup>*

Hence, in applying the QCA's logic above, it is reasonable for the estimate of below-rail average costs to be determined using contracted gtk and tonnes, not the actuals.

- 3 The QCA considers that criterion (b) is concerned with the question of whether the facility for the service has natural monopoly characteristics (i.e. **whether economies of scale are realised by a single facility meeting total foreseeable demand**, relative to two or more facilities) (emphasis added).<sup>42</sup> For Aurizon Network, economies of scale relate to whether average costs continue to decline as output (i.e. below-rail capacity) increases. The Goonyella system was constructed to deliver 140 mtpa of capacity.<sup>43</sup> The extent to which economies of scale can be realised within the Goonyella system is dependent on whether average costs decline when capacity exceeds 140 mtpa, not actual throughput. Since contracted gtk and tonnes (139 mt) more closely align with capacity of 140 mtpa, relative to actual tonnes (111.1 mt) to derive below-rail average costs, contracted gtk and tonnes are more appropriate to apply than actuals.

Finally, we make two further observations on why contracted gtk and tonnes are the appropriate basis for determining below-rail average costs:

- 1 When the QCA determines the below-rail average cost in the Goonyella system that results from the below-rail expansions required to accommodate 93 mtpa of demand, the QCA divides total costs by expected *contracted* tonnes of 148 mtpa.<sup>44</sup> This is inconsistent with the QCA's approach for determining existing average supply chain costs, where the costs are derived in reference to actual tonnes. The QCA should have used the same gtk and tonnages in determining existing and expansion below-rail average costs to undertake a like-for-like comparison.
- 2 Using actual tonnes instead of contracted tonnes causes significant variation in the below-rail average costs. This variability detracts from the conservative approach adopted by the QCA in its assessment. Contracted tonnes in FY17 were 139 mt in the Goonyella system, while actual tonnes were 121.5 mt (FY16)<sup>45</sup>, 111.1 mt (FY17) and 126 mt (FY18)<sup>46</sup>. If the FY18 tonnes had been selected instead of those in FY17, below-rail average costs would have been 12 per cent lower.

We present the differences between actual tonnes and contracted tonnes (including on a gtk basis) for the Goonyella and Blackwater systems in FY17 in Table 4.

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<sup>41</sup> QCA Final Decision on Aurizon Network UT5 proposal: 258

<sup>42</sup> Draft Recommendation, Part C, p. 47

<sup>43</sup> Aurizon Network's 2016 BCAR, p. 5

<sup>44</sup> Draft Recommendation, Part C, Appendix A, p. 138

<sup>45</sup> Aurizon Network's 2016-17 NDP, p. 8

<sup>46</sup> Aurizon Network's FY2018 Maintenance Cost Report, p. 9

**Table 4: FY17 below-rail contracted and actual tonnes in the Goonyella and Blackwater systems**

Coal system	Goonyella	Blackwater
Actual tonnes (mt)	111.1	62.1
Contracted tonnes (mt)	139.0	78.2
Actual gtps (billion)	36.1	35.0
Contracted gtps (billions) <sup>47</sup>	45.2	44.1

Source: Aurizon Network's 2016 BCAR report (Public Release), pp. 8, 12, 16; Aurizon Network's FY2017 Revenue Adjustment – Explanatory Memorandum Revised as at 5 December 2017, p. 6

### 6.1.1 GHD's analysis

The appropriate formula to adopt to calculate the relevant below-rail costs is:

$$\frac{AT2 \text{ to } AT4 \text{ Adjusted Allowable Revenues} + AT1 \text{ revenue (contracted gtps)}}{\text{Contracted tonnes}}$$

Under this approach, the average lower-bound supply chain costs for a Goonyella mine using the Blackwater system is \$16.44 per tonne, as detailed in Table 5. This is approximately \$0.58 per tonne lower than the QCA's estimated average supply chain cost of \$17.02 per tonne. We note that when the appropriate formula is applied to the Goonyella system, the average supply chain cost remains \$11.42 per tonne.

Our detailed calculation methodology for deriving the \$16.44 per tonne is shown at Appendix A.

<sup>47</sup> Aurizon Network's 2016 BCAR report and FY2017 revenue-cap adjustment report do not identify what contracted gtps are. To address this gap, it has been assumed that there is a one-to-one relationship between the ratios of (contracted tonnes / actual tonnes) and (contracted gtps / actual gtps).

**Table 5: FY17 lower-bound supply chain costs for Goonyella and Blackwater coal systems**

Coal system	Estimated by:	
<b>Goonyella (DBCT)</b>	<b>QCA</b>	<b>GHD</b>
AT2-4 revenue (fixed) + AT1 revenue (based on actual gtps vs contracted gtps) (\$m)	341.3	347.1
Actual tonnes vs contracted tonnes (mt)	111.1	139.0
Average below-rail cost (\$ per tonne)	\$3.07*	\$2.50**
Average above-rail cost (\$ per tonne)	\$3.25	\$3.82
<b>Average supply chain cost (lower bound) (\$ per tonne)</b>	<b>\$11.42</b>	<b>\$11.42</b>
<b>Blackwater (RGCT)</b>	<b>QCA</b>	<b>GHD</b>
AT2-4 revenue (fixed) + AT1 revenue (based on actual gtps vs contracted gtps) (\$m)	450.1	458.5
Actual tonnes vs contracted tonnes (mt)	62.1	78.2
Average below-rail cost (\$ per tonne)	\$7.25	\$5.86
Average above-rail cost (\$ per tonne)	\$5.03	\$5.35
<b>Average supply chain cost (lower bound) (\$ per tonne)</b>	<b>\$17.02</b>	<b>\$16.44</b>

\*Calculated as AT1-4 revenue (based on actual gtp) divided by actual tonnes.

\*\*Calculated as AT1-4 revenue (based on contracted gtp) divided by contracted tonnes.

## 6.2 The QCA's upper-bound below-rail cost estimate for Goonyella mines using Blackwater system

The QCA's upper-bound estimate for below-rail costs for a Goonyella mine using the Blackwater system is the sum of the average costs in the Blackwater and Goonyella systems. This overstates the upper bound because it incorrectly includes the AT2 tariff component for the Goonyella system. A Goonyella mine that accesses capacity at the Port of Gladstone is exempt from paying this AT2 tariff component because it does not use the Coppabella to Hay Point Junction constrained corridor to undertake this journey.<sup>48</sup>

The FY17 contracted Goonyella tonnes were 139 mt, which Aurizon Network derived on the basis of 27,552 TSEs.<sup>49</sup> The AT2 tariff in FY17 was \$1,369 per reference train path (rtp).<sup>50</sup>

<sup>48</sup> 2016 AU, Schedule F, cl. 2.3(a)(ii)(A) and cl. 2.3(b)

<sup>49</sup> Aurizon Network's 2016 BCAR, p. 12

<sup>50</sup> 2016 AU, p. 391

As the number of TSEs is a suitable reflection of the expected number of rtps, our estimate of AT2 revenue is \$37.7m (\$1,369 per rtp x 27,552 rtps). Dividing the \$37.7m by contracted tonnes of 139 mt yields an AT2 share of the below-rail average cost of \$0.27 per tonne. We subtract \$0.27 per tonne from our estimated below-rail average cost of \$2.50 per tonne to determine the correct upper-bound supply chain costs to be \$2.23 per tonne (see Table 6).

**Table 6: FY17 supply chain costs for a Goonyella mine accessing RGTCT**

Blackwater coal system	QCA estimate	GHD estimate
Lower bound (\$ per tonne)	\$17.02	\$16.44
Plus: the relevant estimate of the below-rail average cost in the Goonyella system	\$3.07	\$2.23
<b>Upper bound (\$ per tonne)</b>	<b>\$20.09</b>	<b>\$18.67</b>

### 6.3 Rectifying the QCA's least cost assessment with corrected average supply chain costs

We recreate the QCA's least cost assessment using the corrected average supply chain costs for the lower and upper bound in Table 7 and Table 8, respectively.

**Table 7: GHD estimate of lower-bound average supply chain costs for using RGTCT**

Coal tonnages	DBCT (unit cost)	DBCT + RGTCT (unit cost)
85 mtpa	\$11.42	\$11.42 (DBCT)
8 mtpa	\$18.74	At least \$16.44 (RGTCT)
<b>93 mtpa (average cost)</b>	<b>\$12.05</b>	<b>\$11.85</b>

When the lower-bound supply chain cost at RGTCT is recalculated based on contracted TSEs and tonnes (as \$16.44 per tonne), the average cost of DBCT (unexpanded) and RGTCT servicing the 93 mtpa of demand is **\$11.85 per tonne**. This is lower than the average supply chain of DBCT (expanded) meeting the 93 mtpa of demand. Hence, criterion (b) is not satisfied.

**Table 8: GHD estimate of upper-bound average supply chain costs for using RGTCT**

Coal tonnages	DBCT (unit cost)	DBCT + RGTCT (unit cost)
85 mtpa	\$11.42	\$11.42 (DBCT)
8 mtpa	\$18.74	At most \$18.67 (RGTCT)
<b>93 mtpa (average cost)</b>	<b>\$12.05</b>	<b>\$12.04</b>

Under the upper-bound scenario, the average cost of DBCT and RGTCT servicing the 93 mtpa of demand is **\$12.04 per tonne**, which is lower than that of DBCT (expanded) alone (\$12.05 per tonne). Therefore, criterion (b) is not satisfied in this instance either.

## 6.4 Conclusion on below-rail aspects of the QCA’s calculated average supply chain costs

**Box 3: Criterion (b) is not satisfied even under an appropriately calculated upper-bound supply chain cost for a Goonyella mine accessing RGTCT.**

The QCA has used actual tonnes and gtps, instead of contracted tonnes and gtps, to determine below-rail average costs. The use of contracted tonnes and gtps is supported by, among other things, the observations that:

- 1 The QCA has used capacity entitlements as the relevant measure of total foreseeable demand in respect of DBCT, but has not extended this principle to its below-rail cost calculations. Aurizon Network’s Train Service Entitlements (TSEs), which reflect contracted tonnes and gtps, are the relevant measure of demand for the below-rail calculations.
- 2 Aurizon Network’s take-or-pay pricing framework, which seeks to send price signals to customers about efficient contracting, is anchored to TSEs. The QCA’s recent UT5 final decision acknowledges this point.
- 3 Economies of scale, which the QCA considers is important for identifying natural-monopoly characteristics, relates to whether average costs decline as output increases. In the case of Aurizon Network, output relates to the level of below-rail capacity that has already been produced and been contracted, not actual use of the contracted capacity.

The QCA has also over-estimated the upper-bound below-rail cost for a Goonyella mine accessing RGTCT because it has incorrectly incorporated the Goonyella AT2 component in the calculation.

When the above- and -below-rail costs are recalculated to correct for these errors, it is least cost for total foreseeable demand in the market to be met by a combination of DBCT (unexpanded) and RGTCT even under the scenario where the upper-bound supply chain costs to RGTCT are adopted. Hence, criterion (b) is not satisfied.

## 7. Other comments on the QCA's approach to deriving average costs

The QCA said its cost-estimation approach for the least cost assessment is based on publicly available data.

<sup>51</sup> The QCA also implies that, because of some conservative assumptions it has made, <sup>52</sup> its estimates of how the below-rail expansions in the Goonyella system and expansions at DBCT increase the average supply chain cost are likely to be overstated.

This chapter explains why, conforming to the QCA's own framework, we consider the QCA's estimate of the cost impacts of the expansions are unlikely to be overstated. Thus, the QCA's estimate of the DBCT (as expanded) supply chain average cost of \$12.05 per tonne is not overstated.

### 7.1 The QCA's estimation of average below-rail cost in Goonyella system after expansion

When the QCA incorporates the impact of below-rail expansions on the below-rail average cost in the Goonyella system, it estimates that this cost will increase by approximately \$0.54 per tonne (\$3.61 per tonne less \$3.07 per tonne).<sup>53</sup>

The QCA has adopted Aurizon Network's FY17 AT1 – AT4 revenue (total revenue) of \$341.3m as the basis for its calculations of the average below-rail cost in the Goonyella system. This is comprised of \$22.7m in AT1 revenue<sup>54</sup> and \$318.6m in AT2 – AT4 revenue,<sup>55</sup> and is divided by actual throughput of 111.1 mt to yield a below-rail average cost of \$3.07 per tonne.<sup>56</sup>

AT1 revenue can be understood as the 'variable cost' component of Aurizon Network's cost base, as it is based on actual throughput. AT2 – AT4 revenue can be understood as the 'fixed cost' component of Aurizon Network's cost base and is recovered on a take-or-pay basis (i.e. via contracted TSEs).

The QCA calculates the \$3.61 per tonne average below-rail cost (expanded) using the following methodology:

- 1 Scale total FY17 total revenue (\$341.3m) up to reflect 140 mtpa. The QCA assumes that there is a one-to-one relationship between revenue and tonnage.
  - i.e. multiply \$341.3m by (140 mtpa divided by 111.1 mtpa) to obtain \$430.1m.

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<sup>51</sup> Draft Recommendation, Part C, Appendix A, p. 128

<sup>52</sup> Draft Recommendation, Part C, Appendix A, pp. 136 and 138

<sup>53</sup> Draft Recommendation, Part C, Appendix A, p. 138

<sup>54</sup> Draft Recommendation, Part C, Appendix A, p. 130

<sup>55</sup> Aurizon Network's FY2017 Revenue Adjustment – Explanatory Memorandum Revised as at 5 December 2017, pp. 6-7

<sup>56</sup> Aurizon Network's FY2017 Revenue Adjustment – Explanatory Memorandum Revised as at 5 December 2017, pp. 6-7

- 2 Since a below-rail expansion is necessary on the Goonyella system to accommodate 93 mtpa of demand at DBCT and 55 mtpa of demand at HPCT, the QCA calculates the return on and return of components associated with an \$859.5m (FY18)<sup>57</sup> below-rail expansion.
  - The QCA states this amount is \$104.6m<sup>58</sup>
- 3 Add the expansion cost to the total scaled revenue (determined in step one)
  - i.e. add \$104.6m and \$430.1m
- 4 Divide the resulting total revenue by the total number of expanded tonnes (148 mtpa) to yield the cost per tonne associated with below-rail expansion
  - i.e. \$534.7m divided by 148 mtpa. The result is \$3.61 per tonne.

In making these assumptions, the QCA states that:

'This approach of considering the highest revenue amount and scaling it in line with the increase in volumes as well as adding a rough estimate of the expansion capital costs is extremely conservative. A less conservative approach would have been to only scale up the operations and maintenance part of the revenue for volumes. Therefore, the approach considered here will overestimate the below-rail cost of using the Goonyella system (with expansion) for accessing DBCT'<sup>59</sup>

When evaluating *all* the steps that the QCA has undertaken to determine the expanded below-rail average cost, we do not consider its approach has led to an over-estimate.

We have adjusted the QCA's assumptions according to the following methodology:

- 1 As the AT1 revenue reflects the variable component of Aurizon Network's revenue, the AT1 revenue should be scaled to reflect 148 mtpa of demand, while the AT2 – AT4 revenue should be held constant.
  - Multiply \$22.7m by (148 mt divided by 111.1 mt) = \$30.3m
  - Add \$30.3m to the unadjusted AT2 – AT4 revenue of \$318.6m to yield the adjusted total revenue of \$348.8m
- 2 Calculate the return on and of components associated with expansion
  - Adopt the QCA-determined amount of \$104.6m.
- 3 Add the expansion costs to the scaled revenue to determine total AT1 – AT4 revenue with expansion
  - Add \$104.6m to \$348.8m. The result is \$453.4m
- 4 Divide the total revenue (with expansion) by the total number of tonnes (with expansion) to derive the total below-cost per tonne associated with below-rail expansion
  - Divide \$453.4m by 148 mt. The result is \$3.06 per tonne.

Table 9 shows that our estimate of the increase in below-rail average costs from the Goonyella system expanding is marginally higher than the QCA-estimated increase (i.e. \$0.56 per tonne, compared with \$0.54 per tonne). Therefore, in our view, the QCA has not overestimated the difference between existing below-rail average costs and expanded below-rail average costs for the Goonyella system.

<sup>57</sup> We note that the QCA's approach uses FY18 expansion costs and FY17 existing costs to determine average supply chain costs. We have not sought to resolve this inconsistency to present all costs in common dollars-of-the-day terms, to be consistent with the QCA's approach.

<sup>58</sup> Draft Recommendation, Part C, Appendix A, p. 137

<sup>59</sup> Draft Recommendation, Part C, Appendix A, p. 138

**Table 9: QCA/GHD comparison of impact of below-rail expansion on below-rail average costs**

Description	QCA	GHD
Existing below-rail average cost (\$ per tonne)	3.07	2.50
Expanded below-rail average cost (\$ per tonne)	3.61	3.06
<b>Difference (\$ per tonne)</b>	<b>\$0.54</b>	<b>\$0.56</b>

We have provided evidence to show that even if the QCA had adopted ‘less conservative’ assumptions for its least cost analysis, the difference in the average supply chain cost for the DBCT (without expansion) and RGTCT versus DBCT (expanded) would have been similar. Hence, the QCA is incorrect in saying that its ‘conservative’ approach overstates the below-rail cost of using the Goonyella system (with expansion) for accessing DBCT.

## 7.2 The QCA’s estimation of average terminal cost at DBCT after expansion

The Zone 4 and 8X Phase 1 expansions at DBCT will be necessary to meet total foreseeable demand in the market of 93 mtpa.<sup>60</sup> The QCA notes that it received several sets of capital costs for these expansions, and it uses the highest of those costs (i.e. the HoustonKemp report numbers of \$497.5m for Zone 4 and \$234.9m for 8X Phase 1) for its analysis. In particular, the QCA adds these capital costs into its DBCT tariff model to determine that the TIC will be \$2.67 per tonne after the expansions.<sup>61</sup>

We observe that the QCA has been conservative in selecting the highest reported capital costs for the Zone 4 and 8X Phase 1 expansions. However, the QCA’s approach for determining the impact of these costs on the Terminal Infrastructure Charge (TIC) is not based on information that is publicly available. It relies on the QCA’s DBCT tariff model, which has not been published. Hence, the QCA has not solely relied on publicly available information to estimate its average supply chain costs. The QCA’s approach is also inconsistent with that it adopted in relation to the Aurizon Network expansions (i.e. using the QCA’s DBCT tariff model instead of assessing what the return on and of capital would be on the DBCT expansions, based on the currently approved WACC and an assumed remaining useful life).

To address these considerations, we have adopted the lowest reported capital costs of \$374.2m for the Zone 4 expansion and \$168.2m for the 8X Phase 1 expansion. We then calculate the return on capital (based on the 5.82 per cent regulated rate of return<sup>62</sup> approved by the QCA for DBCT during the current regulatory period) and return of capital (based on a 36-year remaining life<sup>63</sup>) for these expansions. Our estimate of the return on and of capital is approximately \$47m<sup>64</sup>, which is marginally less than the QCA’s estimate of \$49m.<sup>65</sup> Under our estimate, the TIC after expansion is \$2.65 per tonne instead of \$2.67 per tonne (see Table 10).

<sup>60</sup> Draft Recommendation, Part C, Appendix A, p. 136

<sup>61</sup> Draft Recommendation, Part C, Appendix A, p. 137

<sup>62</sup> Final Decision on 2015 DBCT Draft Access Undertaking, p. 122

<sup>63</sup> Draft Recommendation, Part C, Appendix A, p. 136

<sup>64</sup> \$542.4m x 5.82 per cent plus \$542.4m divided by 36 years of remaining life

<sup>65</sup> Draft Recommendation, Part C, Appendix A, p. 137

**Table 10: QCA/GHD comparison of expanded port-terminal cost at DBCT**

Description	QCA	GHD
Expanded port-terminal average cost (\$ per tonne)	2.67	2.65

### 7.3 Corrected average supply chain cost for using DBCT (expanded)

When we apply the corrected per-tonne contribution of rail and port-expansion costs to derive the per-tonne average cost of DBCT (expanded), the average cost per tonne is \$12.05 per tonne. This is the same as that the QCA has derived (see Table 11).

**Table 11: QCA/GHD comparison of expanded average supply chain costs to use DBCT**

Description	QCA	GHD
Below-rail cost	\$3.61	\$3.06
Above-rail cost	\$3.25	\$3.82
Coal handling cost	\$5.14	\$5.12
Other port and shipping costs	\$0.05	\$0.05
<b>Average cost per tonne (with expansion)</b>	<b>\$12.05</b>	<b>\$12.05</b>

### 7.4 Conclusion

**Box 4: The QCA’s estimate of \$12.05 per tonne for the average cost of a Goonyella mine accessing DBCT (as expanded) is not overstated.**

Our estimate of the increase in below-rail average costs from the Goonyella system expanding is marginally higher than the QCA-estimated increase (i.e. \$0.56 per tonne, compared with \$0.54 per tonne). Therefore, the QCA has not overestimated the difference between existing below-rail average costs and expanded below-rail average costs for the Goonyella system.

Our estimate of the increase in port-terminal average costs, based on using the lowest reported capital costs for the relevant expansions and using publicly available information only, the resulting TIC is approximately \$0.02 per tonne lower than the QCA’s estimated TIC (\$2.65 per tonne, compared with \$2.67 per tonne).

When we apply the corrected per-tonne contribution of rail- and port-expansion costs to derive the per-tonne average cost of DBCT (expanded), the average cost per tonne is \$12.05 per tonne. Hence, the QCA’s estimate of this average supply chain cost is not overstated.

# Appendices

# Appendix A

Table 12 in this appendix provides detail on the calculations presented in Table 5 of the report. We correct the QCA's average lower-bound supply chain costs for a Goonyella mine using the Goonyella or Blackwater (to access RGTCT) systems.

The key steps, using the Goonyella system as the reference point, for our analysis are as follows:

- 1 Determine Aurizon Network's AT1 – AT4 revenue.
  - Adopt the Adjusted Allowance Revenue for (AT2 – AT4) for the Goonyella system for FY17 of \$318.6m
  - To determine AT1 revenue, apply an AT1 tariff of \$0.63 per '000gtk<sup>66</sup> to the GHD estimate of contracted gtk of 45.2 billion gtk (refer Table 4 of this report)<sup>67</sup>
  - This yields a total AT1 – AT4 revenue amount of \$347.1m
- 2 Divide the revised AT1 – AT4 revenue by contracted tonnes of 139 mt to determine the average below-rail cost per tonne. We estimate this amount to be \$2.50 per tonne.
- 3 Determine average above-rail cost.
  - The QCA estimates that the total rail cost is \$6.32 per tonne. The implied average above-rail cost for the Goonyella system under the QCA's approach is \$3.25 per tonne. That is, \$6.32 less \$3.07 per tonne.
  - We subtract our calculated below-rail charge of \$2.50 per tonne from \$6.32 per tonne to derive the implied average above-rail cost of \$3.82 per tonne.

The GHD average supply chain cost estimate for the Goonyella system is the same as the QCA's of \$11.42 per tonne.

We apply the same methodology to determine the Blackwater lower-bound costs, but note the following differences in our assumptions:

- AT1 tariff of \$0.92 per '000gtk applied to the GHD estimate of contracted gtk of 44.1 billion gtk (refer Table 4 of this report)
- AT2 – AT4 revenue of \$458.5m
- Above-rail costs in the Blackwater system are 40 per cent higher than those in the Goonyella system, per the QCA's assumption in its Draft Recommendation.<sup>68</sup> We have effected this by multiplying \$3.82 per tonne by 1.40.

We estimate an average supply chain cost is \$16.44 per tonne compared to the QCA's estimate of \$17.02 per tonne in the Blackwater system (to access RGTCT).

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<sup>66</sup> Aurizon Network's approved 2016 AU, Schedule F, clause 8.2(a)

<sup>67</sup> Aurizon Network's 2016 BCAR report and FY2017 revenue-cap adjustment report do not identify what contracted gtk are. To address this gap, it has been assumed that there is a one-to-one relationship between the ratios of (contracted tonnes / actual tonnes) and (contracted gtk / actual gtk). (Contracted tonnes / actual tonnes) are calculated as 78.2 / 62.1 in this instance.

<sup>68</sup> Draft Recommendation, Part C, Appendix A, p. 132

**Table 12: FY17 lower-bound supply chain costs for Goonyella and Blackwater coal systems**

Coal system	Estimated by:	
	QCA	GHD
<b>Goonyella (DBCT)</b>		
Numerator: AT2-4 revenue (fixed) + AT1 revenue (actual gtps vs contracted gtps) (\$m)	$318.6 + (0.63 \times 36.1) = 341.3$	$(318.6 + (0.63 \times 45.2)) = 347.1$
Denominator: actual tonnes vs contracted tonnes (mt)	111.1	139.0
Average below-rail cost (Numerator / Denominator) - \$ per tonne	3.07	2.50
Average above-rail cost - \$ per tonne	$6.32^{69} - 3.07 = 3.25$	$6.32 - 2.50 = 3.82$
<b>Average supply chain cost (lower bound) - \$ per tonne</b>	<b>\$11.42</b>	<b>\$11.42</b>
<b>Blackwater (RGCT)</b>		
Numerator: AT2-4 revenue (fixed) + AT1 revenue (actual gtps vs contracted gtps) (\$m)	$417.9 + (0.92 \times 35.0) = 450.1$	$417.9 + (0.92 \times 44.1^{70}) = 458.5$
Denominator: actual tonnes vs contracted tonnes (mt)	62.1	78.2
Average below-rail cost (Numerator / Denominator) - \$ per tonne	7.25	5.86
Average above-rail cost - \$ per tonne	$3.25 \times 1.40 = 5.03$	$3.82 \times 1.40 = 5.35$
<b>Average supply chain cost (lower bound) - \$ per tonne</b>	<b>\$17.02</b>	<b>\$16.44</b>

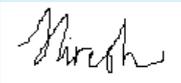
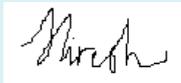
<sup>69</sup> Draft Recommendation, Part C, Appendix A, p. 130

<sup>70</sup> It has been assumed that there is a one-to-one relationship between the ratios of (contracted tonnes / actual tonnes) and (contracted gtps / actual gtps). (Contracted tonnes / actual tonnes) are calculated as 78.2 / 62.1 in this instance.

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Rev.No.	Author	Reviewer		Approved for Issue		
		Name	Signature	Name	Signature	Date
Final	Jacqui Marshall Hiresh Devaser	Hiresh Devaser		Hiresh Devaser		8 March 2019



**Appendix 8 Table: Amendments to Deed Poll, Framework, SAA**

## Rationale for changes in DBCT Deed Poll (March 2019) to DBCT Deed Poll (June 2018)\*

\*Drafting amendments that are of a minor, non-substantive nature are not included in the table below.

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
<b>Recital D and New Recital E</b>	Amendments to tense in Recital D and introduction of new Recital E that confirms the period in which the Framework will apply	N/A	<p>The changes are made to reflect the execution of the Deed Poll and establishment of the initial Framework in March 2019, prior to the expiration of the existing declaration on 9 September 2020.</p> <p>New Recital E, in particular, confirms that the Framework will apply during the period commencing on the expiration of the existing declaration on 9 September 2020 and ending on the earlier of 9 September 2030 or the date on which any re-declaration of the use of the Terminal first takes effect.</p>
<b>Original Recital F and Recital G</b>	Original Recital F concerning the Framework Objective has been deleted and Recital G amended to refer to the definition of 'Framework Objective' in clause 1	See concerns identified in respect of the amendment of the clause 1.1 definition of 'Framework Objective' and the deletion of original clause 5 (Framework objective) below.	<p>The changes made are consequential to the amendment of the definition of 'Framework Objective' in clause 1 so as to define that term by reference to section 69E of the QCA Act, rather than by reference to clause 1.3 of the Framework, and the deletion of original clause 5 which provided that DBCTM would not amend the Framework Objective except with the prior written consent of the State.</p> <p>Original Recital F is deleted as it set out the Framework Objective as prescribed in clause 1.3(a) of the Framework. Recital G, which states that the Framework has been prepared in accordance with and gives effect to the Framework Objective, has</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
			been amended so as to note that that term is defined in clause 1 of the Deed Poll.
<b>Recital H(a)</b>	Recital H(a) is amended to reflect that the Deed Poll now confirms that the Framework will continue to apply to the use of the Terminal (including Access to the Services) throughout the Term	N/A	The changes made are consequential to the amendment of clause 4.1 to incorporate a new covenant by DBCTM in favour of the Covenantees that the Framework will continue to apply to the use of the Terminal (including Access to the Services) throughout the Term.
<b>Clause 1.1, Chapeau and various new definitions</b>	<p>Chapeau to clause 1.1 amended to clarify that capitalised terms in the Deed Poll only take the meaning given to those terms in the Framework where they are not defined in the Deed Poll</p> <p>New definitions included for 'DBCT Trustee', 'Existing Terminal', 'Operation and Maintenance Contract', 'Operator', 'Terminal Component', 'Terminal Infrastructure Charge or</p>	See concerns identified in respect of the introduction of new clause 6 (Pricing under Access Framework) below.	These changes to clause 1.1 are consequential to the incorporation of the new pricing covenant in new clause 6. The relevant amendments to clause 1.1 ensure that the meaning and operation of the new clause 6 pricing covenant is independent of the Framework, such that its meaning and operation cannot be altered by amending the Framework in accordance with clauses 7 and 8 of the Deed Poll. The amendments do this by defining any terms used in new clause 6 that inform the content of the covenant provided by DBCTM under that clause in the Deed Poll itself, rather than by reference to the Framework.

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
	TIC' and 'Terminal Operating Costs'		
<b>Clause 1.1, 'Background' definition</b>	Deletion of definition of 'Background'	N/A	The definition of 'Background' is deleted because this defined term is not used in the Deed Poll.
<b>Clause 1.1, 'Framework' definition</b>	Definition of 'Framework' is amended	N/A	The definition of 'Framework' is amended to reflect the execution of the Deed Poll and establishment of the initial Framework in March 2019, prior to the expiration of the existing declaration on 9 September 2020, with the result that the Framework will take effect on, but will not be dated, 9 September 2020.
<b>Clause 1.1, 'Framework Objective' definition</b>	Definition of 'Framework Objective' is amended	<p>DUG raised the following concerns in respect of DBCTM's ability to amend the Framework Objective under the Deed Poll submitted by DBCTM in June 2018 (DUG cross-submission at 59-61):</p> <ul style="list-style-type: none"> <li>• DBCTM can amend the Framework Objective with the State's consent, which undermines the protection the requirement that amendments promote the Framework Objective provides.</li> <li>• Decisions of the State may not take account of user interests and have a political dimension and change with political cycles, resulting in uncertainty as to how the State will act in future.</li> </ul>	The definition of 'Framework Objective' is amended to address DUG's concerns regarding the ability of DBCTM to amend the Framework Objective with the consent of the State. It does this by specifying the Framework Objective in the Deed Poll, rather than by reference to the Framework, as the Deed Poll cannot be revoked or amended by DBCTM (see clause 3). The Deed Poll specifies the Framework Objective by reference to the object set out in section 69E of the QCA Act, as amended from time to time. As a consequence, the Framework Objective is amended only in the event of legislative amendment of the object of Part 5 of the QCA Act and such that the Framework Objective reflects the object of Part 5 of the QCA Act in force from time to time.

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
<b>Clause 1.1, 'Third Parties' definition</b>	New definition included for 'Third Parties'	See concerns identified in respect of the amendment of the clause 8 (Amendments to Framework) below.	The incorporation of the new definition of 'Third Parties' is consequential to the amendments to clause 8 and other clauses of the Deed Poll to address the QCA and DUG concerns regarding DBCTM's ability to amend the Framework. The term 'Third Parties' is defined by reference to clause 8 as amended to mean non-Covenantees that comment on proposed amendments to the Framework. Clauses 8 and other clauses of the Deed Poll as amended confer rights on these Third Parties to be notified by DBCTM, and to commence legal proceedings to challenge the validity, of final proposed amendments to the Framework.
<b>Original clause 1.2 (now clause 1.3)</b>	Original clause 1.2.7 is deleted  New clauses 1.3.7 and 1.3.8 are incorporated	N/A	Original clause 1.2.7 (which provided that any schedules and attachments form part of the Deed Poll) is deleted, as the only schedule or attachment to the Deed Poll is the Framework and the Framework does not form part of the Deed Poll.  New clause 1.3.7 is introduced to clarify that any reference to 'day' or 'days' is a reference to calendar days.  New clause 1.3.8 is introduced to provide that a reasonable interpretation of the Deed Poll that would make it valid, lawful and enforceable is to be preferred to an alternative interpretation that would make it unenforceable, illegal, invalid or void.
<b>Clause 2</b>	Original clauses 2.1 and 2.3 (now 2.4) are	See concerns identified in respect of the amendment of the clause 8 (Amendments to Framework) below.	The changes to clause 2 are consequential to the amendments made to clause 8 and other clauses of

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
	amended and new clause 2.2 is introduced		<p>the Deed Poll to address QCA and DUG concerns regarding DBCTM's ability to amend the Framework.</p> <p>Under clause 8 and other clauses of the Deed Poll as amended, non-Covenantees that comment on proposed amendments to the Framework (referred to as 'Third Parties') are conferred with rights to be notified by DBCTM, and commence legal proceedings to challenge the validity, of final proposed amendments to the Framework. As a consequence, clause 2 is amended to provide that DBCTM makes the covenants in clause 8 of the Deed Poll in favour and for the benefit of Third Parties (in addition to Covenantees).</p>
<b>Clause 3</b>	Clause 3.1 (Deed Poll is irrevocable) is amended	N/A	<p>Clause 3.1 is amended to reflect the execution of the Deed Poll and establishment of the initial Framework in March 2019, prior to the expiration of the existing declaration on 9 September 2020. Previously, clause 3.1 provided that DBCTM covenants that it will not revoke or amend the Deed Poll <i>during the Term</i>, which is defined by reference to the Framework to commence on the Commencement Date (i.e. 9 September 2020). Clause 3.1 is amended such that DBCTM now covenants that it will not revoke or amend the Deed Poll <i>until the expiry of the Term</i>, with the result that DBCTM cannot revoke or amend the Deed Poll from the time of execution of that Deed Poll until the expiry of the Term (including in particular in the period pre-dating 9 September 2020).</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
<b>Clause 4</b>	Clauses 4.1 and 4.2 are amended	N/A	<p>Clause 4.1 is amended to remove the reference to original clause 5 (as original clause 5, which provided for amendment of the Framework Objective, has been deleted) and incorporate a new covenant, namely that the Framework will continue to apply to the use of the Terminal (including Access to the Services) throughout the Term. As a consequence, DBCTM will now breach clause 4.1 of the Deed Poll if, for any reason, the Framework ceases to apply to the use of the Terminal prior to expiry of the Term (which occurs on the earlier of 9 September 2030 or the date on which any re-declaration of the use of the Terminal first takes effect).</p> <p>Clause 4.2 of the Deed Poll is amended as a consequence of the execution of the Deed Poll and establishment of the initial Framework in March 2019, prior to the expiration of the existing declaration and the Framework taking effect on 9 September 2020. The amendment of clause 4.2 clarifies that DBCTM covenants to comply with the Framework <i>for the Term</i> (which commences on 9 September 2020).</p>
<b>Original clause 5</b>	Original clause 5, which provided for the amendment of the Framework Objective, has been deleted	DUG raised a concern in respect of DBCTM's ability to amend the Framework Objective under the Deed Poll submitted by DBCTM in June 2018 with the State's consent (DUG cross-submission at 61). DUG asserted that this undermines the protection the requirement that amendments promote the Framework Objective provides, particularly as decisions of the State may not take account of user interests and have a	Original clause 5, under which DBCTM covenanted that it would not amend the Framework Objective except with the prior written consent of the State, has been deleted to address DUG concerns regarding the ability of DBCTM to amend the Framework Objective with the consent of the State.

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>political dimension and change with political cycles, resulting in uncertainty as to how the State will act in future.</p>	<p>The Framework Objective is now specified in the Deed Poll (in clause 1.1), rather than by reference to the Framework, as the Deed Poll cannot be revoked or amended by DBCTM (see clause 3). The Deed Poll specifies the Framework Objective by reference to the object set out in section 69E of the QCA Act, as amended from time to time. As a consequence, the Framework Objective is amended only in the event of legislative amendment of the object of Part 5 of the QCA Act and such that the Framework Objective reflects the object of Part 5 of the QCA Act in force from time to time.</p>
<b>New clause 6</b>	<p>New clause 6, which provides for new pricing covenant, is incorporated</p>	<p>The fundamental basis of the QCA’s draft recommendation that criterion (a) is satisfied for the DBCT service is that there are significant asymmetries in the access charges between new and existing users, such that potential efficient new entrants will be deterred from entering the coal tenements market (Draft Decision, at [77]-[79], [82]-[87] and [93]-[94]). The QCA reasoned as follows:</p> <ul style="list-style-type: none"> <li>• In a future without declaration, existing users would be protected by their EUAs, and would continue to gain access to the Terminal on substantially the same terms as they would with declaration.</li> <li>• By contrast, future access seekers would face the risk of negotiating access in an environment where DBCTM would have the discretion to set access terms and conditions, and the risk of paying a materially higher access charge reflecting the cost of accessing WICET - \$20 per tonne.</li> </ul>	<p>New clause 6 is introduced to provide for a new pricing covenant directed at addressing QCA and DUG concerns regarding the divergence in pricing faced by new users under the Framework from pricing faced by existing users under Existing User Agreements and the limitations on the protections afforded to access seekers by the Framework (given DBCTM's ability to amend the Framework under the Deed Poll as submitted in June 2018).</p> <p>Under new clause 6, DBCTM covenants that:</p> <ul style="list-style-type: none"> <li>• Any TIC it imposes during the Term will be lower than: <ul style="list-style-type: none"> <li>• For the Existing Terminal, the TIC for the Existing Terminal that would apply under a QCA</li> </ul> </li> </ul>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<ul style="list-style-type: none"> <li>• This would result in a price differential between new and existing users in the order of \$15, without declaration.</li> <li>• Without declaration there would, therefore, be a material difference between the terms and conditions of access for future access seekers and existing users, such that potential new entrants to the coal tenements market may be discouraged from entering that market, and competition in that market would be materially adversely affected.</li> </ul> <p>The QCA also expressed concern that, as a consequence, there is asymmetry between existing users and future access seekers under the Framework in respect of the terms on which they can use any capacity acquired from an existing user (Draft Decision, at 66, 84 (footnote 279), 88 (footnote 288), and 96-97). The QCA reasoned:</p> <ul style="list-style-type: none"> <li>• Existing users can, and will continue to be able, to trade capacity directly under the terms of their EUAs and DBCTM would be constrained from unreasonably frustrating this. Existing users can therefore acquire capacity from other existing users and utilise any capacity rights so acquired under the terms of their EUAs. They are only required to pay the Framework price if they cannot secure capacity from another existing user. Subject to the availability of capacity from other existing users therefore, existing users can acquire capacity required for new tenements at the price applicable under EUAs.</li> <li>• By contrast, the QCA contends, future access seekers who acquire capacity from existing users will still</li> </ul>	<p>administered pricing regime plus \$3 (\$2020/21 real); and</p> <ul style="list-style-type: none"> <li>• For any other Terminal Component, the greater of the TIC for that Terminal Component that would apply under a QCA administered pricing regime and the maximum TIC for the Existing Terminal referred to above.</li> <li>• The only other access charges DBCTM will impose for access under an access agreement entered into under the Framework or otherwise during the Term will be those required for the pass through to Access Holders of Terminal Operating Costs incurred by DBCTM.</li> </ul> <p>The covenant limits any amount by which the TIC for a Terminal Component may exceed the regulated TIC for the Existing Terminal to \$3 (\$2020/21 real). In assessing whether declaration would promote a material increase in competition in the coal tenements market, the QCA stated that coal handling charges faced by future access seekers that are \$3.50 in excess of those faced by existing users are not materially different to those faced by existing users under their Existing User Agreements (Draft Decision, at 86). DBCTM has no ability to remove or modify the protection afforded by this covenant in respect of access pricing, as the Deed Poll cannot be revoked or amended by DBCTM (see clause 3). In the event of breach of this covenant,</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>need to negotiate a new user agreement with DBCTM pursuant to the Framework and therefore pay a price based on their 'willingness to pay' relative to other access seekers. They will, therefore, have to pay a 'willingness to pay' price in the future without declaration regardless of whether they acquire capacity directly from DBCTM or from existing users through a permanent or long-term capacity transfer.</p> <ul style="list-style-type: none"> <li>This asymmetry enhances the asymmetry in the access terms and conditions faced by existing users and future access seekers, which is relevant for the coal tenements market.</li> </ul>	<p>an access holder / seeker can seek an order from the courts of Queensland for specific performance (see clauses 9.2 and 11.1).</p> <p>In circumstances where the potential asymmetry in the TIC, and resultant coal handling charge, faced by access seekers and existing users is addressed through the new pricing covenant in the Deed Poll, there is no material difference in the price terms on which existing users and future access seekers may utilise capacity acquired from existing users under the Framework.</p>
<b>New clause 7.2</b>	Original clause 8.6 is relocated as new clause 7.2	N/A	Original clause 8.6 is relocated to clause 7, as new clause 7.2, as a consequence of the amendments made to clause 8 of the Deed Poll to address QCA and DUG concerns regarding DBCTM's ability to amend the Framework. No substantive amendments are made to original clause 8.6 in so doing.
<b>Original clause 7.2 (now clause 7.3)</b>	Original clause 7.2 (now clause 7.3) is amended	N/A	Original clause 7.2 (now clause 7.3) is amended to confirm, for the avoidance of doubt, that a reference to amendment of the Framework in the Deed Poll includes amendment of any Schedule to that Framework (including but not limited to amendment of the SAA).
<b>Clause 8</b>	Clause 8, concerning amendments to the Framework, is amended	<p>The QCA concluded in respect of the Deed Poll submitted by DBCTM in June 2018 that (Draft Decision, at 68-69):</p> <ul style="list-style-type: none"> <li>There are a range of amendments - outcomes in relation to the Access Undertaking or Framework -</li> </ul>	Clause 8.2, which establishes the criteria for amendment of the Framework by DBCTM, is amended to provide that DBCTM may only amend the Framework where (in addition to the

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>that would promote the objective under Part 5 of the QCA Act / Framework Objective.</p> <ul style="list-style-type: none"> <li>• Under the June 2018 Deed Poll, DBCTM has an unchecked discretion to select the amendment from within this range because: <ul style="list-style-type: none"> <li>• amendments are only required by the Deed Poll to promote the Framework Objective; and</li> <li>• in any court proceedings alleging that the amendments breach this requirement, the court would be limited to resolving whether the amendments promote the Objective and could not revisit DBCTM's choice of amendments from within the range of different amendments that promote the Objective.</li> </ul> </li> <li>• Under the QCA Act, the QCA has periodically approved an Access Undertaking and SAA and, in doing so, it is the QCA that exercises the discretion as to the preferred amendments (having regard to the objective and the other mandatory considerations in section 138(2)).</li> <li>• The discretion DBCTM would have under the June 2018 Deed Poll in amending the Framework may create uncertainty as to the terms of the Framework and the SAA which may apply, and could be counterproductive to concluding negotiations in a timely and cost effective manner.</li> </ul>	<p>amendment(s) promoting the Framework Objective), the amendments are appropriate having regard to the mandatory considerations set out in original clause 8.5 (now clause 8.3) of the Deed Poll (which mirror those in section 138(2) of the QCA Act). Original clause 8.5 (now clause 8.3) has been amended so as to mirror the language of the mandatory considerations in section 138(2) of the QCA Act.</p> <p>Original clauses 8.3 and 8.4, which required DBCTM to consult with Confirmed Access Seekers, Access Applicants and Access Holders regarding proposed amendments and provided for them to bring any concern or objection to DBCTM's attention within one month of first being consulted by DBCTM, have been deleted. These clauses have been replaced by new clauses 8.4 to 8.6, which establish more prescriptive procedures (including consultation requirements and timeframes) that must be followed by DBCTM in proposing amendments to the Framework.</p> <p>Among other things, new clause 8.4 establishes obligations on DBCTM to:</p> <ul style="list-style-type: none"> <li>• notify Covenantees of proposed amendments to the Framework;</li> <li>• advertise its intention to amend the Framework in a national newspaper;</li> </ul>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>DUG raised the following concerns in respect of DBCTM's ability to amend the Framework under the June 2018 Deed Poll (DUG cross-submission at 59-61):</p> <ul style="list-style-type: none"> <li>• The mandatory considerations set out in clause 8.5 of the June 2018 Deed Poll do not limit DBCTM's ability to amend the Framework; the amendments don't have to be appropriate having regard to those considerations and, given DBCTM's incentives as a monopoly provider, there won't be an independent balancing of those factors as occurs where the QCA has regard to them in approving an Access Undertaking.</li> <li>• It is difficult to test whether amendments comply with the requirement to promote the Framework Objective: <ul style="list-style-type: none"> <li>• What promotes the Framework Objective is open to differences of view.</li> <li>• The only way to raise an objection to amendments is to commence Court proceedings within 90 days of the amendments first being published, with the result that: <ul style="list-style-type: none"> <li>• amendments may 'slip through' without consideration;</li> <li>• amendments will be made to the detriment of future access seekers who are not aware of or considering the Framework at the time of the amendments,</li> </ul> </li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• publish proposed amendments on its website;</li> <li>• invite comments on the proposed amendments from Covenantees and any other person;</li> <li>• review and consider those comments;</li> <li>• publish the final form of the proposed amendments on its website; and</li> <li>• give notice to Covenantees and any other person who provided comments (referred to as 'Third Parties') of the final proposed amendments.</li> </ul> <p>New clauses 8.5 and 8.6 provide that the final proposed amendments will not take effect unless and until time has lapsed for a Covenantee or Third Party to commence proceedings to challenge the validity of those amendments without the commencement of any such proceedings or a court has determined such proceedings in favour of DBCTM.</p> <p>Clause 8.7 is amended as a consequence of new clauses 8.4 to 8.6 so as to provide for any final proposed amendments that take effect to remain published on DBCTM's website together with a note advising the date on which they became effective.</p> <p>Following amendment of clause 8, the criteria governing amendment of the Framework mirror those governing the QCA's approval of an access</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>whereas the QCA considers the impact of amendments on future access seekers.</p> <ul style="list-style-type: none"> <li>There is resultant uncertainty as to whether the Framework will apply in the future without declaration even for a 10 year period.</li> </ul>	<p>undertaking. Further, in proceedings for an alleged breach of clause 8 of the Deed Poll that challenge the validity of the final proposed amendments commenced by a Covenantor or Third Party, the court is now required to consider whether the final proposed amendments are appropriate having regard to the mandatory considerations set out in what is now clause 8.3 (which mirror those in section 138(2) of the QCA Act applicable to approval of an access undertaking by the QCA) including the interests of future access seekers. If the court determines that the amendments are not appropriate having regard to those matters, the court may make a declaratory order to the effect that giving effect to the final proposed amendments would breach the Deed Poll. In this event, the final proposed amendments will not take effect, by reason of new clauses 8.5 and 8.6.</p>
<b>Clause 9.2</b>	Clause 9.2, which establishes conditions on the covenants in the Deed Poll, is amended	N/A	<p>The changes to clause 9.2 are consequential to the amendments made to clause 8 and other clauses of the Deed Poll to address QCA and DUG concerns regarding DBCTM's ability to amend the Framework. Consequent upon the incorporation in the Deed Poll of more onerous criteria for amendment of the Framework, with the resultant ability for a court to prevent the making of amendments that are not appropriate having regard to the mandatory considerations set out in what is now clause 8.3 (which mirror those set out in section 138(2) of the QCA Act which are applicable to the QCA's approval of an access undertaking), clause 9.2 has been amended to provide that the only remedy available</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
			under the Deed Poll for a breach of DBCTM's covenants under clauses 7 and 8 in respect of amendments to the Framework is declaratory relief.
<b>Clauses 11.2, and new clauses 11.3, 11.4 and 11.5</b>	Clause 11.2, which provides for legal proceedings for breach of the Deed Poll covenants, are amended and supplemented by new clauses 11.3, 11.4 and 11.5	<p>One of the concerns raised by DUG in respect of DBCTM's ability to amend the Framework under the Deed Poll submitted by DBCTM in June 2018 was that the only way to raise an objection to amendments is to commence Court proceedings within 90 days of the amendments first being published, with the result that (DUG cross submission at 60-61):</p> <ul style="list-style-type: none"> <li>• amendments may 'slip through' without consideration;</li> <li>• amendments will be made to the detriment of future access seekers who are not aware of or considering the Framework at the time of the amendments, whereas the QCA considers the impact of amendments on future access seekers.</li> </ul> <p>This DUG concern is primarily addressed by amendments to clause 8 of the Deed Poll (discussed above). However, the amendments to clause 11 discussed at right also assist to address this concern.</p>	<p>Clause 11.2 previously required any legal proceedings commenced by a Covenantee for breach of the Deed Poll in respect of amendments to the Framework to be filed and served within 90 days after the date of publication of the amendments on DBCTM's website.</p> <p>New clauses 11.4 and 11.5 now provide for legal proceedings for breach of the Deed Poll covenants in respect of amendments to the Framework. These clauses provide that any legal proceedings commenced by a Covenantee for a breach of clause 7 and/or clause 8, or a Third Party for a breach of clause 8, must be filed and served on DBCTM within 120 days after the date of notice by DBCTM of the final proposed amendments to the Framework (instead of 90 days of the date of the relevant amendments to the Framework as under the clause 11.2 in the Deed Poll as submitted in June 2018).</p> <p>Clause 11.2 as amended and new clause 11.3 provide for legal proceedings for breach of any other Deed Poll covenants. These clauses provide that any legal proceedings commenced by a Covenantee for a breach of clauses 3, 4.1, 5 and/or 6 must be filed and served by DBCTM within 120 days after the date of the breach.</p>

**Rationale for changes in DBCT Access Framework (March 2019) to DBCT Access Framework (June 2018)\***

\*Drafting amendments that are of a minor, non-substantive nature (including the updating of cross references) are not included in the table below.

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
<b>Clause 1.3 (Object of this Framework)</b>	Clause 1.3 is amended to remove specification of Framework Objective	<p>DUG raised the following concerns in respect of DBCTM's ability to amend the Framework Objective under the Deed Poll submitted by DBCTM in June 2018 (DUG cross-submission at 59-61):</p> <ul style="list-style-type: none"> <li>• DBCTM can amend the Framework Objective with the State's consent, which undermines the protection the requirement that amendments promote the Framework Objective provides.</li> <li>• Decisions of the State may not take account of user interests and have a political dimension and change with political cycles, resulting in uncertainty as to how the State will act in future.</li> </ul>	DUG's concern is addressed by specifying the Framework Objective in the Deed Poll (by reference to the object set out in section 69E of the QCA Act), rather than in the Framework, as the Deed Poll cannot be revoked or amended by DBCTM. Clause 1.3 is therefore amended to delete original paragraph (a), which specified the Framework Objective, and original paragraph (b) is amended to refer to the specification of the Framework Objective in the Deed Poll.
<b>Clause 5.4 (Priority of Access Applications and execution of Access Agreements)</b>	Clause 5.4(e), (h) and (i) are amended  New clause 5.4(j) and (k) are introduced	<p>The QCA concluded that the capacity allocation mechanism under the Framework results in uncertainty for future access seekers about whether and when they would obtain access (Draft Decision, at 70-71, 85 and 87).</p> <ul style="list-style-type: none"> <li>• The capacity allocation mechanism allows DBCTM to auction terminal capacity to extract the maximum price from access seekers, based on their willingness to pay.</li> <li>• An access seeker's access to terminal capacity would be subject to its willingness</li> </ul>	The QCA concern regarding capacity allocation under the Framework is dependent on the ability of DBCTM to price capacity for future access seekers on the basis of willingness to pay and is, accordingly, addressed by the new pricing covenant under the Deed Poll and amendment of the Framework to cap the Ceiling TIC at the Floor TIC for the Existing Terminal plus \$3 (\$2020/21 real), so constraining the asserted uncertainty as to what access seekers have to do to get access.

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>to pay relative to that of other access seekers and there being sufficient capacity available to meet access seekers' requirements.</p> <ul style="list-style-type: none"> <li>• As a result, access seekers would face uncertainty about whether and when they would obtain terminal access to support their planned mining operations.</li> <li>• This would operate to adversely affect future access seekers' ability to compete with existing users in the coal tenements market.</li> <li>• By contrast, in the future with declaration, the capacity allocation mechanism is predictable and transparent to assist with access seekers' forward planning.</li> <li>• The Access Undertakings to date provide guidance on the future with declaration, and under those Access Undertakings there has been an access queuing mechanism that allocates capacity on a 'first come first served' basis. Access seekers who are not at the front of the queue can obtain access if they execute an access agreement provided that those at the front of the queue are not willing to execute an agreement at that time.</li> <li>• A key aspect of the queuing mechanism is that access seekers face the same reference tariff (regulated TIC), which is cost</li> </ul>	<p>Nonetheless, clause 5.4 of the Framework is also amended to address this QCA concern.</p> <p>Clause 5.4(e) to (k) as amended provide for the process by which an access seeker who is not at the front of the queue can obtain access by executing an access agreement not conditional on a Terminal expansion provided that those at the front of the queue are not willing to execute an agreement at that time. These provisions now provide that the relevant access seekers may execute a binding access agreement in the form of the SAA for the purposes of this process notwithstanding that the agreement does not have a completed value for the Initial TIC. In these circumstances, the Initial TIC will be negotiated and/or arbitrated upon only after any binding access agreement(s) are entered into and thus the capacity allocation process is complete.</p> <p>Except where an access seeker elects to negotiate the Initial TIC with DBCTM before or during the capacity allocation process, DBCTM will negotiate the Initial TIC with the access seeker only after it enters into a binding SAA and is thus allocated capacity. Whether the access seeker elects to negotiate the Initial TIC with DBCTM before or during the capacity allocation process will have no bearing on</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>reflective, for accessing existing capacity, regardless of their position in the queue.</p> <ul style="list-style-type: none"> <li>Effectively, capacity is allocated based on an access seekers' willingness to execute an access agreement subject to their position in the queue, with the result that access seekers know what they have to do to get access and there are clear criteria the provider needs to follow when deciding on whom to grant access rights.</li> </ul>	<p>whether it obtains access on the terms of the SAA.</p> <p>These amendments ensure that capacity is allocated on the basis of an access seeker's willingness to execute an SAA subject to their position in the queue, with the result that access seekers know what they have to do to get access, and not on the basis of their willingness to pay relate to other access seekers. As a consequence, DBCTM cannot use the capacity allocation mechanism under the Framework to extract the maximum price from access seekers based on their willingness to pay.</p> <p>Clause 5.4(h) is also amended to clarify that a Notifying Access Seeker to whom DBCTM delivers a signed access agreement must provide security reasonably required by DBCTM (unless the circumstances in clause 5.4(g) apply). This mirrors the existing requirement for security for Notified Access Seekers that deliver signed access agreements to DBCTM.</p>
<p><b>Clauses 5.4 (Priority of Access Applications and execution of Access Agreements), 5.12 (Review of Pricing Method and Indicative Access Charges), 11.7 (Unreasonable and uneconomic</b></p>	<p>Introduced new clause 5.4(l)(15) and (16)</p> <p>Clause 5.12(a) and (c) is amended</p>	<p>See QCA concern identified in respect of the amendment of clause 5.4 above.</p> <p>The QCA further observed that this concern is equally true for accessing expansion capacity, as all access seekers face the same expansion price that would be set by QCA having regard to DBCTM being</p>	<p>Clauses 5.4(l) and 5.12(a) and (c) as amended provide for the process by which an access seeker who is not at the front of the queue can obtain access by executing an access agreement conditional on a Terminal expansion provided that those at the front of</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
<p><b>proposed Terminal Capacity Expansions) and 12.1 (Access Agreements)</b></p>	<p>Clause 11.7 is amended</p> <p>New clause 12.1(f) is introduced</p>	<p>able to recover at least its efficient expansion costs, not a price based on their willingness to pay.</p>	<p>the queue are not willing to execute a conditional access agreement at that time. These provisions now operate to provide that the relevant access seekers may execute a conditional access agreement notwithstanding that the agreement does not have a completed value for the initial TIC or other access charges. In these circumstances, the access charges will be negotiated and/or arbitrated upon only after any binding conditional access agreement(s) are entered into and thus the capacity allocation process is complete.</p> <p>Except where an access seeker elects to negotiate the initial TIC or other access charges with DBCTM before or during the capacity allocation process, DBCTM will negotiate the charges with the access seeker only after it enters into a binding conditional access agreement and is thus allocated capacity. Whether the access seeker elects to negotiate the initial TIC or other access charges with DBCTM before or during the capacity allocation process will have no bearing on whether it obtains access.</p> <p>These amendments ensure that capacity conditional on a Terminal expansion is allocated on the basis of an access seekers' willingness to execute a conditional access agreement subject to their position in the</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
			<p>queue, with the result that access seekers know what they have to do to get access, and not on the basis of their willingness to pay relative to that of other access seekers. As a consequence, DBCTM cannot use the capacity allocation mechanism under the Framework to extract the maximum price from access seekers based on their willingness to pay.</p> <p>Clause 5.12(a) and (c) as amended and new clause 12.1(f), which reinstates clause 13.1(f) of the 2017 Access Undertaking, also provide for certain decisions that an Expansion Arbitrator must determine. These include the Expansion Arbitrator determining any Different Terms that the Access Seeker disputes (where a Conditional Access Agreement applies) and any missing dollar amounts, such as the initial TIC, where a Standard Access Agreement applies.</p> <p>Clause 11.7 is amended to provide that if DBCT Holdings consents to the modification or temporary delay of an expansion, this may mean the condition precedent to any Conditional Access Agreement may not be fulfilled.</p>
<b>Clause 10.4 (Terminal Infrastructure Charge)</b>	<p>New clause 10.4(e) is introduced</p> <p>Clause 10.4(d) and original clause</p>	See concerns identified in respect of the amendment of the Schedule C, Section 2 below.	<p>The changes to clause 10.4 are consequential to the amendments to Schedule C.</p> <p>New clause 10.4(e) is introduced to confirm, for the avoidance of doubt, that in any</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
	10.4(e) (now clause 10.4(f)) are amended		<p>arbitration relating to the Initial TIC to apply to Access or Increased Access to a Terminal Component, the Arbitrator must determine an Initial TIC for the Terminal Component that is equal to the Floor TIC for that Terminal Component, if the Ceiling TIC for the Terminal Component is lower than the Floor TIC for that Terminal Component.</p> <p>Clause 10.4(d) and original clause 10.4(e) (now clause 10.4(f)) are amended to clarify the hierarchy of provisions following the introduction of new clause 10.4(e).</p>
<p><b>Schedule C, Section 2 (Initial Terminal Infrastructure Charge), paragraphs (b) and (c)</b></p>	<p>New Schedule C, Section 2(b) is introduced</p> <p>Original Section 2(b) and (c) (now Section 2(c)) is amended</p>	<p>The fundamental basis of the QCA’s draft recommendation that criterion (a) is satisfied for the DBCT service is that there are significant asymmetries in the access charges between new and existing users, such that potential efficient new entrants will be deterred from entering the coal tenements market (Draft Decision, at [77]-[79], [82]-[87] and [93]-[94]). The QCA reasoned as follows:</p> <ul style="list-style-type: none"> <li>• In a future without declaration, existing users would be protected by their EUAs, and would continue to gain access to the Terminal on substantially the same terms as they would with declaration.</li> <li>• By contrast, future access seekers would face the risk of negotiating access in an environment where DBCTM would have the discretion to set access terms and</li> </ul>	<p>Consistent with the new pricing covenant introduced to the Deed Poll, new Section 2(b) is introduced to Schedule C to require that the Ceiling TIC is lower than the Floor TIC for the Existing Terminal (i.e. the TIC for the Existing Terminal that would apply under a QCA administered pricing regime) plus \$3 (\$2020/21 real). If, as a consequence, the Ceiling TIC for a Differentiated Expansion Component would be lower than the Floor TIC for that Terminal Component, new clause 10.4(e) will operate to provide that the Initial TIC for the Terminal Component is set equal to the Floor TIC for the Terminal Component (so ensuring that efficient expansions are not deterred or frustrated).</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>conditions, and the risk of paying a materially higher access charge reflecting the cost of accessing WICET - \$20 per tonne.</p> <ul style="list-style-type: none"> <li>• This would result in a price differential between new and existing users in the order of \$15, without declaration.</li> <li>• Without declaration there would, therefore, be a material difference between the terms and conditions of access for future access seekers and existing users, such that potential new entrants to the coal tenements market may be discouraged from entering that market, and competition in that market would be materially adversely affected.</li> </ul> <p>The QCA also expressed concern that, as a consequence, there is asymmetry between existing users and future access seekers under the Framework in respect of the terms on which they can use any capacity acquired from an existing user (Draft Decision, at 66, 84 (footnote 279), 88 (footnote 288), and 96-97). The QCA reasoned:</p> <ul style="list-style-type: none"> <li>• Existing users can, and will continue to be able, to trade capacity directly under the terms of their EUAs and DBCTM would be constrained from unreasonably frustrating this. Existing users can therefore acquire capacity from other existing users and utilise any capacity rights so acquired under the terms of their EUAs. They are only</li> </ul>	<p>New Schedule C, Section 2(b), together with the new pricing covenant in the Deed Poll, limits any amount by which the TIC for a Terminal Component may exceed the regulated TIC for the Existing Terminal to \$3 (\$2020/21 real). In assessing whether declaration would promote a material increase in competition in the coal tenements market, the QCA stated that coal handling charges faced by future access seekers that are \$3.50 in excess of those faced by existing users are not materially different to those faced by existing users under their Existing User Agreements (Draft Decision, at 86).</p> <p>In circumstances where the potential asymmetry in the TIC, and resultant coal handling charge, faced by access seekers and existing users is addressed through the new pricing covenant in the Deed Poll and the introduction of new Schedule C, Section 2(b) in the Framework, there is no material difference in the price terms on which existing users and future access seekers may utilise capacity acquired from existing users under the Framework.</p> <p>Consequential amendments are made to original Section 2(b) and (c) (now Section 2(c)).</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>required to pay the Framework price if they cannot secure capacity from another existing user. Subject to the availability of capacity from other existing users therefore, existing users can acquire capacity required for new tenements at the price applicable under EUAs.</p> <ul style="list-style-type: none"> <li>• By contrast, the QCA contends, future access seekers who acquire capacity from existing users will still need to negotiate a new user agreement with DBCTM pursuant to the Framework and therefore pay a price based on their 'willingness to pay' relative to other access seekers. They will, therefore, have to pay a 'willingness to pay' price in the future without declaration regardless of whether they acquire capacity directly from DBCTM or from existing users through a permanent or long-term capacity transfer.</li> <li>• This asymmetry enhances the asymmetry in the access terms and conditions faced by existing users and future access seekers, which is relevant for the coal tenements market.</li> </ul>	
<p><b>Schedule C, Section 2 (Initial Terminal Infrastructure Charge), paragraph (e)(6)</b></p>	<p>Schedule C, Section 2(e)(6) is amended</p>	<p>N/A</p>	<p>Consistent with original Schedule C, Section 2(e)(5), Section 2(e)(6) is amended to provide, for the avoidance of doubt, that, in assessing the capacity expected to be available at another coal terminal to serve miners' coal volumes, any contractual limitations on the</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
			coal volumes to be served at that other terminal are to be disregarded.
<b>Schedule G, Section 1 (Definitions)</b>	Definitions of 'Deed Poll', 'Different Terms', 'Framework Objective' and 'Terminating Date' are amended	N/A	<p>The definitions of 'Deed Poll' and 'Terminating Date' are amended to reflect the date of execution of the Deed Poll, and that this is prior to the expiration of the existing declaration and thus the Commencement Date.</p> <p>The definition of 'Different Terms' is amended as a consequence of the amendments to Sections 5.4(l), 5.12(a) and (c), and 12.1 discussed above.</p> <p>The definition of 'Framework Objective' is amended as a consequence of amendments to the Deed Poll and Framework so as to specify this Objective in the Deed Poll, rather than the Framework, to address DUG concerns about DBCTM's ability to amend the Framework Objective under the Deed Poll submitted by DBCTM in June 2018.</p>
<b>Schedule G, Section 3 (Change to Index)</b>	New Section 3 (Change to Index) is introduced	N/A	Section 3 (Change to Index) is introduced to incorporate clause 4 of the interpretation provisions in Schedule 9 to the SAA applicable under the 2017 Access Undertaking, which was deleted from the SAA applicable under the Framework previously submitted by DBCTM. This provision provides for the circumstances in which an index (such as the Consumer Price

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
			Index) used in a formula in the pricing provisions is not available.

### Rationale for changes in DBCT SAA (March 2019) to DBCT SAA (June 2018)\*

\*Drafting amendments that are of a minor, non-substantive nature (including the updating of cross references) are not included in the table below.

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
<p><b>Clause 12.5 (Permission of third party to Ship)</b></p> <p><b>Schedule 7 - Template Notice for Third Party Permission to Ship</b></p>	<p>Clause 12.5 of the SAA is amended to remove the requirement for DBCTM consent to the grant of a permission to ship to a third party</p> <p>Consequential amendments are made to Schedule 7</p>	<p>The QCA expressed a concern that future access seekers may face greater project risk in respect of new tenements than existing users under the Deed Poll and Framework, which would not arise in the future with declaration (Draft Decision, at 92-93). It reasoned as follows:</p> <ul style="list-style-type: none"> <li>Existing users can potentially defray 'take or pay' liability under EUAs if coal price expectations do not materialise, and thus project risk, by transferring capacity to other existing users in the secondary capacity trading market.</li> <li>Whether new entrants, if they execute a user agreement with DBCTM under the Framework, would have the ability to directly trade unused capacity with other users would depend on what access terms they negotiate with DBCTM in an environment in which DBCTM would have discretion to set access terms.</li> <li>To the extent that future access seekers are unable to directly trade capacity with other users,</li> </ul>	<p>The SAA has been amended with the consequence that the Framework establishes a right to transfer capacity rights under an access agreement akin to that conferred under section 106 of the QCA Act.</p> <p>The right conferred on a user by section 106 is a right to unilaterally transfer all or part of the user's interest in an access agreement to a third party subject to giving the provider notice. However, the right is qualified by the stipulation that the user's obligations under the agreement continue, unless the transferee and other parties to the agreement (i.e. the access provider) otherwise agree (section 106(5)). Accordingly, the right conferred by section 106 is akin to a right to permit a third party to ship, which is unqualified by any requirement for prior DBCTM consent.</p> <p>The right to permit a third party to ship provided by the SAA (clause 12.5) has been amended to remove the requirement for prior DBCTM consent to the grant by the access holder of permission to ship by a third party. As a consequence, the right to permit a</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
		<p>it would enhance the asymmetry in the access terms faced by new entrants and existing users.</p> <ul style="list-style-type: none"> <li>In the future with declaration, the QCA Act provides a right for a user to transfer all or part of the user's interest in an agreement subject to certain conditions (section 106) so future access seekers' ability to trade unused new capacity would be akin to existing users' capacity to trade unused existing capacity and a heightened project risk for new access seekers would not eventuate.</li> </ul>	<p>third party to ship conferred by the SAA now mirrors the right conferred by section 106 of the QCA Act.</p> <p>The provisions of the SAA applicable under the Framework concerning the assignment of a user's capacity rights and permission to third party to ship (clauses 12.2 and 12.5) are substantively identical to those of an existing user under the same provisions of the EUAs (with the exception only that under the SAA applicable under the Framework a user does not require DBCTM's consent to the grant of a permission to ship to a third party). Thus, if a future access seeker enters into a user agreement on the terms of the SAA, it will have the same ability to directly trade unused capacity with other users that existing users have under the EUAs.</p> <p>While the future access seeker and DBCTM may agree on different terms to those of the SAA, the new entrant has a right to arbitration in the event agreement cannot be reached and, in any arbitration, the Arbitrator must determine on non-price access terms substantively identical to those of the SAA except to the extent necessary to give effect to any agreement between DBCTM and the access seeker (Access Framework, clause 16.4(f)). It follows that the arbitrator would be required to determine on terms that give the new entrant the same ability to directly trade unused capacity with other users that existing users have under the EUAs. Therefore, DBCTM does not have a discretion under the Framework as to whether future access seekers, if they execute a user agreement with DBCTM under</p>

Section	Changes	QCA &/or DUG concern addressed	Rationale for changes
			<p>the Framework, would have the ability to directly trade unused capacity with other users.</p> <p>The basis on which the QCA maintains that DBCTM has a discretion as to access terms, including in particular the rights of future access seekers to trade unused capacity rights with other users, is unclear. To the extent that the QCA's view is informed by DBCTM's discretion under the Deed Poll submitted by DBCTM in June 2018 to amend the Framework, amendments to the Deed Poll have been made to address this concern.</p>

## Appendix 9 Deed Poll

## Irrevocable Deed Poll

### DETAILS

Date	11th March	2019
Parties	Name	DBCT Management Pty Limited
	Address	Level 15, 1 Eagle Street, Brisbane QLD 4000

### BACKGROUND

- A. The Terminal is a common user coal port. The Terminal includes in-loading, stockpiling, reclaiming, out-loading, and associated facilities for the handling of coal. The Terminal is located at the Port of Hay Point, south of Mackay in Queensland.
- B. On 14 September 2001, the DBCT Trustee as trustee of the DBCT Trust, and DBCT Management, entered into a number of agreements with DBCT Holdings and PCQ (both wholly owned by the State) under which DBCT Trustee and DBCT Management were granted a 50 year lease (with an option for a further 49 years) of the Terminal.
- C. An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract. The Operator of the Terminal has historically been user-owned and independent of the lessee.
- D. On 8 September 2020, the existing declaration of coal handling services at the Terminal under section 250 of the *Queensland Competition Authority Act 1997 (Qld) (QCA Act)* will expire. The Framework has been developed in response and provides a balanced approach to the provision of Access and a Framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Access Seekers seeking Access to the Services at the Terminal.
- E. The Framework will remain in effect and continue to apply to the use of the Terminal (including Access to the Services) throughout the Term, which will end on the earlier of:
  - a. 9 September 2030 (being the date that is ten years from the Framework's Commencement Date of 9 September 2020); and
  - b. the date on, or after, 9 September 2020 on which use of the Terminal is first taken to be a service declared under Part 5, Division 2 of the QCA Act.
- F. The Framework provides for:
  - a. the negotiation and provision of Access to the Services at the Terminal; and
  - b. measures to mitigate potential adverse effects on competition which could arise out of the ownership of a related Supply Chain Business.
- G. The Framework has been prepared in accordance with, and gives effect to, the Framework Objective (as that term is defined in clause 1 below).
- H. This Deed Poll:

- a. confirms that the Framework will remain in effect for, and continue to apply to the use of the Terminal (including Access to the Services) throughout, the Term; and
- b. prescribes how the Framework may be amended.

## TERMS

### 1. Definitions and Interpretation

#### Definitions

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

**Confirmed Access Seekers** has the meaning given in clause 2.1.1.

**Covenantees** has the meaning given in clause 2.1.

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

**Existing Terminal** means the Terminal as it exists on 9 September 2020 together with each terminal capacity expansion that is treated as forming part of the Existing Terminal for the purposes of determining Access Charges.

**Framework** means the Dalrymple Bay Coal Terminal Access Framework which will come into effect on 9 September 2020, as may be amended from time to time. A copy of the Framework which is current as at the date of this Deed Poll is at Annexure A to this Deed Poll.

**Framework Objective** has the meaning given in section 69E of the QCA Act, as may be amended from time to time. In the event that section 69E of the QCA Act is repealed, the Framework Objective will have the meaning given in section 69E of the QCA Act immediately prior to its repeal.

**Operation & Maintenance Contract** means the contract between DBCT Management, the DBCT Trustee and the Operator under which the Operator is engaged by DBCT Management to operate and maintain the Terminal on a day to day basis.

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

**Terminal Component** means each of the Existing Terminal and any terminal capacity expansion that is treated as a separate Terminal Component to the Existing Terminal for the purposes of determining Access Charges.

**Terminal Infrastructure Charge** or **TIC** means an amount per tonne payable by an Access Holder for access or increased access to a Terminal Component under an access agreement negotiated by DBCT Management and an Access Holder under the Framework or otherwise entered into during the Term.

**Terminal Operating Costs** means:

1.2. any amounts:

- 1.2.1. reasonably incurred or charged by the Operator (including any margin payable to the Operator under the Operation & Maintenance Contract);
- 1.2.2. in the nature of an operating expense for the Terminal and reasonably incurred or charged by DBCT Management with the express written consent of not less than 66% of Access Holders and Existing Users by contract tonnage; and

- 1.2.3. reasonably incurred by DBCT Management in exercising its rights under the Operation & Maintenance Contract to step in or take work out of the hands of the Operator (as a result of a default by the Operator),

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

**The State** means the Treasurer of the State of Queensland from time to time.

**Third Parties** has the meaning given in clause 8.4.6.

## **Interpretation**

- 1.3. In the interpretation of this Deed Poll, the following provisions apply unless the context otherwise requires:
  - 1.3.1. headings are inserted for convenience only and do not affect the interpretation of this Deed Poll;
  - 1.3.2. a reference in this Deed Poll to any document or agreement is to that document or agreement as amended, novated, supplemented or replaced;
  - 1.3.3. a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed Poll;
  - 1.3.4. where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
  - 1.3.5. a word which indicates the singular also indicates the plural, a word which indicates the plural also indicates the singular, and a reference to any gender also indicates the other genders;
  - 1.3.6. references to the word 'include' or 'including' are to be interpreted without limitation;
  - 1.3.7. the word 'day' or 'days' is a reference to calendar days; and
  - 1.3.8. if a provision of this Deed Poll is reasonably capable of an interpretation which would make that provision valid, lawful and enforceable, and an alternative interpretation that would make it unenforceable, illegal, invalid or void then, so far as is possible, that provision will be interpreted or construed to be limited and read down to the extent necessary to make it valid and enforceable.

## **2. Beneficiaries of Deed Poll**

- 2.1. Subject to clause 2.2, DBCT Management makes all of the covenants in this Deed Poll in favour of, and only for the benefit of:
  - 2.1.1. Access Seekers who have signed an Access Application Form or Access Renewal Form as set out at Schedule A to the Framework, or who are a party to a Conditional Access Agreement (**Confirmed Access Seekers**);
  - 2.1.2. Access Applicants;
  - 2.1.3. Access Holders;
  - 2.1.4. DBCT Holdings; and
  - 2.1.5. The State,(together, **Covenantees**).

- 2.2. DBCT Management makes the covenants in clause 8 of this Deed Poll in favour of, and only for the benefit of, the Covenantees and the Third Parties.
- 2.3. DBCT Management makes the covenants in this Deed Poll on the date of this Deed, and then each day until the end of the Term.
- 2.4. DBCT Management makes the covenants to the Covenantees and the Third Parties in this Deed Poll subject to the conditions set out at clauses 8, 9, 10 and 11 of this Deed Poll.

**3. Deed Poll is irrevocable**

- 3.1. DBCT Management covenants in favour of the Covenantees that it will not revoke or amend this Deed Poll until the expiry of the Term.

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

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

**5. Notice of intention to renew or not renew**

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

**6. Pricing under the Access Framework**

- 6.1. DBCT Management covenants in favour of the Covenantees that any Terminal Infrastructure Charge (TIC) it imposes during the Term will be lower than:
  - 6.1.1. for the Existing Terminal, the sum of the TIC that would apply for the Existing Terminal under a QCA administered pricing regime and the Maximum Spread, where the Maximum Spread is:
    - 6.1.1.1. \$3 in the Financial Year commencing on 1 July 2020; and
    - 6.1.1.2. in any subsequent Financial Year is derived by escalating the Maximum Spread in the immediately preceding Financial Year for the annual change in the Consumer Price Index by application of the following formula:

$$MS_t = MS_{t-1} \times (1 + CPI_t)$$

where:

$MS_t$  is the Maximum Spread to apply with effect from 1 July in Financial Year t;

$MS_{t-1}$  is the Maximum Spread applicable in Financial Year t-1; and

$CPI_t$  is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1;

6.1.2. for a Terminal Component other than the Existing Terminal, the greater of:

6.1.2.1. the TIC that would apply for that Terminal Component under a QCA administered pricing regime; and

6.1.2.2. the maximum TIC for the Existing Terminal specified in clause 6.1.1 above.

6.2. DBCT Management further covenants in favour of the Covenantees that, other than the TIC, the charge(s) for access or increased access to a Terminal Component it imposes under an access agreement negotiated under the Framework or otherwise entered into during the Term will be limited to any charge(s) that pass Terminal Operating Costs incurred by DBCT Management through to Access Holders.

## **7. Review of Framework by agreement**

7.1. If:

7.1.1. as a result of any review of the Framework by DBCT Management and the Access Holders, DBCT Management and the Access Holders agree that amendment of the Framework is desirable; or

7.1.2. DBCT Management (acting reasonably) considers it necessary that the Framework be amended so as to rectify a significant inequity or significant unfairness suffered by an Access Seeker, Access Applicant, Access Holder or DBCT Management, which inequity or unfairness was not generally foreseen or intended at the Commencement Date,

then DBCT Management will, subject to and in accordance with clause 8, amend the Framework to address the relevant issue(s).

7.2. If DBCT Management and each Access Holder reach agreement on mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain, DBCT Management will consult with the Access Holders regarding the amendment(s) to the Framework reasonably required to implement the agreed mechanisms (to the extent relevant to the Services, the Terminal or the Framework) and will, subject to and in accordance with clause 8, amend the Framework accordingly.

7.3. For clarification, an amendment to the Framework may include an amendment to the Schedules to the Framework including an amendment to the Standard Access Agreement as set out at Schedule B to the Framework.

## **8. Amendments to Framework**

8.1. The Framework can only be amended in accordance with this clause 8.

8.2. DBCT Management can amend the Framework, from time to time, so long as the amendment(s):

8.2.1. promote the Framework Objective; and

8.2.2. are appropriate having regard to each of the mandatory considerations set out in clause 8.3.

8.3. DBCT Management covenants in favour of the Covenantees that if, and when, it amends the Framework it will have regard to each of the following mandatory considerations:

- 8.3.1. the legitimate business interests of DBCT Holdings in its capacity as the owner of the Terminal;
- 8.3.2. the legitimate business interests of DBCT Management in its capacity as the operator of the Terminal;
- 8.3.3. public interest, including the public interest in having competition in markets (whether or not in Australia);
- 8.3.4. the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users are adversely affected;
- 8.3.5. the effect of excluding existing assets for pricing purposes;
- 8.3.6. the following pricing principles in relation to the price of access to the Terminal:
  - 8.3.6.1. the price should generate expected revenue for the Terminal that is at least enough to meet the efficient costs of providing access to the Terminal and include a return on investment commensurate with the regulatory and commercial risks involved;
  - 8.3.6.2. the price should allow for multi-part pricing and price discrimination when it aids efficiency;
  - 8.3.6.3. the price should not allow DBCT Management to set terms and conditions that discriminate in favour of the downstream operations of DBCT Management or a related body corporate of DBCT Management, except to the extent the cost of providing Access to other operators is higher; and
  - 8.3.6.4. the price should provide incentives to reduce costs or otherwise improve productivity.
- 8.4. The consultation process that DBCT Management will follow in relation to any proposed amendment(s) to the Framework is as follows:
  - 8.4.1. DBCT Management will provide written notice to all Covenantees of its intention to amend the Framework (**Notice**). The Notice will:
    - 8.4.1.1. be sent by express post on the day that the Notice is dated to the Covenantees' registered offices (except in the case of the State, in which case the Notice will be sent by express post to the office of the Treasurer of the State of Queensland);
    - 8.4.1.2. advise the date on which the proposed amendments to the Framework will be available for review on DBCT Management's website (such date must be not more than seven days after the day that the Notice is dated (**Review Date**)); and
    - 8.4.1.3. advise that any comments on the proposed amendments to the Framework must be received by DBCT Management by post (at its registered office) no later than 45 days after the Review Date.
  - 8.4.2. On or about the same day that DBCT Management sends the Notice to the Covenantees in accordance with clause 8.4.1, DBCT Management will advertise its intention to amend the Framework in a newspaper that is distributed nationally (**Advertisement**). The Advertisement will include the following:
    - 8.4.2.1. the Review Date; and

- 8.4.2.2. a statement to the effect that any comments on the proposed amendments to the Framework must be received by DBCT Management by post (at its registered office) no later than 45 days after the Review Date.
- 8.4.3. DBCT Management will publish the proposed amendments to the Framework on its website on the Review Date. The proposed amendments are to remain on DBCT Management's website for not less than 180 days.
- 8.4.4. DBCT Management will review and consider any comments that may be received in relation to the proposed amendments to the Framework (**Comments**), however it will not be bound to implement any Comments.
- 8.4.5. Following its review and consideration of the Comments, DBCT Management will publish the final form of the proposed amendments to the Framework (**Final Proposed Amendments**) on its website for a period of not less than 121 days.
- 8.4.6. On the day the Final Proposed Amendments are published on its website, DBCT Management will provide written notice, dated the same date as publication on the website, to (a) the Covenantees, and (b) any other third parties who have provided Comments (**Third Parties**), that the Final Proposed Amendments are available on its website (**Final Notice**). The Final Notice will:
  - 8.4.6.1. be sent by express post to the Covenantees' registered offices (except in the case of the State, in which case the Notice will be sent by express post to the office of the Treasurer of the State of Queensland), and to the return addresses provided by the Third Parties;
  - 8.4.6.2. state the date on which, absent the commencement of legal proceedings in accordance with clause 11, the Final Proposed Amendments will become effective (with such date being no less than 121 days after the day that the Final Notice is dated) (**Provisional Date**);
  - 8.4.6.3. state that if any party wishes to challenge the validity of the Final Proposed Amendments, they must do so by commencing legal proceedings in accordance with clause 11 within 120 days after the day that the Final Notice is dated;
  - 8.4.6.4. state that if a party does not commence legal proceedings in accordance with clause 11 within 120 days after the day that the Final Notice is dated, that party will lose any right to challenge the validity of the Final Proposed Amendments.
- 8.5. If no Covenantantee or Third Party commences legal proceedings to challenge the validity of the Final Proposed Amendments within 120 days after the day that the Final Notice is dated, the Final Proposed Amendments will become effective on the Provisional Date.
- 8.6. If any Covenantantee or Third Party commences legal proceedings to challenge the validity of the Final Proposed Amendments within 120 days after the day that the Final Notice is dated, the Final Proposed Amendments will not become effective:
  - 8.6.1. unless and until such time as the court has determined the legal proceedings in favour of DBCT Management by dismissing any legal proceedings brought by a Covenantantee or Third Party; and then
  - 8.6.2. on a date to be advised by DBCT Management by publication on its website.
- 8.7. Any Final Proposed Amendments that become effective in accordance with clause 8.5 or 8.6 will remain published on DBCT Management's website together with a note advising of the date that the Final Proposed Amendments became effective.

## 9. Breach of Deed Poll

- 9.1. DBCT Management acknowledges that damages are not an adequate remedy for breach of this Deed Poll.
- 9.2. DBCT Management makes the covenants in this Deed Poll subject to the following conditions:
  - 9.2.1. damages are not a remedy for any breach of this Deed Poll;
  - 9.2.2. the only remedy available for any breach of this Deed Poll (other than a breach of clause 7 and / or clause 8 of this Deed Poll) is specific performance;
  - 9.2.3. specific performance is not a remedy for any breach of clause 7 and / or clause 8 of this Deed Poll;
  - 9.2.4. the only remedy available for any breach of clause 7 and / or clause 8 of this Deed Poll is declaratory relief; and
  - 9.2.5. if a Covenantee alleges that DBCT Management has not complied with its obligations at clause 4.2, any dispute arising will be determined in accordance with the dispute resolution provisions contained in the Framework, and not this Deed Poll.

## **10. Governing law**

- 10.1. This Deed Poll is governed by the laws in force in the State of Queensland.

## **11. Jurisdiction and Dispute Resolution**

- 11.1. Subject to clause 9.2.5, the courts of Queensland have exclusive jurisdiction to determine any disputes arising out of or in connection with this Deed Poll.

### **Legal proceedings for breach of clause 3, clause 4.1, clause 5 and / or clause 6**

- 11.2. Any legal proceeding commenced by a Covenantee against DBCT Management for an alleged breach of clause 3, clause 4.1, clause 5 and / or clause 6 must be filed and served on DBCT Management within 120 days after the date that the alleged breach of this Deed Poll is said to have occurred.
- 11.3. DBCT Management may rely upon clause 11.2 as a complete defence to any proceedings filed or served 121 days or more after the date that the alleged breach of this Deed Poll is said to have occurred.

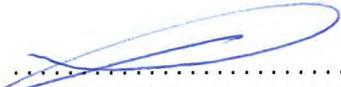
### **Legal proceedings for breach of clause 7 and / or clause 8**

- 11.4. Any legal proceeding commenced against DBCT Management by a Covenantee for an alleged breach of clause 7 and / or clause 8, or a Third Party in relation to an alleged breach of clause 8, must be filed and served on DBCT Management within 120 days after the date of the Final Notice.
- 11.5. DBCT Management may rely upon clause 11.4 as a complete defence to any proceedings filed or served 121 days or more after the date of the Final Notice.

**EXECUTION**

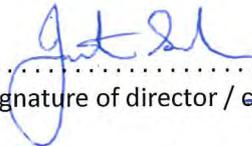
Executed as a Deed.

**EXECUTED** by  
**DBCT MANAGEMENT PTY LTD** (ACN 097 698 916) in  
accordance with s 127 of the Corporations Act 2001:

  
.....  
Signature of director

**Ray Neill**

.....  
Name of director (print)

  
.....  
Signature of director / ~~company secretary~~

**JONATHAN SELLAR**

.....  
Name of director / ~~company secretary~~ (print)

**ANNEXURE A**

Framework (current as at 11 March 2019)

## Appendix 10 Deed Poll – mark up to June 2018

## Irrevocable Deed Poll

### DETAILS

<b>Date</b>		201 <u>98</u>
<b>Parties</b>	Name	DBCT Management Pty Limited
	Address	Level 15, 1 Eagle Street, Brisbane QLD 4000

### BACKGROUND

- A. The Terminal is a common user coal port. The Terminal includes in-loading, stockpiling, reclaiming, out-loading, and associated facilities for the handling of coal. The Terminal is located at the Port of Hay Point, south of Mackay in Queensland.
- B. On 14 September 2001, the DBCT Trustee as trustee of the DBCT Trust, and DBCT Management, entered into a number of agreements with DBCT Holdings and PCQ (both wholly owned by the State) under which DBCT Trustee and DBCT Management were granted a 50 year lease (with an option for a further 49 years) of the Terminal.
- C. An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract. The Operator of the Terminal has historically been user-owned and independent of the lessee.
- D. On 8 September 2020, the existing declaration of coal handling services at the Terminal under section 250 of the Queensland Competition Authority Act 1997 (Qld) (QCA Act) will expired. The Framework has been developed in response and provides a balanced approach to the provision of Access and a framework Framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Access Seekers seeking Access to the Services at the Terminal.
- E. The Framework will remain in effect and continue to apply to the use of the Terminal (including Access to the Services) throughout the Term, which will end on the earlier of:
- a. 9 September 2030 (being the date that is ten years from the Framework's Commencement Date of 9 September 2020); and
  - b. the date on, or after, 9 September 2020 on which use of the Terminal is first taken to be a service declared under Part 5, Division 2 of the QCA Act.
- E.F. The Framework provides for:
- a. the negotiation and provision of Access to the Services at the Terminal; and
  - b. measures to mitigate potential adverse effects on competition which could arise out of the ownership of a related Supply Chain Business.
- F. As prescribed in Section 1.3(a) of the Framework, the objective of the Framework is to promote the economically efficient operation of, use of and investment in, the Terminal, with the effect of promoting effective competition in upstream and downstream markets.
- G. The Framework has been prepared in accordance with, and gives effect to, the Framework Objective (as that term is defined in clause 1 below).

- H. ~~For the benefit of the Covenantees only, T~~his Deed Poll:
- a. confirms that ~~subject to clauses 5, 7 and 8 of this Deed Poll,~~ the Framework will remain in effect for, ~~and continue to apply to the use of the Terminal (including Access to the Services) throughout,~~ the Term; and
  - b. prescribes how the Framework may be amended.

## TERMS

### 1. Definitions and Interpretation

#### Definitions

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

~~Background~~ means ~~the background section of this Deed Poll.~~

**Confirmed Access Seekers** has the meaning given in clause 2.1.1.

**Covenantees** has the meaning given in clause 2.1.

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

Existing Terminal means the Terminal as it exists on 9 September 2020 together with each terminal capacity expansion that is treated as forming part of the Existing Terminal for the purposes of determining Access Charges.

**Framework** means the Dalrymple Bay Coal Terminal Access Framework ~~which will come into effect on dated~~ 9 September 2020, as ~~it~~ may be amended from time to time. A copy of the Framework which is current as at the date of this Deed Poll is at Annexure A to this Deed Poll.

**Framework Objective** has the meaning given in ~~Section~~ section 69E of the QCA Act, as may be amended from time to time. In the event that section 69E of the QCA Act is repealed, the Framework Objective will have the meaning given in section 69E of the QCA Act immediately prior to its repeal. ~~1.3(a) of the Framework.~~

Operation & Maintenance Contract means the contract between DBCT Management, the DBCT Trustee and the Operator under which the Operator is engaged by DBCT Management to operate and maintain the Terminal on a day to day basis.

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

Terminal Component means each of the Existing Terminal and any terminal capacity expansion that is treated as a separate Terminal Component to the Existing Terminal for the purposes of determining Access Charges.

Terminal Infrastructure Charge or **TIC** means an amount per tonne payable by an Access Holder for access or increased access to a Terminal Component under an access agreement negotiated by DBCT Management and an Access Holder under the Framework or otherwise entered into during the Term.

Terminal Operating Costs means:

1.2. any amounts:

1.2.1. reasonably incurred or charged by the Operator (including any margin payable to the Operator under the Operation & Maintenance Contract);

1.2.2. in the nature of an operating expense for the Terminal and reasonably incurred or charged by DBCT Management with the express written consent of not less than 66% of Access Holders and Existing Users by contract tonnage; and

1.2.3. reasonably incurred by DBCT Management in exercising its rights under the Operation & Maintenance Contract to step in or take work out of the hands of the Operator (as a result of a default by the Operator),

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

**The State** means the Treasurer of the State of Queensland from time to time.

**Third Parties** has the meaning given in clause [8.4.6](#).

## Interpretation

1.3. In the interpretation of this Deed Poll, the following provisions apply unless the context otherwise requires:

- 1.3.1. headings are inserted for convenience only and do not affect the interpretation of this Deed Poll;
- 1.3.2. a reference in this Deed Poll to any document or agreement is to that document or agreement as amended, novated, supplemented or replaced;
- 1.3.3. a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed Poll;
- 1.3.4. where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
- 1.3.5. a word which indicates the singular also indicates the plural, a word which indicates the plural also indicates the singular, and a reference to any gender also indicates the other genders;
- 1.3.6. references to the word 'include' or 'including' are to be interpreted without limitation; ~~and~~
- 1.3.7. the word 'day' or 'days' is a reference to calendar days; and ~~any schedules and attachments form part of this Deed Poll.~~
- 1.3.8. if a provision of this Deed Poll is reasonably capable of an interpretation which would make that provision valid, lawful and enforceable, and an alternative interpretation that would make it unenforceable, illegal, invalid or void then, so far as is possible, that provision will be interpreted or construed to be limited and read down to the extent necessary to make it valid and enforceable.

## 2. Beneficiaries of ~~deed-Deed poll~~ Poll

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

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

2.1.4. DBCT Holdings; and

2.1.5. The State,

(together, **Covenantees**).

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

~~2.2.2.3.~~ DBCT Management makes the covenants in this Deed Poll on the date of this Deed, and then each day until the end of the Term.

~~2.3.2.4.~~ DBCT Management makes the covenants to the Covenantees and the Third Parties in this Deed Poll subject to the conditions set out at clauses ~~8.4~~, 9, 10 and 11 of this Deed Poll.

### **3. Deed ~~poll~~ Poll is irrevocable**

3.1. DBCT Management covenants in favour of the Covenantees that it will not revoke or amend this Deed Poll ~~during-until~~ the expiry of the Term.

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

4.1. Subject to any amendments permitted in accordance with clauses ~~5,7~~ and 8 of this Deed Poll, DBCT Management covenants in favour of the Covenantees that the Framework will remain in effect for, and continue to apply to the use of the Terminal (including Access to the Services) throughout, the Term.

4.2. ~~Subject to clause 9.2.3,~~ DBCT Management covenants in favour of the Covenantees ~~only~~ that it will comply with the Framework for the Term.

### ~~5. Framework objective~~

~~5.1 DBCT Management covenants in favour of the Covenantees that it will not amend the Framework Objective, except with the prior written consent of the State.~~

### ~~6.5. Notice of intention to renew or not renew~~

~~6.1.5.1.~~ At least 12 months before the tenth anniversary of the Commencement Date, DBCT Management will publish the following on its website:

~~6.1.1.5.1.1.~~ notice of its intention to renew, or not renew, the operation of the Framework for a further term; and

~~6.1.2.5.1.2.~~ where operation of the Framework is being renewed for a further term, details of the term and a copy of the Framework with any amendment(s).

### 6. Pricing under the Access Framework

6.1. DBCT Management covenants in favour of the Covenantees that any Terminal Infrastructure Charge (TIC) it imposes during the Term will be lower than:

6.1.1. for the Existing Terminal, the sum of the TIC that would apply for the Existing Terminal under a QCA administered pricing regime and the Maximum Spread, where the Maximum Spread is:

6.1.1.1. \$3 in the Financial Year commencing on 1 July 2020; and

6.1.1.2. in any subsequent Financial Year is derived by escalating the Maximum Spread in the immediately preceding Financial Year for the annual change in the Consumer Price Index by application of the following formula:

$$MS_t = MS_{t-1} \times (1 + CPI_t)$$

where:

MS<sub>t</sub> is the Maximum Spread to apply with effect from 1 July in Financial Year t;

MS<sub>t-1</sub> is the Maximum Spread applicable in Financial Year t-1; and

CPI<sub>t</sub> is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1;

6.1.2. for a Terminal Component other than the Existing Terminal, the greater of:

6.1.2.1. the TIC that would apply for that Terminal Component under a QCA administered pricing regime; and

6.1.2.2. the maximum TIC for the Existing Terminal specified in clause 6.1.1 above.

6.2. DBCT Management further covenants in favour of the Covenantees that, other than the TIC, the charge(s) for access or increased access to a Terminal Component it imposes under an access agreement negotiated under the Framework or otherwise entered into during the Term will be limited to any charge(s) that pass Terminal Operating Costs incurred by DBCT Management through to Access Holders.

## **7. Review of ~~framework~~ Framework by agreement**

7.1. If:

7.1.1. as a result of any review of the Framework by DBCT Management and the Access Holders, DBCT Management and the Access Holders agree that amendment of the Framework is desirable; or

7.1.2. DBCT Management (acting reasonably) considers it necessary that the Framework be amended so as to rectify a significant inequity or significant unfairness suffered by an Access Seeker, Access Applicant, Access Holder or DBCT Management, which inequity or unfairness was not generally foreseen or intended at the Commencement Date,

then DBCT Management will, subject to and in accordance with clause 8, amend the Framework to address the relevant issue(s).

7.2. If DBCT Management and each Access Holder reach agreement on mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain, DBCT Management will consult with the Access Holders regarding the amendment(s) to the Framework reasonably required to implement the agreed mechanisms (to the extent relevant to the Services, the Terminal or the Framework) and will, subject to and in accordance with clause 8, amend the Framework accordingly.

7.3. For clarification, an amendment to the Framework may include an amendment to the Schedules to the Framework including an amendment to the Standard Access Agreement as set out at Schedule B to the Framework.

## 8. Amendments to ~~framework~~Framework

8.1. The Framework can only be amended in accordance with this clause 8.

~~8.2.~~ DBCT Management can amend the Framework, from time to time, so long as the amendment(s):

~~8.2.1.~~ promotes the Framework Objective; ~~and~~

~~8.1.1-8.2.2.~~ are appropriate having regard to each of the mandatory considerations set out in clause ~~8.3.~~

~~8.2.~~ DBCT Management will consult with Confirmed Access Seekers, Access Applicants and Access Holders regarding any proposed amendment(s).

~~8.3.~~ In the event that a Confirmed Access Seeker, Access Applicant and / or Access Holder has any concern about, or objection to, the proposed amendment(s), it will bring the concern or objection to DBCT Management's attention within one month of it having first been consulted by DBCT Management in relation to the proposed amendment(s).

~~8.4.8.3.~~ DBCT Management covenants in favour of the Covenantees that if, and when, it amends the Framework it will have regard to each of the following mandatory considerations:

~~8.4.1-8.3.1.~~ the legitimate business interests of DBCT Holdings in its capacity as the owner of the Terminal;

~~8.4.2-8.3.2.~~ the legitimate business interests of DBCT Management in its capacity as the operator of the Terminal;

~~8.4.3-8.3.3.~~ public interest, including the public interest in having competition in markets (whether or not in Australia);

~~8.4.4-8.3.4.~~ the interests of ~~Confirmed Access Seekers and Access Applicants~~ persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of ~~Access Holders~~ users are adversely affected;

~~8.4.5-8.3.5.~~ the effect of excluding existing assets for pricing purposes;

~~8.4.6-8.3.6.~~ the following pricing principles in relation to the price of access to the Terminal:

~~8.4.6.1-8.3.6.1.~~ the price should generate expected revenue for the Terminal that is at least enough to meet the efficient costs of providing access to the Terminal and include a return on investment commensurate with the regulatory and commercial risks involved;

~~8.4.6.2-8.3.6.2.~~ the price should allow for multi-part pricing and price discrimination when it aids efficiency;

~~8.4.6.3-8.3.6.3.~~ the price should not allow DBCT Management to set terms and conditions that discriminate in favour of the downstream operations of DBCT Management or a related body corporate of DBCT Management, except to the extent the cost of providing Access to other operators is higher; and

~~8.4.6.4-8.3.6.4.~~ the price should provide incentives to reduce costs or otherwise improve productivity.

8.4. The consultation process that DBCT Management will follow in relation to any proposed amendment(s) to the Framework is as follows:

- 8.4.1. DBCT Management will provide written notice to all Covenantees of its intention to amend the Framework (**Notice**). The Notice will:
- 8.4.1.1. be sent by express post on the day that the Notice is dated to the Covenantees' registered offices (except in the case of the State, in which case the Notice will be sent by express post to the office of the Treasurer of the State of Queensland);
  - 8.4.1.2. advise the date on which the proposed amendments to the Framework will be available for review on DBCT Management's website (such date must be not more than seven days after the day that the Notice is dated (**Review Date**)); and
  - 8.4.1.3. advise that any comments on the proposed amendments to the Framework must be received by DBCT Management by post (at its registered office) no later than 45 days after the Review Date.
- 8.4.2. On or about the same day that DBCT Management sends the Notice to the Covenantees in accordance with clause **8.4.1**, DBCT Management will advertise its intention to amend the Framework in a newspaper that is distributed nationally (**Advertisement**). The Advertisement will include the following:
- 8.4.2.1. the Review Date; and
  - 8.4.2.2. a statement to the effect that any comments on the proposed amendments to the Framework must be received by DBCT Management by post (at its registered office) no later than 45 days after the Review Date.
- 8.4.3. DBCT Management will publish the proposed amendments to the Framework on its website on the Review Date. The proposed amendments are to remain on DBCT Management's website for not less than 180 days.
- 8.4.4. DBCT Management will review and consider any comments that may be received in relation to the proposed amendments to the Framework (**Comments**), however it will not be bound to implement any Comments.
- 8.4.5. Following its review and consideration of the Comments, DBCT Management will publish the final form of the proposed amendments to the Framework (**Final Proposed Amendments**) on its website for a period of not less than 121 days.
- 8.4.6. On the day the Final Proposed Amendments are published on its website, DBCT Management will provide written notice, dated the same date as publication on the website, to (a) the Covenantees, and (b) any other third parties who have provided Comments (**Third Parties**), that the Final Proposed Amendments are available on its website (**Final Notice**). The Final Notice will:
- 8.4.6.1. be sent by express post to the Covenantees' registered offices (except in the case of the State, in which case the Notice will be sent by express post to the office of the Treasurer of the State of Queensland), and to the return addresses provided by the Third Parties;
  - 8.4.6.2. state the date on which, absent the commencement of legal proceedings in accordance with clause **11**, the Final Proposed Amendments will become effective (with such date being no less than 121 days after the day that the Final Notice is dated) (**Provisional Date**);
  - 8.4.6.3. state that if any party wishes to challenge the validity of the Final Proposed Amendments, they must do so by commencing legal proceedings in accordance with clause **11** within 120 days after the day that the Final Notice is dated;

8.4.6.4. state that if a party does not commence legal proceedings in accordance with clause 11 within 120 days after the day that the Final Notice is dated, that party will lose any right to challenge the validity of the Final Proposed Amendments.

~~8.5.—Subject to this clause 8, if DBCT Management and each Access Holder reach agreement on mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain, DBCT Management will consult with the Access Holders regarding the amendment(s) to the Framework reasonably required to implement the agreed mechanisms (to the extent relevant to the Services, the Terminal or the Framework) and will amend the Framework accordingly.~~

8.5. If no Covenantor or Third Party commences legal proceedings to challenge the validity of the Final Proposed Amendments within 120 days after the day that the Final Notice is dated, the Final Proposed Amendments will become effective on the Provisional Date.

8.6. If any Covenantor or Third Party commences legal proceedings to challenge the validity of the Final Proposed Amendments within 120 days after the day that the Final Notice is dated, the Final Proposed Amendments will not become effective:

8.6.1. unless and until such time as the court has determined the legal proceedings in favour of DBCT Management by dismissing any legal proceedings brought by a Covenantor or Third Party; and then

8.6.2. on a date to be advised by DBCT Management by publication on its website.

~~8.6.8.7. Any Final Proposed Amendments that become effective amendment(s) to the Framework in accordance with this clause 8.5 or 8.6 will remain published be published as soon as reasonably practicable on DBCT Management's website together with a note advising of the date that the Final Proposed Amendments became effective.~~

## **9. Breach of ~~deed~~ Deed ~~poll~~ Poll**

9.1. DBCT Management acknowledges that damages are not an adequate remedy for breach of this Deed Poll.

9.2. DBCT Management makes the covenants in this Deed Poll subject to the following conditions:

9.2.1. damages are not a remedy for any breach of this Deed Poll;

9.2.2. the only remedy available for any breach of this Deed Poll (other than a breach of clause 7 and / or clause 8 of this Deed Poll) is specific performance;

9.2.3. specific performance is not a remedy for any breach of clause 7 and / or clause 8 of this Deed Poll;

9.2.4. the only remedy available for any breach of clause 7 and / or clause 8 of this Deed Poll is declaratory relief; and

~~9.2.2.~~9.2.5. if a Covenantor alleges that DBCT Management has not complied with its obligations at clause 4.2, any dispute arising will be determined in accordance with the dispute resolution provisions contained in the Framework, and not this Deed Poll.

## **10. Governing law**

10.1. This Deed Poll is governed by the laws in force in the State of Queensland.

## **11. Jurisdiction and Dispute Resolution**

11.1. Subject to clause ~~9.2.59.2.59.2.3~~, the courts of Queensland have exclusive jurisdiction to determine any disputes arising out of or in connection with this Deed Poll.

#### Legal proceedings for breach of clause 3, clause 4.1, clause 5 and / or clause 6

11.2. Any legal proceeding commenced by a ~~In the event that any one or more of the~~ Covenantees, commences ~~proceedings~~ against DBCT Management for an alleged breach of clauses ~~3, or~~ clause 4.1, clause 5 and / or clause ~~6 5, 6, 7 and / or 8, such proceedings~~ must be filed and served on DBCT Management within ~~90-120~~ days ~~after~~ the date that the alleged breach of this Deed Poll is said to have occurred. ~~relevant amendment(s) to the Framework were first published on DBCT Management's website.~~

11.3. DBCT Management may rely upon ~~this~~ clause 11.2 as a complete defence to any proceedings filed or served ~~91-121~~ days or more after the date that the alleged breach of this Deed Poll is said to have occurred. ~~relevant amendment(s) to the Framework were first published on DBCT Management's website.~~

#### Legal proceedings for breach of clause 7 and / or clause 8

11.4. Any legal proceeding commenced against DBCT Management by a Covenantee for an alleged breach of clause 7 and / or clause 8, or a Third Party in relation to an alleged breach of clause 8, must be filed and served on DBCT Management within 120 days after the date of the Final Notice.

11.5. DBCT Management may rely upon clause 11.4 as a complete defence to any proceedings filed or served 121 days or more after the date of the Final Notice.

**EXECUTION**

Executed as a Deed.

~~SIGNED, SEALED AND DELIVERED~~**EXECUTED** by  
**DBCT MANAGEMENT PTY LTD (ACN 097 698 916)**  
~~acting by the following persons or, if the seal is~~  
~~affixed, witnessed by the following persons~~ in  
accordance with s\_127 of the Corporations Act 2001:

.....  
Signature of director

.....  
Signature of director / company secretary

.....  
Name of director (print)

.....  
Name of director / company secretary (print)

## ANNEXURE A

Framework (current as at ~~insert date of Deed Poll~~ 11 March 2019)

## Appendix 11 Access Framework – as attached to Deed Poll

# **Dalrymple Bay Coal Terminal Access Framework**

**11 March 2019**

## **DBCT Management Pty Ltd**

Level 15

Waterfront Place

1 Eagle Street

Brisbane QLD 4000

Tel: 07 3002 3100

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## **1 Introduction**

### **1.1 Purpose of this document**

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

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

**(Operator)** An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract. The Operator of the Terminal has historically been user-owned and independent of the lessee.

**(Establishment of Framework)** On the Expiry Date, the declaration of coal handling services at the Terminal under the *Queensland Competition Authority Act 1997* (Qld) expired. This Framework has been developed in response and provides a balanced approach to the provision of Access and a framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Access Seekers seeking Access to the Services at the Terminal.

### **1.2 Scope of Framework**

This Framework provides for:

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

### **1.3 Object of this Framework**

- (a) This Framework has been prepared in accordance with, and gives effect to, the Framework Objective specified in the Deed Poll.

### **1.4 Duration of Framework**

This Framework will apply on and from the Commencement Date. It will apply until the Terminating Date.

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

This Framework applies to the negotiation of Access Agreements or the negotiation of additional Access rights in addition to those already the subject of an Access

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

## **1.6 Implementation of Differentiation in Access Agreements**

Following a Price Ruling that a Terminal Capacity Expansion will be a Differentiated Expansion Component, DBCT Management will:

- (a) calculate Access Charges under each Access Agreement in accordance with the provisions of this Framework; and
- (b) in good faith, take all reasonable steps to negotiate any necessary amendments to any Access Agreement executed prior to the Price Ruling, to ensure that they are consistent with the Access Charges being calculated in accordance with the provisions of this Framework in relation to the application of Differentiation to a Terminal Capacity Expansion.

---

## **2 Definitions and Interpretation**

### **2.1 Definitions**

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

### **2.2 Interpretation**

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

---

## **3 Role of DBCT Management and the Operator**

### **3.1 Role of DBCT Management**

- (a) The owner of the Terminal is DBCT Holdings.
- (b) DBCT Trustee and DBCT Management, under the Leases, are the lessee and sublessee of the Terminal. Under the terms of the Leases and the Port Services Agreement, DBCT Management is solely responsible for providing Access to Access Holders and Access Seekers during the Lease Term.
- (c) DBCT Management will comply with and give effect to this Framework, except as otherwise provided for under an Access Agreement or required by law.
- (d) DBCT Management will ensure that employees, subcontractors and agents of subcontractors comply with the requirements of this Framework, except as otherwise provided for under an Access Agreement or required by law.
- (e) Where the performance of an obligation under this Framework requires a Related Body Corporate of DBCT Management to take or refrain from taking

some action, DBCT Management must procure that the Related Body Corporate takes or refrains from taking that action.

- (f) DBCT Management must procure that any Related Body Corporate provides all necessary assistance and information where this is required for the performance by DBCT Management of an obligation under this Framework.

### **3.2 Role of the Operator**

During the Term of the Framework, DBCT Management acknowledges and agrees that:

- (a) the Operator is and will remain Dalrymple Bay Coal Terminal Pty Limited ACN 010 268 167 (**DBCT PL**) and that DBCT PL is majority owned or wholly owned by Access Holders and Existing Users;
- (b) each Access Holder and Existing User has a right under the constitution of DBCT PL to become a shareholder of DBCT PL;
- (c) if an Access Holder or Existing User is not a shareholder of DBCT PL but wishes to become a shareholder of DBCT PL then that Access Holder or Existing User may, in accordance with the constitution of DBCT PL, apply to become a shareholder of DBCT PL by making an application to DBCT PL at the following address:  
  
Dalrymple Bay Coal Terminal Pty Limited  
M.S. F283  
Mackay, Queensland, 4740  
Attention: Chief Executive and General Manager;
- (d) the Operator carries out its obligations under the Operation & Maintenance Contract and Terminal Regulations independently of DBCT Management.

### **3.3 Operation and Maintenance Contract**

During the Term of the Framework, DBCT Management undertakes to:

- (a) maintain the Operation & Maintenance Contract; and
- (b) ensure that the terms of the Operation and Maintenance Contract, if amended at any time, remain substantially consistent with the terms set out in Schedule H.

---

## **4 Services to be provided**

DBCT Management must provide the Services at the Terminal to Access Holders in accordance with this Framework and each Access Agreement, including in compliance with the Terminal Regulations (and, without limitation, in accordance with the level of service set out in Schedule E of this Framework).

---

## 5 Negotiation arrangements

### 5.1 Framework for negotiation

- (a) **(Outline)** This Section 5 of this Framework outlines the process which will be followed to enable Access Seekers to obtain Access. It deals with:
  - (1) an Access Application by an Access Seeker and a Renewal Application by an Access Applicant;
  - (2) provision of an Indicative Access Proposal by DBCT Management;
  - (3) negotiations to develop an Access Agreement;
  - (4) principles for the entering into of an Access Agreement where it is conditional upon a Terminal Capacity Expansion; and
  - (5) various other provisions relating to when and the basis on which Access Agreements may be entered into pursuant to Access Applications.
- (b) **(Progressing Access Applications)** DBCT Management will take all reasonable steps to progress each Access Application and any negotiations to develop an Access Agreement with an Access Seeker in a timely manner and will complete each relevant step as soon as is practicable.
- (c) **(Negotiations to be in good faith)** DBCT Management and an Access Seeker must negotiate in good faith for reaching an Access Agreement.
- (d) **(No unfair differentiation between Access Seekers)** DBCT Management must not unfairly differentiate between Access Seekers in a way that has a material adverse effect on the ability of one or more Access Seekers to compete with other Access Seekers.
- (e) **(DBCT Management to satisfy Access Seeker's requirements)** In negotiations for an Access Agreement, DBCT Management must make all reasonable efforts to try to satisfy the reasonable requirements of the Access Seeker.

### 5.2 Application for Access and information to be provided

- (a) **(Form of Access Application)** Any application for Access must be in the form specified in Schedule A and include:
  - (1) a warranty in the form specified in; and
  - (2) such other information that may be required by, Schedule A.
- (b) **(Access Seeker to agree to comply with Framework and Deed Poll)** An Access Seeker must, when submitting an Access Application, unconditionally and irrevocably agree to comply with the requirements, obligations and processes in:

- (1) this Framework relating to it or its Access Application; and
- (2) the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll,

and if the Access Seeker does not do so then:

- (3) DBCT Management will have no obligations, and the Access Seeker no rights, under this Framework in respect of the Access Application or the Access sought in that Access Application; and
  - (4) DBCT Management may refuse to accept the Access Application.
- (c) **(Forecasts in Access Application)** DBCT Management acknowledges that, at the time an Access Application is made, some information provided in the Access Application may be a forecast only. The Access Seeker must use its best endeavours to ensure that any such information contained in an Access Application is as accurate as possible and must immediately notify DBCT Management as soon as it becomes aware that the information is, or is likely to be, inaccurate.
- (d) **(Information sought by Access Seeker prior to Access Application)** Prior to submitting an Access Application, an Access Seeker may request from DBCT Management:
- (1) reasonably available preliminary information relating to the Access Application (including copies of the then current Standard Access Agreement and Terminal Regulations) – which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request;
  - (2) initial meetings to discuss the proposed Access Application and the requirements of the Access Application Form set out in Schedule A which DBCT Management must facilitate within a reasonable time after being requested to do so.

**(Revisions to Access Application)**

- (e) At any time after an Access Seeker submits an Access Application to DBCT Management but prior to the commencement of the negotiation period referred to in Section 5.7 in respect of the Access Application, an Access Seeker may notify DBCT Management that it wishes to revise certain information specified in its Access Application.
- (f) In considering whether to allow an Access Seeker to revise certain information specified in its Access Application, DBCT Management will have regard to the impact of the proposed revision, if allowed by DBCT Management, on other Access Seekers and Access Holders.

- (g) Without otherwise limiting DBCT Management’s discretion to allow an Access Seeker to revise information specified in its Access Application, DBCT Management will allow an Access Seeker to revise information specified in its Access Application in accordance with Section 5.4(c) or if DBCT Management is reasonably of the opinion that the proposed revision:
  - (1) if allowed by DBCT Management, would not substantially alter the nature of the Access rights sought by the Access Seeker in its Access Application prior to the revision;
  - (2) if allowed by DBCT Management, would not adversely impact on other Access Seekers or Access Holders; and
- (h) is not otherwise prohibited under Section 5.4(i)(3), 5.4(l)(7) or 5.10(h).

### 5.3 What happens after lodgement of Access Application

- (a) **(Acknowledgement by DBCT Management)** Upon receiving a purported Access Application under Section 5.2, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Seeker receipt of the application and confirm whether the application is an Access Application complying with Section 5.2.
- (b) **(Request by DBCT Management for further information)** DBCT Management may request from the Access Seeker additional information where DBCT Management can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal, or clarification of information provided, including (but not limited to) obtaining further information to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, a Security provider. Upon receiving the required information or clarification from the Access Seeker, DBCT Management must provide written acknowledgment of the receipt of this further information as soon as practicable and, in any event, within 10 Business Days of receipt of the further information.
- (c) **(Provision of further information by Access Seeker)** The Access Seeker must provide any information reasonably requested by DBCT Management under this Section 5.3 within 20 Business Days of receipt of the request from DBCT Management (or such later date as DBCT Management agrees to, it being required to act reasonably in agreeing to extend the period if the Access Seeker demonstrates good grounds for a longer period applying). If the Access Seeker does not provide the requested information within that period, its Access Application will be deemed to have been rejected, but it may apply again for Access in accordance with Section 5.2. If an Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to acknowledgement under this Section 5.3 of the Access Application.

(d) **(Rejection if Access Seeker fails to provide information or demonstrate application criteria) If:**

- (1) an Access Application fails to comply with Section 5.2 (including where the Access Seeker fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
- (2) DBCT Management, acting reasonably, is of the opinion that an Access Application:
  - (A) does not demonstrate that the Access Seeker is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Access Application (which must be no more than 5 years from the date of the Access Application); or
  - (B) does not demonstrate that the Access Seeker has:
    - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Access Application in respect of the first five Financial Years of Access applied for; and
    - (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Seeker, consistent with the total net tonnes specified in item 7 of the Access Application,

then DBCT Management may reject the Access Application. Where DBCT Management rejects an Access Application in accordance with this Section 5.3, the Access Application will be deemed not to have been received, for the purposes of the Queue, unless Section 5.3(e) applies.

(e) **(Disputed rejection of Access Application) If** DBCT Management rejects an Access Application submitted by an Access Seeker and the Access Seeker, acting reasonably, is of the opinion that its Access Application should have been accepted by DBCT Management in accordance with this Framework, then the Access Seeker may refer the matter for dispute resolution in accordance with Section 16 of this Framework within 15 Business Days of receiving the notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect of the Access sought in the relevant Access Application, unless and until the Dispute is resolved in favour of DBCT Management.

(f) **(Expiry of Access Application) Subject to an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT**

Management in accordance with this Framework before the relevant expiry date:

- (1) an Access Application submitted to DBCT Management before the Commencement Date will, unless the Access Application is renewed under Section 5.3A, expire on the date which is eight weeks after the Commencement Date;
  - (2) any Access Application submitted to DBCT Management on or after the Commencement Date will, unless the Application is renewed under Section 5.3A, expire on the next occurring 31 August; and
  - (3) an Access Application which has been renewed in accordance with Section 5.3A, will, unless the Access Application is further renewed under Section 5.3A, expire on the next 31 August occurring after the 31 August on which the Access Application was to expire immediately prior to the Renewal Application being accepted.
- (g) **(Notice of Expiry)** DBCT Management will give notice of the timing of expiry to all Access Seekers with a current Access Application (including those which remain current due to a previous Renewal Application being accepted):
- (1) for Access Applications for which the expiry date is set by Section 5.3(f)(1), on the Commencement Date; and
  - (2) for Access Applications for which the expiry date is set by Section 5.3(f)(2) or 5.3(f)(3), at least 1 month and no more than 3 months prior to expiry date of the Access Application.

### **5.3A Renewal Applications**

- (a) **(Renewal Application)** An Access Applicant that wishes to renew its Access Application must:
- (1) submit to DBCT Management a Renewal Application in the form specified in Schedule A and include:
    - (A) the warranty in the form specified in Schedule A; and
    - (B) such other information that may be required, as specified in Schedule A,not later than 15 Business Days before the date that its Access Application is due to expire; and
  - (2) when submitting the Renewal Application, unconditionally and irrevocably agree to comply with the requirements, obligations and processes in:

- (A) this Framework relating to it or its Renewal Application; and
- (B) the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll,

and if the Access Seeker does not do so then DBCT Management may refuse to accept the Renewal Application.

- (b) **(Forecasts in Renewal Application)** DBCT Management acknowledges that, at the time a Renewal Application is made, some information provided in the Renewal Application may be a forecast only. The Access Applicant must, however, use its best endeavours to ensure that any such information contained in a Renewal Application is as accurate as reasonably possible.
- (c) **(Acknowledgement by DBCT Management)** Upon receiving a purported Renewal Application under this Section 5.3A, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Applicant receipt of the Renewal Application and confirm whether the application is a Renewal Application complying with this Section 5.3A.
- (d) **(Rejection if Access Seeker fails to provide information or demonstrate renewal criteria)** If:
  - (1) an Access Applicant fails to comply with this Section 5.3A in respect of a Renewal Application (including where the Access Applicant fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
  - (2) DBCT Management, acting reasonably, is of the opinion that a Renewal Application submitted by an Access Applicant:
    - (A) does not demonstrate that the Access Applicant is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Renewal Application (which must be no more than 5 years from the date of the Renewal Application); or
    - (B) does not demonstrate that the Access Applicant has:
      - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Renewal Application in respect of the first five Financial Years of Access applied for; and
      - (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Applicant, consistent with the total net tonnes specified in item 7 of the Renewal Application,

then DBCT Management may reject the Renewal Application. If DBCT Management rejects a Renewal Application or the Access Applicant fails to submit a Renewal Application to DBCT Management within the timeframe required in Section 5.3A(a), then the Access Applicant's current Access Application will expire on its expiry date (as determined in accordance with Section 5.3(f)) and the Access Applicant will be removed from the Queue on the date the Access Application expires, unless Section 5.3A(e) applies.

- (e) **(Disputed rejection of Renewal Application)** If DBCT Management rejects a Renewal Application submitted by an Access Applicant and the Access Applicant, acting reasonably, is of the opinion that its Renewal Application should have been accepted by DBCT Management in accordance with this Framework, then the Access Applicant may refer the matter for dispute resolution in accordance with Section 16 of this Framework within 15 Business Days of receiving the notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect of the Access sought in the relevant Renewal Application, unless and until the Dispute is resolved in favour of DBCT Management.
- (f) **(New Access Application if renewal is substantially different)** If DBCT Management, acting reasonably, is of the view that a Renewal Application is substantially different to the Access Seeker's current Access Application, then subject to paragraph (g) of this Section 5.3A, DBCT Management will treat the Renewal Application as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the difference is an increase in the annual Tonnage required or a longer term, then only the additional annual Tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.
- (g) With respect to the renewal of an Access Application referred to in paragraph (b) of the definition of 'Access Application', if the first Renewal Application after the Commencement Date is for an increase in the term from 5 or more years, then the extended term will not be taken to constitute the subject of a new Access Application and will instead be considered as part of the Renewal Application.
- (h) **(Renewed Access Application)** To the extent that a Renewal Application is confirmed by DBCT Management as a Renewal Application complying with Section 5.3A (or is determined as complying with Section 5.3A in a Dispute referred by the Access Applicant in accordance with Section 5.3A(e)):
  - (1) the Access Applicant's current Access Application will be taken to have been renewed;

- (2) the content of the Renewal Application will be taken to be the Access Applicant's Access Application for the purposes of this Framework; and
- (3) the priority of the Access Applicant in the Queue will continue to be determined by the Access Application Date.

#### **5.4 Priority of Access Applications and execution of Access Agreements**

- (a) **(Formation of Queue)** If at any time there are two or more current Access Applications and there is or will be insufficient Available System Capacity associated with Existing Terminal Capacity at any relevant time to accommodate an increase in the Handling of coal applied for in all of those Access Applications, a queue (the **Queue**) will be formed.
- (b) **(General rules for priority in Queue)** Subject to any other provision in Section 5, the priority of an Access Seeker in the Queue will be determined by their Access Application Date, with an earlier Access Application Date having priority in the Queue over any later Access Application Date. An Access Seeker may be removed from the Queue once their Access Application is no longer current in accordance with the terms of Sections 5.3, 5.4, 5.6, 5.7(a)(2), 5.7(a)(4), 5.8, 5.9 or 5.10 of this Framework. An Access Seeker may lose priority in the Queue pursuant to Sections 5.4 or 5.10. The Queue will cease to exist if Available System Capacity at all relevant times subsequently exceeds the amount of capacity requested in all of the then current Access Applications.
- (c) **(Notice of formation of or change in Queue)** Promptly after a Queue is first formed and promptly after each occasion that the Annual Contract Tonnage applied for in the Queue is increased or decreased, DBCT Management must notify each Access Seeker in the Queue of:
  - (1) the Annual Contract Tonnage applied for in priority to that Access Seeker in the Queue;
  - (2) the total Annual Contract Tonnage applied for in the Queue at that time; and
  - (3) a breakdown of the Annual Contract Tonnage applied for in the Queue by the dates for commencement of Access and Annual Contract Tonnage applied for in each Access Application (without any identification of the Access Seeker which made each Access Application but with identification of the dates for commencement of Access).

#### **(Access Agreements for Available System Capacity from the Existing Terminal)**

- (d) **(Entry into Access Agreement for Available System Capacity)** Promptly upon being advised in writing by an Access Holder or Existing User that all or part of its Annual Contract Tonnage in respect of the Existing Terminal will become available, DBCT Management will:

- (1) notify each Access Seeker in the Queue of the date for the commencement of such Access and the relevant Tonnage; and
  - (2) issue an Indicative Access Proposal for Available System Capacity in respect of the relevant Tonnage to the Access Seeker who is first in the Queue.
- (e) **(Entry into Access Agreement not conditional on Terminal Capacity Expansion by Access Seekers not first in the Queue but seeking Access at an earlier date)** The following process will apply in relation to Access Seekers who are not first in the Queue but are ready to enter into an Access Agreement that is not conditional on a Terminal Capacity Expansion:
- (1) An Access Seeker who is not first in the Queue (the Notifying Access Seeker) but is seeking Access from existing Available System Capacity at a date that is at least 6 months earlier than the date for commencement of Access applied for in the Access Application which is first in the Queue, may give notice in writing to DBCT Management in accordance with Section 5.4(e)(2) (**Notice**).
  - (2) The Notice is to state that the Notifying Access Seeker is prepared to enter into an Access Agreement consistent (subject to the next subsection) with its Access Application on either:
    - (A) the terms of the Standard Access Agreement; or
    - (B) on other terms agreed between DBCT Management and the Access Seeker.
  - (3) The Notice may state that the Notifying Access Seeker wishes to enter into an Access Agreement for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice.

If DBCT Management receives a Notice under section 5.4(e)(1) from the Notifying Access Seeker, it must promptly:

- (4) notify, in writing, all other Access Seekers that are ahead of the Notifying Access Seeker in the Queue (each a **Notified Access Seeker**) of this development (including the requested date for commencement of Access, but not the identity of the Notifying Access Seeker); and
- (5) allow 3 months from the date when such notice is given by DBCT Management for each Notified Access Seeker to:
  - (A) deliver to DBCT Management two signed copies of an Access Agreement consistent with its Access Application (except that it

may be for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice) and on:

- (i) the terms of the Standard Access Agreement (**Binding Standard Access Agreement**); or
  - (ii) other terms agreed between DBCT Management and a Notified Access Seeker; and
- (B) deliver to DBCT Management any Security required by DBCT Management (acting consistently with this Framework).
- (f) **(Execution of Access Agreements in order of Access Seekers in Queue which commit)**

If, during the above 3 month period, one or more of the Notified Access Seekers:

- (1) delivers to DBCT Management such signed copies of an Access Agreement for Access to commence on a date which is the same as or earlier than the date for commencement of Access referred to in section 5.4(e)(3) (which, for clarification, may be a retrospective date, provided that any revised Access commencement date must not precede the date of the Notice); and
- (2) also provides any Security reasonably required by DBCT Management (or does not provide such Security but the circumstances in Section 5.4(g) apply),

then DBCT Management must:

- (3) give priority to such of those Notified Access Seekers that are seeking Access on the earliest date for commencement of Access (provided that, if there are two or more Notified Access Seekers each seeking Access commencing on the same date, priority will be given to the Notified Access Seekers in order of their position in the Queue);
- (4) (subject to there being sufficient Available System Capacity at the relevant time) execute those copies of the Access Agreement and re-deliver one signed copy to such Notified Access Seeker; and
- (5) repeat that process in order of the date for commencement of the Access that they are seeking with each successive Notified Access Seeker (if any) which has delivered during the 3 month period such a signed Access Agreement and any Security required by DBCT Management (acting consistently with this Framework).

- (g) **(Issues with provision of requested Security)** If a Notified Access Seeker is unable to provide any Security reasonably required by DBCT Management within the 3 month period referred to in Section 5.4(f) (or if, by the end of the first month of that 3 month period, the Access Seeker disputes DBCT Management’s entitlement to the Security requested), the Access Agreement to be executed and delivered by the relevant Notified Access Seeker in that period will be modified so that it is a condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, Security which the Independent Expert determines to be fair is provided within 20 Business Days after the Independent Expert makes that determination), and the “Effective Date” will be adjusted accordingly.
- (h) **(Execution of Access Agreement with Notifying Access Seeker, if sufficient remaining Capacity)** If, after all Access Agreements with all Notified Access Seekers referred to in Section 5.4(e)(5) who have duly delivered signed documents (and provided Security if relevant) have been executed (or negotiations have ceased pursuant to Section 5.8), there is still sufficient Available System Capacity, then DBCT Management will sign and deliver a Binding Standard Access Agreement or an Access Agreement on other terms agreed between DBCT Management and the Notifying Access Seeker to the Notifying Access Seeker for that Available System Capacity (or that part of it which the Notifying Access Seeker requires) provided that the Notifying Access Seeker first provides any Security reasonably required by DBCT Management (or does not provide such Security but, where the expression Notified Access Seeker in section 5.4(g) is replaced by the expression Notifying Access Seeker, the circumstances in section 5.4(g) apply).
- (i) **(Clarifications)** For clarity:
- (1) **(Position in Queue may be lost by not executing Access Agreement)** any Notified Access Seeker that does not within the above 3 month period deliver to DBCT Management a signed Access Agreement:
- (A) may be removed by DBCT Management from the Queue, in which case the Notified Access Seeker’s Access Application will be taken to have been rejected and the Access Application negotiation process for that Notified Access Seeker will be discontinued, unless a bona fide Dispute in relation to the removal is referred under Section 16 in which case, the Notified Access Seeker will maintain its position in the Queue until that Dispute is resolved; or
- (B) will not, if DBCT Management does not remove the Notified Access Seeker from the Queue, lose its place in the Queue (although a Notifying Access Seeker which does execute an

Access Agreement pursuant to this Section 5.4 will no longer be in the Queue in respect of the tonnage the subject of that Access Agreement) and the Access Application negotiation process for that Access Seeker will otherwise continue in accordance with Section 5 of this Framework;

- (2) **(Considerations regarding removal from Queue)** in considering whether to remove an Access Seeker from the Queue under Section 5.4(i)(1), DBCT Management will have regard to:
  - (A) the date that the Access Seeker proposes to commence delivering coal to the Terminal in comparison with the date that the Notifying Access Seeker proposes to commence delivering coal to the Terminal;
  - (B) the tonnes that the Access Seeker requires to commence delivering coal to the Terminal in comparison with the tonnes that the Notifying Access Seeker proposes to commence delivering to the Terminal; and
  - (C) the likelihood of future Access becoming available at the Terminal on or prior to the date for commencement of Access sought by the Access Seeker that DBCT Management is considering whether to remove from the Queue;
- (3) **(Amendments to Access Application)** except as provided for in Section 5.4(f)(1), an Access Seeker may not amend the date for commencement of delivery of coal to the Terminal specified in its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.4(e)(4);
- (4) **(Offers of Access Agreement not to exceed Available System Capacity)** unless otherwise required by the Port Services Agreement or Section 11 of this Framework, DBCT Management must not offer to enter into an Access Agreement for Annual Contract Tonnage which would result in Aggregate Annual Contract Tonnage of all Access Holders and Existing Users exceeding the Available System Capacity at a relevant time;
- (5) **(Access Seeker may accept lesser tonnage if insufficient capacity for tonnage applied for)** where the process in Sections 5.4(c), 5.4(e) and 5.4(f) would have the effect of giving an Access Seeker a right to enter into an Access Agreement, except for the fact that there is insufficient Available System Capacity to meet that Access Seeker's Access Application in full, DBCT Management must inform that Access Seeker to that effect, and the Access Seeker may elect to require an

Access Agreement for a lesser tonnage consistent with Available System Capacity from time to time during the period originally applied for (subject to the other terms of this Framework), with the balance of the Annual Contract Tonnage originally applied for remaining the subject of the Access Application; and

- (6) **(Binding nature)** by the Notifying Access Seeker sending a notice under section 5.4(e)(2)(A) and by a Notified Access Seeker delivering a signed copy of a Binding Standard Access Agreement to DBCT Management each of them and DBCT Management agree that the Standard Access Agreement is legally effective to bind each party signing it, notwithstanding that section 2 of Schedule 2 of the Binding Standard Access Agreement does not have a completed dollar amount (i.e. \$xx.xx) included in it.

**(Contracting on basis of Binding Standard Access Agreement)**

- (j) Where DBCT Management executes and redelivers (or delivers as the case may be) a Binding Standard Access Agreement to a Notified Access Seeker or the Notifying Access Seeker, DBCT Management must record the priorities given to Notified Access Seekers under section 5.4(f)(3) and the Available System Capacity allocated to the Notifying Access Seeker under its Binding Standard Access Agreement and determine whether any person should be removed from the Queue, and make such adjustment to the Queue as DBCT Management determines in accordance with this Framework.
- (k) Where section 2 of Schedule 2 of a Binding Standard Access Agreement does not have a completed dollar amount included in it, the following provisions apply:
  - (1) upon completion of all actions of DBCT Management under section 5.4(j), DBCT Management will notify in writing each of the parties to a Binding Standard Access Agreement, and the parties to such Binding Standard Access Agreement must negotiate and seek to agree the dollar amount to be included in section 2 of Schedule 2, for a period of 30 days from such notice (or such longer period as the parties agree);
  - (2) where such agreement is reached the parties shall execute a deed (in such form as agreed by them acting reasonably) to amend the Binding Standard Access Agreement to incorporate that dollar amount; and
  - (3) Where the parties to the Binding Standard Access Agreement do not reach an agreement on the dollar amount, this shall be a Dispute and either party may refer the Dispute to arbitration in accordance with this section, and:

- (A) the Dispute shall be considered to be of a kind referred to in section 10.1(b) and sections 10.3 and 10.4 apply except to the extent necessary to give effect to any matter agreed by the parties;
- (B) the provisions of section 16.4 (excluding paragraphs 16.4(f) and (g)) apply (being the relevant provisions of section 16.4 that would apply if it was agreed that a Standard Access Agreement's terms and conditions applied); and
- (C) section 16.5 applies.

**(Conditional Access Agreements)**

- (l) **(Entry into an Access Agreement conditional on Terminal Capacity Expansion)** The following process will apply in relation to the entry into Access Agreements that are conditional, wholly or partly, on a Terminal Capacity Expansion **(Conditional Access Agreement)**:
  - (1) When the Aggregate Annual Contract Tonnage sought within the next 5 years by Applicants in a Queue cannot be met from Available System Capacity, such that a Terminal Capacity Expansion may be justified, DBCT Management will invite an offer from each Applicant in the Queue to enter into a Conditional Access Agreement.
  - (2) Unless otherwise specified in a Conditional Access Agreement, the date for commencement of Access under a Conditional Access Agreement will be the date on which the Terminal Capacity Expansion is Complete and operating, and DBCT Management notifies Access Seekers in accordance with Section 11.1(l) or 11.1(q), as applicable, on which date the Conditional Access Agreement will take effect as an Access Agreement.
  - (3) In response to an invitation from DBCT Management given under Section 5.4(l)(1), any Access Seeker may make an offer to enter into a Conditional Access Agreement that may be (but need not be) subject to a condition precedent which relates to:
    - (A) **(Conditional on Terminal Capacity Expansion)** the triggering of an obligation by DBCT Management to perform a specified Terminal Capacity Expansion with a specified estimated cost within a specified estimated timeframe;
    - (B) **(Conditional on other System elements)** DBCT Management being reasonably satisfied that a Service Provider (other than DBCT Management), Access Holder, Existing User, Access Seeker or other relevant entity has committed or will commit,

subject only to conditions which are customary for that Service Provider and an expansion of that nature, to providing an expansion of a relevant part of the System which is necessary to create sufficient Available System Capacity; and

- (C) **(Conditional on Section 5.4(q) being satisfied)** DBCT Management being reasonably satisfied that the Access Seeker's Access rights are matched by an entitlement held by the Access Seeker or a person on its behalf to rail infrastructure access rights relating to the coal the subject of the Conditional Access Agreement.

The following provisions relate to any such offer:

- (4) **(Invitation to each Access Seeker)** DBCT Management must give the same notice (**Expansion Notice**) at the same time to each Access Seeker in the Queue, inviting them to submit to DBCT Management (by way of offer to DBCT Management) two signed copies of such a Conditional Access Agreement consistent with their Access Application (except that it may be for a lower tonnage or shorter term than originally requested provided there is a bona fide commercial reason for seeking such lower tonnage or shorter term) on the terms of the Standard Access Agreement or on any other terms which DBCT Management has notified the Access Seeker would be acceptable to DBCT Management (**Different Terms**), and subject to the condition precedent referred to above.
- (5) **(Position in Queue may be lost by not offering a Conditional Access Agreement)** Any Access Seeker that does not, within 3 months after DBCT Management gives the Access Seeker an Expansion Notice, deliver to DBCT Management a signed Conditional Access Agreement in accordance with the Expansion Notice:
  - (A) may, subject to Section 5.4(l)(6), be removed by DBCT Management from the Queue, in which case the Access Seeker's Access Application will be taken to have been rejected and the Access Application negotiation process for that Access Seeker will be discontinued; or
  - (B) will not, if DBCT Management does not remove the Access Seeker from the Queue, lose its place in the Queue (although if DBCT Management executes a Conditional Access Agreement offered by any other Access Seeker pursuant to this Section 5.4(l), that Access Seeker will, subject to Section 5.4(l)(11), no longer be in the Queue in respect of the Tonnage the subject of that Conditional Access Agreement) and

the Access Application negotiation process for the Access Seeker will otherwise continue in accordance with Section 5 of this Framework.

- (6) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under section 5.4(l)(5)(A), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (7) **(Amendments to Access Application)** Except as provided in Section 5.4(l)(4) and (5) an Access Seeker may not amend its Access Application during the 3 month period which commences on the date the Access Seeker receives an Expansion Notice.
- (8) **(Acceptance of offers in order of priority in Queue)** If, during the 3 month period following the giving of an Expansion Notice one or more of the Access Seekers in the Queue:
  - (A) delivers to DBCT Management such signed copies of a Conditional Access Agreement; and
  - (B) provides any Security required by DBCT Management (or the circumstances in Section 5.4(l)(9) apply),

DBCT Management will then give priority to the Access Seeker so doing which has the highest ranking in the Queue and (subject to there being sufficient Available System Capacity should the Terminal Capacity Expansion the subject of the condition precedent proceed) will execute their Conditional Access Agreement. DBCT Management will then repeat the process down the Queue with each successive Access Seeker (if any) which has delivered such a signed Conditional Access Agreement and any relevant Security during the 3 month period.

- (9) **(Issues with provision of Security requested)** If an Access Seeker is unable to provide the Security required by DBCT Management within the 3 month period referred to in Section 5.4(l)(8) (or, by the fifth Business Day of the 3 month period referred to in Section 5.4(l)(8), the Access Seeker disputes DBCT Management's entitlement to the Security requested), the Conditional Access Agreement to be executed will be modified so that it is a further condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, a Security which the Independent Expert determines to be fair is provided within 20 Business Days after the Independent Expert

makes that determination), and the "Effective Date" will be adjusted accordingly.

- (10) **(Termination if condition precedent not fulfilled)** Each Conditional Access Agreement referred to in Section 5.4(l)(4) and 5.4(l)(8) (as applicable) must be on the basis that it will terminate if a relevant condition precedent referred to in Section 5.4(l)(3) is not fulfilled within a reasonable period from the date of execution of the Conditional Access Agreement (which will not be less than 3 months). However, DBCT Management and an Access Seeker can agree to extend this period from time to time, as long as an extension for the same period has been offered by DBCT Management to all Access Seekers who have such condition precedent.
- (11) **(Access Seeker rejoins Queue if Conditional Access Agreements terminate)** If a Conditional Access Agreement referred to in Section 5.4(l)(8) terminates because:
  - (A) a condition precedent referred to in Section 5.4(l)(3) has not been fulfilled within the reasonable period nominated (or any extended period as agreed between DBCT Management and each Access Seeker in accordance with Section 5.4(l)(10)), the relevant Access Seekers will resume their respective positions in the Queue as if the Access Seekers had never signed the Conditional Access Agreements; or
  - (B) a condition precedent that requires the Access Seeker to provide Security (as referred to in Section 5.4(l)(9)) is not fulfilled, DBCT Management may exercise its discretion to remove that Access Seeker from the Queue in accordance with Sections 5.4(l)(5) and 5.4(l)(6) and, if so removed, the negotiation process for that Access Seeker in respect of the Terminal Capacity Expansion will be discontinued.
- (12) **(Reductions in contracted tonnage if estimated expansion of Terminal Capacity not achieved)** Each Conditional Access Agreement will include a provision entitling DBCT Management to re-determine Terminal Capacity and Expansion Component Capacity in accordance with Section 11.1(k) and to proportionately reduce the Annual Contract Tonnage allocated under the Conditional Access Agreement to the Access Seeker, subject to the following rules:
  - (A) in relation to Socialised Terminal Capacity, if the capacity at the Existing Terminal determined by DBCT Management in accordance with Section 11.1(k)(3) is less than the estimation of aggregate (expanded) capacity at the Existing Terminal made at

the time of entry into the Conditional Access Agreement, then DBCT Management will proportionately reduce the Annual Contract Tonnage in all Conditional Access Agreements so that the aggregate Tonnage of all Conditional Access Agreements is equal to the additional capacity at the Existing Terminal determined in accordance with Section 11.1(k) after the deduction of capacity required to eliminate any shortfall between aggregate Annual Contract Tonnages and capacity at the Existing Terminal which existed prior to the Terminal Capacity Expansion (see Section 5.4(m)(3));

- (B) unless otherwise agreed with participating Access Seekers, in relation to a Differentiated Expansion Component, any Differentially Priced Capacity will be allocated to meet the full entitlements of Access Seekers as set out under relevant Conditional Access Agreements.
- (13) **(Reduced Tonnages revert to Queue)** If DBCT Management reduces the Annual Contract Tonnage allocated under a Conditional Access Agreement in accordance with Section 5.4(l)(12), then - in respect of the number of those tonnes which are reduced - an Access Seeker which has had its tonnes reduced will be:
- (A) placed equal first in the Queue with any other Access Seekers whose tonnes have been reduced following the Terminal Capacity Expansion; and
  - (B) taken not to have signed the relevant Conditional Access Agreement in respect of those tonnes.
- (14) **(Section 5.4(q) not affected)** Nothing in this Section 5.4(l) is to be construed as limiting or in any way being contrary to the principle of Handling of Annual Contract Tonnage only being able to be availed of to the extent of matching rail access entitlement, in Section 5.4(q).
- (15) **(Binding nature)** By the Access Seeker delivering a signed Conditional Access Agreement to DBCT Management, the Access Seeker and DBCT Management agree that, the Conditional Access Agreement is legally effective to bind each party signing it, notwithstanding that it may have provisions without a completed dollar amount (i.e. \$xx.xx) included in it **(Binding Conditional Access Agreement)** and notwithstanding the Conditional Access Agreement will not come into operation until its condition precedent is fulfilled.
- (16) **(Contracting on basis of Binding Conditional Access Agreement)** Where a Conditional Access Agreement does not have a completed dollar amount included in it, the following provisions apply:

- (A) upon completion of all actions of DBCT Management under section 5.4(l)(5), (6) and (8), DBCT Management will notify in writing each of the parties to a Binding Conditional Access Agreement, and the parties to such Binding Conditional Access Agreement must negotiate and seek to agree the dollar amount to be included in the Agreement, for a period of 30 days from such notice (or such longer period as the parties agree).
- (B) Where such agreement is reached the parties shall execute a deed (in such form as agreed by them acting reasonably) to amend the Binding Conditional Access Agreement to incorporate that dollar amount.
- (C) Where the parties to the Binding Conditional Access Agreement do not reach an agreement on the dollar amount, this shall be a Dispute and the Dispute will be determined by the Expansion Arbitrator in making a Price Ruling in accordance with section 5.12.

**(Overriding principles)**

- (m) Despite any other provision of this Section 5.4:
  - (1) **(Existing Access Applications transitioned)** Any outstanding Access Application lodged by an Access Seeker under the 2017 Access Undertaking which applied prior to this Framework will (for the purpose only of determining priority of lodgement and therefore priority in the Queue) be deemed to have been an Access Application lodged under this Framework, as if this Framework had commenced on the date that the first such Access Application was lodged;
  - (2) **(Application for extension of term has priority)** An Access Application to extend the term of an Access Agreement (to the extent that it does not increase the relevant Annual Contract Tonnage) to accord with a bona fide re-estimation of the life of a mine will have precedence over an Access Application for new tonnage;
  - (3) **(Terminal Capacity Expansion allocated first to eliminate shortfalls in capacity below already contracted tonnage)** If a Terminal Capacity Expansion is being Socialised, then the additional Terminal Capacity which results from that Terminal Capacity Expansion (determined in accordance with Section 11.1(k)) will be:
    - (A) firstly utilised to eliminate shortfalls in Annual Contract Tonnes under existing Access Agreements and Existing User Agreements; and

- (B) only thereafter allocated to Annual Contract Tonnages under Conditional Access Agreements entered into in respect of that Terminal Capacity Expansion and proportionately reduced in accordance with Section 5.4(l)(12).
- (4) **(Allocation of Differentially Priced Capacity)** Differentially Priced Capacity will be utilised to meet Annual Contract Tonnages under Access Agreements entered into by the Access Seekers in respect of the relevant Differentiated Expansion Component. Consequently, Access Seekers and Access Holders who are not Differentially Priced Access Seekers in respect of that Differentiated Expansion Component will have no entitlement to have that Differentially Priced Capacity utilised to eliminate shortfalls in Annual Contract Tonnages under their Access Agreements.
- (5) **(Alternative arrangements in some cases if they achieve greater utilisation)** If, in a particular case, the strict application of the process set out in this Section 5.4 would result in a materially greater amount of Available System Capacity not being able to be utilised than could otherwise be the case if an alternative process is followed, then (in the interests of maximising coal exports from Queensland) DBCT Management may enter into one or more Access Agreements in accordance with that alternative process.
- (n) **(Options to extend term taken into account)** For the purpose of this Section 5.4, an Access Holder or Existing User which has an option to extend the term of its Access Agreement or Existing User Agreement (as relevant) will initially be deemed to have exercised that option, when determining whether or not a Queue exists or needs to be formed in relation to a new Access Application. However, if DBCT Management has the right to do so, it may, on each occasion in which a Queue is formed or re-formed, endeavour to have the exercise of that option brought forward or waived (in the latter case with the intention that one or more waivers may result in the Queue no longer existing).
- (o) **(Other provisions of Framework not limited)** Nothing in this Section 5.4 will be taken to limit or be contrary to:
- (1) any right DBCT Management has pursuant to Section 5.8; or
  - (2) any rights or obligations of DBCT Management in Section 11 relating to the expansion of the Terminal (in particular the principle of new Access Agreements only being entered into consistently with anticipated System Capacity).

- (p) **(Disclosure of certain Access Application details)** DBCT Management may at any time and from time to time disclose to any person the aggregate tonnage which is the subject of Access Applications but, except as:
- (1) required by law;
  - (2) consented to by the relevant Access Seeker;
  - (3) reasonably necessary or desirable in relation to planning for operation of the Terminal; or
  - (4) reasonably required to be disclosed to a rail infrastructure provider to assist in development of the System Master Plan,

DBCT Management will not disclose details of an Access Application (including details of the Access Seeker).

- (q) **(Entitlement to have Annual Contract Tonnage Handled must be matched by below rail access)** Despite any other provision in this Framework, DBCT Management must not enter into an Access Agreement with an Access Seeker unless it contains Clause 11.5 of the Standard Access Agreement (under which the Access Holder is not entitled to have its Annual Contract Tonnage Handled at the Terminal, to the extent and for such period as, the Access Holder has not demonstrated to the reasonable satisfaction of DBCT Management that that Annual Contract Tonnage is matched by an entitlement held by the Access Holder or a person on its behalf to railway track access relating to the coal the subject of the Access Agreement).
- (r) **(Notification of Differentially Priced Capacity)** Promptly following Completion of a Differentiated Expansion Component, DBCT Management will notify all Expansion Parties, Access Seekers in the Queue and all Access Holders of the following:
- (1) the date of Completion;
  - (2) the Differentially Priced Capacity; and
  - (3) if any tonnage associated with the Differentiated Expansion Component is uncontracted and, if so, the tonnage which is available for Access Seekers.
- (s) **(Formation of a Differentiated Queue)** If at any time there are two or more current Access Applications received in respect of Differentially Priced Capacity and there is or will be insufficient System Capacity associated with Differentially Priced Capacity which is available at any relevant time to accommodate an increase in Handling of coal applied for in all of those Access Applications, a new queue will form in respect of the Differentially Priced Capacity (the **Differentiated Queue**).

- (t) **(Queuing Principles for a Differentiated Queue)** DBCT Management will manage any Differentiated Queue in accordance with the following principles:
- (1) DBCT Management will apply the same general rules for priority as apply with respect to the Queue, under this Section 5.4.
  - (2) Access Seekers must specify which queue they wish to join when applying for Access (the Queue or a Differentiated Queue).
  - (3) Access Seekers may be in both the Queue and a Differentiated Queue separately and simultaneously under different Access Applications.
  - (4) Where capacity becomes available in either the Queue or a Differentiated Queue (but not both queues), DBCT Management will invite all Access Seekers in the relevant queue to submit a signed Access Agreement in the priority order of the relevant queue.
- (u) **(Commercial discretion of DBCT Management where Access Application involves both queues)** Where Available System Capacity relies on Terminal Capacity that comprises both Socialised Capacity and Differentially Priced Capacity, DBCT Management will invite Access Seekers in both the Queue and the Differentiated Queue to submit a relevant signed Access Agreement in accordance with the queuing principles in this Section 5.4.
- (v) **(Reordering of queues applying commercial discretion)** If, having obtained signed Access Agreements from Access Seekers in respect of Available System Capacity under Section 5.4(u), DBCT Management determines that the most efficient use of Available System Capacity is to contract with the same Access Seeker in respect of both Socialised Terminal Capacity and Differentially Priced Capacity, it may accept a signed Access Agreement other than in the order of the relevant queue, provided that, prior to accepting such signed Access Agreement and subject to Section 5.4(w), DBCT Management:
- (1) has notified all other Access Seekers in each Queue of:
    - (A) its intention to reorder one or both queues; and
    - (B) any commercial principles which it intends to apply when reordering one or both queues; and
  - (2) has provided all Access Seekers with a reasonable opportunity to respond; and
  - (3) is satisfied (acting reasonably), based on any responses received from Access Seekers and applying those commercial principles, that there is no Access Seeker which is higher in either queue that is prepared to contract on an equivalent basis.

For this purpose, any commercial principles must operate as between Access Seekers strictly on a non-discriminatory basis.

(w) **(Dispute in relation to reordering of a queue)**

- (1) An Access Seeker may refer any Dispute in relation to reordering of a queue under Section 5.4(v) as a Dispute under Section 16.
- (2) If a Dispute is raised in respect of any reordering of a queue, DBCT Management will not enter into any relevant Access Agreement under Section 5.4(v) unless and until the Dispute is withdrawn or determined and in accordance with any such determination.

## 5.5 Indicative Access Proposal

- (a) **(Timing for Indicative Access Proposal)** As soon as practicable and in any event within 20 Business Days following receipt of an Access Application (or, if additional information has been requested by DBCT Management under Section 5.3, within 20 Business Days of receipt of all of the additional information requested), DBCT Management must use its reasonable endeavours to provide the relevant Access Seeker with a response containing proposed terms and conditions of Access (**Indicative Access Proposal**).
- (b) **(Notice of additional time needed by DBCT Management)** If it is not reasonable to provide an Indicative Access Proposal within 20 Business Days of receipt of an Access Application (or, if applicable, the additional information requested under Section 5.3), DBCT Management must, as soon as practicable, but in any event, within 20 Business Days, advise the relevant Access Seeker of its estimate of the extra time required to deliver the Indicative Access Proposal.
- (c) **(Dispute by Access Seeker as to need for additional time)** If the Access Seeker is of the opinion that the estimate of extra time for preparation of the Indicative Access Proposal is excessive, then the Access Seeker may refer the matter for Expert Determination. DBCT Management must use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by DBCT Management or as otherwise determined by the Independent Expert.
- (d) **(Content of Indicative Access Proposal)** The Indicative Access Proposal must set out:
  - (1) an indicative assessment as to whether there is sufficient Available System Capacity at all relevant times (having regard amongst other things to outstanding Access Applications in a Queue) to accommodate the Access Application;

- (2) advice in respect of the existence of (but not the identity of) other Access Seekers who have already submitted an Access Application and the aggregate tonnage profile(s) requested in those Access Applications;
- (3) the Standard Access Agreement or a draft access agreement where the Access Application contemplates Access on different terms;
- (4) the expiry date of the Indicative Access Proposal, which will be 30 Business Days following the date the Access Seeker receives the Indicative Access Proposal (should there be no notification by the Access Seeker pursuant to Section 5.6 that the Indicative Access Proposal has not been prepared in accordance with the Framework);
- (5) if there is sufficient Available System Capacity to accommodate the Access Application, advice to that effect, and:
  - (A) if it is reasonable to provide such an indication, a non-binding indication of the expected Access Charges for the requested Services in the Access Application based on an allocation of Non-Expansion Costs in accordance with Section 10.7;
  - (B) if the sufficiency of Available System Capacity for the provision of any of the Access sought depends on the Completion of a planned or reasonably expected Terminal Capacity Expansion:
    - (i) an initial assessment of the Pricing Method that will be applicable to the Access sought (including reasons), having regard to the required Terminal Capacity Expansion, any relevant Price Ruling(s) by an Expansion Arbitrator and the Expansion Pricing Principles;
    - (ii) a non-binding indication of the expected Access Charges for the purposes of sub-paragraph (A) (where it is reasonable to provide such an indication) that is based on the applicable Pricing Method determined by the initial assessment referred to at sub-paragraph (B)(i); and
    - (iii) if the Pricing Method for the required Terminal Capacity Expansion has not yet been determined by an Expansion Arbitrator, a non-binding indication of the expected Access Charges for the purposes of sub-paragraph (A) (where it is reasonable to provide such an indication) that also includes an indication of the expected Access Charges where the applicable Pricing Method is not that

determined by the initial assessment referred to at sub-paragraph (B)(i);

- (C) the current Terminal Master Plan and System Master Plan;
  - (D) details of any additional information required by DBCT Management to progress the Access Application and develop the terms and conditions for acceptance; and
  - (E) details of any security, guarantee, other support or other information required by DBCT Management to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, its guarantor; and
- (6) if there is insufficient Available System Capacity (as determined by reference to the assessment of System Capacity undertaken prior to the time of giving the indicative assessment) to accommodate the Access Application, advice to that effect, and:
- (A) reasonable particulars as to why this circumstance prevails;
  - (B) an estimate of what the Available System Capacity is at relevant times;
  - (C) whether a Queue has been formed in accordance with Section 5.4 of this Framework (including as a result of the relevant Access Application);
  - (D) an initial assessment of the Pricing Method that will be applicable to the Access sought (including reasons) having regard to any planned or reasonably expected Terminal Capacity Expansions, any relevant Price Ruling(s) by an Expansion Arbitrator and the Expansion Pricing Principles;
  - (E) if it is reasonable to provide such an indication:
    - (i) a non-binding indication of the expected Access Charges for the requested Services in the Access Application where the applicable Pricing Method is as determined by the initial assessment referred to at sub-paragraph (D) and Non-Expansion Costs are allocated in accordance with Section 10.7; and
    - (ii) if the Pricing Method for the required Terminal Capacity Expansion has not yet been determined by an Expansion Arbitrator, a non-binding indication of the expected Access Charges for the requested Services in the Access Application where the applicable Pricing Method is not

that determined by the initial assessment referred to at sub-paragraph (D) and Non-Expansion Costs are allocated in accordance with Section 10.7;

- (F) a copy of the System Master Plan and an indicative timetable for any expansion of System Capacity which may be undertaken (if any).
- (e) **(Best Endeavours indication of Access Charges)** In assessing the applicable Pricing Method and providing a non-binding indication of the likely resulting Access Charges for the purpose of this Section 5, DBCT Management shall use its best endeavours to provide an accurate indication of the likely Pricing Method and Access Charges, having regard to all available information.
- (f) **(Indicative Access Proposal not binding on DBCT Management)** The Indicative Access Proposal will, unless it contains specific conditions to the contrary, contain indicative arrangements only and does not oblige DBCT Management to provide Access.
- (g) **(Access Seeker may dispute time-frame)** If, after 20 Business Days following DBCT Management's acknowledgment of the Access Application, the Access Seeker believes that DBCT Management is not making reasonable progress in the preparation of the Indicative Access Proposal, the Access Seeker may refer the timing of the provision by DBCT Management of the Indicative Access Proposal for Expert Determination.
- (h) **(Where Terminal Capacity Expansion is needed to satisfy an Access Application)** Where there is not sufficient Available System Capacity to accommodate the Access Application and the Access Seeker wishes to continue the negotiation process provided for in this Section 5, such negotiations may continue on the basis that a Terminal Capacity Expansion may be undertaken in accordance with Section 11 of this Framework which (whether with or without any relevant expansion of other components of the System) is estimated to provide sufficient Available System Capacity. In this case, if DBCT Management is unable to comply with the timeframes specified in Section 5 of this Framework, it will advise the Access Seeker of the estimated timeframes. If the Access Seeker does not believe the proposed timetable is reasonable or believes that DBCT Management is not making reasonable progress, it may refer the timetable for Expert Determination.

## 5.6 Response to Indicative Access Proposal

- (a) **(Access Seeker's response)** If the Access Seeker intends to progress its Access Application on the basis of the arrangements set out in the Indicative Access Proposal, it must notify DBCT Management of its intention to do so within 30 Business Days of the date it receives the Indicative Access Proposal. If the Access Seeker does not notify DBCT Management of its intention before the

expiry date of the Indicative Access Proposal, its Access Application will be deemed to have lapsed and it may apply again for Access in accordance with Section 5.2 (unless a longer period for notification is agreed between the parties).

- (b) **(DBCT Management to expedite any replacement Access Application)** If an Access Application lapses but the Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to the issue of a new Indicative Access Proposal.
- (c) **(Notice of non-complying Indicative Access Proposal)** If the Access Seeker considers that the Indicative Access Proposal has not been prepared in accordance with Section 5.5 of this Framework, it must give DBCT Management notice in writing within 20 Business Days of receipt of the Indicative Access Proposal to that effect, setting out the reasons why the Access Seeker believes that the Indicative Access Proposal is inconsistent with Section 5.5 of this Framework.
- (d) **(Response to notice of non-compliance)** DBCT Management must use all reasonable efforts to respond to a notice of non-compliance under paragraph (c) of this Section 5.6, including, where appropriate, the making of revisions to the Indicative Access Proposal, within 20 Business Days of the notice. If DBCT Management is unable to respond within this time period, it must notify the Access Seeker of the date on which it expects to be able to respond.
- (e) **(Dispute relating to Indicative Access Proposal)** If the Access Seeker is not satisfied with:
  - (1) the response to the notice given under paragraph (c) of this Section 5.6;  
or
  - (2) DBCT Management's estimated date to respond to that notice,the Access Seeker may refer the matter for Expert Determination.

## 5.7 Negotiation process

- (a) **(Parties to negotiate if Access Seeker wishes to)** If the Access Seeker indicates its willingness to progress its Access Application under Section 5.6 (or otherwise, in the case of an Access Application of the type referred to in paragraph (b) of the definition of that term), then both parties must commence negotiations as soon as reasonably possible to progress towards an Access Agreement or a Conditional Access Agreement. The period for negotiation will commence on the date notified by the Access Seeker under Section 5.6(a) (or the date 5 Business Days after the commencement of the Term in the case of an Access Application referred to in paragraph (b) of the

definition of the term Access Application, even if there have been discussions prior to that date) and end upon any of the following events:

- (1) execution of an Access Agreement or Conditional Access Agreement in respect of Access sought by the Access Seeker;
  - (2) written notification by the Access Seeker that it no longer wishes to proceed with its Access Application (at which time its Access Application will be deemed to have lapsed);
  - (3) DBCT Management issuing a Negotiation Cessation Notice to the Access Seeker in accordance with Section 5.8;
  - (4) the expiration of 6 months from the commencement of the negotiation period or, if both parties agree to an extension of the negotiation period, the expiration of the agreed extended term, provided that agreement to extend the negotiation period is not unreasonably withheld by either party;
  - (5) a reduction in Available System Capacity due to:
    - (A) another Access Seeker finalising an Access Agreement in accordance with this Framework, where that reduction in Available System Capacity adversely affects DBCT Management's ability to offer Access to the Access Seeker under the terms of the Indicative Access Proposal; or
    - (B) a sustained change in the System operating assumptions of one or more components of the Dalrymple Bay Coal Chain requiring re-determination of System Capacity under Section 11.1, where that reduction in Available System Capacity adversely affects DBCT Management's ability to provide Access to the Access Seeker under the terms of the Indicative Access Proposal; or
  - (6) DBCT Management receiving Notice from a Notifying Access Seeker in accordance with Section 5.4(e), for the process contemplated by Section 5.4(f) to occur.
- (b) **(Review of Indicative Access Proposal)** In the event that the negotiation period is suspended for the reasons set out in Section 5.7(a)(5) or Section 5.7(a)(6) (and once the process contemplated by Section 5.4(f) to Section 5.4(h) is complete, if applicable), DBCT Management must review the Indicative Access Proposal and prepare a revised Indicative Access Proposal in accordance with Section 5.5 and the negotiation process will recommence from the date this is provided to the Access Seeker.
- (c) **(Revisions to Access Application)** During the negotiation period, the Access Seeker may review and revise the information provided to DBCT Management

in the Access Application, provided that such revision does not substantially alter the nature of the Access rights sought by the Access Seeker and is not otherwise prohibited under Section 5.4(i)(3), 5.4(l)(7) or 5.10(h). If DBCT Management is reasonably of the view that an Access Seeker's revision of information provided to DBCT Management in the Access Application has substantially altered the nature of the Access rights sought by the Access Seeker, then subject to paragraphs (d) and (e) of this Section 5.7, DBCT Management will treat the revised information as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the revision is for an increase in the annual tonnage required or a longer term, then only the additional annual tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.

- (d) **(Certain extensions of term do not create new Access Application)** If, in the case of an Access Application referred to in paragraph (b) of the definition of that term, the revision is for an increase in the term from 5 or more years, then the extended term will be treated as part of the original Access Application.
- (e) **(Reduction in tonnage applied for does not create new Access Application)** A reduction in tonnage or term will not, of itself, constitute a new Access Application pursuant to this paragraph if there is a bona fide commercial reason for such reduction.
- (f) **(Dispute relating to negotiation)** If a Dispute arises between the parties during the negotiation period and the parties are unable to resolve the Dispute to their mutual satisfaction, then either party may seek to resolve the Dispute in accordance with the dispute resolution process set out in Section 16 within 3 months after the end of the negotiation period in accordance with Section 5.7(a)(4).
- (g) **(Negotiations to continue despite Dispute)** To remove any doubt, the negotiation process and the obligations of the parties in that regard are to continue notwithstanding the commencement of a dispute resolution process pursuant to Section 16 of this Framework.

## 5.8 Negotiation Cessation Notice

- (a) **(Negotiation Cessation Notice)** At any time during the negotiation process under Section 5.7, DBCT Management may give notice to an Access Seeker that it does not intend to enter into an Access Agreement with the Access Seeker (such notice being a Negotiation Cessation Notice), if:
  - (1) an Access Seeker does not comply with all of its material obligations contained in this Framework;

- (2) DBCT Management is reasonably of the opinion that there is no reasonable likelihood that the Access Seeker will comply with the material terms and conditions of an Access Agreement;
  - (3) DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access, at the level of capacity sought;
  - (4) DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not or is likely not to be reputable or of good financial standing;
  - (5) except where the decision of an Independent Expert contains manifest error, the Access Seeker does not materially comply with a decision of the Independent Expert pursuant to Section 16.3; or
  - (6) an Access Seeker does not materially comply with a decision of the Arbitrator pursuant to Section 16.4.
- (b) **(Negotiation Cessation Notice to include reasons)** A Negotiation Cessation Notice must identify the reasons for DBCT Management's decision not to enter into an Access Agreement with the Access Seeker.
- (c) **(Examples of no reasonable likelihood of compliance)** It will be reasonable for DBCT Management to form the view that circumstances in Section 5.8(a)(2) or 5.8(a)(4) apply if for example:
- (1) the Access Seeker is Insolvent;
  - (2) the Access Seeker, or a Related Body Corporate of the Access Seeker, is currently or has in the previous two years been in material default of any Access Agreement (which has not been promptly rectified), Existing User Agreement or any other agreement where its performance under that agreement is relevant to the Access Seeker's likely performance under an Access Agreement; or
  - (3) the Access Seeker or a proposed provider of Security fail to establish their solvency and creditworthiness in accordance with Section 5.9.
- (d) **(Dispute as to Negotiation Cessation Notice)** If the Access Seeker reasonably considers that DBCT Management has improperly given it a Negotiation Cessation Notice, then (provided that Section 5.8(c)(1), 5.8(c)(2) or 5.8(c)(3) do not apply) the Access Seeker may refer the matter to dispute resolution in accordance with Section 16. If the resolution of the Dispute is in favour of the Access Seeker, DBCT Management must re-commence negotiations with that Access Seeker.

- (e) **(Recovery of costs of DBCT Management)** Subject to any Dispute on the matter being otherwise determined, DBCT Management may recover from the Access Seeker its reasonable costs incurred in negotiations with the Access Seeker where it ceases negotiations in accordance with a Negotiation Cessation Notice validly issued under this Section 5.8. A Dispute about the recovery of these costs may be referred to dispute resolution in accordance with Section 16 of this Framework.

## 5.9 Creditworthiness of Access Seeker

- (a) **(Access Seeker to be creditworthy)** DBCT Management:
  - (1) may remove from the Queue; and
  - (2) regardless of whether the relevant Access Seeker has been removed from the Queue by DBCT Management, will not be required to enter into an Access Agreement or proceed with an Access Application with, an Access Seeker which is or has become Insolvent or which, after DBCT Management's reasonable request, fails within a reasonable period to establish or confirm its likely creditworthiness for the term of the Access Agreement required, or to provide adequate Security from another entity which establishes or confirms its likely creditworthiness for the term of the Access Agreement required.
- (b) **(Information as to solvency)** To confirm the solvency and creditworthiness of an Access Seeker and, where DBCT Management requires, the provider of a Security, the Access Seeker will provide such information as may be reasonably requested by DBCT Management to establish that solvency and creditworthiness.
- (c) **(Provision of Security)** If an Access Seeker or, where DBCT Management requires, its Security provider, is unable to establish their solvency and creditworthiness in their own right, creditworthiness may be established by the Access Seeker and Security provider by providing further Security (as reasonably required by DBCT Management), for example (but not limited to) any one or more of:
  - (1) letters of credit;
  - (2) tripartite agreements with project financiers; and
  - (3) guarantees or security from entities with a Standard and Poors or Moodys rating of not less than investment grade.
- (d) **(Access Agreement may permit Security to be required)** For clarification, nothing in this Section 5.9 limits the rights of DBCT Management under an Access Agreement to require Security (or additional Security) after the

commencement of an Access Agreement in accordance with the terms of that Access Agreement.

#### **5.10 Funding of feasibility studies**

- (a) **(Funding of System Capacity studies)** If DBCT Management is required to undertake a System Capacity assessment under Section 11.1 which is not otherwise funded as part of feasibility studies for an Expansion Component under this Section 5.10, DBCT Management may recover the reasonable costs of such assessment as attributable to the Existing Terminal through NECAP. DBCT Management will consult with and make available the results of all capacity assessments undertaken in accordance with Section 11.1 to all Access Holders and Expansion Parties, including separately identifying:
- (1) the assessed capacity of the Existing Terminal;
  - (2) the projected capacity of a Terminal Capacity Expansion, including, if relevant, the projected capacity of a Differentiated Expansion Component; and
  - (3) the Expansion Component options being considered in any feasibility studies under this Section 5.10.
- (b) **(Request for Access Applicants to Fund Feasibility Studies)** If DBCT Management, acting reasonably, concludes that the Aggregate Annual Contract Tonnages applied for in Access Applications lodged with it, together with all other relevant circumstances, justify the undertaking of a study to determine the feasibility of a relevant Terminal Capacity Expansion then DBCT Management may, subject to Section 5.10(c), give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management. DBCT Management may not make such a request unless a Funding Agreement or Underwriting Agreement (as applicable) has been made and published on the DBCT Management's website in accordance with Section 5.10(q)(9)(E).
- (c) **(Notices will be given simultaneously)** DBCT Management will, in giving notices under Section 5.10(b), give such notices to all Access Applicants in the Queue, as relevant to the contemplated increase in Annual Contract Tonnage which would be facilitated by the Terminal Capacity Expansion under consideration, on or about the same date.
- (d) **(Requests to be proportionate to tonnages applied for)** DBCT Management will request that any funding or underwriting of the feasibility study or feasibility studies referred to in Section 5.10(b) pursuant to a Funding Agreement or Underwriting Agreement (as applicable) be proportionate amongst the relevant participating Access Applicants, according to the respective sum of the Annual Contract Tonnages requested in their Access

Applications over the first 10 years of Handling under the Conditional Access Agreement applied for by them.

- (e) **(Order of responses to notices)** DBCT Management must, in dealing with responses from Access Applicants to notices given by DBCT Management under Section 5.10(b), start with the response given by the Access Applicant that has the highest ranking in the Queue and proceed to the response given by each successive Access Applicant in order of their respective ranking in the Queue.
- (f) **(Position in Queue may be lost to subsequent Applicants)** If an Access Applicant is requested by DBCT Management to enter into a Funding Agreement or Underwriting Agreement but the Access Applicant:
  - (1) declines to do so;
  - (2) fails to enter into a Funding Agreement or Underwriting Agreement (as applicable) with DBCT Management on such terms as DBCT Management reasonably requires within 3 months after being requested by DBCT Management to do so; or
  - (3) does not provide security required by DBCT Management in connection with the Funding Agreement or Underwriting Agreement (as applicable) within 3 months after being requested by DBCT Management to do so,(such an Access Applicant being a **Non-Funding Access Applicant**) then:
  - (4) DBCT Management may, subject to Section 5.10(g), remove the Non-Funding Access Applicant from the Queue, in which case the Non-Funding Access Applicant's Access Application will be taken to have been rejected; or
  - (5) if DBCT Management does not remove the Non-Funding Access Applicant from the Queue, then to the extent that any Access Applicant(s) after the Non-Funding Access Applicant in the Queue within 3 months thereafter:
    - (A) enter(s) into a Funding Agreement or Underwriting Agreement with DBCT Management; and
    - (B) provide(s) security required by DBCT Management in relation to the Funding Agreement or Underwriting Agreement (as applicable) of at least the aggregate amount that is required by DBCT Management to fund or underwrite the study referred to in Section 5.10(b) in the proportion to which the tonnage applied for by an Access Applicant bears to the additional

Aggregate Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion,

those subsequent Access Applicants will, from the date on which they are legally committed to provide or underwrite such feasibility funding and provide security under the Funding Agreement or Underwriting Agreement (as applicable), have priority in the Queue ahead of the Non-Funding Access Applicant.

- (g) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under Section 5.10(f)(4), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (h) **(Amendments to Access Application)** An Access Seeker may not amend its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.10(b).
- (i) **(Priorities restored if feasibility study does not proceed)** If an Access Applicant obtains a higher priority in the Queue as a result of Section 5.10(f), and DBCT Management elects not to proceed with the relevant feasibility study, then the relevant Access Applicant will again have the same priority in the Queue as it would have had if Section 5.10(f) did not apply.
- (j) **(Clarifications)** Nothing in this Section 5.10:
  - (1) requires DBCT Management to proceed with a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study (as the case may be) unless it secures a Funding Agreement or Underwriting Agreement in respect of the full cost of that feasibility study from one or more Access Seekers;
  - (2) prohibits an Access Seeker from providing more than its required proportion in respect of any funding or underwriting requested for Feasibility Studies (but providing a greater proportion does not in itself entitle that Access Seeker to any additional tonnage under an Access Agreement); or
  - (3) is to be taken as limiting the obligations of DBCT Management in Section 11.
- (k) **(Disputes relating to requests for Feasibility Funding)** If any Access Applicant considers that the terms of the Funding Agreement, Underwriting Agreement or the amount or type of security required in connection with the Funding Agreement or Underwriting Agreement requested by DBCT Management

pursuant to Sections 5.10(b) and 5.10(d) are not reasonable, it may within 3 months after being requested to enter into a Funding Agreement or Underwriting Agreement and to provide security, apply for Expert Determination to determine what is reasonable, and in such event:

- (1) the determination of the Independent Expert as to what is reasonable will apply in respect of what DBCT Management can require from each Access Applicant; and
- (2) the period of 3 months in Section 5.10(f) will become a period ending 15 days after the Independent Expert notifies its determination.

The terms of a Funding Agreement or Underwriting Agreement will be reasonable to the extent that they are consistent with the terms of a Standard Funding Agreement or Standard Underwriting Agreement (as applicable) approved in accordance with Section 5.10(q).

- (l) **(FEL 3 Feasibility Funding)** If DBCT Management having completed a FEL 1 Feasibility Study and FEL 2 Feasibility Study, acting reasonably and consistently with prudent business practice concludes that Aggregate Annual Contract Tonnage applied for in one or more Access Applications lodged with it, together with all other relevant circumstances, justify it undertaking a FEL 3 Feasibility Study, DBCT Management may, at its own cost, undertake a FEL 3 Feasibility Study. For clarity, if DBCT Management undertakes to independently fund a FEL 3 Feasibility Study this will not affect the entitlement of any Funding Access Seekers (which funded the relevant FEL 1 Feasibility Study and FEL 2 Feasibility Study) to continue to participate in any subsequent Expansion Component.
- (m) **(Transitional arrangements for previous funding)** If at the Commencement Date DBCT Management is undertaking a FEL 1 Feasibility Study or FEL 2 Feasibility Study in respect of a relevant proposed Terminal Capacity Expansion, DBCT Management may (by giving not less than 14 days written notice) give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management in which case:
  - (1) Sections 5.10(d), 5.10(e), 5.10(f), 5.10(g), 5.10(i) and 5.10(k) apply (with such modifications as the circumstances require); and
  - (2) if the Feasibility Study being undertaken at the Commencement Date is a FEL 2 Feasibility Study, the Funding Agreement and Underwriting Agreement will apply to the FEL 2 Feasibility Study and the FEL 1 Feasibility Study which preceded the FEL 2 Feasibility Study.
- (n) **(Credit for prior Funding, and refunds)** If an Access Seeker has provided funding for a Feasibility Study referred to in Section 5.10(m) prior to the

Commencement Date, the amount funded will be deemed to be a contribution to the funding requested under Section 5.10(m). To the extent that an Access Seeker has contributed funds (as opposed to underwriting the funding) prior to the Commencement Date in excess of the funds required to be contributed under Section 5.10(m) DBCT Management may elect to refund to that Access Seeker such excess funding or credit it towards any further contribution to a Feasibility Study required or agreed to be paid by that Access Seeker.

- (o) **(Contributions to Funding of Feasibility Studies by DBCT Management)** DBCT Management may at its discretion elect to itself bear, or be required under law or by the Port Services Agreement to itself fund, all or part of the costs of a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study which one or more Access Applicants do not fund or underwrite in accordance with a Funding Agreement or Underwriting Agreement (as applicable). Nothing in this Section 5.10(o) affects:
- (1) DBCT Management's rights to apply to recover such sum through the Initial Terminal Infrastructure Charge in the case of a Differentiated Expansion Component, or adjustment to the Terminal Infrastructure Charge for the Existing Terminal on the occurrence of a Review Event of the kind described in paragraph (b) of the definition of that term in the case of a Socialised Expansion, if the relevant proposed Terminal Capacity Expansion proceeds;
  - (2) DBCT Management's rights to apply to have such sum included in the prudent Capital Expenditure determined by an Expansion Arbitrator if DBCT Management is required by Section 11 of this Framework to investigate or undertake a Terminal Capacity Expansion; or
  - (3) DBCT Management's obligation (if any) to fund a FEL 3 Feasibility Study.
- (p) **(Refund of FEL 1, FEL 2 and FEL 3 contributions if Terminal Capacity Expansion proceeds)** In the event that the Terminal Capacity Expansion the subject of a FEL 1 Feasibility Study and FEL 2 Feasibility Study and FEL 3 Feasibility Study proceeds and substantial site works commence, DBCT Management will promptly following the commencement of substantial site works:
- (1) refund to each Funding Access Seeker who contributed funds (as opposed to underwriting the funding) under Section 5.10(b) for that Terminal Capacity Expansion the funds provided by that Access Seeker; and
  - (2) release any underwriting commitment made by each Funding Access Seeker in respect of that Terminal Capacity Expansion.
- (q) **(Preparation and approval of Standard Funding Agreement or Standard Underwriting Agreement)**

- (1) DBCT Management must prepare a proposed Standard Funding Agreement or proposed Standard Underwriting Agreement (as applicable) (Proposed Standard Funding/Underwriting Agreement) where:
  - (A) DBCT Management considers there to be reasonable likelihood that the Aggregate Annual Contract Tonnage applied for in Access Applications or Conditional Access Agreements may justify undertaking Feasibility Studies during the Term of the Access Framework; or
  - (B) DBCT Management receives a written notice from an Access Seeker or Access Holder requesting DBCT Management develop a Proposed Standard Funding/Underwriting Agreement.
- (2) In preparing a Proposed Standard Funding/Underwriting Agreement DBCT Management must consult with Access Seekers, Expansion Parties and Access Holders.
- (3) A Proposed Standard Funding/Underwriting Agreement must be reasonable in all of the circumstances having regard to terms of the Framework and:
  - (A) the legitimate business interests of DBCT Holding in its capacity as the owner of the Terminal;
  - (B) the legitimate business interests of DBCT Management in its capacity as the operator of the Terminal;
  - (C) the public interest, including the public interest in having competition in markets (whether or not in Australia); and
  - (D) the interests of Access Seekers who have signed an Access Application Form or Access Renewal Form (as set out at Schedule A), or who are a party to a Conditional Access Agreement, and Access Applicants, including whether adequate provision has been made for compensation if the rights of the existing Access Holders or Existing Users are adversely affected.
- (4) DBCT Management must publish the Proposed Standard Funding/Underwriting Agreement on its website and must separately notify all Access Holders and Access Seekers promptly following publication of DBCT Management's Proposed Standard Funding/Underwriting Agreement.
- (5) An Access Seeker or Access Holder may, within 3 months after receiving the notice from DBCT Management, give DBCT Management a Dispute Notice under Section 16.1 regarding whether the Proposed Standard

Funding/Underwriting Agreement is consistent with Section 5.10(q)(3). Such notice must specify the way in which the Access Seeker or Access Holder considers that the Proposed Standard Funding/Underwriting Agreement fails to satisfy Section 5.10(q)(3) and, if necessary, any amendments which the Access Seeker or Access Holder considers are necessary to satisfy Section 5.10(q)(3).

- (6) If the Dispute is not resolved in accordance with Section 16.2, such Dispute is to be resolved in accordance with Section 16.4.
- (7) If the Dispute is to be resolved in accordance with Section 16.4, an Arbitrator is to decide whether the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3). If the Arbitrator decides that the Proposed Standard Funding/Underwriting Agreement does not satisfy Section 5.10(q)(3), the Arbitrator is to decide the terms of an alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting Agreement (as applicable) (**Alternative Proposed Standard Funding/Underwriting Agreement**) that it considers will satisfy Section 5.10(q)(3), provided that the Arbitrator must give DBCT Management a reasonable opportunity to consider and comment on the draft. The Arbitrator will take into account any comments made by DBCT Management in relation to the Arbitrator's draft.
- (8) Notwithstanding a notice given under Section 5.10(q)(5), the Arbitrator may approve the Proposed Standard Funding/Underwriting Agreement, if the Arbitrator considers it reasonable in all of the circumstances having regard to terms of the Framework and the matters set out in Section 5.10(q)(3).
- (9) If:
  - (A) no notice is given under Section 5.10(q)(5);
  - (B) notice is given under Section 5.10(q)(5) but the Dispute is resolved under Section 16.2;
  - (C) the Arbitrator decides that the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3);  
or
  - (D) the Arbitrator decides that an Alternative Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3),then:
  - (E) the Proposed Standard Funding/Underwriting Agreement or the Alternative Proposed Standard Funding/Underwriting

Agreement (as the case may be) will become the approved Standard Funding Agreement or the approved Standard Underwriting Agreement (as applicable), which is to be published on DBCT Management's website; and

- (F) DBCT Management will, if requested by Access Seekers or Access Holders, enter into agreements with Access Seekers or Access Holders, on the terms of the approved Standard Funding Agreement or approved Standard Underwriting Agreement (as applicable), unless otherwise agreed between DBCT Management and the relevant Access Seeker or Access Holder.
- (10) For clarity, nothing in this Section 5.10(q) limits or restricts DBCT Management or an Access Seeker or Access Holder from referring as a Dispute any failure to agree reasonable amendments to a Standard Funding Agreement/Underwriting Agreement where it is being used in respect of a specific Terminal Capacity Expansion.

#### **5.11 Access Agreement Process**

If an Access Agreement provides a mechanism for applications for additional capacity to be made by the relevant Access Holder under that Agreement, those provisions may be utilised by that Access Holder in respect of additional capacity sought under that Agreement, but such application will be treated as an Access Application for the purposes of this Section 5.

#### **5.12 Review of Pricing Method and Indicative Access Charges**

- (a) **(Review of estimated Access Charges)** Where an Indicative Access Proposal has been prepared on the basis that a Terminal Capacity Expansion would be required in order to accommodate the relevant Access Application:
  - (1) as soon as practicable and in any event within 20 Business Days following completion of a FEL 1 Feasibility Study, DBCT Management must review the Indicative Access Proposal and provide the Access Seeker with a revised assessment of the applicable Pricing Method and estimated Access Charges for the Services requested in the Access Application (a Revised Pricing Proposal);
  - (2) as soon as practicable and in any event within 20 Business Days following completion of a FEL 2 Feasibility Study which supports proceeding to a FEL 3 Feasibility Study (including where that support is conditional on whether an Expansion Component will be priced Differentially or Socialised), DBCT Management must (unless it has already done so pursuant to Section 11.5(a)) review the Revised Pricing Proposal and apply to an Expansion Arbitrator for a Price Ruling in

respect of the Terminal Capacity Expansion under Section 11.5 that determines:

- (A) the applicable Pricing Method for the Terminal Capacity Expansion;
  - (B) the prudent Capital Expenditure in respect of the Terminal Capacity Expansion, with which any determination of an Initial TIC to apply in respect of the Existing Terminal if the Terminal Capacity Expansion is Socialised or the Differentiated Expansion Component if the Terminal Capacity Expansion is Differentiated (as the case may be) following Completion of the Terminal Capacity Expansion should be consistent;
  - (C) if the Price Ruling is to apply to a Conditional Access Agreement, any Different Terms where the Access Seeker disputes the Different Terms and if Different Terms are determined by the Expansion Arbitrator, the determined Different Terms will be included in any Access Agreement to which the Price Ruling applies; and
  - (D) if the Price Ruling is to apply to a Binding Conditional Access Agreement, the dollar amount to apply in respect of that Conditional Access Agreement.
- (b) **(Application for Price Ruling)** An application for a Price Ruling shall include:
- (1) information about the nature and amount of Capital Expenditure forecast to carry out the Terminal Capacity Expansion, as assessed in any Feasibility Studies;
  - (2) information about any Different Terms that will have been agreed;
  - (3) information about the increase in Terminal Capacity expected to arise from the Terminal Capacity Expansion (and expected increases to System Capacity);
  - (4) information about positive or negative impacts on existing Access Holders or existing operations of the Terminal;
  - (5) information about the forecast demand for Access to the increased Terminal Capacity;
  - (6) an assessment of the Pricing Method applicable to the Terminal Capacity Expansion, applying the Expansion Pricing Principles;
  - (7) information about the anticipated impact on Non-Expansion Costs for the Terminal; and

- (8) an estimate of the Terminal Infrastructure Charge that will apply to the Differentiated Terminal Component if the Terminal Capacity Expansion was Differentiated, or the amendment to the Terminal Infrastructure Charge that will apply if the Terminal Capacity Expansion was Socialised, having regard to the information referred to above and the other pricing arrangements set out in Section 10.
- (c) **(Expansion Arbitrator to provide Price Ruling)** In response to an application for a Price Ruling under Section 5.12(a) and/or Section 11.5 , the Expansion Arbitrator shall, after conducting an investigation:
  - (1) determine the application;
  - (2) determine whether the Terminal Capacity Expansion should be Socialised or Differentiated, applying the Expansion Pricing Principles; and
  - (3) in making a determination of the kind referred to in (2)(C) or (D) above:
    - (A) section 10 applies and the Dispute shall be considered to be of a kind referred to in section 10.1(b), except to the extent necessary to give effect to any matter agreed by the parties to a Conditional Access Agreement to which the Price Ruling applies; and
    - (B) the provisions of section 16.4 (excluding paragraphs 16.4(f) and (g)) apply.

### 5.13 Access Transfers

- (a) In processing any request by an Access Holder or Access Seeker for a transfer of rights or entitlements under an Access Agreement (whether by way of assignment or novation), DBCT Management must consent to any such proposed transfer unless DBCT Management (acting reasonably) is satisfied that:
  - (1) the assignor is in material breach of its Access Agreement; or
  - (2) the assignee:
    - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement or the assignee has not otherwise provided security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;

- (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; or
  - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf.
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in Section 5.13(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.
- (d) An Access Holder or an Access Seeker may refer to the Arbitrator as a Dispute under Section 16 of this Framework:
  - (1) any refusal by DBCT Management to consent to a transfer;
  - (2) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer;
  - (3) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

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## 6 Terminal Regulations

### 6.1 Compliance with Terminal Regulations

- (a) **(Compliance by DBCT Management and Operator)** DBCT Management acknowledges that under the Operation & Maintenance Contract DBCT Management and the Operator must comply with the Terminal Regulations. DBCT Management must comply with, and will procure that the Operator complies with, the Terminal Regulations in force from time to time.
- (b) **(Compliance by Access Holders is condition of Access)** Each Access Holder must observe the Terminal Regulations, in force from time to time, as a condition of Access to and the right to have its coal Handled at the Terminal.

### 6.2 Amendment of Terminal Regulations

- (a) **(Process for amending Terminal Regulations)** The Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues. If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:

- (1) conduct reasonable consultation with Access Holders, Access Seekers, Expansion Parties and/or Rail Operators in relation to the proposed amendment; and
  - (2) following the completion of such reasonable consultation, notify the Access Holders, Access Seekers, Expansion Parties and Rail Operators:
    - (A) of the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) of the detailed reasons for its decision to give (or not give) consent to the proposed amendment; and
    - (D) except in the case of notification to Rail Operators, that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (b) **(Implementation of amended Terminal Regulations)** A proposed amendment to the Terminal Regulations will not be implemented unless:
- (1) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1); and
  - (2) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;
    - (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, an Independent Expert appointed to hear the objection (in accordance with Section 6.2(f)) has rejected that objection; or
    - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided,

and an Independent Expert appointed to hear the objection (in accordance with Section 6.2(g)) has upheld that objection.

- (c) **(Consent of DBCT Management)** DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under Section 6.2(b)(2)(A) or 6.2(b)(2)(B) if it has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1) and, taking into account the results of such consultation, it reasonably considers that:
- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Framework, and any Access Agreements; and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (d) **(Criteria for disputing refusal to provide consent)** If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, an Access Holder, Access Seeker or Expansion Party may object to DBCT Management's refusal to provide consent if they reasonably consider that:
- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Framework and any Access Agreement of the Access Holder, Access Seeker or Expansion Party (as the case may be); and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or

obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

(e) **(Notice of amendments to Terminal Regulations)** DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with Section 6.2(i)).

(f) **(Objection to DBCT Management decision to approve amendment of Terminal Regulations)**

(1) If:

(A) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and

(B) an Access Holder, Access Seeker or Expansion Party objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied,

then the Access Holder, Access Seeker or Expansion Party may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management of its objection to the consent to the proposed amendment, such objection to be determined by an Independent Expert.

(2) If, in response to an objection notified by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(f)(1) of this Framework or any corresponding provision of an Access Agreement), the Independent Expert determines that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied then:

(A) the proposed amendment and DBCT Management's consent to the proposed amendment will be taken to have been withdrawn; and

(B) the proposed amendment will not be made.

(g) **(Objection to DBCT Management decision to reject amendment of Terminal Regulations)**

(1) If:

(A) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and

- (B) an Access Holder, Access Seeker or Expansion Party objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied,  
  
then the Access Holder, Access Seeker or Expansion Party may within 30 days of being notified of DBCT Management’s refusal to give its consent to a proposed amendment to the Terminal Regulations, notify DBCT Management of its objection to DBCT Management not providing consent for the proposed amendment, such objection to be determined by an Independent Expert.
- (2) If, in response to an objection notified by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(g)(1) of this Framework or any corresponding provision of an Access Agreement), the Independent Expert determines that the criteria in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied, then:
  - (A) DBCT Management’s consent to the proposed amendment will be deemed to have been given; and
  - (B) the proposed amendment will be made.
- (h) **(Protection of DBCT Management)** Subject to DBCT Management complying with Section 6.2(b), DBCT Management will not be liable to Access Seekers (and the Standard Access Agreement will provide that DBCT Management will have no liability (on any basis whatsoever) to an Access Holder which executes it) as a result of DBCT Management consenting to an amendment to the Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by Section 6.2(c). For clarification, this does not affect DBCT Management’s obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Framework or a relevant Access Agreement.
- (i) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Regulations available to each Access Holder, Access Seeker and Rail Operator (which may be by displaying it on DBCT Management's website).

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## **7 Confidentiality requirements**

### **7.1 Confidential Information to be kept confidential**

Subject to Sections 5.4(c) and 16.4(e) each relevant Access Seeker, Access Holder and DBCT Management will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged under the negotiation arrangements in Section 5 of this Framework or any other part of this Framework, except:

- (a) where disclosure is required by any law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or requirement of a stock exchange or regulator;
- (b) with the prior written consent of the relevant Access Seeker, Access Holder or DBCT Management, as applicable;
- (c) where disclosure is to the recipient's professional advisors provided that such professional advisors are under a duty of confidentiality;
- (d) to the extent disclosure is necessary for notifications to financiers, brokers, insurers or claims assessors or reasonably necessary in connection with seeking financing from a bona fide financier, provided that the broker, insurer, claims assessor or financier to whom the disclosure is made is under a legal obligation to keep the information confidential;
- (e) where disclosure is made to any person or body established to provide coordination in the Dalrymple Bay Coal Chain;
- (f) where disclosure is to a Capacity Expert, an Independent Expert, an Arbitrator, an Expansion Arbitrator, or a court (in the case of a party seeking urgent injunctive relief) to the extent necessary for resolving a Dispute provided that DBCT Management does not disclose the Confidential Information of one Access Seeker or Access Holder to another Access Seeker or Access Holder without the first-mentioned Access Seeker's or Access Holder's consent, unless directed to by a Capacity Expert, an Independent Expert, an Arbitrator, an Expansion Arbitrator or a court (as the case may be); or
- (g) to the extent disclosure is required to protect the safety or security of persons or property or in connection with an accident or emergency.

### **7.2 Confidentiality deed**

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

### **7.3 Use of Confidential Information**

Without limiting the circumstances specified in this Section 7 in which Confidential Information may be used or disclosed, an Access Seeker, an Access Holder and DBCT

Management must otherwise only use Confidential Information provided to it under this Framework for the purposes for which it was provided.

#### **7.4 Reporting of aggregated information**

For the avoidance of doubt, nothing in this Section 7 prevents DBCT Management from:

- (a) complying with its obligations under Sections 9.1 and 9.2; or
- (b) disclosing, in the ordinary course of business, financial reporting information which has been aggregated with other information of a similar nature such that it cannot reasonably be, and is not reasonably capable of being, identified with, attributed to or used to identify, any Access Seeker, Access Holder, Existing User or Rail Operator.

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### **8 Ring-fencing arrangements**

#### **8.1 No related Supply Chain Businesses**

DBCT Management 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.

#### **8.2 Non-discrimination**

DBCT Management will not:

- (a) engage in conduct for the purpose of preventing or hindering an Access Holder's or Access Seeker's Access; or
- (b) unfairly differentiate between Access Seekers, Access Holders or Rail Operators.

#### **8.3 Confidentiality undertaking by board members**

DBCT Management will ensure that each of its directors executes a confidentiality deed pursuant to which the relevant director agrees to only use and disclose Confidential Information obtained as a director of DBCT Management in connection with its role as a director of DBCT Management.

#### **8.4 Complaint handling**

If an Access Holder or Access Seeker considers that DBCT Management may have breached one or more of its obligations under this Section 8 they may raise a Dispute in respect of such complaint in accordance with Section 16 of this Framework.

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### **9 Reporting by DBCT Management**

#### **9.1 Indicators relating to compliance with this Framework**

DBCT Management will Publicly Report on an annual basis the following information:

- (a) **(Indicative Access Proposals)** the number and percentage of total Indicative Access Proposals provided within the applicable timeframe;
- (b) **(Access Applications)** the number and percentage of Access Applications received for which an extension of time for provision of an Indicative Access Proposal was sought by DBCT Management;
- (c) **(Response times)** the average delay (in days) taken to provide an Indicative Access Proposal not provided within the applicable timeframe;
- (d) **(Disputes)** the number of instances where a Dispute has been referred to dispute resolution in accordance with Section 16;
- (e) **(Negotiation periods for successful outcomes)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (f) **(Negotiation periods where no Access Agreement signed)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of any reason other than the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (g) **(Access Transfer Applications)** in respect of the Access Transfer processes set out in Section 5.13, the following:
  - (1) the number of requests received for a transfer of rights or entitlements; and
  - (2) the period taken to resolve each transfer, being in each case the period from the date of receipt of the request and ending on the earliest of the date that:
    - (A) an Access Agreement facilitating the transfer was executed by DBCT Management;
    - (B) DBCT Management gave notice to the transferor that consent for the transfer was refused; or
    - (C) any notice was given to the Arbitrator of a Dispute in relation to the purported transfer;
- (h) **(Access Agreements concluded)** the number of instances where a negotiation period that had commenced, ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker; and

- (i) **(Complaints)** written complaints received by DBCT Management in relation to its compliance with this Framework.

## 9.2 Indicators relating to service quality

DBCT Management is required to Publicly Report on the following service quality key performance indicators for the Terminal on a quarterly basis:

- (a) **(System delivery):**

- (1) number of trains requested by the Operator and scheduled by the rail providers to arrive at the Terminal;
  - (2) actual number of trains completing unloading at the Terminal;
  - (3) number of tonnes of coal scheduled to be delivered to the Terminal; and
  - (4) number of tonnes of coal actually delivered to the Terminal,
- for each month of the quarter.

- (b) **(Inloading performance):**

- (1) average train unloading time at the Terminal (on a Terminal job-open to job-close basis); and
  - (2) average train unload time (from permission to unload the train until unloading of the last wagon is complete),
- for each month of the quarter.

- (c) **(Stockyard performance):**

- (1) average stock-build time per parcel; and
  - (2) average stock-residence time per parcel,
- for each month of the quarter.

- (d) **(Out-loading performance):**

in respect of each outloading conveyor:

- (1) average gross load rate per vessel class – first coal to last coal; and
  - (2) average utilisation of out-load conveyors,
- for each month of the quarter.

- (e) **(Vessel performance):**
  - (1) number of vessels (by class);
  - (2) average number of parcels per vessel (by class);
  - (3) total tonnes per vessel (by class); and
  - (4) total tonnes shipped,for each month of the quarter.
- (f) **(Vessel queuing)** (vessels which have arrived and are awaiting berthing to load):
  - (1) average daily total vessels in queue;
  - (2) average daily number of vessels in queue where relevant coal is not yet available to be railed to the Terminal (“dead ships”);
  - (3) vessel queuing times;
  - (4) queue ordering; and
  - (5) average waiting time to berth at anchor,for each month of the quarter.
- (g) **(Operating efficiency)** inloading and outloading.
- (h) **(Environmental performance):**
  - (1) number of times during each month of the quarter that the “management objective” (as provided for in the Terminal’s environmental licence and approvals) in dust deposition was exceeded; and
  - (2) number of times during each month of the quarter that the “acoustic quality objective” (as provided for in the Terminal’s environmental licence and approvals) was exceeded.
- (i) **(Other)** any additional or alternative service quality key performance indicators that DBCT Management and Access Holders agree from time to time.

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## **10 Pricing arrangements**

### **10.1 Application of Pricing Provisions**

- (a) The Access Charges for each Terminal Component in respect of which the Access Holder has an entitlement to Access will be as agreed between DBCT Management and the Access Holder.
- (b) If DBCT Management and an Access Seeker are unable to agree Initial Access Charges to apply from the commencement of an Access Agreement or increased Access and one of them refers a Dispute relating to those Initial Access Charges for resolution in accordance with the dispute resolution process set out in Section 16 in accordance with Section 5.7(f) of this Framework, any determination by the Arbitrator of terms relating to Initial Access Charges in accordance with Section 16.4 of this Framework must be in accordance with Sections 10.3 to 10.5, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (c) If a Dispute concerning the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into that Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any consequential changes in the drafting of the provisions of the Access Agreement) is referred by DBCT Management or the Access Holder for resolution in accordance with Section 16 of this Framework, in making any Arbitration determination in accordance with Section 16.4 of this Framework the Arbitrator must:
  - (1) determine the Initial Access Charges to apply from the start of the Pricing Period in accordance with Sections 10.3 to 10.5 of this Framework; and
  - (2) subject to paragraph (1) above, give effect to and make a determination that is consistent with the Standard Access Agreement in place under the Access Framework at the time of the Arbitrator's determination,except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (d) Section 10.6 applies to the review during a Pricing Period of the Access Charges applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, and any determination by an

Arbitrator of a Dispute concerning such a review that is referred for resolution by DBCT Management or the Access Holder in accordance with Section 16.4 of this Framework must be in accordance with Section 10.6, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.

- (e) Sections 10.7 and 10.8 apply in accordance with their terms.

## 10.2 Interpretation of Pricing Provisions

- (a) In this Framework, the following principles of interpretation shall apply:
  - (1) **(Single meaning where only Socialisation applies)** for so long as Access to the Terminal continues to be priced on a Socialised basis, the terms and definitions of this Framework relevant to pricing apply to all Access collectively; and
  - (2) **(Alternative meanings where Differentiation applies)** where, pursuant to Section 10.8, Access to the Terminal is charged to one or more Access Holders on a Differentiated basis, the terms and definitions of this Framework relevant to pricing apply to each Terminal Component separately.
- (b) To avoid doubt, if an Access Holder seeks and obtains increased Access in respect of a Terminal Component on one or more occasions, the Access Holder may have more than one Access Agreement and/or a different Terminal Infrastructure Charge for the Terminal Component may apply to each of the tranches of Access obtained by the Access Holder.

## 10.3 Access Charges

Access Charges for each Terminal Component will comprise two parts:

- (a) a Terminal Infrastructure Charge; and
- (b) an Operation & Maintenance Charge.

## 10.4 Terminal Infrastructure Charge

- (a) **(TIC)** The Access Agreement will impose a Terminal Infrastructure Charge (**TIC**) for each Terminal Component in respect of which the Access Holder has an entitlement to Access or increased Access, being an amount per tonne payable by the Access Holder at a relevant time, calculated (and adjusted as required) in accordance with this Section 10 and Schedule C, Sections 2 and 3.

- (b) **(Applies to Annual Contract Tonnage)** The TIC will apply to all Annual Contract Tonnage, or where:
- (1) Section 10.2(a)(2) applies, a different TIC will apply to the Annual Contract Tonnage in respect of each Terminal Component for which the Access Holder has an entitlement to Access;
  - (2) Section 10.2(b) applies, a different TIC may apply to the Annual Contract Tonnage in respect of each tranche of Access to which the Access Holder has obtained an entitlement.
- (c) **(Payment of TIC)** Each Access Holder will pay to DBCT Management in respect of its Annual Contract Tonnage a payment in each Month of each Financial Year during the term of its Access Agreement (the Monthly Payment) calculated (and adjusted as required) in accordance with Schedule C.
- (d) **(Determination of Initial TIC)** Subject to paragraph (e) and unless paragraph (f) applies, in any Arbitration of a kind referred to in Section 10.1(b) or 10.1(c), the Arbitrator must determine a TIC for a Terminal Component to apply under the Access Agreement from commencement of that Agreement, increased Access under that Agreement or the relevant Pricing Period (**Initial TIC**) that:
- (1) reflects a 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;
  - (2) is no less than the Floor TIC calculated in accordance with Schedule C, Section 2(a); and
  - (3) is no greater than the Ceiling TIC calculated in accordance with Schedule C, Section 2(b) to 2(b).
- (e) **(Determination of Initial TIC if Ceiling TIC is below Floor TIC)** Unless paragraph (f) applies, in any arbitration of a kind referred to in Section 10.1(b) or 10.1(c), if the Ceiling TIC for the Terminal Component calculated in accordance with Schedule C, Section 2(b) to 2(b) is lower than the Floor TIC for that Terminal Component calculated in accordance with Schedule C, Section 2(a), the Arbitrator must determine an Initial TIC for the Terminal Component that is equal to the Floor TIC for that Terminal Component.
- (f) **(Determination of Initial TIC if Arbitration already occurred in Pricing Period)** This paragraph (f) applies in an Arbitration of the kind referred to in Section 10.1(b) where an Arbitration determination on an Initial TIC for one or more Access Holders has previously been made under Section 16.4 of this Framework for the Pricing Period in which the Access Agreement or increased Access that is the subject of the first-mentioned Arbitration will commence.

The Arbitrator must determine the Initial TIC to apply for the Terminal Component under the Access Agreement from commencement of that Access Agreement or increased Access under that Access Agreement as follows:

- (1) subject to paragraph 10.4(f)(2), the Initial TIC to apply from commencement of the Access Agreement or increased Access under the Access Agreement must be equal to the Initial TIC for the Pricing Period determined in the first completed Arbitration for that Pricing Period adjusted:
    - (A) based on escalation for the annual change in the Consumer Price Index in accordance with Schedule C, Section 3(a) to 3(d); and
    - (B) for any Review Event that has occurred since the completion of the first completed Arbitration in accordance with Schedule C, Section 3(e) to 3(j);
  - (2) if the resultant Initial TIC for the Access Seeker is higher than the Ceiling TIC applicable at the time of Arbitration or lower than the Floor TIC applicable at that time, the Arbitrator must not apply any Review Event adjustment or adjustments under paragraph 10.4(f)(1) to the Initial TIC determined in the first completed Arbitration for the Pricing Period to the extent that the Review Event adjustment or adjustments would otherwise result in an Initial TIC for the Access Seeker that is higher than the Ceiling TIC or lower than the Floor TIC.
- (g) **(Determination of Floor TIC following Terminal Capacity Expansion)** In any Arbitration of a kind referred to in Section 10.1(b) or 10.1(c) following the Completion and hand over to the Operator of a Terminal Capacity Expansion:
- (1) any determination of the Floor TIC by the Arbitrator must be consistent with any Price Ruling by the Expansion Arbitrator in respect of that Terminal Capacity Expansion; and
  - (2) the Arbitrator must accept Capital Expenditure incurred in respect of that Terminal Capacity Expansion is prudent if the Expansion Arbitrator has determined under Section 11.5 that that Capital Expenditure is prudent and take that prudent Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the Floor TIC.

Nothing in this paragraph precludes the Arbitrator from determining that any additional Capital Expenditure incurred in respect of the Terminal Capacity Expansion is also prudent and also taking that additional Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the Floor TIC.

- (h) **(Determination of Ceiling TIC)** Data from an independent third party data provider must be used in any determination of the Ceiling TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) by an Arbitrator unless the Arbitrator is satisfied that the data from the provider is manifestly incorrect in one or more respects and the error or, if there is more than one error, the errors considered collectively, are 'material', where 'material' means that the error(s) have a material effect on the resultant Ceiling TIC. In that case, the Arbitrator may disregard the independent third party data provider's data and use alternative data but only to the extent that the Arbitrator is satisfied that the provider's data is manifestly incorrect.

## 10.5 Operation & Maintenance Charge

- (a) **(Terminal Operating Costs recovery)** Terminal Operating Costs will be recovered from the Access Holder through the Operation & Maintenance Charge. The Operation & Maintenance Charge for the Access Holder will be calculated on the basis outlined in the Standard Access Agreement and otherwise in accordance with the Operations & Maintenance Contract.
- (b) Where a Differentiated Expansion Component exists and Terminal Operating Costs are required to be allocated between different Terminal Components, then the Operation & Maintenance Charge for each Access Holder will be calculated in accordance with the following procedure:
  - (1) the quantum of Terminal Operating Costs, and the proposed allocation among Terminal Components, will be advised to DBCT Management by the Operator. The Operator will determine the allocation in accordance with Section 10.7(a);
  - (2) DBCT Management will review the quantum and allocation proposed by the Operator and, where relevant, make any variation it considers necessary to comply with Section 10.5(c)(3); and
  - (3) DBCT Management will recover Terminal Operating Costs allocated to a Terminal Component from an Access Holder through the Operation & Maintenance Charge determined in accordance with paragraph 10.5(a).
- (c) **(Notifications, payments and adjustments)** DBCT Management will:
  - (1) notify Access Holders of estimated Terminal Operating Costs annually in advance;
  - (2) recover such estimated costs monthly;
  - (3) notify Access Holders of any applicable adjustment at the end of each Financial Year – to recover any shortfall or to reimburse Access Holders

in the event of under-recovery or over-recovery of Terminal Operating Costs by DBCT Management; and

- (4) recover or reimburse at the end of each quarter and at the end of a Financial Year (as the case may be), such amount (if any) as referred to in Section 10.5(c)(3).

#### **10.6 Review of TIC applicable under Access Agreements in form of the Standard Access Agreement**

- (a) **(Reviews of TIC during a Pricing Period)** On each occasion referred to in Schedule C, Section 3(a) or 3(e) during a Pricing Period, DBCT Management will amend the TIC for a Terminal Component then applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, to the extent that it is affected by the occasion, in accordance with Schedule C, Section 3. The TIC will be amended (effective from the relevant date in Schedule C, Section 3(c) or 3(i)) when DBCT Management gives notice to the relevant Access Holder of the amended TIC.
- (b) **(Arbitration of Dispute arising from reviews of TIC during a Pricing Period)** In any Arbitration of the kind referred to in Section 10.1(d) of this Framework, the Arbitrator:
  - (1) must apply Schedule C, Section 3 to determine an amended TIC;
  - (2) if the resultant amended TIC for the Access Holder is higher than the Ceiling TIC applicable at the time of Arbitration or lower than the Floor TIC applicable at that time, must not apply the amendment to the TIC that would otherwise result under paragraph 10.6(b)(1) to the extent that that amendment would otherwise result in an amended TIC that is higher than the Ceiling TIC or lower than the Floor TIC;
  - (3) if the Dispute relates to a Review Event referred to in paragraph 10.6(b) of the definition of Review Event, must:
    - (A) make a determination in respect of the amended TIC to apply in accordance with Schedule C, Section 3(g) that is consistent with any Price Ruling by the Expansion Arbitrator in respect of the relevant Socialised Expansion; and
    - (B) accept that Capital Expenditure in respect of the relevant Socialised Expansion is prudent if the Expansion Arbitrator has determined under Section 11.5 that that Capital Expenditure is prudent and take that prudent Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the amended TIC.

Nothing in this paragraph precludes the Arbitrator from determining that any additional Capital Expenditure incurred in respect of the relevant Socialised Expansion is also prudent and also taking that additional Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the amended TIC to apply in accordance with Schedule C, Section 3(g); and

- (4) if the Dispute relates to a Review Event referred to in paragraph 10.6(c) of the definition of Review Event, must accept that NECAP is prudent and include it in the determination of the 'Adjustment amount' under Schedule C, Section 3(h) if required by Section 11.10(b) of this Framework and may otherwise accept that NECAP is prudent and include it in the determination of the 'Adjustment amount' under Schedule C, Section 3(h) having regard to the matters set out in Section 11.10(c) of this Framework.
- (c) **(Date amended TIC takes effect)** Until the amended TIC is determined as provided for in this Section 10.6 and Schedule C, Section 3, the TIC applicable immediately prior to the occasion referred to in Schedule C, Section 3(a) or 3(e) will remain in effect and continue to be due and payable. When DBCT Management gives notice or the Arbitrator communicates the determination of the amended TIC determined as provided for in this Section 10.6 and Schedule C, Section 3, the amended TIC will apply with effect from the relevant date in Schedule C, Section 3(c) or 3(i) (**Effective Date**) and DBCT Management will calculate the amount which would have been payable to it by way of Monthly Payments in the period since the Effective Date if that amended TIC had been in effect from that time and the relevant party must pay to the other party the difference between that amount and the amount actually received by DBCT Management by way of Monthly Payments between the Effective Date and the date DBCT Management gives notice or the Arbitrator communicates the determination of the amended TIC.

## 10.7 Cost Allocation

- (a) **(Cost allocation as per Cost Allocation Manual)** Where this Framework provides for:
- (1) the allocation of Terminal Operating Costs among multiple Terminal Components; or
  - (2) the inclusion in the NECAP Asset Base of Capital Expenditure not related to a Terminal Capacity Expansion, and there are multiple Terminal Components,

the cost in question is to be allocated in accordance with the Cost Allocation Manual or, if no Cost Allocation Manual exists, in accordance with the Cost

Allocation Principles. Any Dispute as to the allocation of costs in accordance with the Cost Allocation Manual may be referred to dispute resolution under Section 16 of the Framework.

- (b) **(Preparation of draft Cost Allocation Manual)** When the first Price Ruling is made, DBCT Management must prepare a draft Cost Allocation Manual and submit it to the Independent Expert for approval.
- (c) **(Preparation of revised draft Cost Allocation Manual)** DBCT Management shall, if so requested by the Independent Expert, prepare and submit within 60 days of such request, a revised draft Cost Allocation Manual that satisfies the requirements of the Independent Expert.
- (d) **(Consulting in good faith with the Operator)** DBCT Management shall consult in good faith with the Operator in preparing the Cost Allocation Manual and updating it, from time to time.
- (e) **(Approval of Cost Allocation Manual)** As soon as practicable after the Independent Expert approves the final Cost Allocation Manual, DBCT Management must publish the Cost Allocation Manual on its website.
- (f) **(Cost Allocation Manual requirements)** The Cost Allocation Manual should:
  - (1) provide a transparent basis for assigning costs to separate Terminal Components in different circumstances; and
  - (2) be consistent with the Cost Allocation Principles.
- (g) **(Cost Allocation Principles):** Non-Expansion Costs should be allocated:
  - (A) **(Identifiable cost)** if the cost is uniquely identified or directly incurred in relation to a particular Terminal Component, to that Terminal Component;
  - (B) **(Attributable cost)** if the cost is not an identifiable cost, but there is a reasonable causal relationship between the cost and one or more Terminal Components, to those Terminal Components, in proportion to their reasonably estimated cost drivers; and
  - (C) **(Non-identifiable and non-attributable cost)** if the cost is neither identifiable nor attributable to a particular Terminal Component, on a reasonable basis between the Terminal Components.

## 10.8 Expansion Pricing Principles

- (a) In assessing whether or not Differentiation should apply in respect of a proposed Terminal Capacity Expansion, the following principles shall apply:

- (1) where Socialisation of a Terminal Capacity Expansion would decrease the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a), the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework and the Floor TIC for the Existing Terminal should be determined by reference to the sum of the costs of the Existing Terminal and the costs of the Terminal Capacity Expansion (a **Socialised Expansion**);
  - (2) where Socialisation of a Terminal Capacity Expansion would increase the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a) (a **Cost Sensitive Expansion**), subject to Section 10.8(b), the Terminal Capacity Expansion should be treated as a separate Terminal Component, and the Floor TIC for that Terminal Component determined by reference to the costs of the Terminal Capacity Expansion (and without reference to the costs of the Existing Terminal) (a **Differentiated Expansion Component**).
- (b) A Cost Sensitive Expansion may be treated as forming part of the Existing Terminal (and therefore, not treated as a Differentiated Expansion Component) where circumstances exist that justify Socialisation. In determining whether there are circumstances that warrant Socialisation, consideration must be given to:
- (1) the materiality of the increase in the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a) that would be affected by socialising the Cost Sensitive Expansion;
  - (2) the extent to which assets or infrastructure the subject of the Cost Sensitive Expansion will operate wholly or partly, in an integrated way with the Existing Terminal or as a stand-alone development;
  - (3) the extent to which the Cost Sensitive Expansion is likely to benefit users of the Existing Terminal (for example, such as through higher efficiency, reliability or flexibility of the Existing Terminal);
  - (4) any differences in the risks of providing Access to users of the Existing Terminal in respect of additional Terminal Capacity created by the Cost Sensitive Expansion;
  - (5) the financeability of any proposed expansion pricing arrangement, including by reason of the risk of Differentially Priced Access Holders switching between high and low priced Terminal Capacity that otherwise has identical functionality; and
  - (6) any other factor that the Expansion Arbitrator considers relevant.

It is acknowledged that there may be circumstances in which parts and not the whole of a Cost Sensitive Expansion may be Socialised.

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## 11 Terminal Capacity Expansion

### 11.1 Procedure for determining Terminal Capacity and System Capacity

- (a) DBCT Management will, at each time required in Section 11.1(k), either:
- (1) **(Estimate capacities)** accept an estimation that has been accepted by the Capacity Expert as provided for in Section 11.1(m)(3) of the maximum reasonably achievable capacity (measured in tonnes of coal per Financial Year) of:
    - (A) the Terminal (on a “name-plate capacity” basis) (**Terminal Capacity**), including separately identifying:
      - (i) the capacity of the Existing Terminal (on a “name-plate capacity” basis) (**Existing Terminal Capacity**); and
      - (ii) the capacity of each Expansion Component (on a “name-plate capacity” basis) (each an **Expansion Component Capacity**), which for clarity may constitute either Socialised Terminal Capacity or Differentially Priced Capacity depending upon the nature of the relevant Expansion Component; and
    - (B) the System (**System Capacity**),  
provided that the estimation was accepted by the Capacity Expert as provided for in Section 11.1(m)(3) in the immediately preceding 6 months and there has been no change in any of the factors to be taken into account in estimating the Terminal Capacity, the Expansion Component Capacity or the System Capacity since the estimation accepted by the Capacity Expert that is reasonably expected to materially affect the Terminal Capacity, the Expansion Component Capacity or the System Capacity; or
  - (2) **(Determine capacities after advice and consultation)** (to the extent that there is no estimation as provided for in Section 11.1(m)(3)) acting reasonably and after:
    - (A) taking advice from a Capacity Expert appointed by DBCT Management under this Section 11.1 (**Capacity Expert**); and
    - (B) consultation by DBCT Management and that Capacity Expert with the Operator, Access Holders, any Expansion Parties, and other Service Providers or their respective nominees,

determine Terminal Capacity, Expansion Component Capacity and System Capacity (as applicable) in accordance with this Section 11.1, having regard to:

- (C) **(Terminal operating assumptions)** in respect of Terminal Capacity – the following Terminal operating assumptions:
  - (i) DBCT Management’s obligations, Access Holders’ entitlements under Access Agreements and Existing Users’ entitlements under Existing User Agreements (including taking into account historical and reasonably estimated rates of utilisation of the Terminal Capacity, but also having regard to reasonably foreseeable future changes in capacity utilisation rates);
  - (ii) DBCT Management’s requirement to comply with Good Operating and Maintenance Practice;
  - (iii) the Terminal Regulations;
  - (iv) an objective of maximum reasonably achievable capacity for the Terminal without unduly increasing vessel waiting times as a result of the operation of the Terminal;
  - (v) rail and vessel interfaces with the Terminal;
  - (vi) the estimated additional capacity which it is anticipated will become available in a relevant Financial Year as a result of any proposed Terminal Capacity Expansion; and
  - (vii) any other matter DBCT Management reasonably considers appropriate;
- (D) **(Terminal operating assumptions – Differentiated Expansion Component)** in respect of Expansion Component Capacity for a Differentiated Expansion Component – the Terminal operating assumptions set out at Section 11.1(a)(2)(C), to the extent applicable solely to the Differentiated Expansion Component; and
- (E) **(System operating assumptions)** in respect of System Capacity – the following System operating assumptions (to the extent that such information is available to DBCT Management):
  - (i) operating modes of the System;

- (ii) rail infrastructure characteristics (e.g. single track, double track, passing loops and speed restraints);
  - (iii) the tonnes to be loaded by or on behalf of an Access Holder or Existing User at each relevant train load out facility;
  - (iv) Terminal Capacity as assessed in accordance with Section 11.1(a)(2)(C) and the capacity and performance implications arising out of Terminal interfaces with rail unloading and vessel loading;
  - (v) quantity, configuration and performance characteristics of locomotives and rolling stock;
  - (vi) capacity and performance of mine loading facilities;
  - (vii) the System Master Plan; and
  - (viii) any other matter DBCT Management reasonably considers appropriate.
- (b) **(Additional assumptions)** For clarification, Terminal Capacity, Expansion Component Capacity and System Capacity are to be:
- (1) estimated making a projected allowance (as applicable to either Terminal Capacity and/or Expansion Component Capacity alone or to System Capacity) for interruptions or loss of capacity from maintenance, repairs, inclement weather, breakdowns, derailments, cancellations, loading and unloading issues (including sticky coal), vessel-types (based on a historical analysis);
  - (2) estimated as at the date of estimation and for the Financial Year in which that date falls and for each of the following two Financial Years; and
  - (3) assumed to continue at no lesser rate indefinitely after the periods referred to in Section 11.1(b)(2), except to the extent that (at the time of making the estimation) DBCT Management or the Capacity Expert are actually aware of a reasonably certain future material decrease in capacity (for example, where DBCT Management is aware of a decrease in capacity caused by a planned shutdown in another part of the System).
- (c) **(Disclosure of process and advice)** Subject to any confidentiality restrictions applying to DBCT Management, DBCT Management must disclose to the Access Holders, Access Seekers, Expansion Parties, the Operator and other Service Providers its decision making process in relation to its estimations of

Terminal Capacity, Expansion Component Capacity and System Capacity and provide them with a copy of any report that DBCT Management receives from the Capacity Expert in relation to estimating those capacities. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 11.1(c) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information.

- (d) **(Capacity Expert)** Any Capacity Expert to be appointed by DBCT Management under this Section 11.1 will be:
- (1) where a group of Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage of all Access Holders for that Financial Year object (in accordance with Section 11.1(g)) to the Capacity Expert nominated by DBCT Management, a Capacity Expert appointed in accordance with Section 11.1(g);
  - (2) where a majority of the group of Expansion Parties for an Expansion Component object (in accordance with Section 11.1(g)) to the Capacity Expert nominated by DBCT Management, a Capacity Expert appointed in accordance with Section 11.1(g); or
  - (3) where Section 11.1(d)(1) and 11.1(d)(2) do not apply, a Capacity Expert nominated by DBCT Management.
- (e) **(Notice of proposed Capacity Expert)** DBCT Management will advise all Access Holders (and, where relevant, Expansion Parties) as to the identity of any Capacity Expert it proposes appointing pursuant to Section 11.1(a)(2) and request that any objection to that Capacity Expert be given in writing to DBCT Management within 14 days after receipt of DBCT Management's notice.
- (f) **(Appointment if no objection)** If no group of Access Holders or Expansion Parties determined in accordance with Section 11.1(d) objects in writing to the Capacity Expert nominated by DBCT Management within the 14 day period referred to in Section 11.1(e), DBCT Management will promptly appoint the Capacity Expert nominated by it.
- (g) **(Procedure if objection to proposed Capacity Expert)** If a group of Access Holders or Expansion Parties determined in accordance with Section 11.1(d) objects within the 14 day period provided for in Section 11.1(e):
- (1) DBCT Management will promptly request the Resolution Institute to nominate a Capacity Expert, and it will engage the Capacity Expert so nominated; and

- (2) the 6 month period referred to in Section 11.1(k)(1) will not commence until the Capacity Expert has been nominated by the Resolution Institute.
- (h) **(Independent Capacity Expert to consult)** DBCT Management must require its Capacity Expert to consult (as far as is practicable, and to the extent that consultation has not already occurred in respect of a relevant estimation of Terminal Capacity, Expansion Component Capacity or System Capacity (as applicable)) with the Operator, Access Holders, any Access Seekers and other Service Providers, or their respective nominees with respect to the factors referred to in Sections 11.1(a)(2)(C), and 11.1(a)(2)(E).
- (i) **(Objection to estimation by Capacity Expert)** Despite Section 16, DBCT Management's estimation of Terminal Capacity, Expansion Component Capacity and System Capacity under Section 11.1(a) may not be disputed or challenged (including under Section 16 of this Framework) or otherwise subject to review by or on behalf of Access Holders or Access Seekers:
- (1) except on the basis that it has been determined in bad faith, in breach of the Framework or an Access Agreement, or on the basis of a manifest error;
- (2) unless Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage for all Access Holders for that Financial Year each object on the same or similar grounds; or
- (3) unless Expansion Parties whose combined projected Annual Contract Tonnage would amount to greater than 50% of the projected Expansion Component Capacity, each object on the same or similar grounds.
- (j) **(Determination of Capacity conclusive)** The capacity of the Terminal, Differentiated Expansion Component and System Capacity estimated under Section 11.1(a) (or, if applicable, Section 16) will constitute Terminal Capacity, Expansion Component Capacity or System Capacity (as relevant) for the purposes of this Framework until it is next reassessed.
- (k) **(Times for re determination of Capacity)** Terminal Capacity, Expansion Component Capacity and System Capacity will be assessed by DBCT Management in accordance with Section 11.1(a) and will be reassessed during the Term of this Framework:
- (1) before entering into any new Access Agreement or otherwise increasing Aggregate Annual Contract Tonnage unless the Terminal Capacity, the Expansion Component Capacity and the System Capacity was assessed or reassessed in accordance with Section 11.1(a) in the immediately preceding 12 months and there has been no change in any

- of the factors to be taken into account in estimating the Terminal Capacity, the Expansion Component Capacity or the System Capacity since that time that is reasonably expected to materially affect the Terminal Capacity, the Expansion Component Capacity or the System Capacity;
- (2) during each stage of a Feasibility Study being conducted by DBCT Management in accordance with Section 5.10;
  - (3) (subject to Section 11.1(g)(2)) not later than 6 months, or such time as otherwise agreed by the parties, after each of the following:
    - (A) the Completion of each Terminal Capacity Expansion; and
    - (B) the time at which DBCT Management becomes aware of the completion of each material and discrete expansion (such materiality to be determined by DBCT Management acting reasonably) of any other component of the System; or
  - (4) otherwise at DBCT Management's discretion.
- (l) **(Notification of assessments of Terminal Capacity, Expansion Component Capacity and System Capacity)** DBCT Management must promptly notify DBCT Holdings, each Access Holder and each Access Seeker of each capacity assessment undertaken in accordance with this Section 11.1.
- (m) **(Requirements for Capacity Expert report process)** The following will apply to a Capacity Expert's report for the purposes of Section 11.1(a):
- (1) subject to confidentiality restrictions applying to DBCT Management, DBCT Management must provide to the Capacity Expert all relevant information which DBCT Management has or to which it has access, to assist the Capacity Expert to reach his or her estimation. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 11.1(m) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information;
  - (2) DBCT Management must, as far as practicable, use reasonable endeavours to work cooperatively with each other Service Provider (for example by regularly providing information relevant to System Capacity) and, as far as practicable, using reasonable endeavours to agree on the joint engagement of Capacity Experts for the purposes of both this Framework and in respect of similar obligations by other Service Providers; and
  - (3) if the Capacity Expert reasonably considers that there is either agreement or broad consensus amongst stakeholders in the Dalrymple

Bay Coal Chain as to Terminal Capacity, Expansion Component Capacity or System Capacity (such agreement or consensus having been reached having regard to the Capacity Expert's report(s)), the Capacity Expert must accept that agreement or broad consensus as evidence of Terminal Capacity, Expansion Component Capacity or System Capacity (as the case may be) except to the extent that the Capacity Expert reasonably forms the opinion that there is compelling evidence to the contrary.

- (n) **(Tonnages under Access Agreements and Existing User Agreements must not exceed System Capacity)** DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new Access Agreement) exceed the System Capacity (as determined for a relevant time), unless otherwise required to do so by the Access Framework (including pursuant to Section 11.3), law, or an agreement relating to its tenure of the Terminal including the Framework Agreement or the Port Services Agreement. For clarification:
- (1) **(Access Agreements can be conditional on capacity resulting from a Terminal Capacity Expansion)** this does not prohibit DBCT Management from entering into a Conditional Access Agreement as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on the Completion of the relevant Terminal Capacity Expansion will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the Completion of the relevant Terminal Capacity Expansion); and
  - (2) **(Framework not breached if System Capacity exceeded after good faith reasonable efforts)** DBCT Management will not be in breach of this Framework if it has complied with this Framework (or made good faith and reasonable attempts to comply) but the re-determination of System Capacity in accordance with Section 11.1(k) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (o) **(Protection of DBCT Management)** Notwithstanding any other provision of this Framework, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this Section 11.1, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) to any Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder which executes it):
- (1) for any breach of this Section 11.1;

- (2) for any delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity, Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
  - (3) if one or more factors related to utilisation of capacity of the Terminal, or any other part of the System subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under a Standard Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor) provided that such factor is not a breach by DBCT Management of any other part of this Framework or an Access Agreement; or
  - (4) for any defect, error or omission on the part of the Capacity Expert appointed under Section 11.1.
- (p) **(Recovery of Capacity Expert's costs)** The costs of a Capacity Expert appointed under Section 11.1(d):
- (1) following the Completion of and handover to the Operator of a Terminal Capacity Expansion will be borne by DBCT Management, and may be included in the prudent Capital Expenditure for the Terminal Capacity Expansion as an Other Cost in accordance with Section 11.5(a)(3)(B); and
  - (2) in all circumstances other than as described in Section 11.1(p)(1), be borne by DBCT Management.
- (q) **(Provisional allocation pending determination of Capacity)** Notwithstanding any other provision of this Framework, DBCT Management may, on a provisional basis, allocate after the Completion of a Terminal Capacity Expansion the anticipated increase in Terminal Capacity and Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) until Terminal Capacity, Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) and System Capacity is determined in accordance with Section 11.1(k).

## 11.2 Terminal Capacity Expansion consultation

- (a) **(Meeting agendas)** DBCT Management will hold meetings with Access Holders and, where they exist, Expansion Parties not less than twice per Financial Year to consult in good faith upon the following issues:
  - (1) current Terminal Capacity, Expansion Component Capacity and System Capacity;

- (2) constraints on current Terminal Capacity, Expansion Component Capacity and System Capacity including the impact on vessel waiting times and Access Holder transport costs;
  - (3) future contracts/forecasts that may impact on Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (4) significant issues relevant to Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (5) the timing and nature of the next Terminal Capacity Expansion (if any) and the impact on current capacity requirements, pricing and the Terminal Master Plan and System Master Plan; and
  - (6) any proposed changes to the Terminal Regulations.
- (b) DBCT Management will also hold such meetings to consult in good faith upon these issues in respect of Differentially Priced Capacity with Differentially Priced Access Holders for the relevant Differential Expansion Component.
  - (c) **(Meeting administration)** DBCT Management will distribute, in a timely manner, agendas, detailed briefing material and a copy of the minutes of each of these meetings to all Access Holders, Expansion Parties and DBCT Holdings.
  - (d) **(Separate meetings with Expansion Parties)** For the avoidance of doubt, nothing in this Section 11.2 limits or restricts DBCT Management from meeting separately with Expansion Parties to the extent that the matters raised relate only to a Differentiated Expansion Component.

### 11.3 General obligation to undertake Terminal Capacity Expansions

- (a) Subject to Sections 11.7 and 11.8 of this Framework, DBCT Management will undertake Terminal Capacity Expansions as are necessary to:
  - (1) **(Accommodate growth)** accommodate the actual and reasonably anticipated future growth of demand (having regard to Access Applications received by DBCT Management and other relevant factors) for the use of the Terminal by Access Holders and Access Seekers;
  - (2) **(Eliminate shortfalls in Terminal Capacity)** eliminate sustained shortfalls in actual Terminal Capacity below the aggregate of Annual Contract Tonnages of Access Holders and Existing Users, whatever the reason for such shortfalls;
  - (3) **(Good Operating and Maintenance Practices)** ensure that the Terminal complies with Good Operating and Maintenance Practice in respect of quality standards for such facilities, good environmental practice and applicable environmental standards; and

(4) **(Laws)** comply with Approvals and applicable laws,

provided that DBCT Management will nevertheless have regard to the System Master Plan and the expected capacity of other components of the System, with the intention that the capacity of the Terminal will (as far as practicable and economic and can reasonably be anticipated) not significantly and disproportionately exceed System Capacity for more than 12 months after the Completion of a Terminal Capacity Expansion.

(b) **(Factors to be taken into account)** It is recognised that:

(1) the name-plate capacity of each individual component of the System will, on a "stand alone" basis at all times, be likely to exceed the aggregate System Capacity to some extent; and

(2) DBCT Management does not have any control over any part of the System other than the Terminal, and DBCT Management's estimate of expected capacity of the other components of the System will have limited accuracy (for example, because of changes in or operation of the System or the operation of any upstream components of the System in relation to the Terminal, delays in expansions of other parts of the System (including in the circumstance in which another Service Provider delays an expansion which was provided for in a System Master Plan) and other differences to DBCT Management's assumptions).

(c) **(Protection of DBCT Management)** Accordingly DBCT Management will not have any liability to an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 11.3, even if it does not actually comply with this Section 11.3.

#### **11.4 Accommodation of Capacity**

(a) **(General obligation to accommodate Access Applications)** Subject to Sections 5.4(l), 11.7 and 11.8 of this Framework, and the proviso in Section 11.3(a), DBCT Management will use best endeavours to ensure that, as soon as reasonably practical after DBCT Management receives from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement that will be unconditional and legally binding and require the Access Seeker to obtain Handling of coal at the Terminal for a period in excess of 5 years (or 10 years or more Handling of coal if acceptance of the offer would require a Capacity Expansion), the Terminal is able to Handle that coal without a material and sustained increase in:

(1) vessel waiting times; or

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

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

- (b) **(Bona fide offers and reasonably creditworthy Access Seekers)** Without limiting the circumstances in which DBCT Management may be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement, if:

- (1) DBCT Management receives an offer from an Access Seeker to enter into an Access Agreement on the terms of the Standard Access Agreement, or receives an offer from an Access Seeker to enter into an Access Agreement where any departure of the terms of that offer from the terms of a Standard Access Agreement is not likely to increase cost (direct or indirect) or risks to DBCT Management; and

- (2) the Access Seeker has satisfied DBCT Management (acting reasonably) in accordance with Section 5.9 that the Access Seeker (or any relevant Security provider) has the financial and other relevant resources to enable it to discharge its obligations under the relevant Access Agreement,

then for the purpose of this Section 11.4, DBCT Management will be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement.

## 11.5 Undertaking Terminal Capacity Expansions

- (a) **(Terminal Capacity Expansion application to be lodged with Arbitrator)** If DBCT Management proposes to expand the Terminal during the Term of the Framework (either because it is obliged to do so under this Framework or wishes to do so without being obliged to do so), then in respect of the particular expansion to the Terminal it will submit to an arbitrator appointed in accordance with Section 16.4 (**Expansion Arbitrator**) a Terminal Capacity Expansion application, which must include the following information:

- (1) details of the scope of the proposed Terminal Capacity Expansion, including:
  - (A) confirmation of Terminal operating assumptions and System operating assumptions in the FEL 3 Feasibility Study, including confirmation of the capacity of the Existing Terminal and

System Capacity prior to the proposed Terminal Capacity Expansion and the proposed Expansion Component Capacity; and

- (B) either:
  - (i) confirmation that, and details of how, the Terminal Capacity Expansion complies with both the current Terminal Master Plan and System Master Plan; or
  - (ii) a justification acceptable to the Expansion Arbitrator as to why it does not, and need not, comply with the Terminal Master Plan or System Master Plan, but will nevertheless be economically and operationally prudent;
- (2) the terms and conditions of any Access Agreements that are conditional on the Terminal Capacity Expansion;
- (3) the estimated cost of the proposed Terminal Capacity Expansion categorised into:
  - (A) works that are proposed to be managed under the Tender and Contract Management Process (TCMP) (Contract Costs); and
  - (B) work and costs which are not to be managed under the TCMP (Other Costs);
- (4) the estimated timetable for the proposed Terminal Capacity Expansion;
- (5) a high level project execution strategy, which will, among other things, identify risks and risk mitigation;
- (6) either:
  - (A) evidence that the 60/60 Requirement has been complied with; or
  - (B) DBCT Management's justification for the Terminal Capacity Expansion without the 60/60 Requirement having been complied with;
- (7) the process for the tendering and awarding of contracts, standard form contract terms, and the contract management process for the management of contracts post award (these processes together constitute the TCMP);
- (8) the process by which costs will be expended, tracked and managed if they are not covered by the TCMP; and

- (9) an application for a Price Ruling in respect of the Terminal Capacity Expansion, if one has not already been made.
- (b) **(Monthly reporting to Expansion Arbitrator)** DBCT Management will also submit to the Expansion Arbitrator (with a copy to each Access Holder) a monthly report setting out:
  - (1) the status of each contract awarded under the TCMP, including the degree of completion and the anticipated final cost inclusive of actual and provisioned variations;
  - (2) the status of each element of the Other Costs, including the costs incurred, the degree of completion and the anticipated final costs; and
  - (3) if anticipated final costs vary from the costs initially forecast, details of and the reasons for the variation.
- (c) **(Expansion Arbitrator to confirm Price Ruling following application for Expansion)** Following receipt of an application under Section 5.12(a)(2) or 11.5(a)(9), the Expansion Arbitrator will provide to DBCT Management and each Expansion Party notice of, in respect of a relevant Expansion Component:
  - (1) where a Price Ruling has been made in accordance with Section 5.12(c), the content of the Expansion Arbitrator's ruling and details of any material changes apparent in the application which may require a new or varied Price Ruling to be made, including the extent to which the circumstances of the Expansion Component vary from the assumptions made in the original Price Ruling;
  - (2) where a Price Ruling has not been made in accordance with Section 5.12(c), but a Price Ruling Application has been made under Section 5.12(a)(2) or 11.5(a)(9), a copy of the Price Ruling Application and information on the Expansion Arbitrator's process for determining a Price Ruling for that Terminal Capacity Expansion.
- (d) **(DBCT Management to provide information to the Expansion Arbitrator)** DBCT Management will provide all information required by the Expansion Arbitrator or any advisor to the Expansion Arbitrator to enable the Expansion Arbitrator to assess the prudence of any proposed or actual Capital Expenditure. Prior to disclosing any confidential information, DBCT Management must ensure that the Expansion Arbitrator (and any advisor to the Expansion Arbitrator) enters into a confidentiality deed with DBCT Management to the effect that the Expansion Arbitrator (and any advisor to the Expansion Arbitrator) must keep the information confidential and only use that information for the purpose of its engagement under this Section 11.5.
- (e) **(Expansion Arbitrator's acceptance of prudence of contract costs)**

- (1) The Expansion Arbitrator will accept that Capital Expenditure in respect of a proposed Expansion Component is prudent and any determination by an Arbitrator of a Floor TIC or amended TIC to apply in respect of the Existing Terminal or a Floor TIC to apply in respect of the Differentiated Expansion Component (as relevant) following the Completion of the Terminal Capacity Expansion should take that Capital Expenditure into account in accordance with Section 10.4(f) or 10.6(b)(3) (as applicable) if DBCT Management can demonstrate and the Expansion Arbitrator is satisfied that:
  - (A) the scope of the works complies with Section 11.5(f) and the requirements of that Section have been met; and
  - (B) the standard and specifications of the works is appropriate, as provided for in Section 11.5(g) and the requirements of that Section have been met; and
  - (C) the works were undertaken in accordance with the approved TCMP or were otherwise reasonable, as provided for in Sections 11.5(i), 11.5(j), 11.5(k) and 11.5(l) and the requirements of those Sections have been met.
- (2) In the event that the Expansion Arbitrator considers that any elements specified in Section 11.5(e)(1) are not satisfactorily met, the Expansion Arbitrator will undertake an assessment of the prudence of the Capital Expenditure as if the works were Other Costs, as provided for in Section 11.5(m). In undertaking this assessment, the Expansion Arbitrator will take into account the extent to which DBCT Management has achieved compliance with the expansion approval process outlined in this Section 11.5, including consistency with any assumptions associated with a Price Ruling.

(f) **(Expansion Arbitrator's acceptance of scope of works)**

- (1) The Expansion Arbitrator will accept the scope of the proposed Terminal Capacity Expansion if it is satisfied that:
  - (A) the scope is consistent with the current Terminal Master Plan and System Master Plan and applicable laws;
  - (B) the 60/60 Requirement has been complied with; and
  - (C) (together with any other relevant expansions of one or more components of the System) the Terminal Capacity Expansion will result in an increase in System Capacity and will not be expected to result in Terminal Capacity significantly and disproportionately exceeding System Capacity for more than 12 months after Completion of a Terminal Capacity Expansion.

- (2) The Expansion Arbitrator will accept or not accept the scope within 20 Business Days of being provided with all of the information it requires to assess the proposed works and the criteria listed in Section 11.5(f)(1). If the Expansion Arbitrator does not accept the scope of the proposed works, it will give reasons in writing.
- (g) **(Expansion Arbitrator's acceptance of standard and specifications of works)**
- (1) The Expansion Arbitrator will review the standard and specifications of works relating to a Terminal Capacity Expansion and all relevant contract terms to ensure that the works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement, or, in the case of contract terms, are not likely to materially adversely impact on a prudent balance between price and risk.
  - (2) The Expansion Arbitrator will accept or not accept on a contract by contract basis the standard, specifications, and contract terms for the works within 20 Business Days of receipt of the technical specifications, design drawings and contract terms for the works and any other information needed by the Expansion Arbitrator to review the standard, specifications and contract terms for the works. If the Expansion Arbitrator does not accept the standard, specifications and contract terms of the works, it will give reasons in writing.
  - (3) If DBCT Management amends the submitted technical specifications and/or design drawings and/or material contract terms after an approval by the Expansion Arbitrator, DBCT Management will immediately advise the Expansion Arbitrator of the changes. The Expansion Arbitrator will accept or not accept the changes.
- (h) **(60/60 Requirement)**
- (1) **(What is the 60/60 Requirement)** In this Section 11.5, the "60/60 Requirement" is satisfied when:
    - (A) DBCT Management has executed Access Agreements from Access Holders, each of which provides for the Handling of coal for a period of at least 10 years duration, for at least 60% of the proposed Terminal Capacity increment.
    - (B) 60% of all Access Holders and Expansion Parties (as determined by their Annual Contract Tonnages reduced by the relevant exclusions set out in Section 11.5(h)(1)(C)) do not oppose the Terminal Capacity Expansion, having been given the information and notice in Section 11.5(h)(2) at least 15 Business

Days before it is determined whether or not the 60/60 Requirement has been satisfied.

- (C) The relevant exclusions are the tonnages of any Access Holder of existing capacity at the Terminal where the Access Holder is:
  - (i) legally and beneficially, the same entity as; or
  - (ii) a related body corporate of an Access Holder that is legally and beneficially, the same entity as,

an Expansion Party that is within Section 11.5(h)(1)(A). For clarification, where an Expansion Party or Access Holder is, or acts on behalf of, a joint venture, the Expansion Party or Access Holder will only be "legally and beneficially" the same, in respect of both an Access Agreement and an Access Application or two or more Access Agreements and Access Applications, where each of the entities comprising the joint venture relating to each relevant Access Agreement and Access Application is the same (or a related body corporate of the same) entity in each context.

- (2) **(DBCT Management to provide information for 60/60 Requirement process)** DBCT Management will provide the Access Holders and Expansion Parties referred to in Section 11.5(h)(1)(B) relevant to a proposed Terminal Capacity Expansion with the following information, for the purposes of determining whether the 60/60 Requirement can be complied with in respect of a proposed Terminal Capacity Expansion:
  - (A) outline details of the scope of the proposed Terminal Capacity Expansion works;
  - (B) details of how the Terminal Capacity Expansion complies with the current Terminal Master Plan and System Master Plan;
  - (C) without limitation to Section 5.10, provide a copy of the capacity assessment undertaken in accordance with Section 11.1 which separately identifies the capacity of the Existing Terminal and the proposed Expansion Component Capacity;
  - (D) cost estimates for the proposed Terminal Capacity Expansion and each element of the Terminal Capacity Expansion, including contingency, financing and escalation allowances;
  - (E) a schedule of each element of the proposed Terminal Capacity Expansion;

- (F) the projected total Terminal Capacity and System Capacity following the Terminal Capacity Expansion;
  - (G) a high level project execution strategy, which strategy will, among other things, identify risks and risk mitigation;
  - (H) a schedule of likely reductions in Terminal Capacity and System Capacity during construction;
  - (I) an outline of Existing User Agreement tonnages, Access Agreement tonnages, Conditional Access Agreement tonnages and Access Application tonnages and contract periods;
  - (J) an estimate of what effect the proposed Terminal Capacity Expansion will have on each Terminal Component's Terminal Infrastructure Charges and Operation and Maintenance Charges;
  - (K) a notice that the above information is being expressly provided in contemplation of the 60/60 Requirement (even if the notice was given prior to the Commencement Date);
  - (L) where a Price Ruling has been made in respect of a relevant Terminal Capacity Expansion, the content of the Expansion Arbitrator's Price Ruling; and
  - (M) where a Price Ruling has not yet been made in respect of a relevant Terminal Capacity Expansion, the application for a Price Ruling filed with the Expansion Arbitrator under Section 11.5(a)(9).
- (3) **(60/60 Requirement conclusive)** Once evidence of compliance with the 60/60 Requirement has been provided and accepted by the Expansion Arbitrator it will not be subject to further review (provided that the evidence presented was not misleading or deceptive and there has been no dishonesty or manifest error).
- (4) **(60/60 Requirement determines deemed need for Terminal Capacity Expansion)** If Section 11.5(a)(6)(A) applies, the Expansion Arbitrator will confirm the sufficiency (or sufficiencies) of evidence of the 60/60 Requirement within 20 Business Days of receipt of the Terminal Capacity Expansion application. If the Expansion Arbitrator provides such confirmation, it will be deemed to have accepted the need for the Terminal Capacity Expansion.
- (5) **(Expansion Arbitrator review if 60/60 Requirement not met)** If Section 11.5(a)(6)(B) applies, the Expansion Arbitrator will, within 3 months of receipt of the Terminal Capacity Expansion application,

review whether the Terminal should be expanded in the way proposed by DBCT Management. If the Expansion Arbitrator does not accept that the Terminal should be expanded in the way proposed by DBCT Management, it will give reasons in writing.

(i) **(Tender and Contract Management Processes)**

(1) **(General principles for Expansion Arbitrator approval)** The Expansion Arbitrator will approve DBCT Management's TCMP if it is satisfied that it is consistent with the following general principles, namely that the TCMP:

- (A) is in accordance with good industry practice;
- (B) will generate an efficient and competitive outcome;
- (C) will avoid conflict of interest or collusion amongst tenderers;
- (D) is prudent in the circumstances of the Terminal Capacity Expansion project; and
- (E) will avoid unreasonable exposure to contract variation claims.

(2) **(Detailed considerations for Expansion Arbitrator approval)** In particular, in considering whether or not to approve DBCT Management's TCMP, the Expansion Arbitrator will consider whether (amongst other things):

- (A) there is a clear process for the calling of tenders, including having clear specifications for tenders, and processes for mitigating conflicts of interest (except when it is assessed that calling tenders is likely to be less advantageous than an alternative means of negotiating a contract);
- (B) (where applicable) there is a tender assessment process which contains clear and appropriate processes for determining the successful tender, with any decisions to approve a tender that is not the lowest tender being appropriately justified and documented;
- (C) the basis of payment for works is clearly specified and the basis for undertaking the works is in accordance with good commercial practice;
- (D) there is a process for managing contracts before and after award that accords with good commercial practice for a project of the type and scale of the Terminal Capacity Expansion and provides appropriate guidance on the criteria that DBCT Management should apply to decisions regarding the

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

- (i) safety during construction and operation;
  - (ii) compliance with environmental requirements during construction and operation;
  - (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodation of the reasonable requests of Access Holders and Expansion Parties to change the scope and sequence of construction to suit their needs;
  - (v) a prudent balance between:
    - (a) a higher price in return for more certainty as to final cost;
    - (b) a lower price accepting that final cost may be less certain; and
    - (c) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs; and
  - (vii) minimising total project cost which may at times not be consistent with minimisation of individual contract costs;
- (E) there is a process for managing contract variations and/or escalation that occurs post award of a contract, requiring that reasonable consideration be given to managing the risk of contract variations and/or escalation and the allocation of potential risks during the management of the contract and requiring the provision of clear documentary evidence regarding the nature and reasonableness of any variation and/or escalation; and
- (F) DBCT Management has engaged an auditor in accordance with Section 11.5(l) to monitor compliance with the TCMP.
- (3) **(Notification of TCMP decision by Expansion Arbitrator)** The Expansion Arbitrator will within 20 Business Days of the Expansion Arbitrator receiving all the information it requires to assess the TCMP

give DBCT Management a notice in writing whether it will approve or not approve the TCMP, setting out:

- (A) reasons for its decision; and
  - (B) if requested, the way the TCMP should be amended.
- (4) **(Amendment of TCMP)** DBCT Management may at any time and from time to time request amendments to an approved TCMP by giving written notice to the Expansion Arbitrator. Promptly following receipt of a request to amend the TCMP the Expansion Arbitrator will approve or not approve the amendments. In considering such amendments the Expansion Arbitrator will apply Sections 11.5(i)(2) and 11.5(i)(3).
- (j) **(Indicators of prudent contract value)** The Expansion Arbitrator will accept that the value of a contract as awarded is prudent and will include it in his or her determination of the prudent Capital Expenditure for the Terminal Capacity Expansion if:
- (1) the Expansion Arbitrator has approved DBCT Management's TCMP in accordance with Section 11.5(i);
  - (2) the Expansion Arbitrator is satisfied that contract provisions regarding contract variations and escalation accord with good commercial practice; and
  - (3) the auditor engaged in accordance with Section 11.5(l) certifies that the works have been conducted in accordance with the approved TCMP.
- (k) **(Indicators of prudent variations and escalations)** The Expansion Arbitrator will accept that contract variations and/or escalations post award of a contract are prudent and will include them in his or her determination of the prudent Capital Expenditure for the Terminal Capacity Expansion if:
- (1) **(Compliance with TCMP)** a contract which has been accepted as prudent under Section 11.5(j) has been managed in accordance with the approved TCMP;
  - (2) **(Auditor certification)** the auditor engaged in accordance with Section 11.5(l) has certified that contract variations and/or escalations have been handled in a manner consistent with the relevant contract provisions; and
  - (3) **(Variations and escalations)** the Expansion Arbitrator is satisfied that the cost of contract variations and/or escalations is otherwise appropriate, having regard to the following:

- (A) whether adequate consideration was given to properly managing the risk of contract variations and/or escalation or the allocation of potential risks during the awarding and management of the contract;
  - (B) whether the contract has been appropriately managed when regard is had for matters outlined in Section 11.5(i)(2)(D);
  - (C) whether the contract variations and/or escalations are appropriately justified; and
  - (D) whether the contract has been managed with a regard to a prudent balance between costs, schedule and minimising disruption to operating capacity during construction.
- (l) **(Independent external audit)** As part of the implementation of the approved TCMP, DBCT Management will engage an independent external auditor to audit the compliance of DBCT Management's tender and contract management processes with the TCMP approved under this Section 11.5. The process in this regard will be as follows:
- (1) **(Appointment)** DBCT Management will appoint the auditor, subject to obtaining the Expansion Arbitrator's prior approval of the selection of the auditor and the Expansion Arbitrator's prior approval of the terms and conditions of the engagement of the auditor;
  - (2) **(Acknowledgement of duty)** the auditor will be required to acknowledge and accept that the auditor owes a separate contractual duty of care to the Expansion Arbitrator in the provision of the audit and, in the event of a conflict between the auditor's obligations to DBCT Management and its duty of care to the Expansion Arbitrator, the auditor's duty of care to the Expansion Arbitrator will take precedence;
  - (3) **(Audit process to be agreed and approved)** the auditor must agree the processes for conducting an audit with DBCT Management and obtain the Expansion Arbitrator's approval of the audit process. The audit process will consist of a proposed work program, including audit costs (which shall be payable by DBCT Management and included in the prudent Capital Expenditure determined by the Expansion Arbitrator, for the execution of the audit);
  - (4) **(Provision of information to auditor)** DBCT Management will, within a nominated timeframe that is determined by the auditor to be reasonable after consultation with DBCT Management, provide any relevant information the auditor reasonably requires for the purpose of conducting the audit;

- (5) **(Confidentiality deed)** if required by DBCT Management, the auditor will enter into a confidentiality deed with DBCT Management in relation to any information provided by DBCT Management to the effect that it must keep the information confidential and only use that information for the purpose of conducting the audit and completing the audit report detailed below;
  - (6) **(Audit reports)** the auditor will compile an audit report identifying whether DBCT Management has complied in all material respects with the approved TCMP including in relation to contract variations and/or escalation. If the auditor identifies that DBCT Management has not complied in all material respects with the approved TCMP, then the audit report is also to contain details on the relevant non-compliance, any reasons stated by DBCT Management for the relevant non-compliance, and whether the non-compliance was reasonable in the circumstances;
  - (7) **(Progress reports)** the auditor will provide progress reports on the audit process every 6 months. The auditor will also provide a copy of the audit report to DBCT Management and the Expansion Arbitrator upon completion of the audit. The Expansion Arbitrator may have the audit report published on DBCT Management's website if it considers it appropriate; and
  - (8) **(Expansion Arbitrator may require additional detail)** if the Expansion Arbitrator forms the view that any of the auditor's reports (whether progress reports or a final report) are lacking in detail or otherwise deficient, the Expansion Arbitrator may direct DBCT Management to instruct the auditor to review the audit report and, in doing so, to address the concerns of the Expansion Arbitrator.
- (m) **(Prudency of Other Costs)**
- (1) **(Expansion Arbitrator to assess prudency)** The Expansion Arbitrator will undertake an assessment of the prudency of Other Costs, and costs to which Section 11.5(e)(2) applies, after the relevant costs have been expended.
  - (2) **(Considerations relating to prudency)** In assessing whether actual Capital Expenditure is prudent, the Expansion Arbitrator will have regard to the scope of the works undertaken, the standard of the works undertaken and the reasonableness of the cost of works undertaken.
  - (3) **(Factors relevant to scope of work)** In assessing the scope of the works and any associated ancillary services undertaken, the Expansion Arbitrator will have regard to (amongst other things):

- (A) the scope of the proposed Terminal Capacity Expansion;
  - (B) the current Terminal Master Plan and System Master Plan (or to the extent that there is no current System Master Plan, the considerations DBCT Management is required to have regard to under Section 14.2(c));
  - (C) the extent of current contracted demand, likely future demand and any spare capacity considered appropriate, and the need for capital works to accommodate that demand;
  - (D) the appropriateness of DBCT Management’s processes to evaluate and select proposed capital works, including the extent to which alternatives are evaluated as part of the process;
  - (E) the extent to which capital projects that were undertaken were subjected to DBCT Management’s evaluation and selection process; and
  - (F) the extent to which consultation has occurred with relevant stakeholders about the proposed capital works.
- (4) **(Factors relevant to standard and specifications)** In assessing the standard and specifications of the works undertaken, the Expansion Arbitrator will ensure that the proposed works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement and Section 11, Schedule E of this Framework.
- (5) **(Factors relevant to reasonableness)** In assessing the reasonableness of the cost of works undertaken, the Expansion Arbitrator will have regard to, (among other things):
- (A) the level of such costs and risks relative to the scale, nature, cost and complexity of the project;
  - (B) the circumstances prevailing in the markets for engineering, equipment supply and construction;
  - (C) the manner in which the Terminal Capacity Expansion has been managed, including but not limited to the manner in which DBCT Management has balanced the needs of:
    - (i) safety during construction and operation;
    - (ii) compliance with environmental requirements during construction and operation;

- (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodating the reasonable requests of Access Holders to change the scope and sequence of the works undertaken to suit their needs;
  - (v) a prudent balance between:
    - (a) a higher price in return for more certainty as to final cost;
    - (b) a lower price, accepting that final cost may be less certain; and
    - (c) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs; and
  - (vii) minimising the total cost of the Terminal Capacity Expansion which may at times not be consistent with minimisation of individual costs.
- (6) **(Assessing capital expenditure)** In assessing the prudence of Capital Expenditure undertaken, the Expansion Arbitrator will take advice as necessary from independent advisors using appropriate benchmarks and experience, and consult as necessary with relevant stakeholders (the cost of which advisers will be borne by DBCT Management at the discretion of the Expansion Arbitrator).
- (7) **(Audit costs)** The costs of the external auditor referred to in Section 11.5(l) and the advisers referred to in Section 11.5(m)(6) (where payable by DBCT Management) will form part of the Other Costs.
- (n) **(Preliminary assessment of Other Costs)** If requested by DBCT Management, the Expansion Arbitrator will undertake a preliminary assessment of the reasonableness of the Other Costs and shall advise DBCT Management of the results of such assessment. The Expansion Arbitrator will not be bound by this assessment when determining the prudence of actual Capital Expenditure and whether the Capital Expenditure should be included in its determination of the prudent Capital Expenditure for the Terminal Expansion Component.

## 11.6 Interest during construction for Terminal Capacity Expansions

- (a) In the event of a Terminal Capacity Expansion approved by the Expansion Arbitrator pursuant to Section 11.5, construction related financing costs

(which will include a return on capital over the construction period on the Terminal Capacity Expansion expenditure prudently incurred) will be included in the prudent Capital Expenditure for the Terminal Capacity Expansion for the purposes of and taken into account in any determination of a Floor TIC or amended TIC to apply in respect of the Existing Terminal or a Floor TIC to apply in respect of a Differentiated Expansion Component (as the case may be) following Completion of the Terminal Capacity Expansion in accordance with Section 10.4(f) or 10.6(b)(3) (as applicable). The return on capital over the construction period to be included in the prudent Capital Expenditure for the Terminal Capacity Expansion and taken into account in determining the Floor TIC or amended TIC will be calculated at the WACC(1) Rate.

### **11.7 Unreasonable and uneconomic proposed Terminal Capacity Expansions**

If, having regard to:

- (a) the actual or anticipated long-term demand for the Services;
- (b) the extent to which a Terminal Capacity Expansion under the relevant stage of the Terminal Master Plan would produce capacity in excess of demand;
- (c) the cost of the Terminal Capacity Expansion;
- (d) the extent to which DBCT Management can demonstrate on reasonable evidence that the costs of the Terminal Capacity Expansion would be unlikely to be accepted by an Expansion Arbitrator as prudent for the purposes of determining Access Charges in respect of that Terminal Capacity Expansion; and
- (e) the long-term nature of DBCT Management's investment in the Terminal,

the cost to DBCT Management of complying with Sections 11.3, 11.4 and 11.5 would be unreasonable and uneconomic, DBCT Management may submit to DBCT Holdings a written proposal that:

- (f) provides details of the above matters; and
- (g) proposes a modification to or temporary delay in the Terminal Capacity Expansion that would otherwise be required to be undertaken under this Section 11, on terms and conditions that are not inconsistent with the objectives in Clause 2.2 of the Port Services Agreement,

and DBCT Management and DBCT Holdings will consult with one another, the State, Access Holders and Access Seekers, in good faith in respect of the proposal. DBCT Holdings will not unreasonably withhold or delay its agreement to such modification or delay, and for avoidance of doubt, even where its agreement may mean the condition precedent to any Conditional Access Agreement may not be fulfilled. DBCT Management will be relieved of its obligations under this Section 11 to the extent that

DBCT Holdings agrees to modify or delay a Terminal Capacity Expansion (whether such agreement is given under the Framework or the Port Services Agreement).

#### **11.8 Inability to proceed with a proposed Terminal Capacity Expansion**

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

- (a) unable to procure a relevant tenure to or interest in land or seabed necessary for such Terminal Capacity Expansion;
- (b) unable to procure an approval in respect of the occupation or operation of the Terminal, that is required for DBCT Management to lawfully undertake any construction or development otherwise required by a Terminal Capacity Expansion under this Section 11; or
- (c) reasonably of the view that it is not possible to increase Terminal Capacity,

then the obligations of DBCT Management under this Section 11 will be suspended to the extent affected by that inability while that inability continues. DBCT Management will continue to use its best endeavours to (as applicable) procure that approval (including amending, resubmitting or substituting the application and amending the relevant design or work program for the construction or development to procure the approval), procure the interest or tenure, or identify a means of increasing Terminal Capacity.

#### **11.9 Terminal Capacity Expansions to comply with Terminal Master Plan**

If DBCT Management wishes to undertake a Terminal Capacity Expansion under this Section 11, it will do so by undertaking the next applicable stage or stages of development contemplated by the Terminal Master Plan (which is intended to be integrated with the System Master Plan) that are necessary to at least provide the necessary relevant additional Handling capacity.

#### **11.10 Non-expansion Capital Expenditure**

- (a) **(Good Operating and Maintenance Practice and Port Services Agreement)**  
DBCT Management will incur NECAP as is necessary to ensure:
  - (1) that the Terminal complies with Good Operating and Maintenance Practice; and
  - (2) that DBCT Management complies with its obligations under the Port Services Agreement.
- (b) **(Streamlined approval of NECAP)** For the purposes of Section 10.6(b), the Arbitrator must accept that NECAP is prudent and include it in the determination of the amended TIC:

- (1) provided that DBCT Management confirms, to the reasonable satisfaction of the Arbitrator, that the expenditure incurred falls within the definition of Capital Expenditure;
  - (2) if:
    - (A) prior to DBCT Management incurring the NECAP, the NECAP was unanimously approved by all Access Holders whose TIC would be amended by reference to that NECAP; or
    - (B) no Access Holder whose TIC would be amended by reference to that NECAP objected to the NECAP within 20 Business Days after receiving written notice from DBCT Management of NECAP incurred by it which expressly drew their attention to this Section; and
  - (3) if the Operator has recommended in writing the incurring of the NECAP.
- (c) **(Inclusion of NECAP where specific criteria satisfied)** For the purposes of Section 10.6(b), the Arbitrator may accept that NECAP which does not comply with all the conditions in Section 11.10(b) is nonetheless prudent having regard to (among other things):
- (1) the need for the work to be undertaken for the efficient operation and use of the Terminal having regard to demand, cost benefit and other relevant factors;
  - (2) the scope of the work undertaken;
  - (3) the standard of the work undertaken;
  - (4) the circumstances prevailing in the markets for engineering, equipment supply and construction;
  - (5) safety during construction and operation;
  - (6) compliance with environmental requirements during construction and operation;
  - (7) minimising whole of asset life costs; and
  - (8) the advice of independent advisors using appropriate benchmarks and experience and which advisors are appointed (and paid for) by DBCT Management.

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## 12 Terms and conditions of Access

### 12.1 Access Agreements

- (a) **(Standard Access Agreement guide for all Access)** The granting of Access will be underpinned by the Standard Access Agreement.
- (b) **(Parties to Access Agreements)** The parties to each Access Agreement will include DBCT Management, DBCT Trustee and the relevant Access Holder.
- (c) **(Consistency with Standard Access Agreement)** If the Access Seeker so requires (although DBCT Management and the Access Seeker are able to agree otherwise), the Access Agreement will be substantively identical to the Standard Access Agreement.
- (d) **(Different terms)** DBCT Management or an Access Seeker may seek Access on terms which are different from the Standard Access Agreement.
- (e) **(Standard Access Agreement is guide for access negotiations)** For Access required on terms other than the Standard Access Agreement, the terms of the Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement.
- (f) **(Different Terms in a Conditional Access Agreement)** If an Access Seeker is unwilling to agree to any Different Terms required by DBCT Management in respect of the Conditional Access Agreement and DBCT Management or the Access Seeker Disputes the Different Terms, the Conditional Access Agreement to be executed will take effect subject to any new or amended Different Terms that the Expansion Arbitrator determines or approves arising out of the Dispute.
- (g) **(Execution copies to be prepared)** Once an Access Seeker has notified DBCT Management that it is satisfied with the terms and conditions of the Access Agreement as drafted, DBCT Management will, as soon as reasonably practicable, provide a final Access Agreement to the Access Seeker for execution.
- (h) **(Prompt execution)** The parties will use reasonable efforts to duly execute the final Access Agreement as soon as practicable after negotiations are finalised.

## 12.2 Minimum Term of Access Agreements

- (a) **(10 years where Terminal Capacity Expansion required)**
  - (1) An Access Agreement which will, if entered into by DBCT Management, require a Terminal Capacity Expansion, must:
    - (A) provide for the Handling of coal for a minimum term of 10 years; and
    - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage earlier than the end of that 10 year period,

except for any right of DBCT Management to terminate for default.

- (2) A series of Access Agreements which will, if entered into by DBCT Management with an Access Seeker, require a Terminal Capacity Expansion must:
  - (A) provide for the Handling of coal for a minimum Weighted Average Term of 10 years; and
  - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage under any Access Agreement in the series earlier than the tenth anniversary of commencement of the term of the latest-dated Access Agreement in the series, except for any right of DBCT Management to terminate for default.
- (b) **(Replacement Agreements for existing mines)** An Access Agreement in respect of an existing mine for which there is already an Access Agreement may be for any term, but:
  - (1) if it is for less than 5 years that term and the relevant tonnages must correspond with the expected remaining life of that mine; and
  - (2) no option to extend the term may be granted under it if the term is for less than 10 years.
- (c) **(Constraints on term for new mine)** The term of an Access Agreement relating to a new mine (including a mine where production is being resumed after a full closure or a sustained period of dormancy) may be for any term, but:
  - (1) if it is for a term of less than 5 years, DBCT Management may reserve the right to terminate it on not less than 12 months' notice if:
    - (A) DBCT Management executes an Access Agreement for a period in excess of 5 years, commencing during that term; and
    - (B) DBCT Management would have been unable to execute that new Access Agreement without a Terminal Capacity Expansion of the Terminal, had the first mentioned Access Agreement not been terminated at that time; and
  - (2) no option to extend the term may be granted under it if the Access Agreement provides for the Handling of coal for a term of less than 10 years.
- (d) **(Increased Tonnage or term is deemed new Access Agreement)** For clarification, increasing the term of, or Annual Contract Tonnage under, an Access Agreement will be taken to constitute a separate Access Agreement in respect of the increased term or tonnage for the purposes of this Section 12.2.

- (e) **(Clarification re options)** Reference to an Access Agreement in this Section 12.2 does not include an Access Agreement resulting from the exercise of an option to renew or extend the term under a previous Access Agreement.

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## **13 Whole of supply chain efficiency**

### **13.1 Engagement in Dalrymple Bay Coal Chain efficiency improvement**

DBCT Management will, on a “best endeavours” basis, engage with other stakeholders to develop and implement mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain (including forums established pursuant to or arising out of a Memorandum of Understanding dated 1 April 2008 between stakeholders in the DBCT Coal Chain or any subsequent agreement or arrangement replacing or pursuant to that Memorandum of Understanding).

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## **14 Master plans**

### **14.1 Terminal Master Plan**

- (a) **(What the Terminal Master Plan is)** The Terminal Master Plan is the framework and reasoning for the expansion of the Terminal in the most logical and efficient way. It is intended to be a part of, and integrated with, the System Master Plan (and to the extent that at any time there is no System Master Plan, having regard to DBCT Management’s knowledge of the System and System Capacity for the relevant period).
- (b) **(Schedule F)** Until changed pursuant to the Framework and the Port Services Agreement, the Terminal Master Plan is the Terminal Master Plan in Schedule F.
- (c) **(Annual review)** DBCT Management must review the Terminal Master Plan at least annually and otherwise in accordance with its obligations under the Port Services Agreement.
- (d) **(Consultation)** Without limiting Section 14.1(c) DBCT Management must consult with all other Service Providers, Access Holders, Access Seekers and the Operator in respect of any proposed amendment to the Terminal Master Plan.
- (e) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Master Plan available to each other Service Provider and to each Access Holder and Access Seeker and the Operator (which may be by way of reference to a website) promptly after each amendment of the Terminal Master Plan.

## 14.2 System Master Plan

- (a) **(Participate in System Master Planning)** DBCT Management must use its reasonable endeavours to:
  - (1) (to the extent that it has not already occurred at the Commencement Date) reach agreement with each other Service Provider and DBCT Holdings (after consultation with those stakeholders and with all Access Holders and Access Seekers and the Operator) on a System Master Plan; and
  - (2) review (and if necessary revise) that System Master Plan by agreement with each other Service Provider, following ongoing consultation with all the above mentioned stakeholders.
- (b) **(Withdrawal from System Master Planning)** DBCT Management may at any time, acting reasonably, propose amendments to an existing or proposed System Master Plan. If after a reasonable time each other Service Provider does not agree to the amendments proposed by DBCT Management, DBCT Management may withdraw its agreement in respect of that System Master Plan in which case there will be assumed to be no System Master Plan for the purposes of this Framework. DBCT Management will publish on its website its reasons for withdrawing its agreement to a System Master Plan.
- (c) **(If no System Master Plan)** If at any time for any reason there is (or is deemed to be) no System Master Plan in force, where a provision of this Framework requires DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) to have regard to a System Master Plan, DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) will have regard to the Terminal Master Plan together with what it reasonably considers to be the present and likely future state of the other relevant components of the System and what DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) reasonably understands to be generally accepted System operating assumptions.
- (d) **(Protection of DBCT Management)** DBCT Management will not be liable to an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 14.
- (e) **(DBCT Management's obligations in System Master Planning process)** The following apply to DBCT Management in relation to its endeavours to agree a System Master Plan pursuant to Section 14.2(a) and 14.2(b):

- (1) DBCT Management must fully and promptly provide to all other relevant stakeholders all information (to the extent that it is available to DBCT Management) which might reasonably be considered to be relevant for the purpose of determining a System Master Plan (but this does not require DBCT Management to disclose any information which could reasonably be considered to be commercially sensitive to it, any Access Holder or Access Seeker or any other person); and
- (2) DBCT Management must, as far as practicable, work cooperatively with each other Service Provider (for example by regularly providing information relevant to System Capacity and, as far as practicable, using reasonable endeavours to agree on the joint engagement of Capacity Experts for the purpose of the Framework and similar obligations by other Service Providers).

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## 15 Governing Law

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

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## 16 Dispute resolution

### 16.1 Disputes

- (a) **(Disputes under this Framework)** If any dispute or question arises under or in relation to this Framework, including in relation to the negotiation of Access between an Access Seeker and DBCT Management (Dispute) then, unless otherwise expressly agreed by both parties in writing, such Dispute will be resolved in the manner specified in this Framework (where applicable) and in accordance with this Section. Without limitation to the forgoing, any dispute concerning:
  - (1) the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any consequential changes in the drafting of the provisions of the Access Agreement); or
  - (2) the review during a Pricing Period of the Access Charges applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement in accordance with Section 10.6 of this Framework,

is a Dispute under this Framework and will be resolved in the manner specified in this Framework and in accordance with this Section.

- (b) **(Notice of Dispute)** Either party may give to the other party to the Dispute notice in writing (Dispute Notice) specifying the Dispute and requiring that it be dealt with in the manner specified in this Framework (where applicable) and as set out in this Section 16.
- (c) **(Disputes under Access Agreements)** Unless otherwise specified by this Framework or agreed by the parties, disputes under an Access Agreement will be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Framework.
- (d) **(Dispute under Deed Poll)** Subject to clause 9.2.5 of the Deed Poll, the courts of Queensland have exclusive jurisdiction to determine any disputes arising under the Deed Poll.

## 16.2 Chief Executive resolution

- (a) **(Reference to CEOs)** Unless otherwise agreed by both parties or provided for in this Framework (including where the Framework provides that a Dispute or other matter is to be referred to or determined by an Independent Expert (or Expert Determination) or an Arbitrator (or Arbitration)), any Dispute will be referred in the first instance and in any event within 10 Business Days of the giving of the Dispute Notice to the Chief Executive of DBCT Management (or his or her nominee) and the Chief Executive of the Access Seeker or Access Holder (or his or her nominee) for resolution.
- (b) In the event that:
  - (1) resolution is not reached within 10 Business Days of referral; or
  - (2) either Chief Executive appoints a nominee in accordance with this Section 16 that is unacceptable to the other party,

where this Framework provides that the Dispute is to be referred to Expert Determination (or determination by an Independent Expert), the Dispute will be referred to an Independent Expert in accordance with Section 16.3 unless otherwise agreed by the parties. All other Disputes will be referred to Arbitration in accordance with Section 16.4.

## 16.3 Expert Determination

Where a matter is referred to Expert Determination (or determination by an Independent Expert) in accordance with Section 16.2 or as otherwise specified in accordance with this Framework, then the following will apply:

- (a) **(Appointment)** An Independent Expert may be appointed by the parties, or where agreement cannot be reached by the parties within five Business Days, by the Resolution Institute.
- (b) **(Criteria for Independent Expert)** In any event the Independent Expert must:
- (1) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
  - (2) have no interest or duty which conflicts or may conflict with his or her function as Independent Expert, he or she being required to fully disclose any such interest or duty before his or her appointment; and
  - (3) not be a current or immediate past employee of the Access Seeker or Access Holder, or DBCT Management or of a Related Body Corporate of either of them.
- (c) **(Acceptance of appointment)** The Independent Expert appointed pursuant to this Section 16.3 must not act until the Independent Expert has given written notice of the acceptance of his or her appointment to both parties.
- (d) **(Provision of information to Independent Expert)** The parties must upon request by the Independent Expert, provide or make available to the Independent Expert:
- (1) all information in their possession or control (other than Confidential Information);
  - (2) all Confidential Information (subject to entry into arrangements to preserve confidentiality which are acceptable to all relevant parties, acting reasonably); and
  - (3) all other assistance,
- that the Independent Expert may reasonably require. Any such information or assistance must be provided as soon as reasonably practicable. Any determination made by an Independent Expert in relation to a Dispute must be consistent with the provisions of this Framework;
- (e) **(Determination to be given to each party)** The Independent Expert will provide both parties with a copy of the written determination in relation to the Dispute within a reasonable time after his or her appointment.
- (f) **(Confidentiality)** The Independent Expert appointed pursuant to this Section 16.3 is required to undertake to the parties in writing to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her duties.

- (g) **(Not arbitration)** Any person nominated as an Independent Expert pursuant to this Section 16.3 is deemed to be and must act as an Independent Expert and not as an arbitrator. The law relating to arbitration including, without limitation, the Commercial Arbitration Act 2013 (Qld) as it may be amended from time to time, does not apply to the Independent Expert or to the determination or to the procedures by which the Independent Expert may reach that determination.
- (h) **(Independent Expert's decision final)** In the absence of manifest error, the decision of the Independent Expert is final and binding upon the parties. If a party believes that there was a manifest error it may refer the matter to the Arbitrator for a determination in accordance with Section 16.4. If the Arbitrator determines that there was a manifest error, then the parties may agree to refer the Dispute to another Independent Expert in accordance with this Section 16.3, or failing such agreement, either party may refer the Dispute to the Arbitrator for resolution in accordance with Section 16.4.
- (i) **(Costs of Independent Expert)** The costs of the Independent Expert and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the Independent Expert. If two or more Access Seekers or Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Seekers and Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.

#### **16.4 Determination by Arbitration**

- (a) All Disputes referred to Arbitration (or determination by an Arbitrator) under this Framework must be conducted in accordance with this Section 16.4.
- (b) The Dispute shall be submitted to Arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules.
- (c) The Arbitration must be effected by a single suitably qualified and experienced arbitrator who is either:
  - (1) agreed upon between the parties; or
  - (2) in default of such agreement within five Business Days after the Dispute is referred for Arbitration, nominated by the Resolution Institute.
- (d) Any party to the Arbitration may be represented before the Arbitrator by a member of the legal profession without the need for leave of the Arbitrator.
- (e) The proceeding, including any determination by the Arbitrator, will be kept confidential between the parties and the Arbitrator, with the exception that DBCT Management may disclose an Initial TIC for a Terminal Component and

a Pricing Period determined by an Arbitrator in any Arbitration under this Section 16.4 to:

- (1) an Access Seeker in subsequent negotiations with that Access Seeker concerning an Initial TIC for that Terminal Component and that Pricing Period to apply to the Access Seeker from the commencement of an Access Agreement or increased Access under an Access Agreement; or
- (2) the Arbitrator in and the party or parties to any later Arbitration on an Access Dispute concerning an Initial TIC for that Terminal Component and that Pricing Period for the purpose of Section 10.4(e) of this Framework,

subject to the Access Seeker in subsequent negotiations and the party or parties to any later Arbitration first undertaking to maintain the confidentiality of the outcome of the first-mentioned Arbitration.

- (f) Subject to paragraph 16.4(g), in any Dispute relating to the terms and conditions of Access, the Arbitrator must determine on terms and conditions of Access that are substantively identical to the terms of the Standard Access Agreement, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (g) In any Dispute relating to Access Charges, the Arbitrator must determine on terms and conditions relating to Access Charges that are:
  - (1) in accordance with Section 10 of this Framework; and
  - (2) subject to paragraph 16.4(g)(1), substantively identical to the terms of the Standard Access Agreement,except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (h) In making a determination, the Arbitrator must have regard to the terms of the Framework and to the following matters:
  - (1) the Framework Objective;
  - (2) DBCT Management's binding legal obligations and obligations under law;
  - (3) DBCT Management's legitimate business interests and investment in the Terminal;
  - (4) the legitimate business interests of persons who have, or may acquire, rights to use the Terminal;

- (5) the public interest, including the benefit to the public in having competitive markets;
  - (6) the value of the service to:
    - (A) the Access Seeker or Access Holder;
    - (B) a class of Access Seekers or Access Holders;
  - (7) the direct costs to DBCT Management of providing Access to the Terminal, including any costs of a Terminal Capacity Expansion, but not costs associated with losses arising from increased competition;
  - (8) the economic value to DBCT Management of any Terminal Capacity Expansion, or other additional investment in the Terminal, that DBCT Management or an Access Seeker or an Access Holder has undertaken or agreed to undertake;
  - (9) the quality of the Services;
  - (10) the operational and technical requirements necessary for the safe and reliable operation of the Terminal;
  - (11) the economically efficient operation of the Terminal;
  - (12) any other matters to which the Arbitrator thinks it is appropriate to have regard.
- (i) Subject to paragraph 16.4(j), any Arbitration commenced under this Framework may be consolidated with any other arbitration commenced under:
- (1) this Framework; and / or
  - (2) an Access Agreement or other agreement entered into as contemplated by the Framework,

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

- (j) Any Arbitration concerning a Dispute about the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any

consequential changes in the drafting of the provisions of the Access Agreement) must be consolidated with any other Arbitration concerning a dispute of this kind in respect of the same Pricing Period so that there is a single Arbitration of such Disputes for a Pricing Period. Such consolidated Arbitration does not prevent an Arbitrator from making a specific determination that would apply to individual Access Holders or groups of Access Holders.

- (k) The venue for any Arbitration will be Brisbane, Queensland.
- (l) Unless otherwise determined by the Arbitrator, the costs of the Arbitration shall be paid by the unsuccessful party.

### **16.5 Urgent matters**

Nothing in this Section 16 prevents a party from seeking urgent injunctive relief from a court.

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## **17 Limitations to Losses and Damages**

Subject to the terms of an Access Agreement, Funding Agreement, Underwriting Agreement or any other agreement entered into with DBCT Management as contemplated by this Framework, and notwithstanding any other Section of this Framework:

- (a) damages is not a remedy for any breach of this Framework;
- (b) the only remedy available for any breach of this Framework is specific performance; and
- (c) DBCT Management is not liable to Access Holders or Access Seekers for any indirect Loss or Consequential Loss arising in connection with this Framework.

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## **18 Severability**

- (a) Subject to Section 18(b), if a provision of this Framework is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this Framework.
- (b) Section 18(a) does not apply if severing the provision:
  - (1) materially alters the scope and nature of this Framework; or
  - (2) would be contrary to public policy.

## Schedule A - Access Application Form and Renewal Application Form

### Access Application Form

[Note: this form to be issued on Access Seeker's letterhead]

To: Chief Executive Officer  
DBCT Management

#### DBCT Access Application

**TAKE NOTICE** that the Access Seeker named below applies for Access to the Services at Dalrymple Bay Coal Terminal pursuant to section 5.2 of the Access Framework.

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Access Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Access Application.

<b>Category of Access Application:</b>	
A	A new Access Seeker <i>(please (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness).</i> <input type="checkbox"/>
B	An existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Framework). <input type="checkbox"/>
C	An existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by Section 5.11 of the Access Framework. <input type="checkbox"/>
D	An Existing User seeking additional capacity (including an extension of the Term). <input type="checkbox"/>
<i>For existing Access Holders making a category B or C application or Existing Users making a category D application, please complete the declaration below or Schedule A attached:</i>	
I confirm that all details required by Schedule A attached in relation to the Services required at the Terminal, and any Security required, will be as per our [existing Access Agreement / Existing User Agreement] <i>[strike through the inapplicable reference and tick box at right].</i> <input type="checkbox"/>	
<i>[Note: If box is not ticked, please complete Schedule A attached]</i>	
<b>Name</b>	DBCT Management use only Received Date:   Access Application Date: <i>[per section 5.4(b) of the Access Framework ]</i>
<b>Position</b>	
<b>Signed</b>	
<b>Date</b>	

The Access Seeker unconditionally and irrevocably agrees:

- (a) to comply with the requirements, obligations and processes in:
  - a. the Framework relating to it or its Access Application; and
  - b. the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll; and
- (b) that the Access Application is governed by the laws in force in the State of Queensland.

## Schedule A to the Access Application of [insert name]

(Note – where the Access Seeker is an existing Access Holder or Existing User and the details are relevantly the same as the Services being provided under the Access Agreement or Existing User Agreement respectively, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	<b>Year Mtpa</b>
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year:	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments.	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Access Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient: <ul style="list-style-type: none"> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for each of the first 5 Financial Years in item 7 in respect of which Access is applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul> </li> </ul>	

13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	
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<b>Name</b>	<b>Signed</b>
<b>Position</b>	
<b>Date</b>	

## Access Renewal Form

[Note: this form to be issued on Access Seeker's letterhead]

To: Chief Executive Officer  
DBCT Management

### DBCT Renewal Application

**TAKE NOTICE** that the Access Seeker named below applies to renew its Access Application for Access to the Services at Dalrymple Bay Coal Terminal pursuant to Section 5.3A of the Access Framework .

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Renewal Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Renewal Application.

<b>Category of Renewal Application</b>	
A	A renewal of an Access Application which was submitted by a new Access Seeker <i>(please complete the declaration below or (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness).</i> <input type="checkbox"/>
	<i>I confirm that all details required by Schedule A attached in relation to the Services required at DBCT, and any Security required, will be as per our current Access Application [tick box at right]. [Note: If box is not ticked, please complete Schedule A attached]</i> <input type="checkbox"/>
B	A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Framework ). <input type="checkbox"/>
C	A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by section 5.11 of the Access Framework. <input type="checkbox"/>
D	A renewal of an Access Application which was submitted by an Existing User seeking additional capacity (including an extension of the Term). <input type="checkbox"/>
	<i>For existing Access Holders making a category B or C Renewal Application or Existing Users making a category D Renewal Application, please complete the declaration below or Schedule A attached: I confirm that all details required by Schedule A attached in relation to the Services required at the Terminal, and any Security required, will be as per our current Access Application and [existing Access Agreement / Existing User Agreement] [strike through the inapplicable reference and tick box at right].</i> <input type="checkbox"/>
	<i>[Note: If box is not ticked, please complete Schedule A attached]</i>
<b>Name</b>	<i>DBCT Management use only Received Date:</i>
<b>Position</b>	
<b>Signed</b>	

<b>Date</b>	

The Access Seeker unconditionally and irrevocably agrees:

- (a) to comply with the requirements, obligations and processes in:
  - a. the Framework relating to it or its Access Application and Access Renewal Form; and
  - b. the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll; and
- (b) the Access Application and Access Renewal Form are governed by the laws in force in the State of Queensland.

**Schedule A to the Renewal Application of [insert name]**

(Note – where the Access Seeker is an existing Access Holder or Existing User and the details are relevantly the same as the Services being provided under the Access Agreement or Existing User Agreement respectively, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.)

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	Year Mtpa
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Renewal Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Coal Resources in the report is consistent with being able to economically extract the net tonnes of coal per annum requested for each Financial Year in item 7 by the relevant Financial Years (including the proportion which is 'Marketable Coal Reserves' as defined in the JORC Code, and the Access Seeker's approach to converting those Coal Resources to Marketable Coal Reserves).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient: <ul style="list-style-type: none"> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for the first five Financial Year in item 7 in respect of which Access applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul> </li> </ul>	

13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	
<b>Name</b>		<b>Signed</b>
<b>Position</b>		
<b>Date</b>		

## **Schedule B - Standard Access Agreement**

[Standard Access Agreement attached separately]

## Schedule C - The Terminal Infrastructure Charge

For the avoidance of doubt, the terms and provisions of this Schedule should be interpreted in accordance with Section 10 of the Framework.

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### Part A - Rules for calculating Initial Terminal Infrastructure Charge and Monthly Payment applicable in Arbitration on Initial Access Charges

#### 1. Monthly Payment (MP)

Access Holder “u” (**AH<sub>u</sub>**) must pay to DBCT Management a Monthly Payment in respect of its Annual Contract Tonnage in each Month “m” of each Financial Year (**MP<sub>u,m</sub>**), calculated as follows:-

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

where:-

**TIC** is the Terminal Infrastructure Charge applicable to **AH<sub>u</sub>** for a relevant Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant), as amended or adjusted in accordance with Section 3 of this Schedule C; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Annual Contract Tonnage applicable to **AH<sub>u</sub>** in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) attributable to each Month “m” of a Financial Year. Where the rate of the Annual Contract Tonnage for the Access Holder does not vary in a Financial Year and applies to the full Financial Year, the **MRT<sub>u,m</sub>** for the **AH<sub>u</sub>** will be one-twelfth of their Annual Contract Tonnage for the relevant Financial Year. Where the rate of the Annual Contract Tonnage for the **AH<sub>u</sub>** varies during a Financial Year, the **MRT<sub>u,m</sub>** will vary from Month to Month to reflect one-twelfth of the annualised rate of the Annual Contract Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is amended or adjusted in accordance with Schedule C, Section 3.

To avoid doubt, if an Access Holder has more than one TIC for a Terminal Component due to the Access Holder obtaining increased Access to the Terminal Component at a different TIC, the Monthly Payment formula above must be applied separately in relation to the TIC applicable to each tranche of Access to the Terminal Component obtained by the Access Holder, with the total Monthly Payment for the Access Holder being the sum of the Monthly Payments for each tranche of Access.

## 2. Initial Terminal Infrastructure Charge

### The Floor TIC

- (a) The Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) is the TIC for that Terminal Component that would apply under a QCA administered pricing regime.

### The Ceiling TIC

- (b) The Ceiling TIC must be lower than the sum of:
- (1) the Floor TIC for the Existing Terminal; and
  - (2) the Maximum Spread, where the Maximum Spread is:
    - (A) \$3.00 in the Financial Year commencing on 1 July 2020; and
    - (B) in any subsequent Financial Year is derived by escalating the Maximum Spread in the immediately preceding Financial Year for the annual change in the Consumer Price Index by application of the following formula:

$$MSt = MSt-1 \times (1 + CPI_t)$$

where:

$MS_t$  is the Maximum Spread to apply with effect from 1 July in Financial Year t;

$MSt-1$  is the Maximum Spread applicable in Financial Year t-1; and

$CPI_t$  is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1.

- (c) Subject to paragraph (b), the Ceiling TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) is:
- (1) the highest TIC for that Terminal Component at which coal volumes served by that Terminal Component would be the same as if the Floor TIC in respect of that Terminal Component applied; and
  - (2) to be set equal to the lowest 'willingness to pay' (as defined in paragraph (d) below) to be served at the relevant Terminal Component

of those mines expected to be served at the Terminal Component, where:

- (A) mines are served at the Terminal Component in the order of their 'willingness to pay' to be served at that Terminal Component, with those with higher 'willingness to pay' served before those with lower 'willingness to pay'; and
  - (B) the coal volumes to be served at the Terminal Component are the same as if the Floor TIC in respect of that Terminal Component applied and do not exceed the capacity of that Terminal Component to serve those coal volumes.
- (d) For the purpose of paragraph (c)(2), a mine's 'willingness to pay' to be served at the Existing Terminal or Differentiated Expansion Component (as relevant) is:
- (1) expressed on a dollar per tonne basis;
  - (2) zero if:
    - (A) the mine's coal volumes are not technically capable of being delivered to the Terminal (in that the mine is not connected to the Terminal by rail);
    - (B) the mine's coal volumes are technically capable of being delivered to a coal terminal other than the Terminal (in that the mine is connected to that other coal terminal by rail) and its expected profit per tonne is greater when its coal volumes are served at that other coal terminal than when its coal volumes are served at the Terminal; or
    - (C) the mine's expected profit per tonne when its coal volumes are serviced at the relevant Terminal Component is less than zero; and
  - (3) otherwise calculated as:
    - (A) the Floor TIC for the relevant Terminal Component; plus
    - (B) the expected profit per tonne where the mine's coal volumes are served at the relevant Terminal Component at the Floor TIC for that Terminal Component; less
    - (C) either:

- (i) the highest expected profit per tonne where the mine's coal volumes are served at a coal terminal other than the Terminal that is technically capable of taking delivery of those coal volumes (in that the mine is connected to that terminal by rail), if this expected profit per tonne is greater than zero; or
  - (ii) zero, if there is either no coal terminal other than the Terminal that is technically capable of taking delivery of the mine's coal volumes or no coal terminal other than the Terminal that provides an expected profit per tonne greater than zero.
- (e) For the purpose of assessing a mine's 'willingness to pay' for the purposes of paragraphs 2(d)(2) and 2(d)(3) above, expected profit per tonne when its coal volumes are served at a coal terminal is calculated as:
  - (1) the FOB coal price;
  - less
  - (2) mine costs, being the sum of operating costs, royalty payments, depreciation and a reasonable return on the capital costs of developing and operating the mine;
  - (3) rail transport charges for delivering coal to the coal terminal; and
  - (4) applicable infrastructure and handling charges for using port infrastructure including the coal terminal;

on the basis that:

  - (5) miners make terminal usage decisions without reference to any contractual limitations on coal volumes to be served at the Terminal or any other coal terminal; and
  - (6) the volumes of coal that miners prefer to deliver to any coal terminal other than the Terminal must not, when aggregated, exceed the capacity expected to be available at that other coal terminal to serve those coal volumes (disregarding any contractual limitations on coal volumes to be served at that other terminal in accordance with paragraph (e)(5)).
- (f) To avoid doubt, for the purpose of this paragraphs (b) to (e):
  - (1) in deriving the Ceiling TIC for the Existing Terminal or a Differentiated Expansion Component (as relevant), any TIC applicable in respect of

any other Terminal Component and mines' 'willingness to pay' to be served at any other Terminal Component should be disregarded; and

- (2) Section 10.4(h) of the Framework applies to forecasting of the coal volumes of mines.

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## **Part B - Review of the TIC during a Pricing Period under Access Agreements in form of Standard Access Agreement**

### **3. Review of the TIC**

#### **Annual amendment of the TIC**

- (a) A TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for AH<sub>u</sub> will be amended annually on each 1 July after the Initial TIC for AH<sub>u</sub> commenced to apply in accordance with paragraphs (b) to (d) of this Section 3.
- (b) A TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) to apply to AH<sub>u</sub> from each 1 July after the Initial TIC for AH<sub>u</sub> commenced to apply must be escalated for the annual change in the Consumer Price Index by application of the following formula:

$$\text{TIC}_t = \text{TIC}_{t-1} \times (1 + \text{CPI}_t)$$

where:

- $\text{TIC}_t$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) to apply with effect from 1 July in Financial Year t consequent upon the adjustment under this paragraph (b);
- $\text{TIC}_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable as at 30 June in Financial Year t-1 immediately prior to the occurrence of the adjustment under this paragraph (b); and
- $\text{CPI}_t$  is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1.
- (c) By each 15 May after the Initial TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for AH<sub>u</sub> commenced to apply or as soon as practicable thereafter, DBCT Management will notify that AH<sub>u</sub> of the CPI adjustment and resultant TIC to apply with effect from 1 July in the next Financial Year.

- (d) If a Review Event occurs in the period after DBCT Management has notified AH<sub>u</sub> of a TIC to apply with effect from 1 July in the next Financial Year under paragraph (c) above but before that 1 July that affects that TIC, DBCT Management will promptly notify that AH<sub>u</sub> of the amended TIC to apply with effect from 1 July of the next Financial Year in accordance with paragraphs (e) to (j) below.

#### **Amendment of the TIC if a Review Event occurs**

- (e) If a Review Event occurs, DBCT Management will give notice as soon as reasonably practicable of the amended TIC determined in accordance with paragraph (f), (g) or (h) below (as the case may be) to apply because of the Review Event.
- (f) In the case of a Review Event referred to in paragraph (a) of the definition of Review Event (relating to a change in Aggregate Annual Contract Tonnage), a TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) then applicable for AH<sub>u</sub> will be amended by application of the following formula, unless the Review Event occurs as a consequence of a Review Event referred to in paragraph (b) of the definition of Review Event (relating to the Completion and hand over to the Operator of a Socialised Expansion), in which case the TIC will be amended in accordance with paragraph (g):

$$TIC_t = UAF_t \times TIC_{t-1}$$

where:

TIC<sub>t</sub> is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for AH<sub>u</sub> consequent upon the Review Event;

UAF<sub>t</sub> is the utilisation adjustment factor, which is equal to TUR<sub>t</sub> / TUR<sub>t-1</sub>;

TUR is the terminal utilisation ratio, calculated as follows:

(Existing Terminal Capacity or Differentially Priced Capacity (as relevant) / Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant));

TUR<sub>t-1</sub> is the TUR immediately prior to the occurrence of the Review Event;

TUR<sub>t</sub> is the TUR consequent upon the Review Event; and

$TIC_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  immediately prior to the occurrence of the Review Event.

- (g) In the case of a Review Event referred to in paragraph (b) of the definition of Review Event (relating to a Socialised Expansion), a TIC in respect of the Existing Terminal then applicable for  $AH_u$  will be adjusted to an amount calculated as follows:

$$TIC_t = UAF_t \times (TIC_{t-1} - \text{Floor } TIC_{t-1}) + \text{Floor } TIC_t$$

where:

$TIC_t$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  consequent upon the Review Event;

$UAF_t$  is the utilisation adjustment factor, which is equal to  $TUR_t/TUR_{t-1}$ ;

$TUR$  is the terminal utilisation ratio, calculated as follows:

(Existing Terminal Capacity or Differentiated Expansion Component Capacity (as relevant) / Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant))

$TUR_{t-1}$  is the TUR immediately prior to the occurrence of the Review Event;

$TUR_t$  is the TUR consequent upon the Review Event;

$TIC_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  immediately prior to the occurrence of the Review Event;

Floor  $TIC_{t-1}$  is the Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) immediately prior to the occurrence of the Review Event; and

Floor  $TIC_t$  is the Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) consequent upon the Review Event.

- (h) In the case of a Review Event referred to in paragraph (c) of the definition of Review Event (relating to NECAP), the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) that would otherwise apply for  $AH_u$  in Financial Year  $t$  (after making all other adjustments required by paragraphs (c) and (e)) will be adjusted for that Financial Year  $t$  by an amount calculated as follows:

Adjustment amount<sub>t</sub> = NECAP Allowance<sub>t</sub> / Aggregate Annual Contract Tonnage<sub>t</sub>

where:

NECAP Allowance<sub>t</sub> is equal to the sum of the Return on NECAP<sub>t</sub> and the Return of NECAP<sub>t</sub>;

Return on NECAP<sub>t</sub> is the product of the NECAP Asset Base<sub>t</sub> and the WACC(2) Rate;

Return of NECAP<sub>t</sub> is equal to the sum, for each 12 month period ending 31 March in which any program of NECAP included in NECAP Asset Base<sub>t</sub> for the Existing Terminal or Differentiated Expansion Component (as relevant) was Completed and handed over to the Operator, of the total NECAP for any program of NECAP Completed and handed over to the Operator in the 12 month period divided by an asset life of 20 years;

NECAP Asset Base<sub>t</sub> is the NECAP Asset Base for the Existing Terminal or Differentiated Expansion Component (as relevant) as at 1 July for Financial Year t and is derived by rolling forward the value of the NECAP Asset Base from the preceding Financial Year t-1 as follows:

$$\text{NECAP Asset Base}_t = \text{NECAP Asset Base}_{t-1} + \text{NECAP}_{t-1} - \text{Return of NECAP}_{t-1};$$

NECAP Asset Base<sub>t-1</sub> is the value of the NECAP Asset Base at the start of Financial Year t-1 and is zero where Financial Year t is the Financial Year in which the Initial TIC for the relevant Pricing Period commenced;

NECAP<sub>t-1</sub> is the value of the NECAP incurred in any prior period (including NECAP in any period preceding the Commencement Date) on any program of NECAP which was Completed and handed over to the Operator by DBCT Management in the twelve months ending 31 March in Financial Year t-1 and allocated to the Terminal Component or Differentiated Expansion Component (as relevant) in accordance with Section 10.7 of this Framework including NECAP referred to in Section 11.10(b) and NECAP referred to in Section 11.10(c);

Return of  $NECAP_{t-1}$  is the Return of  $NECAP$  included in the  $NECAP$  Allowance $_{t-1}$  in determining the Adjustment amount for Financial Year  $t-1$  in accordance with this paragraph (h) and is zero where Financial Year  $t$  is the Financial Year in which the Initial TIC for the relevant Pricing Period commenced.

- (i) Any amendment made pursuant to paragraph (e) above will be effective from the first day of the Month following the Month in which the Review Event occurs, except for those Review Events of the kind described at paragraph (c) of the Review Event definition, which will be effective from the relevant 1 July.
- (j) For clarification, if a review under paragraph (c) above occurs simultaneously with a review under paragraph (e), they will be reviewed together and the amendments to the TIC under paragraph (c) and under paragraph (e) for each Review Event will be applied cumulatively and become effective on the relevant 1 July.
- (k) If DBCT Management or the Access Holder, acting reasonably, considers that an amended TIC determined in accordance with this Schedule C, Part B would be higher than the Ceiling TIC applicable at the time of determining the amended TIC or lower than the Floor TIC applicable at that time, they may raise a Dispute in accordance with Section 16 of this Framework and any determination by an Arbitrator must be in accordance with Section 10.6(b) of this Framework.

## Schedule D - Confidentiality Deed

### This confidentiality deed

is made on

between the following parties:

1. **DBCT Management Pty Limited**  
ACN 097 698 916  
of Level 15, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000  
(**DBCT Management**)
2. **[insert name of receiving party]**  
[insert ABN/ACN/ARBN]  
of [insert address]  
(**Access Seeker**)

### Recitals

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

### This deed witnesses

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

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## 1. Definitions and interpretation

### 1.1 Definitions

In this deed:

**Access Framework** means the Dalrymple Bay Coal Terminal Access Framework dated 9 September 2020 as varied or replaced from time to time;

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

- (a) the disclosure of the information, data or other matter by the Recipient might reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter; or
- (b) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed,
- (c) provided that such information, data or other matter:
- (d) is not already in the public domain;
- (e) does not become available to the public through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Framework;
- (f) was not in the other party's lawful possession prior to such disclosure; or
- (g) is not received by the other party independently from a third party free to disclose such information, data or other matter,

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

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

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

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

**Document** includes any note, memorandum, record, report, financial information, summary, analysis, calculation, strategic assessment, market survey, business plan,

computer program, computer record, circuit, circuit layout, drawing, specification, material or any other means by which information may be stored or reproduced;

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

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

**Specified Person** means:

- (a) an officer or employee of a Recipient;
- (b) a professional adviser to a Recipient;
- (c) a financier of a Recipient;
- (d) a professional adviser to a financier of a Recipient;
- (e) an officer, employee, or a professional adviser to a related body corporate of a Recipient; or
- (f) an officer or employee of the Operator,

who has a specific need to have access to the Confidential Information for the Express Purpose.

## **1.2 Interpretation**

- (a) Terms defined in the Access Framework have the same meaning in this deed unless otherwise defined.
- (b) Headings are for convenience only and do not affect interpretation.
- (c) In this deed, unless the context otherwise requires:
  - (1) words importing the singular include the plural and vice versa;
  - (2) a reference to any thing (including, but not limited to, any right) includes a part of that thing but nothing in this Clause 1.2(c)(2) implies that performance of part of an obligation constitutes performance of the obligation;
  - (3) the term “related body corporate” has the meaning given to that term under the Corporations Act;
  - (4) the term “associate” has the meaning given to that term in Section 15 of the Corporations Act;

- (5) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and
- (6) a reference to a person includes that person's successors and legal personal representatives.

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## **2. Confidentiality**

The Recipient must:

- (a) hold the Confidential Information in strict confidence and not disclose, or cause or permit the disclosure of, the Confidential Information, except as permitted under this deed or with the prior written consent of the Discloser;
- (b) not disclose, or cause or permit the disclosure to any person of, any opinion in respect of the Confidential Information or a Document created in accordance with Clause 3(c), except as permitted under this deed;
- (c) keep the Confidential Information and any Documents created in accordance with Clause 3(c) in a way such that it is reasonably protected from any use, disclosure or access which is inconsistent with this deed;
- (d) promptly notify the Discloser if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information;
- (e) do anything reasonably required by the Discloser to prevent or stop a breach or threatened breach of this deed or an infringement or threatened infringement of the Discloser's rights arising out of this deed by any person, whether by court proceedings or otherwise; and
- (f) maintain such procedures as are reasonably necessary to ensure compliance with this deed by the Recipient and each Specified Person and, upon request, provide the Discloser details of the procedures adopted.

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## **3. Permitted use and disclosure**

The Recipient may:

- (a) only use the Confidential Information for the Express Purpose;
- (b) not make use of the Confidential Information to the commercial, financial or competitive disadvantage of the Discloser (but this does not preclude the Recipient from using the Confidential Information in negotiations with the Discloser or in any dispute proceedings);

- (c) create, or cause or permit to be created, a Document which reproduces, is based on, utilises or relates to Confidential Information only if that creation is solely for the Express Purpose; and
- (d) only disclose Confidential Information (including as contained in a Document created in accordance with Clause 3(c)) to a Specified Person, and may only make such disclosure solely for the Express Purpose.

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#### **4. Return and destruction of information**

- (a) If requested by the Discloser, the Recipient must promptly return to the Discloser, or destroy or delete as the Discloser directs, all original Documents and copies which:
  - (1) are or contain Confidential Information; and
  - (2) reproduce, are based on, utilise or relate to Confidential Information.
- (b) If a Document or a copy referred to in Clause 4(a) contains information which is Confidential Information of the Recipient, then the Recipient is not required to return that Document but must destroy or delete the portion of the Document containing the Confidential Information of the Discloser.
- (c) Nothing in this clause 4 requires the destruction or return of documentation contained in any board papers or information retained by a professional adviser in accordance with usual professional practice.

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#### **5. Operation of this deed**

- (a) This deed continues without limitation in time but, subject to Clause 5(b), does not apply to any Confidential Information that:
  - (1) the Recipient or a Specified Person is required to disclose by any applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator;
  - (2) is in the public domain other than as a result of a breach of this deed;
  - (3) was at the time of disclosure already in the lawful possession of the Recipient; or
  - (4) is received by the Recipient from a person (other than a Discloser or any employee, officer, agent or adviser of a Discloser) legally entitled to possess that information and provide it to the Recipient.

- (b) If the Recipient or a Specified Person must make a disclosure referred to in Clause 5(a)(1):
  - (1) the Recipient must only disclose, and must ensure that the Specified Person only discloses the minimum Confidential Information required to comply with the applicable law, order or requirement; and
  - (2) before making such disclosure, the Recipient must:
    - (A) give the Discloser reasonable written notice of:
      - (i) the full circumstances of the required disclosure; and
      - (ii) the Confidential Information which it, or the Specified Person, proposes to disclose; and
    - (B) consult with the Discloser as to the form of the disclosure.

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## **6. Acknowledgment**

The Recipient acknowledges that:

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

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## **7. Recipient to ensure others comply**

The Recipient must:

- (a) inform each Specified Person of the Recipient's obligations under this deed;

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

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## **8. Indemnity**

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

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

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## **9. Disclaimer**

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

Confidential Information which the Discloser provides to the Recipient;  
and

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

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## **10. Governing law and jurisdiction**

- (a) This deed is governed by the laws of Queensland.
- (b) Any dispute arising out of or in connection with this deed shall be resolved in accordance with the dispute resolution provisions contained in section 16 of the Access Framework.

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## **11. Waivers**

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

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## **12. Variation**

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

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## **13. Entire agreement**

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



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**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management**

by:

\_\_\_\_\_

Director/Secretary

Director

\_\_\_\_\_

Name (please print)

Name (please print)

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

by:

\_\_\_\_\_

Director/Secretary

Director

\_\_\_\_\_

Name (please print)

Name (please print)

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## **Schedule E - Services**

### **1. Train scheduling**

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate cargo assembly windows at the terminal to receive coal parcels and provide train operators and Access Holders with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of coal in each Financial Year.

### **2. Train unloading**

If a train carrying an Access Holder's coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the coal) consistent with achieving Handling of the Annual Contract Tonnage of coal for an Access Holder.

### **3. Reclaiming and vessel loading**

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive coal) nominated by each Access Holder, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management on behalf of that Access Holder in each Financial Year (as long as the vessel and/or cargo mix required by the Access Holder (or its customer) does not unreasonably impact on the efficiency of the Terminal); and
- (b) load each Access Holder's coal into a vessel which is nominated by the Access Holder and is available for loading so as to achieve the objective in paragraph 3(a).

### **4. Incidental services**

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

- sampling and survey services;
- vessel monitoring;
- co-ordination with ships' agents, masters, customers and other relevant entities;
- crew disembarkation services; and

- wharfage and line services.

## **5. Miscellaneous services**

If required by an Access Holder or any Approval or statutory authority notified to DBCT Management, DBCT Management must, in accordance with Good Operating and Maintenance Practice, provide the following miscellaneous services to the Access Holder:

- moisture adding;
- compacting;
- surfactant adding;
- dozing;
- blending (subject to Section 6(d) below); and
- any other services reasonably requested from time to time in writing by an Access Holder to DBCT Management, provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal.

## **6. Stockpiling and blending**

- (a) DBCT Management must provide to each Access Holder sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the Access Holder's coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that each Access Holder is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the Aggregate Annual Contract Tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in Section 6(a) and 6(b) are subject to any other obligation of DBCT Management under any Existing User Agreement with an Existing User entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:

- (1) require coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (2) require coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (3) limit the proportions in which coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer each Access Holder's coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile an Access Holder's coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## **7. Prevention of contamination**

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

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

## **8. Data provision**

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

## **9. Co-ordination**

Subject to the Access Holder providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

- (a) ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the Access Holder's reasonable quality plans, reasonable shipping programs and contracts as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations; and
- (b) (subject to the foregoing and having regard to equity amongst Access Holders and Existing Users) use its best endeavours to minimise the aggregate cost to the Access Holder arising out of Handling at the Terminal (including Demurrage Costs and rail freight).

## **10. Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract**

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

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

- (2) without limiting Section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

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

## **11. Standard for Services**

- (a) The provision of the above Services by DBCT Management must be carried out with due skill, care and diligence in accordance with this Framework, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (1) lowest total whole of life cost;
  - (2) reliability and economy of performance;
  - (3) maximising the effective life of the Terminal; and
  - (4) DBCT Management's non-discrimination obligations under this Framework.

## **Schedule F - Terminal Master Plan**

[Terminal Master Plan attached separately]

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## Schedule G - Definitions and Interpretation

### 1. Definitions

In this Framework:

**2017 Access Undertaking** means the Dalrymple Bay Coal Terminal Access Undertaking prepared in accordance with the requirements of the *Queensland Competition Authority Act 1997* (Qld) and approved on 16 February 2017.

**60/60 Requirement** has the meaning given in Section 11.5(h).

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

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

**Access Applicant** means a person who has submitted to DBCT Management a valid Access Application that has been confirmed by DBCT Management as compliant with Section 5.2 of this Framework and has not lapsed, expired or otherwise been validly rejected by DBCT Management.

**Access Application** means:

- (a) an application for Access made or deemed to have been made under Section 5.2 of this Framework;
- (b) for the purposes of Sections 5.3(f), 5.3(g), 5.3A, 5.4, 5.7, 5.8, 5.9, and Section 16 only – an Access Application which was duly submitted to DBCT Management prior to the Commencement Date under and in accordance with the 2017 Access Undertaking for the Terminal and which has not been dealt with on the Commencement Date. For clarification, the time of the submission of the Schedule A information (before or after the Commencement Date) will not affect the date on which the application is taken to have been received by DBCT Management; and
- (c) for the purposes of Section 5.4 only – an application of the kind referred to in Section 5.10(q)(9)(F) which is made after the Commencement Date,

as renewed from time to time in accordance with this Framework.

**Access Application Date** means:

- (a) where paragraph (b) of this definition does not apply, the date that the Access Application was received by DBCT Management; or

- (b) the date that the Access Application was deemed to be made if the Access Application was substantially altered in accordance with Section 5.3A or 5.7.

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

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

**Access Seeker** means a party seeking Access, or increased Access, to the Services and includes a party to a Conditional Access Agreement.

**Access Transfer** has the meaning given in Section 5.13 of this Framework.

**Aggregate Annual Contract Tonnage** means, in respect of a relevant Financial Year:

- (a) in respect of a Differentiated Expansion Component, the sum of the Annual Contract Tonnages for only the Differentially Priced Access Holders in respect of that Expansion Component; and
- (b) in respect of the Existing Terminal, the sum of the Annual Contract Tonnages for all Existing Users and Access Holders other than Differentially Priced Access Holders in that Financial Year.

**Alternative Proposed Standard Funding/Underwriting Agreement** means the alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting Agreement as specified under Section 5.10(q)(7).

**Annual Contract Tonnage** means, for an Access Holder or Existing User in a relevant Financial Year, the number of tonnes of coal in that Financial Year that the Access Holder or Existing User is entitled to have Handled under its Access Agreement or Existing User Agreement (as relevant), as amended from time to time, including tonnage which an Access Holder or Existing User is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations and any tonnage which an Access Holder or Existing User would be entitled to have Handled but for the suspension of the Access Holder's or Existing User's right to have the tonnage Handled under an Access Agreement or Existing User Agreement (as relevant).

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

- (a) environmental approvals and licences;
- (b) planning and development approvals and licences; and

(c) local government approvals and licences.

**Arbitration** means an arbitration commenced under section 16.4.

**Arbitrator** means an arbitrator appointed under Section 16.4.

**Available System Capacity** means, in respect of a relevant time, the amount of System Capacity at that time not contracted to be Handled. It is derived by subtracting the Aggregate Annual Contract Tonnage as at the relevant time from System Capacity at that time. Where that subtraction results in a negative number, it will be taken to be "nil". Where Available System Capacity is to be determined in respect of a future time DBCT Management will estimate it taking all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**Business Day** means a day other than a Saturday, a Sunday, or a public holiday in Brisbane.

**Capacity Expert** has the meaning given in clause 11.1(a)(2)(A).

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

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

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

**Ceiling TIC** means the TIC calculated in accordance with Schedule C, Section 2(b)-2(b).

**Coal Guidelines** means the 'Australian Guidelines for Estimating and Reporting of Inventory Coal, Coal Resources and Coal Reserves' published by the Coalfields Geology Council of New South Wales and the Queensland Resources Council or its successor document, as updated from time to time.

**Coal Resources** has the meaning given to it in the JORC Code.

**Commencement Date** means the day following the Expiry Date.

**Completion** means, in respect of relevant works comprising a Terminal Capacity Expansion or other Capital Expenditure program:

- (a) the works are electrically and mechanically complete; and
- (b) testing and commissioning has been satisfactorily completed (including load commissioning),

but where punchlist items (being items intended to be carried out after practical completion and commencement of full operation of the relevant items) are not necessarily complete, and **Complete** and **Completed** have corresponding meanings.

**Conditional Access Agreement** has the meaning given to it in Section 5.4(l) of this Framework.

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

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

provided that such information, data or other matter:

- (c) is not already in the public domain;
- (d) does not become available to the public through means other than a breach of the confidentiality provisions in this Framework or a breach of any confidentiality deed contemplated in Section 7 of this Framework;
- (e) was not in the other party's lawful possession prior to such disclosure; or
- (f) is not received by the other party independently from a third party free to disclose such information, data or other matter;

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

- (g) the disclosure of the information, data or other matter by the recipient would no longer reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter;

- (h) the information, data or other matter has entered in the public domain through means other than a breach of the confidentiality provisions in this Framework or a breach of any confidentiality deed contemplated in Section 7 of this Framework; or
- (i) the information, data or other matter has been received by the recipient independently from a third party free to disclose the information, data or other matter.

**Consequential Loss** means any one or more of the following:

- (a) Loss of profits; or
- (b) Loss of opportunity to make profits; or
- (c) Loss of business opportunity; or
- (d) special exemplary or punitive damages; or
- (e) any Loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such Loss, whether or not such Loss was in the contemplation of the relevant party at the relevant time,

including any of the above types of Loss arising from an interruption to a business or activity.

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

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

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

**Control** has the meaning given to that term in the *Corporations Act 2001* (Cth) and **Controlled** has a corresponding meaning.

**Cost Allocation Principles** has the meaning given in Section 10.7.

**Cost Sensitive Expansion** has the meaning given in Section 10.8(a)(2).

**Dalrymple Bay Coal Chain** means all infrastructure relating to railing and shipping of coal (from mine outloaders to Terminal shiploaders and adjacent infrastructure), excluding Hay Point, generally referred to as the *Dalrymple Bay Coal Chain*, (unless all relevant stakeholders otherwise agree).

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

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

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

**Deed Poll** means the irrevocable deed poll signed by DBCT Management in March 2019 under which it covenants to comply with the Framework.

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

**Different Terms** has the meaning given in Section 5.4(l)(4).

**Differentiation**, in respect of a Terminal Capacity Expansion, means the Terminal Capacity Expansion should be treated as a separate Terminal Component for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework, and the Floor TIC for that Terminal Component determined in accordance with Section 10.4(f) by reference to the costs of the Terminal Capacity Expansion (and without reference to the costs of the Existing Terminal), and **Differentiated** has a corresponding meaning.

**Differentiated Expansion Component** has the meaning giving in Section 10.8(a)(2).

**Differentially Priced Access Agreement** means an Access Agreement under which the Access Charges are to be differentially priced and Services are to be provided by DBCT Management from capacity created by a Differentiated Expansion Component.

**Differentially Priced Access Holder** means an Access Holder who is party to a Differentially Priced Access Agreement.

**Differentially Priced Capacity** means capacity associated with a Differentiated Expansion Component.

**Differentiated Queue** has the meaning set out in Section 5.4(s).

**Dispute** has the meaning given to that term in Section 16.1.

**Dispute Notice** has the meaning given to that term in Section 16.1.

**Early Termination** means the termination of an Access Agreement or Existing User Agreement (**Terminated Agreement**) before its originally scheduled expiry date (but not where that occurred as a result of the exercise of a contractual right to terminate which was included in

the Terminated Agreement when it was entered into, other than a right to do so for default in payment or insolvency of the Access Holder or Existing User, or default by DBCT Management. For the purpose of this definition, termination for default in payment or insolvency will be taken to have occurred if DBCT Management terminates the Terminated Agreement on other grounds but in circumstances where a default in payment or the insolvency of the Access Holder or Existing User could have been reasonably expected within a reasonably short time thereafter had that termination not occurred).

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

**Existing Terminal** means the Terminal as it exists at the Commencement Date together with each Socialised Expansion of that existing Terminal.

**Existing Terminal Capacity** has the meaning given in Section 11.1(a)(1).

**Existing User** means a party who has an entitlement to have coal Handled through the Terminal as at the Commencement Date.

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

**Expansion Arbitrator** has the meaning given in clause 11.5(a).

**Expansion Component** means in respect of a Terminal Capacity Expansion, the Differentiated Expansion Component or that part of the Existing Terminal (as the case may be) that is the subject of the expansion, as determined in accordance with this Framework.

**Expansion Component Capacity** means, for an Expansion Component, the maximum reasonably achievable capacity of that Expansion Component (measured in tonnes per Financial Year) as estimated pursuant to Section 11.1.

**Expansion Parties** means, in respect of an Expansion Component, any Funding Access Seeker or any party to a Conditional Access Agreement associated with that Expansion Component.

**Expansion Pricing Principles** means the principles set out in Section 10.8.

**Expert Determination** means an expert determination process commenced under Section 16.3.

**Expiry Date** means 8 September 2020.

**Feasibility Studies** means in relation to a proposed Terminal Capacity Expansion, a FEL 1 Feasibility Study, FEL 2 Feasibility Study and FEL 3 Feasibility Study.

**FEL 1 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;
- (b) identifies possible Terminal Expansion Components that will create additional Terminal Capacity, including any potential system capacity expansions that may be required to create complementary additional System Capacity;
- (c) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal Expansion Components;
- (d) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal capacity expansion
- (e) unless otherwise agreed by DBCT Management and the relevant Funding Access Seeker, includes an indicative assessment of:
  - (i) project objectives in relation to the creation of additional Terminal Capacity; and
  - (ii) the possible Terminal Expansion Components:
    - (A) a broad cost estimate with a +/- 50% accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
    - (B) a preliminary financial analysis and risk assessment; and
    - (C) indicative timeframes for developing and completing the possible Terminal Components; and
  - (iii) includes a proposed scope, budget, duration and deliverables for a FEL 2 Feasibility Study including the reasons for selecting the possible Terminal Components that will be considered during that FEL 2 Feasibility Study.

**FEL 2 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 Feasibility Study and, if they differ from the previous study, re-estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;
- (b) confirms the project objectives in relation to the creation of additional Terminal Capacity and the possible Terminal Expansion Components that will create the additional Terminal Capacity;
- (c) assesses each of the possible Terminal Components in respect of:

- (i) the technical and operating requirements for that Terminal Capacity Expansion;
  - (ii) an indicative assessment of the additional Capacity that might reasonably be expected by implementing that Terminal Capacity Expansion; and
  - (iii) a preliminary risk assessment for that Terminal Capacity Expansion;
- (a) includes preliminary survey and geotechnical investigation to support the level of design and cost accuracy required for the study;
  - (b) identifies the preferred Terminal Capacity Expansion to be studied under a FEL 3 Feasibility Study; and
  - (c) provides:
    - (i) a high level engineering assessment of the preferred Terminal Capacity Expansion;
    - (ii) analysis of the technical and economic feasibility of the preferred Terminal Capacity Expansion and identifies why it is preferred;
    - (iii) a project budget, with a +/-20% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
    - (iv) an indicative design and construct schedule for the preferred Terminal Capacity Expansion that includes time tolerances; and
    - (v) potential benefits (including additional Terminal Capacity, maintenance and operating benefits) of the preferred Terminal Capacity Expansion; and
  - (d) includes a proposed scope, budget, duration and deliverables for a FEL 3 Feasibility Study,
  - (e) includes an assessment of the available Terminal Capacity that will be created by the Terminal Capacity Expansion; and
  - (f) includes an assessment of the available Terminal Capacity that will be created by the preferred Terminal Expansion Component.

**FEL 3 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that, in relation to the preferred Terminal Capacity Expansion identified in a FEL 2 Feasibility Study:

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 or FEL2 Feasibility Study and, if they differ from the previous

studies, re-estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;

- (b) details the project objective for the preferred Terminal Capacity Expansion;
- (c) provides a detailed assessment of technical and operating requirements of the preferred Terminal Capacity Expansion;
- (d) includes survey and geotechnical investigations to support the level of design and cost accuracy;
- (e) provides a detailed design for the preferred Terminal Capacity Expansion;
- (f) provides the following details of the preferred Terminal Capacity Expansion's scope:
  - (i) an optimised project configuration that would provide the targeted additional Terminal Capacity to be created by the preferred Terminal Capacity Expansion;
  - (ii) a detailed cost estimate with a +/-10% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
  - (iii) a detailed design and construction project schedule;
  - (iv) the basis on which the project contingency was determined;
  - (v) a financial evaluation, including (if applicable) the estimated impact on the relevant TICs;
  - (vi) a procurement methodology and report on any previous approaches to the construction market that are relevant to the preferred Terminal Capacity Expansion;
  - (vii) a project management plan comprised of:
    - (A) resource management plan;
    - (B) cost management plan;
    - (C) design management plan
    - (D) quality management plan;
    - (E) safety management plan;
    - (F) schedule management plan;
    - (G) risk management plan;

- (H) project packaging and delivery strategy;
  - (I) procurement management plan;
  - (J) interface management plan;
  - (K) change management plan;
  - (L) environmental management plan;
  - (M) project phases, milestones and deliverables;
  - (N) project risk assessment report; and
  - (O) regulators notification, if needed, and
- (viii) provides a detailed capacity assessment on the available Terminal Capacity to be created by the preferred Terminal Expansion Component and the associated impact, if any, on the capacity rating of the base Terminal,

and including the outcomes of any analysis and decisions made in relation to the above matters (with reasons, where applicable).

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

**Floor TIC** means the TIC calculated in accordance with Schedule C, Section 2(a).

**Framework** means this Access Framework (including its schedules) as amended from time to time.

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

**Framework Objective** has the meaning given in the Deed Poll.

**Funding Access Seeker** means an Access Seeker that has entered into a Funding Agreement or Underwriting Agreement with DBCT Management.

**Funding Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, pursuant to which an Access Applicant must fund the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study and a FEL 3 Feasibility Study, in respect of a proposed Terminal Capacity Expansion.

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

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

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

**Independent Expert** means an independent expert appointed under Section 16.3.

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

**Initial Access Charges** means the Access Charges for a Terminal Component to apply under an Access Agreement from the commencement of that Agreement, the commencement of increased Access under that Agreement or the commencement of a Pricing Period under that Agreement.

**Initial TIC** means the TIC for a Terminal Component to apply under an Access Agreement from the commencement of that Agreement, the commencement of increased Access under that Agreement or the commencement of a Pricing Period under that Agreement.

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

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the *Corporations Act 2001* (Cth);
- (b) a resolution is passed to place it in voluntary liquidation or to appoint an administrator;
- (c) an application is made to a court for it to be wound up and the application is not dismissed or withdrawn within 14 days;
- (d) the appointment of a controller (as defined in the *Corporations Act 2001* (Cth)) of any of its assets, if that appointment is made and not terminated within 14 days after it is made; or

- (e) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement.

**JORC Code** the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves' prepared by the Joint Ore Reserves Committee of The Australasian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and the Minerals Council of Australia, as updated from time to time.

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

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

**Loss** means any damage, loss (including loss of reputation), cost, expense, fine, penalty or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**Marketable Coal Reserves** has the meaning given to it in the JORC Code.

**Month** means a calendar month.

**Monthly Payment** has the meaning given to it in Section 10.4.

**NECAP Asset Base** means, in respect of a Terminal Component, the NECAP Asset Base for that Terminal Component determined in accordance with Schedule C, Section 3(h).

**NECAP Risk Free Rate** means, in respect of any twelve month period ending 31 March, the rate calculated by averaging the yield of the 10 year Commonwealth Government bond over the 20 Business Days preceding that 31 March.

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

**Non-Expansion Capital Expenditure** or **NECAP** means Capital Expenditure not related to the development of a Terminal Capacity Expansion.

**Non-Expansion Costs** means Terminal Operating Costs and Capital Expenditure not related to the development of a Terminal Capacity Expansion.

**Notice** has the meaning given to that term in Section 5.4(e)(1).

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

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

**Notional Contracted Tonnage** or **NCT** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**Operation & Maintenance Charge** means the component of Access Charges under which DBCT Management recovers Terminal Operating Costs from Access Holders and is calculated in accordance with Section 10.5.

**Operation & Maintenance Contract** or **OMC** means the contract between DBCT Management, the DBCT Trustee and the Operator under which the Operator is engaged by DBCT Management to operate and maintain the Terminal on a day to day basis. The terms of the OMC are summarised for convenience in Schedule H.

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

**Other Costs** has the meaning given in Section 11.5(a)(3)(B).

**PCQ** means Ports Corporation of Queensland Limited ACN 126 302 994.

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

**Price Ruling** means a ruling by an Expansion Arbitrator in respect of a Terminal Capacity Expansion on the Pricing Method and the prudent Capital Expenditure (including the need) for the Terminal Capacity Expansion made following receipt of an application from DBCT Management under Section 5.12(a) or 11.5(a) of this Framework.

**Pricing Method** means the method of pricing Access created by a Terminal Capacity Expansion, being either Socialised or Differential.

**Pricing Period** means the period commencing on the Commencement Date and ending on 30 June 2026 and each subsequent 5 year period during the Term.

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

**Proposed Standard Funding/Underwriting Agreement** means the proposed Standard Funding Agreement or proposed Standard Underwriting Agreement (as applicable) by DBCT Management under Section 5.10(q).

**Publicly Report** means to upload information onto DBCT Management's website so that it is publicly accessible.

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

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

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

**Rail Operator** means an entity that:

- (a) provides above rail services to an Access Holder for the purpose of transporting coal to the Terminal; or
- (b) is nominated by an Access Seeker as likely to provide above rail services to that Access Seeker for the purpose of transporting coal to the Terminal.

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

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

**Renewal Application** has the meaning given in Section 5.3(a).

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

- (a) a change in the Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant), including (without limitation) a change in Aggregate Annual Contract Tonnage occurring as a consequence of the Early Termination of any Access Agreement or Existing User Agreement;
- (b) in respect of the Existing Terminal, Completion and handover to the Operator of the whole of a discrete phase of a Socialised Expansion; and
- (c) each 1 July in a Pricing Period, in respect of any Terminal Component, provided any program of NECAP was:
  - (i) Completed and handed over to the Operator by DBCT Management in the twelve month period ending on 31 March occurring immediately prior to that 1 July and allocated to that Terminal Component in accordance with Section 10.7 of this Framework, including:
    - (A) NECAP referred to in Section 11.10(b); and
    - (B) NECAP referred to in Section 11.10(c); or
  - (ii) included in the NECAP Asset Base for any previous Financial Year of the Pricing Period.

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

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

**Service Provider** means:

- (a) DBCT Management, as the provider of Services at the Terminal;

- (b) each provider at a relevant time of railway infrastructure ("below rail") for any part of the System;
- (c) each provider at a relevant time of railway freight services ("above rail") for any part of the System.

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

**Socialisation**, in respect of a Terminal Capacity Expansion, means the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework, and the Floor TIC for the Existing Terminal determined in accordance with Section 10.4(f) by reference to the sum of the costs of the Existing Terminal and the costs of the Terminal Capacity, and **Socialised** has a corresponding meaning.

**Socialised Expansion** has the meaning given in Section 10.8(a)(1).

**Socialised Terminal Capacity** means capacity associated with a Socialised Expansion.

**Standard Funding Agreement** means the standard Funding Agreement approved in accordance with Section 5.10(q).

**Standard Underwriting Agreement** means the standard Underwriting Agreement approved in accordance with Section 5.10(q).

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

**State** means the State of Queensland.

**Supply Chain Business** means an entity (or group of entities) which:

- (a) provides, or proposes to provide, above rail services in Queensland which access the Terminal;
- (b) owns or holds an interest in, or proposes to acquire such an interest in, coal-producing mines in Queensland that export coal via the Terminal;
- (c) purchases coal that has been produced in Australia and exports that coal via the Terminal;
- (d) provides shipping services from the Terminal; or
- (e) trades in capacity at the Terminal.

**System** means, in respect of the Dalrymple Bay Coal Chain, the following components of infrastructure relating to the transport of coal from mines whose coal is Handled by the Terminal:

- (a) rail loading facility of mines whose coal is Handled by the Terminal;
- (b) railway infrastructure in the Dalrymple Bay Coal Chain;
- (c) railway locomotives and rolling stock used in the Dalrymple Bay Coal Chain; and
- (d) Terminal unloading, stacking, loading and other Handling facilities,

and all interfaces between such components.

**System Capacity** means at a relevant time, the maximum reasonably achievable estimated capacity of the System (measured in tonnes per financial year) as determined pursuant to Section 11.1 in respect of that time. Where System Capacity is required to be estimated in respect of a future time (for example, for the purposes of Section 5.4) DBCT Management will estimate it taking all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**System Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the System Capacity.

**System Master Plan** means, at a relevant time, the master plan (if any) determined pursuant to Section 14.

**TCMP** has the meaning given in Section 11.5(a)(7).

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

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

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

and for the avoidance of doubt, includes the Existing Terminal and any Differentiated Expansion Component.

**Terminal Capacity** means the maximum reasonably achievable capacity of the Terminal (measured in tonnes per Financial Year) as estimated pursuant to Section 11.1.

**Terminal Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the **Terminal Capacity**.

**Terminal Component** means each of:

- (a) the Existing Terminal; and
- (b) the Differentiated Expansion Component.

**Terminal Infrastructure Charge** or **TIC** has the meaning given in Section 10.4.

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

**Terminal Operating Costs** means any amounts:

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

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

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

**Terminating Date** means the earlier of:

- (a) the date which is 10 years from the Commencement Date; and

- (b) the date on or after the Commencement Date on which use of the Terminal is first taken to be a service declared under Part 5, Division 2 of the *Queensland Competition Authority Act 1997* (Qld).

**Tonnage** means the volume of Access supplied under an Access Agreement or access supplied under an Existing User Agreement (as the context requires), determined by reference to the volume of coal Handled or contracted to be Handled.

**Underwriting Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, which gives DBCT Management the right to call for, and requires an Access Applicant to fund in response to such call, the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study,

in respect of a proposed Terminal Capacity Expansion, if the proposed Terminal Capacity Expansion does not proceed.

**WACC(1) Rate** means a rate equivalent to the Construction Period Risk Free Rate plus 4.00%.

**WACC(2) Rate** means, in respect of Financial Year t, the weighted average of the rates equivalent to the NECAP Risk Free Rate plus 5.00% for each twelve month period ending 31 March in which any program of NECAP included in the NECAP Asset Base for Financial Year t for the Existing Terminal or Differentiated Expansion Component (as relevant) was Completed and handed over to the Operator, where the weights are equal to the proportion of the value of the NECAP Asset Base for Financial Year t referable to the program(s) of NECAP Completed and handed over to the Operator in the twelve month period.

## 2. Interpretation

In this Framework unless the context otherwise requires:

- (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
- (b) words denoting the singular include the plural and vice versa;
- (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
- (d) words denoting any gender include all genders;

- (e) references to parties, Parts, Sections, Annexures and Schedules are references to parties, Parts, Sections, Annexures and Schedules to this Framework as modified or varied from time to time;
- (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (g) references to any party to this Framework or any other document, deed or agreement include its successors, permitted assigns, or permitted subcontractors and the obligations of any party extends to those persons;
- (h) all references to dates and times are to Brisbane time;
- (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
- (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
- (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
- (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;
- (m) where there is a requirement under this Framework to consider whether Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holders' respective Annual Contract Tonnages and the extent to which (if at all) Differential Pricing applies to the Annual Contract Tonnages the subject of each Access Agreement;
- (n) where measurement of coal "Handled" is being made in respect of a period, the tonnage loaded into vessels will be taken to be the tonnage Handled in that period; and
- (o) headings are for convenience only and do not affect interpretation of this Framework.

### **3. Change to index**

- (a) If the index used in any formula is not published at the time it is to take effect but will subsequently be published, then the formula will not be applied until such index is available, and the result of applying such formula at such later date shall be backdated to the date of effect.
- (b) If an index used in any formula under this Framework is suspended or discontinued, then:

- (i) it shall be replaced by the index substituted for it; and
- (ii) if the index is not substituted by another index, the parties shall, acting in good faith, meet to agree a replacement index. If the parties cannot agree upon a replacement index within 28 days, then either party may refer the issue to dispute resolution in accordance with clause 16.

## Schedule H - Terms of Operation and Maintenance Contract

Term	Summary of term
Parties	<p>DBCT Management Pty Ltd (<b>DBCTM</b>), DBCT Investor Services Pty Limited as trustee of the DBCT Trust (<b>DBCT Trustee</b>) and the operator, Dalrymple Bay Coal Terminal Pty Limited (<b>Operator</b>).</p> <p>The Operation and Maintenance Contract (<b>Contract</b>) defines the relationships between the parties and their rights and obligations.</p>
Term	<p>The Contract will expire on [date] unless terminated earlier. Other than for default of DBCTM (refer further below), the Operator cannot terminate the Contract before this date.</p> <ul style="list-style-type: none"> <li>• If DBCTM wishes to terminate the Contract other than for the Operator's default, DBCTM must give 5 years' prior notice of termination; and</li> <li>• If an access undertaking is in place and the Operator wishes to terminate other than for DBCTM's default, the Operator can terminate by giving not less than two years notice to DBCTM. If the period of notice given will expire during the term of an access undertaking, the notice period will be extended and take on the from earlier of expiry of the access undertaking or 5 years after the date that a notice of termination is given.</li> </ul>
Intentions of the parties	<p>The parties' intentions include (among other things):</p> <ul style="list-style-type: none"> <li>• The Operator will be responsible for day-to-day operation and maintenance of the Terminal;</li> <li>• The Operator must ensure that its performance of services is coordinated in accordance with the relevant access undertaking in force at the time to the extent that no act or omission by the Operator would cause DBCTM to be in breach of a provision of the access undertaking; and</li> <li>• Subject to DBCTM's rights under the Contract (for example in relation to default by the Operator), DBCTM will not intervene in the day-to-day operation and maintenance of the Terminal.</li> </ul>
Operator's engagement	<p>DBCTM has engaged the Operator to perform the services. The Operator is an independent contractor and not an agent of DBCTM. The services include all things necessary for the operation, maintenance and management of the Terminal.</p>
Operational Services to be performed by the Operator	<p>Operation of the Terminal specifically includes the following services:</p> <ul style="list-style-type: none"> <li>• coordinate the ordering and scheduling of trains;</li> <li>• train unloading;</li> <li>• coal stockpile management, reclamation and handling;</li> <li>• coal blending if required by users of the Terminal;</li> <li>• vessel ordering; and</li> <li>• the loading of ships in accordance with the Terminal Regulations. In the absence of other applicable provisions in the Terminal Regulations, the Operator must normally load ships in order of arrival (subject to there being relevant coal at the Terminal and all prerequisites to loading having been complied with).</li> </ul> <p>These services must be provided in accordance with the approved access undertaking and user agreements and are to be further detailed in an Appendix to the specification included in the Contract.</p>

Term	Summary of term
Maintenance Services to be performed by the Operator	<p>The Operator must maintain the Terminal and each component of the Terminal at its operating capacity as specified in the Contract. This specifically includes:</p> <ul style="list-style-type: none"> <li>• planned maintenance and repair in accordance with an annual operation, maintenance and capital plan (prepared by the Operator);</li> <li>• unplanned maintenance and repair as required (for example following equipment breakdown);</li> <li>• condition monitoring and maintenance management; and</li> <li>• upkeep of the Terminal, including activities such as maintenance of access roads and dust suppression.</li> </ul>
Standard of Operator's performance	<p>The Operator must operate and maintain the Terminal in order to ensure it is capable of operating:</p> <ul style="list-style-type: none"> <li>• at its rated design capacity;</li> <li>• in accordance with good operating and maintenance practice; and</li> <li>• in good and substantial repair.</li> </ul> <p>The Operator must ensure that the Terminal is maintained and operated so as to achieve, as far as practical, the best and most cost effective outcome, taking account, as appropriate, of:</p> <ul style="list-style-type: none"> <li>• lowest total whole of life cost;</li> <li>• reliability and economy of performance;</li> <li>• maximising the effective life of the Terminal;</li> <li>• good operating and maintenance practice;</li> <li>• in the case of competing interests between users, fairness; and</li> <li>• the obligations of DBCTM Management under the access undertaking and any user agreements. These obligations are subject to DBCTM having expended appropriate capital if relevant.</li> </ul> <p>The Operator must provide everything that is necessary for performance of the services, other than any things specified in the Contract as to be provided by DBCTM. The Operator's supply obligations include the supply of water and power to the Terminal. The Operator is also required to supply and maintain spares for the Terminal.</p> <p>The Operator can subcontract parts of the Services without DBCTM's consent, however remains liable for the standard of performance. The Operator is specifically required to supervise the execution of all Services.</p>
Annual operation, maintenance and capital plan	<p>The Operator must, in consultation with DBCTM, prepare and submit an annual operation, maintenance and capital plan by 15 May. The plan will identify the proposed budget for the next financial year and will foreshadow the likely plan and budget for the subsequent two years (i.e. provide a three year budget snapshot).</p>

Term	Summary of term
Payments to the Operator	<p>DBCTM pays the Operator all reasonably incurred costs of performing the services (that is, operating and maintaining the Terminal in accordance with the Contract) plus a margin.</p> <p>The Operator is also entitled to be paid:</p> <ul style="list-style-type: none"> <li>• reimbursement of capital expended by the Operator, subject to certain conditions (outlined below in capital works);</li> <li>• consulting fees in respect of capital works (refer further below in relation to capital works); and</li> <li>• a project management commission if the Operator project manages a non-expansion capital project.</li> </ul> <p>The Contract acknowledges that it is intended that amounts paid to the Operator will be recovered by DBCTM from users under their user agreements. The Operator has obligations to assist DBCTM to facilitate this pass through.</p>
Terminal Regulations	<p>Both the Operator and DBCTM are required to comply with the Terminal Regulations.</p> <p>The Operator may propose amendments to the Terminal Regulations for DBCTM's consent, which DBCTM must not unreasonably withhold but which will be subject to the requirements of the access undertaking in relation to such amendments.</p> <p>DBCTM must require each Terminal user pursuant to their user agreement(s) to comply with the Terminal regulations as applicable from time to time.</p>
Access to the Terminal	<p>DBCTM has granted the Operator a licence to use, occupy and control the Terminal as is necessary to perform the services in accordance with the Contract.</p> <p>The Operator must give DBCTM and its personnel such access to the Terminal as they reasonably require from time to time. However, such access is subject to compliance with the Operator's applicable procedures (including safety requirements). DBCTM must also take reasonable measures not to impede the Operator's performance of the services.</p>
Care of and risk in the Terminal	<p>The Operator has care of the Terminal and assumes the risk of damage to the Terminal and all things located at it (including coal). The Operator must insure the Terminal in accordance with the insurance program detailed in the Contract.</p>
Safety and environmental compliance	<p>The Operator has primary responsibility for the management of safety at the Terminal and for compliance with legal requirements with respect to safety at the Terminal.</p> <p>The Operator also has primary responsibility for the compliance of the Terminal with all relevant environmental laws and requirements. Among other things, the Operator is required to obtain and maintain all required approvals from authorities with respect to the performance of the services.</p>
Records and audits	<p>The Operator must maintain records (including financial records) relating to the services.</p> <p>From time to time, DBCTM may appoint a suitably qualified person to conduct an audit of the records maintained by the Operator and/or of the Operator's relevant systems and procedures.</p> <p>The Operator must work with DBCTM to ensure that DBCTM is able to comply with its reporting obligations under the approved access undertaking.</p>
Continuous improvement	<p>The Operator must work with DBCTM in undertaking reviews to identify and develop options for improved efficiency of the Terminal as well as of the coal transport chain. The parties have coordination obligations in relation to the implementation of the findings of such reviews.</p>

Term	Summary of term
Capital works	<p>Either the Operator or DBCTM can propose that capital works are undertaken. The Operator has obligations to participate in planning for proposed capital works. The Operator is entitled to be paid consulting fees (which are separate and additional to its usual monthly payments) for this participation.</p> <p>If capital works are to proceed, DBCTM and the Operator may agree that the capital works will be implemented by the Operator, DBCTM or another contractor.</p> <p>There is a handover process which applies once capital works have been completed. From the time of handover, the capital works become part of the Terminal and the Operator's obligations to provide the services extend to include that part of the Terminal.</p>
Force majeure	<p>The Contract defines events of force majeure. If a party is affected by such an event, it may be granted relief from performance of its affected obligations under the Contract, subject to compliance with certain requirements.</p>
Dispute resolution	<p>The Contract specifies a dispute resolution procedure which includes the following provisions:</p> <ul style="list-style-type: none"> <li>• If a dispute between DBCTM and the Operator arises out of or in connection with the Contract, then either party may give the other party a notice of dispute.</li> <li>• Neither party may commence any court proceedings or arbitration in respect of any dispute which is the subject of a notice of dispute until the party has complied with the dispute resolution procedure specified in the Contract.</li> <li>• Within 14 days after service of a notice of dispute, the senior executives of each party must confer at least once to attempt to resolve the dispute and failing resolution, to consider and, if possible, agree on methods of resolving the dispute by other means.</li> <li>• If the dispute cannot be resolved by the senior executives after a further period of 14 days or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer the dispute to conciliation.</li> <li>• If the dispute is not resolved by conciliation within a period of 14 days after nomination of the conciliator, the parties may agree to refer the dispute to arbitration or either party may pursue any other means of dispute resolution including litigation.</li> <li>• The Contract will specify procedures with respect to conciliation and arbitration.</li> <li>• The dispute resolution procedure does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect its rights.</li> </ul>
Change in control of the Operator	<p>There is a deemed assignment of the Contract if:</p> <ul style="list-style-type: none"> <li>• a person who is not a user or its related body corporate acquires an interest in the Operator; or</li> <li>• a user or its related body corporate acquires an interest in the Operator which exceeds its proportionate usage of the Terminal.</li> </ul> <p>The Contract may not be assigned without DBCTM's approval.</p>
Termination for default by either party	<p>Each party has termination rights if the other defaults under the Contract. The rights differ between the parties, but allow the non-defaulting party to require rectification or require the defaulting party to show cause, before the non-defaulting party may terminate the Contract.</p>

## Appendix 12 Access Framework – mark up to June 2018

*~~DBCTM Submission Draft including pricing provisions: June 2018~~*

# **Dalrymple Bay Coal Terminal Access Framework**

**~~[11xx] March 2019 - September 2020~~**

## **DBCT Management Pty Ltd**

Level 15

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## 1 Introduction

### 1.1 Purpose of this document

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

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

**(Operator)** An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract. The Operator of the Terminal has historically been user-owned and independent of the lessee.

**(Establishment of Framework)** On the Expiry Date, the declaration of coal handling services at the Terminal under the *Queensland Competition Authority Act 1997* (Qld) expired. This Framework has been developed in response and provides a balanced approach to the provision of Access and a framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Access Seekers seeking Access to the Services at the Terminal.

### 1.2 Scope of Framework

This Framework provides for:

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

### 1.3 Object of this Framework

~~(a) The objective of the Framework is to promote the economically efficient operation of, use of and investment in, the Terminal, with the effect of promoting effective competition in upstream and downstream markets.~~

~~(b)~~(a) This Framework has been prepared in accordance with, and gives effect to, the Framework Objective specified in the Deed Poll.

### 1.4 Duration of Framework

This Framework will apply on and from the Commencement Date. It will apply until the Terminating Date.

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

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

## **1.6 Implementation of Differentiation in Access Agreements**

Following a Price Ruling that a Terminal Capacity Expansion will be a Differentiated Expansion Component, DBCT Management will:

- (a) calculate Access Charges under each Access Agreement in accordance with the provisions of this Framework; and
- (b) in good faith, take all reasonable steps to negotiate any necessary amendments to any Access Agreement executed prior to the Price Ruling, to ensure that they are consistent with the Access Charges being calculated in accordance with the provisions of this Framework in relation to the application of Differentiation to a Terminal Capacity Expansion.

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## **2 Definitions and Interpretation**

### **2.1 Definitions**

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

### **2.2 Interpretation**

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

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## **3 Role of DBCT Management and the Operator**

### **3.1 Role of DBCT Management**

- (a) The owner of the Terminal is DBCT Holdings.
- (b) DBCT Trustee and DBCT Management, under the Leases, are the lessee and sublessee of the Terminal. Under the terms of the Leases and the Port Services Agreement, DBCT Management is solely responsible for providing Access to Access Holders and Access Seekers during the Lease Term.
- (c) DBCT Management will comply with and give effect to this Framework, except as otherwise provided for under an Access Agreement or required by law.

- (d) DBCT Management will ensure that employees, subcontractors and agents of subcontractors comply with the requirements of this Framework, except as otherwise provided for under an Access Agreement or required by law.
- (e) Where the performance of an obligation under this Framework requires a Related Body Corporate of DBCT Management to take or refrain from taking some action, DBCT Management must procure that the Related Body Corporate takes or refrains from taking that action.
- (f) DBCT Management must procure that any Related Body Corporate provides all necessary assistance and information where this is required for the performance by DBCT Management of an obligation under this Framework.

### 3.2 Role of the Operator

During the ~~T~~erm of the Framework, DBCT Management acknowledges and agrees that:

- (a) the Operator is and will remain Dalrymple Bay Coal Terminal Pty Limited ACN 010 268 167 (**DBCT PL**) and that DBCT PL is majority owned or wholly owned by Access Holders and Existing Users;
- (b) each Access Holder and Existing User has a right under the constitution of DBCT PL to become a shareholder of DBCT PL;
- (c) if an Access Holder or Existing User is not a shareholder of DBCT PL but wishes to become a shareholder of DBCT PL then that Access Holder or Existing User may, in accordance with the constitution of DBCT PL, apply to become a shareholder of DBCT PL by making an application to DBCT PL at the following address:  
  
Dalrymple Bay Coal Terminal Pty Limited  
M.S. F283  
Mackay, Queensland, 4740  
Attention: Chief Executive and General Manager;
- (d) the Operator carries out its obligations under the Operation & Maintenance Contract and Terminal Regulations independently of DBCT Management.

### 3.3 Operation and Maintenance Contract

During the ~~T~~erm of the Framework, DBCT Management undertakes to:

- (a) maintain the Operation & Maintenance Contract; and
- (b) ensure that the terms of the Operation and Maintenance Contract, if amended at any time, remain substantially consistent with the terms set out in Schedule H.

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## 4 Services to be provided

DBCT Management must provide the Services at the Terminal to Access Holders in accordance with this Framework and each Access Agreement, including in compliance with the Terminal Regulations (and, without limitation, in accordance with the level of service set out in Schedule E of this Framework).

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## 5 Negotiation arrangements

### 5.1 Framework for negotiation

- (a) **(Outline)** This Section 5 of this Framework outlines the process which will be followed to enable Access Seekers to obtain Access. It deals with:
- (1) an Access Application by an Access Seeker and a Renewal Application by an Access Applicant;
  - (2) provision of an Indicative Access Proposal by DBCT Management;
  - (3) negotiations to develop an Access Agreement;
  - (4) principles for the entering into of an Access Agreement where it is conditional upon a Terminal Capacity Expansion; and
  - (5) various other provisions relating to when and the basis on which Access Agreements may be entered into pursuant to Access Applications.
- (b) **(Progressing Access Applications)** DBCT Management will take all reasonable steps to progress each Access Application and any negotiations to develop an Access Agreement with an Access Seeker in a timely manner and will complete each relevant step as soon as is practicable.
- (c) **(Negotiations to be in good faith)** DBCT Management and an Access Seeker must negotiate in good faith for reaching an Access Agreement.
- (d) **(No unfair differentiation between Access Seekers)** DBCT Management must not unfairly differentiate between Access Seekers in a way that has a material adverse effect on the ability of one or more Access Seekers to compete with other Access Seekers.
- (e) **(DBCT Management to satisfy Access Seeker's requirements)** In negotiations for an Access Agreement, DBCT Management must make all reasonable efforts to try to satisfy the reasonable requirements of the Access Seeker.

### 5.2 Application for Access and information to be provided

- (a) **(Form of Access Application)** Any application for Access must be in the form specified in Schedule A and include:

- (1) a warranty in the form specified in; and
  - (2) such other information that may be required by, Schedule A.
- (b) **(Access Seeker to agree to comply with Framework and Deed Poll)** An Access Seeker must, when submitting an Access Application, unconditionally and irrevocably agree to comply with the requirements, obligations and processes in:
- (1) this Framework relating to it or its Access Application; and
  - (2) the Deed Poll, including the conditions set out in clauses 8-4, 9, 10 and 11 of the Deed Poll,
- and if the Access Seeker does not do so then:
- (3) DBCT Management will have no obligations, and the Access Seeker no rights, under this Framework in respect of the Access Application or the Access sought in that Access Application; and
  - (4) DBCT Management may refuse to accept the Access Application.
- (c) **(Forecasts in Access Application)** DBCT Management acknowledges that, at the time an Access Application is made, some information provided in the Access Application may be a forecast only. The Access Seeker must use its best endeavours to ensure that any such information contained in an Access Application is as accurate as possible and must immediately notify DBCT Management as soon as it becomes aware that the information is, or is likely to be, inaccurate.
- (d) **(Information sought by Access Seeker prior to Access Application)** Prior to submitting an Access Application, an Access Seeker may request from DBCT Management:
- (1) reasonably available preliminary information relating to the Access Application (including copies of the then current Standard Access Agreement and Terminal Regulations) – which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request;
  - (2) initial meetings to discuss the proposed Access Application and the requirements of the Access Application Form set out in Schedule A which DBCT Management must facilitate within a reasonable time after being requested to do so.
- (Revisions to Access Application)**
- (e) At any time after an Access Seeker submits an Access Application to DBCT Management but prior to the commencement of the negotiation period

referred to in Section 5.7 in respect of the Access Application, an Access Seeker may notify DBCT Management that it wishes to revise certain information specified in its Access Application.

- (f) In considering whether to allow an Access Seeker to revise certain information specified in its Access Application, DBCT Management will have regard to the impact of the proposed revision, if allowed by DBCT Management, on other Access Seekers and Access Holders.
- (g) Without otherwise limiting DBCT Management's discretion to allow an Access Seeker to revise information specified in its Access Application, DBCT Management will allow an Access Seeker to revise information specified in its Access Application in accordance with Section 5.4(c) or if DBCT Management is reasonably of the opinion that the proposed revision:
  - (1) if allowed by DBCT Management, would not substantially alter the nature of the Access rights sought by the Access Seeker in its Access Application prior to the revision;
  - (2) if allowed by DBCT Management, would not adversely impact on other Access Seekers or Access Holders; and
- (h) is not otherwise prohibited under Section 5.4(i)(3), 5.4(l)(7) or 5.10(h).

### 5.3 What happens after lodgement of Access Application

- (a) **(Acknowledgement by DBCT Management)** Upon receiving a purported Access Application under Section 5.2, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Seeker receipt of the application and confirm whether the application is an Access Application complying with Section 5.2.
- (b) **(Request by DBCT Management for further information)** DBCT Management may request from the Access Seeker additional information where DBCT Management can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal, or clarification of information provided, including (but not limited to) obtaining further information to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, a Security provider. Upon receiving the required information or clarification from the Access Seeker, DBCT Management must provide written acknowledgment of the receipt of this further information as soon as practicable and, in any event, within 10 Business Days of receipt of the further information.
- (c) **(Provision of further information by Access Seeker)** The Access Seeker must provide any information reasonably requested by DBCT Management under this Section 5.3 within 20 Business Days of receipt of the request from DBCT Management (or such later date as DBCT Management agrees to, it being

required to act reasonably in agreeing to extend the period if the Access Seeker demonstrates good grounds for a longer period applying). If the Access Seeker does not provide the requested information within that period, its Access Application will be deemed to have been rejected, but it may apply again for Access in accordance with Section 5.2. If an Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to acknowledgement under this Section 5.3 of the Access Application.

(d) **(Rejection if Access Seeker fails to provide information or demonstrate application criteria) If:**

- (1) an Access Application fails to comply with Section 5.2 (including where the Access Seeker fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
- (2) DBCT Management, acting reasonably, is of the opinion that an Access Application:
  - (A) does not demonstrate that the Access Seeker is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Access Application (which must be no more than 5 years from the date of the Access Application); or
  - (B) does not demonstrate that the Access Seeker has:
    - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Access Application in respect of the first five Financial Years of Access applied for; and
    - (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Seeker, consistent with the total net tonnes specified in item 7 of the Access Application,

then DBCT Management may reject the Access Application. Where DBCT Management rejects an Access Application in accordance with this Section 5.3, the Access Application will be deemed not to have been received, for the purposes of the Queue, unless Section 5.3(e) applies.

(e) **(Disputed rejection of Access Application) If DBCT Management rejects an Access Application submitted by an Access Seeker and the Access Seeker, acting reasonably, is of the opinion that its Access Application should have been accepted by DBCT Management in accordance with this Framework, then the Access Seeker may refer the matter for dispute resolution in accordance with Section 16 of this Framework within 15 Business Days of receiving the**

notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect of the Access sought in the relevant Access Application, unless and until the Dispute is resolved in favour of DBCT Management.

- (f) **(Expiry of Access Application)** Subject to an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT Management in accordance with this Framework before the relevant expiry date:
- (1) an Access Application submitted to DBCT Management before the Commencement Date will, unless the Access Application is renewed under Section 5.3A, expire on the date which is eight weeks after the Commencement Date;
  - (2) any Access Application submitted to DBCT Management on or after the Commencement Date will, unless the Application is renewed under Section 5.3A, expire on the next occurring 31 August; and
  - (3) an Access Application which has been renewed in accordance with Section 5.3A, will, unless the Access Application is further renewed under Section 5.3A, expire on the next 31 August occurring after the 31 August on which the Access Application was to expire immediately prior to the Renewal Application being accepted.
- (g) **(Notice of Expiry)** DBCT Management will give notice of the timing of expiry to all Access Seekers with a current Access Application (including those which remain current due to a previous Renewal Application being accepted):
- (1) for Access Applications for which the expiry date is set by Section 5.3(f)(1), on the Commencement Date; and
  - (2) for Access Applications for which the expiry date is set by Section 5.3(f)(2) or 5.3(f)(3), at least 1 month and no more than 3 months prior to expiry date of the Access Application.

### 5.3A Renewal Applications

- (a) **(Renewal Application)** An Access Applicant that wishes to renew its Access Application must:
- (1) submit to DBCT Management a Renewal Application in the form specified in Schedule A and include:
    - (A) the warranty in the form specified in Schedule A; and
    - (B) such other information that may be required, as specified in Schedule A,

not later than 15 Business Days before the date that its Access Application is due to expire; and

- (2) when submitting the Renewal Application, unconditionally and irrevocably agree to comply with the requirements, obligations and processes in:
  - (A) this Framework relating to it or its Renewal Application; and
  - (B) the Deed Poll, including the conditions set out in clauses 8-4, 9, 10 and 11 of the Deed Poll,

and if the Access Seeker does not do so then DBCT Management may refuse to accept the Renewal Application.

- (b) **(Forecasts in Renewal Application)** DBCT Management acknowledges that, at the time a Renewal Application is made, some information provided in the Renewal Application may be a forecast only. The Access Applicant must, however, use its best endeavours to ensure that any such information contained in a Renewal Application is as accurate as reasonably possible.
- (c) **(Acknowledgement by DBCT Management)** Upon receiving a purported Renewal Application under this Section 5.3A, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Applicant receipt of the Renewal Application and confirm whether the application is a Renewal Application complying with this Section 5.3A.
- (d) **(Rejection if Access Seeker fails to provide information or demonstrate renewal criteria)** If:
  - (1) an Access Applicant fails to comply with this Section 5.3A in respect of a Renewal Application (including where the Access Applicant fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
  - (2) DBCT Management, acting reasonably, is of the opinion that a Renewal Application submitted by an Access Applicant:
    - (A) does not demonstrate that the Access Applicant is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Renewal Application (which must be no more than 5 years from the date of the Renewal Application); or
    - (B) does not demonstrate that the Access Applicant has:
      - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Renewal

Application in respect of the first five Financial Years of Access applied for; and

- (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Applicant, consistent with the total net tonnes specified in item 7 of the Renewal Application,

then DBCT Management may reject the Renewal Application. If DBCT Management rejects a Renewal Application or the Access Applicant fails to submit a Renewal Application to DBCT Management within the timeframe required in Section 5.3A(a), then the Access Applicant's current Access Application will expire on its expiry date (as determined in accordance with Section 5.3(f)) and the Access Applicant will be removed from the Queue on the date the Access Application expires, unless Section 5.3A(e) applies.

- (e) **(Disputed rejection of Renewal Application)** If DBCT Management rejects a Renewal Application submitted by an Access Applicant and the Access Applicant, acting reasonably, is of the opinion that its Renewal Application should have been accepted by DBCT Management in accordance with this Framework, then the Access Applicant may refer the matter for dispute resolution in accordance with Section 16 of this Framework within 15 Business Days of receiving the notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect of the Access sought in the relevant Renewal Application, unless and until the Dispute is resolved in favour of DBCT Management.
- (f) **(New Access Application if renewal is substantially different)** If DBCT Management, acting reasonably, is of the view that a Renewal Application is substantially different to the Access Seeker's current Access Application, then subject to paragraph (g) of this Section 5.3A, DBCT Management will treat the Renewal Application as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the difference is an increase in the annual Tonnage required or a longer term, then only the additional annual Tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.
- (g) With respect to the renewal of an Access Application referred to in paragraph (b) of the definition of 'Access Application', if the first Renewal Application after the Commencement Date is for an increase in the term from 5 or more years, then the extended term will not be taken to constitute the subject of a new Access Application and will instead be considered as part of the Renewal Application.

- (h) **(Renewed Access Application)** To the extent that a Renewal Application is confirmed by DBCT Management as a Renewal Application complying with Section 5.3A (or is determined as complying with Section 5.3A in a Dispute referred by the Access Applicant in accordance with Section 5.3A(e)):
- (1) the Access Applicant's current Access Application will be taken to have been renewed;
  - (2) the content of the Renewal Application will be taken to be the Access Applicant's Access Application for the purposes of this Framework; and
  - (3) the priority of the Access Applicant in the Queue will continue to be determined by the Access Application Date.

#### 5.4 Priority of Access Applications and execution of Access Agreements

- (a) **(Formation of Queue)** If at any time there are two or more current Access Applications and there is or will be insufficient Available System Capacity associated with Existing Terminal Capacity at any relevant time to accommodate an increase in the Handling of coal applied for in all of those Access Applications, a queue (the **Queue**) will be formed.
- (b) **(General rules for priority in Queue)** Subject to any other provision in Section 5, the priority of an Access Seeker in the Queue will be determined by their Access Application Date, with an earlier Access Application Date having priority in the Queue over any later Access Application Date. An Access Seeker may be removed from the Queue once their Access Application is no longer current in accordance with the terms of Sections 5.3, 5.4, 5.6, 5.7(a)(2), 5.7(a)(4), 5.8, 5.9 or 5.10 of this Framework. An Access Seeker may lose priority in the Queue pursuant to Sections 5.4 or 5.10. The Queue will cease to exist if Available System Capacity at all relevant times subsequently exceeds the amount of capacity requested in all of the then current Access Applications.
- (c) **(Notice of formation of or change in Queue)** Promptly after a Queue is first formed and promptly after each occasion that the Annual Contract Tonnage applied for in the Queue is increased or decreased, DBCT Management must notify each Access Seeker in the Queue of:
- (1) the Annual Contract Tonnage applied for in priority to that Access Seeker in the Queue;
  - (2) the total Annual Contract Tonnage applied for in the Queue at that time; and
  - (3) a breakdown of the Annual Contract Tonnage applied for in the Queue by the dates for commencement of Access and Annual Contract Tonnage applied for in each Access Application (without any

identification of the Access Seeker which made each Access Application but with identification of the dates for commencement of Access).

**(Access Agreements for Available System Capacity from the Existing Terminal)**

(d) **(Entry into Access Agreement for Available System Capacity)** Promptly upon being advised in writing by an Access Holder or Existing User that all or part of its Annual Contract Tonnage in respect of the Existing Terminal will become available, DBCT Management will:

- (1) notify each Access Seeker in the Queue of the date for the commencement of such Access and the relevant Tonnage; and
- (2) issue an Indicative Access Proposal for Available System Capacity in respect of the relevant Tonnage to the Access Seeker who is first in the Queue.

(e) **(Entry into Access Agreement not conditional on Terminal Capacity Expansion by Access Seekers not first in the Queue but seeking Access at an earlier date)** The following process will apply in relation to Access Seekers who are not first in the Queue but are ready to enter into an Access Agreement that is not conditional on a Terminal Capacity Expansion:

(1) An Access Seeker who is not first in the Queue (the Notifying Access Seeker) but is seeking Access from existing Available System Capacity at a date that is at least 6 months earlier than the date for commencement of Access applied for in the Access Application which is first in the Queue, may give notice in writing to DBCT Management in accordance with Section 5.4(e)(2) (**Notice**).

~~(2)~~ The Notice is to state that the Notifying Access Seeker is prepared to enter into

~~(2)~~ an Access Agreement consistent (subject to the next sub-section) with its Access Application on either:

(A) -the terms of the Standard Access Agreement; or

~~(A)~~(B) on ~~any~~ other terms agreed between DBCT Management and the Access Seeker.

(3) The Notice may state that the Notifying Access Seeker wishes to enter into an Access Agreement for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice.

If DBCT Management receives ~~such a~~ Notice under section 5.4(e)(1)-(2)(A) from the Notifying Access Seeker, it must promptly:

- (4) notify, in writing, all other Access Seekers that are ahead of the Notifying Access Seeker in the Queue (each a **Notified Access Seeker**) of this development (including the requested date for commencement of Access, but not the identity of the Notifying Access Seeker); and
- (5) allow 3 months from the date when such notice is given by DBCT Management for each Notified Access Seeker to:

(A) deliver to DBCT Management two signed copies of an Access Agreement consistent with its Access Application (except that it may be for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice) and on:

(i) the terms of the Standard Access Agreement (Binding Standard Access Agreement); or

(ii) ~~on~~ other terms agreed between DBCT Management and a Notified Access Seeker; and

~~(A)~~(B) deliver to DBCT Management any Security required by DBCT Management (acting consistently with this Framework).

(f) **(Execution of Access Agreements in order of Access Seekers in Queue which commit)**

If, during the above 3 month period, one or more of the Notified Access Seekers:

- (1) delivers to DBCT Management such signed copies of an Access Agreement for Access to commence on a date which is the same as or earlier than the date for commencement of Access referred to in section 5.4(e)(3) (which, for clarification, may be a retrospective date, provided that any revised Access commencement date must not precede the date of the Notice); and
- (2) also provides any Security reasonably required by DBCT Management (or does not provide such Security but the circumstances in Section 5.4(g) apply),

then DBCT Management must:

- (3) give priority to such of those Notified Access Seekers that are seeking Access on the earliest date for commencement of Access (provided

- that, if there are two or more Notified Access Seekers each seeking Access commencing on the same date, priority will be given to the Notified Access Seekers in order of their position in the Queue);
- (4) (subject to there being sufficient Available System Capacity at the relevant time) execute those copies of the Access Agreement and re-deliver one signed copy to such Notified Access Seeker; and
- (5) repeat that process in order of the date for commencement of the Access that they are seeking with each successive Notified Access Seeker (if any) which has delivered during the 3 month period such a signed Access Agreement and any Security required by DBCT Management (acting consistently with this Framework).
- (g) **(Issues with provision of requested Security)** If a Notified Access Seeker is unable to provide any Security reasonably required by DBCT Management within the 3 month period referred to in Section 5.4(f) (or if, by the end of the first month of that 3 month period, the Access Seeker disputes DBCT Management’s entitlement to the Security requested), the Access Agreement to be executed and delivered by the relevant Notified Access Seeker in that period will be modified so that it is a condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, Security which the Independent Expert determines to be fair is provided within 20 Business Days after the Independent Expert makes that determination), and the “Effective Date” will be adjusted accordingly.
- (h) **(Execution of Access Agreement with Notifying Access Seeker, if sufficient remaining Capacity)** If, after all Access Agreements with all Notified Access Seekers referred to in Section 5.4(e)(5) who have duly delivered signed documents (and provided Security if relevant) have been executed (or negotiations have ceased pursuant to Section 5.8), there is still sufficient Available System Capacity, then DBCT Management will ~~conclude-sign and deliver a Binding Standard Access Agreement or~~ an Access Agreement on other terms agreed between DBCT Management and the Notifying Access Seeker with-to the Notifying Access Seeker for that Available System Capacity (or that part of it which the Notifying Access Seeker requires) provided that the Notifying Access Seeker first provides any Security reasonably required by DBCT Management (or does not provide such Security but, where the expression Notified Access Seeker in section 5.4(g) is replaced by the expression Notifying Access Seeker, the circumstances in section 5.4(g) apply).
- (i) **(Clarifications)** For clarity:

- (1) **(Position in Queue may be lost by not executing Access Agreement)** any Notified Access Seeker that does not within the above 3 month period deliver to DBCT Management a signed Access Agreement:
  - (A) may be removed by DBCT Management from the Queue, in which case the Notified Access Seeker's Access Application will be taken to have been rejected and the Access Application negotiation process for that Notified Access Seeker will be discontinued, unless a bona fide Dispute in relation to the removal is referred under Section 16 in which case, the Notified Access Seeker will maintain its position in the Queue until that Dispute is resolved; or
  - (B) will not, if DBCT Management does not remove the Notified Access Seeker from the Queue, lose its place in the Queue (although a Notifying Access Seeker which does execute an Access Agreement pursuant to this Section 5.4 will no longer be in the Queue in respect of the tonnage the subject of that Access Agreement) and the Access Application negotiation process for that Access Seeker will otherwise continue in accordance with Section 5 of this Framework;
- (2) **(Considerations regarding removal from Queue)** in considering whether to remove an Access Seeker from the Queue under Section 5.4(i)(1), DBCT Management will have regard to:
  - (A) the date that the Access Seeker proposes to commence delivering coal to the Terminal in comparison with the date that the Notifying Access Seeker proposes to commence delivering coal to the Terminal;
  - (B) the tonnes that the Access Seeker requires to commence delivering coal to the Terminal in comparison with the tonnes that the Notifying Access Seeker proposes to commence delivering to the Terminal; and
  - (C) the likelihood of future Access becoming available at the Terminal on or prior to the date for commencement of Access sought by the Access Seeker that DBCT Management is considering whether to remove from the Queue;
- (3) **(Amendments to Access Application)** except as provided for in Section 5.4(f)(1), an Access Seeker may not amend the date for commencement of delivery of coal to the Terminal specified in its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.4(e)(4);

(4) **(Offers of Access Agreement not to exceed Available System Capacity)** unless otherwise required by the Port Services Agreement or Section 11 of this Framework, DBCT Management must not offer to enter into an Access Agreement for Annual Contract Tonnage which would result in Aggregate Annual Contract Tonnage of all Access Holders and Existing Users exceeding the Available System Capacity at a relevant time; ~~and~~

(5) **(Access Seeker may accept lesser tonnage if insufficient capacity for tonnage applied for)** where the process in Sections 5.4(c), 5.4(e) and 5.4(f) would have the effect of giving an Access Seeker a right to enter into an Access Agreement, except for the fact that there is insufficient Available System Capacity to meet that Access Seeker's Access Application in full, DBCT Management must inform that Access Seeker to that effect, and the Access Seeker may elect to require an Access Agreement for a lesser tonnage consistent with Available System Capacity from time to time during the period originally applied for (subject to the other terms of this Framework), with the balance of the Annual Contract Tonnage originally applied for remaining the subject of the Access Application; ~~and~~

(6) **(Binding nature)** by the Notifying Access Seeker sending a notice under section 5.4(e)(2)(A)± and by a Notified Access Seeker delivering a signed copy of a Binding Standard Access Agreement to DBCT Management each of them and DBCT Management agree that the Standard Access Agreement is legally effective to bind each party signing it, notwithstanding that section 2 of Schedule 2 of the Binding Standard Access Agreement does not have a completed dollar amount (i.e. \$xx.xx) included in it.

**(Contracting on basis of Binding Standard Access Agreement)**

(j) Where DBCT Management executes and redelivers (or delivers as the case may be) a Binding Standard Access Agreement to a Notified Access Seeker or the Notifying Access Seeker, DBCT Management must record the priorities given to Notified Access Seekers under section 5.4(f)(3) and the Available System Capacity allocated to the Notifying Access Seeker under its Binding Standard Access Agreement and determine whether any person should be removed from the Queue, and make such adjustment to the Queue as DBCT Management determines in accordance with this Framework.

(k) Where section 2 of Schedule 2 of a Binding Standard Access Agreement does not have a completed dollar amount included in it, the following provisions apply:

- (1) upon completion of all actions of DBCT Management under section 5.4(j), DBCT Management will notify in writing each of the parties to a Binding Standard Access Agreement, and the parties to such Binding Standard Access Agreement must negotiate and seek to agree the dollar amount to be included in section 2 of Schedule 2, for a period of 30 days from such notice (or such longer period as the parties agree);
- (2) where such agreement is reached the parties shall execute a deed (in such form as agreed by them acting reasonably) to amend the Binding Standard Access Agreement to incorporate that dollar amount; and
- (3) Where the parties to the Binding Standard Access Agreement do not reach an agreement on the dollar amount, this shall be a Dispute and either party may refer the Dispute to arbitration in accordance with this section, and:
  - (A) the Dispute shall be considered to be of a kind referred to in section 10.1(b) and sections 10.3 and 10.4 apply except to the extent necessary to give effect to any matter agreed by the parties;
  - (B) the provisions of section 16.4 (excluding paragraphs 16.4(f) and (g)) apply (being the relevant provisions of section 16.4 that would apply if it was agreed that a Standard Access Agreement's terms and conditions applied); and
  - (C) section 16.5 applies.

#### **(Conditional Access Agreements)**

(1) **(Entry into an Access Agreement conditional on Terminal Capacity Expansion)** The following process will apply in relation to the entry into Access Agreements that are conditional, wholly or partly, on a Terminal Capacity Expansion **(Conditional Access Agreement)**:

- (1) When the Aggregate Annual Contract Tonnage sought within the next 5 years by Applicants in a Queue cannot be met from Available System Capacity, such that a Terminal Capacity Expansion may be justified, DBCT Management will invite an offer from each Applicant in the Queue to enter into a Conditional Access Agreement.
- (2) Unless otherwise specified in a Conditional Access Agreement, the date for commencement of Access under a Conditional Access Agreement will be the date on which the Terminal Capacity Expansion is Complete and operating, and DBCT Management notifies Access Seekers in accordance with Section 11.1(l) or 11.1(q), as applicable, on which date

the Conditional Access Agreement will take effect as an Access Agreement.

- (3) In response to an invitation from DBCT Management given under Section 5.4(l)(1), any Access Seeker may make an offer to enter into a Conditional Access Agreement that may be (but need not be) subject to a condition precedent which relates to:
  - (A) **(Conditional on Terminal Capacity Expansion)** the triggering of an obligation by DBCT Management to perform a specified Terminal Capacity Expansion with a specified estimated cost within a specified estimated timeframe; -
  - (B) **(Conditional on other System elements)** DBCT Management being reasonably satisfied that a Service Provider (other than DBCT Management), Access Holder, Existing User, Access Seeker or other relevant entity has committed or will commit, subject only to conditions which are customary for that Service Provider and an expansion of that nature, to providing an expansion of a relevant part of the System which is necessary to create sufficient Available System Capacity; and ~~for~~
  - (C) **(Conditional on Section 5.4(q) being satisfied)** DBCT Management being reasonably satisfied that the Access Seeker's Access rights are matched by an entitlement held by the Access Seeker or a person on its behalf to rail infrastructure access rights relating to the coal the subject of the Conditional Access Agreement.

The following provisions relate to any such offer:

- (4) **(Invitation to each Access Seeker)** DBCT Management must give the same notice (**Expansion Notice**) at the same time to each Access Seeker in the Queue, inviting them to submit to DBCT Management (by way of offer to DBCT Management) two signed copies of such a Conditional Access Agreement consistent with their Access Application (except that it may be for a lower tonnage or shorter term than originally requested provided there is a bona fide commercial reason for seeking such lower tonnage or shorter term) on the terms of the Standard Access Agreement or on any other terms which DBCT Management has notified the Access Seeker would be acceptable to DBCT Management (**Different Terms**), and subject to the condition precedent referred to above.
- (5) **(Position in Queue may be lost by not offering a Conditional Access Agreement)** Any Access Seeker that does not, within 3 months after DBCT Management gives the Access Seeker an Expansion Notice,

deliver to DBCT Management a signed Conditional Access Agreement in accordance with the Expansion Notice:

- (A) may, subject to Section 5.4(l)(6), be removed by DBCT Management from the Queue, in which case the Access Seeker's Access Application will be taken to have been rejected and the Access Application negotiation process for that Access Seeker will be discontinued; or
  - (B) will not, if DBCT Management does not remove the Access Seeker from the Queue, lose its place in the Queue (although if DBCT Management executes a Conditional Access Agreement offered by any other Access Seeker pursuant to this Section 5.4(l), that Access Seeker will, subject to Section 5.4(l)(11), no longer be in the Queue in respect of the Tonnage the subject of that Conditional Access Agreement) and the Access Application negotiation process for the Access Seeker will otherwise continue in accordance with Section 5 of this Framework.
- (6) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under section 5.4(l)(5)(A), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (7) **(Amendments to Access Application)** Except as provided in Section 5.4(l)(4) and (5), an Access Seeker may not amend its Access Application during the 3 month period ~~40 Business Day~~ period which commences on the date the Access Seeker receives an Expansion Notice.
- (8) **(Acceptance of offers in order of priority in Queue)** If, during the 3 month period following the giving of an Expansion Notice one or more of the Access Seekers in the Queue:
- (A) delivers to DBCT Management such signed copies of a Conditional Access Agreement; and
  - (B) provides any Security required by DBCT Management (or the circumstances in Section 5.4(l)(9) apply),

DBCT Management will then give priority to the Access Seeker so doing which has the highest ranking in the Queue and (subject to there being sufficient Available System Capacity should the Terminal Capacity Expansion the subject of the condition precedent proceed) will execute

their Conditional Access Agreement. DBCT Management will then repeat the process down the Queue with each successive Access Seeker (if any) which has delivered such a signed Conditional Access Agreement and any relevant Security during the 3 month period.

- (9) **(Issues with provision of Security requested)** If an Access Seeker is unable to provide the Security required by DBCT Management within the 3 month period referred to in Section 5.4(l)(8) (or, by the fifth Business Day of the 3 month period referred to in Section 5.4(l)(8), the Access Seeker disputes DBCT Management's entitlement to the Security requested), the Conditional Access Agreement to be executed will be modified so that it is a further condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, a Security which the Independent Expert determines to be fair is provided within 20 Business Days after the Independent Expert makes that determination), and the "Effective Date" will be adjusted accordingly.
- (10) **(Termination if condition precedent not fulfilled)** Each Conditional Access Agreement referred to in Section 5.4(l)(4) and 5.4(l)(8) (as applicable) must be on the basis that it will terminate if a relevant condition precedent referred to in Section 5.4(l)(3) is not fulfilled within a reasonable period from the date of execution of the Conditional Access Agreement (which will not be less than 3 months). However, DBCT Management and an Access Seeker can agree to extend this period from time to time, as long as an extension for the same period has been offered by DBCT Management to all Access Seekers who have such condition precedent.
- (11) **(Access Seeker rejoins Queue if Conditional Access Agreements terminate)** If a Conditional Access Agreement referred to in Section 5.4(l)(8) terminates because:
- (A) a condition precedent referred to in Section 5.4(l)(3) has not been fulfilled within the reasonable period nominated (or any extended period as agreed between DBCT Management and each Access Seeker in accordance with Section 5.4(l)(10)), the relevant Access Seekers will resume their respective positions in the Queue as if the Access Seekers had never signed the Conditional Access Agreements; or
  - (B) a condition precedent that requires the Access Seeker to provide Security (as referred to in Section 5.4(l)(9)) is not fulfilled, DBCT Management may exercise its discretion to remove that Access Seeker from the Queue in accordance with

Sections 5.4(l)(5) and 5.4(l)(6) and, if so removed, the negotiation process for that Access Seeker in respect of the Terminal Capacity Expansion will be discontinued.

- (12) **(Reductions in contracted tonnage if estimated expansion of Terminal Capacity not achieved)** Each Conditional Access Agreement will include a provision entitling DBCT Management to re-determine Terminal Capacity and Expansion Component Capacity in accordance with Section 11.1(k) and to proportionately reduce the Annual Contract Tonnage allocated under the Conditional Access Agreement to the Access Seeker, subject to the following rules:
- (A) in relation to Socialised Terminal Capacity, if the capacity at the Existing Terminal determined by DBCT Management in accordance with Section 11.1(k)(3) is less than the estimation of aggregate (expanded) capacity at the Existing Terminal made at the time of entry into the Conditional Access Agreement, then DBCT Management will proportionately reduce the Annual Contract Tonnage in all Conditional Access Agreements so that the aggregate Tonnage of all Conditional Access Agreements is equal to the additional capacity at the Existing Terminal determined in accordance with Section 11.1(k) after the deduction of capacity required to eliminate any shortfall between aggregate Annual Contract Tonnages and capacity at the Existing Terminal which existed prior to the Terminal Capacity Expansion (see Section 5.4(m)(3));
  - (B) unless otherwise agreed with participating Access Seekers, in relation to a Differentiated Expansion Component, any Differentially Priced Capacity will be allocated to meet the full entitlements of Access Seekers as set out under relevant Conditional Access Agreements.
- (13) **(Reduced Tonnages revert to Queue)** If DBCT Management reduces the Annual Contract Tonnage allocated under a Conditional Access Agreement in accordance with Section 5.4(l)(12), then - in respect of the number of those tonnes which are reduced - an Access Seeker which has had its tonnes reduced will be:
- (A) placed equal first in the Queue with any other Access Seekers whose tonnes have been reduced following the Terminal Capacity Expansion; and
  - (B) taken not to have signed the relevant Conditional Access Agreement in respect of those tonnes.

(14) **(Section 5.4(q) not affected)** Nothing in this Section 5.4(l) is to be construed as limiting or in any way being contrary to the principle of Handling of Annual Contract Tonnage only being able to be availed of to the extent of matching rail access entitlement, in Section 5.4(q).

(14)(15) **(Binding nature)** By the Access Seeker delivering a signed Conditional Access Agreement to DBCT Management, the Access Seeker and DBCT Management agree that, the Conditional Access Agreement is legally effective to bind each party signing it, notwithstanding that it may have provisions without a completed dollar amount (i.e. \$xx.xx) included in it (Binding Conditional Access Agreement) and notwithstanding the Conditional Access Agreement will not come into operation until its condition precedent is fulfilled.

(16) **(Contracting on basis of Binding Conditional Access Agreement)** Where a Conditional Access Agreement does not have a completed dollar amount included in it, the following provisions apply:

(A) upon completion of all actions of DBCT Management under section 5.4(l)(5), (6) and (8), DBCT Management will notify in writing each of the parties to a Binding Conditional Access Agreement, and the parties to such Binding Conditional Access Agreement must negotiate and seek to agree the dollar amount to be included in the Agreement, for a period of 30 days from such notice (or such longer period as the parties agree).

(B) Where such agreement is reached the parties shall execute a deed (in such form as agreed by them acting reasonably) to amend the Binding Conditional Access Agreement to incorporate that dollar amount.

(C) Where the parties to the Binding Conditional Access Agreement do not reach an agreement on the dollar amount, this shall be a Dispute and the Dispute will be determined by the Expansion Arbitrator in making a Price Ruling in accordance with section 5.12.

### **(Overriding principles)**

(m) Despite any other provision of this Section 5.4:

(1) **(Existing Access Applications transitioned)** Any outstanding Access Application lodged by an Access Seeker under the 2017 Access Undertaking which applied prior to this Framework will (for the purpose only of determining priority of lodgement and therefore priority in the Queue) be deemed to have been an Access Application

lodged under this Framework, as if this Framework had commenced on the date that the first such Access Application was lodged;

- (2) **(Application for extension of term has priority)** An Access Application to extend the term of an Access Agreement (to the extent that it does not increase the relevant Annual Contract Tonnage) to accord with a bona fide re-estimation of the life of a mine will have precedence over an Access Application for new tonnage;
- (3) **(Terminal Capacity Expansion allocated first to eliminate shortfalls in capacity below already contracted tonnage)** If a Terminal Capacity Expansion is being Socialised, then the additional Terminal Capacity which results from that Terminal Capacity Expansion (determined in accordance with Section 11.1(k)) will be:
  - (A) firstly utilised to eliminate shortfalls in Annual Contract Tonnages under existing Access Agreements and Existing User Agreements; and
  - (B) only thereafter allocated to Annual Contract Tonnages under Conditional Access Agreements entered into in respect of that Terminal Capacity Expansion and proportionately reduced in accordance with Section 5.4(l)(12).
- (4) **(Allocation of Differentially Priced Capacity)** Differentially Priced Capacity will be utilised to meet Annual Contract Tonnages under Access Agreements entered into by the Access Seekers in respect of the relevant Differentiated Expansion Component. Consequently, Access Seekers and Access Holders who are not Differentially Priced Access Seekers in respect of that Differentiated Expansion Component will have no entitlement to have that Differentially Priced Capacity utilised to eliminate shortfalls in Annual Contract Tonnages under their Access Agreements.
- (5) **(Alternative arrangements in some cases if they achieve greater utilisation)** If, in a particular case, the strict application of the process set out in this Section 5.4 would result in a materially greater amount of Available System Capacity not being able to be utilised than could otherwise be the case if an alternative process is followed, then (in the interests of maximising coal exports from Queensland) DBCT Management may enter into one or more Access Agreements in accordance with that alternative process.

(n) **(Options to extend term taken into account)** For the purpose of this Section 5.4, an Access Holder or Existing User which has an option to extend the term of its Access Agreement or Existing User Agreement (as relevant) will initially be deemed to have exercised that option, when determining whether

or not a Queue exists or needs to be formed in relation to a new Access Application. However, if DBCT Management has the right to do so, it may, on each occasion in which a Queue is formed or re-formed, endeavour to have the exercise of that option brought forward or waived (in the latter case with the intention that one or more waivers may result in the Queue no longer existing).

~~(m)~~(o) **(Other provisions of Framework not limited)** Nothing in this Section 5.4 will be taken to limit or be contrary to:

- (1) any right DBCT Management has pursuant to Section 5.8; or
- (2) any rights or obligations of DBCT Management in Section 11 relating to the expansion of the Terminal (in particular the principle of new Access Agreements only being entered into consistently with anticipated System Capacity).

~~(n)~~(p) **(Disclosure of certain Access Application details)** DBCT Management may at any time and from time to time disclose to any person the aggregate tonnage which is the subject of Access Applications but, except as:

- (1) required by law;
- (2) consented to by the relevant Access Seeker;
- (3) reasonably necessary or desirable in relation to planning for operation of the Terminal; or
- (4) reasonably required to be disclosed to a rail infrastructure provider to assist in development of the System Master Plan,

DBCT Management will not disclose details of an Access Application (including details of the Access Seeker).

~~(o)~~(q) **(Entitlement to have Annual Contract Tonnage Handled must be matched by below rail access)** Despite any other provision in this Framework, DBCT Management must not enter into an Access Agreement with an Access Seeker unless it contains Clause 11.5 of the Standard Access Agreement (under which the Access Holder is not entitled to have its Annual Contract Tonnage Handled at the Terminal, to the extent and for such period as, the Access Holder has not demonstrated to the reasonable satisfaction of DBCT Management that that Annual Contract Tonnage is matched by an entitlement held by the Access Holder or a person on its behalf to railway track access relating to the coal the subject of the Access Agreement).

~~(p)~~(r) **(Notification of Differentially Priced Capacity)** Promptly following Completion of a Differentiated Expansion Component, DBCT Management will notify all

Expansion Parties, Access Seekers in the Queue and all Access Holders of the following:

- (1) the date of Completion;
- (2) the Differentially Priced Capacity; and
- (3) if any tonnage associated with the Differentiated Expansion Component is uncontracted and, if so, the tonnage which is available for Access Seekers.

~~(a)~~(s) **(Formation of a Differentiated Queue)** If at any time there are two or more current Access Applications received in respect of Differentially Priced Capacity and there is or will be insufficient System Capacity associated with Differentially Priced Capacity which is available at any relevant time to accommodate an increase in Handling of coal applied for in all of those Access Applications, a new queue will form in respect of the Differentially Priced Capacity (the **Differentiated Queue**).

~~(b)~~(t) **(Queuing Principles for a Differentiated Queue)** DBCT Management will manage any Differentiated Queue in accordance with the following principles:

- (1) DBCT Management will apply the same general rules for priority as apply with respect to the Queue, under this Section 5.4.
- (2) Access Seekers must specify which queue they wish to join when applying for Access (the Queue or a Differentiated Queue).
- (3) Access Seekers may be in both the Queue and a Differentiated Queue separately and simultaneously under different Access Applications.
- (4) Where capacity becomes available in either the Queue or a Differentiated Queue (but not both queues), DBCT Management will invite all Access Seekers in the relevant queue to submit a signed Access Agreement in the priority order of the relevant queue.

~~(c)~~(u) **(Commercial discretion of DBCT Management where Access Application involves both queues)** Where Available System Capacity relies on Terminal Capacity that comprises both Socialised Capacity and Differentially Priced Capacity, DBCT Management will invite Access Seekers in both the Queue and the Differentiated Queue to submit a relevant signed Access Agreement in accordance with the queuing principles in this Section 5.4.

~~(d)~~(v) **(Reordering of queues applying commercial discretion)** If, having obtained signed Access Agreements from Access Seekers in respect of Available System Capacity under Section 5.4(u), DBCT Management determines that the most efficient use of Available System Capacity is to contract with the same Access Seeker in respect of both Socialised Terminal Capacity and Differentially Priced

Capacity, it may accept a signed Access Agreement other than in the order of the relevant queue, provided that, prior to accepting such signed Access Agreement and subject to Section 5.4(w), DBCT Management:

- (1) has notified all other Access Seekers in each Queue of:
  - (A) its intention to reorder one or both queues; and
  - (B) any commercial principles which it intends to apply when reordering one or both queues; and
- (2) has provided all Access Seekers with a reasonable opportunity to respond; and
- (3) is satisfied (acting reasonably), based on any responses received from Access Seekers and applying those commercial principles, that there is no Access Seeker which is higher in either queue that is prepared to contract on an equivalent basis.

For this purpose, any commercial principles must operate as between Access Seekers strictly on a non-discriminatory basis.

~~(u)~~(w) **(Dispute in relation to reordering of a queue)**

- (1) An Access Seeker may refer any Dispute in relation to reordering of a queue under Section 5.4(v) as a Dispute under Section 16.
- (2) If a Dispute is raised in respect of any reordering of a queue, DBCT Management will not enter into any relevant Access Agreement under Section 5.4(v) unless and until the Dispute is withdrawn or determined and in accordance with any such determination.

## 5.5 Indicative Access Proposal

- (a) **(Timing for Indicative Access Proposal)** As soon as practicable and in any event within 20 Business Days following receipt of an Access Application (or, if additional information has been requested by DBCT Management under Section 5.3, within 20 Business Days of receipt of all of the additional information requested), DBCT Management must use its reasonable endeavours to provide the relevant Access Seeker with a response containing proposed terms and conditions of Access (**Indicative Access Proposal**).
- (b) **(Notice of additional time needed by DBCT Management)** If it is not reasonable to provide an Indicative Access Proposal within 20 Business Days of receipt of an Access Application (or, if applicable, the additional information requested under Section 5.3), DBCT Management must, as soon as practicable, but in any event, within 20 Business Days, advise the relevant Access Seeker of its estimate of the extra time required to deliver the Indicative Access Proposal.

- (c) **(Dispute by Access Seeker as to need for additional time)** If the Access Seeker is of the opinion that the estimate of extra time for preparation of the Indicative Access Proposal is excessive, then the Access Seeker may refer the matter for Expert Determination. DBCT Management must use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by DBCT Management or as otherwise determined by the Independent Expert.
- (d) **(Content of Indicative Access Proposal)** The Indicative Access Proposal must set out:
- (1) an indicative assessment as to whether there is sufficient Available System Capacity at all relevant times (having regard amongst other things to outstanding Access Applications in a Queue) to accommodate the Access Application;
  - (2) advice in respect of the existence of (but not the identity of) other Access Seekers who have already submitted an Access Application and the aggregate tonnage profile(s) requested in those Access Applications;
  - (3) the Standard Access Agreement or a draft access agreement where the Access Application contemplates Access on ~~d~~ifferent ~~t~~erms;
  - (4) the expiry date of the Indicative Access Proposal, which will be 30 Business Days following the date the Access Seeker receives the Indicative Access Proposal (should there be no notification by the Access Seeker pursuant to Section 5.6 that the Indicative Access Proposal has not been prepared in accordance with the Framework);
  - (5) if there is sufficient Available System Capacity to accommodate the Access Application, advice to that effect, and:
    - (A) if it is reasonable to provide such an indication, a non-binding indication of the expected Access Charges for the requested Services in the Access Application based on an allocation of Non-Expansion Costs in accordance with Section 10.7;
    - (B) if the sufficiency of Available System Capacity for the provision of any of the Access sought depends on the Completion of a planned or reasonably expected Terminal Capacity Expansion:
      - (i) an initial assessment of the Pricing Method that will be applicable to the Access sought (including reasons), having regard to the required Terminal Capacity Expansion, any relevant Price Ruling(s) by an Expansion Arbitrator and the Expansion Pricing Principles;

- (ii) a non-binding indication of the expected Access Charges for the purposes of sub-paragraph (A) (where it is reasonable to provide such an indication) that is based on the applicable Pricing Method determined by the initial assessment referred to at sub-paragraph (B)(i); and
  - (iii) if the Pricing Method for the required Terminal Capacity Expansion has not yet been determined by an Expansion Arbitrator, a non-binding indication of the expected Access Charges for the purposes of sub-paragraph (A) (where it is reasonable to provide such an indication) that also includes an indication of the expected Access Charges where the applicable Pricing Method is not that determined by the initial assessment referred to at sub-paragraph (B)(i);
- (C) the current Terminal Master Plan and System Master Plan;
  - (D) details of any additional information required by DBCT Management to progress the Access Application and develop the terms and conditions for acceptance; and
  - (E) details of any security, guarantee, other support or other information required by DBCT Management to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, its guarantor; and
- (6) if there is insufficient Available System Capacity (as determined by reference to the assessment of System Capacity undertaken prior to the time of giving the indicative assessment) to accommodate the Access Application, advice to that effect, and:
    - (A) reasonable particulars as to why this circumstance prevails;
    - (B) an estimate of what the Available System Capacity is at relevant times;
    - (C) whether a Queue has been formed in accordance with Section 5.4 of this Framework (including as a result of the relevant Access Application);
    - (D) an initial assessment of the Pricing Method that will be applicable to the Access sought (including reasons) having regard to any planned or reasonably expected Terminal Capacity Expansions, any relevant Price Ruling(s) by an Expansion Arbitrator and the Expansion Pricing Principles;

- (E) if it is reasonable to provide such an indication:
    - (i) a non-binding indication of the expected Access Charges for the requested Services in the Access Application where the applicable Pricing Method is as determined by the initial assessment referred to at sub-paragraph (D) and Non-Expansion Costs are allocated in accordance with Section 10.7; and
    - (ii) if the Pricing Method for the required Terminal Capacity Expansion has not yet been determined by an Expansion Arbitrator, a non-binding indication of the expected Access Charges for the requested Services in the Access Application where the applicable Pricing Method is not that determined by the initial assessment referred to at sub-paragraph (D) and Non-Expansion Costs are allocated in accordance with Section 10.7;
  - (F) a copy of the System Master Plan and an indicative timetable for any expansion of System Capacity which may be undertaken (if any).
- (e) **(Best Endeavours indication of Access Charges)** In assessing the applicable Pricing Method and providing a non-binding indication of the likely resulting Access Charges for the purpose of this Section 5, DBCT Management shall use its best endeavours to provide an accurate indication of the likely Pricing Method and Access Charges, having regard to all available information.
  - (f) **(Indicative Access Proposal not binding on DBCT Management)** The Indicative Access Proposal will, unless it contains specific conditions to the contrary, contain indicative arrangements only and does not oblige DBCT Management to provide Access.
  - (g) **(Access Seeker may dispute time-frame)** If, after 20 Business Days following DBCT Management's acknowledgment of the Access Application, the Access Seeker believes that DBCT Management is not making reasonable progress in the preparation of the Indicative Access Proposal, the Access Seeker may refer the timing of the provision by DBCT Management of the Indicative Access Proposal for Expert Determination.
  - (h) **(Where Terminal Capacity Expansion is needed to satisfy an Access Application)** Where there is not sufficient Available System Capacity to accommodate the Access Application and the Access Seeker wishes to continue the negotiation process provided for in this Section 5, such negotiations may continue on the basis that a Terminal Capacity Expansion may be undertaken in accordance with Section 11 of this Framework which (whether with or without any relevant expansion of other components of the

System) is estimated to provide sufficient Available System Capacity. In this case, if DBCT Management is unable to comply with the timeframes specified in Section 5 of this Framework, it will advise the Access Seeker of the estimated timeframes. If the Access Seeker does not believe the proposed timetable is reasonable or believes that DBCT Management is not making reasonable progress, it may refer the timetable for Expert Determination.

## 5.6 Response to Indicative Access Proposal

- (a) **(Access Seeker's response)** If the Access Seeker intends to progress its Access Application on the basis of the arrangements set out in the Indicative Access Proposal, it must notify DBCT Management of its intention to do so within 30 Business Days of the date it receives the Indicative Access Proposal. If the Access Seeker does not notify DBCT Management of its intention before the expiry date of the Indicative Access Proposal, its Access Application will be deemed to have lapsed and it may apply again for Access in accordance with Section 5.2 (unless a longer period for notification is agreed between the parties).
- (b) **(DBCT Management to expedite any replacement Access Application)** If an Access Application lapses but the Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to the issue of a new Indicative Access Proposal.
- (c) **(Notice of non-complying Indicative Access Proposal)** If the Access Seeker considers that the Indicative Access Proposal has not been prepared in accordance with Section 5.5 of this Framework, it must give DBCT Management notice in writing within 20 Business Days of receipt of the Indicative Access Proposal to that effect, setting out the reasons why the Access Seeker believes that the Indicative Access Proposal is inconsistent with Section 5.5 of this Framework.
- (d) **(Response to notice of non-compliance)** DBCT Management must use all reasonable efforts to respond to a notice of non-compliance under paragraph (c) of this Section 5.6, including, where appropriate, the making of revisions to the Indicative Access Proposal, within 20 Business Days of the notice. If DBCT Management is unable to respond within this time period, it must notify the Access Seeker of the date on which it expects to be able to respond.
- (e) **(Dispute relating to Indicative Access Proposal)** If the Access Seeker is not satisfied with:
  - (1) the response to the notice given under paragraph (c) of this Section 5.6; or
  - (2) DBCT Management's estimated date to respond to that notice,

the Access Seeker may refer the matter for Expert Determination.

## 5.7 Negotiation process

- (a) **(Parties to negotiate if Access Seeker wishes to)** If the Access Seeker indicates its willingness to progress its Access Application under Section 5.6 (or otherwise, in the case of an Access Application of the type referred to in paragraph (b) of the definition of that term), then both parties must commence negotiations as soon as reasonably possible to progress towards an Access Agreement or a Conditional Access Agreement. The period for negotiation will commence on the date notified by the Access Seeker under Section 5.6(a) (or the date 5 Business Days after the commencement of the Term in the case of an Access Application referred to in paragraph (b) of the definition of the term Access Application, even if there have been discussions prior to that date) and end upon any of the following events:
- (1) execution of an Access Agreement or Conditional Access Agreement in respect of Access sought by the Access Seeker;
  - (2) written notification by the Access Seeker that it no longer wishes to proceed with its Access Application (at which time its Access Application will be deemed to have lapsed);
  - (3) DBCT Management issuing a Negotiation Cessation Notice to the Access Seeker in accordance with Section 5.8;
  - (4) the expiration of 6 months from the commencement of the negotiation period or, if both parties agree to an extension of the negotiation period, the expiration of the agreed extended term, provided that agreement to extend the negotiation period is not unreasonably withheld by either party;
  - (5) a reduction in Available System Capacity due to:
    - (A) another Access Seeker finalising an Access Agreement in accordance with this Framework, where that reduction in Available System Capacity adversely affects DBCT Management's ability to offer Access to the Access Seeker under the terms of the Indicative Access Proposal; or
    - (B) a sustained change in the System operating assumptions of one or more components of the Dalrymple Bay Coal Chain requiring re-determination of System Capacity under Section 11.1, where that reduction in Available System Capacity adversely affects DBCT Management's ability to provide Access to the Access Seeker under the terms of the Indicative Access Proposal; or

- (6) DBCT Management receiving Notice from a Notifying Access Seeker in accordance with Section 5.4(e), for the process contemplated by Section 5.4(f) to occur.
- (b) **(Review of Indicative Access Proposal)** In the event that the negotiation period is suspended for the reasons set out in Section 5.7(a)(5) or Section 5.7(a)(6) (and once the process contemplated by Section 5.4(f) to Section 5.4(h) is complete, if applicable), DBCT Management must review the Indicative Access Proposal and prepare a revised Indicative Access Proposal in accordance with Section 5.5 and the negotiation process will recommence from the date this is provided to the Access Seeker.
- (c) **(Revisions to Access Application)** During the negotiation period, the Access Seeker may review and revise the information provided to DBCT Management in the Access Application, provided that such revision does not substantially alter the nature of the Access rights sought by the Access Seeker and is not otherwise prohibited under Section 5.4(i)(3), 5.4(l)(7) or 5.10(h). If DBCT Management is reasonably of the view that an Access Seeker's revision of information provided to DBCT Management in the Access Application has substantially altered the nature of the Access rights sought by the Access Seeker, then subject to paragraphs (d) and (e) of this Section 5.7, DBCT Management will treat the revised information as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the revision is for an increase in the annual tonnage required or a longer term, then only the additional annual tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.
- (d) **(Certain extensions of term do not create new Access Application)** If, in the case of an Access Application referred to in paragraph (b) of the definition of that term, the revision is for an increase in the term from 5 or more years, then the extended term will be treated as part of the original Access Application.
- (e) **(Reduction in tonnage applied for does not create new Access Application)** A reduction in tonnage or term will not, of itself, constitute a new Access Application pursuant to this paragraph if there is a bona fide commercial reason for such reduction.
- (f) **(Dispute relating to negotiation)** If a Dispute arises between the parties during the negotiation period and the parties are unable to resolve the Dispute to their mutual satisfaction, then either party may seek to resolve the Dispute in accordance with the dispute resolution process set out in Section 16 within 3 months after the end of the negotiation period in accordance with Section 5.7(a)(4).
- (g) **(Negotiations to continue despite Dispute)** To remove any doubt, the negotiation process and the obligations of the parties in that regard are to

continue notwithstanding the commencement of a dispute resolution process pursuant to Section 16 of this Framework.

## 5.8 Negotiation Cessation Notice

- (a) **(Negotiation Cessation Notice)** At any time during the negotiation process under Section 5.7, DBCT Management may give notice to an Access Seeker that it does not intend to enter into an Access Agreement with the Access Seeker (such notice being a Negotiation Cessation Notice), if:
- (1) an Access Seeker does not comply with all of its material obligations contained in this Framework;
  - (2) DBCT Management is reasonably of the opinion that there is no reasonable likelihood that the Access Seeker will comply with the material terms and conditions of an Access Agreement;
  - (3) DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access, at the level of capacity sought;
  - (4) DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not or is likely not to be reputable or of good financial standing;
  - (5) except where the decision of an Independent Expert contains manifest error, the Access Seeker does not materially comply with a decision of the Independent Expert pursuant to Section 16.3; or
  - (6) an Access Seeker does not materially comply with a decision of the Arbitrator pursuant to Section 16.4.
- (b) **(Negotiation Cessation Notice to include reasons)** A Negotiation Cessation Notice must identify the reasons for DBCT Management's decision not to enter into an Access Agreement with the Access Seeker.
- (c) **(Examples of no reasonable likelihood of compliance)** It will be reasonable for DBCT Management to form the view that circumstances in Section 5.8(a)(2) or 5.8(a)(4) apply if for example:
- (1) the Access Seeker is Insolvent;
  - (2) the Access Seeker, or a Related Body Corporate of the Access Seeker, is currently or has in the previous two years been in material default of any Access Agreement (which has not been promptly rectified), Existing User Agreement or any other agreement where its performance under that agreement is relevant to the Access Seeker's likely performance under an Access Agreement; or

- (3) the Access Seeker or a proposed provider of Security fail to establish their solvency and creditworthiness in accordance with Section 5.9.
- (d) **(Dispute as to Negotiation Cessation Notice)** If the Access Seeker reasonably considers that DBCT Management has improperly given it a Negotiation Cessation Notice, then (provided that Section 5.8(c)(1), 5.8(c)(2) or 5.8(c)(3) do not apply) the Access Seeker may refer the matter to dispute resolution in accordance with Section 16. If the resolution of the Dispute is in favour of the Access Seeker, DBCT Management must re-commence negotiations with that Access Seeker.
- (e) **(Recovery of costs of DBCT Management)** Subject to any Dispute on the matter being otherwise determined, DBCT Management may recover from the Access Seeker its reasonable costs incurred in negotiations with the Access Seeker where it ceases negotiations in accordance with a Negotiation Cessation Notice validly issued under this Section 5.8. A Dispute about the recovery of these costs may be referred to dispute resolution in accordance with Section 16 of this Framework.

## 5.9 Creditworthiness of Access Seeker

- (a) **(Access Seeker to be creditworthy)** DBCT Management:
  - (1) may remove from the Queue; and
  - (2) regardless of whether the relevant Access Seeker has been removed from the Queue by DBCT Management, will not be required to enter into an Access Agreement or proceed with an Access Application with, an Access Seeker which is or has become Insolvent or which, after DBCT Management's reasonable request, fails within a reasonable period to establish or confirm its likely creditworthiness for the term of the Access Agreement required, or to provide adequate Security from another entity which establishes or confirms its likely creditworthiness for the term of the Access Agreement required.
- (b) **(Information as to solvency)** To confirm the solvency and creditworthiness of an Access Seeker and, where DBCT Management requires, the provider of a Security, the Access Seeker will provide such information as may be reasonably requested by DBCT Management to establish that solvency and creditworthiness.
- (c) **(Provision of Security)** If an Access Seeker or, where DBCT Management requires, its Security provider, is unable to establish their solvency and creditworthiness in their own right, creditworthiness may be established by the Access Seeker and Security provider by providing further Security (as reasonably required by DBCT Management), for example (but not limited to) any one or more of:

- (1) letters of credit;
  - (2) tripartite agreements with project financiers; and
  - (3) guarantees or security from entities with a Standard and Poors or Moodys rating of not less than investment grade.
- (d) **(Access Agreement may permit Security to be required)** For clarification, nothing in this Section 5.9 limits the rights of DBCT Management under an Access Agreement to require Security (or additional Security) after the commencement of an Access Agreement in accordance with the terms of that Access Agreement.

### 5.10 Funding of feasibility studies

- (a) **(Funding of System Capacity studies)** If DBCT Management is required to undertake a System Capacity assessment under Section 11.1 which is not otherwise funded as part of feasibility studies for an Expansion Component under this Section 5.10, DBCT Management may recover the reasonable costs of such assessment as attributable to the Existing Terminal through NECAP. DBCT Management will consult with and make available the results of all capacity assessments undertaken in accordance with Section 11.1 to all Access Holders and Expansion Parties, including separately identifying:
- (1) the assessed capacity of the Existing Terminal;
  - (2) the projected capacity of a Terminal Capacity Expansion, including, if relevant, the projected capacity of a Differentiated Expansion Component; and
  - (3) the Expansion Component options being considered in any feasibility studies under this Section 5.10.
- (b) **(Request for Access Applicants to Fund Feasibility Studies)** If DBCT Management, acting reasonably, concludes that the Aggregate Annual Contract Tonnages applied for in Access Applications lodged with it, together with all other relevant circumstances, justify the undertaking of a study to determine the feasibility of a relevant Terminal Capacity Expansion then DBCT Management may, subject to Section 5.10(c), give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management. DBCT Management may not make such a request unless a Funding Agreement or Underwriting Agreement (as applicable) has been made and published on the DBCT Management's website in accordance with Section 5.10(q)(9)(E).
- (c) **(Notices will be given simultaneously)** DBCT Management will, in giving notices under Section 5.10(b), give such notices to all Access Applicants in the Queue, as relevant to the contemplated increase in Annual Contract Tonnage

which would be facilitated by the Terminal Capacity Expansion under consideration, on or about the same date.

- (d) **(Requests to be proportionate to tonnages applied for)** DBCT Management will request that any funding or underwriting of the feasibility study or feasibility studies referred to in Section 5.10(b) pursuant to a Funding Agreement or Underwriting Agreement (as applicable) be proportionate amongst the relevant participating Access Applicants, according to the respective sum of the Annual Contract Tonnages requested in their Access Applications over the first 10 years of Handling under the Conditional Access Agreement applied for by them.
- (e) **(Order of responses to notices)** DBCT Management must, in dealing with responses from Access Applicants to notices given by DBCT Management under Section 5.10(b), start with the response given by the Access Applicant that has the highest ranking in the Queue and proceed to the response given by each successive Access Applicant in order of their respective ranking in the Queue.
- (f) **(Position in Queue may be lost to subsequent Applicants)** If an Access Applicant is requested by DBCT Management to enter into a Funding Agreement or Underwriting Agreement but the Access Applicant:
  - (1) declines to do so;
  - (2) fails to enter into a Funding Agreement or Underwriting Agreement (as applicable) with DBCT Management on such terms as DBCT Management reasonably requires within 3 months after being requested by DBCT Management to do so; or
  - (3) does not provide security required by DBCT Management in connection with the Funding Agreement or Underwriting Agreement (as applicable) within 3 months after being requested by DBCT Management to do so,(such an Access Applicant being a **Non-Funding Access Applicant**) then:
  - (4) DBCT Management may, subject to Section 5.10(g), remove the Non-Funding Access Applicant from the Queue, in which case the Non-Funding Access Applicant's Access Application will be taken to have been rejected; or
  - (5) if DBCT Management does not remove the Non-Funding Access Applicant from the Queue, then to the extent that any Access Applicant(s) after the Non-Funding Access Applicant in the Queue within 3 months thereafter:

- (A) enter(s) into a Funding Agreement or Underwriting Agreement with DBCT Management; and
- (B) provide(s) security required by DBCT Management in relation to the Funding Agreement or Underwriting Agreement (as applicable) of at least the aggregate amount that is required by DBCT Management to fund or underwrite the study referred to in Section 5.10(b) in the proportion to which the tonnage applied for by an Access Applicant bears to the additional Aggregate Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion,

those subsequent Access Applicants will, from the date on which they are legally committed to provide or underwrite such feasibility funding and provide security under the Funding Agreement or Underwriting Agreement (as applicable), have priority in the Queue ahead of the Non-Funding Access Applicant.

- (g) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under Section 5.10(f)(4), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (h) **(Amendments to Access Application)** An Access Seeker may not amend its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.10(b).
- (i) **(Priorities restored if feasibility study does not proceed)** If an Access Applicant obtains a higher priority in the Queue as a result of Section 5.10(f), and DBCT Management elects not to proceed with the relevant feasibility study, then the relevant Access Applicant will again have the same priority in the Queue as it would have had if Section 5.10(f) did not apply.
- (j) **(Clarifications)** Nothing in this Section 5.10:
  - (1) requires DBCT Management to proceed with a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study (as the case may be) unless it secures a Funding Agreement or Underwriting Agreement in respect of the full cost of that feasibility study from one or more Access Seekers;
  - (2) prohibits an Access Seeker from providing more than its required proportion in respect of any funding or underwriting requested for Feasibility Studies (but providing a greater proportion does not in itself

entitle that Access Seeker to any additional tonnage under an Access Agreement); or

- (3) is to be taken as limiting the obligations of DBCT Management in Section 11.
- (k) **(Disputes relating to requests for Feasibility Funding)** If any Access Applicant considers that the terms of the Funding Agreement, Underwriting Agreement or the amount or type of security required in connection with the Funding Agreement or Underwriting Agreement requested by DBCT Management pursuant to Sections 5.10(b) and 5.10(d) are not reasonable, it may within 3 months after being requested to enter into a Funding Agreement or Underwriting Agreement and to provide security, apply for Expert Determination to determine what is reasonable, and in such event:
- (1) the determination of the Independent Expert as to what is reasonable will apply in respect of what DBCT Management can require from each Access Applicant; and
  - (2) the period of 3 months in Section 5.10(f) will become a period ending 15 days after the Independent Expert notifies its determination.

The terms of a Funding Agreement or Underwriting Agreement will be reasonable to the extent that they are consistent with the terms of a Standard Funding Agreement or Standard Underwriting Agreement (as applicable) approved in accordance with Section 5.10(q).

- (l) **(FEL 3 Feasibility Funding)** If DBCT Management having completed a FEL 1 Feasibility Study and FEL 2 Feasibility Study, acting reasonably and consistently with prudent business practice concludes that Aggregate Annual Contract Tonnage applied for in one or more Access Applications lodged with it, together with all other relevant circumstances, justify it undertaking a FEL 3 Feasibility Study, DBCT Management may, at its own cost, undertake a FEL 3 Feasibility Study. For clarity, if DBCT Management undertakes to independently fund a FEL 3 Feasibility Study this will not affect the entitlement of any Funding Access Seekers (which funded the relevant FEL 1 Feasibility Study and FEL 2 Feasibility Study) to continue to participate in any subsequent Expansion Component.
- (m) **(Transitional arrangements for previous funding)** If at the Commencement Date DBCT Management is undertaking a FEL 1 Feasibility Study or FEL 2 Feasibility Study in respect of a relevant proposed Terminal Capacity Expansion, DBCT Management may (by giving not less than 14 days written notice) give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management in which case:

- (1) Sections 5.10(d), 5.10(e), 5.10(f), 5.10(g), 5.10(i) and 5.10(k) apply (with such modifications as the circumstances require); and
  - (2) if the Feasibility Study being undertaken at the Commencement Date is a FEL 2 Feasibility Study, the Funding Agreement and Underwriting Agreement will apply to the FEL 2 Feasibility Study and the FEL 1 Feasibility Study which preceded the FEL 2 Feasibility Study.
- (n) **(Credit for prior Funding, and refunds)** If an Access Seeker has provided funding for a Feasibility Study referred to in Section 5.10(m) prior to the Commencement Date, the amount funded will be deemed to be a contribution to the funding requested under Section 5.10(m). To the extent that an Access Seeker has contributed funds (as opposed to underwriting the funding) prior to the Commencement Date in excess of the funds required to be contributed under Section 5.10(m) DBCT Management may elect to refund to that Access Seeker such excess funding or credit it towards any further contribution to a Feasibility Study required or agreed to be paid by that Access Seeker.
- (o) **(Contributions to Funding of Feasibility Studies by DBCT Management)** DBCT Management may at its discretion elect to itself bear, or be required under law or by the Port Services Agreement to itself fund, all or part of the costs of a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study which one or more Access Applicants do not fund or underwrite in accordance with a Funding Agreement or Underwriting Agreement (as applicable). Nothing in this Section 5.10(o) affects:
- (1) DBCT Management's rights to apply to recover such sum through the Initial Terminal Infrastructure Charge in the case of a Differentiated Expansion Component, or adjustment to the Terminal Infrastructure Charge for the Existing Terminal on the occurrence of a Review Event of the kind described in paragraph (b) of the definition of that term in the case of a Socialised Expansion, if the relevant proposed Terminal Capacity Expansion proceeds;
  - (2) DBCT Management's rights to apply to have such sum included in the prudent Capital Expenditure determined by an Expansion Arbitrator if DBCT Management is required by Section 11 of this Framework to investigate or undertake a Terminal Capacity Expansion; or
  - (3) DBCT Management's obligation (if any) to fund a FEL 3 Feasibility Study.
- (p) **(Refund of FEL 1, FEL 2 and FEL 3 contributions if Terminal Capacity Expansion proceeds)** In the event that the Terminal Capacity Expansion the subject of a FEL 1 Feasibility Study and FEL 2 Feasibility Study and FEL 3 Feasibility Study proceeds and substantial site works commence, DBCT Management will promptly following the commencement of substantial site works:

- (1) refund to each Funding Access Seeker who contributed funds (as opposed to underwriting the funding) under Section 5.10(b) for that Terminal Capacity Expansion the funds provided by that Access Seeker; and
  - (2) release any underwriting commitment made by each Funding Access Seeker in respect of that Terminal Capacity Expansion.
- (q) (Preparation and approval of Standard Funding Agreement or Standard Underwriting Agreement)**
- (1) DBCT Management must prepare a proposed Standard Funding Agreement or proposed Standard Underwriting Agreement (as applicable) (Proposed Standard Funding/Underwriting Agreement) where:
    - (A) DBCT Management considers there to be reasonable likelihood that the Aggregate Annual Contract Tonnage applied for in Access Applications or Conditional Access Agreements may justify undertaking Feasibility Studies during the ~~I~~term of the Access Framework; or
    - (B) DBCT Management receives a written notice from an Access Seeker or Access Holder requesting DBCT Management develop a Proposed Standard Funding/Underwriting Agreement.
  - (2) In preparing a Proposed Standard Funding/Underwriting Agreement DBCT Management must consult with Access Seekers, Expansion Parties and Access Holders.
  - (3) A Proposed Standard Funding/Underwriting Agreement must be reasonable in all of the circumstances having regard to terms of the Framework and:
    - (A) the legitimate business interests of DBCT Holding in its capacity as the owner of the Terminal;
    - (B) the legitimate business interests of DBCT Management in its capacity as the operator of the Terminal;
    - (C) the public interest, including the public interest in having competition in markets (whether or not in Australia); and
    - (D) the interests of Access Seekers who have signed an Access Application Form or Access Renewal Form (as set out at Schedule A), or who are a party to a Conditional Access Agreement, and Access Applicants, including whether adequate

provision has been made for compensation if the rights of the existing Access Holders or Existing Users are adversely affected.

- (4) DBCT Management must publish the Proposed Standard Funding/Underwriting Agreement on its website and must separately notify all Access Holders and Access Seekers promptly following publication of DBCT Management's Proposed Standard Funding/Underwriting Agreement.
- (5) An Access Seeker or Access Holder may, within 3 months after receiving the notice from DBCT Management, give DBCT Management a Dispute Notice under Section 16.1 regarding whether the Proposed Standard Funding/Underwriting Agreement is consistent with Section 5.10(q)(3). Such notice must specify the way in which the Access Seeker or Access Holder considers that the Proposed Standard Funding/Underwriting Agreement fails to satisfy Section 5.10(q)(3) and, if necessary, any amendments which the Access Seeker or Access Holder considers are necessary to satisfy Section 5.10(q)(3).
- (6) If the Dispute is not resolved in accordance with Section 16.2, such Dispute is to be resolved in accordance with Section 16.4.
- (7) If the Dispute is to be resolved in accordance with Section 16.4, an Arbitrator is to decide whether the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3). If the Arbitrator decides that the Proposed Standard Funding/Underwriting Agreement does not satisfy Section 5.10(q)(3), the Arbitrator is to decide the terms of an alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting Agreement (as applicable) (**Alternative Proposed Standard Funding/Underwriting Agreement**) that it considers will satisfy Section 5.10(q)(3), provided that the Arbitrator must give DBCT Management a reasonable opportunity to consider and comment on the draft. The Arbitrator will take into account any comments made by DBCT Management in relation to the Arbitrator's draft.
- (8) Notwithstanding a notice given under Section 5.10(q)(5), the Arbitrator may approve the Proposed Standard Funding/Underwriting Agreement, if the Arbitrator considers it reasonable in all of the circumstances having regard to terms of the Framework and the matters set out in Section 5.10(q)(3).
- (9) If:
  - (A) no notice is given under Section 5.10(q)(5);

- (B) notice is given under Section 5.10(q)(5) but the Dispute is resolved under Section 16.2;
- (C) the Arbitrator decides that the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3); or
- (D) the Arbitrator decides that an Alternative Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3)),

then:

- (E) the Proposed Standard Funding/Underwriting Agreement or the Alternative Proposed Standard Funding/Underwriting Agreement (as the case may be) will become the approved Standard Funding Agreement or the approved Standard Underwriting Agreement (as applicable), which is to be published on DBCT Management’s website; and
  - (F) DBCT Management will, if requested by Access Seekers or Access Holders, enter into agreements with Access Seekers or Access Holders, on the terms of the approved Standard Funding Agreement or approved Standard Underwriting Agreement (as applicable), unless otherwise agreed between DBCT Management and the relevant Access Seeker or Access Holder.
- (10) For clarity, nothing in this Section 5.10(q) limits or restricts DBCT Management or an Access Seeker or Access Holder from referring as a Dispute any failure to agree reasonable amendments to a Standard Funding Agreement/Underwriting Agreement where it is being used in respect of a specific Terminal Capacity Expansion.

### **5.11 Access Agreement Process**

If an Access Agreement provides a mechanism for applications for additional capacity to be made by the relevant Access Holder under that Agreement, those provisions may be utilised by that Access Holder in respect of additional capacity sought under that Agreement, but such application will be treated as an Access Application for the purposes of this Section 5.

### **5.12 Review of Pricing Method and Indicative Access Charges**

- (a) **(Review of estimated Access Charges)** Where an Indicative Access Proposal has been prepared on the basis that a Terminal Capacity Expansion would be required in order to accommodate the relevant Access Application:
  - (1) as soon as practicable and in any event within 20 Business Days following completion of a FEL 1 Feasibility Study, DBCT Management

must review the Indicative Access Proposal and provide the Access Seeker with a revised assessment of the applicable Pricing Method and estimated Access Charges for the Services requested in the Access Application (a Revised Pricing Proposal);

(2) as soon as practicable and in any event within 20 Business Days following completion of a FEL 2 Feasibility Study which supports proceeding to a FEL 3 Feasibility Study (including where that support is conditional on whether an Expansion Component will be priced Differentially or Socialised), DBCT Management must (unless it has already done so pursuant to Section 11.5(a)) review the Revised Pricing Proposal and apply to an Expansion Arbitrator for a Price Ruling in respect of the Terminal Capacity Expansion under Section 11.5 ~~that~~ determines:

(A) the applicable Pricing Method for the Terminal Capacity Expansion; ~~and~~

~~(B) the prudent Capital Expenditure in respect of the Terminal Capacity Expansion, with which any determination of an amended-Initial TIC to apply in respect of the Existing Terminal if the Terminal Capacity Expansion is Socialised or the Floor TIC in respect of a Differentiated Expansion Component if the Terminal Capacity Expansion is Differentiated (as the case may be) following Completion of the Terminal Capacity Expansion under Section 10.4(e) or 10.6(b)(3) respectively should be consistent;~~

~~(C) if the Price Ruling is to apply to a Conditional Access Agreement, any Different Terms where the Access Seeker disputes the Different Terms and if Different Terms are determined by the Expansion Arbitrator, the determined Different Terms will be included in any Access Agreement to which the Price Ruling applies; and~~

~~(D) if the Price Ruling is to apply to a Binding Conditional Access Agreement, the dollar amount to apply in respect of that Conditional Access Agreement.~~

~~(B) —~~

~~(C) —~~

(b) **(Application for Price Ruling)** An application for a Price Ruling shall include:

(1) information about the nature and amount of Capital Expenditure forecast to carry out the Terminal Capacity Expansion, as assessed in any Feasibility Studies;

- (2) information about any Different Terms that will have been agreed;
  - (3) information about the increase in Terminal Capacity expected to arise from the Terminal Capacity Expansion (and expected increases to System Capacity);
  - (4) information about positive or negative impacts on existing Access Holders or existing operations of the Terminal;
  - (5) information about the forecast demand for Access to the increased Terminal Capacity;
  - (6) an assessment of the Pricing Method applicable to the Terminal Capacity Expansion, applying the Expansion Pricing Principles;
  - (7) information about the anticipated impact on Non-Expansion Costs for the Terminal; and
  - (8) an estimate of the Terminal Infrastructure Charge that will apply to the Differentiated Terminal Component if the Terminal Capacity Expansion was Differentiated, or the amendment to the Terminal Infrastructure Charge that will apply if the Terminal Capacity Expansion was Socialised, having regard to the information referred to above and the other pricing arrangements set out in Section 10.
- (c) **(Expansion Arbitrator to provide Price Ruling)** In response to an application for a Price Ruling under Section 5.12(a) and/or Section 11.5, the Expansion Arbitrator shall, after conducting an investigation:
- (1) determine the application; ~~and~~
  - (2) determine whether the Terminal Capacity Expansion should be Socialised or Differentiated, applying the Expansion Pricing Principles; and-
  - (3) in making a determination of the kind referred to in (2)(C) or (D) above:
    - (A) section 10 applies and the Dispute shall be considered to be of a kind referred to in section 10.1(b), except to the extent necessary to give effect to any matter agreed by the parties to a Conditional Access Agreement to which the Price Ruling applies; and
    - ~~(A)~~(B) the provisions of section 16.4 (excluding paragraphs 16.4(f) and (g)) apply.

### 5.13 Access Transfers

- (a) In processing any request by an Access Holder or Access Seeker for a transfer of rights or entitlements under an Access Agreement (whether by way of assignment or novation), DBCT Management must consent to any such proposed transfer unless DBCT Management (acting reasonably) is satisfied that:
- (1) the assignor is in material breach of its Access Agreement; or
  - (2) the assignee:
    - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement or the assignee has not otherwise provided security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;
    - (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; or
    - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf.
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in Section 5.13(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.
- (d) An Access Holder or an Access Seeker may refer to the Arbitrator as a Dispute under Section 16 of this Framework:
- (1) any refusal by DBCT Management to consent to a transfer;
  - (2) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer;
  - (3) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

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## **6 Terminal Regulations**

### **6.1 Compliance with Terminal Regulations**

- (a) **(Compliance by DBCT Management and Operator)** DBCT Management acknowledges that under the Operation & Maintenance Contract DBCT Management and the Operator must comply with the Terminal Regulations. DBCT Management must comply with, and will procure that the Operator complies with, the Terminal Regulations in force from time to time.
- (b) **(Compliance by Access Holders is condition of Access)** Each Access Holder must observe the Terminal Regulations, in force from time to time, as a condition of Access to and the right to have its coal Handled at the Terminal.

## 6.2 Amendment of Terminal Regulations

- (a) **(Process for amending Terminal Regulations)** The Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues. If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:
  - (1) conduct reasonable consultation with Access Holders, Access Seekers, Expansion Parties and/or Rail Operators in relation to the proposed amendment; and
  - (2) following the completion of such reasonable consultation, notify the Access Holders, Access Seekers, Expansion Parties and Rail Operators:
    - (A) of the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) of the detailed reasons for its decision to give (or not give) consent to the proposed amendment; and
    - (D) except in the case of notification to Rail Operators, that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (b) **(Implementation of amended Terminal Regulations)** A proposed amendment to the Terminal Regulations will not be implemented unless:
  - (1) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1); and
  - (2) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT

Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;

- (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, an Independent Expert appointed to hear the objection (in accordance with Section 6.2(f)) has rejected that objection; or
  - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided, and an Independent Expert appointed to hear the objection (in accordance with Section 6.2(g)) has upheld that objection.
- (c) **(Consent of DBCT Management)** DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under Section 6.2(b)(2)(A) or 6.2(b)(2)(B) if it has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1) and, taking into account the results of such consultation, it reasonably considers that:
- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Framework, and any Access Agreements; and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (d) **(Criteria for disputing refusal to provide consent)** If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations,

an Access Holder, Access Seeker or Expansion Party may object to DBCT Management's refusal to provide consent if they reasonably consider that:

- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Framework and any Access Agreement of the Access Holder, Access Seeker or Expansion Party (as the case may be); and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (e) **(Notice of amendments to Terminal Regulations)** DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with Section 6.2(i)).
- (f) **(Objection to DBCT Management decision to approve amendment of Terminal Regulations)**
- (1) If:
    - (A) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and
    - (B) an Access Holder, Access Seeker or Expansion Party objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied,

then the Access Holder, Access Seeker or Expansion Party may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management of its objection to the consent to the proposed amendment, such objection to be determined by an Independent Expert.

- (2) If, in response to an objection notified by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(f)(1) of this Framework or any corresponding provision of an Access Agreement), the Independent Expert determines that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied then:
  - (A) the proposed amendment and DBCT Management’s consent to the proposed amendment will be taken to have been withdrawn; and
  - (B) the proposed amendment will not be made.
- (g) **(Objection to DBCT Management decision to reject amendment of Terminal Regulations)**
  - (1) If:
    - (A) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and
    - (B) an Access Holder, Access Seeker or Expansion Party objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied,

then the Access Holder, Access Seeker or Expansion Party may within 30 days of being notified of DBCT Management’s refusal to give its consent to a proposed amendment to the Terminal Regulations, notify DBCT Management of its objection to DBCT Management not providing consent for the proposed amendment, such objection to be determined by an Independent Expert.
  - (2) If, in response to an objection notified by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(g)(1) of this Framework or any corresponding provision of an Access Agreement), the Independent Expert determines that the criteria in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied, then:
    - (A) DBCT Management’s consent to the proposed amendment will be deemed to have been given; and
    - (B) the proposed amendment will be made.
- (h) **(Protection of DBCT Management)** Subject to DBCT Management complying with Section 6.2(b), DBCT Management will not be liable to Access Seekers (and the Standard Access Agreement will provide that DBCT Management will have no liability (on any basis whatsoever) to an Access Holder which executes it) as a result of DBCT Management consenting to an amendment to the

Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by Section 6.2(c). For clarification, this does not affect DBCT Management's obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Framework or a relevant Access Agreement.

- (i) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Regulations available to each Access Holder, Access Seeker and Rail Operator (which may be by displaying it on DBCT Management's website).

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## 7 Confidentiality requirements

### 7.1 Confidential Information to be kept confidential

Subject to Sections 5.4(c) and 16.4(e) each relevant Access Seeker, Access Holder and DBCT Management will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged under the negotiation arrangements in Section 5 of this Framework or any other part of this Framework, except:

- (a) where disclosure is required by any law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or requirement of a stock exchange or regulator;
- (b) with the prior written consent of the relevant Access Seeker, Access Holder or DBCT Management, as applicable;
- (c) where disclosure is to the recipient's professional advisors provided that such professional advisors are under a duty of confidentiality;
- (d) to the extent disclosure is necessary for notifications to financiers, brokers, insurers or claims assessors or reasonably necessary in connection with seeking financing from a bona fide financier, provided that the broker, insurer, claims assessor or financier to whom the disclosure is made is under a legal obligation to keep the information confidential;
- (e) where disclosure is made to any person or body established to provide coordination in the Dalrymple Bay Coal Chain;
- (f) where disclosure is to a Capacity Expert, an Independent Expert, an Arbitrator, an Expansion Arbitrator, or a court (in the case of a party seeking urgent injunctive relief) to the extent necessary for resolving a Dispute provided that DBCT Management does not disclose the Confidential Information of one Access Seeker or Access Holder to another Access Seeker or Access Holder without the first-mentioned Access Seeker's or Access Holder's consent, unless

directed to by a Capacity Expert, an Independent Expert, an Arbitrator, an Expansion Arbitrator or a court (as the case may be); or

- (g) to the extent disclosure is required to protect the safety or security of persons or property or in connection with an accident or emergency.

## **7.2 Confidentiality deed**

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

## **7.3 Use of Confidential Information**

Without limiting the circumstances specified in this Section 7 in which Confidential Information may be used or disclosed, an Access Seeker, an Access Holder and DBCT Management must otherwise only use Confidential Information provided to it under this Framework for the purposes for which it was provided.

## **7.4 Reporting of aggregated information**

For the avoidance of doubt, nothing in this Section 7 prevents DBCT Management from:

- (a) complying with its obligations under Sections 9.1 and 9.2; or
- (b) disclosing, in the ordinary course of business, financial reporting information which has been aggregated with other information of a similar nature such that it cannot reasonably be, and is not reasonably capable of being, identified with, attributed to or used to identify, any Access Seeker, Access Holder, Existing User or Rail Operator.

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# **8 Ring-fencing arrangements**

## **8.1 No related Supply Chain Businesses**

DBCT Management 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.

## **8.2 Non-discrimination**

DBCT Management will not:

- (a) engage in conduct for the purpose of preventing or hindering an Access Holder's or Access Seeker's Access; or
- (b) unfairly differentiate between Access Seekers, Access Holders or Rail Operators.

## **8.3 Confidentiality undertaking by board members**

DBCT Management will ensure that each of its directors executes a confidentiality deed pursuant to which the relevant director agrees to only use and disclose Confidential Information obtained as a director of DBCT Management in connection with its role as a director of DBCT Management.

#### 8.4 Complaint handling

If an Access Holder or Access Seeker considers that DBCT Management may have breached one or more of its obligations under this Section 8 they may raise a Dispute in respect of such complaint in accordance with Section 16 of this Framework.

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## 9 Reporting by DBCT Management

### 9.1 Indicators relating to compliance with this Framework

DBCT Management will Publicly Report on an annual basis the following information:

- (a) **(Indicative Access Proposals)** the number and percentage of total Indicative Access Proposals provided within the applicable timeframe;
- (b) **(Access Applications)** the number and percentage of Access Applications received for which an extension of time for provision of an Indicative Access Proposal was sought by DBCT Management;
- (c) **(Response times)** the average delay (in days) taken to provide an Indicative Access Proposal not provided within the applicable timeframe;
- (d) **(Disputes)** the number of instances where a Dispute has been referred to dispute resolution in accordance with Section 16;
- (e) **(Negotiation periods for successful outcomes)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (f) **(Negotiation periods where no Access Agreement signed)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of any reason other than the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (g) **(Access Transfer Applications)** in respect of the Access Transfer processes set out in Section 5.13, the following:
  - (1) the number of requests received for a transfer of rights or entitlements; and

- (2) the period taken to resolve each transfer, being in each case the period from the date of receipt of the request and ending on the earliest of the date that:
  - (A) an Access Agreement facilitating the transfer was executed by DBCT Management;
  - (B) DBCT Management gave notice to the transferor that consent for the transfer was refused; or
  - (C) any notice was given to the Arbitrator of a Dispute in relation to the purported transfer;
- (h) **(Access Agreements concluded)** the number of instances where a negotiation period that had commenced, ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker; and
- (i) **(Complaints)** written complaints received by DBCT Management in relation to its compliance with this Framework.

## 9.2 Indicators relating to service quality

DBCT Management is required to Publicly Report on the following service quality key performance indicators for the Terminal on a quarterly basis:

- (a) **(System delivery):**
  - (1) number of trains requested by the Operator and scheduled by the rail providers to arrive at the Terminal;
  - (2) actual number of trains completing unloading at the Terminal;
  - (3) number of tonnes of coal scheduled to be delivered to the Terminal; and
  - (4) number of tonnes of coal actually delivered to the Terminal,

for each month of the quarter.
- (b) **(Inloading performance):**
  - (1) average train unloading time at the Terminal (on a Terminal job-open to job-close basis); and
  - (2) average train unload time (from permission to unload the train until unloading of the last wagon is complete),

for each month of the quarter.
- (c) **(Stockyard performance):**

- (1) average stock-build time per parcel; and
  - (2) average stock-residence time per parcel,
- for each month of the quarter.
- (d) **(Out-loading performance):**
- in respect of each outloading conveyor:
- (1) average gross load rate per vessel class – first coal to last coal; and
  - (2) average utilisation of out-load conveyors,
- for each month of the quarter.
- (e) **(Vessel performance):**
- (1) number of vessels (by class);
  - (2) average number of parcels per vessel (by class);
  - (3) total tonnes per vessel (by class); and
  - (4) total tonnes shipped,
- for each month of the quarter.
- (f) **(Vessel queuing)** (vessels which have arrived and are awaiting berthing to load):
- (1) average daily total vessels in queue;
  - (2) average daily number of vessels in queue where relevant coal is not yet available to be railed to the Terminal (“dead ships”);
  - (3) vessel queuing times;
  - (4) queue ordering; and
  - (5) average waiting time to berth at anchor,
- for each month of the quarter.
- (g) **(Operating efficiency)** inloading and outloading.
- (h) **(Environmental performance):**
- (1) number of times during each month of the quarter that the “management objective” (as provided for in the Terminal’s environmental licence and approvals) in dust deposition was exceeded; and

- (2) number of times during each month of the quarter that the “acoustic quality objective” (as provided for in the Terminal’s environmental licence and approvals) was exceeded.
- (i) **(Other)** any additional or alternative service quality key performance indicators that DBCT Management and Access Holders agree from time to time.

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## 10 Pricing arrangements

### 10.1 Application of Pricing Provisions

- (a) The Access Charges for each Terminal Component in respect of which the Access Holder has an entitlement to Access will be as agreed between DBCT Management and the Access Holder.
- (b) If DBCT Management and an Access Seeker are unable to agree Initial Access Charges to apply from the commencement of an Access Agreement or increased Access and one of them refers a Dispute relating to those Initial Access Charges for resolution in accordance with the dispute resolution process set out in Section 16 in accordance with Section 5.7(f) of this Framework, any determination by the Arbitrator of terms relating to Initial Access Charges in accordance with Section 16.4 of this Framework must be in accordance with Sections 10.3 to 10.5, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (c) If a Dispute concerning the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into that Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any consequential changes in the drafting of the provisions of the Access Agreement) is referred by DBCT Management or the Access Holder for resolution in accordance with Section 16 of this Framework, in making any Arbitration determination in accordance with Section 16.4 of this Framework the Arbitrator must:
  - (1) determine the Initial Access Charges to apply from the start of the Pricing Period in accordance with Sections 10.3 to 10.5 of this Framework; and
  - (2) subject to paragraph (1) above, give effect to and make a determination that is consistent with the Standard Access Agreement in place under the Access Framework at the time of the Arbitrator's determination,

except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.

- (d) Section 10.6 applies to the review during a Pricing Period of the Access Charges applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, and any determination by an Arbitrator of a Dispute concerning such a review that is referred for resolution by DBCT Management or the Access Holder in accordance with Section 16.4 of this Framework must be in accordance with Section 10.6, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (e) Sections 10.7 and 10.8 apply in accordance with their terms.

## 10.2 Interpretation of Pricing Provisions

- (a) In this Framework, the following principles of interpretation shall apply:
  - (1) **(Single meaning where only Socialisation applies)** for so long as Access to the Terminal continues to be priced on a Socialised basis, the terms and definitions of this Framework relevant to pricing apply to all Access collectively; and
  - (2) **(Alternative meanings where Differentiation applies)** where, pursuant to Section 10.8, Access to the Terminal is charged to one or more Access Holders on a Differentiated basis, the terms and definitions of this Framework relevant to pricing apply to each Terminal Component separately.
- (b) To avoid doubt, if an Access Holder seeks and obtains increased Access in respect of a Terminal Component on one or more occasions, the Access Holder may have more than one Access Agreement and/or a different Terminal Infrastructure Charge for the Terminal Component may apply to each of the tranches of Access obtained by the Access Holder.

## 10.3 Access Charges

Access Charges for each Terminal Component will comprise two parts:

- (a) a Terminal Infrastructure Charge; and
- (b) an Operation & Maintenance Charge.

## 10.4 Terminal Infrastructure Charge

- (a) **(TIC)** The Access Agreement will impose a Terminal Infrastructure Charge (**TIC**) for each Terminal Component in respect of which the Access Holder has an entitlement to Access or increased Access, being an amount per tonne payable

by the Access Holder at a relevant time, calculated (and adjusted as required) in accordance with this Section 10 and Schedule C, Sections 2 and 3.

(b) **(Applies to Annual Contract Tonnage)** The TIC will apply to all Annual Contract Tonnage, or where:

(1) Section 10.2(a)(2) applies, a different TIC will apply to the Annual Contract Tonnage in respect of each Terminal Component for which the Access Holder has an entitlement to Access;

(2) Section 10.2(b) applies, a different TIC may apply to the Annual Contract Tonnage in respect of each tranche of Access to which the Access Holder has obtained an entitlement.

(c) **(Payment of TIC)** Each Access Holder will pay to DBCT Management in respect of its Annual Contract Tonnage a payment in each Month of each Financial Year during the term of its Access Agreement (the Monthly Payment) calculated (and adjusted as required) in accordance with Schedule C.

(d) **(Determination of Initial TIC)** Subject to paragraph (e) and unless paragraph (f) applies, in any Arbitration of a kind referred to in Section 10.1(b) or 10.1(c), the Arbitrator must determine a TIC for a Terminal Component to apply under the Access Agreement from commencement of that Agreement, increased Access under that Agreement or the relevant Pricing Period (**Initial TIC**) that:

(1) reflects a 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;

(2) is no less than the Floor TIC calculated in accordance with Schedule C, Section 2(a); and

(3) is no greater than the Ceiling TIC calculated in accordance with Schedule C, Section 2(b) to 2(b).

(e) (Determination of Initial TIC if Ceiling TIC is below Floor TIC) Unless paragraph (f) applies, in any arbitration of a kind referred to in Section 10.1(b) or 10.1(c), if the Ceiling TIC for the Terminal Component calculated in accordance with Schedule C, Section 2(b) to 2(b) is lower than the Floor TIC for that Terminal Component calculated in accordance with Schedule C, Section 2(a), the Arbitrator must determine an Initial TIC for the Terminal Component that is equal to the Floor TIC for that Terminal Component.

(e)(f) (Determination of Initial TIC if Arbitration already occurred in Pricing Period) This paragraph (f) applies in any Arbitration of the kind referred to in Section 10.1(b) where an Arbitration determination on an Initial TIC for one or

more Access Holders has previously been made under Section 16.4 of this Framework for the Pricing Period in which the Access Agreement or increased Access that is the subject of the first-mentioned Arbitration will commence. -

~~‡The Arbitrator must determine the Initial TIC to apply for the Terminal Component under the Access Agreement from commencement of that Access Agreement or increased Access under that Access Agreement as follows where an Arbitration determination on an Initial TIC for one or more Access Holders has previously been made under Section 16.4 of this Framework for the Pricing Period in which that Access Agreement or increased Access will commence:~~

- (1) subject to paragraph 10.4(f)(2), the Initial TIC to apply from commencement of the Access Agreement or increased Access under the Access Agreement must be equal to the Initial TIC for the Pricing Period determined in the first completed Arbitration for that Pricing Period adjusted:
  - (A) based on escalation for the annual change in the Consumer Price Index in accordance with Schedule C, Section 3(a) to 3(d); and
  - (B) for any Review Event that has occurred since the completion of the first completed Arbitration in accordance with Schedule C, Section 3(e) to 3(j);
- (2) if the resultant Initial TIC for the Access Seeker is higher than the Ceiling TIC applicable at the time of Arbitration or lower than the Floor TIC applicable at that time, the Arbitrator must not apply any Review Event adjustment or adjustments under paragraph 10.4(f)(1) to the Initial TIC determined in the first completed Arbitration for the Pricing Period to the extent that the Review Event adjustment or adjustments would otherwise result in an Initial TIC for the Access Seeker that is higher than the Ceiling TIC or lower than the Floor TIC.

(f)(g) **(Determination of Floor TIC following Terminal Capacity Expansion)** In any Arbitration of a kind referred to in Section 10.1(b) or 10.1(c) following the Completion and hand over to the Operator of a Terminal Capacity Expansion:

- (1) any determination of the Floor TIC by the Arbitrator must be consistent with any Price Ruling by the Expansion Arbitrator in respect of that Terminal Capacity Expansion; and
- (2) the Arbitrator must accept Capital Expenditure incurred in respect of that Terminal Capacity Expansion is prudent if the Expansion Arbitrator has determined under Section 11.5 that that Capital Expenditure is prudent and take that prudent Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the Floor TIC.

Nothing in this paragraph precludes the Arbitrator from determining that any additional Capital Expenditure incurred in respect of the Terminal Capacity Expansion is also prudent and also taking that additional Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the Floor TIC.

~~(g)~~(h) **(Determination of Ceiling TIC)** Data from an independent third party data provider must be used in any determination of the Ceiling TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) by an Arbitrator unless the Arbitrator is satisfied that the data from the provider is manifestly incorrect in one or more respects and the error or, if there is more than one error, the errors considered collectively, are 'material', where 'material' means that the error(s) have a material effect on the resultant Ceiling TIC. In that case, the Arbitrator may disregard the independent third party data provider's data and use alternative data but only to the extent that the Arbitrator is satisfied that the provider's data is manifestly incorrect.

## 10.5 Operation & Maintenance Charge

- (a) **(Terminal Operating Costs recovery)** Terminal Operating Costs will be recovered from the Access Holder through the Operation & Maintenance Charge. The Operation & Maintenance Charge for the Access Holder will be calculated on the basis outlined in the Standard Access Agreement and otherwise in accordance with the Operations & Maintenance Contract.
- (b) Where a Differentiated Expansion Component exists and Terminal Operating Costs are required to be allocated between different Terminal Components, then the Operation & Maintenance Charge for each Access Holder will be calculated in accordance with the following procedure:
  - (1) the quantum of Terminal Operating Costs, and the proposed allocation among Terminal Components, will be advised to DBCT Management by the Operator. The Operator will determine the allocation in accordance with Section 10.7(a);
  - (2) DBCT Management will review the quantum and allocation proposed by the Operator and, where relevant, make any variation it considers necessary to comply with Section 10.5(c)(3); and
  - (3) DBCT Management will recover Terminal Operating Costs allocated to a Terminal Component from an Access Holder through the Operation & Maintenance Charge determined in accordance with paragraph 10.5(a).
- (c) **(Notifications, payments and adjustments)** DBCT Management will:
  - (1) notify Access Holders of estimated Terminal Operating Costs annually in advance;

- (2) recover such estimated costs monthly;
- (3) notify Access Holders of any applicable adjustment at the end of each Financial Year – to recover any shortfall or to reimburse Access Holders in the event of under-recovery or over-recovery of Terminal Operating Costs by DBCT Management; and
- (4) recover or reimburse at the end of each quarter and at the end of a Financial Year (as the case may be), such amount (if any) as referred to in Section 10.5(c)(3).

#### **10.6 Review of TIC applicable under Access Agreements in form of the Standard Access Agreement**

- (a) **(Reviews of TIC during a Pricing Period)** On each occasion referred to in Schedule C, Section 3(a) or 3(e) during a Pricing Period, DBCT Management will amend the TIC for a Terminal Component then applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, to the extent that it is affected by the occasion, in accordance with Schedule C, Section 3. The TIC will be amended (effective from the relevant date in Schedule C, Section 3(c) or 3(i)) when DBCT Management gives notice to the relevant Access Holder of the amended TIC.
- (b) **(Arbitration of Dispute arising from reviews of TIC during a Pricing Period)** In any Arbitration of the kind referred to in Section 10.1(d) of this Framework, the Arbitrator:
  - (1) must apply Schedule C, Section 3 to determine an amended TIC;
  - (2) if the resultant amended TIC for the Access Holder is higher than the Ceiling TIC applicable at the time of Arbitration or lower than the Floor TIC applicable at that time, must not apply the amendment to the TIC that would otherwise result under paragraph 10.6(b)(1) to the extent that that amendment would otherwise result in an amended TIC that is higher than the Ceiling TIC or lower than the Floor TIC;
  - (3) if the Dispute relates to a Review Event referred to in paragraph 10.6(b) of the definition of Review Event, must:
    - (A) make a determination in respect of the amended TIC to apply in accordance with Schedule C, Section 3(g) that is consistent with any Price Ruling by the Expansion Arbitrator in respect of the relevant Socialised Expansion; and
    - (B) accept that Capital Expenditure in respect of the relevant Socialised Expansion is prudent if the Expansion Arbitrator has determined under Section 11.5 that that Capital Expenditure is

prudent and take that prudent Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the amended TIC.

Nothing in this paragraph precludes the Arbitrator from determining that any additional Capital Expenditure incurred in respect of the relevant Socialised Expansion is also prudent and also taking that additional Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the amended TIC to apply in accordance with Schedule C, Section 3(g); and

- (4) if the Dispute relates to a Review Event referred to in paragraph 10.6(c) of the definition of Review Event, must accept that NECAP is prudent and include it in the determination of the 'Adjustment amount' under Schedule C, Section 3(h) if required by Section 11.10(b) of this Framework and may otherwise accept that NECAP is prudent and include it in the determination of the 'Adjustment amount' under Schedule C, Section 3(h) having regard to the matters set out in Section 11.10(c) of this Framework.
- (c) **(Date amended TIC takes effect)** Until the amended TIC is determined as provided for in this Section 10.6 and Schedule C, Section 3, the TIC applicable immediately prior to the occasion referred to in Schedule C, Section 3(a) or 3(e) will remain in effect and continue to be due and payable. When DBCT Management gives notice or the Arbitrator communicates the determination of the amended TIC determined as provided for in this Section 10.6 and Schedule C, Section 3, the amended TIC will apply with effect from the relevant date in Schedule C, Section 3(c) or 3(i) (**Effective Date**) and DBCT Management will calculate the amount which would have been payable to it by way of Monthly Payments in the period since the Effective Date if that amended TIC had been in effect from that time and the relevant party must pay to the other party the difference between that amount and the amount actually received by DBCT Management by way of Monthly Payments between the Effective Date and the date DBCT Management gives notice or the Arbitrator communicates the determination of the amended TIC.

## 10.7 Cost Allocation

- (a) **(Cost allocation as per Cost Allocation Manual)** Where this Framework provides for:
  - (1) the allocation of Terminal Operating Costs among multiple Terminal Components; or

- (2) the inclusion in the NECAP Asset Base of Capital Expenditure not related to a Terminal Capacity Expansion, and there are multiple Terminal Components,

the cost in question is to be allocated in accordance with the Cost Allocation Manual or, if no Cost Allocation Manual exists, in accordance with the Cost Allocation Principles. Any Dispute as to the allocation of costs in accordance with the Cost Allocation Manual may be referred to dispute resolution under Section 16 of the Framework.

- (b) **(Preparation of draft Cost Allocation Manual)** When the first Price Ruling is made, DBCT Management must prepare a draft Cost Allocation Manual and submit it to the Independent Expert for approval.
- (c) **(Preparation of revised draft Cost Allocation Manual)** DBCT Management shall, if so requested by the Independent Expert, prepare and submit within 60 days of such request, a revised draft Cost Allocation Manual that satisfies the requirements of the Independent Expert.
- (d) **(Consulting in good faith with the Operator)** DBCT Management shall consult in good faith with the Operator in preparing the Cost Allocation Manual and updating it, from time to time.
- (e) **(Approval of Cost Allocation Manual)** As soon as practicable after the Independent Expert approves the final Cost Allocation Manual, DBCT Management must publish the Cost Allocation Manual on its website.
- (f) **(Cost Allocation Manual requirements)** The Cost Allocation Manual should:
  - (1) provide a transparent basis for assigning costs to separate Terminal Components in different circumstances; and
  - (2) be consistent with the Cost Allocation Principles.
- (g) **(Cost Allocation Principles):** Non-Expansion Costs should be allocated:
  - (A) **(Identifiable cost)** if the cost is uniquely identified or directly incurred in relation to a particular Terminal Component, to that Terminal Component;
  - (B) **(Attributable cost)** if the cost is not an identifiable cost, but there is a reasonable causal relationship between the cost and one or more Terminal Components, to those Terminal Components, in proportion to their reasonably estimated cost drivers; and
  - (C) **(Non-identifiable and non-attributable cost)** if the cost is neither identifiable nor attributable to a particular Terminal

Component, on a reasonable basis between the Terminal Components.

## 10.8 Expansion Pricing Principles

- (a) In assessing whether or not Differentiation should apply in respect of a proposed Terminal Capacity Expansion, the following principles shall apply:
- (1) where Socialisation of a Terminal Capacity Expansion would decrease the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a), the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework and the Floor TIC for the Existing Terminal should be determined by reference to the sum of the costs of the Existing Terminal and the costs of the Terminal Capacity Expansion (a **Socialised Expansion**);
  - (2) where Socialisation of a Terminal Capacity Expansion would increase the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a) (a **Cost Sensitive Expansion**), subject to Section 10.8(b), the Terminal Capacity Expansion should be treated as a separate Terminal Component, and the Floor TIC for that Terminal Component determined by reference to the costs of the Terminal Capacity Expansion (and without reference to the costs of the Existing Terminal) (a **Differentiated Expansion Component**).
- (b) A Cost Sensitive Expansion may be treated as forming part of the Existing Terminal (and therefore, not treated as a Differentiated Expansion Component) where circumstances exist that justify Socialisation. In determining whether there are circumstances that warrant Socialisation, consideration must be given to:
- (1) the materiality of the increase in the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a) that would be affected by socialising the Cost Sensitive Expansion;
  - (2) the extent to which assets or infrastructure the subject of the Cost Sensitive Expansion will operate wholly or partly, in an integrated way with the Existing Terminal or as a stand-alone development;
  - (3) the extent to which the Cost Sensitive Expansion is likely to benefit users of the Existing Terminal (for example, such as through higher efficiency, reliability or flexibility of the Existing Terminal);
  - (4) any differences in the risks of providing Access to users of the Existing Terminal in respect of additional Terminal Capacity created by the Cost Sensitive Expansion;

- (5) the financeability of any proposed expansion pricing arrangement, including by reason of the risk of Differentially Priced Access Holders switching between high and low priced Terminal Capacity that otherwise has identical functionality; and
- (6) any other factor that the Expansion Arbitrator considers relevant.

It is acknowledged that there may be circumstances in which parts and not the whole of a Cost Sensitive Expansion may be Socialised.

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## 11 Terminal Capacity Expansion

### 11.1 Procedure for determining Terminal Capacity and System Capacity

- (a) DBCT Management will, at each time required in Section 11.1(k), either:
  - (1) **(Estimate capacities)** accept an estimation that has been accepted by the Capacity Expert as provided for in Section 11.1(m)(3) of the maximum reasonably achievable capacity (measured in tonnes of coal per Financial Year) of:
    - (A) the Terminal (on a “name-plate capacity” basis) (**Terminal Capacity**), including separately identifying:
      - (i) the capacity of the Existing Terminal (on a “name-plate capacity” basis) (**Existing Terminal Capacity**); and
      - (ii) the capacity of each Expansion Component (on a “name-plate capacity” basis) (each an **Expansion Component Capacity**), which for clarity may constitute either Socialised Terminal Capacity or Differentially Priced Capacity depending upon the nature of the relevant Expansion Component; and
    - (B) the System (**System Capacity**),provided that the estimation was accepted by the Capacity Expert as provided for in Section 11.1(m)(3) in the immediately preceding 6 months and there has been no change in any of the factors to be taken into account in estimating the Terminal Capacity, the Expansion Component Capacity or the System Capacity since the estimation accepted by the Capacity Expert that is reasonably expected to materially affect the Terminal Capacity, the Expansion Component Capacity or the System Capacity; or
  - (2) **(Determine capacities after advice and consultation)** (to the extent that there is no estimation as provided for in Section 11.1(m)(3)) acting reasonably and after:

- (A) taking advice from a Capacity Expert appointed by DBCT Management under this Section 11.1 (**Capacity Expert**); and
- (B) consultation by DBCT Management and that Capacity Expert with the Operator, Access Holders, any Expansion Parties, and other Service Providers or their respective nominees,

determine Terminal Capacity, Expansion Component Capacity and System Capacity (as applicable) in accordance with this Section 11.1, having regard to:

- (C) **(Terminal operating assumptions)** in respect of Terminal Capacity – the following Terminal operating assumptions:
  - (i) DBCT Management’s obligations, Access Holders’ entitlements under Access Agreements and Existing Users’ entitlements under Existing User Agreements (including taking into account historical and reasonably estimated rates of utilisation of the Terminal Capacity, but also having regard to reasonably foreseeable future changes in capacity utilisation rates);
  - (ii) DBCT Management’s requirement to comply with Good Operating and Maintenance Practice;
  - (iii) the Terminal Regulations;
  - (iv) an objective of maximum reasonably achievable capacity for the Terminal without unduly increasing vessel waiting times as a result of the operation of the Terminal;
  - (v) rail and vessel interfaces with the Terminal;
  - (vi) the estimated additional capacity which it is anticipated will become available in a relevant Financial Year as a result of any proposed Terminal Capacity Expansion; and
  - (vii) any other matter DBCT Management reasonably considers appropriate;
- (D) **(Terminal operating assumptions – Differentiated Expansion Component)** in respect of Expansion Component Capacity for a Differentiated Expansion Component – the Terminal operating assumptions set out at Section 11.1(a)(2)(C), to the extent applicable solely to the Differentiated Expansion Component; and

- (E) **(System operating assumptions)** in respect of System Capacity – the following System operating assumptions (to the extent that such information is available to DBCT Management):
- (i) operating modes of the System;
  - (ii) rail infrastructure characteristics (e.g. single track, double track, passing loops and speed restraints);
  - (iii) the tonnes to be loaded by or on behalf of an Access Holder or Existing User at each relevant train load out facility;
  - (iv) Terminal Capacity as assessed in accordance with Section 11.1(a)(2)(C) and the capacity and performance implications arising out of Terminal interfaces with rail unloading and vessel loading;
  - (v) quantity, configuration and performance characteristics of locomotives and rolling stock;
  - (vi) capacity and performance of mine loading facilities;
  - (vii) the System Master Plan; and
  - (viii) any other matter DBCT Management reasonably considers appropriate.
- (b) **(Additional assumptions)** For clarification, Terminal Capacity, Expansion Component Capacity and System Capacity are to be:
- (1) estimated making a projected allowance (as applicable to either Terminal Capacity and/or Expansion Component Capacity alone or to System Capacity) for interruptions or loss of capacity from maintenance, repairs, inclement weather, breakdowns, derailments, cancellations, loading and unloading issues (including sticky coal), vessel-types (based on a historical analysis);
  - (2) estimated as at the date of estimation and for the Financial Year in which that date falls and for each of the following two Financial Years; and
  - (3) assumed to continue at no lesser rate indefinitely after the periods referred to in Section 11.1(b)(2), except to the extent that (at the time of making the estimation) DBCT Management or the Capacity Expert are actually aware of a reasonably certain future material decrease in capacity (for example, where DBCT Management is aware of a decrease in capacity caused by a planned shutdown in another part of the System).

- (c) **(Disclosure of process and advice)** Subject to any confidentiality restrictions applying to DBCT Management, DBCT Management must disclose to the Access Holders, Access Seekers, Expansion Parties, the Operator and other Service Providers its decision making process in relation to its estimations of Terminal Capacity, Expansion Component Capacity and System Capacity and provide them with a copy of any report that DBCT Management receives from the Capacity Expert in relation to estimating those capacities. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 11.1(c) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information.
- (d) **(Capacity Expert)** Any Capacity Expert to be appointed by DBCT Management under this Section 11.1 will be:
- (1) where a group of Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage of all Access Holders for that Financial Year object (in accordance with Section 11.1(g)) to the Capacity Expert nominated by DBCT Management, a Capacity Expert appointed in accordance with Section 11.1(g);
  - (2) where a majority of the group of Expansion Parties for an Expansion Component object (in accordance with Section 11.1(g)) to the Capacity Expert nominated by DBCT Management, a Capacity Expert appointed in accordance with Section 11.1(g); or
  - (3) where Section 11.1(d)(1) and 11.1(d)(2) do not apply, a Capacity Expert nominated by DBCT Management.
- (e) **(Notice of proposed Capacity Expert)** DBCT Management will advise all Access Holders (and, where relevant, Expansion Parties) as to the identity of any Capacity Expert it proposes appointing pursuant to Section 11.1(a)(2) and request that any objection to that Capacity Expert be given in writing to DBCT Management within 14 days after receipt of DBCT Management's notice.
- (f) **(Appointment if no objection)** If no group of Access Holders or Expansion Parties determined in accordance with Section 11.1(d) objects in writing to the Capacity Expert nominated by DBCT Management within the 14 day period referred to in Section 11.1(e), DBCT Management will promptly appoint the Capacity Expert nominated by it.
- (g) **(Procedure if objection to proposed Capacity Expert)** If a group of Access Holders or Expansion Parties determined in accordance with Section 11.1(d) objects within the 14 day period provided for in Section 11.1(e):

- (1) DBCT Management will promptly request the Resolution Institute to nominate a Capacity Expert, and it will engage the Capacity Expert so nominated; and
  - (2) the 6 month period referred to in Section 11.1(k)(1) will not commence until the Capacity Expert has been nominated by the Resolution Institute.
- (h) **(Independent Capacity Expert to consult)** DBCT Management must require its Capacity Expert to consult (as far as is practicable, and to the extent that consultation has not already occurred in respect of a relevant estimation of Terminal Capacity, Expansion Component Capacity or System Capacity (as applicable)) with the Operator, Access Holders, any Access Seekers and other Service Providers, or their respective nominees with respect to the factors referred to in Sections 11.1(a)(2)(C), and 11.1(a)(2)(E).
- (i) **(Objection to estimation by Capacity Expert)** Despite Section 16, DBCT Management's estimation of Terminal Capacity, Expansion Component Capacity and System Capacity under Section 11.1(a) may not be disputed or challenged (including under Section 16 of this Framework) or otherwise subject to review by or on behalf of Access Holders or Access Seekers:
- (1) except on the basis that it has been determined in bad faith, in breach of the Framework or an Access Agreement, or on the basis of a manifest error;
  - (2) unless Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage for all Access Holders for that Financial Year each object on the same or similar grounds; or
  - (3) unless Expansion Parties whose combined projected Annual Contract Tonnage would amount to greater than 50% of the projected Expansion Component Capacity, each object on the same or similar grounds.
- (j) **(Determination of Capacity conclusive)** The capacity of the Terminal, Differentiated Expansion Component and System Capacity estimated under Section 11.1(a) (or, if applicable, Section 16) will constitute Terminal Capacity, Expansion Component Capacity or System Capacity (as relevant) for the purposes of this Framework until it is next reassessed.
- (k) **(Times for re determination of Capacity)** Terminal Capacity, Expansion Component Capacity and System Capacity will be assessed by DBCT Management in accordance with Section 11.1(a) and will be reassessed during the Term of this Framework:
- (1) before entering into any new Access Agreement or otherwise increasing Aggregate Annual Contract Tonnage unless the Terminal

Capacity, the Expansion Component Capacity and the System Capacity was assessed or reassessed in accordance with Section 11.1(a) in the immediately preceding 12 months and there has been no change in any of the factors to be taken into account in estimating the Terminal Capacity, the Expansion Component Capacity or the System Capacity since that time that is reasonably expected to materially affect the Terminal Capacity, the Expansion Component Capacity or the System Capacity;

- (2) during each stage of a Feasibility Study being conducted by DBCT Management in accordance with Section 5.10;
  - (3) (subject to Section 11.1(g)(2)) not later than 6 months, or such time as otherwise agreed by the parties, after each of the following:
    - (A) the Completion of each Terminal Capacity Expansion; and
    - (B) the time at which DBCT Management becomes aware of the completion of each material and discrete expansion (such materiality to be determined by DBCT Management acting reasonably) of any other component of the System; or
  - (4) otherwise at DBCT Management's discretion.
- (l) **(Notification of assessments of Terminal Capacity, Expansion Component Capacity and System Capacity)** DBCT Management must promptly notify DBCT Holdings, each Access Holder and each Access Seeker of each capacity assessment undertaken in accordance with this Section 11.1.
- (m) **(Requirements for Capacity Expert report process)** The following will apply to a Capacity Expert's report for the purposes of Section 11.1(a):
- (1) subject to confidentiality restrictions applying to DBCT Management, DBCT Management must provide to the Capacity Expert all relevant information which DBCT Management has or to which it has access, to assist the Capacity Expert to reach his or her estimation. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 11.1(m) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information;
  - (2) DBCT Management must, as far as practicable, use reasonable endeavours to work cooperatively with each other Service Provider (for example by regularly providing information relevant to System Capacity) and, as far as practicable, using reasonable endeavours to agree on the joint engagement of Capacity Experts for the purposes of both this Framework and in respect of similar obligations by other Service Providers; and

- (3) if the Capacity Expert reasonably considers that there is either agreement or broad consensus amongst stakeholders in the Dalrymple Bay Coal Chain as to Terminal Capacity, Expansion Component Capacity or System Capacity (such agreement or consensus having been reached having regard to the Capacity Expert's report(s)), the Capacity Expert must accept that agreement or broad consensus as evidence of Terminal Capacity, Expansion Component Capacity or System Capacity (as the case may be) except to the extent that the Capacity Expert reasonably forms the opinion that there is compelling evidence to the contrary.
- (n) **(Tonnes under Access Agreements and Existing User Agreements must not exceed System Capacity)** DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new Access Agreement) exceed the System Capacity (as determined for a relevant time), unless otherwise required to do so by the Access Framework (including pursuant to Section 11.3), law, or an agreement relating to its tenure of the Terminal including the Framework Agreement or the Port Services Agreement. For clarification:
- (1) **(Access Agreements can be conditional on capacity resulting from a Terminal Capacity Expansion)** this does not prohibit DBCT Management from entering into a Conditional Access Agreement as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on the Completion of the relevant Terminal Capacity Expansion will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the Completion of the relevant Terminal Capacity Expansion); and
- (2) **(Framework not breached if System Capacity exceeded after good faith reasonable efforts)** DBCT Management will not be in breach of this Framework if it has complied with this Framework (or made good faith and reasonable attempts to comply) but the re-determination of System Capacity in accordance with Section 11.1(k) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (o) **(Protection of DBCT Management)** Notwithstanding any other provision of this Framework, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this Section 11.1, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) to any Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder which executes it):

- (1) for any breach of this Section 11.1;
  - (2) for any delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity, Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
  - (3) if one or more factors related to utilisation of capacity of the Terminal, or any other part of the System subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under a Standard Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor) provided that such factor is not a breach by DBCT Management of any other part of this Framework or an Access Agreement; or
  - (4) for any defect, error or omission on the part of the Capacity Expert appointed under Section 11.1.
- (p) **(Recovery of Capacity Expert's costs)** The costs of a Capacity Expert appointed under Section 11.1(d):
- (1) following the Completion of and handover to the Operator of a Terminal Capacity Expansion will be borne by DBCT Management, and may be included in the prudent Capital Expenditure for the Terminal Capacity Expansion as an Other Cost in accordance with Section 11.5(a)(3)(B); and
  - (2) in all circumstances other than as described in Section 11.1(p)(1), be borne by DBCT Management.
- (q) **(Provisional allocation pending determination of Capacity)** Notwithstanding any other provision of this Framework, DBCT Management may, on a provisional basis, allocate after the Completion of a Terminal Capacity Expansion the anticipated increase in Terminal Capacity and Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) until Terminal Capacity, Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) and System Capacity is determined in accordance with Section 11.1(k).

## 11.2 Terminal Capacity Expansion consultation

- (a) **(Meeting agendas)** DBCT Management will hold meetings with Access Holders and, where they exist, Expansion Parties not less than twice per Financial Year to consult in good faith upon the following issues:

- (1) current Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (2) constraints on current Terminal Capacity, Expansion Component Capacity and System Capacity including the impact on vessel waiting times and Access Holder transport costs;
  - (3) future contracts/forecasts that may impact on Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (4) significant issues relevant to Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (5) the timing and nature of the next Terminal Capacity Expansion (if any) and the impact on current capacity requirements, pricing and the Terminal Master Plan and System Master Plan; and
  - (6) any proposed changes to the Terminal Regulations.
- (b) DBCT Management will also hold such meetings to consult in good faith upon these issues in respect of Differentially Priced Capacity with Differentially Priced Access Holders for the relevant Differential Expansion Component.
- (c) **(Meeting administration)** DBCT Management will distribute, in a timely manner, agendas, detailed briefing material and a copy of the minutes of each of these meetings to all Access Holders, Expansion Parties and DBCT Holdings.
- (d) **(Separate meetings with Expansion Parties)** For the avoidance of doubt, nothing in this Section 11.2 limits or restricts DBCT Management from meeting separately with Expansion Parties to the extent that the matters raised relate only to a Differentiated Expansion Component.

### 11.3 General obligation to undertake Terminal Capacity Expansions

- (a) Subject to Sections 11.7 and 11.8 of this Framework, DBCT Management will undertake Terminal Capacity Expansions as are necessary to:
- (1) **(Accommodate growth)** accommodate the actual and reasonably anticipated future growth of demand (having regard to Access Applications received by DBCT Management and other relevant factors) for the use of the Terminal by Access Holders and Access Seekers;
  - (2) **(Eliminate shortfalls in Terminal Capacity)** eliminate sustained shortfalls in actual Terminal Capacity below the aggregate of Annual Contract Tonnages of Access Holders and Existing Users, whatever the reason for such shortfalls;

(3) **(Good Operating and Maintenance Practices)** ensure that the Terminal complies with Good Operating and Maintenance Practice in respect of quality standards for such facilities, good environmental practice and applicable environmental standards; and

(4) **(Laws)** comply with Approvals and applicable laws,

provided that DBCT Management will nevertheless have regard to the System Master Plan and the expected capacity of other components of the System, with the intention that the capacity of the Terminal will (as far as practicable and economic and can reasonably be anticipated) not significantly and disproportionately exceed System Capacity for more than 12 months after the Completion of a Terminal Capacity Expansion.

(b) **(Factors to be taken into account)** It is recognised that:

(1) the name-plate capacity of each individual component of the System will, on a "stand alone" basis at all times, be likely to exceed the aggregate System Capacity to some extent; and

(2) DBCT Management does not have any control over any part of the System other than the Terminal, and DBCT Management's estimate of expected capacity of the other components of the System will have limited accuracy (for example, because of changes in or operation of the System or the operation of any upstream components of the System in relation to the Terminal, delays in expansions of other parts of the System (including in the circumstance in which another Service Provider delays an expansion which was provided for in a System Master Plan) and other differences to DBCT Management's assumptions).

(c) **(Protection of DBCT Management)** Accordingly DBCT Management will not have any liability to an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 11.3, even if it does not actually comply with this Section 11.3.

#### **11.4 Accommodation of Capacity**

(a) **(General obligation to accommodate Access Applications)** Subject to Sections 5.4(l), 11.7 and 11.8 of this Framework, and the proviso in Section 11.3(a), DBCT Management will use best endeavours to ensure that, as soon as reasonably practical after DBCT Management receives from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement that will be unconditional and legally binding and require the Access Seeker to obtain Handling of coal at the Terminal for a period in

excess of 5 years (or 10 years or more Handling of coal if acceptance of the offer would require a Capacity Expansion), the Terminal is able to Handle that coal without a material and sustained increase in:

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

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

- (b) **(Bona fide offers and reasonably creditworthy Access Seekers)** Without limiting the circumstances in which DBCT Management may be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement, if:

- (1) DBCT Management receives an offer from an Access Seeker to enter into an Access Agreement on the terms of the Standard Access Agreement, or receives an offer from an Access Seeker to enter into an Access Agreement where any departure of the terms of that offer from the terms of a Standard Access Agreement is not likely to increase cost (direct or indirect) or risks to DBCT Management; and
- (2) the Access Seeker has satisfied DBCT Management (acting reasonably) in accordance with Section 5.9 that the Access Seeker (or any relevant Security provider) has the financial and other relevant resources to enable it to discharge its obligations under the relevant Access Agreement,

then for the purpose of this Section 11.4, DBCT Management will be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement.

## 11.5 Undertaking Terminal Capacity Expansions

- (a) **(Terminal Capacity Expansion application to be lodged with Arbitrator)** If DBCT Management proposes to expand the Terminal during the Term of the Framework (either because it is obliged to do so under this Framework or wishes to do so without being obliged to do so), then in respect of the particular expansion to the Terminal it will submit to an arbitrator appointed in accordance with Section 16.4 (**Expansion Arbitrator**) a Terminal Capacity Expansion application, which must include the following information:

- (1) details of the scope of the proposed Terminal Capacity Expansion, including:
  - (A) confirmation of Terminal operating assumptions and System operating assumptions in the FEL 3 Feasibility Study, including confirmation of the capacity of the Existing Terminal and System Capacity prior to the proposed Terminal Capacity Expansion and the proposed Expansion Component Capacity; and
  - (B) either:
    - (i) confirmation that, and details of how, the Terminal Capacity Expansion complies with both the current Terminal Master Plan and System Master Plan; or
    - (ii) a justification acceptable to the Expansion Arbitrator as to why it does not, and need not, comply with the Terminal Master Plan or System Master Plan, but will nevertheless be economically and operationally prudent;
- (2) the terms and conditions of any Access Agreements that are conditional on the Terminal Capacity Expansion;
- (3) the estimated cost of the proposed Terminal Capacity Expansion categorised into:
  - (A) works that are proposed to be managed under the Tender and Contract Management Process (TCMP) (Contract Costs); and
  - (B) work and costs which are not to be managed under the TCMP (Other Costs);
- (4) the estimated timetable for the proposed Terminal Capacity Expansion;
- (5) a high level project execution strategy, which will, among other things, identify risks and risk mitigation;
- (6) either:
  - (A) evidence that the 60/60 Requirement has been complied with; or
  - (B) DBCT Management's justification for the Terminal Capacity Expansion without the 60/60 Requirement having been complied with;

- (7) the process for the tendering and awarding of contracts, standard form contract terms, and the contract management process for the management of contracts post award (these processes together constitute the TCMP);
  - (8) the process by which costs will be expended, tracked and managed if they are not covered by the TCMP; and
  - (9) an application for a Price Ruling in respect of the Terminal Capacity Expansion, if one has not already been made.
- (b) **(Monthly reporting to Expansion Arbitrator)** DBCT Management will also submit to the Expansion Arbitrator (with a copy to each Access Holder) a monthly report setting out:
- (1) the status of each contract awarded under the TCMP, including the degree of completion and the anticipated final cost inclusive of actual and provisioned variations;
  - (2) the status of each element of the Other Costs, including the costs incurred, the degree of completion and the anticipated final costs; and
  - (3) if anticipated final costs vary from the costs initially forecast, details of and the reasons for the variation.
- (c) **(Expansion Arbitrator to confirm Price Ruling following application for Expansion)** Following receipt of an application under Section 5.12(a)(2) or 11.5(a)(9), the Expansion Arbitrator will provide to DBCT Management and each Expansion Party notice of, in respect of a relevant Expansion Component:
- (1) where a Price Ruling has been made in accordance with Section 5.12(c), the content of the Expansion Arbitrator's ruling and details of any material changes apparent in the application which may require a new or varied Price Ruling to be made, including the extent to which the circumstances of the Expansion Component vary from the assumptions made in the original Price Ruling;
  - (2) where a Price Ruling has not been made in accordance with Section 5.12(c), but a Price Ruling Application has been made under Section 5.12(a)(2) or 11.5(a)(9), a copy of the Price Ruling Application and information on the Expansion Arbitrator's process for determining a Price Ruling for that Terminal Capacity Expansion.
- (d) **(DBCT Management to provide information to the Expansion Arbitrator)** DBCT Management will provide all information required by the Expansion Arbitrator or any advisor to the Expansion Arbitrator to enable the Expansion Arbitrator to assess the prudence of any proposed or actual Capital Expenditure. Prior to disclosing any confidential information, DBCT

Management must ensure that the Expansion Arbitrator (and any advisor to the Expansion Arbitrator) enters into a confidentiality deed with DBCT Management to the effect that the Expansion Arbitrator (and any advisor to the Expansion Arbitrator) must keep the information confidential and only use that information for the purpose of its engagement under this Section 11.5.

**(e) (Expansion Arbitrator's acceptance of prudence of contract costs)**

(1) The Expansion Arbitrator will accept that Capital Expenditure in respect of a proposed Expansion Component is prudent and any determination by an Arbitrator of a Floor TIC or amended TIC to apply in respect of the Existing Terminal or a Floor TIC to apply in respect of the Differentiated Expansion Component (as relevant) following the Completion of the Terminal Capacity Expansion should take that Capital Expenditure into account in accordance with Section 10.4(f) or 10.6(b)(3) (as applicable) if DBCT Management can demonstrate and the Expansion Arbitrator is satisfied that:

(A) the scope of the works complies with Section 11.5(f) and the requirements of that Section have been met; and

(B) the standard and specifications of the works is appropriate, as provided for in Section 11.5(g) and the requirements of that Section have been met; and

(C) the works were undertaken in accordance with the approved TCMP or were otherwise reasonable, as provided for in Sections 11.5(i), 11.5(j), 11.5(k) and 11.5(l) and the requirements of those Sections have been met.

(2) In the event that the Expansion Arbitrator considers that any elements specified in Section 11.5(e)(1) are not satisfactorily met, the Expansion Arbitrator will undertake an assessment of the prudence of the Capital Expenditure as if the works were Other Costs, as provided for in Section 11.5(m). In undertaking this assessment, the Expansion Arbitrator will take into account the extent to which DBCT Management has achieved compliance with the expansion approval process outlined in this Section 11.5, including consistency with any assumptions associated with a Price Ruling.

**(f) (Expansion Arbitrator's acceptance of scope of works)**

(1) The Expansion Arbitrator will accept the scope of the proposed Terminal Capacity Expansion if it is satisfied that:

(A) the scope is consistent with the current Terminal Master Plan and System Master Plan and applicable laws;

- (B) the 60/60 Requirement has been complied with; and
  - (C) (together with any other relevant expansions of one or more components of the System) the Terminal Capacity Expansion will result in an increase in System Capacity and will not be expected to result in Terminal Capacity significantly and disproportionately exceeding System Capacity for more than 12 months after Completion of a Terminal Capacity Expansion.
- (2) The Expansion Arbitrator will accept or not accept the scope within 20 Business Days of being provided with all of the information it requires to assess the proposed works and the criteria listed in Section 11.5(f)(1). If the Expansion Arbitrator does not accept the scope of the proposed works, it will give reasons in writing.
- (g) **(Expansion Arbitrator's acceptance of standard and specifications of works)**
- (1) The Expansion Arbitrator will review the standard and specifications of works relating to a Terminal Capacity Expansion and all relevant contract terms to ensure that the works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement, or, in the case of contract terms, are not likely to materially adversely impact on a prudent balance between price and risk.
  - (2) The Expansion Arbitrator will accept or not accept on a contract by contract basis the standard, specifications, and contract terms for the works within 20 Business Days of receipt of the technical specifications, design drawings and contract terms for the works and any other information needed by the Expansion Arbitrator to review the standard, specifications and contract terms for the works. If the Expansion Arbitrator does not accept the standard, specifications and contract terms of the works, it will give reasons in writing.
  - (3) If DBCT Management amends the submitted technical specifications and/or design drawings and/or material contract terms after an approval by the Expansion Arbitrator, DBCT Management will immediately advise the Expansion Arbitrator of the changes. The Expansion Arbitrator will accept or not accept the changes.
- (h) **(60/60 Requirement)**
- (1) **(What is the 60/60 Requirement)** In this Section 11.5, the "60/60 Requirement" is satisfied when:
    - (A) DBCT Management has executed Access Agreements from Access Holders, each of which provides for the Handling of coal

for a period of at least 10 years duration, for at least 60% of the proposed Terminal Capacity increment.

(B) 60% of all Access Holders and Expansion Parties (as determined by their Annual Contract Tonnages reduced by the relevant exclusions set out in Section 11.5(h)(1)(C)) do not oppose the Terminal Capacity Expansion, having been given the information and notice in Section 11.5(h)(2) at least 15 Business Days before it is determined whether or not the 60/60 Requirement has been satisfied.

(C) The relevant exclusions are the tonnages of any Access Holder of existing capacity at the Terminal where the Access Holder is:

- (i) legally and beneficially, the same entity as; or
- (ii) a related body corporate of an Access Holder that is legally and beneficially, the same entity as,

an Expansion Party that is within Section 11.5(h)(1)(A). For clarification, where an Expansion Party or Access Holder is, or acts on behalf of, a joint venture, the Expansion Party or Access Holder will only be "legally and beneficially" the same, in respect of both an Access Agreement and an Access Application or two or more Access Agreements and Access Applications, where each of the entities comprising the joint venture relating to each relevant Access Agreement and Access Application is the same (or a related body corporate of the same) entity in each context.

(2) **(DBCT Management to provide information for 60/60 Requirement process)** DBCT Management will provide the Access Holders and Expansion Parties referred to in Section 11.5(h)(1)(B) relevant to a proposed Terminal Capacity Expansion with the following information, for the purposes of determining whether the 60/60 Requirement can be complied with in respect of a proposed Terminal Capacity Expansion:

- (A) outline details of the scope of the proposed Terminal Capacity Expansion works;
- (B) details of how the Terminal Capacity Expansion complies with the current Terminal Master Plan and System Master Plan;
- (C) without limitation to Section 5.10, provide a copy of the capacity assessment undertaken in accordance with Section 11.1 which separately identifies the capacity of the

- Existing Terminal and the proposed Expansion Component Capacity;
- (D) cost estimates for the proposed Terminal Capacity Expansion and each element of the Terminal Capacity Expansion, including contingency, financing and escalation allowances;
  - (E) a schedule of each element of the proposed Terminal Capacity Expansion;
  - (F) the projected total Terminal Capacity and System Capacity following the Terminal Capacity Expansion;
  - (G) a high level project execution strategy, which strategy will, among other things, identify risks and risk mitigation;
  - (H) a schedule of likely reductions in Terminal Capacity and System Capacity during construction;
  - (I) an outline of Existing User Agreement tonnages, Access Agreement tonnages, Conditional Access Agreement tonnages and Access Application tonnages and contract periods;
  - (J) an estimate of what effect the proposed Terminal Capacity Expansion will have on each Terminal Component's Terminal Infrastructure Charges and Operation and Maintenance Charges;
  - (K) a notice that the above information is being expressly provided in contemplation of the 60/60 Requirement (even if the notice was given prior to the Commencement Date);
  - (L) where a Price Ruling has been made in respect of a relevant Terminal Capacity Expansion, the content of the Expansion Arbitrator's Price Ruling; and
  - (M) where a Price Ruling has not yet been made in respect of a relevant Terminal Capacity Expansion, the application for a Price Ruling filed with the Expansion Arbitrator under Section 11.5(a)(9).
- (3) **(60/60 Requirement conclusive)** Once evidence of compliance with the 60/60 Requirement has been provided and accepted by the Expansion Arbitrator it will not be subject to further review (provided that the evidence presented was not misleading or deceptive and there has been no dishonesty or manifest error).
- (4) **(60/60 Requirement determines deemed need for Terminal Capacity Expansion)** If Section 11.5(a)(6)(A) applies, the Expansion Arbitrator

will confirm the sufficiency (or sufficiencies) of evidence of the 60/60 Requirement within 20 Business Days of receipt of the Terminal Capacity Expansion application. If the Expansion Arbitrator provides such confirmation, it will be deemed to have accepted the need for the Terminal Capacity Expansion.

- (5) **(Expansion Arbitrator review if 60/60 Requirement not met)** If Section 11.5(a)(6)(B) applies, the Expansion Arbitrator will, within 3 months of receipt of the Terminal Capacity Expansion application, review whether the Terminal should be expanded in the way proposed by DBCT Management. If the Expansion Arbitrator does not accept that the Terminal should be expanded in the way proposed by DBCT Management, it will give reasons in writing.

(i) **(Tender and Contract Management Processes)**

- (1) **(General principles for Expansion Arbitrator approval)** The Expansion Arbitrator will approve DBCT Management's TCMP if it is satisfied that it is consistent with the following general principles, namely that the TCMP:

- (A) is in accordance with good industry practice;
- (B) will generate an efficient and competitive outcome;
- (C) will avoid conflict of interest or collusion amongst tenderers;
- (D) is prudent in the circumstances of the Terminal Capacity Expansion project; and
- (E) will avoid unreasonable exposure to contract variation claims.

- (2) **(Detailed considerations for Expansion Arbitrator approval)** In particular, in considering whether or not to approve DBCT Management's TCMP, the Expansion Arbitrator will consider whether (amongst other things):

- (A) there is a clear process for the calling of tenders, including having clear specifications for tenders, and processes for mitigating conflicts of interest (except when it is assessed that calling tenders is likely to be less advantageous than an alternative means of negotiating a contract);
- (B) (where applicable) there is a tender assessment process which contains clear and appropriate processes for determining the successful tender, with any decisions to approve a tender that is not the lowest tender being appropriately justified and documented;

- (C) the basis of payment for works is clearly specified and the basis for undertaking the works is in accordance with good commercial practice;
- (D) there is a process for managing contracts before and after award that accords with good commercial practice for a project of the type and scale of the Terminal Capacity Expansion and provides appropriate guidance on the criteria that DBCT Management should apply to decisions regarding the management of the Terminal Capacity Expansion, including but not limited to:
  - (i) safety during construction and operation;
  - (ii) compliance with environmental requirements during construction and operation;
  - (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodation of the reasonable requests of Access Holders and Expansion Parties to change the scope and sequence of construction to suit their needs;
  - (v) a prudent balance between:
    - (a) a higher price in return for more certainty as to final cost;
    - (b) a lower price accepting that final cost may be less certain; and
    - (c) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs; and
  - (vii) minimising total project cost which may at times not be consistent with minimisation of individual contract costs;
- (E) there is a process for managing contract variations and/or escalation that occurs post award of a contract, requiring that reasonable consideration be given to managing the risk of contract variations and/or escalation and the allocation of potential risks during the management of the contract and requiring the provision of clear documentary evidence

- regarding the nature and reasonableness of any variation and/or escalation; and
- (F) DBCT Management has engaged an auditor in accordance with Section 11.5(l) to monitor compliance with the TCMP.
- (3) **(Notification of TCMP decision by Expansion Arbitrator)** The Expansion Arbitrator will within 20 Business Days of the Expansion Arbitrator receiving all the information it requires to assess the TCMP give DBCT Management a notice in writing whether it will approve or not approve the TCMP, setting out:
- (A) reasons for its decision; and
- (B) if requested, the way the TCMP should be amended.
- (4) **(Amendment of TCMP)** DBCT Management may at any time and from time to time request amendments to an approved TCMP by giving written notice to the Expansion Arbitrator. Promptly following receipt of a request to amend the TCMP the Expansion Arbitrator will approve or not approve the amendments. In considering such amendments the Expansion Arbitrator will apply Sections 11.5(i)(2) and 11.5(i)(3).
- (j) **(Indicators of prudent contract value)** The Expansion Arbitrator will accept that the value of a contract as awarded is prudent and will include it in his or her determination of the prudent Capital Expenditure for the Terminal Capacity Expansion if:
- (1) the Expansion Arbitrator has approved DBCT Management’s TCMP in accordance with Section 11.5(i);
- (2) the Expansion Arbitrator is satisfied that contract provisions regarding contract variations and escalation accord with good commercial practice; and
- (3) the auditor engaged in accordance with Section 11.5(l) certifies that the works have been conducted in accordance with the approved TCMP.
- (k) **(Indicators of prudent variations and escalations)** The Expansion Arbitrator will accept that contract variations and/or escalations post award of a contract are prudent and will include them in his or her determination of the prudent Capital Expenditure for the Terminal Capacity Expansion if:
- (1) **(Compliance with TCMP)** a contract which has been accepted as prudent under Section 11.5(j) has been managed in accordance with the approved TCMP;

- (2) **(Auditor certification)** the auditor engaged in accordance with Section 11.5(l) has certified that contract variations and/or escalations have been handled in a manner consistent with the relevant contract provisions; and
  - (3) **(Variations and escalations)** the Expansion Arbitrator is satisfied that the cost of contract variations and/or escalations is otherwise appropriate, having regard to the following:
    - (A) whether adequate consideration was given to properly managing the risk of contract variations and/or escalation or the allocation of potential risks during the awarding and management of the contract;
    - (B) whether the contract has been appropriately managed when regard is had for matters outlined in Section 11.5(i)(2)(D);
    - (C) whether the contract variations and/or escalations are appropriately justified; and
    - (D) whether the contract has been managed with a regard to a prudent balance between costs, schedule and minimising disruption to operating capacity during construction.
- (l) **(Independent external audit)** As part of the implementation of the approved TCMP, DBCT Management will engage an independent external auditor to audit the compliance of DBCT Management's tender and contract management processes with the TCMP approved under this Section 11.5. The process in this regard will be as follows:
- (1) **(Appointment)** DBCT Management will appoint the auditor, subject to obtaining the Expansion Arbitrator's prior approval of the selection of the auditor and the Expansion Arbitrator's prior approval of the terms and conditions of the engagement of the auditor;
  - (2) **(Acknowledgement of duty)** the auditor will be required to acknowledge and accept that the auditor owes a separate contractual duty of care to the Expansion Arbitrator in the provision of the audit and, in the event of a conflict between the auditor's obligations to DBCT Management and its duty of care to the Expansion Arbitrator, the auditor's duty of care to the Expansion Arbitrator will take precedence;
  - (3) **(Audit process to be agreed and approved)** the auditor must agree the processes for conducting an audit with DBCT Management and obtain the Expansion Arbitrator's approval of the audit process. The audit process will consist of a proposed work program, including audit costs (which shall be payable by DBCT Management and included in the

prudent Capital Expenditure determined by the Expansion Arbitrator, for the execution of the audit;

- (4) **(Provision of information to auditor)** DBCT Management will, within a nominated timeframe that is determined by the auditor to be reasonable after consultation with DBCT Management, provide any relevant information the auditor reasonably requires for the purpose of conducting the audit;
  - (5) **(Confidentiality deed)** if required by DBCT Management, the auditor will enter into a confidentiality deed with DBCT Management in relation to any information provided by DBCT Management to the effect that it must keep the information confidential and only use that information for the purpose of conducting the audit and completing the audit report detailed below;
  - (6) **(Audit reports)** the auditor will compile an audit report identifying whether DBCT Management has complied in all material respects with the approved TCMP including in relation to contract variations and/or escalation. If the auditor identifies that DBCT Management has not complied in all material respects with the approved TCMP, then the audit report is also to contain details on the relevant non-compliance, any reasons stated by DBCT Management for the relevant non-compliance, and whether the non-compliance was reasonable in the circumstances;
  - (7) **(Progress reports)** the auditor will provide progress reports on the audit process every 6 months. The auditor will also provide a copy of the audit report to DBCT Management and the Expansion Arbitrator upon completion of the audit. The Expansion Arbitrator may have the audit report published on DBCT Management's website if it considers it appropriate; and
  - (8) **(Expansion Arbitrator may require additional detail)** if the Expansion Arbitrator forms the view that any of the auditor's reports (whether progress reports or a final report) are lacking in detail or otherwise deficient, the Expansion Arbitrator may direct DBCT Management to instruct the auditor to review the audit report and, in doing so, to address the concerns of the Expansion Arbitrator.
- (m) **(Prudency of Other Costs)**
- (1) **(Expansion Arbitrator to assess prudency)** The Expansion Arbitrator will undertake an assessment of the prudency of Other Costs, and costs to which Section 11.5(e)(2) applies, after the relevant costs have been expended.

- (2) **(Considerations relating to prudence)** In assessing whether actual Capital Expenditure is prudent, the Expansion Arbitrator will have regard to the scope of the works undertaken, the standard of the works undertaken and the reasonableness of the cost of works undertaken.
- (3) **(Factors relevant to scope of work)** In assessing the scope of the works and any associated ancillary services undertaken, the Expansion Arbitrator will have regard to (amongst other things):
  - (A) the scope of the proposed Terminal Capacity Expansion;
  - (B) the current Terminal Master Plan and System Master Plan (or to the extent that there is no current System Master Plan, the considerations DBCT Management is required to have regard to under Section 14.2(c));
  - (C) the extent of current contracted demand, likely future demand and any spare capacity considered appropriate, and the need for capital works to accommodate that demand;
  - (D) the appropriateness of DBCT Management's processes to evaluate and select proposed capital works, including the extent to which alternatives are evaluated as part of the process;
  - (E) the extent to which capital projects that were undertaken were subjected to DBCT Management's evaluation and selection process; and
  - (F) the extent to which consultation has occurred with relevant stakeholders about the proposed capital works.
- (4) **(Factors relevant to standard and specifications)** In assessing the standard and specifications of the works undertaken, the Expansion Arbitrator will ensure that the proposed works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement and Section 11, Schedule E of this Framework.
- (5) **(Factors relevant to reasonableness)** In assessing the reasonableness of the cost of works undertaken, the Expansion Arbitrator will have regard to, (among other things):
  - (A) the level of such costs and risks relative to the scale, nature, cost and complexity of the project;
  - (B) the circumstances prevailing in the markets for engineering, equipment supply and construction;

- (C) the manner in which the Terminal Capacity Expansion has been managed, including but not limited to the manner in which DBCT Management has balanced the needs of:
  - (i) safety during construction and operation;
  - (ii) compliance with environmental requirements during construction and operation;
  - (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodating the reasonable requests of Access Holders to change the scope and sequence of the works undertaken to suit their needs;
  - (v) a prudent balance between:
    - (a) a higher price in return for more certainty as to final cost;
    - (b) a lower price, accepting that final cost may be less certain; and
    - (c) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs; and
  - (vii) minimising the total cost of the Terminal Capacity Expansion which may at times not be consistent with minimisation of individual costs.
- (6) **(Assessing capital expenditure)** In assessing the prudence of Capital Expenditure undertaken, the Expansion Arbitrator will take advice as necessary from independent advisors using appropriate benchmarks and experience, and consult as necessary with relevant stakeholders (the cost of which advisors will be borne by DBCT Management at the discretion of the Expansion Arbitrator).
- (7) **(Audit costs)** The costs of the external auditor referred to in Section 11.5(l) and the advisers referred to in Section 11.5(m)(6) (where payable by DBCT Management) will form part of the Other Costs.
- (n) **(Preliminary assessment of Other Costs)** If requested by DBCT Management, the Expansion Arbitrator will undertake a preliminary assessment of the reasonableness of the Other Costs and shall advise DBCT Management of the

results of such assessment. The Expansion Arbitrator will not be bound by this assessment when determining the prudence of actual Capital Expenditure and whether the Capital Expenditure should be included in its determination of the prudent Capital Expenditure for the Terminal Expansion Component.

#### **11.6 Interest during construction for Terminal Capacity Expansions**

- (a) In the event of a Terminal Capacity Expansion approved by the Expansion Arbitrator pursuant to Section 11.5, construction related financing costs (which will include a return on capital over the construction period on the Terminal Capacity Expansion expenditure prudently incurred) will be included in the prudent Capital Expenditure for the Terminal Capacity Expansion for the purposes of and taken into account in any determination of a Floor TIC or amended TIC to apply in respect of the Existing Terminal or a Floor TIC to apply in respect of a Differentiated Expansion Component (as the case may be) following Completion of the Terminal Capacity Expansion in accordance with Section 10.4(f) or 10.6(b)(3) (as applicable). The return on capital over the construction period to be included in the prudent Capital Expenditure for the Terminal Capacity Expansion and taken into account in determining the Floor TIC or amended TIC will be calculated at the WACC(1) Rate.

#### **11.7 Unreasonable and uneconomic proposed Terminal Capacity Expansions**

If, having regard to:

- (a) the actual or anticipated long-term demand for the Services;
- (b) the extent to which a Terminal Capacity Expansion under the relevant stage of the Terminal Master Plan would produce capacity in excess of demand;
- (c) the cost of the Terminal Capacity Expansion;
- (d) the extent to which DBCT Management can demonstrate on reasonable evidence that the costs of the Terminal Capacity Expansion would be unlikely to be accepted by an Expansion Arbitrator as prudent for the purposes of determining Access Charges in respect of that Terminal Capacity Expansion; and
- (e) the long-term nature of DBCT Management's investment in the Terminal,

the cost to DBCT Management of complying with Sections 11.3, 11.4 and 11.5 would be unreasonable and uneconomic, DBCT Management may submit to DBCT Holdings a written proposal that:

- (f) provides details of the above matters; and
- (g) proposes a modification to or temporary delay in the Terminal Capacity Expansion that would otherwise be required to be undertaken under this

Section 11, on terms and conditions that are not inconsistent with the objectives in Clause 2.2 of the Port Services Agreement,

and DBCT Management and DBCT Holdings will consult with one another, the State, Access Holders and Access Seekers, in good faith in respect of the proposal. DBCT Holdings will not unreasonably withhold or delay its agreement to such modification or delay, and for avoidance of doubt, even where its agreement may mean the condition precedent to any Conditional Access Agreement may not be fulfilled. DBCT Management will be relieved of its obligations under this Section 11 to the extent that DBCT Holdings agrees to modify or delay a Terminal Capacity Expansion (whether such agreement is given under the Framework or the Port Services Agreement).

#### **11.8 Inability to proceed with a proposed Terminal Capacity Expansion**

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

- (a) unable to procure a relevant tenure to or interest in land or seabed necessary for such Terminal Capacity Expansion;
- (b) unable to procure an approval in respect of the occupation or operation of the Terminal, that is required for DBCT Management to lawfully undertake any construction or development otherwise required by a Terminal Capacity Expansion under this Section 11; or
- (c) reasonably of the view that it is not possible to increase Terminal Capacity,

then the obligations of DBCT Management under this Section 11 will be suspended to the extent affected by that inability while that inability continues. DBCT Management will continue to use its best endeavours to (as applicable) procure that approval (including amending, resubmitting or substituting the application and amending the relevant design or work program for the construction or development to procure the approval), procure the interest or tenure, or identify a means of increasing Terminal Capacity.

#### **11.9 Terminal Capacity Expansions to comply with Terminal Master Plan**

If DBCT Management wishes to undertake a Terminal Capacity Expansion under this Section 11, it will do so by undertaking the next applicable stage or stages of development contemplated by the Terminal Master Plan (which is intended to be integrated with the System Master Plan) that are necessary to at least provide the necessary relevant additional Handling capacity.

#### **11.10 Non-expansion Capital Expenditure**

- (a) **(Good Operating and Maintenance Practice and Port Services Agreement)**  
DBCT Management will incur NECAP as is necessary to ensure:

- (1) that the Terminal complies with Good Operating and Maintenance Practice; and
  - (2) that DBCT Management complies with its obligations under the Port Services Agreement.
- (b) **(Streamlined approval of NECAP)** For the purposes of Section 10.6(b), the Arbitrator must accept that NECAP is prudent and include it in the determination of the amended TIC:
- (1) provided that DBCT Management confirms, to the reasonable satisfaction of the Arbitrator, that the expenditure incurred falls within the definition of Capital Expenditure;
  - (2) if:
    - (A) prior to DBCT Management incurring the NECAP, the NECAP was unanimously approved by all Access Holders whose TIC would be amended by reference to that NECAP; or
    - (B) no Access Holder whose TIC would be amended by reference to that NECAP objected to the NECAP within 20 Business Days after receiving written notice from DBCT Management of NECAP incurred by it which expressly drew their attention to this Section; and
  - (3) if the Operator has recommended in writing the incurring of the NECAP.
- (c) **(Inclusion of NECAP where specific criteria satisfied)** For the purposes of Section 10.6(b), the Arbitrator may accept that NECAP which does not comply with all the conditions in Section 11.10(b) is nonetheless prudent having regard to (among other things):
- (1) the need for the work to be undertaken for the efficient operation and use of the Terminal having regard to demand, cost benefit and other relevant factors;
  - (2) the scope of the work undertaken;
  - (3) the standard of the work undertaken;
  - (4) the circumstances prevailing in the markets for engineering, equipment supply and construction;
  - (5) safety during construction and operation;
  - (6) compliance with environmental requirements during construction and operation;

- (7) minimising whole of asset life costs; and
- (8) the advice of independent advisors using appropriate benchmarks and experience and which advisors are appointed (and paid for) by DBCT Management.

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## 12 Terms and conditions of Access

### 12.1 Access Agreements

- (a) **(Standard Access Agreement guide for all Access)** The granting of Access will be underpinned by the Standard Access Agreement.
- (b) **(Parties to Access Agreements)** The parties to each Access Agreement will include DBCT Management, DBCT Trustee and the relevant Access Holder.
- (c) **(Consistency with Standard Access Agreement)** If the Access Seeker so requires (although DBCT Management and the Access Seeker are able to agree otherwise), the Access Agreement will be substantively identical to the Standard Access Agreement.
- (d) **(Different terms)** DBCT Management or an Access Seeker may seek Access on terms which are different ~~(Different Terms)~~ from the Standard Access Agreement.
- ~~(e)~~ **(Standard Access Agreement is guide for access negotiations)** For Access required on terms other than the Standard Access Agreement, the terms of the Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement.
- ~~(f)~~ **(Different Terms in a Conditional Access Agreement)** If an Access Seeker is unwilling to agree to any Different Terms required by DBCT Management in respect of the Conditional Access Agreement and DBCT Management or the Access Seeker Disputes the Different Terms, the Conditional Access Agreement to be executed will take effect subject to any new or amended Different Terms that the Expansion Arbitrator determines or approves arising out of the Dispute.
- ~~(e)(g)~~ **(Execution copies to be prepared)** Once an Access Seeker has notified DBCT Management that it is satisfied with the terms and conditions of the Access Agreement as drafted, DBCT Management will, as soon as reasonably practicable, provide a final Access Agreement to the Access Seeker for execution.
- ~~(f)(h)~~ **(Prompt execution)** The parties will use reasonable efforts to duly execute the final Access Agreement as soon as practicable after negotiations are finalised.

## 12.2 Minimum Term of Access Agreements

- (a) **(10 years where Terminal Capacity Expansion required)**
- (1) An Access Agreement which will, if entered into by DBCT Management, require a Terminal Capacity Expansion, must:
- (A) provide for the Handling of coal for a minimum term of 10 years; and
  - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage earlier than the end of that 10 year period, except for any right of DBCT Management to terminate for default.
- (2) A series of Access Agreements which will, if entered into by DBCT Management with an Access Seeker, require a Terminal Capacity Expansion must:
- (A) provide for the Handling of coal for a minimum Weighted Average Term of 10 years; and
  - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage under any Access Agreement in the series earlier than the tenth anniversary of commencement of the term of the latest-dated Access Agreement in the series, except for any right of DBCT Management to terminate for default.
- (b) **(Replacement Agreements for existing mines)** An Access Agreement in respect of an existing mine for which there is already an Access Agreement may be for any term, but:
- (1) if it is for less than 5 years that term and the relevant tonnages must correspond with the expected remaining life of that mine; and
  - (2) no option to extend the term may be granted under it if the term is for less than 10 years.
- (c) **(Constraints on term for new mine)** The term of an Access Agreement relating to a new mine (including a mine where production is being resumed after a full closure or a sustained period of dormancy) may be for any term, but:
- (1) if it is for a term of less than 5 years, DBCT Management may reserve the right to terminate it on not less than 12 months' notice if:
    - (A) DBCT Management executes an Access Agreement for a period in excess of 5 years, commencing during that term; and

- (B) DBCT Management would have been unable to execute that new Access Agreement without a Terminal Capacity Expansion of the Terminal, had the first mentioned Access Agreement not been terminated at that time; and
- (2) no option to extend the term may be granted under it if the Access Agreement provides for the Handling of coal for a term of less than 10 years.
- (d) **(Increased Tonnage or term is deemed new Access Agreement)** For clarification, increasing the term of, or Annual Contract Tonnage under, an Access Agreement will be taken to constitute a separate Access Agreement in respect of the increased term or tonnage for the purposes of this Section 12.2.
- (e) **(Clarification re options)** Reference to an Access Agreement in this Section 12.2 does not include an Access Agreement resulting from the exercise of an option to renew or extend the term under a previous Access Agreement.

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## 13 Whole of supply chain efficiency

### 13.1 Engagement in Dalrymple Bay Coal Chain efficiency improvement

DBCT Management will, on a “best endeavours” basis, engage with other stakeholders to develop and implement mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain (including forums established pursuant to or arising out of a Memorandum of Understanding dated 1 April 2008 between stakeholders in the DBCT Coal Chain or any subsequent agreement or arrangement replacing or pursuant to that Memorandum of Understanding).

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## 14 Master plans

### 14.1 Terminal Master Plan

- (a) **(What the Terminal Master Plan is)** The Terminal Master Plan is the framework and reasoning for the expansion of the Terminal in the most logical and efficient way. It is intended to be a part of, and integrated with, the System Master Plan (and to the extent that at any time there is no System Master Plan, having regard to DBCT Management’s knowledge of the System and System Capacity for the relevant period).
- (b) **(Schedule F)** Until changed pursuant to the Framework and the Port Services Agreement, the Terminal Master Plan is the Terminal Master Plan in Schedule F.
- (c) **(Annual review)** DBCT Management must review the Terminal Master Plan at least annually and otherwise in accordance with its obligations under the Port Services Agreement.

- (d) **(Consultation)** Without limiting Section 14.1(c) DBCT Management must consult with all other Service Providers, Access Holders, Access Seekers and the Operator in respect of any proposed amendment to the Terminal Master Plan.
- (e) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Master Plan available to each other Service Provider and to each Access Holder and Access Seeker and the Operator (which may be by way of reference to a website) promptly after each amendment of the Terminal Master Plan.

## 14.2 System Master Plan

- (a) **(Participate in System Master Planning)** DBCT Management must use its reasonable endeavours to:
  - (1) (to the extent that it has not already occurred at the Commencement Date) reach agreement with each other Service Provider and DBCT Holdings (after consultation with those stakeholders and with all Access Holders and Access Seekers and the Operator) on a System Master Plan; and
  - (2) review (and if necessary revise) that System Master Plan by agreement with each other Service Provider, following ongoing consultation with all the above mentioned stakeholders.
- (b) **(Withdrawal from System Master Planning)** DBCT Management may at any time, acting reasonably, propose amendments to an existing or proposed System Master Plan. If after a reasonable time each other Service Provider does not agree to the amendments proposed by DBCT Management, DBCT Management may withdraw its agreement in respect of that System Master Plan in which case there will be assumed to be no System Master Plan for the purposes of this Framework. DBCT Management will publish on its website its reasons for withdrawing its agreement to a System Master Plan.
- (c) **(If no System Master Plan)** If at any time for any reason there is (or is deemed to be) no System Master Plan in force, where a provision of this Framework requires DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) to have regard to a System Master Plan, DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) will have regard to the Terminal Master Plan together with what it reasonably considers to be the present and likely future state of the other relevant components of the System and what DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) reasonably understands to be generally accepted System operating assumptions.

- (d) **(Protection of DBCT Management)** DBCT Management will not be liable to an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 14.
- (e) **(DBCT Management's obligations in System Master Planning process)** The following apply to DBCT Management in relation to its endeavours to agree a System Master Plan pursuant to Section 14.2(a) and 14.2(b):
  - (1) DBCT Management must fully and promptly provide to all other relevant stakeholders all information (to the extent that it is available to DBCT Management) which might reasonably be considered to be relevant for the purpose of determining a System Master Plan (but this does not require DBCT Management to disclose any information which could reasonably be considered to be commercially sensitive to it, any Access Holder or Access Seeker or any other person); and
  - (2) DBCT Management must, as far as practicable, work cooperatively with each other Service Provider (for example by regularly providing information relevant to System Capacity and, as far as practicable, using reasonable endeavours to agree on the joint engagement of Capacity Experts for the purpose of the Framework and similar obligations by other Service Providers).

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## 15 Governing Law

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

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## 16 Dispute resolution

### 16.1 Disputes

- (a) **(Disputes under this Framework)** If any dispute or question arises under or in relation to this Framework, including in relation to the negotiation of Access between an Access Seeker and DBCT Management (Dispute) then, unless otherwise expressly agreed by both parties in writing, such Dispute will be resolved in the manner specified in this Framework (where applicable) and in accordance with this Section. Without limitation to the foregoing, any dispute concerning:
  - (1) the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating,

paying and reconciling the Access Charges to apply for the Pricing Period or any consequential changes in the drafting of the provisions of the Access Agreement); or

- (2) the review during a Pricing Period of the Access Charges applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement in accordance with Section 10.6 of this Framework,

is a Dispute under this Framework and will be resolved in the manner specified in this Framework and in accordance with this Section.

- (b) **(Notice of Dispute)** Either party may give to the other party to the Dispute notice in writing (Dispute Notice) specifying the Dispute and requiring that it be dealt with in the manner specified in this Framework (where applicable) and as set out in this Section 16.
- (c) **(Disputes under Access Agreements)** Unless otherwise specified by this Framework or agreed by the parties, disputes under an Access Agreement will be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Framework.
- (d) **(Dispute under Deed Poll)** Subject to clause 9.2.53 of the Deed Poll, the courts of Queensland have exclusive jurisdiction to determine any disputes arising under the Deed Poll.

## 16.2 Chief Executive resolution

- (a) **(Reference to CEOs)** Unless otherwise agreed by both parties or provided for in this Framework (including where the Framework provides that a Dispute or other matter is to be referred to or determined by an Independent Expert (or Expert Determination) or an Arbitrator (or Arbitration)), any Dispute will be referred in the first instance and in any event within 10 Business Days of the giving of the Dispute Notice to the Chief Executive of DBCT Management (or his or her nominee) and the Chief Executive of the Access Seeker or Access Holder (or his or her nominee) for resolution.
- (b) In the event that:
  - (1) resolution is not reached within 10 Business Days of referral; or
  - (2) either Chief Executive appoints a nominee in accordance with this Section 16 that is unacceptable to the other party,

where this Framework provides that the Dispute is to be referred to Expert Determination (or determination by an Independent Expert), the Dispute will be referred to an Independent Expert in accordance with Section 16.3 unless

otherwise agreed by the parties. All other Disputes will be referred to Arbitration in accordance with Section 16.4.

### 16.3 Expert Determination

Where a matter is referred to Expert Determination (or determination by an Independent Expert) in accordance with Section 16.2 or as otherwise specified in accordance with this Framework, then the following will apply:

- (a) **(Appointment)** An Independent Expert may be appointed by the parties, or where agreement cannot be reached by the parties within five Business Days, by the Resolution Institute.
- (b) **(Criteria for Independent Expert)** In any event the Independent Expert must:
  - (1) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
  - (2) have no interest or duty which conflicts or may conflict with his or her function as Independent Expert, he or she being required to fully disclose any such interest or duty before his or her appointment; and
  - (3) not be a current or immediate past employee of the Access Seeker or Access Holder, or DBCT Management or of a Related Body Corporate of either of them.
- (c) **(Acceptance of appointment)** The Independent Expert appointed pursuant to this Section 16.3 must not act until the Independent Expert has given written notice of the acceptance of his or her appointment to both parties.
- (d) **(Provision of information to Independent Expert)** The parties must upon request by the Independent Expert, provide or make available to the Independent Expert:
  - (1) all information in their possession or control (other than Confidential Information);
  - (2) all Confidential Information (subject to entry into arrangements to preserve confidentiality which are acceptable to all relevant parties, acting reasonably); and
  - (3) all other assistance,

that the Independent Expert may reasonably require. Any such information or assistance must be provided as soon as reasonably practicable. Any determination made by an Independent Expert in relation to a Dispute must be consistent with the provisions of this Framework;

- (e) **(Determination to be given to each party)** The Independent Expert will provide both parties with a copy of the written determination in relation to the Dispute within a reasonable time after his or her appointment.
- (f) **(Confidentiality)** The Independent Expert appointed pursuant to this Section 16.3 is required to undertake to the parties in writing to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her duties.
- (g) **(Not arbitration)** Any person nominated as an Independent Expert pursuant to this Section 16.3 is deemed to be and must act as an Independent Expert and not as an arbitrator. The law relating to arbitration including, without limitation, the Commercial Arbitration Act 2013 (Qld) as it may be amended from time to time, does not apply to the Independent Expert or to the determination or to the procedures by which the Independent Expert may reach that determination.
- (h) **(Independent Expert's decision final)** In the absence of manifest error, the decision of the Independent Expert is final and binding upon the parties. If a party believes that there was a manifest error it may refer the matter to the Arbitrator for a determination in accordance with Section 16.4. If the Arbitrator determines that there was a manifest error, then the parties may agree to refer the Dispute to another Independent Expert in accordance with this Section 16.3, or failing such agreement, either party may refer the Dispute to the Arbitrator for resolution in accordance with Section 16.4.
- (i) **(Costs of Independent Expert)** The costs of the Independent Expert and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the Independent Expert. If two or more Access Seekers or Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Seekers and Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.

#### 16.4 Determination by Arbitration

- (a) All Disputes referred to Arbitration (or determination by an Arbitrator) under this Framework must be conducted in accordance with this Section 16.4.
- (b) The Dispute shall be submitted to Arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules.
- (c) The Arbitration must be effected by a single suitably qualified and experienced arbitrator who is either:
  - (1) agreed upon between the parties; or

- (2) in default of such agreement within five Business Days after the Dispute is referred for Arbitration, nominated by the Resolution Institute.
- (d) Any party to the Arbitration may be represented before the Arbitrator by a member of the legal profession without the need for leave of the Arbitrator.
- (e) The proceeding, including any determination by the Arbitrator, will be kept confidential between the parties and the Arbitrator, with the exception that DBCT Management may disclose an Initial TIC for a Terminal Component and a Pricing Period determined by an Arbitrator in any Arbitration under this Section 16.4 to:
  - (1) an Access Seeker in subsequent negotiations with that Access Seeker concerning an Initial TIC for that Terminal Component and that Pricing Period to apply to the Access Seeker from the commencement of an Access Agreement or increased Access under an Access Agreement; or
  - (2) the Arbitrator in and the party or parties to any later Arbitration on an Access Dispute concerning an Initial TIC for that Terminal Component and that Pricing Period for the purpose of Section 10.4(e) of this Framework,

subject to the Access Seeker in subsequent negotiations and the party or parties to any later Arbitration first undertaking to maintain the confidentiality of the outcome of the first-mentioned Arbitration.

- (f) Subject to paragraph 16.4(g), in any Dispute relating to the terms and conditions of Access, the Arbitrator must determine on terms and conditions of Access that are substantively identical to the terms of the Standard Access Agreement, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (g) In any Dispute relating to Access Charges, the Arbitrator must determine on terms and conditions relating to Access Charges that are:
  - (1) in accordance with Section 10 of this Framework; and
  - (2) subject to paragraph 16.4(g)(1), substantively identical to the terms of the Standard Access Agreement,except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (h) In making a determination, the Arbitrator must have regard to the terms of the Framework and to the following matters:
  - (1) the Framework Objective;

- (2) DBCT Management's binding legal obligations and obligations under law;
  - (3) DBCT Management's legitimate business interests and investment in the Terminal;
  - (4) the legitimate business interests of persons who have, or may acquire, rights to use the Terminal;
  - (5) the public interest, including the benefit to the public in having competitive markets;
  - (6) the value of the service to:
    - (A) the Access Seeker or Access Holder;
    - (B) a class of Access Seekers or Access Holders;
  - (7) the direct costs to DBCT Management of providing Access to the Terminal, including any costs of a Terminal Capacity Expansion, but not costs associated with losses arising from increased competition;
  - (8) the economic value to DBCT Management of any Terminal Capacity Expansion, or other additional investment in the Terminal, that DBCT Management or an Access Seeker or an Access Holder has undertaken or agreed to undertake;
  - (9) the quality of the Services;
  - (10) the operational and technical requirements necessary for the safe and reliable operation of the Terminal;
  - (11) the economically efficient operation of the Terminal;
  - (12) any other matters to which the Arbitrator thinks it is appropriate to have regard.
- (i) Subject to paragraph 16.4(j), any Arbitration commenced under this Framework may be consolidated with any other arbitration commenced under:
- (1) this Framework; and / or
  - (2) an Access Agreement or other agreement entered into as contemplated by the Framework,

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

- (j) Any Arbitration concerning a Dispute about the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any consequential changes in the drafting of the provisions of the Access Agreement) must be consolidated with any other Arbitration concerning a dispute of this kind in respect of the same Pricing Period so that there is a single Arbitration of such Disputes for a Pricing Period. Such consolidated Arbitration does not prevent an Arbitrator from making a specific determination that would apply to individual Access Holders or groups of Access Holders.
- (k) The venue for any Arbitration will be Brisbane, Queensland.
- (l) Unless otherwise determined by the Arbitrator, the costs of the Arbitration shall be paid by the unsuccessful party.

## **16.5 Urgent matters**

Nothing in this Section 16 prevents a party from seeking urgent injunctive relief from a court.

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## **17 Limitations to Losses and Damages**

Subject to the terms of an Access Agreement, Funding Agreement, Underwriting Agreement or any other agreement entered into with DBCT Management as contemplated by this Framework, and notwithstanding any other Section of this Framework:

- (a) damages is not a remedy for any breach of this Framework;
- (b) the only remedy available for any breach of this Framework is specific performance; and
- (c) DBCT Management is not liable to Access Holders or Access Seekers for any indirect Loss or Consequential Loss arising in connection with this Framework.

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## **18 Severability**

- (a) Subject to Section 18(b), if a provision of this Framework is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this Framework.
- (b) Section 18(a) does not apply if severing the provision:

- (1) materially alters the scope and nature of this Framework; or
- (2) would be contrary to public policy.

## Schedule A - Access Application Form and Renewal Application Form

### Access Application Form

[Note: this form to be issued on Access Seeker's letterhead]

To: Chief Executive Officer  
DBCT Management

#### DBCT Access Application

**TAKE NOTICE** that the Access Seeker named below applies for Access to the Services at Dalrymple Bay Coal Terminal pursuant to section 5.2 of the Access Framework.

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Access Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Access Application.

<b>Category of Access Application:</b>	
A	A new Access Seeker <i>(please (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness).</i> <input type="checkbox"/>
B	An existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Framework). <input type="checkbox"/>
C	An existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by Section 5.11 of the Access Framework. <input type="checkbox"/>
D	An Existing User seeking additional capacity (including an extension of the Term). <input type="checkbox"/>
<i>For existing Access Holders making a category B or C application or Existing Users making a category D application, please complete the declaration below or Schedule A attached:</i>	
I confirm that all details required by Schedule A attached in relation to the Services required at the Terminal, and any Security required, will be as per our [existing Access Agreement / Existing User Agreement] <i>[strike through the inapplicable reference and tick box at right]</i> . <input type="checkbox"/>	
<i>[Note: If box is not ticked, please complete Schedule A attached]</i>	
<b>Name</b>	DBCT Management use only Received Date:    Access Application Date: <i>[per section 5.4(b) of the Access Framework ]</i>
<b>Position</b>	
<b>Signed</b>	
<b>Date</b>	

The Access Seeker unconditionally and irrevocably agrees:

- (a) to comply with the requirements, obligations and processes in:
  - a. the Framework relating to it or its Access Application; and
  - b. the Deed Poll, including the conditions set out in clauses 8-4, 9, 10 and 11 of the Deed Poll; and
- (b) that the Access Application is governed by the laws in force in the State of Queensland.

## Schedule A to the Access Application of [insert name]

(Note – where the Access Seeker is an existing Access Holder or Existing User and the details are relevantly the same as the Services being provided under the Access Agreement or Existing User Agreement respectively, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	<b>Year Mtpa</b>
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year:	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments.	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Access Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient: <ul style="list-style-type: none"> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for each of the first 5 Financial Years in item 7 in respect of which Access is applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul> </li> </ul>	

13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	
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<b>Name</b>	<b>Signed</b>
<b>Position</b>	
<b>Date</b>	

## Access Renewal Form

[Note: this form to be issued on Access Seeker's letterhead]

To: Chief Executive Officer  
DBCT Management

### DBCT Renewal Application

**TAKE NOTICE** that the Access Seeker named below applies to renew its Access Application for Access to the Services at Dalrymple Bay Coal Terminal pursuant to Section 5.3A of the Access Framework .

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Renewal Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Renewal Application.

<b>Category of Renewal Application</b>	
A	A renewal of an Access Application which was submitted by a new Access Seeker <i>(please complete the declaration below or (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness).</i> <input type="checkbox"/>
	<i>I confirm that all details required by Schedule A attached in relation to the Services required at DBCT, and any Security required, will be as per our current Access Application [tick box at right]. [Note: If box is not ticked, please complete Schedule A attached]</i> <input type="checkbox"/>
B	A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Framework ). <input type="checkbox"/>
C	A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by section 5.11 of the Access Framework. <input type="checkbox"/>
D	A renewal of an Access Application which was submitted by an Existing User seeking additional capacity (including an extension of the Term). <input type="checkbox"/>
	<i>For existing Access Holders making a category B or C Renewal Application or Existing Users making a category D Renewal Application, please complete the declaration below or Schedule A attached: I confirm that all details required by Schedule A attached in relation to the Services required at the Terminal, and any Security required, will be as per our current Access Application and [existing Access Agreement / Existing User Agreement] [strike through the inapplicable reference and tick box at right].</i> <input type="checkbox"/>
	<i>[Note: If box is not ticked, please complete Schedule A attached]</i>
<b>Name</b>	<i>DBCT Management use only Received Date:</i>
<b>Position</b>	
<b>Signed</b>	

<b>Date</b>	

The Access Seeker unconditionally and irrevocably agrees:

- (a) to comply with the requirements, obligations and processes in:
  - a. the Framework relating to it or its Access Application and Access Renewal Form; and
  - b. the Deed Poll, including the conditions set out in clauses 8-4, 9, 10 and 11 of the Deed Poll; and
- (b) the Access Application and Access Renewal Form are governed by the laws in force in the State of Queensland.

**Schedule A to the Renewal Application of [insert name]**

(Note – where the Access Seeker is an existing Access Holder or Existing User and the details are relevantly the same as the Services being provided under the Access Agreement or Existing User Agreement respectively, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.)

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	Year Mtpa
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Renewal Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Coal Resources in the report is consistent with being able to economically extract the net tonnes of coal per annum requested for each Financial Year in item 7 by the relevant Financial Years (including the proportion which is 'Marketable Coal Reserves' as defined in the JORC Code, and the Access Seeker's approach to converting those Coal Resources to Marketable Coal Reserves).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient:</li> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for the first five Financial Year in item 7 in respect of which Access applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul>	

13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	
<b>Name</b>		<b>Signed</b>
<b>Position</b>		
<b>Date</b>		

## Schedule B - Standard Access Agreement

[Standard Access Agreement attached separately]

## Schedule C - The Terminal Infrastructure Charge

For the avoidance of doubt, the terms and provisions of this Schedule should be interpreted in accordance with Section 10~~10.1(e)~~ of the Framework.

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### Part A - Rules for calculating Initial Terminal Infrastructure Charge and Monthly Payment applicable in Arbitration on Initial Access Charges

#### 1. Monthly Payment (MP)

Access Holder “u” (**AH<sub>u</sub>**) must pay to DBCT Management a Monthly Payment in respect of its Annual Contract Tonnage in each Month “m” of each Financial Year (**MP<sub>u,m</sub>**), calculated as follows:-

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

where:-

**TIC** is the Terminal Infrastructure Charge applicable to **AH<sub>u</sub>** for a relevant Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant), as amended or adjusted in accordance with Section 3 of this Schedule C; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Annual Contract Tonnage applicable to **AH<sub>u</sub>** in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) attributable to each Month “m” of a Financial Year. Where the rate of the Annual Contract Tonnage for the Access Holder does not vary in a Financial Year and applies to the full Financial Year, the **MRT<sub>u,m</sub>** for the **AH<sub>u</sub>** will be one-twelfth of their Annual Contract Tonnage for the relevant Financial Year. Where the rate of the Annual Contract Tonnage for the **AH<sub>u</sub>** varies during a Financial Year, the **MRT<sub>u,m</sub>** will vary from Month to Month to reflect one-twelfth of the annualised rate of the Annual Contract Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is amended or adjusted in accordance with Schedule C, Section 3.

To avoid doubt, if an Access Holder has more than one TIC for a Terminal Component due to the Access Holder obtaining increased Access to the Terminal Component at a different TIC, the Monthly Payment formula above must be applied separately in relation to the TIC applicable to each tranche of Access to the Terminal Component obtained by the Access Holder, with the total Monthly Payment for the Access Holder being the sum of the Monthly Payments for each tranche of Access.

## 2. Initial Terminal Infrastructure Charge

### The Floor TIC

- (a) The Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) is the TIC for that Terminal Component that would apply under a QCA administered pricing regime.

### The Ceiling TIC

(b) The Ceiling TIC must be lower than the sum of:

(1) the Floor TIC for the Existing Terminal; and

(2) the Maximum Spread, where the Maximum Spread is:

(A) \$3.00 in the Financial Year commencing on 1 July 2020; and

(B) in any subsequent Financial Year is derived by escalating the Maximum Spread in the immediately preceding Financial Year for the annual change in the Consumer Price Index by application of the following formula:

$$\text{MSt} = \text{MSt-1} \times (1 + \text{CPIt})$$

where:

MS<sub>t</sub> is the Maximum Spread to apply with effect from 1 July in Financial Year t;

MSt-1 is the Maximum Spread applicable in Financial Year t-1; and

CPI<sub>t</sub> is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1.

~~(b)~~(c) Subject to paragraph (b), tThe Ceiling TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) is:

(1) ~~the highest TIC for that Terminal Component at which coal volumes served by that Terminal Component would be the same as if the Floor TIC in respect of that Terminal Component applied; and-~~

(2) ~~The Ceiling TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) is~~ to be set equal to the lowest 'willingness to pay' (as defined in paragraph (d)~~(d)~~ below) to be served

at the relevant Terminal Component of those mines expected to be served at the Terminal Component, where:

- (A) mines are served at the Terminal Component in the order of their 'willingness to pay' to be served at that Terminal Component, with those with higher 'willingness to pay' served before those with lower 'willingness to pay'; and
- (B) the coal volumes to be served at the Terminal Component are the same as if the Floor TIC in respect of that Terminal Component applied and do not exceed the capacity of that Terminal Component to serve those coal volumes.

(e)(d) For the purpose of paragraph ~~(e)(c)(2)~~, a mine's 'willingness to pay' to be served at the Existing Terminal or Differentiated Expansion Component (as relevant) is:

- (1) expressed on a dollar per tonne basis;
- (2) zero if:
  - (A) the mine's coal volumes are not technically capable of being delivered to the Terminal (in that the mine is not connected to the Terminal by rail);
  - (B) the mine's coal volumes are technically capable of being delivered to a coal terminal other than the Terminal (in that the mine is connected to that other coal terminal by rail) and its expected profit per tonne is greater when its coal volumes are served at that other coal terminal than when its coal volumes are served at the Terminal; or
  - (C) the mine's expected profit per tonne when its coal volumes are serviced at the relevant Terminal Component is less than zero; and
- (3) otherwise calculated as:
  - (A) the Floor TIC for the relevant Terminal Component; plus
  - (B) the expected profit per tonne where the mine's coal volumes are served at the relevant Terminal Component at the Floor TIC for that Terminal Component; less
  - (C) either:

- (i) the highest expected profit per tonne where the mine's coal volumes are served at a coal terminal other than the Terminal that is technically capable of taking delivery of those coal volumes (in that the mine is connected to that terminal by rail), if this expected profit per tonne is greater than zero; or
- (ii) zero, if there is either no coal terminal other than the Terminal that is technically capable of taking delivery of the mine's coal volumes or no coal terminal other than the Terminal that provides an expected profit per tonne greater than zero.

~~(d)~~(e) For the purpose of assessing a mine's 'willingness to pay' for the purposes of paragraphs 2(d)(2) and 2(d)(3) above, expected profit per tonne when its coal volumes are served at a coal terminal is calculated as:

- (1) the FOB coal price;  
less
- (2) mine costs, being the sum of operating costs, royalty payments, depreciation and a reasonable return on the capital costs of developing and operating the mine;
- (3) rail transport charges for delivering coal to the coal terminal; and
- (4) applicable infrastructure and handling charges for using port infrastructure including the coal terminal;

on the basis that:

- (5) miners make terminal usage decisions without reference to any contractual limitations on coal volumes to be served at the Terminal or any other coal terminal; and
- (6) the volumes of coal that miners prefer to deliver to any coal terminal other than the Terminal must not, when aggregated, exceed the capacity expected to be available at that other coal terminal to serve those coal volumes (disregarding any contractual limitations on coal volumes to be served at that other terminal in accordance with paragraph (e)(5)).

~~(e)~~(f) To avoid doubt, for the purpose of this paragraphs (b) to ~~(e)~~(2)~~(e)~~:

- (1) in deriving the Ceiling TIC for the Existing Terminal or a Differentiated Expansion Component (as relevant), any TIC applicable in respect of

any other Terminal Component and mines' 'willingness to pay' to be served at any other Terminal Component should be disregarded; and

- (2) Section 10.4(h) ~~10.4(g)~~ of the Framework applies to forecasting of the coal volumes of mines.

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## Part B - Review of the TIC during a Pricing Period under Access Agreements in form of Standard Access Agreement

### 3. Review of the TIC

#### Annual amendment of the TIC

- (a) A TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for AH<sub>u</sub> will be amended annually on each 1 July after the Initial TIC for AH<sub>u</sub> commenced to apply in accordance with paragraphs (b) to (d) of this Section 3.
- (b) A TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) to apply to AH<sub>u</sub> from each 1 July after the Initial TIC for AH<sub>u</sub> commenced to apply must be escalated for the annual change in the Consumer Price Index by application of the following formula:

$$\text{TIC}_t = \text{TIC}_{t-1} \times (1 + \text{CPI}_t)$$

where:

- $\text{TIC}_t$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) to apply with effect from 1 July in Financial Year t consequent upon the adjustment under this paragraph (b);
- $\text{TIC}_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable as at 30 June in Financial Year t-1 immediately prior to the occurrence of the adjustment under this paragraph (b); and
- $\text{CPI}_t$  is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1.
- (c) By each 15 May after the Initial TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for AH<sub>u</sub> commenced to apply or as soon as practicable thereafter, DBCT Management will notify that AH<sub>u</sub> of the CPI adjustment and resultant TIC to apply with effect from 1 July in the next Financial Year.

- (d) If a Review Event occurs in the period after DBCT Management has notified AH<sub>u</sub> of a TIC to apply with effect from 1 July in the next Financial Year under paragraph (c) above but before that 1 July that affects that TIC, DBCT Management will promptly notify that AH<sub>u</sub> of the amended TIC to apply with effect from 1 July of the next Financial Year in accordance with paragraphs (e) to (j) below.

#### **Amendment of the TIC if a Review Event occurs**

- (e) If a Review Event occurs, DBCT Management will give notice as soon as reasonably practicable of the amended TIC determined in accordance with paragraph (f), (g) or (h) below (as the case may be) to apply because of the Review Event.
- (f) In the case of a Review Event referred to in paragraph (a) of the definition of Review Event (relating to a change in Aggregate Annual Contract Tonnage), a TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) then applicable for AH<sub>u</sub> will be amended by application of the following formula, unless the Review Event occurs as a consequence of a Review Event referred to in paragraph (b) of the definition of Review Event (relating to the Completion and hand over to the Operator of a Socialised Expansion), in which case the TIC will be amended in accordance with paragraph (g):

$$TIC_t = UAF_t \times TIC_{t-1}$$

where:

TIC<sub>t</sub> is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for AH<sub>u</sub> consequent upon the Review Event;

UAF<sub>t</sub> is the utilisation adjustment factor, which is equal to TUR<sub>t</sub> / TUR<sub>t-1</sub>;

TUR is the terminal utilisation ratio, calculated as follows:

(Existing Terminal Capacity or Differentially Priced Capacity (as relevant) / Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant));

TUR<sub>t-1</sub> is the TUR immediately prior to the occurrence of the Review Event;

TUR<sub>t</sub> is the TUR consequent upon the Review Event; and

$TIC_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  immediately prior to the occurrence of the Review Event.

- (g) In the case of a Review Event referred to in paragraph (b) of the definition of Review Event (relating to a Socialised Expansion), a TIC in respect of the Existing Terminal then applicable for  $AH_u$  will be adjusted to an amount calculated as follows:

$$TIC_t = UAF_t \times (TIC_{t-1} - \text{Floor } TIC_{t-1}) + \text{Floor } TIC_t$$

where:

$TIC_t$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  consequent upon the Review Event;

$UAF_t$  is the utilisation adjustment factor, which is equal to  $TUR_t/TUR_{t-1}$ ;

$TUR$  is the terminal utilisation ratio, calculated as follows:

(Existing Terminal Capacity or Differentiated Expansion Component Capacity (as relevant) / Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant))

$TUR_{t-1}$  is the TUR immediately prior to the occurrence of the Review Event;

$TUR_t$  is the TUR consequent upon the Review Event;

$TIC_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  immediately prior to the occurrence of the Review Event;

Floor  $TIC_{t-1}$  is the Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) immediately prior to the occurrence of the Review Event; and

Floor  $TIC_t$  is the Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) consequent upon the Review Event.

- (h) In the case of a Review Event referred to in paragraph (c) of the definition of Review Event (relating to NECAP), the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) that would otherwise apply for  $AH_u$  in Financial Year  $t$  (after making all other adjustments required by paragraphs (c) and (e)) will be adjusted for that Financial Year  $t$  by an amount calculated as follows:

Adjustment amount<sub>t</sub> = NECAP Allowance<sub>t</sub> / Aggregate Annual Contract Tonnage<sub>t</sub>

where:

NECAP Allowance<sub>t</sub> is equal to the sum of the Return on NECAP<sub>t</sub> and the Return of NECAP<sub>t</sub>;

Return on NECAP<sub>t</sub> is the product of the NECAP Asset Base<sub>t</sub> and the WACC(2) Rate;

Return of NECAP<sub>t</sub> is equal to the sum, for each 12 month period ending 31 March in which any program of NECAP included in NECAP Asset Base<sub>t</sub> for the Existing Terminal or Differentiated Expansion Component (as relevant) was Completed and handed over to the Operator, of the total NECAP for any program of NECAP Completed and handed over to the Operator in the 12 month period divided by an asset life of 20 years;

NECAP Asset Base<sub>t</sub> is the NECAP Asset Base for the Existing Terminal or Differentiated Expansion Component (as relevant) as at 1 July for Financial Year t and is derived by rolling forward the value of the NECAP Asset Base from the preceding Financial Year t-1 as follows:

$$\text{NECAP Asset Base}_t = \text{NECAP Asset Base}_{t-1} + \text{NECAP}_{t-1} - \text{Return of NECAP}_{t-1};$$

NECAP Asset Base<sub>t-1</sub> is the value of the NECAP Asset Base at the start of Financial Year t-1 and is zero where Financial Year t is the Financial Year in which the Initial TIC for the relevant Pricing Period commenced;

NECAP<sub>t-1</sub> is the value of the NECAP incurred in any prior period (including NECAP in any period preceding the Commencement Date) on any program of NECAP which was Completed and handed over to the Operator by DBCT Management in the twelve months ending 31 March in Financial Year t-1 and allocated to the Terminal Component or Differentiated Expansion Component (as relevant) in accordance with Section 10.7 of this Framework including NECAP referred to in Section 11.10(b) and NECAP referred to in Section 11.10(c);

Return of  $NECAP_{t-1}$  is the Return of NECAP included in the NECAP Allowance $_{t-1}$  in determining the Adjustment amount for Financial Year t-1 in accordance with this paragraph (h) and is zero where Financial Year t is the Financial Year in which the Initial TIC for the relevant Pricing Period commenced.

- (i) Any amendment made pursuant to paragraph (e) above will be effective from the first day of the Month following the Month in which the Review Event occurs, except for those Review Events of the kind described at paragraph (c) of the Review Event definition, which will be effective from the relevant 1 July.
- (j) For clarification, if a review under paragraph (c) above occurs simultaneously with a review under paragraph (e), they will be reviewed together and the amendments to the TIC under paragraph (c) and under paragraph (e) for each Review Event will be applied cumulatively and become effective on the relevant 1 July.
- (k) If DBCT Management or the Access Holder, acting reasonably, considers that an amended TIC determined in accordance with this Schedule C, Part B would be higher than the Ceiling TIC applicable at the time of determining the amended TIC or lower than the Floor TIC applicable at that time, they may raise a Dispute in accordance with Section 16 of this Framework and any determination by an Arbitrator must be in accordance with Section 10.6(b) of this Framework.

## Schedule D - Confidentiality Deed

### This confidentiality deed

is made on

between the following parties:

1. **DBCT Management Pty Limited**  
ACN 097 698 916  
of Level 15, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000  
(**DBCT Management**)
2. **[insert name of receiving party]**  
[insert ABN/ACN/ARBN]  
of [insert address]  
(**Access Seeker**)

### Recitals

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

### This deed witnesses

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

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## 1. Definitions and interpretation

### 1.1 Definitions

In this deed:

**Access Framework** means the Dalrymple Bay Coal Terminal Access Framework dated 9 September 2020 as varied or replaced from time to time;

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

- (a) the disclosure of the information, data or other matter by the Recipient might reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter; or
- (b) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed,
- (c) provided that such information, data or other matter:
- (d) is not already in the public domain;
- (e) does not become available to the public through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Framework;
- (f) was not in the other party's lawful possession prior to such disclosure; or
- (g) is not received by the other party independently from a third party free to disclose such information, data or other matter,

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

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

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

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

**Document** includes any note, memorandum, record, report, financial information, summary, analysis, calculation, strategic assessment, market survey, business plan,

computer program, computer record, circuit, circuit layout, drawing, specification, material or any other means by which information may be stored or reproduced;

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

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

**Specified Person** means:

- (a) an officer or employee of a Recipient;
- (b) a professional adviser to a Recipient;
- (c) a financier of a Recipient;
- (d) a professional adviser to a financier of a Recipient;
- (e) an officer, employee, or a professional adviser to a related body corporate of a Recipient; or
- (f) an officer or employee of the Operator,

who has a specific need to have access to the Confidential Information for the Express Purpose.

## 1.2 Interpretation

- (a) Terms defined in the Access Framework have the same meaning in this deed unless otherwise defined.
- (b) Headings are for convenience only and do not affect interpretation.
- (c) In this deed, unless the context otherwise requires:
  - (1) words importing the singular include the plural and vice versa;
  - (2) a reference to any thing (including, but not limited to, any right) includes a part of that thing but nothing in this Clause 1.2(c)(2) implies that performance of part of an obligation constitutes performance of the obligation;
  - (3) the term “related body corporate” has the meaning given to that term under the Corporations Act;
  - (4) the term “associate” has the meaning given to that term in Section 15 of the Corporations Act;

- (5) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and
- (6) a reference to a person includes that person's successors and legal personal representatives.

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## **2. Confidentiality**

The Recipient must:

- (a) hold the Confidential Information in strict confidence and not disclose, or cause or permit the disclosure of, the Confidential Information, except as permitted under this deed or with the prior written consent of the Discloser;
- (b) not disclose, or cause or permit the disclosure to any person of, any opinion in respect of the Confidential Information or a Document created in accordance with Clause 3(c), except as permitted under this deed;
- (c) keep the Confidential Information and any Documents created in accordance with Clause 3(c) in a way such that it is reasonably protected from any use, disclosure or access which is inconsistent with this deed;
- (d) promptly notify the Discloser if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information;
- (e) do anything reasonably required by the Discloser to prevent or stop a breach or threatened breach of this deed or an infringement or threatened infringement of the Discloser's rights arising out of this deed by any person, whether by court proceedings or otherwise; and
- (f) maintain such procedures as are reasonably necessary to ensure compliance with this deed by the Recipient and each Specified Person and, upon request, provide the Discloser details of the procedures adopted.

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## **3. Permitted use and disclosure**

The Recipient may:

- (a) only use the Confidential Information for the Express Purpose;
- (b) not make use of the Confidential Information to the commercial, financial or competitive disadvantage of the Discloser (but this does not preclude the Recipient from using the Confidential Information in negotiations with the Discloser or in any dispute proceedings);

- (c) create, or cause or permit to be created, a Document which reproduces, is based on, utilises or relates to Confidential Information only if that creation is solely for the Express Purpose; and
- (d) only disclose Confidential Information (including as contained in a Document created in accordance with Clause 3(c)) to a Specified Person, and may only make such disclosure solely for the Express Purpose.

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#### **4. Return and destruction of information**

- (a) If requested by the Discloser, the Recipient must promptly return to the Discloser, or destroy or delete as the Discloser directs, all original Documents and copies which:
  - (1) are or contain Confidential Information; and
  - (2) reproduce, are based on, utilise or relate to Confidential Information.
- (b) If a Document or a copy referred to in Clause 4(a) contains information which is Confidential Information of the Recipient, then the Recipient is not required to return that Document but must destroy or delete the portion of the Document containing the Confidential Information of the Discloser.
- (c) Nothing in this clause 4 requires the destruction or return of documentation contained in any board papers or information retained by a professional adviser in accordance with usual professional practice.

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#### **5. Operation of this deed**

- (a) This deed continues without limitation in time but, subject to Clause 5(b), does not apply to any Confidential Information that:
  - (1) the Recipient or a Specified Person is required to disclose by any applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator;
  - (2) is in the public domain other than as a result of a breach of this deed;
  - (3) was at the time of disclosure already in the lawful possession of the Recipient; or
  - (4) is received by the Recipient from a person (other than a Discloser or any employee, officer, agent or adviser of a Discloser) legally entitled to possess that information and provide it to the Recipient.

- (b) If the Recipient or a Specified Person must make a disclosure referred to in Clause 5(a)(1):
  - (1) the Recipient must only disclose, and must ensure that the Specified Person only discloses the minimum Confidential Information required to comply with the applicable law, order or requirement; and
  - (2) before making such disclosure, the Recipient must:
    - (A) give the Discloser reasonable written notice of:
      - (i) the full circumstances of the required disclosure; and
      - (ii) the Confidential Information which it, or the Specified Person, proposes to disclose; and
    - (B) consult with the Discloser as to the form of the disclosure.

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## **6. Acknowledgment**

The Recipient acknowledges that:

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

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## **7. Recipient to ensure others comply**

The Recipient must:

- (a) inform each Specified Person of the Recipient's obligations under this deed;

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

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## **8. Indemnity**

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

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

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## **9. Disclaimer**

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

Confidential Information which the Discloser provides to the Recipient;  
and

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

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## **10. Governing law and jurisdiction**

- (a) This deed is governed by the laws of Queensland.
- (b) Any dispute arising out of or in connection with this deed shall be resolved in accordance with the dispute resolution provisions contained in section 16 of the Access Framework.

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## **11. Waivers**

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

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## **12. Variation**

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

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## **13. Entire agreement**

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



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**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management**

by:

\_\_\_\_\_

Director/Secretary

Director

\_\_\_\_\_

Name (please print)

Name (please print)

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

by:

\_\_\_\_\_

Director/Secretary

Director

\_\_\_\_\_

Name (please print)

Name (please print)

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## Schedule E - Services

### 1. Train scheduling

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate cargo assembly windows at the terminal to receive coal parcels and provide train operators and Access Holders with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of coal in each Financial Year.

### 2. Train unloading

If a train carrying an Access Holder's coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the coal) consistent with achieving Handling of the Annual Contract Tonnage of coal for an Access Holder.

### 3. Reclaiming and vessel loading

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive coal) nominated by each Access Holder, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management on behalf of that Access Holder in each Financial Year (as long as the vessel and/or cargo mix required by the Access Holder (or its customer) does not unreasonably impact on the efficiency of the Terminal); and
- (b) load each Access Holder's coal into a vessel which is nominated by the Access Holder and is available for loading so as to achieve the objective in paragraph 3(a).

### 4. Incidental services

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

- sampling and survey services;
- vessel monitoring;
- co-ordination with ships' agents, masters, customers and other relevant entities;
- crew disembarkation services; and

- wharfage and line services.

## **5. Miscellaneous services**

If required by an Access Holder or any Approval or statutory authority notified to DBCT Management, DBCT Management must, in accordance with Good Operating and Maintenance Practice, provide the following miscellaneous services to the Access Holder:

- moisture adding;
- compacting;
- surfactant adding;
- dozing;
- blending (subject to Section 6(d) below); and
- any other services reasonably requested from time to time in writing by an Access Holder to DBCT Management, provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal.

## **6. Stockpiling and blending**

- (a) DBCT Management must provide to each Access Holder sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the Access Holder's coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that each Access Holder is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the Aggregate Annual Contract Tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in Section 6(a) and 6(b) are subject to any other obligation of DBCT Management under any Existing User Agreement with an Existing User entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:

- (1) require coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (2) require coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (3) limit the proportions in which coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer each Access Holder's coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile an Access Holder's coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## **7. Prevention of contamination**

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

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

## **8. Data provision**

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

## **9. Co-ordination**

Subject to the Access Holder providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

- (a) ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the Access Holder's reasonable quality plans, reasonable shipping programs and contracts as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations; and
- (b) (subject to the foregoing and having regard to equity amongst Access Holders and Existing Users) use its best endeavours to minimise the aggregate cost to the Access Holder arising out of Handling at the Terminal (including Demurrage Costs and rail freight).

## 10. Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract

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

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

- (2) without limiting Section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

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

## **11. Standard for Services**

- (a) The provision of the above Services by DBCT Management must be carried out with due skill, care and diligence in accordance with this Framework, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (1) lowest total whole of life cost;
  - (2) reliability and economy of performance;
  - (3) maximising the effective life of the Terminal; and
  - (4) DBCT Management's non-discrimination obligations under this Framework.

## Schedule F - Terminal Master Plan

[Terminal Master Plan attached separately]

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## Schedule G - Definitions and Interpretation

### 1. Definitions

In this Framework:

**2017 Access Undertaking** means the Dalrymple Bay Coal Terminal Access Undertaking prepared in accordance with the requirements of the *Queensland Competition Authority Act 1997* (Qld) and approved on 16 February 2017.

**60/60 Requirement** has the meaning given in Section 11.5(h).

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

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

**Access Applicant** means a person who has submitted to DBCT Management a valid Access Application that has been confirmed by DBCT Management as compliant with Section 5.2 of this Framework and has not lapsed, expired or otherwise been validly rejected by DBCT Management.

**Access Application** means:

- (a) an application for Access made or deemed to have been made under Section 5.2 of this Framework;
- (b) for the purposes of Sections 5.3(f), 5.3(g), 5.3A, 5.4, 5.7, 5.8, 5.9, and Section 16 only – an Access Application which was duly submitted to DBCT Management prior to the Commencement Date under and in accordance with the 2017 Access Undertaking for the Terminal and which has not been dealt with on the Commencement Date. For clarification, the time of the submission of the Schedule A information (before or after the Commencement Date) will not affect the date on which the application is taken to have been received by DBCT Management; and
- (c) for the purposes of Section 5.4 only – an application of the kind referred to in Section 5.10(q)(9)(F) which is made after the Commencement Date,

as renewed from time to time in accordance with this Framework.

**Access Application Date** means:

- (a) where paragraph (b) of this definition does not apply, the date that the Access Application was received by DBCT Management; or

- (b) the date that the Access Application was deemed to be made if the Access Application was substantially altered in accordance with Section 5.3A or 5.7.

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

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

**Access Seeker** means a party seeking Access, or increased Access, to the Services and includes a party to a Conditional Access Agreement.

**Access Transfer** has the meaning given in Section 5.13 of this Framework.

**Aggregate Annual Contract Tonnage** means, in respect of a relevant Financial Year:

- (a) in respect of a Differentiated Expansion Component, the sum of the Annual Contract Tonnages for only the Differentially Priced Access Holders in respect of that Expansion Component; and
- (b) in respect of the Existing Terminal, the sum of the Annual Contract Tonnages for all Existing Users and Access Holders other than Differentially Priced Access Holders in that Financial Year.

**Alternative Proposed Standard Funding/Underwriting Agreement** means the alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting Agreement as specified under Section 5.10(q)(7).

**Annual Contract Tonnage** means, for an Access Holder or Existing User in a relevant Financial Year, the number of tonnes of coal in that Financial Year that the Access Holder or Existing User is entitled to have Handled under its Access Agreement or Existing User Agreement (as relevant), as amended from time to time, including tonnage which an Access Holder or Existing User is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations and any tonnage which an Access Holder or Existing User would be entitled to have Handled but for the suspension of the Access Holder's or Existing User's right to have the tonnage Handled under an Access Agreement or Existing User Agreement (as relevant).

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

- (a) environmental approvals and licences;
- (b) planning and development approvals and licences; and

(c) local government approvals and licences.

**Arbitration** means an arbitration commenced under section 16.4.

**Arbitrator** means an arbitrator appointed under Section 16.4.

**Available System Capacity** means, in respect of a relevant time, the amount of System Capacity at that time not contracted to be Handled. It is derived by subtracting the Aggregate Annual Contract Tonnage as at the relevant time from System Capacity at that time. Where that subtraction results in a negative number, it will be taken to be "nil". Where Available System Capacity is to be determined in respect of a future time DBCT Management will estimate it taking all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**Business Day** means a day other than a Saturday, a Sunday, or a public holiday in Brisbane.

**Capacity Expert** has the meaning given in clause 11.1(a)(2)(A).

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

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

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

**Ceiling TIC** means the TIC calculated in accordance with Schedule C, Section 2(b)-2(b).

**Coal Guidelines** means the 'Australian Guidelines for Estimating and Reporting of Inventory Coal, Coal Resources and Coal Reserves' published by the Coalfields Geology Council of New South Wales and the Queensland Resources Council or its successor document, as updated from time to time.

**Coal Resources** has the meaning given to it in the JORC Code.

**Commencement Date** means the day following the Expiry Date.

**Completion** means, in respect of relevant works comprising a Terminal Capacity Expansion or other Capital Expenditure program:

- (a) the works are electrically and mechanically complete; and
- (b) testing and commissioning has been satisfactorily completed (including load commissioning),

but where punchlist items (being items intended to be carried out after practical completion and commencement of full operation of the relevant items) are not necessarily complete, and **Complete** and **Completed** have corresponding meanings.

**Conditional Access Agreement** has the meaning given to it in Section 5.4(l) of this Framework.

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

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

provided that such information, data or other matter:

- (c) is not already in the public domain;
- (d) does not become available to the public through means other than a breach of the confidentiality provisions in this Framework or a breach of any confidentiality deed contemplated in Section 7 of this Framework;
- (e) was not in the other party's lawful possession prior to such disclosure; or
- (f) is not received by the other party independently from a third party free to disclose such information, data or other matter;

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

- (g) the disclosure of the information, data or other matter by the recipient would no longer reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter;

- (h) the information, data or other matter has entered in the public domain through means other than a breach of the confidentiality provisions in this Framework or a breach of any confidentiality deed contemplated in Section 7 of this Framework; or
- (i) the information, data or other matter has been received by the recipient independently from a third party free to disclose the information, data or other matter.

**Consequential Loss** means any one or more of the following:

- (a) Loss of profits; or
- (b) Loss of opportunity to make profits; or
- (c) Loss of business opportunity; or
- (d) special exemplary or punitive damages; or
- (e) any Loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such Loss, whether or not such Loss was in the contemplation of the relevant party at the relevant time,

including any of the above types of Loss arising from an interruption to a business or activity.

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

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

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

**Control** has the meaning given to that term in the *Corporations Act 2001* (Cth) and **Controlled** has a corresponding meaning.

**Cost Allocation Principles** has the meaning given in Section 10.7.

**Cost Sensitive Expansion** has the meaning given in Section 10.8(a)(2).

**Dalrymple Bay Coal Chain** means all infrastructure relating to railing and shipping of coal (from mine outloaders to Terminal shiploaders and adjacent infrastructure), excluding Hay Point, generally referred to as the *Dalrymple Bay Coal Chain*, (unless all relevant stakeholders otherwise agree).

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

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

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

**Deed Poll** means the irrevocable deed poll ~~dated [insert]~~ given signed in March 2019 by DBCT Management under which it covenants to comply with the Framework.

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

**Different Terms** has the meaning given in Section ~~12.1(d)~~ 5.4(l)(4).

**Differentiation**, in respect of a Terminal Capacity Expansion, means the Terminal Capacity Expansion should be treated as a separate Terminal Component for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework, and the Floor TIC for that Terminal Component determined in accordance with Section 10.4(f) by reference to the costs of the Terminal Capacity Expansion (and without reference to the costs of the Existing Terminal), and **Differentiated** has a corresponding meaning.

**Differentiated Expansion Component** has the meaning giving in Section 10.8(a)(2).

**Differentially Priced Access Agreement** means an Access Agreement under which the Access Charges are to be differentially priced and Services are to be provided by DBCT Management from capacity created by a Differentiated Expansion Component.

**Differentially Priced Access Holder** means an Access Holder who is party to a Differentially Priced Access Agreement.

**Differentially Priced Capacity** means capacity associated with a Differentiated Expansion Component.

**Differentiated Queue** has the meaning set out in Section 5.4(s).

**Dispute** has the meaning given to that term in Section 16.1.

**Dispute Notice** has the meaning given to that term in Section 16.1.

**Early Termination** means the termination of an Access Agreement or Existing User Agreement (**Terminated Agreement**) before its originally scheduled expiry date (but not where that occurred as a result of the exercise of a contractual right to terminate which was included in

the Terminated Agreement when it was entered into, other than a right to do so for default in payment or insolvency of the Access Holder or Existing User, or default by DBCT Management. For the purpose of this definition, termination for default in payment or insolvency will be taken to have occurred if DBCT Management terminates the Terminated Agreement on other grounds but in circumstances where a default in payment or the insolvency of the Access Holder or Existing User could have been reasonably expected within a reasonably short time thereafter had that termination not occurred).

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

**Existing Terminal** means the Terminal as it exists at the Commencement Date together with each Socialised Expansion of that existing Terminal.

**Existing Terminal Capacity** has the meaning given in Section 11.1(a)(1).

**Existing User** means a party who has an entitlement to have coal Handled through the Terminal as at the Commencement Date.

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

**Expansion Arbitrator** has the meaning given in clause 11.5(a).

**Expansion Component** means in respect of a Terminal Capacity Expansion, the Differentiated Expansion Component or that part of the Existing Terminal (as the case may be) that is the subject of the expansion, as determined in accordance with this Framework.

**Expansion Component Capacity** means, for an Expansion Component, the maximum reasonably achievable capacity of that Expansion Component (measured in tonnes per Financial Year) as estimated pursuant to Section 11.1.

**Expansion Parties** means, in respect of an Expansion Component, any Funding Access Seeker or any party to a Conditional Access Agreement associated with that Expansion Component.

**Expansion Pricing Principles** means the principles set out in Section 10.8.

**Expert Determination** means an expert determination process commenced under Section 16.3.

**Expiry Date** means 8 September 2020.

**Feasibility Studies** means in relation to a proposed Terminal Capacity Expansion, a FEL 1 Feasibility Study, FEL 2 Feasibility Study and FEL 3 Feasibility Study.

**FEL 1 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;
- (b) identifies possible Terminal Expansion Components that will create additional Terminal Capacity, including any potential system capacity expansions that may be required to create complementary additional System Capacity;
- (c) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal Expansion Components;
- (d) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal capacity expansion
- (e) unless otherwise agreed by DBCT Management and the relevant Funding Access Seeker, includes an indicative assessment of:
  - (i) project objectives in relation to the creation of additional Terminal Capacity; and
  - (ii) the possible Terminal Expansion Components:
    - (A) a broad cost estimate with a +/- 50% accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
    - (B) a preliminary financial analysis and risk assessment; and
    - (C) indicative timeframes for developing and completing the possible Terminal Components; and
  - (iii) includes a proposed scope, budget, duration and deliverables for a FEL 2 Feasibility Study including the reasons for selecting the possible Terminal Components that will be considered during that FEL 2 Feasibility Study.

**FEL 2 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 Feasibility Study and, if they differ from the previous study, re-estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;
- (b) confirms the project objectives in relation to the creation of additional Terminal Capacity and the possible Terminal Expansion Components that will create the additional Terminal Capacity;
- (c) assesses each of the possible Terminal Components in respect of:

- (i) the technical and operating requirements for that Terminal Capacity Expansion;
  - (ii) an indicative assessment of the additional Capacity that might reasonably be expected by implementing that Terminal Capacity Expansion; and
  - (iii) a preliminary risk assessment for that Terminal Capacity Expansion;
- (a) includes preliminary survey and geotechnical investigation to support the level of design and cost accuracy required for the study;
  - (b) identifies the preferred Terminal Capacity Expansion to be studied under a FEL 3 Feasibility Study; and
  - (c) provides:
    - (i) a high level engineering assessment of the preferred Terminal Capacity Expansion;
    - (ii) analysis of the technical and economic feasibility of the preferred Terminal Capacity Expansion and identifies why it is preferred;
    - (iii) a project budget, with a +/-20% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
    - (iv) an indicative design and construct schedule for the preferred Terminal Capacity Expansion that includes time tolerances; and
    - (v) potential benefits (including additional Terminal Capacity, maintenance and operating benefits) of the preferred Terminal Capacity Expansion; and
  - (d) includes a proposed scope, budget, duration and deliverables for a FEL 3 Feasibility Study,
  - (e) includes an assessment of the available Terminal Capacity that will be created by the Terminal Capacity Expansion; and
  - (f) includes an assessment of the available Terminal Capacity that will be created by the preferred Terminal Expansion Component.

**FEL 3 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that, in relation to the preferred Terminal Capacity Expansion identified in a FEL 2 Feasibility Study:

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 or FEL2 Feasibility Study and, if they differ from the previous

studies, re-estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;

- (b) details the project objective for the preferred Terminal Capacity Expansion;
- (c) provides a detailed assessment of technical and operating requirements of the preferred Terminal Capacity Expansion;
- (d) includes survey and geotechnical investigations to support the level of design and cost accuracy;
- (e) provides a detailed design for the preferred Terminal Capacity Expansion;
- (f) provides the following details of the preferred Terminal Capacity Expansion's scope:
  - (i) an optimised project configuration that would provide the targeted additional Terminal Capacity to be created by the preferred Terminal Capacity Expansion;
  - (ii) a detailed cost estimate with a +/-10% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
  - (iii) a detailed design and construction project schedule;
  - (iv) the basis on which the project contingency was determined;
  - (v) a financial evaluation, including (if applicable) the estimated impact on the relevant TICs;
  - (vi) a procurement methodology and report on any previous approaches to the construction market that are relevant to the preferred Terminal Capacity Expansion;
  - (vii) a project management plan comprised of:
    - (A) resource management plan;
    - (B) cost management plan;
    - (C) design management plan
    - (D) quality management plan;
    - (E) safety management plan;
    - (F) schedule management plan;
    - (G) risk management plan;

- (H) project packaging and delivery strategy;
  - (I) procurement management plan;
  - (J) interface management plan;
  - (K) change management plan;
  - (L) environmental management plan;
  - (M) project phases, milestones and deliverables;
  - (N) project risk assessment report; and
  - (O) regulators notification, if needed, and
- (viii) provides a detailed capacity assessment on the available Terminal Capacity to be created by the preferred Terminal Expansion Component and the associated impact, if any, on the capacity rating of the base Terminal,

and including the outcomes of any analysis and decisions made in relation to the above matters (with reasons, where applicable).

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

**Floor TIC** means the TIC calculated in accordance with Schedule C, Section 2(a).

**Framework** means this Access Framework (including its schedules) as amended from time to time.

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

**Framework Objective** has the meaning given in ~~clause 1.31.3(a)~~ the Deed Poll.

**Funding Access Seeker** means an Access Seeker that has entered into a Funding Agreement or Underwriting Agreement with DBCT Management.

**Funding Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, pursuant to which an Access Applicant must fund the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study and a FEL 3 Feasibility Study, in respect of a proposed Terminal Capacity Expansion.

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

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

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

**Independent Expert** means an independent expert appointed under Section 16.3.

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

**Initial Access Charges** means the Access Charges for a Terminal Component to apply under an Access Agreement from the commencement of that Agreement, the commencement of increased Access under that Agreement or the commencement of a Pricing Period under that Agreement.

**Initial TIC** means the TIC for a Terminal Component to apply under an Access Agreement from the commencement of that Agreement, the commencement of increased Access under that Agreement or the commencement of a Pricing Period under that Agreement.

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

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the *Corporations Act 2001* (Cth);
- (b) a resolution is passed to place it in voluntary liquidation or to appoint an administrator;
- (c) an application is made to a court for it to be wound up and the application is not dismissed or withdrawn within 14 days;
- (d) the appointment of a controller (as defined in the *Corporations Act 2001* (Cth)) of any of its assets, if that appointment is made and not terminated within 14 days after it is made; or

- (e) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement.

**JORC Code** the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves' prepared by the Joint Ore Reserves Committee of The Australasian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and the Minerals Council of Australia, as updated from time to time.

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

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

**Loss** means any damage, loss (including loss of reputation), cost, expense, fine, penalty or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**Marketable Coal Reserves** has the meaning given to it in the JORC Code.

**Month** means a calendar month.

**Monthly Payment** has the meaning given to it in Section 10.4.

**NECAP Asset Base** means, in respect of a Terminal Component, the NECAP Asset Base for that Terminal Component determined in accordance with Schedule C, Section 3(h).

**NECAP Risk Free Rate** means, in respect of any twelve month period ending 31 March, the rate calculated by averaging the yield of the 10 year Commonwealth Government bond over the 20 Business Days preceding that 31 March.

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

**Non-Expansion Capital Expenditure** or **NECAP** means Capital Expenditure not related to the development of a Terminal Capacity Expansion.

**Non-Expansion Costs** means Terminal Operating Costs and Capital Expenditure not related to the development of a Terminal Capacity Expansion.

**Notice** has the meaning given to that term in Section 5.4(e)(1).

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

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

**Notional Contracted Tonnage** or **NCT** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**Operation & Maintenance Charge** means the component of Access Charges under which DBCT Management recovers Terminal Operating Costs from Access Holders and is calculated in accordance with Section 10.5.

**Operation & Maintenance Contract** or **OMC** means the contract between DBCT Management, the DBCT Trustee and the Operator under which the Operator is engaged by DBCT Management to operate and maintain the Terminal on a day to day basis. The terms of the OMC are summarised for convenience in Schedule H.

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

**Other Costs** has the meaning given in Section 11.5(a)(3)(B).

**PCQ** means Ports Corporation of Queensland Limited ACN 126 302 994.

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

**Price Ruling** means a ruling by an Expansion Arbitrator in respect of a Terminal Capacity Expansion on the Pricing Method and the prudent Capital Expenditure (including the need) for the Terminal Capacity Expansion made following receipt of an application from DBCT Management under Section 5.12(a) or 11.5(a) of this Framework.

**Pricing Method** means the method of pricing Access created by a Terminal Capacity Expansion, being either Socialised or Differential.

**Pricing Period** means the period commencing on the Commencement Date and ending on 30 June 2026 and each subsequent 5 year period during the Term.

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

**Proposed Standard Funding/Underwriting Agreement** means the proposed Standard Funding Agreement or proposed Standard Underwriting Agreement (as applicable) by DBCT Management under Section 5.10(q).

**Publicly Report** means to upload information onto DBCT Management's website so that it is publicly accessible.

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

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

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

**Rail Operator** means an entity that:

- (a) provides above rail services to an Access Holder for the purpose of transporting coal to the Terminal; or
- (b) is nominated by an Access Seeker as likely to provide above rail services to that Access Seeker for the purpose of transporting coal to the Terminal.

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

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

**Renewal Application** has the meaning given in Section 5.3(a).

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

- (a) a change in the Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant), including (without limitation) a change in Aggregate Annual Contract Tonnage occurring as a consequence of the Early Termination of any Access Agreement or Existing User Agreement;
- (b) in respect of the Existing Terminal, Completion and handover to the Operator of the whole of a discrete phase of a Socialised Expansion; and
- (c) each 1 July in a Pricing Period, in respect of any Terminal Component, provided any program of NECAP was:
  - (i) Completed and handed over to the Operator by DBCT Management in the twelve month period ending on 31 March occurring immediately prior to that 1 July and allocated to that Terminal Component in accordance with Section 10.7 of this Framework, including:
    - (A) NECAP referred to in Section 11.10(b); and
    - (B) NECAP referred to in Section 11.10(c); or
  - (ii) included in the NECAP Asset Base for any previous Financial Year of the Pricing Period.

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

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

**Service Provider** means:

- (a) DBCT Management, as the provider of Services at the Terminal;

- (b) each provider at a relevant time of railway infrastructure ("below rail") for any part of the System;
- (c) each provider at a relevant time of railway freight services ("above rail") for any part of the System.

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

**Socialisation**, in respect of a Terminal Capacity Expansion, means the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework, and the Floor TIC for the Existing Terminal determined in accordance with Section 10.4(f) by reference to the sum of the costs of the Existing Terminal and the costs of the Terminal Capacity, and **Socialised** has a corresponding meaning.

**Socialised Expansion** has the meaning given in Section 10.8(a)(1).

**Socialised Terminal Capacity** means capacity associated with a Socialised Expansion.

**Standard Funding Agreement** means the standard Funding Agreement approved in accordance with Section 5.10(q).

**Standard Underwriting Agreement** means the standard Underwriting Agreement approved in accordance with Section 5.10(q).

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

**State** means the State of Queensland.

**Supply Chain Business** means an entity (or group of entities) which:

- (a) provides, or proposes to provide, above rail services in Queensland which access the Terminal;
- (b) owns or holds an interest in, or proposes to acquire such an interest in, coal-producing mines in Queensland that export coal via the Terminal;
- (c) purchases coal that has been produced in Australia and exports that coal via the Terminal;
- (d) provides shipping services from the Terminal; or
- (e) trades in capacity at the Terminal.

**System** means, in respect of the Dalrymple Bay Coal Chain, the following components of infrastructure relating to the transport of coal from mines whose coal is Handled by the Terminal:

- (a) rail loading facility of mines whose coal is Handled by the Terminal;
- (b) railway infrastructure in the Dalrymple Bay Coal Chain;
- (c) railway locomotives and rolling stock used in the Dalrymple Bay Coal Chain; and
- (d) Terminal unloading, stacking, loading and other Handling facilities,

and all interfaces between such components.

**System Capacity** means at a relevant time, the maximum reasonably achievable estimated capacity of the System (measured in tonnes per financial year) as determined pursuant to Section 11.1 in respect of that time. Where System Capacity is required to be estimated in respect of a future time (for example, for the purposes of Section 5.4) DBCT Management will estimate it taking all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**System Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the System Capacity.

**System Master Plan** means, at a relevant time, the master plan (if any) determined pursuant to Section 14.

**TCMP** has the meaning given in Section 11.5(a)(7).

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

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

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

and for the avoidance of doubt, includes the Existing Terminal and any Differentiated Expansion Component.

**Terminal Capacity** means the maximum reasonably achievable capacity of the Terminal (measured in tonnes per Financial Year) as estimated pursuant to Section 11.1.

**Terminal Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the **Terminal Capacity**.

**Terminal Component** means each of:

- (a) the Existing Terminal; and
- (b) the Differentiated Expansion Component.

**Terminal Infrastructure Charge** or **TIC** has the meaning given in Section 10.4.

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

**Terminal Operating Costs** means any amounts:

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

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

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

**Terminating Date** means the earlier of:

- (a) the date which is 10 years from the Commencement Date; and

- (b) the date on or after the Commencement Date on which use of the Terminal is first taken to be a service declared under Part 5, Division 2 of the *Queensland Competition Authority Act 1997* (Qld).

**Tonnage** means the volume of Access supplied under an Access Agreement or access supplied under an Existing User Agreement (as the context requires), determined by reference to the volume of coal Handled or contracted to be Handled.

**Underwriting Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, which gives DBCT Management the right to call for, and requires an Access Applicant to fund in response to such call, the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study,

in respect of a proposed Terminal Capacity Expansion, if the proposed Terminal Capacity Expansion does not proceed.

**WACC(1) Rate** means a rate equivalent to the Construction Period Risk Free Rate plus 4.00%.

**WACC(2) Rate** means, in respect of Financial Year t, the weighted average of the rates equivalent to the NECAP Risk Free Rate plus 5.00% for each twelve month period ending 31 March in which any program of NECAP included in the NECAP Asset Base for Financial Year t for the Existing Terminal or Differentiated Expansion Component (as relevant) was Completed and handed over to the Operator, where the weights are equal to the proportion of the value of the NECAP Asset Base for Financial Year t referable to the program(s) of NECAP Completed and handed over to the Operator in the twelve month period.

## 2. Interpretation

In this Framework unless the context otherwise requires:

- (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
- (b) words denoting the singular include the plural and vice versa;
- (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
- (d) words denoting any gender include all genders;

- (e) references to parties, Parts, Sections, Annexures and Schedules are references to parties, Parts, Sections, Annexures and Schedules to this Framework as modified or varied from time to time;
- (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (g) references to any party to this Framework or any other document, deed or agreement include its successors, permitted assigns, or permitted subcontractors and the obligations of any party extends to those persons;
- (h) all references to dates and times are to Brisbane time;
- (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
- (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
- (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
- (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;
- (m) where there is a requirement under this Framework to consider whether Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holders' respective Annual Contract Tonnages and the extent to which (if at all) Differential Pricing applies to the Annual Contract Tonnages the subject of each Access Agreement;
- (n) where measurement of coal "Handled" is being made in respect of a period, the tonnage loaded into vessels will be taken to be the tonnage Handled in that period; and
- (o) headings are for convenience only and do not affect interpretation of this Framework.

### **3. Change to index**

- (a) If the index used in any formula is not published at the time it is to take effect but will subsequently be published, then the formula will not be applied until such index is available, and the result of applying such formula at such later date shall be backdated to the date of effect.**
- (b) If an index used in any formula under this Framework is suspended or discontinued, then:**

(i) it shall be replaced by the index substituted for it; and

(ii) if the index is not substituted by another index, the parties shall, acting in good faith, meet to agree a replacement index. If the parties cannot agree upon a replacement index within 28 days, then either party may refer the issue to dispute resolution in accordance with clause 16.

## Schedule H - Terms of Operation and Maintenance Contract

Term	Summary of term
Parties	<p>DBCT Management Pty Ltd (<b>DBCTM</b>), DBCT Investor Services Pty Limited as trustee of the DBCT Trust (<b>DBCT Trustee</b>) and the operator, Dalrymple Bay Coal Terminal Pty Limited (<b>Operator</b>).</p> <p>The Operation and Maintenance Contract (<b>Contract</b>) defines the relationships between the parties and their rights and obligations.</p>
Term	<p>The Contract will expire on [date] unless terminated earlier. Other than for default of DBCTM (refer further below), the Operator cannot terminate the Contract before this date.</p> <ul style="list-style-type: none"> <li>• If DBCTM wishes to terminate the Contract other than for the Operator's default, DBCTM must give 5 years' prior notice of termination; and</li> <li>• If an access undertaking is in place and the Operator wishes to terminate other than for DBCTM's default, the Operator can terminate by giving not less than two years notice to DBCTM. If the period of notice given will expire during the term of an access undertaking, the notice period will be extended and take on the from earlier of expiry of the access undertaking or 5 years after the date that a notice of termination is given.</li> </ul>
Intentions of the parties	<p>The parties' intentions include (among other things):</p> <ul style="list-style-type: none"> <li>• The Operator will be responsible for day-to-day operation and maintenance of the Terminal;</li> <li>• The Operator must ensure that its performance of services is coordinated in accordance with the relevant access undertaking in force at the time to the extent that no act or omission by the Operator would cause DBCTM to be in breach of a provision of the access undertaking; and</li> <li>• Subject to DBCTM's rights under the Contract (for example in relation to default by the Operator), DBCTM will not intervene in the day-to-day operation and maintenance of the Terminal.</li> </ul>
Operator's engagement	<p>DBCTM has engaged the Operator to perform the services. The Operator is an independent contractor and not an agent of DBCTM. The services include all things necessary for the operation, maintenance and management of the Terminal.</p>
Operational Services to be performed by the Operator	<p>Operation of the Terminal specifically includes the following services:</p> <ul style="list-style-type: none"> <li>• coordinate the ordering and scheduling of trains;</li> <li>• train unloading;</li> <li>• coal stockpile management, reclamation and handling;</li> <li>• coal blending if required by users of the Terminal;</li> <li>• vessel ordering; and</li> <li>• the loading of ships in accordance with the Terminal Regulations. In the absence of other applicable provisions in the Terminal Regulations, the Operator must normally load ships in order of arrival (subject to there being relevant coal at the Terminal and all prerequisites to loading having been complied with).</li> </ul> <p>These services must be provided in accordance with the approved access undertaking and user agreements and are to be further detailed in an Appendix to the specification included in the Contract.</p>

Term	Summary of term
Maintenance Services to be performed by the Operator	<p>The Operator must maintain the Terminal and each component of the Terminal at its operating capacity as specified in the Contract. This specifically includes:</p> <ul style="list-style-type: none"> <li>• planned maintenance and repair in accordance with an annual operation, maintenance and capital plan (prepared by the Operator);</li> <li>• unplanned maintenance and repair as required (for example following equipment breakdown);</li> <li>• condition monitoring and maintenance management; and</li> <li>• upkeep of the Terminal, including activities such as maintenance of access roads and dust suppression.</li> </ul>
Standard of Operator's performance	<p>The Operator must operate and maintain the Terminal in order to ensure it is capable of operating:</p> <ul style="list-style-type: none"> <li>• at its rated design capacity;</li> <li>• in accordance with good operating and maintenance practice; and</li> <li>• in good and substantial repair.</li> </ul> <p>The Operator must ensure that the Terminal is maintained and operated so as to achieve, as far as practical, the best and most cost effective outcome, taking account, as appropriate, of:</p> <ul style="list-style-type: none"> <li>• lowest total whole of life cost;</li> <li>• reliability and economy of performance;</li> <li>• maximising the effective life of the Terminal;</li> <li>• good operating and maintenance practice;</li> <li>• in the case of competing interests between users, fairness; and</li> <li>• the obligations of DBCTM Management under the access undertaking and any user agreements. These obligations are subject to DBCTM having expended appropriate capital if relevant.</li> </ul> <p>The Operator must provide everything that is necessary for performance of the services, other than any things specified in the Contract as to be provided by DBCTM. The Operator's supply obligations include the supply of water and power to the Terminal. The Operator is also required to supply and maintain spares for the Terminal.</p> <p>The Operator can subcontract parts of the Services without DBCTM's consent, however remains liable for the standard of performance. The Operator is specifically required to supervise the execution of all Services.</p>
Annual operation, maintenance and capital plan	<p>The Operator must, in consultation with DBCTM, prepare and submit an annual operation, maintenance and capital plan by 15 May. The plan will identify the proposed budget for the next financial year and will foreshadow the likely plan and budget for the subsequent two years (i.e. provide a three year budget snapshot).</p>

Term	Summary of term
Payments to the Operator	<p>DBCTM pays the Operator all reasonably incurred costs of performing the services (that is, operating and maintaining the Terminal in accordance with the Contract) plus a margin.</p> <p>The Operator is also entitled to be paid:</p> <ul style="list-style-type: none"> <li>• reimbursement of capital expended by the Operator, subject to certain conditions (outlined below in capital works);</li> <li>• consulting fees in respect of capital works (refer further below in relation to capital works); and</li> <li>• a project management commission if the Operator project manages a non-expansion capital project.</li> </ul> <p>The Contract acknowledges that it is intended that amounts paid to the Operator will be recovered by DBCTM from users under their user agreements. The Operator has obligations to assist DBCTM to facilitate this pass through.</p>
Terminal Regulations	<p>Both the Operator and DBCTM are required to comply with the Terminal Regulations.</p> <p>The Operator may propose amendments to the Terminal Regulations for DBCTM's consent, which DBCTM must not unreasonably withhold but which will be subject to the requirements of the access undertaking in relation to such amendments.</p> <p>DBCTM must require each Terminal user pursuant to their user agreement(s) to comply with the Terminal regulations as applicable from time to time.</p>
Access to the Terminal	<p>DBCTM has granted the Operator a licence to use, occupy and control the Terminal as is necessary to perform the services in accordance with the Contract.</p> <p>The Operator must give DBCTM and its personnel such access to the Terminal as they reasonably require from time to time. However, such access is subject to compliance with the Operator's applicable procedures (including safety requirements). DBCTM must also take reasonable measures not to impede the Operator's performance of the services.</p>
Care of and risk in the Terminal	<p>The Operator has care of the Terminal and assumes the risk of damage to the Terminal and all things located at it (including coal). The Operator must insure the Terminal in accordance with the insurance program detailed in the Contract.</p>
Safety and environmental compliance	<p>The Operator has primary responsibility for the management of safety at the Terminal and for compliance with legal requirements with respect to safety at the Terminal.</p> <p>The Operator also has primary responsibility for the compliance of the Terminal with all relevant environmental laws and requirements. Among other things, the Operator is required to obtain and maintain all required approvals from authorities with respect to the performance of the services.</p>
Records and audits	<p>The Operator must maintain records (including financial records) relating to the services.</p> <p>From time to time, DBCTM may appoint a suitably qualified person to conduct an audit of the records maintained by the Operator and/or of the Operator's relevant systems and procedures.</p> <p>The Operator must work with DBCTM to ensure that DBCTM is able to comply with its reporting obligations under the approved access undertaking.</p>
Continuous improvement	<p>The Operator must work with DBCTM in undertaking reviews to identify and develop options for improved efficiency of the Terminal as well as of the coal transport chain. The parties have coordination obligations in relation to the implementation of the findings of such reviews.</p>

Term	Summary of term
Capital works	<p>Either the Operator or DBCTM can propose that capital works are undertaken. The Operator has obligations to participate in planning for proposed capital works. The Operator is entitled to be paid consulting fees (which are separate and additional to its usual monthly payments) for this participation.</p> <p>If capital works are to proceed, DBCTM and the Operator may agree that the capital works will be implemented by the Operator, DBCTM or another contractor.</p> <p>There is a handover process which applies once capital works have been completed. From the time of handover, the capital works become part of the Terminal and the Operator's obligations to provide the services extend to include that part of the Terminal.</p>
Force majeure	<p>The Contract defines events of force majeure. If a party is affected by such an event, it may be granted relief from performance of its affected obligations under the Contract, subject to compliance with certain requirements.</p>
Dispute resolution	<p>The Contract specifies a dispute resolution procedure which includes the following provisions:</p> <ul style="list-style-type: none"> <li>• If a dispute between DBCTM and the Operator arises out of or in connection with the Contract, then either party may give the other party a notice of dispute.</li> <li>• Neither party may commence any court proceedings or arbitration in respect of any dispute which is the subject of a notice of dispute until the party has complied with the dispute resolution procedure specified in the Contract.</li> <li>• Within 14 days after service of a notice of dispute, the senior executives of each party must confer at least once to attempt to resolve the dispute and failing resolution, to consider and, if possible, agree on methods of resolving the dispute by other means.</li> <li>• If the dispute cannot be resolved by the senior executives after a further period of 14 days or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer the dispute to conciliation.</li> <li>• If the dispute is not resolved by conciliation within a period of 14 days after nomination of the conciliator, the parties may agree to refer the dispute to arbitration or either party may pursue any other means of dispute resolution including litigation.</li> <li>• The Contract will specify procedures with respect to conciliation and arbitration.</li> <li>• The dispute resolution procedure does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect its rights.</li> </ul>
Change in control of the Operator	<p>There is a deemed assignment of the Contract if:</p> <ul style="list-style-type: none"> <li>• a person who is not a user or its related body corporate acquires an interest in the Operator; or</li> <li>• a user or its related body corporate acquires an interest in the Operator which exceeds its proportionate usage of the Terminal.</li> </ul> <p>The Contract may not be assigned without DBCTM's approval.</p>
Termination for default by either party	<p>Each party has termination rights if the other defaults under the Contract. The rights differ between the parties, but allow the non-defaulting party to require rectification or require the defaulting party to show cause, before the non-defaulting party may terminate the Contract.</p>

**Appendix 13 Standard Access Agreement – as attached to Deed Poll**

**USER AGREEMENT**  
**2020 Access Framework**

**Date:**

**DBCT MANAGEMENT PTY LIMITED**

**("DBCT Management")**

**DBCT INVESTOR SERVICES PTY LTD as trustee of the DBCT Trust**

**("DBCT Guarantor")**

***[Insert User name]***

**("User")**

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**This Agreement** is made on the Execution Date

**BETWEEN**      **DBCT MANAGEMENT PTY LIMITED ABN 16 097 698 916**  
                          **("DBCT Management")**

**AND**             **THE USER DESCRIBED IN SCHEDULE 1 ("User")**

**AND**             **DBCT INVESTOR SERVICES PTY LTD ABN 11 052 156 082, as**  
                          **trustee of the DBCT TRUST ("DBCT Guarantor")**

## **RECITALS**

- A.       DBCT Management is the lessee of the Terminal under long term leases.
- B.       The Operator operates and maintains the Terminal on behalf of DBCT Management.
- C.       The User wishes to use the Terminal to Ship its Coal.
- D.       DBCT Management has agreed to grant Access to the User on the terms and conditions contained in this Agreement.

## **IT IS AGREED**

### **1.       DEFINITIONS AND INTERPRETATIONS**

#### **1.1       Definitions**

Unless the subject or context is inconsistent, each of the capitalised terms used in this Agreement has the meaning assigned to it in Schedule 9.

#### **1.2       Interpretation**

The rules set out in Schedule 9 apply to and govern the interpretation of this Agreement.

### **2.       TERM**

[Subject to clause 29.1], this Agreement commences on the Effective Date and continues in force until the end of the Term specified in Item 6 of Schedule 1 (unless terminated earlier pursuant to clause 14.2 or clause 14.3).

### **3.       HANDLING OF COAL**

#### **3.1       Agreement to provide Access**

- (a)      DBCT Management:
  - (i)       grants Access to the User on the terms of this Agreement; and
  - (ii)      unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in the Access Framework.

- (b) The User unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in:
  - (i) the Access Framework; and
  - (ii) the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll.

### **3.2 Provision and operation of the Terminal**

In granting to the User the Access referred to in clause 3.1, DBCT Management must, subject to this Agreement:

- (a) make the Terminal available and operate it to enable the Annual Contract Tonnage (subject to delivery to the Terminal and the availability of vessels) to be Handled at the Terminal in each Financial Year; and
- (b) provide Services as required by the User.

### **3.3 Delivery by rail**

The User must ensure that its Coal is delivered to the Terminal by rail utilising rolling stock which is compatible with and (as far as it is practicable for the User to control) efficiently utilises the unloading facilities at the Terminal.

### **3.4 User to use reasonable endeavours to Ship its Annual Contract Tonnage**

The User must use all reasonable endeavours to Ship its Annual Contract Tonnage through the Terminal in each Financial Year.

### **3.5 Even Shipments**

The User must work towards, and must use all reasonable endeavours to achieve, the Shipping of its Coal through the Terminal at an even rate throughout each Financial Year (and, where Item 7 in Schedule 1 provides for a specific tonnage in respect of a nominated shorter period at some time during the Term, then at an even rate throughout that shorter period). The parties recognise that vessel arrival times, rail scheduling, maintenance and other factors can result in some short-term, routine unevenness to an even rate of Shipping.

### **3.6 Terminal Regulations**

- (a) DBCT Management must comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time.
- (b) The User must observe the Terminal Regulations, in force from time to time, as a condition of Access to and the right to have its Coal Handled at the Terminal.
- (c) The User acknowledges that Terminal Regulations may include terms which:-
  - (i) require scheduling of Access Holders' and Existing Users' railing in and Handling of Coal in ways which promote Terminal efficiency and endeavour to achieve the objective set out in clause 3.5;
  - (ii) temporarily reduce the tonnage of Coal which may be Handled or Services provided under this Agreement, during such periods as capacity of the Terminal or relevant Services becomes restricted, provided that such reductions and restrictions affect all Access Holders and Existing Users equitably (but this does not relieve the User or DBCT Management respectively from any liability which they might have in respect of the capacity or Services having become restricted);

- (iii) prescribe requirements for cargo building windows, unloading of trains, stockpiling and cargo assembly, vessels, arrival of vessels, loading of vessels, pre-loading requirements, order of loading and unloading and other matters where possible (including matters of the type dealt with in the Terminal Regulations at the Effective Date) which promote the efficient, safe and equitable utilisation of capacity at the Terminal and Terminal Services;
  - (iv) require Access Holders to co-operate with the Operator and other Access Holders and Existing Users in relation to scheduling, loading, unloading, priorities and other matters relating to the operation of the Terminal; and
  - (v) allow the exercise of discretions on the part of the Operator in limited cases, where it is reasonable to do so, to optimise Terminal efficiency (such power to be exercised in good faith and in a non-discriminatory way).
- (d) The User acknowledges and agrees that the Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues.
- (e) If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:
- (i) promptly notify the User of any proposed amendments to Terminal Regulations;
  - (ii) provide the User with a copy of such proposed amendments to the Terminal Regulations (which may be by displaying it on DBCT Management's website);
  - (iii) conduct reasonable consultation with the User in relation to the proposed amendment; and
  - (iv) following the completion of such reasonable consultation, notify the User:
    - (A) of the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) of the detailed reasons for its decision to give (or not give) consent to the proposed amendment; and
    - (D) that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (f) A proposed amendment to the Terminal Regulations will not be implemented unless:
- (i) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Framework; and
  - (ii) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;

- (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, the Independent Expert appointed to hear the objection (in accordance with clause 3.6(j) and/or Section 6.2(f) of the Access Framework) has rejected that objection; or
  - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided, and the Independent Expert appointed to hear the objection (in accordance with clause 3.6(l) and/or Section 6.2(g) of the Access Framework) has upheld that objection.
- (g) DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under clauses 3.6(f)(ii)(A) or 3.6(f)(ii)(B) if it has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Framework and, taking into account the results of such consultation, it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Framework, and any Access Agreements; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (h) If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, the User may object to DBCT Management's refusal to provide consent if it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Framework and this Agreement; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

- (i) DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with 3.6(o)).
- (j) If:
- (i) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied,
- then the User may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management of its objection to the consent to the proposed amendment, such objection to be determined by an Independent Expert.
- (k) If, in response to an objection notified to the Independent Expert by the User under clause 3.6(j), the Independent Expert determines that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied, then:
- (i) the proposed amendment and DBCT Management's consent to the proposed amendment will be taken to have been withdrawn; and
  - (ii) the proposed amendment will not be made.
- (l) If:
- (i) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied,
- then the User may, within 30 days of being notified of the amendments by DBCT Management, notify DBCT Management of its objection to DBCT Management not providing consent for the proposed amendment, such objection to be determined by an Independent Expert.
- (m) If, in response to an objection notified to the Independent Expert by the User under clause 3.6(l), the Independent Expert determines that the criteria in in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied, then:
- (i) DBCT Management's consent to the proposed amendment will be deemed to have been given; and
  - (ii) the proposed amendment will be made.
- (n) Subject to DBCT Management complying with clause 3.6(f), DBCT Management will not be liable to the User on any basis whatsoever as a result of DBCT Management consenting to an amendment to the Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by clause 3.6(g). For clarification, this does not affect DBCT Management's obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Agreement or the Access Framework.

- (o) DBCT Management must make a copy of the Terminal Regulations available to the User (which may be by displaying it on DBCT Management's website).

### **3.7 Addressing disproportionate use of Terminal capacity and risk minimisation**

- (a) If at any time DBCT Management, acting reasonably and on the recommendation of the Operator, considers that:
  - (i) the User is disproportionately consuming the capacity of the Terminal (when compared with other Access Holders or Existing Users on a per tonne basis) and other Access Holders are materially adversely affected as a result; or
  - (ii) the provision of the User's Coal to the Terminal or Handling of that Coal at the Terminal creates a disproportionate risk to the Terminal (when compared with Coal of other Access Holders or Existing Users),

and that it is reasonably practicable for the User to reduce that disproportionate consumption of capacity or disproportionate risk, DBCT Management may give written notice to the User to that effect.
- (b) If DBCT Management gives notice to the User pursuant to clause 3.7(a) the User must:
  - (i) meet with DBCT Management (or with the Operator if DBCT Management gives notice that the Operator is authorised to act as its nominee) to attempt to agree on an appropriate action plan; and
  - (ii) promptly, and in any event, within 60 days of the meeting referred to in clause 3.7(b)(i), develop and implement an action plan agreed between the parties or (if there is no agreement, but it is consistent with clause 3.7(c)) an action plan required by DBCT Management.
- (c) DBCT Management is not entitled to require anything in an action plan which would be:
  - (i) unreasonable or uneconomic for the User in all the circumstances; or
  - (ii) inconsistent with what is generally accepted as good operating practice in the prevailing circumstances.
- (d) A dispute between DBCT Management (or the Operator) and the User in respect of this clause 3.7 may be referred to dispute resolution in accordance with clause 15.

## **4. PAYMENT OF CHARGES AND ADJUSTMENTS**

### **4.1 Interpretation of Pricing Provisions**

In this Agreement, the following principles of interpretation shall apply:

- (a) for so long as there is a single Terminal Component, the terms and definitions of this Agreement relevant to pricing apply to all Access collectively; and
- (b) where there are multiple Terminal Components, the terms and definitions of this Agreement relevant to pricing apply to each Terminal Component separately.

For the avoidance of doubt, the Access contracted under this Agreement relates to [the Existing Terminal / a Differentiated Expansion Component].

### **4.2 Charges payable regardless of remedies**

The charges payable pursuant to this clause 4 must be paid by the User promptly when due, regardless of any remedies which might be available to the User pursuant to clause 13 or otherwise:

- (a) except to the extent that clause 5.3 applies;
- (b) unless and until, and to the extent that, it is determined through dispute resolution or agreed that the charges are not payable pursuant to clause 13.4(b); and
- (c) unless a relevant Delay is caused by Wilful Default by DBCT Management (clause 13.5).

#### **4.3 Access Charges**

Access Charges for each Terminal Component will comprise two parts:

- (a) a TIC; and
- (b) a charge to recoup the costs of operation and maintenance of the Terminal, being:
  - (i) the Handling Charge – Fixed;
  - (ii) the Handling Charge – Variable; and
  - (iii) where applicable, charges for Miscellaneous Services.

#### **4.4 User to pay TIC**

The User must pay the TIC to DBCT Management for each tonne of Annual Contract Tonnage by monthly instalments (each a Monthly Payment) in accordance with clause 5.1(b).

#### **4.5 User to pay Handling Charge - Fixed**

- (a) The User must pay HCF to DBCT Management, calculated in accordance with clause 6.2.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCF reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.6 User to pay Handling Charges - Variable**

- (a) The User must pay HCV to DBCT Management, calculated in accordance with clause 6.3.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCV reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.7 User to pay Miscellaneous Services charges**

The User must pay DBCT Management for Miscellaneous Services provided at the Terminal where such services are charged separately from HCF and HCV, at the rates applicable pursuant to clause 6.4.

#### **4.8 DBCT Management's business interruption insurance**

Any insurance premium which relates to business interruption cover for DBCT Management will not form part of any HCV, HCF or Miscellaneous Charge. (For clarification, this is because of the obligation of Access Holders whose Access Agreement is on the terms of the Standard Access Agreement to continue paying Access Charges whilst an event of Force Majeure continues - clause 13.3(b)).

## 5. ACCOUNTS

### 5.1 Calculation, rendering and payment of tax invoices

- (a) DBCT Management and the User must give each other appropriate tax invoices or adjustment notes for any charge payable by the User to DBCT Management or any amounts payable by DBCT Management to the User under clause 4.
- (b) With respect to the Monthly Payment, HCF, HCV and charges for Miscellaneous Services, the User must pay each tax invoice duly given to it by DBCT Management by no later than that date (the "Due Date") which is 30 days after the date of receipt of that tax invoice.
- (c) Tax invoices may only be rendered by DBCT Management monthly in arrears for the Monthly Payment, and monthly instalments of HCF, HCV and charges for Miscellaneous Services.
- (d) With respect to the annual reconciliation and adjustment of HCF and HCV:
  - (i) DBCT Management must calculate and notify the User of any adjustment required against interim amounts paid in respect of HCF and HCV within one month from the end of the Financial Year to which it relates.
  - (ii) DBCT Management or the User (as applicable) must then give the other an appropriate tax invoice reflecting the payment to be made pursuant to any adjustment under clause 5.1(d)(i) on or before the date 14 days after the amount of the adjustment is notified to the User by DBCT Management (or, if later, within 14 days after the resolution of any dispute over the calculations of adjustments, including any dispute referred to in clause 5.1(d)(iv)).
  - (iii) The parties must pay the adjustment relevant under this clause 5.1(d) within 14 days after the receipt of a relevant tax invoice pursuant to clause 5.1(d)(ii).
  - (iv) If the adjustment contemplated under this clause 5.1(d) is wholly or partially impacted by a dispute (as between two or more of the User, another Access Holder, an Existing User and DBCT Management), no amount need be paid in respect of that disputed amount until that dispute has been resolved but, as far as it is practicable, undisputed amounts must be promptly paid (with tax invoices being given accordingly, but the giving of a tax invoice in respect of the undisputed part of a payment will not prejudice the dispute). DBCT Management and the User must use reasonable endeavours to attempt to expeditiously resolve any such dispute to which they are a party.

### 5.2 Interest on late payments

- (a) If the User does not pay a tax invoice by the Due Date, DBCT Management, without prejudice to its other rights under this Agreement, may charge interest to the User on the amount owed computed from the Due Date to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself incur interest, on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.
- (b) If DBCT Management does not make a payment to the User on the date due for such payment or does not notify the User of the amount of an adjustment to be paid by DBCT Management by the required date to do so, the User, without prejudice to its rights under this Agreement, may charge interest to DBCT Management on the amount owed computed from the date due for such payment (or the date on which payment would have become due had the adjustment been duly notified) to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself

incur interest on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.

### 5.3 Disputes over accounts

- (a) Subject to clause 5.1(d)(iv) if the User disputes the amount of a tax invoice from DBCT Management on the basis that it contains a manifest administrative error or is incorrectly calculated, then the User must pay:
- (i) the whole of the undisputed part of the tax invoice by the Due Date; and
  - (ii) 50% of the disputed portion, pending resolution of that dispute (and the User will not be in default for non-payment, if it does so).
- (b) Payment in accordance with clause 5.3(a) will not prejudice the User's rights under clause 15.
- (c) If following the resolution of a dispute, DBCT Management refunds that portion of the disputed tax invoice which has been paid or the User pays the unpaid portion of a disputed tax invoice, then DBCT Management or the User shall pay interest at the No Fault Interest Rate on the refunded amount (in the case of DBCT Management) or the paid amount (in the case of the User) computed from the date on which the disputed amount was originally due to the date the adjustment is paid.

## 6. HANDLING CHARGES

### 6.1 Utilisation Advice

- (a) As soon as practicable after the Execution Date, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the balance of the then current Financial Year (on a monthly basis) and the next 3 full Financial Years of the Term (on an annual basis).
- (b) By no later than 15 February in each Financial Year, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the next full Financial Year (on a monthly basis) and the 3 full Financial Years of the Term following that next Financial Year (on an annual basis).
- (c) In the five Business Days preceding each 1 July, 1 October, 1 January and 1 April in each Financial Year, the User must update DBCT Management and the Operator with a revised Utilisation Advice relating to that Financial Year, together with projections of similar information for the 12 month period commencing on the date of that update.
- (d) The User will be under no liability to DBCT Management if the actual number, types or tonnages of vessels or the amount of Coal is or are greater or fewer than the number, types, tonnages or amounts estimated in this clause or estimated in any advice given pursuant to this clause 6.1.

### 6.2 HCF

- (a) HCF for each Financial Year in respect of the Terminal Component is calculated as follows:-

$$HCF = [OFC + DC + MC] \times \frac{ACT}{TACT}$$

Where:-

OFC is the aggregate of all Fixed Operating Costs for the Financial Year in respect of the relevant Terminal Component;

DC is other expenditure (not being Capital Expenditure) incurred by the Operator for the operation and maintenance of the relevant Terminal Component (including any Operator's margin) for that Financial Year and reimbursable by DBCT Management pursuant to the Operation & Maintenance Contract;

MC is the minor Capital Expenditure for the relevant Terminal Component (not included in DC) in the relevant Financial Year, to a maximum of \$3 million;

ACT is the User's Annual Contract Tonnage in respect of the relevant Terminal Component; and

TACT is the total of the annual contract tonnages (or if an Existing User's actual tonnage Shipped is greater than its annual contract tonnage, the actual tonnage Shipped) of all Access Holders and Existing Users for each relevant Financial Year in respect of the relevant Terminal Component.

- (b) As soon as practicable after each 31 May, having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCF payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.3 HCV

- (a) HCV for each Financial Year in respect of the Terminal Component is calculated as follows:-

$$HCV = \frac{OVC}{TTCS} \times \text{the actual number of tonnes of Coal Shipped by the User pursuant to this Agreement in the relevant Financial Year in respect of the relevant Terminal Component.}$$

Where:-

OVC is the aggregate of all Variable Operating Costs in respect of the Handling of all Coal through the relevant Terminal Component for a Financial Year; and

TTCS is the total number of tonnes of Coal Shipped through the relevant Terminal Component during that Financial Year.

- (b) As soon as practicable after each 31 May, and having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCV payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.4 Miscellaneous Services

- (a) Charges for Miscellaneous Services must be an amount which the Operator reasonably estimates as:-
- (i) relevant reasonable additional costs to be incurred by the Operator as a result of the Miscellaneous Services including the Operator's profit margin; and
  - (ii) any other additional costs likely to be incurred by other Access Holders and Existing Users (for example, additional demurrage) as a result of the delays in Handling other Coal, arising out of the Miscellaneous Services.
- (b) Any charges recovered under this clause 6.4 or an equivalent clause in another Access Agreement or Existing User Agreement must be deducted from operating costs and the Operator's margin in respect of those operating costs for the purposes of calculating HCF and HCV.

- (c) The parties recognise that the Operator has historically charged Access Holders and Existing Users directly for some services provided at the Terminal, and nothing in this Agreement precludes that practice from continuing.

## **7. REVIEW OF ACCESS CHARGES**

### **7.1 Amendments to TIC**

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

### **7.2 5 year review of charges**

- (a) At the request of either party by notice to the other party no later than 18 months prior to the start of a Pricing Period, all charges under this Agreement and the method of calculating, paying and reconciling them (including the terms of Schedule 2) and any consequential changes in drafting of provisions will be reviewed in their entirety, effective from the start of each Pricing Period, in accordance with the following provisions of this clause 7.2.
- (b) Each review pursuant to clause 7.2(a) will determine the types, calculation, payment and reconciliation of charges payable by the User pursuant to this Agreement, and may have regard to the terms of the Access Framework effective at the time of the review.
- (c) DBCT Management and the User must commence each review pursuant to clause 7.2(a) no later than 18 months prior to the start of a Pricing Period, and:
- (i) the parties must endeavour to agree as early as it is practicable to do so (if possible, by no later than the start of the relevant Pricing Period) on the basis and amount of new charges to apply from the start of that Pricing Period;
  - (ii) if the parties do not reach agreement by the date 6 months prior to the start of the relevant Pricing Period, either party may refer the determination of the issues to arbitration in accordance with the Access Framework;
  - (iii) if there is no agreement or determination by the start of the Pricing Period then:
    - (A) the charges (and method of paying and reconciling them) applying prior to that Pricing Period will continue to apply until otherwise agreed or determined; and
    - (B) any determination or agreement will (unless the parties otherwise agree) operate retrospectively from the start of the relevant Pricing Period and, as soon as practicable after the determination or agreement, an adjustment will be paid by the relevant party (based on the amounts which have been paid to that date on an interim basis and the amounts which are agreed or determined to be payable from the start of the relevant Pricing Period to the date the adjustment is paid) together with interest on the amount of the adjustment at the No Fault Interest Rate. The amount of interest will be determined by reconciling the amounts and timings of payments made on an interim basis with amounts payable and timing of those payments which would have applied in accordance with the agreement or determination.
- (d) If a matter is referred to arbitration under clause 7.2(c)(ii), the arbitration must be conducted in accordance with the Access Framework.

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

## **8. SET-OFF**

### **8.1 DBCT Management may set-off**

Unless otherwise stated, DBCT Management may set-off against any amount payable to the User under this Agreement any amount which is due and payable by the User to DBCT Management under this Agreement.

### **8.2 Amount set-off deemed to have been paid**

Any amount set-off by DBCT Management is deemed to have been paid by the User and the amount against which the set-off has been effected is deemed to have been paid by DBCT Management to the User.

### **8.3 User may set-off**

Unless otherwise stated, the User may set-off against any amount payable to DBCT Management under this Agreement any amount which is due and payable by DBCT Management to the User under this Agreement.

### **8.4 Amount set-off deemed to have been paid**

Any amount set-off by the User is deemed to have been paid by DBCT Management and the amount against which the set-off has been effected is deemed to have been paid by the User to DBCT Management.

## **9. DETERMINATION OF TONNAGE**

### **9.1 Certificate of weight and Cargo Manifest**

The User must:

- (a) commission an independent surveyor to issue a certificate of weight of each cargo of the User's Coal loaded on a vessel at the Terminal, based on vessel draught measurements at the Port, or otherwise cause the weight of each cargo to be determined and certified in another way which is independent and acceptable to DBCT Management (acting reasonably) and (if DBCT Management so requires) adopted by all Access Holders and Existing Users;
- (b) send the Cargo Manifest (which must include a statement as to the weight so certified under clause 9.1(a)) to DBCT Management (with a copy to the Operator) upon completion of the loading of each vessel with a cargo of the User's Coal; and
- (c) ensure that a Product Shipment Notice is attached to each Cargo Manifest.

### **9.2 Basis of calculation**

DBCT Management must use the information contained in each Cargo Manifest and Product Shipment Notice as the basis of calculating charges payable under this Agreement.

### 9.3 Further account

- (a) If at any time:-
- (i) DBCT Management can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid less than it was entitled to, DBCT Management may calculate and send to the User a further tax invoice for the difference owed to DBCT Management; and
  - (ii) the User can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid more than it was entitled to, DBCT Management must upon request by the User and delivery of a tax invoice or adjustment note, either pay to the User the difference owed to the User or issue a credit note to the User for the difference owed to the User.
- (b) In addition to payment of the amount referred to under 9.3(a) ("**Applicable Amount**"), DBCT Management (in the case of clause 9.3(a)(i)) or the User (in the case of clause 9.3(a)(ii)) shall be entitled to interest on the Applicable Amount calculated at the No Fault Interest Rate and calculated from the date on which the incorrectly calculated invoice was paid to the date on which the Applicable Amount was actually paid.

## 10. EXPANSION OF TERMINAL

### 10.1 Actions preliminary to decision to expand the Terminal

Before making any decision to expand the Terminal, DBCT Management must:

- (a) advise the User of the reasons for, extent, timing and estimated cost of any Expansion Component under consideration;
- (b) consult the User as to whether changes in the User's Annual Contract Tonnage or the method of operation of the Terminal, including the User's arrangements for Shipping its Coal, would avoid or delay the need for the Expansion Component or reduce the extent or estimated cost of the Expansion Component; and
- (c) consider how to maximise the utilisation of the Terminal.

Nothing in this clause 10.1 limits any provision of the Access Framework.

### 10.2 Minimisation of interference

DBCT Management must use all reasonable endeavours to carry out any Terminal Capacity Expansion of or other work at the Terminal and any infrastructure connected to the Terminal so as to minimise interference with the Handling of the User's Coal.

### 10.3 Terminal and System Capacity

- (a) DBCT Management will from time to time estimate Terminal Capacity (and Expansion Component Capacity, including Socialised Terminal Capacity or Differentially Priced Capacity for each Expansion Component, as applicable) and System Capacity in accordance with the Access Framework (or if there is no provision for doing so in an Access Framework at a relevant time, in accordance with the process applying under the last access undertaking or framework in which such a process was provided for).
- (b) DBCT Management must reassess Terminal Capacity, each relevant Expansion Component Capacity and System Capacity before entering into any new Access Agreement or otherwise increasing the aggregate tonnage of Coal contracted to be Handled through the Terminal, unless it considers that none of the factors to be taken

into account in determining Terminal Capacity, any relevant Expansion Component Capacity and System Capacity have materially changed since the most recent determination of Terminal Capacity, any relevant Expansion Component Capacity and System Capacity and that determination was made less than 12 months previously.

- (c) DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new Access Agreement if it was entered into) exceed the System Capacity (as determined for the relevant time), unless otherwise required or permitted to do so by the Access Framework, law or an agreement relating to its tenure of the Terminal (including the Framework Agreement and the Port Services Agreement). For clarification:
- (i) without limiting clause 19, this does not prohibit DBCT Management from entering into a Conditional Access Agreement, as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on such Terminal Capacity Expansion occurring will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the completion of the relevant Terminal Capacity Expansion); and
  - (ii) DBCT Management will not be in breach of this Agreement if it has complied with the Access Framework (or made good faith and reasonable attempts to comply) but an assessment of System Capacity (after the assessment required by the Access Framework following the completion of a relevant Terminal Capacity Expansion) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (d) Notwithstanding any other provisions of this Agreement, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this clause 10.3 and Section 11.1 of the Access Framework, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) nor will it be liable to the User:
- (i) for any breach of this clause 10.3 or Section 11.1 of the Access Framework;
  - (ii) for any delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
  - (iii) if one or more factors related to utilisation of capacity of the Terminal or any other part of the System which subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under an Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor) provided that such factor is not a breach by DBCT Management of any other part of the Access Framework, this Agreement or any other Access Agreement; or
  - (iv) for any defect, error or omission on the part of the independent expert appointed under the Access Framework to assist with the assessment of Terminal Capacity, each relevant Expansion Component Capacity (including Socialised Terminal Capacity and Differentially Priced Capacity) and System Capacity.
- (e) Subject to the provisions of this Agreement and to the requirements and provisions of the Access Framework, any statute and any agreement in respect of the tenure of the Terminal (including the Framework Agreement and the Port Services Agreement),

DBCT Management agrees with the User that any request by the User for an increase in Annual Contract Tonnage pursuant to clause 11.1 will be agreed to, to the extent that it does not cause System Capacity to be exceeded and in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Framework.

## 11. CHANGES TO ANNUAL CONTRACT TONNAGE

### 11.1 Adjustments at User's request

- (a) The User may only adjust its Annual Contract Tonnage pursuant to this clause 11.1 or clause 12.2.
- (b) [From the date 5 years after the commencement of the Shipment (or increased rate of Shipment) of Coal arising out of the Current Expansion - *add these words for an Access Agreement under which Coal is Shipped for 10 years or more and which necessitated an Expansion*] The User may without penalty reduce the Annual Contract Tonnage by giving not less than five years notice to DBCT Management of the extent and the period of the reduction required.
- (c) If the User wishes to increase the Annual Contract Tonnage (for all or any part of the remainder of the Term), either:-
- (i) from the Annual Contract Tonnage at the Effective Date; or
  - (ii) from a lesser or greater Annual Contract Tonnage previously adjusted under this clause 11.1,

then the User may so notify DBCT Management, which may:-

- (iii) subject to the availability of unallocated Terminal Capacity and System Capacity and the provisions of clauses 10.3 and 29.3, the Access Framework, any statute, and any agreement in respect of the tenure of the Terminal as it existed at 1 July 2005 (including the Port Services Agreement and the Framework Agreement), allow the User to increase the Annual Contract Tonnage (wholly or partially) to the respective amounts and periods requested in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Framework; or
  - (iv) advise the User that no increase can occur, because it would cause Terminal Capacity or System Capacity to be exceeded.
- (d) Nothing in this clause limits any other rights which the User may have as an Access Seeker under the Access Framework or in clause 12.3.

### 11.2 Shipping Coal in excess of Annual Contract Tonnage

The User must not Ship Coal in excess of its Annual Contract Tonnage. If the User wishes to Ship Coal in excess of its Annual Contract Tonnage, the User may seek from another Access Holder the assignment of additional annual contract tonnage under clause 12.2. In accordance with clause 12.3, DBCT Management will not unreasonably refuse to consent to such a proposed assignment.

### 11.3 User not using Annual Contract Tonnage

If, in the reasonable opinion of DBCT Management, a User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and such failure is not due to a Force Majeure event at the Terminal or a failure by DBCT Management to Ship the User's Coal, then the following will apply:-

- (a) DBCT Management may notify the User that DBCT Management has formed the opinion that the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and that there is a reasonable expectation of demand from other Access Holders or Access Seekers for the User's underutilised tonnage;
- (b) the User must make submissions as to whether the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period within 21 days of receiving the notice from DBCT Management;
- (c) if the User fails to produce reasonable evidence that demonstrates that it is likely in future to substantially Ship the whole of its Annual Contract Tonnage, then DBCT Management may notify the User that it intends to appropriately reduce the User's Annual Contract Tonnage;
- (d) if the User considers that DBCT Management has not complied with the requirements of this clause in reducing the User's Annual Contract Tonnage, then the User may, within 21 days of receiving notice under clause 11.3(c), refer the matter to dispute resolution in accordance with clause 15; and
- (e) DBCT Management must not implement a reduction in Annual Contract Tonnage until the expiration of the period for resolution of a dispute referred to in clause 11.3(d).

#### **11.4 Capacity to be taken into account only once**

If the User notifies DBCT Management that the User is unable to, and forgoes its right to, Ship all or part of its Annual Contract Tonnage (the "**Notified Tonnage**") through the Terminal for any period (the "**Notified Period**"), then, for the purpose of charges otherwise payable by the User for the Notified Period, the User's Annual Contract Tonnage will be taken to be reduced by such part of the Notified Tonnage in respect of which DBCT Management grants additional annual contract tonnage to another Access Holder (for the same or comparable charges to those reduced under this clause) and which DBCT Management would not have been able to grant (due to lack of capacity) but for the User foregoing its right to Ship the Notified Tonnage through the Terminal.

#### **11.5 Reduction in tonnes Handled where User fails to obtain rail access**

- (a) Before the User is entitled to have coal Handled pursuant to this Agreement, it must produce evidence reasonably satisfactory to DBCT Management that the Annual Contract Tonnage under this Agreement is matched by an entitlement held by the User (or a person on its behalf) to railway track access relating to the coal the subject of this User Agreement:
  - (i) for the whole of the Term; or
  - (ii) for any relevant shorter period.
- (b) If the User only produces such evidence of access to railway track entitlement pursuant to clause 11.5(a)(ii) for a period shorter than the entire Term, it must continue to provide evidence of such access before the commencement of each successive period during the Term for which such evidence has not previously been produced, and the provisions of clause 11.5(c) will apply in respect of each of the first and each successive such period during the Term.
- (c) To the extent the tonnage in respect of which the User is able to demonstrate an entitlement to railway track access for a relevant period is less than the Annual Contract Tonnage for that period, the Annual Contract Tonnage will (despite any other provisions of this Agreement):
  - (i) be deemed to be reduced to that lesser tonnage, for all purposes relevant to the entitlement to have coal Handled at the Terminal pursuant to this Agreement during such period; but

- (ii) will remain unchanged for all other purposes pursuant to this Agreement, and specifically for the purposes of the liability of the User to pay Access Charges and any other amount payable pursuant to this Agreement based on the actual Annual Contract Tonnage.
- (d) DBCT Management will in good faith make an assessment of the tonnage of coal able to be railed to the Terminal pursuant to an entitlement to railway track access (which would normally be expressed as a number of train paths for any relevant period) and (subject to clause 15) the tonnage so determined shall be the tonnage which is adopted for the purpose of comparison with the Annual Contract Tonnage for a period for the purposes of this clause 11.5.
- (e) Where a relevant period is not a whole Financial Year or not two or more whole Financial Years, references in this clause to Annual Contract Tonnage over that period will mean that part of the Annual Contract Tonnage which accrues over that period, assuming it accrues throughout each Financial Year in equal increments.

## **12. ASSIGNMENT**

### **12.1 DBCT Management may assign**

After consultation with the User, DBCT Management may assign all or any part of its benefits under this Agreement to any person who is responsible and has the expertise and financial capacity needed to operate and maintain the Terminal and comply with the obligations of DBCT Management under this Agreement.

### **12.2 User may assign**

With the prior consent of DBCT Management, which consent will not be unreasonably withheld, a User may assign all or part of its rights or entitlements under this Agreement (including, in particular, all or part of its Annual Contract Tonnage) permanently or temporarily on the following basis:

- (a) the assignment will not be effective unless:- the assignee enters into a deed (prepared by DBCT Management at the expense of such assignee) with DBCT Management substantially in the form contained in Schedule 6 by which DBCT Management and the assignee agree to be bound by the terms, conditions and obligations of this Agreement or the assignee's Access Agreement (as DBCT Management, acting reasonably, determines) in respect of the assigned rights or entitlements as if the assignee were the User in respect of those assigned rights and entitlements;
- (b) when the assignment takes effect, the User will be discharged from all terms, conditions and obligations of this Agreement (except to the extent that they accrued prior to the assignment) in respect of the rights and entitlements assigned; and
- (c) if the User assigns only part of its rights or entitlements to another person, this Agreement will be treated from that time as if it were only an Agreement in respect of the unassigned rights or entitlements.

For clarification, "assign" and "assignment" includes novation or variation to the parties' respective Access Agreements.

### **12.3 Response to requests for consent to assignment by User**

- (a) DBCT Management must consent to a proposed assignment of rights or entitlements under clause 12.2 (whether by way of assignment or novation) unless DBCT Management (acting reasonably) is satisfied that:
  - (i) the assignor is in material breach of this Agreement; or

- (ii) the assignee:
  - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement and does not otherwise provide security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;
  - (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; or
  - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf.
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in clause 12.3(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.
- (d) The User or the assignee may refer as a dispute to arbitration under clause 15 of this Agreement:
  - (i) any refusal by DBCT Management to consent to a transfer;
  - (ii) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer; and
  - (iii) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

#### **12.4 Change of control of User**

- (a) The User must obtain DBCT Management's consent (not to be unreasonably withheld or delayed) to any Change of Control in the User. DBCT Management's consent may be subject to reasonable conditions (including the provision of reasonable security) and the User must comply with any conditions.
- (b) Any dispute in respect of the reasonableness of any refusal by DBCT to consent to a Change of Control, or of any conditions sought by DBCT Management under this clause 12.4, may be referred as a dispute under clause 15.

#### **12.5 Permission to third party to Ship**

The User may permit a third party to Ship Coal through the Terminal treating that cargo as part of the User's Annual Contract Tonnage, without complying with clause 12.2. In such case:

- (a) the User will remain liable for the performance of its obligations under this Agreement in respect of all Coal so Handled, and for all purposes that Coal will be taken to be the Coal of the User Handled pursuant to this Agreement;
- (b) the User must give DBCT Management and the Operator a notice in the form of Schedule 7 not less than 14 days prior to the scheduled departure of the relevant vessel, but DBCT Management must accept such shorter period of notice as causes no

unreasonable adverse consequences to it, the Operator, Existing Users or other Access Holders;

- (c) the cargo must be made in accordance with the notice provided under clause 12.5(b); and
- (d) the Product Shipment Notice attached to the Cargo Manifest provided by the User under clause 9.1 must disclose the name or names of any third party so using the User's Annual Contract Tonnage, and the tonnages of Coal so Handled for that third party.

## 13. REMEDIES

### 13.1 DBCT Management's remedies in the event of Delay

- (a) To the extent that the User is responsible for a Delay, or a Delay arises from events external to the Terminal, DBCT Management's remedies will be limited to its entitlement to payment of the charges provided for in clause 4 of this Agreement.
- (b) Nothing in this clause 13.1 precludes DBCT Management from applying for an injunction, declaration or specific performance in respect of the User's obligations under this Agreement.

### 13.2 User's remedies in the event of Delay

To the extent that the User is not responsible for a Delay and to the extent that a Delay does not arise from events external to the Terminal, the User's remedies against DBCT Management in respect of the Delay are limited as set out below:

- (a) If the Delay is a Permissible Delay, DBCT Management will have no liability to the User in respect of any Claim for Loss arising from the Delay;
- (b) If the Delay arises from Force Majeure affecting DBCT Management's ability to comply with its obligations, clause 13.3 applies;
- (c) If the Delay arises from Wilful Default by DBCT Management, clause 13.5 applies; and
- (d) In all other circumstances, and without prejudice to its right to dispute responsibility for the Delay, the User must continue to meet its payment obligations under clause 4 unless and until the adjudication of an arbitrator, order of the Court or agreement between the parties, determines responsibility for the Delay, in which case clause 13.4 applies.

Nothing in this clause 13.2 precludes the User from applying for an injunction, declaration or specific performance in respect of DBCT Management's obligations under this Agreement.

### 13.3 Force Majeure

- (a) If DBCT Management is affected by an event of Force Majeure, such that it will be unable to fulfil all or part of its obligations under the Agreement (the "**Affected Obligations**"), and anticipates Delays exceeding 48 hours, it must notify the User within 7 days after the occurrence of the event, providing full details of:
  - (i) the Affected Obligations and Delays expected;
  - (ii) the action that DBCT Management has taken and proposes to take to remedy the situation; and
  - (iii) DBCT Management's estimate of the time during which it will be unable to carry out the Affected Obligations due to the event of Force Majeure.
- (b) DBCT Management's Affected Obligations under this Agreement shall be suspended (without it being in default) to the extent of and for the period that the performance of

such obligations are affected by an event of Force Majeure, provided that it complies with clause 13.3(c). However, the User's obligations to pay the Charges in clause 4 will not abate during a period where DBCT Management is affected by an event of Force Majeure.

- (c) DBCT Management must:
- (i) use all reasonable efforts (including the expenditure of reasonable sums of money) to mitigate the effect of the event of Force Majeure upon its performance of this Agreement; and
  - (ii) keep the User informed (not less than fortnightly) of the steps being taken to mitigate the effect upon the performance of this Agreement, including an estimate of the continued duration of the Delay.

#### **13.4 User's rights for Delays attributable to other circumstances**

In the circumstances in clause 13.2(d), DBCT Management's liability to the User is limited to:

- (a) the Third Party Amount; plus
- (b) if the adjudication of an arbitrator, order of a court or agreement between the parties determines that the Delay was at least 66% DBCT Management's Personal Responsibility, and to the extent that there is any shortfall in the recovery by the User of its Direct Loss from the Third Party Amount - the User's Direct Loss in respect of the Delay, but not exceeding the percentage of the User's Direct Loss equivalent to the percentage of DBCT Management's Personal Responsibility.

#### **13.5 Wilful Default by DBCT Management**

If a Delay is caused by Wilful Default by DBCT Management, the User:

- (a) is relieved to that extent of any corresponding payment obligations under clause 4;
- (b) may terminate this Agreement pursuant to clause 14.3; and
- (c) may sue DBCT Management for damages for breach of contract.

#### **13.6 Long Term Delays**

- (a) This clause 13.6 sets out certain rights and obligations of the parties in respect of Delays, including Long Term Delays. This clause 13.6 is:
  - (i) in addition to, and does not limit any other provision of this Agreement; and
  - (ii) does not limit or affect any other right which a party may have against another party in respect of an act or omission of the other party.
- (b) If Loss, damage or destruction occurs in respect of the Terminal, DBCT Management must promptly claim and thereafter promptly apply all relevant available insurance proceeds towards reinstatement of the damaged property, unless (having regard to factors such as the reasonably foreseeable ongoing needs for Handling at the Terminal) DBCT Management considers that reinstatement is not in the interests of stakeholders and no less than 60% of Access Holders and Existing Users (by tonnage) and DBCT Holdings all agree that reinstatement should not occur.
- (c) If Long-Term Delays occur, such that the capacity of the Terminal (as demonstrated by its performance) on a sustained on-going basis is less than 95% of the Aggregate Annual Contract Tonnage at that time (the difference being referred to as the "Shortfall"), then DBCT Management must undertake a Terminal Capacity Expansion sufficient to eliminate the Shortfall if (and on the same basis as) DBCT Management would have been obliged under the terms of the Access Framework (in particular

considering sections 11.3, 11.4, 11.7, and 11.8 of the Access Framework) to undertake a Terminal Capacity Expansion had the amount of the Shortfall been the annual contract tonnage sought by new Access Seekers whose offers to enter into Access Agreements prima facie triggered the requirement for a Terminal Capacity Expansion. For clarification, DBCT Management will not be obliged to undertake a Terminal Capacity Expansion under this Agreement:

- (i) if such Terminal Capacity Expansion is unreasonable and uneconomic pursuant to section 11.7 of the Access Framework; or
  - (ii) if section 11.8 of the Access Framework applies.
- (d) If at any time:
- (i) the capacity of the Terminal on a sustained ongoing basis is reduced to the order of 10%, or less, of the Aggregate Annual Contract Tonnage of all Access Holders and Existing Users at the time;
  - (ii) the reduction of capacity referred to in clause 13.6(d)(i) above, is not attributable to an act or omission of the User; and
  - (iii) DBCT Management does not, within a reasonable time after a written request by the User to do so ("reasonable" being assessed according to the extent of works needed to redress the situation), commence and expeditiously proceed with the works necessary to reinstate the Terminal to a capacity sufficient to meet the reasonably expected sustained ongoing demand for Handling of Coal (whether or not DBCT Management has an obligation to undertake such works),

the User may terminate this Agreement, on giving not less than 30 days' notice to DBCT Management to that effect in writing. Neither party will be liable to the other arising from such a termination (other than a liability which arises prior to the date of termination).

### **13.7 Limitation period for notice of Claims by User**

- (a) The User shall not be entitled to make any Claim against DBCT Management in respect of any Delay unless written notice of the Claim specifically reserving the User's rights under clause 13.2 has been given to DBCT Management by the date 4 months after the end of the Financial Year in which the Delay first occurred (or, if a material fact of a decisive character relating to the right to Claim against DBCT Management was not within the means of knowledge of the User until after that time, within 2 months of the date on which the User first becomes aware of that material fact). Any subsequent Loss arising directly or indirectly from the cause of the first occurrence may be included in the Claim without further notice being given, but a separate notice must be given for each different and unrelated cause from which it is alleged a Claim arises.
- (b) This clause 13.7 does not apply to a Claim to the extent that it is made under clause 13.6.

## **14. TERMINATION**

### **14.1 Suspension**

If the User is in default in the due and punctual performance of an obligation under this Agreement and:

- (a) in respect of the User's default of an obligation to pay money or to provide any Security required pursuant to clause 29, such default has not been remedied within 30 days after DBCT Management has given written notice to the User of the default; or
- (b) in respect of the User's default of a material obligation (other than an obligation to pay money or provide Security), such default has not been remedied, or the User has not expeditiously commenced to remedy it, within 60 days after DBCT Management has given written notice to the User of the default,

then, without prejudice to DBCT Management's other rights under this Agreement, DBCT Management may (by written notice to the User pursuant to this clause) suspend the User's rights to have its Coal Handled under this Agreement until payment (including interest under clause 5.2) is made, Security is provided or the other relevant default is remedied or commenced to be expeditiously remedied. If such suspension occurs, the User's obligations based on its Annual Contract Tonnage (for example charges based on those amounts) will be unchanged, but DBCT Management's obligations to Handle those amounts for the relevant Financial Year will be reduced proportionately.

#### **14.2 Termination by DBCT Management**

Subject to clause 14.5, if DBCT Management has duly given notice that it has suspended the User's rights to have its Coal Handled (but not the User's obligations) under this Agreement pursuant to clause 14.1 and if the default still has not been remedied after a further period of 14 days from the notice of suspension, DBCT Management may terminate this Agreement forthwith by further notice to the User pursuant to this clause.

#### **14.3 Termination by User**

Subject to clause 14.5, the User may terminate this Agreement by written notice to DBCT Management as follows:-

- (a) if DBCT Management is in default in the due and punctual performance of an obligation to pay money under this Agreement and such default has not been remedied for a period of 30 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied; or
- (b) if DBCT Management is in default in the due and punctual performance of a material obligation under this Agreement (not being an obligation to pay money or a Delay) and such default has not been remedied or DBCT Management has not expeditiously commenced to remedy such default within a period of 60 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied.

#### **14.4 Abandonment of Coal on termination**

The User must remove any of its Coal remaining in the Terminal within three months from the termination of this Agreement, whether by expiry or otherwise, failing which the Coal will be deemed abandoned.

#### **14.5 Disputes about defaults**

If an event or circumstance is alleged to constitute a default referred to in clause 14.2 or clause 14.3 and is the subject of a dispute under clause 15, then DBCT Management or the User (as applicable) shall not exercise any right to suspend or terminate this Agreement unless and until the default has not been rectified within a reasonable time (being not less than 14 days) after the end of the resolution process in clause 15.

## 15. GOVERNING LAW AND DISPUTE RESOLUTION

### 15.1 Governing law

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

### 15.2 Disputes

- (a) **(Disputes under this Agreement)** If a dispute between DBCT Management and the User arises out of or in connection with this Agreement, then, unless otherwise specified by the Access Framework or agreed by the parties in writing, such dispute will be resolved in accordance with this clause 15. Either party may give to the other party a notice of dispute in writing identifying and providing details of the dispute.
- (b) **(Disputes under the Access Framework)** If any dispute or question arises under or in relation to the Access Framework, including (without limitation) a dispute in relation to the negotiation of Access between an Access Seeker or Access Holder and DBCT Management, such dispute will be resolved in the manner specified in the Access Framework.
- (c) **(Dispute under Deed Poll)** Subject to clause 9.2.5 of the Deed Poll, the courts of Queensland have exclusive jurisdiction to determine any dispute arising under the Deed Poll.

### 15.3 Further steps required before arbitration

- (a) Subject to clause 15.5, no party may commence arbitration in respect of any dispute notified or notifiable under this clause 15 until that party has complied with the requirements of this clause 15.3.
- (b) Within 14 days after service of a notice of dispute, the senior executives of DBCT Management and the User (or people for the time being acting in that role) must confer at least once to attempt to resolve the dispute, and failing resolution of the dispute to consider and if possible agree on methods of resolving the dispute by other means.
- (c) If the dispute cannot be so resolved after a further period of 14 days or if at any time either DBCT Management or the User considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer such dispute to arbitration in accordance with clause 15.4.

### 15.4 Arbitration procedure

- (a) Any disputes that are not otherwise resolved in accordance with this clause 15 or the Access Framework will be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules (**Rules**).
- (b) The arbitration must be effected by a single suitably qualified and experienced arbitrator who is either:
  - (i) agreed upon between the parties; or
  - (ii) in default of such agreement within 10 days after the dispute is referred to arbitration, nominated by the Resolution Institute.
- (c) Any party to the arbitration may be represented before the arbitrator by a member of the legal profession without the need for leave of the arbitrator.
- (d) Any arbitration commenced under this Agreement may be consolidated with any other arbitration commenced under:
  - (i) this Agreement; and / or

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

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

- (e) The venue for any arbitration will be Brisbane, Queensland.
- (f) Unless otherwise determined by the arbitrator, the costs of the arbitration shall be paid by the unsuccessful party.

### **15.5 Interlocutory relief**

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

### **15.6 Dispute not to affect performance of obligations**

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

## **16. WARRANTIES**

### **16.1 Warranties by DBCT Management**

DBCT Management agrees and acknowledges that:

- (a) Subject to:
  - (i) an event of Force Majeure;
  - (ii) Maintenance Work; and
  - (iii) any decision to cease or reduce Maintenance Work for a component of the Terminal on the basis that it is more cost-efficient to replace it and it is to be replaced,

each Terminal Component will be maintained to be available to operate to at least its rated design capacity;
- (b) it will ensure that the Terminal is maintained in accordance with Good Operating and Maintenance Practice;
- (c) it will consult with the User in relation to the appointment of any replacement Operator of the Terminal and will promptly on request negotiate amendments to this Agreement to reflect the terms of any new Access Framework, from the time (should it occur) that Dalrymple Bay Coal Terminal Pty Ltd ceases to be the Operator;
- (d) the User will (at no charge, but at its own cost) be granted reasonable access to the Terminal for reasonable purposes, including customer goodwill inspections, performance of shipping agent functions, Coal sampling and User inspections of Operations, provided that on each occasion the User complies with the Operator's site rules, DBCT Management's reasonable visitor notification requirements and the User is accompanied by an authorised person at such times while on the Terminal site as DBCT Management or the Operator reasonably requires (provided that they make such a representative available, having been given reasonable notice by the User).

## 16.2 Warranties by the parties

Each party warrants to the others that it has the requisite power to enter into this Agreement from the Execution Date.

## 17. USER COMMITTEE AND IMPROVEMENT PROGRAM

### 17.1 Participation in User Committee

DBCT Management and the User agree to participate in a committee consisting of one representative of each of DBCT Management, the Operator and each Access Holder and Existing User (the "User Committee").

### 17.2 Terms of reference of User Committee

The User Committee is established for the following purposes:

- (a) to provide a forum for consultation between all participants on matters relating to the operation and performance of the Terminal, including (without limitation) any factors relating to any participant which may impact on the future performance or efficiency of the Terminal;
- (b) to enable consultation between all participants on current and planned Terminal facilities, including all proposals for any enhancement of the Terminal; and
- (c) to consult on matters relating to the Terminal Regulations, including (without limitation) any proposed changes to the Terminal Regulations.

### 17.3 Frequency of meetings

DBCT Management and the User acknowledge that it is intended that the User Committee meet on a Quarterly basis and at such further times as participants in the User Committee agree.

### 17.4 Representation

DBCT Management and the User will each appoint, and acknowledge that each other prospective member of the User Committee is entitled to appoint, a person to represent its respective interests on the User Committee (each a "**Representative**"). If a Representative is not available to attend a meeting of the User Committee, the relevant member of the User Committee may nominate an alternate person to represent its interests at the User Committee.

### 17.5 Chairperson

The User agrees that the Representative appointed by DBCT Management will act as chairman of the User Committee.

### 17.6 Role of the Operator

DBCT Management must, as far as the Operation & Maintenance Contract allows, procure that the Operator provides appropriate support to the User Committee, including the provision of any relevant operational reports, as the User Committee may reasonably request the Operator to provide from time to time.

## 18. NOT USED

## 19. EXPANSION TONNES

*[A Conditional Access Agreement in which all or part of the Annual Contract Tonnage does not apply until a Terminal Capacity Expansion (the 'Current Expansion') has occurred, in*

***circumstances where that Terminal Capacity Expansion will form part of the Terminal under this Agreement once completed, will include a clause, an outline of terms of which are as follows:]***

- (a) Subject to clause 19(e), the Annual Contract Tonnage will be [increased by] **[insert]** Mtpa for the period commencing on the first day of the Month following completion and successful commissioning of the Current Expansion until the end of that Financial Year, and thereafter in each subsequent Financial Year. The target date for this to occur is **[insert]**.
- (b) DBCT Management must provide at least monthly progress reports to the User in relation to the Current Expansion and such further progress reports as may reasonably be required as the Current Expansion nears completion.
- (c) DBCT Management's obligation to commence Handling, and the User's obligation to commence paying charges, in respect of the additional Annual Contract Tonnage arising out of the Current Expansion or any part thereof (as applicable) only begins on the first day of the Month following the date that DBCT Management gives the User a notice that the User is:
  - (i) awarded the additional Annual Contract Tonnage or any part thereof (as applicable); and
  - (ii) entitled to have the additional Annual Contract Tonnage or any part thereof (as applicable) handled at the Terminal.
- (d) DBCT Management must use reasonable endeavours to have the Current Expansion completed as close as practicable to the target date referred to in clause 19(a), but it will not be required to expend additional amounts to overcome delays caused by third parties or otherwise beyond the reasonable control of DBCT Management.
- (e) DBCT Management will proportionately reduce the Annual Contract Tonnage under this Agreement and the annual contract tonnages under all other Access Agreements entered into with the intention of utilising additional capacity arising out of the Current Expansion, if the actual Terminal Capacity following completion of the Current Expansion is less than the estimate of (expanded) Terminal Capacity made at the time this Agreement was entered into. That reduction will be by the proportion which the additional Terminal Capacity resulting from the Current Expansion as estimated at the time this Agreement was entered into bears to the actual additional Terminal Capacity arising from the Current Expansion. In relation to:
  - (i) Socialised Terminal Capacity, the allocation of proportionately reduced capacity will occur after first deducting any capacity required from the Current Expansion to "make up" any shortfall between already existing aggregate annual contract tonnages and actual Terminal Capacity which existed prior to the Current Expansion; and
  - (ii) Differentially Priced Capacity resulting from the Current Expansion will be allocated to meet the full entitlements under this Agreement and any other Access Agreements associated with the Differentially Priced Capacity.

## **20. OPTIONS**

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

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

the Term as already extended by the exercise of an option under this clause 20(a) for 5 years or more).

- (b) If DBCT Management receives an Access Application for additional capacity which cannot be met without a Terminal Capacity Expansion if the option in clause 20(a) and other relevant options are exercised, it may notify the User, requiring it to respond within 90 days, either exercising the option in clause 20(a) in respect of all or part of an extended Term and/or tonnage the subject of the option, or waiving it.
- (c) DBCT Management must give notices under clause 20(b) and any equivalent provision of another Access Agreement or Existing User Agreement to relevant Access Holders or Existing Users with options, in order of the earliest expiring Access Agreement or Existing User Agreement, for the purposes of deciding which option date is to be accelerated first. Where an Access Holder/s or Existing User/s with the earliest expiring date exercise/s its/their option by the accelerated date, DBCT Management may then go to the next Access Holder/s or Existing User/s in order of expiring agreements until there has been a waiver of sufficient options to ensure that the bona fide request can be accepted without the necessity for a Terminal Capacity Expansion. Access Holders or Existing Users whose terms expire within 6 months of each other will, for the purposes of this clause 20, be deemed to have terms which expire on the same date, and must be given notices at the same time.
- (d) Where more than one Access Holder or Existing User has tonnages which expire (or which are deemed to expire) on the same date, those Access Holders/Existing Users which do not exercise their accelerated option will lose the amount of tonnes the subject of the option proportionately with their respective annual contract tonnages immediately prior to the end of the current term. (For example, if a bona fide request for 5 Mtpa is received and Access Holders/Existing Users with 10, 5, 2 and 3 Mtpa of contracted tonnages do not exercise their options, then the options for those Access Holders/Existing Users will be reduced by 2.5, 1.25, 0.5 and 0.75 Mtpa respectively).
- (e) If the Access Application referred to in clause 20(b) is not converted into an Access Agreement within 3 months after the above process is completed, the status quo existing before notice from DBCT Management will be re-instated (i.e. options will not be taken to have been forfeited merely because the accelerated date for exercise has not been complied with, and any accelerated exercise of an option will be taken not to have occurred).

## 21. GST

- (a) Any reference in this clause to a term defined or used in the A New Tax System (Goods and Services Tax) Act 1999 is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.
- (b) Unless expressly included, the consideration for any supply made under or in connection with this Agreement does not include an amount on account of GST in respect of the supply ("**GST Exclusive Consideration**") except as provided under this clause.
- (c) Any amount referred to in this Agreement (other than an amount referred to in clause 21(f)) which is relevant in determining a payment to be made by one of the parties to the other is, unless indicated otherwise, a reference to that amount expressed on a GST exclusive basis.
- (d) To the extent that GST is payable in respect of any supply made by a party ("**Supplier**") under or in connection with this Agreement, the consideration to be provided under this Agreement for that supply (unless it is expressly stated to include GST) is increased by

an amount equal to the GST Exclusive Consideration (or its GST exclusive market value if applicable) multiplied by the rate at which GST is imposed in respect of the supply.

- (e) The recipient must pay the additional amount payable under clause 21(d) to the Supplier at the same time as the GST Exclusive Consideration is otherwise required to be provided.
- (f) Whenever an adjustment event occurs in relation to any taxable supply made under or in connection with this Agreement the Supplier must determine the net GST in relation to the supply (taking into account any adjustment) and if the net GST differs from the amount previously paid under clause 21(d), the amount of the difference must be paid by, refunded to or credited to the recipient, as applicable.
- (g) If one of the parties to this Agreement is entitled to be reimbursed or indemnified for a Loss, cost, expense or outgoing incurred in connection with this Agreement, then the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit to which the party being reimbursed or indemnified (or its representative member) is entitled in relation to that Loss, cost, expense or outgoing and then, if the amount of the payment is consideration or part consideration for a taxable supply, it must be increased on account of GST in accordance with clause 21(f).

## **22. NOTICES**

### **22.1 Notices and other communications**

All notices and other communications provided for or permitted under this Agreement must be in writing and must be given by mail, or facsimile transmission as follows:-

- (a) if to DBCT Management, to:-
  - Address: Level 15, 1 Eagle Street, Brisbane, Qld 4000
  - Attention: Chief Executive Officer
  - Fax No.: 07 3002 3101
  - Email: [anthony.timbrell@dbctm.com.au](mailto:anthony.timbrell@dbctm.com.au)
- (b) if to the User, to it at the address set out in Schedule 1,  
or to such other address or person as either party may specify by notice in writing to the other.

### **22.2 Deemed to have been given or made**

All such notices or communications are deemed to have been duly given or made:-

- (a) on the date upon which the notice or communication would, in the ordinary course of the post, have been delivered to the address to which it was posted;
- (b) when delivered; or
- (c) if sent by facsimile transmission, at the conclusion of an apparently successful transmission,

but if the delivery or facsimile is effected on a day that is not a Business Day or after 5pm in the place of receipt on a Business Day, it will be taken to have been given or made on the next Business Day.

**23. SURVIVAL OF REMEDIES**

The remedies of the parties arising by law, by the terms of this Agreement or otherwise are cumulative and will survive the termination of this Agreement by effluxion of time or otherwise.

**24. WAIVER**

A waiver by either party of any default in the strict and literal performance of or compliance with any provision of this Agreement will not be deemed to be a waiver of strict and literal performance of and compliance with any other provision of this Agreement nor to be a waiver of, or in any manner release the other party from, strict compliance with any provision, in the future nor will any delay or omission of either party to exercise any right under this Agreement in any manner impair the exercise of any such right accruing to it thereafter.

**25. COSTS**

Whether or not any of the transactions contemplated by this Agreement are consummated, each party must pay its own fees and expenses of and incidental to the negotiation, preparation and execution of this Agreement. The User will pay on demand any stamp duty payable on this Agreement.

**26. ENTIRE AGREEMENT****26.1 Full and Complete Understanding**

This Agreement constitutes the full and complete understanding between the parties with respect to the subject matter of this Agreement. There is no other oral understanding, agreement, warranty or representation whether express or implied in any way extending, defining or otherwise relating to the provisions of this Agreement or binding on the parties with respect to any of the matters to which this Agreement relates.

**26.2 No inducement**

Each of the parties covenants and irrevocably acknowledges that it has not been induced to enter into this Agreement by any statement, warranty, representation, understanding, act, omission, fact, matter, thing or conduct by or on behalf of any person including the other party, other than as expressly recorded in this Agreement.

**26.3 Provision is to remain in full force and effect**

The provisions of this clause 26 will operate and remain in full force and effect. No other fact, matter or circumstance, including breach of the provisions of the *Competition and Consumer Act 2010* (Cth) by a party to this Agreement, will interfere with or in any way derogate from the operation and effect of this clause.

**27. SEVERANCE**

If any term of this Agreement is for any reason acknowledged by the parties, or adjudged by a court of competent jurisdiction or held by any competent government authority to be invalid, illegal or unenforceable, such term or provision will be severed from the remainder of the provisions of this Agreement and will be deemed never to have been part of this Agreement and the remainder of the provisions of this Agreement will subsist and remain in full force and effect, unless a basic purpose or purposes of this Agreement would thereby be defeated.

## 28. JOINT VENTURE LIABILITY

*[insert as relevant]*

### 28.1 Definitions

In this clause:

- (a) “**Financial Obligation**” means an obligation of a party under or arising out of this Agreement to pay or cause to be paid an amount of money, including a liability for damages for a breach of a Performance Obligation;
- (b) “**Joint Venture**” means the joint venture between the Joint Venturers, details of which are set out in Item 3 of Schedule 1;
- (c) “**Joint Venture Percentage**” means the respective percentage interest of each Joint Venturer in the Joint Venture, as set out in Item 3 of Schedule 1;
- (d) “**Joint Venturers**” means each of the entities set out in Item 3 of Schedule 1 as holding a Joint Venture Percentage.
- (e) “**Performance Obligation**” means any obligation of a party arising under this Agreement, other than a Financial Obligation.

### 28.2 User agent for Joint Venturers

- (a) The User enters into this Agreement as agent for and on behalf of the Joint Venturers, and the User warrants that it is duly authorised to do so.
- (b) The User will not be personally liable under this Agreement in its capacity as agent for the Joint Venturers.

**OR**

### **[Joint Venturers comprise a single party]**

The Joint Venturers comprising the User will be a single party to this Agreement, but their respective rights against and liabilities to DBCT Management and DBCT Guarantor will be determined in accordance with this clause 28.]

### 28.3 Financial Obligations of Joint Venturers are several

Subject to clauses 28.4 and 28.5 (and any other provision of this Agreement which may expressly provide otherwise), the liability of each Joint Venturer in respect of each Financial Obligation of the User is several, and each Joint Venturer will only be liable for an amount owing by the User equivalent to its Joint Venture Percentage of that amount.

### 28.4 Rights and Performance Obligations of Joint Venturers are joint

- (a) Each right of the User under this Agreement can only be exercised by the User or by *[delete highlighted words where the Joint Venturers are all signatories in their own right]* the Joint Venturers jointly.
- (b) Each Joint Venturer will be jointly liable in respect of each Performance Obligation of the User (other than any Performance Obligation expressed to be imposed on an individual Joint Venturer).

### 28.5 Individual Joint Venturer default

- (a) If:
  - (i) a Joint Venturer defaults in respect of the performance of a Financial Obligation of the User;

- (ii) the other Joint Venturers are not in default in respect of that Financial Obligation; and
- (iii) **[where there is a single User, as agent for the Joint Venturers]** the User gives a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

**OR**

- (iv) **[where the Joint Venturers are all signatories in their own right]** the other Joint Venturers give a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

then that defaulting Joint Venturer (unless it disputes the default in writing to DBCT Management within 7 days of receiving a copy of the notice) will be solely liable, to the extent of the default, in the performance of that Financial Obligation.

- (b) Any notice given pursuant to clause 28.5(a)(iii) and not disputed by the defaulting Joint Venturer within the time prescribed is conclusive evidence that the defaulting Joint Venturer specified in the notice is in default to the extent stated and the notice binds all parties unless and until revoked or amended by the User.
- (c) If more than one (but not all) Joint Venturers default and are subject to a notice under clause 28.5(a)(iii), they will be severally liable in proportion to their respective relevant Joint Venture Percentages.
- (d) Nothing in this clause 28 affects DBCT Management's rights under clauses 14.1 and 14.2 of this Agreement.

## **28.6 Clarifications**

For clarification:

- (a) any assignment by a Joint Venturer of any part of its Joint Venture Percentage in respect of this Agreement will be an assignment to which clause 12.2 applies, but in such a case references in that clause to the "User" and "assignee" respectively will be taken to refer only to the relevant Joint Venturer and the intended assignee from it;
- (b) any assignment by the User which is merely the substitution of a new agent for the Joint Venture (where there is no change in the Joint Venturers or the Joint Venture Percentages) will be consented to by DBCT Management unless it has reasonable grounds to object to the proposed new agent (for example, it is insolvent or has a history of default).

## **29. GUARANTEES OF USER**

### **29.1 User to provide Security **[insert if provision of security is a condition precedent]****

**[Notwithstanding clause 2]**, it is a condition precedent to this Agreement that the User must provide to DBCT Management, the Security in Schedule 8, effective not later than the Effective Date, to secure the obligations of the User to DBCT Management under this Agreement.

### **29.2 Failure to provide Security **[insert if relevant]****

If the User does not provide the Security referred to in clause 29.1, then this Agreement will have no force or effect.

### **29.3 Guarantee if User does not remain in good financial standing**

- (a) If after the Execution Date:

- (i) the User applies to DBCT Management to increase the Annual Contract Tonnage;
- (ii) in the reasonable opinion of DBCT Management, there is a likelihood that the User (or, if applicable, a provider of Security) may have ceased or will cease to be reputable or of good financial standing; or
- (iii) a Security previously given in connection with this Agreement is due to expire within 90 days,

the User must provide such information to DBCT Management as may be reasonably requested by DBCT Management by notice to establish that the User (or, as applicable, a provider of Security) is reputable and of good financial standing. DBCT Management must keep any such information in the strictest confidence, except that DBCT Management may disclose such information on a confidential basis to its financiers and consultants who require such information to assess the solvency and creditworthiness of the User or provider of Security.

- (b) If, after the Execution Date, in the reasonable opinion of DBCT Management:
  - (i) the User (or, as applicable, a provider of Security) has ceased to be reputable or of good financial standing with the capability to fulfil all of its obligations under (or in respect of) this Agreement; or
  - (ii) [where this Agreement concerns Access to a Differentiated Expansion Component] there is a materially increased risk that the circumstances in 29.3(b)(i) will occur prior to the earlier of the Terminating Date and the end of the Term,

then the User must provide, within 20 Business Days after written notice from DBCT Management, to DBCT Management, a Security which:-

  - (iii) secures (to an extent reasonable in the circumstances) the obligations under this Agreement of the User to DBCT Management;
  - (iv) is from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing and with the capability to fulfil or cause the fulfilment of all of the financial obligations of the User under this Agreement; and
  - (v) is in a form, and for an amount and period, satisfactory to DBCT Management (acting reasonably).
- (c) If the User does not provide such Security within 20 Business Days of receiving such written notice from DBCT Management, then the User will be in breach of a material obligation under this Agreement.
- (d) The User is entitled to dispute a conclusion by DBCT Management on which a notice under clauses 29.3(a) or 29.3(b) is based.

#### **29.4 Request to remove or reduce Security**

- (a) If the User has provided a Security pursuant to this clause 29 and considers that its financial circumstances have improved or any other relevant circumstances have changed since the provision of the Security, it may request DBCT Management to release or reduce the Security.
- (b) The User must provide to DBCT Management such evidence of its financial circumstances, or other relevant circumstances, as DBCT Management reasonably requests, before DBCT Management is obliged to consider the request.

- (c) DBCT Management must not unreasonably refuse any such request, but it may have regard to (amongst other things) the circumstances in which the Security was originally provided, changes in circumstances since that time, and any reasonable custom and practice of DBCT Management in respect of requiring security from new Access Holders.

### **30. GUARANTEE OF DBCT MANAGEMENT'S OBLIGATIONS**

#### **30.1 Guarantee**

DBCT Guarantor irrevocably and unconditionally guarantees to the User on demand payment of all amounts payable by DBCT Management under or arising out of this Agreement (including all amounts for which DBCT Management may become liable in respect of any breach of this Agreement).

#### **30.2 Unconditional nature of guarantee**

DBCT Guarantor agrees that DBCT Guarantor's obligations under this Agreement are unconditional (irrespective of the validity, regularity or enforceability of any provision of this Agreement or the absence of any action to enforce the same or the waiver or the consent of the User in respect of any provision of this Agreement or the recovery of any judgment against DBCT Management or any action to enforce the same or any variation of the terms of this Agreement or any other dealings, transactions or arrangements between the User and DBCT Management or other circumstances which might otherwise constitute a legal or equitable discharge of or defence to a surety). This guarantee shall be a continuing guarantee which shall not be discharged except by a complete performance of all obligations of DBCT Management under this Agreement.

#### **30.3 Guarantee not affected by changed circumstances**

The liability of DBCT Guarantor under this Agreement will not be lessened, affected or impaired by any time or indulgence granted to DBCT Management by the User or any dealings or transactions between the User and DBCT Management (whether or not DBCT Guarantor is a party or cognisant of the same) or by the dissolution of DBCT Management or any change in the status, functions, control or ownership of DBCT Management or any consolidation, merger, conveyance or transfer by DBCT Management or any waiver, variation or novation of this Agreement or other dealings, transactions or arrangements between the User and DBCT Management which might otherwise constitute a discharge to a surety.

#### **30.4 Capacity of DBCT Guarantor**

- (a) DBCT Guarantor enters into this Agreement as trustee of the DBCT Trust and in no other capacity.
- (b) Any liability of DBCT Guarantor arising from this Agreement can be enforced against DBCT Guarantor only to the extent to which it can be satisfied out of the property of the DBCT Trust and out of which the DBCT Guarantor is actually indemnified for the liability. This provision applies despite any other provision of this Agreement.
- (c) A person entitled to the benefit of this Agreement may not sue DBCT Guarantor personally or seek the appointment of a liquidator, administrator, receiver or similar person to DBCT Guarantor personally or prove any liquidation, administration or arrangement of or affecting DBCT Guarantor personally.
- (d) The provisions of this clause 30.4 do not apply to any obligation or liability of DBCT Guarantor to the extent that it is not satisfied because under its constitution or deed of trust or by operation of law there is a reduction in the extent of DBCT Guarantor's

indemnification over the assets of the DBCT Trust, as a result of DBCT Guarantor's fraud, negligence, breach of trust or breach of duty.

- (e) All of the provisions of this clause 30 are subject to this clause 30.4.

### **31. LIMITATIONS TO LOSSES AND DAMAGES**

#### **31.1 No indirect Loss or Consequential Loss**

Notwithstanding any other provision of this Agreement, DBCT Management is not liable to the User for any indirect Loss or Consequential Loss.

**SCHEDULE 1 - REFERENCE SCHEDULE**

Item	Reference	Definition/Details								
1	DBCT Management	DBCT Management Pty Limited ABN 16 097 698 916								
2	DBCT Guarantor	DBCT Investor Services Pty Ltd ABN 11 052 156 082 as trustee for the DBCT Trust								
3	User	<i>[Insert name, address for notices and contact details]</i>								
4	Execution Date									
5	Effective Date									
6	Term	[ ] years*  (* note: if this Agreement provides for the Shipping of Coal for 10 years or more the Option and rolling 12 month extension process in Clause 20 applies)								
7	Annual Contract Tonnage	<table border="0"> <tr> <td>Year</td> <td>Tonnage</td> </tr> <tr> <td>20xx</td> <td>AAA</td> </tr> <tr> <td>20yy</td> <td>BBB</td> </tr> <tr> <td>20zz etc</td> <td>CCC</td> </tr> </table>	Year	Tonnage	20xx	AAA	20yy	BBB	20zz etc	CCC
Year	Tonnage									
20xx	AAA									
20yy	BBB									
20zz etc	CCC									
8	Terminal Component	<p><i>[For an Agreement which is entered by an Expansion Party in respect of one or more Expansion Component(s) only, insert details of the Expansion Component(s)]</i></p> <p><i>[For an Agreement which is entered in respect of the Existing Terminal (excluding Expansion Components), identify the Existing Terminal excluding any Expansion Components]</i></p>								

## SCHEDULE 2 - CALCULATION OF TERMINAL INFRASTRUCTURE CHARGE AND MONTHLY PAYMENT

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### 1. Monthly Payment (MP)

For each Terminal Component the User must pay to DBCT Management a Monthly Payment in each Month "m" of each Financial Year ( $MP_{u,m}$ ), calculated as follows:-

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

where:-

**TIC** is the Terminal Infrastructure Charge per tonne of Annual Contract Tonnage applicable for a relevant Financial Year to the Terminal Component as specified under Schedule 2, Section 2, and amended or adjusted in accordance with Schedule 2, Section 3; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Annual Contract Tonnage attributable to each Month "m" of a Financial Year in respect of the Terminal Component. Where the rate of the Annual Contract Tonnage for the User does not vary during a Financial Year and applies to the full Financial Year, the MRT<sub>u,m</sub> for the User will be one-twelfth of the Annual Contract Tonnage for the relevant Financial Year. Where the rate of the Annual Contract Tonnage for the User varies during a Financial Year, the MRT<sub>u,m</sub> will vary from Month to Month to reflect one-twelfth of the annualised rate of the Annual Contract Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is amended or adjusted in accordance with Schedule 2, Section 3.

### 2. Terminal Infrastructure Charge (TIC)

The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date, being a charge per tonne of Annual Contract Tonnage for the Terminal Component, is \$[insert amount agreed between DBCTM and User or determined by the arbitrator in the event the Initial TIC is referred to arbitration under the Access Framework].

### 3. Amendment of the TIC

- (a) The TIC will be amended and adjusted annually and on the occurrence of a Review Event in accordance with section 10 and Schedule C of the Access Framework.
- (b) DBCT Management will notify the User of any amendment or adjustment to the TIC in accordance with Schedule C of the Access Framework.
- (c) Any amendment to the TIC will be effective from the date specified in the Access Framework.

## SCHEDULE 3 - SERVICES

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### 1. **Train scheduling**

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate cargo assembly windows at the terminal to receive Coal parcels and provide train operators and Access Holders with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of Coal in each Financial Year.

### 2. **Train unloading**

If a train carrying an Access Holder's Coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the Coal) consistent with achieving Handling of the Annual Contract Tonnage of Coal for an Access Holder.

### 3. **Reclaiming and vessel loading**

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive Coal) nominated by the User, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management in each Financial Year (as long as the vessel and/or cargo mix required by the User or its customer does not unreasonably impact on the efficiency of the Terminal); and
- (b) load the User's Coal into a vessel which is nominated by the User and is available for loading so as to achieve the objective in section 3(a).

### 4. **Incidental services**

DBCT Management must provide the following services, incidental to Coal handling (unless provided directly by the Operator):

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

### 5. **Miscellaneous services**

If required by the User or any Approval or statutory authority notified to DBCT Management, DBCT Management must provide the following Miscellaneous Services to the User:

- moisture adding;
- compacting;
- surfactant adding;

- dozing;
- blending (subject to section 6(d) below); and
- any other services reasonably requested from time to time in writing by the User to DBCT Management, provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal.

## 6. **Stockpiling and blending**

- (a) DBCT Management must provide to the User sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the User's Coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that the User is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the total annual contract tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in sections 6(a) and 6(b) are subject to any other obligation of DBCT Management under any Existing User Agreement with an Existing User entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend Coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:
  - (i) require Coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (ii) require Coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (iii) limit the proportions in which Coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer the User's Coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile the User's Coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## 7. **Prevention of contamination**

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

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

## 8. **Data provision**

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

## 9. Co-ordination

Subject to the User providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

- (a) ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the User's reasonable quality plans, reasonable shipping programs and contracts as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations, and
- (b) (subject to the foregoing and having regard to equity amongst Access Holders and Existing Users) use its best endeavours to minimise the aggregate cost to the User arising out of Handling at the Terminal (including Demurrage Costs and rail freight).

## 10. Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract

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

- (a) any relevant provisions of the Terminal Regulations;
- (b) any specific provision of this Agreement including any provisions relating to an event of Force Majeure;
- (c) the ability of DBCT Management to require the Operator under the Operation & Maintenance Contract to provide the Services; and
- (d) without limiting section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

## 11. Standard for Services

- (a) The provision of the above Services by DBCT Management must be carried out in accordance with due skill, care and diligence in accordance with the Access Framework, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable Laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (i) lowest total whole of life cost;
  - (ii) reliability and economy of performance;
  - (iii) maximising the effective life of the Terminal; and
  - (iv) DBCT Management's non-discrimination obligations under the Access Framework.

**SCHEDULE 4 – UTILISATION ADVICE**

**(clause 6.1)**

Calendar Year:														
Mine:														
	Annual Forecast	Updated Forecast				Additional Information								Comments / Exceptions
						Planned Mine Outages	Rail Ent.*	Ship Mix**						
Forecast Due Date	15-Feb	1 Jul	1 Oct	1 Jan	1 Apr			Handi	S-Pan.	M-Pan.	S-Cape.	M-Cape.	Unk	(Include comments on any special requirements, or exceptions from existing practice for the period)
Units	'000t	'0005	'000t	'000t	'000t	days	'000t	'000t	'000t	'000t	'000t	'000t	'000t	
Apr	----	----	----	----	----									
May	----	----	----	----	----									
Jun	----	----	----	----	----									
Jul			----	----	----									
Aug			----	----	----									
Sep			----	----	----									
Oct				----	----									
Nov					----									
Dec					----									
Jan														
Feb														
Mar														
Apr														
May														
Jun														
Jul	----	----												
Aug	----	----												
Sep	----	----												



**SCHEDULE 5 - PRODUCT SHIPMENT NOTICE**

**(clause 9.1)**

<b>TO</b>	:	North Queensland Bulk Ports Corporation Limited (Fax: ) DBCT Management Pty Ltd (Fax: 07 3002 3101)
<b>FROM</b>	:	<i>[User shipping coal]</i>
<b>SUBJECT</b>	:	Product Shipment Notice – DBCT
<b>DATE</b>	:	
<b>PAGE</b>	:	1 (including this cover page)

<b>Ship Name:</b>	
<b>Date Departed:</b>	
<b>Shipping Number:</b>	
<b>Mine Name:</b>	
<b>User Agreement Name:</b>	
<b>Party liable for User Agreement charges:</b>	
<b>Total Number of Tonnes:</b>	

(This total **MUST** agree with Manifest. If the Manifest covers multiple cargoes, separate Product Shipment Notices for each cargo must be completed)

Does Manifest include more than one cargo?

No   
Yes

User: \_\_\_\_\_ Date: \_\_\_\_\_

**SCHEDULE 6 - TEMPLATE FOR ASSIGNMENT OF ANNUAL CONTRACT  
TONNAGE**

---

**(clause 12.2)**

**Deed of Variation**

**DBCT Management Pty Limited**

**[User 1 full name]**

and

**[Assignee full name]**

---

## This Deed of Variation

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

- 1 **DBCT Management Pty Limited**  
ACN 097 698 916)  
of Level 15, 1 Eagle Street, Brisbane, Queensland  
**(DBCT Management)**
- 2 **The User named in item 1 of the Schedule**  
([User 1])
- 3 **The person named in item 3 of the Schedule**  
([Assignee])

Recitals [Option 1 – Select this option where the Assignee is **not** an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.
- B. [User 1] is a party to a User Agreement with DBCT Management, and under the User Agreement DBCT Management grants [User 1] a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship Coal through the Terminal in the Swap Period under a User Agreement.
- E. [User 1] wishes to vary the Annual Contract Tonnage in its User Agreement so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the Terminal in the Swap Period, and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.
- F. [Assignee] wishes to enter into a User Agreement with DBCT Management to Ship the Swap Contract Tonnage through the Terminal in the Swap Period.
- G. DBCT Management has agreed to consent to the variation to [User 1]'s User Agreement to achieve that objective, on the terms of this deed.

Recitals [Option 2 – Select this option where the Assignee is an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.

- B. [User 1] and [Assignee] are each a party to a User Agreement with DBCT Management, and under each User Agreement DBCT Management grants them a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship more Coal through the Terminal in the Swap Period than its entitlement under [Assignee]'s User Agreement.
- E. [User 1] and [Assignee] wish to vary the Annual Contract Tonnages in their respective User Agreements so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the Terminal in the Swap Period (in addition to its existing Annual Contract Tonnage), and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.
- F. DBCT Management has agreed to consent to the variations to the User Agreements to achieve that objective, on the terms of this deed.

### The deed witnesses

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

---

## 1 Definitions and interpretation

### 1.1 Definitions

**Effective Date** means the date set out in item 7 of the Schedule.

**Swap Contract Tonnage** means the absolute tonnages (or respective tonnages for respective periods) set out in item 6 of the Schedule. Where the Swap Period relates to part, but not all, of a Financial Year, the Swap Contract Tonnage in respect of that period is expressed as an annualised rate for that period - for the purposes of calculating the Monthly Charges for the Swap Period under the User Agreement and determining the rate at which Shipping is permitted in that period.

**Swap Period** means the period set out in item 5 of the Schedule.

[User 1]'s User Agreement means an agreement between DBCT Management and [User 1] bearing the date set out in item 2 of the Schedule.

[[Assignee]'s User Agreement means an agreement between DBCT Management and [Assignee] bearing the date set out in item 4 of the Schedule.] *[Drafting Note: Select this option if the Assignee is an existing User.]*

**[[Assignee]]'s User Agreement** means a User Agreement to be entered into between DBCT Management and **[Assignee]**. ***[Drafting Note: Select this option if the Assignee is not an existing User.]***

User Agreement means one or more of **[User 1]**'s User Agreement and **[Assignee]**'s User Agreement as the context requires.

## 1.2 Interpretation

- (a) Terms which are defined in the User Agreement/s or Terminal Regulations have the same meaning in this deed (except where the context otherwise requires).
- (b) The interpretation provisions of the User Agreement/s apply in respect of the interpretation of this deed, as if set out in this deed.

---

## 2 Variations to User Agreement/s

### 2.1 **[User 1]**'s User Agreement

As of the Effective Date, the Annual Contract Tonnage in **[User 1]**'s User Agreement is reduced by the Swap Contract Tonnage for the Swap Period.

### 2.2 **[Assignee]**'s User Agreement

As of the Effective Date, the Annual Contract Tonnage in **[Assignee]**'s User Agreement will be the Swap Contract Tonnage for the Swap Period. ***[Drafting Note: Delete this paragraph if the Assignee is an existing User.]***

As of the Effective Date, the Annual Contract Tonnage in the **[Assignee]**'s User Agreement is increased by the Swap Contract Tonnage for the Swap Period. ***[Drafting Note: Delete this paragraph if the Assignee is not an existing User.]***

### 2.3 Revised Consolidated Annual Contract Tonnages

DBCT Management will provide to **[User 1]** and **[Assignee]** respectively a revised, consolidated table of Annual Contract Tonnages for the Term of their User Agreement, to reflect the amendments [and new entitlements] pursuant to this deed. In the absence of manifest error, that table will be taken to replace the table of Annual Contract Tonnages previously applicable under the relevant User Agreement (if applicable). ***[Drafting Note: Delete words in square brackets if the Assignee is an existing User.]***

### 2.4 Calculation of Entitlement under the Terminal Regulations

For the avoidance of any doubt, it is intended that **[Assignee]** will become entitled to the "Entitlement" under the Queue Management Procedures currently in place under the Terminal Regulations which **[User 1]** would (but for this deed) have previously been entitled to in relation to the Swap Contract Tonnage for the Swap Period, but that neither parties' Entitlements outside the Swap Period (if any) will be affected. ***[Note: only***

***required if Terminal Regulations include a Queue Management System at the time this deed is entered into]***

## 2.5 Transitional

- (a) The parties recognise that certain determinations (for example, the annualised amount of HCF and HCV) may have been made to date in respect of a current Financial Year before the variations in this deed were agreed.
- (b) DBCT Management shall, as soon as practicable, cause appropriate adjustments to be made in respect to the amounts charged under [[User 1]'s User Agreement/the respective User Agreements], to reflect the variations arising out of this deed. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***
- (c) Nothing in this deed requires DBCT Management or the Operator to pay or repay amounts other than adjustments of the kind already contemplated by [[User 1]'s User Agreement/the User Agreements]. In particular, DBCT Management is not as a result of the variations effected by this deed required to accelerate a payment, or to make a payment to either of the other parties which, in aggregate, is more than it would have otherwise have been required to make but for this deed. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***

## 2.6 User Agreements still in force

Except as set out in clauses 2.1 and 2.2 of this deed, the parties agree and acknowledge that all other provisions of [User 1]'s User Agreement/the User Agreements] remain in full force and effect. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***

---

## 3 Costs and stamp duty etc

- (a) [User 1] and [Assignee] will each bear their own costs and expenses in respect of the negotiation, preparation and execution of this deed.
- (b) [Assignee] will be liable for the costs and expenses (including legal costs) of DBCT Management in respect of the negotiation, preparation and execution of this deed, and any stamp duty and other duties, taxes or other amounts payable as a result of this deed.

---

## 4 Governing law

This deed is governed by the laws of Queensland.

---

## **5 Counterparts**

This deed may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one instrument.

## Schedule to Deed of Variation

(clause 12.2 Standard Access Agreement)

Item

1.	User reducing Annual Contract Tonnage	<i>[insert User 1 full name ]</i>
2.	<b>[User 1]</b> 's User Agreement (date)	<i>[insert date]</i>
3.	User [increasing / acquiring] Annual Contract Tonnage <b>[Drafting Note: Select the relevant option depending on whether the Assignee is an existing User.]</b>	<i>[insert Assignee's full name ] [insert date]</i>
4.	<b>[Assignee]</b> 's User Agreement (date)	<i>[insert date] [Drafting Note: Insert 'Not applicable' if the Assignee is not an existing User.]</i>
5.	Swap Period	<i>[insert start and end dates of Swap Period]</i>
6.	Swap Contract Tonnage	<i>[insert absolute no. of tonnes swapped for each relevant period and annualised rate for each period]Mt</i>  (Annualised rate*:[ <input type="text"/> ] Mtpa)
7.	Effective Date	<i>[insert date of agreement to swap]</i>

\* Annualised rate = (Swap Contract Tonnage / No. of days in Swap Period) x 365

---

**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management Pty Limited:**

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

\_\_\_\_\_  
Director

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

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

**Signed sealed and delivered by  
[User 1 full name]:**

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

\_\_\_\_\_  
Director

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

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

**Signed sealed and delivered by  
[Assignee full name]:**

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

\_\_\_\_\_  
Director

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

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

**SCHEDULE 7 - TEMPLATE NOTICE FOR THIRD PARTY PERMISSION TO SHIP**

**(clause 12.5)**

**TO** : Dalrymple Bay Coal Terminal Pty Ltd (Fax: 07 4956 3353)  
 DBCT Management Pty Ltd (Fax: 07 3002 3101)

**FROM** : *[Principal's name*  
*Beneficiary's name]*

**SUBJECT** : Notice of Permission for Third Party to Ship Coal

**DATE** :

<b>User offering the Capacity (Principal):</b>	
<b>Company accepting the Capacity (Beneficiary):</b>	
<b>Period pertaining to the swap:</b>	
<b>Total Number of Tonnes:</b>	
<b>Nominated Vessel (where known):</b>	
<b>Is this a:</b> (a) Transfer (i.e. a one-way transaction) that will not be repaid; or <input type="checkbox"/> (b) Swap (i.e. a two-way transaction) that will be repaid? <input type="checkbox"/> <b>Repayment date:</b> /    / <b>When is repayment expected?</b>	

Acknowledgment of this notice is subject to receipt of separate Product Shipment Notice (PSN) for all cargos. Invoicing will be in strict accordance with User Agreement terms (i.e. all charges will be to the Principal).

\_\_\_\_\_  
 Principal  
 Date of Request:

\_\_\_\_\_  
 Beneficiary  
 Date of Request:

**Notice Acknowledged:**

\_\_\_\_\_  
 DBCT Management Pty Ltd  
 Date of Acknowledgment:

## SCHEDULE 8 - SECURITY

---

**(clause 29)**

***[Insert details, if applicable]***

*[eg The User must provide the following Security from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing, with the capability to fulfil all of the obligations of the User under this Agreement.]*

## SCHEDULE 9 - DEFINITIONS AND INTERPRETATION

---

### Definitions

"**Access**" has the meaning given in the Access Framework.

"**Access Agreement**" has the meaning given in the Access Framework.

"**Access Application**" has the meaning given in the Access Framework.

"**Access Charges**" has the meaning given in the Access Framework.

"**Access Holder**" has the meaning given in the Access Framework.

"**Access Seekers**" has the meaning given in the Access Framework.

"**Access Framework**" means the access framework (including its schedules) applying to DBCT Management from time to time relating to provision of the Services by it, as implemented under the Deed Poll.

"**Aggregate Annual Contract Tonnage**" has the meaning given in the Access Framework.

"**Agreement**" means this agreement, including all schedules attached to it.

"**Annual Contract Tonnage**" means the maximum quantity of Coal that the User is entitled to deliver to and have Handled through the Terminal in a relevant Financial Year under this Agreement in accordance with Item 7 of Schedule 1 (as amended from time to time pursuant to this Agreement) including tonnage which the User is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations and any tonnage which the User would be entitled to have Handled but for the suspension of the User's right to have the tonnage Handled under this Agreement.

For clarification, where a Financial Year or any relevant period is less than twelve months, or the annualised rate of Annual Contract Tonnage varies during a Financial Year, the Annual Contract Tonnage will be expressed as the relevant annualised rate at a point in time for the purposes of calculating the charges payable each Month, but will nevertheless be the absolute amount of tonnes which the User is entitled to have Handled over the entire Financial Year for purposes such as any annual reconciliation of HCF and the tonnages included in the Aggregate Annual Contract Tonnage.

"**Approval**" has the meaning given in the Access Framework.

"**Business Day**" means any day other than a Saturday, a Sunday, or a public holiday in Brisbane.

"**Capital Expenditure**" means expenditure which:

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

but not expenditure recovered through HCF or HCV.

**"Cargo Manifest"** means the manifest referred to in clause 9.

**"Cash Rate Target"** means, at a relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website (www.rba.gov.au) at that time.

**"Change of Control"** will occur in the User if at any time during the term of this Agreement, any person obtains, or ceases to hold, directly or indirectly:

- (a) beneficial ownership of 50% or more (in aggregate) of the voting shares in the corporation; or
- (b) effective control of the board of directors of the corporation, other than as a result of the transfer of securities in a corporation listed on any recognised stock exchange.

**"Claim"** means any action, proceeding, allegation, demand or claim in any form for relief or compensation of any nature.

**"Coal"** means coal, coke, and other like materials as are approved by DBCT Management.

**"Commencement Date"** has the meaning given in the Access Framework.

**"Conditional Access Agreement"** has the meaning given in the Access Framework.

**"Consequential Loss"** means any one or more of the following:

- (a) Loss of profits; or
- (b) Loss of opportunity to make profits; or
- (c) Loss of business opportunity; or
- (d) special exemplary or punitive damages; or
- (e) any Loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such Loss, whether or not such Loss was in the contemplation of the parties at the time of entry into this agreement,

including any of the above types of Loss arising from an interruption to a business or activity.

**"Current Expansion"** means *(to be inserted as applicable)*.

**"Deed Poll"** means the irrevocable deed poll signed by DBCT Management in March 2019 under which it covenants to comply with the Access Framework.

**"Default Interest Rate"** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 3.5%.

**"DBCT Management's Personal Responsibility"** means DBCT Management's personal liability as a result of its own acts or omissions, independently of and excluding any liability which it might have directly or indirectly arising from the acts or omissions of the Operator or third parties (including contractors and subcontractors of DBCT Management).

**"Delay"** means any delay, inability or failure (for any reason, including breach of this Agreement or negligence) to Ship or Handle Coal in the tonnages and at the rates contemplated in this Agreement. For the User, this includes a failure to deliver Coal to the Terminal or an inability to schedule vessels to load Coal. For DBCT Management, this includes the inability to provide Services at the Terminal (in whole or part) for any reason when Coal would otherwise have been made available by the User.

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

**"Differentially Priced Capacity"** has the meaning given in the Access Framework.

**"Differentiated Expansion Component"** has the meaning given in the Access Framework.

**"Direct Loss"** means charges actually paid pursuant to this Agreement in respect of the period of the Delay. For the purposes of clause 13.4, the User's Losses arising out of a Delay will be taken to include the amount of the relevant Direct Losses.

**"Due Date"** has the meaning given in clause 5.1.

**"Effective Date"** means,[ subject to prior satisfaction of the condition precedent in clause 29.1,] the date set out as such in Schedule 1.

**"Execution Date"** is the date described as such in Schedule 1 and will be completed as the day this Agreement is executed by the last of the parties to execute it.

**"Existing Terminal"** has the meaning given in the Access Framework.

**"Existing User"** means a party who has an entitlement to have coal Handled through the Terminal as at the Commencement Date.

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

**"Expansion Component"** has the meaning given in the Access Framework.

**"Expansion Component Capacity"** has the meaning given in the Access Framework.

**"Expansion Party"** has the meaning given in the Access Framework.

**"Financial Year"** means:-

- (a) the First Financial Year; and
- (b) each 12-month period from July 1 of one calendar year to June 30 of the next ensuing calendar year; and
- (c) any period from the last July 1 in the Term until the end of the Term.

**"First Financial Year"** means the period from the Effective Date to the next following 30 June.

**"Fixed Operating Costs"** means the aggregate of all amounts:

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

to the extent that they represent a fixed cost of operating the Terminal.

**"Force Majeure"** means any event or circumstance not within the control of DBCT Management, and which, by the exercise of a reasonable standard of care and diligence, DBCT Management could not have overcome. Any act or omission of the Operator will be assumed to be beyond the control of DBCT Management, unless it has been specifically directed by DBCT Management and carried out by the Operator in the manner in which it can reasonably be inferred that DBCT Management intended.

**"Framework Agreement"** means the framework agreement between DBCT Holdings Pty Ltd, the State of Queensland, DBCT Management and others dated 31 August 2001.

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

**"GST Exclusive Consideration"** has meaning given to it in clause 21(b).

**"Handle"** means the receiving by rail, unloading, stacking, storing, reclaiming and loading of vessels with Coal, including any other relevant Services required by the User using infrastructure at the Terminal.

**"HCF"** or **"Handling Charge - Fixed"** means the charge determined under clause 6.2.

**"HCV"** or **"Handling Charge - Variable"** means the charge determined under clause 6.3.

**"Independent Expert"** means an independent expert appointed under section 16.3 of the Access Framework.

**"Initial TIC"** means the TIC for the Terminal Component to apply under this Agreement from the Effective Date or the commencement of a Pricing Period. The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date is the amount specified in Schedule 2, clause 2.

**"Law"** means any law, statute, by-law, regulation, rule, order, ordinance, proclamation, or delegated or subordinated legislation of the Commonwealth or of any State or Territory of Australia or of any local government.

**"Long Term Delays"** means ongoing, sustained Delays that arise out of physical loss, destruction or damage at the Terminal.

**"Loss"** means any damage, loss (including loss of reputation), cost, expense, fine, penalty or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**"Maintenance Work"** means any work involving maintenance of or repairs to (including repair by replacement) any part of the Terminal, including any inspections or investigations required by Good Operating and Maintenance Practice.

**"Miscellaneous Services"** means:

- (a) services requested by the User from time to time which services are nominated in Schedule 3 as Miscellaneous Services; or
- (b) services to the extent that they are materially different (in nature, extent or cost) to the Services provided to other Access Holders and Existing Users at the Terminal including as a result of the nature of the User's Coal (or any contaminants in it) or requirements in respect of its handling, storage, blending, unloading or loading which result in materially additional costs or delays.

**"Month"** means a calendar month.

**"Monthly Payment"** means the monthly instalment of the TIC payable pursuant to clause 4.4, calculated (and adjusted as required) in accordance with Schedule 2.

**"Mtpa"** means million tonnes per annum.

**"No Fault Interest Rate"** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 0.2%.

**"Notified Period"** has the meaning given in clause 11.4.

**"Notified Tonnage"** has the meaning given in clause 11.4.

**"Notional Contracted Tonnage"** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**"Operation & Maintenance Contract"** means the agreement under which the Operator agrees to operate and maintain the Terminal on a day to day basis, and includes any other agreement in substitution for it under which DBCT Management agrees with a person to operate the Terminal.

**"Operator"** means Dalrymple Bay Coal Terminal Pty Ltd ACN 010 268 167 or such other contractor engaged by DBCT Management under the Operation & Maintenance Contract.

**"Permissible Delay"** means:

- (a) any Delay from which DBCT Management is released from liability pursuant to clauses 3.6(1) or 10.3; or
- (b) any Delay which is imposed by DBCT Management, acting reasonably:
  - (i) because it considers it necessary for the safety of any person or to prevent material damage to property (except where the threat to the person or property arises out of Wilful Default or reckless neglect on the part of DBCT Management); or
  - (ii) to facilitate the performance of Maintenance Work (other than Maintenance Work to the extent it is necessitated by Wilful Default or reckless neglect on the part of DBCT Management) or of a Terminal Capacity Expansion in accordance with clause 10.2.

**"Port"** means both the harbour of Hay Point proclaimed by the Governor-in-Council by Order-in-Council dated 30 October 1983, and all real property held by DBCT Management as part of or relating to that Port.

**"Port Services Agreement"** has the meaning given in the Framework Agreement.

**"Pricing Period"** means the period ending on 30 June 2026 and each subsequent 5 year period during the Term.

**"Product Shipment Notice"** means a notice in the form of Schedule 5.

**"Quarter"** means:

- (a) each 3 month period commencing on 1 July, 1 October, 1 January and 1 April; and
- (b) in respect of the first quarter, commencing on the Effective Date and ending on the day before the commencement of the next quarter.

**"Rail Operator"** has the meaning given in the Access Framework.

**"Representative"** has the meaning given to it in clause 17.4.

**"Review Event"** has the meaning given to it in the Access Framework.

**"Rules"** has the meaning given in clause 15.4(a).

**"Security"** means any form of security or guarantee required to be provided or in fact provided pursuant to clause 29.

**"Services"** means the services described in Schedule 3.

**"Ship"** means the delivery of Coal to the Terminal by rail and the arrangement of vessels by the User such that DBCT Management is able to Handle the User's Annual Contract Tonnage.

**"Socialised Terminal Capacity"** has the meaning given in the Access Framework.

**"Standard Access Agreement"** has the meaning given in the Access Framework.

**"Supplier"** has the meaning given to it in clause 21(d).

**“System”** has the meaning given in the Access Framework.

**“System Capacity”** has the meaning given in the Access Framework.

**"Term"** means the term of this Agreement as specified in Item 6 of Schedule 1, as extended in accordance with this Agreement.

**"Terminal"** means the Terminal Component of the land and port infrastructure located at the Port of Hay Point which is owned by DBCT Holdings Pty Ltd or the State of Queensland and leased to DBCT Guarantor and/or DBCT Management, and known as the Dalrymple Bay Coal Terminal, and includes the following which form part of the Terminal Component:

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

**"Terminal Capacity"** has the meaning given in the Access Framework.

**"Terminal Capacity Expansion"** has the meaning given in the Access Framework.

**“Terminal Component”** means the part of the Terminal as specified in Item 8 of Schedule 1.

**"Terminal Infrastructure Charge" or "TIC"** means the amount (per tonne) payable on the Annual Contract Tonnage specified in Schedule 2, as adjusted in accordance with Schedule 2 and the Access Framework.

**"Terminal Regulations"** means regulations in force and available on DBCT Management’s website governing procedures for the operation of the Terminal existing as at the commencement of this Agreement as amended from time to time in accordance with the Access Framework.

**"Terminating Date"** has the meaning given in the Access Framework.

**"Third Party Amount"** means the amount for which DBCT Management is actually indemnified by the Operator and/or another third party (including a liability insurer) in respect of liability for any Claim made by the User, less DBCT Management's costs of recovery of that amount. For clarification, if a Delay affects more than one Access Holder or Existing User, then the aggregate amount of any payment received by DBCT Management which related to a common Third Party Amount claimed by such affected Access Holders or Existing Users will be distributed to them in the proportions of their respective annual contracted tonnages.

**"User"** means the person specified in item 3 of Schedule 1.

**"User Committee"** has the meaning given to it in clause 17.1.

**"Utilisation Advice"** means a notice in the form in Schedule 4 given by the User to DBCT Management under clause 6.1.

**"Variable Operating Costs"** means the aggregate of all amounts:

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

to the extent that they represent a variable cost of operating the Terminal.

**“Vessel Nomination”** means a vessel nomination notice given by the User under the Terminal Regulations for the purpose of finalising the relevant nominated parcel and vessel details for a proposed shipment.

**"Wilful Default"** means a deliberate act or omission which will result in (and can reasonably be expected to have been intended to result in) a breach of this Agreement and which, as soon as practicable, but in any event within 30 days after written notice (particularising the alleged breach) is given to the party alleged to be in default, is not either:

- (a) acknowledged by the defaulting party and rectified; or
- (b) disputed by the party allegedly in default and referred to dispute resolution in accordance with clause 15, but if the notice of default is ultimately determined by arbitration or order of a court or agreement to have been justified, then rectified as soon as practicable but in any event within 30 days of the adjudication or agreement.

For the purposes of this definition, rectification will be taken to have occurred within the time period stated above, even if not actually completed within that time period, if rectification is reasonably practicable and commences within the stated period and proceeds at all times expeditiously.

## Interpretation

1. In this Agreement headings are for convenience only and do not affect its interpretation.
2. Except to the extent that the context otherwise requires:
  - (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
  - (b) words denoting the singular include the plural and vice versa;
  - (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
  - (d) words denoting any gender include all genders;
  - (e) references to parties, clauses and Schedules are references to parties, clauses and Schedules to this Agreement as modified or varied from time to time;
  - (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
  - (g) references to any party to this Agreement or any other document, deed or agreement include its successors or permitted assigns;
  - (h) all references to dates and times are to Brisbane time;
  - (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
  - (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
  - (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
  - (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;

- (m) where a provision provides that a party will act reasonably or prudently, that shall (where the context permits) be construed in the context of DBCT Management's obligation to act in accordance with Good Operating and Maintenance Practice;
- (n) where there is a requirement under this Agreement to consider whether the User or Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holder's respective annual contract tonnage; and
- (o) where measurement of Coal "Handled" (or in the context of the User, "Shipped") is being made in respect of a period, the tonnage loaded into vessels as determined in accordance with clause 9 will be taken to be the tonnage Handled (or, as the context requires, Shipped) in that period.

3. Payments on Business Days

Where the day on which any payment of money under this Agreement is to be made is not a Business Day, the payment may be made on the next Business Day.

**EXECUTION**

**Executed as an agreement**

**Signed for**  
**DBCT**  
**Management Pty Limited**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

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

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

**Signed for**  
**DBCT Investor Services Pty Ltd**  
**as trustee for the DBCT Trust**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

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

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

**Signed for**  
**[Insert User name]:**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Representative

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

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

**Appendix 14 Standard Access Agreement – mark up to June 2018**

**USER AGREEMENT**  
**[2020] Access Framework**

**Date:**

**DBCT MANAGEMENT PTY LIMITED**

**("DBCT Management")**

**DBCT INVESTOR SERVICES PTY LTD as trustee of the DBCT Trust**

**("DBCT Guarantor")**

***[Insert User name]***

**("User")**

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**This Agreement** is made on the Execution Date

**BETWEEN**      **DBCT MANAGEMENT PTY LIMITED ABN 16 097 698 916**  
                          **("DBCT Management")**

**AND**              **THE USER DESCRIBED IN SCHEDULE 1 ("User")**

**AND**              **DBCT INVESTOR SERVICES PTY LTD ABN 11 052 156 082, as**  
                          **trustee of the DBCT TRUST ("DBCT Guarantor")**

## **RECITALS**

- A.        DBCT Management is the lessee of the Terminal under long term leases.
- B.        The Operator operates and maintains the Terminal on behalf of DBCT Management.
- C.        The User wishes to use the Terminal to Ship its Coal.
- D.        DBCT Management has agreed to grant Access to the User on the terms and conditions contained in this Agreement.

## **IT IS AGREED**

### **1.        DEFINITIONS AND INTERPRETATIONS**

#### **1.1       Definitions**

Unless the subject or context is inconsistent, each of the capitalised terms used in this Agreement has the meaning assigned to it in Schedule 9.

#### **1.2       Interpretation**

The rules set out in Schedule 9 apply to and govern the interpretation of this Agreement.

### **2.        TERM**

[Subject to clause 29.1], this Agreement commences on the Effective Date and continues in force until the end of the Term specified in Item 6 of Schedule 1 (unless terminated earlier pursuant to clause 14.2 or clause 14.3).

### **3.        HANDLING OF COAL**

#### **3.1       Agreement to provide Access**

- (a)      DBCT Management:
  - (i)       grants Access to the User on the terms of this Agreement; and
  - (ii)      unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in the Access Framework.

- (b) The User unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in:
- (i) the Access Framework; and
  - (ii) the Deed Poll, including the conditions set out in clauses 8.4, 9, 10 and 11 of the Deed Poll.

### **3.2 Provision and operation of the Terminal**

In granting to the User the Access referred to in clause 3.1, DBCT Management must, subject to this Agreement:

- (a) make the Terminal available and operate it to enable the Annual Contract Tonnage (subject to delivery to the Terminal and the availability of vessels) to be Handled at the Terminal in each Financial Year; and
- (b) provide Services as required by the User.

### **3.3 Delivery by rail**

The User must ensure that its Coal is delivered to the Terminal by rail utilising rolling stock which is compatible with and (as far as it is practicable for the User to control) efficiently utilises the unloading facilities at the Terminal.

### **3.4 User to use reasonable endeavours to Ship its Annual Contract Tonnage**

The User must use all reasonable endeavours to Ship its Annual Contract Tonnage through the Terminal in each Financial Year.

### **3.5 Even Shipments**

The User must work towards, and must use all reasonable endeavours to achieve, the Shipping of its Coal through the Terminal at an even rate throughout each Financial Year (and, where Item 7 in Schedule 1 provides for a specific tonnage in respect of a nominated shorter period at some time during the Term, then at an even rate throughout that shorter period). The parties recognise that vessel arrival times, rail scheduling, maintenance and other factors can result in some short-term, routine unevenness to an even rate of Shipping.

### **3.6 Terminal Regulations**

- (a) DBCT Management must comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time.
- (b) The User must observe the Terminal Regulations, in force from time to time, as a condition of Access to and the right to have its Coal Handled at the Terminal.
- (c) The User acknowledges that Terminal Regulations may include terms which:-
  - (i) require scheduling of Access Holders' and Existing Users' railing in and Handling of Coal in ways which promote Terminal efficiency and endeavour to achieve the objective set out in clause 3.5;
  - (ii) temporarily reduce the tonnage of Coal which may be Handled or Services provided under this Agreement, during such periods as capacity of the Terminal or relevant Services becomes restricted, provided that such reductions and restrictions affect all Access Holders and Existing Users equitably (but this does not relieve the User or DBCT Management respectively from any liability which they might have in respect of the capacity or Services having become restricted);

- (iii) prescribe requirements for cargo building windows, unloading of trains, stockpiling and cargo assembly, vessels, arrival of vessels, loading of vessels, pre-loading requirements, order of loading and unloading and other matters where possible (including matters of the type dealt with in the Terminal Regulations at the Effective Date) which promote the efficient, safe and equitable utilisation of capacity at the Terminal and Terminal Services;
  - (iv) require Access Holders to co-operate with the Operator and other Access Holders and Existing Users in relation to scheduling, loading, unloading, priorities and other matters relating to the operation of the Terminal; and
  - (v) allow the exercise of discretions on the part of the Operator in limited cases, where it is reasonable to do so, to optimise Terminal efficiency (such power to be exercised in good faith and in a non-discriminatory way).
- (d) The User acknowledges and agrees that the Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues.
- (e) If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:
- (i) promptly notify the User of any proposed amendments to Terminal Regulations;
  - (ii) provide the User with a copy of such proposed amendments to the Terminal Regulations (which may be by displaying it on DBCT Management's website);
  - (iii) conduct reasonable consultation with the User in relation to the proposed amendment; and
  - (iv) following the completion of such reasonable consultation, notify the User:
    - (A) of the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) of the detailed reasons for its decision to give (or not give) consent to the proposed amendment; and
    - (D) that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (f) A proposed amendment to the Terminal Regulations will not be implemented unless:
- (i) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Framework; and
  - (ii) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;

- (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, the Independent Expert appointed to hear the objection (in accordance with clause 3.6(j) and/or Section 6.2(f) of the Access Framework) has rejected that objection; or
  - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided, and the Independent Expert appointed to hear the objection (in accordance with clause 3.6(l) and/or Section 6.2(g) of the Access Framework) has upheld that objection.
- (g) DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under clauses 3.6(f)(ii)(A) or 3.6(f)(ii)(B) if it has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Framework and, taking into account the results of such consultation, it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Framework, and any Access Agreements; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (h) If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, the User may object to DBCT Management's refusal to provide consent if it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Framework and this Agreement; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

- (i) DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with 3.6(o)).
- (j) If:
- (i) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied,
- then the User may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management of its objection to the consent to the proposed amendment, such objection to be determined by an Independent Expert.
- (k) If, in response to an objection notified to the Independent Expert by the User under clause 3.6(j), the Independent Expert determines that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied, then:
- (i) the proposed amendment and DBCT Management's consent to the proposed amendment will be taken to have been withdrawn; and
  - (ii) the proposed amendment will not be made.
- (l) If:
- (i) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied,
- then the User may, within 30 days of being notified of the amendments by DBCT Management, notify DBCT Management of its objection to DBCT Management not providing consent for the proposed amendment, such objection to be determined by an Independent Expert.
- (m) If, in response to an objection notified to the Independent Expert by the User under clause 3.6(l), the Independent Expert determines that the criteria in in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied, then:
- (i) DBCT Management's consent to the proposed amendment will be deemed to have been given; and
  - (ii) the proposed amendment will be made.
- (n) Subject to DBCT Management complying with clause 3.6(f), DBCT Management will not be liable to the User on any basis whatsoever as a result of DBCT Management consenting to an amendment to the Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by clause 3.6(g). For clarification, this does not affect DBCT Management's obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Agreement or the Access Framework.

- (o) DBCT Management must make a copy of the Terminal Regulations available to the User (which may be by displaying it on DBCT Management's website).

### **3.7 Addressing disproportionate use of Terminal capacity and risk minimisation**

- (a) If at any time DBCT Management, acting reasonably and on the recommendation of the Operator, considers that:
- (i) the User is disproportionately consuming the capacity of the Terminal (when compared with other Access Holders or Existing Users on a per tonne basis) and other Access Holders are materially adversely affected as a result; or
  - (ii) the provision of the User's Coal to the Terminal or Handling of that Coal at the Terminal creates a disproportionate risk to the Terminal (when compared with Coal of other Access Holders or Existing Users),
- and that it is reasonably practicable for the User to reduce that disproportionate consumption of capacity or disproportionate risk, DBCT Management may give written notice to the User to that effect.
- (b) If DBCT Management gives notice to the User pursuant to clause 3.7(a) the User must:
- (i) meet with DBCT Management (or with the Operator if DBCT Management gives notice that the Operator is authorised to act as its nominee) to attempt to agree on an appropriate action plan; and
  - (ii) promptly, and in any event, within 60 days of the meeting referred to in clause ~~3.7(b)(i)~~~~3-7(a)(i)~~, develop and implement an action plan agreed between the parties or (if there is no agreement, but it is consistent with clause 3.7(c)) an action plan required by DBCT Management.
- (c) DBCT Management is not entitled to require anything in an action plan which would be:
- (i) unreasonable or uneconomic for the User in all the circumstances; or
  - (ii) inconsistent with what is generally accepted as good operating practice in the prevailing circumstances.
- (d) A dispute between DBCT Management (or the Operator) and the User in respect of this clause 3.7 may be referred to dispute resolution in accordance with clause 15.

## **4. PAYMENT OF CHARGES AND ADJUSTMENTS**

### **4.1 Interpretation of Pricing Provisions**

In this Agreement, the following principles of interpretation shall apply:

- (a) for so long as there is a single Terminal Component, the terms and definitions of this Agreement relevant to pricing apply to all Access collectively; and
- (b) where there are multiple Terminal Components, the terms and definitions of this Agreement relevant to pricing apply to each Terminal Component separately.

For the avoidance of doubt, the Access contracted under this Agreement relates to [the Existing Terminal / a Differentiated Expansion Component].

### **4.2 Charges payable regardless of remedies**

The charges payable pursuant to this clause 4 must be paid by the User promptly when due, regardless of any remedies which might be available to the User pursuant to clause 13 or otherwise:

- (a) except to the extent that clause 5.3 applies;
- (b) unless and until, and to the extent that, it is determined through dispute resolution or agreed that the charges are not payable pursuant to clause 13.4(b); and
- (c) unless a relevant Delay is caused by Wilful Default by DBCT Management (clause 13.5).

#### **4.3 Access Charges**

Access Charges for each Terminal Component will comprise two parts:

- (a) a TIC; and
- (b) a charge to recoup the costs of operation and maintenance of the Terminal, being:
  - (i) the Handling Charge – Fixed;
  - (ii) the Handling Charge – Variable; and
  - (iii) where applicable, charges for Miscellaneous Services.

#### **4.4 User to pay TIC**

The User must pay the TIC to DBCT Management for each tonne of Annual Contract Tonnage by monthly instalments (each a Monthly Payment) in accordance with clause 5.1(b).

#### **4.5 User to pay Handling Charge - Fixed**

- (a) The User must pay HCF to DBCT Management, calculated in accordance with clause 6.2.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCF reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.6 User to pay Handling Charges - Variable**

- (a) The User must pay HCV to DBCT Management, calculated in accordance with clause 6.3.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCV reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.7 User to pay Miscellaneous Services charges**

The User must pay DBCT Management for Miscellaneous Services provided at the Terminal where such services are charged separately from HCF and HCV, at the rates applicable pursuant to clause 6.4.

#### **4.8 DBCT Management's business interruption insurance**

Any insurance premium which relates to business interruption cover for DBCT Management will not form part of any HCV, HCF or Miscellaneous Charge. (For clarification, this is because of the obligation of Access Holders whose Access Agreement is on the terms of the Standard Access Agreement to continue paying Access Charges whilst an event of Force Majeure continues - clause 13.3(b)).

## 5. ACCOUNTS

### 5.1 Calculation, rendering and payment of tax invoices

- (a) DBCT Management and the User must give each other appropriate tax invoices or adjustment notes for any charge payable by the User to DBCT Management or any amounts payable by DBCT Management to the User under clause 4.
- (b) With respect to the Monthly Payment, HCF, HCV and charges for Miscellaneous Services, the User must pay each tax invoice duly given to it by DBCT Management by no later than that date (the "Due Date") which is 30 days after the date of receipt of that tax invoice.
- (c) Tax invoices may only be rendered by DBCT Management monthly in arrears for the Monthly Payment, and monthly instalments of HCF, HCV and charges for Miscellaneous Services.
- (d) With respect to the annual reconciliation and adjustment of HCF and HCV:
  - (i) DBCT Management must calculate and notify the User of any adjustment required against interim amounts paid in respect of HCF and HCV within one month from the end of the Financial Year to which it relates.
  - (ii) DBCT Management or the User (as applicable) must then give the other an appropriate tax invoice reflecting the payment to be made pursuant to any adjustment under clause 5.1(d)(i) on or before the date 14 days after the amount of the adjustment is notified to the User by DBCT Management (or, if later, within 14 days after the resolution of any dispute over the calculations of adjustments, including any dispute referred to in clause 5.1(d)(iv)).
  - (iii) The parties must pay the adjustment relevant under this clause 5.1(d) within 14 days after the receipt of a relevant tax invoice pursuant to clause 5.1(d)(ii).
  - (iv) If the adjustment contemplated under this clause 5.1(d) is wholly or partially impacted by a dispute (as between two or more of the User, another Access Holder, an Existing User and DBCT Management), no amount need be paid in respect of that disputed amount until that dispute has been resolved but, as far as it is practicable, undisputed amounts must be promptly paid (with tax invoices being given accordingly, but the giving of a tax invoice in respect of the undisputed part of a payment will not prejudice the dispute). DBCT Management and the User must use reasonable endeavours to attempt to expeditiously resolve any such dispute to which they are a party.

### 5.2 Interest on late payments

- (a) If the User does not pay a tax invoice by the Due Date, DBCT Management, without prejudice to its other rights under this Agreement, may charge interest to the User on the amount owed computed from the Due Date to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself incur interest, on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.
- (b) If DBCT Management does not make a payment to the User on the date due for such payment or does not notify the User of the amount of an adjustment to be paid by DBCT Management by the required date to do so, the User, without prejudice to its rights under this Agreement, may charge interest to DBCT Management on the amount owed computed from the date due for such payment (or the date on which payment would have become due had the adjustment been duly notified) to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself

incur interest on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.

### 5.3 Disputes over accounts

- (a) Subject to clause 5.1(d)(iv) if the User disputes the amount of a tax invoice from DBCT Management on the basis that it contains a manifest administrative error or is incorrectly calculated, then the User must pay:
- (i) the whole of the undisputed part of the tax invoice by the Due Date; and
  - (ii) 50% of the disputed portion, pending resolution of that dispute (and the User will not be in default for non-payment, if it does so).
- (b) Payment in accordance with clause 5.3(a) will not prejudice the User's rights under clause 15.
- (c) If following the resolution of a dispute, DBCT Management refunds that portion of the disputed tax invoice which has been paid or the User pays the unpaid portion of a disputed tax invoice, then DBCT Management or the User shall pay interest at the No Fault Interest Rate on the refunded amount (in the case of DBCT Management) or the paid amount (in the case of the User) computed from the date on which the disputed amount was originally due to the date the adjustment is paid.

## 6. HANDLING CHARGES

### 6.1 Utilisation Advice

- (a) As soon as practicable after the Execution Date, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the balance of the then current Financial Year (on a monthly basis) and the next 3 full Financial Years of the Term (on an annual basis).
- (b) By no later than 15 February in each Financial Year, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the next full Financial Year (on a monthly basis) and the 3 full Financial Years of the Term following that next Financial Year (on an annual basis).
- (c) In the five Business Days preceding each 1 July, 1 October, 1 January and 1 April in each Financial Year, the User must update DBCT Management and the Operator with a revised Utilisation Advice relating to that Financial Year, together with projections of similar information for the 12 month period commencing on the date of that update.
- (d) The User will be under no liability to DBCT Management if the actual number, types or tonnages of vessels or the amount of Coal is or are greater or fewer than the number, types, tonnages or amounts estimated in this clause or estimated in any advice given pursuant to this clause 6.1.

### 6.2 HCF

- (a) HCF for each Financial Year in respect of the Terminal Component is calculated as follows:-

$$HCF = [OFC + DC + MC] \times \frac{ACT}{TACT}$$

Where:-

OFC is the aggregate of all Fixed Operating Costs for the Financial Year in respect of the relevant Terminal Component;

DC is other expenditure (not being Capital Expenditure) incurred by the Operator for the operation and maintenance of the relevant Terminal Component (including any Operator's margin) for that Financial Year and reimbursable by DBCT Management pursuant to the Operation & Maintenance Contract;

MC is the minor Capital Expenditure for the relevant Terminal Component (not included in DC) in the relevant Financial Year, to a maximum of \$3 million;

ACT is the User's Annual Contract Tonnage in respect of the relevant Terminal Component; and

TACT is the total of the annual contract tonnages (or if an Existing User's actual tonnage Shipped is greater than its annual contract tonnage, the actual tonnage Shipped) of all Access Holders and Existing Users for each relevant Financial Year in respect of the relevant Terminal Component.

- (b) As soon as practicable after each 31 May, having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCF payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.3 HCV

- (a) HCV for each Financial Year in respect of the Terminal Component is calculated as follows:-

$$HCV = \frac{OVC}{TTCS} \times \text{the actual number of tonnes of Coal Shipped by the User pursuant to this Agreement in the relevant Financial Year in respect of the relevant Terminal Component.}$$

Where:-

OVC is the aggregate of all Variable Operating Costs in respect of the Handling of all Coal through the relevant Terminal Component for a Financial Year; and

TTCS is the total number of tonnes of Coal Shipped through the relevant Terminal Component during that Financial Year.

- (b) As soon as practicable after each 31 May, and having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCV payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.4 Miscellaneous Services

- (a) Charges for Miscellaneous Services must be an amount which the Operator reasonably estimates as:-
- (i) relevant reasonable additional costs to be incurred by the Operator as a result of the Miscellaneous Services including the Operator's profit margin; and
  - (ii) any other additional costs likely to be incurred by other Access Holders and Existing Users (for example, additional demurrage) as a result of the delays in Handling other Coal, arising out of the Miscellaneous Services.
- (b) Any charges recovered under this clause 6.4 or an equivalent clause in another Access Agreement or Existing User Agreement must be deducted from operating costs and the Operator's margin in respect of those operating costs for the purposes of calculating HCF and HCV.

- (c) The parties recognise that the Operator has historically charged Access Holders and Existing Users directly for some services provided at the Terminal, and nothing in this Agreement precludes that practice from continuing.

## **7. REVIEW OF ACCESS CHARGES**

### **7.1 Amendments to TIC**

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

### **7.2 5 year review of charges**

- (a) At the request of either party by notice to the other party no later than 18 months prior to the start of a Pricing Period, all charges under this Agreement and the method of calculating, paying and reconciling them (including the terms of Schedule 2) and any consequential changes in drafting of provisions will be reviewed in their entirety, effective from the start of each Pricing Period, in accordance with the following provisions of this clause 7.2.
- (b) Each review pursuant to clause 7.2(a) will determine the types, calculation, payment and reconciliation of charges payable by the User pursuant to this Agreement, and may have regard to the terms of the Access Framework effective at the time of the review.
- (c) DBCT Management and the User must commence each review pursuant to clause 7.2(a) no later than 18 months prior to the start of a Pricing Period, and:
- (i) the parties must endeavour to agree as early as it is practicable to do so (if possible, by no later than the start of the relevant Pricing Period) on the basis and amount of new charges to apply from the start of that Pricing Period;
  - (ii) if the parties do not reach agreement by the date 6 months prior to the start of the relevant Pricing Period, either party may refer the determination of the issues to arbitration in accordance with the Access Framework;
  - (iii) if there is no agreement or determination by the start of the Pricing Period then:
    - (A) the charges (and method of paying and reconciling them) applying prior to that Pricing Period will continue to apply until otherwise agreed or determined; and
    - (B) any determination or agreement will (unless the parties otherwise agree) operate retrospectively from the start of the relevant Pricing Period and, as soon as practicable after the determination or agreement, an adjustment will be paid by the relevant party (based on the amounts which have been paid to that date on an interim basis and the amounts which are agreed or determined to be payable from the start of the relevant Pricing Period to the date the adjustment is paid) together with interest on the amount of the adjustment at the No Fault Interest Rate. The amount of interest will be determined by reconciling the amounts and timings of payments made on an interim basis with amounts payable and timing of those payments which would have applied in accordance with the agreement or determination.
- (d) If a matter is referred to arbitration under clause 7.2(c)(ii), the arbitration must be conducted in accordance with the Access Framework.

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

## **8. SET-OFF**

### **8.1 DBCT Management may set-off**

Unless otherwise stated, DBCT Management may set-off against any amount payable to the User under this Agreement any amount which is due and payable by the User to DBCT Management under this Agreement.

### **8.2 Amount set-off deemed to have been paid**

Any amount set-off by DBCT Management is deemed to have been paid by the User and the amount against which the set-off has been effected is deemed to have been paid by DBCT Management to the User.

### **8.3 User may set-off**

Unless otherwise stated, the User may set-off against any amount payable to DBCT Management under this Agreement any amount which is due and payable by DBCT Management to the User under this Agreement.

### **8.4 Amount set-off deemed to have been paid**

Any amount set-off by the User is deemed to have been paid by DBCT Management and the amount against which the set-off has been effected is deemed to have been paid by the User to DBCT Management.

## **9. DETERMINATION OF TONNAGE**

### **9.1 Certificate of weight and Cargo Manifest**

The User must:

- (a) commission an independent surveyor to issue a certificate of weight of each cargo of the User's Coal loaded on a vessel at the Terminal, based on vessel draught measurements at the Port, or otherwise cause the weight of each cargo to be determined and certified in another way which is independent and acceptable to DBCT Management (acting reasonably) and (if DBCT Management so requires) adopted by all Access Holders and Existing Users;
- (b) send the Cargo Manifest (which must include a statement as to the weight so certified under clause 9.1(a)) to DBCT Management (with a copy to the Operator) upon completion of the loading of each vessel with a cargo of the User's Coal; and
- (c) ensure that a Product Shipment Notice is attached to each Cargo Manifest.

### **9.2 Basis of calculation**

DBCT Management must use the information contained in each Cargo Manifest and Product Shipment Notice as the basis of calculating charges payable under this Agreement.

### 9.3 Further account

- (a) If at any time:-
- (i) DBCT Management can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid less than it was entitled to, DBCT Management may calculate and send to the User a further tax invoice for the difference owed to DBCT Management; and
  - (ii) the User can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid more than it was entitled to, DBCT Management must upon request by the User and delivery of a tax invoice or adjustment note, either pay to the User the difference owed to the User or issue a credit note to the User for the difference owed to the User.
- (b) In addition to payment of the amount referred to under 9.3(a) ("**Applicable Amount**"), DBCT Management (in the case of clause 9.3(a)(i)) or the User (in the case of clause 9.3(a)(ii)) shall be entitled to interest on the Applicable Amount calculated at the No Fault Interest Rate and calculated from the date on which the incorrectly calculated invoice was paid to the date on which the Applicable Amount was actually paid.

## 10. EXPANSION OF TERMINAL

### 10.1 Actions preliminary to decision to expand the Terminal

Before making any decision to expand the Terminal, DBCT Management must:

- (a) advise the User of the reasons for, extent, timing and estimated cost of any Expansion Component under consideration;
- (b) consult the User as to whether changes in the User's Annual Contract Tonnage or the method of operation of the Terminal, including the User's arrangements for Shipping its Coal, would avoid or delay the need for the Expansion Component or reduce the extent or estimated cost of the Expansion Component; and
- (c) consider how to maximise the utilisation of the Terminal.

Nothing in this clause 10.1 limits any provision of the Access Framework.

### 10.2 Minimisation of interference

DBCT Management must use all reasonable endeavours to carry out any Terminal Capacity Expansion of or other work at the Terminal and any infrastructure connected to the Terminal so as to minimise interference with the Handling of the User's Coal.

### 10.3 Terminal and System Capacity

- (a) DBCT Management will from time to time estimate Terminal Capacity (and Expansion Component Capacity, including Socialised Terminal Capacity or Differentially Priced Capacity for each Expansion Component, as applicable) and System Capacity in accordance with the Access Framework (or if there is no provision for doing so in an Access Framework at a relevant time, in accordance with the process applying under the last access undertaking or framework in which such a process was provided for).
- (b) DBCT Management must reassess Terminal Capacity, each relevant Expansion Component Capacity and System Capacity before entering into any new Access Agreement or otherwise increasing the aggregate tonnage of Coal contracted to be Handled through the Terminal, unless it considers that none of the factors to be taken

into account in determining Terminal Capacity, any relevant Expansion Component Capacity and System Capacity have materially changed since the most recent determination of Terminal Capacity, any relevant Expansion Component Capacity and System Capacity and that determination was made less than 12 months previously.

- (c) DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new Access Agreement if it was entered into) exceed the System Capacity (as determined for the relevant time), unless otherwise required or permitted to do so by the Access Framework, law or an agreement relating to its tenure of the Terminal (including the Framework Agreement and the Port Services Agreement). For clarification:
- (i) without limiting clause 19, this does not prohibit DBCT Management from entering into a Conditional Access Agreement, as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on such Terminal Capacity Expansion occurring will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the completion of the relevant Terminal Capacity Expansion); and
  - (ii) DBCT Management will not be in breach of this Agreement if it has complied with the Access Framework (or made good faith and reasonable attempts to comply) but an assessment of System Capacity (after the assessment required by the Access Framework following the completion of a relevant Terminal Capacity Expansion) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (d) Notwithstanding any other provisions of this Agreement, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this clause 10.3 and Section 11.1 of the Access Framework, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) nor will it be liable to the User:
- (i) for any breach of this clause 10.3 or Section 11.1 of the Access Framework;
  - (ii) for any delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
  - (iii) if one or more factors related to utilisation of capacity of the Terminal or any other part of the System which subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under an Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor) provided that such factor is not a breach by DBCT Management of any other part of the Access Framework, this Agreement or any other Access Agreement; or
  - (iv) for any defect, error or omission on the part of the independent expert appointed under the Access Framework to assist with the assessment of Terminal Capacity, each relevant Expansion Component Capacity (including Socialised Terminal Capacity and Differentially Priced Capacity) and System Capacity.
- (e) Subject to the provisions of this Agreement and to the requirements and provisions of the Access Framework, any statute and any agreement in respect of the tenure of the Terminal (including the Framework Agreement and the Port Services Agreement),

DBCT Management agrees with the User that any request by the User for an increase in Annual Contract Tonnage pursuant to clause 11.1 will be agreed to, to the extent that it does not cause System Capacity to be exceeded and in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Framework.

## 11. CHANGES TO ANNUAL CONTRACT TONNAGE

### 11.1 Adjustments at User's request

- (a) The User may only adjust its Annual Contract Tonnage pursuant to this clause 11.1 or clause 12.2.
- (b) [From the date 5 years after the commencement of the Shipment (or increased rate of Shipment) of Coal arising out of the Current Expansion - *add these words for an Access Agreement under which Coal is Shipped for 10 years or more and which necessitated an Expansion*] The User may without penalty reduce the Annual Contract Tonnage by giving not less than five years notice to DBCT Management of the extent and the period of the reduction required.
- (c) If the User wishes to increase the Annual Contract Tonnage (for all or any part of the remainder of the Term), either:-
- (i) from the Annual Contract Tonnage at the Effective Date; or
  - (ii) from a lesser or greater Annual Contract Tonnage previously adjusted under this clause 11.1,
- then the User may so notify DBCT Management, which may:-
- (iii) subject to the availability of unallocated Terminal Capacity and System Capacity and the provisions of clauses 10.3 and 29.3, the Access Framework, any statute, and any agreement in respect of the tenure of the Terminal as it existed at 1 July 2005 (including the Port Services Agreement and the Framework Agreement), allow the User to increase the Annual Contract Tonnage (wholly or partially) to the respective amounts and periods requested in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Framework; or
  - (iv) advise the User that no increase can occur, because it would cause Terminal Capacity or System Capacity to be exceeded.
- (d) Nothing in this clause limits any other rights which the User may have as an Access Seeker under the Access Framework or in clause 12.3.

### 11.2 Shipping Coal in excess of Annual Contract Tonnage

The User must not Ship Coal in excess of its Annual Contract Tonnage. If the User wishes to Ship Coal in excess of its Annual Contract Tonnage, the User may seek from another Access Holder the assignment of additional annual contract tonnage under clause 12.2. In accordance with clause 12.3, DBCT Management will not unreasonably refuse to consent to such a proposed assignment.

### 11.3 User not using Annual Contract Tonnage

If, in the reasonable opinion of DBCT Management, a User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and such failure is not due to a Force Majeure event at the Terminal or a failure by DBCT Management to Ship the User's Coal, then the following will apply:-

- (a) DBCT Management may notify the User that DBCT Management has formed the opinion that the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and that there is a reasonable expectation of demand from other Access Holders or Access Seekers for the User's underutilised tonnage;
- (b) the User must make submissions as to whether the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period within 21 days of receiving the notice from DBCT Management;
- (c) if the User fails to produce reasonable evidence that demonstrates that it is likely in future to substantially Ship the whole of its Annual Contract Tonnage, then DBCT Management may notify the User that it intends to appropriately reduce the User's Annual Contract Tonnage;
- (d) if the User considers that DBCT Management has not complied with the requirements of this clause in reducing the User's Annual Contract Tonnage, then the User may, within 21 days of receiving notice under clause 11.3(c), refer the matter to dispute resolution in accordance with clause 15; and
- (e) DBCT Management must not implement a reduction in Annual Contract Tonnage until the expiration of the period for resolution of a dispute referred to in clause 11.3(d).

#### **11.4 Capacity to be taken into account only once**

If the User notifies DBCT Management that the User is unable to, and forgoes its right to, Ship all or part of its Annual Contract Tonnage (the "**Notified Tonnage**") through the Terminal for any period (the "**Notified Period**"), then, for the purpose of charges otherwise payable by the User for the Notified Period, the User's Annual Contract Tonnage will be taken to be reduced by such part of the Notified Tonnage in respect of which DBCT Management grants additional annual contract tonnage to another Access Holder (for the same or comparable charges to those reduced under this clause) and which DBCT Management would not have been able to grant (due to lack of capacity) but for the User foregoing its right to Ship the Notified Tonnage through the Terminal.

#### **11.5 Reduction in tonnes Handled where User fails to obtain rail access**

- (a) Before the User is entitled to have coal Handled pursuant to this Agreement, it must produce evidence reasonably satisfactory to DBCT Management that the Annual Contract Tonnage under this Agreement is matched by an entitlement held by the User (or a person on its behalf) to railway track access relating to the coal the subject of this User Agreement:
  - (i) for the whole of the Term; or
  - (ii) for any relevant shorter period.
- (b) If the User only produces such evidence of access to railway track entitlement pursuant to clause 11.5(a)(ii) for a period shorter than the entire Term, it must continue to provide evidence of such access before the commencement of each successive period during the Term for which such evidence has not previously been produced, and the provisions of clause 11.5(c) will apply in respect of each of the first and each successive such period during the Term.
- (c) To the extent the tonnage in respect of which the User is able to demonstrate an entitlement to railway track access for a relevant period is less than the Annual Contract Tonnage for that period, the Annual Contract Tonnage will (despite any other provisions of this Agreement):
  - (i) be deemed to be reduced to that lesser tonnage, for all purposes relevant to the entitlement to have coal Handled at the Terminal pursuant to this Agreement during such period; but

- (ii) will remain unchanged for all other purposes pursuant to this Agreement, and specifically for the purposes of the liability of the User to pay Access Charges and any other amount payable pursuant to this Agreement based on the actual Annual Contract Tonnage.
- (d) DBCT Management will in good faith make an assessment of the tonnage of coal able to be railed to the Terminal pursuant to an entitlement to railway track access (which would normally be expressed as a number of train paths for any relevant period) and (subject to clause 15) the tonnage so determined shall be the tonnage which is adopted for the purpose of comparison with the Annual Contract Tonnage for a period for the purposes of this clause 11.5.
- (e) Where a relevant period is not a whole Financial Year or not two or more whole Financial Years, references in this clause to Annual Contract Tonnage over that period will mean that part of the Annual Contract Tonnage which accrues over that period, assuming it accrues throughout each Financial Year in equal increments.

## **12. ASSIGNMENT**

### **12.1 DBCT Management may assign**

After consultation with the User, DBCT Management may assign all or any part of its benefits under this Agreement to any person who is responsible and has the expertise and financial capacity needed to operate and maintain the Terminal and comply with the obligations of DBCT Management under this Agreement.

### **12.2 User may assign**

With the prior consent of DBCT Management, which consent will not be unreasonably withheld, a User may assign all or part of its rights or entitlements under this Agreement (including, in particular, all or part of its Annual Contract Tonnage) permanently or temporarily on the following basis:

- (a) the assignment will not be effective unless:- the assignee enters into a deed (prepared by DBCT Management at the expense of such assignee) with DBCT Management substantially in the form contained in Schedule 6 by which DBCT Management and the assignee agree to be bound by the terms, conditions and obligations of this Agreement or the assignee's Access Agreement (as DBCT Management, acting reasonably, determines) in respect of the assigned rights or entitlements as if the assignee were the User in respect of those assigned rights and entitlements;
- (b) when the assignment takes effect, the User will be discharged from all terms, conditions and obligations of this Agreement (except to the extent that they accrued prior to the assignment) in respect of the rights and entitlements assigned; and
- (c) if the User assigns only part of its rights or entitlements to another person, this Agreement will be treated from that time as if it were only an Agreement in respect of the unassigned rights or entitlements.

For clarification, "assign" and "assignment" includes novation or variation to the parties' respective Access Agreements.

### **12.3 Response to requests for consent to assignment by User**

- (a) DBCT Management must consent to a proposed assignment of rights or entitlements under clause 12.2 (whether by way of assignment or novation) unless DBCT Management (acting reasonably) is satisfied that:
  - (i) the assignor is in material breach of this Agreement; or

- (ii) the assignee:
  - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement and does not otherwise provide security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;
  - (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; or
  - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf.
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in clause 12.3(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.
- (d) The User or the assignee may refer as a dispute to arbitration under clause 15 of this Agreement:
  - (i) any refusal by DBCT Management to consent to a transfer;
  - (ii) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer; and
  - (iii) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

#### 12.4 Change of control of User

- (a) The User must obtain DBCT Management's consent (not to be unreasonably withheld or delayed) to any Change of Control in the User. DBCT Management's consent may be subject to reasonable conditions (including the provision of reasonable security) and the User must comply with any conditions.
- (b) Any dispute in respect of the reasonableness of any refusal by DBCT to consent to a Change of Control, or of any conditions sought by DBCT Management under this clause 12.4, may be referred as a dispute under clause 15.

#### 12.5 Permission to third party to Ship

~~With the prior consent of DBCT Management (which will not be unreasonably refused, particularly if the third party is another Access Holder),~~ The User may permit a third party to Ship Coal through the Terminal treating that cargo as part of the User's Annual Contract Tonnage, without complying with clause 12.2. In such case:

- (a) the User will remain liable for the performance of its obligations under this Agreement in respect of all Coal so Handled, and for all purposes that Coal will be taken to be the Coal of the User Handled pursuant to this Agreement;
- (b) the User must give DBCT Management and the Operator a notice in the form of Schedule 7 ~~(which will constitute a request for DBCT Management's consent)~~ not less

than 14 days prior to the scheduled departure of the relevant vessel, but DBCT Management must accept such shorter period of notice as causes no unreasonable adverse consequences to it, the Operator, Existing Users or other Access Holders;

- (c) the cargo must be made in accordance with the notice provided under clause 12.5(b) ~~(provided that DBCT Management and the Operator do not refuse consent to the request made)~~; and
- (d) the Product Shipment Notice attached to the Cargo Manifest provided by the User under clause 9.1 must disclose the name or names of any third party so using the User's Annual Contract Tonnage, and the tonnages of Coal so Handled for that third party.

## 13. REMEDIES

### 13.1 DBCT Management's remedies in the event of Delay

- (a) To the extent that the User is responsible for a Delay, or a Delay arises from events external to the Terminal, DBCT Management's remedies will be limited to its entitlement to payment of the charges provided for in clause 4 of this Agreement.
- (b) Nothing in this clause 13.1 precludes DBCT Management from applying for an injunction, declaration or specific performance in respect of the User's obligations under this Agreement.

### 13.2 User's remedies in the event of Delay

To the extent that the User is not responsible for a Delay and to the extent that a Delay does not arise from events external to the Terminal, the User's remedies against DBCT Management in respect of the Delay are limited as set out below:

- (a) If the Delay is a Permissible Delay, DBCT Management will have no liability to the User in respect of any Claim for Loss arising from the Delay;
- (b) If the Delay arises from Force Majeure affecting DBCT Management's ability to comply with its obligations, clause 13.3 applies;
- (c) If the Delay arises from Wilful Default by DBCT Management, clause 13.5 applies; and
- (d) In all other circumstances, and without prejudice to its right to dispute responsibility for the Delay, the User must continue to meet its payment obligations under clause 4 unless and until the adjudication of an arbitrator, order of the Court or agreement between the parties, determines responsibility for the Delay, in which case clause 13.4 applies.

Nothing in this clause 13.2 precludes the User from applying for an injunction, declaration or specific performance in respect of DBCT Management's obligations under this Agreement.

### 13.3 Force Majeure

- (a) If DBCT Management is affected by an event of Force Majeure, such that it will be unable to fulfil all or part of its obligations under the Agreement (the "**Affected Obligations**"), and anticipates Delays exceeding 48 hours, it must notify the User within 7 days after the occurrence of the event, providing full details of:
  - (i) the Affected Obligations and Delays expected;
  - (ii) the action that DBCT Management has taken and proposes to take to remedy the situation; and
  - (iii) DBCT Management's estimate of the time during which it will be unable to carry out the Affected Obligations due to the event of Force Majeure.

- (b) DBCT Management's Affected Obligations under this Agreement shall be suspended (without it being in default) to the extent of and for the period that the performance of such obligations are affected by an event of Force Majeure, provided that it complies with clause 13.3(c). However, the User's obligations to pay the Charges in clause 4 will not abate during a period where DBCT Management is affected by an event of Force Majeure.
- (c) DBCT Management must:
  - (i) use all reasonable efforts (including the expenditure of reasonable sums of money) to mitigate the effect of the event of Force Majeure upon its performance of this Agreement; and
  - (ii) keep the User informed (not less than fortnightly) of the steps being taken to mitigate the effect upon the performance of this Agreement, including an estimate of the continued duration of the Delay.

#### **13.4 User's rights for Delays attributable to other circumstances**

In the circumstances in clause 13.2(d), DBCT Management's liability to the User is limited to:

- (a) the Third Party Amount; plus
- (b) if the adjudication of an arbitrator, order of a court or agreement between the parties determines that the Delay was at least 66% DBCT Management's Personal Responsibility, and to the extent that there is any shortfall in the recovery by the User of its Direct Loss from the Third Party Amount - the User's Direct Loss in respect of the Delay, but not exceeding the percentage of the User's Direct Loss equivalent to the percentage of DBCT Management's Personal Responsibility.

#### **13.5 Wilful Default by DBCT Management**

If a Delay is caused by Wilful Default by DBCT Management, the User:

- (a) is relieved to that extent of any corresponding payment obligations under clause 4;
- (b) may terminate this Agreement pursuant to clause 14.3; and
- (c) may sue DBCT Management for damages for breach of contract.

#### **13.6 Long Term Delays**

- (a) This clause 13.6 sets out certain rights and obligations of the parties in respect of Delays, including Long Term Delays. This clause 13.6 is:
  - (i) in addition to, and does not limit any other provision of this Agreement; and
  - (ii) does not limit or affect any other right which a party may have against another party in respect of an act or omission of the other party.
- (b) If Loss, damage or destruction occurs in respect of the Terminal, DBCT Management must promptly claim and thereafter promptly apply all relevant available insurance proceeds towards reinstatement of the damaged property, unless (having regard to factors such as the reasonably foreseeable ongoing needs for Handling at the Terminal) DBCT Management considers that reinstatement is not in the interests of stakeholders and no less than 60% of Access Holders and Existing Users (by tonnage) and DBCT Holdings all agree that reinstatement should not occur.
- (c) If Long-Term Delays occur, such that the capacity of the Terminal (as demonstrated by its performance) on a sustained on-going basis is less than 95% of the Aggregate Annual Contract Tonnage at that time (the difference being referred to as the "Shortfall"), then DBCT Management must undertake a Terminal Capacity Expansion

sufficient to eliminate the Shortfall if (and on the same basis as) DBCT Management would have been obliged under the terms of the Access Framework (in particular considering sections 11.3, 11.4, 11.7, and 11.8 of the Access Framework) to undertake a Terminal Capacity Expansion had the amount of the Shortfall been the annual contract tonnage sought by new Access Seekers whose offers to enter into Access Agreements prima facie triggered the requirement for a Terminal Capacity Expansion. For clarification, DBCT Management will not be obliged to undertake a Terminal Capacity Expansion under this Agreement:

- (i) if such Terminal Capacity Expansion is unreasonable and uneconomic pursuant to section 11.7 of the Access Framework; or
  - (ii) if section 11.8 of the Access Framework applies.
- (d) If at any time:
- (i) the capacity of the Terminal on a sustained ongoing basis is reduced to the order of 10%, or less, of the Aggregate Annual Contract Tonnage of all Access Holders and Existing Users at the time;
  - (ii) the reduction of capacity referred to in clause 13.6(d)(i) above, is not attributable to an act or omission of the User; and
  - (iii) DBCT Management does not, within a reasonable time after a written request by the User to do so ("reasonable" being assessed according to the extent of works needed to redress the situation), commence and expeditiously proceed with the works necessary to reinstate the Terminal to a capacity sufficient to meet the reasonably expected sustained ongoing demand for Handling of Coal (whether or not DBCT Management has an obligation to undertake such works),

the User may terminate this Agreement, on giving not less than 30 days' notice to DBCT Management to that effect in writing. Neither party will be liable to the other arising from such a termination (other than a liability which arises prior to the date of termination).

### **13.7 Limitation period for notice of Claims by User**

- (a) The User shall not be entitled to make any Claim against DBCT Management in respect of any Delay unless written notice of the Claim specifically reserving the User's rights under clause 13.2 has been given to DBCT Management by the date 4 months after the end of the Financial Year in which the Delay first occurred (or, if a material fact of a decisive character relating to the right to Claim against DBCT Management was not within the means of knowledge of the User until after that time, within 2 months of the date on which the User first becomes aware of that material fact). Any subsequent Loss arising directly or indirectly from the cause of the first occurrence may be included in the Claim without further notice being given, but a separate notice must be given for each different and unrelated cause from which it is alleged a Claim arises.
- (b) This clause 13.7 does not apply to a Claim to the extent that it is made under clause 13.6.

## **14. TERMINATION**

### **14.1 Suspension**

If the User is in default in the due and punctual performance of an obligation under this Agreement and:

- (a) in respect of the User's default of an obligation to pay money or to provide any Security required pursuant to clause 29, such default has not been remedied within 30 days after DBCT Management has given written notice to the User of the default; or
- (b) in respect of the User's default of a material obligation (other than an obligation to pay money or provide Security), such default has not been remedied, or the User has not expeditiously commenced to remedy it, within 60 days after DBCT Management has given written notice to the User of the default,

then, without prejudice to DBCT Management's other rights under this Agreement, DBCT Management may (by written notice to the User pursuant to this clause) suspend the User's rights to have its Coal Handled under this Agreement until payment (including interest under clause 5.2) is made, Security is provided or the other relevant default is remedied or commenced to be expeditiously remedied. If such suspension occurs, the User's obligations based on its Annual Contract Tonnage (for example charges based on those amounts) will be unchanged, but DBCT Management's obligations to Handle those amounts for the relevant Financial Year will be reduced proportionately.

#### **14.2 Termination by DBCT Management**

Subject to clause 14.5, if DBCT Management has duly given notice that it has suspended the User's rights to have its Coal Handled (but not the User's obligations) under this Agreement pursuant to clause 14.1 and if the default still has not been remedied after a further period of 14 days from the notice of suspension, DBCT Management may terminate this Agreement forthwith by further notice to the User pursuant to this clause.

#### **14.3 Termination by User**

Subject to clause 14.5, the User may terminate this Agreement by written notice to DBCT Management as follows:-

- (a) if DBCT Management is in default in the due and punctual performance of an obligation to pay money under this Agreement and such default has not been remedied for a period of 30 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied; or
- (b) if DBCT Management is in default in the due and punctual performance of a material obligation under this Agreement (not being an obligation to pay money or a Delay) and such default has not been remedied or DBCT Management has not expeditiously commenced to remedy such default within a period of 60 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied.

#### **14.4 Abandonment of Coal on termination**

The User must remove any of its Coal remaining in the Terminal within three months from the termination of this Agreement, whether by expiry or otherwise, failing which the Coal will be deemed abandoned.

#### **14.5 Disputes about defaults**

If an event or circumstance is alleged to constitute a default referred to in clause 14.2 or clause 14.3 and is the subject of a dispute under clause 15, then DBCT Management or the User (as applicable) shall not exercise any right to suspend or terminate this Agreement unless and until the default has not been rectified within a reasonable time (being not less than 14 days) after the end of the resolution process in clause 15.

## 15. GOVERNING LAW AND DISPUTE RESOLUTION

### 15.1 Governing law

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

### 15.2 Disputes

- (a) **(Disputes under this Agreement)** If a dispute between DBCT Management and the User arises out of or in connection with this Agreement, then, unless otherwise specified by the Access Framework or agreed by the parties in writing, such dispute will be resolved in accordance with this clause 15. Either party may give to the other party a notice of dispute in writing identifying and providing details of the dispute.
- (b) **(Disputes under the Access Framework)** If any dispute or question arises under or in relation to the Access Framework, including (without limitation) a dispute in relation to the negotiation of Access between an Access Seeker or Access Holder and DBCT Management, such dispute will be resolved in the manner specified in the Access Framework.
- (c) **(Dispute under Deed Poll)** Subject to clause 9.2.53 of the Deed Poll, the courts of Queensland have exclusive jurisdiction to determine any dispute arising under the Deed Poll.

### 15.3 Further steps required before arbitration

- (a) Subject to clause 15.5, no party may commence arbitration in respect of any dispute notified or notifiable under this clause 15 until that party has complied with the requirements of this clause 15.3.
- (b) Within 14 days after service of a notice of dispute, the senior executives of DBCT Management and the User (or people for the time being acting in that role) must confer at least once to attempt to resolve the dispute, and failing resolution of the dispute to consider and if possible agree on methods of resolving the dispute by other means.
- (c) If the dispute cannot be so resolved after a further period of 14 days or if at any time either DBCT Management or the User considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer such dispute to arbitration in accordance with clause 15.4.

### 15.4 Arbitration procedure

- (a) Any disputes that are not otherwise resolved in accordance with this clause 15 or the Access Framework will be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules (**Rules**).
- (b) The arbitration must be effected by a single suitably qualified and experienced arbitrator who is either:
  - (i) agreed upon between the parties; or
  - (ii) in default of such agreement within 10 days after the dispute is referred to arbitration, nominated by the Resolution Institute.
- (c) Any party to the arbitration may be represented before the arbitrator by a member of the legal profession without the need for leave of the arbitrator.
- (d) Any arbitration commenced under this Agreement may be consolidated with any other arbitration commenced under:
  - (i) this Agreement; and / or

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

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

- (e) The venue for any arbitration will be Brisbane, Queensland.
- (f) Unless otherwise determined by the arbitrator, the costs of the arbitration shall be paid by the unsuccessful party.

### **15.5 Interlocutory relief**

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

### **15.6 Dispute not to affect performance of obligations**

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

## **16. WARRANTIES**

### **16.1 Warranties by DBCT Management**

DBCT Management agrees and acknowledges that:

- (a) Subject to:
  - (i) an event of Force Majeure;
  - (ii) Maintenance Work; and
  - (iii) any decision to cease or reduce Maintenance Work for a component of the Terminal on the basis that it is more cost-efficient to replace it and it is to be replaced,

each Terminal Component will be maintained to be available to operate to at least its rated design capacity;
- (b) it will ensure that the Terminal is maintained in accordance with Good Operating and Maintenance Practice;
- (c) it will consult with the User in relation to the appointment of any replacement Operator of the Terminal and will promptly on request negotiate amendments to this Agreement to reflect the terms of any new Access Framework, from the time (should it occur) that Dalrymple Bay Coal Terminal Pty Ltd ceases to be the Operator;
- (d) the User will (at no charge, but at its own cost) be granted reasonable access to the Terminal for reasonable purposes, including customer goodwill inspections, performance of shipping agent functions, Coal sampling and User inspections of Operations, provided that on each occasion the User complies with the Operator's site rules, DBCT Management's reasonable visitor notification requirements and the User is accompanied by an authorised person at such times while on the Terminal site as DBCT Management or the Operator reasonably requires (provided that they make such a representative available, having been given reasonable notice by the User).

## 16.2 Warranties by the parties

Each party warrants to the others that it has the requisite power to enter into this Agreement from the Execution Date.

## 17. USER COMMITTEE AND IMPROVEMENT PROGRAM

### 17.1 Participation in User Committee

DBCT Management and the User agree to participate in a committee consisting of one representative of each of DBCT Management, the Operator and each Access Holder and Existing User (the "**User Committee**").

### 17.2 Terms of reference of User Committee

The User Committee is established for the following purposes:

- (a) to provide a forum for consultation between all participants on matters relating to the operation and performance of the Terminal, including (without limitation) any factors relating to any participant which may impact on the future performance or efficiency of the Terminal;
- (b) to enable consultation between all participants on current and planned Terminal facilities, including all proposals for any enhancement of the Terminal; and
- (c) to consult on matters relating to the Terminal Regulations, including (without limitation) any proposed changes to the Terminal Regulations.

### 17.3 Frequency of meetings

DBCT Management and the User acknowledge that it is intended that the User Committee meet on a Quarterly basis and at such further times as participants in the User Committee agree.

### 17.4 Representation

DBCT Management and the User will each appoint, and acknowledge that each other prospective member of the User Committee is entitled to appoint, a person to represent its respective interests on the User Committee (each a "**Representative**"). If a Representative is not available to attend a meeting of the User Committee, the relevant member of the User Committee may nominate an alternate person to represent its interests at the User Committee.

### 17.5 Chairperson

The User agrees that the Representative appointed by DBCT Management will act as chairman of the User Committee.

### 17.6 Role of the Operator

DBCT Management must, as far as the Operation & Maintenance Contract allows, procure that the Operator provides appropriate support to the User Committee, including the provision of any relevant operational reports, as the User Committee may reasonably request the Operator to provide from time to time.

## 18. NOT USED

## 19. EXPANSION TONNES

*[A Conditional Access Agreement in which all or part of the Annual Contract Tonnage does not apply until a Terminal Capacity Expansion (the 'Current Expansion') has occurred, in*

***circumstances where that Terminal Capacity Expansion will form part of the Terminal under this Agreement once completed, will include a clause, an outline of terms of which are as follows:]***

- (a) Subject to clause 19(e), the Annual Contract Tonnage will be [increased by] [*insert*] Mtpa for the period commencing on the first day of the Month following completion and successful commissioning of the Current Expansion until the end of that Financial Year, and thereafter in each subsequent Financial Year. The target date for this to occur is [*insert*].
- (b) DBCT Management must provide at least monthly progress reports to the User in relation to the Current Expansion and such further progress reports as may reasonably be required as the Current Expansion nears completion.
- (c) DBCT Management's obligation to commence Handling, and the User's obligation to commence paying charges, in respect of the additional Annual Contract Tonnage arising out of the Current Expansion or any part thereof (as applicable) only begins on the first day of the Month following the date that DBCT Management gives the User a notice that the User is:
  - (i) awarded the additional Annual Contract Tonnage or any part thereof (as applicable); and
  - (ii) entitled to have the additional Annual Contract Tonnage or any part thereof (as applicable) handled at the Terminal.
- (d) DBCT Management must use reasonable endeavours to have the Current Expansion completed as close as practicable to the target date referred to in clause 19(a), but it will not be required to expend additional amounts to overcome delays caused by third parties or otherwise beyond the reasonable control of DBCT Management.
- (e) DBCT Management will proportionately reduce the Annual Contract Tonnage under this Agreement and the annual contract tonnages under all other Access Agreements entered into with the intention of utilising additional capacity arising out of the Current Expansion, if the actual Terminal Capacity following completion of the Current Expansion is less than the estimate of (expanded) Terminal Capacity made at the time this Agreement was entered into. That reduction will be by the proportion which the additional Terminal Capacity resulting from the Current Expansion as estimated at the time this Agreement was entered into bears to the actual additional Terminal Capacity arising from the Current Expansion. In relation to:
  - (i) Socialised Terminal Capacity, the allocation of proportionately reduced capacity will occur after first deducting any capacity required from the Current Expansion to "make up" any shortfall between already existing aggregate annual contract tonnages and actual Terminal Capacity which existed prior to the Current Expansion; and
  - (ii) Differentially Priced Capacity resulting from the Current Expansion will be allocated to meet the full entitlements under this Agreement and any other Access Agreements associated with the Differentially Priced Capacity.

## **20. OPTIONS**

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

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

the Term as already extended by the exercise of an option under this clause 20(a) for 5 years or more).

- (b) If DBCT Management receives an Access Application for additional capacity which cannot be met without a Terminal Capacity Expansion if the option in clause 20(a) and other relevant options are exercised, it may notify the User, requiring it to respond within 90 days, either exercising the option in clause 20(a) in respect of all or part of an extended Term and/or tonnage the subject of the option, or waiving it.
- (c) DBCT Management must give notices under clause 20(b) and any equivalent provision of another Access Agreement or Existing User Agreement to relevant Access Holders or Existing Users with options, in order of the earliest expiring Access Agreement or Existing User Agreement, for the purposes of deciding which option date is to be accelerated first. Where an Access Holder/s or Existing User/s with the earliest expiring date exercise/s its/their option by the accelerated date, DBCT Management may then go to the next Access Holder/s or Existing User/s in order of expiring agreements until there has been a waiver of sufficient options to ensure that the bona fide request can be accepted without the necessity for a Terminal Capacity Expansion. Access Holders or Existing Users whose terms expire within 6 months of each other will, for the purposes of this clause 20, be deemed to have terms which expire on the same date, and must be given notices at the same time.
- (d) Where more than one Access Holder or Existing User has tonnages which expire (or which are deemed to expire) on the same date, those Access Holders/Existing Users which do not exercise their accelerated option will lose the amount of tonnes the subject of the option proportionately with their respective annual contract tonnages immediately prior to the end of the current term. (For example, if a bona fide request for 5 Mtpa is received and Access Holders/Existing Users with 10, 5, 2 and 3 Mtpa of contracted tonnages do not exercise their options, then the options for those Access Holders/Existing Users will be reduced by 2.5, 1.25, 0.5 and 0.75 Mtpa respectively).
- (e) If the Access Application referred to in clause 20(b) is not converted into an Access Agreement within 3 months after the above process is completed, the status quo existing before notice from DBCT Management will be re-instated (i.e. options will not be taken to have been forfeited merely because the accelerated date for exercise has not been complied with, and any accelerated exercise of an option will be taken not to have occurred).

## 21. GST

- (a) Any reference in this clause to a term defined or used in the A New Tax System (Goods and Services Tax) Act 1999 is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.
- (b) Unless expressly included, the consideration for any supply made under or in connection with this Agreement does not include an amount on account of GST in respect of the supply ("**GST Exclusive Consideration**") except as provided under this clause.
- (c) Any amount referred to in this Agreement (other than an amount referred to in clause 21(f)) which is relevant in determining a payment to be made by one of the parties to the other is, unless indicated otherwise, a reference to that amount expressed on a GST exclusive basis.
- (d) To the extent that GST is payable in respect of any supply made by a party ("**Supplier**") under or in connection with this Agreement, the consideration to be provided under this Agreement for that supply (unless it is expressly stated to include GST) is increased by

an amount equal to the GST Exclusive Consideration (or its GST exclusive market value if applicable) multiplied by the rate at which GST is imposed in respect of the supply.

- (e) The recipient must pay the additional amount payable under clause 21(d) to the Supplier at the same time as the GST Exclusive Consideration is otherwise required to be provided.
- (f) Whenever an adjustment event occurs in relation to any taxable supply made under or in connection with this Agreement the Supplier must determine the net GST in relation to the supply (taking into account any adjustment) and if the net GST differs from the amount previously paid under clause 21(d), the amount of the difference must be paid by, refunded to or credited to the recipient, as applicable.
- (g) If one of the parties to this Agreement is entitled to be reimbursed or indemnified for a Loss, cost, expense or outgoing incurred in connection with this Agreement, then the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit to which the party being reimbursed or indemnified (or its representative member) is entitled in relation to that Loss, cost, expense or outgoing and then, if the amount of the payment is consideration or part consideration for a taxable supply, it must be increased on account of GST in accordance with clause 21(f).

## **22. NOTICES**

### **22.1 Notices and other communications**

All notices and other communications provided for or permitted under this Agreement must be in writing and must be given by mail, or facsimile transmission as follows:-

- (a) if to DBCT Management, to:-
  - Address: Level 15, 1 Eagle Street, Brisbane, Qld 4000
  - Attention: Chief Executive Officer
  - Fax No.: 07 3002 3101
  - Email: anthony.timbrell@dbctm.com.au
- (b) if to the User, to it at the address set out in Schedule 1,  
or to such other address or person as either party may specify by notice in writing to the other.

### **22.2 Deemed to have been given or made**

All such notices or communications are deemed to have been duly given or made:-

- (a) on the date upon which the notice or communication would, in the ordinary course of the post, have been delivered to the address to which it was posted;
- (b) when delivered; or
- (c) if sent by facsimile transmission, at the conclusion of an apparently successful transmission,

but if the delivery or facsimile is effected on a day that is not a Business Day or after 5pm in the place of receipt on a Business Day, it will be taken to have been given or made on the next Business Day.

**23. SURVIVAL OF REMEDIES**

The remedies of the parties arising by law, by the terms of this Agreement or otherwise are cumulative and will survive the termination of this Agreement by effluxion of time or otherwise.

**24. WAIVER**

A waiver by either party of any default in the strict and literal performance of or compliance with any provision of this Agreement will not be deemed to be a waiver of strict and literal performance of and compliance with any other provision of this Agreement nor to be a waiver of, or in any manner release the other party from, strict compliance with any provision, in the future nor will any delay or omission of either party to exercise any right under this Agreement in any manner impair the exercise of any such right accruing to it thereafter.

**25. COSTS**

Whether or not any of the transactions contemplated by this Agreement are consummated, each party must pay its own fees and expenses of and incidental to the negotiation, preparation and execution of this Agreement. The User will pay on demand any stamp duty payable on this Agreement.

**26. ENTIRE AGREEMENT****26.1 Full and Complete Understanding**

This Agreement constitutes the full and complete understanding between the parties with respect to the subject matter of this Agreement. There is no other oral understanding, agreement, warranty or representation whether express or implied in any way extending, defining or otherwise relating to the provisions of this Agreement or binding on the parties with respect to any of the matters to which this Agreement relates.

**26.2 No inducement**

Each of the parties covenants and irrevocably acknowledges that it has not been induced to enter into this Agreement by any statement, warranty, representation, understanding, act, omission, fact, matter, thing or conduct by or on behalf of any person including the other party, other than as expressly recorded in this Agreement.

**26.3 Provision is to remain in full force and effect**

The provisions of this clause 26 will operate and remain in full force and effect. No other fact, matter or circumstance, including breach of the provisions of the *Competition and Consumer Act 2010* (Cth) by a party to this Agreement, will interfere with or in any way derogate from the operation and effect of this clause.

**27. SEVERANCE**

If any term of this Agreement is for any reason acknowledged by the parties, or adjudged by a court of competent jurisdiction or held by any competent government authority to be invalid, illegal or unenforceable, such term or provision will be severed from the remainder of the provisions of this Agreement and will be deemed never to have been part of this Agreement and the remainder of the provisions of this Agreement will subsist and remain in full force and effect, unless a basic purpose or purposes of this Agreement would thereby be defeated.

## 28. JOINT VENTURE LIABILITY

*[insert as relevant]*

### 28.1 Definitions

In this clause:

- (a) “**Financial Obligation**” means an obligation of a party under or arising out of this Agreement to pay or cause to be paid an amount of money, including a liability for damages for a breach of a Performance Obligation;
- (b) “**Joint Venture**” means the joint venture between the Joint Venturers, details of which are set out in Item 3 of Schedule 1;
- (c) “**Joint Venture Percentage**” means the respective percentage interest of each Joint Venturer in the Joint Venture, as set out in Item 3 of Schedule 1;
- (d) “**Joint Venturers**” means each of the entities set out in Item 3 of Schedule 1 as holding a Joint Venture Percentage.
- (e) “**Performance Obligation**” means any obligation of a party arising under this Agreement, other than a Financial Obligation.

### 28.2 User agent for Joint Venturers

- (a) The User enters into this Agreement as agent for and on behalf of the Joint Venturers, and the User warrants that it is duly authorised to do so.
- (b) The User will not be personally liable under this Agreement in its capacity as agent for the Joint Venturers.

**OR**

### **[Joint Venturers comprise a single party]**

The Joint Venturers comprising the User will be a single party to this Agreement, but their respective rights against and liabilities to DBCT Management and DBCT Guarantor will be determined in accordance with this clause 28.]

### 28.3 Financial Obligations of Joint Venturers are several

Subject to clauses 28.4 and 28.5 (and any other provision of this Agreement which may expressly provide otherwise), the liability of each Joint Venturer in respect of each Financial Obligation of the User is several, and each Joint Venturer will only be liable for an amount owing by the User equivalent to its Joint Venture Percentage of that amount.

### 28.4 Rights and Performance Obligations of Joint Venturers are joint

- (a) Each right of the User under this Agreement can only be exercised by the User or by *[delete highlighted words where the Joint Venturers are all signatories in their own right]* the Joint Venturers jointly.
- (b) Each Joint Venturer will be jointly liable in respect of each Performance Obligation of the User (other than any Performance Obligation expressed to be imposed on an individual Joint Venturer).

### 28.5 Individual Joint Venturer default

- (a) If:
  - (i) a Joint Venturer defaults in respect of the performance of a Financial Obligation of the User;

- (ii) the other Joint Venturers are not in default in respect of that Financial Obligation; and
- (iii) **[where there is a single User, as agent for the Joint Venturers]** the User gives a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

**OR**

- (iv) **[where the Joint Venturers are all signatories in their own right ]** the other Joint Venturers give a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

then that defaulting Joint Venturer (unless it disputes the default in writing to DBCT Management within 7 days of receiving a copy of the notice) will be solely liable, to the extent of the default, in the performance of that Financial Obligation.

- (b) Any notice given pursuant to clause 28.5(a)(iii) and not disputed by the defaulting Joint Venturer within the time prescribed is conclusive evidence that the defaulting Joint Venturer specified in the notice is in default to the extent stated and the notice binds all parties unless and until revoked or amended by the User.
- (c) If more than one (but not all) Joint Venturers default and are subject to a notice under clause 28.5(a)(iii), they will be severally liable in proportion to their respective relevant Joint Venture Percentages.
- (d) Nothing in this clause 28 affects DBCT Management's rights under clauses 14.1 and 14.2 of this Agreement.

## **28.6 Clarifications**

For clarification:

- (a) any assignment by a Joint Venturer of any part of its Joint Venture Percentage in respect of this Agreement will be an assignment to which clause 12.2 applies, but in such a case references in that clause to the "User" and "assignee" respectively will be taken to refer only to the relevant Joint Venturer and the intended assignee from it;
- (b) any assignment by the User which is merely the substitution of a new agent for the Joint Venture (where there is no change in the Joint Venturers or the Joint Venture Percentages) will be consented to by DBCT Management unless it has reasonable grounds to object to the proposed new agent (for example, it is insolvent or has a history of default).

## **29. GUARANTEES OF USER**

### **29.1 User to provide Security **[insert if provision of security is a condition precedent]****

**[Notwithstanding clause 2]**, it is a condition precedent to this Agreement that the User must provide to DBCT Management, the Security in Schedule 8, effective not later than the Effective Date, to secure the obligations of the User to DBCT Management under this Agreement.

### **29.2 Failure to provide Security **[insert if relevant]****

If the User does not provide the Security referred to in clause 29.1, then this Agreement will have no force or effect.

### **29.3 Guarantee if User does not remain in good financial standing**

- (a) If after the Execution Date:

- (i) the User applies to DBCT Management to increase the Annual Contract Tonnage;
- (ii) in the reasonable opinion of DBCT Management, there is a likelihood that the User (or, if applicable, a provider of Security) may have ceased or will cease to be reputable or of good financial standing; or
- (iii) a Security previously given in connection with this Agreement is due to expire within 90 days,

the User must provide such information to DBCT Management as may be reasonably requested by DBCT Management by notice to establish that the User (or, as applicable, a provider of Security) is reputable and of good financial standing. DBCT Management must keep any such information in the strictest confidence, except that DBCT Management may disclose such information on a confidential basis to its financiers and consultants who require such information to assess the solvency and creditworthiness of the User or provider of Security.

- (b) If, after the Execution Date, in the reasonable opinion of DBCT Management:
  - (i) the User (or, as applicable, a provider of Security) has ceased to be reputable or of good financial standing with the capability to fulfil all of its obligations under (or in respect of) this Agreement; or
  - (ii) [where this Agreement concerns Access to a Differentiated Expansion Component] there is a materially increased risk that the circumstances in 29.3(b)(i) will occur prior to the earlier of the Terminating Date and the end of the Term,

then the User must provide, within 20 Business Days after written notice from DBCT Management, to DBCT Management, a Security which:-

  - (iii) secures (to an extent reasonable in the circumstances) the obligations under this Agreement of the User to DBCT Management;
  - (iv) is from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing and with the capability to fulfil or cause the fulfilment of all of the financial obligations of the User under this Agreement; and
  - (v) is in a form, and for an amount and period, satisfactory to DBCT Management (acting reasonably).
- (c) If the User does not provide such Security within 20 Business Days of receiving such written notice from DBCT Management, then the User will be in breach of a material obligation under this Agreement.
- (d) The User is entitled to dispute a conclusion by DBCT Management on which a notice under clauses 29.3(a) or 29.3(b) is based.

#### **29.4 Request to remove or reduce Security**

- (a) If the User has provided a Security pursuant to this clause 29 and considers that its financial circumstances have improved or any other relevant circumstances have changed since the provision of the Security, it may request DBCT Management to release or reduce the Security.
- (b) The User must provide to DBCT Management such evidence of its financial circumstances, or other relevant circumstances, as DBCT Management reasonably requests, before DBCT Management is obliged to consider the request.

- (c) DBCT Management must not unreasonably refuse any such request, but it may have regard to (amongst other things) the circumstances in which the Security was originally provided, changes in circumstances since that time, and any reasonable custom and practice of DBCT Management in respect of requiring security from new Access Holders.

### **30. GUARANTEE OF DBCT MANAGEMENT'S OBLIGATIONS**

#### **30.1 Guarantee**

DBCT Guarantor irrevocably and unconditionally guarantees to the User on demand payment of all amounts payable by DBCT Management under or arising out of this Agreement (including all amounts for which DBCT Management may become liable in respect of any breach of this Agreement).

#### **30.2 Unconditional nature of guarantee**

DBCT Guarantor agrees that DBCT Guarantor's obligations under this Agreement are unconditional (irrespective of the validity, regularity or enforceability of any provision of this Agreement or the absence of any action to enforce the same or the waiver or the consent of the User in respect of any provision of this Agreement or the recovery of any judgment against DBCT Management or any action to enforce the same or any variation of the terms of this Agreement or any other dealings, transactions or arrangements between the User and DBCT Management or other circumstances which might otherwise constitute a legal or equitable discharge of or defence to a surety). This guarantee shall be a continuing guarantee which shall not be discharged except by a complete performance of all obligations of DBCT Management under this Agreement.

#### **30.3 Guarantee not affected by changed circumstances**

The liability of DBCT Guarantor under this Agreement will not be lessened, affected or impaired by any time or indulgence granted to DBCT Management by the User or any dealings or transactions between the User and DBCT Management (whether or not DBCT Guarantor is a party or cognisant of the same) or by the dissolution of DBCT Management or any change in the status, functions, control or ownership of DBCT Management or any consolidation, merger, conveyance or transfer by DBCT Management or any waiver, variation or novation of this Agreement or other dealings, transactions or arrangements between the User and DBCT Management which might otherwise constitute a discharge to a surety.

#### **30.4 Capacity of DBCT Guarantor**

- (a) DBCT Guarantor enters into this Agreement as trustee of the DBCT Trust and in no other capacity.
- (b) Any liability of DBCT Guarantor arising from this Agreement can be enforced against DBCT Guarantor only to the extent to which it can be satisfied out of the property of the DBCT Trust and out of which the DBCT Guarantor is actually indemnified for the liability. This provision applies despite any other provision of this Agreement.
- (c) A person entitled to the benefit of this Agreement may not sue DBCT Guarantor personally or seek the appointment of a liquidator, administrator, receiver or similar person to DBCT Guarantor personally or prove any liquidation, administration or arrangement of or affecting DBCT Guarantor personally.
- (d) The provisions of this clause 30.4 do not apply to any obligation or liability of DBCT Guarantor to the extent that it is not satisfied because under its constitution or deed of trust or by operation of law there is a reduction in the extent of DBCT Guarantor's

indemnification over the assets of the DBCT Trust, as a result of DBCT Guarantor's fraud, negligence, breach of trust or breach of duty.

- (e) All of the provisions of this clause 30 are subject to this clause 30.4.

### **31. LIMITATIONS TO LOSSES AND DAMAGES**

#### **31.1 No indirect Loss or Consequential Loss**

Notwithstanding any other provision of this Agreement, DBCT Management is not liable to the User for any indirect Loss or Consequential Loss.

**SCHEDULE 1 - REFERENCE SCHEDULE**

<b>Item</b>	<b>Reference</b>	<b>Definition/Details</b>								
1	DBCT Management	DBCT Management Pty Limited ABN 16 097 698 916								
2	DBCT Guarantor	DBCT Investor Services Pty Ltd ABN 11 052 156 082 as trustee for the DBCT Trust								
3	User	<i>[Insert name, address for notices and contact details]</i>								
4	Execution Date									
5	Effective Date									
6	Term	[ ] years*  (* note: if this Agreement provides for the Shipping of Coal for 10 years or more the Option and rolling 12 month extension process in Clause 20 applies)								
7	Annual Contract Tonnage	<table> <thead> <tr> <th>Year</th> <th>Tonnage</th> </tr> </thead> <tbody> <tr> <td>20xx</td> <td>AAA</td> </tr> <tr> <td>20yy</td> <td>BBB</td> </tr> <tr> <td>20zz etc</td> <td>CCC</td> </tr> </tbody> </table>	Year	Tonnage	20xx	AAA	20yy	BBB	20zz etc	CCC
Year	Tonnage									
20xx	AAA									
20yy	BBB									
20zz etc	CCC									
8	Terminal Component	<p><i>[For an Agreement which is entered by an Expansion Party in respect of one or more Expansion Component(s) only, insert details of the Expansion Component(s)]</i></p> <p><i>[For an Agreement which is entered in respect of the Existing Terminal (excluding Expansion Components), identify the Existing Terminal excluding any Expansion Components]</i></p>								

## SCHEDULE 2 - CALCULATION OF TERMINAL INFRASTRUCTURE CHARGE AND MONTHLY PAYMENT

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### 1. Monthly Payment (MP)

For each Terminal Component the User must pay to DBCT Management a Monthly Payment in each Month "m" of each Financial Year ( $MP_{u,m}$ ), calculated as follows:-

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

where:-

**TIC** is the Terminal Infrastructure Charge per tonne of Annual Contract Tonnage applicable for a relevant Financial Year to the Terminal Component as specified under Schedule 2, Section 2, and amended or adjusted in accordance with Schedule 2, Section 3; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Annual Contract Tonnage attributable to each Month "m" of a Financial Year in respect of the Terminal Component. Where the rate of the Annual Contract Tonnage for the User does not vary during a Financial Year and applies to the full Financial Year, the MRT<sub>u,m</sub> for the User will be one-twelfth of the Annual Contract Tonnage for the relevant Financial Year. Where the rate of the Annual Contract Tonnage for the User varies during a Financial Year, the MRT<sub>u,m</sub> will vary from Month to Month to reflect one-twelfth of the annualised rate of the Annual Contract Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is amended or adjusted in accordance with Schedule 2, Section 3.

### 2. Terminal Infrastructure Charge (TIC)

The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date, being a charge per tonne of Annual Contract Tonnage for the Terminal Component, is \$[insert amount agreed between DBCTM and User or determined by the arbitrator in the event the Initial TIC is referred to arbitration under the Access Framework].

### 3. Amendment of the TIC

- (a) The TIC will be amended and adjusted annually and on the occurrence of a Review Event in accordance with section 10 and Schedule C of the Access Framework.
- (b) DBCT Management will notify the User of any amendment or adjustment to the TIC in accordance with Schedule C of the Access Framework.
- (c) Any amendment to the TIC will be effective from the date specified in the Access Framework.

## SCHEDULE 3 - SERVICES

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### 1. **Train scheduling**

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate cargo assembly windows at the terminal to receive Coal parcels and provide train operators and Access Holders with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of Coal in each Financial Year.

### 2. **Train unloading**

If a train carrying an Access Holder's Coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the Coal) consistent with achieving Handling of the Annual Contract Tonnage of Coal for an Access Holder.

### 3. **Reclaiming and vessel loading**

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive Coal) nominated by the User, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management in each Financial Year (as long as the vessel and/or cargo mix required by the User or its customer does not unreasonably impact on the efficiency of the Terminal); and
- (b) load the User's Coal into a vessel which is nominated by the User and is available for loading so as to achieve the objective in section 3(a).

### 4. **Incidental services**

DBCT Management must provide the following services, incidental to Coal handling (unless provided directly by the Operator):

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

### 5. **Miscellaneous services**

If required by the User or any Approval or statutory authority notified to DBCT Management, DBCT Management must provide the following Miscellaneous Services to the User:

- moisture adding;
- compacting;
- surfactant adding;

- dozing;
- blending (subject to section 6(d) below); and
- any other services reasonably requested from time to time in writing by the User to DBCT Management, provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal.

## 6. **Stockpiling and blending**

- (a) DBCT Management must provide to the User sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the User's Coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that the User is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the total annual contract tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in sections 6(a) and 6(b) are subject to any other obligation of DBCT Management under any Existing User Agreement with an Existing User entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend Coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:
  - (i) require Coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (ii) require Coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (iii) limit the proportions in which Coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer the User's Coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile the User's Coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## 7. **Prevention of contamination**

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

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

## 8. **Data provision**

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

## 9. Co-ordination

Subject to the User providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

- (a) ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the User's reasonable quality plans, reasonable shipping programs and contracts as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations, and
- (b) (subject to the foregoing and having regard to equity amongst Access Holders and Existing Users) use its best endeavours to minimise the aggregate cost to the User arising out of Handling at the Terminal (including Demurrage Costs and rail freight).

## 10. Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract

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

- (a) any relevant provisions of the Terminal Regulations;
- (b) any specific provision of this Agreement including any provisions relating to an event of Force Majeure;
- (c) the ability of DBCT Management to require the Operator under the Operation & Maintenance Contract to provide the Services; and
- (d) without limiting section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

## 11. Standard for Services

- (a) The provision of the above Services by DBCT Management must be carried out in accordance with due skill, care and diligence in accordance with the Access Framework, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable Laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (i) lowest total whole of life cost;
  - (ii) reliability and economy of performance;
  - (iii) maximising the effective life of the Terminal; and
  - (iv) DBCT Management's non-discrimination obligations under the Access Framework.

**SCHEDULE 4 – UTILISATION ADVICE**

**(clause 6.1)**

Calendar Year:														
Mine:														
	Annual Forecast	Updated Forecast				Additional Information								Comments / Exceptions
						Planned Mine Outages	Rail Ent.*	Ship Mix**						
Forecast Due Date	15-Feb	1 Jul	1 Oct	1 Jan	1 Apr			Handi	S-Pan.	M-Pan.	S-Cape.	M-Cape.	Unk	(Include comments on any special requirements, or exceptions from existing practice for the period)
Units	'000t	'0005	'000t	'000t	'000t	days	'000t	'000t	'000t	'000t	'000t	'000t	'000t	
Apr	----	----	----	----	----									
May	----	----	----	----	----									
Jun	----	----	----	----	----									
Jul			----	----	----									
Aug			----	----	----									
Sep			----	----	----									
Oct				----	----									
Nov					----									
Dec														
Jan														
Feb														
Mar														
Apr														
May														
Jun														
Jul	----	----												
Aug	----	----												
Sep	----	----												



**SCHEDULE 5 - PRODUCT SHIPMENT NOTICE**

**(clause 9.1)**

<b>TO</b>	:	North Queensland Bulk Ports Corporation Limited (Fax:            ) )
		DBCT Management Pty Ltd (Fax: 07 3002 3101)
<b>FROM</b>	:	<i>[User shipping coal]</i>
<b>SUBJECT</b>	:	Product Shipment Notice – DBCT
<b>DATE</b>	:	
<b>PAGE</b>	:	<b>1</b> (including this cover page)

<b>Ship Name:</b>	
<b>Date Departed:</b>	
<b>Shipping Number:</b>	
<b>Mine Name:</b>	
<b>User Agreement Name:</b>	
<b>Party liable for User Agreement charges:</b>	
<b>Total Number of Tonnes:</b>	

(This total **MUST** agree with Manifest. If the Manifest covers multiple cargoes, separate Product Shipment Notices for each cargo must be completed)

Does Manifest include more than one cargo?

- No             
 Yes

User: \_\_\_\_\_ Date: \_\_\_\_\_

**SCHEDULE 6 - TEMPLATE FOR ASSIGNMENT OF ANNUAL CONTRACT  
TONNAGE**

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**(clause 12.2)**

**Deed of Variation**

**DBCT Management Pty Limited**

**[User 1 full name]**

and

**[Assignee full name]**

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## This Deed of Variation

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

- 1 **DBCT Management Pty Limited**  
ACN 097 698 916)  
of Level 15, 1 Eagle Street, Brisbane, Queensland  
**(DBCT Management)**
- 2 **The User named in item 1 of the Schedule**  
([User 1])
- 3 **The person named in item 3 of the Schedule**  
([Assignee])

Recitals [Option 1 – Select this option where the Assignee is **not** an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.
- B. [User 1] is a party to a User Agreement with DBCT Management, and under the User Agreement DBCT Management grants [User 1] a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship Coal through the Terminal in the Swap Period under a User Agreement.
- E. [User 1] wishes to vary the Annual Contract Tonnage in its User Agreement so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the Terminal in the Swap Period, and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.
- F. [Assignee] wishes to enter into a User Agreement with DBCT Management to Ship the Swap Contract Tonnage through the Terminal in the Swap Period.
- G. DBCT Management has agreed to consent to the variation to [User 1]'s User Agreement to achieve that objective, on the terms of this deed.

Recitals [Option 2 – Select this option where the Assignee is an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.

- B. [User 1] and [Assignee] are each a party to a User Agreement with DBCT Management, and under each User Agreement DBCT Management grants them a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship more Coal through the Terminal in the Swap Period than its entitlement under [Assignee]'s User Agreement.
- E. [User 1] and [Assignee] wish to vary the Annual Contract Tonnages in their respective User Agreements so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the Terminal in the Swap Period (in addition to its existing Annual Contract Tonnage), and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.
- F. DBCT Management has agreed to consent to the variations to the User Agreements to achieve that objective, on the terms of this deed.

### The deed witnesses

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

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## 1 Definitions and interpretation

### 1.1 Definitions

**Effective Date** means the date set out in item 7 of the Schedule.

**Swap Contract Tonnage** means the absolute tonnages (or respective tonnages for respective periods) set out in item 6 of the Schedule. Where the Swap Period relates to part, but not all, of a Financial Year, the Swap Contract Tonnage in respect of that period is expressed as an annualised rate for that period - for the purposes of calculating the Monthly Charges for the Swap Period under the User Agreement and determining the rate at which Shipping is permitted in that period.

**Swap Period** means the period set out in item 5 of the Schedule.

[User 1]'s User Agreement means an agreement between DBCT Management and [User 1] bearing the date set out in item 2 of the Schedule.

[[Assignee]'s User Agreement means an agreement between DBCT Management and [Assignee] bearing the date set out in item 4 of the Schedule ~~and DBCT Management.~~] *[Drafting Note: Select this option if the Assignee is an existing User.]*

**[[Assignee]]'s User Agreement** means a User Agreement to be entered into between DBCT Management and **[Assignee]**. *[Drafting Note: Select this option if the Assignee is not an existing User.]*

User Agreement means one or more of **[User 1]**'s User Agreement and **[Assignee]**'s User Agreement as the context requires.

## 1.2 Interpretation

- (a) Terms which are defined in the User Agreement/s or Terminal Regulations have the same meaning in this deed (except where the context otherwise requires).
- (b) The interpretation provisions of the User Agreement/s apply in respect of the interpretation of this deed, as if set out in this deed.

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## 2 Variations to User Agreement/s

### 2.1 **[User 1]'s User Agreement**

As of the Effective Date, the Annual Contract Tonnage in **[User 1]**'s User Agreement is reduced by the Swap Contract Tonnage for the Swap Period.

### 2.2 **[Assignee]'s User Agreement**

As of the Effective Date, the Annual Contract Tonnage in **[Assignee]**'s User Agreement will be the Swap Contract Tonnage for the Swap Period. *[Drafting Note: Delete this paragraph if the Assignee is an existing User.]*

As of the Effective Date, the Annual Contract Tonnage in the **[Assignee]**'s User Agreement is increased by the Swap Contract Tonnage for the Swap Period. *[Drafting Note: Delete this paragraph if the Assignee is not an existing User.]*

### 2.3 Revised Consolidated Annual Contract Tonnages

DBCT Management will provide to **[User 1]** and **[Assignee]** respectively a revised, consolidated table of Annual Contract Tonnages for the Term of their User Agreement, to reflect the amendments [and new entitlements] pursuant to this deed. In the absence of manifest error, that table will be taken to replace the table of Annual Contract Tonnages previously applicable under the relevant User Agreement (if applicable). *[Drafting Note: Delete words in square brackets if the Assignee is an existing User.]*

### 2.4 Calculation of Entitlement under the Terminal Regulations

For the avoidance of any doubt, it is intended that **[Assignee]** will become entitled to the "Entitlement" under the Queue Management Procedures currently in place under the Terminal Regulations which **[User 1]** would (but for this deed) have previously been entitled to in relation to the Swap Contract Tonnage for the Swap Period, but that neither parties' Entitlements outside the Swap Period (if any) will be affected. *[Note: only*

***required if Terminal Regulations include a Queue Management System at the time this deed is entered into]***

## **2.5 Transitional**

- (a) The parties recognise that certain determinations (for example, the annualised amount of HCF and HCV) may have been made to date in respect of a current Financial Year before the variations in this deed were agreed.
- (b) DBCT Management shall, as soon as practicable, cause appropriate adjustments to be made in respect to the amounts charged under [[User 1]'s User Agreement/the respective User Agreements], to reflect the variations arising out of this deed. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***
- (c) Nothing in this deed requires DBCT Management or the Operator to pay or repay amounts other than adjustments of the kind already contemplated by [[User 1]'s User Agreement/the User Agreements]. In particular, DBCT Management is not as a result of the variations effected by this deed required to accelerate a payment, or to make a payment to either of the other parties which, in aggregate, is more than it would have otherwise have been required to make but for this deed. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***

## **2.6 User Agreements still in force**

Except as set out in clauses 2.1 and 2.2 of this deed, the parties agree and acknowledge that all other provisions of [User 1]'s User Agreement/the User Agreements] remain in full force and effect. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***

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## **3 Costs and stamp duty etc**

- (a) [User 1] and [Assignee] will each bear their own costs and expenses in respect of the negotiation, preparation and execution of this deed.
- (b) [Assignee] will be liable for the costs and expenses (including legal costs) of DBCT Management in respect of the negotiation, preparation and execution of this deed, and any stamp duty and other duties, taxes or other amounts payable as a result of this deed.

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## **4 Governing law**

This deed is governed by the laws of Queensland.

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## **5 Counterparts**

This deed may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one instrument.

## Schedule to Deed of Variation

(clause 12.2 Standard Access Agreement)

Item

1.	User reducing Annual Contract Tonnage	<i>[insert User 1 full name ]</i>
2.	<b>[User 1]</b> 's User Agreement (date)	<i>[insert date]</i>
3.	User <b>[increasing / acquiring]</b> Annual Contract Tonnage <b>[Drafting Note: Select the relevant option depending on whether the Assignee is an existing User.]</b>	<i>[insert Assignee's full name ] [insert date]</i>
4.	<b>[Assignee]</b> 's User Agreement (date)	<i>[insert date] [Drafting Note: Insert 'Not applicable' if the Assignee is not an existing User.]</i>
5.	Swap Period	<i>[insert start and end dates of Swap Period]</i>
6.	Swap Contract Tonnage	<i>[insert absolute no. of tonnes swapped for each relevant period and annualised rate for each period]Mt</i>  (Annualised rate*:[ <input type="text"/> ] Mtpa)
7.	Effective Date	<i>[insert date of agreement to swap]</i>

\* Annualised rate = (Swap Contract Tonnage / No. of days in Swap Period) x 365

---

**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management Pty Limited:**

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

\_\_\_\_\_  
Director

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

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

**Signed sealed and delivered by  
[User 1 full name]:**

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

\_\_\_\_\_  
Director

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

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

**Signed sealed and delivered by  
[Assignee full name]:**

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

\_\_\_\_\_  
Director

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

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

**SCHEDULE 7 - TEMPLATE ~~REQUEST NOTICE~~ FOR THIRD PARTY PERMISSION TO SHIP**

(clause 12.5)

**TO** : Dalrymple Bay Coal Terminal Pty Ltd (Fax: 07 4956 3353)  
 DBCT Management Pty Ltd (Fax: 07 3002 3101)

**FROM** : *[Principal's name*  
*Beneficiary's name]*

**SUBJECT** : ~~Notice of Request for~~ Permission for Third Party to Ship Coal

**DATE** :

<b>User offering the Capacity (Principal):</b>	
<b>Company accepting the Capacity (Beneficiary):</b>	
<b>Period pertaining to the swap:</b>	
<b>Total Number of Tonnes:</b>	
<b>Nominated Vessel (where known):</b>	
<b>Is this a:</b> (a) Transfer (i.e. a one-way transaction) that will not be repaid; or <input type="checkbox"/> (b) Swap (i.e. a two-way transaction) that will be repaid? <input type="checkbox"/> <b>Repayment date:</b> / / <b>When is repayment expected?</b>	

~~A~~ Acceptance-Acknowledgment of this ~~request notice~~ is subject to receipt of separate Product Shipment Notice (PSN) for all cargos. Invoicing will be in strict accordance with User Agreement terms (i.e. all charges will be to the Principal).

\_\_\_\_\_  
 Principal  
 Date of Request:

\_\_\_\_\_  
 Beneficiary  
 Date of Request:

~~Request Approved~~ Notice Acknowledged:

\_\_\_\_\_  
 DBCT Management Pty Ltd  
 Date of ~~Acknowledgment~~ approval:

## SCHEDULE 8 - SECURITY

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**(clause 29)**

***[Insert details, if applicable]***

*[eg The User must provide the following Security from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing, with the capability to fulfil all of the obligations of the User under this Agreement.]*

## SCHEDULE 9 - DEFINITIONS AND INTERPRETATION

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### Definitions

"**Access**" has the meaning given in the Access Framework.

"**Access Agreement**" has the meaning given in the Access Framework.

"**Access Application**" has the meaning given in the Access Framework.

"**Access Charges**" has the meaning given in the Access Framework.

"**Access Holder**" has the meaning given in the Access Framework.

"**Access Seekers**" has the meaning given in the Access Framework.

"**Access Framework**" means the access framework (including its schedules) applying to DBCT Management from time to time relating to provision of the Services by it, as implemented under the Deed Poll.

"**Aggregate Annual Contract Tonnage**" has the meaning given in the Access Framework.

"**Agreement**" means this agreement, including all schedules attached to it.

"**Annual Contract Tonnage**" means the maximum quantity of Coal that the User is entitled to deliver to and have Handled through the Terminal in a relevant Financial Year under this Agreement in accordance with Item 7 of Schedule 1 (as amended from time to time pursuant to this Agreement) including tonnage which the User is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations and any tonnage which the User would be entitled to have Handled but for the suspension of the User's right to have the tonnage Handled under this Agreement.

For clarification, where a Financial Year or any relevant period is less than twelve months, or the annualised rate of Annual Contract Tonnage varies during a Financial Year, the Annual Contract Tonnage will be expressed as the relevant annualised rate at a point in time for the purposes of calculating the charges payable each Month, but will nevertheless be the absolute amount of tonnes which the User is entitled to have Handled over the entire Financial Year for purposes such as any annual reconciliation of HCF and the tonnages included in the Aggregate Annual Contract Tonnage.

"**Approval**" has the meaning given in the Access Framework.

"**Business Day**" means any day other than a Saturday, a Sunday, or a public holiday in Brisbane.

"**Capital Expenditure**" means expenditure which:

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

but not expenditure recovered through HCF or HCV.

**"Cargo Manifest"** means the manifest referred to in clause 9.

**"Cash Rate Target"** means, at a relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website ([www.rba.gov.au](http://www.rba.gov.au)) at that time.

**"Change of Control"** will occur in the User if at any time during the term of this Agreement, any person obtains, or ceases to hold, directly or indirectly:

- (a) beneficial ownership of 50% or more (in aggregate) of the voting shares in the corporation; or
- (b) effective control of the board of directors of the corporation, other than as a result of the transfer of securities in a corporation listed on any recognised stock exchange.

**"Claim"** means any action, proceeding, allegation, demand or claim in any form for relief or compensation of any nature.

**"Coal"** means coal, coke, and other like materials as are approved by DBCT Management.

**"Commencement Date"** has the meaning given in the Access Framework.

**"Conditional Access Agreement"** has the meaning given in the Access Framework.

**"Consequential Loss"** means any one or more of the following:

- (a) Loss of profits; or
- (b) Loss of opportunity to make profits; or
- (c) Loss of business opportunity; or
- (d) special exemplary or punitive damages; or
- (e) any Loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such Loss, whether or not such Loss was in the contemplation of the parties at the time of entry into this agreement,

including any of the above types of Loss arising from an interruption to a business or activity.

**"Current Expansion"** means *(to be inserted as applicable)*.

**"Deed Poll"** means the irrevocable deed poll dated ~~[insert]~~ given signed by DBCT Management in March 2019 under which it covenants to comply with the Access Framework.

**"Default Interest Rate"** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 3.5%.

**"DBCT Management's Personal Responsibility"** means DBCT Management's personal liability as a result of its own acts or omissions, independently of and excluding any liability which it might have directly or indirectly arising from the acts or omissions of the Operator or third parties (including contractors and subcontractors of DBCT Management).

**"Delay"** means any delay, inability or failure (for any reason, including breach of this Agreement or negligence) to Ship or Handle Coal in the tonnages and at the rates contemplated in this Agreement. For the User, this includes a failure to deliver Coal to the Terminal or an inability to schedule vessels to load Coal. For DBCT Management, this includes the inability to provide Services at the Terminal (in whole or part) for any reason when Coal would otherwise have been made available by the User.

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

**"Differentially Priced Capacity"** has the meaning given in the Access Framework.

**"Differentiated Expansion Component"** has the meaning given in the Access Framework.

**"Direct Loss"** means charges actually paid pursuant to this Agreement in respect of the period of the Delay. For the purposes of clause 13.4, the User's Losses arising out of a Delay will be taken to include the amount of the relevant Direct Losses.

**"Due Date"** has the meaning given in clause 5.1.

**"Effective Date"** means,[ subject to prior satisfaction of the condition precedent in clause 29.1,] the date set out as such in Schedule 1.

**"Execution Date"** is the date described as such in Schedule 1 and will be completed as the day this Agreement is executed by the last of the parties to execute it.

**"Existing Terminal"** has the meaning given in the Access Framework.

**"Existing User"** means a party who has an entitlement to have coal Handled through the Terminal as at the Commencement Date.

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

**"Expansion Component"** has the meaning given in the Access Framework.

**"Expansion Component Capacity"** has the meaning given in the Access Framework.

**"Expansion Party"** has the meaning given in the Access Framework.

**"Financial Year"** means:-

- (a) the First Financial Year; and
- (b) each 12-month period from July 1 of one calendar year to June 30 of the next ensuing calendar year; and
- (c) any period from the last July 1 in the Term until the end of the Term.

**"First Financial Year"** means the period from the Effective Date to the next following 30 June.

**"Fixed Operating Costs"** means the aggregate of all amounts:

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

to the extent that they represent a fixed cost of operating the Terminal.

**"Force Majeure"** means any event or circumstance not within the control of DBCT Management, and which, by the exercise of a reasonable standard of care and diligence, DBCT Management could not have overcome. Any act or omission of the Operator will be assumed to be beyond the control of DBCT Management, unless it has been specifically directed by DBCT Management and carried out by the Operator in the manner in which it can reasonably be inferred that DBCT Management intended.

**"Framework Agreement"** means the framework agreement between DBCT Holdings Pty Ltd, the State of Queensland, DBCT Management and others dated 31 August 2001.

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

**"GST Exclusive Consideration"** has meaning given to it in clause 21(b).

**"Handle"** means the receiving by rail, unloading, stacking, storing, reclaiming and loading of vessels with Coal, including any other relevant Services required by the User using infrastructure at the Terminal.

**"HCF"** or **"Handling Charge - Fixed"** means the charge determined under clause 6.2.

**"HCV"** or **"Handling Charge - Variable"** means the charge determined under clause 6.3.

**"Independent Expert"** means an independent expert appointed under section 16.3 of the Access Framework.

**"Initial TIC"** means the TIC for the Terminal Component to apply under this Agreement from the Effective Date or the commencement of a Pricing Period. The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date is the amount specified in Schedule 2, clause 2.

**"Law"** means any law, statute, by-law, regulation, rule, order, ordinance, proclamation, or delegated or subordinated legislation of the Commonwealth or of any State or Territory of Australia or of any local government.

**"Long Term Delays"** means ongoing, sustained Delays that arise out of physical loss, destruction or damage at the Terminal.

**"Loss"** means any damage, loss (including loss of reputation), cost, expense, fine, penalty or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**"Maintenance Work"** means any work involving maintenance of or repairs to (including repair by replacement) any part of the Terminal, including any inspections or investigations required by Good Operating and Maintenance Practice.

**"Miscellaneous Services"** means:

- (a) services requested by the User from time to time which services are nominated in Schedule 3 as Miscellaneous Services; or
- (b) services to the extent that they are materially different (in nature, extent or cost) to the Services provided to other Access Holders and Existing Users at the Terminal including as a result of the nature of the User's Coal (or any contaminants in it) or requirements in respect of its handling, storage, blending, unloading or loading which result in materially additional costs or delays.

**"Month"** means a calendar month.

**"Monthly Payment"** means the monthly instalment of the TIC payable pursuant to clause 4.4, calculated (and adjusted as required) in accordance with Schedule 2.

**"Mtpa"** means million tonnes per annum.

**"No Fault Interest Rate"** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 0.2%.

**"Notified Period"** has the meaning given in clause 11.4.

**"Notified Tonnage"** has the meaning given in clause 11.4.

**"Notional Contracted Tonnage"** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**"Operation & Maintenance Contract"** means the agreement under which the Operator agrees to operate and maintain the Terminal on a day to day basis, and includes any other agreement in substitution for it under which DBCT Management agrees with a person to operate the Terminal.

**"Operator"** means Dalrymple Bay Coal Terminal Pty Ltd ACN 010 268 167 or such other contractor engaged by DBCT Management under the Operation & Maintenance Contract.

**"Permissible Delay"** means:

- (a) any Delay from which DBCT Management is released from liability pursuant to clauses 3.6(1) or 10.3; or
- (b) any Delay which is imposed by DBCT Management, acting reasonably:
  - (i) because it considers it necessary for the safety of any person or to prevent material damage to property (except where the threat to the person or property arises out of Wilful Default or reckless neglect on the part of DBCT Management); or
  - (ii) to facilitate the performance of Maintenance Work (other than Maintenance Work to the extent it is necessitated by Wilful Default or reckless neglect on the part of DBCT Management) or of a Terminal Capacity Expansion in accordance with clause 10.2.

**"Port"** means both the harbour of Hay Point proclaimed by the Governor-in-Council by Order-in-Council dated 30 October 1983, and all real property held by DBCT Management as part of or relating to that Port.

**"Port Services Agreement"** has the meaning given in the Framework Agreement.

**"Pricing Period"** means the period ending on 30 June 2026 and each subsequent 5 year period during the Term.

**"Product Shipment Notice"** means a notice in the form of Schedule 5.

**"Quarter"** means:

- (a) each 3 month period commencing on 1 July, 1 October, 1 January and 1 April; and
- (b) in respect of the first quarter, commencing on the Effective Date and ending on the day before the commencement of the next quarter.

**"Rail Operator"** has the meaning given in the Access Framework.

**"Representative"** has the meaning given to it in clause 17.4.

**"Review Event"** has the meaning given to it in the Access Framework.

**"Rules"** has the meaning given in clause 15.4(a).

**"Security"** means any form of security or guarantee required to be provided or in fact provided pursuant to clause 29.

**"Services"** means the services described in Schedule 3.

**"Ship"** means the delivery of Coal to the Terminal by rail and the arrangement of vessels by the User such that DBCT Management is able to Handle the User's Annual Contract Tonnage.

**"Socialised Terminal Capacity"** has the meaning given in the Access Framework.

**"Standard Access Agreement"** has the meaning given in the Access Framework.

**"Supplier"** has the meaning given to it in clause 21(d).

**“System”** has the meaning given in the Access Framework.

**“System Capacity”** has the meaning given in the Access Framework.

**"Term"** means the term of this Agreement as specified in Item 6 of Schedule 1, as extended in accordance with this Agreement.

**"Terminal"** means the Terminal Component of the land and port infrastructure located at the Port of Hay Point which is owned by DBCT Holdings Pty Ltd or the State of Queensland and leased to DBCT Guarantor and/or DBCT Management, and known as the Dalrymple Bay Coal Terminal, and includes the following which form part of the Terminal Component:

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

**"Terminal Capacity"** has the meaning given in the Access Framework.

**"Terminal Capacity Expansion"** has the meaning given in the Access Framework.

**“Terminal Component”** means the part of the Terminal as specified in Item 8 of Schedule 1.

**"Terminal Infrastructure Charge" or "TIC"** means the amount (per tonne) payable on the Annual Contract Tonnage specified in Schedule 2, as adjusted in accordance with Schedule 2 and the Access Framework.

**"Terminal Regulations"** means regulations in force and available on DBCT Management’s website governing procedures for the operation of the Terminal existing as at the commencement of this Agreement as amended from time to time in accordance with the Access Framework.

**"Terminating Date"** has the meaning given in the Access Framework.

**"Third Party Amount"** means the amount for which DBCT Management is actually indemnified by the Operator and/or another third party (including a liability insurer) in respect of liability for any Claim made by the User, less DBCT Management's costs of recovery of that amount. For clarification, if a Delay affects more than one Access Holder or Existing User, then the aggregate amount of any payment received by DBCT Management which related to a common Third Party Amount claimed by such affected Access Holders or Existing Users will be distributed to them in the proportions of their respective annual contracted tonnages.

**"User"** means the person specified in item 3 of Schedule 1.

**"User Committee"** has the meaning given to it in clause 17.1.

**"Utilisation Advice"** means a notice in the form in Schedule 4 given by the User to DBCT Management under clause 6.1.

**"Variable Operating Costs"** means the aggregate of all amounts:

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

to the extent that they represent a variable cost of operating the Terminal.

**“Vessel Nomination”** means a vessel nomination notice given by the User under the Terminal Regulations for the purpose of finalising the relevant nominated parcel and vessel details for a proposed shipment.

**"Wilful Default"** means a deliberate act or omission which will result in (and can reasonably be expected to have been intended to result in) a breach of this Agreement and which, as soon as practicable, but in any event within 30 days after written notice (particularising the alleged breach) is given to the party alleged to be in default, is not either:

- (a) acknowledged by the defaulting party and rectified; or
- (b) disputed by the party allegedly in default and referred to dispute resolution in accordance with clause 15, but if the notice of default is ultimately determined by arbitration or order of a court or agreement to have been justified, then rectified as soon as practicable but in any event within 30 days of the adjudication or agreement.

For the purposes of this definition, rectification will be taken to have occurred within the time period stated above, even if not actually completed within that time period, if rectification is reasonably practicable and commences within the stated period and proceeds at all times expeditiously.

## Interpretation

1. In this Agreement headings are for convenience only and do not affect its interpretation.
2. Except to the extent that the context otherwise requires:
  - (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
  - (b) words denoting the singular include the plural and vice versa;
  - (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
  - (d) words denoting any gender include all genders;
  - (e) references to parties, clauses and Schedules are references to parties, clauses and Schedules to this Agreement as modified or varied from time to time;
  - (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
  - (g) references to any party to this Agreement or any other document, deed or agreement include its successors or permitted assigns;
  - (h) all references to dates and times are to Brisbane time;
  - (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
  - (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
  - (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
  - (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;

- (m) where a provision provides that a party will act reasonably or prudently, that shall (where the context permits) be construed in the context of DBCT Management's obligation to act in accordance with Good Operating and Maintenance Practice;
- (n) where there is a requirement under this Agreement to consider whether the User or Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holder's respective annual contract tonnage; and
- (o) where measurement of Coal "Handled" (or in the context of the User, "Shipped") is being made in respect of a period, the tonnage loaded into vessels as determined in accordance with clause 9 will be taken to be the tonnage Handled (or, as the context requires, Shipped) in that period.

3. Payments on Business Days

Where the day on which any payment of money under this Agreement is to be made is not a Business Day, the payment may be made on the next Business Day.

**EXECUTION**

**Executed as an agreement**

**Signed for**  
**DBCT**  
**Management Pty Limited**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

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

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

**Signed for**  
**DBCT Investor Services Pty Ltd**  
**as trustee for the DBCT Trust**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

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

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

**Signed for**  
**[Insert User name]:**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Representative

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

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

## Appendix 15 Executed Deed Poll

## Irrevocable Deed Poll

### DETAILS

Date	11th March	2019
Parties	Name	DBCT Management Pty Limited
	Address	Level 15, 1 Eagle Street, Brisbane QLD 4000

### BACKGROUND

- A. The Terminal is a common user coal port. The Terminal includes in-loading, stockpiling, reclaiming, out-loading, and associated facilities for the handling of coal. The Terminal is located at the Port of Hay Point, south of Mackay in Queensland.
- B. On 14 September 2001, the DBCT Trustee as trustee of the DBCT Trust, and DBCT Management, entered into a number of agreements with DBCT Holdings and PCQ (both wholly owned by the State) under which DBCT Trustee and DBCT Management were granted a 50 year lease (with an option for a further 49 years) of the Terminal.
- C. An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract. The Operator of the Terminal has historically been user-owned and independent of the lessee.
- D. On 8 September 2020, the existing declaration of coal handling services at the Terminal under section 250 of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) will expire. The Framework has been developed in response and provides a balanced approach to the provision of Access and a Framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Access Seekers seeking Access to the Services at the Terminal.
- E. The Framework will remain in effect and continue to apply to the use of the Terminal (including Access to the Services) throughout the Term, which will end on the earlier of:
  - a. 9 September 2030 (being the date that is ten years from the Framework's Commencement Date of 9 September 2020); and
  - b. the date on, or after, 9 September 2020 on which use of the Terminal is first taken to be a service declared under Part 5, Division 2 of the QCA Act.
- F. The Framework provides for:
  - a. the negotiation and provision of Access to the Services at the Terminal; and
  - b. measures to mitigate potential adverse effects on competition which could arise out of the ownership of a related Supply Chain Business.
- G. The Framework has been prepared in accordance with, and gives effect to, the Framework Objective (as that term is defined in clause 1 below).
- H. This Deed Poll:

- a. confirms that the Framework will remain in effect for, and continue to apply to the use of the Terminal (including Access to the Services) throughout, the Term; and
- b. prescribes how the Framework may be amended.

## TERMS

### 1. Definitions and Interpretation

#### Definitions

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

**Confirmed Access Seekers** has the meaning given in clause 2.1.1.

**Covenantees** has the meaning given in clause 2.1.

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

**Existing Terminal** means the Terminal as it exists on 9 September 2020 together with each terminal capacity expansion that is treated as forming part of the Existing Terminal for the purposes of determining Access Charges.

**Framework** means the Dalrymple Bay Coal Terminal Access Framework which will come into effect on 9 September 2020, as may be amended from time to time. A copy of the Framework which is current as at the date of this Deed Poll is at Annexure A to this Deed Poll.

**Framework Objective** has the meaning given in section 69E of the QCA Act, as may be amended from time to time. In the event that section 69E of the QCA Act is repealed, the Framework Objective will have the meaning given in section 69E of the QCA Act immediately prior to its repeal.

**Operation & Maintenance Contract** means the contract between DBCT Management, the DBCT Trustee and the Operator under which the Operator is engaged by DBCT Management to operate and maintain the Terminal on a day to day basis.

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

**Terminal Component** means each of the Existing Terminal and any terminal capacity expansion that is treated as a separate Terminal Component to the Existing Terminal for the purposes of determining Access Charges.

**Terminal Infrastructure Charge** or **TIC** means an amount per tonne payable by an Access Holder for access or increased access to a Terminal Component under an access agreement negotiated by DBCT Management and an Access Holder under the Framework or otherwise entered into during the Term.

**Terminal Operating Costs** means:

1.2. any amounts:

- 1.2.1. reasonably incurred or charged by the Operator (including any margin payable to the Operator under the Operation & Maintenance Contract);
- 1.2.2. in the nature of an operating expense for the Terminal and reasonably incurred or charged by DBCT Management with the express written consent of not less than 66% of Access Holders and Existing Users by contract tonnage; and

- 1.2.3. reasonably incurred by DBCT Management in exercising its rights under the Operation & Maintenance Contract to step in or take work out of the hands of the Operator (as a result of a default by the Operator),

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

**The State** means the Treasurer of the State of Queensland from time to time.

**Third Parties** has the meaning given in clause 8.4.6.

## **Interpretation**

- 1.3. In the interpretation of this Deed Poll, the following provisions apply unless the context otherwise requires:
  - 1.3.1. headings are inserted for convenience only and do not affect the interpretation of this Deed Poll;
  - 1.3.2. a reference in this Deed Poll to any document or agreement is to that document or agreement as amended, novated, supplemented or replaced;
  - 1.3.3. a reference to a clause, part, schedule or attachment is a reference to a clause, part, schedule or attachment of or to this Deed Poll;
  - 1.3.4. where a word or phrase is given a defined meaning, another part of speech or other grammatical form in respect of that word or phrase has a corresponding meaning;
  - 1.3.5. a word which indicates the singular also indicates the plural, a word which indicates the plural also indicates the singular, and a reference to any gender also indicates the other genders;
  - 1.3.6. references to the word 'include' or 'including' are to be interpreted without limitation;
  - 1.3.7. the word 'day' or 'days' is a reference to calendar days; and
  - 1.3.8. if a provision of this Deed Poll is reasonably capable of an interpretation which would make that provision valid, lawful and enforceable, and an alternative interpretation that would make it unenforceable, illegal, invalid or void then, so far as is possible, that provision will be interpreted or construed to be limited and read down to the extent necessary to make it valid and enforceable.

## **2. Beneficiaries of Deed Poll**

- 2.1. Subject to clause 2.2, DBCT Management makes all of the covenants in this Deed Poll in favour of, and only for the benefit of:
  - 2.1.1. Access Seekers who have signed an Access Application Form or Access Renewal Form as set out at Schedule A to the Framework, or who are a party to a Conditional Access Agreement (**Confirmed Access Seekers**);
  - 2.1.2. Access Applicants;
  - 2.1.3. Access Holders;
  - 2.1.4. DBCT Holdings; and
  - 2.1.5. The State,(together, **Covenantees**).

- 2.2. DBCT Management makes the covenants in clause 8 of this Deed Poll in favour of, and only for the benefit of, the Covenantees and the Third Parties.
- 2.3. DBCT Management makes the covenants in this Deed Poll on the date of this Deed, and then each day until the end of the Term.
- 2.4. DBCT Management makes the covenants to the Covenantees and the Third Parties in this Deed Poll subject to the conditions set out at clauses 8, 9, 10 and 11 of this Deed Poll.

**3. Deed Poll is irrevocable**

- 3.1. DBCT Management covenants in favour of the Covenantees that it will not revoke or amend this Deed Poll until the expiry of the Term.

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

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

**5. Notice of intention to renew or not renew**

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

**6. Pricing under the Access Framework**

- 6.1. DBCT Management covenants in favour of the Covenantees that any Terminal Infrastructure Charge (TIC) it imposes during the Term will be lower than:
  - 6.1.1. for the Existing Terminal, the sum of the TIC that would apply for the Existing Terminal under a QCA administered pricing regime and the Maximum Spread, where the Maximum Spread is:
    - 6.1.1.1. \$3 in the Financial Year commencing on 1 July 2020; and
    - 6.1.1.2. in any subsequent Financial Year is derived by escalating the Maximum Spread in the immediately preceding Financial Year for the annual change in the Consumer Price Index by application of the following formula:

$$MS_t = MS_{t-1} \times (1 + CPI_t)$$

where:

$MS_t$  is the Maximum Spread to apply with effect from 1 July in Financial Year  $t$ ;

$MS_{t-1}$  is the Maximum Spread applicable in Financial Year t-1; and

$CPI_t$  is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1;

6.1.2. for a Terminal Component other than the Existing Terminal, the greater of:

6.1.2.1. the TIC that would apply for that Terminal Component under a QCA administered pricing regime; and

6.1.2.2. the maximum TIC for the Existing Terminal specified in clause 6.1.1 above.

6.2. DBCT Management further covenants in favour of the Covenantees that, other than the TIC, the charge(s) for access or increased access to a Terminal Component it imposes under an access agreement negotiated under the Framework or otherwise entered into during the Term will be limited to any charge(s) that pass Terminal Operating Costs incurred by DBCT Management through to Access Holders.

## **7. Review of Framework by agreement**

7.1. If:

7.1.1. as a result of any review of the Framework by DBCT Management and the Access Holders, DBCT Management and the Access Holders agree that amendment of the Framework is desirable; or

7.1.2. DBCT Management (acting reasonably) considers it necessary that the Framework be amended so as to rectify a significant inequity or significant unfairness suffered by an Access Seeker, Access Applicant, Access Holder or DBCT Management, which inequity or unfairness was not generally foreseen or intended at the Commencement Date,

then DBCT Management will, subject to and in accordance with clause 8, amend the Framework to address the relevant issue(s).

7.2. If DBCT Management and each Access Holder reach agreement on mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain, DBCT Management will consult with the Access Holders regarding the amendment(s) to the Framework reasonably required to implement the agreed mechanisms (to the extent relevant to the Services, the Terminal or the Framework) and will, subject to and in accordance with clause 8, amend the Framework accordingly.

7.3. For clarification, an amendment to the Framework may include an amendment to the Schedules to the Framework including an amendment to the Standard Access Agreement as set out at Schedule B to the Framework.

## **8. Amendments to Framework**

8.1. The Framework can only be amended in accordance with this clause 8.

8.2. DBCT Management can amend the Framework, from time to time, so long as the amendment(s):

8.2.1. promote the Framework Objective; and

8.2.2. are appropriate having regard to each of the mandatory considerations set out in clause 8.3.

8.3. DBCT Management covenants in favour of the Covenantees that if, and when, it amends the Framework it will have regard to each of the following mandatory considerations:

- 8.3.1. the legitimate business interests of DBCT Holdings in its capacity as the owner of the Terminal;
- 8.3.2. the legitimate business interests of DBCT Management in its capacity as the operator of the Terminal;
- 8.3.3. public interest, including the public interest in having competition in markets (whether or not in Australia);
- 8.3.4. the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users are adversely affected;
- 8.3.5. the effect of excluding existing assets for pricing purposes;
- 8.3.6. the following pricing principles in relation to the price of access to the Terminal:
  - 8.3.6.1. the price should generate expected revenue for the Terminal that is at least enough to meet the efficient costs of providing access to the Terminal and include a return on investment commensurate with the regulatory and commercial risks involved;
  - 8.3.6.2. the price should allow for multi-part pricing and price discrimination when it aids efficiency;
  - 8.3.6.3. the price should not allow DBCT Management to set terms and conditions that discriminate in favour of the downstream operations of DBCT Management or a related body corporate of DBCT Management, except to the extent the cost of providing Access to other operators is higher; and
  - 8.3.6.4. the price should provide incentives to reduce costs or otherwise improve productivity.
- 8.4. The consultation process that DBCT Management will follow in relation to any proposed amendment(s) to the Framework is as follows:
  - 8.4.1. DBCT Management will provide written notice to all Covenantees of its intention to amend the Framework (**Notice**). The Notice will:
    - 8.4.1.1. be sent by express post on the day that the Notice is dated to the Covenantees' registered offices (except in the case of the State, in which case the Notice will be sent by express post to the office of the Treasurer of the State of Queensland);
    - 8.4.1.2. advise the date on which the proposed amendments to the Framework will be available for review on DBCT Management's website (such date must be not more than seven days after the day that the Notice is dated (**Review Date**)); and
    - 8.4.1.3. advise that any comments on the proposed amendments to the Framework must be received by DBCT Management by post (at its registered office) no later than 45 days after the Review Date.
  - 8.4.2. On or about the same day that DBCT Management sends the Notice to the Covenantees in accordance with clause 8.4.1, DBCT Management will advertise its intention to amend the Framework in a newspaper that is distributed nationally (**Advertisement**). The Advertisement will include the following:
    - 8.4.2.1. the Review Date; and

- 8.4.2.2. a statement to the effect that any comments on the proposed amendments to the Framework must be received by DBCT Management by post (at its registered office) no later than 45 days after the Review Date.
- 8.4.3. DBCT Management will publish the proposed amendments to the Framework on its website on the Review Date. The proposed amendments are to remain on DBCT Management's website for not less than 180 days.
- 8.4.4. DBCT Management will review and consider any comments that may be received in relation to the proposed amendments to the Framework (**Comments**), however it will not be bound to implement any Comments.
- 8.4.5. Following its review and consideration of the Comments, DBCT Management will publish the final form of the proposed amendments to the Framework (**Final Proposed Amendments**) on its website for a period of not less than 121 days.
- 8.4.6. On the day the Final Proposed Amendments are published on its website, DBCT Management will provide written notice, dated the same date as publication on the website, to (a) the Covenantees, and (b) any other third parties who have provided Comments (**Third Parties**), that the Final Proposed Amendments are available on its website (**Final Notice**). The Final Notice will:
  - 8.4.6.1. be sent by express post to the Covenantees' registered offices (except in the case of the State, in which case the Notice will be sent by express post to the office of the Treasurer of the State of Queensland), and to the return addresses provided by the Third Parties;
  - 8.4.6.2. state the date on which, absent the commencement of legal proceedings in accordance with clause 11, the Final Proposed Amendments will become effective (with such date being no less than 121 days after the day that the Final Notice is dated) (**Provisional Date**);
  - 8.4.6.3. state that if any party wishes to challenge the validity of the Final Proposed Amendments, they must do so by commencing legal proceedings in accordance with clause 11 within 120 days after the day that the Final Notice is dated;
  - 8.4.6.4. state that if a party does not commence legal proceedings in accordance with clause 11 within 120 days after the day that the Final Notice is dated, that party will lose any right to challenge the validity of the Final Proposed Amendments.
- 8.5. If no Covenantantee or Third Party commences legal proceedings to challenge the validity of the Final Proposed Amendments within 120 days after the day that the Final Notice is dated, the Final Proposed Amendments will become effective on the Provisional Date.
- 8.6. If any Covenantantee or Third Party commences legal proceedings to challenge the validity of the Final Proposed Amendments within 120 days after the day that the Final Notice is dated, the Final Proposed Amendments will not become effective:
  - 8.6.1. unless and until such time as the court has determined the legal proceedings in favour of DBCT Management by dismissing any legal proceedings brought by a Covenantantee or Third Party; and then
  - 8.6.2. on a date to be advised by DBCT Management by publication on its website.
- 8.7. Any Final Proposed Amendments that become effective in accordance with clause 8.5 or 8.6 will remain published on DBCT Management's website together with a note advising of the date that the Final Proposed Amendments became effective.

## 9. Breach of Deed Poll

- 9.1. DBCT Management acknowledges that damages are not an adequate remedy for breach of this Deed Poll.
- 9.2. DBCT Management makes the covenants in this Deed Poll subject to the following conditions:
  - 9.2.1. damages are not a remedy for any breach of this Deed Poll;
  - 9.2.2. the only remedy available for any breach of this Deed Poll (other than a breach of clause 7 and / or clause 8 of this Deed Poll) is specific performance;
  - 9.2.3. specific performance is not a remedy for any breach of clause 7 and / or clause 8 of this Deed Poll;
  - 9.2.4. the only remedy available for any breach of clause 7 and / or clause 8 of this Deed Poll is declaratory relief; and
  - 9.2.5. if a Covenantee alleges that DBCT Management has not complied with its obligations at clause 4.2, any dispute arising will be determined in accordance with the dispute resolution provisions contained in the Framework, and not this Deed Poll.

## **10. Governing law**

- 10.1. This Deed Poll is governed by the laws in force in the State of Queensland.

## **11. Jurisdiction and Dispute Resolution**

- 11.1. Subject to clause 9.2.5, the courts of Queensland have exclusive jurisdiction to determine any disputes arising out of or in connection with this Deed Poll.

### **Legal proceedings for breach of clause 3, clause 4.1, clause 5 and / or clause 6**

- 11.2. Any legal proceeding commenced by a Covenantee against DBCT Management for an alleged breach of clause 3, clause 4.1, clause 5 and / or clause 6 must be filed and served on DBCT Management within 120 days after the date that the alleged breach of this Deed Poll is said to have occurred.
- 11.3. DBCT Management may rely upon clause 11.2 as a complete defence to any proceedings filed or served 121 days or more after the date that the alleged breach of this Deed Poll is said to have occurred.

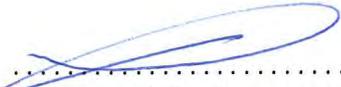
### **Legal proceedings for breach of clause 7 and / or clause 8**

- 11.4. Any legal proceeding commenced against DBCT Management by a Covenantee for an alleged breach of clause 7 and / or clause 8, or a Third Party in relation to an alleged breach of clause 8, must be filed and served on DBCT Management within 120 days after the date of the Final Notice.
- 11.5. DBCT Management may rely upon clause 11.4 as a complete defence to any proceedings filed or served 121 days or more after the date of the Final Notice.

**EXECUTION**

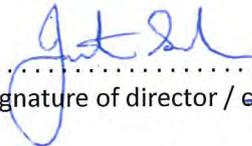
Executed as a Deed.

**EXECUTED** by  
**DBCT MANAGEMENT PTY LTD** (ACN 097 698 916) in  
accordance with s 127 of the Corporations Act 2001:

  
.....  
Signature of director

**Ray Neill**

.....  
Name of director (print)

  
.....  
Signature of director / ~~company~~ secretary

**JONATHAN SELLAR**

.....  
Name of director / ~~company~~ secretary (print)

**ANNEXURE A**

Framework (current as at 11 March 2019)

# **Dalrymple Bay Coal Terminal Access Framework**

**11 March 2019**

## **DBCT Management Pty Ltd**

Level 15

Waterfront Place

1 Eagle Street

Brisbane QLD 4000

Tel: 07 3002 3100

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## **1 Introduction**

### **1.1 Purpose of this document**

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

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

**(Operator)** An Operator is contracted to operate the Terminal on behalf of DBCT Management pursuant to an operations and maintenance contract. The Operator of the Terminal has historically been user-owned and independent of the lessee.

**(Establishment of Framework)** On the Expiry Date, the declaration of coal handling services at the Terminal under the *Queensland Competition Authority Act 1997* (Qld) expired. This Framework has been developed in response and provides a balanced approach to the provision of Access and a framework (based on a negotiate/arbitrate model) to manage negotiations in an efficient and transparent manner for Access Seekers seeking Access to the Services at the Terminal.

### **1.2 Scope of Framework**

This Framework provides for:

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

### **1.3 Object of this Framework**

- (a) This Framework has been prepared in accordance with, and gives effect to, the Framework Objective specified in the Deed Poll.

### **1.4 Duration of Framework**

This Framework will apply on and from the Commencement Date. It will apply until the Terminating Date.

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

This Framework applies to the negotiation of Access Agreements or the negotiation of additional Access rights in addition to those already the subject of an Access

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

## **1.6 Implementation of Differentiation in Access Agreements**

Following a Price Ruling that a Terminal Capacity Expansion will be a Differentiated Expansion Component, DBCT Management will:

- (a) calculate Access Charges under each Access Agreement in accordance with the provisions of this Framework; and
- (b) in good faith, take all reasonable steps to negotiate any necessary amendments to any Access Agreement executed prior to the Price Ruling, to ensure that they are consistent with the Access Charges being calculated in accordance with the provisions of this Framework in relation to the application of Differentiation to a Terminal Capacity Expansion.

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## **2 Definitions and Interpretation**

### **2.1 Definitions**

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

### **2.2 Interpretation**

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

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## **3 Role of DBCT Management and the Operator**

### **3.1 Role of DBCT Management**

- (a) The owner of the Terminal is DBCT Holdings.
- (b) DBCT Trustee and DBCT Management, under the Leases, are the lessee and sublessee of the Terminal. Under the terms of the Leases and the Port Services Agreement, DBCT Management is solely responsible for providing Access to Access Holders and Access Seekers during the Lease Term.
- (c) DBCT Management will comply with and give effect to this Framework, except as otherwise provided for under an Access Agreement or required by law.
- (d) DBCT Management will ensure that employees, subcontractors and agents of subcontractors comply with the requirements of this Framework, except as otherwise provided for under an Access Agreement or required by law.
- (e) Where the performance of an obligation under this Framework requires a Related Body Corporate of DBCT Management to take or refrain from taking

some action, DBCT Management must procure that the Related Body Corporate takes or refrains from taking that action.

- (f) DBCT Management must procure that any Related Body Corporate provides all necessary assistance and information where this is required for the performance by DBCT Management of an obligation under this Framework.

### **3.2 Role of the Operator**

During the Term of the Framework, DBCT Management acknowledges and agrees that:

- (a) the Operator is and will remain Dalrymple Bay Coal Terminal Pty Limited ACN 010 268 167 (**DBCT PL**) and that DBCT PL is majority owned or wholly owned by Access Holders and Existing Users;
- (b) each Access Holder and Existing User has a right under the constitution of DBCT PL to become a shareholder of DBCT PL;
- (c) if an Access Holder or Existing User is not a shareholder of DBCT PL but wishes to become a shareholder of DBCT PL then that Access Holder or Existing User may, in accordance with the constitution of DBCT PL, apply to become a shareholder of DBCT PL by making an application to DBCT PL at the following address:

Dalrymple Bay Coal Terminal Pty Limited  
M.S. F283  
Mackay, Queensland, 4740  
Attention: Chief Executive and General Manager;

- (d) the Operator carries out its obligations under the Operation & Maintenance Contract and Terminal Regulations independently of DBCT Management.

### **3.3 Operation and Maintenance Contract**

During the Term of the Framework, DBCT Management undertakes to:

- (a) maintain the Operation & Maintenance Contract; and
- (b) ensure that the terms of the Operation and Maintenance Contract, if amended at any time, remain substantially consistent with the terms set out in Schedule H.

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## **4 Services to be provided**

DBCT Management must provide the Services at the Terminal to Access Holders in accordance with this Framework and each Access Agreement, including in compliance with the Terminal Regulations (and, without limitation, in accordance with the level of service set out in Schedule E of this Framework).

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## 5 Negotiation arrangements

### 5.1 Framework for negotiation

- (a) **(Outline)** This Section 5 of this Framework outlines the process which will be followed to enable Access Seekers to obtain Access. It deals with:
  - (1) an Access Application by an Access Seeker and a Renewal Application by an Access Applicant;
  - (2) provision of an Indicative Access Proposal by DBCT Management;
  - (3) negotiations to develop an Access Agreement;
  - (4) principles for the entering into of an Access Agreement where it is conditional upon a Terminal Capacity Expansion; and
  - (5) various other provisions relating to when and the basis on which Access Agreements may be entered into pursuant to Access Applications.
- (b) **(Progressing Access Applications)** DBCT Management will take all reasonable steps to progress each Access Application and any negotiations to develop an Access Agreement with an Access Seeker in a timely manner and will complete each relevant step as soon as is practicable.
- (c) **(Negotiations to be in good faith)** DBCT Management and an Access Seeker must negotiate in good faith for reaching an Access Agreement.
- (d) **(No unfair differentiation between Access Seekers)** DBCT Management must not unfairly differentiate between Access Seekers in a way that has a material adverse effect on the ability of one or more Access Seekers to compete with other Access Seekers.
- (e) **(DBCT Management to satisfy Access Seeker's requirements)** In negotiations for an Access Agreement, DBCT Management must make all reasonable efforts to try to satisfy the reasonable requirements of the Access Seeker.

### 5.2 Application for Access and information to be provided

- (a) **(Form of Access Application)** Any application for Access must be in the form specified in Schedule A and include:
  - (1) a warranty in the form specified in; and
  - (2) such other information that may be required by, Schedule A.
- (b) **(Access Seeker to agree to comply with Framework and Deed Poll)** An Access Seeker must, when submitting an Access Application, unconditionally and irrevocably agree to comply with the requirements, obligations and processes in:

- (1) this Framework relating to it or its Access Application; and
- (2) the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll,

and if the Access Seeker does not do so then:

- (3) DBCT Management will have no obligations, and the Access Seeker no rights, under this Framework in respect of the Access Application or the Access sought in that Access Application; and
  - (4) DBCT Management may refuse to accept the Access Application.
- (c) **(Forecasts in Access Application)** DBCT Management acknowledges that, at the time an Access Application is made, some information provided in the Access Application may be a forecast only. The Access Seeker must use its best endeavours to ensure that any such information contained in an Access Application is as accurate as possible and must immediately notify DBCT Management as soon as it becomes aware that the information is, or is likely to be, inaccurate.
- (d) **(Information sought by Access Seeker prior to Access Application)** Prior to submitting an Access Application, an Access Seeker may request from DBCT Management:
- (1) reasonably available preliminary information relating to the Access Application (including copies of the then current Standard Access Agreement and Terminal Regulations) – which DBCT Management must provide within 10 Business Days of DBCT Management receiving the request;
  - (2) initial meetings to discuss the proposed Access Application and the requirements of the Access Application Form set out in Schedule A which DBCT Management must facilitate within a reasonable time after being requested to do so.

**(Revisions to Access Application)**

- (e) At any time after an Access Seeker submits an Access Application to DBCT Management but prior to the commencement of the negotiation period referred to in Section 5.7 in respect of the Access Application, an Access Seeker may notify DBCT Management that it wishes to revise certain information specified in its Access Application.
- (f) In considering whether to allow an Access Seeker to revise certain information specified in its Access Application, DBCT Management will have regard to the impact of the proposed revision, if allowed by DBCT Management, on other Access Seekers and Access Holders.

- (g) Without otherwise limiting DBCT Management’s discretion to allow an Access Seeker to revise information specified in its Access Application, DBCT Management will allow an Access Seeker to revise information specified in its Access Application in accordance with Section 5.4(c) or if DBCT Management is reasonably of the opinion that the proposed revision:
  - (1) if allowed by DBCT Management, would not substantially alter the nature of the Access rights sought by the Access Seeker in its Access Application prior to the revision;
  - (2) if allowed by DBCT Management, would not adversely impact on other Access Seekers or Access Holders; and
- (h) is not otherwise prohibited under Section 5.4(i)(3), 5.4(l)(7) or 5.10(h).

### 5.3 What happens after lodgement of Access Application

- (a) **(Acknowledgement by DBCT Management)** Upon receiving a purported Access Application under Section 5.2, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Seeker receipt of the application and confirm whether the application is an Access Application complying with Section 5.2.
- (b) **(Request by DBCT Management for further information)** DBCT Management may request from the Access Seeker additional information where DBCT Management can reasonably demonstrate the need for such information for the purpose of preparing an Indicative Access Proposal, or clarification of information provided, including (but not limited to) obtaining further information to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, a Security provider. Upon receiving the required information or clarification from the Access Seeker, DBCT Management must provide written acknowledgment of the receipt of this further information as soon as practicable and, in any event, within 10 Business Days of receipt of the further information.
- (c) **(Provision of further information by Access Seeker)** The Access Seeker must provide any information reasonably requested by DBCT Management under this Section 5.3 within 20 Business Days of receipt of the request from DBCT Management (or such later date as DBCT Management agrees to, it being required to act reasonably in agreeing to extend the period if the Access Seeker demonstrates good grounds for a longer period applying). If the Access Seeker does not provide the requested information within that period, its Access Application will be deemed to have been rejected, but it may apply again for Access in accordance with Section 5.2. If an Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to acknowledgement under this Section 5.3 of the Access Application.

(d) **(Rejection if Access Seeker fails to provide information or demonstrate application criteria) If:**

- (1) an Access Application fails to comply with Section 5.2 (including where the Access Seeker fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
- (2) DBCT Management, acting reasonably, is of the opinion that an Access Application:
  - (A) does not demonstrate that the Access Seeker is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Access Application (which must be no more than 5 years from the date of the Access Application); or
  - (B) does not demonstrate that the Access Seeker has:
    - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Access Application in respect of the first five Financial Years of Access applied for; and
    - (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Seeker, consistent with the total net tonnes specified in item 7 of the Access Application,

then DBCT Management may reject the Access Application. Where DBCT Management rejects an Access Application in accordance with this Section 5.3, the Access Application will be deemed not to have been received, for the purposes of the Queue, unless Section 5.3(e) applies.

(e) **(Disputed rejection of Access Application) If** DBCT Management rejects an Access Application submitted by an Access Seeker and the Access Seeker, acting reasonably, is of the opinion that its Access Application should have been accepted by DBCT Management in accordance with this Framework, then the Access Seeker may refer the matter for dispute resolution in accordance with Section 16 of this Framework within 15 Business Days of receiving the notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect of the Access sought in the relevant Access Application, unless and until the Dispute is resolved in favour of DBCT Management.

(f) **(Expiry of Access Application) Subject to** an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT

Management in accordance with this Framework before the relevant expiry date:

- (1) an Access Application submitted to DBCT Management before the Commencement Date will, unless the Access Application is renewed under Section 5.3A, expire on the date which is eight weeks after the Commencement Date;
  - (2) any Access Application submitted to DBCT Management on or after the Commencement Date will, unless the Application is renewed under Section 5.3A, expire on the next occurring 31 August; and
  - (3) an Access Application which has been renewed in accordance with Section 5.3A, will, unless the Access Application is further renewed under Section 5.3A, expire on the next 31 August occurring after the 31 August on which the Access Application was to expire immediately prior to the Renewal Application being accepted.
- (g) **(Notice of Expiry)** DBCT Management will give notice of the timing of expiry to all Access Seekers with a current Access Application (including those which remain current due to a previous Renewal Application being accepted):
- (1) for Access Applications for which the expiry date is set by Section 5.3(f)(1), on the Commencement Date; and
  - (2) for Access Applications for which the expiry date is set by Section 5.3(f)(2) or 5.3(f)(3), at least 1 month and no more than 3 months prior to expiry date of the Access Application.

### **5.3A Renewal Applications**

- (a) **(Renewal Application)** An Access Applicant that wishes to renew its Access Application must:
- (1) submit to DBCT Management a Renewal Application in the form specified in Schedule A and include:
    - (A) the warranty in the form specified in Schedule A; and
    - (B) such other information that may be required, as specified in Schedule A,not later than 15 Business Days before the date that its Access Application is due to expire; and
  - (2) when submitting the Renewal Application, unconditionally and irrevocably agree to comply with the requirements, obligations and processes in:

- (A) this Framework relating to it or its Renewal Application; and
- (B) the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll,

and if the Access Seeker does not do so then DBCT Management may refuse to accept the Renewal Application.

- (b) **(Forecasts in Renewal Application)** DBCT Management acknowledges that, at the time a Renewal Application is made, some information provided in the Renewal Application may be a forecast only. The Access Applicant must, however, use its best endeavours to ensure that any such information contained in a Renewal Application is as accurate as reasonably possible.
- (c) **(Acknowledgement by DBCT Management)** Upon receiving a purported Renewal Application under this Section 5.3A, DBCT Management must, within 10 Business Days of its receipt, acknowledge in writing to the Access Applicant receipt of the Renewal Application and confirm whether the application is a Renewal Application complying with this Section 5.3A.
- (d) **(Rejection if Access Seeker fails to provide information or demonstrate renewal criteria)** If:
  - (1) an Access Applicant fails to comply with this Section 5.3A in respect of a Renewal Application (including where the Access Applicant fails to include the warranty provided for in, or such other information as may be required by, Schedule A); or
  - (2) DBCT Management, acting reasonably, is of the opinion that a Renewal Application submitted by an Access Applicant:
    - (A) does not demonstrate that the Access Applicant is reasonably likely to commence delivery of coal to the Terminal on the date specified in item 5 of the Renewal Application (which must be no more than 5 years from the date of the Renewal Application); or
    - (B) does not demonstrate that the Access Applicant has:
      - (i) Marketable Coal Reserves that are consistent with the net tonnes specified in item 7 of the Renewal Application in respect of the first five Financial Years of Access applied for; and
      - (ii) Coal Resources that are, together with the Marketable Coal Reserves of the Access Applicant, consistent with the total net tonnes specified in item 7 of the Renewal Application,

then DBCT Management may reject the Renewal Application. If DBCT Management rejects a Renewal Application or the Access Applicant fails to submit a Renewal Application to DBCT Management within the timeframe required in Section 5.3A(a), then the Access Applicant's current Access Application will expire on its expiry date (as determined in accordance with Section 5.3(f)) and the Access Applicant will be removed from the Queue on the date the Access Application expires, unless Section 5.3A(e) applies.

- (e) **(Disputed rejection of Renewal Application)** If DBCT Management rejects a Renewal Application submitted by an Access Applicant and the Access Applicant, acting reasonably, is of the opinion that its Renewal Application should have been accepted by DBCT Management in accordance with this Framework, then the Access Applicant may refer the matter for dispute resolution in accordance with Section 16 of this Framework within 15 Business Days of receiving the notice of rejection. In that case, the Access Applicant may not be removed from the Queue, and DBCT Management must not offer to enter an Access Agreement with another Access Applicant in respect of the Access sought in the relevant Renewal Application, unless and until the Dispute is resolved in favour of DBCT Management.
- (f) **(New Access Application if renewal is substantially different)** If DBCT Management, acting reasonably, is of the view that a Renewal Application is substantially different to the Access Seeker's current Access Application, then subject to paragraph (g) of this Section 5.3A, DBCT Management will treat the Renewal Application as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the difference is an increase in the annual Tonnage required or a longer term, then only the additional annual Tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.
- (g) With respect to the renewal of an Access Application referred to in paragraph (b) of the definition of 'Access Application', if the first Renewal Application after the Commencement Date is for an increase in the term from 5 or more years, then the extended term will not be taken to constitute the subject of a new Access Application and will instead be considered as part of the Renewal Application.
- (h) **(Renewed Access Application)** To the extent that a Renewal Application is confirmed by DBCT Management as a Renewal Application complying with Section 5.3A (or is determined as complying with Section 5.3A in a Dispute referred by the Access Applicant in accordance with Section 5.3A(e)):
  - (1) the Access Applicant's current Access Application will be taken to have been renewed;

- (2) the content of the Renewal Application will be taken to be the Access Applicant's Access Application for the purposes of this Framework; and
- (3) the priority of the Access Applicant in the Queue will continue to be determined by the Access Application Date.

#### **5.4 Priority of Access Applications and execution of Access Agreements**

- (a) **(Formation of Queue)** If at any time there are two or more current Access Applications and there is or will be insufficient Available System Capacity associated with Existing Terminal Capacity at any relevant time to accommodate an increase in the Handling of coal applied for in all of those Access Applications, a queue (the **Queue**) will be formed.
- (b) **(General rules for priority in Queue)** Subject to any other provision in Section 5, the priority of an Access Seeker in the Queue will be determined by their Access Application Date, with an earlier Access Application Date having priority in the Queue over any later Access Application Date. An Access Seeker may be removed from the Queue once their Access Application is no longer current in accordance with the terms of Sections 5.3, 5.4, 5.6, 5.7(a)(2), 5.7(a)(4), 5.8, 5.9 or 5.10 of this Framework. An Access Seeker may lose priority in the Queue pursuant to Sections 5.4 or 5.10. The Queue will cease to exist if Available System Capacity at all relevant times subsequently exceeds the amount of capacity requested in all of the then current Access Applications.
- (c) **(Notice of formation of or change in Queue)** Promptly after a Queue is first formed and promptly after each occasion that the Annual Contract Tonnage applied for in the Queue is increased or decreased, DBCT Management must notify each Access Seeker in the Queue of:
  - (1) the Annual Contract Tonnage applied for in priority to that Access Seeker in the Queue;
  - (2) the total Annual Contract Tonnage applied for in the Queue at that time; and
  - (3) a breakdown of the Annual Contract Tonnage applied for in the Queue by the dates for commencement of Access and Annual Contract Tonnage applied for in each Access Application (without any identification of the Access Seeker which made each Access Application but with identification of the dates for commencement of Access).

#### **(Access Agreements for Available System Capacity from the Existing Terminal)**

- (d) **(Entry into Access Agreement for Available System Capacity)** Promptly upon being advised in writing by an Access Holder or Existing User that all or part of its Annual Contract Tonnage in respect of the Existing Terminal will become available, DBCT Management will:

- (1) notify each Access Seeker in the Queue of the date for the commencement of such Access and the relevant Tonnage; and
  - (2) issue an Indicative Access Proposal for Available System Capacity in respect of the relevant Tonnage to the Access Seeker who is first in the Queue.
- (e) **(Entry into Access Agreement not conditional on Terminal Capacity Expansion by Access Seekers not first in the Queue but seeking Access at an earlier date)** The following process will apply in relation to Access Seekers who are not first in the Queue but are ready to enter into an Access Agreement that is not conditional on a Terminal Capacity Expansion:
- (1) An Access Seeker who is not first in the Queue (the Notifying Access Seeker) but is seeking Access from existing Available System Capacity at a date that is at least 6 months earlier than the date for commencement of Access applied for in the Access Application which is first in the Queue, may give notice in writing to DBCT Management in accordance with Section 5.4(e)(2) (**Notice**).
  - (2) The Notice is to state that the Notifying Access Seeker is prepared to enter into an Access Agreement consistent (subject to the next subsection) with its Access Application on either:
    - (A) the terms of the Standard Access Agreement; or
    - (B) on other terms agreed between DBCT Management and the Access Seeker.
  - (3) The Notice may state that the Notifying Access Seeker wishes to enter into an Access Agreement for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice.

If DBCT Management receives a Notice under section 5.4(e)(1) from the Notifying Access Seeker, it must promptly:

- (4) notify, in writing, all other Access Seekers that are ahead of the Notifying Access Seeker in the Queue (each a **Notified Access Seeker**) of this development (including the requested date for commencement of Access, but not the identity of the Notifying Access Seeker); and
- (5) allow 3 months from the date when such notice is given by DBCT Management for each Notified Access Seeker to:
  - (A) deliver to DBCT Management two signed copies of an Access Agreement consistent with its Access Application (except that it

may be for a lower Tonnage, shorter term or earlier date for commencement of Access than requested in the Access Application, provided that any revised Access commencement date must not precede the date of the Notice) and on:

- (i) the terms of the Standard Access Agreement (**Binding Standard Access Agreement**); or
  - (ii) other terms agreed between DBCT Management and a Notified Access Seeker; and
- (B) deliver to DBCT Management any Security required by DBCT Management (acting consistently with this Framework).
- (f) **(Execution of Access Agreements in order of Access Seekers in Queue which commit)**

If, during the above 3 month period, one or more of the Notified Access Seekers:

- (1) delivers to DBCT Management such signed copies of an Access Agreement for Access to commence on a date which is the same as or earlier than the date for commencement of Access referred to in section 5.4(e)(3) (which, for clarification, may be a retrospective date, provided that any revised Access commencement date must not precede the date of the Notice); and
- (2) also provides any Security reasonably required by DBCT Management (or does not provide such Security but the circumstances in Section 5.4(g) apply),

then DBCT Management must:

- (3) give priority to such of those Notified Access Seekers that are seeking Access on the earliest date for commencement of Access (provided that, if there are two or more Notified Access Seekers each seeking Access commencing on the same date, priority will be given to the Notified Access Seekers in order of their position in the Queue);
- (4) (subject to there being sufficient Available System Capacity at the relevant time) execute those copies of the Access Agreement and re-deliver one signed copy to such Notified Access Seeker; and
- (5) repeat that process in order of the date for commencement of the Access that they are seeking with each successive Notified Access Seeker (if any) which has delivered during the 3 month period such a signed Access Agreement and any Security required by DBCT Management (acting consistently with this Framework).

- (g) **(Issues with provision of requested Security)** If a Notified Access Seeker is unable to provide any Security reasonably required by DBCT Management within the 3 month period referred to in Section 5.4(f) (or if, by the end of the first month of that 3 month period, the Access Seeker disputes DBCT Management’s entitlement to the Security requested), the Access Agreement to be executed and delivered by the relevant Notified Access Seeker in that period will be modified so that it is a condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, Security which the Independent Expert determines to be fair is provided within 20 Business Days after the Independent Expert makes that determination), and the “Effective Date” will be adjusted accordingly.
- (h) **(Execution of Access Agreement with Notifying Access Seeker, if sufficient remaining Capacity)** If, after all Access Agreements with all Notified Access Seekers referred to in Section 5.4(e)(5) who have duly delivered signed documents (and provided Security if relevant) have been executed (or negotiations have ceased pursuant to Section 5.8), there is still sufficient Available System Capacity, then DBCT Management will sign and deliver a Binding Standard Access Agreement or an Access Agreement on other terms agreed between DBCT Management and the Notifying Access Seeker to the Notifying Access Seeker for that Available System Capacity (or that part of it which the Notifying Access Seeker requires) provided that the Notifying Access Seeker first provides any Security reasonably required by DBCT Management (or does not provide such Security but, where the expression Notified Access Seeker in section 5.4(g) is replaced by the expression Notifying Access Seeker, the circumstances in section 5.4(g) apply).
- (i) **(Clarifications)** For clarity:
- (1) **(Position in Queue may be lost by not executing Access Agreement)** any Notified Access Seeker that does not within the above 3 month period deliver to DBCT Management a signed Access Agreement:
- (A) may be removed by DBCT Management from the Queue, in which case the Notified Access Seeker’s Access Application will be taken to have been rejected and the Access Application negotiation process for that Notified Access Seeker will be discontinued, unless a bona fide Dispute in relation to the removal is referred under Section 16 in which case, the Notified Access Seeker will maintain its position in the Queue until that Dispute is resolved; or
- (B) will not, if DBCT Management does not remove the Notified Access Seeker from the Queue, lose its place in the Queue (although a Notifying Access Seeker which does execute an

Access Agreement pursuant to this Section 5.4 will no longer be in the Queue in respect of the tonnage the subject of that Access Agreement) and the Access Application negotiation process for that Access Seeker will otherwise continue in accordance with Section 5 of this Framework;

- (2) **(Considerations regarding removal from Queue)** in considering whether to remove an Access Seeker from the Queue under Section 5.4(i)(1), DBCT Management will have regard to:
  - (A) the date that the Access Seeker proposes to commence delivering coal to the Terminal in comparison with the date that the Notifying Access Seeker proposes to commence delivering coal to the Terminal;
  - (B) the tonnes that the Access Seeker requires to commence delivering coal to the Terminal in comparison with the tonnes that the Notifying Access Seeker proposes to commence delivering to the Terminal; and
  - (C) the likelihood of future Access becoming available at the Terminal on or prior to the date for commencement of Access sought by the Access Seeker that DBCT Management is considering whether to remove from the Queue;
- (3) **(Amendments to Access Application)** except as provided for in Section 5.4(f)(1), an Access Seeker may not amend the date for commencement of delivery of coal to the Terminal specified in its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.4(e)(4);
- (4) **(Offers of Access Agreement not to exceed Available System Capacity)** unless otherwise required by the Port Services Agreement or Section 11 of this Framework, DBCT Management must not offer to enter into an Access Agreement for Annual Contract Tonnage which would result in Aggregate Annual Contract Tonnage of all Access Holders and Existing Users exceeding the Available System Capacity at a relevant time;
- (5) **(Access Seeker may accept lesser tonnage if insufficient capacity for tonnage applied for)** where the process in Sections 5.4(c), 5.4(e) and 5.4(f) would have the effect of giving an Access Seeker a right to enter into an Access Agreement, except for the fact that there is insufficient Available System Capacity to meet that Access Seeker's Access Application in full, DBCT Management must inform that Access Seeker to that effect, and the Access Seeker may elect to require an

Access Agreement for a lesser tonnage consistent with Available System Capacity from time to time during the period originally applied for (subject to the other terms of this Framework), with the balance of the Annual Contract Tonnage originally applied for remaining the subject of the Access Application; and

- (6) **(Binding nature)** by the Notifying Access Seeker sending a notice under section 5.4(e)(2)(A) and by a Notified Access Seeker delivering a signed copy of a Binding Standard Access Agreement to DBCT Management each of them and DBCT Management agree that the Standard Access Agreement is legally effective to bind each party signing it, notwithstanding that section 2 of Schedule 2 of the Binding Standard Access Agreement does not have a completed dollar amount (i.e. \$xx.xx) included in it.

**(Contracting on basis of Binding Standard Access Agreement)**

- (j) Where DBCT Management executes and redelivers (or delivers as the case may be) a Binding Standard Access Agreement to a Notified Access Seeker or the Notifying Access Seeker, DBCT Management must record the priorities given to Notified Access Seekers under section 5.4(f)(3) and the Available System Capacity allocated to the Notifying Access Seeker under its Binding Standard Access Agreement and determine whether any person should be removed from the Queue, and make such adjustment to the Queue as DBCT Management determines in accordance with this Framework.
- (k) Where section 2 of Schedule 2 of a Binding Standard Access Agreement does not have a completed dollar amount included in it, the following provisions apply:
  - (1) upon completion of all actions of DBCT Management under section 5.4(j), DBCT Management will notify in writing each of the parties to a Binding Standard Access Agreement, and the parties to such Binding Standard Access Agreement must negotiate and seek to agree the dollar amount to be included in section 2 of Schedule 2, for a period of 30 days from such notice (or such longer period as the parties agree);
  - (2) where such agreement is reached the parties shall execute a deed (in such form as agreed by them acting reasonably) to amend the Binding Standard Access Agreement to incorporate that dollar amount; and
  - (3) Where the parties to the Binding Standard Access Agreement do not reach an agreement on the dollar amount, this shall be a Dispute and either party may refer the Dispute to arbitration in accordance with this section, and:

- (A) the Dispute shall be considered to be of a kind referred to in section 10.1(b) and sections 10.3 and 10.4 apply except to the extent necessary to give effect to any matter agreed by the parties;
- (B) the provisions of section 16.4 (excluding paragraphs 16.4(f) and (g)) apply (being the relevant provisions of section 16.4 that would apply if it was agreed that a Standard Access Agreement's terms and conditions applied); and
- (C) section 16.5 applies.

**(Conditional Access Agreements)**

- (l) **(Entry into an Access Agreement conditional on Terminal Capacity Expansion)** The following process will apply in relation to the entry into Access Agreements that are conditional, wholly or partly, on a Terminal Capacity Expansion **(Conditional Access Agreement)**:
  - (1) When the Aggregate Annual Contract Tonnage sought within the next 5 years by Applicants in a Queue cannot be met from Available System Capacity, such that a Terminal Capacity Expansion may be justified, DBCT Management will invite an offer from each Applicant in the Queue to enter into a Conditional Access Agreement.
  - (2) Unless otherwise specified in a Conditional Access Agreement, the date for commencement of Access under a Conditional Access Agreement will be the date on which the Terminal Capacity Expansion is Complete and operating, and DBCT Management notifies Access Seekers in accordance with Section 11.1(l) or 11.1(q), as applicable, on which date the Conditional Access Agreement will take effect as an Access Agreement.
  - (3) In response to an invitation from DBCT Management given under Section 5.4(l)(1), any Access Seeker may make an offer to enter into a Conditional Access Agreement that may be (but need not be) subject to a condition precedent which relates to:
    - (A) **(Conditional on Terminal Capacity Expansion)** the triggering of an obligation by DBCT Management to perform a specified Terminal Capacity Expansion with a specified estimated cost within a specified estimated timeframe;
    - (B) **(Conditional on other System elements)** DBCT Management being reasonably satisfied that a Service Provider (other than DBCT Management), Access Holder, Existing User, Access Seeker or other relevant entity has committed or will commit,

subject only to conditions which are customary for that Service Provider and an expansion of that nature, to providing an expansion of a relevant part of the System which is necessary to create sufficient Available System Capacity; and

- (C) **(Conditional on Section 5.4(q) being satisfied)** DBCT Management being reasonably satisfied that the Access Seeker's Access rights are matched by an entitlement held by the Access Seeker or a person on its behalf to rail infrastructure access rights relating to the coal the subject of the Conditional Access Agreement.

The following provisions relate to any such offer:

- (4) **(Invitation to each Access Seeker)** DBCT Management must give the same notice (**Expansion Notice**) at the same time to each Access Seeker in the Queue, inviting them to submit to DBCT Management (by way of offer to DBCT Management) two signed copies of such a Conditional Access Agreement consistent with their Access Application (except that it may be for a lower tonnage or shorter term than originally requested provided there is a bona fide commercial reason for seeking such lower tonnage or shorter term) on the terms of the Standard Access Agreement or on any other terms which DBCT Management has notified the Access Seeker would be acceptable to DBCT Management (**Different Terms**), and subject to the condition precedent referred to above.
- (5) **(Position in Queue may be lost by not offering a Conditional Access Agreement)** Any Access Seeker that does not, within 3 months after DBCT Management gives the Access Seeker an Expansion Notice, deliver to DBCT Management a signed Conditional Access Agreement in accordance with the Expansion Notice:
  - (A) may, subject to Section 5.4(l)(6), be removed by DBCT Management from the Queue, in which case the Access Seeker's Access Application will be taken to have been rejected and the Access Application negotiation process for that Access Seeker will be discontinued; or
  - (B) will not, if DBCT Management does not remove the Access Seeker from the Queue, lose its place in the Queue (although if DBCT Management executes a Conditional Access Agreement offered by any other Access Seeker pursuant to this Section 5.4(l), that Access Seeker will, subject to Section 5.4(l)(11), no longer be in the Queue in respect of the Tonnage the subject of that Conditional Access Agreement) and

the Access Application negotiation process for the Access Seeker will otherwise continue in accordance with Section 5 of this Framework.

- (6) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under section 5.4(l)(5)(A), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (7) **(Amendments to Access Application)** Except as provided in Section 5.4(l)(4) and (5) an Access Seeker may not amend its Access Application during the 3 month period which commences on the date the Access Seeker receives an Expansion Notice.
- (8) **(Acceptance of offers in order of priority in Queue)** If, during the 3 month period following the giving of an Expansion Notice one or more of the Access Seekers in the Queue:
  - (A) delivers to DBCT Management such signed copies of a Conditional Access Agreement; and
  - (B) provides any Security required by DBCT Management (or the circumstances in Section 5.4(l)(9) apply),

DBCT Management will then give priority to the Access Seeker so doing which has the highest ranking in the Queue and (subject to there being sufficient Available System Capacity should the Terminal Capacity Expansion the subject of the condition precedent proceed) will execute their Conditional Access Agreement. DBCT Management will then repeat the process down the Queue with each successive Access Seeker (if any) which has delivered such a signed Conditional Access Agreement and any relevant Security during the 3 month period.

- (9) **(Issues with provision of Security requested)** If an Access Seeker is unable to provide the Security required by DBCT Management within the 3 month period referred to in Section 5.4(l)(8) (or, by the fifth Business Day of the 3 month period referred to in Section 5.4(l)(8), the Access Seeker disputes DBCT Management's entitlement to the Security requested), the Conditional Access Agreement to be executed will be modified so that it is a further condition precedent to it becoming effective that such Security is provided to DBCT Management within 20 Business Days after the Execution Date (or, if so disputed, a Security which the Independent Expert determines to be fair is provided within 20 Business Days after the Independent Expert

makes that determination), and the "Effective Date" will be adjusted accordingly.

- (10) **(Termination if condition precedent not fulfilled)** Each Conditional Access Agreement referred to in Section 5.4(l)(4) and 5.4(l)(8) (as applicable) must be on the basis that it will terminate if a relevant condition precedent referred to in Section 5.4(l)(3) is not fulfilled within a reasonable period from the date of execution of the Conditional Access Agreement (which will not be less than 3 months). However, DBCT Management and an Access Seeker can agree to extend this period from time to time, as long as an extension for the same period has been offered by DBCT Management to all Access Seekers who have such condition precedent.
- (11) **(Access Seeker rejoins Queue if Conditional Access Agreements terminate)** If a Conditional Access Agreement referred to in Section 5.4(l)(8) terminates because:
  - (A) a condition precedent referred to in Section 5.4(l)(3) has not been fulfilled within the reasonable period nominated (or any extended period as agreed between DBCT Management and each Access Seeker in accordance with Section 5.4(l)(10)), the relevant Access Seekers will resume their respective positions in the Queue as if the Access Seekers had never signed the Conditional Access Agreements; or
  - (B) a condition precedent that requires the Access Seeker to provide Security (as referred to in Section 5.4(l)(9)) is not fulfilled, DBCT Management may exercise its discretion to remove that Access Seeker from the Queue in accordance with Sections 5.4(l)(5) and 5.4(l)(6) and, if so removed, the negotiation process for that Access Seeker in respect of the Terminal Capacity Expansion will be discontinued.
- (12) **(Reductions in contracted tonnage if estimated expansion of Terminal Capacity not achieved)** Each Conditional Access Agreement will include a provision entitling DBCT Management to re-determine Terminal Capacity and Expansion Component Capacity in accordance with Section 11.1(k) and to proportionately reduce the Annual Contract Tonnage allocated under the Conditional Access Agreement to the Access Seeker, subject to the following rules:
  - (A) in relation to Socialised Terminal Capacity, if the capacity at the Existing Terminal determined by DBCT Management in accordance with Section 11.1(k)(3) is less than the estimation of aggregate (expanded) capacity at the Existing Terminal made at

the time of entry into the Conditional Access Agreement, then DBCT Management will proportionately reduce the Annual Contract Tonnage in all Conditional Access Agreements so that the aggregate Tonnage of all Conditional Access Agreements is equal to the additional capacity at the Existing Terminal determined in accordance with Section 11.1(k) after the deduction of capacity required to eliminate any shortfall between aggregate Annual Contract Tonnages and capacity at the Existing Terminal which existed prior to the Terminal Capacity Expansion (see Section 5.4(m)(3));

- (B) unless otherwise agreed with participating Access Seekers, in relation to a Differentiated Expansion Component, any Differentially Priced Capacity will be allocated to meet the full entitlements of Access Seekers as set out under relevant Conditional Access Agreements.
- (13) **(Reduced Tonnages revert to Queue)** If DBCT Management reduces the Annual Contract Tonnage allocated under a Conditional Access Agreement in accordance with Section 5.4(l)(12), then - in respect of the number of those tonnes which are reduced - an Access Seeker which has had its tonnes reduced will be:
- (A) placed equal first in the Queue with any other Access Seekers whose tonnes have been reduced following the Terminal Capacity Expansion; and
  - (B) taken not to have signed the relevant Conditional Access Agreement in respect of those tonnes.
- (14) **(Section 5.4(q) not affected)** Nothing in this Section 5.4(l) is to be construed as limiting or in any way being contrary to the principle of Handling of Annual Contract Tonnage only being able to be availed of to the extent of matching rail access entitlement, in Section 5.4(q).
- (15) **(Binding nature)** By the Access Seeker delivering a signed Conditional Access Agreement to DBCT Management, the Access Seeker and DBCT Management agree that, the Conditional Access Agreement is legally effective to bind each party signing it, notwithstanding that it may have provisions without a completed dollar amount (i.e. \$xx.xx) included in it **(Binding Conditional Access Agreement)** and notwithstanding the Conditional Access Agreement will not come into operation until its condition precedent is fulfilled.
- (16) **(Contracting on basis of Binding Conditional Access Agreement)** Where a Conditional Access Agreement does not have a completed dollar amount included in it, the following provisions apply:

- (A) upon completion of all actions of DBCT Management under section 5.4(l)(5), (6) and (8), DBCT Management will notify in writing each of the parties to a Binding Conditional Access Agreement, and the parties to such Binding Conditional Access Agreement must negotiate and seek to agree the dollar amount to be included in the Agreement, for a period of 30 days from such notice (or such longer period as the parties agree).
- (B) Where such agreement is reached the parties shall execute a deed (in such form as agreed by them acting reasonably) to amend the Binding Conditional Access Agreement to incorporate that dollar amount.
- (C) Where the parties to the Binding Conditional Access Agreement do not reach an agreement on the dollar amount, this shall be a Dispute and the Dispute will be determined by the Expansion Arbitrator in making a Price Ruling in accordance with section 5.12.

**(Overriding principles)**

- (m) Despite any other provision of this Section 5.4:
  - (1) **(Existing Access Applications transitioned)** Any outstanding Access Application lodged by an Access Seeker under the 2017 Access Undertaking which applied prior to this Framework will (for the purpose only of determining priority of lodgement and therefore priority in the Queue) be deemed to have been an Access Application lodged under this Framework, as if this Framework had commenced on the date that the first such Access Application was lodged;
  - (2) **(Application for extension of term has priority)** An Access Application to extend the term of an Access Agreement (to the extent that it does not increase the relevant Annual Contract Tonnage) to accord with a bona fide re-estimation of the life of a mine will have precedence over an Access Application for new tonnage;
  - (3) **(Terminal Capacity Expansion allocated first to eliminate shortfalls in capacity below already contracted tonnage)** If a Terminal Capacity Expansion is being Socialised, then the additional Terminal Capacity which results from that Terminal Capacity Expansion (determined in accordance with Section 11.1(k)) will be:
    - (A) firstly utilised to eliminate shortfalls in Annual Contract Tonnes under existing Access Agreements and Existing User Agreements; and

- (B) only thereafter allocated to Annual Contract Tonnages under Conditional Access Agreements entered into in respect of that Terminal Capacity Expansion and proportionately reduced in accordance with Section 5.4(l)(12).
- (4) **(Allocation of Differentially Priced Capacity)** Differentially Priced Capacity will be utilised to meet Annual Contract Tonnages under Access Agreements entered into by the Access Seekers in respect of the relevant Differentiated Expansion Component. Consequently, Access Seekers and Access Holders who are not Differentially Priced Access Seekers in respect of that Differentiated Expansion Component will have no entitlement to have that Differentially Priced Capacity utilised to eliminate shortfalls in Annual Contract Tonnages under their Access Agreements.
- (5) **(Alternative arrangements in some cases if they achieve greater utilisation)** If, in a particular case, the strict application of the process set out in this Section 5.4 would result in a materially greater amount of Available System Capacity not being able to be utilised than could otherwise be the case if an alternative process is followed, then (in the interests of maximising coal exports from Queensland) DBCT Management may enter into one or more Access Agreements in accordance with that alternative process.
- (n) **(Options to extend term taken into account)** For the purpose of this Section 5.4, an Access Holder or Existing User which has an option to extend the term of its Access Agreement or Existing User Agreement (as relevant) will initially be deemed to have exercised that option, when determining whether or not a Queue exists or needs to be formed in relation to a new Access Application. However, if DBCT Management has the right to do so, it may, on each occasion in which a Queue is formed or re-formed, endeavour to have the exercise of that option brought forward or waived (in the latter case with the intention that one or more waivers may result in the Queue no longer existing).
- (o) **(Other provisions of Framework not limited)** Nothing in this Section 5.4 will be taken to limit or be contrary to:
- (1) any right DBCT Management has pursuant to Section 5.8; or
  - (2) any rights or obligations of DBCT Management in Section 11 relating to the expansion of the Terminal (in particular the principle of new Access Agreements only being entered into consistently with anticipated System Capacity).

- (p) **(Disclosure of certain Access Application details)** DBCT Management may at any time and from time to time disclose to any person the aggregate tonnage which is the subject of Access Applications but, except as:
- (1) required by law;
  - (2) consented to by the relevant Access Seeker;
  - (3) reasonably necessary or desirable in relation to planning for operation of the Terminal; or
  - (4) reasonably required to be disclosed to a rail infrastructure provider to assist in development of the System Master Plan,

DBCT Management will not disclose details of an Access Application (including details of the Access Seeker).

- (q) **(Entitlement to have Annual Contract Tonnage Handled must be matched by below rail access)** Despite any other provision in this Framework, DBCT Management must not enter into an Access Agreement with an Access Seeker unless it contains Clause 11.5 of the Standard Access Agreement (under which the Access Holder is not entitled to have its Annual Contract Tonnage Handled at the Terminal, to the extent and for such period as, the Access Holder has not demonstrated to the reasonable satisfaction of DBCT Management that that Annual Contract Tonnage is matched by an entitlement held by the Access Holder or a person on its behalf to railway track access relating to the coal the subject of the Access Agreement).
- (r) **(Notification of Differentially Priced Capacity)** Promptly following Completion of a Differentiated Expansion Component, DBCT Management will notify all Expansion Parties, Access Seekers in the Queue and all Access Holders of the following:
- (1) the date of Completion;
  - (2) the Differentially Priced Capacity; and
  - (3) if any tonnage associated with the Differentiated Expansion Component is uncontracted and, if so, the tonnage which is available for Access Seekers.
- (s) **(Formation of a Differentiated Queue)** If at any time there are two or more current Access Applications received in respect of Differentially Priced Capacity and there is or will be insufficient System Capacity associated with Differentially Priced Capacity which is available at any relevant time to accommodate an increase in Handling of coal applied for in all of those Access Applications, a new queue will form in respect of the Differentially Priced Capacity (the **Differentiated Queue**).

- (t) **(Queuing Principles for a Differentiated Queue)** DBCT Management will manage any Differentiated Queue in accordance with the following principles:
- (1) DBCT Management will apply the same general rules for priority as apply with respect to the Queue, under this Section 5.4.
  - (2) Access Seekers must specify which queue they wish to join when applying for Access (the Queue or a Differentiated Queue).
  - (3) Access Seekers may be in both the Queue and a Differentiated Queue separately and simultaneously under different Access Applications.
  - (4) Where capacity becomes available in either the Queue or a Differentiated Queue (but not both queues), DBCT Management will invite all Access Seekers in the relevant queue to submit a signed Access Agreement in the priority order of the relevant queue.
- (u) **(Commercial discretion of DBCT Management where Access Application involves both queues)** Where Available System Capacity relies on Terminal Capacity that comprises both Socialised Capacity and Differentially Priced Capacity, DBCT Management will invite Access Seekers in both the Queue and the Differentiated Queue to submit a relevant signed Access Agreement in accordance with the queuing principles in this Section 5.4.
- (v) **(Reordering of queues applying commercial discretion)** If, having obtained signed Access Agreements from Access Seekers in respect of Available System Capacity under Section 5.4(u), DBCT Management determines that the most efficient use of Available System Capacity is to contract with the same Access Seeker in respect of both Socialised Terminal Capacity and Differentially Priced Capacity, it may accept a signed Access Agreement other than in the order of the relevant queue, provided that, prior to accepting such signed Access Agreement and subject to Section 5.4(w), DBCT Management:
- (1) has notified all other Access Seekers in each Queue of:
    - (A) its intention to reorder one or both queues; and
    - (B) any commercial principles which it intends to apply when reordering one or both queues; and
  - (2) has provided all Access Seekers with a reasonable opportunity to respond; and
  - (3) is satisfied (acting reasonably), based on any responses received from Access Seekers and applying those commercial principles, that there is no Access Seeker which is higher in either queue that is prepared to contract on an equivalent basis.

For this purpose, any commercial principles must operate as between Access Seekers strictly on a non-discriminatory basis.

(w) **(Dispute in relation to reordering of a queue)**

- (1) An Access Seeker may refer any Dispute in relation to reordering of a queue under Section 5.4(v) as a Dispute under Section 16.
- (2) If a Dispute is raised in respect of any reordering of a queue, DBCT Management will not enter into any relevant Access Agreement under Section 5.4(v) unless and until the Dispute is withdrawn or determined and in accordance with any such determination.

## 5.5 Indicative Access Proposal

- (a) **(Timing for Indicative Access Proposal)** As soon as practicable and in any event within 20 Business Days following receipt of an Access Application (or, if additional information has been requested by DBCT Management under Section 5.3, within 20 Business Days of receipt of all of the additional information requested), DBCT Management must use its reasonable endeavours to provide the relevant Access Seeker with a response containing proposed terms and conditions of Access (**Indicative Access Proposal**).
- (b) **(Notice of additional time needed by DBCT Management)** If it is not reasonable to provide an Indicative Access Proposal within 20 Business Days of receipt of an Access Application (or, if applicable, the additional information requested under Section 5.3), DBCT Management must, as soon as practicable, but in any event, within 20 Business Days, advise the relevant Access Seeker of its estimate of the extra time required to deliver the Indicative Access Proposal.
- (c) **(Dispute by Access Seeker as to need for additional time)** If the Access Seeker is of the opinion that the estimate of extra time for preparation of the Indicative Access Proposal is excessive, then the Access Seeker may refer the matter for Expert Determination. DBCT Management must use reasonable efforts to provide the Indicative Access Proposal within the estimated time period provided by DBCT Management or as otherwise determined by the Independent Expert.
- (d) **(Content of Indicative Access Proposal)** The Indicative Access Proposal must set out:
  - (1) an indicative assessment as to whether there is sufficient Available System Capacity at all relevant times (having regard amongst other things to outstanding Access Applications in a Queue) to accommodate the Access Application;

- (2) advice in respect of the existence of (but not the identity of) other Access Seekers who have already submitted an Access Application and the aggregate tonnage profile(s) requested in those Access Applications;
- (3) the Standard Access Agreement or a draft access agreement where the Access Application contemplates Access on different terms;
- (4) the expiry date of the Indicative Access Proposal, which will be 30 Business Days following the date the Access Seeker receives the Indicative Access Proposal (should there be no notification by the Access Seeker pursuant to Section 5.6 that the Indicative Access Proposal has not been prepared in accordance with the Framework);
- (5) if there is sufficient Available System Capacity to accommodate the Access Application, advice to that effect, and:
  - (A) if it is reasonable to provide such an indication, a non-binding indication of the expected Access Charges for the requested Services in the Access Application based on an allocation of Non-Expansion Costs in accordance with Section 10.7;
  - (B) if the sufficiency of Available System Capacity for the provision of any of the Access sought depends on the Completion of a planned or reasonably expected Terminal Capacity Expansion:
    - (i) an initial assessment of the Pricing Method that will be applicable to the Access sought (including reasons), having regard to the required Terminal Capacity Expansion, any relevant Price Ruling(s) by an Expansion Arbitrator and the Expansion Pricing Principles;
    - (ii) a non-binding indication of the expected Access Charges for the purposes of sub-paragraph (A) (where it is reasonable to provide such an indication) that is based on the applicable Pricing Method determined by the initial assessment referred to at sub-paragraph (B)(i); and
    - (iii) if the Pricing Method for the required Terminal Capacity Expansion has not yet been determined by an Expansion Arbitrator, a non-binding indication of the expected Access Charges for the purposes of sub-paragraph (A) (where it is reasonable to provide such an indication) that also includes an indication of the expected Access Charges where the applicable Pricing Method is not that

determined by the initial assessment referred to at sub-paragraph (B)(i);

- (C) the current Terminal Master Plan and System Master Plan;
  - (D) details of any additional information required by DBCT Management to progress the Access Application and develop the terms and conditions for acceptance; and
  - (E) details of any security, guarantee, other support or other information required by DBCT Management to establish the solvency and creditworthiness of the Access Seeker and, where DBCT Management requires, its guarantor; and
- (6) if there is insufficient Available System Capacity (as determined by reference to the assessment of System Capacity undertaken prior to the time of giving the indicative assessment) to accommodate the Access Application, advice to that effect, and:
- (A) reasonable particulars as to why this circumstance prevails;
  - (B) an estimate of what the Available System Capacity is at relevant times;
  - (C) whether a Queue has been formed in accordance with Section 5.4 of this Framework (including as a result of the relevant Access Application);
  - (D) an initial assessment of the Pricing Method that will be applicable to the Access sought (including reasons) having regard to any planned or reasonably expected Terminal Capacity Expansions, any relevant Price Ruling(s) by an Expansion Arbitrator and the Expansion Pricing Principles;
  - (E) if it is reasonable to provide such an indication:
    - (i) a non-binding indication of the expected Access Charges for the requested Services in the Access Application where the applicable Pricing Method is as determined by the initial assessment referred to at sub-paragraph (D) and Non-Expansion Costs are allocated in accordance with Section 10.7; and
    - (ii) if the Pricing Method for the required Terminal Capacity Expansion has not yet been determined by an Expansion Arbitrator, a non-binding indication of the expected Access Charges for the requested Services in the Access Application where the applicable Pricing Method is not

that determined by the initial assessment referred to at sub-paragraph (D) and Non-Expansion Costs are allocated in accordance with Section 10.7;

- (F) a copy of the System Master Plan and an indicative timetable for any expansion of System Capacity which may be undertaken (if any).
- (e) **(Best Endeavours indication of Access Charges)** In assessing the applicable Pricing Method and providing a non-binding indication of the likely resulting Access Charges for the purpose of this Section 5, DBCT Management shall use its best endeavours to provide an accurate indication of the likely Pricing Method and Access Charges, having regard to all available information.
- (f) **(Indicative Access Proposal not binding on DBCT Management)** The Indicative Access Proposal will, unless it contains specific conditions to the contrary, contain indicative arrangements only and does not oblige DBCT Management to provide Access.
- (g) **(Access Seeker may dispute time-frame)** If, after 20 Business Days following DBCT Management's acknowledgment of the Access Application, the Access Seeker believes that DBCT Management is not making reasonable progress in the preparation of the Indicative Access Proposal, the Access Seeker may refer the timing of the provision by DBCT Management of the Indicative Access Proposal for Expert Determination.
- (h) **(Where Terminal Capacity Expansion is needed to satisfy an Access Application)** Where there is not sufficient Available System Capacity to accommodate the Access Application and the Access Seeker wishes to continue the negotiation process provided for in this Section 5, such negotiations may continue on the basis that a Terminal Capacity Expansion may be undertaken in accordance with Section 11 of this Framework which (whether with or without any relevant expansion of other components of the System) is estimated to provide sufficient Available System Capacity. In this case, if DBCT Management is unable to comply with the timeframes specified in Section 5 of this Framework, it will advise the Access Seeker of the estimated timeframes. If the Access Seeker does not believe the proposed timetable is reasonable or believes that DBCT Management is not making reasonable progress, it may refer the timetable for Expert Determination.

## 5.6 Response to Indicative Access Proposal

- (a) **(Access Seeker's response)** If the Access Seeker intends to progress its Access Application on the basis of the arrangements set out in the Indicative Access Proposal, it must notify DBCT Management of its intention to do so within 30 Business Days of the date it receives the Indicative Access Proposal. If the Access Seeker does not notify DBCT Management of its intention before the

expiry date of the Indicative Access Proposal, its Access Application will be deemed to have lapsed and it may apply again for Access in accordance with Section 5.2 (unless a longer period for notification is agreed between the parties).

- (b) **(DBCT Management to expedite any replacement Access Application)** If an Access Application lapses but the Access Seeker lodges a replacement Access Application, DBCT Management will endeavour in good faith to expedite the steps leading to the issue of a new Indicative Access Proposal.
- (c) **(Notice of non-complying Indicative Access Proposal)** If the Access Seeker considers that the Indicative Access Proposal has not been prepared in accordance with Section 5.5 of this Framework, it must give DBCT Management notice in writing within 20 Business Days of receipt of the Indicative Access Proposal to that effect, setting out the reasons why the Access Seeker believes that the Indicative Access Proposal is inconsistent with Section 5.5 of this Framework.
- (d) **(Response to notice of non-compliance)** DBCT Management must use all reasonable efforts to respond to a notice of non-compliance under paragraph (c) of this Section 5.6, including, where appropriate, the making of revisions to the Indicative Access Proposal, within 20 Business Days of the notice. If DBCT Management is unable to respond within this time period, it must notify the Access Seeker of the date on which it expects to be able to respond.
- (e) **(Dispute relating to Indicative Access Proposal)** If the Access Seeker is not satisfied with:
  - (1) the response to the notice given under paragraph (c) of this Section 5.6;  
or
  - (2) DBCT Management's estimated date to respond to that notice,the Access Seeker may refer the matter for Expert Determination.

## 5.7 Negotiation process

- (a) **(Parties to negotiate if Access Seeker wishes to)** If the Access Seeker indicates its willingness to progress its Access Application under Section 5.6 (or otherwise, in the case of an Access Application of the type referred to in paragraph (b) of the definition of that term), then both parties must commence negotiations as soon as reasonably possible to progress towards an Access Agreement or a Conditional Access Agreement. The period for negotiation will commence on the date notified by the Access Seeker under Section 5.6(a) (or the date 5 Business Days after the commencement of the Term in the case of an Access Application referred to in paragraph (b) of the

definition of the term Access Application, even if there have been discussions prior to that date) and end upon any of the following events:

- (1) execution of an Access Agreement or Conditional Access Agreement in respect of Access sought by the Access Seeker;
  - (2) written notification by the Access Seeker that it no longer wishes to proceed with its Access Application (at which time its Access Application will be deemed to have lapsed);
  - (3) DBCT Management issuing a Negotiation Cessation Notice to the Access Seeker in accordance with Section 5.8;
  - (4) the expiration of 6 months from the commencement of the negotiation period or, if both parties agree to an extension of the negotiation period, the expiration of the agreed extended term, provided that agreement to extend the negotiation period is not unreasonably withheld by either party;
  - (5) a reduction in Available System Capacity due to:
    - (A) another Access Seeker finalising an Access Agreement in accordance with this Framework, where that reduction in Available System Capacity adversely affects DBCT Management's ability to offer Access to the Access Seeker under the terms of the Indicative Access Proposal; or
    - (B) a sustained change in the System operating assumptions of one or more components of the Dalrymple Bay Coal Chain requiring re-determination of System Capacity under Section 11.1, where that reduction in Available System Capacity adversely affects DBCT Management's ability to provide Access to the Access Seeker under the terms of the Indicative Access Proposal; or
  - (6) DBCT Management receiving Notice from a Notifying Access Seeker in accordance with Section 5.4(e), for the process contemplated by Section 5.4(f) to occur.
- (b) **(Review of Indicative Access Proposal)** In the event that the negotiation period is suspended for the reasons set out in Section 5.7(a)(5) or Section 5.7(a)(6) (and once the process contemplated by Section 5.4(f) to Section 5.4(h) is complete, if applicable), DBCT Management must review the Indicative Access Proposal and prepare a revised Indicative Access Proposal in accordance with Section 5.5 and the negotiation process will recommence from the date this is provided to the Access Seeker.
- (c) **(Revisions to Access Application)** During the negotiation period, the Access Seeker may review and revise the information provided to DBCT Management

in the Access Application, provided that such revision does not substantially alter the nature of the Access rights sought by the Access Seeker and is not otherwise prohibited under Section 5.4(i)(3), 5.4(l)(7) or 5.10(h). If DBCT Management is reasonably of the view that an Access Seeker's revision of information provided to DBCT Management in the Access Application has substantially altered the nature of the Access rights sought by the Access Seeker, then subject to paragraphs (d) and (e) of this Section 5.7, DBCT Management will treat the revised information as a new Access Application, and the process set out in this Section 5 will recommence from that point. If the revision is for an increase in the annual tonnage required or a longer term, then only the additional annual tonnage or additional term (as applicable) will be taken to constitute the subject of a new Access Application.

- (d) **(Certain extensions of term do not create new Access Application)** If, in the case of an Access Application referred to in paragraph (b) of the definition of that term, the revision is for an increase in the term from 5 or more years, then the extended term will be treated as part of the original Access Application.
- (e) **(Reduction in tonnage applied for does not create new Access Application)** A reduction in tonnage or term will not, of itself, constitute a new Access Application pursuant to this paragraph if there is a bona fide commercial reason for such reduction.
- (f) **(Dispute relating to negotiation)** If a Dispute arises between the parties during the negotiation period and the parties are unable to resolve the Dispute to their mutual satisfaction, then either party may seek to resolve the Dispute in accordance with the dispute resolution process set out in Section 16 within 3 months after the end of the negotiation period in accordance with Section 5.7(a)(4).
- (g) **(Negotiations to continue despite Dispute)** To remove any doubt, the negotiation process and the obligations of the parties in that regard are to continue notwithstanding the commencement of a dispute resolution process pursuant to Section 16 of this Framework.

## 5.8 Negotiation Cessation Notice

- (a) **(Negotiation Cessation Notice)** At any time during the negotiation process under Section 5.7, DBCT Management may give notice to an Access Seeker that it does not intend to enter into an Access Agreement with the Access Seeker (such notice being a Negotiation Cessation Notice), if:
  - (1) an Access Seeker does not comply with all of its material obligations contained in this Framework;

- (2) DBCT Management is reasonably of the opinion that there is no reasonable likelihood that the Access Seeker will comply with the material terms and conditions of an Access Agreement;
  - (3) DBCT Management is reasonably of the opinion that the Access Seeker has no genuine intention of gaining Access, or has no reasonable likelihood of utilising Access, at the level of capacity sought;
  - (4) DBCT Management is reasonably of the opinion that the Access Seeker or its guarantor is not or is likely not to be reputable or of good financial standing;
  - (5) except where the decision of an Independent Expert contains manifest error, the Access Seeker does not materially comply with a decision of the Independent Expert pursuant to Section 16.3; or
  - (6) an Access Seeker does not materially comply with a decision of the Arbitrator pursuant to Section 16.4.
- (b) **(Negotiation Cessation Notice to include reasons)** A Negotiation Cessation Notice must identify the reasons for DBCT Management's decision not to enter into an Access Agreement with the Access Seeker.
- (c) **(Examples of no reasonable likelihood of compliance)** It will be reasonable for DBCT Management to form the view that circumstances in Section 5.8(a)(2) or 5.8(a)(4) apply if for example:
- (1) the Access Seeker is Insolvent;
  - (2) the Access Seeker, or a Related Body Corporate of the Access Seeker, is currently or has in the previous two years been in material default of any Access Agreement (which has not been promptly rectified), Existing User Agreement or any other agreement where its performance under that agreement is relevant to the Access Seeker's likely performance under an Access Agreement; or
  - (3) the Access Seeker or a proposed provider of Security fail to establish their solvency and creditworthiness in accordance with Section 5.9.
- (d) **(Dispute as to Negotiation Cessation Notice)** If the Access Seeker reasonably considers that DBCT Management has improperly given it a Negotiation Cessation Notice, then (provided that Section 5.8(c)(1), 5.8(c)(2) or 5.8(c)(3) do not apply) the Access Seeker may refer the matter to dispute resolution in accordance with Section 16. If the resolution of the Dispute is in favour of the Access Seeker, DBCT Management must re-commence negotiations with that Access Seeker.

- (e) **(Recovery of costs of DBCT Management)** Subject to any Dispute on the matter being otherwise determined, DBCT Management may recover from the Access Seeker its reasonable costs incurred in negotiations with the Access Seeker where it ceases negotiations in accordance with a Negotiation Cessation Notice validly issued under this Section 5.8. A Dispute about the recovery of these costs may be referred to dispute resolution in accordance with Section 16 of this Framework.

## 5.9 Creditworthiness of Access Seeker

- (a) **(Access Seeker to be creditworthy)** DBCT Management:
  - (1) may remove from the Queue; and
  - (2) regardless of whether the relevant Access Seeker has been removed from the Queue by DBCT Management, will not be required to enter into an Access Agreement or proceed with an Access Application with, an Access Seeker which is or has become Insolvent or which, after DBCT Management's reasonable request, fails within a reasonable period to establish or confirm its likely creditworthiness for the term of the Access Agreement required, or to provide adequate Security from another entity which establishes or confirms its likely creditworthiness for the term of the Access Agreement required.
- (b) **(Information as to solvency)** To confirm the solvency and creditworthiness of an Access Seeker and, where DBCT Management requires, the provider of a Security, the Access Seeker will provide such information as may be reasonably requested by DBCT Management to establish that solvency and creditworthiness.
- (c) **(Provision of Security)** If an Access Seeker or, where DBCT Management requires, its Security provider, is unable to establish their solvency and creditworthiness in their own right, creditworthiness may be established by the Access Seeker and Security provider by providing further Security (as reasonably required by DBCT Management), for example (but not limited to) any one or more of:
  - (1) letters of credit;
  - (2) tripartite agreements with project financiers; and
  - (3) guarantees or security from entities with a Standard and Poors or Moodys rating of not less than investment grade.
- (d) **(Access Agreement may permit Security to be required)** For clarification, nothing in this Section 5.9 limits the rights of DBCT Management under an Access Agreement to require Security (or additional Security) after the

commencement of an Access Agreement in accordance with the terms of that Access Agreement.

#### **5.10 Funding of feasibility studies**

- (a) **(Funding of System Capacity studies)** If DBCT Management is required to undertake a System Capacity assessment under Section 11.1 which is not otherwise funded as part of feasibility studies for an Expansion Component under this Section 5.10, DBCT Management may recover the reasonable costs of such assessment as attributable to the Existing Terminal through NECAP. DBCT Management will consult with and make available the results of all capacity assessments undertaken in accordance with Section 11.1 to all Access Holders and Expansion Parties, including separately identifying:
- (1) the assessed capacity of the Existing Terminal;
  - (2) the projected capacity of a Terminal Capacity Expansion, including, if relevant, the projected capacity of a Differentiated Expansion Component; and
  - (3) the Expansion Component options being considered in any feasibility studies under this Section 5.10.
- (b) **(Request for Access Applicants to Fund Feasibility Studies)** If DBCT Management, acting reasonably, concludes that the Aggregate Annual Contract Tonnages applied for in Access Applications lodged with it, together with all other relevant circumstances, justify the undertaking of a study to determine the feasibility of a relevant Terminal Capacity Expansion then DBCT Management may, subject to Section 5.10(c), give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management. DBCT Management may not make such a request unless a Funding Agreement or Underwriting Agreement (as applicable) has been made and published on the DBCT Management's website in accordance with Section 5.10(q)(9)(E).
- (c) **(Notices will be given simultaneously)** DBCT Management will, in giving notices under Section 5.10(b), give such notices to all Access Applicants in the Queue, as relevant to the contemplated increase in Annual Contract Tonnage which would be facilitated by the Terminal Capacity Expansion under consideration, on or about the same date.
- (d) **(Requests to be proportionate to tonnages applied for)** DBCT Management will request that any funding or underwriting of the feasibility study or feasibility studies referred to in Section 5.10(b) pursuant to a Funding Agreement or Underwriting Agreement (as applicable) be proportionate amongst the relevant participating Access Applicants, according to the respective sum of the Annual Contract Tonnages requested in their Access

Applications over the first 10 years of Handling under the Conditional Access Agreement applied for by them.

- (e) **(Order of responses to notices)** DBCT Management must, in dealing with responses from Access Applicants to notices given by DBCT Management under Section 5.10(b), start with the response given by the Access Applicant that has the highest ranking in the Queue and proceed to the response given by each successive Access Applicant in order of their respective ranking in the Queue.
- (f) **(Position in Queue may be lost to subsequent Applicants)** If an Access Applicant is requested by DBCT Management to enter into a Funding Agreement or Underwriting Agreement but the Access Applicant:
  - (1) declines to do so;
  - (2) fails to enter into a Funding Agreement or Underwriting Agreement (as applicable) with DBCT Management on such terms as DBCT Management reasonably requires within 3 months after being requested by DBCT Management to do so; or
  - (3) does not provide security required by DBCT Management in connection with the Funding Agreement or Underwriting Agreement (as applicable) within 3 months after being requested by DBCT Management to do so,

(such an Access Applicant being a **Non-Funding Access Applicant**) then:

- (4) DBCT Management may, subject to Section 5.10(g), remove the Non-Funding Access Applicant from the Queue, in which case the Non-Funding Access Applicant's Access Application will be taken to have been rejected; or
- (5) if DBCT Management does not remove the Non-Funding Access Applicant from the Queue, then to the extent that any Access Applicant(s) after the Non-Funding Access Applicant in the Queue within 3 months thereafter:
  - (A) enter(s) into a Funding Agreement or Underwriting Agreement with DBCT Management; and
  - (B) provide(s) security required by DBCT Management in relation to the Funding Agreement or Underwriting Agreement (as applicable) of at least the aggregate amount that is required by DBCT Management to fund or underwrite the study referred to in Section 5.10(b) in the proportion to which the tonnage applied for by an Access Applicant bears to the additional

Aggregate Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion,

those subsequent Access Applicants will, from the date on which they are legally committed to provide or underwrite such feasibility funding and provide security under the Funding Agreement or Underwriting Agreement (as applicable), have priority in the Queue ahead of the Non-Funding Access Applicant.

- (g) **(Considerations regarding removal from Queue)** In considering whether to remove an Access Seeker from the Queue under Section 5.10(f)(4), DBCT Management will have regard to the extent to which the additional Annual Contract Tonnage that will be facilitated by the contemplated Terminal Capacity Expansion is reasonably required to provide the Access rights sought by the Access Seeker.
- (h) **(Amendments to Access Application)** An Access Seeker may not amend its Access Application during the 3 month period which commences on the date the Access Seeker receives a notice from DBCT Management under Section 5.10(b).
- (i) **(Priorities restored if feasibility study does not proceed)** If an Access Applicant obtains a higher priority in the Queue as a result of Section 5.10(f), and DBCT Management elects not to proceed with the relevant feasibility study, then the relevant Access Applicant will again have the same priority in the Queue as it would have had if Section 5.10(f) did not apply.
- (j) **(Clarifications)** Nothing in this Section 5.10:
  - (1) requires DBCT Management to proceed with a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study (as the case may be) unless it secures a Funding Agreement or Underwriting Agreement in respect of the full cost of that feasibility study from one or more Access Seekers;
  - (2) prohibits an Access Seeker from providing more than its required proportion in respect of any funding or underwriting requested for Feasibility Studies (but providing a greater proportion does not in itself entitle that Access Seeker to any additional tonnage under an Access Agreement); or
  - (3) is to be taken as limiting the obligations of DBCT Management in Section 11.
- (k) **(Disputes relating to requests for Feasibility Funding)** If any Access Applicant considers that the terms of the Funding Agreement, Underwriting Agreement or the amount or type of security required in connection with the Funding Agreement or Underwriting Agreement requested by DBCT Management

pursuant to Sections 5.10(b) and 5.10(d) are not reasonable, it may within 3 months after being requested to enter into a Funding Agreement or Underwriting Agreement and to provide security, apply for Expert Determination to determine what is reasonable, and in such event:

- (1) the determination of the Independent Expert as to what is reasonable will apply in respect of what DBCT Management can require from each Access Applicant; and
- (2) the period of 3 months in Section 5.10(f) will become a period ending 15 days after the Independent Expert notifies its determination.

The terms of a Funding Agreement or Underwriting Agreement will be reasonable to the extent that they are consistent with the terms of a Standard Funding Agreement or Standard Underwriting Agreement (as applicable) approved in accordance with Section 5.10(q).

- (l) **(FEL 3 Feasibility Funding)** If DBCT Management having completed a FEL 1 Feasibility Study and FEL 2 Feasibility Study, acting reasonably and consistently with prudent business practice concludes that Aggregate Annual Contract Tonnage applied for in one or more Access Applications lodged with it, together with all other relevant circumstances, justify it undertaking a FEL 3 Feasibility Study, DBCT Management may, at its own cost, undertake a FEL 3 Feasibility Study. For clarity, if DBCT Management undertakes to independently fund a FEL 3 Feasibility Study this will not affect the entitlement of any Funding Access Seekers (which funded the relevant FEL 1 Feasibility Study and FEL 2 Feasibility Study) to continue to participate in any subsequent Expansion Component.
- (m) **(Transitional arrangements for previous funding)** If at the Commencement Date DBCT Management is undertaking a FEL 1 Feasibility Study or FEL 2 Feasibility Study in respect of a relevant proposed Terminal Capacity Expansion, DBCT Management may (by giving not less than 14 days written notice) give Access Applicants in the Queue a notice requesting that they enter into a Funding Agreement or Underwriting Agreement with DBCT Management in which case:
  - (1) Sections 5.10(d), 5.10(e), 5.10(f), 5.10(g), 5.10(i) and 5.10(k) apply (with such modifications as the circumstances require); and
  - (2) if the Feasibility Study being undertaken at the Commencement Date is a FEL 2 Feasibility Study, the Funding Agreement and Underwriting Agreement will apply to the FEL 2 Feasibility Study and the FEL 1 Feasibility Study which preceded the FEL 2 Feasibility Study.
- (n) **(Credit for prior Funding, and refunds)** If an Access Seeker has provided funding for a Feasibility Study referred to in Section 5.10(m) prior to the

Commencement Date, the amount funded will be deemed to be a contribution to the funding requested under Section 5.10(m). To the extent that an Access Seeker has contributed funds (as opposed to underwriting the funding) prior to the Commencement Date in excess of the funds required to be contributed under Section 5.10(m) DBCT Management may elect to refund to that Access Seeker such excess funding or credit it towards any further contribution to a Feasibility Study required or agreed to be paid by that Access Seeker.

- (o) **(Contributions to Funding of Feasibility Studies by DBCT Management)** DBCT Management may at its discretion elect to itself bear, or be required under law or by the Port Services Agreement to itself fund, all or part of the costs of a FEL 1 Feasibility Study, FEL 2 Feasibility Study or FEL 3 Feasibility Study which one or more Access Applicants do not fund or underwrite in accordance with a Funding Agreement or Underwriting Agreement (as applicable). Nothing in this Section 5.10(o) affects:
- (1) DBCT Management's rights to apply to recover such sum through the Initial Terminal Infrastructure Charge in the case of a Differentiated Expansion Component, or adjustment to the Terminal Infrastructure Charge for the Existing Terminal on the occurrence of a Review Event of the kind described in paragraph (b) of the definition of that term in the case of a Socialised Expansion, if the relevant proposed Terminal Capacity Expansion proceeds;
  - (2) DBCT Management's rights to apply to have such sum included in the prudent Capital Expenditure determined by an Expansion Arbitrator if DBCT Management is required by Section 11 of this Framework to investigate or undertake a Terminal Capacity Expansion; or
  - (3) DBCT Management's obligation (if any) to fund a FEL 3 Feasibility Study.
- (p) **(Refund of FEL 1, FEL 2 and FEL 3 contributions if Terminal Capacity Expansion proceeds)** In the event that the Terminal Capacity Expansion the subject of a FEL 1 Feasibility Study and FEL 2 Feasibility Study and FEL 3 Feasibility Study proceeds and substantial site works commence, DBCT Management will promptly following the commencement of substantial site works:
- (1) refund to each Funding Access Seeker who contributed funds (as opposed to underwriting the funding) under Section 5.10(b) for that Terminal Capacity Expansion the funds provided by that Access Seeker; and
  - (2) release any underwriting commitment made by each Funding Access Seeker in respect of that Terminal Capacity Expansion.
- (q) **(Preparation and approval of Standard Funding Agreement or Standard Underwriting Agreement)**

- (1) DBCT Management must prepare a proposed Standard Funding Agreement or proposed Standard Underwriting Agreement (as applicable) (Proposed Standard Funding/Underwriting Agreement) where:
  - (A) DBCT Management considers there to be reasonable likelihood that the Aggregate Annual Contract Tonnage applied for in Access Applications or Conditional Access Agreements may justify undertaking Feasibility Studies during the Term of the Access Framework; or
  - (B) DBCT Management receives a written notice from an Access Seeker or Access Holder requesting DBCT Management develop a Proposed Standard Funding/Underwriting Agreement.
- (2) In preparing a Proposed Standard Funding/Underwriting Agreement DBCT Management must consult with Access Seekers, Expansion Parties and Access Holders.
- (3) A Proposed Standard Funding/Underwriting Agreement must be reasonable in all of the circumstances having regard to terms of the Framework and:
  - (A) the legitimate business interests of DBCT Holding in its capacity as the owner of the Terminal;
  - (B) the legitimate business interests of DBCT Management in its capacity as the operator of the Terminal;
  - (C) the public interest, including the public interest in having competition in markets (whether or not in Australia); and
  - (D) the interests of Access Seekers who have signed an Access Application Form or Access Renewal Form (as set out at Schedule A), or who are a party to a Conditional Access Agreement, and Access Applicants, including whether adequate provision has been made for compensation if the rights of the existing Access Holders or Existing Users are adversely affected.
- (4) DBCT Management must publish the Proposed Standard Funding/Underwriting Agreement on its website and must separately notify all Access Holders and Access Seekers promptly following publication of DBCT Management's Proposed Standard Funding/Underwriting Agreement.
- (5) An Access Seeker or Access Holder may, within 3 months after receiving the notice from DBCT Management, give DBCT Management a Dispute Notice under Section 16.1 regarding whether the Proposed Standard

Funding/Underwriting Agreement is consistent with Section 5.10(q)(3). Such notice must specify the way in which the Access Seeker or Access Holder considers that the Proposed Standard Funding/Underwriting Agreement fails to satisfy Section 5.10(q)(3) and, if necessary, any amendments which the Access Seeker or Access Holder considers are necessary to satisfy Section 5.10(q)(3).

- (6) If the Dispute is not resolved in accordance with Section 16.2, such Dispute is to be resolved in accordance with Section 16.4.
- (7) If the Dispute is to be resolved in accordance with Section 16.4, an Arbitrator is to decide whether the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3). If the Arbitrator decides that the Proposed Standard Funding/Underwriting Agreement does not satisfy Section 5.10(q)(3)), the Arbitrator is to decide the terms of an alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting Agreement (as applicable) (**Alternative Proposed Standard Funding/Underwriting Agreement**) that it considers will satisfy Section 5.10(q)(3), provided that the Arbitrator must give DBCT Management a reasonable opportunity to consider and comment on the draft. The Arbitrator will take into account any comments made by DBCT Management in relation to the Arbitrator's draft.
- (8) Notwithstanding a notice given under Section 5.10(q)(5), the Arbitrator may approve the Proposed Standard Funding/Underwriting Agreement, if the Arbitrator considers it reasonable in all of the circumstances having regard to terms of the Framework and the matters set out in Section 5.10(q)(3).
- (9) If:
  - (A) no notice is given under Section 5.10(q)(5);
  - (B) notice is given under Section 5.10(q)(5) but the Dispute is resolved under Section 16.2;
  - (C) the Arbitrator decides that the Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3);  
or
  - (D) the Arbitrator decides that an Alternative Proposed Standard Funding/Underwriting Agreement satisfies Section 5.10(q)(3)),then:
  - (E) the Proposed Standard Funding/Underwriting Agreement or the Alternative Proposed Standard Funding/Underwriting

Agreement (as the case may be) will become the approved Standard Funding Agreement or the approved Standard Underwriting Agreement (as applicable), which is to be published on DBCT Management's website; and

- (F) DBCT Management will, if requested by Access Seekers or Access Holders, enter into agreements with Access Seekers or Access Holders, on the terms of the approved Standard Funding Agreement or approved Standard Underwriting Agreement (as applicable), unless otherwise agreed between DBCT Management and the relevant Access Seeker or Access Holder.
- (10) For clarity, nothing in this Section 5.10(q) limits or restricts DBCT Management or an Access Seeker or Access Holder from referring as a Dispute any failure to agree reasonable amendments to a Standard Funding Agreement/Underwriting Agreement where it is being used in respect of a specific Terminal Capacity Expansion.

#### **5.11 Access Agreement Process**

If an Access Agreement provides a mechanism for applications for additional capacity to be made by the relevant Access Holder under that Agreement, those provisions may be utilised by that Access Holder in respect of additional capacity sought under that Agreement, but such application will be treated as an Access Application for the purposes of this Section 5.

#### **5.12 Review of Pricing Method and Indicative Access Charges**

- (a) **(Review of estimated Access Charges)** Where an Indicative Access Proposal has been prepared on the basis that a Terminal Capacity Expansion would be required in order to accommodate the relevant Access Application:
  - (1) as soon as practicable and in any event within 20 Business Days following completion of a FEL 1 Feasibility Study, DBCT Management must review the Indicative Access Proposal and provide the Access Seeker with a revised assessment of the applicable Pricing Method and estimated Access Charges for the Services requested in the Access Application (a Revised Pricing Proposal);
  - (2) as soon as practicable and in any event within 20 Business Days following completion of a FEL 2 Feasibility Study which supports proceeding to a FEL 3 Feasibility Study (including where that support is conditional on whether an Expansion Component will be priced Differentially or Socialised), DBCT Management must (unless it has already done so pursuant to Section 11.5(a)) review the Revised Pricing Proposal and apply to an Expansion Arbitrator for a Price Ruling in

respect of the Terminal Capacity Expansion under Section 11.5 that determines:

- (A) the applicable Pricing Method for the Terminal Capacity Expansion;
  - (B) the prudent Capital Expenditure in respect of the Terminal Capacity Expansion, with which any determination of an Initial TIC to apply in respect of the Existing Terminal if the Terminal Capacity Expansion is Socialised or the Differentiated Expansion Component if the Terminal Capacity Expansion is Differentiated (as the case may be) following Completion of the Terminal Capacity Expansion should be consistent;
  - (C) if the Price Ruling is to apply to a Conditional Access Agreement, any Different Terms where the Access Seeker disputes the Different Terms and if Different Terms are determined by the Expansion Arbitrator, the determined Different Terms will be included in any Access Agreement to which the Price Ruling applies; and
  - (D) if the Price Ruling is to apply to a Binding Conditional Access Agreement, the dollar amount to apply in respect of that Conditional Access Agreement.
- (b) **(Application for Price Ruling)** An application for a Price Ruling shall include:
- (1) information about the nature and amount of Capital Expenditure forecast to carry out the Terminal Capacity Expansion, as assessed in any Feasibility Studies;
  - (2) information about any Different Terms that will have been agreed;
  - (3) information about the increase in Terminal Capacity expected to arise from the Terminal Capacity Expansion (and expected increases to System Capacity);
  - (4) information about positive or negative impacts on existing Access Holders or existing operations of the Terminal;
  - (5) information about the forecast demand for Access to the increased Terminal Capacity;
  - (6) an assessment of the Pricing Method applicable to the Terminal Capacity Expansion, applying the Expansion Pricing Principles;
  - (7) information about the anticipated impact on Non-Expansion Costs for the Terminal; and

- (8) an estimate of the Terminal Infrastructure Charge that will apply to the Differentiated Terminal Component if the Terminal Capacity Expansion was Differentiated, or the amendment to the Terminal Infrastructure Charge that will apply if the Terminal Capacity Expansion was Socialised, having regard to the information referred to above and the other pricing arrangements set out in Section 10.
- (c) **(Expansion Arbitrator to provide Price Ruling)** In response to an application for a Price Ruling under Section 5.12(a) and/or Section 11.5 , the Expansion Arbitrator shall, after conducting an investigation:
  - (1) determine the application;
  - (2) determine whether the Terminal Capacity Expansion should be Socialised or Differentiated, applying the Expansion Pricing Principles; and
  - (3) in making a determination of the kind referred to in (2)(C) or (D) above:
    - (A) section 10 applies and the Dispute shall be considered to be of a kind referred to in section 10.1(b), except to the extent necessary to give effect to any matter agreed by the parties to a Conditional Access Agreement to which the Price Ruling applies; and
    - (B) the provisions of section 16.4 (excluding paragraphs 16.4(f) and (g)) apply.

### 5.13 Access Transfers

- (a) In processing any request by an Access Holder or Access Seeker for a transfer of rights or entitlements under an Access Agreement (whether by way of assignment or novation), DBCT Management must consent to any such proposed transfer unless DBCT Management (acting reasonably) is satisfied that:
  - (1) the assignor is in material breach of its Access Agreement; or
  - (2) the assignee:
    - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement or the assignee has not otherwise provided security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;

- (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; or
  - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf.
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in Section 5.13(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.
- (d) An Access Holder or an Access Seeker may refer to the Arbitrator as a Dispute under Section 16 of this Framework:
  - (1) any refusal by DBCT Management to consent to a transfer;
  - (2) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer;
  - (3) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

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## 6 Terminal Regulations

### 6.1 Compliance with Terminal Regulations

- (a) **(Compliance by DBCT Management and Operator)** DBCT Management acknowledges that under the Operation & Maintenance Contract DBCT Management and the Operator must comply with the Terminal Regulations. DBCT Management must comply with, and will procure that the Operator complies with, the Terminal Regulations in force from time to time.
- (b) **(Compliance by Access Holders is condition of Access)** Each Access Holder must observe the Terminal Regulations, in force from time to time, as a condition of Access to and the right to have its coal Handled at the Terminal.

### 6.2 Amendment of Terminal Regulations

- (a) **(Process for amending Terminal Regulations)** The Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues. If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:

- (1) conduct reasonable consultation with Access Holders, Access Seekers, Expansion Parties and/or Rail Operators in relation to the proposed amendment; and
  - (2) following the completion of such reasonable consultation, notify the Access Holders, Access Seekers, Expansion Parties and Rail Operators:
    - (A) of the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) of the detailed reasons for its decision to give (or not give) consent to the proposed amendment; and
    - (D) except in the case of notification to Rail Operators, that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (b) **(Implementation of amended Terminal Regulations)** A proposed amendment to the Terminal Regulations will not be implemented unless:
- (1) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1); and
  - (2) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;
    - (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, an Independent Expert appointed to hear the objection (in accordance with Section 6.2(f)) has rejected that objection; or
    - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided,

and an Independent Expert appointed to hear the objection (in accordance with Section 6.2(g)) has upheld that objection.

- (c) **(Consent of DBCT Management)** DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under Section 6.2(b)(2)(A) or 6.2(b)(2)(B) if it has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with Section 6.2(a)(1) and, taking into account the results of such consultation, it reasonably considers that:
- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Framework, and any Access Agreements; and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (d) **(Criteria for disputing refusal to provide consent)** If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, an Access Holder, Access Seeker or Expansion Party may object to DBCT Management's refusal to provide consent if they reasonably consider that:
- (1) the amendments relate to operational issues;
  - (2) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (3) the amendments are consistent with this Framework and any Access Agreement of the Access Holder, Access Seeker or Expansion Party (as the case may be); and
  - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or

obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

(e) **(Notice of amendments to Terminal Regulations)** DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with Section 6.2(i)).

(f) **(Objection to DBCT Management decision to approve amendment of Terminal Regulations)**

(1) If:

(A) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and

(B) an Access Holder, Access Seeker or Expansion Party objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied,

then the Access Holder, Access Seeker or Expansion Party may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management of its objection to the consent to the proposed amendment, such objection to be determined by an Independent Expert.

(2) If, in response to an objection notified by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(f)(1) of this Framework or any corresponding provision of an Access Agreement), the Independent Expert determines that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are not satisfied then:

(A) the proposed amendment and DBCT Management's consent to the proposed amendment will be taken to have been withdrawn; and

(B) the proposed amendment will not be made.

(g) **(Objection to DBCT Management decision to reject amendment of Terminal Regulations)**

(1) If:

(A) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and

- (B) an Access Holder, Access Seeker or Expansion Party objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied,  
  
then the Access Holder, Access Seeker or Expansion Party may within 30 days of being notified of DBCT Management’s refusal to give its consent to a proposed amendment to the Terminal Regulations, notify DBCT Management of its objection to DBCT Management not providing consent for the proposed amendment, such objection to be determined by an Independent Expert.
- (2) If, in response to an objection notified by an Access Holder, Access Seeker or Expansion Party (whether under Section 6.2(g)(1) of this Framework or any corresponding provision of an Access Agreement), the Independent Expert determines that the criteria in Sections 6.2(c)(1) to 6.2(c)(4) are satisfied, then:
  - (A) DBCT Management’s consent to the proposed amendment will be deemed to have been given; and
  - (B) the proposed amendment will be made.
- (h) **(Protection of DBCT Management)** Subject to DBCT Management complying with Section 6.2(b), DBCT Management will not be liable to Access Seekers (and the Standard Access Agreement will provide that DBCT Management will have no liability (on any basis whatsoever) to an Access Holder which executes it) as a result of DBCT Management consenting to an amendment to the Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by Section 6.2(c). For clarification, this does not affect DBCT Management’s obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Framework or a relevant Access Agreement.
- (i) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Regulations available to each Access Holder, Access Seeker and Rail Operator (which may be by displaying it on DBCT Management's website).

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## **7 Confidentiality requirements**

### **7.1 Confidential Information to be kept confidential**

Subject to Sections 5.4(c) and 16.4(e) each relevant Access Seeker, Access Holder and DBCT Management will, at all times, keep confidential and not disclose to any other person, any Confidential Information exchanged under the negotiation arrangements in Section 5 of this Framework or any other part of this Framework, except:

- (a) where disclosure is required by any law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or requirement of a stock exchange or regulator;
- (b) with the prior written consent of the relevant Access Seeker, Access Holder or DBCT Management, as applicable;
- (c) where disclosure is to the recipient's professional advisors provided that such professional advisors are under a duty of confidentiality;
- (d) to the extent disclosure is necessary for notifications to financiers, brokers, insurers or claims assessors or reasonably necessary in connection with seeking financing from a bona fide financier, provided that the broker, insurer, claims assessor or financier to whom the disclosure is made is under a legal obligation to keep the information confidential;
- (e) where disclosure is made to any person or body established to provide coordination in the Dalrymple Bay Coal Chain;
- (f) where disclosure is to a Capacity Expert, an Independent Expert, an Arbitrator, an Expansion Arbitrator, or a court (in the case of a party seeking urgent injunctive relief) to the extent necessary for resolving a Dispute provided that DBCT Management does not disclose the Confidential Information of one Access Seeker or Access Holder to another Access Seeker or Access Holder without the first-mentioned Access Seeker's or Access Holder's consent, unless directed to by a Capacity Expert, an Independent Expert, an Arbitrator, an Expansion Arbitrator or a court (as the case may be); or
- (g) to the extent disclosure is required to protect the safety or security of persons or property or in connection with an accident or emergency.

### **7.2 Confidentiality deed**

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

### **7.3 Use of Confidential Information**

Without limiting the circumstances specified in this Section 7 in which Confidential Information may be used or disclosed, an Access Seeker, an Access Holder and DBCT

Management must otherwise only use Confidential Information provided to it under this Framework for the purposes for which it was provided.

#### **7.4 Reporting of aggregated information**

For the avoidance of doubt, nothing in this Section 7 prevents DBCT Management from:

- (a) complying with its obligations under Sections 9.1 and 9.2; or
- (b) disclosing, in the ordinary course of business, financial reporting information which has been aggregated with other information of a similar nature such that it cannot reasonably be, and is not reasonably capable of being, identified with, attributed to or used to identify, any Access Seeker, Access Holder, Existing User or Rail Operator.

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### **8 Ring-fencing arrangements**

#### **8.1 No related Supply Chain Businesses**

DBCT Management 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.

#### **8.2 Non-discrimination**

DBCT Management will not:

- (a) engage in conduct for the purpose of preventing or hindering an Access Holder's or Access Seeker's Access; or
- (b) unfairly differentiate between Access Seekers, Access Holders or Rail Operators.

#### **8.3 Confidentiality undertaking by board members**

DBCT Management will ensure that each of its directors executes a confidentiality deed pursuant to which the relevant director agrees to only use and disclose Confidential Information obtained as a director of DBCT Management in connection with its role as a director of DBCT Management.

#### **8.4 Complaint handling**

If an Access Holder or Access Seeker considers that DBCT Management may have breached one or more of its obligations under this Section 8 they may raise a Dispute in respect of such complaint in accordance with Section 16 of this Framework.

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### **9 Reporting by DBCT Management**

#### **9.1 Indicators relating to compliance with this Framework**

DBCT Management will Publicly Report on an annual basis the following information:

- (a) **(Indicative Access Proposals)** the number and percentage of total Indicative Access Proposals provided within the applicable timeframe;
- (b) **(Access Applications)** the number and percentage of Access Applications received for which an extension of time for provision of an Indicative Access Proposal was sought by DBCT Management;
- (c) **(Response times)** the average delay (in days) taken to provide an Indicative Access Proposal not provided within the applicable timeframe;
- (d) **(Disputes)** the number of instances where a Dispute has been referred to dispute resolution in accordance with Section 16;
- (e) **(Negotiation periods for successful outcomes)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (f) **(Negotiation periods where no Access Agreement signed)** the average length of the negotiation period (in days), where the negotiation period has commenced and has ceased as the result of any reason other than the execution of an Access Agreement in respect of the Access sought by the Access Seeker;
- (g) **(Access Transfer Applications)** in respect of the Access Transfer processes set out in Section 5.13, the following:
  - (1) the number of requests received for a transfer of rights or entitlements; and
  - (2) the period taken to resolve each transfer, being in each case the period from the date of receipt of the request and ending on the earliest of the date that:
    - (A) an Access Agreement facilitating the transfer was executed by DBCT Management;
    - (B) DBCT Management gave notice to the transferor that consent for the transfer was refused; or
    - (C) any notice was given to the Arbitrator of a Dispute in relation to the purported transfer;
- (h) **(Access Agreements concluded)** the number of instances where a negotiation period that had commenced, ceased as the result of the execution of an Access Agreement in respect of the Access sought by the Access Seeker; and

- (i) **(Complaints)** written complaints received by DBCT Management in relation to its compliance with this Framework.

## 9.2 Indicators relating to service quality

DBCT Management is required to Publicly Report on the following service quality key performance indicators for the Terminal on a quarterly basis:

(a) **(System delivery):**

- (1) number of trains requested by the Operator and scheduled by the rail providers to arrive at the Terminal;
  - (2) actual number of trains completing unloading at the Terminal;
  - (3) number of tonnes of coal scheduled to be delivered to the Terminal; and
  - (4) number of tonnes of coal actually delivered to the Terminal,
- for each month of the quarter.

(b) **(Inloading performance):**

- (1) average train unloading time at the Terminal (on a Terminal job-open to job-close basis); and
  - (2) average train unload time (from permission to unload the train until unloading of the last wagon is complete),
- for each month of the quarter.

(c) **(Stockyard performance):**

- (1) average stock-build time per parcel; and
  - (2) average stock-residence time per parcel,
- for each month of the quarter.

(d) **(Out-loading performance):**

in respect of each outloading conveyor:

- (1) average gross load rate per vessel class – first coal to last coal; and
  - (2) average utilisation of out-load conveyors,
- for each month of the quarter.

- (e) **(Vessel performance):**
  - (1) number of vessels (by class);
  - (2) average number of parcels per vessel (by class);
  - (3) total tonnes per vessel (by class); and
  - (4) total tonnes shipped,for each month of the quarter.
- (f) **(Vessel queuing)** (vessels which have arrived and are awaiting berthing to load):
  - (1) average daily total vessels in queue;
  - (2) average daily number of vessels in queue where relevant coal is not yet available to be railed to the Terminal (“dead ships”);
  - (3) vessel queuing times;
  - (4) queue ordering; and
  - (5) average waiting time to berth at anchor,for each month of the quarter.
- (g) **(Operating efficiency)** inloading and outloading.
- (h) **(Environmental performance):**
  - (1) number of times during each month of the quarter that the “management objective” (as provided for in the Terminal’s environmental licence and approvals) in dust deposition was exceeded; and
  - (2) number of times during each month of the quarter that the “acoustic quality objective” (as provided for in the Terminal’s environmental licence and approvals) was exceeded.
- (i) **(Other)** any additional or alternative service quality key performance indicators that DBCT Management and Access Holders agree from time to time.

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## **10 Pricing arrangements**

### **10.1 Application of Pricing Provisions**

- (a) The Access Charges for each Terminal Component in respect of which the Access Holder has an entitlement to Access will be as agreed between DBCT Management and the Access Holder.
- (b) If DBCT Management and an Access Seeker are unable to agree Initial Access Charges to apply from the commencement of an Access Agreement or increased Access and one of them refers a Dispute relating to those Initial Access Charges for resolution in accordance with the dispute resolution process set out in Section 16 in accordance with Section 5.7(f) of this Framework, any determination by the Arbitrator of terms relating to Initial Access Charges in accordance with Section 16.4 of this Framework must be in accordance with Sections 10.3 to 10.5, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (c) If a Dispute concerning the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into that Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any consequential changes in the drafting of the provisions of the Access Agreement) is referred by DBCT Management or the Access Holder for resolution in accordance with Section 16 of this Framework, in making any Arbitration determination in accordance with Section 16.4 of this Framework the Arbitrator must:
  - (1) determine the Initial Access Charges to apply from the start of the Pricing Period in accordance with Sections 10.3 to 10.5 of this Framework; and
  - (2) subject to paragraph (1) above, give effect to and make a determination that is consistent with the Standard Access Agreement in place under the Access Framework at the time of the Arbitrator's determination,except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (d) Section 10.6 applies to the review during a Pricing Period of the Access Charges applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, and any determination by an

Arbitrator of a Dispute concerning such a review that is referred for resolution by DBCT Management or the Access Holder in accordance with Section 16.4 of this Framework must be in accordance with Section 10.6, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.

- (e) Sections 10.7 and 10.8 apply in accordance with their terms.

## 10.2 Interpretation of Pricing Provisions

- (a) In this Framework, the following principles of interpretation shall apply:
  - (1) **(Single meaning where only Socialisation applies)** for so long as Access to the Terminal continues to be priced on a Socialised basis, the terms and definitions of this Framework relevant to pricing apply to all Access collectively; and
  - (2) **(Alternative meanings where Differentiation applies)** where, pursuant to Section 10.8, Access to the Terminal is charged to one or more Access Holders on a Differentiated basis, the terms and definitions of this Framework relevant to pricing apply to each Terminal Component separately.
- (b) To avoid doubt, if an Access Holder seeks and obtains increased Access in respect of a Terminal Component on one or more occasions, the Access Holder may have more than one Access Agreement and/or a different Terminal Infrastructure Charge for the Terminal Component may apply to each of the tranches of Access obtained by the Access Holder.

## 10.3 Access Charges

Access Charges for each Terminal Component will comprise two parts:

- (a) a Terminal Infrastructure Charge; and
- (b) an Operation & Maintenance Charge.

## 10.4 Terminal Infrastructure Charge

- (a) **(TIC)** The Access Agreement will impose a Terminal Infrastructure Charge (**TIC**) for each Terminal Component in respect of which the Access Holder has an entitlement to Access or increased Access, being an amount per tonne payable by the Access Holder at a relevant time, calculated (and adjusted as required) in accordance with this Section 10 and Schedule C, Sections 2 and 3.

- (b) **(Applies to Annual Contract Tonnage)** The TIC will apply to all Annual Contract Tonnage, or where:
- (1) Section 10.2(a)(2) applies, a different TIC will apply to the Annual Contract Tonnage in respect of each Terminal Component for which the Access Holder has an entitlement to Access;
  - (2) Section 10.2(b) applies, a different TIC may apply to the Annual Contract Tonnage in respect of each tranche of Access to which the Access Holder has obtained an entitlement.
- (c) **(Payment of TIC)** Each Access Holder will pay to DBCT Management in respect of its Annual Contract Tonnage a payment in each Month of each Financial Year during the term of its Access Agreement (the Monthly Payment) calculated (and adjusted as required) in accordance with Schedule C.
- (d) **(Determination of Initial TIC)** Subject to paragraph (e) and unless paragraph (f) applies, in any Arbitration of a kind referred to in Section 10.1(b) or 10.1(c), the Arbitrator must determine a TIC for a Terminal Component to apply under the Access Agreement from commencement of that Agreement, increased Access under that Agreement or the relevant Pricing Period (**Initial TIC**) that:
- (1) reflects a 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;
  - (2) is no less than the Floor TIC calculated in accordance with Schedule C, Section 2(a); and
  - (3) is no greater than the Ceiling TIC calculated in accordance with Schedule C, Section 2(b) to 2(b).
- (e) **(Determination of Initial TIC if Ceiling TIC is below Floor TIC)** Unless paragraph (f) applies, in any arbitration of a kind referred to in Section 10.1(b) or 10.1(c), if the Ceiling TIC for the Terminal Component calculated in accordance with Schedule C, Section 2(b) to 2(b) is lower than the Floor TIC for that Terminal Component calculated in accordance with Schedule C, Section 2(a), the Arbitrator must determine an Initial TIC for the Terminal Component that is equal to the Floor TIC for that Terminal Component.
- (f) **(Determination of Initial TIC if Arbitration already occurred in Pricing Period)** This paragraph (f) applies in an Arbitration of the kind referred to in Section 10.1(b) where an Arbitration determination on an Initial TIC for one or more Access Holders has previously been made under Section 16.4 of this Framework for the Pricing Period in which the Access Agreement or increased Access that is the subject of the first-mentioned Arbitration will commence.

The Arbitrator must determine the Initial TIC to apply for the Terminal Component under the Access Agreement from commencement of that Access Agreement or increased Access under that Access Agreement as follows:

- (1) subject to paragraph 10.4(f)(2), the Initial TIC to apply from commencement of the Access Agreement or increased Access under the Access Agreement must be equal to the Initial TIC for the Pricing Period determined in the first completed Arbitration for that Pricing Period adjusted:
    - (A) based on escalation for the annual change in the Consumer Price Index in accordance with Schedule C, Section 3(a) to 3(d); and
    - (B) for any Review Event that has occurred since the completion of the first completed Arbitration in accordance with Schedule C, Section 3(e) to 3(j);
  - (2) if the resultant Initial TIC for the Access Seeker is higher than the Ceiling TIC applicable at the time of Arbitration or lower than the Floor TIC applicable at that time, the Arbitrator must not apply any Review Event adjustment or adjustments under paragraph 10.4(f)(1) to the Initial TIC determined in the first completed Arbitration for the Pricing Period to the extent that the Review Event adjustment or adjustments would otherwise result in an Initial TIC for the Access Seeker that is higher than the Ceiling TIC or lower than the Floor TIC.
- (g) **(Determination of Floor TIC following Terminal Capacity Expansion)** In any Arbitration of a kind referred to in Section 10.1(b) or 10.1(c) following the Completion and hand over to the Operator of a Terminal Capacity Expansion:
- (1) any determination of the Floor TIC by the Arbitrator must be consistent with any Price Ruling by the Expansion Arbitrator in respect of that Terminal Capacity Expansion; and
  - (2) the Arbitrator must accept Capital Expenditure incurred in respect of that Terminal Capacity Expansion is prudent if the Expansion Arbitrator has determined under Section 11.5 that that Capital Expenditure is prudent and take that prudent Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the Floor TIC.

Nothing in this paragraph precludes the Arbitrator from determining that any additional Capital Expenditure incurred in respect of the Terminal Capacity Expansion is also prudent and also taking that additional Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the Floor TIC.

- (h) **(Determination of Ceiling TIC)** Data from an independent third party data provider must be used in any determination of the Ceiling TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) by an Arbitrator unless the Arbitrator is satisfied that the data from the provider is manifestly incorrect in one or more respects and the error or, if there is more than one error, the errors considered collectively, are 'material', where 'material' means that the error(s) have a material effect on the resultant Ceiling TIC. In that case, the Arbitrator may disregard the independent third party data provider's data and use alternative data but only to the extent that the Arbitrator is satisfied that the provider's data is manifestly incorrect.

## 10.5 Operation & Maintenance Charge

- (a) **(Terminal Operating Costs recovery)** Terminal Operating Costs will be recovered from the Access Holder through the Operation & Maintenance Charge. The Operation & Maintenance Charge for the Access Holder will be calculated on the basis outlined in the Standard Access Agreement and otherwise in accordance with the Operations & Maintenance Contract.
- (b) Where a Differentiated Expansion Component exists and Terminal Operating Costs are required to be allocated between different Terminal Components, then the Operation & Maintenance Charge for each Access Holder will be calculated in accordance with the following procedure:
  - (1) the quantum of Terminal Operating Costs, and the proposed allocation among Terminal Components, will be advised to DBCT Management by the Operator. The Operator will determine the allocation in accordance with Section 10.7(a);
  - (2) DBCT Management will review the quantum and allocation proposed by the Operator and, where relevant, make any variation it considers necessary to comply with Section 10.5(c)(3); and
  - (3) DBCT Management will recover Terminal Operating Costs allocated to a Terminal Component from an Access Holder through the Operation & Maintenance Charge determined in accordance with paragraph 10.5(a).
- (c) **(Notifications, payments and adjustments)** DBCT Management will:
  - (1) notify Access Holders of estimated Terminal Operating Costs annually in advance;
  - (2) recover such estimated costs monthly;
  - (3) notify Access Holders of any applicable adjustment at the end of each Financial Year – to recover any shortfall or to reimburse Access Holders

in the event of under-recovery or over-recovery of Terminal Operating Costs by DBCT Management; and

- (4) recover or reimburse at the end of each quarter and at the end of a Financial Year (as the case may be), such amount (if any) as referred to in Section 10.5(c)(3).

#### **10.6 Review of TIC applicable under Access Agreements in form of the Standard Access Agreement**

- (a) **(Reviews of TIC during a Pricing Period)** On each occasion referred to in Schedule C, Section 3(a) or 3(e) during a Pricing Period, DBCT Management will amend the TIC for a Terminal Component then applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, to the extent that it is affected by the occasion, in accordance with Schedule C, Section 3. The TIC will be amended (effective from the relevant date in Schedule C, Section 3(c) or 3(i)) when DBCT Management gives notice to the relevant Access Holder of the amended TIC.
- (b) **(Arbitration of Dispute arising from reviews of TIC during a Pricing Period)** In any Arbitration of the kind referred to in Section 10.1(d) of this Framework, the Arbitrator:
  - (1) must apply Schedule C, Section 3 to determine an amended TIC;
  - (2) if the resultant amended TIC for the Access Holder is higher than the Ceiling TIC applicable at the time of Arbitration or lower than the Floor TIC applicable at that time, must not apply the amendment to the TIC that would otherwise result under paragraph 10.6(b)(1) to the extent that that amendment would otherwise result in an amended TIC that is higher than the Ceiling TIC or lower than the Floor TIC;
  - (3) if the Dispute relates to a Review Event referred to in paragraph 10.6(b) of the definition of Review Event, must:
    - (A) make a determination in respect of the amended TIC to apply in accordance with Schedule C, Section 3(g) that is consistent with any Price Ruling by the Expansion Arbitrator in respect of the relevant Socialised Expansion; and
    - (B) accept that Capital Expenditure in respect of the relevant Socialised Expansion is prudent if the Expansion Arbitrator has determined under Section 11.5 that that Capital Expenditure is prudent and take that prudent Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the amended TIC.

Nothing in this paragraph precludes the Arbitrator from determining that any additional Capital Expenditure incurred in respect of the relevant Socialised Expansion is also prudent and also taking that additional Capital Expenditure and any associated construction related financing costs determined in accordance with Section 11.6 into account in determining the amended TIC to apply in accordance with Schedule C, Section 3(g); and

- (4) if the Dispute relates to a Review Event referred to in paragraph 10.6(c) of the definition of Review Event, must accept that NECAP is prudent and include it in the determination of the 'Adjustment amount' under Schedule C, Section 3(h) if required by Section 11.10(b) of this Framework and may otherwise accept that NECAP is prudent and include it in the determination of the 'Adjustment amount' under Schedule C, Section 3(h) having regard to the matters set out in Section 11.10(c) of this Framework.
- (c) **(Date amended TIC takes effect)** Until the amended TIC is determined as provided for in this Section 10.6 and Schedule C, Section 3, the TIC applicable immediately prior to the occasion referred to in Schedule C, Section 3(a) or 3(e) will remain in effect and continue to be due and payable. When DBCT Management gives notice or the Arbitrator communicates the determination of the amended TIC determined as provided for in this Section 10.6 and Schedule C, Section 3, the amended TIC will apply with effect from the relevant date in Schedule C, Section 3(c) or 3(i) (**Effective Date**) and DBCT Management will calculate the amount which would have been payable to it by way of Monthly Payments in the period since the Effective Date if that amended TIC had been in effect from that time and the relevant party must pay to the other party the difference between that amount and the amount actually received by DBCT Management by way of Monthly Payments between the Effective Date and the date DBCT Management gives notice or the Arbitrator communicates the determination of the amended TIC.

## 10.7 Cost Allocation

- (a) **(Cost allocation as per Cost Allocation Manual)** Where this Framework provides for:
- (1) the allocation of Terminal Operating Costs among multiple Terminal Components; or
  - (2) the inclusion in the NECAP Asset Base of Capital Expenditure not related to a Terminal Capacity Expansion, and there are multiple Terminal Components,

the cost in question is to be allocated in accordance with the Cost Allocation Manual or, if no Cost Allocation Manual exists, in accordance with the Cost

Allocation Principles. Any Dispute as to the allocation of costs in accordance with the Cost Allocation Manual may be referred to dispute resolution under Section 16 of the Framework.

- (b) **(Preparation of draft Cost Allocation Manual)** When the first Price Ruling is made, DBCT Management must prepare a draft Cost Allocation Manual and submit it to the Independent Expert for approval.
- (c) **(Preparation of revised draft Cost Allocation Manual)** DBCT Management shall, if so requested by the Independent Expert, prepare and submit within 60 days of such request, a revised draft Cost Allocation Manual that satisfies the requirements of the Independent Expert.
- (d) **(Consulting in good faith with the Operator)** DBCT Management shall consult in good faith with the Operator in preparing the Cost Allocation Manual and updating it, from time to time.
- (e) **(Approval of Cost Allocation Manual)** As soon as practicable after the Independent Expert approves the final Cost Allocation Manual, DBCT Management must publish the Cost Allocation Manual on its website.
- (f) **(Cost Allocation Manual requirements)** The Cost Allocation Manual should:
  - (1) provide a transparent basis for assigning costs to separate Terminal Components in different circumstances; and
  - (2) be consistent with the Cost Allocation Principles.
- (g) **(Cost Allocation Principles):** Non-Expansion Costs should be allocated:
  - (A) **(Identifiable cost)** if the cost is uniquely identified or directly incurred in relation to a particular Terminal Component, to that Terminal Component;
  - (B) **(Attributable cost)** if the cost is not an identifiable cost, but there is a reasonable causal relationship between the cost and one or more Terminal Components, to those Terminal Components, in proportion to their reasonably estimated cost drivers; and
  - (C) **(Non-identifiable and non-attributable cost)** if the cost is neither identifiable nor attributable to a particular Terminal Component, on a reasonable basis between the Terminal Components.

## 10.8 Expansion Pricing Principles

- (a) In assessing whether or not Differentiation should apply in respect of a proposed Terminal Capacity Expansion, the following principles shall apply:

- (1) where Socialisation of a Terminal Capacity Expansion would decrease the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a), the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework and the Floor TIC for the Existing Terminal should be determined by reference to the sum of the costs of the Existing Terminal and the costs of the Terminal Capacity Expansion (a **Socialised Expansion**);
  - (2) where Socialisation of a Terminal Capacity Expansion would increase the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a) (a **Cost Sensitive Expansion**), subject to Section 10.8(b), the Terminal Capacity Expansion should be treated as a separate Terminal Component, and the Floor TIC for that Terminal Component determined by reference to the costs of the Terminal Capacity Expansion (and without reference to the costs of the Existing Terminal) (a **Differentiated Expansion Component**).
- (b) A Cost Sensitive Expansion may be treated as forming part of the Existing Terminal (and therefore, not treated as a Differentiated Expansion Component) where circumstances exist that justify Socialisation. In determining whether there are circumstances that warrant Socialisation, consideration must be given to:
- (1) the materiality of the increase in the Floor TIC for the Existing Terminal determined in accordance with Schedule C, Section 2(a) that would be affected by socialising the Cost Sensitive Expansion;
  - (2) the extent to which assets or infrastructure the subject of the Cost Sensitive Expansion will operate wholly or partly, in an integrated way with the Existing Terminal or as a stand-alone development;
  - (3) the extent to which the Cost Sensitive Expansion is likely to benefit users of the Existing Terminal (for example, such as through higher efficiency, reliability or flexibility of the Existing Terminal);
  - (4) any differences in the risks of providing Access to users of the Existing Terminal in respect of additional Terminal Capacity created by the Cost Sensitive Expansion;
  - (5) the financeability of any proposed expansion pricing arrangement, including by reason of the risk of Differentially Priced Access Holders switching between high and low priced Terminal Capacity that otherwise has identical functionality; and
  - (6) any other factor that the Expansion Arbitrator considers relevant.

It is acknowledged that there may be circumstances in which parts and not the whole of a Cost Sensitive Expansion may be Socialised.

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## 11 Terminal Capacity Expansion

### 11.1 Procedure for determining Terminal Capacity and System Capacity

- (a) DBCT Management will, at each time required in Section 11.1(k), either:
- (1) **(Estimate capacities)** accept an estimation that has been accepted by the Capacity Expert as provided for in Section 11.1(m)(3) of the maximum reasonably achievable capacity (measured in tonnes of coal per Financial Year) of:
    - (A) the Terminal (on a “name-plate capacity” basis) (**Terminal Capacity**), including separately identifying:
      - (i) the capacity of the Existing Terminal (on a “name-plate capacity” basis) (**Existing Terminal Capacity**); and
      - (ii) the capacity of each Expansion Component (on a “name-plate capacity” basis) (each an **Expansion Component Capacity**), which for clarity may constitute either Socialised Terminal Capacity or Differentially Priced Capacity depending upon the nature of the relevant Expansion Component; and
    - (B) the System (**System Capacity**),  
  
provided that the estimation was accepted by the Capacity Expert as provided for in Section 11.1(m)(3) in the immediately preceding 6 months and there has been no change in any of the factors to be taken into account in estimating the Terminal Capacity, the Expansion Component Capacity or the System Capacity since the estimation accepted by the Capacity Expert that is reasonably expected to materially affect the Terminal Capacity, the Expansion Component Capacity or the System Capacity; or
  - (2) **(Determine capacities after advice and consultation)** (to the extent that there is no estimation as provided for in Section 11.1(m)(3)) acting reasonably and after:
    - (A) taking advice from a Capacity Expert appointed by DBCT Management under this Section 11.1 (**Capacity Expert**); and
    - (B) consultation by DBCT Management and that Capacity Expert with the Operator, Access Holders, any Expansion Parties, and other Service Providers or their respective nominees,

determine Terminal Capacity, Expansion Component Capacity and System Capacity (as applicable) in accordance with this Section 11.1, having regard to:

- (C) **(Terminal operating assumptions)** in respect of Terminal Capacity – the following Terminal operating assumptions:
  - (i) DBCT Management’s obligations, Access Holders’ entitlements under Access Agreements and Existing Users’ entitlements under Existing User Agreements (including taking into account historical and reasonably estimated rates of utilisation of the Terminal Capacity, but also having regard to reasonably foreseeable future changes in capacity utilisation rates);
  - (ii) DBCT Management’s requirement to comply with Good Operating and Maintenance Practice;
  - (iii) the Terminal Regulations;
  - (iv) an objective of maximum reasonably achievable capacity for the Terminal without unduly increasing vessel waiting times as a result of the operation of the Terminal;
  - (v) rail and vessel interfaces with the Terminal;
  - (vi) the estimated additional capacity which it is anticipated will become available in a relevant Financial Year as a result of any proposed Terminal Capacity Expansion; and
  - (vii) any other matter DBCT Management reasonably considers appropriate;
- (D) **(Terminal operating assumptions – Differentiated Expansion Component)** in respect of Expansion Component Capacity for a Differentiated Expansion Component – the Terminal operating assumptions set out at Section 11.1(a)(2)(C), to the extent applicable solely to the Differentiated Expansion Component; and
- (E) **(System operating assumptions)** in respect of System Capacity – the following System operating assumptions (to the extent that such information is available to DBCT Management):
  - (i) operating modes of the System;

- (ii) rail infrastructure characteristics (e.g. single track, double track, passing loops and speed restraints);
  - (iii) the tonnes to be loaded by or on behalf of an Access Holder or Existing User at each relevant train load out facility;
  - (iv) Terminal Capacity as assessed in accordance with Section 11.1(a)(2)(C) and the capacity and performance implications arising out of Terminal interfaces with rail unloading and vessel loading;
  - (v) quantity, configuration and performance characteristics of locomotives and rolling stock;
  - (vi) capacity and performance of mine loading facilities;
  - (vii) the System Master Plan; and
  - (viii) any other matter DBCT Management reasonably considers appropriate.
- (b) **(Additional assumptions)** For clarification, Terminal Capacity, Expansion Component Capacity and System Capacity are to be:
- (1) estimated making a projected allowance (as applicable to either Terminal Capacity and/or Expansion Component Capacity alone or to System Capacity) for interruptions or loss of capacity from maintenance, repairs, inclement weather, breakdowns, derailments, cancellations, loading and unloading issues (including sticky coal), vessel-types (based on a historical analysis);
  - (2) estimated as at the date of estimation and for the Financial Year in which that date falls and for each of the following two Financial Years; and
  - (3) assumed to continue at no lesser rate indefinitely after the periods referred to in Section 11.1(b)(2), except to the extent that (at the time of making the estimation) DBCT Management or the Capacity Expert are actually aware of a reasonably certain future material decrease in capacity (for example, where DBCT Management is aware of a decrease in capacity caused by a planned shutdown in another part of the System).
- (c) **(Disclosure of process and advice)** Subject to any confidentiality restrictions applying to DBCT Management, DBCT Management must disclose to the Access Holders, Access Seekers, Expansion Parties, the Operator and other Service Providers its decision making process in relation to its estimations of

Terminal Capacity, Expansion Component Capacity and System Capacity and provide them with a copy of any report that DBCT Management receives from the Capacity Expert in relation to estimating those capacities. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 11.1(c) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information.

- (d) **(Capacity Expert)** Any Capacity Expert to be appointed by DBCT Management under this Section 11.1 will be:
- (1) where a group of Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage of all Access Holders for that Financial Year object (in accordance with Section 11.1(g)) to the Capacity Expert nominated by DBCT Management, a Capacity Expert appointed in accordance with Section 11.1(g);
  - (2) where a majority of the group of Expansion Parties for an Expansion Component object (in accordance with Section 11.1(g)) to the Capacity Expert nominated by DBCT Management, a Capacity Expert appointed in accordance with Section 11.1(g); or
  - (3) where Section 11.1(d)(1) and 11.1(d)(2) do not apply, a Capacity Expert nominated by DBCT Management.
- (e) **(Notice of proposed Capacity Expert)** DBCT Management will advise all Access Holders (and, where relevant, Expansion Parties) as to the identity of any Capacity Expert it proposes appointing pursuant to Section 11.1(a)(2) and request that any objection to that Capacity Expert be given in writing to DBCT Management within 14 days after receipt of DBCT Management's notice.
- (f) **(Appointment if no objection)** If no group of Access Holders or Expansion Parties determined in accordance with Section 11.1(d) objects in writing to the Capacity Expert nominated by DBCT Management within the 14 day period referred to in Section 11.1(e), DBCT Management will promptly appoint the Capacity Expert nominated by it.
- (g) **(Procedure if objection to proposed Capacity Expert)** If a group of Access Holders or Expansion Parties determined in accordance with Section 11.1(d) objects within the 14 day period provided for in Section 11.1(e):
- (1) DBCT Management will promptly request the Resolution Institute to nominate a Capacity Expert, and it will engage the Capacity Expert so nominated; and

- (2) the 6 month period referred to in Section 11.1(k)(1) will not commence until the Capacity Expert has been nominated by the Resolution Institute.
- (h) **(Independent Capacity Expert to consult)** DBCT Management must require its Capacity Expert to consult (as far as is practicable, and to the extent that consultation has not already occurred in respect of a relevant estimation of Terminal Capacity, Expansion Component Capacity or System Capacity (as applicable)) with the Operator, Access Holders, any Access Seekers and other Service Providers, or their respective nominees with respect to the factors referred to in Sections 11.1(a)(2)(C), and 11.1(a)(2)(E).
- (i) **(Objection to estimation by Capacity Expert)** Despite Section 16, DBCT Management's estimation of Terminal Capacity, Expansion Component Capacity and System Capacity under Section 11.1(a) may not be disputed or challenged (including under Section 16 of this Framework) or otherwise subject to review by or on behalf of Access Holders or Access Seekers:
- (1) except on the basis that it has been determined in bad faith, in breach of the Framework or an Access Agreement, or on the basis of a manifest error;
- (2) unless Access Holders whose combined Annual Contract Tonnage for the then current Financial Year is greater than 50% of the Aggregate Annual Contract Tonnage for all Access Holders for that Financial Year each object on the same or similar grounds; or
- (3) unless Expansion Parties whose combined projected Annual Contract Tonnage would amount to greater than 50% of the projected Expansion Component Capacity, each object on the same or similar grounds.
- (j) **(Determination of Capacity conclusive)** The capacity of the Terminal, Differentiated Expansion Component and System Capacity estimated under Section 11.1(a) (or, if applicable, Section 16) will constitute Terminal Capacity, Expansion Component Capacity or System Capacity (as relevant) for the purposes of this Framework until it is next reassessed.
- (k) **(Times for re determination of Capacity)** Terminal Capacity, Expansion Component Capacity and System Capacity will be assessed by DBCT Management in accordance with Section 11.1(a) and will be reassessed during the Term of this Framework:
- (1) before entering into any new Access Agreement or otherwise increasing Aggregate Annual Contract Tonnage unless the Terminal Capacity, the Expansion Component Capacity and the System Capacity was assessed or reassessed in accordance with Section 11.1(a) in the immediately preceding 12 months and there has been no change in any

- of the factors to be taken into account in estimating the Terminal Capacity, the Expansion Component Capacity or the System Capacity since that time that is reasonably expected to materially affect the Terminal Capacity, the Expansion Component Capacity or the System Capacity;
- (2) during each stage of a Feasibility Study being conducted by DBCT Management in accordance with Section 5.10;
  - (3) (subject to Section 11.1(g)(2)) not later than 6 months, or such time as otherwise agreed by the parties, after each of the following:
    - (A) the Completion of each Terminal Capacity Expansion; and
    - (B) the time at which DBCT Management becomes aware of the completion of each material and discrete expansion (such materiality to be determined by DBCT Management acting reasonably) of any other component of the System; or
  - (4) otherwise at DBCT Management's discretion.
- (l) **(Notification of assessments of Terminal Capacity, Expansion Component Capacity and System Capacity)** DBCT Management must promptly notify DBCT Holdings, each Access Holder and each Access Seeker of each capacity assessment undertaken in accordance with this Section 11.1.
- (m) **(Requirements for Capacity Expert report process)** The following will apply to a Capacity Expert's report for the purposes of Section 11.1(a):
- (1) subject to confidentiality restrictions applying to DBCT Management, DBCT Management must provide to the Capacity Expert all relevant information which DBCT Management has or to which it has access, to assist the Capacity Expert to reach his or her estimation. DBCT Management will not enter into any confidentiality restrictions which would prevent disclosure for the purposes of this Section 11.1(m) except as may be commercially reasonable and customary to avoid disclosure of commercially sensitive information;
  - (2) DBCT Management must, as far as practicable, use reasonable endeavours to work cooperatively with each other Service Provider (for example by regularly providing information relevant to System Capacity) and, as far as practicable, using reasonable endeavours to agree on the joint engagement of Capacity Experts for the purposes of both this Framework and in respect of similar obligations by other Service Providers; and
  - (3) if the Capacity Expert reasonably considers that there is either agreement or broad consensus amongst stakeholders in the Dalrymple

Bay Coal Chain as to Terminal Capacity, Expansion Component Capacity or System Capacity (such agreement or consensus having been reached having regard to the Capacity Expert's report(s)), the Capacity Expert must accept that agreement or broad consensus as evidence of Terminal Capacity, Expansion Component Capacity or System Capacity (as the case may be) except to the extent that the Capacity Expert reasonably forms the opinion that there is compelling evidence to the contrary.

- (n) **(Tonnes under Access Agreements and Existing User Agreements must not exceed System Capacity)** DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new Access Agreement) exceed the System Capacity (as determined for a relevant time), unless otherwise required to do so by the Access Framework (including pursuant to Section 11.3), law, or an agreement relating to its tenure of the Terminal including the Framework Agreement or the Port Services Agreement. For clarification:
- (1) **(Access Agreements can be conditional on capacity resulting from a Terminal Capacity Expansion)** this does not prohibit DBCT Management from entering into a Conditional Access Agreement as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on the Completion of the relevant Terminal Capacity Expansion will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the Completion of the relevant Terminal Capacity Expansion); and
  - (2) **(Framework not breached if System Capacity exceeded after good faith reasonable efforts)** DBCT Management will not be in breach of this Framework if it has complied with this Framework (or made good faith and reasonable attempts to comply) but the re-determination of System Capacity in accordance with Section 11.1(k) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (o) **(Protection of DBCT Management)** Notwithstanding any other provision of this Framework, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this Section 11.1, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) to any Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder which executes it):
- (1) for any breach of this Section 11.1;

- (2) for any delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity, Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
  - (3) if one or more factors related to utilisation of capacity of the Terminal, or any other part of the System subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under a Standard Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor) provided that such factor is not a breach by DBCT Management of any other part of this Framework or an Access Agreement; or
  - (4) for any defect, error or omission on the part of the Capacity Expert appointed under Section 11.1.
- (p) **(Recovery of Capacity Expert's costs)** The costs of a Capacity Expert appointed under Section 11.1(d):
- (1) following the Completion of and handover to the Operator of a Terminal Capacity Expansion will be borne by DBCT Management, and may be included in the prudent Capital Expenditure for the Terminal Capacity Expansion as an Other Cost in accordance with Section 11.5(a)(3)(B); and
  - (2) in all circumstances other than as described in Section 11.1(p)(1), be borne by DBCT Management.
- (q) **(Provisional allocation pending determination of Capacity)** Notwithstanding any other provision of this Framework, DBCT Management may, on a provisional basis, allocate after the Completion of a Terminal Capacity Expansion the anticipated increase in Terminal Capacity and Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) until Terminal Capacity, Expansion Component Capacity (if relevant depending on the Terminal Capacity Expansion) and System Capacity is determined in accordance with Section 11.1(k).

## 11.2 Terminal Capacity Expansion consultation

- (a) **(Meeting agendas)** DBCT Management will hold meetings with Access Holders and, where they exist, Expansion Parties not less than twice per Financial Year to consult in good faith upon the following issues:
  - (1) current Terminal Capacity, Expansion Component Capacity and System Capacity;

- (2) constraints on current Terminal Capacity, Expansion Component Capacity and System Capacity including the impact on vessel waiting times and Access Holder transport costs;
  - (3) future contracts/forecasts that may impact on Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (4) significant issues relevant to Terminal Capacity, Expansion Component Capacity and System Capacity;
  - (5) the timing and nature of the next Terminal Capacity Expansion (if any) and the impact on current capacity requirements, pricing and the Terminal Master Plan and System Master Plan; and
  - (6) any proposed changes to the Terminal Regulations.
- (b) DBCT Management will also hold such meetings to consult in good faith upon these issues in respect of Differentially Priced Capacity with Differentially Priced Access Holders for the relevant Differential Expansion Component.
  - (c) **(Meeting administration)** DBCT Management will distribute, in a timely manner, agendas, detailed briefing material and a copy of the minutes of each of these meetings to all Access Holders, Expansion Parties and DBCT Holdings.
  - (d) **(Separate meetings with Expansion Parties)** For the avoidance of doubt, nothing in this Section 11.2 limits or restricts DBCT Management from meeting separately with Expansion Parties to the extent that the matters raised relate only to a Differentiated Expansion Component.

### 11.3 General obligation to undertake Terminal Capacity Expansions

- (a) Subject to Sections 11.7 and 11.8 of this Framework, DBCT Management will undertake Terminal Capacity Expansions as are necessary to:
  - (1) **(Accommodate growth)** accommodate the actual and reasonably anticipated future growth of demand (having regard to Access Applications received by DBCT Management and other relevant factors) for the use of the Terminal by Access Holders and Access Seekers;
  - (2) **(Eliminate shortfalls in Terminal Capacity)** eliminate sustained shortfalls in actual Terminal Capacity below the aggregate of Annual Contract Tonnages of Access Holders and Existing Users, whatever the reason for such shortfalls;
  - (3) **(Good Operating and Maintenance Practices)** ensure that the Terminal complies with Good Operating and Maintenance Practice in respect of quality standards for such facilities, good environmental practice and applicable environmental standards; and

(4) **(Laws)** comply with Approvals and applicable laws,

provided that DBCT Management will nevertheless have regard to the System Master Plan and the expected capacity of other components of the System, with the intention that the capacity of the Terminal will (as far as practicable and economic and can reasonably be anticipated) not significantly and disproportionately exceed System Capacity for more than 12 months after the Completion of a Terminal Capacity Expansion.

(b) **(Factors to be taken into account)** It is recognised that:

(1) the name-plate capacity of each individual component of the System will, on a "stand alone" basis at all times, be likely to exceed the aggregate System Capacity to some extent; and

(2) DBCT Management does not have any control over any part of the System other than the Terminal, and DBCT Management's estimate of expected capacity of the other components of the System will have limited accuracy (for example, because of changes in or operation of the System or the operation of any upstream components of the System in relation to the Terminal, delays in expansions of other parts of the System (including in the circumstance in which another Service Provider delays an expansion which was provided for in a System Master Plan) and other differences to DBCT Management's assumptions).

(c) **(Protection of DBCT Management)** Accordingly DBCT Management will not have any liability to an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 11.3, even if it does not actually comply with this Section 11.3.

#### **11.4 Accommodation of Capacity**

(a) **(General obligation to accommodate Access Applications)** Subject to Sections 5.4(l), 11.7 and 11.8 of this Framework, and the proviso in Section 11.3(a), DBCT Management will use best endeavours to ensure that, as soon as reasonably practical after DBCT Management receives from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement that will be unconditional and legally binding and require the Access Seeker to obtain Handling of coal at the Terminal for a period in excess of 5 years (or 10 years or more Handling of coal if acceptance of the offer would require a Capacity Expansion), the Terminal is able to Handle that coal without a material and sustained increase in:

(1) vessel waiting times; or

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

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

- (b) **(Bona fide offers and reasonably creditworthy Access Seekers)** Without limiting the circumstances in which DBCT Management may be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement, if:

- (1) DBCT Management receives an offer from an Access Seeker to enter into an Access Agreement on the terms of the Standard Access Agreement, or receives an offer from an Access Seeker to enter into an Access Agreement where any departure of the terms of that offer from the terms of a Standard Access Agreement is not likely to increase cost (direct or indirect) or risks to DBCT Management; and

- (2) the Access Seeker has satisfied DBCT Management (acting reasonably) in accordance with Section 5.9 that the Access Seeker (or any relevant Security provider) has the financial and other relevant resources to enable it to discharge its obligations under the relevant Access Agreement,

then for the purpose of this Section 11.4, DBCT Management will be taken to have received from a reasonably creditworthy Access Seeker a bona fide offer to enter into an Access Agreement.

## 11.5 Undertaking Terminal Capacity Expansions

- (a) **(Terminal Capacity Expansion application to be lodged with Arbitrator)** If DBCT Management proposes to expand the Terminal during the Term of the Framework (either because it is obliged to do so under this Framework or wishes to do so without being obliged to do so), then in respect of the particular expansion to the Terminal it will submit to an arbitrator appointed in accordance with Section 16.4 (**Expansion Arbitrator**) a Terminal Capacity Expansion application, which must include the following information:

- (1) details of the scope of the proposed Terminal Capacity Expansion, including:
  - (A) confirmation of Terminal operating assumptions and System operating assumptions in the FEL 3 Feasibility Study, including confirmation of the capacity of the Existing Terminal and

System Capacity prior to the proposed Terminal Capacity Expansion and the proposed Expansion Component Capacity; and

- (B) either:
  - (i) confirmation that, and details of how, the Terminal Capacity Expansion complies with both the current Terminal Master Plan and System Master Plan; or
  - (ii) a justification acceptable to the Expansion Arbitrator as to why it does not, and need not, comply with the Terminal Master Plan or System Master Plan, but will nevertheless be economically and operationally prudent;
- (2) the terms and conditions of any Access Agreements that are conditional on the Terminal Capacity Expansion;
- (3) the estimated cost of the proposed Terminal Capacity Expansion categorised into:
  - (A) works that are proposed to be managed under the Tender and Contract Management Process (TCMP) (Contract Costs); and
  - (B) work and costs which are not to be managed under the TCMP (Other Costs);
- (4) the estimated timetable for the proposed Terminal Capacity Expansion;
- (5) a high level project execution strategy, which will, among other things, identify risks and risk mitigation;
- (6) either:
  - (A) evidence that the 60/60 Requirement has been complied with; or
  - (B) DBCT Management's justification for the Terminal Capacity Expansion without the 60/60 Requirement having been complied with;
- (7) the process for the tendering and awarding of contracts, standard form contract terms, and the contract management process for the management of contracts post award (these processes together constitute the TCMP);
- (8) the process by which costs will be expended, tracked and managed if they are not covered by the TCMP; and

- (9) an application for a Price Ruling in respect of the Terminal Capacity Expansion, if one has not already been made.
- (b) **(Monthly reporting to Expansion Arbitrator)** DBCT Management will also submit to the Expansion Arbitrator (with a copy to each Access Holder) a monthly report setting out:
  - (1) the status of each contract awarded under the TCMP, including the degree of completion and the anticipated final cost inclusive of actual and provisioned variations;
  - (2) the status of each element of the Other Costs, including the costs incurred, the degree of completion and the anticipated final costs; and
  - (3) if anticipated final costs vary from the costs initially forecast, details of and the reasons for the variation.
- (c) **(Expansion Arbitrator to confirm Price Ruling following application for Expansion)** Following receipt of an application under Section 5.12(a)(2) or 11.5(a)(9), the Expansion Arbitrator will provide to DBCT Management and each Expansion Party notice of, in respect of a relevant Expansion Component:
  - (1) where a Price Ruling has been made in accordance with Section 5.12(c), the content of the Expansion Arbitrator's ruling and details of any material changes apparent in the application which may require a new or varied Price Ruling to be made, including the extent to which the circumstances of the Expansion Component vary from the assumptions made in the original Price Ruling;
  - (2) where a Price Ruling has not been made in accordance with Section 5.12(c), but a Price Ruling Application has been made under Section 5.12(a)(2) or 11.5(a)(9), a copy of the Price Ruling Application and information on the Expansion Arbitrator's process for determining a Price Ruling for that Terminal Capacity Expansion.
- (d) **(DBCT Management to provide information to the Expansion Arbitrator)** DBCT Management will provide all information required by the Expansion Arbitrator or any advisor to the Expansion Arbitrator to enable the Expansion Arbitrator to assess the prudence of any proposed or actual Capital Expenditure. Prior to disclosing any confidential information, DBCT Management must ensure that the Expansion Arbitrator (and any advisor to the Expansion Arbitrator) enters into a confidentiality deed with DBCT Management to the effect that the Expansion Arbitrator (and any advisor to the Expansion Arbitrator) must keep the information confidential and only use that information for the purpose of its engagement under this Section 11.5.
- (e) **(Expansion Arbitrator's acceptance of prudence of contract costs)**

- (1) The Expansion Arbitrator will accept that Capital Expenditure in respect of a proposed Expansion Component is prudent and any determination by an Arbitrator of a Floor TIC or amended TIC to apply in respect of the Existing Terminal or a Floor TIC to apply in respect of the Differentiated Expansion Component (as relevant) following the Completion of the Terminal Capacity Expansion should take that Capital Expenditure into account in accordance with Section 10.4(f) or 10.6(b)(3) (as applicable) if DBCT Management can demonstrate and the Expansion Arbitrator is satisfied that:
  - (A) the scope of the works complies with Section 11.5(f) and the requirements of that Section have been met; and
  - (B) the standard and specifications of the works is appropriate, as provided for in Section 11.5(g) and the requirements of that Section have been met; and
  - (C) the works were undertaken in accordance with the approved TCMP or were otherwise reasonable, as provided for in Sections 11.5(i), 11.5(j), 11.5(k) and 11.5(l) and the requirements of those Sections have been met.
- (2) In the event that the Expansion Arbitrator considers that any elements specified in Section 11.5(e)(1) are not satisfactorily met, the Expansion Arbitrator will undertake an assessment of the prudence of the Capital Expenditure as if the works were Other Costs, as provided for in Section 11.5(m). In undertaking this assessment, the Expansion Arbitrator will take into account the extent to which DBCT Management has achieved compliance with the expansion approval process outlined in this Section 11.5, including consistency with any assumptions associated with a Price Ruling.

(f) **(Expansion Arbitrator's acceptance of scope of works)**

- (1) The Expansion Arbitrator will accept the scope of the proposed Terminal Capacity Expansion if it is satisfied that:
  - (A) the scope is consistent with the current Terminal Master Plan and System Master Plan and applicable laws;
  - (B) the 60/60 Requirement has been complied with; and
  - (C) (together with any other relevant expansions of one or more components of the System) the Terminal Capacity Expansion will result in an increase in System Capacity and will not be expected to result in Terminal Capacity significantly and disproportionately exceeding System Capacity for more than 12 months after Completion of a Terminal Capacity Expansion.

- (2) The Expansion Arbitrator will accept or not accept the scope within 20 Business Days of being provided with all of the information it requires to assess the proposed works and the criteria listed in Section 11.5(f)(1). If the Expansion Arbitrator does not accept the scope of the proposed works, it will give reasons in writing.
- (g) **(Expansion Arbitrator's acceptance of standard and specifications of works)**
- (1) The Expansion Arbitrator will review the standard and specifications of works relating to a Terminal Capacity Expansion and all relevant contract terms to ensure that the works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement, or, in the case of contract terms, are not likely to materially adversely impact on a prudent balance between price and risk.
  - (2) The Expansion Arbitrator will accept or not accept on a contract by contract basis the standard, specifications, and contract terms for the works within 20 Business Days of receipt of the technical specifications, design drawings and contract terms for the works and any other information needed by the Expansion Arbitrator to review the standard, specifications and contract terms for the works. If the Expansion Arbitrator does not accept the standard, specifications and contract terms of the works, it will give reasons in writing.
  - (3) If DBCT Management amends the submitted technical specifications and/or design drawings and/or material contract terms after an approval by the Expansion Arbitrator, DBCT Management will immediately advise the Expansion Arbitrator of the changes. The Expansion Arbitrator will accept or not accept the changes.
- (h) **(60/60 Requirement)**
- (1) **(What is the 60/60 Requirement)** In this Section 11.5, the "60/60 Requirement" is satisfied when:
    - (A) DBCT Management has executed Access Agreements from Access Holders, each of which provides for the Handling of coal for a period of at least 10 years duration, for at least 60% of the proposed Terminal Capacity increment.
    - (B) 60% of all Access Holders and Expansion Parties (as determined by their Annual Contract Tonnages reduced by the relevant exclusions set out in Section 11.5(h)(1)(C)) do not oppose the Terminal Capacity Expansion, having been given the information and notice in Section 11.5(h)(2) at least 15 Business

Days before it is determined whether or not the 60/60 Requirement has been satisfied.

- (C) The relevant exclusions are the tonnages of any Access Holder of existing capacity at the Terminal where the Access Holder is:
  - (i) legally and beneficially, the same entity as; or
  - (ii) a related body corporate of an Access Holder that is legally and beneficially, the same entity as,

an Expansion Party that is within Section 11.5(h)(1)(A). For clarification, where an Expansion Party or Access Holder is, or acts on behalf of, a joint venture, the Expansion Party or Access Holder will only be "legally and beneficially" the same, in respect of both an Access Agreement and an Access Application or two or more Access Agreements and Access Applications, where each of the entities comprising the joint venture relating to each relevant Access Agreement and Access Application is the same (or a related body corporate of the same) entity in each context.

- (2) **(DBCT Management to provide information for 60/60 Requirement process)** DBCT Management will provide the Access Holders and Expansion Parties referred to in Section 11.5(h)(1)(B) relevant to a proposed Terminal Capacity Expansion with the following information, for the purposes of determining whether the 60/60 Requirement can be complied with in respect of a proposed Terminal Capacity Expansion:
  - (A) outline details of the scope of the proposed Terminal Capacity Expansion works;
  - (B) details of how the Terminal Capacity Expansion complies with the current Terminal Master Plan and System Master Plan;
  - (C) without limitation to Section 5.10, provide a copy of the capacity assessment undertaken in accordance with Section 11.1 which separately identifies the capacity of the Existing Terminal and the proposed Expansion Component Capacity;
  - (D) cost estimates for the proposed Terminal Capacity Expansion and each element of the Terminal Capacity Expansion, including contingency, financing and escalation allowances;
  - (E) a schedule of each element of the proposed Terminal Capacity Expansion;

- (F) the projected total Terminal Capacity and System Capacity following the Terminal Capacity Expansion;
  - (G) a high level project execution strategy, which strategy will, among other things, identify risks and risk mitigation;
  - (H) a schedule of likely reductions in Terminal Capacity and System Capacity during construction;
  - (I) an outline of Existing User Agreement tonnages, Access Agreement tonnages, Conditional Access Agreement tonnages and Access Application tonnages and contract periods;
  - (J) an estimate of what effect the proposed Terminal Capacity Expansion will have on each Terminal Component's Terminal Infrastructure Charges and Operation and Maintenance Charges;
  - (K) a notice that the above information is being expressly provided in contemplation of the 60/60 Requirement (even if the notice was given prior to the Commencement Date);
  - (L) where a Price Ruling has been made in respect of a relevant Terminal Capacity Expansion, the content of the Expansion Arbitrator's Price Ruling; and
  - (M) where a Price Ruling has not yet been made in respect of a relevant Terminal Capacity Expansion, the application for a Price Ruling filed with the Expansion Arbitrator under Section 11.5(a)(9).
- (3) **(60/60 Requirement conclusive)** Once evidence of compliance with the 60/60 Requirement has been provided and accepted by the Expansion Arbitrator it will not be subject to further review (provided that the evidence presented was not misleading or deceptive and there has been no dishonesty or manifest error).
- (4) **(60/60 Requirement determines deemed need for Terminal Capacity Expansion)** If Section 11.5(a)(6)(A) applies, the Expansion Arbitrator will confirm the sufficiency (or sufficiencies) of evidence of the 60/60 Requirement within 20 Business Days of receipt of the Terminal Capacity Expansion application. If the Expansion Arbitrator provides such confirmation, it will be deemed to have accepted the need for the Terminal Capacity Expansion.
- (5) **(Expansion Arbitrator review if 60/60 Requirement not met)** If Section 11.5(a)(6)(B) applies, the Expansion Arbitrator will, within 3 months of receipt of the Terminal Capacity Expansion application,

review whether the Terminal should be expanded in the way proposed by DBCT Management. If the Expansion Arbitrator does not accept that the Terminal should be expanded in the way proposed by DBCT Management, it will give reasons in writing.

(i) **(Tender and Contract Management Processes)**

(1) **(General principles for Expansion Arbitrator approval)** The Expansion Arbitrator will approve DBCT Management's TCMP if it is satisfied that it is consistent with the following general principles, namely that the TCMP:

- (A) is in accordance with good industry practice;
- (B) will generate an efficient and competitive outcome;
- (C) will avoid conflict of interest or collusion amongst tenderers;
- (D) is prudent in the circumstances of the Terminal Capacity Expansion project; and
- (E) will avoid unreasonable exposure to contract variation claims.

(2) **(Detailed considerations for Expansion Arbitrator approval)** In particular, in considering whether or not to approve DBCT Management's TCMP, the Expansion Arbitrator will consider whether (amongst other things):

- (A) there is a clear process for the calling of tenders, including having clear specifications for tenders, and processes for mitigating conflicts of interest (except when it is assessed that calling tenders is likely to be less advantageous than an alternative means of negotiating a contract);
- (B) (where applicable) there is a tender assessment process which contains clear and appropriate processes for determining the successful tender, with any decisions to approve a tender that is not the lowest tender being appropriately justified and documented;
- (C) the basis of payment for works is clearly specified and the basis for undertaking the works is in accordance with good commercial practice;
- (D) there is a process for managing contracts before and after award that accords with good commercial practice for a project of the type and scale of the Terminal Capacity Expansion and provides appropriate guidance on the criteria that DBCT Management should apply to decisions regarding the

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

- (i) safety during construction and operation;
  - (ii) compliance with environmental requirements during construction and operation;
  - (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodation of the reasonable requests of Access Holders and Expansion Parties to change the scope and sequence of construction to suit their needs;
  - (v) a prudent balance between:
    - (a) a higher price in return for more certainty as to final cost;
    - (b) a lower price accepting that final cost may be less certain; and
    - (c) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs; and
  - (vii) minimising total project cost which may at times not be consistent with minimisation of individual contract costs;
- (E) there is a process for managing contract variations and/or escalation that occurs post award of a contract, requiring that reasonable consideration be given to managing the risk of contract variations and/or escalation and the allocation of potential risks during the management of the contract and requiring the provision of clear documentary evidence regarding the nature and reasonableness of any variation and/or escalation; and
- (F) DBCT Management has engaged an auditor in accordance with Section 11.5(l) to monitor compliance with the TCMP.
- (3) **(Notification of TCMP decision by Expansion Arbitrator)** The Expansion Arbitrator will within 20 Business Days of the Expansion Arbitrator receiving all the information it requires to assess the TCMP

give DBCT Management a notice in writing whether it will approve or not approve the TCMP, setting out:

- (A) reasons for its decision; and
  - (B) if requested, the way the TCMP should be amended.
- (4) **(Amendment of TCMP)** DBCT Management may at any time and from time to time request amendments to an approved TCMP by giving written notice to the Expansion Arbitrator. Promptly following receipt of a request to amend the TCMP the Expansion Arbitrator will approve or not approve the amendments. In considering such amendments the Expansion Arbitrator will apply Sections 11.5(i)(2) and 11.5(i)(3).
- (j) **(Indicators of prudent contract value)** The Expansion Arbitrator will accept that the value of a contract as awarded is prudent and will include it in his or her determination of the prudent Capital Expenditure for the Terminal Capacity Expansion if:
- (1) the Expansion Arbitrator has approved DBCT Management’s TCMP in accordance with Section 11.5(i);
  - (2) the Expansion Arbitrator is satisfied that contract provisions regarding contract variations and escalation accord with good commercial practice; and
  - (3) the auditor engaged in accordance with Section 11.5(l) certifies that the works have been conducted in accordance with the approved TCMP.
- (k) **(Indicators of prudent variations and escalations)** The Expansion Arbitrator will accept that contract variations and/or escalations post award of a contract are prudent and will include them in his or her determination of the prudent Capital Expenditure for the Terminal Capacity Expansion if:
- (1) **(Compliance with TCMP)** a contract which has been accepted as prudent under Section 11.5(j) has been managed in accordance with the approved TCMP;
  - (2) **(Auditor certification)** the auditor engaged in accordance with Section 11.5(l) has certified that contract variations and/or escalations have been handled in a manner consistent with the relevant contract provisions; and
  - (3) **(Variations and escalations)** the Expansion Arbitrator is satisfied that the cost of contract variations and/or escalations is otherwise appropriate, having regard to the following:

- (A) whether adequate consideration was given to properly managing the risk of contract variations and/or escalation or the allocation of potential risks during the awarding and management of the contract;
  - (B) whether the contract has been appropriately managed when regard is had for matters outlined in Section 11.5(i)(2)(D);
  - (C) whether the contract variations and/or escalations are appropriately justified; and
  - (D) whether the contract has been managed with a regard to a prudent balance between costs, schedule and minimising disruption to operating capacity during construction.
- (l) **(Independent external audit)** As part of the implementation of the approved TCMP, DBCT Management will engage an independent external auditor to audit the compliance of DBCT Management's tender and contract management processes with the TCMP approved under this Section 11.5. The process in this regard will be as follows:
- (1) **(Appointment)** DBCT Management will appoint the auditor, subject to obtaining the Expansion Arbitrator's prior approval of the selection of the auditor and the Expansion Arbitrator's prior approval of the terms and conditions of the engagement of the auditor;
  - (2) **(Acknowledgement of duty)** the auditor will be required to acknowledge and accept that the auditor owes a separate contractual duty of care to the Expansion Arbitrator in the provision of the audit and, in the event of a conflict between the auditor's obligations to DBCT Management and its duty of care to the Expansion Arbitrator, the auditor's duty of care to the Expansion Arbitrator will take precedence;
  - (3) **(Audit process to be agreed and approved)** the auditor must agree the processes for conducting an audit with DBCT Management and obtain the Expansion Arbitrator's approval of the audit process. The audit process will consist of a proposed work program, including audit costs (which shall be payable by DBCT Management and included in the prudent Capital Expenditure determined by the Expansion Arbitrator, for the execution of the audit;
  - (4) **(Provision of information to auditor)** DBCT Management will, within a nominated timeframe that is determined by the auditor to be reasonable after consultation with DBCT Management, provide any relevant information the auditor reasonably requires for the purpose of conducting the audit;

- (5) **(Confidentiality deed)** if required by DBCT Management, the auditor will enter into a confidentiality deed with DBCT Management in relation to any information provided by DBCT Management to the effect that it must keep the information confidential and only use that information for the purpose of conducting the audit and completing the audit report detailed below;
  - (6) **(Audit reports)** the auditor will compile an audit report identifying whether DBCT Management has complied in all material respects with the approved TCMP including in relation to contract variations and/or escalation. If the auditor identifies that DBCT Management has not complied in all material respects with the approved TCMP, then the audit report is also to contain details on the relevant non-compliance, any reasons stated by DBCT Management for the relevant non-compliance, and whether the non-compliance was reasonable in the circumstances;
  - (7) **(Progress reports)** the auditor will provide progress reports on the audit process every 6 months. The auditor will also provide a copy of the audit report to DBCT Management and the Expansion Arbitrator upon completion of the audit. The Expansion Arbitrator may have the audit report published on DBCT Management's website if it considers it appropriate; and
  - (8) **(Expansion Arbitrator may require additional detail)** if the Expansion Arbitrator forms the view that any of the auditor's reports (whether progress reports or a final report) are lacking in detail or otherwise deficient, the Expansion Arbitrator may direct DBCT Management to instruct the auditor to review the audit report and, in doing so, to address the concerns of the Expansion Arbitrator.
- (m) **(Prudency of Other Costs)**
- (1) **(Expansion Arbitrator to assess prudency)** The Expansion Arbitrator will undertake an assessment of the prudency of Other Costs, and costs to which Section 11.5(e)(2) applies, after the relevant costs have been expended.
  - (2) **(Considerations relating to prudency)** In assessing whether actual Capital Expenditure is prudent, the Expansion Arbitrator will have regard to the scope of the works undertaken, the standard of the works undertaken and the reasonableness of the cost of works undertaken.
  - (3) **(Factors relevant to scope of work)** In assessing the scope of the works and any associated ancillary services undertaken, the Expansion Arbitrator will have regard to (amongst other things):

- (A) the scope of the proposed Terminal Capacity Expansion;
  - (B) the current Terminal Master Plan and System Master Plan (or to the extent that there is no current System Master Plan, the considerations DBCT Management is required to have regard to under Section 14.2(c));
  - (C) the extent of current contracted demand, likely future demand and any spare capacity considered appropriate, and the need for capital works to accommodate that demand;
  - (D) the appropriateness of DBCT Management’s processes to evaluate and select proposed capital works, including the extent to which alternatives are evaluated as part of the process;
  - (E) the extent to which capital projects that were undertaken were subjected to DBCT Management’s evaluation and selection process; and
  - (F) the extent to which consultation has occurred with relevant stakeholders about the proposed capital works.
- (4) **(Factors relevant to standard and specifications)** In assessing the standard and specifications of the works undertaken, the Expansion Arbitrator will ensure that the proposed works do not involve any unnecessary works or contain design standards that exceed those standards necessary to comply with Clause 12.1 of the Port Services Agreement and Section 11, Schedule E of this Framework.
- (5) **(Factors relevant to reasonableness)** In assessing the reasonableness of the cost of works undertaken, the Expansion Arbitrator will have regard to, (among other things):
- (A) the level of such costs and risks relative to the scale, nature, cost and complexity of the project;
  - (B) the circumstances prevailing in the markets for engineering, equipment supply and construction;
  - (C) the manner in which the Terminal Capacity Expansion has been managed, including but not limited to the manner in which DBCT Management has balanced the needs of:
    - (i) safety during construction and operation;
    - (ii) compliance with environmental requirements during construction and operation;

- (iii) minimising disruption to operating capacity during construction;
  - (iv) accommodating the reasonable requests of Access Holders to change the scope and sequence of the works undertaken to suit their needs;
  - (v) a prudent balance between:
    - (a) a higher price in return for more certainty as to final cost;
    - (b) a lower price, accepting that final cost may be less certain; and
    - (c) costs, schedule and minimising disruption to operating capacity during construction;
  - (vi) minimising whole of asset life costs including future maintenance and operating costs; and
  - (vii) minimising the total cost of the Terminal Capacity Expansion which may at times not be consistent with minimisation of individual costs.
- (6) **(Assessing capital expenditure)** In assessing the prudence of Capital Expenditure undertaken, the Expansion Arbitrator will take advice as necessary from independent advisors using appropriate benchmarks and experience, and consult as necessary with relevant stakeholders (the cost of which advisors will be borne by DBCT Management at the discretion of the Expansion Arbitrator).
- (7) **(Audit costs)** The costs of the external auditor referred to in Section 11.5(l) and the advisers referred to in Section 11.5(m)(6) (where payable by DBCT Management) will form part of the Other Costs.
- (n) **(Preliminary assessment of Other Costs)** If requested by DBCT Management, the Expansion Arbitrator will undertake a preliminary assessment of the reasonableness of the Other Costs and shall advise DBCT Management of the results of such assessment. The Expansion Arbitrator will not be bound by this assessment when determining the prudence of actual Capital Expenditure and whether the Capital Expenditure should be included in its determination of the prudent Capital Expenditure for the Terminal Expansion Component.

## 11.6 Interest during construction for Terminal Capacity Expansions

- (a) In the event of a Terminal Capacity Expansion approved by the Expansion Arbitrator pursuant to Section 11.5, construction related financing costs

(which will include a return on capital over the construction period on the Terminal Capacity Expansion expenditure prudently incurred) will be included in the prudent Capital Expenditure for the Terminal Capacity Expansion for the purposes of and taken into account in any determination of a Floor TIC or amended TIC to apply in respect of the Existing Terminal or a Floor TIC to apply in respect of a Differentiated Expansion Component (as the case may be) following Completion of the Terminal Capacity Expansion in accordance with Section 10.4(f) or 10.6(b)(3) (as applicable). The return on capital over the construction period to be included in the prudent Capital Expenditure for the Terminal Capacity Expansion and taken into account in determining the Floor TIC or amended TIC will be calculated at the WACC(1) Rate.

### **11.7 Unreasonable and uneconomic proposed Terminal Capacity Expansions**

If, having regard to:

- (a) the actual or anticipated long-term demand for the Services;
- (b) the extent to which a Terminal Capacity Expansion under the relevant stage of the Terminal Master Plan would produce capacity in excess of demand;
- (c) the cost of the Terminal Capacity Expansion;
- (d) the extent to which DBCT Management can demonstrate on reasonable evidence that the costs of the Terminal Capacity Expansion would be unlikely to be accepted by an Expansion Arbitrator as prudent for the purposes of determining Access Charges in respect of that Terminal Capacity Expansion; and
- (e) the long-term nature of DBCT Management's investment in the Terminal,

the cost to DBCT Management of complying with Sections 11.3, 11.4 and 11.5 would be unreasonable and uneconomic, DBCT Management may submit to DBCT Holdings a written proposal that:

- (f) provides details of the above matters; and
- (g) proposes a modification to or temporary delay in the Terminal Capacity Expansion that would otherwise be required to be undertaken under this Section 11, on terms and conditions that are not inconsistent with the objectives in Clause 2.2 of the Port Services Agreement,

and DBCT Management and DBCT Holdings will consult with one another, the State, Access Holders and Access Seekers, in good faith in respect of the proposal. DBCT Holdings will not unreasonably withhold or delay its agreement to such modification or delay, and for avoidance of doubt, even where its agreement may mean the condition precedent to any Conditional Access Agreement may not be fulfilled. DBCT Management will be relieved of its obligations under this Section 11 to the extent that

DBCT Holdings agrees to modify or delay a Terminal Capacity Expansion (whether such agreement is given under the Framework or the Port Services Agreement).

### **11.8 Inability to proceed with a proposed Terminal Capacity Expansion**

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

- (a) unable to procure a relevant tenure to or interest in land or seabed necessary for such Terminal Capacity Expansion;
- (b) unable to procure an approval in respect of the occupation or operation of the Terminal, that is required for DBCT Management to lawfully undertake any construction or development otherwise required by a Terminal Capacity Expansion under this Section 11; or
- (c) reasonably of the view that it is not possible to increase Terminal Capacity,

then the obligations of DBCT Management under this Section 11 will be suspended to the extent affected by that inability while that inability continues. DBCT Management will continue to use its best endeavours to (as applicable) procure that approval (including amending, resubmitting or substituting the application and amending the relevant design or work program for the construction or development to procure the approval), procure the interest or tenure, or identify a means of increasing Terminal Capacity.

### **11.9 Terminal Capacity Expansions to comply with Terminal Master Plan**

If DBCT Management wishes to undertake a Terminal Capacity Expansion under this Section 11, it will do so by undertaking the next applicable stage or stages of development contemplated by the Terminal Master Plan (which is intended to be integrated with the System Master Plan) that are necessary to at least provide the necessary relevant additional Handling capacity.

### **11.10 Non-expansion Capital Expenditure**

- (a) **(Good Operating and Maintenance Practice and Port Services Agreement)**  
DBCT Management will incur NECAP as is necessary to ensure:
  - (1) that the Terminal complies with Good Operating and Maintenance Practice; and
  - (2) that DBCT Management complies with its obligations under the Port Services Agreement.
- (b) **(Streamlined approval of NECAP)** For the purposes of Section 10.6(b), the Arbitrator must accept that NECAP is prudent and include it in the determination of the amended TIC:

- (1) provided that DBCT Management confirms, to the reasonable satisfaction of the Arbitrator, that the expenditure incurred falls within the definition of Capital Expenditure;
  - (2) if:
    - (A) prior to DBCT Management incurring the NECAP, the NECAP was unanimously approved by all Access Holders whose TIC would be amended by reference to that NECAP; or
    - (B) no Access Holder whose TIC would be amended by reference to that NECAP objected to the NECAP within 20 Business Days after receiving written notice from DBCT Management of NECAP incurred by it which expressly drew their attention to this Section; and
  - (3) if the Operator has recommended in writing the incurring of the NECAP.
- (c) **(Inclusion of NECAP where specific criteria satisfied)** For the purposes of Section 10.6(b), the Arbitrator may accept that NECAP which does not comply with all the conditions in Section 11.10(b) is nonetheless prudent having regard to (among other things):
- (1) the need for the work to be undertaken for the efficient operation and use of the Terminal having regard to demand, cost benefit and other relevant factors;
  - (2) the scope of the work undertaken;
  - (3) the standard of the work undertaken;
  - (4) the circumstances prevailing in the markets for engineering, equipment supply and construction;
  - (5) safety during construction and operation;
  - (6) compliance with environmental requirements during construction and operation;
  - (7) minimising whole of asset life costs; and
  - (8) the advice of independent advisors using appropriate benchmarks and experience and which advisors are appointed (and paid for) by DBCT Management.

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## 12 Terms and conditions of Access

### 12.1 Access Agreements

- (a) **(Standard Access Agreement guide for all Access)** The granting of Access will be underpinned by the Standard Access Agreement.
- (b) **(Parties to Access Agreements)** The parties to each Access Agreement will include DBCT Management, DBCT Trustee and the relevant Access Holder.
- (c) **(Consistency with Standard Access Agreement)** If the Access Seeker so requires (although DBCT Management and the Access Seeker are able to agree otherwise), the Access Agreement will be substantively identical to the Standard Access Agreement.
- (d) **(Different terms)** DBCT Management or an Access Seeker may seek Access on terms which are different from the Standard Access Agreement.
- (e) **(Standard Access Agreement is guide for access negotiations)** For Access required on terms other than the Standard Access Agreement, the terms of the Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement.
- (f) **(Different Terms in a Conditional Access Agreement)** If an Access Seeker is unwilling to agree to any Different Terms required by DBCT Management in respect of the Conditional Access Agreement and DBCT Management or the Access Seeker Disputes the Different Terms, the Conditional Access Agreement to be executed will take effect subject to any new or amended Different Terms that the Expansion Arbitrator determines or approves arising out of the Dispute.
- (g) **(Execution copies to be prepared)** Once an Access Seeker has notified DBCT Management that it is satisfied with the terms and conditions of the Access Agreement as drafted, DBCT Management will, as soon as reasonably practicable, provide a final Access Agreement to the Access Seeker for execution.
- (h) **(Prompt execution)** The parties will use reasonable efforts to duly execute the final Access Agreement as soon as practicable after negotiations are finalised.

## 12.2 Minimum Term of Access Agreements

- (a) **(10 years where Terminal Capacity Expansion required)**
  - (1) An Access Agreement which will, if entered into by DBCT Management, require a Terminal Capacity Expansion, must:
    - (A) provide for the Handling of coal for a minimum term of 10 years; and
    - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage earlier than the end of that 10 year period,

except for any right of DBCT Management to terminate for default.

- (2) A series of Access Agreements which will, if entered into by DBCT Management with an Access Seeker, require a Terminal Capacity Expansion must:
  - (A) provide for the Handling of coal for a minimum Weighted Average Term of 10 years; and
  - (B) not allow the Access Holder to voluntarily reduce the Annual Contract Tonnage under any Access Agreement in the series earlier than the tenth anniversary of commencement of the term of the latest-dated Access Agreement in the series, except for any right of DBCT Management to terminate for default.
- (b) **(Replacement Agreements for existing mines)** An Access Agreement in respect of an existing mine for which there is already an Access Agreement may be for any term, but:
  - (1) if it is for less than 5 years that term and the relevant tonnages must correspond with the expected remaining life of that mine; and
  - (2) no option to extend the term may be granted under it if the term is for less than 10 years.
- (c) **(Constraints on term for new mine)** The term of an Access Agreement relating to a new mine (including a mine where production is being resumed after a full closure or a sustained period of dormancy) may be for any term, but:
  - (1) if it is for a term of less than 5 years, DBCT Management may reserve the right to terminate it on not less than 12 months' notice if:
    - (A) DBCT Management executes an Access Agreement for a period in excess of 5 years, commencing during that term; and
    - (B) DBCT Management would have been unable to execute that new Access Agreement without a Terminal Capacity Expansion of the Terminal, had the first mentioned Access Agreement not been terminated at that time; and
  - (2) no option to extend the term may be granted under it if the Access Agreement provides for the Handling of coal for a term of less than 10 years.
- (d) **(Increased Tonnage or term is deemed new Access Agreement)** For clarification, increasing the term of, or Annual Contract Tonnage under, an Access Agreement will be taken to constitute a separate Access Agreement in respect of the increased term or tonnage for the purposes of this Section 12.2.

- (e) **(Clarification re options)** Reference to an Access Agreement in this Section 12.2 does not include an Access Agreement resulting from the exercise of an option to renew or extend the term under a previous Access Agreement.

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## **13 Whole of supply chain efficiency**

### **13.1 Engagement in Dalrymple Bay Coal Chain efficiency improvement**

DBCT Management will, on a “best endeavours” basis, engage with other stakeholders to develop and implement mechanisms to improve the overall efficiency of the Dalrymple Bay Coal Chain (including forums established pursuant to or arising out of a Memorandum of Understanding dated 1 April 2008 between stakeholders in the DBCT Coal Chain or any subsequent agreement or arrangement replacing or pursuant to that Memorandum of Understanding).

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## **14 Master plans**

### **14.1 Terminal Master Plan**

- (a) **(What the Terminal Master Plan is)** The Terminal Master Plan is the framework and reasoning for the expansion of the Terminal in the most logical and efficient way. It is intended to be a part of, and integrated with, the System Master Plan (and to the extent that at any time there is no System Master Plan, having regard to DBCT Management’s knowledge of the System and System Capacity for the relevant period).
- (b) **(Schedule F)** Until changed pursuant to the Framework and the Port Services Agreement, the Terminal Master Plan is the Terminal Master Plan in Schedule F.
- (c) **(Annual review)** DBCT Management must review the Terminal Master Plan at least annually and otherwise in accordance with its obligations under the Port Services Agreement.
- (d) **(Consultation)** Without limiting Section 14.1(c) DBCT Management must consult with all other Service Providers, Access Holders, Access Seekers and the Operator in respect of any proposed amendment to the Terminal Master Plan.
- (e) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Master Plan available to each other Service Provider and to each Access Holder and Access Seeker and the Operator (which may be by way of reference to a website) promptly after each amendment of the Terminal Master Plan.

## 14.2 System Master Plan

- (a) **(Participate in System Master Planning)** DBCT Management must use its reasonable endeavours to:
  - (1) (to the extent that it has not already occurred at the Commencement Date) reach agreement with each other Service Provider and DBCT Holdings (after consultation with those stakeholders and with all Access Holders and Access Seekers and the Operator) on a System Master Plan; and
  - (2) review (and if necessary revise) that System Master Plan by agreement with each other Service Provider, following ongoing consultation with all the above mentioned stakeholders.
- (b) **(Withdrawal from System Master Planning)** DBCT Management may at any time, acting reasonably, propose amendments to an existing or proposed System Master Plan. If after a reasonable time each other Service Provider does not agree to the amendments proposed by DBCT Management, DBCT Management may withdraw its agreement in respect of that System Master Plan in which case there will be assumed to be no System Master Plan for the purposes of this Framework. DBCT Management will publish on its website its reasons for withdrawing its agreement to a System Master Plan.
- (c) **(If no System Master Plan)** If at any time for any reason there is (or is deemed to be) no System Master Plan in force, where a provision of this Framework requires DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) to have regard to a System Master Plan, DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) will have regard to the Terminal Master Plan together with what it reasonably considers to be the present and likely future state of the other relevant components of the System and what DBCT Management (or a Capacity Expert / an Independent Expert / an Arbitrator / Expansion Arbitrator (as relevant)) reasonably understands to be generally accepted System operating assumptions.
- (d) **(Protection of DBCT Management)** DBCT Management will not be liable to an Access Seeker (and the Standard Access Agreement will provide that DBCT Management will not be liable to an Access Holder who executes it) if DBCT Management makes a good faith and reasonable attempt to comply with this Section 14.
- (e) **(DBCT Management's obligations in System Master Planning process)** The following apply to DBCT Management in relation to its endeavours to agree a System Master Plan pursuant to Section 14.2(a) and 14.2(b):

- (1) DBCT Management must fully and promptly provide to all other relevant stakeholders all information (to the extent that it is available to DBCT Management) which might reasonably be considered to be relevant for the purpose of determining a System Master Plan (but this does not require DBCT Management to disclose any information which could reasonably be considered to be commercially sensitive to it, any Access Holder or Access Seeker or any other person); and
- (2) DBCT Management must, as far as practicable, work cooperatively with each other Service Provider (for example by regularly providing information relevant to System Capacity and, as far as practicable, using reasonable endeavours to agree on the joint engagement of Capacity Experts for the purpose of the Framework and similar obligations by other Service Providers).

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## 15 Governing Law

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

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## 16 Dispute resolution

### 16.1 Disputes

- (a) **(Disputes under this Framework)** If any dispute or question arises under or in relation to this Framework, including in relation to the negotiation of Access between an Access Seeker and DBCT Management (Dispute) then, unless otherwise expressly agreed by both parties in writing, such Dispute will be resolved in the manner specified in this Framework (where applicable) and in accordance with this Section. Without limitation to the forgoing, any dispute concerning:
  - (1) the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any consequential changes in the drafting of the provisions of the Access Agreement); or
  - (2) the review during a Pricing Period of the Access Charges applicable under an Access Agreement that contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement in accordance with Section 10.6 of this Framework,

is a Dispute under this Framework and will be resolved in the manner specified in this Framework and in accordance with this Section.

- (b) **(Notice of Dispute)** Either party may give to the other party to the Dispute notice in writing (Dispute Notice) specifying the Dispute and requiring that it be dealt with in the manner specified in this Framework (where applicable) and as set out in this Section 16.
- (c) **(Disputes under Access Agreements)** Unless otherwise specified by this Framework or agreed by the parties, disputes under an Access Agreement will be dealt with in accordance with the provisions of that Access Agreement and are not dealt with under this Framework.
- (d) **(Dispute under Deed Poll)** Subject to clause 9.2.5 of the Deed Poll, the courts of Queensland have exclusive jurisdiction to determine any disputes arising under the Deed Poll.

## 16.2 Chief Executive resolution

- (a) **(Reference to CEOs)** Unless otherwise agreed by both parties or provided for in this Framework (including where the Framework provides that a Dispute or other matter is to be referred to or determined by an Independent Expert (or Expert Determination) or an Arbitrator (or Arbitration)), any Dispute will be referred in the first instance and in any event within 10 Business Days of the giving of the Dispute Notice to the Chief Executive of DBCT Management (or his or her nominee) and the Chief Executive of the Access Seeker or Access Holder (or his or her nominee) for resolution.
- (b) In the event that:
  - (1) resolution is not reached within 10 Business Days of referral; or
  - (2) either Chief Executive appoints a nominee in accordance with this Section 16 that is unacceptable to the other party,

where this Framework provides that the Dispute is to be referred to Expert Determination (or determination by an Independent Expert), the Dispute will be referred to an Independent Expert in accordance with Section 16.3 unless otherwise agreed by the parties. All other Disputes will be referred to Arbitration in accordance with Section 16.4.

## 16.3 Expert Determination

Where a matter is referred to Expert Determination (or determination by an Independent Expert) in accordance with Section 16.2 or as otherwise specified in accordance with this Framework, then the following will apply:

- (a) **(Appointment)** An Independent Expert may be appointed by the parties, or where agreement cannot be reached by the parties within five Business Days, by the Resolution Institute.
- (b) **(Criteria for Independent Expert)** In any event the Independent Expert must:
- (1) have appropriate qualifications and practical experience having regard to the nature of the Dispute;
  - (2) have no interest or duty which conflicts or may conflict with his or her function as Independent Expert, he or she being required to fully disclose any such interest or duty before his or her appointment; and
  - (3) not be a current or immediate past employee of the Access Seeker or Access Holder, or DBCT Management or of a Related Body Corporate of either of them.
- (c) **(Acceptance of appointment)** The Independent Expert appointed pursuant to this Section 16.3 must not act until the Independent Expert has given written notice of the acceptance of his or her appointment to both parties.
- (d) **(Provision of information to Independent Expert)** The parties must upon request by the Independent Expert, provide or make available to the Independent Expert:
- (1) all information in their possession or control (other than Confidential Information);
  - (2) all Confidential Information (subject to entry into arrangements to preserve confidentiality which are acceptable to all relevant parties, acting reasonably); and
  - (3) all other assistance,
- that the Independent Expert may reasonably require. Any such information or assistance must be provided as soon as reasonably practicable. Any determination made by an Independent Expert in relation to a Dispute must be consistent with the provisions of this Framework;
- (e) **(Determination to be given to each party)** The Independent Expert will provide both parties with a copy of the written determination in relation to the Dispute within a reasonable time after his or her appointment.
- (f) **(Confidentiality)** The Independent Expert appointed pursuant to this Section 16.3 is required to undertake to the parties in writing to keep confidential all matters coming to his or her knowledge by reason of this appointment and performance of his or her duties.

- (g) **(Not arbitration)** Any person nominated as an Independent Expert pursuant to this Section 16.3 is deemed to be and must act as an Independent Expert and not as an arbitrator. The law relating to arbitration including, without limitation, the Commercial Arbitration Act 2013 (Qld) as it may be amended from time to time, does not apply to the Independent Expert or to the determination or to the procedures by which the Independent Expert may reach that determination.
- (h) **(Independent Expert's decision final)** In the absence of manifest error, the decision of the Independent Expert is final and binding upon the parties. If a party believes that there was a manifest error it may refer the matter to the Arbitrator for a determination in accordance with Section 16.4. If the Arbitrator determines that there was a manifest error, then the parties may agree to refer the Dispute to another Independent Expert in accordance with this Section 16.3, or failing such agreement, either party may refer the Dispute to the Arbitrator for resolution in accordance with Section 16.4.
- (i) **(Costs of Independent Expert)** The costs of the Independent Expert and the reasonable costs of the parties are to be borne by the parties in such proportions as determined by the Independent Expert. If two or more Access Seekers or Access Holders are parties to a Dispute involving substantially the same issues and there are no special circumstances making it necessary or desirable for them to be separately represented, it will only be reasonable for those Access Seekers and Access Holders in aggregate to recover the costs of being collectively represented in any Dispute.

#### **16.4 Determination by Arbitration**

- (a) All Disputes referred to Arbitration (or determination by an Arbitrator) under this Framework must be conducted in accordance with this Section 16.4.
- (b) The Dispute shall be submitted to Arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules.
- (c) The Arbitration must be effected by a single suitably qualified and experienced arbitrator who is either:
  - (1) agreed upon between the parties; or
  - (2) in default of such agreement within five Business Days after the Dispute is referred for Arbitration, nominated by the Resolution Institute.
- (d) Any party to the Arbitration may be represented before the Arbitrator by a member of the legal profession without the need for leave of the Arbitrator.
- (e) The proceeding, including any determination by the Arbitrator, will be kept confidential between the parties and the Arbitrator, with the exception that DBCT Management may disclose an Initial TIC for a Terminal Component and

a Pricing Period determined by an Arbitrator in any Arbitration under this Section 16.4 to:

- (1) an Access Seeker in subsequent negotiations with that Access Seeker concerning an Initial TIC for that Terminal Component and that Pricing Period to apply to the Access Seeker from the commencement of an Access Agreement or increased Access under an Access Agreement; or
- (2) the Arbitrator in and the party or parties to any later Arbitration on an Access Dispute concerning an Initial TIC for that Terminal Component and that Pricing Period for the purpose of Section 10.4(e) of this Framework,

subject to the Access Seeker in subsequent negotiations and the party or parties to any later Arbitration first undertaking to maintain the confidentiality of the outcome of the first-mentioned Arbitration.

- (f) Subject to paragraph 16.4(g), in any Dispute relating to the terms and conditions of Access, the Arbitrator must determine on terms and conditions of Access that are substantively identical to the terms of the Standard Access Agreement, except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (g) In any Dispute relating to Access Charges, the Arbitrator must determine on terms and conditions relating to Access Charges that are:
  - (1) in accordance with Section 10 of this Framework; and
  - (2) subject to paragraph 16.4(g)(1), substantively identical to the terms of the Standard Access Agreement,except to the extent necessary to give effect to any matter agreed by the parties to the Arbitration.
- (h) In making a determination, the Arbitrator must have regard to the terms of the Framework and to the following matters:
  - (1) the Framework Objective;
  - (2) DBCT Management's binding legal obligations and obligations under law;
  - (3) DBCT Management's legitimate business interests and investment in the Terminal;
  - (4) the legitimate business interests of persons who have, or may acquire, rights to use the Terminal;

- (5) the public interest, including the benefit to the public in having competitive markets;
  - (6) the value of the service to:
    - (A) the Access Seeker or Access Holder;
    - (B) a class of Access Seekers or Access Holders;
  - (7) the direct costs to DBCT Management of providing Access to the Terminal, including any costs of a Terminal Capacity Expansion, but not costs associated with losses arising from increased competition;
  - (8) the economic value to DBCT Management of any Terminal Capacity Expansion, or other additional investment in the Terminal, that DBCT Management or an Access Seeker or an Access Holder has undertaken or agreed to undertake;
  - (9) the quality of the Services;
  - (10) the operational and technical requirements necessary for the safe and reliable operation of the Terminal;
  - (11) the economically efficient operation of the Terminal;
  - (12) any other matters to which the Arbitrator thinks it is appropriate to have regard.
- (i) Subject to paragraph 16.4(j), any Arbitration commenced under this Framework may be consolidated with any other arbitration commenced under:
- (1) this Framework; and / or
  - (2) an Access Agreement or other agreement entered into as contemplated by the Framework,

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

- (j) Any Arbitration concerning a Dispute about the Access Charges to apply under an Access Agreement, which contains pricing provisions that are substantively identical to those of the Standard Access Agreement applicable at the time of entry into the Access Agreement, for a Pricing Period that commences during the term of that Access Agreement (including the Initial Access Charges to apply from the start of the Pricing Period, the method of calculating, paying and reconciling the Access Charges to apply for the Pricing Period or any

consequential changes in the drafting of the provisions of the Access Agreement) must be consolidated with any other Arbitration concerning a dispute of this kind in respect of the same Pricing Period so that there is a single Arbitration of such Disputes for a Pricing Period. Such consolidated Arbitration does not prevent an Arbitrator from making a specific determination that would apply to individual Access Holders or groups of Access Holders.

- (k) The venue for any Arbitration will be Brisbane, Queensland.
- (l) Unless otherwise determined by the Arbitrator, the costs of the Arbitration shall be paid by the unsuccessful party.

### **16.5 Urgent matters**

Nothing in this Section 16 prevents a party from seeking urgent injunctive relief from a court.

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## **17 Limitations to Losses and Damages**

Subject to the terms of an Access Agreement, Funding Agreement, Underwriting Agreement or any other agreement entered into with DBCT Management as contemplated by this Framework, and notwithstanding any other Section of this Framework:

- (a) damages is not a remedy for any breach of this Framework;
- (b) the only remedy available for any breach of this Framework is specific performance; and
- (c) DBCT Management is not liable to Access Holders or Access Seekers for any indirect Loss or Consequential Loss arising in connection with this Framework.

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## **18 Severability**

- (a) Subject to Section 18(b), if a provision of this Framework is illegal or unenforceable in any relevant jurisdiction, it may be severed for the purposes of that jurisdiction without affecting the enforceability of the other provisions of this Framework.
- (b) Section 18(a) does not apply if severing the provision:
  - (1) materially alters the scope and nature of this Framework; or
  - (2) would be contrary to public policy.

## Schedule A - Access Application Form and Renewal Application Form

### Access Application Form

[Note: this form to be issued on Access Seeker's letterhead]

To: Chief Executive Officer  
DBCT Management

#### DBCT Access Application

**TAKE NOTICE** that the Access Seeker named below applies for Access to the Services at Dalrymple Bay Coal Terminal pursuant to section 5.2 of the Access Framework.

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Access Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Access Application.

<b>Category of Access Application:</b>	
A	A new Access Seeker <i>(please (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness).</i> <input type="checkbox"/>
B	An existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Framework). <input type="checkbox"/>
C	An existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by Section 5.11 of the Access Framework. <input type="checkbox"/>
D	An Existing User seeking additional capacity (including an extension of the Term). <input type="checkbox"/>
<i>For existing Access Holders making a category B or C application or Existing Users making a category D application, please complete the declaration below or Schedule A attached:</i>	
I confirm that all details required by Schedule A attached in relation to the Services required at the Terminal, and any Security required, will be as per our [existing Access Agreement / Existing User Agreement] <i>[strike through the inapplicable reference and tick box at right]</i> . <input type="checkbox"/>	
<i>[Note: If box is not ticked, please complete Schedule A attached]</i>	
<b>Name</b>	DBCT Management use only Received Date:   Access Application Date: <i>[per section 5.4(b) of the Access Framework ]</i>
<b>Position</b>	
<b>Signed</b>	
<b>Date</b>	

The Access Seeker unconditionally and irrevocably agrees:

- (a) to comply with the requirements, obligations and processes in:
  - a. the Framework relating to it or its Access Application; and
  - b. the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll; and
- (b) that the Access Application is governed by the laws in force in the State of Queensland.

## Schedule A to the Access Application of [insert name]

(Note – where the Access Seeker is an existing Access Holder or Existing User and the details are relevantly the same as the Services being provided under the Access Agreement or Existing User Agreement respectively, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	<b>Year Mtpa</b>
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year:	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments.	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Access Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient: <ul style="list-style-type: none"> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for each of the first 5 Financial Years in item 7 in respect of which Access is applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul> </li> </ul>	

13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	
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<b>Name</b>	<b>Signed</b>
<b>Position</b>	
<b>Date</b>	

## Access Renewal Form

[Note: this form to be issued on Access Seeker's letterhead]

To: Chief Executive Officer  
DBCT Management

### DBCT Renewal Application

**TAKE NOTICE** that the Access Seeker named below applies to renew its Access Application for Access to the Services at Dalrymple Bay Coal Terminal pursuant to Section 5.3A of the Access Framework .

<b>Name of Access Seeker</b>	
<b>Origin of Coal (Mine Name)</b>	
<b>Street address</b>	
<b>Telephone</b>	
<b>Attention</b>	
<b>Email address</b>	

The Access Seeker warrants that it has:

- (a) rights to below rail infrastructure; and/or
- (b) made or will promptly make an application to the relevant railway infrastructure service provider to obtain rights to rail infrastructure (which it reasonably expects will be granted if this Renewal Application is granted); and/or
- (c) otherwise made arrangements,

to ensure that rail access is sufficient to deliver to the Terminal the tonnages which are the subject of this Renewal Application.

<b>Category of Renewal Application</b>	
A	A renewal of an Access Application which was submitted by a new Access Seeker <i>(please complete the declaration below or (1) complete Schedule A attached and (2) provide evidence of solvency or security offered to enable DBCT Management to assess creditworthiness).</i> <input type="checkbox"/>
	<i>I confirm that all details required by Schedule A attached in relation to the Services required at DBCT, and any Security required, will be as per our current Access Application [tick box at right]. [Note: If box is not ticked, please complete Schedule A attached]</i> <input type="checkbox"/>
B	A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) pursuant to a mechanism in its Access Agreement (as contemplated by section 5.11 of the Access Framework ). <input type="checkbox"/>
C	A renewal of an Access Application which was submitted by an existing Access Holder seeking additional capacity (including an extension of the Term) other than in the circumstances contemplated by section 5.11 of the Access Framework. <input type="checkbox"/>
D	A renewal of an Access Application which was submitted by an Existing User seeking additional capacity (including an extension of the Term). <input type="checkbox"/>
	<i>For existing Access Holders making a category B or C Renewal Application or Existing Users making a category D Renewal Application, please complete the declaration below or Schedule A attached: I confirm that all details required by Schedule A attached in relation to the Services required at the Terminal, and any Security required, will be as per our current Access Application and [existing Access Agreement / Existing User Agreement] [strike through the inapplicable reference and tick box at right].</i> <input type="checkbox"/>
	<i>[Note: If box is not ticked, please complete Schedule A attached]</i>
<b>Name</b>	<i>DBCT Management use only Received Date:</i>
<b>Position</b>	
<b>Signed</b>	

<b>Date</b>	

The Access Seeker unconditionally and irrevocably agrees:

- (a) to comply with the requirements, obligations and processes in:
  - a. the Framework relating to it or its Access Application and Access Renewal Form; and
  - b. the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll; and
- (b) the Access Application and Access Renewal Form are governed by the laws in force in the State of Queensland.

**Schedule A to the Renewal Application of [insert name]**

(Note – where the Access Seeker is an existing Access Holder or Existing User and the details are relevantly the same as the Services being provided under the Access Agreement or Existing User Agreement respectively, state “as existing”. Cross reference to further sheets to be attached where there is insufficient room in the table below.)

1	Name and contact details	As above
2	Stockpiling requirements	
3	Blending requirements	
4	Number of products	
5	Date of commencement of delivery of coal to the Terminal	
6	Description of each type of coal (including coal qualities such as moisture content, dust extinction moisture level, “stickiness”, and contamination levels and any special requirements the Access Seeker has in relation to its coal, including any special equipment or particular Handling processes) to be delivered to the Terminal	
7	Net tonnes of coal per annum requested for each Financial Year where access is requested	Year Mtpa
8	Proposed number of trains and wagons per train for each week from the proposed date of commencement of the delivery of coal to the Terminal to the end of the first full Financial Year	
9	Proposed gross tonnes per wagon	
10	To the extent possible, the number, type and respective gross and deadweight tonnages of vessels, on a month by month basis, expected to ship the Access Seeker’s coal from the proposed date of the commencement of the delivery of coal to the Terminal to the end of the first full Financial Year, including details of the numbers of single and part vessel consignments	
11	Requirements for trial shipments (if any)	
12	<ul style="list-style-type: none"> <li>• A report prepared by a ‘competent person’ (as defined in the JORC Code) in accordance with the JORC Code and the Coal Guidelines which provides an estimate of Marketable Coal Reserves and Coal Resources as at the date the report is prepared (which must be within 12 months of the date of the Renewal Application) which are to be allocated for shipment under the Access Seeker’s Access Agreement. The estimate must be calculated in accordance with the JORC Code and the Coal Guidelines. The report and the key documents used to develop the report must be verified by a ‘competent person’ (as defined in the JORC Code).</li> <li>• An explanation of how the estimate of Coal Resources in the report is consistent with being able to economically extract the net tonnes of coal per annum requested for each Financial Year in item 7 by the relevant Financial Years (including the proportion which is 'Marketable Coal Reserves' as defined in the JORC Code, and the Access Seeker's approach to converting those Coal Resources to Marketable Coal Reserves).</li> <li>• An explanation of how the estimate of Marketable Coal Reserves and Coal Resources in the report is consistent with having sufficient:</li> <li>• Marketable Coal Reserves for the net tonnes of coal per annum requested for the first five Financial Year in item 7 in respect of which Access applied for; and</li> <li>• Coal Resources, together with the Marketable Coal Reserves, for the net tonnes of coal per annum requested for each Financial Year in item 7.</li> </ul>	

13	<ul style="list-style-type: none"> <li>• A description of the coal mine project that will be used as the source of coal to be delivered by the Access Seeker to the Terminal (<b>Source Mine Project</b>).</li> <li>• The project timeline (including key milestones) for the construction, commissioning and production phases of the Source Mine Project.</li> <li>• An explanation of how the Source Mine Project is currently tracking against the project timeline and a description of the current stage of the Source Mine Project.</li> <li>• An explanation of how the project timeline referred to above is consistent with the date for commencement of delivery of coal to the Terminal (as specified in item 5).</li> <li>• An assessment of the prospects of the Access Seeker obtaining any debt or equity finance required in order for the Source Mine Project to achieve the key milestones referred to in the project timeline including commencement of the production phase.</li> <li>• The Access Seeker’s progress in obtaining the necessary approvals for the Source Mine Project.</li> </ul>	
<b>Name</b>		<b>Signed</b>
<b>Position</b>		
<b>Date</b>		

## **Schedule B - Standard Access Agreement**

[Standard Access Agreement attached separately]

## Schedule C - The Terminal Infrastructure Charge

For the avoidance of doubt, the terms and provisions of this Schedule should be interpreted in accordance with Section 10 of the Framework.

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### Part A - Rules for calculating Initial Terminal Infrastructure Charge and Monthly Payment applicable in Arbitration on Initial Access Charges

#### 1. Monthly Payment (MP)

Access Holder “u” (**AH<sub>u</sub>**) must pay to DBCT Management a Monthly Payment in respect of its Annual Contract Tonnage in each Month “m” of each Financial Year (**MP<sub>u,m</sub>**), calculated as follows:-

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

where:-

**TIC** is the Terminal Infrastructure Charge applicable to **AH<sub>u</sub>** for a relevant Financial Year in respect of the Existing Terminal or Differentiated Expansion Component (as relevant), as amended or adjusted in accordance with Section 3 of this Schedule C; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Annual Contract Tonnage applicable to **AH<sub>u</sub>** in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) attributable to each Month “m” of a Financial Year. Where the rate of the Annual Contract Tonnage for the Access Holder does not vary in a Financial Year and applies to the full Financial Year, the **MRT<sub>u,m</sub>** for the **AH<sub>u</sub>** will be one-twelfth of their Annual Contract Tonnage for the relevant Financial Year. Where the rate of the Annual Contract Tonnage for the **AH<sub>u</sub>** varies during a Financial Year, the **MRT<sub>u,m</sub>** will vary from Month to Month to reflect one-twelfth of the annualised rate of the Annual Contract Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is amended or adjusted in accordance with Schedule C, Section 3.

To avoid doubt, if an Access Holder has more than one TIC for a Terminal Component due to the Access Holder obtaining increased Access to the Terminal Component at a different TIC, the Monthly Payment formula above must be applied separately in relation to the TIC applicable to each tranche of Access to the Terminal Component obtained by the Access Holder, with the total Monthly Payment for the Access Holder being the sum of the Monthly Payments for each tranche of Access.

## 2. Initial Terminal Infrastructure Charge

### The Floor TIC

- (a) The Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) is the TIC for that Terminal Component that would apply under a QCA administered pricing regime.

### The Ceiling TIC

- (b) The Ceiling TIC must be lower than the sum of:
- (1) the Floor TIC for the Existing Terminal; and
  - (2) the Maximum Spread, where the Maximum Spread is:
    - (A) \$3.00 in the Financial Year commencing on 1 July 2020; and
    - (B) in any subsequent Financial Year is derived by escalating the Maximum Spread in the immediately preceding Financial Year for the annual change in the Consumer Price Index by application of the following formula:

$$MSt = MSt-1 \times (1 + CPI_t)$$

where:

$MS_t$  is the Maximum Spread to apply with effect from 1 July in Financial Year t;

$MSt-1$  is the Maximum Spread applicable in Financial Year t-1; and

$CPI_t$  is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1.

- (c) Subject to paragraph (b), the Ceiling TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) is:
- (1) the highest TIC for that Terminal Component at which coal volumes served by that Terminal Component would be the same as if the Floor TIC in respect of that Terminal Component applied; and
  - (2) to be set equal to the lowest 'willingness to pay' (as defined in paragraph (d) below) to be served at the relevant Terminal Component

of those mines expected to be served at the Terminal Component, where:

- (A) mines are served at the Terminal Component in the order of their 'willingness to pay' to be served at that Terminal Component, with those with higher 'willingness to pay' served before those with lower 'willingness to pay'; and
  - (B) the coal volumes to be served at the Terminal Component are the same as if the Floor TIC in respect of that Terminal Component applied and do not exceed the capacity of that Terminal Component to serve those coal volumes.
- (d) For the purpose of paragraph (c)(2), a mine's 'willingness to pay' to be served at the Existing Terminal or Differentiated Expansion Component (as relevant) is:
- (1) expressed on a dollar per tonne basis;
  - (2) zero if:
    - (A) the mine's coal volumes are not technically capable of being delivered to the Terminal (in that the mine is not connected to the Terminal by rail);
    - (B) the mine's coal volumes are technically capable of being delivered to a coal terminal other than the Terminal (in that the mine is connected to that other coal terminal by rail) and its expected profit per tonne is greater when its coal volumes are served at that other coal terminal than when its coal volumes are served at the Terminal; or
    - (C) the mine's expected profit per tonne when its coal volumes are serviced at the relevant Terminal Component is less than zero; and
  - (3) otherwise calculated as:
    - (A) the Floor TIC for the relevant Terminal Component; plus
    - (B) the expected profit per tonne where the mine's coal volumes are served at the relevant Terminal Component at the Floor TIC for that Terminal Component; less
    - (C) either:

- (i) the highest expected profit per tonne where the mine's coal volumes are served at a coal terminal other than the Terminal that is technically capable of taking delivery of those coal volumes (in that the mine is connected to that terminal by rail), if this expected profit per tonne is greater than zero; or
  - (ii) zero, if there is either no coal terminal other than the Terminal that is technically capable of taking delivery of the mine's coal volumes or no coal terminal other than the Terminal that provides an expected profit per tonne greater than zero.
- (e) For the purpose of assessing a mine's 'willingness to pay' for the purposes of paragraphs 2(d)(2) and 2(d)(3) above, expected profit per tonne when its coal volumes are served at a coal terminal is calculated as:
  - (1) the FOB coal price;
  - less
  - (2) mine costs, being the sum of operating costs, royalty payments, depreciation and a reasonable return on the capital costs of developing and operating the mine;
  - (3) rail transport charges for delivering coal to the coal terminal; and
  - (4) applicable infrastructure and handling charges for using port infrastructure including the coal terminal;

on the basis that:

  - (5) miners make terminal usage decisions without reference to any contractual limitations on coal volumes to be served at the Terminal or any other coal terminal; and
  - (6) the volumes of coal that miners prefer to deliver to any coal terminal other than the Terminal must not, when aggregated, exceed the capacity expected to be available at that other coal terminal to serve those coal volumes (disregarding any contractual limitations on coal volumes to be served at that other terminal in accordance with paragraph (e)(5)).
- (f) To avoid doubt, for the purpose of this paragraphs (b) to (e):
  - (1) in deriving the Ceiling TIC for the Existing Terminal or a Differentiated Expansion Component (as relevant), any TIC applicable in respect of

any other Terminal Component and mines' 'willingness to pay' to be served at any other Terminal Component should be disregarded; and

- (2) Section 10.4(h) of the Framework applies to forecasting of the coal volumes of mines.

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**Part B - Review of the TIC during a Pricing Period under Access Agreements in form of Standard Access Agreement**

**3. Review of the TIC**

**Annual amendment of the TIC**

- (a) A TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for AH<sub>u</sub> will be amended annually on each 1 July after the Initial TIC for AH<sub>u</sub> commenced to apply in accordance with paragraphs (b) to (d) of this Section 3.
- (b) A TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) to apply to AH<sub>u</sub> from each 1 July after the Initial TIC for AH<sub>u</sub> commenced to apply must be escalated for the annual change in the Consumer Price Index by application of the following formula:

$$TIC_t = TIC_{t-1} \times (1 + CPI_t)$$

where:

- TIC<sub>t</sub> is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) to apply with effect from 1 July in Financial Year t consequent upon the adjustment under this paragraph (b);
- TIC<sub>t-1</sub> is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable as at 30 June in Financial Year t-1 immediately prior to the occurrence of the adjustment under this paragraph (b); and
- CPI<sub>t</sub> is the annual percentage change in the Australian Bureau of Statistics CPI All Groups, Weighted Average of Eight Capital Cities from the March quarter in Financial Year t-2 to the March quarter in Financial Year t-1.
- (c) By each 15 May after the Initial TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) for AH<sub>u</sub> commenced to apply or as soon as practicable thereafter, DBCT Management will notify that AH<sub>u</sub> of the CPI adjustment and resultant TIC to apply with effect from 1 July in the next Financial Year.

- (d) If a Review Event occurs in the period after DBCT Management has notified AH<sub>u</sub> of a TIC to apply with effect from 1 July in the next Financial Year under paragraph (c) above but before that 1 July that affects that TIC, DBCT Management will promptly notify that AH<sub>u</sub> of the amended TIC to apply with effect from 1 July of the next Financial Year in accordance with paragraphs (e) to (j) below.

#### **Amendment of the TIC if a Review Event occurs**

- (e) If a Review Event occurs, DBCT Management will give notice as soon as reasonably practicable of the amended TIC determined in accordance with paragraph (f), (g) or (h) below (as the case may be) to apply because of the Review Event.
- (f) In the case of a Review Event referred to in paragraph (a) of the definition of Review Event (relating to a change in Aggregate Annual Contract Tonnage), a TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) then applicable for AH<sub>u</sub> will be amended by application of the following formula, unless the Review Event occurs as a consequence of a Review Event referred to in paragraph (b) of the definition of Review Event (relating to the Completion and hand over to the Operator of a Socialised Expansion), in which case the TIC will be amended in accordance with paragraph (g):

$$TIC_t = UAF_t \times TIC_{t-1}$$

where:

TIC<sub>t</sub> is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for AH<sub>u</sub> consequent upon the Review Event;

UAF<sub>t</sub> is the utilisation adjustment factor, which is equal to TUR<sub>t</sub> / TUR<sub>t-1</sub>;

TUR is the terminal utilisation ratio, calculated as follows:

(Existing Terminal Capacity or Differentially Priced Capacity (as relevant) / Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant));

TUR<sub>t-1</sub> is the TUR immediately prior to the occurrence of the Review Event;

TUR<sub>t</sub> is the TUR consequent upon the Review Event; and

$TIC_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  immediately prior to the occurrence of the Review Event.

- (g) In the case of a Review Event referred to in paragraph (b) of the definition of Review Event (relating to a Socialised Expansion), a TIC in respect of the Existing Terminal then applicable for  $AH_u$  will be adjusted to an amount calculated as follows:

$$TIC_t = UAF_t \times (TIC_{t-1} - \text{Floor } TIC_{t-1}) + \text{Floor } TIC_t$$

where:

$TIC_t$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  consequent upon the Review Event;

$UAF_t$  is the utilisation adjustment factor, which is equal to  $TUR_t/TUR_{t-1}$ ;

$TUR$  is the terminal utilisation ratio, calculated as follows:

(Existing Terminal Capacity or Differentiated Expansion Component Capacity (as relevant) / Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant))

$TUR_{t-1}$  is the TUR immediately prior to the occurrence of the Review Event;

$TUR_t$  is the TUR consequent upon the Review Event;

$TIC_{t-1}$  is the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) applicable for  $AH_u$  immediately prior to the occurrence of the Review Event;

Floor  $TIC_{t-1}$  is the Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) immediately prior to the occurrence of the Review Event; and

Floor  $TIC_t$  is the Floor TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) consequent upon the Review Event.

- (h) In the case of a Review Event referred to in paragraph (c) of the definition of Review Event (relating to NECAP), the TIC in respect of the Existing Terminal or Differentiated Expansion Component (as relevant) that would otherwise apply for  $AH_u$  in Financial Year  $t$  (after making all other adjustments required by paragraphs (c) and (e)) will be adjusted for that Financial Year  $t$  by an amount calculated as follows:

Adjustment amount<sub>t</sub> = NECAP Allowance<sub>t</sub> / Aggregate Annual Contract Tonnage<sub>t</sub>

where:

NECAP Allowance<sub>t</sub> is equal to the sum of the Return on NECAP<sub>t</sub> and the Return of NECAP<sub>t</sub>;

Return on NECAP<sub>t</sub> is the product of the NECAP Asset Base<sub>t</sub> and the WACC(2) Rate;

Return of NECAP<sub>t</sub> is equal to the sum, for each 12 month period ending 31 March in which any program of NECAP included in NECAP Asset Base<sub>t</sub> for the Existing Terminal or Differentiated Expansion Component (as relevant) was Completed and handed over to the Operator, of the total NECAP for any program of NECAP Completed and handed over to the Operator in the 12 month period divided by an asset life of 20 years;

NECAP Asset Base<sub>t</sub> is the NECAP Asset Base for the Existing Terminal or Differentiated Expansion Component (as relevant) as at 1 July for Financial Year t and is derived by rolling forward the value of the NECAP Asset Base from the preceding Financial Year t-1 as follows:

NECAP Asset Base<sub>t</sub> = NECAP Asset Base<sub>t-1</sub> + NECAP<sub>t-1</sub> - Return of NECAP<sub>t-1</sub>;

NECAP Asset Base<sub>t-1</sub> is the value of the NECAP Asset Base at the start of Financial Year t-1 and is zero where Financial Year t is the Financial Year in which the Initial TIC for the relevant Pricing Period commenced;

NECAP<sub>t-1</sub> is the value of the NECAP incurred in any prior period (including NECAP in any period preceding the Commencement Date) on any program of NECAP which was Completed and handed over to the Operator by DBCT Management in the twelve months ending 31 March in Financial Year t-1 and allocated to the Terminal Component or Differentiated Expansion Component (as relevant) in accordance with Section 10.7 of this Framework including NECAP referred to in Section 11.10(b) and NECAP referred to in Section 11.10(c);

Return of  $NECAP_{t-1}$  is the Return of  $NECAP$  included in the  $NECAP$  Allowance $_{t-1}$  in determining the Adjustment amount for Financial Year  $t-1$  in accordance with this paragraph (h) and is zero where Financial Year  $t$  is the Financial Year in which the Initial TIC for the relevant Pricing Period commenced.

- (i) Any amendment made pursuant to paragraph (e) above will be effective from the first day of the Month following the Month in which the Review Event occurs, except for those Review Events of the kind described at paragraph (c) of the Review Event definition, which will be effective from the relevant 1 July.
- (j) For clarification, if a review under paragraph (c) above occurs simultaneously with a review under paragraph (e), they will be reviewed together and the amendments to the TIC under paragraph (c) and under paragraph (e) for each Review Event will be applied cumulatively and become effective on the relevant 1 July.
- (k) If DBCT Management or the Access Holder, acting reasonably, considers that an amended TIC determined in accordance with this Schedule C, Part B would be higher than the Ceiling TIC applicable at the time of determining the amended TIC or lower than the Floor TIC applicable at that time, they may raise a Dispute in accordance with Section 16 of this Framework and any determination by an Arbitrator must be in accordance with Section 10.6(b) of this Framework.

## Schedule D - Confidentiality Deed

### This confidentiality deed

is made on

between the following parties:

1. **DBCT Management Pty Limited**  
ACN 097 698 916  
of Level 15, Waterfront Place, 1 Eagle Street, Brisbane QLD 4000  
(**DBCT Management**)
2. **[insert name of receiving party]**  
[insert ABN/ACN/ARBN]  
of [insert address]  
(**Access Seeker**)

### Recitals

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

### This deed witnesses

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

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## 1. Definitions and interpretation

### 1.1 Definitions

In this deed:

**Access Framework** means the Dalrymple Bay Coal Terminal Access Framework dated 9 September 2020 as varied or replaced from time to time;

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

- (a) the disclosure of the information, data or other matter by the Recipient might reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter; or
- (b) the information, data or other matter is marked or otherwise clearly identified as confidential by a party when disclosed,
- (c) provided that such information, data or other matter:
- (d) is not already in the public domain;
- (e) does not become available to the public through means other than a breach of this confidentiality deed or of the confidentiality provisions of the Access Framework;
- (f) was not in the other party's lawful possession prior to such disclosure; or
- (g) is not received by the other party independently from a third party free to disclose such information, data or other matter,

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

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

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

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

**Document** includes any note, memorandum, record, report, financial information, summary, analysis, calculation, strategic assessment, market survey, business plan,

computer program, computer record, circuit, circuit layout, drawing, specification, material or any other means by which information may be stored or reproduced;

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

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

**Specified Person** means:

- (a) an officer or employee of a Recipient;
- (b) a professional adviser to a Recipient;
- (c) a financier of a Recipient;
- (d) a professional adviser to a financier of a Recipient;
- (e) an officer, employee, or a professional adviser to a related body corporate of a Recipient; or
- (f) an officer or employee of the Operator,

who has a specific need to have access to the Confidential Information for the Express Purpose.

## 1.2 Interpretation

- (a) Terms defined in the Access Framework have the same meaning in this deed unless otherwise defined.
- (b) Headings are for convenience only and do not affect interpretation.
- (c) In this deed, unless the context otherwise requires:
  - (1) words importing the singular include the plural and vice versa;
  - (2) a reference to any thing (including, but not limited to, any right) includes a part of that thing but nothing in this Clause 1.2(c)(2) implies that performance of part of an obligation constitutes performance of the obligation;
  - (3) the term “related body corporate” has the meaning given to that term under the Corporations Act;
  - (4) the term “associate” has the meaning given to that term in Section 15 of the Corporations Act;

- (5) an expression importing a natural person includes any company, partnership, joint venture, association, corporation or other body corporate and any government agency; and
- (6) a reference to a person includes that person's successors and legal personal representatives.

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## **2. Confidentiality**

The Recipient must:

- (a) hold the Confidential Information in strict confidence and not disclose, or cause or permit the disclosure of, the Confidential Information, except as permitted under this deed or with the prior written consent of the Discloser;
- (b) not disclose, or cause or permit the disclosure to any person of, any opinion in respect of the Confidential Information or a Document created in accordance with Clause 3(c), except as permitted under this deed;
- (c) keep the Confidential Information and any Documents created in accordance with Clause 3(c) in a way such that it is reasonably protected from any use, disclosure or access which is inconsistent with this deed;
- (d) promptly notify the Discloser if it suspects, or becomes aware of, any unauthorised use, storage, copying or disclosure of the Confidential Information;
- (e) do anything reasonably required by the Discloser to prevent or stop a breach or threatened breach of this deed or an infringement or threatened infringement of the Discloser's rights arising out of this deed by any person, whether by court proceedings or otherwise; and
- (f) maintain such procedures as are reasonably necessary to ensure compliance with this deed by the Recipient and each Specified Person and, upon request, provide the Discloser details of the procedures adopted.

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## **3. Permitted use and disclosure**

The Recipient may:

- (a) only use the Confidential Information for the Express Purpose;
- (b) not make use of the Confidential Information to the commercial, financial or competitive disadvantage of the Discloser (but this does not preclude the Recipient from using the Confidential Information in negotiations with the Discloser or in any dispute proceedings);

- (c) create, or cause or permit to be created, a Document which reproduces, is based on, utilises or relates to Confidential Information only if that creation is solely for the Express Purpose; and
- (d) only disclose Confidential Information (including as contained in a Document created in accordance with Clause 3(c)) to a Specified Person, and may only make such disclosure solely for the Express Purpose.

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#### **4. Return and destruction of information**

- (a) If requested by the Discloser, the Recipient must promptly return to the Discloser, or destroy or delete as the Discloser directs, all original Documents and copies which:
  - (1) are or contain Confidential Information; and
  - (2) reproduce, are based on, utilise or relate to Confidential Information.
- (b) If a Document or a copy referred to in Clause 4(a) contains information which is Confidential Information of the Recipient, then the Recipient is not required to return that Document but must destroy or delete the portion of the Document containing the Confidential Information of the Discloser.
- (c) Nothing in this clause 4 requires the destruction or return of documentation contained in any board papers or information retained by a professional adviser in accordance with usual professional practice.

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#### **5. Operation of this deed**

- (a) This deed continues without limitation in time but, subject to Clause 5(b), does not apply to any Confidential Information that:
  - (1) the Recipient or a Specified Person is required to disclose by any applicable law or legally binding order of any court, government, semi-government authority, administrative or judicial body, or a requirement of a stock exchange or regulator;
  - (2) is in the public domain other than as a result of a breach of this deed;
  - (3) was at the time of disclosure already in the lawful possession of the Recipient; or
  - (4) is received by the Recipient from a person (other than a Discloser or any employee, officer, agent or adviser of a Discloser) legally entitled to possess that information and provide it to the Recipient.

- (b) If the Recipient or a Specified Person must make a disclosure referred to in Clause 5(a)(1):
    - (1) the Recipient must only disclose, and must ensure that the Specified Person only discloses the minimum Confidential Information required to comply with the applicable law, order or requirement; and
    - (2) before making such disclosure, the Recipient must:
      - (A) give the Discloser reasonable written notice of:
        - (i) the full circumstances of the required disclosure; and
        - (ii) the Confidential Information which it, or the Specified Person, proposes to disclose; and
      - (B) consult with the Discloser as to the form of the disclosure.
- 

## **6. Acknowledgment**

The Recipient acknowledges that:

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

## **7. Recipient to ensure others comply**

The Recipient must:

- (a) inform each Specified Person of the Recipient's obligations under this deed;

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

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## **8. Indemnity**

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

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

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## **9. Disclaimer**

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

Confidential Information which the Discloser provides to the Recipient;  
and

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

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## **10. Governing law and jurisdiction**

- (a) This deed is governed by the laws of Queensland.
- (b) Any dispute arising out of or in connection with this deed shall be resolved in accordance with the dispute resolution provisions contained in section 16 of the Access Framework.

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## **11. Waivers**

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

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## **12. Variation**

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

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## **13. Entire agreement**

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



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**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management**

by:

\_\_\_\_\_

Director/Secretary

Director

\_\_\_\_\_

Name (please print)

Name (please print)

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

by:

\_\_\_\_\_

Director/Secretary

Director

\_\_\_\_\_

Name (please print)

Name (please print)

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## Schedule E - Services

### 1. Train scheduling

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate cargo assembly windows at the terminal to receive coal parcels and provide train operators and Access Holders with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of coal in each Financial Year.

### 2. Train unloading

If a train carrying an Access Holder's coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the coal) consistent with achieving Handling of the Annual Contract Tonnage of coal for an Access Holder.

### 3. Reclaiming and vessel loading

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive coal) nominated by each Access Holder, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management on behalf of that Access Holder in each Financial Year (as long as the vessel and/or cargo mix required by the Access Holder (or its customer) does not unreasonably impact on the efficiency of the Terminal); and
- (b) load each Access Holder's coal into a vessel which is nominated by the Access Holder and is available for loading so as to achieve the objective in paragraph 3(a).

### 4. Incidental services

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

- sampling and survey services;
- vessel monitoring;
- co-ordination with ships' agents, masters, customers and other relevant entities;
- crew disembarkation services; and

- wharfage and line services.

## **5. Miscellaneous services**

If required by an Access Holder or any Approval or statutory authority notified to DBCT Management, DBCT Management must, in accordance with Good Operating and Maintenance Practice, provide the following miscellaneous services to the Access Holder:

- moisture adding;
- compacting;
- surfactant adding;
- dozing;
- blending (subject to Section 6(d) below); and
- any other services reasonably requested from time to time in writing by an Access Holder to DBCT Management, provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal.

## **6. Stockpiling and blending**

- (a) DBCT Management must provide to each Access Holder sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the Access Holder's coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that each Access Holder is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the Aggregate Annual Contract Tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in Section 6(a) and 6(b) are subject to any other obligation of DBCT Management under any Existing User Agreement with an Existing User entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:

- (1) require coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (2) require coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (3) limit the proportions in which coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer each Access Holder's coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile an Access Holder's coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## **7. Prevention of contamination**

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

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

## **8. Data provision**

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

## **9. Co-ordination**

Subject to the Access Holder providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

- (a) ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the Access Holder's reasonable quality plans, reasonable shipping programs and contracts as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations; and
- (b) (subject to the foregoing and having regard to equity amongst Access Holders and Existing Users) use its best endeavours to minimise the aggregate cost to the Access Holder arising out of Handling at the Terminal (including Demurrage Costs and rail freight).

## 10. Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract

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

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

- (2) without limiting Section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

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

## **11. Standard for Services**

- (a) The provision of the above Services by DBCT Management must be carried out with due skill, care and diligence in accordance with this Framework, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (1) lowest total whole of life cost;
  - (2) reliability and economy of performance;
  - (3) maximising the effective life of the Terminal; and
  - (4) DBCT Management's non-discrimination obligations under this Framework.

## **Schedule F - Terminal Master Plan**

[Terminal Master Plan attached separately]

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## Schedule G - Definitions and Interpretation

### 1. Definitions

In this Framework:

**2017 Access Undertaking** means the Dalrymple Bay Coal Terminal Access Undertaking prepared in accordance with the requirements of the *Queensland Competition Authority Act 1997* (Qld) and approved on 16 February 2017.

**60/60 Requirement** has the meaning given in Section 11.5(h).

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

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

**Access Applicant** means a person who has submitted to DBCT Management a valid Access Application that has been confirmed by DBCT Management as compliant with Section 5.2 of this Framework and has not lapsed, expired or otherwise been validly rejected by DBCT Management.

**Access Application** means:

- (a) an application for Access made or deemed to have been made under Section 5.2 of this Framework;
- (b) for the purposes of Sections 5.3(f), 5.3(g), 5.3A, 5.4, 5.7, 5.8, 5.9, and Section 16 only – an Access Application which was duly submitted to DBCT Management prior to the Commencement Date under and in accordance with the 2017 Access Undertaking for the Terminal and which has not been dealt with on the Commencement Date. For clarification, the time of the submission of the Schedule A information (before or after the Commencement Date) will not affect the date on which the application is taken to have been received by DBCT Management; and
- (c) for the purposes of Section 5.4 only – an application of the kind referred to in Section 5.10(q)(9)(F) which is made after the Commencement Date,

as renewed from time to time in accordance with this Framework.

**Access Application Date** means:

- (a) where paragraph (b) of this definition does not apply, the date that the Access Application was received by DBCT Management; or

- (b) the date that the Access Application was deemed to be made if the Access Application was substantially altered in accordance with Section 5.3A or 5.7.

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

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

**Access Seeker** means a party seeking Access, or increased Access, to the Services and includes a party to a Conditional Access Agreement.

**Access Transfer** has the meaning given in Section 5.13 of this Framework.

**Aggregate Annual Contract Tonnage** means, in respect of a relevant Financial Year:

- (a) in respect of a Differentiated Expansion Component, the sum of the Annual Contract Tonnages for only the Differentially Priced Access Holders in respect of that Expansion Component; and
- (b) in respect of the Existing Terminal, the sum of the Annual Contract Tonnages for all Existing Users and Access Holders other than Differentially Priced Access Holders in that Financial Year.

**Alternative Proposed Standard Funding/Underwriting Agreement** means the alternative proposed Standard Funding Agreement or alternative proposed Standard Underwriting Agreement as specified under Section 5.10(q)(7).

**Annual Contract Tonnage** means, for an Access Holder or Existing User in a relevant Financial Year, the number of tonnes of coal in that Financial Year that the Access Holder or Existing User is entitled to have Handled under its Access Agreement or Existing User Agreement (as relevant), as amended from time to time, including tonnage which an Access Holder or Existing User is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations and any tonnage which an Access Holder or Existing User would be entitled to have Handled but for the suspension of the Access Holder's or Existing User's right to have the tonnage Handled under an Access Agreement or Existing User Agreement (as relevant).

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

- (a) environmental approvals and licences;
- (b) planning and development approvals and licences; and

(c) local government approvals and licences.

**Arbitration** means an arbitration commenced under section 16.4.

**Arbitrator** means an arbitrator appointed under Section 16.4.

**Available System Capacity** means, in respect of a relevant time, the amount of System Capacity at that time not contracted to be Handled. It is derived by subtracting the Aggregate Annual Contract Tonnage as at the relevant time from System Capacity at that time. Where that subtraction results in a negative number, it will be taken to be "nil". Where Available System Capacity is to be determined in respect of a future time DBCT Management will estimate it taking all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**Business Day** means a day other than a Saturday, a Sunday, or a public holiday in Brisbane.

**Capacity Expert** has the meaning given in clause 11.1(a)(2)(A).

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

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

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

**Ceiling TIC** means the TIC calculated in accordance with Schedule C, Section 2(b)-2(b).

**Coal Guidelines** means the 'Australian Guidelines for Estimating and Reporting of Inventory Coal, Coal Resources and Coal Reserves' published by the Coalfields Geology Council of New South Wales and the Queensland Resources Council or its successor document, as updated from time to time.

**Coal Resources** has the meaning given to it in the JORC Code.

**Commencement Date** means the day following the Expiry Date.

**Completion** means, in respect of relevant works comprising a Terminal Capacity Expansion or other Capital Expenditure program:

- (a) the works are electrically and mechanically complete; and
- (b) testing and commissioning has been satisfactorily completed (including load commissioning),

but where punchlist items (being items intended to be carried out after practical completion and commencement of full operation of the relevant items) are not necessarily complete, and **Complete** and **Completed** have corresponding meanings.

**Conditional Access Agreement** has the meaning given to it in Section 5.4(l) of this Framework.

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

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

provided that such information, data or other matter:

- (c) is not already in the public domain;
- (d) does not become available to the public through means other than a breach of the confidentiality provisions in this Framework or a breach of any confidentiality deed contemplated in Section 7 of this Framework;
- (e) was not in the other party's lawful possession prior to such disclosure; or
- (f) is not received by the other party independently from a third party free to disclose such information, data or other matter;

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

- (g) the disclosure of the information, data or other matter by the recipient would no longer reasonably be expected to affect the commercial affairs of the owner of the information, data or other matter;

- (h) the information, data or other matter has entered in the public domain through means other than a breach of the confidentiality provisions in this Framework or a breach of any confidentiality deed contemplated in Section 7 of this Framework; or
- (i) the information, data or other matter has been received by the recipient independently from a third party free to disclose the information, data or other matter.

**Consequential Loss** means any one or more of the following:

- (a) Loss of profits; or
- (b) Loss of opportunity to make profits; or
- (c) Loss of business opportunity; or
- (d) special exemplary or punitive damages; or
- (e) any Loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such Loss, whether or not such Loss was in the contemplation of the relevant party at the relevant time,

including any of the above types of Loss arising from an interruption to a business or activity.

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

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

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

**Control** has the meaning given to that term in the *Corporations Act 2001* (Cth) and **Controlled** has a corresponding meaning.

**Cost Allocation Principles** has the meaning given in Section 10.7.

**Cost Sensitive Expansion** has the meaning given in Section 10.8(a)(2).

**Dalrymple Bay Coal Chain** means all infrastructure relating to railing and shipping of coal (from mine outloaders to Terminal shiploaders and adjacent infrastructure), excluding Hay Point, generally referred to as the *Dalrymple Bay Coal Chain*, (unless all relevant stakeholders otherwise agree).

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

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

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

**Deed Poll** means the irrevocable deed poll signed by DBCT Management in March 2019 under which it covenants to comply with the Framework.

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

**Different Terms** has the meaning given in Section 5.4(l)(4).

**Differentiation**, in respect of a Terminal Capacity Expansion, means the Terminal Capacity Expansion should be treated as a separate Terminal Component for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework, and the Floor TIC for that Terminal Component determined in accordance with Section 10.4(f) by reference to the costs of the Terminal Capacity Expansion (and without reference to the costs of the Existing Terminal), and **Differentiated** has a corresponding meaning.

**Differentiated Expansion Component** has the meaning giving in Section 10.8(a)(2).

**Differentially Priced Access Agreement** means an Access Agreement under which the Access Charges are to be differentially priced and Services are to be provided by DBCT Management from capacity created by a Differentiated Expansion Component.

**Differentially Priced Access Holder** means an Access Holder who is party to a Differentially Priced Access Agreement.

**Differentially Priced Capacity** means capacity associated with a Differentiated Expansion Component.

**Differentiated Queue** has the meaning set out in Section 5.4(s).

**Dispute** has the meaning given to that term in Section 16.1.

**Dispute Notice** has the meaning given to that term in Section 16.1.

**Early Termination** means the termination of an Access Agreement or Existing User Agreement (**Terminated Agreement**) before its originally scheduled expiry date (but not where that occurred as a result of the exercise of a contractual right to terminate which was included in

the Terminated Agreement when it was entered into, other than a right to do so for default in payment or insolvency of the Access Holder or Existing User, or default by DBCT Management. For the purpose of this definition, termination for default in payment or insolvency will be taken to have occurred if DBCT Management terminates the Terminated Agreement on other grounds but in circumstances where a default in payment or the insolvency of the Access Holder or Existing User could have been reasonably expected within a reasonably short time thereafter had that termination not occurred).

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

**Existing Terminal** means the Terminal as it exists at the Commencement Date together with each Socialised Expansion of that existing Terminal.

**Existing Terminal Capacity** has the meaning given in Section 11.1(a)(1).

**Existing User** means a party who has an entitlement to have coal Handled through the Terminal as at the Commencement Date.

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

**Expansion Arbitrator** has the meaning given in clause 11.5(a).

**Expansion Component** means in respect of a Terminal Capacity Expansion, the Differentiated Expansion Component or that part of the Existing Terminal (as the case may be) that is the subject of the expansion, as determined in accordance with this Framework.

**Expansion Component Capacity** means, for an Expansion Component, the maximum reasonably achievable capacity of that Expansion Component (measured in tonnes per Financial Year) as estimated pursuant to Section 11.1.

**Expansion Parties** means, in respect of an Expansion Component, any Funding Access Seeker or any party to a Conditional Access Agreement associated with that Expansion Component.

**Expansion Pricing Principles** means the principles set out in Section 10.8.

**Expert Determination** means an expert determination process commenced under Section 16.3.

**Expiry Date** means 8 September 2020.

**Feasibility Studies** means in relation to a proposed Terminal Capacity Expansion, a FEL 1 Feasibility Study, FEL 2 Feasibility Study and FEL 3 Feasibility Study.

**FEL 1 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;
- (b) identifies possible Terminal Expansion Components that will create additional Terminal Capacity, including any potential system capacity expansions that may be required to create complementary additional System Capacity;
- (c) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal Expansion Components;
- (d) makes a preliminary assessment of the available Terminal capacity that will be created by the Terminal capacity expansion
- (e) unless otherwise agreed by DBCT Management and the relevant Funding Access Seeker, includes an indicative assessment of:
  - (i) project objectives in relation to the creation of additional Terminal Capacity; and
  - (ii) the possible Terminal Expansion Components:
    - (A) a broad cost estimate with a +/- 50% accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
    - (B) a preliminary financial analysis and risk assessment; and
    - (C) indicative timeframes for developing and completing the possible Terminal Components; and
  - (iii) includes a proposed scope, budget, duration and deliverables for a FEL 2 Feasibility Study including the reasons for selecting the possible Terminal Components that will be considered during that FEL 2 Feasibility Study.

**FEL 2 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that:

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 Feasibility Study and, if they differ from the previous study, re-estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;
- (b) confirms the project objectives in relation to the creation of additional Terminal Capacity and the possible Terminal Expansion Components that will create the additional Terminal Capacity;
- (c) assesses each of the possible Terminal Components in respect of:

- (i) the technical and operating requirements for that Terminal Capacity Expansion;
  - (ii) an indicative assessment of the additional Capacity that might reasonably be expected by implementing that Terminal Capacity Expansion; and
  - (iii) a preliminary risk assessment for that Terminal Capacity Expansion;
- (a) includes preliminary survey and geotechnical investigation to support the level of design and cost accuracy required for the study;
  - (b) identifies the preferred Terminal Capacity Expansion to be studied under a FEL 3 Feasibility Study; and
  - (c) provides:
    - (i) a high level engineering assessment of the preferred Terminal Capacity Expansion;
    - (ii) analysis of the technical and economic feasibility of the preferred Terminal Capacity Expansion and identifies why it is preferred;
    - (iii) a project budget, with a +/-20% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
    - (iv) an indicative design and construct schedule for the preferred Terminal Capacity Expansion that includes time tolerances; and
    - (v) potential benefits (including additional Terminal Capacity, maintenance and operating benefits) of the preferred Terminal Capacity Expansion; and
  - (d) includes a proposed scope, budget, duration and deliverables for a FEL 3 Feasibility Study,
  - (e) includes an assessment of the available Terminal Capacity that will be created by the Terminal Capacity Expansion; and
  - (f) includes an assessment of the available Terminal Capacity that will be created by the preferred Terminal Expansion Component.

**FEL 3 Feasibility Study** means in respect of a proposed Terminal Capacity Expansion, a study that, in relation to the preferred Terminal Capacity Expansion identified in a FEL 2 Feasibility Study:

- (a) re-confirms Terminal operating assumptions and System operating assumptions undertaken in the FEL 1 or FEL2 Feasibility Study and, if they differ from the previous

studies, re-estimates Terminal Capacity and System Capacity in accordance with Section 11.1 of the Framework;

- (b) details the project objective for the preferred Terminal Capacity Expansion;
- (c) provides a detailed assessment of technical and operating requirements of the preferred Terminal Capacity Expansion;
- (d) includes survey and geotechnical investigations to support the level of design and cost accuracy;
- (e) provides a detailed design for the preferred Terminal Capacity Expansion;
- (f) provides the following details of the preferred Terminal Capacity Expansion's scope:
  - (i) an optimised project configuration that would provide the targeted additional Terminal Capacity to be created by the preferred Terminal Capacity Expansion;
  - (ii) a detailed cost estimate with a +/-10% level of accuracy (or such other accuracy where agreed with the Funding Access Seekers (acting reasonably));
  - (iii) a detailed design and construction project schedule;
  - (iv) the basis on which the project contingency was determined;
  - (v) a financial evaluation, including (if applicable) the estimated impact on the relevant TICs;
  - (vi) a procurement methodology and report on any previous approaches to the construction market that are relevant to the preferred Terminal Capacity Expansion;
  - (vii) a project management plan comprised of:
    - (A) resource management plan;
    - (B) cost management plan;
    - (C) design management plan
    - (D) quality management plan;
    - (E) safety management plan;
    - (F) schedule management plan;
    - (G) risk management plan;

- (H) project packaging and delivery strategy;
  - (I) procurement management plan;
  - (J) interface management plan;
  - (K) change management plan;
  - (L) environmental management plan;
  - (M) project phases, milestones and deliverables;
  - (N) project risk assessment report; and
  - (O) regulators notification, if needed, and
- (viii) provides a detailed capacity assessment on the available Terminal Capacity to be created by the preferred Terminal Expansion Component and the associated impact, if any, on the capacity rating of the base Terminal,

and including the outcomes of any analysis and decisions made in relation to the above matters (with reasons, where applicable).

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

**Floor TIC** means the TIC calculated in accordance with Schedule C, Section 2(a).

**Framework** means this Access Framework (including its schedules) as amended from time to time.

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

**Framework Objective** has the meaning given in the Deed Poll.

**Funding Access Seeker** means an Access Seeker that has entered into a Funding Agreement or Underwriting Agreement with DBCT Management.

**Funding Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, pursuant to which an Access Applicant must fund the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study and a FEL 3 Feasibility Study, in respect of a proposed Terminal Capacity Expansion.

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

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

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

**Independent Expert** means an independent expert appointed under Section 16.3.

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

**Initial Access Charges** means the Access Charges for a Terminal Component to apply under an Access Agreement from the commencement of that Agreement, the commencement of increased Access under that Agreement or the commencement of a Pricing Period under that Agreement.

**Initial TIC** means the TIC for a Terminal Component to apply under an Access Agreement from the commencement of that Agreement, the commencement of increased Access under that Agreement or the commencement of a Pricing Period under that Agreement.

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

- (a) it is unable to pay all its debts as and when they become due and payable or it has failed to comply with a statutory demand as provided in Section 459F(1) of the *Corporations Act 2001* (Cth);
- (b) a resolution is passed to place it in voluntary liquidation or to appoint an administrator;
- (c) an application is made to a court for it to be wound up and the application is not dismissed or withdrawn within 14 days;
- (d) the appointment of a controller (as defined in the *Corporations Act 2001* (Cth)) of any of its assets, if that appointment is made and not terminated within 14 days after it is made; or

- (e) it resolves to enter into or enters into any form of arrangement (formal or informal) with its creditors or any of them, including a deed of company arrangement.

**JORC Code** the 'Australasian Code for Reporting of Exploration Results, Mineral Resources and Ore Reserves' prepared by the Joint Ore Reserves Committee of The Australasian Institute of Mining and Metallurgy, Australian Institute of Geoscientists and the Minerals Council of Australia, as updated from time to time.

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

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

**Loss** means any damage, loss (including loss of reputation), cost, expense, fine, penalty or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**Marketable Coal Reserves** has the meaning given to it in the JORC Code.

**Month** means a calendar month.

**Monthly Payment** has the meaning given to it in Section 10.4.

**NECAP Asset Base** means, in respect of a Terminal Component, the NECAP Asset Base for that Terminal Component determined in accordance with Schedule C, Section 3(h).

**NECAP Risk Free Rate** means, in respect of any twelve month period ending 31 March, the rate calculated by averaging the yield of the 10 year Commonwealth Government bond over the 20 Business Days preceding that 31 March.

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

**Non-Expansion Capital Expenditure** or **NECAP** means Capital Expenditure not related to the development of a Terminal Capacity Expansion.

**Non-Expansion Costs** means Terminal Operating Costs and Capital Expenditure not related to the development of a Terminal Capacity Expansion.

**Notice** has the meaning given to that term in Section 5.4(e)(1).

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

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

**Notional Contracted Tonnage** or **NCT** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**Operation & Maintenance Charge** means the component of Access Charges under which DBCT Management recovers Terminal Operating Costs from Access Holders and is calculated in accordance with Section 10.5.

**Operation & Maintenance Contract** or **OMC** means the contract between DBCT Management, the DBCT Trustee and the Operator under which the Operator is engaged by DBCT Management to operate and maintain the Terminal on a day to day basis. The terms of the OMC are summarised for convenience in Schedule H.

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

**Other Costs** has the meaning given in Section 11.5(a)(3)(B).

**PCQ** means Ports Corporation of Queensland Limited ACN 126 302 994.

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

**Price Ruling** means a ruling by an Expansion Arbitrator in respect of a Terminal Capacity Expansion on the Pricing Method and the prudent Capital Expenditure (including the need) for the Terminal Capacity Expansion made following receipt of an application from DBCT Management under Section 5.12(a) or 11.5(a) of this Framework.

**Pricing Method** means the method of pricing Access created by a Terminal Capacity Expansion, being either Socialised or Differential.

**Pricing Period** means the period commencing on the Commencement Date and ending on 30 June 2026 and each subsequent 5 year period during the Term.

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

**Proposed Standard Funding/Underwriting Agreement** means the proposed Standard Funding Agreement or proposed Standard Underwriting Agreement (as applicable) by DBCT Management under Section 5.10(q).

**Publicly Report** means to upload information onto DBCT Management's website so that it is publicly accessible.

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

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

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

**Rail Operator** means an entity that:

- (a) provides above rail services to an Access Holder for the purpose of transporting coal to the Terminal; or
- (b) is nominated by an Access Seeker as likely to provide above rail services to that Access Seeker for the purpose of transporting coal to the Terminal.

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

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

**Renewal Application** has the meaning given in Section 5.3(a).

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

- (a) a change in the Aggregate Annual Contract Tonnage in respect of the Existing Terminal or Differentiated Expansion Component (as relevant), including (without limitation) a change in Aggregate Annual Contract Tonnage occurring as a consequence of the Early Termination of any Access Agreement or Existing User Agreement;
- (b) in respect of the Existing Terminal, Completion and handover to the Operator of the whole of a discrete phase of a Socialised Expansion; and
- (c) each 1 July in a Pricing Period, in respect of any Terminal Component, provided any program of NECAP was:
  - (i) Completed and handed over to the Operator by DBCT Management in the twelve month period ending on 31 March occurring immediately prior to that 1 July and allocated to that Terminal Component in accordance with Section 10.7 of this Framework, including:
    - (A) NECAP referred to in Section 11.10(b); and
    - (B) NECAP referred to in Section 11.10(c); or
  - (ii) included in the NECAP Asset Base for any previous Financial Year of the Pricing Period.

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

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

**Service Provider** means:

- (a) DBCT Management, as the provider of Services at the Terminal;

- (b) each provider at a relevant time of railway infrastructure ("below rail") for any part of the System;
- (c) each provider at a relevant time of railway freight services ("above rail") for any part of the System.

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

**Socialisation**, in respect of a Terminal Capacity Expansion, means the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal for the purpose of determining Access Charges in accordance with Sections 10.3 to 10.5 of this Framework, and the Floor TIC for the Existing Terminal determined in accordance with Section 10.4(f) by reference to the sum of the costs of the Existing Terminal and the costs of the Terminal Capacity, and **Socialised** has a corresponding meaning.

**Socialised Expansion** has the meaning given in Section 10.8(a)(1).

**Socialised Terminal Capacity** means capacity associated with a Socialised Expansion.

**Standard Funding Agreement** means the standard Funding Agreement approved in accordance with Section 5.10(q).

**Standard Underwriting Agreement** means the standard Underwriting Agreement approved in accordance with Section 5.10(q).

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

**State** means the State of Queensland.

**Supply Chain Business** means an entity (or group of entities) which:

- (a) provides, or proposes to provide, above rail services in Queensland which access the Terminal;
- (b) owns or holds an interest in, or proposes to acquire such an interest in, coal-producing mines in Queensland that export coal via the Terminal;
- (c) purchases coal that has been produced in Australia and exports that coal via the Terminal;
- (d) provides shipping services from the Terminal; or
- (e) trades in capacity at the Terminal.

**System** means, in respect of the Dalrymple Bay Coal Chain, the following components of infrastructure relating to the transport of coal from mines whose coal is Handled by the Terminal:

- (a) rail loading facility of mines whose coal is Handled by the Terminal;
- (b) railway infrastructure in the Dalrymple Bay Coal Chain;
- (c) railway locomotives and rolling stock used in the Dalrymple Bay Coal Chain; and
- (d) Terminal unloading, stacking, loading and other Handling facilities,

and all interfaces between such components.

**System Capacity** means at a relevant time, the maximum reasonably achievable estimated capacity of the System (measured in tonnes per financial year) as determined pursuant to Section 11.1 in respect of that time. Where System Capacity is required to be estimated in respect of a future time (for example, for the purposes of Section 5.4) DBCT Management will estimate it taking all relevant factors into account (including System Capacity expected to arise out of a System Capacity Expansion which has been or can reasonably be expected to be committed to at the time of the estimation).

**System Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the System Capacity.

**System Master Plan** means, at a relevant time, the master plan (if any) determined pursuant to Section 14.

**TCMP** has the meaning given in Section 11.5(a)(7).

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

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

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

and for the avoidance of doubt, includes the Existing Terminal and any Differentiated Expansion Component.

**Terminal Capacity** means the maximum reasonably achievable capacity of the Terminal (measured in tonnes per Financial Year) as estimated pursuant to Section 11.1.

**Terminal Capacity Expansion** means the construction, upgrade, refinement, purchase, installation and/or erection of new works or items or modifications to existing works or items intended to materially increase the **Terminal Capacity**.

**Terminal Component** means each of:

- (a) the Existing Terminal; and
- (b) the Differentiated Expansion Component.

**Terminal Infrastructure Charge** or **TIC** has the meaning given in Section 10.4.

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

**Terminal Operating Costs** means any amounts:

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

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

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

**Terminating Date** means the earlier of:

- (a) the date which is 10 years from the Commencement Date; and

- (b) the date on or after the Commencement Date on which use of the Terminal is first taken to be a service declared under Part 5, Division 2 of the *Queensland Competition Authority Act 1997* (Qld).

**Tonnage** means the volume of Access supplied under an Access Agreement or access supplied under an Existing User Agreement (as the context requires), determined by reference to the volume of coal Handled or contracted to be Handled.

**Underwriting Agreement** means an agreement on such terms as DBCT Management reasonably requires, including in relation to the provision of such security to DBCT Management as it reasonably requires, which gives DBCT Management the right to call for, and requires an Access Applicant to fund in response to such call, the reasonable and proper costs of:

- (a) a FEL 1 Feasibility Study; and
- (b) after a satisfactory outcome from a FEL 1 Feasibility Study, a FEL 2 Feasibility Study,

in respect of a proposed Terminal Capacity Expansion, if the proposed Terminal Capacity Expansion does not proceed.

**WACC(1) Rate** means a rate equivalent to the Construction Period Risk Free Rate plus 4.00%.

**WACC(2) Rate** means, in respect of Financial Year t, the weighted average of the rates equivalent to the NECAP Risk Free Rate plus 5.00% for each twelve month period ending 31 March in which any program of NECAP included in the NECAP Asset Base for Financial Year t for the Existing Terminal or Differentiated Expansion Component (as relevant) was Completed and handed over to the Operator, where the weights are equal to the proportion of the value of the NECAP Asset Base for Financial Year t referable to the program(s) of NECAP Completed and handed over to the Operator in the twelve month period.

## 2. Interpretation

In this Framework unless the context otherwise requires:

- (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
- (b) words denoting the singular include the plural and vice versa;
- (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
- (d) words denoting any gender include all genders;

- (e) references to parties, Parts, Sections, Annexures and Schedules are references to parties, Parts, Sections, Annexures and Schedules to this Framework as modified or varied from time to time;
- (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
- (g) references to any party to this Framework or any other document, deed or agreement include its successors, permitted assigns, or permitted subcontractors and the obligations of any party extends to those persons;
- (h) all references to dates and times are to Brisbane time;
- (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
- (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
- (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
- (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;
- (m) where there is a requirement under this Framework to consider whether Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holders' respective Annual Contract Tonnages and the extent to which (if at all) Differential Pricing applies to the Annual Contract Tonnages the subject of each Access Agreement;
- (n) where measurement of coal "Handled" is being made in respect of a period, the tonnage loaded into vessels will be taken to be the tonnage Handled in that period; and
- (o) headings are for convenience only and do not affect interpretation of this Framework.

### **3. Change to index**

- (a) If the index used in any formula is not published at the time it is to take effect but will subsequently be published, then the formula will not be applied until such index is available, and the result of applying such formula at such later date shall be backdated to the date of effect.
- (b) If an index used in any formula under this Framework is suspended or discontinued, then:

- (i) it shall be replaced by the index substituted for it; and
- (ii) if the index is not substituted by another index, the parties shall, acting in good faith, meet to agree a replacement index. If the parties cannot agree upon a replacement index within 28 days, then either party may refer the issue to dispute resolution in accordance with clause 16.

## Schedule H - Terms of Operation and Maintenance Contract

Term	Summary of term
Parties	<p>DBCT Management Pty Ltd (<b>DBCTM</b>), DBCT Investor Services Pty Limited as trustee of the DBCT Trust (<b>DBCT Trustee</b>) and the operator, Dalrymple Bay Coal Terminal Pty Limited (<b>Operator</b>).</p> <p>The Operation and Maintenance Contract (<b>Contract</b>) defines the relationships between the parties and their rights and obligations.</p>
Term	<p>The Contract will expire on [date] unless terminated earlier. Other than for default of DBCTM (refer further below), the Operator cannot terminate the Contract before this date.</p> <ul style="list-style-type: none"> <li>• If DBCTM wishes to terminate the Contract other than for the Operator's default, DBCTM must give 5 years' prior notice of termination; and</li> <li>• If an access undertaking is in place and the Operator wishes to terminate other than for DBCTM's default, the Operator can terminate by giving not less than two years notice to DBCTM. If the period of notice given will expire during the term of an access undertaking, the notice period will be extended and take on the from earlier of expiry of the access undertaking or 5 years after the date that a notice of termination is given.</li> </ul>
Intentions of the parties	<p>The parties' intentions include (among other things):</p> <ul style="list-style-type: none"> <li>• The Operator will be responsible for day-to-day operation and maintenance of the Terminal;</li> <li>• The Operator must ensure that its performance of services is coordinated in accordance with the relevant access undertaking in force at the time to the extent that no act or omission by the Operator would cause DBCTM to be in breach of a provision of the access undertaking; and</li> <li>• Subject to DBCTM's rights under the Contract (for example in relation to default by the Operator), DBCTM will not intervene in the day-to-day operation and maintenance of the Terminal.</li> </ul>
Operator's engagement	<p>DBCTM has engaged the Operator to perform the services. The Operator is an independent contractor and not an agent of DBCTM. The services include all things necessary for the operation, maintenance and management of the Terminal.</p>
Operational Services to be performed by the Operator	<p>Operation of the Terminal specifically includes the following services:</p> <ul style="list-style-type: none"> <li>• coordinate the ordering and scheduling of trains;</li> <li>• train unloading;</li> <li>• coal stockpile management, reclamation and handling;</li> <li>• coal blending if required by users of the Terminal;</li> <li>• vessel ordering; and</li> <li>• the loading of ships in accordance with the Terminal Regulations. In the absence of other applicable provisions in the Terminal Regulations, the Operator must normally load ships in order of arrival (subject to there being relevant coal at the Terminal and all prerequisites to loading having been complied with).</li> </ul> <p>These services must be provided in accordance with the approved access undertaking and user agreements and are to be further detailed in an Appendix to the specification included in the Contract.</p>

Term	Summary of term
Maintenance Services to be performed by the Operator	<p>The Operator must maintain the Terminal and each component of the Terminal at its operating capacity as specified in the Contract. This specifically includes:</p> <ul style="list-style-type: none"> <li>• planned maintenance and repair in accordance with an annual operation, maintenance and capital plan (prepared by the Operator);</li> <li>• unplanned maintenance and repair as required (for example following equipment breakdown);</li> <li>• condition monitoring and maintenance management; and</li> <li>• upkeep of the Terminal, including activities such as maintenance of access roads and dust suppression.</li> </ul>
Standard of Operator's performance	<p>The Operator must operate and maintain the Terminal in order to ensure it is capable of operating:</p> <ul style="list-style-type: none"> <li>• at its rated design capacity;</li> <li>• in accordance with good operating and maintenance practice; and</li> <li>• in good and substantial repair.</li> </ul> <p>The Operator must ensure that the Terminal is maintained and operated so as to achieve, as far as practical, the best and most cost effective outcome, taking account, as appropriate, of:</p> <ul style="list-style-type: none"> <li>• lowest total whole of life cost;</li> <li>• reliability and economy of performance;</li> <li>• maximising the effective life of the Terminal;</li> <li>• good operating and maintenance practice;</li> <li>• in the case of competing interests between users, fairness; and</li> <li>• the obligations of DBCTM Management under the access undertaking and any user agreements. These obligations are subject to DBCTM having expended appropriate capital if relevant.</li> </ul> <p>The Operator must provide everything that is necessary for performance of the services, other than any things specified in the Contract as to be provided by DBCTM. The Operator's supply obligations include the supply of water and power to the Terminal. The Operator is also required to supply and maintain spares for the Terminal.</p> <p>The Operator can subcontract parts of the Services without DBCTM's consent, however remains liable for the standard of performance. The Operator is specifically required to supervise the execution of all Services.</p>
Annual operation, maintenance and capital plan	<p>The Operator must, in consultation with DBCTM, prepare and submit an annual operation, maintenance and capital plan by 15 May. The plan will identify the proposed budget for the next financial year and will foreshadow the likely plan and budget for the subsequent two years (i.e. provide a three year budget snapshot).</p>

Term	Summary of term
Payments to the Operator	<p>DBCTM pays the Operator all reasonably incurred costs of performing the services (that is, operating and maintaining the Terminal in accordance with the Contract) plus a margin.</p> <p>The Operator is also entitled to be paid:</p> <ul style="list-style-type: none"> <li>• reimbursement of capital expended by the Operator, subject to certain conditions (outlined below in capital works);</li> <li>• consulting fees in respect of capital works (refer further below in relation to capital works); and</li> <li>• a project management commission if the Operator project manages a non-expansion capital project.</li> </ul> <p>The Contract acknowledges that it is intended that amounts paid to the Operator will be recovered by DBCTM from users under their user agreements. The Operator has obligations to assist DBCTM to facilitate this pass through.</p>
Terminal Regulations	<p>Both the Operator and DBCTM are required to comply with the Terminal Regulations.</p> <p>The Operator may propose amendments to the Terminal Regulations for DBCTM's consent, which DBCTM must not unreasonably withhold but which will be subject to the requirements of the access undertaking in relation to such amendments.</p> <p>DBCTM must require each Terminal user pursuant to their user agreement(s) to comply with the Terminal regulations as applicable from time to time.</p>
Access to the Terminal	<p>DBCTM has granted the Operator a licence to use, occupy and control the Terminal as is necessary to perform the services in accordance with the Contract.</p> <p>The Operator must give DBCTM and its personnel such access to the Terminal as they reasonably require from time to time. However, such access is subject to compliance with the Operator's applicable procedures (including safety requirements). DBCTM must also take reasonable measures not to impede the Operator's performance of the services.</p>
Care of and risk in the Terminal	<p>The Operator has care of the Terminal and assumes the risk of damage to the Terminal and all things located at it (including coal). The Operator must insure the Terminal in accordance with the insurance program detailed in the Contract.</p>
Safety and environmental compliance	<p>The Operator has primary responsibility for the management of safety at the Terminal and for compliance with legal requirements with respect to safety at the Terminal.</p> <p>The Operator also has primary responsibility for the compliance of the Terminal with all relevant environmental laws and requirements. Among other things, the Operator is required to obtain and maintain all required approvals from authorities with respect to the performance of the services.</p>
Records and audits	<p>The Operator must maintain records (including financial records) relating to the services.</p> <p>From time to time, DBCTM may appoint a suitably qualified person to conduct an audit of the records maintained by the Operator and/or of the Operator's relevant systems and procedures.</p> <p>The Operator must work with DBCTM to ensure that DBCTM is able to comply with its reporting obligations under the approved access undertaking.</p>
Continuous improvement	<p>The Operator must work with DBCTM in undertaking reviews to identify and develop options for improved efficiency of the Terminal as well as of the coal transport chain. The parties have coordination obligations in relation to the implementation of the findings of such reviews.</p>

Term	Summary of term
Capital works	<p>Either the Operator or DBCTM can propose that capital works are undertaken. The Operator has obligations to participate in planning for proposed capital works. The Operator is entitled to be paid consulting fees (which are separate and additional to its usual monthly payments) for this participation.</p> <p>If capital works are to proceed, DBCTM and the Operator may agree that the capital works will be implemented by the Operator, DBCTM or another contractor.</p> <p>There is a handover process which applies once capital works have been completed. From the time of handover, the capital works become part of the Terminal and the Operator's obligations to provide the services extend to include that part of the Terminal.</p>
Force majeure	<p>The Contract defines events of force majeure. If a party is affected by such an event, it may be granted relief from performance of its affected obligations under the Contract, subject to compliance with certain requirements.</p>
Dispute resolution	<p>The Contract specifies a dispute resolution procedure which includes the following provisions:</p> <ul style="list-style-type: none"> <li>• If a dispute between DBCTM and the Operator arises out of or in connection with the Contract, then either party may give the other party a notice of dispute.</li> <li>• Neither party may commence any court proceedings or arbitration in respect of any dispute which is the subject of a notice of dispute until the party has complied with the dispute resolution procedure specified in the Contract.</li> <li>• Within 14 days after service of a notice of dispute, the senior executives of each party must confer at least once to attempt to resolve the dispute and failing resolution, to consider and, if possible, agree on methods of resolving the dispute by other means.</li> <li>• If the dispute cannot be resolved by the senior executives after a further period of 14 days or if at any time either party considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer the dispute to conciliation.</li> <li>• If the dispute is not resolved by conciliation within a period of 14 days after nomination of the conciliator, the parties may agree to refer the dispute to arbitration or either party may pursue any other means of dispute resolution including litigation.</li> <li>• The Contract will specify procedures with respect to conciliation and arbitration.</li> <li>• The dispute resolution procedure does not prevent any party from seeking urgent interlocutory or declaratory relief from a court of competent jurisdiction where, in that party's reasonable opinion, that action is necessary to protect its rights.</li> </ul>
Change in control of the Operator	<p>There is a deemed assignment of the Contract if:</p> <ul style="list-style-type: none"> <li>• a person who is not a user or its related body corporate acquires an interest in the Operator; or</li> <li>• a user or its related body corporate acquires an interest in the Operator which exceeds its proportionate usage of the Terminal.</li> </ul> <p>The Contract may not be assigned without DBCTM's approval.</p>
Termination for default by either party	<p>Each party has termination rights if the other defaults under the Contract. The rights differ between the parties, but allow the non-defaulting party to require rectification or require the defaulting party to show cause, before the non-defaulting party may terminate the Contract.</p>

**USER AGREEMENT**  
**2020 Access Framework**

**Date:**

**DBCT MANAGEMENT PTY LIMITED**

**("DBCT Management")**

**DBCT INVESTOR SERVICES PTY LTD as trustee of the DBCT Trust**

**("DBCT Guarantor")**

***[Insert User name]***

**("User")**

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**This Agreement** is made on the Execution Date

**BETWEEN**        **DBCT MANAGEMENT PTY LIMITED ABN 16 097 698 916**  
                          **("DBCT Management")**

**AND**                **THE USER DESCRIBED IN SCHEDULE 1 ("User")**

**AND**                **DBCT INVESTOR SERVICES PTY LTD ABN 11 052 156 082, as**  
                          **trustee of the DBCT TRUST ("DBCT Guarantor")**

## **RECITALS**

- A.        DBCT Management is the lessee of the Terminal under long term leases.
- B.        The Operator operates and maintains the Terminal on behalf of DBCT Management.
- C.        The User wishes to use the Terminal to Ship its Coal.
- D.        DBCT Management has agreed to grant Access to the User on the terms and conditions contained in this Agreement.

## **IT IS AGREED**

### **1.        DEFINITIONS AND INTERPRETATIONS**

#### **1.1        Definitions**

Unless the subject or context is inconsistent, each of the capitalised terms used in this Agreement has the meaning assigned to it in Schedule 9.

#### **1.2        Interpretation**

The rules set out in Schedule 9 apply to and govern the interpretation of this Agreement.

### **2.        TERM**

[Subject to clause 29.1], this Agreement commences on the Effective Date and continues in force until the end of the Term specified in Item 6 of Schedule 1 (unless terminated earlier pursuant to clause 14.2 or clause 14.3).

### **3.        HANDLING OF COAL**

#### **3.1        Agreement to provide Access**

- (a)        DBCT Management:
  - (i)        grants Access to the User on the terms of this Agreement; and
  - (ii)        unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in the Access Framework.

- (b) The User unconditionally and irrevocably agrees to comply with the requirements, obligations and processes in:
  - (i) the Access Framework; and
  - (ii) the Deed Poll, including the conditions set out in clauses 8, 9, 10 and 11 of the Deed Poll.

### **3.2 Provision and operation of the Terminal**

In granting to the User the Access referred to in clause 3.1, DBCT Management must, subject to this Agreement:

- (a) make the Terminal available and operate it to enable the Annual Contract Tonnage (subject to delivery to the Terminal and the availability of vessels) to be Handled at the Terminal in each Financial Year; and
- (b) provide Services as required by the User.

### **3.3 Delivery by rail**

The User must ensure that its Coal is delivered to the Terminal by rail utilising rolling stock which is compatible with and (as far as it is practicable for the User to control) efficiently utilises the unloading facilities at the Terminal.

### **3.4 User to use reasonable endeavours to Ship its Annual Contract Tonnage**

The User must use all reasonable endeavours to Ship its Annual Contract Tonnage through the Terminal in each Financial Year.

### **3.5 Even Shipments**

The User must work towards, and must use all reasonable endeavours to achieve, the Shipping of its Coal through the Terminal at an even rate throughout each Financial Year (and, where Item 7 in Schedule 1 provides for a specific tonnage in respect of a nominated shorter period at some time during the Term, then at an even rate throughout that shorter period). The parties recognise that vessel arrival times, rail scheduling, maintenance and other factors can result in some short-term, routine unevenness to an even rate of Shipping.

### **3.6 Terminal Regulations**

- (a) DBCT Management must comply with, and will use its best endeavours to ensure that the Operator complies with, the Terminal Regulations in force from time to time.
- (b) The User must observe the Terminal Regulations, in force from time to time, as a condition of Access to and the right to have its Coal Handled at the Terminal.
- (c) The User acknowledges that Terminal Regulations may include terms which:-
  - (i) require scheduling of Access Holders' and Existing Users' railing in and Handling of Coal in ways which promote Terminal efficiency and endeavour to achieve the objective set out in clause 3.5;
  - (ii) temporarily reduce the tonnage of Coal which may be Handled or Services provided under this Agreement, during such periods as capacity of the Terminal or relevant Services becomes restricted, provided that such reductions and restrictions affect all Access Holders and Existing Users equitably (but this does not relieve the User or DBCT Management respectively from any liability which they might have in respect of the capacity or Services having become restricted);

- (iii) prescribe requirements for cargo building windows, unloading of trains, stockpiling and cargo assembly, vessels, arrival of vessels, loading of vessels, pre-loading requirements, order of loading and unloading and other matters where possible (including matters of the type dealt with in the Terminal Regulations at the Effective Date) which promote the efficient, safe and equitable utilisation of capacity at the Terminal and Terminal Services;
  - (iv) require Access Holders to co-operate with the Operator and other Access Holders and Existing Users in relation to scheduling, loading, unloading, priorities and other matters relating to the operation of the Terminal; and
  - (v) allow the exercise of discretions on the part of the Operator in limited cases, where it is reasonable to do so, to optimise Terminal efficiency (such power to be exercised in good faith and in a non-discriminatory way).
- (d) The User acknowledges and agrees that the Operator may, from time to time, by written notice to DBCT Management, propose amendments to the Terminal Regulations regarding operational issues.
- (e) If the Operator submits to DBCT Management a proposed amendment to the Terminal Regulations DBCT Management must:
- (i) promptly notify the User of any proposed amendments to Terminal Regulations;
  - (ii) provide the User with a copy of such proposed amendments to the Terminal Regulations (which may be by displaying it on DBCT Management's website);
  - (iii) conduct reasonable consultation with the User in relation to the proposed amendment; and
  - (iv) following the completion of such reasonable consultation, notify the User:
    - (A) of the wording of the proposed amendment;
    - (B) whether it has given its consent to the proposed amendment;
    - (C) of the detailed reasons for its decision to give (or not give) consent to the proposed amendment; and
    - (D) that there is a 30 day period for notifying DBCT Management of any objections to the decision to consent or not consent (as applicable) to the amendment.
- (f) A proposed amendment to the Terminal Regulations will not be implemented unless:
- (i) DBCT Management has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Framework; and
  - (ii) one of the following has occurred:
    - (A) DBCT Management has consented to the proposed amendment to the Terminal Regulations and no Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management;

- (B) DBCT Management has consented to the proposed amendments to the Terminal Regulations and while an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days of being notified of the amendments by DBCT Management, the Independent Expert appointed to hear the objection (in accordance with clause 3.6(j) and/or Section 6.2(f) of the Access Framework) has rejected that objection; or
  - (C) DBCT Management has not consented to the proposed amendments to the Terminal Regulations, but an Access Holder, Access Seeker or Expansion Party has given notice to DBCT Management objecting to consent not being provided, and the Independent Expert appointed to hear the objection (in accordance with clause 3.6(l) and/or Section 6.2(g) of the Access Framework) has upheld that objection.
- (g) DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under clauses 3.6(f)(ii)(A) or 3.6(f)(ii)(B) if it has conducted reasonable consultation with Access Holders, Access Seekers, Expansion Parties and Rail Operators in accordance with the Access Framework and, taking into account the results of such consultation, it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Framework, and any Access Agreements; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (h) If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, the User may object to DBCT Management's refusal to provide consent if it reasonably considers that:
- (i) the amendments relate to operational issues;
  - (ii) the amended Terminal Regulations, as a whole, will operate equitably amongst Existing Users, Access Holders, Access Seekers (should they become Access Holders) and Expansion Parties (should they become Access Holders) and, where the relevant amendments affect Rail Operators, amongst affected Rail Operators;
  - (iii) the amendments are consistent with the Access Framework and this Agreement; and
  - (iv) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Approvals, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

- (i) DBCT Management must notify all Access Holders, Access Seekers, Expansion Parties and Rail Operators of any amendments to the Terminal Regulations that have been approved and must provide a copy of the amended Terminal Regulations to these parties (which may be by way of reference to the website on which the amended Terminal Regulations are available in accordance with 3.6(o)).
- (j) If:
- (i) DBCT Management has given its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied,
- then the User may, within 30 days after being notified of DBCT Management's consent, notify DBCT Management of its objection to the consent to the proposed amendment, such objection to be determined by an Independent Expert.
- (k) If, in response to an objection notified to the Independent Expert by the User under clause 3.6(j), the Independent Expert determines that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are not satisfied, then:
- (i) the proposed amendment and DBCT Management's consent to the proposed amendment will be taken to have been withdrawn; and
  - (ii) the proposed amendment will not be made.
- (l) If:
- (i) DBCT Management has refused to give its consent to a proposed amendment to the Terminal Regulations; and
  - (ii) the User objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied,
- then the User may, within 30 days of being notified of the amendments by DBCT Management, notify DBCT Management of its objection to DBCT Management not providing consent for the proposed amendment, such objection to be determined by an Independent Expert.
- (m) If, in response to an objection notified to the Independent Expert by the User under clause 3.6(l), the Independent Expert determines that the criteria in in clauses 3.6(g)(i) to 3.6(g)(iv) are satisfied, then:
- (i) DBCT Management's consent to the proposed amendment will be deemed to have been given; and
  - (ii) the proposed amendment will be made.
- (n) Subject to DBCT Management complying with clause 3.6(f), DBCT Management will not be liable to the User on any basis whatsoever as a result of DBCT Management consenting to an amendment to the Terminal Regulations or the due implementation and observance of an amendment to the Terminal Regulations, as long as DBCT Management had in all respects acted reasonably and in good faith and (acting reasonably and in good faith) had formed the opinion required by clause 3.6(g). For clarification, this does not affect DBCT Management's obligation to do anything required on its part to cause the termination or consequential amendment of a Terminal Regulation after any determination that the Terminal Regulation breaches this Agreement or the Access Framework.

- (o) DBCT Management must make a copy of the Terminal Regulations available to the User (which may be by displaying it on DBCT Management's website).

### **3.7 Addressing disproportionate use of Terminal capacity and risk minimisation**

- (a) If at any time DBCT Management, acting reasonably and on the recommendation of the Operator, considers that:
- (i) the User is disproportionately consuming the capacity of the Terminal (when compared with other Access Holders or Existing Users on a per tonne basis) and other Access Holders are materially adversely affected as a result; or
  - (ii) the provision of the User's Coal to the Terminal or Handling of that Coal at the Terminal creates a disproportionate risk to the Terminal (when compared with Coal of other Access Holders or Existing Users),
- and that it is reasonably practicable for the User to reduce that disproportionate consumption of capacity or disproportionate risk, DBCT Management may give written notice to the User to that effect.
- (b) If DBCT Management gives notice to the User pursuant to clause 3.7(a) the User must:
- (i) meet with DBCT Management (or with the Operator if DBCT Management gives notice that the Operator is authorised to act as its nominee) to attempt to agree on an appropriate action plan; and
  - (ii) promptly, and in any event, within 60 days of the meeting referred to in clause 3.7(b)(i), develop and implement an action plan agreed between the parties or (if there is no agreement, but it is consistent with clause 3.7(c)) an action plan required by DBCT Management.
- (c) DBCT Management is not entitled to require anything in an action plan which would be:
- (i) unreasonable or uneconomic for the User in all the circumstances; or
  - (ii) inconsistent with what is generally accepted as good operating practice in the prevailing circumstances.
- (d) A dispute between DBCT Management (or the Operator) and the User in respect of this clause 3.7 may be referred to dispute resolution in accordance with clause 15.

## **4. PAYMENT OF CHARGES AND ADJUSTMENTS**

### **4.1 Interpretation of Pricing Provisions**

In this Agreement, the following principles of interpretation shall apply:

- (a) for so long as there is a single Terminal Component, the terms and definitions of this Agreement relevant to pricing apply to all Access collectively; and
- (b) where there are multiple Terminal Components, the terms and definitions of this Agreement relevant to pricing apply to each Terminal Component separately.

For the avoidance of doubt, the Access contracted under this Agreement relates to [the Existing Terminal / a Differentiated Expansion Component].

### **4.2 Charges payable regardless of remedies**

The charges payable pursuant to this clause 4 must be paid by the User promptly when due, regardless of any remedies which might be available to the User pursuant to clause 13 or otherwise:

- (a) except to the extent that clause 5.3 applies;
- (b) unless and until, and to the extent that, it is determined through dispute resolution or agreed that the charges are not payable pursuant to clause 13.4(b); and
- (c) unless a relevant Delay is caused by Wilful Default by DBCT Management (clause 13.5).

#### **4.3 Access Charges**

Access Charges for each Terminal Component will comprise two parts:

- (a) a TIC; and
- (b) a charge to recoup the costs of operation and maintenance of the Terminal, being:
  - (i) the Handling Charge – Fixed;
  - (ii) the Handling Charge – Variable; and
  - (iii) where applicable, charges for Miscellaneous Services.

#### **4.4 User to pay TIC**

The User must pay the TIC to DBCT Management for each tonne of Annual Contract Tonnage by monthly instalments (each a Monthly Payment) in accordance with clause 5.1(b).

#### **4.5 User to pay Handling Charge - Fixed**

- (a) The User must pay HCF to DBCT Management, calculated in accordance with clause 6.2.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCF reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.6 User to pay Handling Charges - Variable**

- (a) The User must pay HCV to DBCT Management, calculated in accordance with clause 6.3.
- (b) On an interim basis (subject to end-of-Financial Year reconciliations and adjustments pursuant to clause 5.1(d)) the User must pay DBCT Management monthly instalments each equal to one-twelfth of the annual HCV reasonably estimated by DBCT Management at the commencement of the relevant Financial Year.

#### **4.7 User to pay Miscellaneous Services charges**

The User must pay DBCT Management for Miscellaneous Services provided at the Terminal where such services are charged separately from HCF and HCV, at the rates applicable pursuant to clause 6.4.

#### **4.8 DBCT Management's business interruption insurance**

Any insurance premium which relates to business interruption cover for DBCT Management will not form part of any HCV, HCF or Miscellaneous Charge. (For clarification, this is because of the obligation of Access Holders whose Access Agreement is on the terms of the Standard Access Agreement to continue paying Access Charges whilst an event of Force Majeure continues - clause 13.3(b)).

## 5. ACCOUNTS

### 5.1 Calculation, rendering and payment of tax invoices

- (a) DBCT Management and the User must give each other appropriate tax invoices or adjustment notes for any charge payable by the User to DBCT Management or any amounts payable by DBCT Management to the User under clause 4.
- (b) With respect to the Monthly Payment, HCF, HCV and charges for Miscellaneous Services, the User must pay each tax invoice duly given to it by DBCT Management by no later than that date (the "Due Date") which is 30 days after the date of receipt of that tax invoice.
- (c) Tax invoices may only be rendered by DBCT Management monthly in arrears for the Monthly Payment, and monthly instalments of HCF, HCV and charges for Miscellaneous Services.
- (d) With respect to the annual reconciliation and adjustment of HCF and HCV:
  - (i) DBCT Management must calculate and notify the User of any adjustment required against interim amounts paid in respect of HCF and HCV within one month from the end of the Financial Year to which it relates.
  - (ii) DBCT Management or the User (as applicable) must then give the other an appropriate tax invoice reflecting the payment to be made pursuant to any adjustment under clause 5.1(d)(i) on or before the date 14 days after the amount of the adjustment is notified to the User by DBCT Management (or, if later, within 14 days after the resolution of any dispute over the calculations of adjustments, including any dispute referred to in clause 5.1(d)(iv)).
  - (iii) The parties must pay the adjustment relevant under this clause 5.1(d) within 14 days after the receipt of a relevant tax invoice pursuant to clause 5.1(d)(ii).
  - (iv) If the adjustment contemplated under this clause 5.1(d) is wholly or partially impacted by a dispute (as between two or more of the User, another Access Holder, an Existing User and DBCT Management), no amount need be paid in respect of that disputed amount until that dispute has been resolved but, as far as it is practicable, undisputed amounts must be promptly paid (with tax invoices being given accordingly, but the giving of a tax invoice in respect of the undisputed part of a payment will not prejudice the dispute). DBCT Management and the User must use reasonable endeavours to attempt to expeditiously resolve any such dispute to which they are a party.

### 5.2 Interest on late payments

- (a) If the User does not pay a tax invoice by the Due Date, DBCT Management, without prejudice to its other rights under this Agreement, may charge interest to the User on the amount owed computed from the Due Date to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself incur interest, on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.
- (b) If DBCT Management does not make a payment to the User on the date due for such payment or does not notify the User of the amount of an adjustment to be paid by DBCT Management by the required date to do so, the User, without prejudice to its rights under this Agreement, may charge interest to DBCT Management on the amount owed computed from the date due for such payment (or the date on which payment would have become due had the adjustment been duly notified) to the actual date of payment at the Default Interest Rate, and unpaid interest may be compounded and itself

incur interest on a monthly basis until payment at a rate equal to 1/12th of the Default Interest Rate.

### 5.3 Disputes over accounts

- (a) Subject to clause 5.1(d)(iv) if the User disputes the amount of a tax invoice from DBCT Management on the basis that it contains a manifest administrative error or is incorrectly calculated, then the User must pay:
- (i) the whole of the undisputed part of the tax invoice by the Due Date; and
  - (ii) 50% of the disputed portion, pending resolution of that dispute (and the User will not be in default for non-payment, if it does so).
- (b) Payment in accordance with clause 5.3(a) will not prejudice the User's rights under clause 15.
- (c) If following the resolution of a dispute, DBCT Management refunds that portion of the disputed tax invoice which has been paid or the User pays the unpaid portion of a disputed tax invoice, then DBCT Management or the User shall pay interest at the No Fault Interest Rate on the refunded amount (in the case of DBCT Management) or the paid amount (in the case of the User) computed from the date on which the disputed amount was originally due to the date the adjustment is paid.

## 6. HANDLING CHARGES

### 6.1 Utilisation Advice

- (a) As soon as practicable after the Execution Date, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the balance of the then current Financial Year (on a monthly basis) and the next 3 full Financial Years of the Term (on an annual basis).
- (b) By no later than 15 February in each Financial Year, the User must give a Utilisation Advice to each of DBCT Management and the Operator relating to the next full Financial Year (on a monthly basis) and the 3 full Financial Years of the Term following that next Financial Year (on an annual basis).
- (c) In the five Business Days preceding each 1 July, 1 October, 1 January and 1 April in each Financial Year, the User must update DBCT Management and the Operator with a revised Utilisation Advice relating to that Financial Year, together with projections of similar information for the 12 month period commencing on the date of that update.
- (d) The User will be under no liability to DBCT Management if the actual number, types or tonnages of vessels or the amount of Coal is or are greater or fewer than the number, types, tonnages or amounts estimated in this clause or estimated in any advice given pursuant to this clause 6.1.

### 6.2 HCF

- (a) HCF for each Financial Year in respect of the Terminal Component is calculated as follows:-

$$HCF = [OFC + DC + MC] \times \frac{ACT}{TACT}$$

Where:-

OFC is the aggregate of all Fixed Operating Costs for the Financial Year in respect of the relevant Terminal Component;

DC is other expenditure (not being Capital Expenditure) incurred by the Operator for the operation and maintenance of the relevant Terminal Component (including any Operator's margin) for that Financial Year and reimbursable by DBCT Management pursuant to the Operation & Maintenance Contract;

MC is the minor Capital Expenditure for the relevant Terminal Component (not included in DC) in the relevant Financial Year, to a maximum of \$3 million;

ACT is the User's Annual Contract Tonnage in respect of the relevant Terminal Component; and

TACT is the total of the annual contract tonnages (or if an Existing User's actual tonnage Shipped is greater than its annual contract tonnage, the actual tonnage Shipped) of all Access Holders and Existing Users for each relevant Financial Year in respect of the relevant Terminal Component.

- (b) As soon as practicable after each 31 May, having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCF payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.3 HCV

- (a) HCV for each Financial Year in respect of the Terminal Component is calculated as follows:-

$$HCV = \frac{OVC}{TTCS} \times \text{the actual number of tonnes of Coal Shipped by the User pursuant to this Agreement in the relevant Financial Year in respect of the relevant Terminal Component.}$$

Where:-

OVC is the aggregate of all Variable Operating Costs in respect of the Handling of all Coal through the relevant Terminal Component for a Financial Year; and

TTCS is the total number of tonnes of Coal Shipped through the relevant Terminal Component during that Financial Year.

- (b) As soon as practicable after each 31 May, and having consulted with the Operator, DBCT Management must advise the User in writing of the estimated HCV payable by the User during the forthcoming Financial Year in respect of the relevant Terminal Component.

### 6.4 Miscellaneous Services

- (a) Charges for Miscellaneous Services must be an amount which the Operator reasonably estimates as:-
- (i) relevant reasonable additional costs to be incurred by the Operator as a result of the Miscellaneous Services including the Operator's profit margin; and
  - (ii) any other additional costs likely to be incurred by other Access Holders and Existing Users (for example, additional demurrage) as a result of the delays in Handling other Coal, arising out of the Miscellaneous Services.
- (b) Any charges recovered under this clause 6.4 or an equivalent clause in another Access Agreement or Existing User Agreement must be deducted from operating costs and the Operator's margin in respect of those operating costs for the purposes of calculating HCF and HCV.

- (c) The parties recognise that the Operator has historically charged Access Holders and Existing Users directly for some services provided at the Terminal, and nothing in this Agreement precludes that practice from continuing.

## **7. REVIEW OF ACCESS CHARGES**

### **7.1 Amendments to TIC**

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

### **7.2 5 year review of charges**

- (a) At the request of either party by notice to the other party no later than 18 months prior to the start of a Pricing Period, all charges under this Agreement and the method of calculating, paying and reconciling them (including the terms of Schedule 2) and any consequential changes in drafting of provisions will be reviewed in their entirety, effective from the start of each Pricing Period, in accordance with the following provisions of this clause 7.2.
- (b) Each review pursuant to clause 7.2(a) will determine the types, calculation, payment and reconciliation of charges payable by the User pursuant to this Agreement, and may have regard to the terms of the Access Framework effective at the time of the review.
- (c) DBCT Management and the User must commence each review pursuant to clause 7.2(a) no later than 18 months prior to the start of a Pricing Period, and:
- (i) the parties must endeavour to agree as early as it is practicable to do so (if possible, by no later than the start of the relevant Pricing Period) on the basis and amount of new charges to apply from the start of that Pricing Period;
  - (ii) if the parties do not reach agreement by the date 6 months prior to the start of the relevant Pricing Period, either party may refer the determination of the issues to arbitration in accordance with the Access Framework;
  - (iii) if there is no agreement or determination by the start of the Pricing Period then:
    - (A) the charges (and method of paying and reconciling them) applying prior to that Pricing Period will continue to apply until otherwise agreed or determined; and
    - (B) any determination or agreement will (unless the parties otherwise agree) operate retrospectively from the start of the relevant Pricing Period and, as soon as practicable after the determination or agreement, an adjustment will be paid by the relevant party (based on the amounts which have been paid to that date on an interim basis and the amounts which are agreed or determined to be payable from the start of the relevant Pricing Period to the date the adjustment is paid) together with interest on the amount of the adjustment at the No Fault Interest Rate. The amount of interest will be determined by reconciling the amounts and timings of payments made on an interim basis with amounts payable and timing of those payments which would have applied in accordance with the agreement or determination.
- (d) If a matter is referred to arbitration under clause 7.2(c)(ii), the arbitration must be conducted in accordance with the Access Framework.

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

## **8. SET-OFF**

### **8.1 DBCT Management may set-off**

Unless otherwise stated, DBCT Management may set-off against any amount payable to the User under this Agreement any amount which is due and payable by the User to DBCT Management under this Agreement.

### **8.2 Amount set-off deemed to have been paid**

Any amount set-off by DBCT Management is deemed to have been paid by the User and the amount against which the set-off has been effected is deemed to have been paid by DBCT Management to the User.

### **8.3 User may set-off**

Unless otherwise stated, the User may set-off against any amount payable to DBCT Management under this Agreement any amount which is due and payable by DBCT Management to the User under this Agreement.

### **8.4 Amount set-off deemed to have been paid**

Any amount set-off by the User is deemed to have been paid by DBCT Management and the amount against which the set-off has been effected is deemed to have been paid by the User to DBCT Management.

## **9. DETERMINATION OF TONNAGE**

### **9.1 Certificate of weight and Cargo Manifest**

The User must:

- (a) commission an independent surveyor to issue a certificate of weight of each cargo of the User's Coal loaded on a vessel at the Terminal, based on vessel draught measurements at the Port, or otherwise cause the weight of each cargo to be determined and certified in another way which is independent and acceptable to DBCT Management (acting reasonably) and (if DBCT Management so requires) adopted by all Access Holders and Existing Users;
- (b) send the Cargo Manifest (which must include a statement as to the weight so certified under clause 9.1(a)) to DBCT Management (with a copy to the Operator) upon completion of the loading of each vessel with a cargo of the User's Coal; and
- (c) ensure that a Product Shipment Notice is attached to each Cargo Manifest.

### **9.2 Basis of calculation**

DBCT Management must use the information contained in each Cargo Manifest and Product Shipment Notice as the basis of calculating charges payable under this Agreement.

### 9.3 Further account

- (a) If at any time:-
- (i) DBCT Management can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid less than it was entitled to, DBCT Management may calculate and send to the User a further tax invoice for the difference owed to DBCT Management; and
  - (ii) the User can demonstrate that an account previously sent to the User was incorrectly calculated, or based on incorrect information, so that DBCT Management was paid more than it was entitled to, DBCT Management must upon request by the User and delivery of a tax invoice or adjustment note, either pay to the User the difference owed to the User or issue a credit note to the User for the difference owed to the User.
- (b) In addition to payment of the amount referred to under 9.3(a) ("**Applicable Amount**"), DBCT Management (in the case of clause 9.3(a)(i)) or the User (in the case of clause 9.3(a)(ii)) shall be entitled to interest on the Applicable Amount calculated at the No Fault Interest Rate and calculated from the date on which the incorrectly calculated invoice was paid to the date on which the Applicable Amount was actually paid.

## 10. EXPANSION OF TERMINAL

### 10.1 Actions preliminary to decision to expand the Terminal

Before making any decision to expand the Terminal, DBCT Management must:

- (a) advise the User of the reasons for, extent, timing and estimated cost of any Expansion Component under consideration;
- (b) consult the User as to whether changes in the User's Annual Contract Tonnage or the method of operation of the Terminal, including the User's arrangements for Shipping its Coal, would avoid or delay the need for the Expansion Component or reduce the extent or estimated cost of the Expansion Component; and
- (c) consider how to maximise the utilisation of the Terminal.

Nothing in this clause 10.1 limits any provision of the Access Framework.

### 10.2 Minimisation of interference

DBCT Management must use all reasonable endeavours to carry out any Terminal Capacity Expansion of or other work at the Terminal and any infrastructure connected to the Terminal so as to minimise interference with the Handling of the User's Coal.

### 10.3 Terminal and System Capacity

- (a) DBCT Management will from time to time estimate Terminal Capacity (and Expansion Component Capacity, including Socialised Terminal Capacity or Differentially Priced Capacity for each Expansion Component, as applicable) and System Capacity in accordance with the Access Framework (or if there is no provision for doing so in an Access Framework at a relevant time, in accordance with the process applying under the last access undertaking or framework in which such a process was provided for).
- (b) DBCT Management must reassess Terminal Capacity, each relevant Expansion Component Capacity and System Capacity before entering into any new Access Agreement or otherwise increasing the aggregate tonnage of Coal contracted to be Handled through the Terminal, unless it considers that none of the factors to be taken

into account in determining Terminal Capacity, any relevant Expansion Component Capacity and System Capacity have materially changed since the most recent determination of Terminal Capacity, any relevant Expansion Component Capacity and System Capacity and that determination was made less than 12 months previously.

- (c) DBCT Management must not enter into any Access Agreement if the Aggregate Annual Contract Tonnage would (after including the tonnage under the new Access Agreement if it was entered into) exceed the System Capacity (as determined for the relevant time), unless otherwise required or permitted to do so by the Access Framework, law or an agreement relating to its tenure of the Terminal (including the Framework Agreement and the Port Services Agreement). For clarification:
- (i) without limiting clause 19, this does not prohibit DBCT Management from entering into a Conditional Access Agreement, as long as the terms of all such Conditional Access Agreements are such that the increase in Aggregate Annual Contract Tonnage consequent on such Terminal Capacity Expansion occurring will nevertheless not cause Aggregate Annual Contract Tonnage to exceed System Capacity (based on the estimated System Capacity at the completion of the relevant Terminal Capacity Expansion); and
  - (ii) DBCT Management will not be in breach of this Agreement if it has complied with the Access Framework (or made good faith and reasonable attempts to comply) but an assessment of System Capacity (after the assessment required by the Access Framework following the completion of a relevant Terminal Capacity Expansion) reveals that System Capacity is less than the Aggregate Annual Contract Tonnage at that time.
- (d) Notwithstanding any other provisions of this Agreement, if DBCT Management complies (or makes a good faith and reasonable attempt to comply) with the provisions of this clause 10.3 and Section 11.1 of the Access Framework, DBCT Management will not have any liability (whether for loss, damage, cost, expense or other remedy) nor will it be liable to the User:
- (i) for any breach of this clause 10.3 or Section 11.1 of the Access Framework;
  - (ii) for any delay which arises as a result of the Aggregate Annual Contract Tonnage (which was expected not to exceed Terminal Capacity Expansion Component Capacity or System Capacity) subsequently exceeding Terminal Capacity, Expansion Component Capacity or System Capacity for any reason;
  - (iii) if one or more factors related to utilisation of capacity of the Terminal or any other part of the System which subsequently changes (for example, changes in service levels required pursuant to a right of Access Holders under an Access Agreement, the nature of coal Handled, an Access Holder's use of the Terminal, vessel mix, railway infrastructure, rolling stock or locomotives, rail loading facilities of mines or any other relevant factor) provided that such factor is not a breach by DBCT Management of any other part of the Access Framework, this Agreement or any other Access Agreement; or
  - (iv) for any defect, error or omission on the part of the independent expert appointed under the Access Framework to assist with the assessment of Terminal Capacity, each relevant Expansion Component Capacity (including Socialised Terminal Capacity and Differentially Priced Capacity) and System Capacity.
- (e) Subject to the provisions of this Agreement and to the requirements and provisions of the Access Framework, any statute and any agreement in respect of the tenure of the Terminal (including the Framework Agreement and the Port Services Agreement),

DBCT Management agrees with the User that any request by the User for an increase in Annual Contract Tonnage pursuant to clause 11.1 will be agreed to, to the extent that it does not cause System Capacity to be exceeded and in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Framework.

## 11. CHANGES TO ANNUAL CONTRACT TONNAGE

### 11.1 Adjustments at User's request

- (a) The User may only adjust its Annual Contract Tonnage pursuant to this clause 11.1 or clause 12.2.
- (b) [From the date 5 years after the commencement of the Shipment (or increased rate of Shipment) of Coal arising out of the Current Expansion - *add these words for an Access Agreement under which Coal is Shipped for 10 years or more and which necessitated an Expansion*] The User may without penalty reduce the Annual Contract Tonnage by giving not less than five years notice to DBCT Management of the extent and the period of the reduction required.
- (c) If the User wishes to increase the Annual Contract Tonnage (for all or any part of the remainder of the Term), either:-
- (i) from the Annual Contract Tonnage at the Effective Date; or
  - (ii) from a lesser or greater Annual Contract Tonnage previously adjusted under this clause 11.1,

then the User may so notify DBCT Management, which may:-

- (iii) subject to the availability of unallocated Terminal Capacity and System Capacity and the provisions of clauses 10.3 and 29.3, the Access Framework, any statute, and any agreement in respect of the tenure of the Terminal as it existed at 1 July 2005 (including the Port Services Agreement and the Framework Agreement), allow the User to increase the Annual Contract Tonnage (wholly or partially) to the respective amounts and periods requested in accordance with the provisions relating to Access Seekers seeking increased Access under Section 5 of the Access Framework; or
  - (iv) advise the User that no increase can occur, because it would cause Terminal Capacity or System Capacity to be exceeded.
- (d) Nothing in this clause limits any other rights which the User may have as an Access Seeker under the Access Framework or in clause 12.3.

### 11.2 Shipping Coal in excess of Annual Contract Tonnage

The User must not Ship Coal in excess of its Annual Contract Tonnage. If the User wishes to Ship Coal in excess of its Annual Contract Tonnage, the User may seek from another Access Holder the assignment of additional annual contract tonnage under clause 12.2. In accordance with clause 12.3, DBCT Management will not unreasonably refuse to consent to such a proposed assignment.

### 11.3 User not using Annual Contract Tonnage

If, in the reasonable opinion of DBCT Management, a User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and such failure is not due to a Force Majeure event at the Terminal or a failure by DBCT Management to Ship the User's Coal, then the following will apply:-

- (a) DBCT Management may notify the User that DBCT Management has formed the opinion that the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period and that there is a reasonable expectation of demand from other Access Holders or Access Seekers for the User's underutilised tonnage;
- (b) the User must make submissions as to whether the User has not Shipped and is unlikely to Ship its Annual Contract Tonnage over a sustained period within 21 days of receiving the notice from DBCT Management;
- (c) if the User fails to produce reasonable evidence that demonstrates that it is likely in future to substantially Ship the whole of its Annual Contract Tonnage, then DBCT Management may notify the User that it intends to appropriately reduce the User's Annual Contract Tonnage;
- (d) if the User considers that DBCT Management has not complied with the requirements of this clause in reducing the User's Annual Contract Tonnage, then the User may, within 21 days of receiving notice under clause 11.3(c), refer the matter to dispute resolution in accordance with clause 15; and
- (e) DBCT Management must not implement a reduction in Annual Contract Tonnage until the expiration of the period for resolution of a dispute referred to in clause 11.3(d).

#### **11.4 Capacity to be taken into account only once**

If the User notifies DBCT Management that the User is unable to, and forgoes its right to, Ship all or part of its Annual Contract Tonnage (the "**Notified Tonnage**") through the Terminal for any period (the "**Notified Period**"), then, for the purpose of charges otherwise payable by the User for the Notified Period, the User's Annual Contract Tonnage will be taken to be reduced by such part of the Notified Tonnage in respect of which DBCT Management grants additional annual contract tonnage to another Access Holder (for the same or comparable charges to those reduced under this clause) and which DBCT Management would not have been able to grant (due to lack of capacity) but for the User foregoing its right to Ship the Notified Tonnage through the Terminal.

#### **11.5 Reduction in tonnes Handled where User fails to obtain rail access**

- (a) Before the User is entitled to have coal Handled pursuant to this Agreement, it must produce evidence reasonably satisfactory to DBCT Management that the Annual Contract Tonnage under this Agreement is matched by an entitlement held by the User (or a person on its behalf) to railway track access relating to the coal the subject of this User Agreement:
  - (i) for the whole of the Term; or
  - (ii) for any relevant shorter period.
- (b) If the User only produces such evidence of access to railway track entitlement pursuant to clause 11.5(a)(ii) for a period shorter than the entire Term, it must continue to provide evidence of such access before the commencement of each successive period during the Term for which such evidence has not previously been produced, and the provisions of clause 11.5(c) will apply in respect of each of the first and each successive such period during the Term.
- (c) To the extent the tonnage in respect of which the User is able to demonstrate an entitlement to railway track access for a relevant period is less than the Annual Contract Tonnage for that period, the Annual Contract Tonnage will (despite any other provisions of this Agreement):
  - (i) be deemed to be reduced to that lesser tonnage, for all purposes relevant to the entitlement to have coal Handled at the Terminal pursuant to this Agreement during such period; but

- (ii) will remain unchanged for all other purposes pursuant to this Agreement, and specifically for the purposes of the liability of the User to pay Access Charges and any other amount payable pursuant to this Agreement based on the actual Annual Contract Tonnage.
- (d) DBCT Management will in good faith make an assessment of the tonnage of coal able to be railed to the Terminal pursuant to an entitlement to railway track access (which would normally be expressed as a number of train paths for any relevant period) and (subject to clause 15) the tonnage so determined shall be the tonnage which is adopted for the purpose of comparison with the Annual Contract Tonnage for a period for the purposes of this clause 11.5.
- (e) Where a relevant period is not a whole Financial Year or not two or more whole Financial Years, references in this clause to Annual Contract Tonnage over that period will mean that part of the Annual Contract Tonnage which accrues over that period, assuming it accrues throughout each Financial Year in equal increments.

## **12. ASSIGNMENT**

### **12.1 DBCT Management may assign**

After consultation with the User, DBCT Management may assign all or any part of its benefits under this Agreement to any person who is responsible and has the expertise and financial capacity needed to operate and maintain the Terminal and comply with the obligations of DBCT Management under this Agreement.

### **12.2 User may assign**

With the prior consent of DBCT Management, which consent will not be unreasonably withheld, a User may assign all or part of its rights or entitlements under this Agreement (including, in particular, all or part of its Annual Contract Tonnage) permanently or temporarily on the following basis:

- (a) the assignment will not be effective unless:- the assignee enters into a deed (prepared by DBCT Management at the expense of such assignee) with DBCT Management substantially in the form contained in Schedule 6 by which DBCT Management and the assignee agree to be bound by the terms, conditions and obligations of this Agreement or the assignee's Access Agreement (as DBCT Management, acting reasonably, determines) in respect of the assigned rights or entitlements as if the assignee were the User in respect of those assigned rights and entitlements;
- (b) when the assignment takes effect, the User will be discharged from all terms, conditions and obligations of this Agreement (except to the extent that they accrued prior to the assignment) in respect of the rights and entitlements assigned; and
- (c) if the User assigns only part of its rights or entitlements to another person, this Agreement will be treated from that time as if it were only an Agreement in respect of the unassigned rights or entitlements.

For clarification, "assign" and "assignment" includes novation or variation to the parties' respective Access Agreements.

### **12.3 Response to requests for consent to assignment by User**

- (a) DBCT Management must consent to a proposed assignment of rights or entitlements under clause 12.2 (whether by way of assignment or novation) unless DBCT Management (acting reasonably) is satisfied that:
  - (i) the assignor is in material breach of this Agreement; or

- (ii) the assignee:
  - (A) is not of good financial standing, creditworthy and able to fully discharge the financial obligations of the Access Holder under the relevant Access Agreement and does not otherwise provide security in a form acceptable to DBCT Management (acting reasonably) for the performance of the obligations under this Agreement in respect of the transferred rights or entitlements;
  - (B) is incapable of performing the obligations of the Access Holder under the Access Agreement in respect of the transferred rights or entitlements, including complying with the Terminal Regulations; or
  - (C) is unable to reasonably demonstrate that the rights or entitlements to be transferred under the relevant Access Agreement are matched by an entitlement to railway track access held by the assignee or a person on its behalf.
- (b) The assignor must provide all information reasonably required by DBCT Management to assess the criteria specified in clause 12.3(a) to DBCT Management in a timely manner.
- (c) DBCT Management must take all steps necessary to assess and respond to any request for a transfer as soon as reasonably practicable.
- (d) The User or the assignee may refer as a dispute to arbitration under clause 15 of this Agreement:
  - (i) any refusal by DBCT Management to consent to a transfer;
  - (ii) any failure to agree the reasonable terms governing an Access Agreement which is the subject of a transfer; and
  - (iii) any failure by DBCT Management in assessing or responding to a request for transfer in a timely manner.

#### **12.4 Change of control of User**

- (a) The User must obtain DBCT Management's consent (not to be unreasonably withheld or delayed) to any Change of Control in the User. DBCT Management's consent may be subject to reasonable conditions (including the provision of reasonable security) and the User must comply with any conditions.
- (b) Any dispute in respect of the reasonableness of any refusal by DBCT to consent to a Change of Control, or of any conditions sought by DBCT Management under this clause 12.4, may be referred as a dispute under clause 15.

#### **12.5 Permission to third party to Ship**

The User may permit a third party to Ship Coal through the Terminal treating that cargo as part of the User's Annual Contract Tonnage, without complying with clause 12.2. In such case:

- (a) the User will remain liable for the performance of its obligations under this Agreement in respect of all Coal so Handled, and for all purposes that Coal will be taken to be the Coal of the User Handled pursuant to this Agreement;
- (b) the User must give DBCT Management and the Operator a notice in the form of Schedule 7 not less than 14 days prior to the scheduled departure of the relevant vessel, but DBCT Management must accept such shorter period of notice as causes no

unreasonable adverse consequences to it, the Operator, Existing Users or other Access Holders;

- (c) the cargo must be made in accordance with the notice provided under clause 12.5(b); and
- (d) the Product Shipment Notice attached to the Cargo Manifest provided by the User under clause 9.1 must disclose the name or names of any third party so using the User's Annual Contract Tonnage, and the tonnages of Coal so Handled for that third party.

## 13. REMEDIES

### 13.1 DBCT Management's remedies in the event of Delay

- (a) To the extent that the User is responsible for a Delay, or a Delay arises from events external to the Terminal, DBCT Management's remedies will be limited to its entitlement to payment of the charges provided for in clause 4 of this Agreement.
- (b) Nothing in this clause 13.1 precludes DBCT Management from applying for an injunction, declaration or specific performance in respect of the User's obligations under this Agreement.

### 13.2 User's remedies in the event of Delay

To the extent that the User is not responsible for a Delay and to the extent that a Delay does not arise from events external to the Terminal, the User's remedies against DBCT Management in respect of the Delay are limited as set out below:

- (a) If the Delay is a Permissible Delay, DBCT Management will have no liability to the User in respect of any Claim for Loss arising from the Delay;
- (b) If the Delay arises from Force Majeure affecting DBCT Management's ability to comply with its obligations, clause 13.3 applies;
- (c) If the Delay arises from Wilful Default by DBCT Management, clause 13.5 applies; and
- (d) In all other circumstances, and without prejudice to its right to dispute responsibility for the Delay, the User must continue to meet its payment obligations under clause 4 unless and until the adjudication of an arbitrator, order of the Court or agreement between the parties, determines responsibility for the Delay, in which case clause 13.4 applies.

Nothing in this clause 13.2 precludes the User from applying for an injunction, declaration or specific performance in respect of DBCT Management's obligations under this Agreement.

### 13.3 Force Majeure

- (a) If DBCT Management is affected by an event of Force Majeure, such that it will be unable to fulfil all or part of its obligations under the Agreement (the "**Affected Obligations**"), and anticipates Delays exceeding 48 hours, it must notify the User within 7 days after the occurrence of the event, providing full details of:
  - (i) the Affected Obligations and Delays expected;
  - (ii) the action that DBCT Management has taken and proposes to take to remedy the situation; and
  - (iii) DBCT Management's estimate of the time during which it will be unable to carry out the Affected Obligations due to the event of Force Majeure.
- (b) DBCT Management's Affected Obligations under this Agreement shall be suspended (without it being in default) to the extent of and for the period that the performance of

such obligations are affected by an event of Force Majeure, provided that it complies with clause 13.3(c). However, the User's obligations to pay the Charges in clause 4 will not abate during a period where DBCT Management is affected by an event of Force Majeure.

- (c) DBCT Management must:
- (i) use all reasonable efforts (including the expenditure of reasonable sums of money) to mitigate the effect of the event of Force Majeure upon its performance of this Agreement; and
  - (ii) keep the User informed (not less than fortnightly) of the steps being taken to mitigate the effect upon the performance of this Agreement, including an estimate of the continued duration of the Delay.

#### **13.4 User's rights for Delays attributable to other circumstances**

In the circumstances in clause 13.2(d), DBCT Management's liability to the User is limited to:

- (a) the Third Party Amount; plus
- (b) if the adjudication of an arbitrator, order of a court or agreement between the parties determines that the Delay was at least 66% DBCT Management's Personal Responsibility, and to the extent that there is any shortfall in the recovery by the User of its Direct Loss from the Third Party Amount - the User's Direct Loss in respect of the Delay, but not exceeding the percentage of the User's Direct Loss equivalent to the percentage of DBCT Management's Personal Responsibility.

#### **13.5 Wilful Default by DBCT Management**

If a Delay is caused by Wilful Default by DBCT Management, the User:

- (a) is relieved to that extent of any corresponding payment obligations under clause 4;
- (b) may terminate this Agreement pursuant to clause 14.3; and
- (c) may sue DBCT Management for damages for breach of contract.

#### **13.6 Long Term Delays**

- (a) This clause 13.6 sets out certain rights and obligations of the parties in respect of Delays, including Long Term Delays. This clause 13.6 is:
  - (i) in addition to, and does not limit any other provision of this Agreement; and
  - (ii) does not limit or affect any other right which a party may have against another party in respect of an act or omission of the other party.
- (b) If Loss, damage or destruction occurs in respect of the Terminal, DBCT Management must promptly claim and thereafter promptly apply all relevant available insurance proceeds towards reinstatement of the damaged property, unless (having regard to factors such as the reasonably foreseeable ongoing needs for Handling at the Terminal) DBCT Management considers that reinstatement is not in the interests of stakeholders and no less than 60% of Access Holders and Existing Users (by tonnage) and DBCT Holdings all agree that reinstatement should not occur.
- (c) If Long-Term Delays occur, such that the capacity of the Terminal (as demonstrated by its performance) on a sustained on-going basis is less than 95% of the Aggregate Annual Contract Tonnage at that time (the difference being referred to as the "Shortfall"), then DBCT Management must undertake a Terminal Capacity Expansion sufficient to eliminate the Shortfall if (and on the same basis as) DBCT Management would have been obliged under the terms of the Access Framework (in particular

considering sections 11.3, 11.4, 11.7, and 11.8 of the Access Framework) to undertake a Terminal Capacity Expansion had the amount of the Shortfall been the annual contract tonnage sought by new Access Seekers whose offers to enter into Access Agreements prima facie triggered the requirement for a Terminal Capacity Expansion. For clarification, DBCT Management will not be obliged to undertake a Terminal Capacity Expansion under this Agreement:

- (i) if such Terminal Capacity Expansion is unreasonable and uneconomic pursuant to section 11.7 of the Access Framework; or
  - (ii) if section 11.8 of the Access Framework applies.
- (d) If at any time:
- (i) the capacity of the Terminal on a sustained ongoing basis is reduced to the order of 10%, or less, of the Aggregate Annual Contract Tonnage of all Access Holders and Existing Users at the time;
  - (ii) the reduction of capacity referred to in clause 13.6(d)(i) above, is not attributable to an act or omission of the User; and
  - (iii) DBCT Management does not, within a reasonable time after a written request by the User to do so ("reasonable" being assessed according to the extent of works needed to redress the situation), commence and expeditiously proceed with the works necessary to reinstate the Terminal to a capacity sufficient to meet the reasonably expected sustained ongoing demand for Handling of Coal (whether or not DBCT Management has an obligation to undertake such works),

the User may terminate this Agreement, on giving not less than 30 days' notice to DBCT Management to that effect in writing. Neither party will be liable to the other arising from such a termination (other than a liability which arises prior to the date of termination).

### **13.7 Limitation period for notice of Claims by User**

- (a) The User shall not be entitled to make any Claim against DBCT Management in respect of any Delay unless written notice of the Claim specifically reserving the User's rights under clause 13.2 has been given to DBCT Management by the date 4 months after the end of the Financial Year in which the Delay first occurred (or, if a material fact of a decisive character relating to the right to Claim against DBCT Management was not within the means of knowledge of the User until after that time, within 2 months of the date on which the User first becomes aware of that material fact). Any subsequent Loss arising directly or indirectly from the cause of the first occurrence may be included in the Claim without further notice being given, but a separate notice must be given for each different and unrelated cause from which it is alleged a Claim arises.
- (b) This clause 13.7 does not apply to a Claim to the extent that it is made under clause 13.6.

## **14. TERMINATION**

### **14.1 Suspension**

If the User is in default in the due and punctual performance of an obligation under this Agreement and:

- (a) in respect of the User's default of an obligation to pay money or to provide any Security required pursuant to clause 29, such default has not been remedied within 30 days after DBCT Management has given written notice to the User of the default; or
- (b) in respect of the User's default of a material obligation (other than an obligation to pay money or provide Security), such default has not been remedied, or the User has not expeditiously commenced to remedy it, within 60 days after DBCT Management has given written notice to the User of the default,

then, without prejudice to DBCT Management's other rights under this Agreement, DBCT Management may (by written notice to the User pursuant to this clause) suspend the User's rights to have its Coal Handled under this Agreement until payment (including interest under clause 5.2) is made, Security is provided or the other relevant default is remedied or commenced to be expeditiously remedied. If such suspension occurs, the User's obligations based on its Annual Contract Tonnage (for example charges based on those amounts) will be unchanged, but DBCT Management's obligations to Handle those amounts for the relevant Financial Year will be reduced proportionately.

#### **14.2 Termination by DBCT Management**

Subject to clause 14.5, if DBCT Management has duly given notice that it has suspended the User's rights to have its Coal Handled (but not the User's obligations) under this Agreement pursuant to clause 14.1 and if the default still has not been remedied after a further period of 14 days from the notice of suspension, DBCT Management may terminate this Agreement forthwith by further notice to the User pursuant to this clause.

#### **14.3 Termination by User**

Subject to clause 14.5, the User may terminate this Agreement by written notice to DBCT Management as follows:-

- (a) if DBCT Management is in default in the due and punctual performance of an obligation to pay money under this Agreement and such default has not been remedied for a period of 30 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied; or
- (b) if DBCT Management is in default in the due and punctual performance of a material obligation under this Agreement (not being an obligation to pay money or a Delay) and such default has not been remedied or DBCT Management has not expeditiously commenced to remedy such default within a period of 60 days after the User has given to DBCT Management written notice specifying the default and requiring the default to be remedied.

#### **14.4 Abandonment of Coal on termination**

The User must remove any of its Coal remaining in the Terminal within three months from the termination of this Agreement, whether by expiry or otherwise, failing which the Coal will be deemed abandoned.

#### **14.5 Disputes about defaults**

If an event or circumstance is alleged to constitute a default referred to in clause 14.2 or clause 14.3 and is the subject of a dispute under clause 15, then DBCT Management or the User (as applicable) shall not exercise any right to suspend or terminate this Agreement unless and until the default has not been rectified within a reasonable time (being not less than 14 days) after the end of the resolution process in clause 15.

## 15. GOVERNING LAW AND DISPUTE RESOLUTION

### 15.1 Governing law

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

### 15.2 Disputes

- (a) **(Disputes under this Agreement)** If a dispute between DBCT Management and the User arises out of or in connection with this Agreement, then, unless otherwise specified by the Access Framework or agreed by the parties in writing, such dispute will be resolved in accordance with this clause 15. Either party may give to the other party a notice of dispute in writing identifying and providing details of the dispute.
- (b) **(Disputes under the Access Framework)** If any dispute or question arises under or in relation to the Access Framework, including (without limitation) a dispute in relation to the negotiation of Access between an Access Seeker or Access Holder and DBCT Management, such dispute will be resolved in the manner specified in the Access Framework.
- (c) **(Dispute under Deed Poll)** Subject to clause 9.2.5 of the Deed Poll, the courts of Queensland have exclusive jurisdiction to determine any dispute arising under the Deed Poll.

### 15.3 Further steps required before arbitration

- (a) Subject to clause 15.5, no party may commence arbitration in respect of any dispute notified or notifiable under this clause 15 until that party has complied with the requirements of this clause 15.3.
- (b) Within 14 days after service of a notice of dispute, the senior executives of DBCT Management and the User (or people for the time being acting in that role) must confer at least once to attempt to resolve the dispute, and failing resolution of the dispute to consider and if possible agree on methods of resolving the dispute by other means.
- (c) If the dispute cannot be so resolved after a further period of 14 days or if at any time either DBCT Management or the User considers that the other party is not making reasonable efforts to resolve the dispute, either party may refer such dispute to arbitration in accordance with clause 15.4.

### 15.4 Arbitration procedure

- (a) Any disputes that are not otherwise resolved in accordance with this clause 15 or the Access Framework will be submitted to arbitration in accordance with, and subject to, the Resolution Institute Arbitration Rules (**Rules**).
- (b) The arbitration must be effected by a single suitably qualified and experienced arbitrator who is either:
  - (i) agreed upon between the parties; or
  - (ii) in default of such agreement within 10 days after the dispute is referred to arbitration, nominated by the Resolution Institute.
- (c) Any party to the arbitration may be represented before the arbitrator by a member of the legal profession without the need for leave of the arbitrator.
- (d) Any arbitration commenced under this Agreement may be consolidated with any other arbitration commenced under:
  - (i) this Agreement; and / or

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

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

- (e) The venue for any arbitration will be Brisbane, Queensland.
- (f) Unless otherwise determined by the arbitrator, the costs of the arbitration shall be paid by the unsuccessful party.

### **15.5 Interlocutory relief**

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

### **15.6 Dispute not to affect performance of obligations**

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

## **16. WARRANTIES**

### **16.1 Warranties by DBCT Management**

DBCT Management agrees and acknowledges that:

- (a) Subject to:
  - (i) an event of Force Majeure;
  - (ii) Maintenance Work; and
  - (iii) any decision to cease or reduce Maintenance Work for a component of the Terminal on the basis that it is more cost-efficient to replace it and it is to be replaced,

each Terminal Component will be maintained to be available to operate to at least its rated design capacity;
- (b) it will ensure that the Terminal is maintained in accordance with Good Operating and Maintenance Practice;
- (c) it will consult with the User in relation to the appointment of any replacement Operator of the Terminal and will promptly on request negotiate amendments to this Agreement to reflect the terms of any new Access Framework, from the time (should it occur) that Dalrymple Bay Coal Terminal Pty Ltd ceases to be the Operator;
- (d) the User will (at no charge, but at its own cost) be granted reasonable access to the Terminal for reasonable purposes, including customer goodwill inspections, performance of shipping agent functions, Coal sampling and User inspections of Operations, provided that on each occasion the User complies with the Operator's site rules, DBCT Management's reasonable visitor notification requirements and the User is accompanied by an authorised person at such times while on the Terminal site as DBCT Management or the Operator reasonably requires (provided that they make such a representative available, having been given reasonable notice by the User).

## 16.2 Warranties by the parties

Each party warrants to the others that it has the requisite power to enter into this Agreement from the Execution Date.

## 17. USER COMMITTEE AND IMPROVEMENT PROGRAM

### 17.1 Participation in User Committee

DBCT Management and the User agree to participate in a committee consisting of one representative of each of DBCT Management, the Operator and each Access Holder and Existing User (the "User Committee").

### 17.2 Terms of reference of User Committee

The User Committee is established for the following purposes:

- (a) to provide a forum for consultation between all participants on matters relating to the operation and performance of the Terminal, including (without limitation) any factors relating to any participant which may impact on the future performance or efficiency of the Terminal;
- (b) to enable consultation between all participants on current and planned Terminal facilities, including all proposals for any enhancement of the Terminal; and
- (c) to consult on matters relating to the Terminal Regulations, including (without limitation) any proposed changes to the Terminal Regulations.

### 17.3 Frequency of meetings

DBCT Management and the User acknowledge that it is intended that the User Committee meet on a Quarterly basis and at such further times as participants in the User Committee agree.

### 17.4 Representation

DBCT Management and the User will each appoint, and acknowledge that each other prospective member of the User Committee is entitled to appoint, a person to represent its respective interests on the User Committee (each a "**Representative**"). If a Representative is not available to attend a meeting of the User Committee, the relevant member of the User Committee may nominate an alternate person to represent its interests at the User Committee.

### 17.5 Chairperson

The User agrees that the Representative appointed by DBCT Management will act as chairman of the User Committee.

### 17.6 Role of the Operator

DBCT Management must, as far as the Operation & Maintenance Contract allows, procure that the Operator provides appropriate support to the User Committee, including the provision of any relevant operational reports, as the User Committee may reasonably request the Operator to provide from time to time.

## 18. NOT USED

## 19. EXPANSION TONNES

*[A Conditional Access Agreement in which all or part of the Annual Contract Tonnage does not apply until a Terminal Capacity Expansion (the 'Current Expansion') has occurred, in*

***circumstances where that Terminal Capacity Expansion will form part of the Terminal under this Agreement once completed, will include a clause, an outline of terms of which are as follows:]***

- (a) Subject to clause 19(e), the Annual Contract Tonnage will be [increased by] [*insert*] Mtpa for the period commencing on the first day of the Month following completion and successful commissioning of the Current Expansion until the end of that Financial Year, and thereafter in each subsequent Financial Year. The target date for this to occur is [*insert*].
- (b) DBCT Management must provide at least monthly progress reports to the User in relation to the Current Expansion and such further progress reports as may reasonably be required as the Current Expansion nears completion.
- (c) DBCT Management's obligation to commence Handling, and the User's obligation to commence paying charges, in respect of the additional Annual Contract Tonnage arising out of the Current Expansion or any part thereof (as applicable) only begins on the first day of the Month following the date that DBCT Management gives the User a notice that the User is:
  - (i) awarded the additional Annual Contract Tonnage or any part thereof (as applicable); and
  - (ii) entitled to have the additional Annual Contract Tonnage or any part thereof (as applicable) handled at the Terminal.
- (d) DBCT Management must use reasonable endeavours to have the Current Expansion completed as close as practicable to the target date referred to in clause 19(a), but it will not be required to expend additional amounts to overcome delays caused by third parties or otherwise beyond the reasonable control of DBCT Management.
- (e) DBCT Management will proportionately reduce the Annual Contract Tonnage under this Agreement and the annual contract tonnages under all other Access Agreements entered into with the intention of utilising additional capacity arising out of the Current Expansion, if the actual Terminal Capacity following completion of the Current Expansion is less than the estimate of (expanded) Terminal Capacity made at the time this Agreement was entered into. That reduction will be by the proportion which the additional Terminal Capacity resulting from the Current Expansion as estimated at the time this Agreement was entered into bears to the actual additional Terminal Capacity arising from the Current Expansion. In relation to:
  - (i) Socialised Terminal Capacity, the allocation of proportionately reduced capacity will occur after first deducting any capacity required from the Current Expansion to "make up" any shortfall between already existing aggregate annual contract tonnages and actual Terminal Capacity which existed prior to the Current Expansion; and
  - (ii) Differentially Priced Capacity resulting from the Current Expansion will be allocated to meet the full entitlements under this Agreement and any other Access Agreements associated with the Differentially Priced Capacity.

## **20. OPTIONS**

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

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

the Term as already extended by the exercise of an option under this clause 20(a) for 5 years or more).

- (b) If DBCT Management receives an Access Application for additional capacity which cannot be met without a Terminal Capacity Expansion if the option in clause 20(a) and other relevant options are exercised, it may notify the User, requiring it to respond within 90 days, either exercising the option in clause 20(a) in respect of all or part of an extended Term and/or tonnage the subject of the option, or waiving it.
- (c) DBCT Management must give notices under clause 20(b) and any equivalent provision of another Access Agreement or Existing User Agreement to relevant Access Holders or Existing Users with options, in order of the earliest expiring Access Agreement or Existing User Agreement, for the purposes of deciding which option date is to be accelerated first. Where an Access Holder/s or Existing User/s with the earliest expiring date exercise/s its/their option by the accelerated date, DBCT Management may then go to the next Access Holder/s or Existing User/s in order of expiring agreements until there has been a waiver of sufficient options to ensure that the bona fide request can be accepted without the necessity for a Terminal Capacity Expansion. Access Holders or Existing Users whose terms expire within 6 months of each other will, for the purposes of this clause 20, be deemed to have terms which expire on the same date, and must be given notices at the same time.
- (d) Where more than one Access Holder or Existing User has tonnages which expire (or which are deemed to expire) on the same date, those Access Holders/Existing Users which do not exercise their accelerated option will lose the amount of tonnes the subject of the option proportionately with their respective annual contract tonnages immediately prior to the end of the current term. (For example, if a bona fide request for 5 Mtpa is received and Access Holders/Existing Users with 10, 5, 2 and 3 Mtpa of contracted tonnages do not exercise their options, then the options for those Access Holders/Existing Users will be reduced by 2.5, 1.25, 0.5 and 0.75 Mtpa respectively).
- (e) If the Access Application referred to in clause 20(b) is not converted into an Access Agreement within 3 months after the above process is completed, the status quo existing before notice from DBCT Management will be re-instated (i.e. options will not be taken to have been forfeited merely because the accelerated date for exercise has not been complied with, and any accelerated exercise of an option will be taken not to have occurred).

## 21. GST

- (a) Any reference in this clause to a term defined or used in the A New Tax System (Goods and Services Tax) Act 1999 is, unless the context indicates otherwise, a reference to that term as defined or used in that Act.
- (b) Unless expressly included, the consideration for any supply made under or in connection with this Agreement does not include an amount on account of GST in respect of the supply ("**GST Exclusive Consideration**") except as provided under this clause.
- (c) Any amount referred to in this Agreement (other than an amount referred to in clause 21(f)) which is relevant in determining a payment to be made by one of the parties to the other is, unless indicated otherwise, a reference to that amount expressed on a GST exclusive basis.
- (d) To the extent that GST is payable in respect of any supply made by a party ("**Supplier**") under or in connection with this Agreement, the consideration to be provided under this Agreement for that supply (unless it is expressly stated to include GST) is increased by

an amount equal to the GST Exclusive Consideration (or its GST exclusive market value if applicable) multiplied by the rate at which GST is imposed in respect of the supply.

- (e) The recipient must pay the additional amount payable under clause 21(d) to the Supplier at the same time as the GST Exclusive Consideration is otherwise required to be provided.
- (f) Whenever an adjustment event occurs in relation to any taxable supply made under or in connection with this Agreement the Supplier must determine the net GST in relation to the supply (taking into account any adjustment) and if the net GST differs from the amount previously paid under clause 21(d), the amount of the difference must be paid by, refunded to or credited to the recipient, as applicable.
- (g) If one of the parties to this Agreement is entitled to be reimbursed or indemnified for a Loss, cost, expense or outgoing incurred in connection with this Agreement, then the amount of the reimbursement or indemnity payment must first be reduced by an amount equal to any input tax credit to which the party being reimbursed or indemnified (or its representative member) is entitled in relation to that Loss, cost, expense or outgoing and then, if the amount of the payment is consideration or part consideration for a taxable supply, it must be increased on account of GST in accordance with clause 21(f).

## **22. NOTICES**

### **22.1 Notices and other communications**

All notices and other communications provided for or permitted under this Agreement must be in writing and must be given by mail, or facsimile transmission as follows:-

- (a) if to DBCT Management, to:-
  - Address: Level 15, 1 Eagle Street, Brisbane, Qld 4000
  - Attention: Chief Executive Officer
  - Fax No.: 07 3002 3101
  - Email: [anthony.timbrell@dbctm.com.au](mailto:anthony.timbrell@dbctm.com.au)
- (b) if to the User, to it at the address set out in Schedule 1,  
or to such other address or person as either party may specify by notice in writing to the other.

### **22.2 Deemed to have been given or made**

All such notices or communications are deemed to have been duly given or made:-

- (a) on the date upon which the notice or communication would, in the ordinary course of the post, have been delivered to the address to which it was posted;
- (b) when delivered; or
- (c) if sent by facsimile transmission, at the conclusion of an apparently successful transmission,

but if the delivery or facsimile is effected on a day that is not a Business Day or after 5pm in the place of receipt on a Business Day, it will be taken to have been given or made on the next Business Day.

**23. SURVIVAL OF REMEDIES**

The remedies of the parties arising by law, by the terms of this Agreement or otherwise are cumulative and will survive the termination of this Agreement by effluxion of time or otherwise.

**24. WAIVER**

A waiver by either party of any default in the strict and literal performance of or compliance with any provision of this Agreement will not be deemed to be a waiver of strict and literal performance of and compliance with any other provision of this Agreement nor to be a waiver of, or in any manner release the other party from, strict compliance with any provision, in the future nor will any delay or omission of either party to exercise any right under this Agreement in any manner impair the exercise of any such right accruing to it thereafter.

**25. COSTS**

Whether or not any of the transactions contemplated by this Agreement are consummated, each party must pay its own fees and expenses of and incidental to the negotiation, preparation and execution of this Agreement. The User will pay on demand any stamp duty payable on this Agreement.

**26. ENTIRE AGREEMENT****26.1 Full and Complete Understanding**

This Agreement constitutes the full and complete understanding between the parties with respect to the subject matter of this Agreement. There is no other oral understanding, agreement, warranty or representation whether express or implied in any way extending, defining or otherwise relating to the provisions of this Agreement or binding on the parties with respect to any of the matters to which this Agreement relates.

**26.2 No inducement**

Each of the parties covenants and irrevocably acknowledges that it has not been induced to enter into this Agreement by any statement, warranty, representation, understanding, act, omission, fact, matter, thing or conduct by or on behalf of any person including the other party, other than as expressly recorded in this Agreement.

**26.3 Provision is to remain in full force and effect**

The provisions of this clause 26 will operate and remain in full force and effect. No other fact, matter or circumstance, including breach of the provisions of the *Competition and Consumer Act 2010* (Cth) by a party to this Agreement, will interfere with or in any way derogate from the operation and effect of this clause.

**27. SEVERANCE**

If any term of this Agreement is for any reason acknowledged by the parties, or adjudged by a court of competent jurisdiction or held by any competent government authority to be invalid, illegal or unenforceable, such term or provision will be severed from the remainder of the provisions of this Agreement and will be deemed never to have been part of this Agreement and the remainder of the provisions of this Agreement will subsist and remain in full force and effect, unless a basic purpose or purposes of this Agreement would thereby be defeated.

## 28. JOINT VENTURE LIABILITY

*[insert as relevant]*

### 28.1 Definitions

In this clause:

- (a) “**Financial Obligation**” means an obligation of a party under or arising out of this Agreement to pay or cause to be paid an amount of money, including a liability for damages for a breach of a Performance Obligation;
- (b) “**Joint Venture**” means the joint venture between the Joint Venturers, details of which are set out in Item 3 of Schedule 1;
- (c) “**Joint Venture Percentage**” means the respective percentage interest of each Joint Venturer in the Joint Venture, as set out in Item 3 of Schedule 1;
- (d) “**Joint Venturers**” means each of the entities set out in Item 3 of Schedule 1 as holding a Joint Venture Percentage.
- (e) “**Performance Obligation**” means any obligation of a party arising under this Agreement, other than a Financial Obligation.

### 28.2 User agent for Joint Venturers

- (a) The User enters into this Agreement as agent for and on behalf of the Joint Venturers, and the User warrants that it is duly authorised to do so.
- (b) The User will not be personally liable under this Agreement in its capacity as agent for the Joint Venturers.

**OR**

### **[Joint Venturers comprise a single party]**

The Joint Venturers comprising the User will be a single party to this Agreement, but their respective rights against and liabilities to DBCT Management and DBCT Guarantor will be determined in accordance with this clause 28.]

### 28.3 Financial Obligations of Joint Venturers are several

Subject to clauses 28.4 and 28.5 (and any other provision of this Agreement which may expressly provide otherwise), the liability of each Joint Venturer in respect of each Financial Obligation of the User is several, and each Joint Venturer will only be liable for an amount owing by the User equivalent to its Joint Venture Percentage of that amount.

### 28.4 Rights and Performance Obligations of Joint Venturers are joint

- (a) Each right of the User under this Agreement can only be exercised by the User or by *[delete highlighted words where the Joint Venturers are all signatories in their own right]* the Joint Venturers jointly.
- (b) Each Joint Venturer will be jointly liable in respect of each Performance Obligation of the User (other than any Performance Obligation expressed to be imposed on an individual Joint Venturer).

### 28.5 Individual Joint Venturer default

- (a) If:
  - (i) a Joint Venturer defaults in respect of the performance of a Financial Obligation of the User;

- (ii) the other Joint Venturers are not in default in respect of that Financial Obligation; and
- (iii) **[where there is a single User, as agent for the Joint Venturers]** the User gives a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

**OR**

- (iv) **[where the Joint Venturers are all signatories in their own right]** the other Joint Venturers give a notice to DBCT Management, copied to the defaulting Joint Venturer, identifying the defaulting Joint Venturer and its default,

then that defaulting Joint Venturer (unless it disputes the default in writing to DBCT Management within 7 days of receiving a copy of the notice) will be solely liable, to the extent of the default, in the performance of that Financial Obligation.

- (b) Any notice given pursuant to clause 28.5(a)(iii) and not disputed by the defaulting Joint Venturer within the time prescribed is conclusive evidence that the defaulting Joint Venturer specified in the notice is in default to the extent stated and the notice binds all parties unless and until revoked or amended by the User.
- (c) If more than one (but not all) Joint Venturers default and are subject to a notice under clause 28.5(a)(iii), they will be severally liable in proportion to their respective relevant Joint Venture Percentages.
- (d) Nothing in this clause 28 affects DBCT Management's rights under clauses 14.1 and 14.2 of this Agreement.

## **28.6 Clarifications**

For clarification:

- (a) any assignment by a Joint Venturer of any part of its Joint Venture Percentage in respect of this Agreement will be an assignment to which clause 12.2 applies, but in such a case references in that clause to the "User" and "assignee" respectively will be taken to refer only to the relevant Joint Venturer and the intended assignee from it;
- (b) any assignment by the User which is merely the substitution of a new agent for the Joint Venture (where there is no change in the Joint Venturers or the Joint Venture Percentages) will be consented to by DBCT Management unless it has reasonable grounds to object to the proposed new agent (for example, it is insolvent or has a history of default).

## **29. GUARANTEES OF USER**

### **29.1 User to provide Security **[insert if provision of security is a condition precedent]****

**[Notwithstanding clause 2]**, it is a condition precedent to this Agreement that the User must provide to DBCT Management, the Security in Schedule 8, effective not later than the Effective Date, to secure the obligations of the User to DBCT Management under this Agreement.

### **29.2 Failure to provide Security **[insert if relevant]****

If the User does not provide the Security referred to in clause 29.1, then this Agreement will have no force or effect.

### **29.3 Guarantee if User does not remain in good financial standing**

- (a) If after the Execution Date:

- (i) the User applies to DBCT Management to increase the Annual Contract Tonnage;
- (ii) in the reasonable opinion of DBCT Management, there is a likelihood that the User (or, if applicable, a provider of Security) may have ceased or will cease to be reputable or of good financial standing; or
- (iii) a Security previously given in connection with this Agreement is due to expire within 90 days,

the User must provide such information to DBCT Management as may be reasonably requested by DBCT Management by notice to establish that the User (or, as applicable, a provider of Security) is reputable and of good financial standing. DBCT Management must keep any such information in the strictest confidence, except that DBCT Management may disclose such information on a confidential basis to its financiers and consultants who require such information to assess the solvency and creditworthiness of the User or provider of Security.

- (b) If, after the Execution Date, in the reasonable opinion of DBCT Management:
  - (i) the User (or, as applicable, a provider of Security) has ceased to be reputable or of good financial standing with the capability to fulfil all of its obligations under (or in respect of) this Agreement; or
  - (ii) [where this Agreement concerns Access to a Differentiated Expansion Component] there is a materially increased risk that the circumstances in 29.3(b)(i) will occur prior to the earlier of the Terminating Date and the end of the Term,
 then the User must provide, within 20 Business Days after written notice from DBCT Management, to DBCT Management, a Security which:-
  - (iii) secures (to an extent reasonable in the circumstances) the obligations under this Agreement of the User to DBCT Management;
  - (iv) is from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing and with the capability to fulfil or cause the fulfilment of all of the financial obligations of the User under this Agreement; and
  - (v) is in a form, and for an amount and period, satisfactory to DBCT Management (acting reasonably).
- (c) If the User does not provide such Security within 20 Business Days of receiving such written notice from DBCT Management, then the User will be in breach of a material obligation under this Agreement.
- (d) The User is entitled to dispute a conclusion by DBCT Management on which a notice under clauses 29.3(a) or 29.3(b) is based.

#### **29.4 Request to remove or reduce Security**

- (a) If the User has provided a Security pursuant to this clause 29 and considers that its financial circumstances have improved or any other relevant circumstances have changed since the provision of the Security, it may request DBCT Management to release or reduce the Security.
- (b) The User must provide to DBCT Management such evidence of its financial circumstances, or other relevant circumstances, as DBCT Management reasonably requests, before DBCT Management is obliged to consider the request.

- (c) DBCT Management must not unreasonably refuse any such request, but it may have regard to (amongst other things) the circumstances in which the Security was originally provided, changes in circumstances since that time, and any reasonable custom and practice of DBCT Management in respect of requiring security from new Access Holders.

### **30. GUARANTEE OF DBCT MANAGEMENT'S OBLIGATIONS**

#### **30.1 Guarantee**

DBCT Guarantor irrevocably and unconditionally guarantees to the User on demand payment of all amounts payable by DBCT Management under or arising out of this Agreement (including all amounts for which DBCT Management may become liable in respect of any breach of this Agreement).

#### **30.2 Unconditional nature of guarantee**

DBCT Guarantor agrees that DBCT Guarantor's obligations under this Agreement are unconditional (irrespective of the validity, regularity or enforceability of any provision of this Agreement or the absence of any action to enforce the same or the waiver or the consent of the User in respect of any provision of this Agreement or the recovery of any judgment against DBCT Management or any action to enforce the same or any variation of the terms of this Agreement or any other dealings, transactions or arrangements between the User and DBCT Management or other circumstances which might otherwise constitute a legal or equitable discharge of or defence to a surety). This guarantee shall be a continuing guarantee which shall not be discharged except by a complete performance of all obligations of DBCT Management under this Agreement.

#### **30.3 Guarantee not affected by changed circumstances**

The liability of DBCT Guarantor under this Agreement will not be lessened, affected or impaired by any time or indulgence granted to DBCT Management by the User or any dealings or transactions between the User and DBCT Management (whether or not DBCT Guarantor is a party or cognisant of the same) or by the dissolution of DBCT Management or any change in the status, functions, control or ownership of DBCT Management or any consolidation, merger, conveyance or transfer by DBCT Management or any waiver, variation or novation of this Agreement or other dealings, transactions or arrangements between the User and DBCT Management which might otherwise constitute a discharge to a surety.

#### **30.4 Capacity of DBCT Guarantor**

- (a) DBCT Guarantor enters into this Agreement as trustee of the DBCT Trust and in no other capacity.
- (b) Any liability of DBCT Guarantor arising from this Agreement can be enforced against DBCT Guarantor only to the extent to which it can be satisfied out of the property of the DBCT Trust and out of which the DBCT Guarantor is actually indemnified for the liability. This provision applies despite any other provision of this Agreement.
- (c) A person entitled to the benefit of this Agreement may not sue DBCT Guarantor personally or seek the appointment of a liquidator, administrator, receiver or similar person to DBCT Guarantor personally or prove any liquidation, administration or arrangement of or affecting DBCT Guarantor personally.
- (d) The provisions of this clause 30.4 do not apply to any obligation or liability of DBCT Guarantor to the extent that it is not satisfied because under its constitution or deed of trust or by operation of law there is a reduction in the extent of DBCT Guarantor's

indemnification over the assets of the DBCT Trust, as a result of DBCT Guarantor's fraud, negligence, breach of trust or breach of duty.

- (e) All of the provisions of this clause 30 are subject to this clause 30.4.

### **31. LIMITATIONS TO LOSSES AND DAMAGES**

#### **31.1 No indirect Loss or Consequential Loss**

Notwithstanding any other provision of this Agreement, DBCT Management is not liable to the User for any indirect Loss or Consequential Loss.

**SCHEDULE 1 - REFERENCE SCHEDULE**

<b>Item</b>	<b>Reference</b>	<b>Definition/Details</b>								
1	DBCT Management	DBCT Management Pty Limited ABN 16 097 698 916								
2	DBCT Guarantor	DBCT Investor Services Pty Ltd ABN 11 052 156 082 as trustee for the DBCT Trust								
3	User	<i>[Insert name, address for notices and contact details]</i>								
4	Execution Date									
5	Effective Date									
6	Term	[ ] years*  (* note: if this Agreement provides for the Shipping of Coal for 10 years or more the Option and rolling 12 month extension process in Clause 20 applies)								
7	Annual Contract Tonnage	<table border="0"> <tr> <td>Year</td> <td>Tonnage</td> </tr> <tr> <td>20xx</td> <td>AAA</td> </tr> <tr> <td>20yy</td> <td>BBB</td> </tr> <tr> <td>20zz etc</td> <td>CCC</td> </tr> </table>	Year	Tonnage	20xx	AAA	20yy	BBB	20zz etc	CCC
Year	Tonnage									
20xx	AAA									
20yy	BBB									
20zz etc	CCC									
8	Terminal Component	<p><i>[For an Agreement which is entered by an Expansion Party in respect of one or more Expansion Component(s) only, insert details of the Expansion Component(s)]</i></p> <p><i>[For an Agreement which is entered in respect of the Existing Terminal (excluding Expansion Components), identify the Existing Terminal excluding any Expansion Components]</i></p>								

## SCHEDULE 2 - CALCULATION OF TERMINAL INFRASTRUCTURE CHARGE AND MONTHLY PAYMENT

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### 1. Monthly Payment (MP)

For each Terminal Component the User must pay to DBCT Management a Monthly Payment in each Month "m" of each Financial Year ( $MP_{u,m}$ ), calculated as follows:-

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

where:-

**TIC** is the Terminal Infrastructure Charge per tonne of Annual Contract Tonnage applicable for a relevant Financial Year to the Terminal Component as specified under Schedule 2, Section 2, and amended or adjusted in accordance with Schedule 2, Section 3; and

**MRT<sub>u,m</sub>** is the number of tonnes which is the proportion of the Annual Contract Tonnage attributable to each Month "m" of a Financial Year in respect of the Terminal Component. Where the rate of the Annual Contract Tonnage for the User does not vary during a Financial Year and applies to the full Financial Year, the MRT<sub>u,m</sub> for the User will be one-twelfth of the Annual Contract Tonnage for the relevant Financial Year. Where the rate of the Annual Contract Tonnage for the User varies during a Financial Year, the MRT<sub>u,m</sub> will vary from Month to Month to reflect one-twelfth of the annualised rate of the Annual Contract Tonnage at that time.

The Monthly Payment will be adjusted during a Financial Year where the TIC is amended or adjusted in accordance with Schedule 2, Section 3.

### 2. Terminal Infrastructure Charge (TIC)

The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date, being a charge per tonne of Annual Contract Tonnage for the Terminal Component, is \$[insert amount agreed between DBCTM and User or determined by the arbitrator in the event the Initial TIC is referred to arbitration under the Access Framework].

### 3. Amendment of the TIC

- (a) The TIC will be amended and adjusted annually and on the occurrence of a Review Event in accordance with section 10 and Schedule C of the Access Framework.
- (b) DBCT Management will notify the User of any amendment or adjustment to the TIC in accordance with Schedule C of the Access Framework.
- (c) Any amendment to the TIC will be effective from the date specified in the Access Framework.

## SCHEDULE 3 - SERVICES

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### 1. **Train scheduling**

DBCT Management must (subject to availability of trains and factors beyond its control) co-ordinate cargo assembly windows at the terminal to receive Coal parcels and provide train operators and Access Holders with details of cargo receipt windows suitable for terminal acceptance of trains and ensure sufficient unloading capacity is made available at the Terminal, to allow each Access Holder to ship its Annual Contract Tonnage of Coal in each Financial Year.

### 2. **Train unloading**

If a train carrying an Access Holder's Coal arrives at the Terminal within its designated cargo build window, DBCT Management must ensure that the train is unloaded at a rate (consistent with the type and condition of the Coal) consistent with achieving Handling of the Annual Contract Tonnage of Coal for an Access Holder.

### 3. **Reclaiming and vessel loading**

DBCT Management must:

- (a) make the Terminal available for berthing by vessels (which are satisfactory in all respects to receive Coal) nominated by the User, such that not less than the Annual Contract Tonnage can be Handled by DBCT Management in each Financial Year (as long as the vessel and/or cargo mix required by the User or its customer does not unreasonably impact on the efficiency of the Terminal); and
- (b) load the User's Coal into a vessel which is nominated by the User and is available for loading so as to achieve the objective in section 3(a).

### 4. **Incidental services**

DBCT Management must provide the following services, incidental to Coal handling (unless provided directly by the Operator):

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

### 5. **Miscellaneous services**

If required by the User or any Approval or statutory authority notified to DBCT Management, DBCT Management must provide the following Miscellaneous Services to the User:

- moisture adding;
- compacting;
- surfactant adding;

- dozing;
- blending (subject to section 6(d) below); and
- any other services reasonably requested from time to time in writing by the User to DBCT Management, provided that such services will not unreasonably impact on the efficiency or capacity of the Terminal.

## 6. **Stockpiling and blending**

- (a) DBCT Management must provide to the User sufficient stockpile areas to allow cargo assembly (i.e. assembly of cargo for a nominated vessel with an appropriate arrival time) for vessels onto which the User's Coal is to be loaded.
- (b) Remnant management areas will be determined by the Operator in areas of the Terminal which are not required for cargo assembly and which can be made available for dedicated stockpiling without materially affecting efficiency of the Terminal. DBCT Management must ensure that the User is offered the opportunity to use a proportion of that stockpiling area which accords with its proportion of the total annual contract tonnage under all Access Agreements and Existing User Agreements.
- (c) The stockpiling rights in sections 6(a) and 6(b) are subject to any other obligation of DBCT Management under any Existing User Agreement with an Existing User entered into prior to 1 July 2004 (to the extent that such obligation has not been waived).
- (d) DBCT Management must blend Coal if so requested, but subject to requirements in the Terminal Regulations from time to time, which may:
  - (i) require Coal to be blended before it is received at the Terminal, where reasonably practicable;
  - (ii) require Coal to be blended into a stockpile where reasonably practicable (rather than being blended from stockpile); and
  - (iii) limit the proportions in which Coal may be blended (to limit the increase in consumption of capacity of the Terminal consumed because of blending).
- (e) DBCT Management must transfer the User's Coal from the train unloading facility at the Terminal to the relevant stockpile area or a cargo assembly area and stockpile the User's Coal in that area (except to the extent that a quality plan under the Terminal Regulations has been agreed to which provides for direct loading from train to vessel).

## 7. **Prevention of contamination**

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

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

## 8. **Data provision**

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

## 9. Co-ordination

Subject to the User providing relevant information to DBCT Management within a reasonable time, DBCT Management must:

- (a) ensure, as far as practicable, that it discharges its obligations in this Schedule in accordance with the requirements of the User's reasonable quality plans, reasonable shipping programs and contracts as notified to DBCT Management and the Operator from time to time consistent with Terminal Regulations, and
- (b) (subject to the foregoing and having regard to equity amongst Access Holders and Existing Users) use its best endeavours to minimise the aggregate cost to the User arising out of Handling at the Terminal (including Demurrage Costs and rail freight).

## 10. Terminal Regulations, Force Majeure, Laws and Operation & Maintenance Contract

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

- (a) any relevant provisions of the Terminal Regulations;
- (b) any specific provision of this Agreement including any provisions relating to an event of Force Majeure;
- (c) the ability of DBCT Management to require the Operator under the Operation & Maintenance Contract to provide the Services; and
- (d) without limiting section 10(c) any specific provision in the Operation & Maintenance Contract including any provisions relating to an event of force majeure.

## 11. Standard for Services

- (a) The provision of the above Services by DBCT Management must be carried out in accordance with due skill, care and diligence in accordance with the Access Framework, the Terminal Regulations, Good Operating and Maintenance Practice and all applicable Laws.
- (b) When providing the above Services, DBCT Management must take into account the following factors, where relevant:
  - (i) lowest total whole of life cost;
  - (ii) reliability and economy of performance;
  - (iii) maximising the effective life of the Terminal; and
  - (iv) DBCT Management's non-discrimination obligations under the Access Framework.

**SCHEDULE 4 – UTILISATION ADVICE**

**(clause 6.1)**

Calendar Year:														
Mine:														
	Annual Forecast	Updated Forecast				Additional Information								Comments / Exceptions
						Planned Mine Outages	Rail Ent.*	Ship Mix**						
Forecast Due Date	15-Feb	1 Jul	1 Oct	1 Jan	1 Apr			Handi	S-Pan.	M-Pan.	S-Cape.	M-Cape.	Unk	(Include comments on any special requirements, or exceptions from existing practice for the period)
Units	'000t	'0005	'000t	'000t	'000t	days	'000t	'000t	'000t	'000t	'000t	'000t	'000t	
Apr	----	----	----	----	----									
May	----	----	----	----	----									
Jun	----	----	----	----	----									
Jul			----	----	----									
Aug			----	----	----									
Sep			----	----	----									
Oct				----	----									
Nov					----									
Dec					----									
Jan														
Feb														
Mar														
Apr														
May														
Jun														
Jul	----	----												
Aug	----	----												
Sep	----	----												



**SCHEDULE 5 - PRODUCT SHIPMENT NOTICE**

**(clause 9.1)**

<b>TO</b>	:	North Queensland Bulk Ports Corporation Limited (Fax: _____ ) DBCT Management Pty Ltd (Fax: 07 3002 3101)
<b>FROM</b>	:	<i>[User shipping coal]</i>
<b>SUBJECT</b>	:	Product Shipment Notice – DBCT
<b>DATE</b>	:	
<b>PAGE</b>	:	1 (including this cover page)

<b>Ship Name:</b>	
<b>Date Departed:</b>	
<b>Shipping Number:</b>	
<b>Mine Name:</b>	
<b>User Agreement Name:</b>	
<b>Party liable for User Agreement charges:</b>	
<b>Total Number of Tonnes:</b>	

(This total **MUST** agree with Manifest. If the Manifest covers multiple cargoes, separate Product Shipment Notices for each cargo must be completed)

Does Manifest include more than one cargo?

No   
Yes

User: \_\_\_\_\_ Date: \_\_\_\_\_

**SCHEDULE 6 - TEMPLATE FOR ASSIGNMENT OF ANNUAL CONTRACT  
TONNAGE**

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**(clause 12.2)**

**Deed of Variation**

**DBCT Management Pty Limited**

**[User 1 full name]**

and

**[Assignee full name]**

---

## This Deed of Variation

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

- 1 **DBCT Management Pty Limited**  
ACN 097 698 916)  
of Level 15, 1 Eagle Street, Brisbane, Queensland  
**(DBCT Management)**
- 2 **The User named in item 1 of the Schedule**  
([User 1])
- 3 **The person named in item 3 of the Schedule**  
([Assignee])

Recitals [Option 1 – Select this option where the Assignee is **not** an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.
- B. [User 1] is a party to a User Agreement with DBCT Management, and under the User Agreement DBCT Management grants [User 1] a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship Coal through the Terminal in the Swap Period under a User Agreement.
- E. [User 1] wishes to vary the Annual Contract Tonnage in its User Agreement so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the Terminal in the Swap Period, and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.
- F. [Assignee] wishes to enter into a User Agreement with DBCT Management to Ship the Swap Contract Tonnage through the Terminal in the Swap Period.
- G. DBCT Management has agreed to consent to the variation to [User 1]'s User Agreement to achieve that objective, on the terms of this deed.

Recitals [Option 2 – Select this option where the Assignee is an existing User.]

- A. DBCT Management is the owner of a long term lease of the Terminal.

- B. [User 1] and [Assignee] are each a party to a User Agreement with DBCT Management, and under each User Agreement DBCT Management grants them a right to have an Annual Contract Tonnage of Coal Handled at the Terminal.
- C. [User 1]'s entitlement to Ship Coal through the Terminal in the Swap Period under [User 1]'s User Agreement exceeds its requirements by the Swap Contract Tonnage.
- D. [Assignee] wishes to Ship more Coal through the Terminal in the Swap Period than its entitlement under [Assignee]'s User Agreement.
- E. [User 1] and [Assignee] wish to vary the Annual Contract Tonnages in their respective User Agreements so that [Assignee] is entitled to Ship the Swap Contract Tonnage through the Terminal in the Swap Period (in addition to its existing Annual Contract Tonnage), and [User 1]'s entitlement to Ship Coal under [User 1]'s User Agreement is reduced accordingly.
- F. DBCT Management has agreed to consent to the variations to the User Agreements to achieve that objective, on the terms of this deed.

### The deed witnesses

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

---

## 1 Definitions and interpretation

### 1.1 Definitions

**Effective Date** means the date set out in item 7 of the Schedule.

**Swap Contract Tonnage** means the absolute tonnages (or respective tonnages for respective periods) set out in item 6 of the Schedule. Where the Swap Period relates to part, but not all, of a Financial Year, the Swap Contract Tonnage in respect of that period is expressed as an annualised rate for that period - for the purposes of calculating the Monthly Charges for the Swap Period under the User Agreement and determining the rate at which Shipping is permitted in that period.

**Swap Period** means the period set out in item 5 of the Schedule.

[User 1]'s User Agreement means an agreement between DBCT Management and [User 1] bearing the date set out in item 2 of the Schedule.

[[Assignee]'s User Agreement means an agreement between DBCT Management and [Assignee] bearing the date set out in item 4 of the Schedule.] *[Drafting Note: Select this option if the Assignee is an existing User.]*

**[[Assignee]]'s User Agreement** means a User Agreement to be entered into between DBCT Management and **[Assignee]**. *[Drafting Note: Select this option if the Assignee is not an existing User.]*

User Agreement means one or more of **[User 1]**'s User Agreement and **[Assignee]**'s User Agreement as the context requires.

## 1.2 Interpretation

- (a) Terms which are defined in the User Agreement/s or Terminal Regulations have the same meaning in this deed (except where the context otherwise requires).
- (b) The interpretation provisions of the User Agreement/s apply in respect of the interpretation of this deed, as if set out in this deed.

---

## 2 Variations to User Agreement/s

### 2.1 **[User 1]**'s User Agreement

As of the Effective Date, the Annual Contract Tonnage in **[User 1]**'s User Agreement is reduced by the Swap Contract Tonnage for the Swap Period.

### 2.2 **[Assignee]**'s User Agreement

As of the Effective Date, the Annual Contract Tonnage in **[Assignee]**'s User Agreement will be the Swap Contract Tonnage for the Swap Period. *[Drafting Note: Delete this paragraph if the Assignee is an existing User.]*

As of the Effective Date, the Annual Contract Tonnage in the **[Assignee]**'s User Agreement is increased by the Swap Contract Tonnage for the Swap Period. *[Drafting Note: Delete this paragraph if the Assignee is not an existing User.]*

### 2.3 Revised Consolidated Annual Contract Tonnages

DBCT Management will provide to **[User 1]** and **[Assignee]** respectively a revised, consolidated table of Annual Contract Tonnages for the Term of their User Agreement, to reflect the amendments [and new entitlements] pursuant to this deed. In the absence of manifest error, that table will be taken to replace the table of Annual Contract Tonnages previously applicable under the relevant User Agreement (if applicable). *[Drafting Note: Delete words in square brackets if the Assignee is an existing User.]*

### 2.4 Calculation of Entitlement under the Terminal Regulations

For the avoidance of any doubt, it is intended that **[Assignee]** will become entitled to the "Entitlement" under the Queue Management Procedures currently in place under the Terminal Regulations which **[User 1]** would (but for this deed) have previously been entitled to in relation to the Swap Contract Tonnage for the Swap Period, but that neither parties' Entitlements outside the Swap Period (if any) will be affected. *[Note: only*

***required if Terminal Regulations include a Queue Management System at the time this deed is entered into]***

## 2.5 Transitional

- (a) The parties recognise that certain determinations (for example, the annualised amount of HCF and HCV) may have been made to date in respect of a current Financial Year before the variations in this deed were agreed.
- (b) DBCT Management shall, as soon as practicable, cause appropriate adjustments to be made in respect to the amounts charged under [[User 1]'s User Agreement/the respective User Agreements], to reflect the variations arising out of this deed. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***
- (c) Nothing in this deed requires DBCT Management or the Operator to pay or repay amounts other than adjustments of the kind already contemplated by [[User 1]'s User Agreement/the User Agreements]. In particular, DBCT Management is not as a result of the variations effected by this deed required to accelerate a payment, or to make a payment to either of the other parties which, in aggregate, is more than it would have otherwise have been required to make but for this deed. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***

## 2.6 User Agreements still in force

Except as set out in clauses 2.1 and 2.2 of this deed, the parties agree and acknowledge that all other provisions of [User 1]'s User Agreement/the User Agreements] remain in full force and effect. ***[Drafting Note: Select the relevant option depending in whether the Assignee is an existing User.]***

---

## 3 Costs and stamp duty etc

- (a) [User 1] and [Assignee] will each bear their own costs and expenses in respect of the negotiation, preparation and execution of this deed.
- (b) [Assignee] will be liable for the costs and expenses (including legal costs) of DBCT Management in respect of the negotiation, preparation and execution of this deed, and any stamp duty and other duties, taxes or other amounts payable as a result of this deed.

---

## 4 Governing law

This deed is governed by the laws of Queensland.

---

## **5 Counterparts**

This deed may be executed in any number of counterparts. All counterparts taken together will be taken to constitute one instrument.

## Schedule to Deed of Variation

(clause 12.2 Standard Access Agreement)

Item

1.	User reducing Annual Contract Tonnage	<i>[insert User 1 full name ]</i>
2.	<b>[User 1]</b> 's User Agreement (date)	<i>[insert date]</i>
3.	User [increasing / acquiring] Annual Contract Tonnage <b>[Drafting Note: Select the relevant option depending on whether the Assignee is an existing User.]</b>	<i>[insert Assignee's full name ] [insert date]</i>
4.	<b>[Assignee]</b> 's User Agreement (date)	<i>[insert date] [Drafting Note: Insert 'Not applicable' if the Assignee is not an existing User.]</i>
5.	Swap Period	<i>[insert start and end dates of Swap Period]</i>
6.	Swap Contract Tonnage	<i>[insert absolute no. of tonnes swapped for each relevant period and annualised rate for each period]Mt</i>  (Annualised rate*:[ <input type="text"/> ] Mtpa)
7.	Effective Date	<i>[insert date of agreement to swap]</i>

\* Annualised rate = (Swap Contract Tonnage / No. of days in Swap Period) x 365

---

**Executed as a deed:**

**Signed sealed and delivered by  
DBCT Management Pty Limited:**

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

\_\_\_\_\_  
Director

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

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

**Signed sealed and delivered by  
[User 1 full name]:**

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

\_\_\_\_\_  
Director

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

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

**Signed sealed and delivered by  
[Assignee full name]:**

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

\_\_\_\_\_  
Director

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

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

**SCHEDULE 7 - TEMPLATE NOTICE FOR THIRD PARTY PERMISSION TO SHIP**

**(clause 12.5)**

**TO** : Dalrymple Bay Coal Terminal Pty Ltd (Fax: 07 4956 3353)  
 DBCT Management Pty Ltd (Fax: 07 3002 3101)

**FROM** : *[Principal's name*  
*Beneficiary's name]*

**SUBJECT** : Notice of Permission for Third Party to Ship Coal

**DATE** :

<b>User offering the Capacity (Principal):</b>	
<b>Company accepting the Capacity (Beneficiary):</b>	
<b>Period pertaining to the swap:</b>	
<b>Total Number of Tonnes:</b>	
<b>Nominated Vessel (where known):</b>	
<b>Is this a:</b> (a) Transfer (i.e. a one-way transaction) that will not be repaid; or <input type="checkbox"/> (b) Swap (i.e. a two-way transaction) that will be repaid? <input type="checkbox"/> <b>Repayment date:</b> /    / <b>When is repayment expected?</b>	

Acknowledgment of this notice is subject to receipt of separate Product Shipment Notice (PSN) for all cargos. Invoicing will be in strict accordance with User Agreement terms (i.e. all charges will be to the Principal).

\_\_\_\_\_  
 Principal  
 Date of Request:

\_\_\_\_\_  
 Beneficiary  
 Date of Request:

**Notice Acknowledged:**

\_\_\_\_\_  
 DBCT Management Pty Ltd  
 Date of Acknowledgment:

## SCHEDULE 8 - SECURITY

---

**(clause 29)**

***[Insert details, if applicable]***

*[eg The User must provide the following Security from an entity which, in the reasonable opinion of DBCT Management, is reputable and of good financial standing, with the capability to fulfil all of the obligations of the User under this Agreement.]*

## SCHEDULE 9 - DEFINITIONS AND INTERPRETATION

---

### Definitions

"**Access**" has the meaning given in the Access Framework.

"**Access Agreement**" has the meaning given in the Access Framework.

"**Access Application**" has the meaning given in the Access Framework.

"**Access Charges**" has the meaning given in the Access Framework.

"**Access Holder**" has the meaning given in the Access Framework.

"**Access Seekers**" has the meaning given in the Access Framework.

"**Access Framework**" means the access framework (including its schedules) applying to DBCT Management from time to time relating to provision of the Services by it, as implemented under the Deed Poll.

"**Aggregate Annual Contract Tonnage**" has the meaning given in the Access Framework.

"**Agreement**" means this agreement, including all schedules attached to it.

"**Annual Contract Tonnage**" means the maximum quantity of Coal that the User is entitled to deliver to and have Handled through the Terminal in a relevant Financial Year under this Agreement in accordance with Item 7 of Schedule 1 (as amended from time to time pursuant to this Agreement) including tonnage which the User is entitled to have Handled but which may not, at a practical level, be able to be Handled due to circumstances such as a force majeure event or relevant provisions of Terminal Regulations and any tonnage which the User would be entitled to have Handled but for the suspension of the User's right to have the tonnage Handled under this Agreement.

For clarification, where a Financial Year or any relevant period is less than twelve months, or the annualised rate of Annual Contract Tonnage varies during a Financial Year, the Annual Contract Tonnage will be expressed as the relevant annualised rate at a point in time for the purposes of calculating the charges payable each Month, but will nevertheless be the absolute amount of tonnes which the User is entitled to have Handled over the entire Financial Year for purposes such as any annual reconciliation of HCF and the tonnages included in the Aggregate Annual Contract Tonnage.

"**Approval**" has the meaning given in the Access Framework.

"**Business Day**" means any day other than a Saturday, a Sunday, or a public holiday in Brisbane.

"**Capital Expenditure**" means expenditure which:

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

but not expenditure recovered through HCF or HCV.

**"Cargo Manifest"** means the manifest referred to in clause 9.

**"Cash Rate Target"** means, at a relevant time, the cash rate target then prevailing and published by the Reserve Bank of Australia on its website (www.rba.gov.au) at that time.

**"Change of Control"** will occur in the User if at any time during the term of this Agreement, any person obtains, or ceases to hold, directly or indirectly:

- (a) beneficial ownership of 50% or more (in aggregate) of the voting shares in the corporation; or
- (b) effective control of the board of directors of the corporation, other than as a result of the transfer of securities in a corporation listed on any recognised stock exchange.

**"Claim"** means any action, proceeding, allegation, demand or claim in any form for relief or compensation of any nature.

**"Coal"** means coal, coke, and other like materials as are approved by DBCT Management.

**"Commencement Date"** has the meaning given in the Access Framework.

**"Conditional Access Agreement"** has the meaning given in the Access Framework.

**"Consequential Loss"** means any one or more of the following:

- (a) Loss of profits; or
- (b) Loss of opportunity to make profits; or
- (c) Loss of business opportunity; or
- (d) special exemplary or punitive damages; or
- (e) any Loss which does not directly and naturally flow in the normal course of events from the occurrence of the event giving rise to the liability for such Loss, whether or not such Loss was in the contemplation of the parties at the time of entry into this agreement,

including any of the above types of Loss arising from an interruption to a business or activity.

**"Current Expansion"** means *(to be inserted as applicable)*.

**"Deed Poll"** means the irrevocable deed poll signed by DBCT Management in March 2019 under which it covenants to comply with the Access Framework.

**"Default Interest Rate"** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 3.5%.

**"DBCT Management's Personal Responsibility"** means DBCT Management's personal liability as a result of its own acts or omissions, independently of and excluding any liability which it might have directly or indirectly arising from the acts or omissions of the Operator or third parties (including contractors and subcontractors of DBCT Management).

**"Delay"** means any delay, inability or failure (for any reason, including breach of this Agreement or negligence) to Ship or Handle Coal in the tonnages and at the rates contemplated in this Agreement. For the User, this includes a failure to deliver Coal to the Terminal or an inability to schedule vessels to load Coal. For DBCT Management, this includes the inability to provide Services at the Terminal (in whole or part) for any reason when Coal would otherwise have been made available by the User.

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

**"Differentially Priced Capacity"** has the meaning given in the Access Framework.

**"Differentiated Expansion Component"** has the meaning given in the Access Framework.

**"Direct Loss"** means charges actually paid pursuant to this Agreement in respect of the period of the Delay. For the purposes of clause 13.4, the User's Losses arising out of a Delay will be taken to include the amount of the relevant Direct Losses.

**"Due Date"** has the meaning given in clause 5.1.

**"Effective Date"** means,[ subject to prior satisfaction of the condition precedent in clause 29.1,] the date set out as such in Schedule 1.

**"Execution Date"** is the date described as such in Schedule 1 and will be completed as the day this Agreement is executed by the last of the parties to execute it.

**"Existing Terminal"** has the meaning given in the Access Framework.

**"Existing User"** means a party who has an entitlement to have coal Handled through the Terminal as at the Commencement Date.

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

**"Expansion Component"** has the meaning given in the Access Framework.

**"Expansion Component Capacity"** has the meaning given in the Access Framework.

**"Expansion Party"** has the meaning given in the Access Framework.

**"Financial Year"** means:-

- (a) the First Financial Year; and
- (b) each 12-month period from July 1 of one calendar year to June 30 of the next ensuing calendar year; and
- (c) any period from the last July 1 in the Term until the end of the Term.

**"First Financial Year"** means the period from the Effective Date to the next following 30 June.

**"Fixed Operating Costs"** means the aggregate of all amounts:

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

to the extent that they represent a fixed cost of operating the Terminal.

**"Force Majeure"** means any event or circumstance not within the control of DBCT Management, and which, by the exercise of a reasonable standard of care and diligence, DBCT Management could not have overcome. Any act or omission of the Operator will be assumed to be beyond the control of DBCT Management, unless it has been specifically directed by DBCT Management and carried out by the Operator in the manner in which it can reasonably be inferred that DBCT Management intended.

**"Framework Agreement"** means the framework agreement between DBCT Holdings Pty Ltd, the State of Queensland, DBCT Management and others dated 31 August 2001.

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

**"GST Exclusive Consideration"** has meaning given to it in clause 21(b).

**"Handle"** means the receiving by rail, unloading, stacking, storing, reclaiming and loading of vessels with Coal, including any other relevant Services required by the User using infrastructure at the Terminal.

**"HCF"** or **"Handling Charge - Fixed"** means the charge determined under clause 6.2.

**"HCV"** or **"Handling Charge - Variable"** means the charge determined under clause 6.3.

**"Independent Expert"** means an independent expert appointed under section 16.3 of the Access Framework.

**"Initial TIC"** means the TIC for the Terminal Component to apply under this Agreement from the Effective Date or the commencement of a Pricing Period. The Initial TIC for the Terminal Component for the Financial Year commencing on the Effective Date is the amount specified in Schedule 2, clause 2.

**"Law"** means any law, statute, by-law, regulation, rule, order, ordinance, proclamation, or delegated or subordinated legislation of the Commonwealth or of any State or Territory of Australia or of any local government.

**"Long Term Delays"** means ongoing, sustained Delays that arise out of physical loss, destruction or damage at the Terminal.

**"Loss"** means any damage, loss (including loss of reputation), cost, expense, fine, penalty or liability incurred by the person concerned, however it arises and whether it is present or future, fixed or unascertained, actual or contingent.

**"Maintenance Work"** means any work involving maintenance of or repairs to (including repair by replacement) any part of the Terminal, including any inspections or investigations required by Good Operating and Maintenance Practice.

**"Miscellaneous Services"** means:

- (a) services requested by the User from time to time which services are nominated in Schedule 3 as Miscellaneous Services; or
- (b) services to the extent that they are materially different (in nature, extent or cost) to the Services provided to other Access Holders and Existing Users at the Terminal including as a result of the nature of the User's Coal (or any contaminants in it) or requirements in respect of its handling, storage, blending, unloading or loading which result in materially additional costs or delays.

**"Month"** means a calendar month.

**"Monthly Payment"** means the monthly instalment of the TIC payable pursuant to clause 4.4, calculated (and adjusted as required) in accordance with Schedule 2.

**"Mtpa"** means million tonnes per annum.

**"No Fault Interest Rate"** means, at a relevant time, the rate per annum equal to the Cash Rate Target at that time plus 0.2%.

**"Notified Period"** has the meaning given in clause 11.4.

**"Notified Tonnage"** has the meaning given in clause 11.4.

**"Notional Contracted Tonnage"** means, in respect of a Financial Year the Aggregate Annual Contract Tonnage.

**"Operation & Maintenance Contract"** means the agreement under which the Operator agrees to operate and maintain the Terminal on a day to day basis, and includes any other agreement in substitution for it under which DBCT Management agrees with a person to operate the Terminal.

**"Operator"** means Dalrymple Bay Coal Terminal Pty Ltd ACN 010 268 167 or such other contractor engaged by DBCT Management under the Operation & Maintenance Contract.

**"Permissible Delay"** means:

- (a) any Delay from which DBCT Management is released from liability pursuant to clauses 3.6(1) or 10.3; or
- (b) any Delay which is imposed by DBCT Management, acting reasonably:
  - (i) because it considers it necessary for the safety of any person or to prevent material damage to property (except where the threat to the person or property arises out of Wilful Default or reckless neglect on the part of DBCT Management); or
  - (ii) to facilitate the performance of Maintenance Work (other than Maintenance Work to the extent it is necessitated by Wilful Default or reckless neglect on the part of DBCT Management) or of a Terminal Capacity Expansion in accordance with clause 10.2.

**"Port"** means both the harbour of Hay Point proclaimed by the Governor-in-Council by Order-in-Council dated 30 October 1983, and all real property held by DBCT Management as part of or relating to that Port.

**"Port Services Agreement"** has the meaning given in the Framework Agreement.

**"Pricing Period"** means the period ending on 30 June 2026 and each subsequent 5 year period during the Term.

**"Product Shipment Notice"** means a notice in the form of Schedule 5.

**"Quarter"** means:

- (a) each 3 month period commencing on 1 July, 1 October, 1 January and 1 April; and
- (b) in respect of the first quarter, commencing on the Effective Date and ending on the day before the commencement of the next quarter.

**"Rail Operator"** has the meaning given in the Access Framework.

**"Representative"** has the meaning given to it in clause 17.4.

**"Review Event"** has the meaning given to it in the Access Framework.

**"Rules"** has the meaning given in clause 15.4(a).

**"Security"** means any form of security or guarantee required to be provided or in fact provided pursuant to clause 29.

**"Services"** means the services described in Schedule 3.

**"Ship"** means the delivery of Coal to the Terminal by rail and the arrangement of vessels by the User such that DBCT Management is able to Handle the User's Annual Contract Tonnage.

**"Socialised Terminal Capacity"** has the meaning given in the Access Framework.

**"Standard Access Agreement"** has the meaning given in the Access Framework.

**"Supplier"** has the meaning given to it in clause 21(d).

**“System”** has the meaning given in the Access Framework.

**“System Capacity”** has the meaning given in the Access Framework.

**"Term"** means the term of this Agreement as specified in Item 6 of Schedule 1, as extended in accordance with this Agreement.

**"Terminal"** means the Terminal Component of the land and port infrastructure located at the Port of Hay Point which is owned by DBCT Holdings Pty Ltd or the State of Queensland and leased to DBCT Guarantor and/or DBCT Management, and known as the Dalrymple Bay Coal Terminal, and includes the following which form part of the Terminal Component:

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

**"Terminal Capacity"** has the meaning given in the Access Framework.

**"Terminal Capacity Expansion"** has the meaning given in the Access Framework.

**“Terminal Component”** means the part of the Terminal as specified in Item 8 of Schedule 1.

**"Terminal Infrastructure Charge" or "TIC"** means the amount (per tonne) payable on the Annual Contract Tonnage specified in Schedule 2, as adjusted in accordance with Schedule 2 and the Access Framework.

**"Terminal Regulations"** means regulations in force and available on DBCT Management’s website governing procedures for the operation of the Terminal existing as at the commencement of this Agreement as amended from time to time in accordance with the Access Framework.

**"Terminating Date"** has the meaning given in the Access Framework.

**"Third Party Amount"** means the amount for which DBCT Management is actually indemnified by the Operator and/or another third party (including a liability insurer) in respect of liability for any Claim made by the User, less DBCT Management's costs of recovery of that amount. For clarification, if a Delay affects more than one Access Holder or Existing User, then the aggregate amount of any payment received by DBCT Management which related to a common Third Party Amount claimed by such affected Access Holders or Existing Users will be distributed to them in the proportions of their respective annual contracted tonnages.

**"User"** means the person specified in item 3 of Schedule 1.

**"User Committee"** has the meaning given to it in clause 17.1.

**"Utilisation Advice"** means a notice in the form in Schedule 4 given by the User to DBCT Management under clause 6.1.

**"Variable Operating Costs"** means the aggregate of all amounts:

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

to the extent that they represent a variable cost of operating the Terminal.

**“Vessel Nomination”** means a vessel nomination notice given by the User under the Terminal Regulations for the purpose of finalising the relevant nominated parcel and vessel details for a proposed shipment.

**"Wilful Default"** means a deliberate act or omission which will result in (and can reasonably be expected to have been intended to result in) a breach of this Agreement and which, as soon as practicable, but in any event within 30 days after written notice (particularising the alleged breach) is given to the party alleged to be in default, is not either:

- (a) acknowledged by the defaulting party and rectified; or
- (b) disputed by the party allegedly in default and referred to dispute resolution in accordance with clause 15, but if the notice of default is ultimately determined by arbitration or order of a court or agreement to have been justified, then rectified as soon as practicable but in any event within 30 days of the adjudication or agreement.

For the purposes of this definition, rectification will be taken to have occurred within the time period stated above, even if not actually completed within that time period, if rectification is reasonably practicable and commences within the stated period and proceeds at all times expeditiously.

## Interpretation

1. In this Agreement headings are for convenience only and do not affect its interpretation.
2. Except to the extent that the context otherwise requires:
  - (a) reference to any statute or statutory provision includes any modification or re-enactment of, or any legislative provisions substituted for, and all legislation and statutory instruments issued under such legislation or such provision;
  - (b) words denoting the singular include the plural and vice versa;
  - (c) words denoting persons or individuals include corporations, associations, trustees, instrumentalities and partnerships and vice versa;
  - (d) words denoting any gender include all genders;
  - (e) references to parties, clauses and Schedules are references to parties, clauses and Schedules to this Agreement as modified or varied from time to time;
  - (f) references to any document, deed or agreement include references to such document or agreement as amended, novated, supplemented, varied or replaced from time to time;
  - (g) references to any party to this Agreement or any other document, deed or agreement include its successors or permitted assigns;
  - (h) all references to dates and times are to Brisbane time;
  - (i) all references to "\$" and "dollars" are to the lawful currency of Australia;
  - (j) a reference to "including" shall be construed as "including, but not limited to," and "include" and "includes" shall be construed similarly;
  - (k) where a provision provides that a party "may" do something, "may" shall be construed as discretionary and without obligation;
  - (l) where any word or phrase is given a defined meaning, any other grammatical form of that word or phrase has a corresponding meaning;

- (m) where a provision provides that a party will act reasonably or prudently, that shall (where the context permits) be construed in the context of DBCT Management's obligation to act in accordance with Good Operating and Maintenance Practice;
- (n) where there is a requirement under this Agreement to consider whether the User or Access Holders are being treated or will be affected equitably, the party so considering must have regard to (amongst other things) the Access Holder's respective annual contract tonnage; and
- (o) where measurement of Coal "Handled" (or in the context of the User, "Shipped") is being made in respect of a period, the tonnage loaded into vessels as determined in accordance with clause 9 will be taken to be the tonnage Handled (or, as the context requires, Shipped) in that period.

3. Payments on Business Days

Where the day on which any payment of money under this Agreement is to be made is not a Business Day, the payment may be made on the next Business Day.

## EXECUTION

### Executed as an agreement

**Signed for**  
**DBCT**  
**Management Pty Limited**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

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

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

**Signed for**  
**DBCT Investor Services Pty Ltd**  
**as trustee for the DBCT Trust**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Director

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

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

**Signed for**  
**[Insert User name]:**  
by its representative  
in the presence of:

\_\_\_\_\_  
Witness

\_\_\_\_\_  
Representative

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

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



**DBCT Management - Master Plan 2018**  
**Expansion Opportunities at the Dalrymple Bay Coal Terminal**



Document Control					
Rev No	Date	Revision Details	Author	Verifier	Approver
1	29/03/2018	Submission Document	PW	JK	AT
2	26/04/2018	Minor amendments	PW	JK	AT
<b>Document Owner</b>			<b>Next revision date</b>		
Jesse Knight			31/03/2019		

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## **1 Executive Summary**

The Bowen Basin experienced strong production and demand growth for coal in the first decade of the 2000s. In order to accommodate this demand, DBCT Management Pty Limited (“DBCTM”) responded by undertaking numerous capacity expansions. The DBCT 7X project was the most recent expansion and lifted terminal capacity to 85 million tonnes per annum (Mtpa), underwritten by long term take or pay contracts with the world’s biggest mining companies.

Since commissioning the new capacity in 2009, throughput has slowly increased in line with global demand. During and after delivery of DBCT’s 7X expansion, global coal markets experienced a period of rapid expansion, followed by oversupply and ultimately rationalisation of surplus production capacity. Due to a combination of high global steel production and consistent global metallurgical supply disruptions, the price of hard coking coal (HCC) has been close to US\$200mt FOB since late 2016. Demand for DBCT’s capacity has again returned to the market, and DBCT Management is signing new Access Agreements to service both greenfield and brownfield metallurgical coal mine developments.

DBCT Management is obliged by the Port Services Agreement (PSA) and the Access Undertaking (AU) to accommodate the actual and reasonably anticipated future demand for the use of DBCT’s Users and access seekers. Accordingly, DBCTM has continued to plan post 85 Mtpa expansions to take DBCT’s nameplate capacity up to a maximum of 136 Mtpa.

While metallurgical coal demand growth is occurring and widely anticipated to continue, the timing of demand for expansions has historically proven difficult to forecast. The next wave of mine development is expected to be approached in a more measured way than during the previous “mining boom”. This measured approach will increasingly lead to a demand for incremental expansion capacity. This and the previous Master Plan both outline an incremental expansion pathway for DBCT while recognising the regulatory hurdles that need to be cleared prior to commencing any development works.

This Master Plan takes into account recent regulatory changes which now set a higher bar for planning and executing expansion. The Master Plan reviews the preferred expansion pathway to meet the requirements of future capacity demand, without trying to predict when those individual expansion options might be activated.

### **1.1 DBCT Background (Chapter 2)**

Chapter 2 reviews DBCTM’s involvement in the terminal and describes the asset relevant to land use and geographical location, including a brief history of the terminal and the progression to DBCT’s current configuration. Various elements of DBCT’s operations are discussed, including a description of the major plant, machinery and infrastructure that allow the terminal to deliver 85 Mtpa of capacity. The region encompassing the terminal, in addition to the land leases that make up the terminal footprint are outlined for ease of reference.

The chapter also deals with the Master Planning process and DBCT Management’s alignment with the Whole of System Master Planning function of the Integrated Logistics Company (ILC). The regulatory framework is outlined in detail in this chapter, as is the current contractual position of the terminal.

Further, Chapter 2 briefly summarises the Access Regime in place for DBCT and highlights recent changes to the Access Undertaking which has introduced some additional hurdles to further development at DBCT.

## **1.2 Current Operations (Chapter 3)**

This chapter provides an overview of the current operations of DBCT, including; cargo assembly and hybrid stockpiling, an overview of the remnant zone, and a summary of the independent capacity modelling results.

Additional topics addressed in this chapter include the impact of service provision, including non-common blending ratios, breakdowns, maintenance and smaller vessels that can all erode terminal and supply chain capacity.

## **1.3 Future Supply/Demand (Chapter 4)**

This chapter assesses global demand and supply prospects in the context of triggering further expansions at DBCT. Previous forecasts, based on leading industry analysis have been unreliable, due to a range of factors including the global financial crisis and more recently, changes in Chinese government policy and the volatility of global coal markets.

DBCT Management expects stability in growth from the usual supply regions including Japan and South Korea, continued swing purchasing from China, while India and South-East Asia drive further growth for coal handled by DBCT.

Competing suppliers do pose a threat to DBCT's demand, particularly Mozambican and Indian domestic coal production, however these regions are not expected to materially impact the long-term growth of the Bowen Basin. Continuing demand out of the Bowen Basin is expected to drive demand for expansion capacity at DBCT and other coal terminals. While there is no way to reliably predict the timing of expansions, DBCT Management has developed this Master Plan with the intent of having a clearly outlined development pathway that can be triggered when demand exceeds available capacity.

## **1.4 DBCT Expansion Options (Chapter 5)**

This chapter outlines the proposed expansion pathway for DBCT. The expansion pathway has not been modified since the previous Master Plan. It is still DBCTM's view that to satisfy the likely and foreseeable demand, 3 projects would be required. These projects are referred to as Zone 4, 8X and 9X. The Zone 4 project, coupled with the Hybrid Operating mode, alleviates current system operating constraints limiting the system to a capacity below 85 Mtpa and then delivers an additional 4 Mtpa beyond 85 Mtpa to take the System Capacity to 89 Mtpa. The 8X Project would be implemented in 2 phases and would ultimately take the system capacity to 102 Mtpa. 8X expands the current stockyard to its full potential, meaning any capacity requirement beyond 102 Mtpa would necessitate the development of a new stockyard, supported by a 4th inloading system and a 4th outloading system. Development beyond 8X is referred to as 9X. The relative viability of the expansion steps is explored in this chapter and the additional hurdles introduced by the 2017 Access Undertaking have been explored.

## **1.5 Environment (Chapter 6)**

This chapter outlines the pertinent environmental issues relevant to the expansion projects identified, including dust and noise forecasts associated with the Zone 4 and 8X expansions.

It aligns with leading practice guidelines and policy settings by the Commonwealth & State Governments by ensuring early consideration of environmental values for development along the coast adjacent to the Great Barrier Reef.

It demonstrates that the preferred expansion options outlined in Chapter 5 do not significantly compromise the anticipated environmental outcomes for terminal operations including existing Environmental Authorities, however advanced engineering work and re-modelling is recommended. Further, the enhancement of port environmental buffers will be a critical 'port-protection' issue for consideration during formal State Master Planning work (currently underway).

## **1.6 Stakeholder Consultation (Chapter 7)**

Chapter 7 details how DBCTM has and will interface with stakeholders in terms of current operations and future expansion of the terminal.

## 2 Introduction and Background

### 2.1 Background to DBCT

DBCT was established in 1983 by the Queensland Government as a common user coal export facility. In 2001, the Queensland Government, represented by Ports Corporation of Queensland (“PCQ”) and DBCT Holdings P/L, awarded a long-term lease over DBCT (a 50-year term with a 49-year renewal option) to a consortium collectively known as Coal Logistics–North Queensland (CL-NQ). Following a change of ownership in 2009 to Brookfield Infrastructure Partners (BIP), DBCT Management (DBCTM) has held management responsibility for the DBCT assets as the Secondary Lessee. For the purposes of this document, DBCTM collectively stands for the leaseholder and related entities responsible for fulfilling the duties related to the DBCT lease, the obligations contained in the Port Services Agreement (PSA) and any of the head leasing agreements.

The Port of Hay Point is approximately 38 kms south of Mackay and consists of two coal terminals - DBCT and Hay Point Services (‘HPS’) (Figure 1).

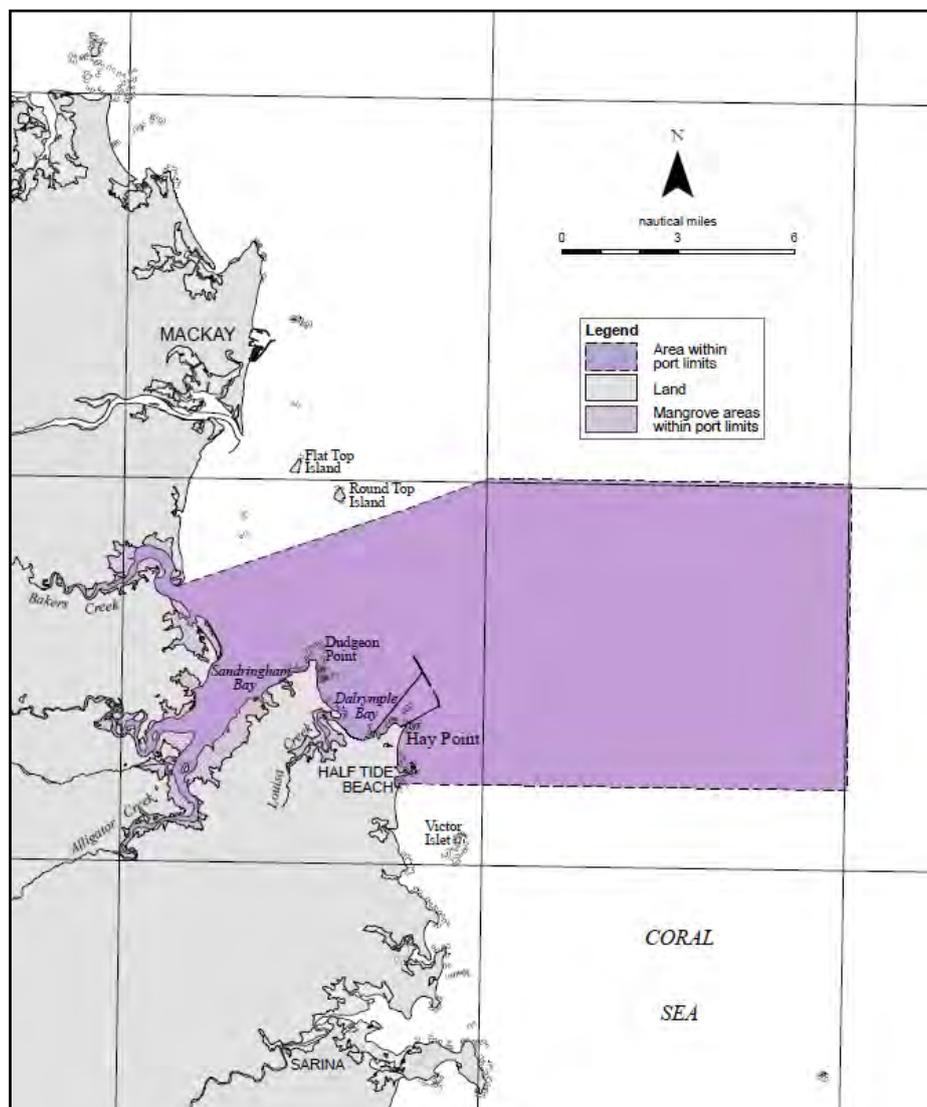


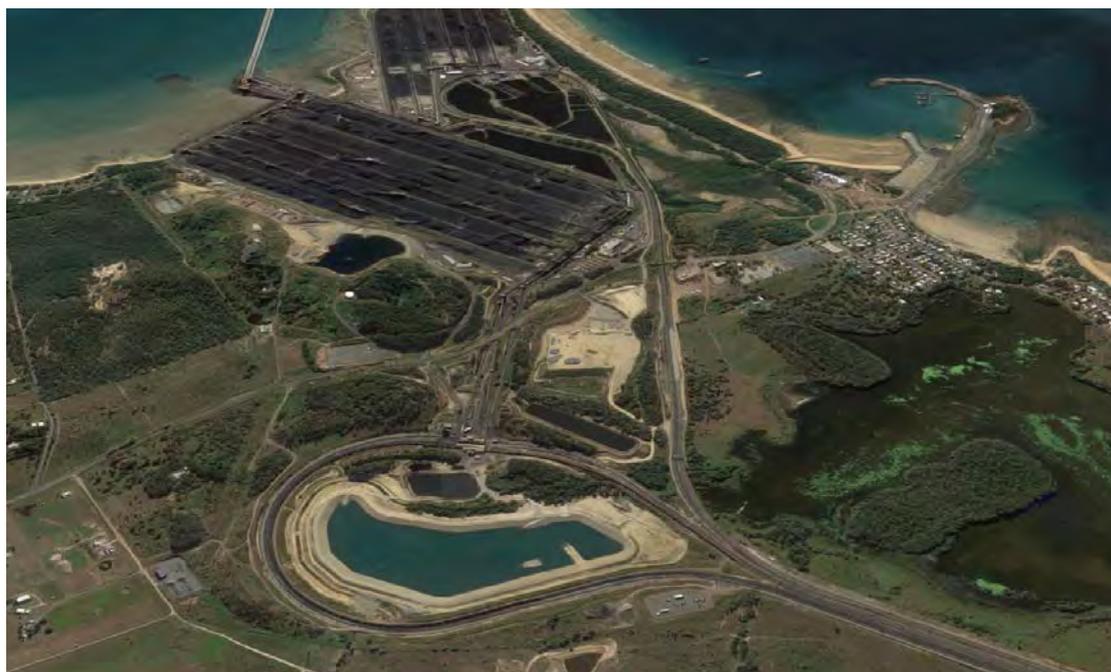
Figure 1: Port of Hay Point Port Limits – (Department Transport and Main Roads, 2013)

DBCT Management Master Plan 2018  
*Introduction and Background*

The port is administered by North Queensland Bulk Ports (NQBP) as the statutory Port Authority and strategic port land owner. The terminals are linked to the Bowen Basin coalfields (Figure 2) by the electrified Goonyella rail system operated by Aurizon Network. Figure 3 shows DBCT in the foreground.



Figure 2: Bowen Basin coalfields – (DNRME, 2016)



**Figure 3: Port of Hay Point**

DBCT is a bulk export coal terminal which is owned by the State of Queensland. The daily terminal operations and maintenance activities are undertaken by Dalrymple Bay Coal Terminal Pty Ltd (“DBCT P/L”), a 3rd party service provider owned by 5 of DBCT’s Access Holders. Terminal operations and maintenance activities are undertaken by DBCT Pty Ltd under an Operations & Maintenance Contract (“OMC”).

Additional information is available from these websites <http://www.dbctm.com.au> and <http://www.dbct.com.au>

The land use surrounding the port is a mix of agricultural, rural/residential and urban. The residential communities neighbouring DBCT (Figure 4) are the communities of Louisa Creek, Half Tide, Timberlands, the Droughtmaster Drive area and Salonika Beach. Responsible and ongoing interaction with these communities is an important element of DBCT Management’s master planning and development process.



Figure 4: Position of DBCT relative to the local area

## 2.2 Current Asset Description

### 2.2.1 Basic Configuration

DBCT's basic configuration can be described as: 3 rail receiving stations; a stockyard; and 4 off-shore wharves; all connected by a series of conveyor systems. DBCT is situated on approximately 214 hectares of strategic port land and 160 hectares of off-shore sea-bed lease, primarily described by the following lots:

- Lot 126 on SP123776
- Lot 130 on SP105841
- Lot 131 on SP136318
- Lot 133 on SP136320
- Lot 134 on SP185573
- Lot 135 on SP185580

- Lot 41/42 on SP136319
- Lot 43 on SP185559

Lot Part of 132 on SP136318 (Lease C on SP185554 and Lease D on SP185555)

The site stretches for more than 2.38 kms from the rail inloading stations to the land side end of the jetty, with the wharves a further 3.8 kms off-shore. The total rated terminal capacity is 85 Mtpa, making it Queensland's largest standalone coal export terminal. Including the capacity of HPS (55 Mtpa) the Port of Hay Point is one of the largest bulk export coal ports in the world.

DBCT is a common-user facility, handling a wide variety of coal types from eight coal producers. DBCT processes 3 commercial coal categories, including: coking coal, Pulverised Coal Injection (PCI) coal, and thermal coal. Coals can be further blended from the terminal's stockpiles to create many different "blended" products. The majority of DBCT's exports are shipped on a Free on Board (FOB) basis. The customers of DBCT's Producers (i.e. the coal buyers) are responsible for organising and paying for sea transport. Coupled with the available stockyard capacity, the high number of products drives a cargo assembly and hybrid operating mode in the terminal.

DBCT makes use of the following plant and equipment to achieve an 85 Mtpa nameplate capacity:

- 3 rail receival stations - 2 x 5,500 tph (IL1 & 2); 1 x 8,100 tph (IL3)
- 4 stackers - 1 x 5,500 tph; 1 x 6,000 tph; 2 x 8,100 tph
- 3 reclaimers – 1 x 4,250 tph; 2 x 5,300 tph
- 5 stacker-reclaimers - various stack rates from 4,250 - 5,500 tph and various reclaim rates from 3,700 tph – 5,300 tph
- 8 stockpile rows, each approximately 1,100 m in length (note that row 8 is a half row). Maximum designed volumetric yard capacity (static – meaning if every pile was full) is approximately 2.3 million tonnes of coal
- 3 outloading systems (OL1, OL2 and OL3) and 3 shiploaders – 1 x 7,200 tph (SL1); 1 x 7,600 tph (SL2); and 1 x 8,650 tph (SL3)
- 4 berths capable of receiving cape size vessels
- SL1 can serve berths 1 and 2; SL2 can serve berths 1 and 2 and SL3 serves berths 3 and 4

OL1 serves SL1 and SL3; OL2 can serve SL2 and SL3; and OL3 can serve SL1, SL2 and SL3 Inloading

DBCT has three inloading stations, feeding three inloading conveyor systems which deliver coal to the DBCT stockyard. The inloading stations can accept a number of different train configurations and wagon types from any one of three above rail haulage operators (Pacific National, Aurizon National and BMA Rail). The coal wagons are bottom dump type, with the coal falling out of the wagons and into the rail receival pits for transfer via inloading conveyor to the stockyard. Any of the inloading stations can feed coal to the stackers or stacker reclaimers in any part of the DBCT stockyard. This configuration gives DBCT's operator ultimate flexibility when planning the location of stockpiles in the DBCT stockyard.

### 2.2.2 Stockyard

The stockyard (Figure 5) consists of eight machinery bunds which support twelve yard machines and seven and a half stockpile rows. These rows are each divided into three “cells” containing stockpiles (separated by drainage pits). The twelve yard machines include four stackers, three reclaimers and five stacker/reclaimers laid out as per the following diagram:

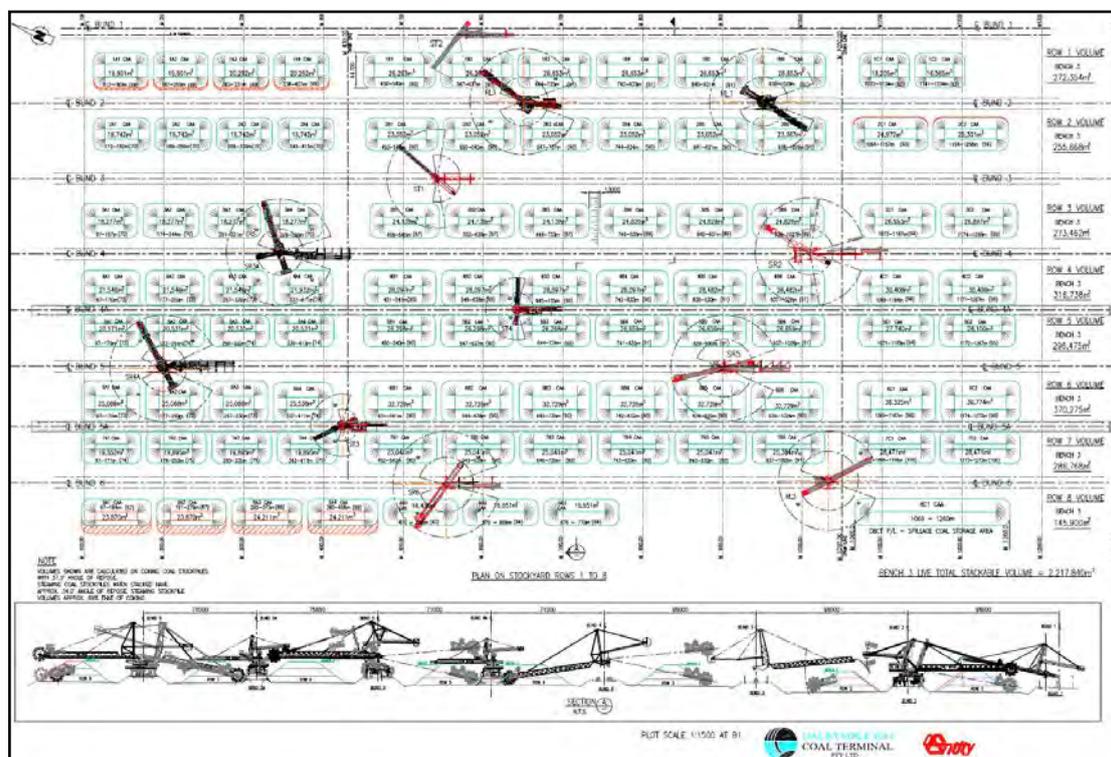


Figure 5: Stockyard layout of DBCT delivering 85 Mtpa – (DBCT Pty Ltd 2016)

The volumetric capacity of each of the stockyard rows is shown in table 1 below. The actual working capacity of the rows at any time will be determined by the number of stockpiles in each row and their sizes:

DBCT Stockyard Capacity									
Stockpile Row	Row 1	Row 2	Row 3	Row 4	Row 5	Row 6	Row 7	Row 8	Total
Capacity (m <sup>3</sup> )	272,354	255,868	273,462	316,738	296,475	370,275	286,768	145,900	2,217,840

Table 1: DBCT yard row volumes – (DBCT Pty Ltd, 2016)

The stockyard has delinked inloading and outloading systems, meaning each arriving train can usually be stacked without interrupting or impeding vessel loading activities. The yard configuration and operating strategy maximises outloading performance by making two reclaiming machines available to each outloading system. Under normal operating circumstances, two reclaiming machines dig from two stockpiles simultaneously to complete one loading activity into the vessel. If the product is not a blend, both stockpiles will contain the same product.

Individual yard machine rates are as follows:

	ST1	ST2	ST3	ST4	RL1	RL2	RL3	SR2	SR3A	SR4A	SR5	SR6
Average stack Rate	5,500	6,000	8,100	8,100				4,250	5,500	5,500	5,500	5,500
Average reclaim rate					5,300	5,300	4,250	3,700	5,300	5,300	4,500	4,300
average throughload rate						5,500	4,250	4,250	5,500	5,500	5,500	5,500

**Table 2: DBCT yard machine rates – (DBCT Pty Ltd, 2016)**

Operationally, the DBCT stockyard is divided into four independent zones, which are usually paired with a single outloading system and generally operate under the following configuration:

- Zone one includes the southern end of stockyard rows three, four, five and six, and normally feeds the first outloading system. Zone one is shown in brown in Figure 6.
- Zone two includes stockyard rows one and two, and normally feeds the second outloading system. Zone two is shown in green in Figure 6.
- Zone three includes the northern end of stockyard rows three, four, five and six, and normally feeds the high rate third outloading system. Zone three is shown in blue in Figure 6.
- Zone four includes row seven and the half row eight (shown in yellow in Figure 6). This zone contains only remnant stockpiles and can feed any of the outloading systems. The remnant zone and strategy is explained in further detail later in this Master Plan (Chapter 3).



Figure 6: DBCT zonal configuration Zones.

Zones one to three are referred to as the dynamic zone, while zone four is referred to as the static zone.

### 2.2.3 Outloading

Each of the outloading conveyor systems is predominantly paired with a rate-matched shiploader. In this configuration, the pair of reclaiming machines, the outloading conveyor system and the shiploader have matched speeds to maximise individual machine utilisation.

From time to time (usually during maintenance outages), the outloading systems can be reconfigured to feed different shiploaders. Generally, the following outloading systems feed the corresponding shiploaders:

- Outloading system one feeds coal to shiploader one.
- Outloading system two feeds coal to shiploader two.
- The high rate outloading system three feeds coal to the high rate shiploader three.

Shiploader one and two are normally dedicated to berths one and two respectively with shiploader three loading coal into vessels on both berths three and four.

#### **2.2.4 Water Management Infrastructure**

The water management infrastructure on the site is shown in Figure 7 and includes the following:

- An Industrial Dam (ID) with a capacity of 421 ML, which receives all run-off from the stockyard catchment area. The ID contains a series of concrete pits and containment cells designed to detain and remove coal fines that settle out from the stormwater inflows. Coal fines are periodically recovered and shipped from the terminal. A dedicated system of High Flow Transfer Pumps is also located at the ID to transfer incoming stormwater inflows to the Quarry Dam (QD) via an 800 mm pipeline through the stockyard. As a management objective, the ID is kept as close to empty as possible to maximise the available buffer storage, and minimise the likelihood of an uncontrolled stormwater discharge to the local Sandfly Creek area.
- A Quarry Dam (QD) with a capacity of 837 ML, which receives the majority of its stored water as pumped flow from the ID, with only minor site run-off from the small catchment area local to the QD. The QD serves as the primary operational water storage dam at the terminal, and has a floating pontoon pump system to transfer operational water to the site as required.
- A Rail Loop Dam (RLD) within the rail loop area that has a capacity 847 ML. It receives no run-off with the majority of its inflow via a gravity fed 800 mm pipeline from the QD during times when excess water is harvested from the ID during sustained heavy rainfall. Transfer pumps can also return water from the RLD through the same pipeline back to the QD in the dry season for operational reuse.
- A Rail Receival Dam (RRD) with a capacity of 22 ML, which stores and recycles the operational return water from the train unloading facilities and the local catchment.
- An additional dam known as Spindler's Dam, with a capacity of 59 ML, which receives runoff from the local catchment between the train unloading facilities and the stockyard that includes the three inloading conveyors. Water can be returned to the stockyard for reuse via a small diesel pump and pipeline system.
- A dedicated 2 ML industrial water storage tank and pump system located at the southern end of the stockyard provides a source of industrial and fire water to the entire site.
- A dedicated 1 ML industrial water storage tank and pump system located at the train unloading facilities to provide a source of moisture addition and dust suppression water to three unloading sheds.
- A Flocculent plant located near the ID to treat stormwater inflows entering the ID to further improve the coal fines sedimentation and recovery process.



Figure 7: Water Management Infrastructure

## 2.3 Contractual Framework

### 2.3.1 Requirement for a Master Plan

The Port Services Agreement (PSA) requires DBCT Management (DBCTM) to submit a Master Plan to DBCT Holdings addressing any changes in circumstances, demand, technology or other relevant matters, no later than 31 March each year. Due to the

uncertain timing of demand to trigger terminal expansion, there can be long periods where no expansion activity is required. DBCTM has therefore requested an amendment to the PSA to allow it to only submit a master plan, where DBCTM determines that (acting reasonably):

- i. substantive changes are required to be made to the Master Plan; or
- ii. the current Master Plan has been developed to its ultimate extent.

The Master Plan has been drafted to:

- i. ensure that DBCT is developed in accordance with Access Seeker applications for terminal capacity, infrastructure planning best practice, principles of environmental sustainability, applicable laws and the balanced interests of its stakeholders;
- ii. ensure the PSA requirement for any expansion to be both economic and reasonable is satisfied, noting also the need to have regard to environment laws and the principles of environmental sustainability;
- iii. ensure a responsible alignment of supply chain partner infrastructure based on a supply chain “cargo assembly/hybrid” methodology;
- iv. ensure compliance with contractual commitments and statutory obligations for master planning which meet the requirements of the PSA;
- v. ensure a continued ‘leading practice’ approach to port/terminal planning within the coastal zone, particularly within the GBRWHA.

This Master Plan presents three incremental terminal expansions to accommodate uncertain future demand. These 3 expansions are designed to be developed sequentially. The industry practice of using Front End Loading (FEL) engineering to assess the various levels of feasibility has been employed in the engineering studies that underpin this plan. Only the first expansion step outlined in this Master Plan (Zone 4) has been studied to a level of certainty that is commonly referred to as FEL3 or a Feasibility Study level. It is anticipated that the Zone 4 expansion would provide a further 4.1 Mtpa of terminal capacity above the existing 85 Mtpa terminal capacity.

FEL1 studies (concept only) have also been undertaken for the other 2 incremental expansions 8X and 9X. Pre-feasibility and Feasibility work will ultimately be required to better understand these expansions.

The second stage in the expansion pathway (8X) involves terminal inloading upgrades, yard machine upgrades, stockyard enhancements and outloading upgrades. This expansion is expected to add between 12 and 13 Mtpa above that of Zone 4, taking terminal capacity from 89.1 to around 102 Mtpa. 9X is the third stage of the expansion pathway. The 9X expansion would introduce a 2nd stockyard to supplement the existing DBCT stockyard. The new stockyard would likely be located on the western side of the existing terminal, subject to land availability.

### **2.3.2 Whole of System Master Planning**

The Integrated Logistics Company (ILC) produces integrated, 10 year Master Plans (MP) for the Goonyella Coal Chain encompassing; All Mines in the Goonyella and Newlands System:

- The Below rail infrastructure and operating methods and principles.

- Dalrymple Bay Coal Terminal infrastructure and operating methods.
- Hay Point Coal Services Terminal infrastructure and operating methods.
- Adani Abbot Point Terminal and operating methods.
- Port Channel and vessel movement practices.

To prevent misalignment of infrastructure development, the ILC Master Plans (MP) seeks to align future supply chain infrastructure expansions across all asset owners and operators by:

- i. the development of a common set of inputs and assumptions for the determination of system capacity
- ii. the development and maintenance of an integrated full system simulation model, which is used as a tool to assess system capacity and evaluate future capacity requirements, and
- iii. aligning and assessing alternative infrastructure expansion options in the Dalrymple Bay Coal Chain

The development and implementation of the ILC’s MP was part of a longer term solution to the address the historical underperformance of the Goonyella supply chain.

To ensure planning alignment within the Goonyella Coal Chain, DBCTM uses the ILC System Capacity Model for its capacity planning purposes. DBCTM has engaged the ILC Master Planning group to model the existing system in addition to various expansion scenarios to quantify capacity benefits and production losses during implementation. The modelling results have guided the development of this Master Plan.

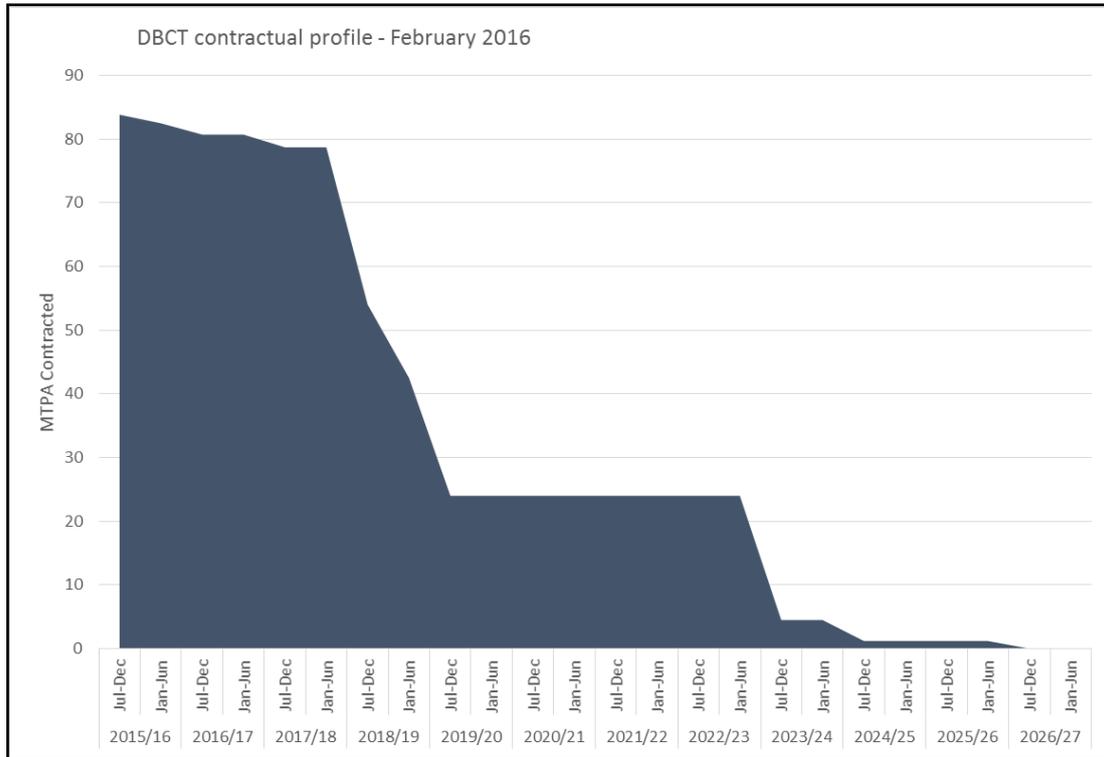
The ILC’s modelling establishes the pre-expansion system capacity as 83.8 Mtpa with the current terminal capacity at 85 Mtpa.

### **2.3.3 Contractual Position**

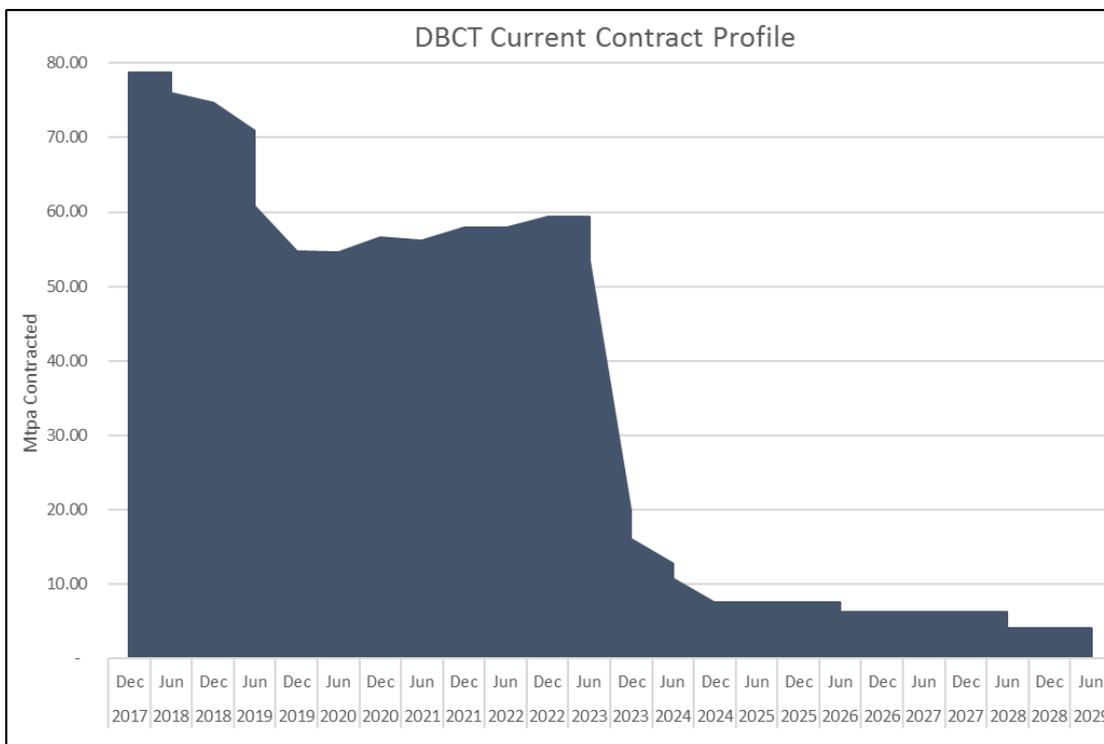
Access to DBCT is contracted in accordance with the provisions of the Access Undertaking. The Standard Access Agreement (SAA) forms a part of the AU and underpins negotiations for contracting capacity at DBCT. In order to secure evergreen five year extension options, the Access Seeker is required to enter into a minimum 10 year Access Agreement. Within 12 months of the end of the initial term, the Access Holder has an option to nominate up to a five year extension for all or part of the contract tonnage. Because of this mechanism, the contract expiry profile can at times appear to be imminent and substantial. Historically the majority of expiring contracts have been extended prior to expiry of the extension option. Recently miners have shown a propensity towards reducing take or pay obligations, leading to some contracts not being extended and additional capacity being made available to Access Seekers.

The contractual volumes, as at February 2016 and March 2018, are shown in Figure 8 and Figure 9 respectively.

**2.3.4 Contractual Position February 2016**



**Figure 8: Contractual Position February 2016**



**Figure 9: Contractual Position March 2018**

## 2.4 Government Legislation

### 2.4.1 Government Legislation

In July 2011, the UNESCO World Heritage Committee requested the Australian Government undertake a comprehensive strategic assessment of the Great Barrier Reef World Heritage Area (GBRWHA) and develop a long-term plan for sustainable development that will protect the region's outstanding universal values. The assessment was completed by the Federal and Queensland Government and resulted in the development of the *Reef 2050 Long Term Sustainability Plan ('Reef 2050')*.

The Queensland Government has responsibility for protection of the State waters and is therefore committed to a number of *Reef 2050* initiatives relating to port development. In 2015 the Queensland Government introduced new legislation, the *Sustainable Ports Development Act (2015)* which sets out the blueprint for port planning and management for certain ports in Queensland. The act aligns with the Commonwealth and State Government commitments under *Reef 2050* developed in response to recommendations of the UNESCO World Heritage Committee.

This legislation outlines a number of initiatives including:

- identification of the Port of Abbot Point, Port of Gladstone, Ports of Hay Point & Mackay and the Port of Townsville as 'priority ports' which require formal 'Port Master Plans' to regulate development consistent with principles of 'ecologically sustainable development'
- introduction of statutory 'Port Overlays' to implement the master planning objectives
- protection of greenfield landside and marine areas through the prohibition of certain future development
- prohibition of certain capital dredging along the Queensland coastline, and
- prohibition of sea-based disposal of capital dredge material within the GBRWHA

Formal 'Port Master Plans' will be prepared by the State in consultation with port entities, relevant local governments and other state entities such as State Development and the Department of Environment & Heritage Protection.

DBCTM views this Terminal Master Plan as a critical input into the Long Term Development Plan being prepared by NQBP and subsequently into the formal State Port Master Planning process, as shown in Figure 10 .



Figure 10: Queensland Planning Process

#### **2.4.2 Proposals for Land Use and Site Development**

Under the *Transport Infrastructure Act 1994* (TIA), a Port Authority is required to develop and review a Land Use Plan to ensure the appropriate and sustainable development of strategic port land. As the Port Authority for the Port of Hay Point, NQBP has the responsibility of preparing and revising the Land Use Plan and administering all ‘Assessment Manager’ functions pursuant to the *Sustainable Planning Act, 2009* (SPA) for all assessable development on areas classified as ‘Strategic Port Land’ at the port.

The current Port of Hay Point Land Use Plan was approved in July 2010 and provides an overall framework for the appropriate regulation and management of the development of strategic port land. The Land Use Plan was prepared in accordance with the statutory provisions of the (TIA). It sets out NQBP’s planning and development intents for its strategic port land at the Port of Hay Point, while giving careful consideration to core matters relevant to the local and regional area including environmental, economic and social sustainability.

As a point of reference, Figure 11 shows the current off-shore and on-shore areas defined as Strategic Port Land at the Port of Hay Point. Figure 12 shows DBCT more specifically.

It is anticipated that the existing LUP will be amended following (or concurrently with) the preparation of the formal State Port Master Plan under the *Sustainable Ports Development Act, 2015*.

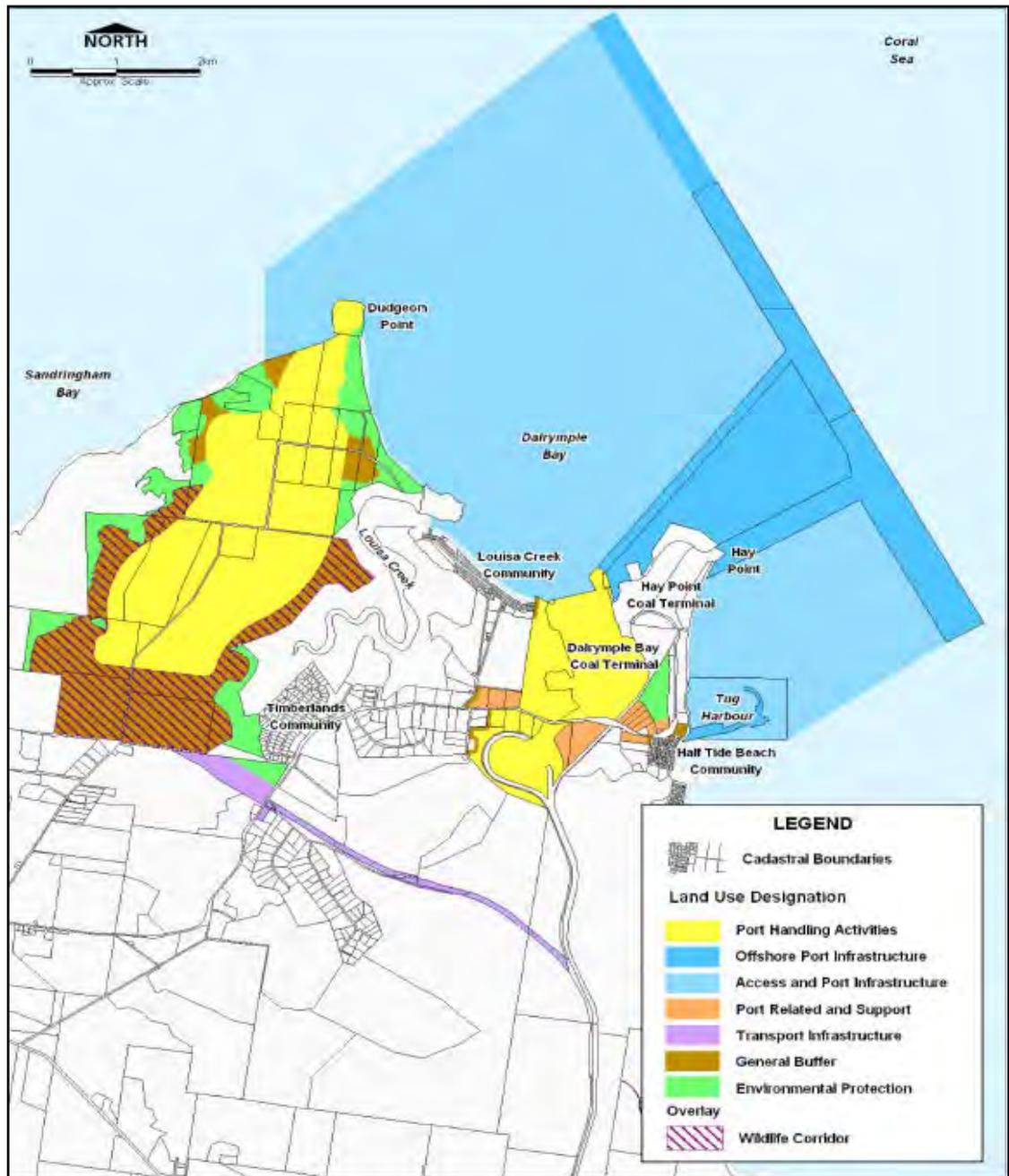


Figure 11: NQBP Strategic Port Land and Offshore Port Infrastructure Hay Point

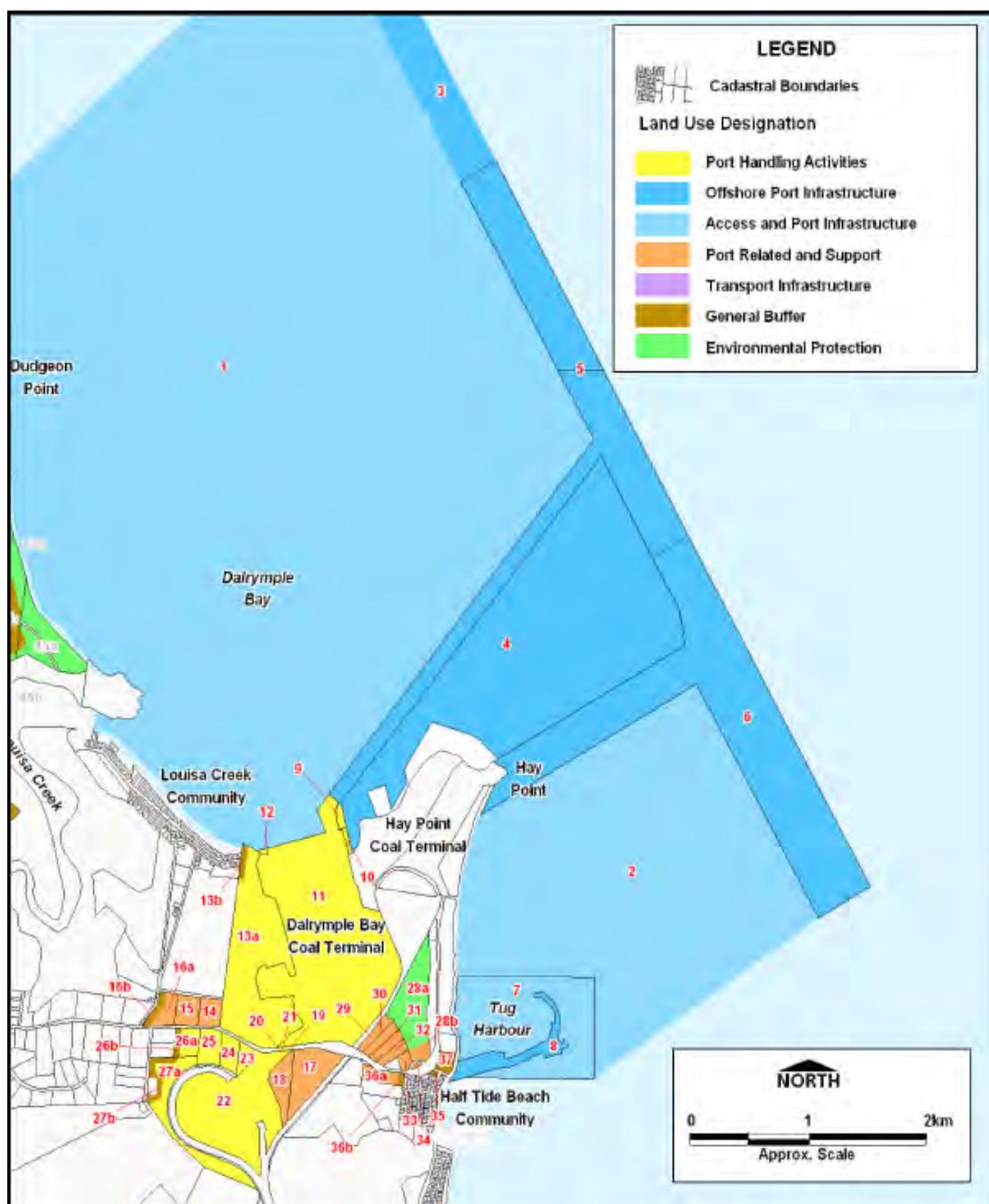


Figure 12: DBCT development on Strategic Port Land

Any future expansions of DBCT will need to be developed to meet the land use provisions of the 'Port of Hay Point Land Use Plan – Port Handling Activities Area and/or Offshore Port Infrastructure'. The land will be used for the purpose of loading, unloading and transport of commodities (bulk coal) to support the Central Queensland Coal Industry. Aspects of the preferred site development are contained in Chapters 5 and 6 of this Master Plan.

## 2.5 Access Regime

DBCT is declared for third party access under the Queensland Competition Authority Act 1997 (Qld) (QCA Act). An Access Undertaking (AU) details the terms and conditions (including the tariff that can be charged) under which third parties can access DBCT's services.

After the approval of the first AU (2006 AU), the existing Terminal User Agreements were replaced with a Standard Access Agreement (SAA). The SAA forms part of and is based on, the terms and conditions set out in the AU. The revenue cap approach and the risk profile proposed in the QCA's final decision, are reflected in subsequent approved AU's and SAA's as follows:

- The 2006 AU (including a new SAA) was approved on 15 June 2006 and backdated to 1 July 2004.
- The 2006 AU expired on 31 December 2010, and was replaced with the 2010 AU agreed with stakeholders and approved by the QCA in 2010.
- The 2010 AU expired on 30 June 2016, and was replaced with the 2017 AU which was approved by the QCA in February 2017 and backdated to 1 July 2016.

As required for the first time by the 2010 AU, DBCTM has moved away from the concept of contracting standalone terminal capacity, in favour of contracting only available system capacity<sup>1</sup>. In support of this principle, the terminal Master Plan is integrated with the System Master Plan, which is the framework for expansion of the System in the most logical and efficient way, determined collaboratively by all system participants.

### 2.5.1 Access Applications

Access Applications are a mechanism that provide the Access Seeker with an option to access DBCT capacity which may become available in the future. When capacity does become available, either due to expansion, an expiring contract, or a terminated contract, DBCTM must offer the capacity to the DBCT Access Queue (access queue). The access queue is formed when available capacity is not sufficient to satisfy the capacity requirements of one or more Access Seekers.

Capacity is offered and contracted in accordance with Section 5.4 of the DBCT Access Undertaking. The 2017 AU was the first to introduce a mechanism to remove an Access Seeker from the access queue where an offer of available capacity is declined by that Access Seeker. After receiving an Indicative Access Proposal and declining the offer of capacity, the Access Seeker's Access Application will be deemed to have lapsed and the Access Seeker will be removed from the queue. The intent of this mechanism is to ensure that an access queue doesn't exist at times when there is system capacity available for contracting.

If an access seeker does intend to contract the available capacity, the access seeker is required to sign an Access Agreement (AA). If an access seeker does execute an AA

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<sup>1</sup> System Capacity is the maximum reasonably achievable capacity of the system, being the components of the Goonyella Coal Chain infrastructure relating to transport of coal from mines whose coal is handled by DBCT

to contract for access to DBCT, the access seeker's Access Application will be reduced by the tonnage specified in the schedule of the AA. The Access Seeker will retain its position in the access queue, assuming the remaining tonnage under the access application is greater than zero and there is not sufficient available capacity to service this remaining tonnage.

### **2.5.2 Expansion pricing under the 2017 Access Undertaking**

The Port Services Agreement requires the principle of average pricing to prevail for expansions of DBCT. It requires DBCTM to seek to have future Access Undertakings maintain Common User Charges (socialised pricing). In 2013, the QCA released a paper on Capacity Expansion and Access Pricing for Rail and Ports. In that paper, the QCA identified "key propositions based on economic efficiency, fairness and governance principles which constituted an averaging down/incremental up approach to expansion pricing".<sup>2</sup> The QCA required DBCTM to incorporate these principles in the 2017 AU.

With respect to expansion pricing, the 2017 AU includes the following<sup>3</sup>:

- Where Socialisation of a Terminal Capacity Expansion would decrease the Reference Tariff for users of the Existing Terminal, the Terminal Capacity Expansion should be treated as forming part of the Existing Terminal, such that a single Reference Tariff and Annual Revenue Requirement shall apply to the Existing Terminal (including the Terminal Capacity Expansion) (a Socialised Expansion).
- Where Socialisation of a Terminal Capacity Expansion would increase the Reference Tariff for users of the Existing Terminal (a Cost Sensitive Expansion), subject to Section 11.13(c), the Terminal Capacity Expansion should be treated as a separate Terminal Component, with its own Regulated Asset Base, Reference Tariff and Annual Revenue Requirement (a Differentiated Expansion Component).
- A Cost Sensitive Expansion may be treated as forming part of the Existing Terminal (and therefore, not treated as a Differentiated Expansion Component) where circumstances exist that justify Socialisation. In determining whether there are circumstances that warrant Socialisation, consideration shall be given to:
  1. the materiality of the increase in the Existing Terminal's Reference Tariff that would be affected by socialising the Cost Sensitive Expansion
  2. the extent to which assets or infrastructure the subject of the Cost Sensitive Expansion will operate wholly or partly, in an integrated way with the Existing Terminal or as a stand-alone development
  3. the extent to which the Cost Sensitive Expansion is likely to benefit users of the Existing Terminal (for example, such as through higher efficiency, reliability or flexibility of the Existing Terminal)

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<sup>2</sup> QCA, Capacity Expansion and Access Pricing for Rail and Ports April 2013 p. iv

<sup>3</sup> Dalrymple Bay Coal Terminal Access Undertaking

4. any differences in the risks of providing Access to users of the Existing Terminal in respect of additional Terminal Capacity created by the Cost Sensitive Expansion, and
5. any other factor that the QCA considers relevant

The introduction of differential pricing will potentially have an impact on the viability of further expansions of DBCT. This issue is addressed in greater detail in Chapter 5.

### **2.5.3 Expansion timing under the 2017 Access Undertaking**

The 2017 Access Undertaking introduced for the first time a detailed definition of Front End Loaded engineering (FEL) studies. This definition is more onerous than what is widely accepted within the industry thus requiring a greater level of detail than would normally be undertaken. The Access Undertaking also introduced constraints around the funding of feasibility studies. Coupled with the delays associated with determination of expansion pricing, the net effect is that the current Access Undertaking introduces material delay to future expansions which did not exist in prior Undertakings. This actual impact is addressed in more detail in Chapter 5.

### 3 Current Operations

#### 3.1 Mode of Operation

Bulk supply chains can be operated in a variety of configurations, however Australian coal terminals generally operate under one of three methodologies:

- cargo assembly
- dedicated stockpiling
- hybrid (a combination of dedicated stockpiling and cargo assembly)

The decision to choose one operating mode over the other will likely result from the number of discrete products which need to be accommodated and the available space for stockpiling the various coal products.

A dedicated stockpile port allows terminal users to stockpile large amounts of product at the port without:

- a vessel necessarily being waiting at the terminal load that product
- a vessel being in transit to the loading terminal

In a dedicated stockpiling export terminal, the miner will typically produce the coal and then rail that coal to the export terminal for loading when the next train is available. This in turn should lead to a predictable railing schedule and greater visibility as to when train services will be required. Track infrastructure in a dedicated stockpile operation is designed to suit the regular and consistent mix of trains required to meet contractual obligations. The receiving vessel arrives at the port to load the coal from a dedicated stockpile, as do subsequent vessels chartered to load the same coal product. The railing system replenishes the stockyard by railing product evenly from the mine to the export terminal.

Because of the irregular demand pattern for an individual product and DBCT's available storage space in the stockyard, it is impossible to maintain dedicated stockpiles for all products handled by DBCT. DBCT has evolved to operate under a cargo assembly logistics methodology. Unlike a dedicated stockpiling operation, a cargo assembly operation requires railings of products to meet the arrival of the vessel. In the DBCT cargo assembly operation, a vessel typically arrives and once all parcels to be loaded on the vessel are produced and available for railing, the above rail operators bring the coal to the terminal where it is assembled in a space allocated to the parcel in the DBCT stockyard. Railings to complete the vessel are subject to the availability of the mine load-out, DBCT stockyard space, above rail assets and below rail pathing

Under cargo assembly, the stockpile for each individual vessel and each parcel on that vessel needs to be separated from the other cargoes in the stockyard. This separation avoids product contamination between distinct parcels and cargoes. The space between individual products is unable to be utilised. To reduce stockpile separation and the resulting unutilised space in the stockyard, particularly when the same product is required for multiple vessels, limited dedicated stockpiling (hybrid) was introduced for high volume products. The hybrid operating methodology is covered later in this chapter.

### **3.1.1 DBCT Dedicated Stockpiling Option**

Dedicated stockpiling in the existing DBCT footprint is not a viable option for the following reasons:

- The additional land required to support dedicated stockpiling would consume all current expansion options for DBCT, yet still provide less than 85 Mtpa of terminal capacity.
- The capital cost of such additional stockyard space would need to include new bunds and additional yard machines.
- Current Access Holders would have to bear the full cost of the current operation and the terminal expansion required to create dedicated stockpiles to service less than 85 Mtpa.

### **3.1.2 Hybrid**

Recognising the improved stockyard space utilisation of a dedicated stockpiling operation and the storage efficiency of a pure cargo assembly model, the supply chain identified an opportunity to implement a combination of both operating modes to best utilise supply chain assets.

The hybrid operating mode was designed with two objectives in mind:

1. Pre-railing for selected parcel builds where efficiencies can be gained across the various assets of the supply chain.
2. Multiple parcel builds using the same stockpile space to improve the efficiency of the terminal stockyard.

By better utilising the space required to build cargoes for high volume products with the same coal characteristics, the supply chain can make better use of the available DBCT stockyard space. Pre-railing allows for a more even drawdown of cargo across the supply chain, therefore allowing a more efficient and effective use of all supply chain assets. In recognition of these potential benefits, involved stakeholders implemented a hybrid operating mode for the DBCT supply chain.

Under the hybrid operating mode, the supply chain planners look at upcoming demand and identify opportunities where the same product is required for multiple near-spaced vessels. Under cargo assembly, the stockyard planners would ordinarily plan to stack the cargoes for two vessels into distinct separated stockpiles. Under the hybrid system, the stockyard planners have the ability to plan for the same product (required for two or more vessels) to be stacked into a single stockpile. This removes:

- the need for the stockpile separation between similar products for multiple vessels
- the amount of time the stockpile footprint is allocated but unutilised while the terminal waits for train deliveries to fill that allocated space
- the need for a remnant space for that product. If demand continues for long enough to justify the reallocation of the remnant space to the dynamic zone, a remnant may not be required for the hybrid product. The remnant stockpile would only be replaced by a hybrid stockpile for as long as the hybrid stockpile is justified by continuous shipping demand.

The hybrid operating mode attempts to address the shortcomings of a pure cargo assembly operation and is intended to be used for at least two vessels, or a long succession of vessels. The supply chain only needs to consider the arrival of vessels requiring the same product soon after one another prior to building the hybrid stockpile. The duration of the existence of the hybrid stockpile is then only limited by the continuing, near-spaced shipping demand for that particular coal type.

Under both cargo assembly and the hybrid operating mode, the terminal operator needs a variety of vessels at its disposal in order to maximise berth utilisation. This may include vessels already waiting at the DBCT anchorage, or vessels which are on their way and soon to arrive. Should a mine be unable to produce coal for the next ship in the queue and where other vessels are available for loading, the terminal operator can promote another vessel. Utilising vessels further down the queue is preferential to foregoing the use of outloading capacity by allowing an unoccupied berth or an idle outloading system.

### **3.1.3 Remnant Management**

To assist in vessel loading requirements, and without impacting the utilisation of the DBCT stockyard, the DBCT stockyard has been segregated into two distinct zones. Row seven and the half row eight are used for the exclusive purpose of managing remnant coal, this area is known as the 'static zone'. Each Access Holder is allocated a portion of the total volume of the static zone in accordance with its share of Aggregate Annual Contract Tonnage. The remaining six rows of the stockyard operate in full cargo assembly or hybrid mode, otherwise known as the 'dynamic zone'.

This vessel assembly strategy sees two cargo assembly or hybrid stockpiles allocated to each parcel in the dynamic stockyard zones (shown in Figure 6: DBCT zonal configuration Zones). The dynamic zone will ideally comprise one less than the total number of trains required to complete the parcel or cargo. Any remaining coal from the final train not required to complete the parcel or cargo will be stacked into the Access Holder's remnant stockpile.

If the Access Holder has suitable coal in its allocated remnant area, the amount of coal railed should ideally be less than the required parcel or cargo. The balance of the parcel is 'topped' up from the Access Holder's remnant stockpile. If there is insufficient coal in the remnant area to complete the vessel, the remainder of the coal in the last train used to complete the parcel will be stacked into the Access Holder's remnant area.

Each Access Holder is responsible for managing the quantity and quality of remnant coal in its dedicated area, including separation requirements for different products.

## **3.2 Operations**

### **3.2.1 Service Provision**

Terminal capacity is calculated considering historical service provision and shipping mix (the capacity model accounts for the impact of differing service requirements). However, if future service requirements evolve beyond the current demands, the rated terminal capacity could be adversely impacted. Any detrimental impact of terminal service demands can also impact the upstream coal chain, causing individual supply chain assets to operate below their rated capacity, in turn compromising the overall system capacity.

Because of product diversification catering for specific end-user preferences, DBCT is required to meet varying service requirements as is the case with all terminals servicing the Bowen Basin. Different coal types present different handling characteristics, requiring a variety of handling strategies to ensure the product can be handled by the terminal without compromising the coal quality. Reduction of normal equipment rates to cater for these individual products can impose a performance impact on terminal capacity.

Producers pay a common tariff per tonne of coal shipped, however different handling requirements will impact the terminal’s performance (e.g. sticky coal, blending, dusty coal, wet coal). Some of these coal types and product blends consume more terminal capacity than others. The handling characteristics of individual coal types may also impact performance of the assets upstream of DBCT.

### 3.2.2 Vessel Trends

DBCT can load coal onto vessels ranging from 40,000 Dwt tonnes in size, up to approximately 220,000 Dwt. DBCT is primarily exposed to four classes of vessels: Large Cape Size (140,000-220,000 Dwt), Capes (100,000-140,000 Dwt), Panamax and Japmax (65,000-100,000 dwt) and Handimax (40,000-65,000 Dwt). Due to limited deballasting capability in small vessels, loading times are not proportionate to the size of the vessel as demonstrated in table 3, which outlines the comparative load rates by vessels loaded at DBCT in the 2016 and 2017 calendar years. The load rates show a clear bias towards fast loading performance into the larger vessels.

Vessel Type	Avg load rate (tph)	Avg load time	% of total vessels	# of vessels
VLC	4813	30.72	38%	502
Cape	4818	22.29	5%	67
Japmax	4831	16.78	37%	491
Panamax	4218	16.25	14%	179
Handimax	3359	13.85	6%	75

Table 3: DBCT ship arrivals 1 Jan 2016 – 31 December 2017

DBCT’s outloading capability has been enhanced in the current decade by the industry trend towards larger vessels. Larger, newer vessels offer economies of scale and efficiency advantages to the charterer, while generally offering better deballasting performance for the loading terminal.

DBCT’s average vessel size surpassed 100,000 Dwt in 2010 and has remained stable in subsequent years. Despite this consistent trend towards larger vessels, the arriving vessel mix can change from month to month in response to freight rate volatility. DBCTM must continually assess its terminal capacity assumptions using the latest vessel arrival size distribution data. Despite the month to month variations in freight rates for the various vessel classes, DBCT has consistently loaded vessels for days and weeks at rates well above the 85 Mtpa nameplate capacity.

### 3.2.3 Mine Load Points and Recharge Capability

The performance of individual train loading infrastructure at the various mines also contributes to overall system capacity. The capability of mine load-out infrastructure must be able to support the hybrid and cargo assembly requirements of the



downstream supply chain assets. If the individual train load out capabilities do not allow for a hybrid/cargo assembly build rate of 85 Mtpa, the total system capacity is likely to be compromised. This occurs because delays in an under-performing mine load-out impact cargo build rates at the terminal.

Mine loadout performance in the DBCT coal chain is variable, with a combination of high performance and legacy mine loadouts in operation. Downstream supply chain infrastructure assets and operating strategies have necessarily been built to accommodate this wide variance in train load-out performance. Nevertheless, Access Seekers must demonstrate that proposed mine load out facilities and haulage arrangements will not degrade system capacity before contracting for access to DBCT. This assessment is undertaken in consultation with the ILC using the system capacity model.

## 4 Supply/Demand Expectations

The Port Services Agreement requires DBCTM to:

- assess the current and future needs of Producers for services and facilities, and
- provide projections for the demand for services at DBCT

### 4.1 Throughput Growth

DBCT’s highest throughput in a financial year was 71.5 Million tonnes in 2014/15. While a gap still exists between DBCT’s best ‘year’ of throughput, current throughput (approx. 70 Mtpa) and terminal capacity (85 Mtpa), this has generally resulted from sub-85 Mtpa levels of demand (refer Figure 13). While it is difficult to assess current mine capability, it is assumed that the take or pay nature of the DBCT Access Agreements have incentivised DBCT Users to contract port capacity sufficient to meet mine production, traditionally with some extra capacity contracted to provide logistical flexibility.

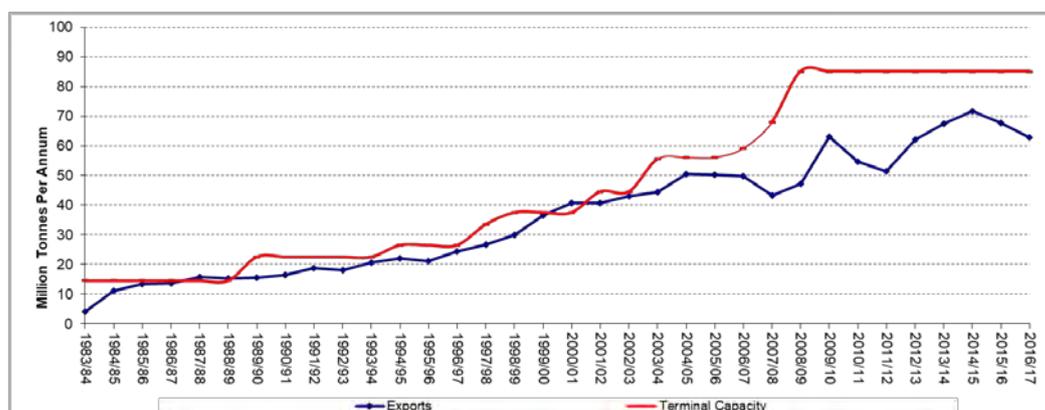


Figure 13: DBCT throughput and capacity growth history (DBCT Management, 2016)

In the depressed coal markets prior to late 2016, and with costs clearly under focus, miners undertook to relinquish any unnecessary take or pay obligations, particularly terminal capacity. There has been interest in some of this relinquished capacity from a combination of smaller brownfield and greenfield mine developers.

Unlike the previous “mining boom”, DBCTM expects the next wave of coal mine development to occur in a much more measured and controlled fashion. It is also likely that spare capacity at other ports will be more attractive than expansion capacity at DBCT. This will occur because existing spare capacity will likely be available sooner than expansion capacity at DBCT and carries no approval, timing, or execution risks.

### 4.2 Metallurgical Coal History

DBCT’s predominant export product is metallurgical coal (PCI and coking), accounting for approximately 84% of total throughput. DBCTM’s master planning is primarily focused on the metallurgical coal demand and development, as this is the dominant resource within DBCT’s catchment area.

Metallurgical coal is primarily used for steelmaking, with integrated steel mills requiring between 0.7 and 0.9 tonnes of metallurgical coal to produce one tonne of steel. Metallurgical coal prices trended down over most of the 1990’s, but began to

rise in 2001 before spiking in 2007 and 2008. Prices spiked again in 2011 as flooding reduced Queensland export volumes by approximately 13%. The price then began a gradual fall following the flooding event, culminating in a low contract price of US\$81/mt FOB in the January 2016 quarter. Following government mandated rationalisation of Chinese coal production in 2016, coinciding with mine specific issues in Queensland and New South Wales, the spot HCC price again surpassed US\$200/t FOB.<sup>4</sup>

More recently, tropical cyclone Debbie (TC Debbie) halted exports from the Central Queensland Coal Network (CQCN) for three weeks after crossing land in March 2017. In addition to a three-week interruption to railings to Hay Point and multi-week delays to railings in the Blackwater and Newlands coal networks, TC Debbie had long-lasting impacts on the DBCT supply chain for much of 2017. Spot prices spiked above US\$300/mt following TC Debbie but have since returned to near \$US200/t. The spot price has sustained at well above US\$200/t for the first three months of 2018. This pricing history is shown in Figure 14 below.

A key change occurred in seaborne hard coking coal (HCC) markets immediately following TC Debbie, reportedly in response to the price volatility that resulted. After decades of resistance to index-linked pricing, Japanese coal end-users finally accepted a move away from negotiated contract pricing. A new mechanism was agreed between buyer and seller which was linked to key daily spot pricing indices. The new index linked quarterly pricing mechanism utilises the daily average prime HCC spot price from three major coal indices (Argus, Platts and TSI). The daily average HCC price from the three indices for the preceding three months are then used to calculate the current quarter’s contract price. DBCTM is uncertain what impact this change might have on long term volatility in pricing and demand patterns.<sup>5</sup>

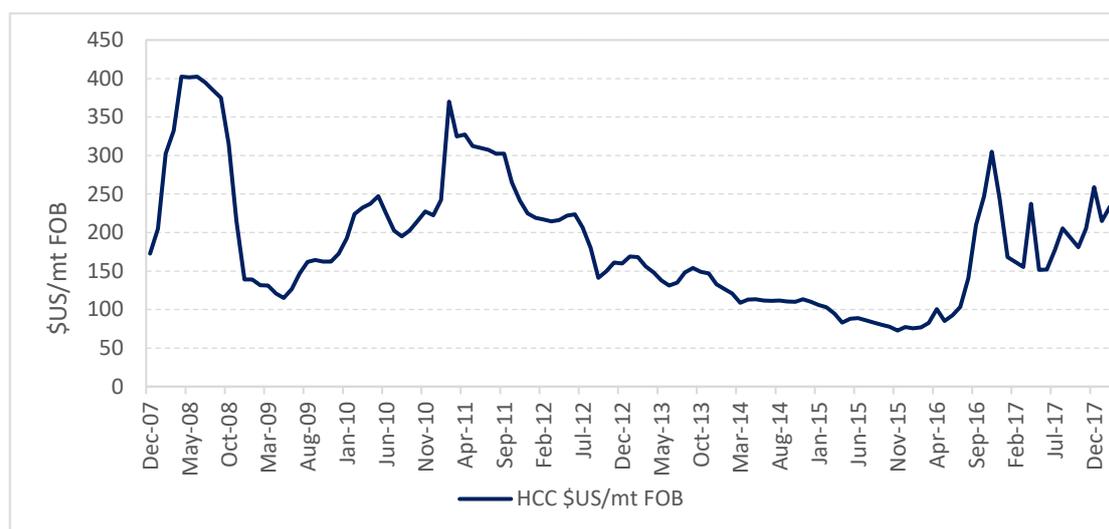


Figure 14: Spot FOB Newcastle Thermal and QLD met coal price history (Platts CTI & IHS, 2007-2018)

<sup>4</sup> Platts CTI and IHS Inside Coal

<sup>5</sup> Argus website (<http://www.argusmedia.com/news/article/?id=1477863>)



China is the world's largest consumer and producer of metallurgical coal. Australia and the US are the world's other major producers, while Japan, India and Russia are the world's other major coal consumers. Global metallurgical coal production is estimated at about 1,045 million tonnes per annum. Seaborne metallurgical coal trade was approximately 314 Mt in 2016 with the remainder of metallurgical coal supply coming from domestic production and imports over land.<sup>9</sup>

Australia is the dominant metallurgical coal exporter, holding 60% of the market, followed by the US which exported approximately 11% of global seaborne coal in 2016. Approximately 80% of Australia's exports go to Asian markets, although Australian producers also ship significant volumes to Europe. Imports are much less concentrated than exports, however the Far East (combined) takes just less than half of global volumes, with China alone accounting for about 19% of the metallurgical coal exported in the seaborne market

China's investment-led growth strategy saw its economy boom during the 2000s, driving up consumption of many raw commodities, particularly metallurgical coal and iron ore. From 2000 to 2013, the urban population in China grew by an average 20 million people per annum. This urbanisation process required massive volumes of steel to meet demand from infrastructure and building projects. Over the same period, Chinese steel production grew by an average of 50 Million tonnes annually, increasing from 129 Mt to 823 Mt, (representing 7 times the steelmaking capacity of the U.S). The boom in Chinese steel production coincided with a substantial expansion in Chinese domestic metallurgical coal production. Ultimately China needed to supplement domestic supply with imports, taking 126 Mt of coal in 2009.

Much of this growth in demand was met by North American and Australian production. Incentivised by the growth in the seaborne price, miners worked hard to rapidly expand production. This campaign to meet growing seaborne metallurgical coal demand resulted in substantial increases in the cash cost of coal production as miners sought to export the tonnes at any cost. The miners accepted this cash cost growth, expecting that the cost of production was likely to be lower than the sale price of coal. Many coal mining projects were commissioned and brought online around the world, lured by the expectation of continuing growth in Chinese demand.

Slowing Chinese economic growth after 2011, a corresponding drop in steel production and new coal mining capacity being brought online led to an oversupply of coal globally. Coal prices subsequently fell across the board between 2012 and 2016. Much of the supply in the US and Canadian markets was no longer profitable and was removed from the market, or was subject to some form of ownership restructuring. This oversupply situation culminated in US\$81/t sale prices in the Jan-Mar quarter of 2016 (Figure 14).



By September 2016, the Chinese government imposed 276 working day limits on all domestic coal mines to improve the profitability of China's coal mining industry. These working day limitations at coal mines occurred in the midst of the Chinese government executing its ambitious targets to rationalise Chinese coal and steelmaking production capacity. This rationalisation program was achieved through a variety of measures, including mine closures justified on the basis of safety concerns, consolidation of China's major mining companies and mandated shutdowns of small or illegal mining operations.

So far, this Chinese consolidation initiative has resulted in 473 Mtpa of coal mines (both thermal and metallurgical) leaving the market in 2016 and 2017, with a further 150 Mtpa of coal production to be closed in 2018. This has been a major contributor to the recent rebalancing of supply and demand in the global market. Due to the recently tightened supply situation, supply disruptions occurring in any metallurgical coal mining region have quickly resulted in seaborne coal price increases.

### **4.3 Supply**

The supply of metallurgical coal into the seaborne market is currently dominated by four countries. In 2016, Australia held a 60% share of global exports, US based producers hold 11%, Canada holds 8% and Russia holds 7%. Queensland and Australian coal producers have a natural geographical advantage over many other metallurgical coal producers, which are generally located further away from DBCT's typical Asian buying regions.<sup>9</sup>

During the mid to late 2000s, in response to expected continuing high Chinese demand, global metallurgical coal production reached historically high levels through the introduction of new coal mines and capacity expansions at already operating mines. Since 2009, Australia has increased its exports by approximately 50 Mt.<sup>9</sup>

In response to subsequent falling coal prices between 2012 and 2016, many coal producers took the approach of reducing the unit cost of producing coal by maximising coal production rates. Increased production added extra coal supply to an already oversupplied market and depressed prices further. In the same period, focus shifted to achieving cost savings at coal mining operations to improve profitability and in some cases, survival. Cost savings were achieved in a number of ways, but the main focus areas were reducing the cost of labour and the exploration spend. DBCTM expects Australian producers to continue to benefit from cost reductions achieved in the downturn between 2012 and 2016.

During the recent downturn, many of the top tier coal producers in the US were forced to idle coal mines, or seek bankruptcy protection under Chapter 11 provisions. In response to a rebounding coal market, a number of these operations have since resumed production and re-joined the export market. US metallurgical coal exports increased 31% year on year in 2017, with almost half of all US metallurgical coal exports going to European ports. DBCTM expects that US coal suppliers will continue to provide swing capacity to the global seaborne markets.<sup>9</sup>

Mozambican coal production has also faced delays and extra costs to repair, upgrade and build coal transport infrastructure. The most advanced and significant coal mine (Moatize) and accompanying infrastructure project (Nacala) in Mozambique is majority owned by Vale. The Moatize mine exported 11.3 Mt of coal in 2017, 6.95 Mt

of this was metallurgical coal.<sup>6</sup> The Moatize mine project will export up to 18 Mtpa from Nacala Port at full capacity, utilising the Nacala Rail corridor for coal transportation. The Nacala rail corridor upgrade project secured financing in late 2017. This upgrade project will ultimately increase the Nacala rail corridor's coal export capacity to 22 Mtpa.<sup>7</sup> Given its proximity to India and Europe, Mozambique's coal production has the potential to displace some demand for Australian metallurgical coals.

Although Mongolian miners have recently faced issues with cash flow and profitability, Mongolian coal developments have the potential to displace demand for Australian coal, particularly demand from Chinese importers. Mongolian miners exported approximately 18 Mt of coal in 2017, most of this was exported across the border to China. Infrastructure and border bottlenecks have recently constrained exports as Mongolian miners' ramped-up production in response to improved market conditions. Mongolian miners are still limited in their access to export markets other than China, meaning the sale price of Mongolian coal is usually well below the seaborne price.

After falling to US\$81/t FOB in Q1 2016, HCC prices have been sustained above US\$100/mt FOB since August/September 2016, and have been above US\$200/t for the first quarter of 2018. These improved market conditions are likely the result of the recent rebalancing of supply and demand and seemingly consistent disruptions to supply around the world.<sup>8</sup>

Coinciding with sustained improving market conditions, DBCTM has observed an increase in interest for port capacity from a combination of greenfield and brownfield coal mine developers. This increased interest indicates that confidence in the market is returning and miners may be more willing to invest in coal mine developments in the Bowen Basin. Following years of cost cutting initiatives, combined with well-developed infrastructure and a natural proximity advantage to Asian import destinations, Australian miners are expected to maintain a substantial advantage over their global competitors.

Recent demand trends from DBCT's major coal import regions are shown in Figure 16.

#### **4.3.1 Domestic Indian production growth**

While India has abundant coal reserves and some of the lowest mining cash costs in the world, the coal reserves generally aren't in areas where the coal is consumed. Indian metallurgical coal also tends to be of lower quality and with higher impurities than Australian coals.

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<sup>6</sup> Vale Production & sales Q4 2017 ([http://www.vale.com/EN/investors/information-market/Press-Releases/ReleaseDocuments/2017%204Q%20Production%20Report\\_i.pdf](http://www.vale.com/EN/investors/information-market/Press-Releases/ReleaseDocuments/2017%204Q%20Production%20Report_i.pdf))

<sup>7</sup> African Development Bank – Nacala corridor resettlement ([https://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/Mozambique\\_-\\_NACALA\\_RAIL\\_\\_\\_PORT\\_PROJECT\\_-\\_Summary\\_RAP\\_%E2%80%93\\_10\\_2015.pdf](https://www.afdb.org/fileadmin/uploads/afdb/Documents/Environmental-and-Social-Assessments/Mozambique_-_NACALA_RAIL___PORT_PROJECT_-_Summary_RAP_%E2%80%93_10_2015.pdf))

<sup>8</sup> Platts Coal Trader International – Premium low vol. hard coking coal price (2007-2015). IHS Inside Coal – Australian prime hard coking coal (2015-2018)

India's seaborne demand will largely depend on the performance of its domestic coal industry. New coal mine developments have historically been subject to delays while waiting for land acquisition and the award of the mining lease. With only Bharat Coking Coal Limited current producing substantial quantities of metallurgical coal in India, combined with concerns about quality, Indian domestic metallurgical coal supplies are expected to increasingly struggle to keep pace with India's ambitious steel production expansion plans. Accordingly, DBCTM expects that India is likely to need to supplement its domestic metallurgical coal production with greater seaborne metallurgical coal or raw steel imports.

#### **4.3.2 Chinese Domestic production**

Chinese domestic producers accounted for 578 million tonnes of metallurgical coal supply in 2016.<sup>9</sup> Much of China's coal production prior to 2018 was reportedly running at a loss. These coal mines were supplying metallurgical coal to steel mills which were also struggling with profitability and low levels of utilisation. To combat this lack of profitability in domestic coal supply, the Chinese government imposed policies designed to protect Chinese coal producers from competition from imported coals in 2015.

The first of the key policies involved quality checks for trace elements, the second was a blanket tariff applied to imported coals which was subsequently removed. Both of these policies appear to have had little effect on longer term Australian coal exports to China. This is particularly true for coal exports from DBCT to China which were the highest on record in 2017 (15 Mt) (Figure 19).

The Chinese government subsequently mandated ambitious targets for rationalising unviable and unsafe domestic coal production. China's ambitious targets for coal and steel production rationalisation have largely been met or outperformed with 473 Mtpa of coal production being removed from the market in 2016 and 2017, with a further 150 Mtpa expected to be removed in 2018. Due to mandated reduction targets, development and investment in new Chinese coking coal mines has been limited and will be unable to offset the lost production capacity. This will likely lead to China increasingly entering the seaborne market to satisfy its coking coal needs.<sup>10</sup>

#### **4.4 Drivers of demand**

Global crude steel production grew from 1,343 million tonnes in 2008 to 1,691 million tonnes in 2017.<sup>11</sup> DBCTM expects that India's infrastructure build program will continue to drive strong demand for DBCT's coal.

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<sup>9</sup> Dept. of Industry, Innovation and Science (<https://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/ResourcesandEnergyQuarterlyDecember2017/documents/Resources-and-Energy-Quarterly-December-2017.pdf>)

<sup>10</sup> SXCoal website (<http://www.sxcoal.com/news/4569671/info/en>)

<sup>11</sup> World Steel Association Website (<https://www.worldsteel.org/media-centre/press-releases/2018/World-crude-steel-output-increases-by-5.3--in-2017.htm>)

China’s expected growing dependence on seaborne coal will continue to drive healthy demand for coal exports from Queensland. Japan and South Korea’s steel production is expected to remain stable, and not materially alter demand levels for Australian coal.



**Figure 15: World crude steel production – World Steel Association, 2017**

The comparatively mature economies of Japan, South Korea and Europe have well-developed steelmaking capacity, but are not endowed with substantial domestic metallurgical coal reserves. These economies experienced growth in their steelmaking industries well before the recent rise of China and India as steelmaking giants. South Korea and Japan experienced similar rapid growth in the early development phases of their economies, but have stabilised at approximately 70 Mtpa and 105 Mtpa of crude steel production respectively. Chinese and Indian steel production and coal demand has grown rapidly and is expected to eventually mature and stabilise like the Japanese and South Korean economies before them. It is uncertain when this stabilisation will occur and at what level of annual production this is likely to occur.<sup>12</sup>

Other factors such as increased usage of recycled steel, or technologies that replace traditional metallurgical coal and iron ore production processes, such as POSCO’s FINEX technology may pose a risk to long term metallurgical coal demand.

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<sup>12</sup> World Steel Association website (<https://www.worldsteel.org/media-centre/press-releases/2018/World-crude-steel-output-increases-by-5.3--in-2017.html>)

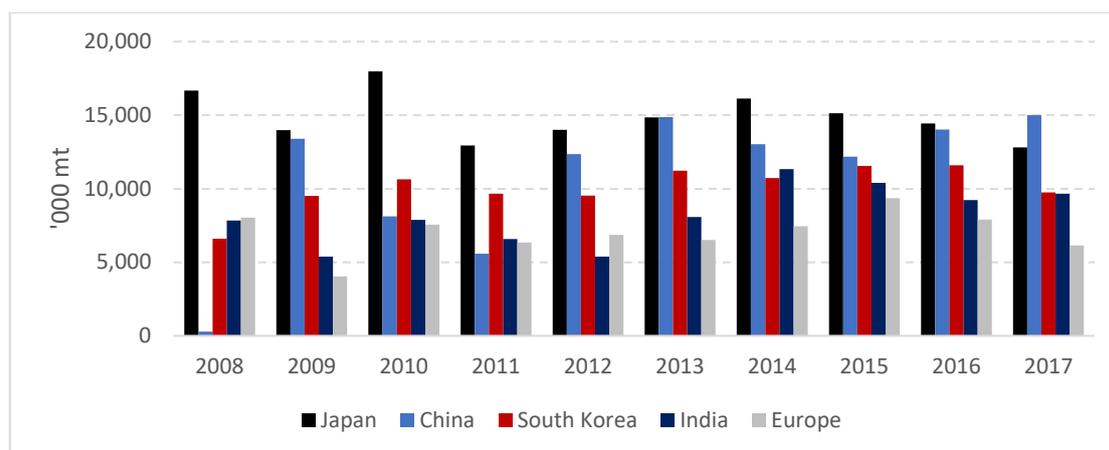


Figure 16: DBCT historical exports to key importing regions (DBCT Management, 2018)

#### 4.4.1 India

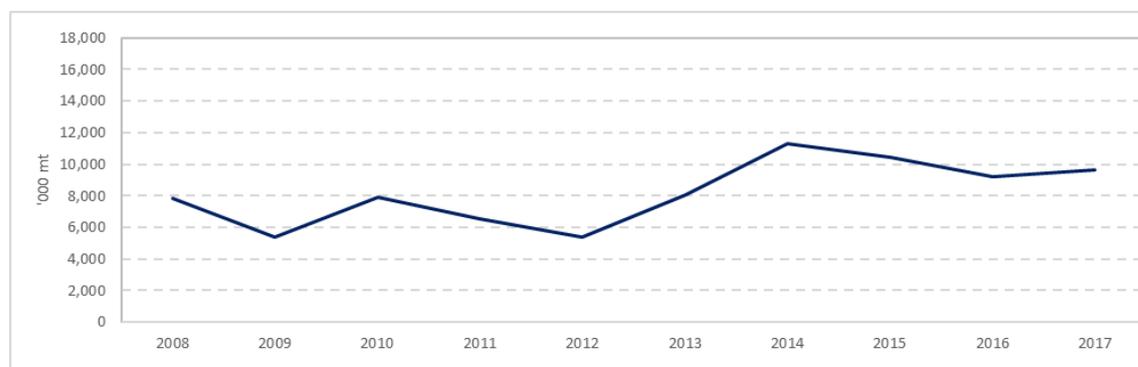


Figure 17: Indian imports from DBCT (DBCT Management, 2018)

Facing difficulties in obtaining supplies of high quality domestic coal production, India's steel ministry wrote to the Indian government in early 2018 to request that tariffs on coking coal imports into India be removed. Despite the tariffs, Indian imports of metallurgical coal were 12% higher in 2017 (43.5 Mt) than 2016 (38.83 Mt), indicating that Indian demand for metallurgical coal is growing and that domestic metallurgical coal production cannot keep pace.<sup>13</sup>

India's ambitions to increase domestic crude steel production from 100 Mtpa in 2017 to 300 Mtpa in 2025 is the most likely driver of seaborne met coal demand growth in the coming decade. India increased steel production by 6% in 2017, and for the first time surpassed 100 Million tonnes of crude steel production in a year.<sup>14</sup> A number of Indian steelmaking facilities are currently subject to expansion projects, however to reach the 300 Mtpa crude steel target by 2025, India will need to further streamline the approvals process for steel mill development.

<sup>13</sup> Dept. of Industry, Innovation and Science (<https://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/ResourcesandEnergyQuarterlyDecember2017/documents/Resources-and-Energy-Quarterly-December-2017.pdf>)

<sup>14</sup> World Steel Association website (<https://www.worldsteel.org/media-centre/press-releases/2018/World-crude-steel-output-increases-by-5.3--in-2017.html>)

With supply channels to India already well established between Queensland coal producers and various Indian customers, DBCT’s exporters are well positioned to satisfy some of this Indian coal demand growth. DBCT has already seen significant growth to India as an export destination in the past decade, (Figure 17).

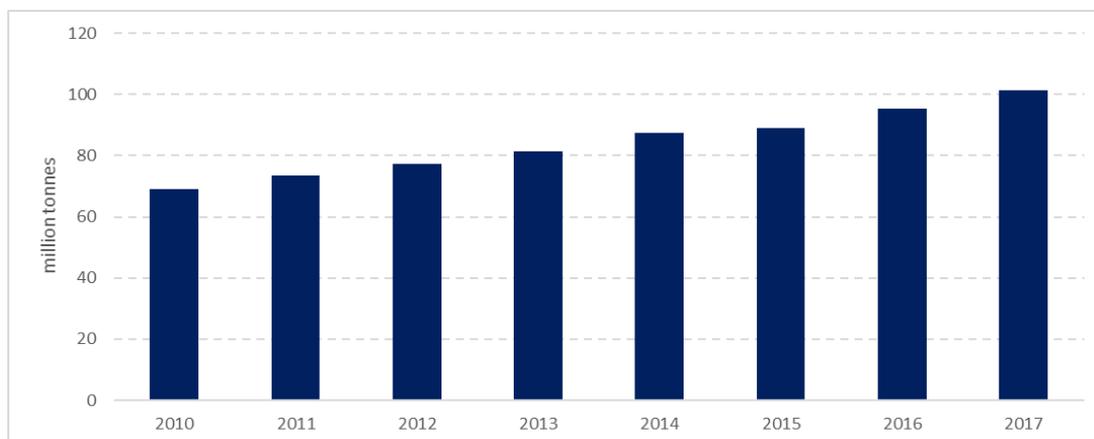


Figure 18: Indian crude steel production (World Steel Association, 2018)

#### 4.4.2 China

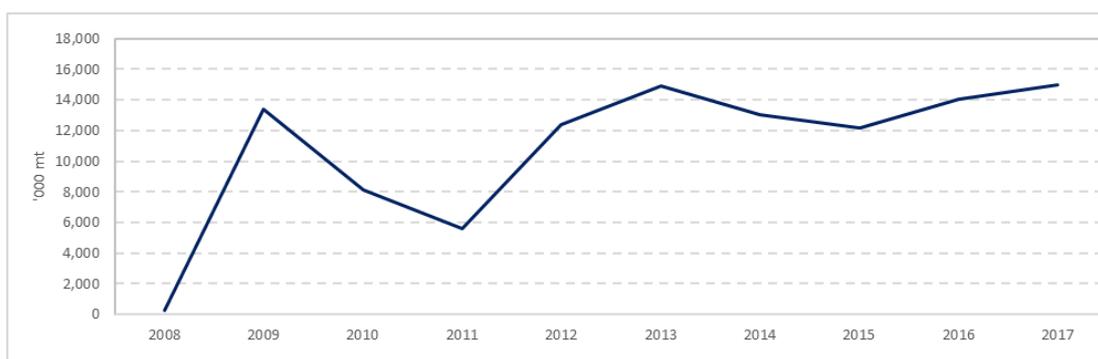
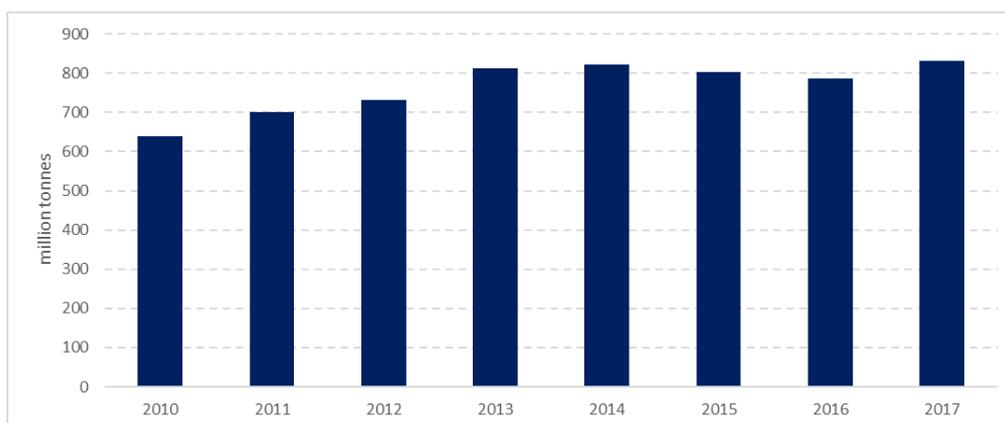


Figure 19: Chinese imports from DBCT (DBCT Management, 2018)

After entering the seaborne market as an importer in 2009, China’s demand for metallurgical coal has grown and shrunk with the performance of its economy, steel producers and domestic metallurgical coal production. China’s steelmakers are estimated to have imported 71 million tonnes of metallurgical coal in 2017.<sup>15</sup> Chinese steel producers recorded a decade or more of extraordinary crude steel production growth until 2014 (822 Mt), followed by a period of lower domestic consumption and growing crude steel exports in 2015 and 2016. Despite widespread capacity rationalisation in 2016 and 2017, Chinese crude steel production was the highest on record in 2017 (832 Mt).

<sup>15</sup> Dept. of Industry, Innovation and Science (<https://www.industry.gov.au/Office-of-the-Chief-Economist/Publications/ResourcesandEnergyQuarterlyDecember2017/documents/Resources-and-Energy-Quarterly-December-2017.pdf>)

In addition to the reported removal of approximately 120 Mtpa of steel production capacity in 2016 and 2017, the Chinese government is targeting the reduction of another 30 Mtpa of steel production in 2018, bringing the three year total to approximately 150 Mtpa. The original mandate was for 100-150 Mtpa of steelmaking capacity to be removed between 2016 and 2020, meaning production cuts have been occurring in line with the targets set out in the 13<sup>th</sup> five year plan (2016). DBCTM expects this reduction in Chinese capacity to have a positive benefit on the global steel market and to improve steelmaking profitability in DBCT’s other key export regions.<sup>16</sup>



**Figure 20: Chinese crude steel production (World Steel Association, 2018)**

Despite Chinese steel exports reducing by approximately 31 percent between 2016 and 2017, anti-dumping measures have increasingly been applied in other steel-producing regions. These policies are designed to protect local industry against cheap Chinese steel imports. The US Government is attempting to implement trade tariffs on steel imports from a number of countries, including China. The EU had instituted similar tariffs on cheap Chinese steel imports in 2011 and these tariffs were extended for another five years in March 2018. These protectionist policies may become more prevalent in other regions with steelmaking industries in coming years, potentially reducing demand for Chinese steel exports.<sup>17</sup>

As can be seen in Figure 19, DBCT’s exposure to Chinese imports has grown significantly over the past decade. Chinese buyers have typically only turned to imported coal when the price was lower than domestically delivered coal, meaning China’s demand has been volatile and difficult to forecast. Chinese demand is uncertain, volatile and subject to a number of domestic policies, combined with the general outlook for the Chinese economy.

<sup>16</sup> SXCoal website (<http://www.sxcoal.com/news/4569671/info/en>)

<sup>17</sup> United States Trade Administration website (<https://www.trade.gov/steel/countries/exports/china.asp>)

### 4.4.3 South Korea and Japan

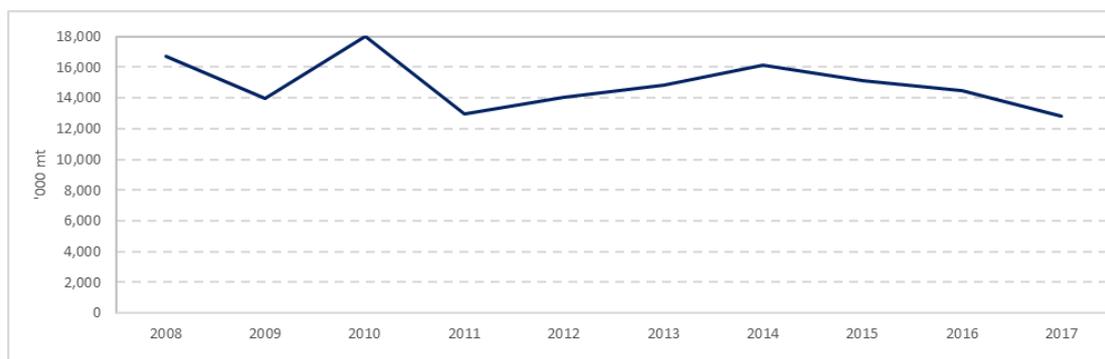


Figure 21: Japanese imports from DBCT (DBCT Management, 2018)

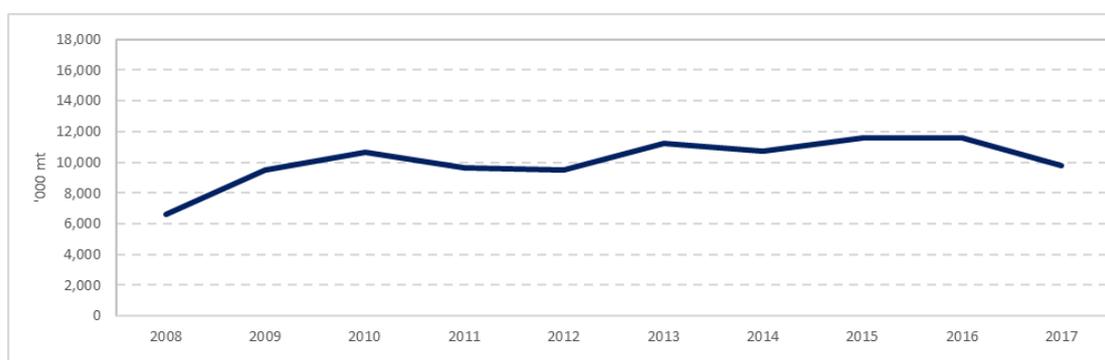


Figure 22: South Korean imports from DBCT (DBCT Management, 2018)

DBCTM views South Korea and Japan as stable destinations for DBCT’s metallurgical coal exports. While these nations are not expected to provide material growth in metallurgical coal demand, these two regions are expected to continue taking a substantial percentage of DBCT’s coal, as has been the case for at least the past ten years. Many of the mines that export through DBCT have varying levels of Japanese joint venture ownership, which is expected to continue the long-term sourcing of coal by Japanese buyers from these mines.

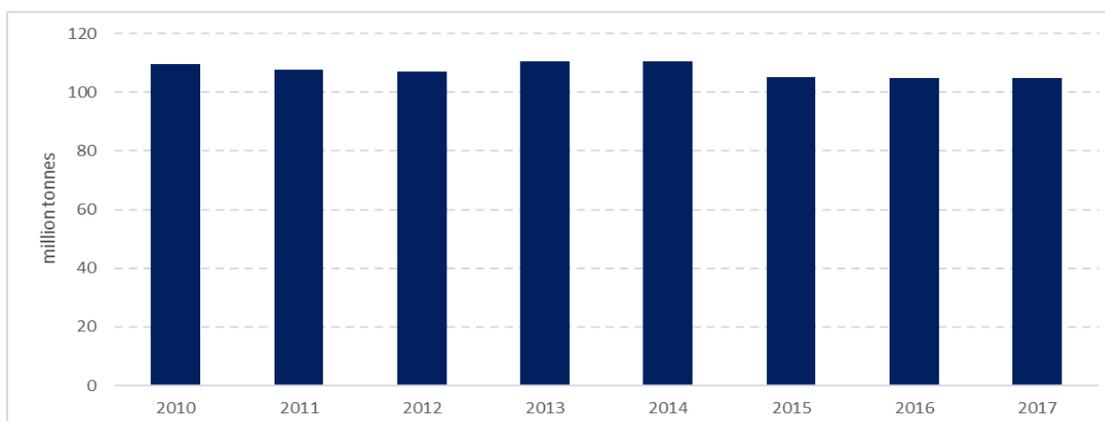


Figure 23: Japanese crude steel production (World Steel Association, 2018)

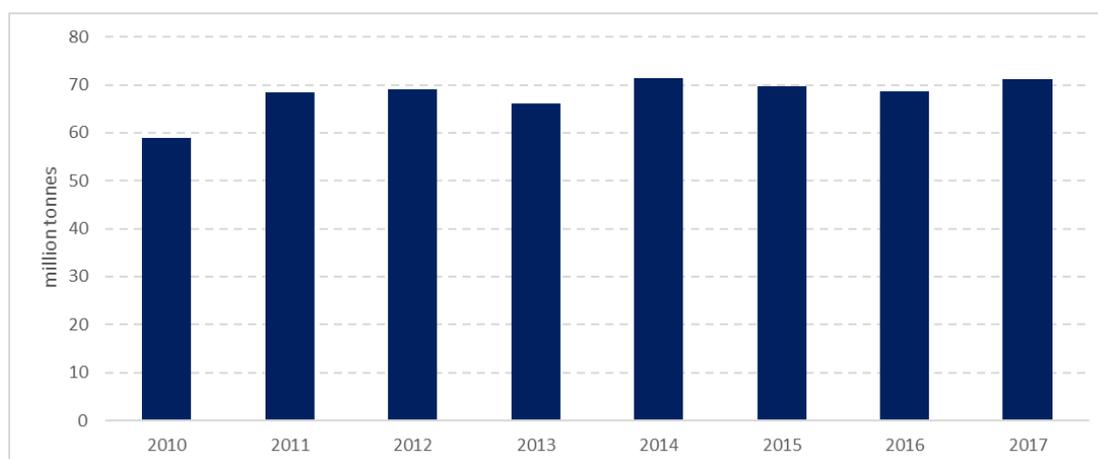


Figure 24: South Korean crude steel production (World Steel Association, 2018)

#### 4.4.4 Europe

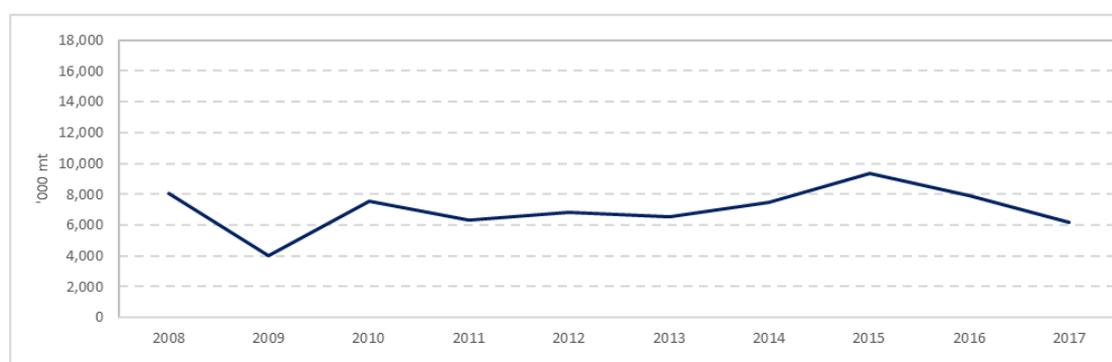


Figure 25: European imports from DBCT (DBCT Management, 2018)

There have been steelmaking facility closures in the past three to five years in some of DBCT’s usual European export destinations, however these closures represent a small percentage of Europe’s overall steelmaking capacity. Despite a reduction in crude steel output from 2012 to 2016, crude steel production from the EU has recovered to 168.7 Mt of output in 2017 (Figure 26).<sup>18</sup>

Historically low freight rates have likely been a factor in the increasing volumes of exports from DBCT to Europe over the past decade. Europe’s appetite for DBCT coal will continue to be responsive to freight rate volatility and the exchange rates of various currencies against the US dollar. Both factors have the potential to impact the ability of DBCT exporters to maintain their recently established foothold in the European markets. Australian producers were able to displace US coal production into Europe as the coal markets deteriorated between 2012 and 2016. DBCTM is unsure if European buyers would increase imports from the US if the US dollar weakened, or freight rates rose.

<sup>18</sup> World Steel Association website (<https://www.worldsteel.org/media-centre/press-releases/2018/World-crude-steel-output-increases-by-5.3--in-2017.html>)

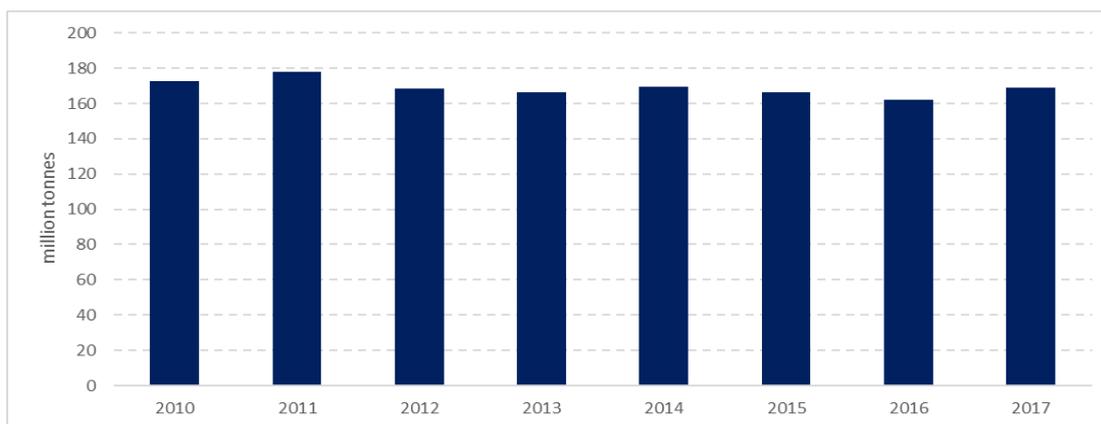


Figure 26: Eu-28 crude steel production (World Steel Association, 2018)

#### 4.4.5 Thermal coal

While DBCT’s thermal coal throughput comprises approximately 16% of total throughput in any single year, it is necessary to consider thermal coal as an integral element of DBCT’s contracted capacity and a potential contributor to DBCT’s capacity growth. Accordingly, DBCT Management expects demand for thermal coal exports out of Queensland to grow in the medium to long term. Demand for DBCT’s thermal coal exports are expected to continue from traditional customers of the DBCT-exporting thermal mines. The growth in thermal coal demand from Queensland and DBCT is expected to increase with continuing economic development in India and the South East Asian regions. In the case of both regions, imports of thermal coal are expected to supplement domestic production.

Demand for new expansion capacity could conceivably come from thermal coal developments in the traditional Bowen Basin catchment area. Over time, DBCTM has received high numbers of Access Applications that related to thermal coal developments in the central Bowen Basin.

#### 4.5 Mine Development Expansion Triggers

In the first quarter of 2016, coking coal prices were lower than they had been since prior to the mining boom of the late 2000’s, coinciding with the publication of the 2016 DBCT Master Plan. At that time there was no demand for expansion capacity at DBCT and capacity was being relinquished for the first time in DBCT’s history. By late 2016, metallurgical coal prices had surpassed US\$100/mt and have remained well above that level ever since. In the previous master plan, DBCTM anticipated that there would be no further coal mine developments until coal prices were sustained above the incentive price. While DBCTM did not attempt to determine this incentive price, Deutsche Bank (September 2015) suggested this price globally was approximately US\$127/mt.

DBCTM has seen an increase in Access Seeker activity during the second half of 2017 and into early 2018. DBCTM expects this indicated demand to be underpinned by mine development which will result in re-contracting of any relinquished capacity. DBCT Management does not believe the timing for terminal development can be forecast with any reliability and has avoided doing so in this or the previous master plan. DBCT Management instead approaches its master planning obligations by outlining an incremental development pathway that can be activated when real demand is presented and can be underwritten by access agreements.

## 5 DBCT Mtpa Expansion Options

### 5.1 Development Objectives for DBCT

DBCTM's development objectives for DBCT are as follows:

- Develop Master Plans that define strategies to ensure efficient and secure long-term operation of the DBCT facility to meet the needs of the existing terminal Users and Access Seekers.
- Develop an expansion pathway that is consistent with the Sustainable Ports Development Act and Reef 2050 Long Term Sustainability Plan by promoting the incremental development of the existing facility to satisfy the growth needs of the coal industry.
- Continue to build an alliance with all coal chain stakeholders in order to achieve mutually beneficial enhancements for the operation of the coal chain, including an equitable sharing of the costs and benefits of system improvements.
- Conduct the core business functions (treasury, financing, customer relations, regulatory relations, contracts management, etc.), while outsourcing technical and operating functions, to ensure that the DBCT facility continues to be managed, operated and maintained at a standard consistent with the obligations set out in the PSA.
- Realize additional system throughput through improved process efficiency at the terminal and within the Goonyella coal chain.
- Support community involvement and engage in ongoing meaningful stakeholder consultation.
- Ensure a continued 'leading practice' approach to port/terminal planning within the coastal zone, particularly within the GBRWHA.

DBCTM uses the following key drivers to guide the ongoing planning for expansions at DBCT:

- system capacity yield
- lowest whole of life costs (maintainability, operational flexibility etc.)
- minimising operational loss of capacity during construction
- minimisation of environmental impacts
- integration with existing infrastructure
- providing an incremental expansion pathway to maximise the potential of existing infrastructure and match the anticipated incremental growth of the coal chain
- realisation of terminal capacity against User contracted requirements, and
- future upgrade/optimisation potential.

Any terminal expansion is integrally linked to other supply chain infrastructure which has been illustrated in previous DBCTM Master Plans. DBCTM has been working closely with the ILC to match infrastructure expansions with the other system components to provide for the efficient use of infrastructure and ensure capacity expectations are met and delivered across the system.

DBCTM has a PSA obligation to accommodate the actual and reasonably anticipated future growth of demand for the use of DBCT by Access Holders and Access Seekers, as well as a regulatory obligation to address and accommodate Access Applications, subject to a reasonableness test. DBCTM has developed expansion options that address these obligations.

## 5.2 Expansion Studies

### 5.2.1 Recap of Master Plan 2016

Master Plan 2016 outlined an incremental expansion pathway that could take the terminal to an ultimate capacity of up to 136 Mtpa. The proposed expansion pathway is summarised in Table 4 below;

Stage		Description	Capacity (Mtpa)
Zone 4		Completion of Row 8, additional elevated stacker bund and additional Stacker (Bund 7/ST5), replacement of existing Reclaimer RL2 with new Reclaimer RL4 with extended reach into Row 8.	89
8X	Phase 1	Stockyard Augmentation Project (including vertical concrete walls on existing bunds 1 and 3), Stacker ST2 upgrade, Stacker ST1 upgrade and an upgrade of Conveyors R1 & R2	94
	Phase 2	Rail Reception Pit 4, Inloading Buffer Storage, Upgrade to Inloading 2 and Outloading 2	102
9X (Implemented over 3 phases)		Additional Stockyard at Louisa Ck, Upgrades to Inloading 1, additional Outloading System 4 and up to 2 berths to the north, including significant land reclamation to accommodate dredge spoil	Up to 136

**Table 4: Proposed expansion pathway**

This Master Plan is consistent with the previous Master Plan insofar as the incremental development pathway remains essentially unchanged. The only change with respect to the expansion pathway is the viability of the 3rd step (9X). The likelihood of conditions being favourable to underpin a 9X expansion project in the future has been diminished by 2 significant contributing factors.

1. The introduction of Differential Pricing in the 2017 AU, which raises doubts about whether such an expansion is capable of achieving the objectives of being economic or reasonable.
2. The perceived difficulty of securing permits to complete the dredging required for the berths required for 9X.

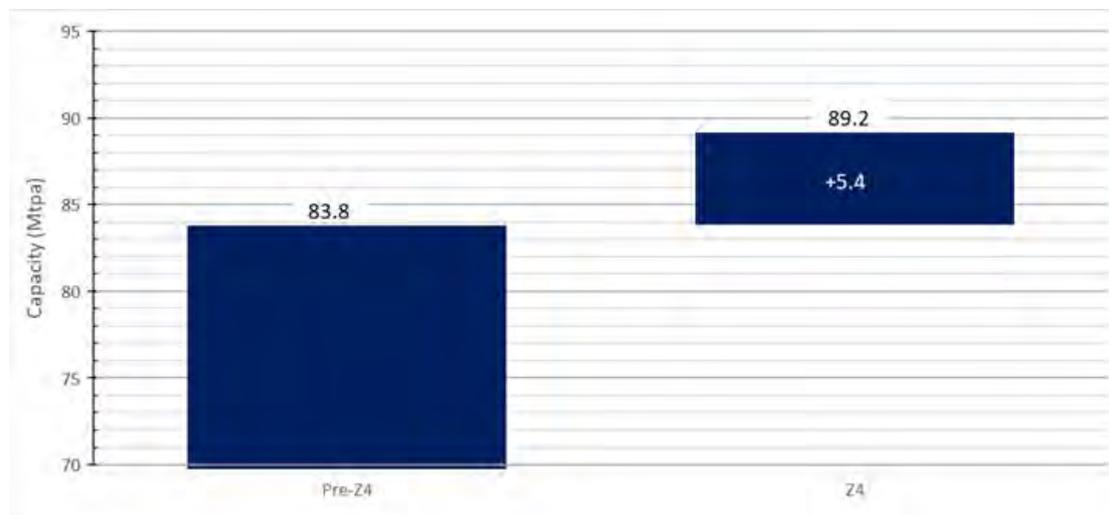
These issues are discussed further in Section 5.4.3

## 5.3 System Capacity Modelling

During 2015, DBCTM engaged the ILC to model various expansion scenarios before finalising the pre-feasibility study for the Zone 4 project. The ILC first established the pre-expansion capacity of the Goonyella System and then modelled the final configuration of the Zone 4 project.

The Pre-Zone 4 capacity was modelled at 83.8 Mtpa (Pre-Z4UP) and the modelled

system capacity post Zone 4 was determined as 89.2 Mtpa as shown in Figure 27



**Figure 27: Zone 4 capacity modelling**

The source of expansion tonnes within the Goonyella network are unknown, meaning the “model” was only able to be used to test the sensitivity of the result to various source mine locations within the network. Five separate ‘assumed’ mine locations were tested from various areas within the Goonyella network. In each case, it was assumed that the additional 4 Mtpa (from 85 to 89 Mtpa) would be sourced from a location on each of the following branch lines:

- North Goonyella branch
- Blair Athol branch
- Dysart branch (northern end)
- Dysart branch (southern end)
- Hail Creek branch

The worst modelled capacity result achieved for any of the scenarios was 89.2 Mtpa with some mine locations producing slightly better results.

The ILC intends to update the System Master Plan in the second half of 2018. Once that work has been completed, the Zone 4 modelling results will be revalidated. DBCTM does not currently expect the results to be materially different to previous modelling results.

During 2015, DBCTM engaged Ausenco, in parallel to the work being undertaken by the ILC on the Zone 4 project, to undertake system capacity modelling to assist with scenario testing for 8X and 9X concept development. Ausenco has had a long association with DBCT and modelling DBCT capacity, both on a standalone basis and within the context of the entire coal chain. Ausenco first modelled the existing system, followed by the Zone 4 expansion. After Ausenco’s model was producing modelling results broadly consistent with the ILC’s modelling, Ausenco’s work was extended to include various 8X and 9X scenarios.

The capacity assessments for the 8X and 9X concepts included in this Master Plan were independently estimated by Aurecon Hatch. Aurecon Hatch initially estimated capacities using static modelling.

DBCTM and Aurecon then tested capacities using Ausenco’s dynamic capacity modelling, which were ultimately considered sufficiently robust for concept level studies. Prior to progressing further with 8X studies, DBCTM would engage the ILC to verify the results using its latest dynamic system capacity model.

## 5.4 Expansion Pathway

### 5.4.1 Zone 4

The proposed Zone 4 Project involves expansion of the existing stockyard row 8 to enable both rows 7 and 8 to operate together as a 4th operating zone. The 4th zone would be utilised for storage of remnants and selected high-throughput coal types in dedicated stockpiles.

The project includes the following key components:

- Extension of Row 8 and the provision of a vertical walled bund (Bund 7) on the western side of the stockyard.
- Relocation of hybrid stockpiling (currently in use throughout the yard) with storage of selected high-volume products in dedicated piles in Zone 4 and another in a dedicated pile in Zone 2.
- Provision of an independent stacking path to Row 8 via the new Bund 7 and a new Stacker ST5 to improve the availability of the Zone 4 reclaim machines to attend to reclaim tasks.
- The replacement of the existing Reclaimer RL2 with a new Reclaimer with different geometry and a longer boom to ensure that it can reach all coal stored in Row 8 after the expansion.
- The relocation of the existing Western Site Access Gate and the Western Access Road.

The above aspects of the Zone 4 Project are illustrated in Figure 28 below.



Figure 28: Extent of Works for Zone 4

The Zone 4 project delivers an increase in stockyard storage capacity and some minor improvements in stacking and reclaiming efficiency. Prior to Zone 4, simulation

modelling undertaken by the ILC indicates that the existing Goonyella system capacity is constrained to approximately 83.8 Mtpa, despite the standalone nameplate capacity of DBCT of 85 Mtpa.

The Zone 4 expansion is not focused on provision of more coal handling equipment but instead focuses on increasing the storage volume available for Cargo Assembly and Hybrid Operations. This additional volume delivers an efficiency gain in the existing coal chain by allowing parcels to be sourced from more mine load outs and accommodated in the stockyard at any one time. This improved efficiency, in turn, provides additional system capacity by reducing the peaking congestion at points in the network. The infrastructure provided in Zone 4 will operate in a wholly integrated way with the existing facility, meaning that existing Users will necessarily have the same access to the facilities built as part of this expansion as expanding Access Seekers. The Zone 4 Project effectively closes the gap between Goonyella system capacity and nameplate DBCT capacity, while at the same time increasing overall system capacity to 89 Mtpa.

The proposed increase in the DBCT stockyard storage volume is to be achieved by an increase in width and length of row 8. The upgraded row 8 will feature a high retaining wall on the western side to allow greater storage efficiency than has been achieved in any other existing walled row.

The increased stockyard volume also facilitates an important change to the efficiency of the hybrid stockyard mode. In the context of the Zone 4 expansion project, the increased volume in Row 8 allows two of these dedicated product stockpiles to be moved out of the cargo assembly zones and into rows 7 and 8, coexisting with the remnant stockpiles. This allows rows 7 and 8 to be treated as a 4<sup>th</sup> stockyard Zone that will handle the two dedicated high-throughput coal brands as well as all remnants. The products in the Zone 4 dedicated piles are then not required to be handled via any of the other three cargo assembly zones or outloading systems. Coal from Zone 4 can then be proportioned across the 3 outloading systems in a way that allows Zone 4 to act as an extension, at various times, of each of the other three zones.

The effective storage ratio for the cargo assembly portion of throughput is increased and the increase in storage ratio is distributed more evenly across the stockyard zones than can be achieved prior to implementation of the Zone 4 project.

Minor improvements in overall stacking and reclaiming performance are also achieved in the Zone 4 project via:

- replacement of the existing RL2 reclaimer with a longer boom RL4 reclaimer. RL4 will achieve higher average reclaim rates due to its ability to reclaim from wider stockpiles
- addition of a new high capacity stacker ST5 to facilitate independent stacking into row 8 without disrupting reclaim operations

These equipment improvements contribute to the overall throughput capacity gain that will be achieved as a result of the Zone 4 project.

The modelling results indicate that the Goonyella system capacity increases from 83.8 Mtpa to 89 Mtpa as a result of the Zone 4 project. The Zone 4 project releases system capacity between the currently modelled system capacity of 83.8 Mtpa and the currently contracted 85 Mtpa. Unlocking 1.2 Mtpa of system capacity will benefit the existing terminal users, while also provide Access Seekers with 4 Mtpa of additional capacity beyond 85 Mtpa.

The stockpile areas are proposed to be utilised as shown below (Figure 29).

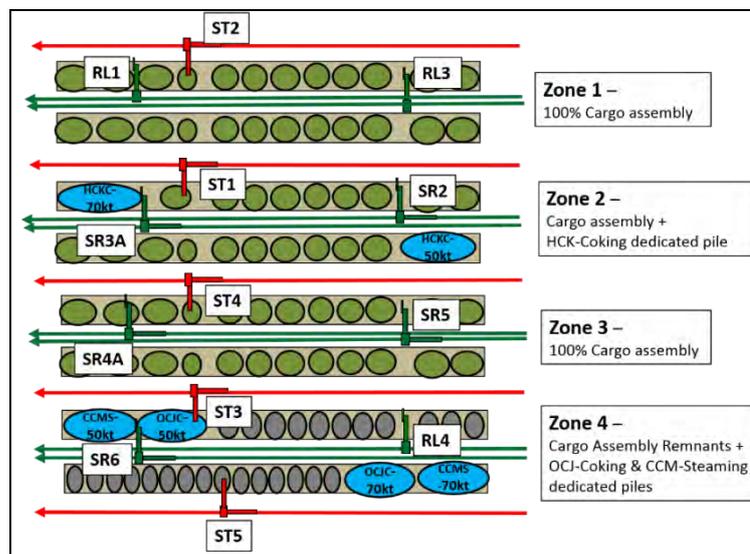


Figure 29: DBCT Stockyard following Zone 4 expansion

Use of the Zones can be described as follows:

- Zone 1 – This zone remains a cargo assembly zone.
- Zone 2 – This zone remains largely as a cargo assembly zone, but will also accommodate two dedicated stockpiles with total 120 kilotonne (kt) capacity for a high throughput coking coal (shown in blue). This is expected to handle the majority of the total throughput of this coal type.
- Zone 3 – This Zone remains a cargo assembly zone.
- Zone 4 – This zone, including Rows 7 and 8, was previously used only as a storage area for dedicated remnant stockpiles to support the cargo assembly operation. Following the extension of Row 8, this zone will now also accommodate 2 new dedicated stockpiles for each of two high throughput coal types.

The use of dedicated stockpiles allows cargoes destined for several vessels to be stacked together without separation between piles, meaning that these cargoes would consume much less stockyard area over time per tonne of throughput. This approach leaves more space for storage of other lower throughput coals that remain in separate cargo assembly stockpiles.

The Row 8 development within the Zone 4 project achieves a higher storage volume potential in Row 8 in comparison to other existing walled rows on the site. This occurs because of the increased height of the wall on the western side of Row 8 in comparison to the wall height on other rows at DBCT. This benefit is able to be utilised by the new large dedicated storage piles where significant length savings are achieved. Savings in stockpile length for the smaller remnant stockpiles are also possible, however the benefit is not as great as it would be for the larger, dedicated stockpiles. Further volume benefits are also achieved in Row 8, because being the western most stockyard row, there is no requirement for cross drains in Row 8 and no consequent loss of stockpile space.

#### 5.4.1.1 Indicative cost of the Zone 4 project

A capital cost estimate was compiled for Zone 4 during the 2015 feasibility study in . Direct and indirect costs were generally compiled in detail with Material Take-offs (MTOs) produced through engineering and applied to detailed unit rates. The estimate was prepared using CCS Candy software - an analytical, resource-based estimating system.

During the study, budget pricing was sought for approximately 75% of the direct costs which was included as the basis for the stacker, reclaimer, civil construction, structural steel supply and fabrication and mechanical supply estimates. Contingency was included in the capital estimate following a Quantitative Risk Analysis (QRA) at P90 confidence. Estimate accuracy has been evaluated at approximately -15% to +20% at 90% confidence intervals.

Description	AU \$M
Direct Costs:	
Inloading	15.3
Stockyard	101.4
Yard machines	66.1
Site wide facilities	27.8
Indirect Costs	63.3
Contingency P90	82.2
<b>Total AU\$M</b>	<b>356.1</b>

**Table 5: Cost breakdown for Zone 4 Expansion**

Contingency was established in the QRA process which ranged components of the estimate at a summarised level. The resulting estimate at a P50 confidence level is \$308.8M with a contingency of AU\$34.9M. The range around this is between AU\$268.7 (P10) and AU\$356.1M (P90).

The estimate base date is June 2015 with no allowance for forward escalation.

#### 5.4.1.2 Regulatory approvals for Zone 4

Relevant State approvals have been gained for this expansion, namely:

- DBCT P/L as the terminal operator, holding an existing Environmental Authority ('EA') (Permit EPPR00504513), granted on 19 October 2015 and authorising the undertaking of ERA 50 (Bulk Material Handling up to 89 Mtp. This EA includes the proposed Zone 4 expansion and ERA 63 (Sewage Treatment (more than 100 but less than 1500 Equivalent Persons design capacity)); and
- DBCTM as terminal owner, holds an existing EA, granted on 27 April 2015, which authorises the undertaking of ERA 16 – Extractive Activities (extracting and screening, other than dredging of more than 100,000t but not more than 1,000,000t in a year) across the DBCT terminal site (Permit EPPR02825115). The EA authorises the undertaking of blasting as part of the extractive activities.

These Environmental Authorities have been issued by the Queensland Department of Environment & Heritage Protection ('DEHP') and cover the full extent of Zone 4 up to the terminal capacity of 89 Mtpa.

A formal referral was also made for the Zone 4 project under the *Environment*

*Protection & Biodiversity Conservation Act, 1999 ('EPBC Act')* (Ref: 2015/7541). On 12 September 2015, the Commonwealth advised that the Zone 4 project was deemed to be a 'Non-Controlled Action' and no approval under the *EPBC Act* would be required.

On 15 December 2015, NQBP issued a conditional Port Development Approval under the Port of Hay Point Land Use Plan (approved under the *TI Act*), relating to the full extent of Zone 4 works.

#### 5.4.2 8X Project

As previously mentioned, the expansion pathway beyond Zone 4 remains at early concept level only. The 8X and 9X project scopes outlined herein are subject to change as engineering progresses to pre-feasibility and then to feasibility level.

FEL1 studies (concept only) have also been undertaken for the other 2 incremental 8X and 9X expansions. Pre-feasibility and Feasibility work will ultimately be required to better understand these expansions, however, in accordance with the AU, this work will only be undertaken on the basis that an Access Seeker or Access Seekers are prepared to underwrite or fund the costs of the study.

The proposed 8X project is made up of a series of minor upgrades to the existing machines, systems and infrastructure, and the effective replacement of one of the existing inloading systems with a higher capacity system. Because of the building block nature of the project it can easily be implemented in phases. Two main phases have been identified as per Table 6.

8X – Phase 1								
Expansion element	Capex	Estimated Inloading capacity		Estimated Outloading capacity		Adjusted Outloading capacity for storage ratio @ 2.2%	Resultant capacity	
		(tpa)	Cap increment	(tpa)	Cap increment		(tpa)	Cap increment
Zone 4 (baseline)	N/A	89.8	N/A	90.7	N/A	90.8	89.8	N/A
ST1 and ST2 upgrades	50.62	93.0	3.2	90.7	0	90.8	90.7	0.9
Stockpile Augmentation Project (SAP) + R2/RL3 Zone Swap - Zone 1 to OL3, Zone 3 to OL2	135.8	93.0	N/A	93.0	2.3	93.0	93.0	2.3
<b>TOTAL Phase 1</b>	<b>185.6</b>	<b>93</b>	<b>3.2</b>	<b>93</b>	<b>2.3</b>	<b>93</b>	<b>93</b>	<b>3.2</b>

Table 6: 8X Project Phase 1 Summary

8X - Phase 2								
Add IL4 to stackers, Upgrade IL2 and Shut down IL1	253.6	100.6	7.6	93.0	0	93.0	93.0	0
OL2 Upgrade	9.6	100.6	0	93.9	0.9	93.9	93.9	0.9
Inload buffer storage	201.3	101.4	0.8	101.3	7.4	99.9	99.9	6.0
<b>TOTAL Phase 2</b>	<b>473</b>	<b>101.4</b>	<b>8.4</b>	<b>101.3</b>	<b>8.3</b>	<b>99.9</b>	<b>99.9</b>	<b>6.9</b>
<b>TOTAL 8X</b>	<b>650.9</b>	<b>101.4</b>	<b>11.6</b>	<b>101.3</b>	<b>10.6</b>	<b>99.9</b>	<b>99.9</b>	<b>10.1</b>

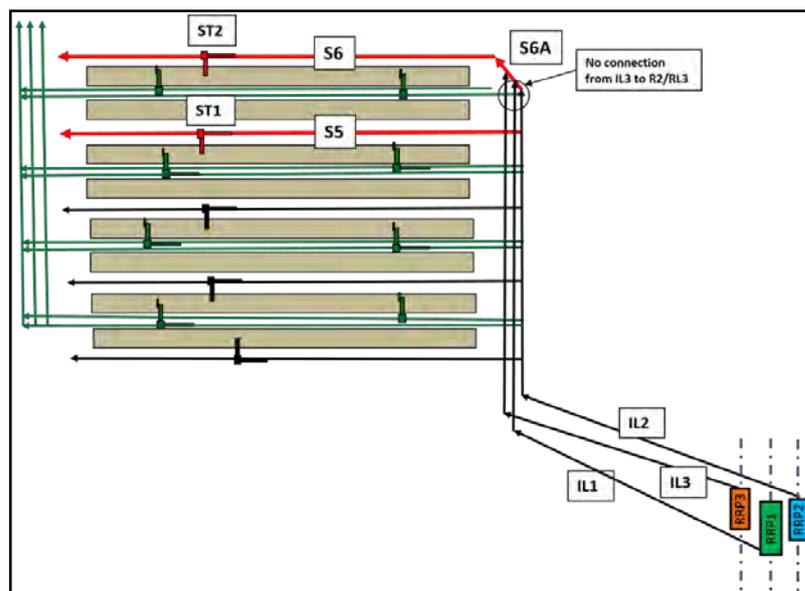
**Table 7: 8x – Phase 2**

8X – Alternative Phase 2 (if allow storage ratio to fall to 2.15%)								
Add IL4 to stackers, Upgrade IL2 and Shut down IL1	253.6	100.6	7.6	93.0	0	93.0	93.0	0
OL2 Upgrade	9.6	100.6	0	93.9	0.9	93.9	93.9	0.9
Inload buffer storage	201.3	101.4	0.8	101.3	7.4	101.3	101.3	7.4
<b>TOTAL Phase 2</b>	<b>473</b>	<b>101.4</b>	<b>8.4</b>	<b>101.3</b>	<b>8.3</b>	<b>101.3</b>	<b>101.3</b>	<b>8.3</b>
<b>TOTAL 8X</b>	<b>650.9</b>	<b>101.4</b>	<b>11.6</b>	<b>101.3</b>	<b>10.6</b>	<b>101.3</b>	<b>101.3</b>	<b>11.5</b>

**Table 8: 8X Project Phase 2 Summary**

#### 5.4.2.1 Stackers ST1 and ST2 Upgrade

Inloading system No. 3 has a rate of 8,100 tph but is limited to lower rates of 6,000 tph and 5,500 tph when used to stack via ST2 and ST1 respectively. The upgrade of these stackers and the associated yard conveyors is proposed as a potential 8X project as indicated in Figure 30.



**Figure 30- ST1 and ST2 Upgrade – Conveyors S6, S6A and S5 also require upgrade**

In the case of ST2, a rate of 8,100 tph capacity can be achieved with only conveyor speed increases for conveyor S6A, S6 and the ST2 boom conveyor. The ST2 upgrade has been separately studied within an earlier 8X study completed by Aurecon Hatch in 2009.

In the case of ST1, a replacement of this machine with new ST1A stacker is possible prior to the commitment of 8X due to the age and condition of the existing ST1 machine. The ST1 replacement options have also been studied separately by Aurecon Hatch as reported in the document H348252-500000-100-066-0004, “Stacker ST1 Replacement Study, Feasibility Report”, March 2015. If the machine is not replaced before 8X then ST1 would need to be replaced at that point because the geometry of the existing machine cannot accommodate the vertical walls. If ST1 is replaced before 8X, then the new machine geometry will be suitable, however the new machine will still require an upgrade to accommodate a rate increase as part of 8X.

The associated S5 yard conveyor can be upgraded to 8,100 tph by fitting an 1,800 mm belt to the existing stringers and operating it at 6.6 m/s. Alternatively, a slightly lower capacity of 7,500 tph could be adopted if the current maximum conveyor speed of 6.2 m/s for the site was observed. A parallel 2,000 mm wide yard conveyor could also be constructed to achieve the target 8,100 tph with slower belt speeds.

#### 5.4.2.2 Stockpile Augmentation Project (SAP)

The Stockyard Augmentation Project (SAP) is the only component of the 8X project that will deliver an increase in stockyard storage volume. It is important to maintain a storage ratio sufficient to accommodate a larger number of stockpiles. Additional stockpiles allow cargos to be simultaneously drawn from a larger number of mines at any given time. This balances the load across the rail network, avoiding potential congestion.

The key elements of the SAP project are highlighted in Figure 31 and are summarised as:

- Addition of concrete walls to Bund 1 and Bund 3 to improve storage volume in Rows 1, 2 and 3. The constructed walls allow wider stockpiles to be stacked against the walls, similar to those developed for Bunds 4A and 5A during the 7X Expansion. Vertical walls will also improve the average reclaim rates on machines RL1, RL3, SR2 and SR3A. Volume improvements are approximately 20 to 30% compared to existing earthen bund walls, depending upon the mix of parcel sizes utilising this space. Larger parcel sizes lead to a larger percentage change.
- Upgrade of R2 conveyor to allow RL3 to be reset at its full reclaim rate potential (from 4200 tph to 5300 tph).
- A potential 'Zone swap' involving an alternative allocation of stockyard zones to outloading systems to better align the high volume, highest reclaim rate Zone 1 with the highest performing outloading system OL3.

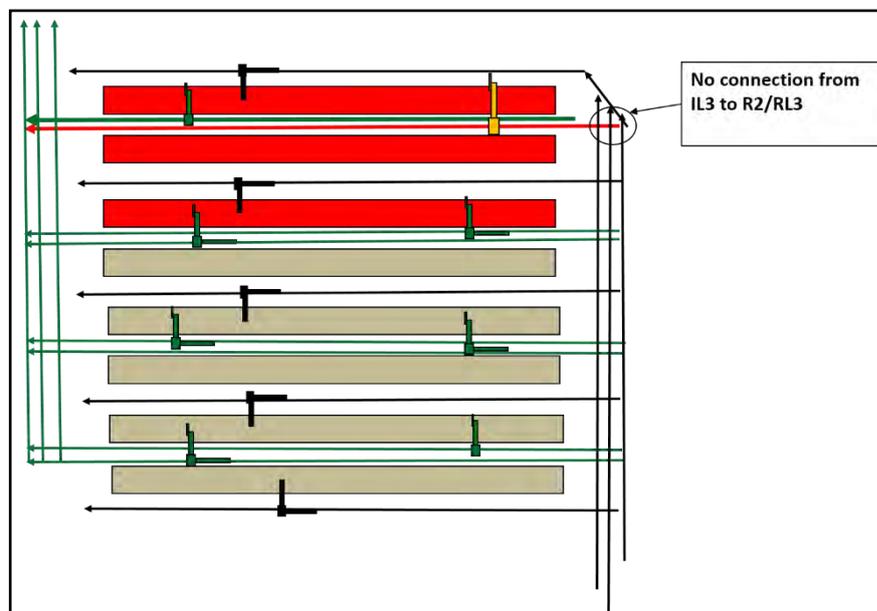


Figure 31: Schematic indicating scope of SAP project including upgrade of the RL3 yard machine and conveyor R2.

The proposed allocation of stockyard zones to outloading systems following the SAP project are shown in Figure 32.

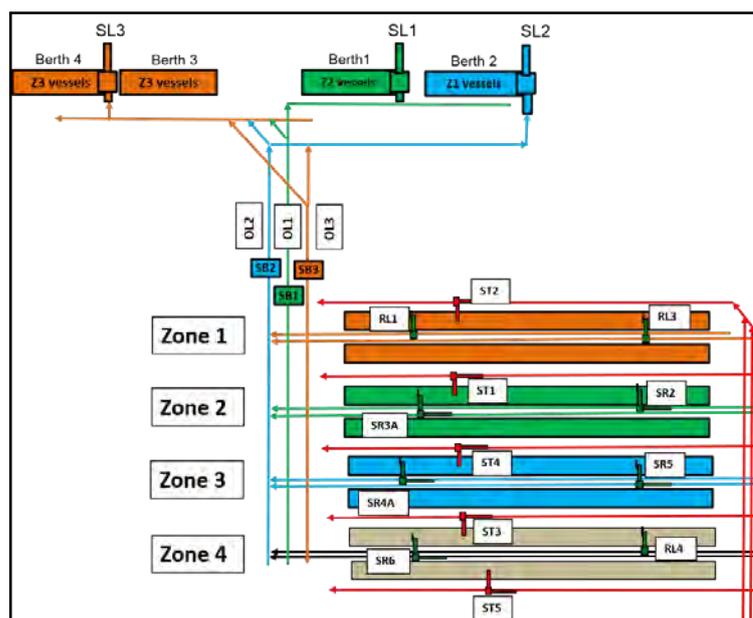


Figure 32: Proposed re-allocation of stockyard zones to OL systems following the SAP project

The SAP project will tend to draw increased capacity towards rows 2 and 3 and considering ST1 is already heavily utilised, it is likely that the ST1 upgrade would have a larger impact following completion of the SAP project.

#### 5.4.2.3 New IL4 and IL2 upgrade

The upgrade of the existing IL1 and IL2 systems from 5,500 tph to 8,100 tph would be expected to achieve a significant boost to inloading capacity. Such an upgrade would require substantial modifications to the two rail receival pits RRP1 and RRP2 and the associated conveyors. These upgrades have been previously investigated by Aurecon Hatch. The findings are documented in the report: H79920CMP03-01, "Dalrymple Bay Coal Terminal, MP03 Concept Study, Upgrade of Inloading Systems 1 and 2", June 2005. The upgrade of the RRP1 pit was separately investigated by DBCTM around the same time.

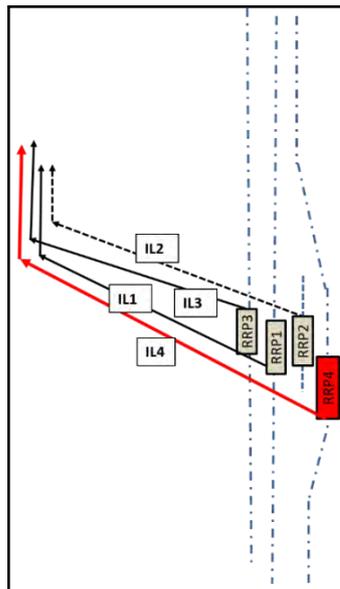
It is technically feasible to upgrade these systems, however the shutdown durations to complete the works is prohibitive. RRP2 would need to be shut down for approximately 6 months and RRP1 would likely need to be shut down for considerably longer. The RRP1 pit would require extensive modifications to the receival hoppers and feeder system, as well as the conveyor systems. Completing both upgrades before building a 4th system would reduce the terminal capacity to around 60 Mtpa for more than a year.

A new high capacity 4th inloading system (similar to inloading 3 developed in 7X) could be built to replace one of the existing inloading systems to provide a capacity improvement. This option would allow for the existing systems to be upgraded without capacity loss because the capacity is replaced before the losses are incurred. The upgrade of RRP2 is feasible by replacing the existing 1600 mm belts with wider 1,800 mm belts, operating at a maximum speed of approximately 6.4 m/s to minimise dust lift-off. The IL2 upgrade would only be carried out once the new IL4 was commissioned.

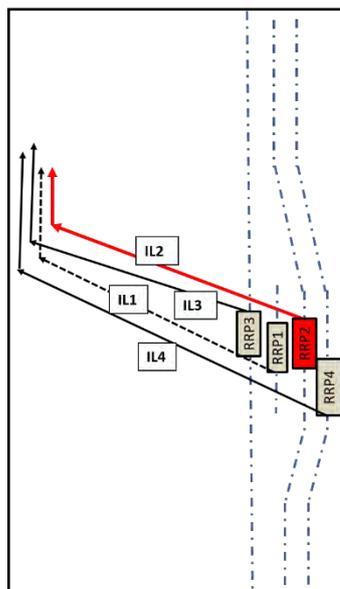
It is envisaged that the IL1 system would not be upgraded in 8X and would be decommissioned after IL2 is returned to service. If required, IL1 would be upgraded and returned to service as a part of the 9X project.

DBCT will only have three inloading systems in operation at the completion of the 8X project, removing the requirement to develop a 4th rail loop as part of 8X.

Considering the approaches described above, a potential sequence for upgrade of inloading systems during the 8X expansion and progressing to the potential future 9X development is described in Figure 33 and Figure 34.



**Figure 33: IL system upgrade – Step 1 - Establish new IL4 and RRP4, relocate existing RRP2 loop to service the new RRP4 and shutdown RRP2 and IL2 for refurbishment.**



**Figure 34: IL system upgrade – Step 2 - Re-commission upgraded RRP2 and IL2, relocate RRP1 loop track to service RRP2, shutdown RRP1 and IL1. IL1 would likely remain shut-down until the future 9X expansion phase.**

With an objective to avoid the use of stacker reclaimers for stacking and to include upgrade options that achieve this outcome, it is proposed to connect the new IL4 system only to the stacking lines in the yard and not to the reclaim conveyors. It is acknowledged that this strategy will prevent throughloading from the IL4 system.

#### 5.4.2.4 **OL2 Upgrade**

The rate limitations of the outloading conveyor systems and surge bin capacities contribute to “full bin” events during shiploading. “Full bin” events impose delays on yard machines that would normally be avoided by matching outloading rates to surge bin capacities and reclaim rates.

The potential throughput gains that might be obtained from improved conveying rates downstream of the surge bin were examined in previous studies completed by Aurecon Hatch:

- H79923CM/MP03-06 – “MP03 Concept Study, Upgrade of Outloading Systems 1 and 2” June 2005
- 319999-8043-M-RE-00001(Rev 3) – Additional Investigations into Upgrade of OL1 and OL2 – Stockyard to Surge Bin

These studies resulted in the upgrade of the conveyors between the stockyard and surge bin as a part of the 7X project completed in 2009. The studies also concluded that further capacity gains were available through upgrades to the OL1 and OL2 conveying systems downstream of the surge bins.

Approximately 1.0 Mtpa was estimated to be available from OL2 and only 0.5 Mtpa available from OL1 due to the limitations of the smaller surge bin. That conclusion was based on an outloading rate change from 7,200 tph to 8,650 tph for both systems, whereas the outloading rate for OL2 has already been increased to 7,600 tph. The further gains are expected to be approximately 0.8 Mtpa for OL2.

The cost and operational impact to upgrade OL1 is significantly greater than that of OL2. Upgrading OL1 is not considered viable based on the current level of study and is therefore not included in the 8X Scope.

#### 5.4.2.5 **Inloading Buffer Storage**

This expansion element involves the addition of a short-term buffer storage facility within the inloading system. The concept allows trains to unload to the buffer store when there is no stacker machine available. The buffered coal would then be discharged to the stockyard once the required stacker becomes available. This is shown schematically in Figure 35.

The proposal requires a conveying path to be provided between the buffer storage and the stockyard that is independent of the inloading systems. Considering the proposals and sequence for upgrading the inloading systems as described above, an opportunity exists to reuse a significant portion of the existing IL1 system that would otherwise be decommissioned. This dictates the sequence for this expansion element because it can only be commissioned after IL4 is built and after IL2 is upgraded.

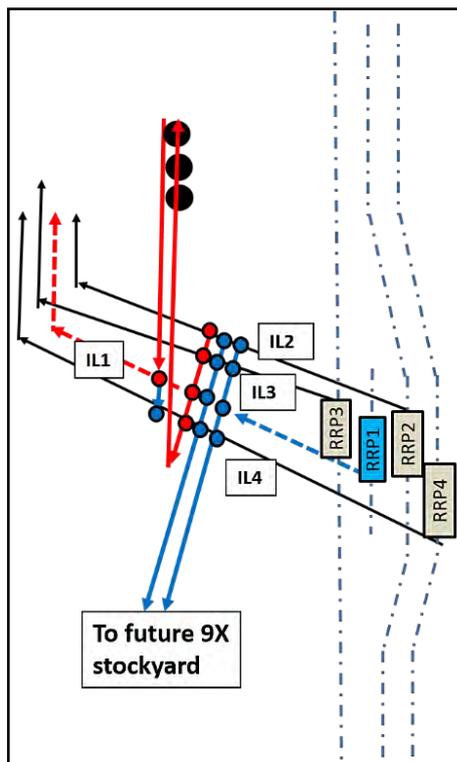


Figure 35: Schematic of inloading buffer system concept. Works required for the buffer storage are shown in red and would follow the RRP2/IL2 upgrade step for the inloading systems upgrade shown in Figure 34. Related works that would be required at the transition to the 9X upgrade when a new stockyard might be established are shown in blue.

Further details of the proposed buffer storage concept are described below:

- The schematic shown in Figure 35 suggests use of silos to provide storage. Silos would likely deliver the highest Capex/lowest Opex solution but other storage options could be employed. (e.g. stockyard in shed, bunker etc.).
- Further modelling is required to determine the ideal size and number of the storage modules. The use of 3 X 10,000 t modules to match 10,000 t train size lots has been estimated, but a larger number of 5,000 t modules may ultimately be the preferred option.
- The buffer storage should be able to be fed from IL2, IL3 and IL4 through a tripper/diverter chute arrangement.
- The IL1 system between the buffer storage and the yard is proposed to be upgraded to 7,500 tph capability when brought back into operation. It is expected that the ability to discharge a train sized lot back to the yard within the normal train unloading cycle time would be beneficial. Consideration could also be given to retaining the existing IL1 capacity of 5,500 tph.
- Coal brands of different types will be segregated in the buffer storage modules.
- A train would be diverted to the buffer storage whenever there is a conflict for access to stackers that would otherwise have resulted in the use of a Stacker Reclaimer for stacking. The Stacker Reclaimers should not be used to stack from the rail dump station or the buffer storage except as a last priority, if no other options exist or if the Stacker Reclaimers are not involved in a reclaim task.
- The buffer storage should be emptied back to the yard using stackers only,

immediately after the required stacker becomes available and is not being demanded by another train.

- Trains always take priority over the buffer storage for gaining access to stackers. This should be the case even if the buffer storage is part way through a discharge to stackers. An arriving train should interrupt and take the stacker.
- If a train is loading to buffer storage and the stacker becomes available during that time, the remainder of the train should be sent to the stacker. It is recognised that this will drive part use of a given storage cell.

The buffer storage will provide outloading capacity rather than inloading capacity. This capacity is achieved by virtually eliminating the need for the S/R's to prioritise the stacking function over the reclaim function, which at completion of Zone 4 would limit the capacity of the outloading systems.

#### 5.4.2.6 Indicative cost of the 8X Project

An indicative capital cost estimate has been prepared for the 8X Project. In summary, the cost estimate for the 2 phases of the project are as follows.

Phase	Capacity (Mtpa)	AU\$M
1. ST1 and ST2 Upgrade, SAP and R2/RL3 Upgrade	4.5	200
2. IL4, OL2 Upgrade, Inloading and Buffer Storage	8.5	500
<b>Total AU\$M</b>	<b>13 Mtpa</b>	<b>700</b>

Table 9: 8X indicative cost

This estimate is concept level only and is based on the following:

- Target accuracy in the range -25% to + 35% at 80% confidence intervals.
- The estimate is presented in Australian Dollars with a base date of Jun 2015 with no allowance for forward escalation.

The 8X project can be undertaken in 2 separate phases which may be triggered separately depending on the quantum of demand. The 8X expansion is also wholly integrated into the existing facility and is no way separable in operation.

DBCTM is of the understanding that both the Zone 4 and 8X expansions fall into the category of Cost Sensitive Expansions as defined by the current Access Undertaking (AU) in Section 11.13 (b). These expansions are fully integrated, will have the effect of lowering Handling Charges per tonne, and potentially improve overall efficiency and risk to existing Users.

#### 5.4.3 9X Project

The existing footprint at DBCT is limited to the 8X Capacity of 102 Mtpa. Any expansion materially beyond that capacity would require an additional stockyard for which DBCTM does not currently have access to the land. Additionally, any expansion beyond 8X will require additional berths to the north, which will necessitate capital dredging for both the berth pockets as well extensions to the departure path and aprons. Gaining the required approvals from GBRMPA for capital dredging has become materially more difficult in recent years, thereby jeopardising DBCTM's ability

to deliver the 9X Project.

The 9X development will incorporate the following key elements:

- Reactivation and upgrade of RRP1 dump station that would have been placed into “care and maintenance” mode during the earlier 8X expansions works. The tail section of S1 conveyor will need to be upgraded to operate at 8100 tph capacity in order to deliver the additional required train unloading capacity.
- A new fourth (4th) rail loop that would service RRP4 with the existing RRP4 loop re-aligned to RRP2, and RRP2 loop re-aligned to RRP1, as discussed in the 8X development report.
- Provision of link conveyors from the 4 X Rail Receival Pits to feed the new 9X stockyard.
- A stockyard with sufficient storage capacity to match the proposed 34-35 Mtpa capacity expansion. Consideration needs to be given to the variety of potential operating modes, while also ensuring that the storage ratio is the same or greater than that proposed for the 8X development.
- A new fourth outloading system OL4 including; conveyors, surge bin, sample plant and shiploader SL4 with the same operating capacity as the OL3 system. Suitable link conveyors are also required for connectivity between the new stockyard and the outloading systems.
- Berths 5 and 6 to the north of the existing Berth 4, serviced by the new shiploader SL4

It is not currently possible to predict how the new stockyard might be utilised within the expanded terminal operation. There are 2 main options for stockyard strategy which require different configurations.

The stockyard could be either:

- Operated as an integrated part of the existing facility to allow an extension of existing cargo assembly operations. This would suit incremental growth in throughput of the existing coal types combined with the addition of new coal types. All products could be loaded onto vessels in any combination.
- Operated as a stand-alone terminal that would be dedicated to handling a select group of coal types. Following this approach, coal stored in the 9X stockyard would not be able to be loaded onto vessels being loaded from the existing stockyard. This application would tend to be more favourable to higher throughput coals stored in dedicated storage stockpiles.

Considering these two potential operating approaches, a number of configuration options were developed. The options that were found to be viable are summarised on the following page:

5.4.3.1 Configurations for an integrated operation

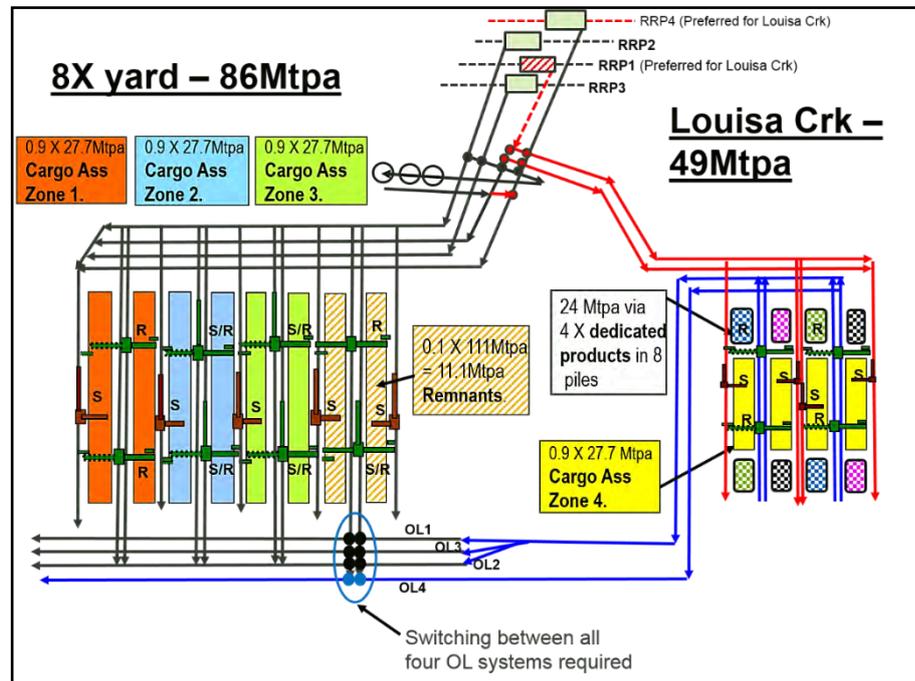


Figure 36: Option 1B – Dedicated product stockpiles moved to Louisa Creek, together with a new cargo assembly zone. Removal of dedicated piles from the existing stockyard results in a capacity loss from the existing yard. Capacity of the Louisa Creek yard is increased to compensate and exports via the OL1, OL2 and OL3 systems as well as OL4

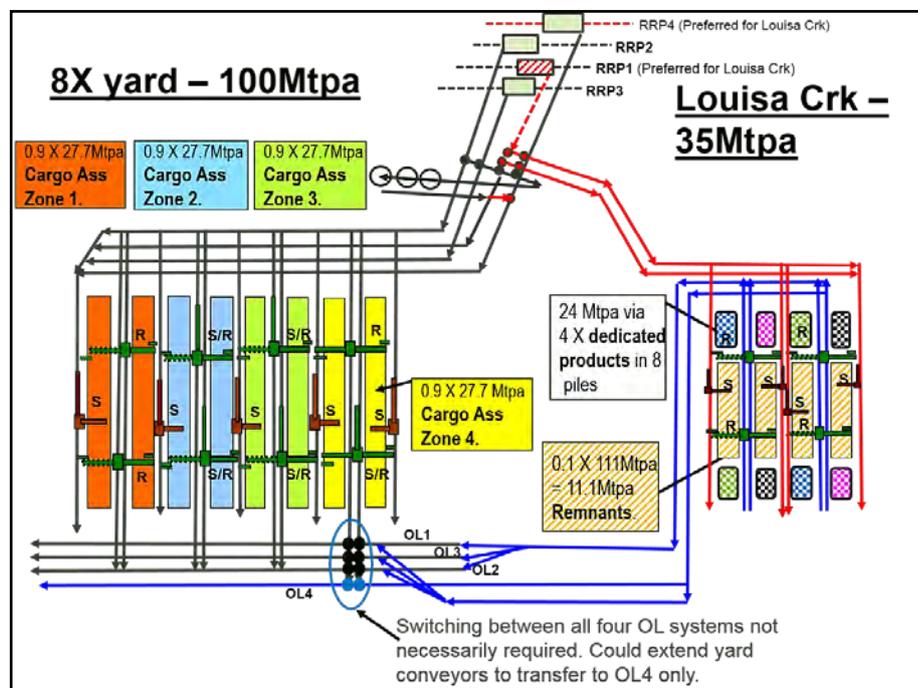


Figure 37: Option 1C – Integrated terminal with dedicated stockpiles and remnants relocated to Louisa Creek. New 4th cargo assembly zone established in Rows 7 and 8.

5.4.3.2 Configuration for stand-alone operation

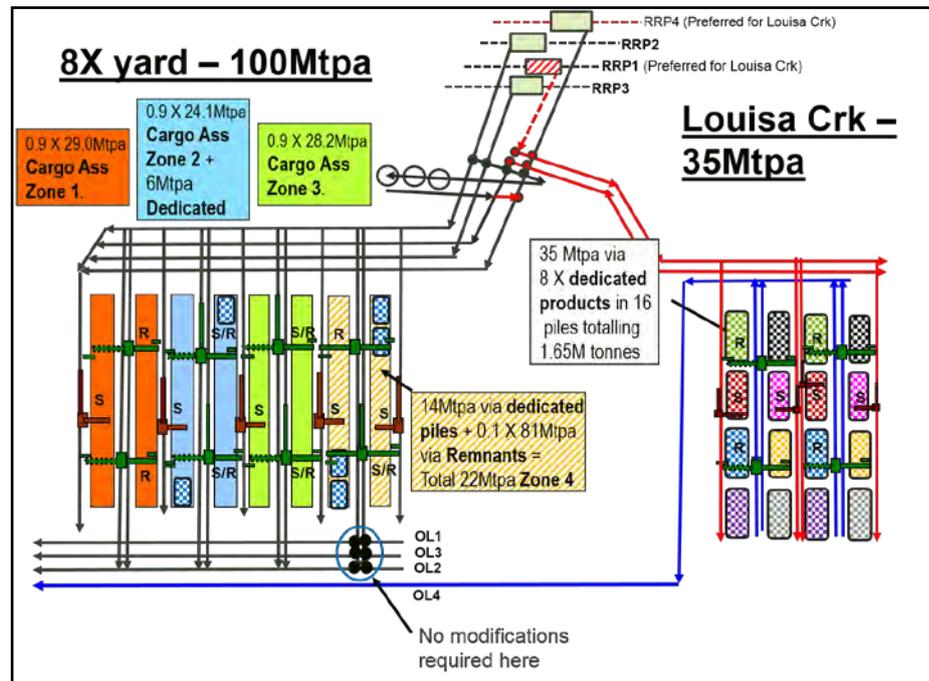


Figure 38: Option 2 – Virtual stand-alone terminal at Louisa Creek for dedicated product stockpiles. Some dedicated stockpiles must be maintained within the 8X yard to retain throughput capacity. Products at Louisa Creek cannot be loaded to vessels with products in the existing yard.

5.4.3.3 Configuration for partially integrated operation

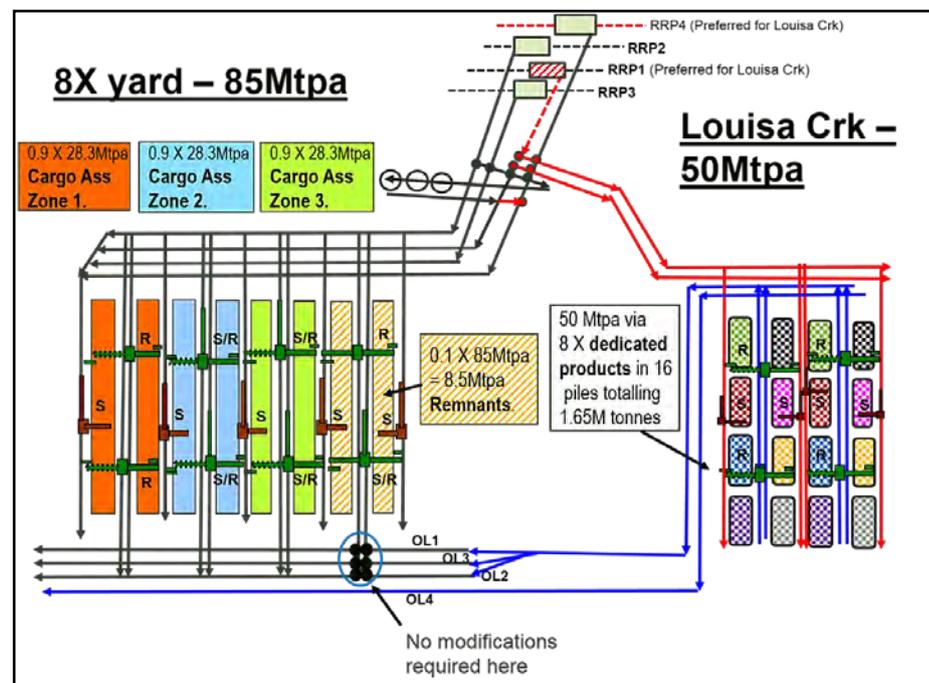
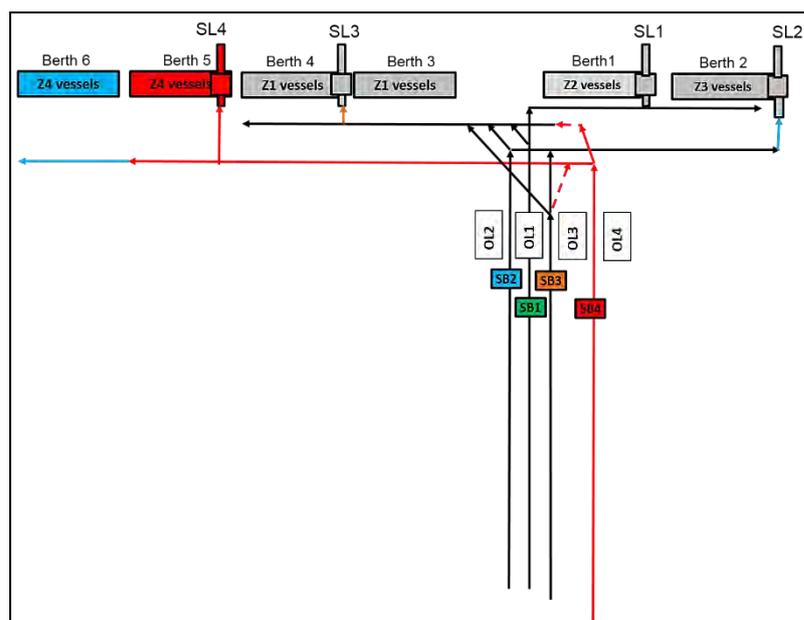


Figure 39: Option 3 – Partially integrated dedicated stockyard at Louisa Creek. This allows dedicated product stockpiles in the 8X yard to be relocated to Louisa Creek and for products stored at Louisa Creek to be loaded to vessels with cargo assembly products stored within the 8X yard (to a limited extent dictated by available capacity in OL1, OL2 & OL3).

#### 5.4.3.4 Offshore configuration

Only one feasible option is envisaged for the 9X expansion of the offshore works. This option can be developed in two stages.

It is proposed that the new OL4 outloading string would load to vessels via a new shiploader SL4 that would operate on new Berths 5 and 6. Berths 5 and 6 are proposed to be constructed to the north of the existing berths, as shown schematically in the Figure 40 below:



**Figure 40: Proposed development of offshore facilities for the 9X project. Berths 5 and 6 and Shiploader 4 are added. The 4th shiploader and outloading system may be dedicated to the new Louisa Creek stockyard or alternatively might be associated with the added 4th cargo assembly zone depending upon the chosen operating mode and chosen stockyard configuration as discussed in the sections above.**

#### 5.4.3.5 Physical arrangements for stockyards and conveyors

Stockyard layouts have been prepared to demonstrate how the configuration options could be accommodated within the Louisa Creek site. Two potential site arrangements have been prepared including a ‘short’ and ‘long’ stockyard option.

In general, configuration options 1B and 1C (integrated DBCT and Louisa Creek operation) would suit the ‘short’ stockyard arrangement, based on current assumptions regarding throughput associated with dedicated product stockpiles. Options 2 and 3 (standalone terminal operation at Louisa Creek) would suit the ‘long’ stockyard arrangement.



**Figure 41: 'Long' stockyard arrangement suited to configuration options 2 and 3.**

The arrangements are such that the short stockyard arrangement could be extended in the future to match the long stockyard (Figure 41) arrangement if deemed necessary.

The outloading conveyor arrangements need to be varied according to the required level of integration between the Louisa Creek stockyard and the existing DBCT stockyard, and the way in which the Louisa Creek stockyard will be utilised.

The single outloading conveyor string shown for the 'long' stockyard in particular is suitable only for Option 2. This suits the case of Louisa Creek being developed as a virtual stand-alone terminal, assuming that 8X operations continue unchanged within the existing stockyard. Any other case will require the construction of some additional outloading conveyors.

The short stockyard arrangement allows the stockyard to be constructed without encroaching upon the Louisa Creek beach and with less impact upon the existing township. If a dredge spoil reclamation area is developed in the location shown above, for storage of dredged material associated with the development of Berth 5 or both Berths 5 and 6 together, then the benefits of avoiding encroachment of the beach may be limited.

## 5.5 Rail Infrastructure

The rail track infrastructure in the vicinity of the terminal does not form part of the asset owned and managed by DBCTM. The current rail track arrangements are understood to contribute to delays in the process of directing full trains to dump stations. Delays have also been observed in clearing empty trains from the loop after unloading to allow uninterrupted unloading of subsequent trains. Some relatively minor rail track improvements would likely address these issues and provide a throughput gain.

Potential modifications that would be expected to avoid train delays and improve utilisation of the dump stations are depicted schematically in red in Figure 42 below. It is proposed that these improvements would be carried out at the time of establishing the 4th dump station during the 8X phase i.e. when RRP4 is fed from a diverted loop 2 and prior to establishment of the 4th rail loop.

The green lines in Figure 42 indicate the proposed establishment of the fourth rail loop. It would likely not be established until much later, coinciding with a later 9X expansion phase as described in Section 5.10.2.

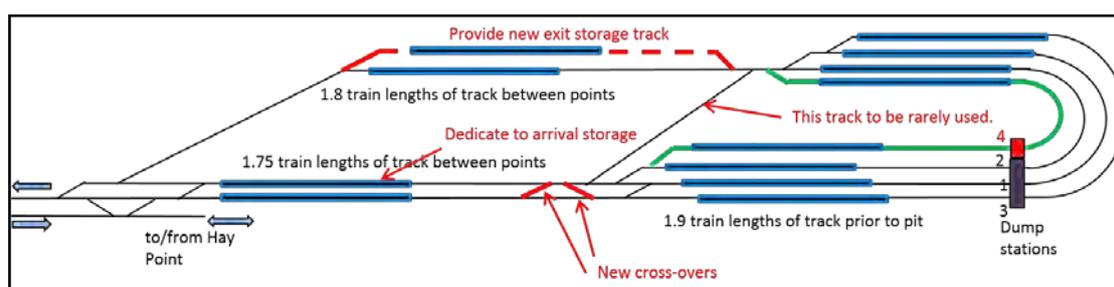


Figure 42: Proposed 8X rail loop modifications shown in red as proposed to be constructed with the IL4 dump station. The fourth rail loop in green would be constructed only at the later 9X stage.

## 5.6 Effect of Expansion Pricing on the Likelihood of Expansion.

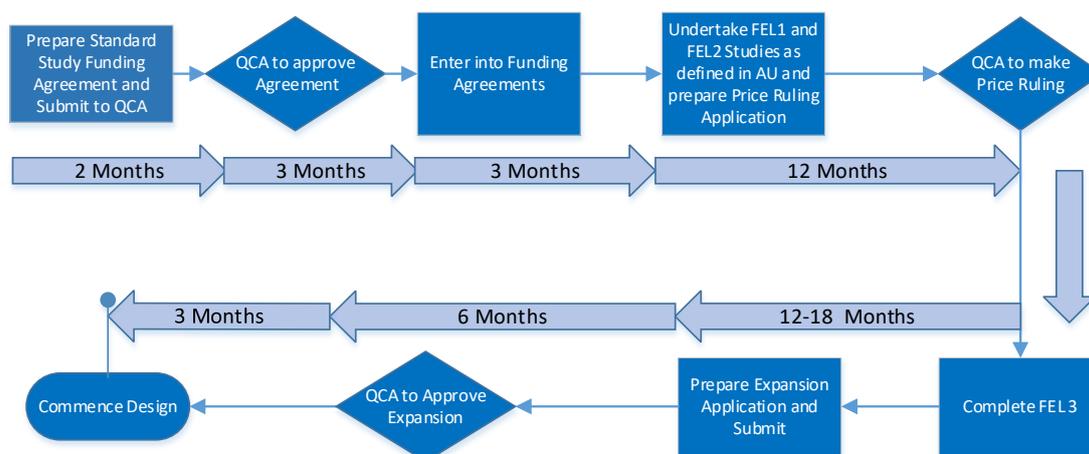
The 2017 AU introduced the concept of differential pricing for future expansions. Under previous undertakings, and prior to privatisation of the terminal, all expansions of DBCT were priced on a socialised basis. An expansion that is socialised has a lower risk profile to DBCTM than an expansion that is priced differentially. This is because the existing Users of the terminal must step in to cover the access charges for an Access Seeker who defaults on their obligations. The underwriting of access charges by existing Users makes the risk profile of an expansion acceptable to both the owner of the facility and potential project financiers. All previous expansions of DBCT were financed on this basis and all current Users benefitted to some degree from this arrangement.

Differential pricing, by comparison, necessarily requires both the owner and project financiers of any expansion to underwrite their investment purely on the basis of the capacity of the Access Seeker to meet their commitment to the post-expansion access charges. In an environment where future developments are likely to be incremental in nature, there is a strong likelihood that these charges will be supported by only one, or perhaps two, Access Seekers. Where these Access Seekers are major international mining houses, the project may still be bankable. If however, the expansion capacity is to be contracted to junior mining companies with greenfield mine projects, it is highly unlikely that either the owner or potential financiers will be able to gain sufficient comfort around the risk of the project to justify proceeding to construction.

These issues will need to be considered by DBCTM before deciding whether to proceed past FEL2.

### 5.7 Impacts of the 2017 Access Undertaking on Expansion timing

The 2017 Access Undertaking defines the process to be followed to continue with Feasibility works and ultimately progress to an Expansion. The process steps are outlined below in Figure 43.



**Figure 43: Expansion Approval process and indicative timeframes**

In 2015 pre-feasibility (FEL2) and feasibility (FEL3) study works for Zone 4 were undertaken to a standard consistent with normal industry practice. The 2017 Access Undertaking requires greater certainty around the estimated capital cost than normally would be achieved from a FEL2 study completed to a standard consistent with normal industry practice. In 2015, sufficient work was undertaken to achieve this level of capital cost certainty in the FEL3 study. Because the level of certainty around capital costs, as defined by the AU for FEL 2 has already been achieved in DBCTM’s previously completed FEL 3 studies, the time required to reach a Price Ruling for Zone 4 will be significantly quicker than for subsequent expansions, which have only been progressed to FEL 1.

The timeframes in Figure 43 are based on the assumption that no objections are received at any point on the timeline. Delays to the timeline above will certainly occur if the QCA receives objections at any of the decision points.

## 6 Environment

### 6.1 Overview/Background

The Queensland Government has responsibility for protection of the State waters and is therefore committed to a number of Reef 2050 initiatives relating to port development. The *Sustainable Ports Development Act (2015)* sets out the blueprint for port planning and management for certain ports in Queensland. The act aligns with the Commonwealth and State Government commitments under *Reef 2050*.

The increased focus on environmental management at Queensland ports, particularly those designated as 'priority ports' reinforces the need for careful and direct attention of those operating at these critical trading nodes.

DBCTM has always taken and discharged its environmental responsibilities carefully and recognises that operating in the GBRWHA requires robust environmental systems.

This attention will continue in forward years under this Master Plan.

Environmental management within the coastal environment, and particularly within the GBRWHA requires two fundamental considerations:

1. Robust consideration of existing environmental values as part of terminal and/or expansion planning – ensuring that environmental values are examined and managed using the well understood mitigation hierarchy of: avoidance, mitigation and offsets; and
2. Ensuring robust Environmental Management Frameworks are in place for the ongoing management of operations consistent with the requirements of Environmental Authorities for terminal operations and/or construction activities.

DBCTM supports the position of the Queensland Government in requiring robust Port Master Plans including greater transparency of Environmental Management Frameworks at Queensland's 'Priority Ports' and a stronger focus on port protection measures including appropriate environmental buffers.

This section of the Master Plan outlines the particular environmental issues and the corresponding management responses at play. It also addresses emissions and impacts likely from the expansion referred to as the Zone 4 expansion and that contemplated under the 8X project.

Leading up to Master Plan 2016 DBCTM did not attempt to undertake emissions modelling for the 9X expansion project because of the preliminary nature of the concept and the lack of certainty regarding various project aspects. The 9X project is of such a scale, that more mature engineering assessments are required before any modelling of any real accuracy could be undertaken. Further, the 9X proposal would most likely trigger full Environmental Impact Statements (EIS) through State and Commonwealth processes in forward years.

### **6.1.1 Existing Environmental Authorities/Regulatory Processes**

It should be noted that existing Environmental Authorities relevant to the terminal site and/or operations include:

- DBCTPL as the terminal operator, hold an existing Environmental Authority ('EA') (Permit EPPR00504513), granted on 19 October, 2015, which authorises the undertaking of ERA 50 (Bulk Material Handling up to 89 Mtpa which includes the proposed expansion included in the Zone 4 project) and ERA 63 (Sewage Treatment (more than 100 but less than 1500 Equivalent Persons design capacity)); and
- Additionally, DBCTM as terminal owner, holds an existing EA, granted on 27 April 2015, which authorises the undertaking of ERA 16 – Extractive Activities (extracting and screening, other than dredging of more than 100,000t but not more than 1,000,000t in a year) across the DBCT terminal site (Permit EPPR02825115). The EA authorises the undertaking of blasting as part of the extractive activities.

These Environmental Authorities have been issued by the Queensland Department of Environment & Heritage Protection ('DEHP') and cover the full extent of the Zone 4 Expansion up to the terminal capacity of 89 Mtpa.

It should also be noted that a formal referral was made for the Zone 4 project under the Environment Protection & Biodiversity Conservation Act, 1999 ('EPBC Act') (Ref: 2015/7541). On 12 September 2015, the Commonwealth advised that the Zone 4 project was deemed to be a 'Non-Controlled Action' and as such, no approval under the EPBC Act would be required.

On 15 December 2015, NQBP issued a conditional *Port Development Approval* under the Port of Hay Point Land Use Plan (approved under the TI Act), relating to the full extent of Zone 4 works.

The balance of this chapter addresses the various environmental/social values relevant to the terminal and its immediate environs and the results of predictive emission modelling relating to the proposed expansion projects Zone 4 and 8X.

## **6.2 Preliminary Environmental Impact Assessment**

The expansion pathway outlined in this Master Plan is staged and incremental – in line with the direction under the new Commonwealth and State regulatory framework regarding coastal development within the GBRWHA.

Options have not simply been examined from an engineering and operational perspective. Because of DBCT's geographical location within the GBRWHA, it has also been important to assess ecological and social values of each of the preferred projects.

The expansion pathway has been examined against various criteria and suitability including:

- Air Quality
- Noise & Vibration
- Visual Amenity
- Cultural Heritage
- Local Maritime Operations
- Community & Social Impacts
- Coastal Processes
- Marine Ecology
- Terrestrial Ecology
- Soil & Geology
- Surface Water Quality & Hydrology
- Transport & Access
- Waste Management
- Land Tenure & Other Stakeholder Interests

Each of the above are described in the following sub-sections.

### **6.2.1 Air Quality**

All potential air quality impacts have been examined and considered for the Zone 4 expansion project.

The increased volume of coal to be stored at an expanded terminal may increase the likelihood of dust emissions affecting neighbouring rural residential/community areas. As such, ongoing compliance with relevant Environmental Authorities will be critical in the forward management of operations as will ensuring participation in the broader 'port-wide' air quality monitoring programs managed by NQBP as the port authority.

As part of this Master Plan, predictive modelling work has been completed – see Section 6.4 for more detail.

DBCTM is continuously monitoring air emissions at and around the terminal in accordance with normal operational environmental management practices.

Work will continue and in conjunction with the port entity, NQBP, the operator will proactively adjust and adapt management practices as appropriate.

Ensuring appropriate port buffers is also a fundamental and strategic requirement for the Port of Hay Point over the longer term. This will be a critical issue for formal State Port Master Planning now underway for the port. DBCTM will work with the State and NQBP in the preparation of this planning document.

### **6.2.2 Noise and Vibration**

All potential noise and vibration impacts have been examined and considered for the Zone 4 expansion project.

At present, DBCT P/L undertakes noise monitoring at four (4) locations around the Port of Hay Point (internally and externally to the terminal) in accordance with the existing EA under the *Environmental Protection Act, 1994* (EP Act).

Noise assessment monitoring is undertaken continuously.

A number of noise control and management measures are incorporated across the DBCT site, and for the 2014-2015 period, noise levels were compliant with the limits under the existing EA.

It is anticipated that there will not be a significant increase in noise and vibration impacts as a result of either the Zone 4 or 8X expansion works (see Section 6.5 for more detail). Intensification of existing terminal operations, largely within existing terminal footprint areas will ensure the minimisation of noise emissions from the site. Further, upgrading operational equipment over time as development continues will also assist in noise and vibration management.

It is considered that the approach to noise/acoustic assessments employed at the terminal is industry best practice – and along the whole terminal process from inloading through to shipment of cargoes.

### **6.2.3 Visual Amenity**

All potential visual amenity impacts have been examined and considered for the Zone 4 expansion project.

DBCT is an existing, long established land use, which forms part of the Port of Hay Point. Since operations first began at the port in October 1971, the Port of Hay Point has become Queensland's largest export port with exports in the 2016/2017 financial year reaching approximately 106 Mtpa across both DBCT and the adjoining Hay Point Coal Terminal.<sup>19</sup> The designation of the Port of Hay Point as one of Queensland's 'Priority Ports' (thereby being a 'relevant port' under the *National Ports Strategy, 2012*) acknowledges that the visual amenity of the node is recognised and part of the landscape of this part of the Queensland coastal zone.

The Port of Hay Point is also recognised in local, regional and state-wide planning instruments as a major infrastructure node along the Queensland coast.

Expansion of the terminal as proposed under this Master Plan is consistent with the well accepted visual amenity of the local environs.

### **6.2.4 Cultural Heritage**

A search of the Cultural Heritage Database maintained by the Department of Aboriginal and Torres Strait Islander Partnerships (DATSIP) was undertaken as part of Zone 4 regulatory applications that did not identify any recorded indigenous cultural heritage sites within the area of the proposed works.

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<sup>19</sup> NQBP website (<https://nqbp.com.au/trade/throughputs>)

Any future expansion would be required to proceed in line with relevant State and Commonwealth legislation regarding Cultural Heritage matters to ensure compliance with the Cultural Heritage Duty of Care under the *Aboriginal Cultural Heritage Act 2003*.

#### **6.2.5 Local Maritime Operations**

Both Zone 4 and 8X expansions do not entail any alteration to local maritime operations. Indeed, no marine development is proposed for either Zone 4 or 8X.

The 9X expansion would entail two new offshore berths and reclamation within the World Heritage Area. Development of this kind would need to be closely examined in terms of interactions with local maritime operations such as recreational and commercial fishing activities.

#### **6.2.6 Community and Social Impacts**

All potential community and social impacts have been examined and considered for the Zone 4 expansion.

Both Zone 4 and 8X expansions entail development within the existing terminal footprint. As such, it is not expected that any social or community impacts are likely as a result of terminal operations under these scenarios. Management of construction impacts will be required particularly with regard to traffic impacts and general movements around the terminal environs.

#### **6.2.7 Coastal Processes**

There are no anticipated coastal process impacts as a result of either the Zone 4 or 8X expansions, as marine works are not included in these phases.

Only the 9X proposal entails development within the coastal zone. Potential impacts associated with this expansion would be fully examined once more detailed engineering assessments have occurred in the course of normal project feasibility work.

Due to recently introduced legislation at both Commonwealth and State government levels, 'at-sea' relocation of capital dredge material is prohibited. The 9X concept therefore includes a proposal to reclaim land (as detailed in Section 5.10.2) using material from necessary berth dredging consistent with the principles of 'beneficial re-use'.

While the reclaimed area may not immediately be used for port purposes, the area will present the opportunity to help screen coastal industrial operations from the World Heritage Area, thereby reducing potential visual amenity impacts.

Given the preliminary nature of the 9X design, the extent of material for this area and size of area is unable to be confirmed. This Master Plan commits to design principles being based on a *Working with Nature* ('WwN') philosophy - as advocated by the World Association for Transport Infrastructure known as 'PIANC'.

As PIANC states:

*'Working with Nature requires that a fully integrated approach be taken as soon as the project objectives are known – i.e. before the initial design is developed. It encourages consideration of how the project objectives can be achieved given the particular, site-specific characteristics of the ecosystem.'*

*Working with Nature is about more than avoiding or mitigating the environmental impacts of a pre-defined design. Rather, it sets out to identify ways of achieving the project objectives by working with natural processes to deliver environmental protection, restoration or enhancement outcomes’.*

#### **6.2.8 Marine Ecology**

There are no anticipated marine ecology impacts as a result of either the Zone 4 or 8X expansions.

Only the 9X proposal entails changes to development within the coastal zone. Potential impacts associated with this expansion will be fully examined once more detailed engineering assessments have occurred in the course of normal project feasibility work.

Increased shipping movements would also need close examination although the increased size of average export parcels per vessel is equating to lower overall vessel movements per export tonne. Using the most recent data from a full financial year (2016/2017) DBCT managed the export of 63,202,057 tonnes of coal via 630 vessels. This equates to an average payload size of 100,320 tonnes per vessel.

#### **6.2.9 Terrestrial Ecology**

All potential terrestrial impacts have been examined and considered for the Zone 4 expansion.

Potential impacts associated with the 8X and 9X expansion options will be fully examined once more detailed engineering assessments have occurred in the course of normal project feasibility work. It is clear though that existing terminal environs are highly disturbed in nature.

#### **6.2.10 Soil and Geology**

Potential impacts upon soil and geology are to be assessed in greater detail prior to development proceeding. Existing groundwater bores (subject to existing state government licence conditions) will continue to be monitored/reported as part of the terminal Environmental Management System.

It is unlikely that soil and/or geological issues will restrict the expansion pathway.

#### **6.2.11 Surface Water Quality and Hydrology**

Works undertaken in 2015 as part of the Water Quality Improvement Project (WQIP), (including the construction of the new Rail Loop Dam) have significantly improved water quality management on site through increased water storage capacity across terminal lands.

The future expansion pathway outlined in this Master Plan is likely to benefit from such water quality management improvements.

#### **6.2.12 Transportation and Access**

Transportation and access issues are unlikely to change under either Zone 4 or 8X expansions. The 9X expansion would however, trigger changes to terminal access and significant changes to rail and road infrastructure.

### 6.2.13 Waste Management

Waste management under all future expansions would be captured in relevant construction and operational environmental management plans as per usual operations.

### 6.2.14 Land Tenure and Other Stakeholder Interests

Both Zone 4 and 8X expansions use existing DBCTM held lands as they largely involve augmentation of existing terminal areas.

The 9X expansion would require further land acquisitions in the immediate port environments for both terminal area and associated infrastructure corridors (road/rail etc.).

## 6.3 Comparison of Expansion Projects

Table 10 outlines the qualitative risk assessment of environmental and planning issues for the proposed expansion pathway.

It should be noted that all regulatory approvals are in place for the Zone 4 expansion, hence its significantly lower risk rating.

Issue/Impact	Zone 4 Expansion (85 Mtpa-89 Mtpa)	8X Expansion (89 tpa-102 Mtpa)	9X Expansion (102 Mtpa-134 Mtpa)
Air Quality	L	M	H
Noise & Vibration	L	M	H
Visual Amenity	L	L	M
Cultural Heritage	L	M	M
Local Maritime Operations	L	L	M
Community & Social Impacts	L	L	H
Coastal Processes	L	L	H
Marine Ecology	L	L	M
Terrestrial Ecology	L	M	M
Soil & Geology	L	L	H
Surface Water Quality & Hydrology	L	L	H
Transport & Access	L	L	H
Waste Management	L	L	L
Land Tenure & Other Stakeholder Interests	L	L	M
<b>L</b>	<b>Low:</b> Limited (if any) delays are likely to be experienced during the approval process as a result of the issues identified		
<b>M</b>	<b>Moderate:</b> Delays are likely to be experienced during the approvals process as a result of the issues identified, however issues are expected to be managed / addressed sufficiently to obtain approval without significant design changes.		
<b>H</b>	<b>High:</b> Significant delays are likely to be experienced during the approvals process due to the issues raised. Resolution of these issues is likely to involve design changes.		

**Table 10: Qualitative comparison of environmental and planning risks for the proposed expansion pathway**

Robust management of the construction phase will be required in accordance with the regulatory approvals already gained by both DBCTM and DBCT P/L including:

- being deemed a 'non-controlled action' under the Environment Protection and Biodiversity Conservation Act, 1999 (Commonwealth), and
- securing all necessary environmental planning approvals under State legislation including Environmental Licenses under the Environmental Protection Act, 1994 and port development approvals under the Sustainable Planning Act, 2009.

The location of the terminal within and adjacent to the GBRWHA, necessitates an absolute focus on: impact avoidance of environmental values as part of planning and design processes, and ensuring robust environmental management systems are in place for ongoing operations. This is especially true for 8X and 9X because of the larger scale of the developments.

For 8X and 9X the following is a list of key issues requiring further investigation in order to provide a more accurate assessment closer to the time of development:

- Cultural Heritage assessments of potential sites outside the existing DBCT footprint
- Likelihood of impact on marine water quality, including impact on local beaches
- Potential impacts to coastal processes as a result of reclamation works and any new marine infrastructure (9X)
- Obtaining the necessary land for 9X
- Reclamation and construction impacts upon local turtle nesting sites
- Potential impacts upon seagrasses and other marine plants
- Impacts to existing mangrove communities and the need for setbacks
- Impact to tidal flow regime of Louisa Creek during 9X expansion works
- Traffic assessment study to determine impacts upon Hay Point Road and the local road network
- Any relevant amendments to Reef 2050 including implementation policies
- Any relevant amendments to the Sustainable Port Development Act, 2015
- Quantitative noise and dust assessments based on enhanced engineering design parameters closer to the time of development
- Enhanced examination of port buffers around the Hay Point 'priority port' precinct

In order to better understand potential noise and dust emissions, DBCTM commissioned preliminary studies of dust and noise modelling to ensure critical issues are factored into preliminary design and feasibility studies. The results are detailed in the following sections.

#### **6.4 Air Quality Environment - Post Expansion**

Due to their past experience with DBCT, Katestone Environmental ("Katestone") was commissioned to undertake predictive modelling for expansion the Zone 4 project and 8X project detailed within this Master Plan.

Particulate matter is the main air pollutant associated with operation of coal terminals. Emissions of other air pollutants will be low and therefore will have a negligible potential for impact compared to particulate matter. Particulate matter was the Primary focus of the Katestone air quality assessment and other air pollutants have not been considered further.

The air quality assessment assumes that the terminal has implemented the 8X Project (i.e. terminal capacity has reached 102 Mtpa). It also assumes that the neighbouring coal terminal is operating at its approved capacity (55 Mtpa). The air quality assessment has been based on the following items:

- Development of a three-dimensional (3D) meteorological dataset representative of prevailing conditions of the surrounding area.
- Estimation of emissions of particulate matter associated with coal terminal operations based on information used in previous air quality assessments, National Pollutant Inventory (NPI) reporting, other data provided by DBCTM and standard assumptions where information is not available.
- Dispersion modelling incorporating emission characteristics and particulate matter emission rates associated with the operation of the coal terminals. The model also includes site-specific 3D meteorology, terrain, land-use and geographical location of sensitive receptors.
- Prediction of levels of particulate matter due to the operation of the coal terminals at identified sensitive receptor locations and the surrounding environment. Predicted ground-level concentrations of the key metrics including: Total Suspended Particulate matter (TSP), PM10 and PM2.5. PM 10 and PM 2.5 are defined as Fraction of Particulate Matter with diameter smaller than 10 and 2.5 micrometres respectively.
- and dust deposition rates have been assessed against the relevant air quality objectives detailed in the:
  - Environmental Authority Permit Number: EPPR00504513 (Date of Issue 19 October, 2015)
  - Environmental Protection (Air) Policy 2008 (Air EPP)
  - National Environment Protection (Ambient Air Quality) Measure (Air NEPM) (Commonwealth Department of the Environment, February, 2016)
  - Department of Environment and Heritage Protection's (EHP) Guideline, Mining: Model mining conditions (EHP, 2013)
  - Application requirements for activities with impacts to air (EHP, 2015)

The general approach to this assessment is consistent with the methodologies applied in earlier air quality assessments conducted for regulatory approvals. In the late 1990s and early 2000s, Katestone developed a dust modelling system representing the Hay Point area that included DBCT and HPCT for the Stage 6 and 7 expansions of DBCT (Hay Point DispMod v1.0). That modelling system used the USEPA's ISC3 Gaussian dispersion model.

The ISC3 model is no longer supported by the USEPA.

More recently, the modelling system was redeveloped using the CALMET/CALPUFF models and this new modelling system was used for more recent expansion projects, most recently for the EIS for the Dudgeon Point Coal Terminal (Hay Point DispMod

v2.0).

The current modelling system (Hay Point DispMod v2.0) incorporates the more sophisticated CALMET meteorological model and the CALPUFF dispersion model, which are accepted for use by regulatory authorities in Australia. Hay Point DispMod v2.0 also incorporates an emissions model that is configured to represent the spatial and temporal emissions from DBCT at 85 Mtpa and HPCT at its current approved capacity of 55 Mtpa.

### 6.4.1 Emissions

Activities associated with the most significant emissions of particulate matter from coal terminals are conveyors, stockpiles, transfers and other activities such as bulldozing and excavators.

Dust emission rates from DBCT and HPCT were estimated in earlier studies from limited near source monitoring of TSP concentrations (GHD/Oceanics, 1975). Updated estimates were included in subsequent studies (Dames & Moore, 1996, Katestone Scientific 2000, Katestone Environmental 2005 and WBM 2004). For this air quality assessment, these estimates have been revised based on more recent emission factors reported in literature (e.g. National Pollutant Inventory Handbooks or the USEPA’s AP-42 compilation of emission factors) and site-specific data obtained through the NPI reporting period 2014/2015.

For the majority of activities, the emission rate of particulate matter is dependent on the wind speed with little or no emissions occurring for some activities (e.g. stockpiles) below a wind speed threshold. For some activities (such as coal conveyors), wind speed and frequency of utilisation are important determinants of the emission rate. Other factors are also important such as coal type, coal moisture content, coal particle size distribution, rainfall and the mitigation measures that may be employed. A summary of emission rates for DBCT (8X Project) operating at 102 Mtpa is provided in Table 11:

Activity	(TSP) (g/s)	PM <sub>10</sub> (g/s)	PM <sub>2.5</sub> (g/s)
Rail receipt	0.17	0.08	0.01
Stacking	0.29	0.14	0.02
Reclaiming	0.57	0.27	0.04
Surge bin	0.17	0.08	0.01
Stockpiles - wind erosion	0.58	0.29	0.04
transfers - inloading	0.45	0.21	0.03
transfers - outloading	1.59	0.75	0.11
Ship loading	0.14	0.07	0.01
Conveyors	0.83	0.30	0.02
Other - bulldozing	1.53	0.50	0.03
Other - excavator	1.47	0.23	0.03
<b>Total</b>	<b>7.8</b>	<b>2.9</b>	<b>0.4</b>

Table note:  
TSP: Total Suspended Particulate Matter  
PM10 and PM2.5: Fraction of Particulate Matter with diameter smaller than 10 and 2.5 micrometres respectively

**Table 11: Summary of Emissions for DBCT (8X project) at 102 Mtpa**

### 6.4.2 Results

Predicted concentrations are compared with limits specified in Condition B2 of DBCT’s EA (Date of Issue, 19 October 2015), objectives specified in the *Air EPP* and EHP guideline documentation (EHP, 2013 and EHP, 2015). Also included is a comparison with the recently updated *Air NEPM* to assess potential impacts should the State based Air EPP objectives be revised to reflect the Air NEPM standards.

The modelling results, based on preliminary engineering, can be summarised as follows:

- Predicted maximum monthly dust deposition rates comply with Condition B2 of DBCT’s EA at all receptors.
- Predicted maximum 24-hour average and annual average concentrations of PM2.5 comply with the relevant Air EPP and Air NEPM objectives and standards at all receptors.
- Predicted 6th high 24-hour average and annual concentrations of PM10 comply with the relevant Air EPP and Air NEPM standards at all receptors.
- Predicted 24-hour average concentrations of TSP comply with Condition B2 of DBCT’s EA at all receptors except at Louisa Creek East (P2).
- Predicted maximum concentrations of PM10 comply with the Air NEPM standard of 50 µg/m<sup>3</sup> (no allowable exceedances) at all receptors except at Louisa Creek East (P2).

The following tables reflect the modelling results:

Receptors	TSP 24-hour average (µg/m <sup>3</sup> )			TSP Annual average (µg/m <sup>3</sup> )	
	DBCT (8X Project) in isolation	DBCT (8X Project) and HPCT	DBCT (8X Project), HPCT and ambient background	DBCT (8X Project) in isolation	DBCT (8X Project), HPCT and ambient background
Louisa Creek West (P1)	19.2	40.7	101	3.3	52.6
Louisa Creek East (P2)	40.5	56.5	116	14.2	64.1
Half Tide (P3)	14.9	18.6	78.5	1.1	50.6
Salonika (P4)	11.4	12.4	72.3	0.7	49.6
Louisa Creek Central	26.4	36.4	96.3	7.8	57.4
Timberlands	6.0	8.1	68	0.3	48.9
<b>Objective / EA Limit</b>	<b>50 µg/m<sup>3</sup> (increase above background) (EA)</b>		<b>110 µg/m<sup>3</sup> (background + 50 µg/m<sup>3</sup>)<sup>a</sup></b>	<b>90 µg/m<sup>3</sup> (Air EPP)</b>	

Table note:  
<sup>a</sup> limit of 110 µg/m<sup>3</sup> was calculated based on background + 50 µg/m<sup>3</sup> as per Condition B2 of DBCT’s EA. A background of 60 µg/m<sup>3</sup> was determined from 75<sup>th</sup> percentile, 24-hour average for P4 from 2001 to 2011.

**Table 12: Predicted ground-level concentrations of TSP**

Receptors	PM <sub>10</sub> Maximum 24-hour average (µg/m <sup>3</sup> )		PM <sub>10</sub> 6 <sup>th</sup> high 24-hour average (µg/m <sup>3</sup> )		PM <sub>10</sub> annual average (µg/m <sup>3</sup> )	
	DBCT (8X Project) in isolation	DBCT (8X Project), HPCT and ambient background	DBCT (8X Project) in isolation	DBCT (8X Project), HPCT and ambient background	DBCT (8X Project) in isolation	DBCT (8X Project), HPCT and ambient background
Louisa Creek West (P1)	9.7	38.5	7.4	26.0	1.7	15.3
Louisa Creek East (P2)	20.9	55.3	16.7	37.8	6.4	20.4
Half Tide (P3)	6.4	26.0	4.9	23.7	0.5	14.1
Salonika (P4)	5.2	22.5	3.2	21.5	0.3	13.6
Louisa Creek Central	12.4	41.2	10.6	31.9	3.8	17.6
Timberlands	4.6	23.1	2.9	20.3	0.2	13.3
<b>Objective</b>	<b>50 µg/m<sup>3</sup> (Air NEPM)</b>		<b>50 µg/m<sup>3</sup> (Air EPP)</b>		<b>25 µg/m<sup>3</sup> (Air NEPM)</b>	

**Table 13: Predicted ground-level concentrations of PM<sub>10</sub>**

Receptors	PM <sub>2.5</sub> Maximum 24-hour average (µg/m <sup>3</sup> )		PM <sub>2.5</sub> annual average (µg/m <sup>3</sup> )	
	DBCT (8X Project) in isolation	DBCT (8X Project), HPCT and ambient background	DBCT (8X Project) in isolation	DBCT (8X Project), HPCT and ambient background
Louisa Creek West (P1)	1.3	6.5	0.25	2.79
Louisa Creek East (P2)	3.2	7.8	0.84	3.41
Half Tide (P3)	0.9	4.1	0.07	2.61
Salonika (P4)	0.7	3.9	0.05	2.57
Louisa Creek Central	2.0	6.2	0.52	3.07
Timberlands	0.7	4.1	0.04	2.55
<b>Objective</b>	<b>25 µg/m<sup>3</sup> / 20 µg/m<sup>3</sup> (Air EPP) / (Air NEPM goal for 2025)</b>		<b>8 µg/m<sup>3</sup> / 7 µg/m<sup>3</sup> (Air EPP) / (Air NEPM goal for 2025)</b>	

**Table 14: Predicted ground-level concentrations of PM<sub>2.5</sub>**

Receptors	Dust deposition monthly average (mg/m <sup>2</sup> /day)		
	DBCT (8X Project) in isolation	DBCT (8X Project) and HPCT	DBCT (8X Project), HPCT and ambient background
Louisa Creek West (P1)	19.6	23.9	38.6
Louisa Creek East (P2)	46.5	47.4	62.0
Half Tide (P3)	5.7	10.0	24.7
Salonika (P4)	4.7	6.3	21.0
Louisa Creek Central	28.4	29.0	43.7
Timberlands	1.0	1.3	16.0
Limit / Guideline	60 mg/m <sup>2</sup> /day (increase above background) (EA)		74.7 mg/m <sup>2</sup> /day (background + 60 mg/m <sup>2</sup> /day) <sup>a</sup> / 120 mg/m <sup>2</sup> /day (EHP model mining conditions)

Table note:  
<sup>a</sup> A limit of 74.7 mg/m<sup>2</sup>/day was calculated based on background + 60 µg/m<sup>3</sup> as per Condition B2 of DBCT's EA. A background of 14.7 µg/m<sup>3</sup> was determined from monitoring data from 2001 to 2011.

**Table 15: Predicted dust deposition rates**

Detailed engineering work as part of further developing the 8X concept will need to explore additional ways to mitigate emissions from the proposed development. As preliminary engineering design was used for the purpose of this current modelling, it is believed reductions in emissions may be possible at various terminal elements during advanced engineering.

Additionally, and in line with best practice long-term planning at and around this 'priority port' node, it is recommended that the form and extent of environmental buffers, particularly along the western boundary of the terminal, be examined further in conjunction with NQBP as the port authority.

It is recommended that the examination of enhanced port buffer options be highlighted as a priority issue in the formal State Port Master Planning endeavours (to be managed by the State of Queensland) scheduled to occur in 2017-2018. This is considered critical to ensure the protection of the port node and neighbouring areas into the future and consistent with the planning approach outlined in the Sustainable Port Development Act, 2015.

## 6.5 Noise Environment - Post Expansion

Predictive noise modelling has also been used to ensure future expansions are within reasonable limits and statutory guidelines as currently known. Due to their past experience with DBCT, Huson & Associates ("Huson") were again commissioned to model noise levels to determine the change in noise level in the environment surrounding the terminal up to and including the proposed 8X project.

The base case operations (permitted by the current environmental authority EPPR00504513 at a throughput of 89 Mtpa) considered in the noise model included Zone 4 works. This case is predicted to meet the target noise levels described in the EA.

### **6.5.1 License Conditions**

The current noise conditions differ from earlier licenses in that D1 now refers to 'environmental nuisance' compared with earlier licenses that referred to 'unlawful environmental nuisance'.

In addition, noise sensitive places are expanded in the current license to include commercial and retail activity places.

The noise sensitive places from the *Environmental Protection (Noise) Policy 2008* are:

- dwelling (indoors and outdoors)
- library and educational institution (including a school, college and university) (for indoors)
- childcare centre or kindergarten (for indoors)
- school or playground (for outdoors)
- hospital, surgery or other medical institution (for indoors)
- commercial and retail activity (for indoors)
- protected area, or an area identified under a conservation plan under the Nature Conservation Act 1992 as a critical habitat or an area of major interest marine park under the Marine Parks Act 2004
- park or garden that is open to the public (whether or not on payment of an amount) for use other than for sport or organised entertainment

The licence changes in the latest environmental authority (EPPR00504513) now imply that the nearest sensitive place to DBCT to the south east of the terminal is the retail activity (shops) near to the new location of the P3 noise monitoring station, instead of the nearest dwelling.

Huson assumed that the commercial activities of NQBP (Ports control centre and public viewing area) and the adjoining Hay Point Coal Terminal were not considered to be Noise Sensitive Places.

### **6.5.2 Assessment of 8X Pathway (including Zone 4)**

#### **6.5.2.1 Noise Impact of 8X - Phase 1**

The noise contribution from ST1, ST2, RL3 and the R2 conveyor are each more than 10 dB below the total DBCT site noise emissions measured at any of the nearest noise sensitive places.

No significant noise increases will be ensured through engineering associated with the stacker and reclaimer upgrades. A minor increase in noise emission from the R2 conveyor speed increase (approximately 1dB) is predicted but this will have no material effect on the noise levels observed in the surrounding community. No change in overall noise levels for any noise sensitive location surrounding DBCT are predicted at the conclusion of Phase 1 (8X). Importantly, Huson predicts that compliance with the current license conditions will be maintained.

#### **6.5.2.2 Noise Impact of 8X - Phase 2**

The opportunity exists to provide additional noise amelioration to the new RRP4 shed compared to that currently available from the existing RRP1 shed. Although a

reduction in noise emissions from the new RRP4 shed can be gained, Huson (2016) conservatively assumed that no net noise reduction has been achieved and that RRP4 simply replaces RRP1 with the same noise emissions.

An upgrade of one of the outloading conveyors may produce a minor noise increase (approximately 1 dB), however, the change to the overall DBCT noise emissions observed at the nearest noise sensitive places will be insignificant.

The most significant increase in noise emissions from the Phase 2 (8X) expansion will be from the new IL4 and buffer storage which will produce a minor noise increase to the south east of the DBCT.

The net change in noise level at P3 (representative of the nearest noise sensitive place to the south east) is from 49.6 dB(A) to 50.3 dB(A), an increase of less than 1 dB and remaining below the 53 dB(A) night time noise limit in the EA.

### **6.5.3 Conclusions**

After completion of the two phases of the 8X expansion Huson (2016) predicted no change in sound levels at noise sensitive places in the region around Louisa Creek to the west of DBCT. A minor noise increase of less than 1 dB(A) was predicted in the noise sensitive places near to the new P3 noise monitoring station in Hay Point to the east and south east of the DBCT. However, the increase in noise level would remain compliant with noise level limits in the current environmental authority.

A minor noise increase of less than 1 dB(A) was also predicted for some of the noise sensitive places around Horsburgh Road that is to the west of the DBCT rail loop.

Importantly though, increased noise level would also comply with noise level limits in the current environmental authority.

## **7 Stakeholder Consultation**

### **7.1 Public Consultation Process**

The Port of Hay Point Community Reference Group (CRG), which is facilitated by North Queensland Bulk Ports (NQBPs) has been a critical link between DBCT and the community. Membership of the CRG currently includes representatives of DBCTM, DBCT P/L, NQBPs, Mackay Regional Council and the local communities of Louisa Creek, Mirani, Sarina, Half Tide and the Droughtmaster Drive area. The general public is invited to attend meetings as observers, with questions taken from the floor. The CRG publishes minutes of meetings, as well as an official newsletter that is made available to communities. At the last meeting of the CRG in May 2017, it was agreed by all parties that the group would only reconvene when there was a compelling reason to meet. In early 2018, DBCTM initiated the reconvening of this group in the first half of 2018 on the basis of expected increases of coal throughput over coming years.

The Port of Hay Point CRG discusses a wide range of local concerns and is kept abreast of general developments at DBCT. This provides an ongoing general public forum to ensure the community is well informed about DBCT issues that affect the whole of port stakeholders. In turn, DBCTM and DBCT P/L are able to consider and gauge general community concerns as part of the ongoing DBCT planning process.

Because the more specific issues associated with the operations of DBCT were sometimes confused with the whole of port group, the DBCT P/L undertook to commence its own Community Working Group (CWG). This group is represented by community members, local government, DBCT P/L, the local State member of parliament and DBCTM. The primary goal of the group is to facilitate open two-way communications that enhance understanding of issues specifically associated with the terminal and to build trust between the members.

Environmental performance remains a source of concern for the community, and this double strategy will ensure community relations are maintained, especially as production increases and environmental risks increase.

DBCTM also recognises that expansion projects may create additional community pressures that are not related to the terminal's operations. Accordingly, DBCTM takes an active role with the community by promoting stakeholder knowledge of future expansions.

CRG meetings have been traditionally held every three months and CWG meetings are held every two months. Since mid-2014, DBCTM has regularly updated these forums on current and future projects. Current and future projects may include those undertaken as Non-Expansionary Capital Works, projects contemplated by the Master Plan, and feasibility studies. These forums are aware of the projects in the Master Plan. A detailed presentation on the updated draft Master Plan was also given to the CWG in February 2018. Considering that there is no change to the expansion pathway, and the motivation for developing Master Plan 2018 was largely to address the commercial difficulties of executing an expansion under the current 2017 Access Undertaking (see section 5.7 of this document), it was determined that no update to the community CRG was required prior to the Master Plan's release. The CWG will be informed of progress when it is reconvened later in 2018.

## **7.2 Community Engagement Strategy**

The primary objective of a community engagement strategy is to assist in the provision of a stable social operating environment for the business and to allow DBCT to expand to meet industry demand. DBCTM's community engagement strategy is based on the following:

- Informing and educating the community regarding the terminal's operating philosophy and activities including values, history, commitment to sustainability, security, among other things.
- Working to continually improve relations with the immediate community through successful community engagement and relationship building.
- Proactively strengthening key stakeholder relationships outside the immediate community.
- Effectively and efficiently managing complaints and issues.
- Promoting greater integration/interdependence between the community and the terminal over the long term.

A multi-faceted approach to Community liaison has been adopted, as no single plan, including attendance at the Port of Hay Point Community Relations Group (CRG), can satisfy all of the expectations of various community groups and individuals.

Typical responsibilities of this liaison role include the following:

- Meet and greet activities, including working with local schools and TAFE colleges, managing site tours, visits and handouts. This forms an integral part of the community information and education campaign.
- Interaction with the CWG local advisory group.
- Production of written material on how the terminal operates, its values, history, environmental initiatives, etc.
- Development of local employment, primarily through the non-expansionary capital works program and DBCT expansion projects, as well as ongoing terminal operations.
- Speaking engagements at local clubs, council, and industry groups.
- Response to community input or issues.
- Maintaining a website to better inform interested parties of terminal related matters.

## **7.3 Key Stakeholder Relations Program**

While the focus of this strategy is community engagement, external stakeholders also need to be included in terminal information releases. These external stakeholders include:

- approval agencies, e.g. Environmental Protection Agency and the Queensland Department of Environment and Science
- elected representatives (State, Federal and local Government)

- Ministers relevant to the operation or expansion of the terminal
- media
- environmental groups, and
- local government officers from such agencies as Department of Natural Resources & Mines and Queensland Health

As such, community engagement programs have been extended to include communication with key stakeholders in order to ensure proactive relationships with these parties.

DBCT is only one component of the Goonyella coal supply chain and relies on the performance and alignment of the upstream and downstream stakeholders to operate at maximum efficiency. As a result, DBCTM continues to place a strong emphasis on maintaining a cooperative relationship with its stakeholders.

Given the expansion pathway presented in this Master Plan is identical to the previous Master Plan (2016) the level of consultation needed in the development of this Master Plan has not been as significant as it has been in previous Master Plans. Nevertheless, this Master Plan (2018) has been prepared by DBCTM in consultation with current stakeholders, identified as follows:

- Local neighbouring communities – via CRG and CWG meetings since mid-2014 with a detailed presentation given to the CWG in February 2018.
- North Queensland Bulk Ports – February 2018.
- Queensland Department of Transport & Main Roads (TMR) including the Ports and Transport Governance Unit and the Sustainable Ports Planning Team - March 2018.
- DBCT Access Holders - February and March 2018.
- DBCT Access Seekers - February and March 2018.
- The DBCT terminal Operator (DBCT Pty Ltd) – Ongoing and specifically in February 2018.
- Aurizon Network (rail network provider) – March 2018.
- Aurizon National - March 2018.
- Pacific National – March 2018.
- Integrated Logistics Company – January 2018.

#### **7.4 Management of Complaints and Issues**

It is important for any organisation undertaking community engagement to field and manage community input and complaints in an efficient and effective manner. Dedicated channels of communication and protocols have been established to facilitate management of community suggestions and issues which include both the terminal Operator and any major works contractors.