

Dalrymple Bay Coal Terminal User Group

2015 Draft Amending Access Undertaking

Submission to the Queensland Competition Authority in response
to Draft Decision

8 July 2016



Contents

1	Background	4
2	Executive Summary	4
3	Overarching issues	5
	3.1 Overarching issues	5
	3.2 Coal market climate	5
	3.3 Competition between ports	11
	3.4 Pricing for terminal expansions	12
	3.5 Evergreen contracts and the prospects of renewal	12
4	Legislative framework	14
5	Scope and administration	17
	5.1 Proposal relating to the Ring-fencing DAAUs	17
	5.2 Terminating date of the access undertaking	17
	5.3 Review of the access undertaking	18
6	Rate of return	20
	6.1 Overview	20
	6.2 Framework issues and legislative context	21
	6.3 Capital structure and credit rating	22
	6.4 Risk free rate	22
	6.5 Debt risk premium	22
	6.6 Debt raising transaction costs and interest rate swap transaction cost allowances	23
	6.7 Market risk premium	23
	6.8 Debt Beta	23
	6.9 Equity beta	23
	6.10 Gamma	27
7	Depreciation	29
	7.1 Useful life of the Terminal	29
	7.2 Depreciation of spares	30
8	Remediation Allowance	30
	8.1 Increase in remediation allowance is unjustified	30
	8.2 Timing of remediation	30
	8.3 Estimated remediation costs in excess of efficient costs of remediation	31
	8.4 Annuity methodology	32
9	Corporate overheads	33
10	Terminal Infrastructure Charge and Modelling	33
11	Ring-fencing	34
	11.1 The DBCT User Group's position	34
	11.2 Independent operator	36
	11.3 Capacity Trading SCB	37
	11.4 Terminal Regulations	38
	11.5 Regulatory oversight of the OMC	39
12	Negotiation framework and capital processes	39
	12.1 Term of Access agreement	39
	12.2 Definition of coal supply chain	39
	12.3 Investment in prudent NECAP	40

13	Differential pricing	41
13.1	Support for Differential Pricing	41
13.2	Treatment of capacity created in a differentiated Terminal expansion	42
13.3	Price Rulings	44
13.4	Allocation of capacity	45
14	Other Access Undertaking concerns	45
14.1	Overview	45
14.2	Amending the definition of Notional Contracted Tonnage	46
14.3	Negotiating Framework (Section 5 / Schedule A)	47
14.4	Potential for user funding of an expansion where DBCTM not obliged to invest	48
15	Standard Access Agreement issues	48
	Schedule 1 – PWC Response to the QCA’s Draft Decision	49
	Schedule 2 – Mark-up of 2015 DAU	50
	Schedule 3 – Mark-up of Standard Access Agreement	54

1 Background

With the current access undertaking in respect of the Terminal (the **2010 AU**) due to expire on 30 June 2016, the Queensland Competition Authority (**QCA**) provided DBCT Management Pty Ltd (**DBCTM**) with an initial undertaking notice on 23 June 2015.

In response to that notice, on 12 October 2015 DBCTM lodged a draft access undertaking (the **2015 DAU**) to replace the 2010 AU.

The QCA invited submissions on the 2015 DAU and, following consideration of submissions received from stakeholders, issued its draft decision on 19 April 2016 (the **Draft Decision**).

The QCA has now invited further submissions concerning its assessment of the 2015 DAU in the Draft Decision.

This is a submission in response to the Draft Decision provided by all the users of the Dalrymple Bay Coal Terminal (**Terminal**), being:

- (a) Anglo American Coal;
- (b) BHP Billiton Mitsui Coal;
- (c) Glencore Coal;
- (d) Stanmore Coal;
- (e) Peabody Energy;
- (f) Rio Tinto; and
- (g) Vale

(together the **DBCT User Group**).

As it does not restate in their entirety previous submissions the DBCT User Group has made on the issues under consideration, it should be read together with the two previous submissions made by the DBCT User Group during the 2015 DAU process including:

- (a) the DBCT User Group Submission dated 24 November 2015 (the **DBCT User Group Initial Submission**); and
- (b) the DBCT User Group Supplementary Submission dated 22 January 2016 (the **DBCT User Group Supplementary Submission**).

2 Executive Summary

The DBCT User Group supports the vast majority of the decisions proposed by the QCA in the Draft Decision, including:

- (a) the QCA's interpretation of the legislation framework;
- (b) most of the rate of return parameters;
- (c) useful life of the Terminal for the purposes of depreciation;
- (d) ring-fencing; and
- (e) differential pricing.

The DBCT User Group does, however, have concerns about some of the decisions made by the QCA in the 2015 DAU Draft Decision, particularly including the pricing decisions made by the QCA.

Specifically, the DBCT User Group is most concerned about the QCA's approach to:

- (a) the proposed weighted average cost of capital (including assessment of the asset beta);
- (b) remediation Allowance;
- (c) corporate overheads;
- (d) obligations to invest in prudent non-expansion capital expenditure; and
- (e) a number of amendments to the undertaking.

The changes proposed to the pricing aspects would result in DBCTM being out of step with the regulated water and energy entities that the QCA (and its independent consultant, Incenta) have rightly recognised as the most appropriate benchmarks.

Accordingly, the DBCT User Group considers that it would be appropriate for the QCA to refuse to approve the 2015 DAU unless the amendments outlined in this submission are made.

3 Overarching issues

3.1 Overarching issues

The Draft Decision considered a number of overarching issues, which impact on a number of other aspects of the proposed undertaking and decision, being:

- (a) the coal market climate;
- (b) competition between ports;
- (c) pricing for terminal expansions; and
- (d) evergreen contracts.

In each case, it is clear to the DBCT User Group that DBCTM's assertions regarding the implications for the risk profile of the Terminal do not stand up to analysis. The DBCT User Group is strongly of the view that none of these four matters supports the alterations (particularly to the asset beta) being sought by DBCTM. The DBCT User Group's comments on those four matters and their relevance are set out below.

3.2 Coal market climate

The DBCT User Group continues to consider that, consistent with the DBCT User Group Initial Submission, the short, medium and long-term outlook for coal export volumes through DBCT is positive.

Further, the DBCT User Group believes that the prospective outlook on Australian coal markets means that the risk exposure of DBCTM is significantly less than was asserted in their submissions for the 2015 DAU. We continue to strongly disagree with DBCTM's contention that its risk profile has increased or that the remaining useful life of the Terminal has decreased due to changes in coal demand or prices.

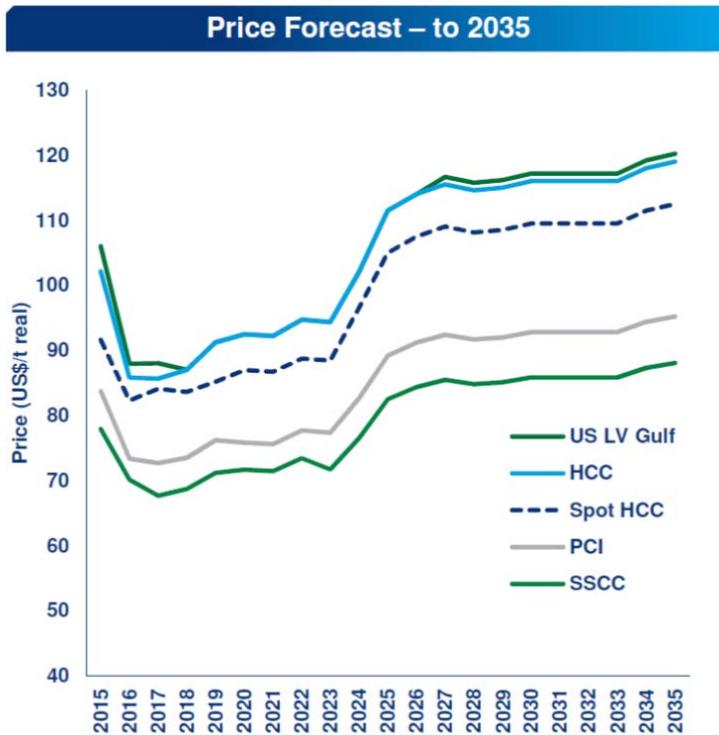
The DBCT User Group has reviewed relevant market data to identify whether the submissions it has previously made continue to be supported by market evidence. Since the publication of the Draft Decision, there have been further indicators that the outlook for coal continues to be positive and DBCTM's previous submissions are broadly unsubstantiated by available market data.

In particular, the DBCT User Group notes the following recent pieces of information which have become available since the Draft Decision:

- (a) the reopening by Stanmore Coal of the Isaac Plains Coal Mine acquired from Vale and Sumitomo and commencement of exports from that mine through the Terminal, which

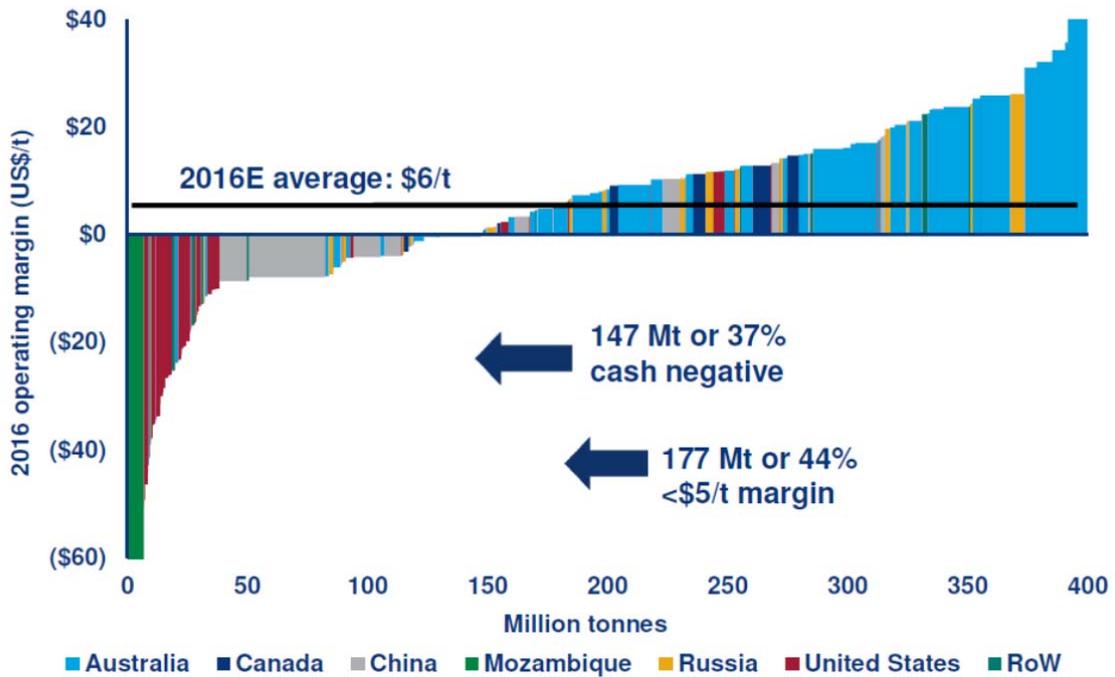
demonstrates in a very practical manner a clear belief in the future prospects of the coal market by a mine utilising the Terminal;

- (b) Taurus Fund Management's acquisition of the Foxleigh mine from Anglo American (which is continuing to produce and export through the Terminal under new ownership);
- (c) the Federal Government budget forecasts were based on a \$US91/tonne FOB price (compared with a \$US73/tonne price at the 2015-16 Mid-year Economic and Fiscal Outlook);
- (d) the Queensland Resources Council announced on 7 June 2016 that Queensland exported 202 million tonnes of coal from June 2015-May 2016, compared to 199 million tonnes over the same 11 month period last financial year;
- (e) the Wood Mackenzie Brisbane Coal Forum 2016 included the following information demonstrating:
 - (i) the anticipated positive trend in metallurgical coal prices:



- (ii) the clearly advantageous position that Australian metallurgical coal maintains on the industry cost curve (such that they would not be expected to be the mines that shut in the event of prolonged weakness in coal prices):

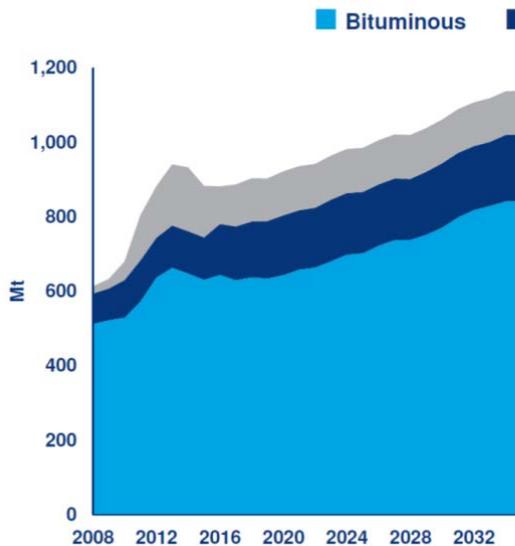
2016 seaborne met coal cash margins (US\$/tonne), including China coastal domestic trade



Source: Wood Mackenzie, Dataset: May 2016, *Nominal terms
 Price assumption HCC: US\$90/t, PCI: US\$73/t, SSCC: US\$64/t, Thermal US\$51/t basis 6,322 kcal/kg gar, FX (local/USD) AUD 1.37, CAD 1.29, RBL 64.8, ZAR 15.7

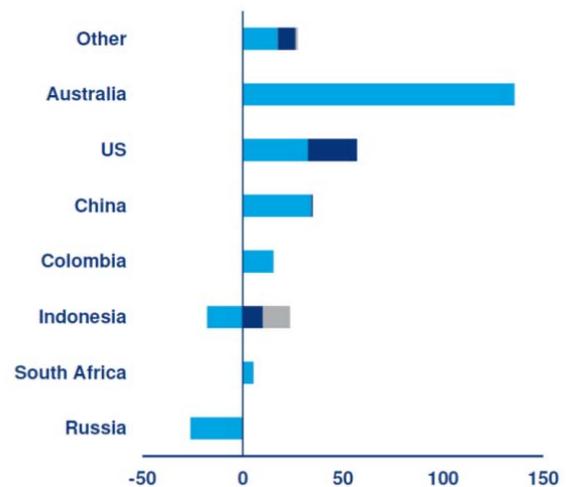
- (iii) the expectation that Australia's share of seaborne thermal coal exports will increase as a result of being higher energy content:

Seaborne thermal supply by rank, Mt



Source: Wood Mackenzie

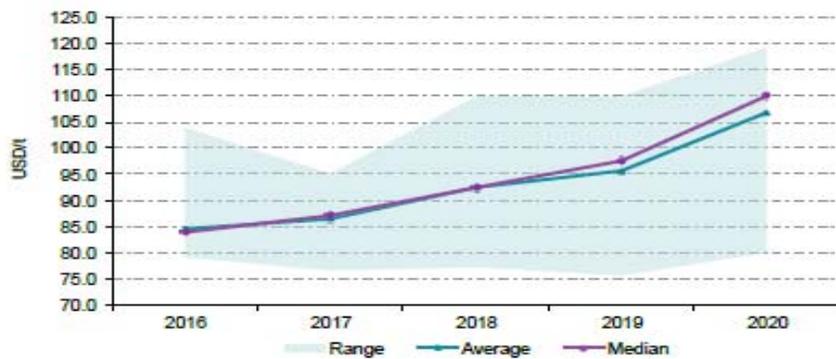
Net supply change 2016-2035, Mt



- (f) KPMG Coal Price and FX consensus forecasts (published March/April 2016), which indicate that the forecast prices of particularly metallurgical coal (based on the views of individual economic commentators and broking houses) continues to be positive and will continue to improve throughout the next regulatory period. Prices are show in USD/t nominal:

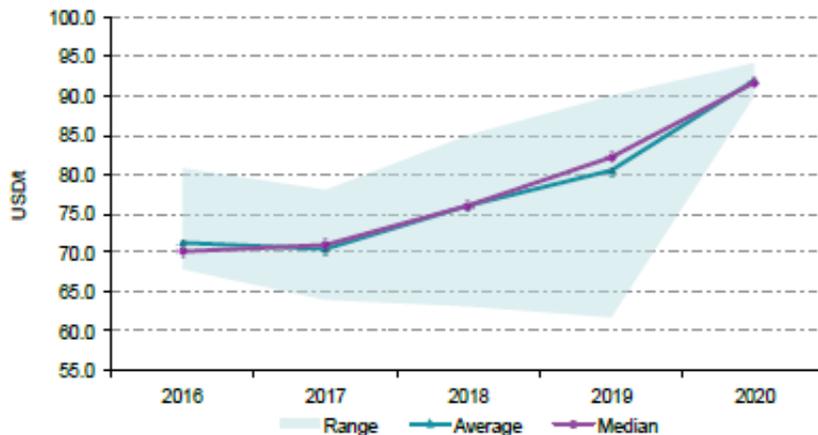
Hard coking coal price forecasts

The hard coking coal price forecasts are summarised below:



Low and ultra-low volatile PCI coal price forecasts

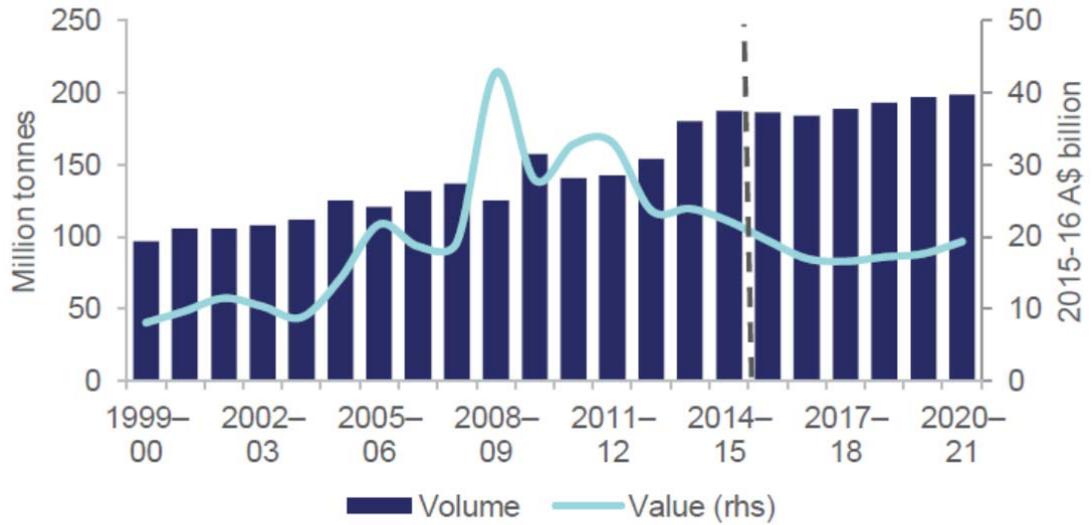
The low and ultra-low volatile PCI coal price forecasts are summarised below:



Source: KPMG Coal Price and FX consensus forecasts (published March/April 2016)

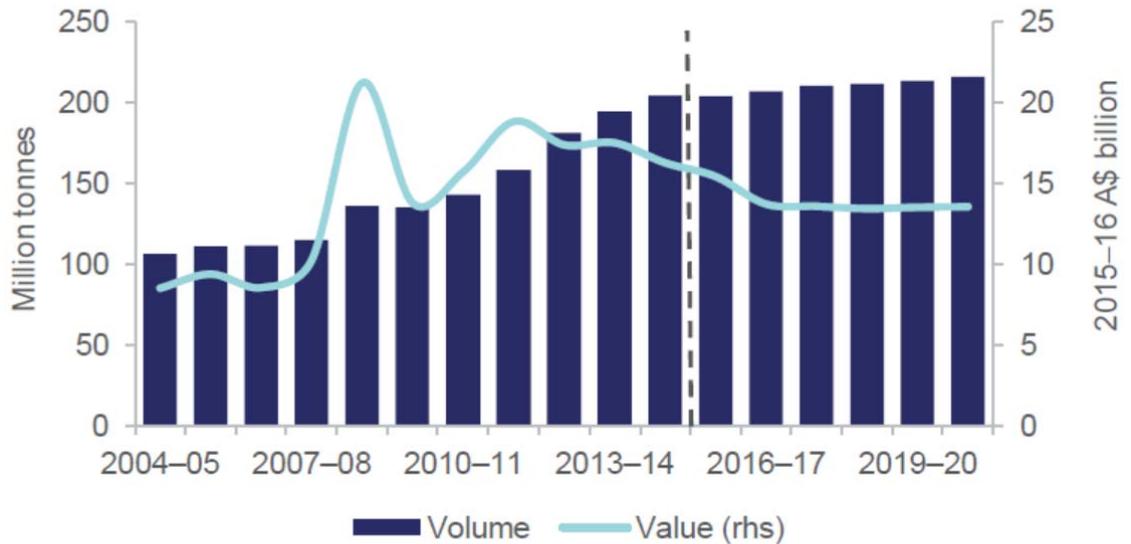
- (g) The Department of Industry and Science, Resources and Energy Quarterly (March 2016) produced by the Office of the Chief Economist, which indicates the anticipated rise in volumes of Australia's metallurgical and thermal coal exports and rise in value of Australia's metallurgical coal exports over the next regulatory period for the Terminal:

Figure 5.7: Australia's metallurgical coal exports



Source: ABS (2016) International Trade, cat. no 5465.0; Department of Industry, Innovation and Science

Figure 6.17: Australia's thermal coal exports

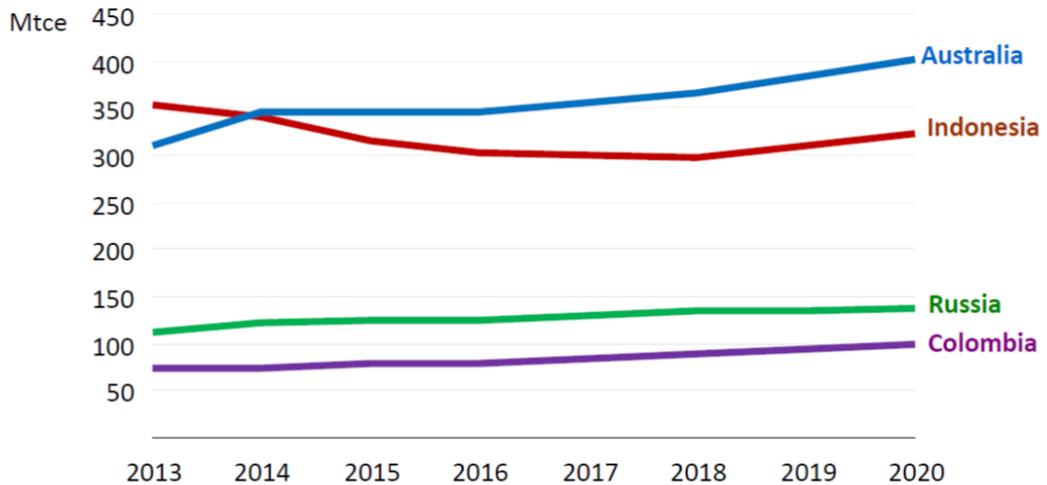


Source: ABS (2016) *International Trade*, cat. no 5465.0; Department of Industry, Innovation and Science

- (h) The International Energy Agency's assessment (in its presentation relating to the *Medium-Term Coal Market Report 2015*, published December 2015) predicted the continuing growth in coal export volumes from Australia:

Australia pushes ahead as the world's largest exporter

Coal exports from key countries



The DBCT User Group therefore considers that the most recent economic data clearly supports the positive outlook for the coal market described in the DBCT User Group Initial Submission (particularly in respect of metallurgical coal which makes up the vast majority of the throughput of the Terminal).

That review of recent economic information is also entirely consistent with the findings of the QCA's consultants, namely:

Incenta:

In summary, while the current seaborne coal industry outlook is depressed, Australian metallurgical coal production is the most competitive in the world, and the long term outlook is positive, with Australia's Chief Economist and the International Energy Agency forecasting continued growth of coal exports, albeit at lower rates, and expecting Australian to continue to dominate seaborne coal trade in the future. While the fall in coal prices has squeezed the profit margins of Australian producers, their relative competitiveness means that current export volumes are expected to be secure over the coming regulatory period and in the long run.

Resource Management International:

RMI agrees with Wood Mackenzie's assessment that world demand for metallurgical coals (hard coking, soft coking and PCI) will persist and grow over their forecast period to 2035 ... RMI considers that the fundamentals of long term demand for steel in China, and growing steel demand in India and SE Asian developing countries, who don't have their own sources of metallurgical coal, suggests that the demand for metallurgical coal from Australia will likely persist beyond 2035.

Australian coking coals, and particular those within the Hay Point catchment area, are well placed both geographically and from a quality and mining cost position, to supply this market.

It is therefore abundantly clear that it would be entirely inappropriate to provide an increase to the asset beta of the Terminal, or a reduction in the assumed useful life of the Terminal, on the basis of the coal market outlook.

3.3 Competition between ports

The DBCT User Group strongly supports the QCA's conclusion that the potential for the Terminal to face competition from other coal terminals is limited. There continues to be no economic or practical evidence of any such competition from other coal terminals, existing or contemplated.

The extent to which other terminals provide any competition to the Terminal is severely limited by the practical constraints to a user switching to utilise other coal terminals. As a result, the other coal terminals do not provide any competitive tension to DBCTM or alter the level of asset stranding risk for the Terminal from that which has prevailed during previous regulatory periods.

As set out in more detail in the DBCT User Group's Initial Submission, the practical constraints on a DBCT User from switching to an alternative coal terminal are principally:

- (a) terminal cost differences;
- (b) insufficient terminal capacity at alternative terminals;
- (c) multi-cargo and coal blending requirements at DBCT that are not available at other terminals (particularly for metallurgical coal);
- (d) significant additional above and below rail costs;
- (e) insufficient below rail capacity (in the absence of costly expansions);

- (f) capital investment required in mine-specific rail infrastructure (for some mines to even be physically capable of railing coal to another terminal);
- (g) rail network differences providing some barriers to a rail haulage provider switching the location of services (i.e. using electric locomotives from the Goonyella system for a diesel only part of the network such as the Newlands system to Abbot Point);
- (h) restraints on substitution arising from long term take or pay commitments for above and below rail services;
- (i) Hay Point Coal Terminal not being a multi-user facility and there being no evidence or indication that its operator, BHP Billiton Mitsubishi Alliance, has any intention to provide access to that terminal to third parties; and
- (j) neither of the Dudgeon Point Coal Terminal proposals proceeding and there being no indication they are likely to do so during the next regulatory term (noting there is an inherent contradiction between DBCTM's claims that coal markets are so depressed that the asset stranding risk is increasing and useful life of the Terminal is decreasing, while also suggesting that multiple greenfield coal terminals are such a realistic prospect of development that they impose competitive tension on DBCTM).

As the QCA notes, the conclusion that other terminals do not provide a competitive constraint on DBCTM is consistent with the findings of both the ACCC¹ and QCA.

It is therefore clear there should be no change to the asset beta for the Terminal, or a reduction in the assumed useful life of the Terminal, as a result of any assertions about competition from other terminals.

3.4 Pricing for terminal expansions

The DBCT User Group strongly supports the need for differential pricing for the detailed reasons set out in the DBCT User Group Initial Submission and its submissions on DBCTM's differential pricing draft amending access undertaking.

Although the prospects of an expansion might currently appear limited, the change is important to:

- (a) provide the appropriate price signals to potential users and thereby drive efficient investment (both in respect of terminal capacity and mines); and
- (b) prevent inefficient cross-subsidisation of future users by existing users.

Further detailed submissions on that matter are set out in section 13 of these submissions below.

3.5 Evergreen contracts and the prospects of renewal

The DBCT User Group continues to consider that users have very strong incentives to exercise the renewal options for the reasons set out in detail in the DBCT User Group Supplementary Submission.

The DBCT User Group acknowledges that a small volume of terminal capacity (2.7 mpta) has recently not been renewed. However, to put that in context:

- (a) the capacity not renewed is only 3.2% of the terminal capacity;

¹ ACCC Statement of Issues, Brookfield Consortium – proposed acquisition of Asciano Limited, 15 October 2015, 14.

- (b) the capacity has only been available to other access seekers since it was offered by DBCTM to the queue on 12 January 2016 (i.e. at the date of this submission, it has been available to be contracted by other users less than 6 months);
- (c) the revenue cap form of regulation and socialisation across the continuing users of the Terminal makes DBCTM completely immune from that capacity not being contracted for the interim period until it is recontracted.

Periods like this, where a small portion of the capacity is not contracted, should be expected and not seen as foreshadowing a long term decrease in demand or substantial increase in the risks of non-renewals as DBCTM asserts in its supplementary submission of 11 March 2016 (the **DBCTM Supplementary Submission**). The decisions that will result in the available capacity being contracted (e.g. mine developments, expansions, re-openings) are not decisions that can be taken instantly upon terminal capacity becoming available, such that short periods of minor under contracting will naturally occur. As noted above, socialisation effectively makes DBCTM revenue neutral during such periods.

The DBCT User Group acknowledges that a chart can be produced showing most of the contracted tonnage theoretically expiring in the next 5 years. However, that is an outcome of the 5 year extension options which have always formed part of the standard User Agreement. This is not a change in risk profile, but the natural outcome of the long-existing contractual arrangements.

DBCTM gives no real basis for its conclusion that it is increasingly likely that users will opt not to exercise their extension option other than the softer prevailing coal prices. However, as analysed in the DBCT User Group's Initial Submission and earlier in this submission (see section 3.2 above):

- (a) the future outlook for coal (particularly the metallurgical coal that makes up the majority of the tonnage exported through the Terminal) is positive, and long term strategic renewal decisions are not going to be made based on spot coal prices; and
- (b) there is already practical evidence of the improvement in the Goonyella system, including the re-opening of the Isaac Plains coal mine (following its acquisition by Stanmore Coal).

The Isaac Plains example, in fact, just demonstrates the exact point that was made in the DBCT User Group's Supplementary Submission – namely that even a user closing a mine will have reason to keep the capacity on foot with the ability to divest a mine with infrastructure capacity in place, and now the capacity is being utilised again by the new owner (Stanmore Coal) of that mine. There is no reason to suspect that any other sale process (such as those announced in respect of the Anglo American coal mines) will operate any differently.

The DBCT User Group notes the West Moreton network / Queensland Rail example that DBCTM seeks to draw on in the DBCTM Supplementary Submission. However, those circumstances are clearly not analogous to the Goonyella supply chain. The West Moreton network is a rail network with only three resources users with a maximum of four mines, such that the exit of a resources user through closure of a mine has substantially greater likelihood of triggering a 'domino effect' where the remaining users are unable to meet the same revenue requirement if socialised among the remaining users. In addition, infrastructure costs are a significantly larger portion of the coal supply chain costs for the West Moreton collieries (compared to the Goonyella collieries) and there are significantly less alternative potential projects that may take up the capacity than exist in the Goonyella system. A review of the submissions made by New Hope in that process clearly indicate the material differences between what is occurring in the West Moreton supply chain and the Goonyella supply chain (and the different magnitude of cost and risk involved).

The DBCT Users also note there continues to be capacity trading between members of the DBCT User Group, such that capacity which is not being used by one User is being taken up by another User that has need for the capacity (thereby increasing the prospects of future renewals).

4 Legislative framework

(a) Support for QCA interpretation

The DBCT User Group strongly supports the QCA's interpretation of the legislative framework provided by the *Queensland Competition Authority Act 1997* (Qld) (the **QCA Act**).

Much of the QCA's analysis is self-evident, so the submissions below only deal with issues which appear to be the subject of some contention.

(b) The public interest

As noted in the 2015 Draft Decision, section 138(2)(d) of the QCA Act requires the QCA to have regard to the public interest.

The DBCT User Group strongly agrees with the QCA's position that:

The term 'public interest' is not defined in the QCA Act, and any assessment of the public interest will necessarily be shaped by its context.

In the current context, we consider the public interest will be served by an access undertaking that promotes the sustainable and efficient development of the Queensland coal industry. This continued investment will, in turn, provide a stimulus to the Queensland economy and local employment.

...

During periods of contraction, the public interest may be served through a heightened focus on the efficient operation of the Terminal, and facilitating greater coal supply chain efficiency, in order to reduce supply chain costs.

Like the QCA, the DBCT User Group sees no inconsistency between the QCA's various expressions of matters that would be in the public interest, including an efficient and competitive coal industry or efficient and sustainable development of the Queensland coal industry.

(c) The pricing principles and 'asymmetric consequences' of errors

The DBCT User Group strongly disagrees with the view expressed by DBCTM in its submission that there are asymmetric consequences from the QCA erring in its assessment of requirements of the public interest at any given time.

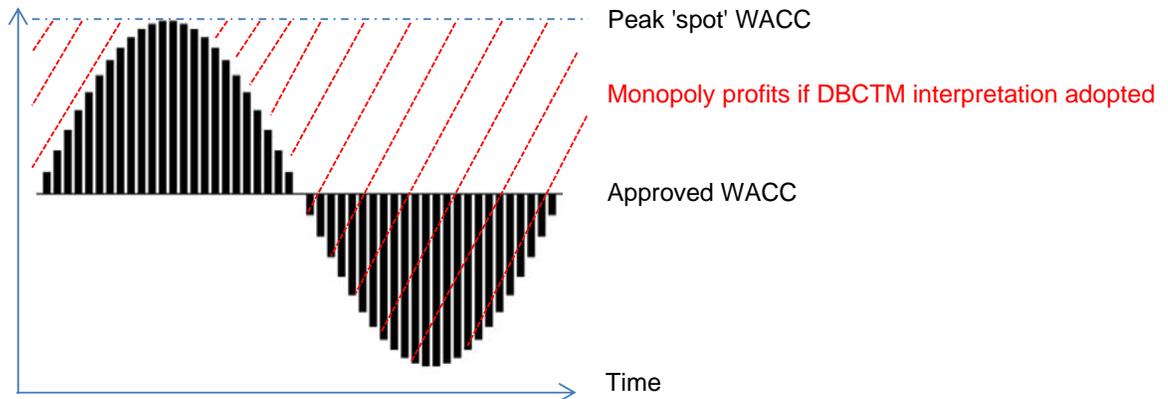
DBCTM submitted that setting a WACC too low creates a worse problem (discouraging infrastructure investment) than setting the WACC too high.

However, as noted in the DBCT User Group Initial Submission, that ignores the obvious points that:

- (i) there will be periods during the regulatory term and the economic life of the infrastructure in question where the WACC would, if it was estimated at that time, have been lower than the applicable approved WACC (most relevantly that is, even in DBCTM's submissions, recognised as clearly being the case under DBCTM's current undertaking at the time of this submission);
- (ii) there is no evidence that the decisions of the QCA, or economic regulators more generally, in respect of WACC disadvantage regulated entities more than they advantage them. Measured over a regulatory period or the longer term it would be expected any 'uncertainty' is revenue neutral;

- (iii) as shown in in Figure 1 below, setting access pricing in a way that avoids the risks of the approved WACC being less than any hypothetical spot estimate over the regulatory term would involve setting the WACC at the highest anticipated spot estimate over the term – effectively delivering substantial monopoly profits to DBCTM over the term;
- (iv) there is no way of measuring with any certainty what the anticipated spot estimate over the term might be – such that any adjustment for this uncertainty would be completely arbitrary and inappropriate; and
- (v) DBCTM's interpretation is clearly inconsistent with the object of Part 5 of the QCA Act (as set out in section 65E of the QCA Act), given that setting prices in a way that delivers substantial monopoly profits will be inconsistent with providing for efficient use of and investment in infrastructure.

Figure 1 – Simple illustration of monopoly profits produced by DBCTM interpretation



In addition, the DBCT User Group notes that:

- (i) the comments cited by DBCTM made by the Productivity Commission² were made in the context of 'all else [being] equal'. As such, the DBCT User Group does not consider that these comments are applicable to the 2015 DAU, given the clear market indications as to the appropriate calculation of the WACC in this current circumstances (which were recognised by the QCA in its Draft Decision). The QCA should only give weight to suggestions that erring on the side of setting the WACC too high is preferable if there is uncertainty in its assessment;
- (ii) there are clearly adverse consequences of setting the WACC too high, including potentially inefficiencies produced through lower utilisation of terminal capacity or inefficient investment being incentivised by a return higher than that corresponding to the risk; and
- (iii) the suggestion by DBCTM that setting the WACC too low will discourage investment is inconsistent with the views it has expressed about the prospects of the market for coal improving. It is clear from DBCTM's submissions that it does not consider investing in the coal market to be prospective for reasons outside of the regulatory pricing regime. As such, the DBCT User Group does not think that significant weight can be attributed to DBCTM's comments about asymmetrical consequences of a lower WACC and the flow on effects to infrastructure investment in respect of the next regulatory period.

Given the above, the DBCT User Group considers that erring on the side of setting a higher WACC on the basis of any perceived asymmetrical consequences for infrastructure investment is clearly inappropriate and not supported by the pricing principles in section 168A of the QCA Act.

Accordingly, the DBCT User Group fully supports the QCA's analysis that:

We do not accept DBCTM's view that the asymmetric consequences of error should be addressed via 'choosing a higher WACC from the distribution of possible WACC estimates as insurance against underinvestment'. Rather, we consider WACC (and its parameters) should be determined by carefully assessing all available evidence

² Productivity Commission, 2013, *Review of the National Access Regime*, report no 66 p. 104.

and using our best judgement to calculate the point estimates that will give rise to an estimate of the WACCC that best meets the pricing principles and the other factors in section 138(2) of the QCA Act.

...

We agree with the DBCT User Group there will be times during the regulatory term when the contemporaneously estimated WACC would be higher or lower than the approved WACC – as is the case presently under DBCTM's 2010 AU. We agree with the DBCT User Group that, measured over the longer term, any difference between a contemporaneously estimated WACC and the approved WACC would be expected to be revenue neutral.

5 Scope and administration

5.1 Proposal relating to the Ring-fencing DAAUs

The DBCT User Group has set out its view on the most sensible way forward with respect to the independent operator, interaction with the Operation and Maintenance Contract (**OMC**) and other provisions contained in the ring-fencing DAAUs in section 11 of this submission.

As explained below, the DBCT User Group has sought to find a sensible compromise between DBCTM's position, and the need to entrench appropriate protections against the vertical integration that already exists (particularly with respect to DBCTM's secondary capacity trading operations at the terminal).

5.2 Terminating date of the access undertaking

(a) QCA approach

The QCA affirmed and adopted its analysis in the November 2015 Ring-Fencing DAAU in its consideration of the appropriate terminating date for the 2015 DAU. Specifically, the Draft Decision suggested that the 2015 DAU should terminate at the earliest of:

- (i) 1 July 2021; or
- (ii) The date that handling of coal at the Terminal ceases to be a declared service for the purposes of the QCA Act.

(b) Should the 2015 DAU terminate upon handling of coal at the Terminal ceasing to be a declared service?

As previously submitted, the DBCT User Group considers that the 2015 DAU will lack regulatory certainty if the access undertaking terminates if the handling of coal at the Terminal ceases to be a declared service part way during the term.

We note the QCA's comments that the resulting regulatory uncertainty is immaterial on the basis that:

- (i) the Port Services Agreement (**PSA**) requires DBCTM to use its best endeavours to ensure that an access undertaking is in force through the terminal lease term; and
- (ii) should the handling of coal ceased to be declared, the QCA Act provides protections for existing rights.

However, the DBCT User Group is unpersuaded that an obligation under the PSA to use 'best endeavours' to ensure an access undertaking is in force through the DBCT lease term offers sufficient protection or appropriate regulatory certainty. The DBCT Users are not parties to the PSA, cannot enforce breaches of that or any other clause of the PSA, and that obligation can be

amended (or breaches of it can be waived) without any consent or input from the DBCT Users. This is not a theoretical risk: DBCTM has in fact approached the State seeking removal of this obligation previously.

The DBCT User Group acknowledges that there are a series of clauses triggered by non-compliance with a material obligation under the PSA (it is accepted that the requirement to use best endeavours to have an undertaking in place would likely constitute a material obligation under the PSA). However, the PSA sets out a number of required steps with no determinate timeframe. As such, the DBCT User Group does not consider reliance on the PSA creates sufficient regulatory certainty.

The DBCT User Group also notes that there is nothing in the QCA Act, or any explanatory or extraneous material to the QCA Act, which stipulates that an undertaking cannot continue in the absence of a declaration of the underlying service. It is intuitive that the QCA Act would allow an undertaking to continue until the end of its regulatory period, even if the service was not intended to be declared after the conclusion of the regulatory period. This is particularly the case given the expiry of the declaration of the service and the conclusion of the regulatory period will not always perfectly align (as is the case here), and users of any given service should not lose the benefit of regulatory oversight in the event that declaration ceases before the regulatory period expires. While the QCA has noted the protections in section 95 of the QCA Act, they are of no use to an access seeker who does not already have an existing User Agreement (and there is at least some uncertainty about how existing User Agreements would operate where they incorporate outcomes occurring under the approved access undertaking).

(c) Should the 2015 DAU terminate upon DBCT PL ceasing to be operator of the Terminal?

The QCA proposes to refuse the inclusion of the date DBCT PL ceases to be the operator of the Terminal as a trigger for termination.

The DBCT User Group still considers that it may be prudent to include this as a terminating event, given that the access undertaking is designed and being considered on the assumption that the Terminal will continue to be operated by an independent user-owned operator (such as DBCT PL) and that that will mitigate a number of risks including operational discrimination and inefficient operation and maintenance costs.

The DBCT User Group, however, acknowledges the QCA's comment that 'uncertainty and commercial disruption is likely to be created with the early termination of the 2010 access undertaking, in the event of an early termination of the OMC'. If the QCA is to maintain its position, then the DBCT User Group notes that it will be critical that the balance of the ring-fencing provisions set out in the 2015 Ring-Fencing DAAU draft decision in relation to the continuing independence and user-owned nature of the operator are included in the 2015 DAU (as discussed in section 11 below) – in order to avoid unanticipated adverse consequences.

5.3 Review of the access undertaking

DBCTM's 2015 DAU has proposed to remove the one- and three-year review triggers that were in the 2010 AU.

DBCTM considers it unnecessary to prescribe these reviews in the 2015 DAU, given these reviews did not take place in the 2010 AU regulatory period. DBCTM proposed that, in the alternative, a review of the access undertaking should be triggered if an inequity or unfairness in the undertaking becomes apparent during the term of the next undertaking.

The DBCT User Group is willing to accept the removal of reviews at specific timeframes.

However, other aspects of Section 1.4 as proposed in the QCA Draft Decision make it flawed and ineffective in that, while it provides for submission of a draft amending access undertaking, it does not provide any certainty that DBCTM will resubmit if the QCA's initial decision is to refuse the draft amending access undertaking. In other words, the QCA is proposing a position where:

- (a) it has made a finding that it is *necessary* that the Undertaking be amended to rectify a significant inequity or unfairness; and
- (b) yet it has *no power* to actually require any amendments be made.

The DBCT User Group therefore considers it is absolutely critical that:

- (a) the QCA has the power to require submission of an undertaking to rectify a significant inequity or unfairness;
- (b) DBCTM is prevented from withdrawal of a draft amending access undertaking submitted in respect of section 1.4(a)(2); and
- (c) DBCTM is required to resubmit such a draft amending access undertaking including all revisions required by the QCA in a final decision on such a draft amending access undertaking (in the event of the QCA not approving the initial version submitted).

Otherwise, as recently demonstrated with the ring-fencing and differential pricing DAAUs it will simply be possible for DBCTM to refuse to resubmit.

The DBCT User Group also continues to consider that, the need for that protection has been heightened by material changes like the introduction of differential pricing and the potential for greater vertical integration in the Goonyella Coal Supply Chain which increase the prospects of unforeseen and unanticipated results.

To the extent the QCA has any concerns about its powers to include in an undertaking provisions for future amendment, the DBCT User Group notes:

- (a) section 137(2)(k) of the QCA Act indicates that an undertaking can include provisions about how the undertaking is to be reviewed; and
- (b) there is nothing in the QCA Act which suggests that the circumstances in which section 139 QCA Act apply are intended to be the exclusive manner in which an undertaking can be amended (in fact the reference in section 137(2)(k) to including additional provisions about a review of the undertaking clearly suggests to the contrary).

To the extent the QCA has any concerns about its power to require resubmission in a form that complies with the QCA's final decision on the draft amending access undertaking, the DBCT User Group note that it would be enough to simply require DBCTM to resubmit a second time (even if not requiring strict compliance with the QCA's final decision), in order for section 136A of the QCA Act to apply. The application of section 136A of the QCA Act would ultimately produce the same outcome (of the QCA being able to compel appropriate amendments to be made in these circumstances).

The QCA's Draft Decisions refer to the QCA's rights under the QCA Act to require amendments where there is an inconsistency with the QCA Act – but that does not provide any real protection as it would be highly unusual for such inconsistency to exist (as the QCA Act is, other than for some minor exceptions, not prescriptive about what access undertakings must contain). There is also nothing implicit in the QCA Act which suggests that just because the QCA Act contains an amendment regime in certain circumstances an Undertaking cannot do so. In fact such a view is clearly inconsistent with previous QCA decisions which have included amendment regimes.

The DBCT User Group has suggested required drafting amendments in Schedule 2.

6 Rate of return

6.1 Overview

The DBCT User Group is generally supportive of the direction of the QCA's Draft Decision as it relates to matters concerning DBCTM's appropriate rate of return.

However, particularly in respect of the asset beta parameter, the DBCT User Group considers a reassessment would indicate that a further reduction was warranted. In the absence of such a reduction, the return being provided to DBCTM will be out of step with the regulated water and energy entities that the QCA (and its independent consultant, Incenta) have recognised as the most appropriate benchmarks.

In that regard, please refer to the enclosed response to the QCA Draft Decision from PwC, as the independent consultant engaged by the DBCT User Group to advise on the appropriate position.

The DBCT User Group acknowledges that the QCA's draft position is closer to that of the DBCT User Group's submissions than what DBCTM proposed. However, that is unsurprising given the DBCT User Group's approach of requesting its independent consultant to provide the most appropriate position based on established precedents and QCA methodology.

The DBCT User Group notes that it is really the DBCT User Group lower bound (that industry could have argued for) that is more comparable to the DBCTM positions (as the most favourable 'ambit claim' that could theoretically be made by each party) – rather than the DBCT User Group's positions (which are already intended to reflect a balanced and appropriate position).

Table 1 below, shows a comparison of each of the DBCTM, DBCT User Group, DBCT User Group (lower bound), QCA Draft Decision and DBCT User Group updated as at 31 May 2016 positions on the WACC and underlying parameters.

Table 1 – Comparison of proposed rate of return parameters

Parameter	DBCTM	DBCT User Group (PwC)	DBCT User Group (Lower Bound)	QCA Draft Decision	DBCT User Group (PwC 31 May 2016)
Risk-free rate	2.8%	2.17%	2.17%	2.10%	1.82%
Market risk premium	8.0 %	6.5%	6.0%	6.5%	6.5%
Asset beta	N/A	0.43	0.35	0.45*	0.43
Equity beta	1.0	0.81	0.45	0.87	0.81
Gamma	0.25	0.47	0.47	0.47	0.47
Capital structure	60%	60%	35%	60%	60%
Credit rating	BBB	BBB	BBB	BBB	BBB
Debt risk premium	2.32%	2.32%	2.32%	2.68%	2.56%
Cost of debt	5.23%	4.75%	4.75%	5.00%	4.60%
Cost of equity	10.8%	7.47%	4.89%	7.76%	7.12%
WACC	7.46%	5.84%	4.84%	6.10%	5.61%

* Incenta Report estimated an asset beta of 0.40 (which the QCA accepted in the Draft Decision as the best technical estimate).

The DBCT User Group also acknowledges that a number of the differences have arisen through changes in market parameters, and anticipates (and supports) those being reassessed in accordance with the QCA's usual practice as part of the Final Decision.

6.2 Framework issues and legislative context

(a) Support for QCA interpretation

The DBCT User Group supports all of the QCA's comments in respect of the interpretation and application of the legislative framework in relation to determining the appropriate WACC.

The DBCT User Group notes DBCTM's assertions regarding:

- (i) the interpretation of the pricing principles in section 168A QCA Act and their implications for the treatment of uncertainty; and
- (ii) the application of the QCA's WACC methodology, leading potentially to material variations in outcomes across regulatory periods and a relatively low return on equity,

and addresses those further in this submission below.

(b) Pricing Principles

The DBCT User Group strongly supports the correctness of the QCA's interpretation of the pricing principles (including the principle in section 168A(a) of the QCA Act) and how they should be had regard to in determining the appropriate rate of return.

As the QCA has noted in its Draft Decision, it is consistent with the legal advice the DBCT User Group has received from Allens regarding the correct interpretation and application of the pricing principles (as enclosed with the DBCT User Group's original submission). It is also consistent with the QCA's interpretation in the recent decisions in respect of other regulated services in Queensland (rail access to the Aurizon Network and Queensland Rail networks).

The reference in section 168A(a) of the QCA Act regarding earning 'at least' enough to meet efficient costs and earn a return on investment commensurate with the risks involved, is not intended to suggest that a regulated infrastructure owner should be able to earn a return that is in excess of the level justified by the risks involved. We agree with the QCA's conclusion that the intention of those words is not to enable an access provider to set prices that are inefficiently high. Any such outcome would be clearly inconsistent with the object of Part 5 of the QCA Act, as it would incentivise inefficient investment.

(c) Application of WACC methodology

DBCTM's criticism of the QCA's approach to determining the appropriate WACC is entirely unwarranted.

It is not problematic to have an approach to calculating the WACC that is 'formulaic' and therefore predictable, provided the QCA assesses the appropriateness of the outcomes produced by any such approach. It is absolutely clear from the QCA's Draft Decision that the QCA have done that.

Regulatory certainty is a positive attribute that promotes efficient investment. It is not consistent with the object of Part 5 of the QCA Act, the interests of access seekers or access holders or the public interest to allow a regulated entity to cherry-pick when the existing pricing methodologies should apply based on what would be most favourable to them. Reactive changes to the QCA's methodology based on the short term issues (whether that is market related issues or the approach taken by a different regulator, will only serve to make pricing outcomes unpredictable and somewhat arbitrary.

The DBCT User Group agrees with the QCA's view that it is possible the current low risk free rates are 'the new normal'. However, even if DBCTM's view that the risk free rate is below historical averages is accepted, adjusting the approach to determining the WACC on that basis will result in inefficient pricing.

The Terminal is a long-life infrastructure asset. Over its life there will clearly be times when the risk free rate is above historical averages and vice versa. No compensating adjustments of the type now seemingly being sought by DBCTM have been applied when the risk free rate has been higher than historical averages, and unless they are then DBCTM's approach will clearly be (measured over the longer term) earning a return above that commensurate with the regulatory and commercial risks involved in providing access.

That approach applies equally to all of the WACC parameters. The appropriate course is to determine each parameter using the QCA's existing methodologies, not to artificially adjust the methodologies used to calculate individual parameters or the overall WACC in order to contrive a different result.

DBCTM also appears to refuse to recognise that the extent of the variance between the current regulatory period and the next one has effectively been exacerbated beyond what the QCA's WACC methodology is likely to have produced, because of the WACC for the current undertaking being set as part of an agreed package. It seems incongruous for DBCTM to seek such a one-off uplift in one regulatory period and then complain about the extent of variance produced in the next regulatory period.

6.3 Capital structure and credit rating

The QCA should exercise caution in simply translating credit ratings which apply to DBCT Finance Pty Ltd, due to the more highly leveraged capital structure that Brookfield employs.

However, the DBCT User Group is willing to accept the QCA's proposed BBB credit rating and assumed 60% gearing capital structure is appropriate on the basis of the evidence currently available (including the report of the QCA's consultant, Incenta).

6.4 Risk free rate

The DBCT User Group supports the methodology for determining the risk free rate set out in the QCA's Draft Decision (which is consistent with the initial submissions of the DBCT User Group and the advice of its independent consultant, PwC).

It is acknowledged that the assessment of the risk free rate will be updated by reference to the average of five-year Commonwealth Government nominal bond yields over the relevant 20 business day period agreed with DBCTM. The DBCT User Group understands that period has now been agreed as the period ending 31 May 2016, and Table 1 above provides PwC's estimate of the appropriate market parameters applying this time period. That estimate is consistent with the Incenta report released by the QCA on 30 June 2016.

6.5 Debt risk premium

The DBCT User Group support the methodology used by the QCA in the Draft Decision to determine the debt risk premium (being the PwC econometric method).

That methodology is supported by both the initial Incenta report and the PwC report enclosed with the DBCT User Group Initial Submission, and the QCA's earlier Final Decision: Cost of debt estimation methodology (August 2014).

It is acknowledged that the assessment of the debt risk premium will be updated by reference to a selected 20 day averaging period.

The DBCT User Group notes that the QCA recently commissioned Incenta to advise on an updated risk free rate and debt risk premium for the agreed 20 day averaging period. Incenta has proposed an amended methodology for calculating the debt risk premium, which the User Group is still reviewing and will provide further comment upon in a supplementary submission.

6.6 Debt raising transaction costs and interest rate swap transaction cost allowances

The DBCT User Group supports the QCA decisions in relation to debt raising transaction costs (of 0.108% per annum) and interest rate swap cost allowances (of 0.113% per annum).

6.7 Market risk premium

The DBCT User Group is willing to accept the QCA's assessment of the market risk premium as 6.5%, consistent with the QCA's methodology as set out in the QCA Market Parameters Paper.

We support the analysis of the QCA regarding the flaws in the assertions made by DBCTM based on the Frontier report.

As noted in its initial submissions, the DBCT User Group continues to consider there is a reasonable basis for a market risk premium of 6%. In particular, based on the QCA's analysis 6.0% would be within the identified ranges for the Ibbotson and Siegel estimates, equal to the survey evidence and only below the Cornell dividend growth estimate.

However, the DBCT User Group accepts the QCA's view that it is not simply a case of averaging the estimates. Given the absence of any new evidence which would justify a departure from the methodology set out in the QCA Market Parameters Paper, the DBCT User Group is willing to accept that it is reasonably open to the QCA to continue to adopt its preferred market risk premium of 6.5%.

6.8 Debt Beta

The DBCT User Group continues to support a debt beta of 0.12, consistent with its initial submissions, the report provided by PwC, the QCA's decisions in respect of the Aurizon Network and the QCA's established methodology.

6.9 Equity beta

(a) Generally support, but asset (and consequently equity) beta remains too high

The DBCT User Group generally supports the analysis and conclusions reached on asset and equity beta of DBCTM by the QCA's independent consultant Incenta.

In particular, the DBCT User Group continues to consider that the Terminal has a very low risk profile given the applicable contractual and regulatory frameworks and positive medium-long term outlook for the coal market and the Goonyella coal projects in particular.

The DBCT User Group does not, however, support the QCA's decision to set an asset beta that is raised again from the estimate provided by Incenta. As set out below, there appears to be limited justification for that change. The DBCT User Group proposes that the asset beta either be the 0.4 estimate provided by Incenta or the 0.43 estimate provided by PwC (or an estimate between the two). Both experts apply a similar conceptual approach, and reach similar conclusions, which implies a reduction from the QCA's nominated asset beta parameter of 0.45 is warranted.

(b) Energy and water utilities are the approach benchmarks

The DBCT User Group agrees with Incenta's conclusion that:

As noted above, DBCT's financial characteristics are more closely aligned to regulated energy and water businesses than to container ports, rail or coal companies, which are all much more sensitive to the economic cycle

and supports the QCA's acceptance of that position.

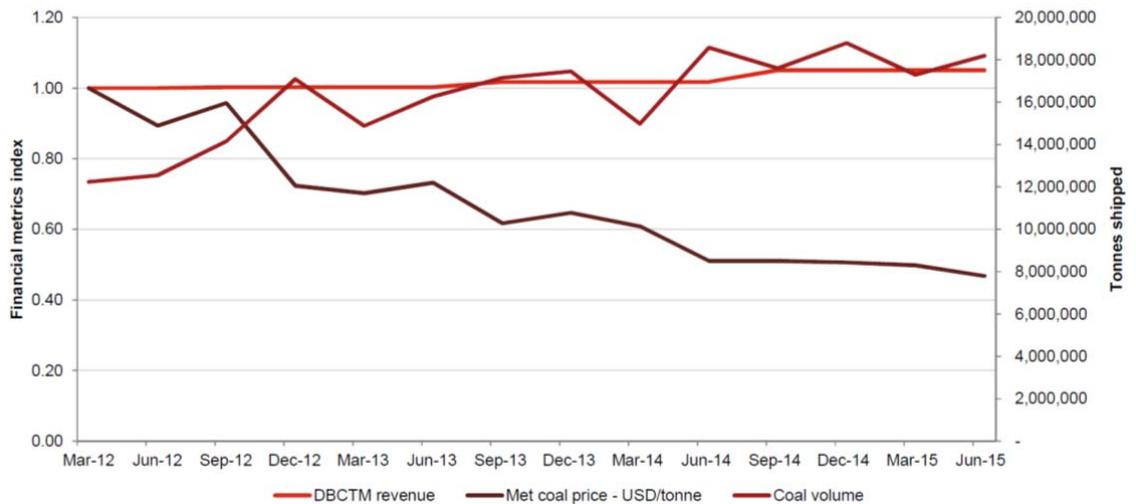
In particular, the DBCT User Group agrees with Incenta's first principles assessment that that alignment to regulated energy and water utilities is evident from:

- (i) relatively inelastic demand – due to the higher switching costs and high degree of DBCTM's monopoly power;
- (ii) customers' relative insensitivity to the economic cycle – arising from the incentives to continue shipments as long as a surplus is being produced over cash costs (given the sunk costs of mining companies and take or pay commitments);
- (iii) the form of regulation – where the revenue cap and socialisation among users, makes DBCTM effectively immune from changes in demand;
- (iv) pricing structure – where DBCTM has an extremely high revenue certainty through a revenue cap, socialisation and take or pay commitments, and (unlike many regulated entities) has no exposure to any risk of being alleged to have incurred inefficient operations and maintenance costs; and
- (v) monopoly power – as noted in section 3.3 above, DBCTM faces no real competitive constraints from other terminals due to the high cost or practical impossibility of users switching terminals.

That reasoning is entirely consistent with the commentary provided by PwC in its initial report (as enclosed in the DBCT User Group Initial Submission), and in PwC's response to the QCA's Draft Decision (as enclosed in Schedule 1 of this submission).

In particular, the DBCT User Group notes the immunity of DBCTM's revenue over the regulatory period, despite changes in volume and price across that period as aptly displayed by the following figure from the PwC response to the QCA Draft Decision:

Figure 1: Changes in estimated DBCTM quarterly revenue, DBCT export volumes and the metallurgical coal price



PwC's response to the QCA's Draft Decision also confirms that Incenta's estimate of an asset beta for regulated water and energy businesses is appropriate. The resulting benchmarks based on regulatory precedents are set out in the following table extracted from PwC's response. It is clear from those precedents that the QCA's proposed asset beta of 0.45 is out of step with general regulatory practice regarding the asset beta of regulated energy and water businesses, which the QCA's own advisor Incenta nominates as appropriate comparators to DBCT.

Table 5: Recent regulatory decisions – asset beta

Regulator	Regulated entity/entities	Year	Asset beta
QCA	Gladstone Area Water Board	2015	0.40
QCA	Seqwater	2013	0.30
IPART	Sydney Water	2016	0.38 [^]
IPART	WaterNSW (formerly Sydney Catchment Authority)	2016	0.38 [^]
ESC	Goulburn-Murray Water	2016	0.38 [^]
ESC	Melbourne Water	2016	0.35 [*]
AER	National electricity transmission businesses	2015	0.38 [^]

[^] Estimated based on an equity beta of 0.7, applying the Conine formula, 60% gearing and standard QCA parameter values

^{*} Estimated based on an equity beta of 0.65, applying the Conine formula, 60% gearing and standard QCA parameter values

Source: QCA, IPART, ESC, AER

(c) Departure from the Incenta estimate

In the context of the comments on the approach benchmarks above, the DBCT User Group considers that insufficient weight has been given to Incenta's finding of an indicative equity beta of 0.40 (and the analysis that supported that) in the QCA's reasoning as to how it reached a draft conclusion of 0.45.

In the Draft Decision, the QCA accepted that Incenta's estimate of a beta of 0.4 'reflects the most appropriate empirical estimate of DBCTM's beta available at this time' and was 'the best technical estimate available'. The DBCT User Group therefore finds it very difficult to understand why the Incenta estimate is not in fact being adopted by the QCA as the appropriate asset beta.

The QCA's proposed increase from the Incenta estimate to 0.45 appears to be a relatively subjective increase which is sought to be justified on the basis of:

- (i) the magnitude of the change from the assumed beta for the last regulatory period; and
- (ii) setting the asset beta at the same level as that adopted in respect of the Aurizon network.

In relation to the first point, it is not clear why a material change in this respect is seen as a negative thing where there has been actual change in DBCTM's risk profile. That is particularly true given the context of re-aligning the current unrealistically high beta that:

- (i) formed part of an agreed package of matters rather than being robustly determined by the QCA on a stand-alone basis; and
- (ii) reflected the risks related to the major expansion program then underway, which the QCA acknowledges is no longer a major issue,

with a beta appropriately reflecting the current risk profile.

If the QCA starts adopting the view that, given the uncertainty in estimating beta, it should typically increase the beta from the best point estimate available then over the longer term the useful life of the Terminal that will clearly result in DBCTM earning above an efficient return. As discussed in section 4(c) above, the DBCT User Group considers such an approach is not consistent with the pricing principles in the QCA Act.

In addition, as noted in PwC's response to the QCA's Draft Decision:

The quantum of movement in one WACC parameter, alone, should not be a driving consideration. While we agree that stability of regulatory outcomes is important, it is the overall impact on the TIC, in combination with other parameter and assumption adjustments, which is important. Our concern is that in not "fully" adjusting the asset beta to 0.40, even though the QCA acknowledges this is the more technically correct estimate, the QCA is insulating DBCTM from this parameter movement. Yet other adjustments – such as the change in terminal remediation costs – are passed through in full.

The DBCT User Group also does not agree that the risk profile for DBCTM can be assessed as perfectly commensurate with that of Aurizon Network. While it is true that the Terminal and Aurizon Network's below rail infrastructure operate in the same coal chain, the DBCT User Group notes that:

- (i) the terminal, by its nature as point infrastructure (where the same services are provided to all users at a single point, with the entire Goonyella supply chain being part of the terminal's 'catchment') rather than linear infrastructure (where particular parts of a rail line are only used by some users of the network), necessarily has a lower stranding risk than the Aurizon network;
- (ii) the proportion of the Terminal that is utilised by metallurgical coal (for which there is no known substitute) rather than thermal coal (for which gas, renewables and other energy sources can provide alternatives, albeit substitution potential is limited by cost and availability), is significantly higher than for the Aurizon Network rail network; and
- (iii) it follows from Incenta's analysis, as discussed in section 6.9(b) above, that DBCTM's risk profile is lower than that of rail infrastructure companies.

As noted in the DBCT User Group's initial submission and earlier in this submission, and consistent with the findings in the QCA Draft Decision:

- (i) there continues to be evidence that the coal market outlook is positive and should not cause a reassessment of the risk profile of the Terminal; and
- (ii) there is no evidence of DBCTM facing any competition from other terminals.

As a result, the DBCT User Group considers the asset beta should be set at 0.4 in accordance with Incenta's estimate.

(d) Incentives for contract renewals

As discussed in detail in section 3.5 above, the DBCT User Group continues to consider that users have very strong incentives to exercise the renewal options for the reasons set out in the DBCT User Group Supplementary Submission. As set out in that section, there is no evident basis for suggesting the prospects of non-renewal have materially increased.

(e) Other changes to DBCTM's risk profile

The return provided to an infrastructure owner is intended to be commensurate with the regulatory and commercial risks involved in providing access (see section 168A(a) QCA Act).

In that regard, the DBCT User Group notes that there are a number of changes the QCA is proposing in the Draft Decision which also seem to alter (in DBCTM's favour) the risk profile. In particular, the following changes do not appear to have been adequately taken into account in setting the beta:

- (i) substantially increasing the remediation allowance (when there has been no change to the remediation obligations that have always been borne by DBCTM under the Port Services Agreement);
- (ii) amendment to the definition of Notional Contracted Tonnage (from that which has been included in every approved DBCT access undertaking to date), which would result in early socialisation of the consequences of a user default which causes early termination of a User Agreement; and
- (iii) depreciation of spares which formed part of the initial regulatory asset base (since regulation was first introduced).

Leaving aside the merits of those changes (which are discussed elsewhere in this submission), in aggregate they represent a shift in DBCTM's systemic risk profile and if they are to form part of the QCA's final decision should be reflected in a corresponding reduction of the beta.

The DBCT User Group appreciates that individual changes of this nature might alone be regarded as insufficiently material to DBCTM's risk profile. However, there must be a point at which numerous incremental reductions of DBCTM's risk profile arising from changes of this nature are, in aggregate, of sufficient materiality to warrant a change in beta – and the DBCT User Group considers that the Draft Decision as it stands has passed that point.

6.10 Gamma

The DBCT User Group supports the analysis and conclusions reached on the appropriate gamma (0.47) by the QCA, and the QCA's assessment of the underlying distribution and utilisation rates.

The reasoning provided in the QCA's Cost of Capital: market parameters paper of August 2014 (the **QCA Market Parameters Paper**) remains appropriate.

Similarly, the matters previously identified by PwC and the DBCT User Group Submission to support the QCA's existing methodology remain correct.

The one arguably new piece of information noted in the Draft Decision is the approach taken by the Australian Competition Tribunal in *Applications by Public Interest Advocacy Centre Ltd and Ausgrid* [2016] ACompT 1 in relation to the AER's 2015 determinations in relation to the New South Wales electricity network businesses (the **Tribunal Decision**), where a gamma of 0.25 has now been proposed by the Tribunal.

However, that is not really anything new which should cause the QCA to change its approach to estimating gamma. It is not the first time the Tribunal has adopted a gamma of 0.25 (see *Application by Energex Limited (Gamma) (No. 5)* [2011] ACompT 9 for an earlier example). The QCA was fully aware of the Tribunal's approach in the Energex gamma decision at the time of establishing its current approach to gamma in the QCA Market Parameters Paper, and considered it thoroughly at that time before confirming the appropriateness of the QCA's current methodology.

The DBCT User Group strongly agrees with the QCA assessment in the Draft Decision that:

... there is nothing in the Tribunal's reasoning that demonstrates our approach to estimating gamma is inappropriate. In particular, we note that the Tribunal's reasoning was based on a 'market value' definition of the utilisation rate, and reliance on dividend drop-off studies for estimating the utilisation rate in that context.

On the other hand, as outlined above, our definition of utilisation rate is the value-weighted average over the utilisation rates of the imputation credits of all investors in the market, where several different estimators are used to estimate the weighted average utilisation rate. Rigorous derivations of the Officer CAPM unambiguously define the utilisation rate in this way and, therefore, we believe that, whereas the utilisation rate is a market-wide concept, it is not a market value concept. Because of this dividend drop-off studies have limited relevance for estimating the utilisation rate.

It appears to the DBCT User Group that the Tribunal Decision in respect of gamma largely turned on how much weight should be given to dividend drop-off studies.

As the Tribunal itself has recognised on multiple occasions, there is no universally accepted value of gamma, and a regulator has to consider the academic models and empirical research methods and decide on a case by case basis what is the most appropriate value for the matter at hand (see for example the comments in *Application by WA Gas Networks Pty Ltd (No. 3)* [2012] ACompT 12; *Application by DGNBP (WA) Transmission Pty Ltd (No. 3)* [2012] ACompT 14).

The QCA is therefore entitled to, and should, consider all of the estimation tools available to it and determine the appropriate weight to be given to them in each case. It is not bound by the Tribunal's view of an appropriate gamma or the relative weight that the Tribunal has given to various estimation tools in making that determination. Rather it is bound to determine the appropriate gamma. It is appropriate for the QCA to consider each of dividend drop-off studies, redemption rates, equity ownership, practitioner behaviour and Lally's conceptual test as relevant data points as it has in the Draft Decision.

The conceptual and empirical concerns that the QCA notes in respect of dividend drop-off studies in the QCA Market Parameters Paper remain equally applicable today. In particular, the DBCT User Group agrees with the QCA that interpretation of the utilisation rate as a market value of imputation credits is inconsistent with its conceptual meaning in the Officer CAPM framework and leads to an unwarranted focus on dividend drop-off studies. Not only are dividend drop-off studies not directly relevant (as they do not measure the impact of the credits on the returns shareholders expect to earn from owing equity), they are also subject to a number of methodological and empirical issues as detailed in the QCA Market Parameters Paper.

If anything those concerns are likely to be exacerbated in the current more volatile stock market conditions where the 'noise' created by other reasons for the changes in the listed stock would be anticipated to be more material (such that the indirect evidence studies of this type are supposed to provide is likely to be even less accurate).

In addition, the DBCT User Group considers that decisions of the Australian Competition Tribunal of this nature need to be treated with a large degree of caution. A regulator (such as the QCA) is in a substantially better position than the Tribunal to consider and make determinations of this nature, as the Tribunal (as it admits in its reasoning in relation to gamma) 'is faced with the selection between competing views' (at [1118]) without the same time or level of flexibility to investigate those competing views that the QCA enjoys. That is to say, the Tribunal is limited to the information before it in relation to an individual proceeding. It is notable that the Tribunal's view is effectively out of step with the views of economic regulators such as the QCA and AER, and in this context, the DBCT User Group considers the QCA should continue to implement its considered approach on the estimation of gamma.

Finally, the DBCT User Group considers that it is important for confidence in the overall regulatory framework in Queensland that the QCA continue to apply a gamma value of 0.47. In the QCA Market Parameters Paper it was specifically stated that:

As gamma is an overall Australian market parameter, and not specific to any particular market of firm, the analysis and results of this review [the 0.47 estimate] will inform estimates of gamma in forthcoming reviews for all entities regulated by the QCA.

The QCA has not been presented with any new evidence by DBCTM to suggest its current approach is inappropriate. Confidence in the consistency and predictability of all QCA decisions may be affected if the QCA were to adopt a different parameter value, despite having previously considered and rejected the evidence presented by DBCTM. Indeed, as recently as June 2016 the QCA – in its final decision on Queensland Rail's access undertaking – reaffirmed its position of a gamma of 0.47. Given the recent timing of that decision, the DBCT User Group can see no basis for the QCA now determining a different gamma value for DBCTM.

7 Depreciation

7.1 Useful life of the Terminal

(a) Maintaining the current useful life

The DBCT User Group supports the QCA's Draft Decision to leave the useful life of the Terminal that is assumed for the purposes of depreciation the same as applies under the existing access undertaking (i.e. expiring in 2054).

As noted earlier in this submission:

- (i) the future outlook for coal (particularly the metallurgical coal that makes up the majority of the tonnage exported through the Terminal) is positive;
- (ii) there is already practical evidence of that in the Goonyella system, including the re-opening of the Isaac Plains coal mine (following its acquisition from Stanmore); and
- (iii) the Goonyella supply chain is particularly well placed to continue to achieve current volumes in the future due to Goonyella mines typically being in the lowest portions of the cost curve and in most cases producing metallurgical coal (for which there are less potential sources outside the Bowen Basin and no known substitutes for use in iron ore production); and
- (iv) the Terminal is not subject to any practical competition from other terminals,

such that there is no real risk of the Terminal not being utilised prior to the QCA's current assumed useful life.

(b) Wood Mackenzie's estimate and RMI analysis

The DBCT User Group particularly notes the findings of the QCA's consultant, Resource Management International (*RMI*) that:

- (a) The estimated economic life of the Terminal is currently 40 years (1 year longer than the current QCA assumed economic life);
- (b) DBCTM's proposed asset life may significantly underestimate the viable supply of coal to the Terminal because:
 - (i) the weighted average mine life approach disregards a significant 'tail tonnage' from mine with a mines life longer than the average;

- (ii) Wood Mackenzie's estimate only recognised marketable coal reserves (and excluded any recognition of measured and indicated coal resources) – when most DBCT Users (and coal companies more generally) would be willing to plan development largely on the basis of such measured and indicated resources and only provide up marketable reserves closer to the timing for actual mining;
- (iii) Wood Mackenzie's estimate excluded projects that were not anticipated to commence production in the next regulatory period (effectively excluding a substantial number of greenfield projects that would be developed during the economic life of the Terminal based on the medium to longer term coal market outlook and their placed on the coal industry cost curve).

Leaving aside, whether a weighted average mine life approach could ever be appropriate, it is absolutely clear that one based on the imperfect Wood Mackenzie approach cannot be.

Like the QCA, the DBCT User Group do not consider the approach which applies in respect of Aurizon Network suggests that a shorter depreciation profile should be applied to the Terminal. The Aurizon Network arrangements are part of a wider package, and reflect differences in the risk profile including the rail being linear infrastructure that is in some cases specific to a particular mine or small number of mines, rather than the Terminal which remains usable for all coal projects in the Goonyella supply chain 'catchment'.

7.2 Depreciation of spares

The DBCT User Group is willing to accept the proposal to depreciate the spares associated with the original asset, across the remaining useful life of the Terminal.

However, it notes that is a change in DBCTM's risk profile. Given that is occurring in conjunction with other changes in risk profile being proposed by the QCA, the QCA should reconsider whether the proposed asset beta remains appropriate.

8 Remediation Allowance

8.1 Increase in remediation allowance is unjustified

As noted in the DBCT User Group Initial Submission, the DBCT User Group is willing to accept that it is appropriate to reconsider the remediation allowance from time to time (including recognising that the current remediation allowance may be insufficient).

However, the DBCT User Group is strongly opposed to the size of the increase in the remediation allowance that is proposed in the QCA's Draft Decision, and considers that it is not justified by the evidence provided by DBCTM to date.

The change from \$0.95 million to \$5.7 million is a very material one, particularly in the context of the remediation obligations under the Port Services Agreement not having changed in any way, and DBCTM not having demonstrated that there has been any step-change in the remediation activities it now anticipates from those previously anticipated.

8.2 Timing of remediation

The extent of the annual remediation allowance is extremely sensitive to the assumed term of remediation, such that it is absolutely critical that the QCA assessment of that issue is appropriate. Calculating the annuity stream for the annual remediation allowance based on remediation earlier than is likely to occur will clearly overcompensate DBCTM, change DBCTM's risk profile, and create inequities by transferring value from existing users of the Terminal to future users of the Terminal.

The QCA's Draft Decision assumes the timing for remediation is the assumed economic life of the Terminal, expiring in 2054.

As noted in its earlier submission, the DBCT User Group considers that that time frame gives insufficient regard to the likelihood of DBCTM renewing the lease (such that the time to remediation is more like 84 years). As the remediation obligation in the PSA is within 3 years after the end of the lease term, even if the useful life was to end at some point after renewal, the obligation to remediate would not be triggered until 2100.

The renewal decision is not a decision that DBCTM will make based on spot coal prices, but based on the medium-longer term outlook. As noted earlier in this submission, that outlook remains positive. In addition, the prospect of new terminals is limited given the legislation and policy at the international, national and state levels aims to reduce the impact of ports and dredging along the Queensland coastline adjacent to the Great Barrier Reef outside of existing port facilities.

While the DBCT User Group acknowledges that the RMI analysis estimated an economic life that very closely aligns with the QCA's assumed economic life, it should be noted that is based only on current 'Measured and Indicated Resources'. There are substantial coal deposits within the Dalrymple Bay Coal Terminal catchment that are likely to extend the life of the Terminal beyond 2054, but which have not yet been classified as 'Measured and Indicated Resources' (due to the current lesser level of geological knowledge and confidence in relation to those resources). With further exploration, the DBCT User Group expects that coal deposits which may currently be classified as 'Inferred Resources' or 'Exploration Targets' will be converted into 'Measured and Indicated Resources' and ultimately reserves, and be likely to form part of the future throughput of the Terminal. That is absolutely normal for a resources industry, as the costs of 'proving up' resources and reserves with more certainty are not incurred until closer to the date of potential development.

Even if it is accepted that it is not absolutely certain that DBCTM will exercise its renewal rights, that possibility should clearly be taken into account by a weighting between the two most likely options (remediation at the end of the current assumed life and remediation at the end of the renewed lease period), rather than completely excluding one of those likely outcomes.

8.3 Estimated remediation costs in excess of efficient costs of remediation

The DBCT User Group agree with the QCA's Draft Decision that DBCTM's proposed estimate of site rehabilitation costs (\$829.43 million) is in excess of the efficient costs of remediation.

The Hatch estimate used by DBCTM is effectively a 'gold plated' remediation that Turner & Townsend rightfully describes as only 'somewhat' prudent, not efficient, and predicated on too strict an interpretation of DBCTM's obligations under the PSA.

The DBCT User Group agrees with each of the Tuner & Townsend findings that:

- (a) the high level nature of the methodology Hatch applied is inappropriate given the scale of costs being proposed;
- (b) the subjectivity of the methodology applied raises questions about the accuracy of the estimate;
- (c) there is potential for double counting (where the costs involved in the asset valuation are in excess of the installed value of the asset);
- (d) the percentages applied lack sensitivity (most evidently by being in increments of 10%);

- (e) treatment percentages disregard the cost of materials included in DBCTM's asset valuations;
- (f) factors applied are not consistent with the rehabilitation treatment (the aggregate difference between the 'Do minimal' and 'Full rehabilitation' estimates is not proportionate to the increase in scope of the rehabilitation work); and
- (g) in some areas, the difference in costs between the 'Do minimal' and 'Full rehabilitation' estimates do not reflect the increase in scope.

In summary, the figures presented by Hatch are 'rubbery' and dependent upon a number of critical, but relatively arbitrary and subjective, judgements about likely future outcomes.

In addition, as noted by Turner & Townsend and the Draft Decision, the PSA requires that the lease area be rehabilitated 'in accordance with DBCT Holdings' reasonable conditions and requirements'.

DBCTM is effectively asserting that it should be assumed that the State will require the 'gold-plated' full rehabilitation option, despite the fact that is well in excess of what has been required at other industrial sites. Further, DBCTM acknowledges in its submissions it is doing that in the absence of any information about what the State will require.

By contrast, Turner & Townsend concluded the 'reasonable conditions' clause is significant as it precludes any requirement to rehabilitate to a higher standard than is required for an open space.

Given the issue being considered is effectively a policy decision the State government of the day will make in many years' time, the Turner & Townsend conclusion seems to be a more reasonable and balanced assessment of the extent of rehabilitation that is practically going to be required.

Accordingly, while it is acknowledged that there are necessarily uncertainties, the Turner & Townsend estimate (\$389.68 million) appears far more reasonable to the DBCT User Group.

However, the DBCT User Group remains unconvinced that it is reasonable to base that estimate solely on 'current known facts' (as the Turner & Townsend estimate does). While the DBCT User Group acknowledges that the QCA has set out its reasons for that approach in the Draft Decision, it seems to give insufficient weight to the likely outcome that technological advances may provide alternative remediation options at a lower cost in the future. The DBCT User Group continues to believe that it is appropriate to provide some form of discount for that possibility (which could, if necessary, be reassessed in future periods if the prospects of such technological advances eventuating are assessed as having decreased).

8.4 Annuity methodology

In relation to the other aspects of the methodology the QCA has utilised to estimate the component of the Terminal Infrastructure Charge required to meet the remediation allowance, the DBCT User Group:

- (a) supports the QCA's proposal to index the previous remediation contributions that have been made at the WACC – which is reasonable as DBCTM (or its owners) would be anticipated to be able to invest the funds to earn the WACC;
- (b) supports the QCA's proposal to apply the WACC from previous undertakings to calculate the amount of the current notional sinking fund – which is reasonable as DBCTM (or its owners) would be anticipated to be able to invest the funds to earn the then applicable WACC which reflected the then prevailing market parameters;

- (c) is willing to accept the timing of payments of the remediation allowance being monthly as part of the Terminal Infrastructure Charge (as that appears to the DBCT User Group how this would operate under the existing User Agreements); and
- (d) supports the QCA's proposal for a 2.5% per annum inflation rate, assuming the intention is to apply a fixed rate of inflation in each future period.

9 Corporate overheads

As noted in the Draft Decision, DBCTM's 2015 DAU proposes an increase in the corporate overheads allowance from approximately \$6.1 million in 2015–16 to \$8.2 million in 2016–17.

While the DBCT User Group considers the draft decision made by the QCA to reduce this figure to approximately \$7.23 million in 2016-17 is an improvement, it considers that this number is higher than is prudent or efficient, and continues to believe that an increase in level of corporate overheads cost allowance is unjustified.

The DBCT User Group reiterates its previous submissions that an increase in the amount implies that 'efficient' costs have increased by more than inflation over the period. Given DBCTM's own views about current and prospective market conditions, and the fact that the resources industry generally is experiencing reductions in headcount and other corporate overhead costs reductions, the DBCT User Group finds it difficult to accept that DBCTM's efficient corporate overheads have actually increased. This is particularly the case given corporate and management functions should become more efficient over time, at least reflecting gains in economy-wide productivity trends.

The DBCT User Group appreciates that the measure set by the QCA is only a benchmark rather than a measure of actual costs. However, even ignoring the industry wide efficiency trends, it also seems highly incongruous that during a period when DBCTM is actual reducing employee numbers due to the lack of project development work, the efficient corporate overhead costs are being said to have increased.

The DBCT User Group supports the QCA's view that any increases in corporate overhead costs should be less than proportional to revenue growth, due to the effects of economies of scale and the efficiencies through general productivity improvements.

The DBCT User Group submits that a reversion to the current corporate cost allowance, as indexed, would be the more appropriate measure. However, the DBCT User Group broadly supports the adoption of the bottom-up benchmarking approach, with some adjustments, which is considered to result in a more plausible estimate for a benchmark regulated firm in the same business than the alternative methods used by DBCTM's consultant (Stephen Meyrick) in his report.

10 Terminal Infrastructure Charge and Modelling

The DBCT User Group's comments on the majority of issues relating to the roll-forward of the regulatory asset base are included elsewhere in this submission.

The DBCT User Group continues to support the typical building blocks roll forward approach employed by the QCA.

In relation to the other issues not addressed elsewhere in this submission, the DBCT User Group:

- (a) supports the QCA's retention of the working capital allowance at 30 days, both to reflect the actual payment terms which exist under User Agreements and due to consistency with previous treatment of this issue in respect of DBCTM;

- (b) supports maintaining the current approach to inflation (the outturn inflation index) rather than applying the expected inflation rate, on the basis that it is not clear that the issues referred to by DBCTM justify the proposed change. Any change to the approach to inflation should only be approved if the QCA is convinced that that will not over the long term result in any increase in pricing or return to DBCTM;
- (c) supports maintaining the residual value of 2.5% for the relevant initial assets in the regulatory asset basis in recognition of the likely scrap value of those assets so as to prevent double-recovery (where DBCTM gains the benefit of both a depreciation allowance and receiving consideration for the scrap materials as well). To the extent that DBCTM proposes an alternative approach that completely removes that double-recovery issue such that the QCA was potentially minded to accept a change, the DBCT User Group would appreciate the opportunity to consider any such alternative proposal; and
- (d) notes the QCA has raised concerns in relation to other minor differences relating to modelling issues, but is unable to comment on those issues based on the information that is currently available to the DBCT User Group. While the DBCT User Group appreciates the QCA's assessment is that these issues would result in very small impacts on the ARR and TIC, the DBCT User Group requests that the DBCT User Group (or at least its economic consultant PWC) be provided with sufficient information to enable it to comment on this issue.

11 Ring-fencing

11.1 The DBCT User Group's position

(a) Acceptance of the potential need to revisit the ring-fencing arrangements

As noted by the QCA in the Draft Decision, on 10 November 2015 DBCTM submitted to the QCA for approval a drafting amending access undertaking which proposed ring-fencing amendments to DBCTM's 2010 DAU (the **Ring-fencing DAAU**). The ring-fencing amendments were proposed as potential mitigants to vertical integration concerns arising from the proposed acquisition of Asciano (which owns the Pacific National above-rail business) by Brookfield (which majority owns and controls DBCTM).

DBCTM withdrew the Ring-fencing DAAU on 24 March 2016 on the basis that the structure of the proposed acquisition had been significantly revised and no longer gave rise to the same extent of competition concerns relating to the Terminal as its previous structure.

Given the above, in the 2015 DAU Draft Decision, the QCA queried whether detailed ring-fencing arrangements, which may have costs associated with them, remain warranted and appropriate in the 2015 DAU. Specifically, the QCA identified three possible alternatives to be considered:

- (i) a return to the 'old' clause 9 provision as drafted in the 2010 DAU;
- (ii) retention of the full proposed ring-fencing arrangements, as proposed by the QCA in the 2015 Ring-fencing DAAU Draft Decision (though perhaps with a caveat that they do not take effect unless vertical integration in the coal supply chain eventuates); and
- (iii) a 'middle ground' where a more limited number of the ring-fencing changes proposed in the 2015 Ring-fencing DAAU Draft Decision would be incorporated in the 2015 DAU, in the event that these may be appropriate even in the absence of vertical integration, or relevant to other activities in related markets (such as DBCTM's capacity trading activities).

The DBCT User Group has considered the QCA's Draft Decision and accepts that, in light of the restructuring of the proposed acquisition of Asciano, the full breadth of proposed ring-fencing measures set out in the November 2015 Ring-fencing DAU are no longer likely to be appropriate. In particular, the DBCT User Group accepts the removal of provisions which were very specific to concerns about vertical integration with an above rail business.

However, the DBCT User Group maintains its position that more significant ring-fencing requirements should be included in the 2015 DAU Final Decision than are proposed by DBCTM, and than were contained in the 2010 DAU.

In particular, the DBCT User Group considers that:

- (i) the ring-fencing provisions entrenching the independence of the Terminal Operator should be included in the 2015 DAU, such that the Operator continues to be majority user owned;
- (ii) the 2015 DAU should include ring-fencing provisions relevant to DBCTM's activities in related markets, with a particular view of regulating the secondary trading activities undertaken by DBCTM's Trading SCB (which is vertical integration that already exists); and
- (iii) the provisions set out in the 2015 Ring-fencing DAAU Draft Decision with respect to the Terminal Regulations should be included in the 2015 DAU.

Schedule 3 of this submission includes a mark-up of parts of the 2015 DAU to demonstrate the changes the DBCT User Group would suggest.

(b) Inclusion of conditional ring-fencing obligations

While the DBCT User Group is willing to accept a 'middle ground' position on ring-fencing in the 2015 DAU, it nonetheless considers that the proposed acquisition of Asciano is demonstrative of why the ring-fencing provisions in the 2015 DAU should be more robust than those included in the 2010 access undertaking (even though the acquisition is no longer proceeding in its original form).

There is a clear need for regulation to ensure that similar commercial proposals that are unanticipated at the time of the access undertaking being approved by the QCA do not undermine the independence of operations at the Terminal. The inclusion of ring-fencing provisions that were triggered in circumstances where vertical integration between DBCTM and other parts of the supply chain would create certainty that adverse impacts on competition would be mitigated, without impose current costs on DBCTM.

The DBCT User Group notes that at the time the 2010 access undertaking was drafted, it was not contemplated that during that regulatory period the owner of the Terminal would seek to acquire any other business in the Dalrymple Bay Coal Chain. This suggests that even where there are no immediate concerns about heightened vertical integration in the supply chain, it is better to err on the side of including protections where there is a material possibility that vertical integration may occur during any given regulatory period. This approach is particularly appropriate given that the proposed transaction of Asciano has not been completed, and continues to be scrutinised by the ACCC.³ The DBCT User Group has some concerns that the consortium may be restructured in a way that re-enlivens competition concerns at the Terminal and considers that appropriate ring-fencing measure in the 2015 DAU Final Decision would mitigate these concerns.

(c) A 'middle ground' between the interests of all stakeholders

³ ACCC Press Release re: statement of issues

Even if the QCA elects not to include future protections, the DBCT User Group nonetheless considers that appropriate ring-fencing measures would, at a minimum, reflect a reasonable balance between the interests of DBCTM and the DBCT User Group that broadly reflects the measures proposed in the 2015 Ring-fencing DAU. The DBCT User Group considers that removal of some of the rail-specific provisions would be acceptable provided that the issues set out below were comprehensively dealt with by the 2015 DAU.

Specifically, the DBCT User Group considers that, at a minimum, the following provisions included in the ring-fencing DAU should be included in the 2015 DAU Final Decision:

- (i) requirements for sub-contracting the provision of operation and maintenance services to a majority user-owned and independent operator, and the provisions dealing with any termination of this contractual relationship;
- (ii) Provisions dealing with the separation of the activities of the trading supply chain business (**Trading SCB**) from the activities of DBCTM, including limitation on its direct dealings with DBCTM and confidentiality commitments;
- (iii) Rules regarding changes to the Terminal Regulations; and
- (iv) Complaint mechanisms.

11.2 Independent operator

The DBCT User Group supports the provisions proposed to be included in Section 3.2, which accurately reflect the role and context in which DBCT PL is the operator of the Terminal. Moreover, given the roles and discretions given to the operator in respect of issues like the Terminal Regulations and prudence of costs, the DBCT User Group continues to believe that the access undertaking is dependent for its proper functioning on DBCT PL on an independent operator operating on the same terms and conditions as DBCT PL continuing as the operator.

As noted earlier in this submission, there is no guarantee that DBCT PL will continue to be engaged as operator of the Terminal by DBCTM, such that it remains important for the users of the Terminal to include protections if that ceased to be the case. Given the QCA's views that the undertaking should continue in the event of a termination of DBCT PL's role as operator, it is important that the undertaking includes appropriate protections for those circumstances.

The DBCT User Group considers it imperative that all protections entrenching the independence of the Operator of the Terminal are therefore retained in the 2015 DAU Final Decision. The DBCT User Group agrees with the position expressed by the QCA in its Ring-fencing DAAU draft decision that the ownership criteria for the Operator of the Terminal should be majority owned by users (i.e. more than 50% owned by users of the Terminal). The DBCT User Group agrees with, and reiterates, the benefits accrued from majority user ownership set out in the Ring-fencing DAAU draft decision, and particularly notes:

- (a) only majority ownership by users allows users to have meaningful control of the Operator, including the approval of operational plans and annual operating budgets;
- (b) user-ownership maximises alignment of the day-to-day operation of the Terminal with the day-to-day operation of the Dalrymple Bay Coal Chain, which optimises the efficiency of the Terminal;
- (c) user-ownership provides a higher degree of transparency and accountability to access holders in the operation of the Terminal (and issues like changes to Terminal Regulations and cost allocations between components of the Terminal which the operator has involvement in); and

- (d) the ability of DBCTM to operate the Terminal in a way which will unfairly advantage any given party is minimised where it does not have majority or equal control of the Terminal.

This is regarded by the DBCT User Group as the most critical issue to be included in the ring-fencing provisions.

The DBCT User Group note that section 137(2)(f) of the QCA Act, indicates an undertaking may include details regarding 'the provision of the service to users otherwise than by the owner or operator to whom the undertaking relates'. It is clear from that section that the QCA Act envisages that access undertakings can make appropriate provision for regulation of the identity of third parties which have been subcontracted to perform all or part of the regulated service (as DBCT PL has been).

11.3 Capacity Trading SCB

The QCA has asked stakeholders to consider their position on the nature and scope of the access transfer arrangements that should be applied in the 2015 DAU. The DBCT User Group is concerned about the vertical integration between the Trading SCB and DBCTM. Some users have had difficulties with DBCTM approving trades between users. The DBCT User Group considers that this is attributable to the incentives for DBCTM to have its Trading SCB facilitate any trades (and generate revenue by doing so) instead of the users facilitating trades between themselves. This creates a clear need for ring-fencing in the 2015 DAU. The DBCT User Group notes that DBCTM did not have a Trading SCB when the 2010 DAU was being negotiated, and as such the ring-fencing provisions in that DAU are insufficient to address the commercial realities present at the Terminal.

The DBCT User Group has considered the interests of users and considers that the ring-fencing provisions proposed in the 2015 Ring-fencing DAAU should be retained with respect to the capacity trading SCB established by DBCTM. In reaching this position, the DBCT User Group acknowledges that the likelihood that the Capacity Trading SCB could be used by DBCTM to engage in conduct that could hinder access or unfairly differentiate between users (or access seekers) to favour the commercial position of a related party operating in the above-rail market is reduced by the proposed restructure of the acquisition of Asciano (discussed above).

The DBCT User Group continues to have concerns about the lack of clarity and accountability on the access transfer arrangements being used by DBCTM to limit the practicality and efficiency of users and third parties engaging in bilateral transfers and short-term transfer to favour the commercial interests of DBCTM's capacity trading SCB. The risk of such conduct occurring has not been completely removed by the changes to the proposed Asciano acquisition. As such, the DBCT User Group continues to be concerned about circumstances such as the following examples provided in its previous submission:

- (a) if the Trading SCB holds capacity as principal, the Trading SCB permitting a third party to use that capacity is unlikely to be covered by the undertaking (such that the price it offers for that right could be well in excess of the price determined appropriate by the QCA). Taken to its extreme, this creates the potential to allow Brookfield to over time de-regulate the pricing of the service by having the Trading SCB signing up for capacity immediately upon expiry of an access agreement;
- (b) a Trading SCB holding capacity as principal is likely to impact DBCTM's economic incentives, including on:
 - (i) investing in expansions (e.g. it may determine not to invest in an expansion with a view to trying to increase the value of the capacity held by the Trading SCB);

- (ii) investing in NECAP (e.g. it may determine to keep NECAP investment to a minimum until the Trading SCB has a buyer for its capacity, with a view to reducing the costs of holding the capacity); and
- (iii) determining whether to consent to assignments of user agreements or use of capacity by a third party (both of which required DBCTM's consent under the Standard Access Agreement) (e.g. it may determine not to provide consent with a view to the proposed assignee instead being provided the capacity by Trading SCB).

On the basis of these concerns, the DBCT User Group strongly supports the QCA's draft decision to refuse DBCTM's proposed ring-fencing arrangements and instead recommend DBCTM amend its 2015 DAU to incorporate ring-fencing arrangements consistent with the QCA's draft decision on DBCTM's November 2015 ring-fencing DAAU. Specifically, the DBCT User Group considers it appropriate to retain the proposed deed poll contained in Schedule I of the November 2015 Ring-fencing DAAU (in the form approved by the QCA in its ring-fencing draft decision), and require any secondary capacity SCB operated by DBCTM to execute a deed poll undertaking to fulfil the obligations therein. Additionally, the DBCT User Group agrees that the amendments proposed by the QCA to the 2015 DAAU and User Agreement are necessary to create sufficient transparency and accountability in the operation of the secondary capacity trading by the Trading SCB.

These amendments to the proposed 2015 DAU would provide the DBCT User Group with sufficient comfort that:

- (a) the Trading SCB will not conduct its activities for the purpose of preventing or hindering access by access seekers or holders; and
- (b) the consequences of the vertical integration inherent in DBCTM operating a secondary capacity trading business will be mitigated by disallowing the Trading SCB to offer favourable terms to related parties of DBCTM than it would offer to its competitor (namely, access holders and access seekers to the Terminal who may also be seeking to trade in secondary capacity).

11.4 Terminal Regulations

DBCTM has sought to engage with the DBCT User Group to reach a compromise on the ring-fencing positions included in the 2015 DAU Final Decision.

The DBCT User Group understands that DBCTM's concerns in relation to the changes made in respect of the Terminal Regulations are principally related to being 'caught in the middle' and having to make assessments about the nature of proposed amendments and their impact on users.

DBCTM expressed a view to the DBCT User Group that any requirement to give reasons for its decision to give or withhold consent is an unnecessary regulatory burden on DBCTM, and would be willing to have amendments to the Terminal Regulations made under clause 6 of the 2015 DAAU be resolved between the Operator, users of the Terminal and the QCA (i.e. without DBCTM's involvement).

The DBCT User Group agrees with the view expressed by the QCA in its Ring-fencing DAAU draft decision that it is appropriate for the QCA to retain a role in resolving disputes under the Terminal Regulations. The DBCT User Group considers that regulatory oversight by the QCA would be a sufficient safeguard such that, even in the absence of involvement of DBCTM, the process to amend Terminal Regulations would be sufficiently robust.

11.5 Regulatory oversight of the OMC

For as long as DBCT PL is the Operator, the DBCT User Group is comfortable that it is not necessary for amendments or variations to the OMC to require QCA approval as, through being user-owned (including having through its constitution the ability for all future users to become shareholders), DBCT PL has the commercial incentives to not agree amendments or variations with DBCTM that are detrimental to the users of the Terminal.

However, the DBCT User Group is concerned that that position may no longer be appropriate where DBCT PL ceases to be the operator. Without knowing the identity or ownership structure of the new operator, the DBCT User Group consider it would be prudent for the QCA to approve amendments or variations to the new operations and maintenance contract in those circumstances.

The DBCT User Group also considers it appropriate that if the Operator terminates the OMC due to DBCTM default, DBCTM is to submit a DAAU to the QCA for approval, with the DAAU specifying amendments DBCTM considers necessary due to the termination of the OMC. This submission therefore supports the consequential amendments to clause 3.3 of the draft 2015 DAU in relation to the OMC (as they relate to the change of independent operator).

12 Negotiation framework and capital processes

12.1 Term of Access agreement

The DBCT User Group maintains its position that DBCTM has not sufficiently justified why the initial term of a conditional access agreement should be extended from 10 years to 15 years. The DBCT User Group therefore agrees with the QCA's position in the Draft Decision that, in the absence of evidence being provided by DBCTM, there is no demonstrated need to increase the term of all conditional access agreements to 15 years to make a potential future Terminal capacity expansion more attractive to potential financiers.

The DBCT User Group therefore supports the QCA draft decision with respect to maintaining the term of the access term at ten years.

Further, given the acknowledgement by DBCTM that expansion is unlikely to occur in the regulatory period covered by the 2015 DAU, it seems imprudent to amend the terms of access agreement (with long term consequences for potential access seekers) in anticipation of potential future investment in expansion of the Terminal (particularly in light of the submissions made previously by DBCTM about the short and medium term prospects of the coal market).

12.2 Definition of coal supply chain

The DBCT User Group notes the QCA's adoption of the defined term 'Dalrymple Bay Coal Chain' in place of 'Goonyella Coal Chain' in the draft 2015 DAU. While the DBCT User Group is largely agnostic on this issue, it wishes to bring the following analysis to the QCA's attention.

The DBCT User Group notes that the definition of Goonyella Coal Chain (as it was used in the 2010 DAU) expressly excluded the Hay Point Terminal from the definition of coal supply chain, and therefore from falling within the ambit of the provisions of the undertaking that referred to that coal chain or terms reliant on that definition like System (and therefore System Capacity). The proposed definition of Dalrymple Bay Coal Chain does not contain the same express exclusion of the Hay Point Terminal.

The DBCT User Group acknowledges that this may be because the QCA holds the view that the Hay Point Terminal is definitively not a part of the Dalrymple Bay Coal Chain. However, there is material available (including on the website of Integrated Logistics Company Pty Ltd) which

suggests that the Hay Point Terminal may be considered by some stakeholders to constitute a part of the Dalrymple Bay Coal Chain.

The definition of Dalrymple Bay Coal Chain should expressly exclude the Hay Point Terminal. The DBCT User Group does not consider that it is necessary to expressly exclude the Northern Missing Link from the definition of Dalrymple Bay Coal Chain, as this is less likely to be colloquially thought of as constituting a part of that definition.

12.3 Investment in prudent NECAP

The DBCT User Group continue to strongly support the amendment of the 2015 DAU described in the DBCT User Group Supplementary Submission to include an obligation on the part of DBCTM to fund prudent non-expansion capital expenditure (**NECAP**) to ensure that the whole-of-asset life costs of the Terminal were minimised taking into account both future capital investment and operating and maintenance costs.

This issue is a continuing one arising from DBCTM's threats not to fund future NECAP unless they were awarded an inappropriately high WACC. This issue has not been resolved since the date of the Supplementary Submission, and if the QCA does not change its position will cause an increase in operating costs over the next regulatory period.

The DBCT User Group appreciates that this is an issue somewhat unique to the Terminal's regulatory framework due to the pass through nature of operations and maintenance costs. However, the QCA has a wide scope in relation to the terms of an undertaking which it considers appropriate.

The DBCT User Group does note the QCA has listed a number of issues which it appears to assume mitigate the risks the DBCT User Group is concerned about. However, none of those measures provide any protection or mitigation in relation to the concerns the DBCT User Group has raised – rather they are protections against 'gold-plating' or overspending on NECAP.

To be clear, the immediate concern of the DBCT User Group is not that the Terminal will not be safe, available to meet access requirements of users or operated and maintained properly (which is what the provisions of the access undertaking, Port Services Agreement or user agreements the QCA raises relate to). Each of those matters will effectively be able to be managed (at least over the next regulatory period) by how DBCT PL operates and maintains the Terminal. However, in order to manage those matters, in circumstances where DBCTM is underinvesting in prudent NECAP, DBCT PL will need to incur higher operating and maintenance costs to achieve those outcomes.

In other words, in the approximately 5 years of the next regulatory period, inefficient underinvestment in NECAP will result in operating and maintenance expenditure being incurred that will:

- (a) treating the actual NECAP being invested in as a given, be efficient and in accordance with good operating and maintenance practice; but
- (b) reflect an inefficient balance between investment in capital expenditure and incurring operating expenditure (not reflective of lowest overall cost).

Therefore, the DBCT User Group strongly disagrees that section 158A of the QCA Act provides any of the protection that the QCA appears to erroneously assume it does (as the DBCT User Group is concerned that there is no provision of the access undertaking that is actually breached by imprudent underinvestment which could be enforced under section 158A in those circumstances).

The DBCT User Group reiterates its previous submission that this could be achieved within the powers of the QCA as provided for in the QCA Act. In relation to the QCA's apparent concerns about whether the QCA Act permits the changes proposed by the DBCT User Group, we note that no apparent basis for the QCA's alleged lack of power has been put forward by either of DBCTM or the QCA. Section 137 of the QCA Act expressly envisages that an undertaking may contain terms relating to extending the facility (noting that extension is defined to include augmentations and replacements), and it seems highly odd to interpret the QCA Act such that an undertaking could include such matters but not include obligations to fund non-expansion capital projects (which clearly will involve replacements in some cases).

If the concern relates to the restrictions on extensions in section 119 QCA Act, the DBCT User Group notes that that provision clearly has no application to the contents of an undertaking as it is solely expressed to apply to access determinations.

It appears to the DBCT User Group that the QCA is inappropriately fettering itself in a way that is precluding an outcome that would be better aligned with factors the QCA is required to have regard to under section 138(2) QCA Act, including the object of Part 5 QCA Act and the pricing principles.

If the QCA is unwilling to change this aspect of its Draft Decision, the DBCT User Group expect that:

- (a) the QCA should instead require the undertaking be amended to clearly provide mechanisms to allow the QCA to implement the potential response referred to on page 209 of the Draft Decision, namely: 'the QCA considers that any over-expenditure of operating expenditure which could have been avoided by a failure by DBCTM to undertake appropriate and prudent investment in NECAP may be grounds for a reduction in DBCTM's recoverable revenue' – there is no evident mechanism provided in the QCA's proposed drafting for that to occur and if this is how the QCA intends to control this issue that should be formalised in Schedule C;
- (b) the wording the QCA has proposed in section 11 of Schedule E should be retained (and appropriately referenced in Section 12.10); and
- (c) this matter will need to be further reviewed at the time of the next access undertaking (when it is likely that the consequences of underinvestment and the impact on operating and maintenance costs will have crystallised and become evident).

13 Differential pricing

13.1 Support for Differential Pricing

The DBCT User Group continues to support the QCA's previously stated conclusions on differential pricing.

As previously recognised by the QCA⁴ and by the DBCT User Group in its previous submissions, the Terminal has expanded to the point where it is now on the increasing part of its long run average cost curve. Given that, it is anticipated by the DBCT User Group that, if costs of expansions were socialised, future expansions are likely to result in substantially higher charges for existing DBCT Users. The anticipated increase in costs would be well past the point to which the parties would have been reasonably expected to agree for existing DBCT Users to bear the costs of future expansions in a hypothetical contract entered before sunk costs were incurred.

⁴ Queensland Competition Authority, *Discussion Paper Capacity Expansion and Access Pricing for Rail and Ports*, April 2013 at 20.

Without repeating the DBCT User Group's submissions on the Differential Pricing DAAU and the 2015 Draft DAU in their entirety, the DBCT User Group continues to strongly support the approach adopted in the Differential Pricing Final Decision and the Discussion Paper of socialising expansion costs where that would reduce tariffs for existing users and applying differential pricing for an expansion where it would otherwise increase tariffs for existing users (which the QCA refers to as 'socialise down/incremental up').

Although the prospects of an expansion might currently appear limited, the change is important to:

- (i) provide the appropriate price signals to potential users and thereby drive efficient investment (both in respect of terminal capacity and mines); and
- (ii) prevent inefficient cross-subsidisation of future users by existing users.

In addition to its support for the principle of differential pricing, the DBCT User Group reiterates its support for the conclusions reached by the QCA with respect to other consequential issues including:

- (i) the responsibility for managing the mitigation of future asset stranding sitting with DBCTM;
- (ii) the state of competition between DBCT and other ports meaning that DBCT will not be at a competitive disadvantage in attracting efficient investment for capacity expansions where those capacity expansions were differentially priced;
- (iii) the incremental up/average down approach to differential pricing not creating a competitive advantage for existing users;
- (iv) differential pricing not introducing any significant or material regulatory uncertainty in the pricing framework for capacity expansion; and
- (v) the QCA's proposed allocation principles for operation and maintenance costs and NECAP.

13.2 Treatment of capacity created in a differentiated Terminal expansion

The DBCT User Group, however, has significant concerns about the QCA's conclusion that DBCTM is entitled to 'consider its own risk position when negotiating access application'. The draft decision states:

This includes DBCTM being entitled to decide if it will prioritise the execution of access agreements for price-differentiated available Terminal capacity, provided that it gives such notice to all access seekers in the queue in accordance with clause 5.4(d) of the 2015 DAU. In this scenario, access seekers in the queue would be able to determine their own access waterfall by first considering the access options available in the secondary access market

The QCA also stated that it did not consider that the DBCT User Group's previous submission that a capacity waterfall should be applied to the negotiation of agreement agreements with access application was in the legitimate business interests of DBCTM.

That appears to have resulted in the QCA's proposed drafting for clause 5.5(f) of the 2015 DAU.

The DBCT User Group has significant concerns with this approach and the evident adverse consequences of, and inefficiencies resulting from, that approach.

Allowing DBCTM to exercise full discretion over which capacity (i.e. from the expanded terminal or from the base terminal) is given to access seekers first creates a clear incentive for DBCTM to offer access to the differentially priced terminal as:

- (i) with the base terminal being socialised, spare capacity in the base terminal is a cost borne by existing users not DBCTM; and
- (ii) it is likely that capacity in the differentiated expansion capacity will attract a higher price per tonne in any case.

This means that, in the event that capacity was available in both the base Terminal and the expanded Terminal, the differentially priced expansion capacity would be offered to the queue before the socialised base terminal capacity. Even if access seekers were not immediately accepting of the higher priced differentiated capacity, it is likely to be a viable economic strategy for DBCTM to engage in monopoly pricing by withholding the socialised capacity.

While the DBCT User Group appreciates that the QCA considers that DBCTM should be allowed to manage its own risk profile, what is being suggested effectively gives DBCTM free rein to force existing users to bear risk relating to uncontracted capacity in the differentiated expansion. That is a very perverse outcome, that completely undermines the entire point of differential pricing of requiring users who desire expansion capacity to fund it without increasing costs for existing users who underwrote the development of the base terminal.

It also appears likely to create other perverse outcomes such as:

- (i) potentially resulting in inefficient use of the terminal capacity (where a user would be willing to contract the base terminal capacity but that is being withheld from doing so by DBCTM because there is no revenue benefit to it of releasing that capacity);
- (ii) incentivising DBCTM to invest in an inefficient expansion sooner than may be prudent due to the knowledge that it will be able to offer the differentiated expansion capacity first (so that the existing terminal users are effectively underwriting some of the risk of the expansion); and
- (iii) effectively creating a transfer of risk to existing base terminal users from DBCTM. A feature of the current contracting arrangements is that the DBCTM maintains a queue of potential access seekers whom may opt to take capacity that becomes available to contract in the base terminal. Going forward, it appears that DBCTM would be permitted to direct access holders in this queue towards a future differentiated expansion capacity project, diminishing the protective value of the current access queue.

The DBCT User Group considers that regulatory oversight is essential to ensure that capacity in each of the differentially priced and base terminal are made available to the queue of access seekers in an efficient way that incentivises throughput through the Terminal, rather than allowing DBCTM unfettered control over which access is offered to the queue first.

The DBCT User Group considers that a capacity waterfall arrangement creates more economic efficient outcomes and minimises the risk of DBCTM making decisions about what capacity to make available to the queue that increase revenue to DBCTM but reduce efficient use of the Terminal. A waterfall of that type is clearly the most efficient outcome – it is economically irrational to be creating a structure that incentivises the most expensive capacity first.

Proposed revisions to the drafting of clause 5.5(f) to provide for that more equitable and efficient outcome are included in Schedule 2.

While the DBCT User Group considers the above approach is the optimal approach, it sets out below alternative approaches (each of which it considers preferable to the QCA Draft Decision approach on this issue), being:

- (a) an approach where the capacity waterfall was amended to allow an access seeker who was willing to pay the higher 'differentiated expansion' pricing to 'jump' the queue where other access seekers were, having been notified on that willingness, not themselves willing to commit to that (see the alternative drafting in Schedule 2 reflecting this approach, which makes clear how the priority would interact with the existing queueing provisions in those circumstances);
- (b) imposing a requirement on DBCTM that if it had sought to offer higher priced 'differentiated expansion' capacity for a certain period of time and that had not been contracted by any access seeker, that DBCTM would be required to offer any surplus 'existing terminal' capacity; or
- (c) a 'dual queue' approach. This option could involve DBCTM maintaining two separate queues – one for the base terminal and one for any differentiated capacity expansion. Each would operate independently and access seekers would determine whether they would apply in one or both queues. By way of example
 - (i) for a coal project proponent with economic fundamentals that would justify immediate investment and contracting on the basis of either 'existing terminal' or 'differentiated expansion' pricing, they would seek access in both queues; and
 - (ii) for a coal project that would only be economic at the 'existing terminal' pricing, they would apply in the 'existing terminal' queue, even though that may result in them not being able to access 'differentiated expansion' capacity that becomes available earlier.

(Given the complications of the drafting amendments to Part 5 of the access undertaking which would be required by the approaches described in paragraphs (b) and (c) above, the DBCT User Group has not provided alternative drafting for those approaches at this stage, but would be happy to work with the QCA to develop such drafting if the QCA considered one of those options to be the most appropriate outcome).

Each of the alternative mechanisms would ensure users could make efficient decisions about which terminal capacity to seek (based on their willingness to pay and their timing needs, which would reflect the underlying economics of the relevant coal projects).

The DBCT User Group notes that all three of the approaches outlined in this section of the submission are far more consistent with the allocative efficiency aspects of the object of Part 5 of the Queensland Competition Authority Act than the QCA Draft Decision position.

13.3 Price Rulings

While the DBCT User Group accepts the proposed timing for a QCA Price Ruling on whether an expansion should be differentially price (after the FEL 2 study under clause 5.12), it is concerned about:

- (i) whether the Price Ruling mechanism and the references to the Division 7A of the QCA Act are effective and the resulting ruling will be binding on DBCTM; and
- (ii) proposed treatment of material changes in cost which occur after such a Price Ruling has been made.

In respect of the references to the QCA Act, the DBCT User Group notes the defined purposes in section 150B QCA Act. It has some concern that the references to the ruling been applied for 'in accordance with' section 150D of the QCA Act (5.12(a)(2)) and the application being determined 'in accordance with' section 150F (5.12(c)) will not be effective if those sections of the QCA Act are interpreted as being only operable in relation to applications for rulings of the type described

in section 150B of the QCA Act. Consequently, the DBCT User Group suggests that instead the wording becomes:

- (i) 'apply to the QCA as if applying for a ruling in accordance with s150D of the QCA Act' (in section 5.12(a)(2)); and
- (ii) 'determine the application as if making a determination in accordance with s150F of the QCA Act' (in section 5.12(c)).

In respect of the proposed treatment of material changes in cost after a Price Ruling has been made, it is not clear how the potential options noted on page 245 of the QCA Draft Decision would actually be applied given the drafting proposed. If the ruling is binding as to whether the expansion costs are socialised or differentiated, it is not necessarily clear how the QCA considers it then has discretion to act inconsistently with that ruling. If the QCA insists on maintaining its drafting it will be incumbent on the QCA in any future pricing ruling to utilise its rights under section 150K(2) of the QCA Act to state any assumptions on which the ruling is made, and then amend section 12.5(c) to require any inconsistency with those assumptions to be reported to the QCA (in the same way a material change in circumstances is), to provide Users with appropriate protections against imprudently incurred costs.

Proposed drafting is included in Schedule 2 of this submission.

13.4 Allocation of capacity

The DBCT User Group also has some concerns about the wording in section 5.4(i)(4).

It is assumed that the intention of that wording was merely to make it clear that where a differentially priced expansion is developed that the capacity created by that expansion should only be contracted by the Access Seekers/Holders which are paying for that capacity.

However, instead of referring to capacity being 'contracted', the wording refers to capacity being 'utilised', which might be interpreted as also preventing operational utilisation of the relevant capacity for coal of other users.

Given that it will be possible for an expansion to be differentially priced where it is not physically separable from the remainder of the Terminal, and that coal throughput on behalf of all users will not be absolute even across a year, the restriction on utilisation has the clear potential to result in very inefficient operation of the Terminal.

The DBCT User Group therefore proposes that the restriction should be on contracting capacity, and in relation to day to day operations, it should simply be provided that priority is given to satisfying the demand of the Access Holders who have contracted the relevant capacity.

Proposed amendments are detailed in Schedule 2 of the submission.

14 Other Access Undertaking concerns

14.1 Overview

The DBCT User Group generally supports the drafting amendments to the 2015 DAU proposed in the QCA Draft Decision, except as otherwise noted in this submission.

However, a number of drafting issues exist in what is proposed by the QCA that the DBCT User Group consider warrant further information.

The DBCT User Group's proposed amendments are included in Schedule 2 (with the reasoning behind those issues that have not been explained earlier in this submission being explained in this section of the submission).

14.2 Amending the definition of Notional Contracted Tonnage

(a) Change to definition

In the draft 2015 DAU, DBCTM proposes to amend the definition of Notional Contracted Tonnage when compared to the 2010 AU definition, to remove the addition of an access holder's Annual Contract Tonnage which it is no longer entitled to have handled due to an early termination of an access agreement.

As correctly identified by the QCA, the practical consequence of the amendment is that, in the event of early termination of an access agreement, the loss of revenue associated with the terminated access agreement would be socialised across the remaining access holders. This is distinct from the way in which all previous access undertakings which have applied to the Terminal operated, where DBCTM bore a share of that cost for the remainder of the regulatory period.

The DBCT User Group⁵ considers this change is not preferable, at least unless it is offset by a recognition of the resulting change in risk profile (in the asset beta) and an acknowledgement by DBCTM that that will result in a change in the security that DBCTM should reasonably be allowed to request under the User Agreements. Drafting changes to reflect reinstating the previous position are included in Schedule 2.

While the DBCT User Group notes the QCA's comments that no additional commercial incentive should be necessary for DBCTM to find alternative users to take up capacity given there is an obligation to offer the capacity to the queue, this view does not take into consideration the commercial reality that DBCTM is necessarily incentivised to arrange for a new access holder if it bears some of the costs of the failure to find a replacement. While the DBCT User Group appreciates that there is an obligation to offer capacity to persons in the queue, a regulatory obligation to offer access and a cost incentive to find a party to take access rights will necessarily drive different commercial behaviour. In any case, this is not a situation where the two are alternatives – the existing provision had the benefit of providing both drivers. The DBCT User Group considers that where DBCTM bears some of the costs arising from an early termination, DBCTM will be incentivised to be quicker and more efficient in filling the 'gap' left by the terminating user.

The DBCT User Group reiterates its previous submission that this is a change in the systematic risk profile and a reduction in the equity beta (as discussed above) is warranted if this change is accepted. It is plainly apparent that the risk profile of DBCTM is significantly altered if the costs of early termination by users are socialised immediately, rather than at the end of the regulatory period, which could result in a difference in the timing of socialisation of up to 5 years.

The DBCT User Group also considers that the change does not reflect the value of the assets held by users. Even if an individual company elects to exist the market for coal for individual commercial reasons, the Terminal will continue to benefit from its proximity to assets that will continue to be economically valuable and produce output.

If despite all of the above, the QCA proceeds with this change, the DBCT User Group note their expectation that, in the context of that change, the extent of security which DBCTM should reasonably be able to require should be lessened (given the alternative form of protection against financial weakness of a User this change would provide).

(b) Potential for double-counting

⁵ Other than Glencore, which is willing to accept this change subject to points to be raised by a separate submission to the QCA.

If the QCA is unwilling to alter its general position of the amendment to the definition of Notional Contracted Tonnage, the DBCT User Group considers that, at a minimum it should rectify the potential for double-recovery that has been created.

The determination of the Revenue Cap in Schedule C would need to be amended to ensure that the revenue lost through early termination is not socialised during any period for which DBCTM is effectively able to recover the loss through the security arrangements that the user had in place at the time of early termination (to the extent that security was in excess of any amounts owing to DBCTM by the relevant user for the period up until termination).

Any other position not only creates the potential for an unjustified windfall gain by DBCTM, but also reduces their incentive to seek appropriate security from users.

This is particularly important in the current context, given that DBCTM has made a number of requests for security to members of the DBCT User Group. In that regard, the DBCT User Group notes that at least one DBCT User is understood to have increased the level of security provided and DBCTM is currently in dispute with other DBCT Users about whether additional security is required (including in relation to unreasonable requests made on DBCT Users which are very clearly of good standing, credit worthy and of financial substance).

Alternative drafting is provided in Schedule 2 to reflect how this issue could be resolved.

14.3 Negotiating Framework (Section 5 / Schedule A)

The DBCT User Group supports a number of the refinements in the QCA Draft Decision, including:

- (a) staying the loss of priority for an access seeker until a bona fide dispute about removal from the queue is determined (5.3A(e), 5.3(g));
- (b) preventing retrospective commencement dates for new access being used to change priority in a queue (5.4(d)(3) and 5.4(e)(1));
- (c) extending a number of the timeframes for executing documents to more reasonable periods (so as to allow parties to make commercial decisions and obtain required internal approvals);
- (d) retaining the cap on inclusion of funding costs of a FEL 1 and FEL 2 Feasibility in the regulatory asset base if a Terminal Capacity Expansion that has been studied does not proceed (5.10(o))
- (e) the requirement to develop a standard funding agreement or proposed standard underwriting agreement (clause 5.10(q))
- (f) not permitting the extension of the required terms of Access Agreements to be extended to 15 year terms;
- (g) the determination of whether differential pricing should apply occurring after completion of a FEL 2 study (clause 5.12); and
- (h) the greater certainty provided in relation to the scope and certainty provided by feasibility studies by the definitions of FEL 1 Feasibility Study, FEL 2 Feasibility Study and FEL 3 Feasibility Study.

However, the DBCT User Group continues to consider a small number of further refinements would assist.

The DBCT User Group is uncertain as to why funding obligations for FEL3 studies have been imposed on Access Seekers, when funding of a FEL 3 study was previously a matter for DBCTM and requests this be reversed.

14.4 Potential for user funding of an expansion where DBCTM not obliged to invest

The DBCT User Group notes that the Draft Decision has specifically requested views from stakeholders on whether it should be open to an Access Seeker to fund an expansion where DBCTM is not obliged to invest in that expansion pursuant to section 12.7 of the undertaking.

The DBCT User Group considers that that should definitely be possible, but appreciates that the prospects of that occurring during the next regulatory period (given the time which would be required to get through the study and assessment phase) are not sufficiently large to warrant the imposition of an extensive user funding regime.

For the purposes of this access undertaking the DBCT User Group are willing to support some language to make it clear that an access seeker could seek (and be granted) that position in an access dispute. For example that could be achieved by wording like the following being included in section 12.7:

For the avoidance of doubt, this section 12.7 does not prevent an Access Seeker seeking (or being granted) the right to contract Access on the basis of funding the required Expansion Component in a dispute under Part 17 or an access determination under Part 5 of the QCA Act.

This issue should be revisited by the QCA in consideration of the next undertaking for the Terminal (where the prospects of an expansion occurring during the term may have materially changed).

15 Standard Access Agreement issues

The DBCT User Group is supportive of a number of the refinements in the QCA Draft Decision, including:

- (a) amendments regarding differential pricing;
- (b) changes reflecting the required term of an access agreement being 10 years;
- (c) reinstating the option clause (20) in its previous form;
- (d) amendment to Schedule 3 to reflect the equivalent provisions in the 2015 DAU (as also proposed to be amended)

Proposed amendments to the Standard Access Agreement (principally to reflect the equivalent changes in the access undertaking in relation to the terminal regulation related provisions) are set out in Schedule 3.

Schedule 1 – PWC Response to the QCA's Draft Decision

Cost of Capital for DBCTM

Response to QCA Draft Decision

DBCT User Group

7 July 2016

Disclaimer

This Report has been prepared by PricewaterhouseCoopers Australia (PwC) for the DBCT User Group in accordance with the scope defined in our engagement letter dated 15 February 2015.

PwC has based this report on information received or obtained, on the basis that such information is accurate. PwC makes no express or implied representation or warranty as to the accuracy, reliability or completeness of the Information. The Information contained in this report has not been subject to an audit or audit-standard review. The information must not be copied, reproduced, distributed, or used, in whole or in part, for any purpose other than detailed in our Proposal without the written permission of the DBCT User Group and PwC.

Our responsibilities and liability are to the DBCT User Group in the context of the use of our report for the purposes set out above. We do not accept any liability or responsibility in relation to the use of our report for any other purpose.

Contents

1	Executive Summary	3
2	Introduction	4
3	Background	6
4	Asset beta	10
5	Imputation	15
6	Updated WACC estimate	19

1 *Executive Summary*

The Queensland Competition Authority (QCA) recently released its draft decision on the Dalrymple Bay Coal Terminal (DBCT) 2015 Draft Access Undertaking (DAU). The draft decision largely adopts parameter values consistent with those we proposed in our original report prepared for the DBCT User Group (the User Group), dated November 2015. This is to be expected, given that the intention of our analysis was to estimate an appropriate weighted average cost of capital (WACC) rate for regulatory purposes, reflecting current market conditions, but also having regard to the outcomes of the QCA's WACC methodology review and their application in recent regulatory decisions.

We have developed an updated WACC estimate for DBCTM Management (DBCTM) in response to the QCA's draft decision and to also reflect the advised 20 day averaging period for market based parameters as at 31 May 2016. Table 1 shows PwC's revised estimate of DBCTM's WACC to be 5.61%, expressed as a post-tax nominal value.

Table 1: PwC estimate of DBCTM WACC as at 21 August 2015 and 31 May 2016

	21 August 2015	31 May 2016
Gearing	60%	60%
Credit rating	BBB	BBB
Asset beta	0.43	0.43
Equity beta	0.81	0.81
Debt beta	0.12	0.12
Risk free rate	2.17%	1.82%
Debt risk premium (raw)	2.32%	2.56%
Interest rate swap costs	0.150%	0.113
Debt issuance costs	0.108%	0.108%
Total debt margin	2.58%	2.78%
Equity market risk premium	6.50%	6.50%
Gamma	0.47	0.47
Post-tax nominal WACC	5.84%	5.61%

Our response to the QCA's draft decision is intended to be read in conjunction with our original November 2015 report, in which we provide more detailed discussion and rationale behind our selection of each WACC parameter.

We note that the QCA recently commissioned Incenta to advise on an updated risk free rate and debt risk premium for the agreed 20 day averaging period. Incenta has proposed an amended methodology for calculating the debt risk premium, which PwC is currently considering and may comment upon further in a supplementary submission.

2 Introduction

DBCT, located south of Mackay, Queensland, is the world's third largest coal export terminal. It has a nameplate capacity of 85 million tonnes per annum and handles approximately 20% of the world's metallurgical coal. It is integral to Queensland's coal export industry.

DBCT is owned by the Queensland State Government and is leased to DBCTM through a 50 year lease with a further 49 year option. DBCTM expanded the terminal to its current capacity, the majority of which is contracted under long-term take-or-pay agreements to coal producers located in the Bowen Basin coalfields.

DBCTM's revenue is regulated by the QCA which sets a regulated annual revenue requirement (ARR) as part of a third-party access framework. The ARR is divided by the annual contracted capacity to calculate the Terminal Infrastructure Charge (TIC), which is the charge paid per tonne by DBCTM's customers (the User Group) to use the terminal's facilities.

QCA 2015 Draft Decision

The 2015 DAU sets out the terms and conditions for negotiating access to the terminal for the 2016-21 regulatory period. DBCTM submitted to the QCA its DAU for the 2016-21 regulatory period on 9 October 2015, in which it proposed a number of changes to the 2010 DAU related to revenue and pricing.

In November 2015 we prepared for the User Group an independent estimate of the WACC rate that would provide a return commensurate with the risk to investors in a benchmark efficient coal terminal, having regard to established QCA regulatory precedent and other methodologies.

The QCA considered DBCTM's DAU and the submissions of stakeholders, and published its draft decision on 19 April 2016¹. In it, the QCA detailed its draft weighted average cost of capital (WACC) parameter values, some of which are substantially different to those proposed by DBCTM.

This report

This report sets out our independent view of the QCA's draft decisions regarding what we consider to be the main areas of difference between the QCA and DBCTM. In general, we consider the parameter values proposed by the QCA to be reasonable, considering the evidence before it, its previous decisions and stated positions.

Section 3 provides a summary of the parameter values proposed by DBCTM, and the QCA's draft decision for each WACC parameter. Section 4 discusses in more detail the reasoning behind QCA's draft asset beta, considering the appropriateness of the asset beta estimated by the QCA's advisor Incenta. Section 5 considers DBCTM's proposed gamma parameter value, summarising the arguments it put forward to support its position, and the QCA's responses to these arguments. Section 6 presents our updated estimate of DBCTM's WACC, calculated as at 31 May 2016.

Our response to the QCA's draft decision is intended to be read in conjunction with our original November 2015 report, in which we provide more detailed discussion and rationale behind our selection of each WACC parameter.

¹ Queensland Competition Authority (2016) *DBCT Management's 2015 draft access undertaking – Draft decision*. Accessed online at: <http://www.qca.org.au/getattachment/bd24a587-d54d-4c70-8f37-d47eef3f28a/QCA-Draft-Decision-DBCTM-s-2015-^DAU.aspx>

Finally, we note that the QCA recently commissioned Incenta to advise on an updated risk free rate and debt risk premium for the agreed 20 day averaging period. Incenta has proposed an amended methodology for calculating the debt risk premium, which PwC is currently considering and may comment upon further in a supplementary submission.

3 Background

The QCA's draft decision largely adopts parameter values consistent with those we proposed in our original report to the User Group. This is to be expected, given that the intention of our analysis was to estimate an appropriate WACC rate for regulatory purposes, reflecting the current market conditions, but also having regard to the outcomes of the QCA's WACC methodology review and their application in recent regulatory decisions.

Table 2 presents the WACC parameters proposed by DBCTM, PwC and the QCA.

Table 2: Proposed WACC parameters

	DBCTM	PwC	QCA
<i>Averaged over 20 days to:</i>	21/08/15	21/08/15	30/10/2015
Gearing	60%	60%	60%
Credit rating	BBB	BBB	BBB
Asset beta	NA	0.43	0.45
Equity beta	1.0	0.81	0.87
Debt beta	NA	0.12	0.12
Risk free rate	2.80%	2.17%	2.10%
Debt risk premium (raw)	2.32%	2.32%	2.68%
Interest rate swap costs	NA	0.150%	0.113%
Debt issuance costs	0.108%	0.108%	0.108%
Total debt margin	2.43%	2.58%	2.90%
Equity market risk premium	8.00%	6.50%	6.50%
Gamma	0.25	0.47	0.47
Post-tax nominal WACC	7.46%	5.84%	6.10%

Source: QCA Draft Decision (2016)

DBCTM, PwC and the QCA reached the same position with respect to DBCTM's capital structure, credit rating and debt issuance costs.

Below we discuss the areas where the parties have proposed different positions.

3.1 Risk free rate

DBCTM measured the risk free rate as the yield on 10-year Commonwealth Government bonds, averaged over the 20 days to August 21 2015. DBCTM used a ten year term rather than a term aligned to the term of the regulatory period as it considered this would align with the horizon of investors, and would also be consistent with wider commercial and regulatory practice.

The QCA considered the risk-free rate at length in its 2014 WACC review. Similar to DBCTM's DAU, a number of submissions to that review considered that the term of the risk-free rate should be equal to ten years, as this approximates more closely the life of the regulated assets or the investment horizon of investors.

However, the QCA's advisor, Professor Lally, noted that the use of a longer term risk-free rate will lead to higher regulatory cash flows than if a shorter term rate is used. The 'NPV = 0'

rule would be violated as a result. The QCA subsequently applied a 'term matched' risk-free rate in both the 2015 Queensland Rail and the 2014 Aurizon draft decisions.

In its draft DBCTM decision, the QCA measured the risk-free rate as the yield on 5-year Commonwealth Government bonds. We adopted the same approach. The difference in the proposed risk free rates (our estimate of 2.17% is marginally higher than the 2.10% estimated by the QCA) is the result of the different averaging period as noted in Table 2. Our estimate of the risk free rate as at 31 May 2016 is 1.82%.

Similar to our more detailed discussion regarding the gamma parameter value in Section 4, we consider that, for regulatory stability, the QCA should maintain its current position of 'term matching' the risk free rate to the length of the regulatory period. Given that DBCTM has not provided any new information or arguments to support the use of a longer rate, we see no reason for the QCA to depart from the position it adopted in its recent decisions for Queensland Rail and Aurizon.

3.2 Debt margin

DBCTM proposed a 'raw' debt risk premium of 2.32%, averaged over the 20 days to 21 August 2015. We adopted this debt risk premium, on the basis that it was estimated according to the PwC econometric methodology approved by the QCA.

Each stakeholder proposed to include debt issuance costs of 0.108%, in accordance with the QCA's standard approach.

We proposed an interest rate swap cost allowance of 0.15%, broadly consistent with the 0.113% per annum swap cost allowance included in the QCA's 2014 draft decision on Aurizon Network's 2014 DAU. The QCA maintained these interest rate swap costs for DBCTM.

DBCTM did not propose an interest rate swap cost allowance because it proposed to use a 10-year term to maturity to estimate the risk free rate and debt risk premium.

We note that in a recent report for the QCA, Incenta proposed an amended methodology for calculating the debt risk premium. PwC is currently considering the amended methodology and may comment further in a supplementary submission. For the purpose of this report, our estimate of the debt risk premium as at 31 May 2016 is 2.56%, applying the same methodology as in our original November 2015 WACC Report.

We have also adopted the 0.113% interest rate swap costs and 0.108% debt issuance costs applied by the QCA.

3.3 Equity market risk premium

DBCTM proposed an equity market risk premium (EMRP) of 8%, higher than the QCA's adopted point estimate of 6.5%, and outside the regulator's range of 5.0% - 7.5%.

DBCTM's proposed value is based on Frontier's weighted average of four estimation methodologies, one of which is the Wright method, which, at 8.8% is substantially higher than the other estimates generated by the QCA in its 2014 WACC review.

We proposed a market risk premium estimate of 6.5%, based on the QCA's WACC methodology review, and its application in the recent regulatory decisions for Aurizon Network and Queensland Rail.

The QCA maintained its current 6.5% market risk premium in its draft decision.

3.4 Asset beta

DBCTM did not propose a debt beta or an asset beta.

DBCTM considered that the equity beta for the 2015 DAU should be at least 1.0 (implying an asset beta of 0.5), supported by a report from Frontier which sought to demonstrate that the risk profile of DBCTM has increased since 2010, relative to other coal terminals.

We estimated DBCTM's asset beta to be 0.43, adopting the methodology Incenta applied to estimate an appropriate asset beta range for Aurizon Network. Our proposed asset beta is the mid-point of a range bounded at the upper end by the weighted average asset beta of 0.50 for

sample toll-road businesses, and bounded at the lower end by Grant Samuel's 2010 estimate of 0.35 for DBCT.

The QCA proposed an asset beta of 0.45 for DBCTM, reflecting the mid-point of the current implied asset beta of 0.50 and the 0.40 asset beta estimated by its advisors Incenta. The QCA did not agree with DBCTM's arguments that current conditions support an equity beta of at least 1.0, noting that DBCTM was insulated from coal market fluctuations (including both export prices and volumes).

3.5 Gamma

Consistent with the advice provided by Frontier, DBCTM proposed a gamma estimate of 0.25, comprising a distribution rate of 0.7 and utilisation rate of 0.35. We proposed a gamma of value of 0.47, derived using the QCA's WACC methodology review, and its application in the recent regulatory decisions for Aurizon Network and Queensland Rail. The QCA applied this estimate.

The QCA and DBCTM had differing views on the approach of estimating gamma, including the ones presented in Table 3.

Table 3: DBCTM and QCA positions

Issue	DBCTM	QCA
Estimation sample	Lally's sample of firms resulted in an upward bias in the distribution rate as smaller firms not included in the sample have lower distribution rates.	The QCA said that a further increase in the number of ASX200 companies was unlikely to result in a significant change to the distribution rate estimate.
Distribution rate	0.7 was the empirical estimate of the distribution rate commonly applied by regulators in Australia, including the Australian Energy Regulator (AER).	The QCA noted that the AER, in its recent decisions, used a range of 0.7-0.8, where the 0.8 estimate is based on listed equity. The Economic Regulation Authority (ERA) adopted a similar analytical approach. The listed-equity estimate of 0.8 applied by the AER and ERA is closer to the QCA's preferred estimate of 0.84 than to DBCTM's proposed estimate of 0.7.
Appropriateness of Lally's 'conceptual test'	Frontier did not agree that Lally's 'conceptual test' established a reasonable range for the utilisation rate	The QCA said it did not act inconsistently in adopting a utilisation rate outside of the bounds established by Lally's conceptual test, while giving weight to that test.

Source: QCA Draft Decision (2016).

3.6 Summary

Of the WACC parameters proposed by DBCTM, PwC and the QCA, the key differences are in respect to the asset beta and gamma estimates (Table 4).

Table 4: Key differences

	DBCTM	PwC	QCA
Asset beta	Implied 0.5, given equity beta of 1	0.43	0.45
Gamma	0.25	0.47	0.47

Source: QCA Draft Decision (2016)

Although there are differences in the estimation methodologies and parameter values selected by DBCTM and the QCA for other parameters (such as the EMRP, debt margin and risk free rate), we consider that the QCA's position on these parameters is settled, and that DBCTM has not provided any new information to challenge the QCA's position. Neither do

we consider that there have there been any significant changes in the approaches adopted by other Australian regulators which may influence the final decision of the QCA.

In contrast, DBCTM's implied asset beta of 0.5 (given an equity beta of 1) is higher than the 0.45 applied by the QCA in its draft decision, and higher still than the 0.40 asset beta proposed by the QCA's advisors, Incenta. The difference in the terminal infrastructure charge resulting from the application of the different asset betas will be significant. We have reviewed the asset beta proposed by Incenta, and provide below in Chapter 4 further commentary as to the appropriateness of its estimation methodology and the draft decision of the QCA.

Similarly, DBCTM proposed a gamma estimate of 0.25, comprising a distribution rate of 0.7 and utilisation rate of 0.35, whereas, the User Group and the QCA proposed a gamma estimate of 0.47, in accordance with the current QCA WACC methodology. The difference between the two parameter values will have a significant impact on the cash flows to which the WACC is applied. Recently there has been some debate as to the appropriate value of imputation credits, with the Australian Competition Tribunal directing the AER to reduce its gamma parameter value from 0.4 to 0.25. We consider these issues in more detail in Chapter 5.

4 Asset beta

4.1 Incenta's advice to the QCA

Incenta considered DBCTM's asset beta should be relatively low, as DBCTM:

- Is subject to a regulatory framework that aligns revenue with cost at periodic intervals and minimises revenue risk during a regulatory period. DBCTM is provided with a rate of return on its regulated asset base and that rate of return is updated at periodic reviews, which limits its exposure to cost risk and interest rate risk.
- Has sound underlying economics, such that there is a high degree of confidence that the revenues promised by the regulatory regime will be received by investors, who will not factor in market based stranded asset risk.

Incenta considered that DBCTM's financial characteristics are more closely aligned to regulated energy and water businesses than to container ports, unregulated commercial rail or coal companies, which are more sensitive to economic cycles.

Incenta estimated an appropriate asset beta for DBCTM to be 0.40, based on a sample of regulated energy and water businesses. Incenta considered that this asset beta is appropriate because it is:

- lower than the toll roads asset beta estimate of 0.50/0.54, which it considered to have higher systematic risk than DBCT
- consistent with the estimated asset beta of 0.41 that it assessed for Aurizon Network, which Incenta considered to have very similar systematic risk characteristics to DBCTM
- consistent with the implied asset beta of 0.415 applied by the QCA's adviser ACG in 2005, considered to be appropriate for DBCTM if it were not engaged in a material capacity expansion.²

4.2 PwC's assessment of Incenta's advice

4.2.1 Relevance of regulated energy and water businesses

Incenta noted that its estimated asset beta for DBCTM was consistent with the asset beta it estimated for Aurizon Network as part of the 2014 Draft Access Undertaking. Like PwC, Incenta considers Aurizon Network and DBCTM to have similar systematic risk profiles. In estimating an asset beta for Aurizon Network, Incenta relied on a sample of regulated energy and water businesses, as these businesses:

- **Are subject to cost-based regulation with periodic reviews:** Cost based regulation with periodic reviews buffers the cash flows of regulated businesses against variations in cost, demand or discount rates on their economic returns over an extended period of time resulting in a lower asset beta.
- **Have their revenue risk buffered by the regulatory framework:** The revenues of regulated energy and water businesses are insensitive to economic cycles. Similarly, Aurizon Network's contracting and regulatory arrangements protect it from volatility in coal prices.

² Incenta Economic Consulting (2016) *DBCT 2015 DAU: Review of WACC Parameters*. Accessed online at: <http://www.qca.org.au/getattachment/66003fdc-93a6-48fb-811d-4478bef762c6/Incenta-Review-of-WACC-parameters.aspx>

- **Have relatively low operational cost risk:** Operating costs form a relatively low proportion of Aurizon Network's total asset value, and, similar to regulated energy and water businesses, allowable revenues are updated to reflect revised forecasts of operating costs at periodic price resets.
- **Are generally subject to low stranding risk (over the life of their existing assets):** Queensland's coal mines have a strong position on the international cost curve, with continued demand forecast, particularly from Asia. There is a relatively low risk of asset stranding for Aurizon Network, similar to regulated energy and water business.³

Incenta's estimated asset beta of 0.42 for Aurizon Network was based largely on the asset betas of comparator regulated energy and water businesses. In its draft decision, the QCA considered that Incenta:

- undertook a rigorous first principles analysis that identified a large sample of international energy and water businesses as relevant comparators for Aurizon Network.
- used a valid estimation approach
- identified a recommended point estimate for Aurizon Network's asset beta (0.42) that was justifiable, noting that the comparator firms Incenta identified were appropriate.

As noted in our original report, we consider that the factors identified above apply also to DBCTM. Given the similarities between the environments in which Aurizon Network and DBCTM operate, we believe that energy and water businesses also are relevant comparators for DBCTM, and form an appropriate comparator sample from which to estimate the asset beta.

The following discussion summarises the evidence provided by PwC and Incenta which demonstrates how DBCTM shares similar characteristics to regulated energy and water businesses.

Reduced variability of cash flows

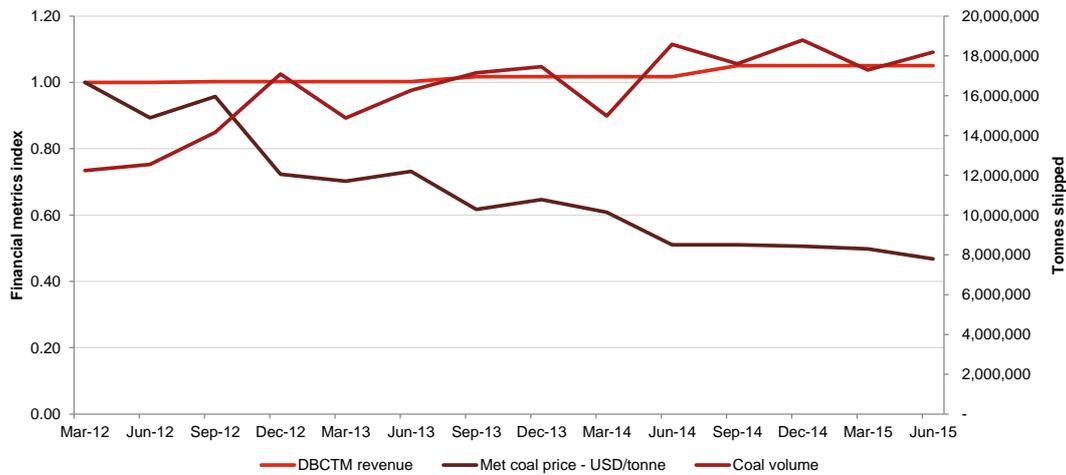
Incenta demonstrated the buffering effect of the regulatory framework on DBCTM's revenue risk, by illustrating that growth in DBCTM's EBIT has been very closely correlated with growth in its RAB. In particular, DBCTM's EBIT did not track the price of coal during the past three years of sustained declines in world coal prices, but instead followed the RAB that increased materially over the 2006 to 2010 period when the capacity increased from 56 Mtpa to 85 Mtpa.⁴

The analysis in our original report illustrated DBCTM's low revenue risk. Presented again below, Figure 1 compares DBCTM's quarterly revenue to changes in the metallurgical coal price and the quarterly volume of tonnes shipped at the terminal over the period March 2012 to June 2015. Over this period, the metallurgical coal price declined significantly, and the volume of tonnes shipped per quarter varied considerably. However, through the take-or-pay contract framework in place with users, and the revenue cap structure of regulation, DBCTM's quarterly revenue remained stable.

³ Incenta Economic Consulting (2013) *Review of Regulatory Capital Structure and Asset / Equity Beta for Aurizon Network – Report to the Queensland Competition Authority*. Accessed online at <http://www.qca.org.au/getattachment/7bdcc7f6-e569-4688-9d6e-15fc941a4660/Incenta-Economic-Consulting-Review-of-Regulatory-C.aspx>

⁴ Incenta Economic Consulting (2016) *DBCT 2015 DAU: Review of WACC Parameters*. Accessed online at: <http://www.qca.org.au/getattachment/66003fdc-93a6-48fb-811d-4478bef762c6/Incenta-Review-of-WACC-parameters.aspx>

Figure 1: Changes in estimated DBCTM quarterly revenue, DBCT export volumes and the metallurgical coal price



Source: DBCTM, QCA, Bloomberg

The QCA acknowledged the insulation of DBCTM against coal price fluctuations in its draft report, noting the close correlation of DBCTM’s EBIT and its regulated asset base, and in particular the fact that DBCTM’s EBIT has remained steady despite falling global coal prices over the past three years.⁵

Low operational cost risk

DBCTM has very low operating cost risk, as the terminal operations and maintenance functions are sub-contracted through an operations and maintenance contract to a third party operator, owned by five of the terminal users who have a financial incentive to operate the terminal efficiently.

Low stranding risk

A number of factors combine to reduce DBCTM’s risk of asset stranding.

In particular, the majority of capacity at DBCT is contracted under long-term take-or-pay agreements to coal producers located in the Bowen Basin coalfields. Incenta considers that although DBCTM has fewer customers and a less diverse customer base in general than regulated energy and water businesses, the prospects of metallurgical coal mines continuing to operate in the Goonyella system are strong.⁶

As discussed in our November 2015 report, there is no viable alternative to DBCT for the User Group, given the limited availability of rail and port access elsewhere, and the additional operating costs that users would incur in switching ports. The QCA’s draft decision supported this assessment.⁷

Further, although DBCTM highlighted in its Draft Access Undertaking the fact that a portion of the current take-or-pay are due to expire during the next regulatory period, some of these volumes are nonetheless contracted under 10 to 15 year take-or pay arrangements with Aurizon Network to be transported to DBCT.

⁵ Queensland Competition Authority (2016) *DBCT Management’s 2015 draft access undertaking – Draft decision*. Accessed online at: <http://www.qca.org.au/getattachment/bd24a587-d54d-4c70-8f37-d47eef3f28a/QCA-Draft-Decision-DBCTM-s-2015-DAU.aspx>

⁶ Incenta Economic Consulting (2016) *DBCT 2015 DAU: Review of WACC Parameters*. Accessed online at: <http://www.qca.org.au/getattachment/66003fde-93a6-48fb-811d-4478bef762e6/Incenta-Review-of-WACC-parameters.aspx>

⁷ Queensland Competition Authority (2016) *DBCT Management’s 2015 draft access undertaking – Draft decision*. Accessed online at: <http://www.qca.org.au/getattachment/bd24a587-d54d-4c70-8f37-d47eef3f28a/QCA-Draft-Decision-DBCTM-s-2015-DAU.aspx>

Overall, we consider that the approach taken by Incenta to estimate an asset beta for DBCTM is appropriate. As we noted in our original report, we consider that the overall risk profile of DBCTM to be similar to Aurizon Network, and we believe that the approach adopted by Incenta to estimate an asset beta for Aurizon Network is also appropriate to estimate an asset beta for DBCTM.

4.2.2 Estimation of the asset beta

We acknowledge that there are certain methodological differences between our approach to estimate the asset beta of an individual firm and the approach adopted by Incenta. For example, we generally require the regression of a firm's share price on the share market overall to explain at least 10 percent of the variation in a firm's share price, in order for the firm to be included in our sample. Incenta has stated previously that it does not impose this restriction.⁸ Similarly, we rely on five years' monthly observations in comparison to the ten years' data applied by Incenta in its advice to the QCA.

As such, the asset betas estimated by PwC and Incenta for comparator energy and water businesses will vary. Our intention was not to estimate an asset beta for regulated water and energy businesses specifically however, so the estimated parameter values are not necessarily directly comparable.

Overall, we consider that Incenta's estimate of an asset beta for regulated water and energy businesses to be appropriate. In particular, we note that the asset beta we apply in our estimation of the cost of capital for a regulated Australian bulk water supplier is very similar to that estimated by Incenta. Further, it is consistent with the asset betas applied by regulators to Australian energy and water businesses as discussed below.

4.3 Recent regulatory decisions

A number of energy and water businesses have been subject to regulatory price reviews recently. Table 5 outlines the asset betas applied by regulators to energy and water businesses nationwide.

Table 5: Recent regulatory decisions – asset beta

Regulator	Regulated entity/entities	Year	Asset beta
QCA	Gladstone Area Water Board	2015	0.40
QCA	Seqwater	2013	0.30
IPART	Sydney Water	2016	0.38 [^]
IPART	WaterNSW (formerly Sydney Catchment Authority)	2016	0.38 [^]
ESC	Goulburn-Murray Water	2016	0.38 [^]
ESC	Melbourne Water	2016	0.35 [*]
AER	National electricity transmission businesses	2015	0.38 [^]

[^] Estimated based on an equity beta of 0.7, applying the Conine formula, 60% gearing and standard QCA parameter values

^{*} Estimated based on an equity beta of 0.65, applying the Conine formula, 60% gearing and standard QCA parameter values

Source: QCA, IPART, ESC, AER

⁸ Incenta Economic Consulting (2015) *WACC parameters for GAWB Price Monitoring 2015-20 – Final Report*. Accessed online at: <http://www.qca.org.au/getattachment/79781e49-9a99-48b1-8428-27bef39dbd16/Incenta-report-May-2015.aspx>

Australian regulators have consistently applied asset betas of between 0.35 and 0.40 for regulated water and energy businesses. We acknowledge that this alone should not determine the asset beta applied by the QCA for DBCTM. However, established regulatory practice and the technical estimates provided by PwC and Incenta combine to form a significant evidence base supporting a view that the systematic risk profile of DBCTM is considerably lower than that of the market overall.

4.4 Summary

Section 4.2 above summarises the evidence presented by Incenta and PwC which demonstrates that DBCTM shares a number of characteristics with regulated energy and water businesses which govern its overall risk profile.

In our view, these businesses are an appropriate comparator group for DBCTM.

Further, the approach adopted by Incenta to estimate an asset beta for Aurizon Network (and considered appropriate by the QCA in its draft decision) is, in our view, suitable to estimate an asset beta for DBCTM.

We believe that the approaches adopted by PwC and Incenta are conceptually consistent and both reflect the structural factors which underpin DBCTM's relatively low risk level. However, we remain of the view that 0.43 is an appropriate asset beta to apply for DBCTM, notwithstanding Incenta's estimate is slightly lower at 0.40. In estimating this value, we applied the approach adopted by Incenta, and approved by the QCA, to estimate an asset beta range for Aurizon as part of the 2014 Access Undertaking. Incenta developed this approach noting the similar risk profiles of regulated energy and water businesses to Aurizon, similarities which the QCA acknowledged also.

That the asset beta estimated by Incenta is similar to ours (0.40 compared to 0.43) provides further evidence that DBCTM's systematic risk profile is lower than the market overall. The low systematic risk profile of businesses similar to DBCTM is also corroborated by the low asset betas of regulated energy and water businesses adopted by Australian regulators. While DBCTM has not, in our view, established credible arguments to support an asset beta higher than 0.50, there is some evidence suggesting that it could be lower than our estimate of 0.43. We consider, therefore, that 0.43 represents a reasonable estimate of an asset beta appropriate for DBCTM.

In its draft decision, the QCA adopted an asset beta of 0.45, noting that although it considered 0.40 the best available technical estimate, a reduction in the asset beta from 0.50 (as implied by an equity beta of 1) to 0.40 would be a significant change for all stakeholders.

We acknowledge that the effects of a reduction in DBCTM's asset beta as proposed by Incenta may be significant. However, the quantum of movement in a single WACC parameter, alone, should not be a driving consideration. While we agree that stability of regulatory outcomes is important, it is the overall impact on the TIC, in combination with other parameter and assumption adjustments, which is important. We note that in not "fully" adjusting the asset beta to 0.40, even though the QCA acknowledges this is the more technically correct estimate, the QCA is insulating DBCTM from this parameter movement. Yet other adjustments - such as the change in terminal remediation costs - are passed through in full.

5 Imputation

Gamma is a function of the pay-out ratio (the amount of imputation credits generated by the benchmark efficient business that are distributed to investors) and the utilisation rate (the ability of investors to utilise the credits to offset personal income taxes).

In its 2014 WACC review, the QCA updated its estimate of the distribution rate to 0.84, based on an analysis of the distribution rates of the twenty largest listed companies by market capitalisation. It also updated its estimate of the utilisation rate to 0.56, a weighted average of five estimation methods – dividend drop-off studies, redemption rates, equity ownership, practitioner behaviour and Professor Lally's conceptual test. The QCA gave primary weighting to the equity ownership of Australian listed companies.⁹

Combined, these values generate a gamma value of 0.47 (0.84 multiplied by 0.56).

The purpose of our original WACC report was to estimate an appropriate WACC rate for DBCTM given the regulatory framework in which it operates. We sought to assess what gamma value the QCA would apply, given its previous decisions and stated position.

This section summarises the arguments that DBCTM presented to the QCA to support its proposed gamma parameter value of 0.25, the QCA's responses to these arguments, and our assessment of the QCA's draft decision, given the evidence before it and its previously stated positions.

5.1 DBCTM's disagreements with the QCA's approach

DBCTM disagreed with the conceptual approach taken by the QCA to estimate both the distribution rate and the utilisation rate.

5.1.1 Distribution rate

DBCTM proposed a distribution rate of 0.7, noting that this is the empirical estimate most commonly applied by Australian regulators.

Further, DBCTM considered that the definition of the distribution rate used by Lally is inconsistent with the QCA's own definition. DBCTM's advisor, Frontier, stated that Lally used the ratio of distributed credits to created credits as the measure of the distribution rate, while the QCA measures the distribution rate as the ratio of distributed credits to corporate tax paid.

Frontier also stated that the benchmark efficient entity should not be assumed to be a large listed multinational company, but rather a regulated entity operating within Australia. All profits of domestic regulated entities are taxed in Australia, such that all tax payments generate imputation credits. However, Lally's top 20 listed firms differ from the benchmark entity in that they generate material foreign-sourced profits which give rise to a higher distribution rate. Therefore, concluded Frontier, the sample of firms selected by Lally results in an upward bias in the distribution rate as smaller firms not included in the sample have lower distribution rates.¹⁰

⁹ Queensland Competition Authority (2014) *Final decision - Cost of capital: market parameters*. Accessed online at <http://www.qca.org.au/getattachment/820a4f29-2878-4641-b445-dcf8af7f75ed/QCA-Final-Decision-Cost-of-Capital-Market-Paramete.aspx>

¹⁰ DBCT Management (2015) *2016 DAU Submission*. Accessed online at: <http://www.qca.org.au/getattachment/5814e3ed-0665-4e80-b52d-63b9f5da5305/TEST-FILE.aspx>

5.1.2 Utilisation rate

On Frontier's advice, DBCTM also rejected the QCA's utilisation rate of 0.56, proposing instead a value of 0.35.

Frontier considered that the definition of the utilisation rate should be a market value, reflecting the value of imputation credits in the hands of investors, rather than the proportion of imputation credits redeemed, as used by the QCA.

Frontier did not agree that Professor Lally's 'conceptual test' established a reasonable range for the utilisation rate, and considered that the QCA acted inconsistently in adopting a utilisation rate outside the bounds of the test while giving weight to the test. Frontier also questioned a number of assumptions of the test.

Further, Frontier stated that it had previously addressed the concerns of the QCA regarding the unreliability of utilisation rate estimates obtained using dividend drop-off analysis. Frontier considered that the QCA's recent determinations had not acknowledged the previous assessment by consultants SFG.¹¹

5.2 The QCA's response to DBCTM

In its draft decision, the QCA noted that Frontier's advice to DBCTM on gamma is similar in to the advice provided by SFG to Aurizon Network as part of the 2014 DAU. The QCA did not accept DBCTM's arguments, noting that they were similar in many respects to the arguments put forward by Aurizon Network during the 2014 DAU.

5.2.1 Distribution rate

Lally advised that it is not sufficient to reject the QCA's assumptions and methodology for estimating the distribution rate solely on the basis that they differ from the practice followed by other Australian regulators. The QCA's methodology should be assessed on its merits.

The QCA stated that the contention that the definitions of the distribution rate used by the QCA and Lally are different is incorrect. The QCA considers that the two definitions are equivalent if company tax paid is defined, consistent with Officer's model, as payments to the ATO only, rather than payments to both the ATO and foreign tax authorities.

Similarly, the QCA rejects the claim that Lally's sample of firms resulted in an upward bias in the distribution rate. The QCA considers that the estimate based on the top 20 companies on the ASX suggests a market-wide distribution rate of around 0.79, closer to Lally's estimate of 0.84 than to the generally applied estimate of 0.70.¹²

5.2.2 Utilisation rate

The QCA did not accept DBCTM's position that the utilisation rate should be defined as a market value concept. In contrast, it considers that the Officer CAPM unambiguously defines the utilisation rate as the weighted average of the utilisation rates of individual investors, such that dividend drop-off studies have limited relevance for estimating the utilisation rate.

The QCA also does not consider that it acted inconsistently in adopting a utilisation rate outside of the bounds established by Lally's conceptual test, while giving weight to that test, noting that Lally stated that he did not establish numerical bounds for his conceptual test.

Similarly, although Frontier states that it addressed the concerns of the QCA regarding the unreliability of utilisation rates estimated using dividend drop-off analysis, the QCA outlined a number of concerns it still holds, including the effect of increases in trading volume around ex-dividend dates; the use of a constant term in the regressions and the reliability of

¹¹ Ibid.

¹² Queensland Competition Authority (2016) *DBCT Management's 2015 draft access undertaking – Draft decision*. Accessed online at: <http://www.qca.org.au/getattachment/bd24a587-d54d-4c70-8f37-d47eefcf3f28a/QCA-Draft-Decision-DBCTM-s-2015-DAU.aspx>

regression based estimates; the interaction between the value of cash dividends and the value of imputation credits; the deletion of small cap companies; and the comparison between the studies by the ERA and SFG.¹³

5.3 Discussion

Firstly, we agree with the QCA that regulatory precedent alone should not determine its position; the appropriateness of any WACC parameter value should be assessed on its own merit, rather than with reference only to common practice. In any case, there is little consensus between regulators regarding an appropriate gamma parameter value (see Table 6).

The ACCC, AER (though revised downwards on appeal), and the ERA have all recently applied a gamma parameter value of 0.40. The QCA and ESC have applied higher values, of 0.47 and 0.50, respectively, while IPART determined in its 2012 review of imputation credits that the value of gamma should be equal to 0.25.

Table 6: Recent regulatory decisions – Gamma

Regulator	Regulated entity/entities	Year	Gamma
IPART	All	2012	0.25
QCA	Queensland Rail	2015	0.47
AER	National electricity transmission businesses	2015	0.40 (revised down to 0.25)
ERA	West Australian Network businesses	2015	0.40
ACCC	Australia Post	2015	0.40
ESC	Goulburn-Murray Water	2016	0.50

Source: IPART, QCA, AER, ERA, ACCC, ESC

The decision of the Australian Competition Tribunal to reduce the gamma value applied by the AER from 0.40 to 0.25¹⁴ does not, of itself, represent new evidence which should influence the QCA's final decision. The QCA considered the Tribunal's direction in its draft decision, noting that it does not invalidate its own approach to estimating gamma as the Tribunal's reasoning is based on a fundamentally different definition of the utilisation rate, the 'market value' rather than the QCA's preferred equity ownership approach.

The QCA considered many of the technical arguments put forward by DBCTM during its substantial 2014 WACC parameters review, in which it established its current position for gamma. The QCA maintained its position in both its 2014 Aurizon Network and 2016 Queensland Rail decisions. It is clear that the QCA has already considered much of the evidence put forward by DBCTM in these decisions.

The QCA could have changed its position when previously presented with this information but did not, and, given there is no new estimation approach or data set proposed by DBCTM, it is not clear why the QCA would change its approach now.

¹³ Queensland Competition Authority (2016) *DBCT Management's 2015 draft access undertaking – Draft decision*. Accessed online at: <http://www.qca.org.au/getattachment/bd24a587-d54d-4c70-8f37-d47ecef3f28a/QCA-Draft-Decision-DBCTM-s-2015-DAU.aspx>

¹⁴ Australian Competition Tribunal (2016) *In the matter of applications by PIAC, Ausgrid and others – Summary*. Accessed online at http://www.competitiontribunal.gov.au/_data/assets/pdf_file/0003/30666/Summary-AER-Review-Decisions-26-Feb-2016.pdf

If the QCA were to adopt a different position on gamma now, despite having considered and rejected similar evidence previously, it would be difficult for stakeholders to understand how the QCA might behave in future decisions related to gamma, but also any other issue for which there are conflicting viewpoints. Previous decisions of the QCA may be considered to be a less reliable indicator of its position on any matter, even in cases where the QCA is not considering any new information. Regulated businesses may then have difficulty understanding the decision making process of the QCA, and predicting how it will act in future decisions, potentially reducing confidence in the stability of the overall regulatory framework.

As such we would expect the QCA to continue to apply a gamma parameter value of 0.47, considering its prior decisions and previously stated positions, and the absence of any new evidence presented by DBCTM.

6 Updated WACC estimate

Table 7 below compares our original WACC estimate for DBCTM, to the updated value estimated as at 31 May 2016. Key differences are the updated debt risk premium and risk free rate parameter values, and the 0.113% interest rate swap costs applied by the QCA. We estimate DBCTM's WACC to be 5.61%, expressed as a post-tax nominal value.

Table 7: Comparison of DBCTM WACC estimated at 21 August 2015 and 31 May 2016

	21 August 2015	31 May 2016
Gearing	60%	60%
Credit rating	BBB	BBB
Asset beta	0.43	0.43
Equity beta	0.81	0.81
Debt beta	0.12	0.12
Risk free rate	2.17%	1.82%
Debt risk premium (raw)	2.32%	2.56%
Interest rate swap costs	0.150%	0.113%
Debt issuance costs	0.108%	0.108%
Total debt margin	2.58%	2.78%
Equity market risk premium	6.50%	6.50%
Gamma	0.47	0.47
Post-tax nominal WACC	5.84%	5.61%

We note that the QCA recently commissioned Incenta to advise on an updated risk free rate and debt risk premium for the agreed 20 day averaging period. Incenta has proposed an amended methodology for calculating the debt risk premium, which PwC is currently considering and may comment further in a supplementary submission.

Schedule 2 – Mark-up of 2015 DAU

As discussed, in the body of the submission, the DBCT User Group has proposed a number of refinements to the 2015 DAU amendments proposed by the QCA in the QCA's Draft Decision.

A mark-up of a number of particular sections of the 2015 DAU (compared to a version in which the QCA Draft Decision amendments are accepted) where the DBCT User Group's suggested amendments are more extensive is included in this Schedule.

In addition to those sections, the DBCT User Group's submissions also support the following less extensive (but in some case equally important) amendments as appropriate to be made to other sections.

2015 DAU Reference	Issue	Proposed Amendment
1.4	Review of Undertaking (see section 5.3 of submission)	Insert a new section 1.4(b) as follows: <i>(b) DBCT Management must:</i> <i>(1) not withdraw any draft amending access undertaking submitted in accordance with section 1.4(a) or section 1.4(b)(2); and</i> <i>(2) submit to the QCA a draft amending access undertaking which complies with the QCA's final decision on a draft amending access undertaking submitted in accordance with Section 1.4(a).</i> Renumber section 1.4(b) and 1.4(c).
4(b)(2)	Liability for subcontractors	Insert at the end of section 4(b)(2) 'except as otherwise provided for under a Access Agreement'
5.2(g)	Notice of expiry of Access Application	Amend section 5.2(g)(2) so it also refers to Access Applications for which the expiry date is set by Section 5.3(f)(3)
5.3A	Cross-reference error	The reference to '5.3A(f)' should be replaced with '5.3(f)'
5.4(i)(4)	Allocation of capacity that is differentially priced (see section 13.4 of submission)	Replace section 5.4(i)(4) with the following: (4) (Allocation of Capacity that is Differentially Priced) Where there is a Differentiated Expansion Component: (A) Expansion Component Capacity will only be contracted to meet Annual Contract Tonnages under Access Agreements entered into by the Access Holders in respect of that Expansion Component; (B) the Existing Terminal Capacity will only be contracted to meet Annual Contract Tonnages under Access Agreements entered into by the Access Holders in respect of the Existing Terminal; (C) Expansion Component Capacity will be utilised in day to day operations to meet Annual Contract Tonnages under Access Agreements entered into by the Access Holders in respect of that Expansion Component in first priority (and only utilised in day to day operations to meet Annual Contract Tonnages under other Access Agreements to the extent there is surplus capacity); and

2015 DAU Reference	Issue	Proposed Amendment
		<p>(D) Expansion Component Capacity will be utilised in day to day operations to meet Annual Contract Tonnages under Access Agreements entered into by the Access Holders in respect of the Existing Terminal in first priority (and only utilised in day to day operations to meet Annual Contract Tonnages under other Access Agreements to the extent there is surplus capacity.</p>
<p>5.5(f)</p>	<p>Allocation of capacity (see section 13.2 of submission)</p>	<p>Amend clause 5.5(f) as follows:</p> <p>(f) (Commercial Discretion of DBCT Management Order of Priority) In circumstances where there is System Capacity sufficient to accommodate some but not all current Access Applications and the Available System Capacity relies on Terminal Capacity that comprises capacity from the Existing Terminal and a Differentiated Expansion, DBCT Management may reasonably determine the commercial principles that will apply to the allocation of Access so long as those principles are applied to all Access Applications on a non-discriminatory basis. <u>will contract the Available System Capacity in the following order of priority:</u></p> <p><u>(i) Existing Terminal; and</u></p> <p><u>(ii) Differentiated Expansion, in ascending order of anticipated Access Charges to the Access Seeker (lowest Access Charges being contracted first) where there are multiple Differentiated Expansions.</u></p> <p>Alternative drafting:</p> <p>(f) (Commercial Discretion of DBCT Management Order of Priority) In circumstances where there is System Capacity sufficient to accommodate some but not all current Access Applications and the Available System Capacity relies on Terminal Capacity that comprises capacity from the Existing Terminal and a Differentiated Expansion, DBCT Management may reasonably determine the commercial principles that will apply to the allocation of Access so long as those principles are applied to all Access Applications on a non-discriminatory basis. <u>will contract the Available System Capacity in the following order of priority:</u></p> <p><u>(i) Existing Terminal; and</u></p> <p><u>(ii) Differentiated Expansion, in ascending order of anticipated Access Charges to the Access Seeker (lowest Access Charges being contracted first) where there are multiple Differentiated Expansions, provided that if an Access Seeker which is not first in the Queue gives notice to DBCT Management in accordance with Section 5.4(d)(2) that it is prepared to enter into an Access Agreement in respect of Expansion Component Capacity for a Differentiated Expansion and that Expansion Component Capacity is not contracted by Notified Access Seekers in accordance with Section 5.4, that the Differentiated</u></p>

2015 DAU Reference	Issue	Proposed Amendment
		<u>Expansion Capacity can be contracted in priority to the Access Seeker which gave the notice in accordance with Section 5.4(d)(2) as permitted by Section 5.4.</u>
5.7(a)(5)(A)	Defined term error	Replace the reference to 'Available Terminal Capacity' with 'Available System Capacity'
5.10(j), (l), (p)	Funding of FEL 3 studies (see section 14.3 of submission)	Delete references to 'FEL 3' and 'FEL 3 Feasibility Study' in section 5.10(j)(1) and 5.10(p) and the definition of Funding Agreement. Delete 'subject to the Funding Access Seekers and' wording in section 5.10(l)
5.12	Pricing Ruling in relation to Differential Pricing (see section 13.3 of submission)	Amend section 5.12 as follows: <ul style="list-style-type: none"> In section 5.12(a)(2) replace '<i>apply to the QCA in accordance with s150D of the QCA Act</i>' with '<i>apply to the QCA as if applying for a ruling in accordance with s150D of the QCA Act</i>' In section 5.12(c)(1) replace '<i>determine the application in accordance s150F of the QCA Act</i>' with '<i>determine the application as if making a determination in accordance with s150F of the QCA Act</i>'.
12(c)(1) 12.5(h)(2)(L)	Change in assumptions made in Price Ruling (see section 13.3 of submission)	Insert at the end of section 12(c)(1) and 12.5(h)(2)(L) ' <i>and any way in which the circumstances of the Expansion Component vary from the assumptions made in the Price Ruling</i> '.
12.7	Funding an expansion where DBCT Management not obliged to expand (see section 14.4 of submission)	Include the following wording at the end of section 12.7. ' <i>For the avoidance of doubt, this section 12.7 does not prevent an Access Seeker seeking (or being granted) the right to contract Access on the basis of funding the required Expansion Component in a dispute under Part 17 or an access determination under Part 5 of the QCA Act</i> '.
12.10(b) and Schedule E	Under-investment in non-expansion capital expenditure (see section	Amend section 12.10 as follows: <ol style="list-style-type: none"> (1) ...; and (2) ...; and <u>(3) the Services are provided in a manner consistent with the factors set out in Section 11 of Schedule E.</u>

2015 DAU Reference	Issue	Proposed Amendment
	12.3 of submission)	<p>Amend section 4(a) of Schedule C as follows:</p> <p>(2) ...; and</p> <p>(3) ...; <u>and</u></p> <p><u>(4) any reduction in the value of the Regulated Asset Base which the QCA considers appropriate having regard to any failure by DBCT Management to invest in Capital Expenditure which does not relate to a Capacity Expansion in a manner consistent with the factors set out in Section 11 of Schedule E.</u></p>
Schedule C	Revenue Cap (see section 14.2(b) of submission – alternative drafting)	<p>Amend section 2 of Schedule C Part A as follows:</p> <p>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:</p> $RC = ARR \times ART / NCT + INCR - \underline{ETS}$ <p>where</p> <p>...</p> <p><u>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 which that value is in excess of any amounts due and payable to DBCTM by the Access Holder for the period prior to Early Termination.</u></p>
Schedule G	Notional Contracted Tonnage definition (see section 14.2(a) of submission).	<p>Reinstate the definition of Notional Contracted Tonnage from the current access undertaking being:</p> <p>Notional Contracted Tonnage or NCT means, in respect of a Financial Year:</p> <p>(a) the Aggregate Annual Contract Tonnage; plus</p> <p>(b) Annual Contract Tonnage which an Access Holder has been entitled to have Handled in that Financial Year under an Access Agreement but which it is no longer entitled to have Handled as a result of an Early Termination (Terminated Agreement), but only until one or more of the following events occur:</p> <p>(1) the Terminating Date; or</p> <p>(2) the date that the Terminated Agreement would have expired (had the early Termination not occurred); or</p> <p>(3) the date that the tonnage under the Terminated Agreement is replaced with tonnage under a new Access Agreement which tonnage, because of Terminal Capacity, could not have been granted unless the Terminated Agreement had been terminated.</p>

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) Where the performance of an obligation under this Undertaking requires a Related Party of DBCT Management (including Trading SCB) to take or refrain from taking some action, DBCT Management must procure that the Related Party takes or refrains from taking that action
- (f) As soon as practicable after the Commencement Date, DBCT Management and the Brookfield Group will direct their respective personnel, including directors, contractors, managers, officers, employees and agents not to do anything inconsistent with any obligations under this Undertaking.
- ~~(g) DBCT Management must procure that any Related Party provides all necessary assistance and information so that it is in a position to comply with this Undertaking, including (without limitation) with any:
 - ~~(1) direction from the QCA under this Undertaking; or~~
 - ~~(2) request from the Auditor under Section 9.6.~~~~

3.2 Role of the Operator

- (a) DBCT Management acknowledges and agrees that:
 - (1) as at the date of this Undertaking, the Operator is 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;
 - (2) each Access Holder has a right under the constitution of DBCT PL to become a shareholder of DBCT PL;
 - (3) 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; and

- (b) the Operator carries out its obligations under the Operation & Maintenance Contract independently of DBCT Management.

3.3 Independent Operator

- (a) Other than in accordance with the QCA's prior written approval, DBCT Management undertakes to maintain:

- (1) the Operation & Maintenance Contract; or
- (2) a contract which is substantially on the terms specified in Schedule I with a party (as Operator):
 - (A) in which more than 50% of the issued shares in the party are held by Access Holders;
 - (B) in which DBCT Management holds no economic interest; and
 - (C) that is not a Related Body Corporate of DBCT Management,

to the extent that maintaining the relevant contract, or contracting on substantially the same terms as those specified in Schedule I, is within DBCT Management's reasonable control.

- ~~(b) As soon as practicable after DBCT Management becomes aware that maintaining either:~~
 - ~~(1) the Operation & Maintenance Contract; or~~
 - ~~(2) a contract which is on substantially the same terms as those specified in Schedule I with a party (as Operator) that satisfies the criteria in Section 3.3(a)(2), is likely to cease to be within DBCT Management's reasonable control, DBCT Management must give the QCA a notice which specifies:~~
 - ~~(3) that maintaining the Operation & Maintenance Contract or the contract referred to in Section 3.3(b)(2) (as applicable) is likely to~~
~~cease to be within DBCT Management's reasonable control;~~
 - ~~(4) the reason for the state of affairs referred to in Section 3.3(b)(3);~~
~~and~~
 - ~~(5) the steps that DBCT Management will undertake to engage a new party (as the Operator) that satisfies the criteria specified in Section 3.3(a)(2).~~
- (b) DBCT Management undertakes not to terminate the Operation & Maintenance Contract or any contract which replaces the Operation &

Maintenance Contract (each, an **Existing Operation & Maintenance Contract**) unless:

- (1) DBCT Management has engaged a replacement operator which satisfies the criteria specified in Section 3.3(a)(2) under a contract which is on substantially the same terms as those specified in Schedule I (**Replacement Operation & Maintenance Contract**); and
 - (2) the Replacement Operation & Maintenance Contract will take effect on termination of the Existing Operation & Maintenance Contract.
- ~~(d) Subject to clause 3.3(f), DBCT Management undertakes to only exercise its step in rights in respect of the Operation & Maintenance Contract in accordance with the terms of the Operation & Maintenance Contract.~~
- ~~(e) Without limiting clause 3.3(d), if DBCT Management exercises its step in rights then it must:~~
- ~~(1) immediately give the QCA a notice which specifies that DBCT Management has exercised its step in rights under the Operation & Maintenance Contract and provides reasonable details of the circumstances giving rise to DBCT Management's exercise of the step in rights;~~
 - ~~(2) within four days after DBCT Management exercises the step in rights, give the QCA a report which sets out, in reasonable detail, the steps that DBCT Management proposes to take, and the steps that DBCT Management proposes the Operator must take, in order for DBCT Management to cease exercising its step in rights; and~~
 - ~~(3) use reasonable endeavours to promptly agree a plan with the QCA which sets out, in reasonable detail, the steps that DBCT Management and the Operator must take in order for DBCT Management to cease exercising its step in rights.~~
- ~~For the avoidance of doubt, DBCT Management must cease exercising its step in rights once the breach giving rise to DBCT Management's exercise of the step in rights has been remedied.~~
- ~~(f) If, pursuant to DBCT Management's exercise of its step in rights under the Operation & Maintenance Contract, DBCT Management proposes to engage a third party to carry out the 'Services' (as defined in the Operation & Maintenance Contract), DBCT Management must not engage the third party unless and until the QCA has approved that third party.~~
- (c) Any contract entered into by DBCT Management which replaces the Operation & Maintenance Contract must be approved by the QCA, including any associated amendments proposed to the Terminal Regulations.
 - ~~(h) DBCT Management acknowledges that the QCA may audit, or request an audit in respect of, DBCT Management's compliance with this clause 3.3 pursuant to clause 9.5 and 9.6.~~

- (d) DBCT Management must, at least 18 months before the scheduled expiry of the Operation & Maintenance Contract, submit a draft amending access undertaking to the QCA for approval by the QCA in accordance with the QCA Act which specifies amendments that DBCT Management, acting reasonably, considers are required to be made to this Undertaking due to the expiry of the Operation & Maintenance Contract.
- (e) DBCT Management must not:
 - (1) terminate the Operation & Maintenance Contract;
 - (2) seek or permit the assignment of the Operation & Maintenance Contract; or
 - (3) permit a change in Control of the Operator,unless a draft amending access undertaking has been approved by the QCA in accordance with the QCA Act which specifies any amendments that DBCT Management, acting reasonably, or the QCA considers are required to be made to this Undertaking due to the termination or assignment of the Operation & Maintenance Contract or a change in Control of the Operator (as applicable).
- (k) ~~DBCT Management must not agree to amend or vary, or seek to amend or vary, the Operation & Maintenance Contract without seeking the prior written approval of the QCA.~~

3.4 — ~~Disclosure of Operation & Maintenance Contract~~

- ~~(a) — If any relevant stakeholder in the Dalrymple Bay Coal Chain wishes to understand how the Operation & Maintenance Contract operates, the stakeholder may give DBCT Management and the Operator a notice pursuant to this section 3.4(a) requesting a summary of the Operation & Maintenance Contract.~~
- ~~(b) — If DBCT Management receives a notice from a stakeholder in accordance with section 3.4(a) then DBCT Management will waive its rights under the Operation & Maintenance Contract in respect of confidentiality insofar as those confidentiality rights relate to the disclosure of a summary of the Operation & Maintenance Contract to the relevant stakeholder.~~

6 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.
- (c) **(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; and Access Seekers that have entered into a Funding Agreement or Underwriting Agreement with DBCT Management (**Funding Access Seekers**) ~~and Rail Operators~~ in relation to the proposed amendment; and
 - (2) ~~if~~ following the completion of such reasonable consultation, notify the Access Holders; and Funding Access Seekers ~~and Rail Operators~~ of:
 - (A) the wording of the proposed amendment; and
 - (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) 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.
- (d) **(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; and Funding Access Seekers ~~and Rail Operators~~ in accordance with Section 6(c)(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; and Funding Access Seeker ~~and Rail Operator~~ has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days after 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; ~~and~~ Funding Access Seeker ~~and Rail Operator~~ has given notice to DBCT Management objecting to consent being provided to the proposed amendments within 30 days after 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; ~~and~~ Funding Access Seeker ~~and Rail Operator~~ has given notice to DBCT Management objecting to consent not being provided, and the QCA has upheld that objection.
- (e) **(Consent of DBCT Management)** DBCT Management will only give its consent to a proposed amendment to the Terminal Regulations under Section 6(d)(2)(A) or 6(d)(2)(B) if it has conducted reasonable consultation with Access Holders; ~~and~~ Funding Access Seekers ~~and Rail Operators~~ in accordance with Section 6(c)(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 and Funding Access Seekers (should they become Access Holders) ~~or, where the relevant amendments relate to Rail Operators, applicable, amongst Rail Operators~~;
 - (3) the amendments are not inconsistent with this Undertaking, an Existing User Agreement or an Access Agreement; and
 - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.
- (f) **(Criteria for disputing refusal to provide consent)** If DBCT Management does not provide its consent to a proposed amendment to the Terminal Regulations, each Access Holder and Funding Access Seeker 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 and Funding Access Seekers (should they become Access Holders) ~~or, where the relevant amendments relate to Rail Operators, applicable, amongst Rail Operators~~;
 - (3) the amendments are consistent with this Undertaking, an Existing User Agreement or an Access Agreement; and
 - (4) the amendments are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory

standards, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

- (g) (Notice of amendments to Terminal Regulations) DBCT Management must notify the Access Holders and Funding Access Seekers of any amendments to the Terminal Regulations that have been approved by the QCA and will 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(i)).

(g) **(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; and Funding Access Seeker ~~and Rail Operator~~ objects to the proposed amendment on the basis that it reasonably considers that the criteria specified in 6(e)(1) to 6(e)(4) are not satisfied,

then the Access Holder; and Funding Access Seeker ~~and Rail Operator~~ 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; and Funding Access Seeker ~~and Rail Operator~~ (whether under Section 6(g)(1) of this Undertaking or any corresponding provision of an Access Agreement or an Existing User Agreement), the QCA determines in accordance with the process under Section 17.4(2) that the criteria specified in Section 6(e)(1) to 6(e)(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.

(h) **(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; and Funding Access Seeker ~~and Rail Operator~~ objects to DBCT Management not providing consent to the proposed amendment on the basis that it reasonably considers that the criteria specified in Section 6(e)(1) to 6(e)(4) are satisfied,

then the Access Holder; and Funding Access Seeker ~~and Rail Operator~~ may within 30 days after being notified of the amendments by DBCT

Management, 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 Access Holder; ~~and~~ Funding Access Seeker ~~and Rail Operator~~ (whether under Section 6(h)(1) of this Undertaking or any corresponding provision of an Access Agreement or an Existing User Agreement), the QCA determines that the criteria in Section 6(e)(1) to 6(e)(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.
- (i) **(Protection of DBCT Management)** Subject to DBCT Management complying with Section 6(d), 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(e). 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.
- (j) **(DBCT Management to make copies available)** DBCT Management must make a copy of the Terminal Regulations available to each Access Holder; ~~and~~ Funding Access Seeker ~~and Rail Operator~~ and the QCA (which may be by displaying it on DBCT Management's website).

9 Ring-fencing arrangements

9.1 Amended undertaking if need for ring-fencing arises

- (a) As at the Commencement Date, DBCT Management and its Related Bodies Corporate do not directly or indirectly have an interest in any Supply Chain Business that is connected to or uses the Terminal.
- (b) If DBCT Management or any of its Related Bodies Corporate directly or indirectly acquire an interest in a Supply Chain Business that is connected to or uses the Terminal, DBCT Management must within 30 days submit a draft amending access undertaking to the QCA which undertaking explains how DBCT Management will resolve the adverse impacts arising from that vertical integration (including protecting the confidentiality of information, avoiding discrimination and avoiding conflicts of interest).
- (c) The QCA will promptly consider a draft amending access undertaking submitted under Section 9.1(b) and consult with shareholders.
- (d) DBCT Management must submit an amending access undertaking which complies with the QCA's final decision on a draft amending access undertaking referred to in Section 9.1(c).

9.2 Non-discrimination

- (a) DBCT Management will not:
 - (1) engage in conduct for the purpose of preventing or hindering an Access Holder's or Access Seeker's Access;
 - (2) unfairly differentiate between Access Seekers and Access Holders;
 - (3) provide Access directly to a Supply Chain Business or a customer, or a person who is negotiating to become a customer, of a Supply Chain Business in relation to the provision of a service by the Supply Chain Business which relates to Access, on more favourable terms than the terms on which DBCT Management provides Access directly to other Access Seekers or Access Holders; or
 - (4) exercise rights or power (including the right to withhold consent) under an Access Agreement in relation to assignments or transfers of Access Rights or an Access Agreement for the purpose of benefiting a Supply Chain Business.

9.3 SCB Trading

- (a) As at the Commencement Date a Related Body Corporate of DBCT Management intends trading spare Terminal capacity.
- (a) DBCT Management:
 - (1) acknowledges that Trading SCBs may only acquire Access from Users and must not acquire, or seek to acquire, from DBCT Management any Access which DBCT Management has not previously granted to a User; and

- (2) will not grant, or seek to grant, to a Trading SCB any Access which DBCT Management has not previously granted to a User.
- (b) A complaint in respect of a breach of the requirements of this Section 9 by an entity within the Brookfield Group will be dealt with in accordance with Section 9.4.
- (b) DBCT Management must ensure that any Trading SCB gives the undertaking contained in Schedule I before that Trading SCB commences any activities related or connected to the trading of capacity at the Terminal.

9.4 Complaint handling

- (a) If an Access Holder, Access Seeker or other affected party considers that DBCT Management may have breached one or more of its obligations under this Section 9 they may lodge a written complaint with DBCT Management.
- (b) DBCT Management will provide to the QCA, as soon as practicable, a copy of any complaint it receives pursuant to Section 9.4(a).
- (c) DBCT Management will:
 - (1) investigate complaints received pursuant to Section 9.6(a); and
 - (2) advise the complainant and the QCA in writing of the outcome of that investigation and DBCT Management's proposed response, if any, and use reasonable endeavours to do so within 20 Business Days after receiving such a complaint.

Schedule I – 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; 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; or
- (b) unfairly differentiate between Access Seekers or Access Holders.

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 or the QCA 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

- (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

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 [] 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 Users;
- (b) aggregating contracted Access which Trading SCB has acquired from Users; and
- (c) selling the contracted Access which Trading SCB has acquired from Users to Access Seekers or Users.

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 any thing (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:

Signed sealed and delivered by [*Trading SCB name*] ACN [*number*]

Director/Secretary

Director

Name (please print)

Name (please print)

Confidentiality deed poll

[Trading SCB]

DBCT Management Pty Ltd

Table of contents

1	Definitions and interpretation	2
	1.1 Definitions	2
	1.2 Interpretation	3
2	Confidentiality	3
3	Permitted use and disclosure	4
4	Benefit of this deed poll	4
5	Return and destruction of information	4
6	Operation of this deed poll	4
7	Acknowledgment	5
8	Recipient to ensure others comply	5
9	Disclaimer	5
10	Governing law and jurisdiction	6
11	Waivers	6
	Signing page	7

Confidentiality deed poll

Date ►

This deed poll is
made by

Recipient **[Trading SCB]**
 ACN [number] of [address]
 (Trading SCB)

and

DBCT Management **DBCT Management Pty Ltd**
 ACN 097 698 916 of Level 15, 1 Eagle St, Brisbane QLD 4001
 (DBCT Management)

in favour of

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.

This deed poll witnesses as follows:

1 Definitions and interpretation

1.1 Definitions

The meanings of the terms used in this deed poll are set out below.

Term	Meaning
Capacity	up to <i>[insert]</i> mtpa of port capacity at Dalrymple Bay Coal Terminal
Confidential Information	<p>all information which:</p> <ol style="list-style-type: none">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;2 relates directly or indirectly to the Discloser or its past, existing or future business, operations, administration or strategic plans; and3 is in oral or visual form, or is recorded or stored in a Document, and includes, without limitation, the fact that:4 Confidential Information is being made available by the Discloser to the Recipient or the Specified Persons; and5 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.
Corporations Act	the <i>Corporations Act 2001</i> (Cth).
Discloser	<i>[Insert User alias]</i> .
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.
Dudgeon Point Project Management	Dudgeon Point Project Management Pty Ltd ACN 150 261 733.
Express Purpose	a possible transfer of all or part of the Capacity from the Discloser to the Recipient
Recipient	Trading SCB.
Specified Person	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.
- (d) Without limiting this clause 3, the Recipient and DBCT Management must not disclose or use the Confidential Information in any way that relates to Dudgeon Point Project Management or any proposed Dudgeon Point coal terminal development.

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

- (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

- (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

- (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.

Executed as a deed poll

Signed sealed and delivered by
[Trading SCB]
By:

sign here ► _____
Director/Secretary

print name _____

sign here ► _____
Director/Secretary

print name _____

Signed sealed and delivered by
DBCT Management Pty Ltd
By:

sign here ► _____
Director/Secretary

print name _____

sign here ► _____
Director/Secretary

print name _____

Schedule 3 – Mark-up of Standard Access Agreement

As discussed, in the body of the submission, the DBCT User Group has proposed a number of refinements to the Standard Access Agreement amendments proposed by the QCA in the QCA's Draft Decision.

A mark-up of a number of section 3.6, regarding Terminal Regulations, (compared to a version in which the QCA Draft Decision amendments are accepted) where the DBCT User Group's suggested amendments are more extensive is included in this Schedule.

In addition to that sections, the DBCT User Group also supports the following lesser amendments as appropriate to be made to other clauses.

2015 SAA Reference	Issue	Proposed Amendment
3.6	Terminal regulations	Equivalent changes to the terminal regulations provisions of the access undertaking
6.3(a)	Definition of TTCS for calculating HCV	<p>Replace the reference to 'Terminal' with 'relevant Terminal Component'</p> <p><i>(b) DBCT Management must:</i></p> <p><i>(1) not withdraw any draft amending access undertaking submitted in accordance with section 1.4(a) or section 1.4(b)(2); and</i></p> <p><i>(2) submit to the QCA a draft amending access undertaking which complies with the QCA's final decision on a draft amending access undertaking submitted in accordance with Section 1.4(a).</i></p> <p>Renumber section 1.4(b) and 1.4(c).</p>
7.3	Review of "user-pays" model	<p>Amend clause 7.3(b) as follows:</p> <p><i>(b) The Formula has no impact on:</i></p> <p><i>(i) ...</i></p> <p><i>(ii) ...; and</i></p> <p><i><u>(iii) the pricing of Tonnage in respect of each other Terminal Component; and</u></i></p> <p><i><u>(iiiiv)</u></i></p>
Definition of Terminal Regulations	Typographical error	Replace 'DCTM' with 'DBCT'