

Dalrymple Bay Coal Terminal User Group

Submission in response to Queensland Competition Authority Consultation Paper

28 October 2019



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1 Introduction

This submission is made on behalf of the Dalrymple Bay Coal Terminal User Group (the **DBCT User Group**), including for these purposes both users with existing access agreements and a number of future access seekers who have not currently contracted capacity, in response to the 4 October 2019 'QCA Consultation Paper – DBCT Management's Executed Deed Poll' (the **QCA Paper**).

The QCA Paper seeks further submissions in respect of:

- (a) whether the implementation of the Deed Poll and access framework on their terms, combined with the threat of declaration, would be sufficient to constrain DBCT Management Pty Ltd's (**DBCTM**) conduct in the absence of declaration—such that access (or increased access) as a result of declaration would not promote a material increase in competition in the coal tenements market; and
- (b) whether DBCTM has demonstrated by its actions following the draft recommendation, including by putting in place the \$3 price cap, that the threat of declaration is a constraint on DBCTM's ability to exercise market power.

We acknowledge that the QCA Paper expressly notes that it is framed on the assumption that the Deed Poll is an appropriate part of the counterfactual (with the Queensland Competition Authority (**QCA**) not yet having determined its view on that issue). For the reasons noted in the DBCT User Group's previous submissions and supporting legal advice, we continue to consider that is not an appropriate assumption. However, as requested by the QCA Paper, the submission below responds on the basis of that assumption.

The DBCT User Group considers that it has clearly been demonstrated in the DBCT User Group's previous submissions (and supporting economic reports) that neither the threat of declaration or the price cap or other elements of the Deed Poll (even in combination) provide a sufficient constraint on DBCTM in the absence of declaration such that criterion (a) would not be satisfied.

However, the DBCT User Group has set out in this submission further analysis on each of the issues requested, including an additional annexed report from PricewaterhouseCoopers (**PwC**).

The DBCT User Group again thanks the QCA for its thorough analysis in its review to date and welcomes the opportunity to provide submissions to the QCA in respect of the QCA Paper.

2 Executive Summary

2.1 The threat of declaration (following revocation) will not be a constraint

It is absolutely clear that the 'threat' of declaration will not impose a constraint on DBCTM's behaviour in the absence of declaration.

That is the case because:

- (a) the prospects of re-declaration (if it is assumed that the current declaration review results in the declaration ceasing) must be extremely limited unless there is a fundamental change in circumstances;
- (b) it will be extremely difficult for a party exposed to monopoly pricing to determine whether the monopoly pricing will be sufficient to convince the QCA and Minister that criterion (a) would not be satisfied, and the extent of the reduction in price it might derive from regulated pricing;
- (c) there is significant time involved in seeking declaration, with re-obtaining a declaration likely to take at least 19 months and obtaining a regulated price following declaration likely to take approximately 3 years (even assuming no judicial review applications) – such that it could never be obtained in a time period which could resolve the competition issues facing potential tenements buyers or access seekers; and
- (d) there is significant cost involved in seeking declaration, particularly given that such costs would be borne by a single party or small number of parties and declaration would be stridently opposed by DBCTM.

All of those matters mean that the 'threat' of declaration will never be a credible threat, such that it will not constrain or influence DBCTM's behaviour.

In addition, as acknowledged in the Draft Decision, any re-regulated price that was determined would not have retrospective effect – so re-declaration can never rectify the competition harm caused in the tenements market during the absence of declaration.

2.2 Irrelevance of DBCTM actions following the Draft Decision

DBCTM's actions following the Draft Decision do not change that analysis or in any way evidence that the threat of declaration will be a constraint on DBCTM's exercise of market power where declaration has ceased.

That is the case because the threat of declaration is fundamentally far greater now during the declaration review process than what it will become if the declaration ceases.

DBCTM's response to the Draft Decision was evidently contrived in an attempt to avoid declaration being continued. For a profit maximising monopolist that is a rational response in the face of the highly credible threat of declaration that currently exists where the Draft Decision recommends declaration and (subject to the Minister agreeing with the QCA's analysis) the Minister has a right (without any further cost or material time delay) to declare the DBCT service. DBCTM would know in that scenario that seeking revocation in the future would also be more difficult without a fundamental change in circumstances. In other words, it is the very fact of an *existing declaration* which gives rise to this review and is constraining DBCTM's behaviour.

By stark contrast, if this review results in the declaration ceasing, the credibility of the threat of declaration will have completely evaporated. That follows because, after a decision to cease declaration in this review, any future threat of declaration will cease to be credible (and therefore cease to influence DBCTM's behaviour). That lack of credibility arises for all the reasons noted above (very limited prospects, difficulty of determining prospects, significant time and significant

cost). All of those factors make it completely impractical for declaration to resolve the issues faced by future tenements acquirers – and importantly for the QCA's assessment of criterion (a), are all factors which don't exist currently.

Consequently, it remains the case that the 'threat' of declaration is evidently not a constraint on DBCTM's exercise of market power in the likely future without declaration, and DBCTM's position is solely reliant on the bare terms of the Deed Poll.

2.3 Deed Poll (and asserted 'price cap') will not be a constraint

The bare terms of the Deed Poll evidently do not provide a sufficient constraint on DBCTM exercising its market power in the absence of declaration.

Previous DBCT User Group submissions have focused on the numerous reasons for that including not being legally effective, the absence of an independent regulator, reliance on litigation for enforcement and weakness/limited utility of the amendment framework. All of which eroded any protections the Deed Poll might otherwise be argued to deliver. This submission should be read in conjunction with all of those previous submissions.

However, this submission specifically addresses issues in relation to the theoretical price cap given the emphasis given to that in the QCA Paper.

The QCA Paper specifically focuses on the theoretical price cap of \$3 under DBCTM's Deed Poll being less than the \$3.50 that the QCA appears to have identified as the possible maximum extent of difference arising from differential pricing of incremental expansions.

However, the proposition that, with declaration, the differential pricing provisions would result in future users paying up to \$3.50 per tonne more than existing users:

- (a) fails to recognise the evidence of existing terminal capacity that will become available (including approximately 10 mtpa of existing terminal capacity which would be released with supply chain expansions and capacity arising from future non-renewals); and
- (b) consistent with the Draft Decision's finding that the relevant incremental expansions are likely to be socialised with declaration, does not reflect the likely outcome of the differential pricing provisions of DBCTM's undertaking when applied to the incremental expansions that may be required to meet foreseeable demand over the proposed declaration period (given the nature of those expansions as being highly integrated with the existing terminal and delivering benefits to both expansion and existing users, they are highly likely to be socialised with declaration).

Accordingly, it is clear that:

- (c) differential pricing is not the likely result with declaration – rather *the likely outcome with declaration is all users continuing to pay an identical price*; whereas
- (d) *the likely outcome without declaration is future users paying at least \$3/tonne more than existing users* (and potentially more due to uncertainty of the hypothetical QCA price and information asymmetry being greater for future users).

Extensive economic evidence has been presented in this submission and previous submissions, including through expert economic reports provided by PwC and Castalia regarding the substantial barrier that the asymmetric pricing treatment of future users creates for competition in the exploration and development coal tenements market. The approximately 10-20% (or closer to 30% difference depending on discount rates applied) lesser value of a tenement to a future user relative to an existing user or complete elimination of value for some projects (as shown in the PwC report in Schedule 1) will result in it being extremely challenging for efficient investors and developers in coal projects outside the existing users to acquire such tenements.

That clearly demonstrates that criterion (a) is satisfied even if it is assumed that the Deed Poll is an appropriate counterfactual, legally effective and enforceable (each of which would be contrary to expert legal advice provided to the QCA).

2.4 Overall conclusions

Given the lack of any credible threat of declaration and the substantially higher price which is likely to apply to future users (relative to existing users) without declaration even if it was assumed the Deed Poll would be given effect to, the DBCT User Group strongly believes that (even on the assumptions in the QCA Paper) it has been clearly demonstrated that criterion (a) is satisfied.

As criterion (b)-(d) are also clearly satisfied, the DBCT User Group strongly considers that it is appropriate for the QCA to maintain its recommendation from the Draft Decision that the DBCT coal handling service remain declared.

3 Threat of declaration not a sufficient constraint

3.1 Previous Submissions

The previous DBCT User Group submissions have raised the following key reasons as to why the 'threat' of declaration will not be a sufficient restraint in the absence of declaration (i.e. following a decision to revoke the declaration):

- (a) any perceived 'threat' will be much diminished to the point of not being credible to DBCTM in these circumstances where the declaration would (on this counterfactual) have already been revoked based on application of the same access criteria that would need to be satisfied to seek declaration;
- (b) there is significant time and cost involved in seeking declaration and which is likely to fall solely on one or a small number of future users, whom would have less resources available to them; and
- (c) even if declaration could ultimately be achieved, it would not rectify the anti-competitive harm that will have already occurred.

No evidence has been provided by DBCTM as to why those positions are not correct. Rather DBCTM simply asserts that it will voluntarily constrain its own behaviour due to the threat of declaration, without undertaking any analysis of whether it is credible for future tenement acquirers or access seekers to pursue that. This submission contains that detailed analysis.

3.2 QCA Draft Decision

The QCA Draft Decision has already analysed and rejected DBCT Management's assertions that the 'threat of declaration' provide an effective constraint on DBCTM's exercise of market power.

In particular the QCA Draft Decision noted:¹

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

In summary, the QCA's view is that the threat of declaration or regulation under the CCA would not constrain DBCT Management's conduct in the absence of declaration.

The DBCT User Group strongly supports the correctness of that analysis and considers nothing has occurred since the Draft Decision which would change that analysis (given that, as discussed in section 0 ,it is a complete fallacy to suggest that the threat of declaration which exists following the Draft Decision will continue in the absence of declaration).

However, the lack of retrospectivity is only one of many components that result in the theoretical ability to apply for declaration not being a sufficient constraint. That issue and the other key components are discussed in more detail further below.

3.3 Significant time and cost to obtain a declaration

Obtaining declaration of a non-declared service is a very lengthy and expensive process.

The current declaration review process (having commenced on 4 April 2018 and with both the steps of the QCA's final recommendation and Ministerial decision currently remaining) is illustrative of that position. DBCTM's conduct during this process also illustrates how DBCTM

¹ QCA, Draft Decision - Part C, page 77.

would be anticipated to react to an application for declaration made in the future – with literally thousands of pages of submissions, numerous economic reports and multiple strategic changes in position.

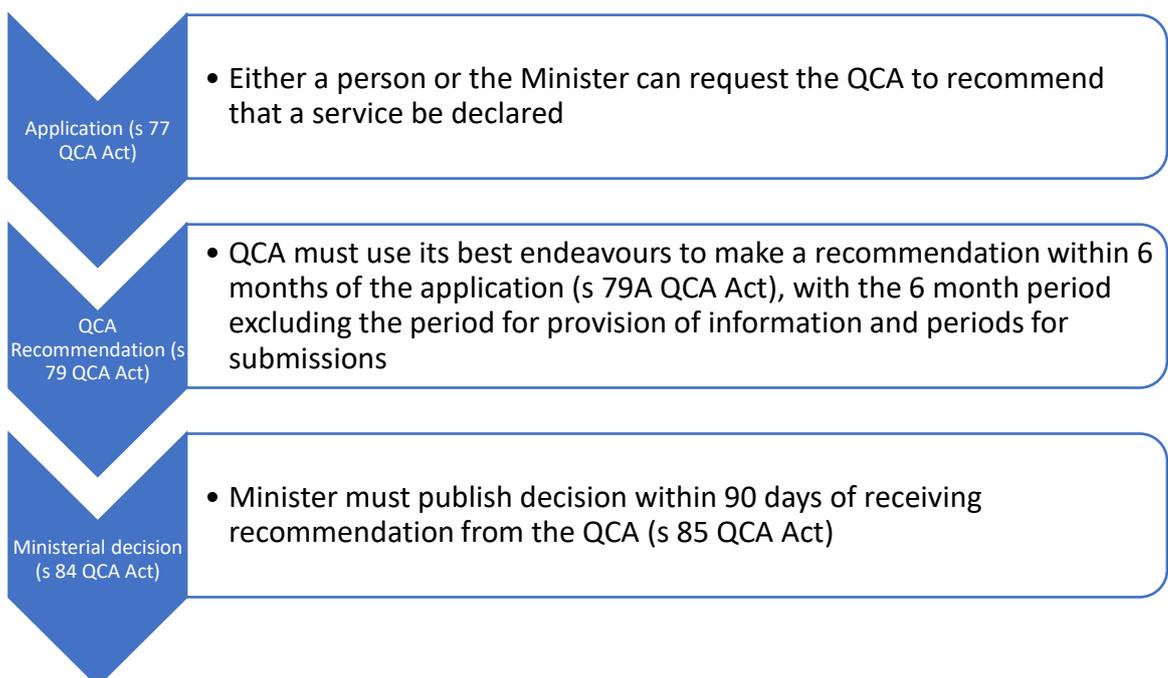
The number and extent of submissions, including detailed expert economic reports, economic and valuation modelling and legal advice presented during this declaration review, is clear evidence of the complex, costly and time intensive nature of considering whether the access criteria are satisfied in respect of a service.

By way of example, the DBCT User Group estimates that its total cost of external legal, economic and other technical advisers in the declaration review process to date have been well over ■■■■■■■■■■, without even taking into account the extensive investment of individual coal producers in terms of management, in-house legal time and engaging their own external advisers. Those costs have been exacerbated by the approach of DBCTM which is estimated to have very significantly out-spent the DBCT User Group and has made extensive arguments to seek cessation of the declaration. DBCTM has also made the process lengthier and costlier by making major changes to its positions (and even ceasing certain aspects of its business) during the process. Those are the challenges that a future potential applicant for declaration would know was ahead of them in the event of seeking declaration.

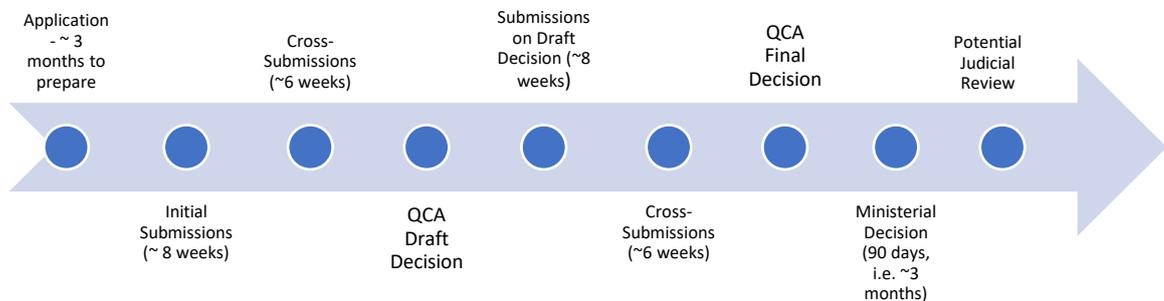
That magnitude of costs has been able to be funded by the DBCT User Group throughout this process as the costs of this process have been able to be shared across the industry. However, in the absence of declaration, a future user would effectively stand alone. It is also a very different proposition to incur this magnitude of costs for DBCT User Group members (some of who are major mining houses and all of which are either in production or anticipating being in production) as opposed to future buyers in the tenement market, who are seeking to acquire a speculative exploration and development tenement years before they would be in production.

3.4 Approximate 19-month timeframe to obtain declaration

The concern about the time to obtain a declaration is not simply an assertion. It is a clear outcome of how the declaration process operates under the *Queensland Competition Authority Act 1997 (Qld)* (the **QCA Act**). To obtain a declaration a stakeholder would need to go through the following steps:



If one assumes that the QCA would follow a fairly typical process and timing for submissions that would result in an indicative timeframe of this type:



In other words that would result in approximately a 19-month timeframe, even assuming:

- (a) there is no information requests outside of the submission process; and
- (b) there is no judicial review applications in respect of the Minister's decision.

However, it has also become clear in this declaration review process that the application of the access criteria to the DBCT service will involve legal interpretation of the access criteria and other matters of law. DBCTM's submissions are littered with numerous unjustified assertions that any legal interpretation they disagree with is an error of law.

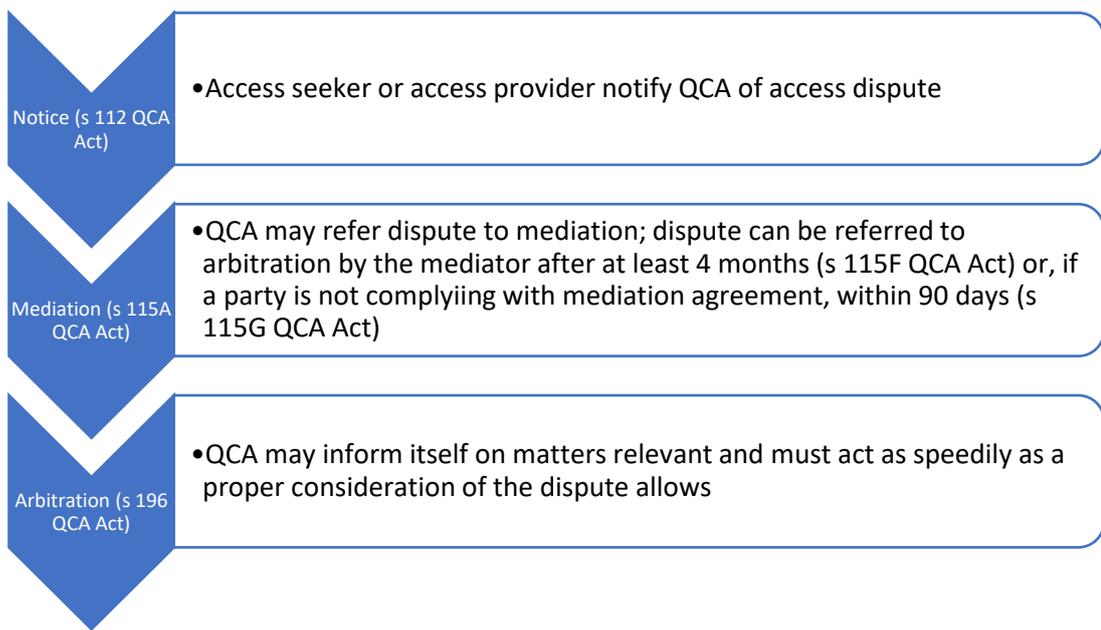
Consequently, there is a high likelihood of a party aggrieved by the ultimate Ministerial Decision to bring judicial review proceedings in the Supreme Court as well (similar to challenges on points of law which occurred in the Newcastle shipping channel declaration process). Those proceedings can then be appealed further as a matter of right to the Court of Appeal. Any such process would be likely to add at least a year or two (if not longer) to the timeframe before a declaration would occur.

However, reaching that stage of the process would still only get to the point of declaration – not to a regulated price which would prevent DBCTM from engaging in monopoly pricing.

3.5 Even more delay to obtain regulated price

To return to the current position of having a regulated price (which is when DBCTM actually becomes truly constrained) would require first declaration and then second, either bringing an access dispute or the QCA requiring production of an access undertaking, as discussed below.

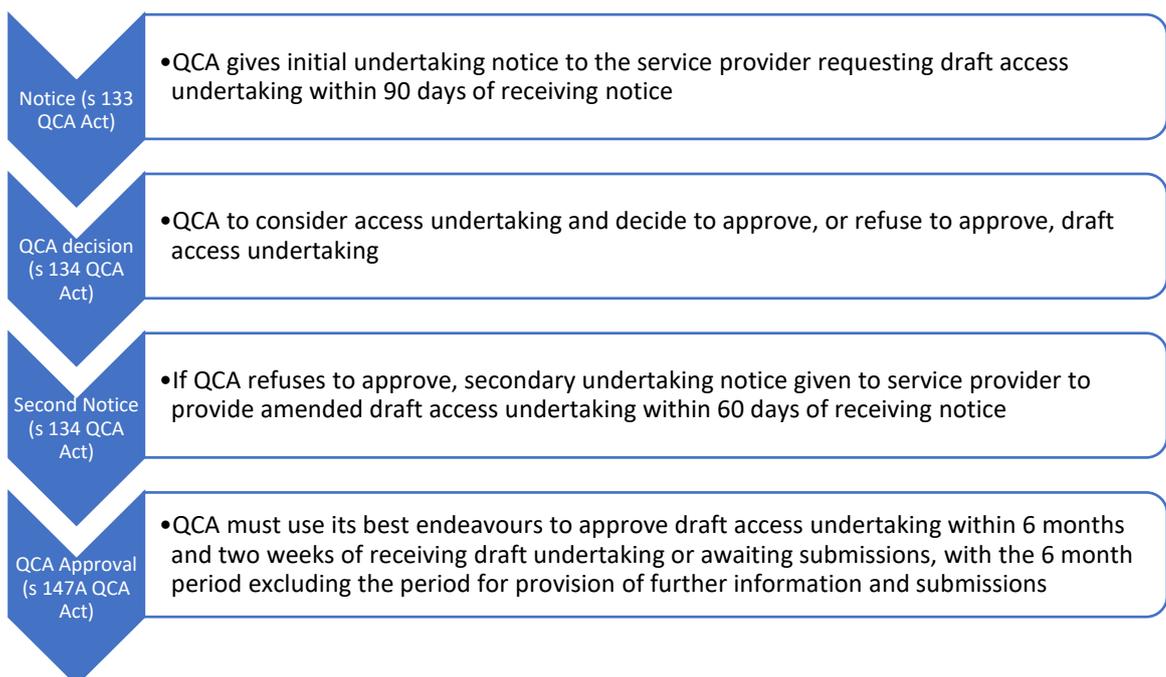
Under the QCA Act, an access dispute follows a process like the below:



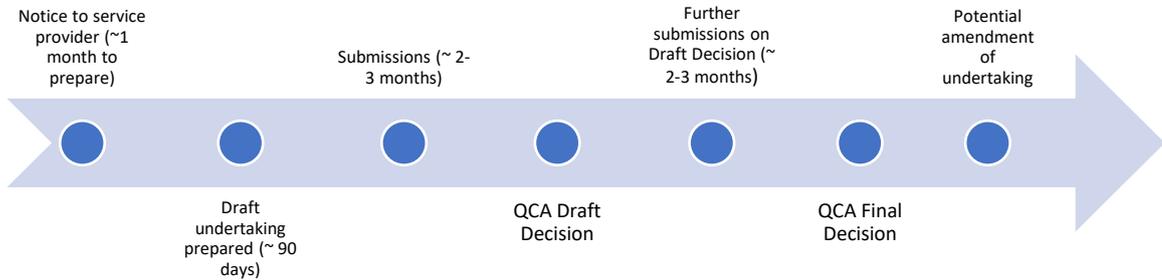
It is impossible to anticipate the complexity of the issues forming the basis of a dispute, or the time required for the QCA to sufficiently inform itself about relevant matters and then release its findings. However, it is likely to be a dispute about (at least) an efficient price – such that there is no real reason to think that it would take less time than the QCA takes in determining reference tariffs in an undertaking process.

However, a review of arbitrations undertaken by the Australian Competition and Consumer Commission (the **ACCC**) (in deciding access disputes for declared/regulated services) revealed that, from the date of the initial dispute notice through to the ACCC's findings being published, required a timeframe of approximately a range of 21 to 32 months.

Alternatively, under the QCA Act, to request an access undertaking (which the future user would be seeking to contain reference tariffs), the QCA and service provider would need to go through the following steps:



If one assumes that the QCA would follow a fairly typical process, that would result in an indicative timeframe like the following (even assuming the minimum periods for submission – despite the fact that the QCA has traditionally provided service providers significantly longer):



Such a process would result in a timeframe of approximately 16 months (beyond the initial period to achieve declaration) to reinstate an undertaking, assuming no extensions or other consultation is required.

Overall, the DBCT User Group estimates that potential access seekers could reasonably be said to face approximately 3 years or more before being able to operate with the regulated price (even excluding the timing for initial failed negotiations prior to any dispute or undertaking being sought).

3.6 Examples of Declaration Timing under National Access Regime

There are no real examples in Queensland of the time taken to obtain a declaration, such that the above estimates, based on the statutory time frames and past QCA practice, are the best indications available.

However, it is also clear that the indicative timelines noted above are a reasonable estimate when they are compared to the experience of the time taken from application to declaration under the national access regime in Part IIIA of the *Competition and Consumer Act 2010* (Cth). A snapshot of the time to declaration for some of the major declaration applications under the national access regime is set out in the below table.

Infrastructure service	Time from application to declaration
Robe rail access / Hammersley rail access	9 ½ months
Goldsworthy rail access	11 ½ months
Port of Newcastle shipping channel	1 year 1 month
Sydney sewage services	1 year 9 months
Sydney airport airside services	3 years 1 ½ months

If you assume a reasonable period (such as 3 months) to prepare an application for declaration, then you end up with the indicative 19-month timeline for the QCA Act declaration process being close to the median of the above national access regime experiences.

However, those time frames only tell part of the picture. For example, the Pilbara rail access disputes were beset by further appeals and legal challenges after the declaration was obtained. In the case of Robe and Hammersley it took over 5 years for those to be finally resolved (and that resulted in the declaration ceasing). The DBCT User Group considers that sort of additional

lengthy series of disputes would be most reflective of the likely timeframe for finalising proceedings in relation to declaration of the service provided by DBCTM. This is particularly the case given how strenuously any attempt to re-declare the DBCT service will be opposed by DBCTM.

A more detailed review of applications made under the national access regime and the time periods to declaration is set out in Schedule 2 to demonstrate this point.

3.7 No retrospective application

Another reason those lengthy time frames are deeply problematic is, as discussed in the Draft Decision, that even if it is assumed that a declaration can be obtained and that a regulated price could be obtained after that, any regulated outcome will only apply from the point of that decision. That is, declaration and any arbitrated price or reference tariff will not come with retrospective application.

Importantly that means:

- (a) the anti-competitive impacts on markets that occurs in the absence of declaration will have already occurred, and will not be instantly undone;
- (b) the monopoly profits that DBCTM makes through monopoly pricing in the interim would be retained by DBCTM – such that it remains profit maximising to undertake such a strategy (and to fight and delay any attempt to seek regulation and regulated pricing);
- (c) future tenement buyers and users will know that they will be facing years of monopoly pricing before any outcome can be achieved, which is likely to change the value proposition and their ability to compete for a tenement even if they were to naively assume they could somehow achieve declaration and regulated pricing in the future.

3.8 Significant cost would be borne by a single/fewer applicants at a time it would be unaffordable

As discussed above, the costs of seeking declaration will be highly material, particularly where they are likely to be borne by one or a small group of future users.

Consequently, the cost benefit analysis for a future user seek declaration is far less favourable than for the DBCT User Group engaging in the current declaration review process.

In addition, at the point of seeking access and being confronted with DBCTM's monopoly pricing, a future user:

- (a) may well have no operating project cash flow available under which it can fund the declaration application (unlike the position of the DBCT User Group in this declaration review); and
- (b) may not be certain of development of its tenement/project – which again makes the cost/benefit analysis far less favourable than for existing producers in this process.

Even more to the point (as discussed in detail in section 3.11 below), given that the competition impact takes effect most evidently at the time of a potential future user considering acquiring a Hay Point catchment coal tenement, the costs are well in excess of the anticipated transaction costs for acquiring such a tenement, and would have to be incurred at a time when the potential acquirer was not even certain of acquiring the tenement.

Accordingly the costs alone are likely to make seeking declaration unviable for many future users.

3.9 Uncertainty of whether access criteria would be satisfied/exact extent of benefits from regulated pricing

In respect of the DBCT service, another key reason that the 'threat' of declaration is not credible is that unlike a refusal to supply access, or clearly discriminatory treatment by a vertically integrated operator favouring its own operations, it will be far from clear to an access seeker when pricing is so high that criterion (a) would be anticipated to be satisfied.

That is the case because criterion (a) addresses the environment and opportunities for competition *in the market*. The impact on a single stakeholder is not sufficient on its own to evidence that.

The individual future access seeker cannot be assumed to have sufficient information, resources and economic advice to be able to clearly assess the impact on the market in the way that it would be required to assess, with any reasonable level of certainty, the prospects of criterion (a) being satisfied based on DBCTM's conduct.

Even if the future access seeker can somehow determine whether it has prospects of demonstrating the access criteria are met – it would also need to have sufficient certainty as to the regulated pricing levels that will be achieved, in order to consider the costs and benefits of seeking declaration.

As a result of both types of uncertainty, and the time and cost issues already identified, DBCTM will clearly understand that it will be able to 'get away with' monopoly pricing.

3.10 Extremely limited prospects of succeeding

Following a Ministerial decision to revoke or cease the declaration, any future user is going to be highly sceptical about their prospects of obtaining a future declaration.

This will not be like the Port of Newcastle shipping channel proceedings, where the access criteria changed after the initial declaration proceedings to make a different result more likely.

Rather, in the hypothetical 'without declaration' environment the Minister (and presumably the QCA) will have made a finding that (despite extensive evidence to the contrary presented by the DBCT User Group and individual users and potential future access seekers) that the access criteria were not satisfied.

That is despite the fact that it is plainly evident now that DBCTM will engage in monopoly pricing without declaration.

Based on the Draft Decision, such a finding would be necessarily reliant on the view that, where DBCTM would otherwise satisfy the access criteria, it can unilaterally contrive obligations to impose upon itself which do the minimum required to change that position.

It follows that, for a future user to feel confident that it has any prospect of successfully achieving re-declaration, both:

- (a) DBCTM would need to engage in truly outrageous and egregious misuses of market power; and
- (b) DBCTM would not upon being confronted with a declaration application simply try to implement a new deed poll / access framework which undertook not to engage in behaviour of that sort in the future.

Therefore, the DBCT User Group finds it very difficult to image a scenario where anyone would consider there to be good prospects of declaration following a decision to cease/revoke the declaration in this review.

3.11 Declaration is not a viable strategy for tenement acquirers

The above is not a theoretical analysis.

As the Draft Decision appropriately recognises, criterion (a) is satisfied because, in the absence of declaration, DBCTM as a profit maximising monopolist will have incentives to increase prices to future users beyond the point that the asymmetry of pricing between existing and future users will create a material hindrance to future user's ability to compete in the Hay Point catchment coal exploration and development tenements markets.

Consequently, it is not at the point of being an access seeker that the impact on competition will be felt, but at the point of a potential future user competing for or considering competing for coal exploration and development tenements in the Hay Point catchment market.

Perhaps the best way of demonstrating the reality of why it is that the 'threat of declaration' is not a constraint, is best considered by reference to how such a 'threat' would be viewed by a potential future buyer of tenements in that market.

It is absolutely clear that for a potential tenement buyer in that position, who cannot compete effectively because of the future higher charges they will face being charged from an unregulated DBCTM, seeking declaration is not a viable strategy

That is clear because:

- (a) **Insufficient time:** The potential tenement acquirer will be seeking to acquire a tenement in a mergers and acquisition process or in a government acreage release tender process. Neither of those processes will extend for anywhere near long enough for obtaining a declaration in time to be viable, despite the potential tenement acquirer requiring declaration in order for the value of its bid to be competitive with that of existing users. It will not be viable to make offers to acquire the tenement conditional on declaration, as vendors will prefer to accept offers without such a condition, and it will not be viable to assume declaration can be subsequently sought at the point of seeking access (for the reasons set out in section 3.12 below).
- (b) **Excessive cost:** Exploration and development tenements are inherently speculative, and it is not certain they could be developed when the bid is submitted or that the potential acquirer will even succeed in their bid to acquire the tenement – such that even if declaration was successful the tenement acquirer might not receive the fruits of that success. In that context, a potential tenement buyer is clearly not going to, on their own, commit to spending millions of dollars (well in excess of any likely transaction costs for the acquisition) to try to obtain declaration. Such an outlay would also be extremely harmful to the value proposition for any such investment. As such, it will not be possible for a potential acquirer in that position to justify the costs which would be involved in seeking declaration.
- (c) **No new evidence/extremely limited prospects of success:** The potential tenement acquirer will not have even arrived at the point of being an access seeker faced with a monopoly price from DBCTM – such that any application for declaration will simply be relitigating the application of the access criteria that (in this hypothetical counterfactual) was already determined against access seekers in the declaration review despite this very competitive harm being squarely identified. Therefore, it has to be assumed any such application would have no real prospects of success.
- (d) **Uncertainty of benefits:** A major difficulty for a new potential buyer in the Hay Point catchment is that at the time of making the bidding decision for a tenement they will have real difficulty in ascertaining the financial benefits they may derive from seeking

declaration (even assuming it was successful). That is particularly likely to be the case for such a new buyer – who would not have experience with the previous regulated access arrangements, the cost profile of the terminal, or be a shareholder in the user owned operating company.

That is, in the very dependent market in which the Draft Decision found criterion (a) to be satisfied, seeking declaration is not a viable strategy for overcoming the barrier to entry the absence of declaration creates. DBCTM will obviously be aware that there is no credible threat, and will, as a rational profit maximising monopolist, not change their behaviour when the threat is entirely theoretical.

Accordingly, it is clear that the theoretical ability to seek re-declaration will not resolve the competitive harm arising in the absence of declaration and does not impose a constraint.

3.12 Declaration is not a viable strategy for access seekers

The only answer to the above, would be an assertion that at the time of bidding for a tenement, the potential tenement acquirer would assume it was a viable strategy to seek declaration if they were faced with monopoly pricing in the future at the point of being an access seeker.

It is however, again, absolutely clear (and will be absolutely clear to a potential tenement buyer) that seeking declaration is not a viable strategy for a future access seeker in those circumstances.

That is clear because:

- (a) **Insufficient time:** The potential access seeker will be seeking terminal access in parallel with obtaining approvals, negotiating land access, operational tenement development and other logistics contracting. These matters cannot be put on hold for the time it would take to obtain a declaration (and obtain a regulated price), and other contractual counterparties will not be willing to enter arrangements conditional on declaration or regulated pricing being achieved.
- (b) **Excessive cost:** Even at the point of being an access seeker, the access seeker is unlikely to have made a final investment decision in development of the tenement/project. Where they have not done so, it is highly unlikely that it would be economically rational for them to commit to the substantial costs, which would be borne on their own, in order to seek declaration.
- (c) **Extremely limited prospects of success:** As noted earlier in this submission, the potential access seeker will not possess the requisite information to determine with sufficient certainty that the price DBCTM is proposing to charge for terminal access is an abuse of market power, which could lead to criterion (a) being satisfied and therefore declaration having reasonable prospects of success. Notably, the assessment of whether criterion (a) has been satisfied does not depend on whether an individual access seeker is worse off under asymmetrical pricing (which it of course will be), but whether the monopoly pricing implemented by DBCTM is sufficient to materially worsen the opportunities and environment for competition in the tenements market. In the absence of truly extreme behaviour by DBCTM, a potential access seeker will never be in this position.
- (d) **Uncertainty of benefits:** In addition, future access seekers will have real difficulty in ascertaining the financial benefits they may derive from seeking declaration (even assuming it was successful). That is particularly likely to be the case for such a new buyer – who would not have experience with the previous regulated access arrangements, the cost profile of the terminal, or be a shareholder in the user owned operating company.

3.13 Conclusions

It follows from the above analysis that:

- (a) the extensive time to obtain declaration (and further delay to obtain regulated pricing);
- (b) the substantial costs to obtain declaration (and further cost to obtain regulated pricing);
- (c) the uncertainty that will face potential tenement acquirers and future access seekers about their prospects of achieving declaration;
- (d) the uncertainty that will face potential tenement acquirers and future access seekers about the extent of the improvement in pricing that would result from regulated pricing;
- (e) the extremely limited prospects of success given what will have been determined by the QCA and Minister for the declaration to have ceased in the first place;

mean that the theoretical opportunity to seek declaration under the QCA Act in response to DBCTM's future exercise of market power:

- (f) is not a realistic or likely response from an access seeker; and
- (g) accordingly, is not a 'credible threat' of the type that would be needed to incentivise DBCTM to constrain its exercise of market power.

In addition, the lack of retrospective application of any subsequently applied regulated pricing also means that the anti-competitive harm arising from DBCTM's actions in the face of the existing declaration review, motivated by the current declaration reveal nothing about what their incentives will be in the absence of declaration when the threat of a swiftly returned declaration will have evaporated.

Accordingly, it is clear that the threat of declaration, either alone or together with the Deed Poll, does not provide an effective constraint on DBCTM's exercise of market power, and the Draft Decision's conclusion that criterion (a) is satisfied remains absolutely appropriate.

4 DBCTM's conduct since the Draft Decision does not demonstrate a constraint

The DBCT User Group acknowledges that DBCTM has changed its position since the Draft Decision.

However, the DBCT User Group strongly disagree with any suggestion that DBCTM's actions following the Draft Decision evidence that the threat of declaration will be a constraint on DBCTM's exercise of market where declaration has ceased.

Seeking to equate DBCTM's response now to their likely response in the future in the absence of declaration is a deeply misplaced analogy.

That is the case because the threat of declaration that DBCTM is faced with (and therefore how they are incentivised to react) is fundamentally different now during the declaration review process to what it will become if the declaration is ceased.

4.1 Current threat of declaration

The DBCT User Group acknowledges that DBCTM's response to the Draft Decision, including amendments to the form of its Deed Poll, was evidently contrived in an attempt to avoid declaration being continued. The entire concept of the Deed Poll was also evidently contrived to avoid declaration.

DBCTM has said as much in their submissions through this process.

For a profit maximising monopolist, that is a rational response in the face of the highly credible threat of declaration that currently exists where the Draft Decision recommends declaration and (subject to the Minister agreeing with the QCA's analysis) the Minister has a right (without any further cost or material time delay) to declare the DBCT service.

DBCTM would also know in that scenario that seeking revocation in the future would be very difficult without a fundamental change in circumstances, and would involve significant time.

In other words, it is the very fact of an *existing declaration* which gives rise to this review, the Draft Decision and the impending prospect of a further 10 year declaration being determined in the near term that is motivating DBCTM's behaviour.

4.2 Threat of declaration evaporates following a decision to cease declaration

By stark contrast, if this review results in the declaration ceasing, the credibility of the threat of declaration will have completely evaporated.

To understand why that is, it is important to keep in mind that, for the 'threat' of declaration to be effective in constraining DBCTM's behaviour (hypothetically, after an initial decision to cease the declaration had been made in this review) it requires more than just a theoretical pathway to achieving declaration under the QCA Act. Rather, it requires that the stakeholder or stakeholder(s) impacted by the exercise of market power would realistically be likely to seek declaration as a viable strategy to resolve DBCTM's exercise of market power, and be likely to succeed in achieving re-declaration. Only then would DBCTM be incentivised to constrain its exercise of market power based on taking the 'threat' of declaration into account.

However, there is no likelihood of either declaration being a viable strategy or it succeeding in those circumstances – such that the 'threat' of declaration is not credible. That lack of credibility arises for all the reasons noted in section 3 of this submission – namely:

- (a) the extensive time to obtain declaration (and further delay to obtain regulated pricing);
- (b) the substantial costs to obtain declaration (and further cost to obtain regulated pricing) – which would have to be borne by a single or small group of potential future users alone;

- (c) the uncertainty that will face potential tenement acquirers and future access seekers about their prospects of achieving declaration;
- (d) the uncertainty that will face potential tenement acquirers and future access seekers about the extent of the improvement in pricing that would result from regulated pricing; and
- (e) the extremely limited prospects of success given what will have been determined by the QCA and Minister for the declaration to have ceased in the first place.

All of those factors make it completely impractical for declaration to resolve the issues faced by future tenements acquirers and future access seekers, and therefore make it highly unlikely that a tenement acquirer or access seeker would seek declaration.

However, importantly for the QCA's assessment of criterion (a) – those factors do not currently exist – which is why DBCTM's conduct since the Draft Decision cannot be the appropriate measure of whether the future 'threat' of declaration would constrain DBCTM's behaviour in the absence of a pre-existing declaration.

The stark difference between the credibility of the threat of declaration to DBCTM in the two scenarios is illustrated below:

	Threat of declaration being continued currently (i.e. Following Draft Decision)	Threat of re-declaration after a decision to cease declaration
Time to declaration	Reasonable to anticipate a QCA recommendation in 2019 and Ministerial decision no later than the first quarter of 2020.	Reasonable to anticipate a process of 19 months to seek to obtain a final decision from the Minister on whether the service should be declared and approximately 3 years to obtain regulated pricing (with potential for further delays with judicial review applications).
Cost to achieve declaration	The DBCT User Group has clearly indicated the ability and willingness to fund submissions in this review to support the declaration being continued.	Highly unlikely a future tenement acquirer or future access seeker would be able to, or consider it was worthwhile, to fund significant costs of seeking declaration alone.
Uncertainty of prospects	Given how extensively ventilated all of the issues relevant to the access criteria have been in submissions, and the detail in the Draft Decision, stakeholders can make clear assessments of the likelihood of declaration.	No real way of future tenement acquirers or future access seekers being able to assess (outside any review process) whether the access criteria would be met – as their only reference point will be the treatment they individually receive.
Uncertainty of improvement (i.e. what regulated pricing will be)	Relatively certain – given the terminal is currently regulated.	The more time passes, the less certain the QCA administered price will become (both because the QCA will review its approach over time and because the cost and operations of the terminal will change over time).

Prospects of success	The Draft Decision recommended declaration. The DBCT User Group has presented compelling submissions and expert evidence which demonstrate the access criteria are satisfied. DBCTM's response to the Draft Decision occurred in the context of a likely outcome of continued declaration if DBCTM maintains its position.	Following a decision to cease declaration, there would a need to be a fundamental change of circumstances to consider that declaration would be likely to succeed.
Retrospective Application	Not an issue as no break in declaration given the review is conducted before expiry of the declaration.	Any declaration and reintroduction of regulated pricing cannot resolve anti-competitive harm and monopoly pricing that has already occurred.

4.3 Conclusions

Accordingly, it is clearly established in the above analysis that:

- (a) the 'threat of declaration' will evaporate and cease to be a constraint if the current declaration ceases as the result of this review; and
- (b) DBCTM's conduct following the Draft Decision cannot be used as evidence of how they will react to the 'threat of declaration' if this review ceases the declaration – given the fundamentally different credibility that threat has in that situation.

It follows that in order for the QCA to determine that criterion (a) is not satisfied, it would be reliant on the bare and ineffective terms of the Deed Poll imposing a sufficient constraint (and each of the assumptions noted in the QCA Paper about the Deed Poll).

For the reasons set out below, the DBCT User Group considers it is very clear that the bare terms of the Deed Poll do not impose a sufficient constraint on DBCTM's exercise of market power.

5 Lack of Constraints Imposed by the Deed Poll and Access Framework

5.1 Overview of issues previously identified

The substantial difficulties with the Deed Poll and access framework have been explained in significant detail in the DBCT User Group's previous submissions and supporting legal advice from Brian O'Donnell QC and Allens.

However, by way of a summary of the key points which have already been raised in detail by the DBCT User Group (even leaving aside the issues of legal effectiveness and inappropriateness of having regard to it) noted in the QCA Paper:

- (a) the Deed Poll does not operate in favour of buyers of coal tenements in the Hay Point catchment (as they are not within the class of beneficiaries noted in the Deed Poll)² – such that for example they have no rights under the amendment regime until they actually become an access seeker which may be years later after which amendments adverse to their interests can have been made in the interim;
- (b) in relation to the key protection DBCTM relies on, the price cap is highly uncertain, as it involves an addition above a hypothetical QCA price that cannot be determined with any precision because the QCA's methodology is not permanently fixed and is a determination of what is appropriate at the time. Because of the degree of uncertainty in what a hypothetical QCA price will be:
 - (i) the 'floor' from which the price cap is determined is more akin to a range, with DBCTM as a profit maximising monopolist being incentivised to argue the hypothetical QCA price is at the top of the range – such that, in practice, due to that uncertainty and information asymmetry being greater for future users, the difference in price between existing and future users will not be capped at \$3/tonne; and
 - (ii) largely as a result of the impossibility of defining the price cap with precision, is not legally enforceable (noting the clear legal advice to that effect from Brian O'Donnell QC);³
- (c) there are numerous practical difficulties in enforcing the Deed Poll and Access Framework, and significant restrictions on the remedies available (even if you assume, contrary to legal advice from Brian O'Donnell QC and Allens, that it is legally effective), which means that there is no real prospect of enforcement and therefore no real incentive for DBCTM to comply – noting particularly:
 - (i) the absence of an independent regulator who, with declaration, has statutory powers to gather information for monitoring compliance and take enforcement action (as exists currently) such that non-compliances are harder to detect and the only way to achieve compliance is through individual stakeholders having to assume the significant burden of legal costs of enforcement action;
 - (ii) even if enforcement action was successfully able to be taken (which the DBCT User Group highly doubts), there is nothing stopping DBCTM engaging in repeated breaches other than, again, individual stakeholders having to assume further burdensome litigation;⁴ and
- (d) the amendment framework is so weak (and so easily gamed by DBCTM given the wide discretion they have to make amendments and the lack of available remedies other than

² DBCT User Group Cross Submission, 29 May 2019 at 78

³ DBCT User Group Cross Submission, 29 May 2019 at 81-83 and Schedule 8

⁴ DBCT User Group Cross Submission, 29 May 2019 at 83-84.

affected individual stakeholders bringing further litigation) that it provides no certainty as to the future terms of access.⁵

The combination of those issues makes it clear that, in practical terms, the Deed Poll and Access Framework will be ineffective in restraining DBCTM's ability to exercise market power.

The likely state of the market without declaration needs to be considered in these practical terms – not based on a fanciful future where DBCTM voluntarily acts as a benevolent monopolist who foregoes profit against its own interests by not taking advantage of the weaknesses, loopholes and bargaining position that the Deed Poll provides. That is clearly the case where, as discussed in detail in sections 3 and 4 above, there is no credible threat of declaration – such that the bare terms of the Deed Poll would need to constrain DBCTM alone, in a way they clearly do not.

The DBCT User Group strongly believes that the issues noted above alone, clearly demonstrates that the Deed Poll does not provide a sufficient constraint. However, the QCA Paper appears to focus heavily on DBCTM's asserted \$3 price cap as a key element of the alleged constraint the Deed Poll imposes (and the QCA's suggestion that a \$3.50 difference applying to differentially priced expansion users would not impact on competition), such that this submission focuses principally on that issue.

5.2 Not appropriate to assume that declaration will result in differential pricing of incremental expansions

The QCA Paper indicates that the QCA Draft Decision observed⁶ that an access charge that exceeded the prevailing access charge by \$3.50 per tonne would not appear to have a material effect on competition in the coal tenements market in a future without declaration based on the proposition that *'if in a future with declaration, DBCT expansion costs were priced on an incremental differential basis, the resultant regulated terminal infrastructure charge (TIC) would likely be higher by that amount for new users relative to the TIC that would apply to existing users'*.

First, it should be noted that the Draft Decision expressly stated that the QCA's view was that differential pricing would not be applied, noting that (even considering the highest estimate of expansion costs that were available without seeking to assess the prudence of those expansions costs):

Based on the information available to the QCA, it would appear that a differentiated access charge may not apply for the expansion projects required to meet foreseeable demand.⁷

No evidence has been provided during the declaration review to justify the QCA forming a different view, and, for the reasons set out below, the DBCT User Group strongly consider that remains the appropriate conclusion

Second, the suggestion in the passage quoted in the QCA paper appears to be that if one makes the following three assumptions:

- (a) there will never be any surplus capacity in the existing terminal which can be contracted, such that all capacity contracted by future users will necessarily have to be expansion capacity;
- (b) differential pricing will definitely apply to future incremental expansions at DBCT; and
- (c) the application of differential pricing will result in an increase in the TIC of at least \$3.50/tonne to future users,

⁵ DBCT User Group Cross Submission, 29 May 2019 at 85-88 and Schedule 8.

⁶ Draft Decision, Part C, 86.

⁷ Draft Decision, Part C, page 86.

then it follows that both with and without declaration the higher pricing facing future users will be much the same, such that criterion (a) cannot be satisfied.

However, none of those three underlying assumptions are justified, such that making a finding on criterion (a) on that basis of those assumptions will lead to a clearly incorrect and inappropriate outcome.

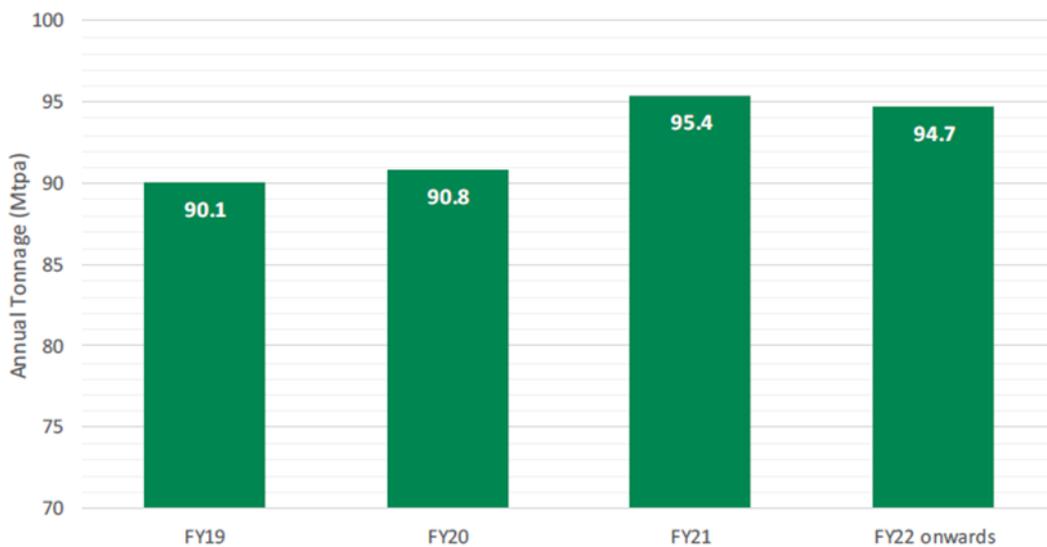
The flaws in those three key assumptions are analysed below.

5.3 False Assumption 1 – The existing terminal has no surplus capacity

As has been discussed at significant length in previous DBCT User Group submissions, the terminal itself has far more capacity than has been contracted to date, because contracting is (under the undertaking) restricted to the lower of terminal or system capacity.

Modelling published by the Integrated Logistics Company Pty Ltd (*ILCO*) indicated that terminal capacity will in fact be more than 10 mtpa higher than currently contracted capacity – as shown in an extract from the ILCO report below:

Figure 4 DBCT Existing Terminal Capacity Estimates¹



Consequently, if demand for that terminal capacity exists, incremental rail expansions would be anticipated to be developed in order to raise system capacity to enable that terminal capacity to be accessed. Resolving this difference between terminal and supply chain capacity is, of course, the very reason that industry is largely supportive of the proposed changes to the Aurizon Network access undertaking to introduce independent capacity assessments and greater obligations in relation to developing more below rail capacity.

There are also avenues for other existing terminal capacity (which is automatically socialised) becoming available. For example, it has become evident during this declaration review that [REDACTED]

[REDACTED]. There also remains the potential for other access holders to not renew some of the capacity they hold, creating the potential to make available more capacity within the existing terminal.

DBCTM's contract position (as shown below in a diagram extracted from their 2019 Master Plan), shows a significant amount of capacity up for renewal during the declaration period.

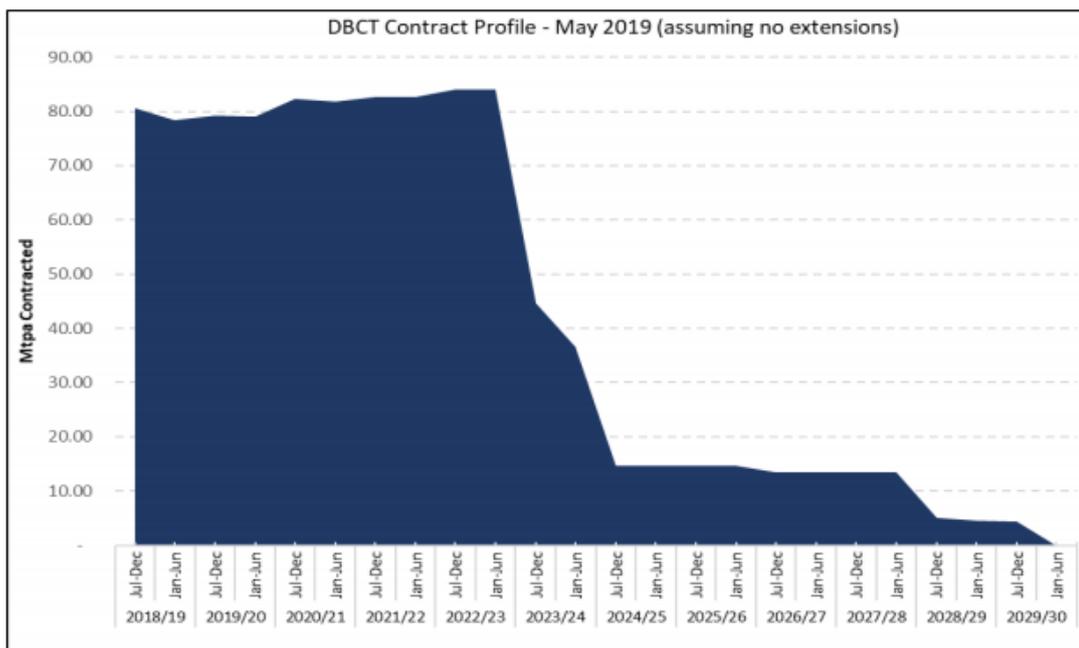


Figure 9: Contractual Position May 2019

While the DBCT User Group considers that the vast majority of this capacity will be renewed by existing users for use on existing and future projects, it seems possible that some capacity could become available or alternatively, that if there was a suspicion that differential pricing might be applied that more marginal access seekers would wait in the queue until existing terminal capacity became available. That alternative seems realistic, given the current context where, despite DBCTM's constant assertions of demand for expansion capacity, no access seeker has contracted expansion capacity through this declaration review, and instead a significant queue remains.

It is clear under the undertaking that costs will be socialised for that surplus capacity in the existing terminal once it is available, such that for at least the next 10 mtpa of terminal capacity (and for any non-renewed capacity) it would be anticipated that future users would, with declaration, face exactly the same pricing as existing users.

5.4 False Assumption 2 – All incremental expansions will definitely be differentially priced

(a) Undertaking provisions regarding when expansions are socialised

The assumption, which seems to have been made in the passage quoted from the Draft Decision in the QCA Paper, that incremental expansions will definitely be differentially priced with declaration is at odds with the provisions of DBCTM's undertaking (see clause 11.13(c)), and how they are likely to apply to the proposed incremental expansions that are actually proposed by DBCTM.

The Draft Decision expressly acknowledged that the QCA's view was that differential pricing would not be applied, noting that (even considering the highest estimate of expansion costs that are available without seeking to assess the prudence of those expansions cost):

Based on the information available to the QCA, it would appear that a differentiated access charge may not apply for the expansion projects required to meet foreseeable demand.⁸

⁸ Draft Decision, Part C, page 86.

However, for completeness, the DBCT User Group has carefully considered how the existing undertaking provisions regarding these issues would be applied to the incremental expansions that DBCTM now proposed.

Clause 11.13(c) of DBCTM's existing undertaking provides (our emphasis added):

A Cost Sensitive Expansion may be treated as forming part of the Existing Terminal (and therefore, not treated as a Differentiated Expansion Component) where circumstances exist that justify Socialisation. In determining whether there are circumstances that warrant Socialisation, consideration shall be given to:

- (1) the materiality of the increase in the Existing Terminal's Reference Tariff that would be affected by socialising the Cost Sensitive Expansion;***
- (2) the extent to which assets or infrastructure the subject of the Cost Sensitive Expansion will operate wholly or partly, in an integrated way with the Existing Terminal or as a stand-alone development;***
- (3) the extent to which the Cost Sensitive Expansion is likely to benefit users of the Existing Terminal (for example, such as through higher efficiency, reliability or flexibility of the Existing Terminal);***
- (4) any differences in the risks of providing Access to users of the Existing Terminal in respect of additional Terminal Capacity created by the Cost Sensitive Expansion; and***
- (5) any other factor that the QCA considers relevant.***

It is acknowledged that there may be circumstances in which parts and not the whole of a Cost Sensitive Expansion may be Socialised.

That is, clause 11.13(c) clearly provides for socialisation of a 'cost-sensitive expansion' (that would increase tariffs if socialised) where that is justified taking into account other matters such as the cost increase being less material, the extent of integration with the existing terminal, likely benefit to existing users, differences in risk and other factors the QCA considers relevant. In addition, that clause expressly acknowledges that it is possible for parts of such an expansion to be socialised.

No economic or other evidence has been provided by any stakeholder in this declaration review process to date to support the proposition that the application of the 'Expansion Pricing Principles' as set out in clause 11.13(c) would result in differential pricing for all incremental expansions.

The DBCT User Group strongly considers that, when regard is had to the nature of the next incremental expansions proposed by DBCTM, the likely outcome with declaration is that all incremental expansions required to meet foreseeable demand during the declaration period will be socialised.

(b) Application to proposed incremental expansions

DBCTM's recently published 2019 Master Plan suggests that the following now represent the next four incremental expansions at DBCT:

Expansion Step			Scope	Incremental Capacity	
Within Footprint	New	Old			
	8X	Phase 1	SL4 on Berth 3	New Shiploader 4 on Berth 3 plus outloading debottlenecking	4.3
		Phase 2	8X Phase 1	Stockyard Augmentation Project (SAP) plus upgrade of Stacker ST2 and conveyors S5, S6A, S6, R1 and R2	2.7
		Phase 3	8X Phase 2	Rail Receiving Pit 4 & Inloading System 4 plus upgrade to Inloading 2 and Outloading 2	3.3
		Phase 4	Zone 4	Completion of Row 8, vertical western wall, replacement of Reclaimer RL2 with a new Stacker Reclaimer to suit the new row 8 configuration, a new stacking conveyor and a new Stacker to the west of Row 8.	3

It is notable that all 8X phases are within the terminal footprint, operate in integrated ways with the existing terminal and mostly involve upgrades or replacements of existing capital assets and equipment which will need to be updated or replaced as non-expansion capital expenditure in due course even if the expansions did not proceed.

Shiploader 4 – Phase 1, 8X

The next incremental expansion is said to be 4.3 mtpa of capacity delivered by the installation of a new shiploader (shiploader 4) on existing Berth 3 plus debottlenecking of the outloading process.

As the DBCT User Group understands this proposal, based on the 2019 Master Plan,⁹ it would be:

- (i) the lowest cost per tonne of capacity created expansion option;
- (ii) highly integrated with the existing terminal – given it is wholly within the existing terminal footprint and merely involves installing a new shiploader on an existing terminal berth and various debottlenecking measures in respect of the existing terminal;
- (iii) would benefit existing users through a 4% increase in overall shiploader availability, removing other current constraints on outloading availability and reducing long term capacity outages particularly in relation to shiploader replacements or major refurbishments; and
- (iv) would involve no difference in risk to providing access to the existing terminal (in fact it is likely to involve less risk due to the reliance on newer equipment); and
- (v) should reduce operating and maintenance costs per tonne through newer equipment.

Consequently, based on the information provided by DBCTM to date, it seems highly likely to be an expansion that would be socialised under the Expansion Pricing Principles even if the average costs increased to some extent, such that with declaration it is highly likely that existing and future users would pay the same TIC for capacity created by this expansion.

Stockpile Augmentation Project and Stacker Upgrade - Phase 2, 8X

The second incremental expansion is said to be 2.7 mtpa of capacity delivered by including vertical concrete walls to Bunds 1 and 3 to increase stockyard storage volume plus a series of minor upgrades to existing machines and systems.

⁹ DBCT 2019 Master Plan, 40-42.

As the DBCT User Group understands this proposal based on the 2019 Master Plan,¹⁰ it would be:

- (i) more attractive from a cost/benefit perspective because a significant component of the cost (the replacement of Stacker 1) has already been committed as a non-expansion capex project;
- (ii) highly integrated with the existing terminal – given it is wholly within the existing terminal footprint and merely involves higher walls to allow greater volumes to be stockpiled in the existing stockpile area, plus minor upgrades to existing parts of the terminal. The Master Plan in fact states that: 'The infrastructure provided in SAP [Stockpile Augmentation Project] will operate in a wholly integrated way with the existing facility';
- (iii) would provide benefits to existing users through the higher stockpile capacity upgrades benefiting all users given the cargo assembly mode of operations – with the Master Plan describing efficiency gains in the existing coal chain by allowing parcels to be sourced from more mine loadouts and accommodated in the stockyard at any one time and reducing peaking congestion;
- (iv) would involve no difference in risk to providing access to the existing terminal (in fact it may involve less risk due to the upgrades involves); and
- (v) should reduce operating and maintenance costs per tonne through the equipment upgrades.

Consequently, based on the information provided by DBCTM to date, it seems highly likely to be an expansion that would be socialised under the Expansion Pricing Principles even if the average costs increased to some extent, such that with declaration it is highly likely that existing and future users would pay the TIC for capacity created by this expansion.

Replacement of Inloading System IL1 (with IL4) and Upgrades of IL2, Outloading System 2 and Shiploader SL 2, Phase 3, 8X

The third incremental expansion is said to be 3.3 mtpa of capacity delivered by the combination of replacement of an inloading system with a new higher capacity system, upgrades to another inloading system, and upgrades to an outloading system and shiploader.

As the DBCT User Group understands this proposal based on the 2019 Master Plan,¹¹ it would be:

- (i) highly integrated with the existing terminal – given it is wholly within the existing terminal footprint and has a substantial component involving upgrades of existing systems. The Master Plan in fact states that: 'The facilities proposed for the 8X Phases 2 and 3 projects are also wholly integrated into the existing facility and are in no way separable in operation';
- (ii) would provide benefits to existing users through the higher loading and outloading rates (which will improve supply chain capacity more generally);
- (iii) would involve no evident difference in risk to providing access to the existing terminal (in fact it may involve less risk due to what the upgrade involves); and
- (iv) should reduce operating and maintenance costs per tonne through new and upgraded equipment.

¹⁰ DBCT 2019 Master Plan, 42.

¹¹ DBCT 2019 Master Plan, 42-48

Zone 4, Phase 4, 8X

The fourth incremental expansion is said to be the previous 'Zone 4' expansion, involving 3 mtpa of capacity delivered by the expansion of existing stockyard Row 8 and the provision of a vertical walled bund (Bund 7) to increase stockyard capacity, with changes in how rows 7 and 8 are operated with the benefit of a new stacker and new reclaimer.

As the DBCT User Group understands this proposal based on the 2019 Master Plan,¹² it would be:

- (i) highly integrated with the existing terminal – given it is wholly within the existing terminal footprint and has a substantial component involving upgrades of existing systems. The Master Plan in fact states that: 'The infrastructure provided in Zone 4 will operate in a wholly integrated way with the existing facility, meaning that existing Users will necessarily have the same access to the facilities built as part of this expansion as expanding Access Seekers';
- (ii) would provide benefits to existing user through the higher stockpile capacity (which will benefit all users given the cargo assembly mode of operations) and higher loading and outloading rates (which will improve supply chain capacity more generally). There will be particular benefits to existing users to providing dedicated stockpiles for selected high volume products – which has the potential to materially reduce demurrage for producers of such products; and
- (iii) would involve no evident difference in risk to providing access to the existing terminal; and
- (iv) should reduce operating and maintenance costs per tonne through the new equipment.

9X

The DBCT User Group acknowledges that the treatment of the 9X Expansion is uncertain given the far less detailed understanding DBCTM and other stakeholders have about the design of such an expansion, the higher costs involved and the anticipated less integrated nature of that expansion.

However, the DBCT User Group notes that, as discussed in previous submissions, credible demand forecasts did not suggest 9X was required to meet foreseeable demand (particularly when the existing terminal capacity discussed in section 5.3 is taken into account).

Even if notionally a 9X expansion was developed, that would only impact on a very small amount of future demand (as most, if not all, such demand should be met by existing terminal capacity and the various phases of the 8X expansions noted above) – such that any uncertainty about the potential future treatment of 9X does not change the fact that, with declaration, the vast majority (if not all) of future users would be likely to face the same price as existing users.

(c) DBCTM clearly intends for all incremental expansions to be socialised

The DBCT User Group also specifically notes that DBCTM has made it very clear that it considers at least all of the 8X Expansions should be socialised and has suggested that it may only proceed with incremental expansions that are socialised. It would be completely inconsistent with all of DBCTM's conduct to date to find that differential pricing was an automatic outcome with declaration.

For example, DBCTM's previously commented in its 11 July 2016 submission to the QCA regarding the differential pricing regime in the current access undertaking that: *'DBCTM*

¹² DBCT 2019 Master Plan, 48-51

anticipates applying to the QCA for a departure from the default in the case of the majority of 'Cost Sensitive' expansions'.

That submission is consistent with DBCTM's stance in subsequent discussions with users that it considers that the next series of incremental expansions (at least prior to 9X) are all appropriate to be socialised.

In DBCTM's recently released 2019 Master Plan, it was reiterated by DBCTM that:¹³

DBCTM understands that all of the 8X Phase 1, 2, 3 & 4 expansions fall into the category of Cost Sensitive Expansions as defined by the 2017 AU in Section 11.13(b). However these expansions are fully integrated, may have the effect of lowering Handling Charges per tonne, and potentially improve overall efficiency and risk to existing Users.

That passage clearly addresses the criteria which can justify socialisation (as discussed above) and indicates DBCTM's unequivocal view that socialisation would be justified for the 8X expansions.

DBCTM also goes on to state in the Master Plan that:¹⁴

Differential pricing, by comparison, necessarily requires both lessee and project financiers of any expansion to underwrite their investment purely on the basis of the capacity of the Access Seeker to meet their commitment to the post-expansion access charges. In an environment where future developments are likely to be incremental in nature, there is a strong likelihood that these charges will be supported by only one, or perhaps two, Access Seekers. Where these Access Seekers have high creditworthiness, the project may still be bankable, provided longer term take-or-pay contracts were negotiated to effectively return DBCTM's capital during the term of the contract. **However, if the Access Seekers have lower creditworthiness, it is highly unlikely that either the lessee or potential financiers would accept the related risk and the project would not proceed.**

These issues will need to be considered by DBCTM before deciding whether to proceed past FEL2.

That is, DBCTM is foreshadowing seeking to refuse to proceed with development of non-socialised expansions.

(d) Conclusions on the appropriate 'with and without' comparison

What is very clear from the above is that the likely outcome for all foreseeable demand during the declaration period is that it will be met by socialised capacity – whether it is ultimately provided by existing terminal capacity or incremental expansions.

If anything, that is becoming more clearly the case as coal prices continue to weaken and projections of foreseeable demand fall, making users less and less likely to agree to access in a potentially differentially priced expansion.

Therefore, the DBCT User Group strongly rejects the assumption that the TIC to be paid by all future users with declaration should be assumed to be higher than for existing users.

That is not supported by any evidence or analysis of how the Expansion Pricing Principles would operate in practice. It is in fact contrary to both the DBCT User Group and DBCTM's expectations, and based on the analysis above appears highly unlikely to occur.

¹³ DBCT 2019 Master Plan, 51

¹⁴ DBCT 2019 Master Plan, 54

Accordingly, the appropriate comparison remains between the opportunities and environment for competition in the Hay Point catchment coal exploration and development tenements market where:

- (i) without declaration, the price charged for the DBCT service to future users is likely to be at least \$3/tonne (if not more) higher than that charged to existing users; and
- (ii) with declaration, the price charged for the DBCT service to future users is likely to be identical.

Given the materiality of the \$3 price differential (discussed in further detail in section 5.6 and the PwC Report) the analysis in the Draft Decision remains entirely correct and appropriate – namely that that asymmetric treatment is sufficient for declaration to promote a material increase in competition in the Hay Point catchment coal tenements market.

5.5 False assumption 3 – Differential pricing would result in an increase of at least \$3.50/tonne to future users

As discussed above, the provisions of DBCTM's access undertaking provide for socialisation where justified, and partial socialisation of incremental expansions.

(a) Partial socialisation

Even if it is assumed that an incremental expansion would be differentially priced to some extent (contrary to all evidence the DBCT User Group and DBCTM have actually provided), the DBCT User Group considers it is very clear that much of the costs of the incremental expansions are likely to be socialised.

In particular, a review of DBCTM's 2019 Master Plan demonstrates very clearly that many of the incremental expansions include components that will clearly have to be undertaken as non-expansion capital expenditure (**NECAP**) – such as new shiploaders, new stackers, new conveyors, upgrades to existing machinery and systems if the expansion does not proceed in the near future.

That is, much of the costs of these expansions, are in fact attributable to the same upgrades and sustaining capital that is necessary to keep the operating and maintenance costs for the terminal at prudent and efficient levels and retain the capacity of the terminal at 85 mtpa while maintenance is occurring on aging equipment.

The DBCT User Group members who are shareholders in the user owned operator confirm that the user owned operator is investigating capital requirements to keep the terminal at its existing capacity in the absence of expansions, and that there is a substantial overlap between those requirements and what DBCTM has classified as expansion investment.

One can see that this is in fact already occurring, where the replacement of Stacker 1 that was envisaged to form Part of the 8X, Phase 2 incremental expansion, in fact has already been invested in as a NECAP project.

The DBCT User Group consider it is likely that all of that type of expenditure would be socialised, given that it will be incurred irrespective of whether expansions are developed or not.

Insufficient details have been provided by DBCTM to stakeholders to allow modelling of any differential pricing on this basis. However, it is clear that any attempt to calculate differential pricing by reference to the capital costs in DBCTM's 2018 or 2019 master plan would significantly over-estimate the extent of likely increases, and be inconsistent with the likely application of the Expansion Pricing Principles in DBCTM's access undertaking.

(b) No modelling to support \$3.50 differentially price outcome

No significant economic analysis has been done during the declaration review to confirm that the \$3.50 is an accurate estimate of the likely increase (particularly in light of DBCTM materially changing its assessment of both the costs of incremental expansions through the declaration review process and the scope of the next incremental expansions in its recent Master Plan).

Even leaving aside the likelihood of full socialisation (discussed in section 5.4), the DBCT User Group notes that:

- (i) the level of costs for each expansion in DBCTM's master plans should not be used as the basis for determining the extent of differential pricing that is likely because:
 - (A) as discussed in section 5.5(a) above, they are largely made up of NECAP that is likely to be socialised, such that the true expansion component may actually cease to be a 'Cost Sensitive Expansion' or only involve a very small differential;
 - (B) they are described by DBCTM itself in its 2019 Master Plan as 'indicative' and 'concept level only' with 'target accuracy in the range of -25% to +35% at 80% confidence intervals'
 - (C) they have never been subjected to any scrutiny of the type that would apply before inclusion in the regulatory asset base, such that they are highly likely to be overstated and (as the DBCT User Group has noted many times in the context of criterion (b) if DBCTM estimates of this type are going to be relied on to make a finding that a criterion is not satisfied then scrutiny first needs to be applied to these estimates); and
 - (D) it is difficult to have any confidence in DBCTM's estimates of expansion capacity when they have changed dramatically during this declaration period in what appears to clearly be self-serving ways;
- (ii) the extent of any future price increase attributable to differential pricing varies depending on:
 - (A) the extent of incremental expansions that are required (which is influenced by both demand and the availability of existing terminal capacity); and
 - (B) whether multiple of the incremental expansions are developed together (as would presumably happen if demand matched to a number of these expansions) or whether they are developed individually.

The DBCT User Group considers that there is no evidence before the QCA from which the QCA can be satisfied that it is appropriate to assume that the likely outcome with declaration (even assuming some degree of differential pricing) is a \$3.50 increase to future users.

The analysis below (and in the last cross-submission from the DBCT User Group) – which clearly evidences that a \$3/tonne pricing differential will materially and adversely impact on competition in the Hay Point catchment coal exploration and development tenements market, would surely also be a relevant factor the QCA would consider in determining whether socialisation of an incremental expansion should occur. That is, the DBCT User Group considers it is highly unlikely that the QCA would consider it appropriate (in the context of DBCT remaining a declared service), applying differential pricing where that would result in a price differential which it had been provided clear evidence would cause a competition impact in the Hay Point catchment coal exploration and development tenements market.

5.6 Impact of the \$3 / tonne differential for future users with and without declaration

It follows from the earlier analysis in this section 5, that the likely outcome with declaration is socialisation (i.e. identical pricing for existing and future users).

The Draft Decision found that without declaration, DBCTM would act as a profit maximising monopolist and increase prices to the point at which the cost to a Goonyella user of access alternatively coal terminal capacity (most likely at WICET) was just more expensive. Even adopting all of the most favourable assumptions to DBCTM about the Deed Poll, the likely outcome without declaration is therefore capping the price differential between existing and future users that would otherwise arise without declaration to the lesser \$3/tonne differential.

DBCTM has sought to assert on a number of occasions that a \$3/tonne differential will not be material, on spurious grounds like the proportion that forms of the metallurgical coal price.

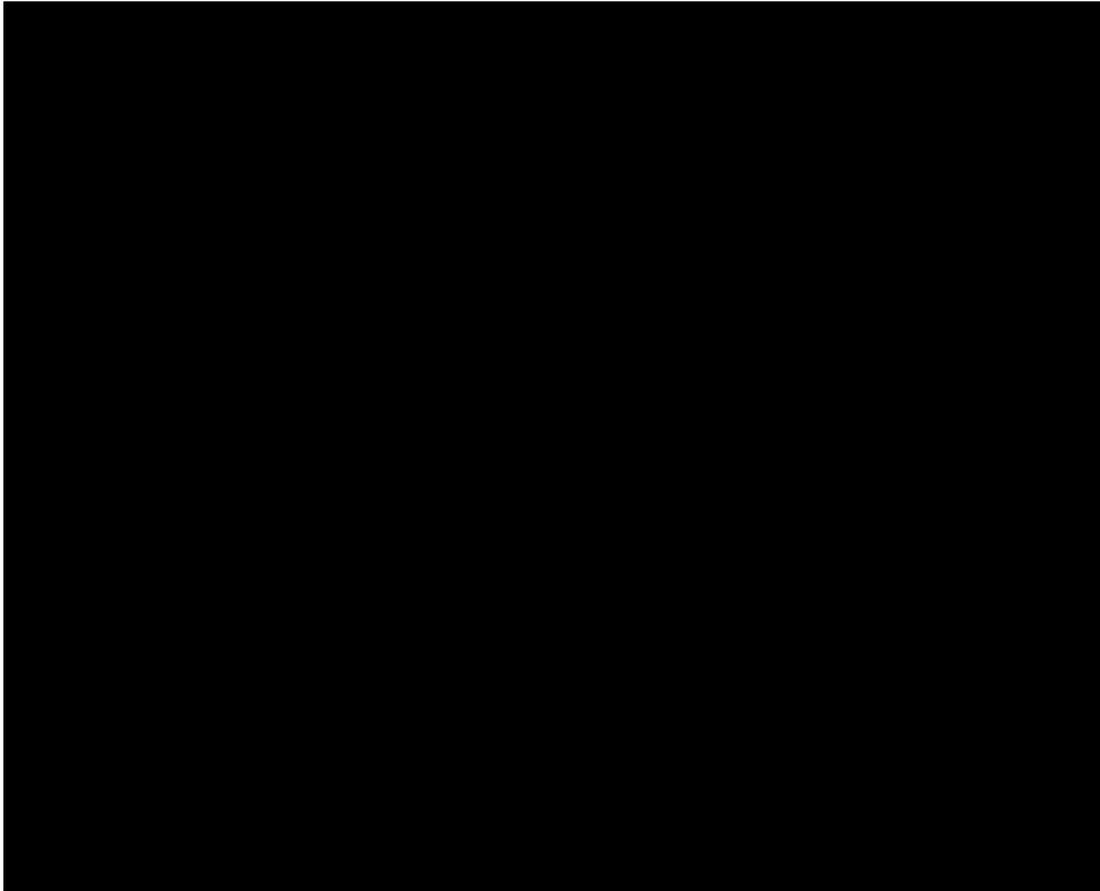
However, to state the obvious, the value of tenements to a mining company are based on the ability to generate profits. Consequently, the issue has never been about the proportion the price differential is of the coal price, but how material such a difference is to the profit margin that a coal producer can derive from a tenement (through the development of a coal project based on that tenement).

Schedule 1 to this submission contains further detailed modelling from PwC which demonstrates clearly how materially this difference in margin between existing and future users impacts on the value each category of user will place on the same Hay Point catchment coal tenement.

PwC has modelled the impact on the value a future user can place on a Hay Point catchment coal tenement, by reference to 12 different coal development projects in the Hay Point catchment (being [REDACTED]

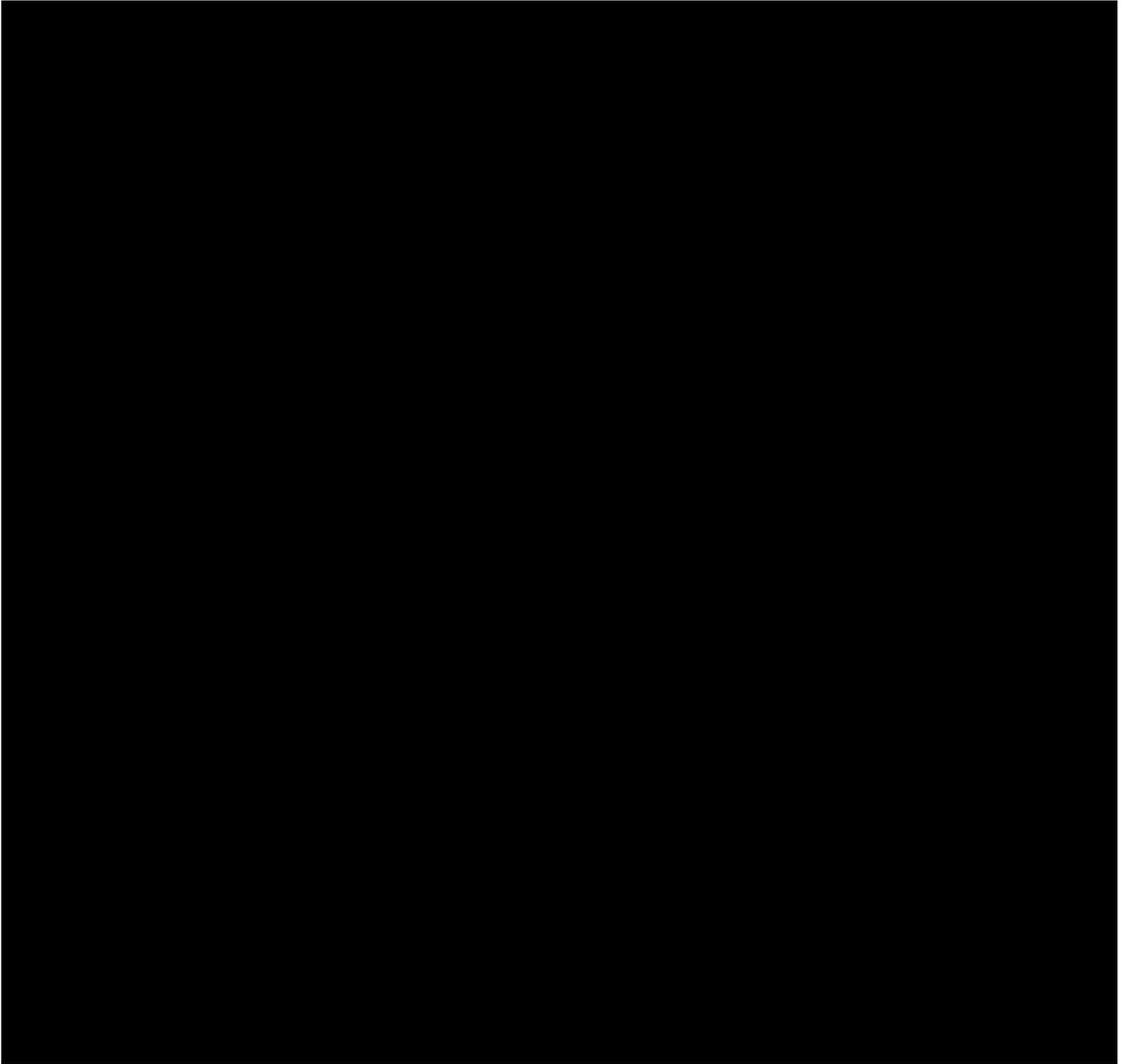
[REDACTED]). In each case, PwC's modelling utilises Wood Mackenzie estimates for the production profile, revenue and other costs for those projects, and then shows how the \$3/tonne TIC increase impacts on the value of the project to a future user relative to an existing user who is not subjected to that increase.

As shown in the diagram below, a \$3/tonne price increase, has a material impact on a coal project's profitability (typically in the range of 5-10% of a project's operating margin). As the PwC report describes it: *'The values represent the proportion of each project's operating margin that is 'stripped away' by the additional TIC'.*



Unsurprisingly \$3/tonne less margin, over millions of tonnes of production over the life of a mine, has a very substantial impact on the value of a project. This is demonstrated in diagrams below, which are based on employing the discounted cash flow valuation model used by industry participants, to show how that difference directly translates into a material difference in the value of each project to an existing user (who can utilise their existing user agreement) or a future user (who is exposed without declaration to monopoly pricing by DBCTM).

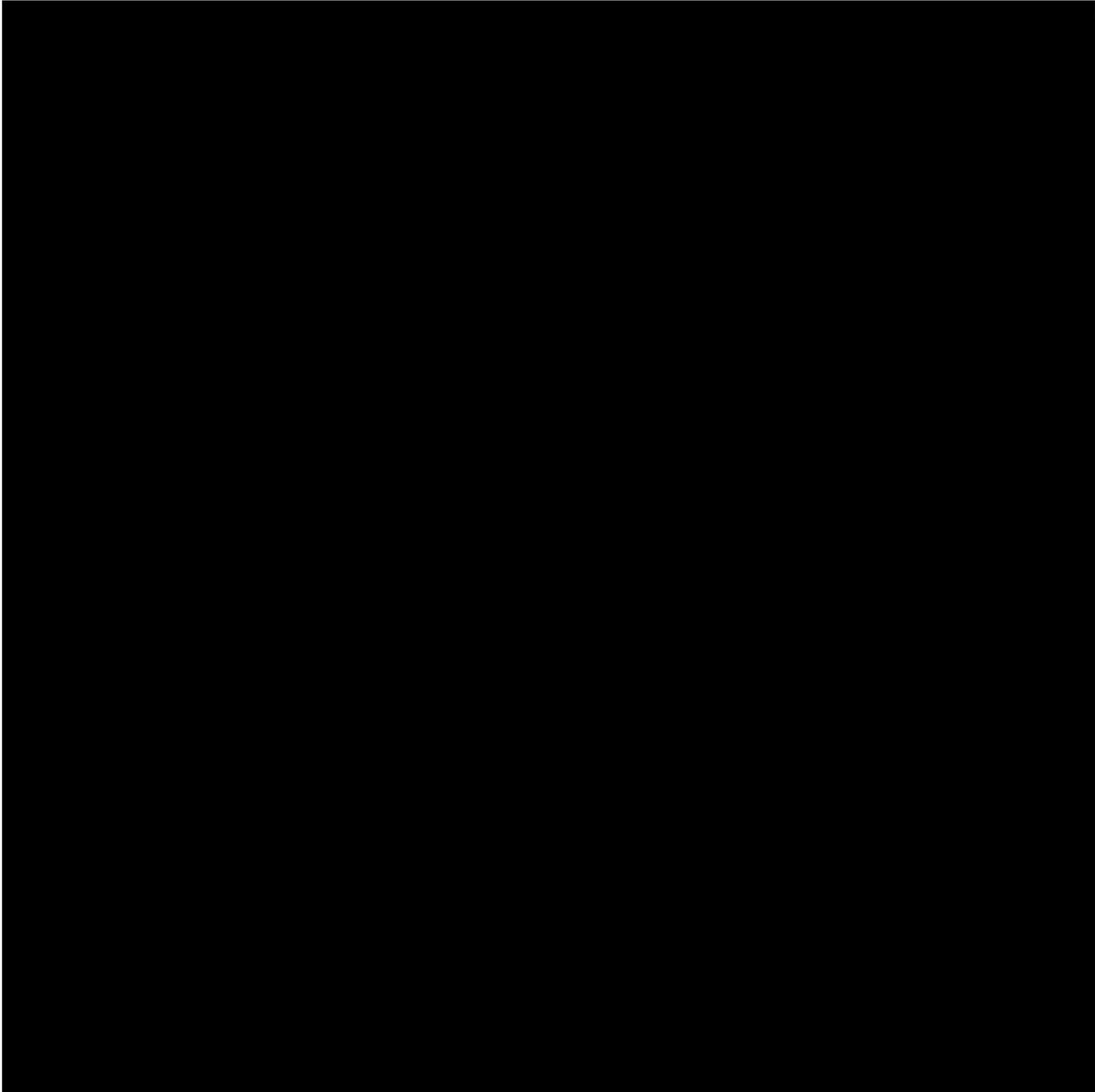
In figure 4, the black line represents the value to a future user while the top of the orange bar represents the value to an existing user.



That diagram highlights the impact of the asymmetric pricing that will occur without declaration, namely that:

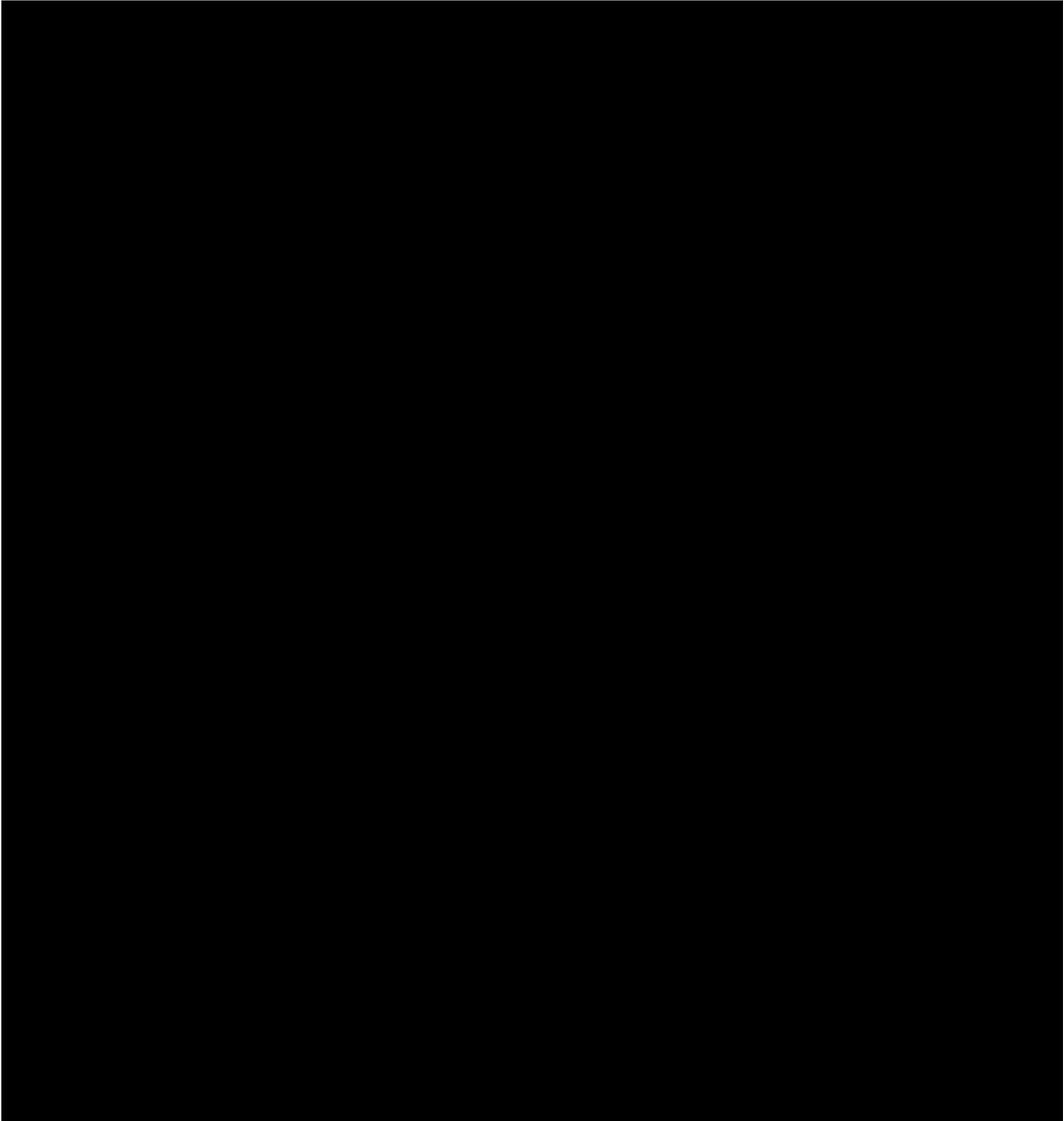
- (a) some projects which are profitable for existing users, actually become loss making for future users (such that future users cease to compete for such tenement at all); and
- (b) all other projects become materially less profitable for future users (such that future users find it challenging to compete for the acquisition of tenements with existing users).

As shown in figures 5 and 6 below, the difference in value caused by the asymmetric pricing which will occur without declaration is typically in the range of 10-20% in value (for those projects which still have value to future users) with the results for [REDACTED] showing there will be some projects for which the difference will be even more dramatic.



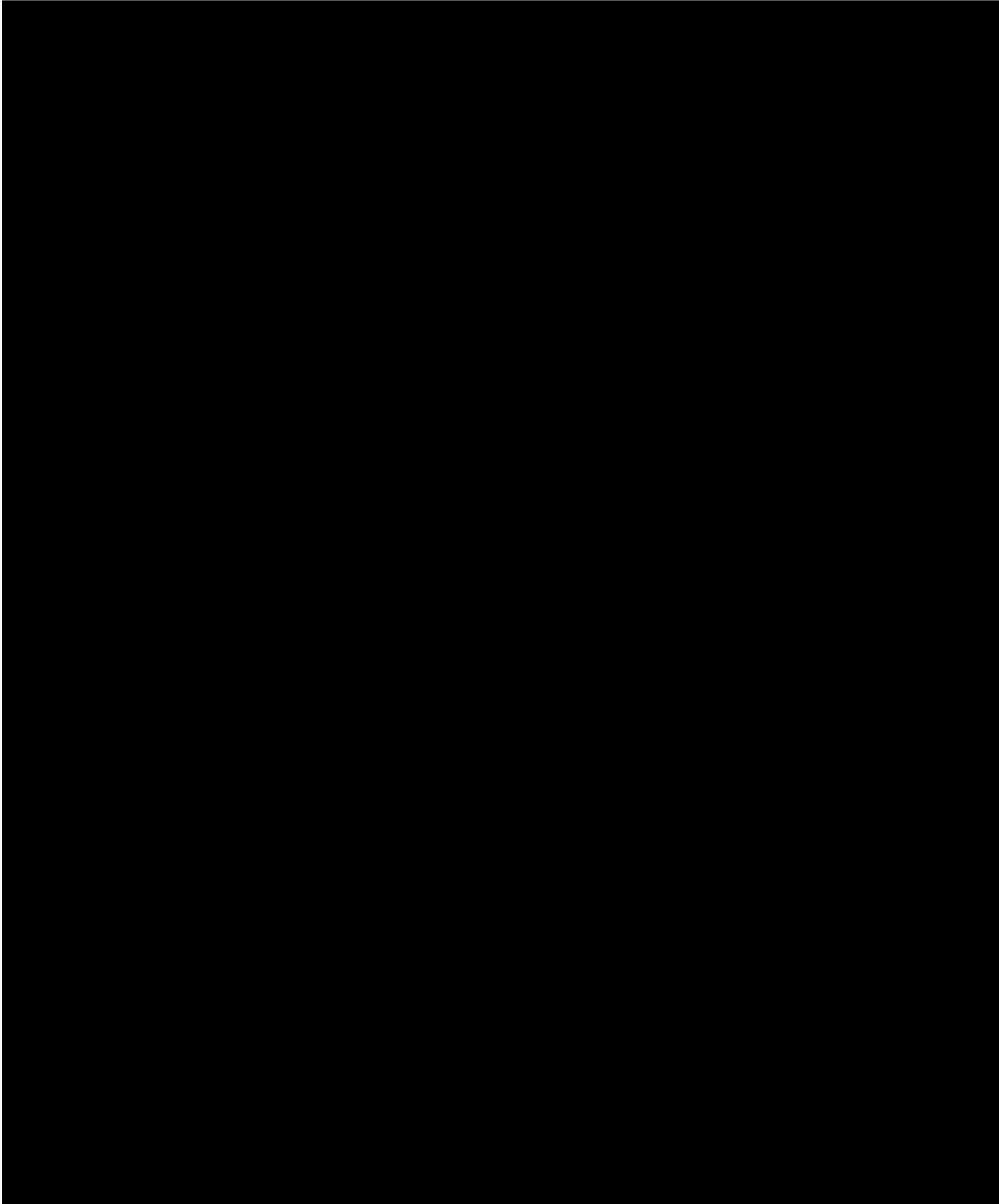
Those modelling outcomes led PwC to the conclusions that:

- (a) 'For each project, there is a clear discrepancy between the valuations that would be generated by existing and new users'
- (b) 'Our analysis suggests that the impact of a TIC premium on project valuation, as a broad proxy for the underlying tenement value, for even the least affected project is roughly six times the impact of DBCTM's estimate.'
- (c) 'The valuation impact is between 10-20 per cent for most of the analysed projects' (after excluding [REDACTED] which completely cease to be profitable for future users and [REDACTED] which loses over two thirds of its value for future users; and
- (d) 'Where some projects may appear viable to existing users ($NPV > 0$), they may not be viable projects for new users faced with a higher TIC. For two of the projects in our analysis, a higher TIC would erode completely the project's valuation. This corroborates QCA's analysis in its Draft Recommendation'.



In addition, in reviewing those modelling results it should be kept in mind that those estimates of the decrease in value for future users are actually very conservative estimates.

Where a discount rate of 15% is applied (i.e. something the DBCT User Group considers is a discount rate more attuned to the risks of mining developments), the typical range is more like 10-25%, as shown in Figure 7 below:



5.7

The substantial value gap created by DBCTM's asymmetric pricing between existing and future users is a clear barrier to entry that will directly impact on efficient future users' ability to compete for the acquisition of coal exploration and development tenements in the Hay Point catchment.

In particular, it is hard to see how efficient new entrants could ever realistically compete in terms of the price offered to sellers of Hay Point catchment coal exploration and development tenements, where the tenement would be so much less valuable to them.

This finding is also entirely consistent with the previous reports from both PwC and Castalia included in the DBCT User Group's previous submissions – and is particularly compelling given the consistent and material adverse effects revealed across the wide scope of projects modelled.

Efficient future new entrants would be expected to take very similar views on long term coal prices and project cost profiles, such that the difference in DBCT coal handling charges will stand out as a clear differentiating factor between the value the various potential buyers feel they can derive from the tenement – and therefore what they can economically acquire the tenement for. As the Castalia report on criterion (a) in Schedule 6 of the DBCT User Group's last cross-submission notes:

HoustonKemp list factors such as the assessment of the coal resource, likely extraction costs, supply chain costs and international coal prices that prospective buyers of tenements would take into account.

...

However, in a competitive market for the acquisition of tenements, it is likely that prospective buyers, all being experienced miners and all having access to the same information, would be likely to have similar views on these factors. There are credible independent forecasts of both coal prices and mining costs and all prospective buyers would have access to the same geotechnical data supplied by the Government.

...

We would expect, in a competitive market, to see a high degree of convergence on these factors for an individual mine between prospective acquirers of tenements—except for one factor—DBCT coal handling charges. For DBCT charges, new entrants would factor in at least \$3/tonne premium over the price paid by incumbents.

DBCTM's only answer to this appears to be that that this value differential can be ignored as existing users will not be significant competitors for tenement acquisition, on the assumption that they will not invest in tenements due to being argued by DBCTM to have existing exploration and development projects that theoretically could be developed to utilise their capacity when existing projects cease to operate. However, as discussed at length in previous DBCT User Group submissions and in the stakeholder forums, DBCTM's submissions completely misunderstand how the tenement market operates. In particular:

- (a) existing users will continue to invest in a portfolio of exploration and development tenements, not just rely on a particular project to replace existing operating projects – due to the uncertainties involved in the prospects of obtaining approvals and profitability of future development of such tenements at the time of acquisition; and
- (b) DBCTM's theory is completely inconsistent with the market behaviour of existing users in past transactions – where existing users have clearly been active investors in Hay Point catchment coal exploration and development tenements even if they could be said to already have sufficient tenements to meet their future requirements.

Accordingly, the PwC modelling clearly demonstrates the validity of the Draft Decision's confirmation that the environment and opportunities for competition in the Hay Point catchment coal tenement will be promoted with declaration due to preventing this asymmetric pricing developing, and proves that that remains the case even if it is assumed that the differential is capped at \$3/tonne.

5.8 Imprecision in hypothetical QCA price – results in likely higher than \$3/tonne price rise

As has previously been raised in DBCT User Group submissions, a key difficulty with the asserted price cap in the Deed Poll is that it sets a \$3 increase from the baseline of a hypothetical price that the QCA would have determined if the service remain declared.

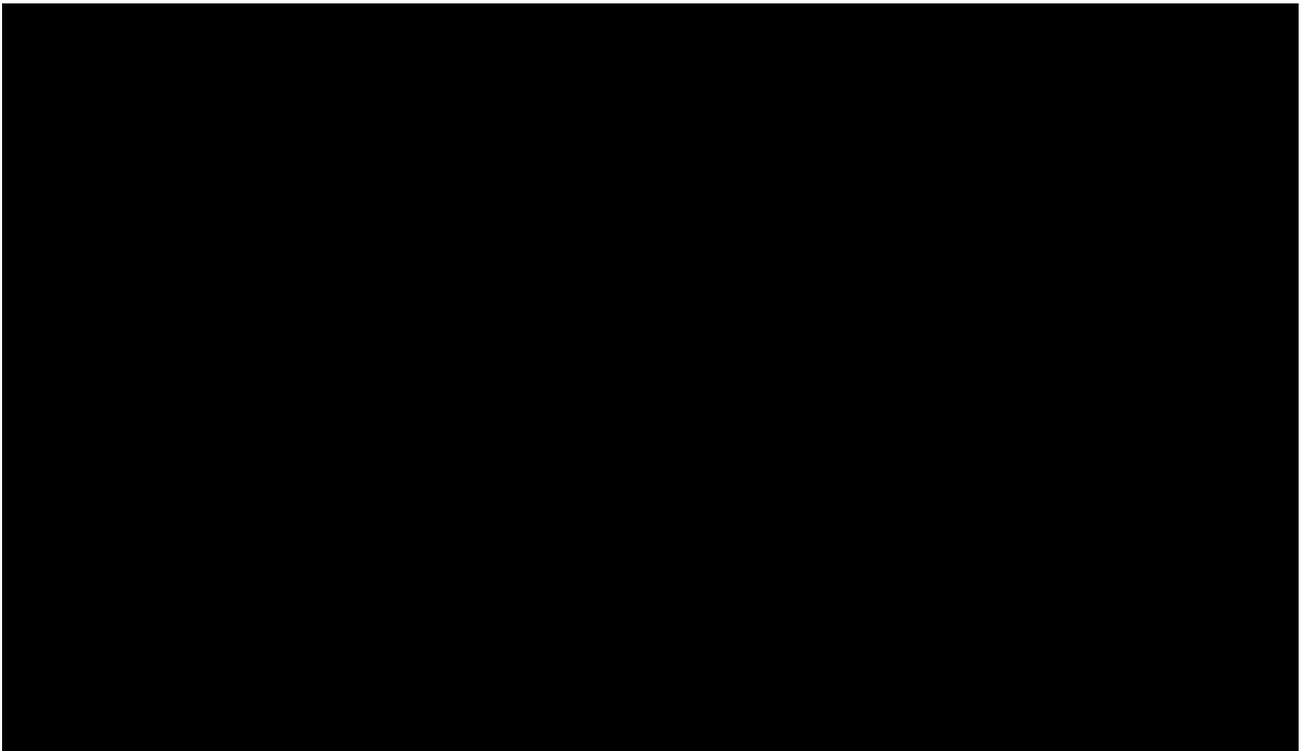
However, as noted in the PwC report:

Even adopting the framework of the building block approach as applied by the QCA in approving previous access undertakings, the basis on which certain future parameters might be set (or reset) could be open to interpretation.

The adjustment made by the QCA to the Aurizon Network UT5 reference tariffs from the WACC that might have been applied based on a purist application of the building block methodology, is clear evidence that that is true.

As a result, there will be no way for an access seeker to determine the QCA hypothetical price with the precision required for an access holder or seeker to be able to determine what the theoretical maximum price actually is under the Deed Poll. The natural outcome of that is that within a range there will be no way for access seeker to monitor compliance and therefore no confidence in whether they would have theoretical rights to seek a lower price based on the asserted price cap obligation. As a profit maximising monopolist, DBCTM will have strong incentives to assert that the hypothetical QCA price is at the top of that range.

By way of illustration, the DBCT User Group's recent submissions on DBCTM's 2020 DAU showed how even adopting the positions DBCTM has argued for during the past regulatory period would create an increase of approximately \$0.89/tonne (even before taking into account the tax treatment issues raised by DBCTM). Those claims are illustrated in the diagram below:



Those claims are also likely to be materially less than what DBCTM claim in the absence of a regulatory setting – as it has made these claims previously in an environment where it known that it has to convince the QCA of their appropriateness.

The difficulty for access seekers in determining the theoretical level of the cap (and the extent of DBCTM's compliance with it) is exacerbated by the fact that access seekers will also be in a position of material information asymmetry when dealing with DBCTM – particularly in relation to capital costs (and particularly for those future users who do not have any shareholder in the user-owned operating company). In addition, future users will not have had the experience that

existing users have had with the QCA methodology for price setting through previous access undertakings.

The PwC report supports this reasoning, noting that:

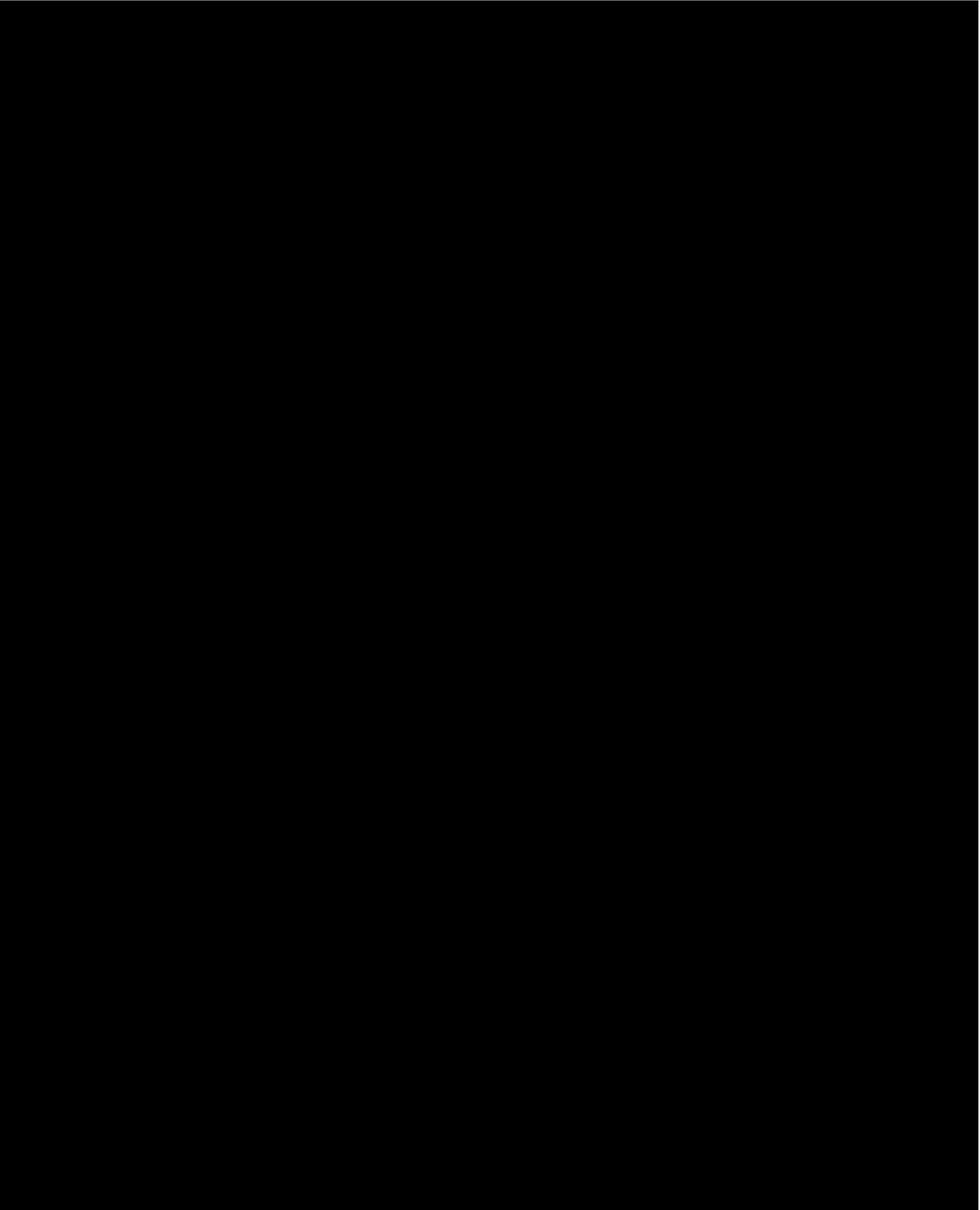
under this Framework there would [be] significant uncertainty regarding the way that DBCTM would seek to determine the underlying 'QCA-determined' charge. Even adopting the framework of the building block approach as applied by the QCA in approving previous access undertakings, the basis on which certain future parameters might be set (or reset) could be open to interpretation.

...

Given this, it is plausible that different users could reasonably form different views on how DBCTM might, under the proposed Access Framework, determine what it considered to be the appropriate 'QCA determined' TIC. Moreover, a new user, with less familiarity with the way that access charges historically have been determined, could be more likely to factor in a higher 'QCA determined' TIC, from which the Access Framework \$3.00 per tonne premium would then apply.

Consequently, the DBCT User Group considers a more accurate assessment of the practical impact on valuation of tenements is produced by considering a price difference of something more akin to \$4/tonne.

PwC has conducted additional modelling based on such a \$4/tonne price differential between existing and future users, which provides a range of valuations differences between existing and future users of roughly 12-28% (for most projects) and nearly complete destroys the remaining value for [REDACTED].



Again, this just demonstrates the material barrier to entry that future users face when competing with existing users for tenement acquisitions in the Hay Point catchment coal exploration and development tenements market, and why criterion (a) is satisfied.

5.9 Conclusions

What is clear from the above is that, even on the most favourable assumptions to DBCTM (i.e. a legally effective and actually implemented \$3/tonne price cap) the asymmetric pricing between existing and future users that will apply without declaration (given DBCTM's profit maximising incentives to engage in monopoly pricing without declaration and the identical pricing that will apply to all users with declaration) will result in a significant barrier to entry for efficient future

entrants in the market for coal exploration and development tenements in the Hay Point catchment.

Given future users have (as both the DBCT User Group and DBCTM pointed out in past submissions) previously formed a significant proportion of the buyers in this tenements market, their comparative disadvantage will result in a materially more concentrated and less competitive market.

In other words, the environment and opportunities for competition will be materially greater in the Hay Point catchment coal exploration and development tenements market with declaration than without – such that criterion (a) is satisfied.

6 Overall Conclusion

The DBCT User Group strongly considers that the above analysis demonstrates beyond any doubt that:

- (a) the threat of declaration will not be sufficient to constrain DBCTM from the exercise of market power in the absence of declaration;
- (b) DBCTM's actions following the draft recommendation, are a product of the declaration, and do not demonstrate that there will be a constraint on its exercise of market power in the absence of declaration (where the 'threat' will cease to be credible and therefore DBCTM's incentives to constrain its behaviour will have disappeared); and
- (c) the terms of the Deed Poll (and related access framework) would not be sufficient to constrain DBCTM from the exercise of market power in the absence of declaration (even if it is assumed they are all complied with and enforced).

Accordingly, it remains clearly appropriate for the findings of the Draft Decision that criterion (a) is satisfied to be reflected in the QCA's final decision, and given criterion (b)-(d) are also clearly satisfied, for the QCA's ultimate recommendation to be that the DBCT service continue to be declared.

Schedule 1 – PwC Report

DBCT User Group

2020 Access Declaration Review

Modelling of impact of TIC premium on indicative
tenement valuation

Disclaimer

We prepared this report solely for the DBCT User Group's use and benefit in accordance with and for the purpose set out in our engagement letter with the DBCT User Group dated 20 August 2019. In doing so, we acted exclusively for the DBCT User Group and considered no-one else's interest. We accept no responsibility, duty or liability:

- to anyone other than the DBCT User Group in connection with this report
- to the DBCT User Group for the consequences of using or relying on it for a purpose other than that referred to above.

We make no representation concerning the appropriateness of this report for anyone other than the DBCT User Group. If anyone other than the DBCT User Group chooses to use or rely on it they do so at their own risk.

The information, statements, statistics and commentary (together the 'Information') contained in this report have been prepared by PwC from publicly available material, discussions with industry experts, and from material provided by the DBCT User Group and its constituent User companies. PwC has relied upon the accuracy, currency and completeness of that Information. The Information contained in this report has not been subject to an audit. PwC may in its absolute discretion, but without being under any obligation to do so, update, amend or supplement this report.

Our modelling is reliant on the assumptions and forecasts as described in this report. These assumptions and forecasts are uncertain and the results are intended to be indicative only, and future outcomes may be different.

While we consent to a copy of this report being provided to the QCA, we do not accept any responsibility or liability (whether in contract, tort (including negligence) or otherwise) to the QCA or any other person for the consequences of any reliance on this report.

This disclaimer applies:

- to the maximum extent permitted by law and, without limitation, to liability arising in negligence or under statute
- even if we consent to anyone other than the DBCT User Group receiving or using this report.

Liability limited by a scheme approved under Professional Standards legislation.

Executive summary

The DBCT User Group engaged PricewaterhouseCoopers Consulting (Australia) Pty Limited (PwC) to provide economic advice in relation to a paper released by the Queensland Competition Authority (QCA) inviting further submissions subsequent to its draft recommendation regarding the ongoing declaration of the Dalrymple Bay Coal Terminal (DBCT).

This report includes expanded modelling of the impact of a higher Terminal Infrastructure Charge (TIC) on the indicative valuation of certain coal tenements/projects in the Hay Point catchment area, as is relevant to access declaration criterion (a) of s76 of the Queensland Competition Authority Act.

Dalrymple Bay Coal Terminal Management (DBCTM) has proposed an Access Framework that would apply where access declaration is revoked. A key feature of this Access Framework is that it explicitly permits DBCTM to charge new users a higher TIC than would apply to existing users under the terms of their evergreen User Agreements. The Access Framework provides that the TIC could be increased by as much as \$3 per tonne (real, \$2020).

We used production cost, volume and coal price data provided by Wood Mackenzie for a number of development projects in the Goonyella system to develop indicative valuations for these projects at a pre-development phase, as a proxy for the underlying tenement value. We then assessed the impact on those indicative valuations of terminal charges being increased by \$3 per tonne, consistent with DBCTM's proposed Access Framework.

On average, our analysis indicates that existing users would retain an operating margin around 5 to 10 per cent higher than would be realisable by new users. This translates to an indicative valuation impact of between 10 and 20 per cent for most of the analysed projects.

Further, our analysis suggests that the minimum impact of the proposed TIC premium on indicative tenement valuation, for the modelled projects, is roughly six times greater than the impact suggested by DBCTM.¹ Our analysis highlights several examples of projects becoming 'unviable' for new users, where they would be 'viable' for existing users.

As with all cash flow valuations, our modelling results are sensitive to changes in assumptions and other modelling parameters. A key valuation parameter is the discount rate. Using a higher discount rate would, all other assumptions unchanged, reduce the base case valuations for all tenements, and increase the extent to which those valuations are reduced by a higher TIC. Under a 15 per cent discount rate (nominal, post-tax), for instance, tenement valuations for most projects would be around 10 to 25 per cent lower for new users, where they are exposed to a higher TIC.

¹ DBCTM (2019), *DBCTM Management Cross Submission*, available at: <https://www.qca.org.au/wp-content/uploads/2019/05/dbct-management-cross-submission.pdf>, Page 13

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1. Introduction

On 18 December 2018, the Queensland Competition Authority (QCA) released its draft recommendation on whether the service of handling of coal at the Dalrymple Bay Coal Terminal (DBCT), including inloading, outloading and stockyard services, should be declared for the purposes of third party access.² The QCA's draft recommendation was that the service ought to continue to be declared.

On 4 October, the QCA released a paper³ inviting further submissions on certain matters relating to the QCA's assessment of whether criterion (a) of s76 of the Queensland Competition Authority Act is satisfied, and specifically:

- *whether the implementation of the Deed Poll and access framework on their terms, combined with the threat of declaration, would be sufficient to constrain DBCT Management's conduct in the absence of declaration — such that access (or increased access) as a result of declaration would not promote a material increase in competition in the coal tenements market; and*
- *whether DBCT Management (DBCTM) has demonstrated by its actions following the draft recommendation, including by putting in place the \$3.00 price cap, that the threat of declaration is a constraint on DBCT Management's ability to exercise market power.*

The DBCT User Group engaged PricewaterhouseCoopers Consulting (Australia) Pty Limited (PwC) to prepare this further report in response to a QCA consultation paper. Consistent with the QCA's October paper, we have assumed in this report that *the Deed Poll is an appropriate part of the counterfactual for the purpose of applying criterion (a)*.⁴

In April, PwC prepared a report for the User Group which included analysis of new users being charged a Terminal Infrastructure Charge (TIC) an additional \$3.00 per tonne above what would be allowed for in a regulated setting.⁵

The analysis in that report⁶ showed that a \$3.00 per tonne increase to port charges would materially impact the indicative valuation of some projects in the relevant coal tenements market. The implementation of the additional charge would create a situation, for the four analysed projects, whereby existing DBCT access holders would value projects up to 30 per cent higher than prospective DBCT access holders. For one of the analysed projects, the higher TIC resulted in what would have been considered a marginal project becoming unviable.

² QCA (2018), *Draft Recommendation - DBCT declaration review*, available at: <http://www.qca.org.au/getattachment/f381d591-bfc6-4974-9d58-a5f47e32d0e3/Part-C-Draft-recommendation-%E2%80%93-the-DBCT-service.aspx>

³ QCA (2019), *QCA Consultation - DBCT Management's Executed Deed Poll*, available at: <https://www.qca.org.au/wp-content/uploads/2019/05/qca-consultation-paper-dbct-management-s-executed-deed-poll.pdf>

⁴ QCA (2019), *QCA Consultation DBCT Management's Executed Deed Poll*, Page 3

⁵ PwC (2019), *Response to Submissions on the QCA's Draft Recommendation*, available at: <https://www.qca.org.au/wp-content/uploads/2019/05/dbct-user-group-cross-submission.pdf>

⁶ PwC (2019), *Response to Submissions on the QCA's Draft Recommendation*, Appendix B

This report provides updated and additional modelling of the impact on indicative tenement valuation of the proposed \$3.00 per tonne TIC premium, as outlined by DBCTM in the now-executed Access Framework.

This report is structured as follows:

- in Section 2 we assess the indicative valuation impact of the additional TIC using an expanded set of prospective developments in the relevant tenement market, as defined by the QCA
- in Section 3 we expand that modelling to include additional sensitivity analysis regarding the indicative valuation impact of the additional TIC when considering a higher discount rate as well as analysis on the potential impact of the pricing uncertainty that new users may face.

For full context, this report should be read in conjunction with our earlier reports to the QCA as part of its declaration review.⁷

⁷ QCA (2019), *Declaration review*, available at: <https://www.qca.org.au/project/declared-infrastructure/declaration-review/>

2. Valuation impact of proposed access framework

2.1 Context to the QCA's draft recommendation and subsequent events

In its draft recommendation, the QCA concluded that the continued declaration of the services offered at DBCT would result in the promotion of competition in at least one dependent market, that being the coal tenements market.⁸

In its draft recommendation⁹, the QCA noted that in the event of an expansion at the terminal which is not socialised, the additional charges for expansion capacity would not constitute a material difference in access terms between users. The QCA calculated a cost of \$8.50 for expansion tonnes, approximately \$3.50 higher than the current charge. This analysis formed the basis for the \$3.00 cap that DBCTM has set in its Access Framework.¹⁰

Both the QCA and DBCTM present the additional \$3.00 per tonne as a proportion of prevailing coal prices. Using this, DBCTM's submission provides analysis purporting to show that an additional \$3.00 per tonne TIC would result in a 1.5 per cent reduction in tenement valuation, based on current market parameters.¹¹

2.2 Modelling approach

In the April PwC report we used Wood Mackenzie asset reports for five mines at the pre-production stage.¹² Subsequently, for this report, we have assessed Wood Mackenzie asset reports for 12 mines¹³ at the pre-production stage, including updated data for the five mines included in our original analysis.

This analysis adopts the production profile, revenue, and cost data provided by Wood Mackenzie. Consistent with our previous report, we have not altered the data in any way, nor has the data been reviewed by any member of the user group who may have an interest in these mines. We have also not removed any of the projects in the pre-production phase for which we received data from our analysis.

⁸ QCA (2018), Draft recommendation - Part C: DBCT declaration review, available at: https://www.qca.org.au/wp-content/uploads/2019/05/34433_Draft-recommendation-Part-C-DBCT-2.pdf

⁹ QCA (2018), *Draft recommendation - Part C: DBCT declaration review*, Page 86.

¹⁰ DBCTM (2019), *DBCT Declaration Review - Response to Initial Submissions*, available at: <https://www.qca.org.au/wp-content/uploads/2019/05/26-dbct-management-submission-on-draft-recommendation.pdf>, Page 6

¹¹ DBCTM (2019), *DBCTM Management Cross Submission*, Page 13

¹² PwC (2019), *Response to Submissions on the QCA's Draft Recommendation*, Appendix B

¹³ [REDACTED] Key: Project 1 - [REDACTED]; Project 2 - [REDACTED]; Project 3 - [REDACTED]; Project 4 - [REDACTED]; Project 5 - [REDACTED]; Project 6 - [REDACTED]; Project 7 - [REDACTED]; Project 8 - [REDACTED]; Project 9 - [REDACTED]; Project 10 - [REDACTED]; Project 11 - [REDACTED]; Project 12 - [REDACTED]

Using the data in the aforementioned asset reports we have applied a conventional discounted cash flow valuation approach with a common valuation base date of January 2019 (with no residual value) to develop indicative valuations for these projects at the pre-production phase, which represent a proxy for the underlying tenement valuation.

Consistent with the analysis in our previous report, we have applied have a valuation discount rate of 13.75 per cent.

2.3 Valuation analysis

The projects display a range of characteristics; from coal type and quality, production levels and years, and capital and operating cost intensity. Table 1 provides a summary of the projects examined in this analysis.

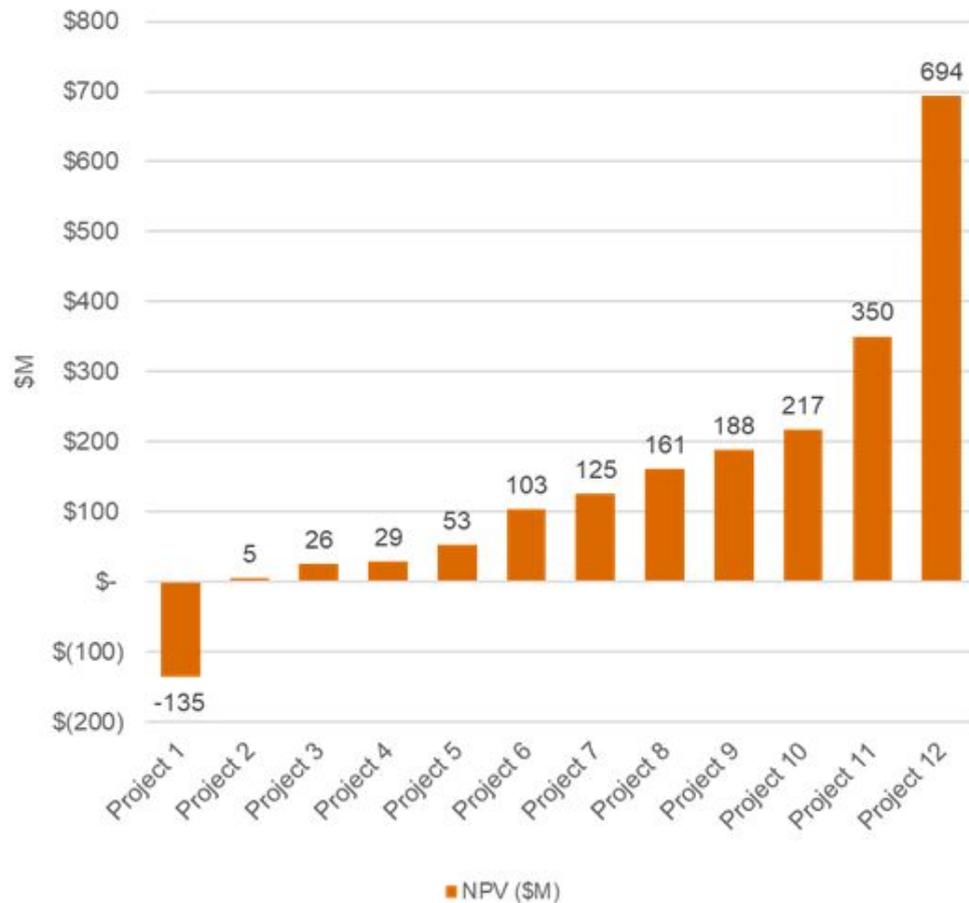
Table 1: Project details

	Years of Production	Metallurgical Coal Production (mtpa)	Thermal Coal Production (mtpa)	Opex PV (\$M)	Capex PV (\$M)
Min	9	0	0	173	19
Max	42	11	9	3,843	1,341
Median	21	3	0	923	4,62

Source: Wood Mackenzie, PwC analysis

Figure 1 shows the implied tenement valuation for each of the 12 projects, applying all of the Wood Mackenzie parameters and forecasts unchanged, and calculated using the approach outlined in Section 2.2. This forms our 'base case'.

Figure 1: Indicative tenement valuation (\$M, January 2019)



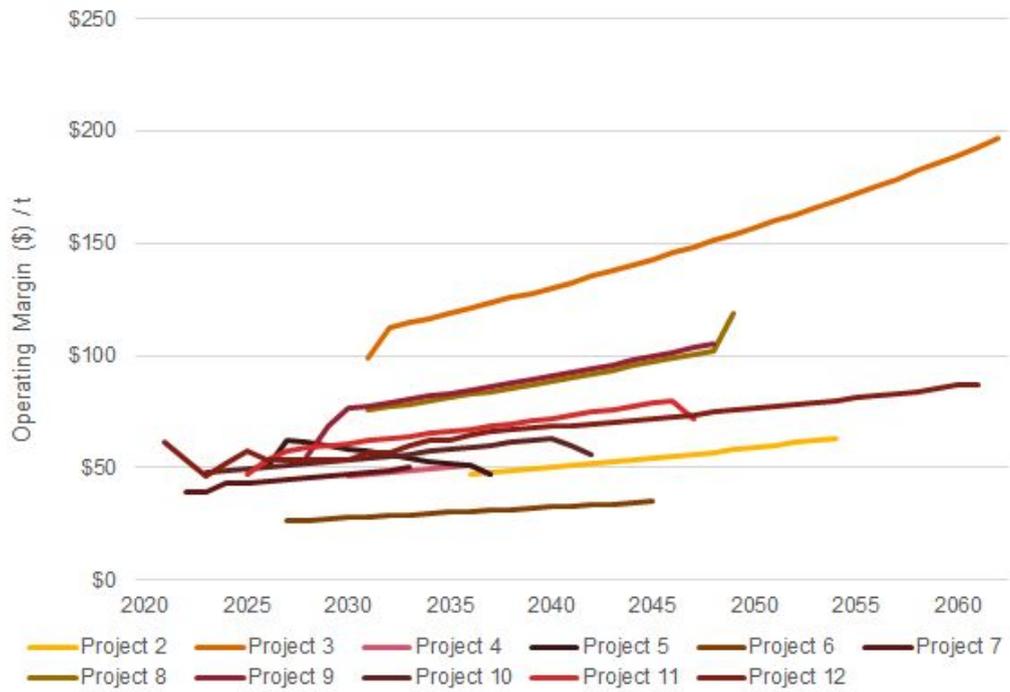
Source: Wood Mackenzie, PwC analysis

As Project 1 has an NPV < \$0, using these default forecasts and valuation assumptions, we have removed it from the subsequent analysis of the impact on tenement valuations were port charges to increase by \$3.00 per tonne, per the terms of DBCTM's Access Framework.

The indicative valuation range otherwise is quite broad, reflecting significant differences in project scale, anticipated mine life, operating cost profiles and coal type (with some mines producing higher value metallurgical coal, others thermal coal only, and some a combination of coal types).

Figure 2 similarly shows the operating margin of each project, again reflecting only the Wood Mackenzie cost parameters and other forecasts. Again, reflecting the different project scale and other characteristics, there is variability evident in the different project operating margins. However, excluding the highest and lowest margin prospects, most projects are reported to generate operating margins around \$A50.00 per tonne (real \$2020, noting that Figure 2 is presented in nominal terms).

Figure 2: Project operating margin per tonne (\$ nominal)

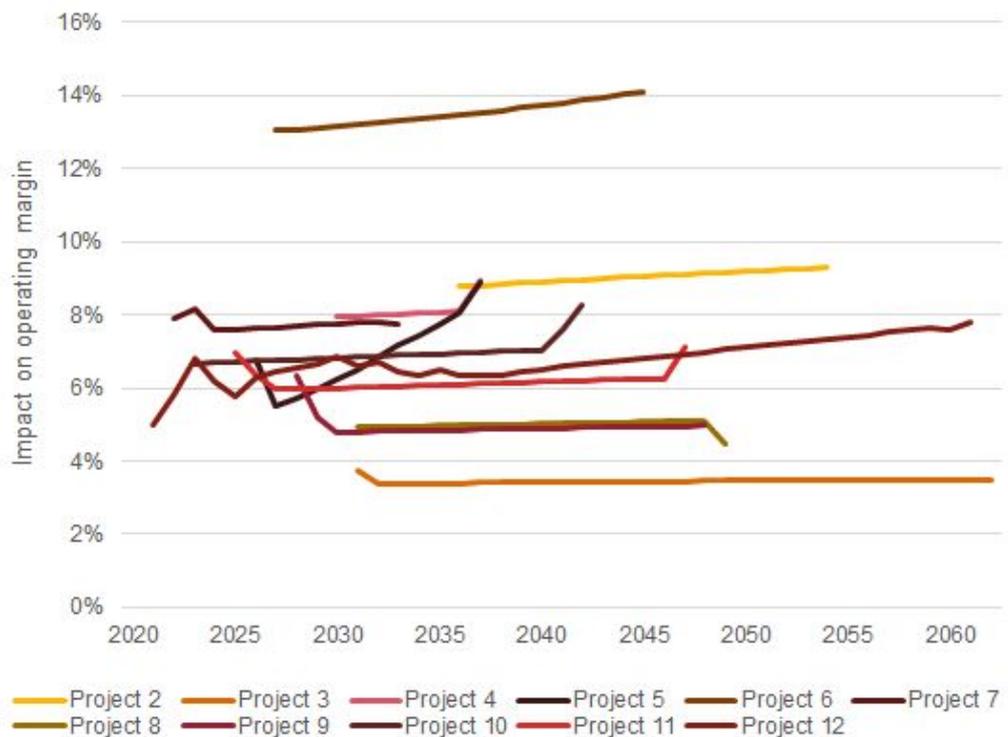


Source: Wood Mackenzie, PwC analysis

Figure 3 shows the impact of a TIC premium of \$3.00 per tonne on the operating margin for each of the 12 projects. The values represent the proportion of each project's operating margin that is 'stripped away' by the additional TIC.

This analysis suggests that an existing user would, depending on the project (and excluding the highest/lowest observations), retain an operating margin up around 5-10 per cent higher than that realisable by a new users, assuming all other project development, operating and valuation characteristics are identical. This range remains broadly consistent with the results presented in our April report.¹⁴

Figure 3: Additional TIC as a proportion of project operating margin (%)



Source: Wood Mackenzie, PwC analysis

¹⁴ PwC (2019), *Response to Submissions on the QCA's Draft Recommendation*, Appendix B, Figure B2

The translation of this reduction in operating margin to indicative tenement valuation is illustrated in Figure 4. The top row of values represent the base case NPV for each project (per Figure 1). The black lines represent the 'new' NPV following the imposition of the \$3.00 per tonne TIC. This contrasts the indicative valuation an existing DBCT user would place on a tenement, with the indicative valuation a new user would determine (assuming all other factors are held constant).

Figure 4: Impact of the additional TIC on indicative tenement valuation (\$M)

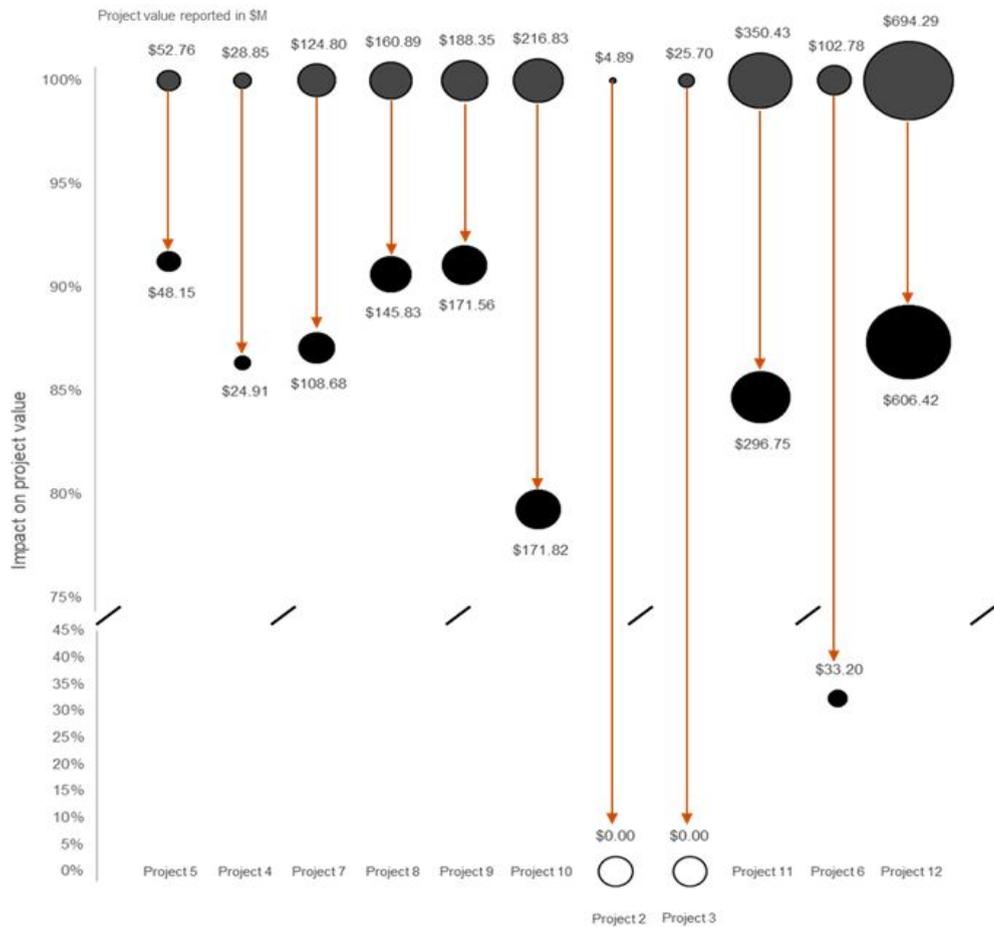


Source: Wood Mackenzie, PwC analysis

Figure 5 presents the same valuation impact in a different way.

Projects are ranked by coal production from smallest to largest (left to right), with the size of the 'bubble' reflecting the project's implied indicative tenement valuation. The top series represents the base case NPV and the bottom series represents the NPV adjusted for the additional TIC for each project. The left-hand axis represents the valuation impact of the higher TIC; ie the proportion of the original indicative valuation remaining after the imposition of the higher terminal access charge.

Figure 5: Valuation impact of the additional TIC (\$M)

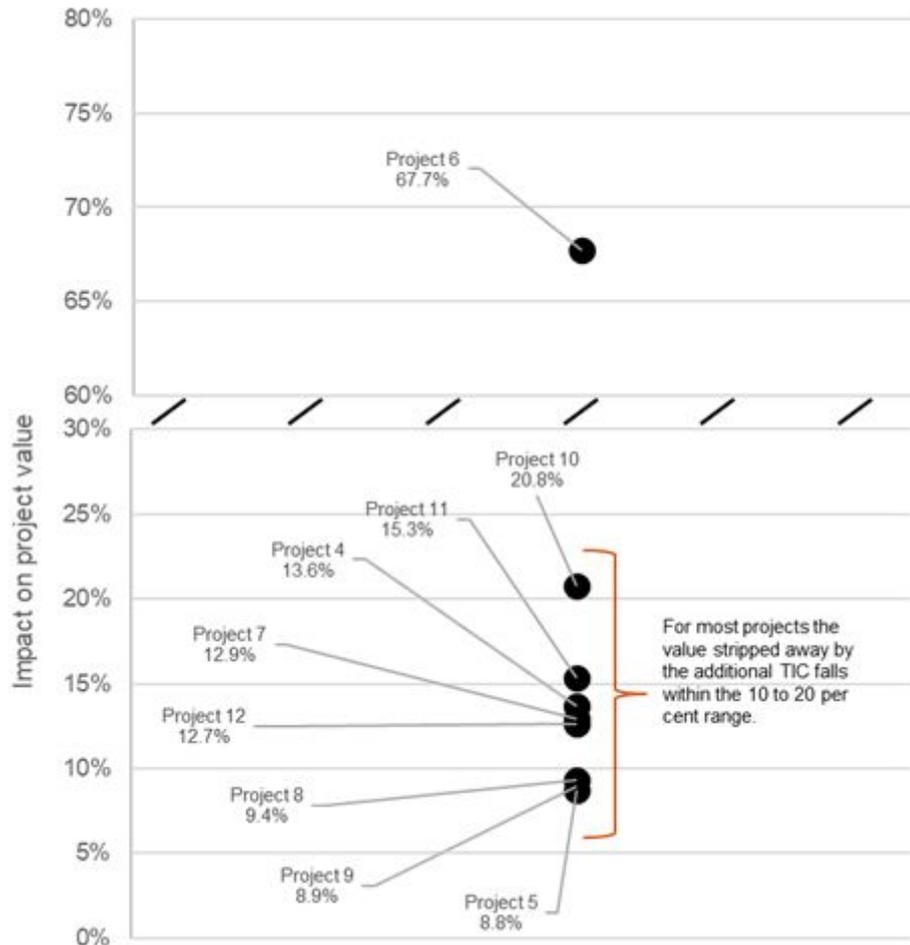


Source: Wood Mackenzie, PwC analysis

This analysis indicates that the impact on indicative tenement valuation of a higher TIC is not systematically related to project scale - larger or smaller projects are not necessarily more or less impacted. Rather, the valuation impact reflects a composite of project characteristics.

Figure 6 summarises the impact of a higher TIC on the indicative tenement valuation for each of the projects. For most projects, the impact is between 10-20 per cent; that is, new users facing a higher port access charge would typically value tenements at around 10-20 per cent less than would existing users, applying otherwise equivalent valuation assumptions and forecasts.¹⁵

Figure 6: Additional TIC as a proportion of total indicative tenement value



Source: Wood Mackenzie, PwC analysis. Figure excludes NPV < \$0 projects.

This analysis suggests that the impact of a TIC premium on an indicative project valuation, as a broad proxy for the underlying tenement value, for even the least affected project is roughly six times the impact of DBCTM's estimate (8.8 per cent versus 1.5 per cent).¹⁶

¹⁵ [REDACTED] have been excluded as the projects are projected as NPV < 0. [REDACTED] has also been excluded for scaling purposes.

¹⁶ DBCTM (2019), *DBCTM Management Cross Submission*, Page 13

Where some projects may present as viable to existing users (NPV > 0), they may not be viable projects for new users faced with a higher TIC. For example, for two of the projects in our analysis (Project 2 and Project 3), a higher TIC would erode completely the indicative tenement valuation. This corroborates QCA's analysis in its draft recommendation:

“In other words, in a future without declaration, potential DBCT users are likely to face a higher fixed take or pay component relative to incumbents due to the material difference in access charges as well as the possibility that they may not be able to mitigate the take or pay liability relative to incumbents, and so the risk of the project becoming unviable for potential DBCT users is likely to be higher relative to incumbents. However, these risks would not arise in a future with declaration.”¹⁷

¹⁷ QCA (2018), *Draft recommendation - Part C: DBCT declaration review*, Page 92.

3. Sensitivity analysis

3.1 Impact of a higher discount rate

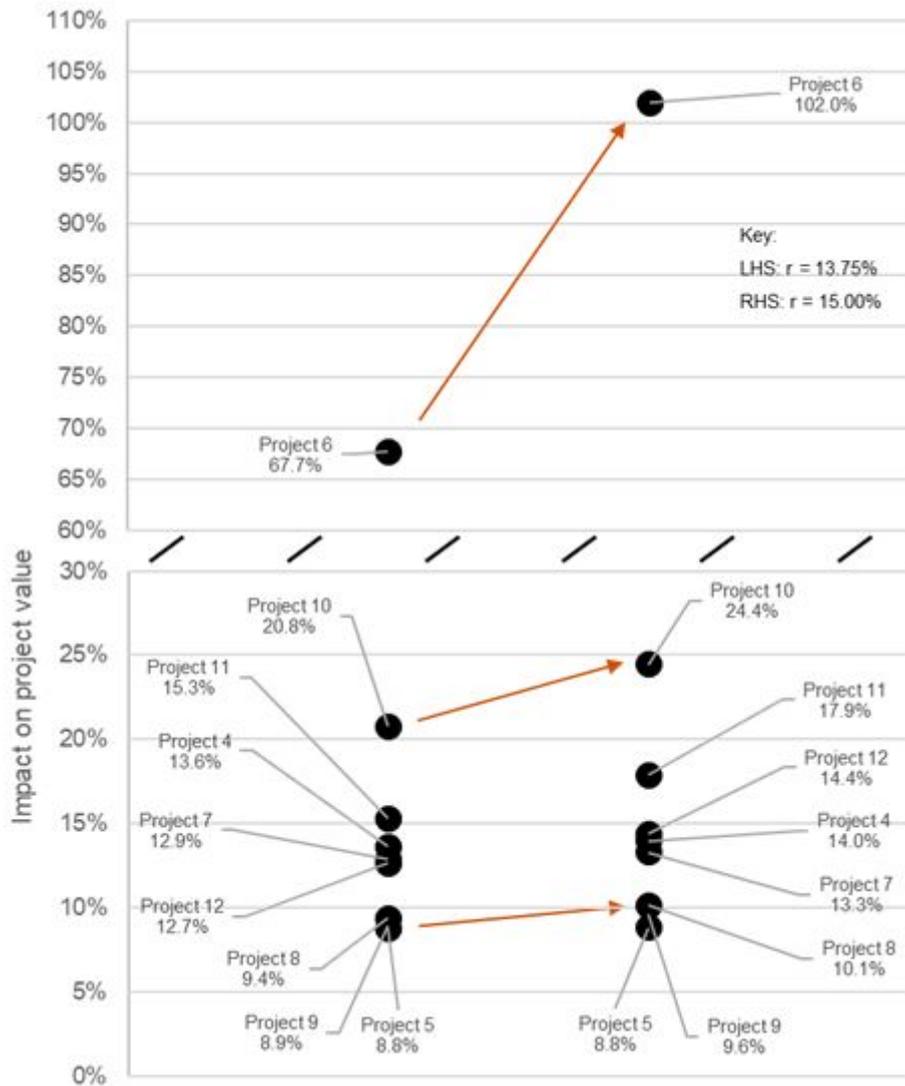
The analysis in Section 2 shows the impact of the additional TIC applying cost, market and other forecasts from Wood Mackenzie. We use this to proxy the way that a differential TIC potentially could impact the indicative valuation of tenements by existing and new DBCT users.

It is possible that valuations could be framed by different proponents applying different, and perhaps more adverse, views of future operating conditions. As such, different users may calculate or require different rates of return, as reflecting their perception of development and other risks.

In our analysis above, and consistent with our April report, we adopted a discount rate of 13.75 per cent (nominal, post-tax). In the sensitivity analysis below, we re-create the valuation impact analysis with indicative valuations adjusted to account for a higher discount rate applied to each project.

Figure 7 shows the impact of applying a higher discount rate to indicative tenement valuations, in conjunction with the additional \$3.00 per tonne TIC. To do this, we have applied the upper bound discount rate of 15.00 per cent, per the WACC calculation in Table A1 (Appendix A).

Figure 7: Impact of the additional TIC on indicative tenement valuation (13.75 per cent discount rate vs 15.00 per cent discount rate)



Source: Wood Mackenzie, PwC analysis. Figure excludes NPV < \$0 projects.

The adoption of a higher discount rate leads to a greater proportion of project valuation being stripped away by the additional TIC. Project 6 would become 'unviable' to a new user (as the cost of the additional TIC exceeds the project value) where it would not for an existing user (who would maintain the valuation outlined in Figure 1). For each of the other projects, a larger proportion of the indicative tenement valuation would be eroded by the higher TIC.

Per Figure 5, Projects 2 and 3 continue to be 'unviable' for a new user where they would not be for an existing user.

3.2 Effect of future TIC uncertainty

The Access Framework proposed by DBCTM would allow DBCT to both determine future terminal charges using a framework consistent with that applied by the QCA, and where terminal charges could, for new users, be increased by up to \$3.00 per tonne.

However, under this Framework there would be significant uncertainty regarding the way that DBCTM would seek to determine the underlying 'QCA-determined' charge. Even adopting the framework of the building block approach as applied by the QCA in approving previous access undertakings, the basis on which certain future parameters might be set (or reset) could be open to interpretation.

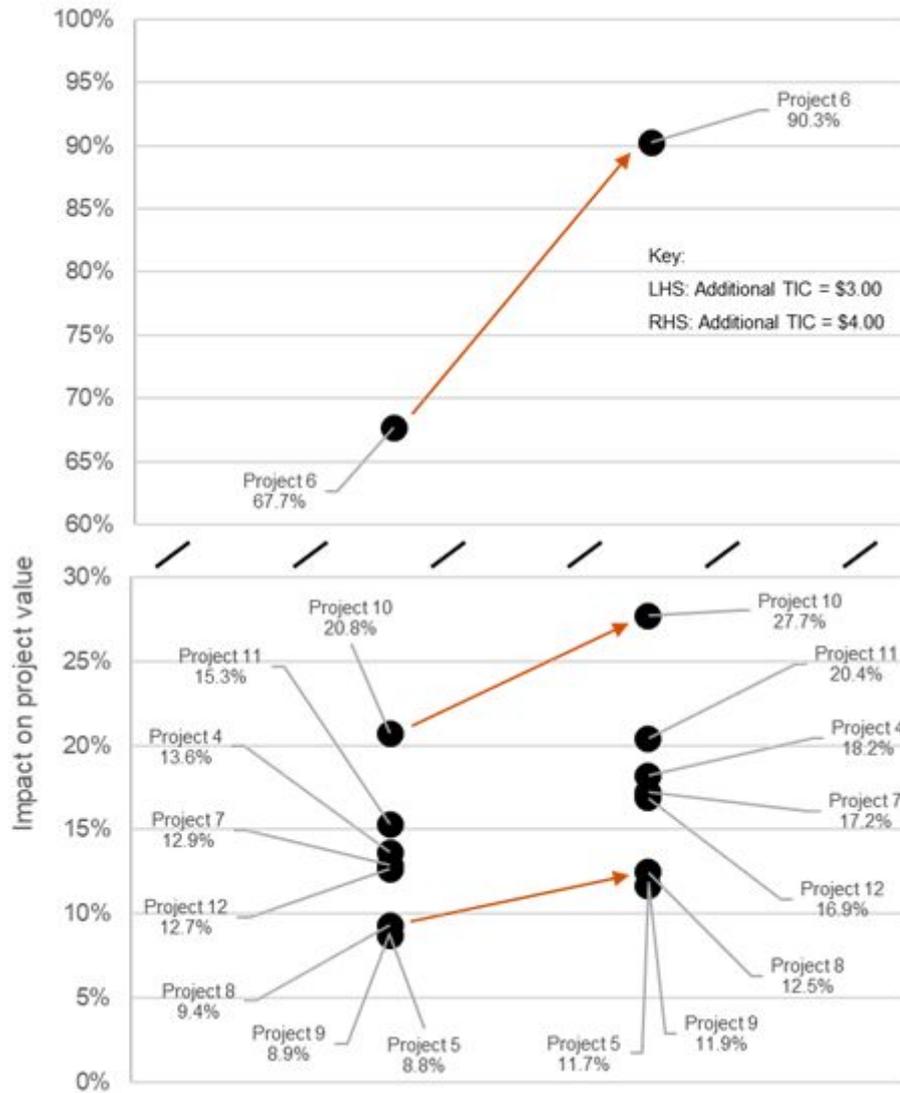
In an analysis undertaken by PwC as part of the User Group's response to the DBCTM 2020 draft access undertaking, we modelled the potential impact on the TIC of incorporating all of the parameter and other methodology adjustments as proposed by DBCT. Conservatively, this analysis suggested that the TIC (using a 1 July 2019 charge as a reference point) could be around \$0.89 per tonne higher, using inputs and parameters as proposed by DBCTM to the QCA.¹⁸

Given this, it is plausible that different users could reasonably form different views on how DBCTM might, under the proposed Access Framework, determine what it considered to be the appropriate 'QCA determined' TIC. Moreover, a new user, with less familiarity with the way that access charges historically have been determined, could be more likely to factor in a higher 'QCA determined' TIC, from which the Access Framework \$3.00 per tonne premium would then apply.

To look at the potential impact of this scenario, Figure 8 presents the same valuation analysis, but where the TIC differential is modelled as \$4.00 per tonne - broadly reflecting the \$3.00 per tonne premium from the Access Framework, but applied on top of a new user's higher (potential) expectation for how DBCTM might determine the 'base' TIC.

¹⁸ PwC (2019), *Review of form of access regulation*, available at: <https://www.qca.org.au/wp-content/uploads/2019/05/dbct-user-group-submission-on-2019-dau-redacted.pdf>, Page 8

Figure 8: Impact of the additional TIC on indicative tenement valuation (\$3.00 per tonne vs \$4.00 per tonne)



Source: Wood Mackenzie, PwC analysis. Figure excludes NPV < \$0 projects.

This analysis shows that the indicative valuation differential increases for all projects, though the effect is not uniform. The typical range for valuation impacts remains between 10 to 20 per cent for most projects modelled, though the projects tend to be higher in that range (and there are outliers where the valuation impact is substantially larger).

Appendix A

A.1 Discount rate

For consistency purposes we have used the same discount rate as our previous analysis in our submission in April 2019.¹⁹

The discount rate used in our analysis was developed using a first principles approach, selecting inputs from market sources including analysis from a set of comparable companies to derive an estimate of the asset beta for these projects.

We then employed the Capital Asset Pricing Model to derive a market-participant WACC and adopted a capital structure based on our comparator company analysis.

Based on the above we have estimated the post-tax nominal WACC for the Proposed Projects to be between 12.5 per cent and 15.0 per cent as at 31 January 2019 (Table A1).

Table A1: WACC calculation

	Low	Mid	High
Risk Free Rate (Rf)	4.00%	4.00%	4.00%
Equity Market Risk Premium	6.00%	6.00%	6.00%
Asset Beta (Ba)	1.20	1.35	1.50
Equity Beta (Be)	1.50	1.69	1.88
Target Gearing (D/(D+E))	20.0%	20.0%	20.0%
Debt/Equity Ratio (D/E)	25.0%	25.0%	25.0%
Asset Specific Risk Premium	2.0%	2.5%	3.0%
Cost of Equity (Ke)	15.0%	16.6%	18.3%
Long Term Cost of Debt	3.0%	3.0%	3.0%
Debt Margin	0.5%	0.5%	0.5%
Debt Issuance Costs	0.20%	0.20%	0.20%
Pre-Tax Cost of Debt	3.70%	3.70%	3.70%
Tax Shield	30.0%	30.0%	30.0%
Pre-Tax Cost of Debt (Kd)	2.6%	2.6%	2.6%
Post-Tax Nominal WACC	12.50%	13.75%	15.00%

Source: Bloomberg, Capital IQ, PwC analysis

¹⁹ PwC (2019), *Response to Submissions on the QCA's Draft Recommendation*, Appendix B



Schedule 2 – Examples of Timing for Obtaining Declaration under the National Access Regime

Infrastructure	Application date	Date of final NCC recommendation	Date of Ministerial decision	Declaration Date & Final Decision	Commentary on interim steps and outcomes
<p>Shipping channel services, Port of Newcastle</p> <p>Glencore Coal Pty Ltd (Glencore) sought declaration of the right to access and use shipping channels provided by Port of Newcastle Operations Pty Ltd (Port of Newcastle).</p>	13 May 2015	10 November 2015	8 January 2016 It was decided not to declare the service.	31 May 2016 Tribunal decision to declare the service (with orders giving effect to the declaration on 16 June 2016)	<p>There was a period of approximately 13 months between the initial application and the date the declaration took effect.</p> <p>On 29 January 2016, Glencore applied to the Australian Competition Tribunal (Tribunal) for review of the Ministerial decision not to declare the service. The Tribunal decided the service should be declared on 31 May 2016 and made orders to that effect on 16 June 2016.</p> <p>On 14 July 2016, Port of Newcastle applied to the Federal Court for judicial review of the Tribunal's decision. The application was dismissed on 16 August 2017. Port of Newcastle applied for special leave to appeal to the High Court, which was also dismissed on 23 March 2018.</p> <p>However, it should be noted that since then, Port of Newcastle has applied for and obtained a revocation decision.</p>
<p>Robe Railway</p> <p>The Pilbara Infrastructure Pty Ltd (Pilbara Infrastructure) sought declaration of a service provided through use of the facility comprising the Robe Railway.</p>	18 January 2008	29 August 2008	27 October 2008 It was decided to declare the service for a period of 20 years.	8 February 2013 (Australian Competition Tribunal) Set aside declaration	<p>While the initial declaration was obtained in approximately 9 ½ months, however after a series of legal challenges within just over 5 years the declaration had been removed</p> <p>On 13 November 2008, Robe River Mining Co. Pty Ltd/Rio Tinto applied to the Tribunal for review of the Treasurer's decision. On 30 June 2010, the Tribunal varied the Treasurer's decision, limiting the declaration to a period of 10 years</p>

Infrastructure	Application date	Date of final NCC recommendation	Date of Ministerial decision	Declaration Date & Final Decision	Commentary on interim steps and outcomes
					<p>On 13 August 2010, Rio Tinto and associated entities appealed the Tribunal's decision to the Full Court of the Federal Court, which allowed Rio Tinto's appeal on 4 May 2011.</p> <p>TPI/Fortescue were granted special leave to appeal this decision to the High Court. On 14 September 2012, the High Court remitted the service back to the Tribunal to be redetermined according to law. On 8 February 2013, the Tribunal set aside the Minister's 2008 decision to declare the service.</p>
<p>Hamersley Railway Pilbara Infrastructure sought declaration of a service provided through use of the Hamersley Railway, provided by Hamersley Iron Pty Ltd (Hamersley Iron).</p>	<p>16 November 2007</p>	<p>29 August 2008</p>	<p>27 October 2008 It was decided to declare the service for a period of 20 years.</p>	<p>8 February 2013 (Australian Competition Tribunal) Set aside declaration</p>	<p>While the initial declaration was obtained in approximately 9 ½ months, after a series of legal challenges within just over 5 years the declaration had been removed</p> <p>On 13 November 2008, Hamersley Iron applied to the Tribunal for review of the Treasurer's decision. The Tribunal set aside the Treasurer's decision to declare the service on 30 June 2010.</p> <p>On 13 August 2010, TPI/Fortescue Metals Group Limited (Fortescue) appealed to the Full Court of the Federal Court in respect of the Tribunal's decision. This appeal was dismissed on 4 May 2011.</p> <p>TPI/Fortescue were granted special leave to appeal to the High Court and on 14 September 2012, the High Court remitted the service back to the Tribunal to be redetermined according to law. The Tribunal set aside the Minister's 2008 decision to declare the service on 8 February 2013.</p>

Infrastructure	Application date	Date of final NCC recommendation	Date of Ministerial decision	Declaration Date & Final Decision	Commentary on interim steps and outcomes
<p>Goldsworthy Railway</p> <p>Pilbara Infrastructure sought declaration of a service provided through use of the Goldsworthy Railway service.</p>	16 November 2007	29 August 2008	27 October 2008 It was decided to declare the service for a period of 20 years.	30 June 2010 Affirmed declaration decisions	<p>While the initial application was obtained in approximately 11 ½ months, it took 2 years 7 ½ months to obtain the final Tribunal decision.</p> <p>On 14 November 2008, BHP Billiton Iron Ore sought review of the Treasurer's decision in the Tribunal. The Tribunal affirmed the Treasurer's decision on 30 June 2010. Please also refer to the below comments in respect of the Mt Newman Railway application.</p>
<p>Tasmanian Railway Network</p> <p>The Department of Infrastructure, Energy and Resources sought declaration of the use of rail across Tasmania.</p>	2 May 2007	15 August 2007	2 October 2007 It was decided to declare the service for a period of 10 years.	2 October 2007	<p>There was a period of approximately five months between the initial application and the final decision being made in respect of the services.</p> <p>The decision was not appealed.</p>
<p>Sydney sewage network services</p> <p>Services Sydney Pty Ltd (Services Sydney) sought declaration of sewage transmission and interconnection services provided by Sydney Water.</p>	3 March 2004	1 December 2004	The Premier was deemed to have made a decision not to declare the services.	21 December 2005 (Competition Tribunal decision)	<p>There was a period of approximately one year and nine months between the initial application and the final decision of the Tribunal in respect of the services.</p> <p>Services Sydney sought review of the Premier's deemed decision in the Tribunal. The Tribunal handed down a decision to set aside the deemed decision and to declare the services on 21 December 2005.</p> <p><i>This declaration was later revoked as the services formed part of the NSW Water Industry Access Regime.</i></p>

Infrastructure	Application date	Date of final NCC recommendation	Date of Ministerial decision	Declaration Date & Final Decision	Commentary on interim steps and outcomes
<p>Airside services at Sydney Airport</p> <p>Virgin Blue Airlines Pty Ltd (Virgin) sought declaration of the use of runways, taxiways and other facilities necessary to allow aircraft carrying domestic passengers to take off and land using runways and move between the runways and passenger terminals of Sydney Airport (SACL).</p>	1 October 2002	30 November 2003	29 January 2004 It was decided the service should not be declared.	12 December 2005 (Competition Tribunal decision)	<p>There was a period of approximately 3 years and 1 ½ months between the initial application and the decision of the Tribunal to declare the service.</p> <p>Virgin sought review of the Minister's decision by the Tribunal, which decided on 12 December 2005 to declare the airside service for five years.</p> <p>SACL sought review of the Tribunal's decision by the Full Court of the Federal Court. This was unsuccessful. SACL applied for special leave to appeal to the High Court, which was dismissed on 2 March 2007.</p>