Dalrymple Bay Coal Terminal User Group

DBCT 2019 DAU: Submission in response to Queensland Competition Authority Stakeholder Notice

22 November 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 25 October 2019 Stakeholder Notice (the ***QCA Notice***).

The QCA Notice seeks further feedback on the appropriateness of the negotiate/arbitrate model proposed by DBCT Management Pty Ltd (***DBCTM***) as part of its 2019 draft access undertaking (the ***2019 DAU***).

As the QCA Notice acknowledges DBCTM's proposal is a *'significant shift from the existing framework'*. It is not justified by any change in circumstances, and the DBCT User Group agree with the QCA's assessment that whether such a change is appropriate represents a threshold matter for the assessment of the 2019 DAU.

The principal reasons a negotiate/arbitrate model is not appropriate were directly addressed in the DBCT User Group's initial submission of 23 September 2019 (the ***User Group Initial Submission***) and submissions from potential future access seekers New Hope and Whitehaven. The DBCT User Group strongly reiterates that it considers that form of regulation highly inappropriate in the circumstances of the DBCT coal handling service, for the reasons set out in the User Group Initial Submission.

However, the DBCT User Group has set out below further submissions on the issues raised in the QCA Notice including responses to each of the QCA's specific guidance questions and commentary on the other stakeholder submissions which have been provided to the QCA to date.

2 Executive Summary

The negotiate/arbitrate model is not appropriate in the circumstances of the DBCT service because:

(a) **it is damaging to regulatory certainty** – both as:

(i) a **fundamental break from what has been determined to be appropriate over a long period without any change in circumstances**; and

(ii) **a change that will damage certainty of future pricing** with resulting damage to investment decisions in dependent markets;

(b) **commercial negotiations (without the guaranteed reference tariff and standard access terms) will not produce efficient and appropriate results in the circumstances of the DBCT service –** due to:

(i) the **market power DBCTM possesses**;

(ii) the **lack of substitute services** which potential users of the DBCT can switch to or even credibly threaten to switch to;

(iii) the **lack of countervailing power** users have (due to that lack of substitutes and the multi-user nature of the terminal meaning DBCTM is not dependent on any one user);

(iv) the **significant information asymmetry** which will exist – particularly for future access seekers and in relation to the costs of providing expansions capacity; and

(v) **DBCTM's proposals** for capacity allocation (in expansions or the notifying access seeker process) **involving capacity being contracted without pricing being known**;

(c) **the theoretical 'backstop' of arbitration will not be effective or a credible threat** which will sufficiently constrain DBCTM's behaviour as:

(i) **arbitration will be very costly**;

(ii) the **outcomes of arbitration will be uncertain**; and

(iii) **arbitration will involve significant delays**;

(d) **it disadvantages future access seekers more than existing access holders** – as:

(i) existing access seekers will have some extent of continued protection against DBCTM's monopoly pricing through the existing price review provisions of their user agreements;

(ii) the factors that DBCTM seeks to require the QCA to have regard to in an arbitration in relation to new access seekers are different to those which apply under the existing user agreements, which is clearly inappropriate and likely to result in inefficient higher prices for access seekers;

(iii) access seekers will suffer from greater information asymmetry than existing access holders in any commercial negotiation; and

(iv) the costs, delays and uncertainty of arbitrated outcomes are much more problematic for future access seekers, which are trying to make project investment and contracting decisions in parallel, and therefore are far more likely to settle for an inefficiently high price rather than to resort to arbitration; and

(e) **it increases negotiation, contracting and arbitration costs** by far more than it will reduce administrative and regulatory costs.

The vast majority of those are issues arising from the application of the negotiate/arbitrate structure to the DBCT service of itself, rather than particular features of the model proposed by DBCTM. The negotiate/arbitration structure simply cannot be made appropriate to the DBCT service through modifications or variations.

By contrast, a continuation of the reference tariff model is appropriate as it provides regulatory certainty, will produce efficient and appropriate pricing for both existing users and future users equally, and involves lower aggregate costs than the alternative. As discussed in the Initial User Group Submission, regulatory commentary and precedent suggests that the circumstances of the DBCT service weigh heavily in favour of an ex-ante pricing form of regulation being far more appropriate to adopt. In addition, it is clear from the undertaking and previous consideration of the DBCT access regime that an undertaking with reference tariffs continues to provide 'room for negotiation' where DBCTM is willing to offer access terms that justify a different price.

Accordingly, the DBCT User Group considers that it is very clearly not appropriate, having regard to the factors set out in section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) (***QCA Act***), for an undertaking for the DBCT service based on a negotiate/arbitrate approach to be approved.

3 The DBCT access regime does provide for commercial negotiations

DBCTM places great emphasis on its assertions that the QCA Act gives primacy to commercial negotiations and that that does not occur under the existing regime.

However, that claim fails to understand both the nature of the current regime and the structure and intent of the QCA Act.

3.1 The DBCT access undertaking expressly provides a clear opportunity for negotiation

First, it should be noted that none of DBCT's access undertakings have even mandated the terms of access (including price of access) to DBCT.

Rather they have provided a minimum set of guaranteed terms and reference pricing to expedite and facilitate such negotiations, with the parties having the discretion to commercially reach agreement on other terms.

Reference tariffs do not prevent negotiations, they prevent inefficient price discrimination that is not justified based on differences in cost and risk arising from differences in bargaining power and information.

That the existing access undertaking supports the right to negotiate access terms is unequivocally set out in clause 13.1 of the existing undertaking, as set out below:

13.1 Access Agreements

…

*(c) (**Consistency with Standard Access Agreement**) If the Access Seeker so requires (although DBCTM Management and the Access Seeker are able to agree otherwise), the Access Agreement will, in all material respects be consistent with the Standard Access Agreement.*

*(d) (**Different terms**) DBCT Management or an Access Seeker may seek Access on terms which are different (**Different Terms**) from the Standard Access Agreement, but if either does so:*

(1) DBCT Management may, acting reasonably:

(A) decline to agree to any such Different Term (for example if accepting the Different Term would create obligations which would be impractical for it to comply with or incur unreasonable expense which it could not recoup from the Access Seeker or cause it to breach another Access Agreement or Existing User Agreement or materially disadvantage other Access Holders); and

(B) require that charges other than the Reference Tariff apply if the Different Terms result in a risk profile or costs (direct or indirect) to it different from those that would have applied under the Standard Access Agreement; or

(2) an Access Seeker may, acting reasonably:

(A) decline to agree to any such Different Term (for example if accepting the Different Term would result in a material and adverse risk or cost position that is inconsistent with an appropriate and symmetrical risk and cost allocation between the contracting parties); and

(B) require that charges other than the Reference Tariff apply if the Different Terms result in a risk profile or costs (direct or indirect) to it different from those that would have applied under the Standard Access Agreement.

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and if the parties cannot agree on any such matter, it may be referred to the QCA for determination.

(e) *(**Standard Access Agreement is a guide for access negotiations**) For Access required on terms other than the Standard Access Agreement, the terms of the Standard Access Agreement will provide guidance as to the terms and conditions that are to be included in the relevant Access Agreement.*

As is plainly evident from that section, it is open to DBCTM and an access seeker to commercially agree different terms, including agreeing different charges to the reference tariff where those different terms result in a risk profile or cost that would differ from those arising under the standard terms.

Other provisions that makes this clear include section 5.4(j)(4) (which includes reference to offering expansion capacity access terms that vary from the standard access agreement) and section 11.12 (regarding charges that diverge from the reference tariff).

There is a sizeable difference (that the DBCTM submissions ignore) between the undertaking provisions, which provide a pre-determined appropriate 'back-stop', as opposed to mandating terms that parties cannot agree to vary.

3.2 QCA's Final Decision recognised the opportunity to negotiate

The ability to negotiate different terms, within a framework designed to facilitate timely and informed negotiations, was recognised in the QCA's final decision in relation to consideration of what became the current undertaking, which relevantly noted that:[1]

> *We consider the negotiation arrangements in the draft decision provide an appropriate balance in the allocation of risks, rights and responsibilities between DBCTM, access seekers and users.*
>
> *In particular, we consider the package of amendments proposed …*
>
> *…*
>
> - *allows DBCTM and access seekers to negotiate different terms to address financial commercial and contractual risks specific to a Terminal expansion (cls 5.4, 5.10, 5.12, 11 and 13)*
> - *…*
> - *provides a reference 2015 SAA to facilitate the timely negotiate process and execution of access agreements, including access agreements conditional on a Terminal expansion (Schedule B).*

3.3 Certification process recognised the opportunity to negotiate

DBCTM's assertions are also contrary to the analysis of the regime that occurred in the context of the certification of the DBCT access regime (described as including the access undertaking, which of course provided for reference tariffs).

For example the National Competition Council (***NCC***) concluded in its final recommendation:[2]

> *The DBCT Access Regime encourages parties to enter into commercial negotiations to reach agreement on the terms and conditions of access and strikes an appropriate balance between the interests of service providers and access seekers.*

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[1] QCA, *Final Decision – DBCT Management's 2015 draft access undertaking*, November 2016, page 202-203.
[2] NCC, *Dalrymple Bay Coal Terminal Access Regime: Application for certification, Final Recommendation*, 10 May 2011, page 20.

DBCTM's assertions are also inconsistent with the State of Queensland's description of the DBCT access regime in its application for that certification:[3]

> ***The primacy of commercial negotiations is also recognised by the Access Undertaking**, which contains the following provisions:*
>
> *(a) a detailed negotiation framework to facilitate commercial negotiation. The framework provides for access agreements consistent with the terms of the standard access agreement approved by the QCA (Standard Access Agreement) or on other terms agreed between DBCT Management and the access seeker. This was also recognised by the QCA in their decision on the 2006 Access Undertaking where they noted that an access seeker and DBCT Management are free to agree to terms and conditions that differ from those contained in a Standard Access Agreement.*
>
> *(b) a dispute resolution process where commercial agreement cannot be reached.*
>
> ***Therefore it is clear that the DBCT Access Regime incorporates the principle of the primacy of commercial negotiation**.*

3.4 The lack of non-reference tariff agreements does not support DBCTM's conclusions

DBCTM seeks to present the fact that it has not agreed material departures from the standard access terms or reference tariff pricing as evidence that there is 'no room for negotiation'.

However, that is not the only possible conclusion, or even the most logical conclusion, that follows from that evidence.

Rather, individual User Group member's experiences are that negotiations of departures from the standard access agreement terms have been largely unfruitful because DBCTM has typically only discussed variations that are less favourable than the standard access agreement, without providing any commensurate benefits to the access seeker which would make that commercially acceptable.

[redacted]

Rationally, it would be anticipated that if DBCTM wished to receive a higher price than the reference tariff it would need to offer better terms than those in the standard access agreement (e,g. by assuming additional risks). That is the room for the negotiation that clearly does exist under the terms of all previous DBCT access undertakings.

[redacted]

[3] Queensland Government, *Application to the National Competition Council for a Recommendation on the Effective of an Access Regime: Queensland Third Party Access Regime for coal handling services at Dalrymple Bay Coal Terminal*, December 2010, page 34-35.

Accordingly, the fact that DBCTM has not reached agreement on non-refence tariff access charges either reflects that DBCTM is not willing to offer better terms or that the additional access charges it seeks are too high for access seekers to be willing to agree to them in order to obtain the more favourable terms.

Therefore the DBCT User Group strongly rejects DBCTM's assertion that previous access undertakings have left no room for negotiations. It is DBCTM's approach to negotiations that has produced that outcome. Removing the 'back-stop' of reference tariffs in that context is clearly not appropriate.

4 The QCA Act expressly recognises ex-ante pricing can be appropriate

In addition, the QCA Act clearly takes a more nuanced approach than DBCTM accepts in its submissions.

The QCA Act expressly provides for:

(a) different approaches to regulation of declared services, including:

  (i) the negotiate/arbitrate regime provided for in the QCA Act itself (which applies in the absence of any undertaking); and

  (ii) regulation by an undertaking customised for the service;[4]

(b) the QCA to have the right to compel submission of an undertaking;[5] and

(c) access undertakings being able to include how charges are to be calculated.[6]

Given that access undertakings can only be approved where the QCA determines they are appropriate,[7] the QCA Act expressly and unequivocally recognises that it can be appropriate for the QCA to require an access undertaking which includes reference tariffs.

That is a well-recognised feature of the QCA Act. For example, it is notable that in its submission to the Productivity Commission's review of the national access regime, Queensland Treasury submitted that:[8]

> *there is no avenue under the National Access Regime in which the ACCC can require a service provider to submit a draft access undertaking. Accordingly, unless a provider chooses to submit an undertaking voluntarily or a separate agreement or Act requires the submission of an undertaking, service providers and access seekers must solely rely on the negotiate-arbitrate framework to negotiate access or settle access disputes.*
>
> ***The Queensland Government has found that access undertakings can be a useful means of regulating access to certain services, particularly where a more direct regulatory approach than solely relying on the negotiate-arbitrate framework is warranted. This is particularly so for capacity constrained infrastructure or where there are multiple access seekers****.*

Accordingly, the intention and structure of the QCA Act perfectly reflects the analysis in the Initial User Group Submission and PwC Report, by recognising that the appropriate form of regulation will vary with the circumstances of an individual declared service. In that regard, the QCA Act is fundamentally different to the national access regime in Part IIIA of the *Competition and Consumer Act 2010* (Cth), which is intended as a regime of broad application, and does not empower a federal economic regulator to make the same decisions about requiring submission of

[4] Part 5, Divisions 4-5 and Division 7 QCA Act
[5] Section 133 QCA Act
[6] Section 137(2)(a) QCA Act
[7] Section 138(2) QCA Act
[8] Queensland Treasury and Trade, *Productivity Commission Inquiry: National Access Regime*, March 2013, page 9.

an undertaking. The national access regime is premised on the view that if a different form of regulation (including one with ex-ante pricing) is warranted, an industry or State regime will be implemented. Commentary from the Productivity Commission about that regime needs to be properly understood in that context.

Consequently, it is actually entirely contrary to the very intention of the QCA Act, to simply assert (as DBCTM does) that a negotiate/arbitrate approach must be favoured due to the 'primacy of commercial negotiations'.

Rather, the QCA Act makes it clear the question is one of appropriateness for the declared service. As what is appropriate will vary from service to service, the exercise the QCA is required to undertake is that reflected in the Initial User Group Submission and PWC Report – namely an analysis of the underlying factors that lead to one form of regulation being more appropriate than another, and consideration of how the circumstances of the DBCT service compare to those factors.

5 Further Commentary in relation to the Form of Regulation

5.1 The Appropriateness of an Ex-ante Regulatory Model for the DBCT service

It is evident from both the existence of numerous ex-ante regulatory models and changes from a negotiate-arbitrate regime to an ex-ante regulatory model as occurred in the telecommunications regime on the basis that *'it is clear that the 'negotiate-arbitrate' model is not producing effective outcomes for industry or consumers*',[9] that there are circumstances where negotiate-arbitrate regimes are not effective and ex-ante regulation is more appropriate.

The Initial User Group Submission provided a clear summary of the economic commentary and analysis in relation to when ex-ante pricing regulation or a negotiate/arbitrate regime would be more appropriate.

The DBCT User Group continues to consider that that analysis is compelling evidence of the appropriateness of reference tariffs in the circumstances of the DBCT service, which are characterised by:

(a) DBCTM's market power;

(b) the lack of any competing substitute service;

(c) significant barriers to entry for establishing a new competing terminal (arising from factors including environmental regulation, land availability and economies of scale);

(d) a large number of existing and future users;

(e) as a result of each of the factors above, access seekers having no countervailing power;

(f) information asymmetry – particularly as between DBCTM and access seekers and in relation to the costs of expansions; and

(g) fundamentally the same service being provided to all users – such that the appropriate pricing is relatively easy to calculate.

[9] Explanatory Memorandum, *Telecommunications Legislation Amendment (Competition and Consumer Safeguards) Bill 2010* (Cth), 4.

5.2 COAG Energy Council commentary

Since the lodgement of the Initial User Group Submission, the COAG Energy Council has published its 'Options to improve gas pipeline regulation' Regulation Impact Statement,[10] which contains a number of further instructive observations.

First, it contains a number of timely reminders of the ACCC's previous findings[11] that:

(a) limitations in the negotiate/arbitrate resolution mechanism (with not all pipeline services being regulated and cost and resources associated with access disputes and uncertainty surrounding the outcome discouraging shippers from triggering arbitrations) were allowing pipelines subject to full and light regulation to engage in monopoly pricing;

(b) limited information regarding the costs incurred by service providers and the relationship between these costs and the prices charged for services were limiting the ability of shippers to readily identify any exercise of market power and to negotiate effectively with service providers; and

(c) the ACCC had continuing concerns that the potential for the threat of arbitration from smaller shippers was viewed as less credible resulting in smaller shippers therefore paying more for services under the Part 23 National Gas Laws negotiate/arbitrate regime – with evidence being found of smaller shippers being unable to secure the same prices offered to larger shippers.

These findings are of course notable for their similarity to the exact concerns that the DBCT User Group, New Hope and Whitehaven have raised with the negotiate/arbitrate model in the context of the DBCT service.

Secondly, it reiterated that the appropriate regulatory response is proportionate to the degree of market power involved in the supply of the relevant services.[12]

Thirdly, it identified the risk of under-regulation arising where the negotiate/arbitrate form of regulation was applied in situations where customers are unable to negotiate effectively,[13] particularly noting the following:

> *Part 23, light regulation and full regulation are all nominally "negotiate-arbitrate" forms of regulation, although the extent to which effective negotiation actually occurs differs depending on who the customer is. For example:*
>
> - *some shippers (e.g. small or captive customers) may lack negotiating power and therefore have limited ability to meaningfully negotiate with service providers; and*
> - *residential and smaller commercial and industrial customers are atomistic and unable to negotiate directly with gas pipelines, and retailers may have little incentive to negotiate on their behalf.*
>
> *As noted by the Expert Panel, the negotiate-arbitrate form of regulation is premised on the idea that shippers have some level of countervailing power:*
>
> *"This form of regulation [negotiate-arbitrate] is likely to be most effective where the regulated service is subject to a degree of contestability and access seekers are relatively small in number and have some countervailing market power to exercise in the commercial negotiation phase."*

[10] COAG Energy Council, *Options to improve gas pipeline regulation – COAG Regulation Impact Statement for consultation*, October 2019
[11] ACCC, Inquiry into the east coast gas market, April 2016, Chapter 7 and ACCC, Gas Inquiry report 2017-202, July 2019, pages 128-129.
[12] COAG Energy Council, *Options to improve gas pipeline regulation – COAG Regulation Impact Statement for consultation*, October 2019, page 68-69.
[13] COAG Energy Council, *Options to improve gas pipeline regulation – COAG Regulation Impact Statement for consultation*, October 2019, page 72-74.

*However, **if users are unable to meaningfully negotiate, either because they are under-resourced, atomistic/unable to co-ordinate or captive and lacking credible alternatives, then it is not clear they have any countervailing power**. The option to seek arbitration may mitigate this to a certain extent. However, **small or unsophisticated shippers may be at a disadvantage in any arbitration, so the threat of arbitration may not be considered credible for these shippers** (see Chapter 10). **In these circumstances, the negotiate-arbitrate model may be a relatively weak form of regulation**. ….*

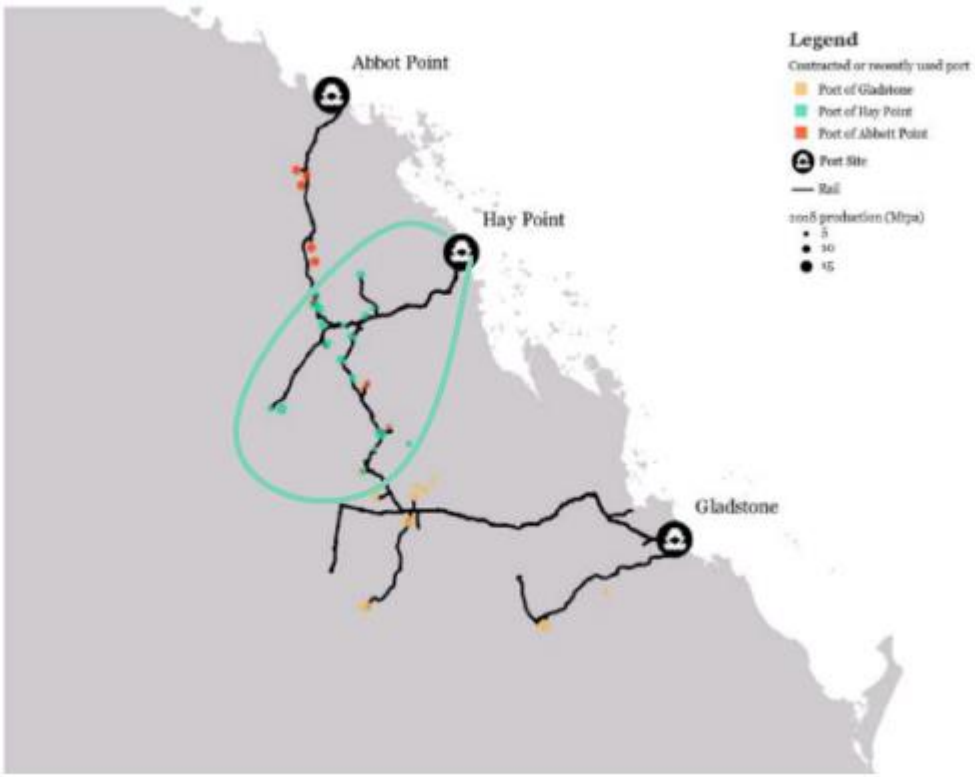
***A related point is that if there are a large number of shippers, there might be large number of arbitrations, which could be quite costly. This is a relevant point** both for considering the available forms of regulation and also the test **for determining what form of regulation applies**. The Productivity Commission made a similar point in the 2004 Gas Access Review, when commenting on the reduced costs due to having reference tariffs available:*

*"Further, there is likely to be more than one access seeker for some pipelines. **A generally available access arrangement for such pipelines is likely to involve lower costs than those of requiring each access seeker to seek access through the negotiate–arbitrate framework of the national access regime**."*

***Where negotiation is unlikely to be meaningful, or the costs of arbitration are likely to be high, a more direct form of price control may be justified**. In theory, full regulation fulfils this role in the current regulatory menu, but it only controls the prices of reference services and reference tariffs are technically enforced through arbitration. If reference services do not cover enough services, then there may be benefit in further strengthening full regulation. However, recent reforms to full regulation have broadened the scope of reference services, which likely achieves this to a large degree.*

Each of the issues highlighted in that passage exist in respect of the DBCT service.

As shown by the diagram below from the declaration review process, there are large numbers of mines on the Goonyella system located close to Hay Point which are truly captive to DBCT due to the substantially higher (and uneconomic cost) to access other terminals (once above and below rail costs and differences in terminal costs are taken into account).



The difficulty of resourcing arbitration for small users such that it is not a credible threat or constraint on the infrastructure service provider's behaviour is a real one for both existing users like [redacted] and potential future access seekers [redacted].

Finally, the users of the terminal are becoming more numerous through a combination of new projects, mine sales and capacity transfers – such that there is, and will continue to be, a relatively large number of users with resulting higher costs of a negotiate/arbitrate model, relative to a reference tariff model (and no dependence by DBCTM on any individual user).

The DBCT User Group strongly reiterates that it cannot be appropriate to replace a system which is evidently functioning well with one that creates material risks of market power being exercised against users of the monopoly infrastructure service.

The most recent commentary from the COAG Council Regulatory Impact Statement simply further emphasises that this is not existing and future users being overly fearful of the outcomes – but for services with similar characteristics to the DBCT service in which this negotiate/arbitrate approach exists, these very real issues of concern have arisen in practice.

As discussed in the Initial User Group Submissions, there are fundamental differences in the characteristics of the markets and services in which 'lighter' forms of regulation have been considered more appropriate.

6 Regulatory Certainty

While it is acknowledged that each draft access undertaking is to be considered afresh on its own merits, the QCA has previously recognised that providing regulatory certainty in respect of long-lived infrastructure assets is in the public interest and is likely to encourage investment in the infrastructure facility itself and in dependent markets.

This has been expressly considered by the QCA in relation to previous draft amending access undertakings DBCTM has submitted, with the QCA specifically noting:[14]

> *The principle of regulatory certainty, although not specifically a factor under section 138(2), is relevant when considering the legitimate business interests of DBCTM, the interests of access seekers and access holders, and the public interest (ss. 138(2)(b), (d), (e) and (h)). It is also a matter that the QCA may in any event have regard to (independent of other related considerations) pursuant to section 138(2)(h). The QCA generally supports regulatory certainty by seeking to provide consistent, transparent and timely decisions that take account of all available relevant information.*
>
> *…*
>
> *where amendments give rise to a material change … including through any reallocation of risk between stakeholders, then the question of regulatory certainty is likely to be a relevant consideration. Where the QCA considers that this may be the case … the QCA recognises the concern raised by the DBCT User Group that … material shifts in the risks faced by stakeholders, in the absence of any change in circumstances, may risk undermining confidence in the predictability of the regime.*

In considering how regulatory certainty should be taken account of in the specific context of departing from anticipated pricing treatment in a new undertaking (in relation to a Queensland Rail undertaking) the QCA has also stated:[15]

> *Regulatory certainty for rail access is an important underpinning of investments made in long-lived infrastructure investments and expenditure on exploration activities. Indeed, uncertainty about pricing can result in a lessening of competition for upstream coal tenements (limited exploration and mine development expenditure) and inefficient use of Queensland Rail's West Moreton network rail infrastructure (by discouraging new entrants from taking any spare rail capacity). Regulatory certainty is consistent with the object of Part 5 of the QCA Act.*
>
> *Specifically, if customers cannot rely on regulatory arrangements to provide certainty, they will be less willing to make future investments in long-lived sunk investments or undertake exploration activities to develop prospective tenements. Both of these have implications for economic efficiency.*

The DBCT User Group strongly supports those statements as a proper consideration of how regulatory certainty is relevant to the appropriateness of an access undertaking.

One would therefore expect that where:

(a) it has been determined by the QCA to be appropriate in every undertaking following privatisation of the terminal (i.e. since the 2006 access undertaking) to adopt reference tariffs;

(b) DBCTM's current owners have publicly indicated *'The 2010 Access Undertaking and the DBCT Access Regime provide a stable, well understood regulatory framework, which provides the certainty required to facilitate further expansion of the terminal as it becomes necessary'*;[16] and

(c) there are known to be significant risks arising from under-regulation (as discussed in section 5 above),

[14] QCA Draft Decision, DBCTM's Modification DAAU, March 2018 page 5-6.
[15] QCA Decision, Queensland Rail's Draft Access Undertaking, June 2016, page 237-238
[16] Brookfield Infrastructure Partners L.P., *Submission – Application for Certification of the Dalrymple Bay Coal Terminal (DBCT) Access Regime*, 14 February 2011.

there would need to have been a fundamental shift in market circumstances in order to justify what the QCA Notice acknowledges is a *'significant shift from the existing framework'*[17] for DBCT pricing.

No such fundamental shift in circumstances has occurred. The declaration review is not such a change in circumstances, it is simply a legal and economic review against different criteria. For the 2019 DAU to be relevant the status quo of the service being declared will be maintained, such that the declaration review will not have produced any change in any case.

It has not gone unnoticed by industry that DBCTM is seeking this fundamental change prior to a publicly reported divestment by Brookfield of some or all of its interest in the terminal. It is not appropriate for the QCA to be approving a structure which creates the potential for existing or future owners of the terminal to charge more than an efficient, cost-reflective price as determined through QCA reference tariffs.

Consequently, given the detrimental impact that the QCA has recognised a lack of regulatory certainty can have on investment, competition and efficiency, there would need to be extremely compelling arguments in favour of DBCTM's proposal to justify a sudden and significant shift from the existing regulatory certainty, consistency and stability that exists in relation to DBCT pricing. No such compelling arguments exist.

7 Responses to other Stakeholder Submissions

The DBCT User Group notes the submissions made by New Hope and Whitehaven Coal as existing or potential future access seekers, both of which express serious and genuine concerns with the negotiate/arbitrate model proposed by DBCTM.

It is unsurprising, given the differences which will exist between existing and future users, that it is potential future users who have put in additional submissions.

Many of the concerns those submissions raise, reflect the reasons the DBCT User Group have identified in the User Group Initial Submission as to why DBCTM's negotiate/arbitrate model is inappropriate.

However, the DBCT User Group wishes to strongly confirm its agreement with the following points which are emphasised in those future access seeker submissions:

(a) even if DBCTM was correct in that their proposal resulted in new and existing users being in the same position (which they are clearly not) – that does not make the 2019 DAU appropriate. Equality is *'a necessary but by no means adequate – feature of an appropriate undertaking'* (Whitehaven submission);

(b) in fact, the adverse outcomes of the negotiate/arbitrate model disproportionately impact future users (Whitehaven and New Hope submissions) due to:

  (i) inequality of access to information – such that the extent of information asymmetry has even greater potential to result in inefficient outcomes and market failures in access negotiations (for reasons including their lack of previous experience with DBCT and not being shareholders in the user owned operator), which is clearly not resolved by the limited and high-level information provision requirements in the 2019 DAU and the QCA Act;

  (ii) future users having greater 'anxiousness' (to use DBCTM's own terminology)/incentives to quickly reach agreement to:

    (A) avoid the costs of arbitration;

[17] QCA Notice, page 2.

(B) secure access quickly due to their inability to absorb the delays in the timeframes for development and approvals of a greenfield project where other take or pay contracts and investment decisions have to be made in parallel to secure port access; and,

(C) secure certain terms of access, due to their inability to make investment decisions where an arbitration process will create uncertainties as to the likely outcome (let alone face the unreasonable outcome of negotiations after a binding agreement has been entered as DBCTM's position on conditional access agreements for expansion capacity envisages),

such that the 'threat of arbitration' to DBCTM is far less credible from new users and will act as a lesser constraint in DBCTM's negotiations with such access seekers.

(c) the adverse outcomes of the negotiate/arbitrate model also disproportionately impacting on smaller companies (New Hope submission) due to:

(i) the additional tariffs proposed for minor variations in coal handling services being more heavily relied upon by smaller companies – which, with less mines and less volume, and typically not producing premium hard coking coal products, have more need of co-shipping and coal blending opportunities – leaving such users particularly exposed to unjustified price rises in relation to such variations due to DBCTM's views on the differences in cost or capacity consumed being unverifiable by a new user; and

(ii) the high cost of arbitration, where smaller users will not have the same economic resources available to pursue such an arbitration (again making it a less credible threat and lesser constraint on DBCTM's behaviour); and

(d) where potential future access seekers have made investments in resources projects (with Winchester South for Whitehaven Coal and New Lenton for New Hope providing clear examples), the QCA's assessment of appropriateness needs to take into account the interest in a stable and predictable regulatory framework (Whitehaven submission).

Those reasons alone are more than sufficient to confirm the inappropriateness of DBCTM's proposed negotiate/arbitrate model.

8 Responses to QCA Guidance Questions

8.1 Does the negotiate/arbitrate model appropriately balance the interests of stakeholders

Does the negotiate/arbitrate model appropriately balance the interests of DBCT Management, access seekers and access holders? If not, can it be modified to be balanced and effective?

(a) Why a negotiate/arbitrate model is not appropriate

The DBCT User Group consider that the negotiate/arbitrate model is fundamentally inappropriate in the circumstances of the DBCT service. It is highly unbalanced in favour of DBCTM and against access holders and access seekers.

The DBCT User Group considers that it is the negotiate/arbitrate model itself that gives rise to the inappropriateness. While there are amendments that could be made to remove some egregious provisions, the flaws of the negotiate/arbitrate structure mean that the 2019 DAU cannot be modified to be appropriate while it relies on that form of regulation.

The User Group Initial Submission (and the PwC report attached to that submission) discuss why a negotiate/arbitrate structure is inappropriate in the circumstances of the DBCT service in

significant detail. Accordingly, the DBCT User Group requests that the QCA consider all of that analysis in addition in conjunction with this submission).

However, for completeness the key points are summarised below:

Issue	Summary
Relevance of Declaration Review	It is absolutely clear, both from the wording of the QCA Act and the QCA and NCC's previous consideration of this issue, that DBCTM completely misstates the law by seeking to conflate the access criteria (as relevant to the declaration review) with the requirement of appropriateness (as relevant to approval of an undertaking under s 138 QCA Act). Appropriateness is not achieved through equal (poor) treatment of access holders and access seekers as DBCTM asserts (even though the assertion of equal treatment is itself untrue). Rather, appropriateness is to be measured having regard to the factors in section 138(2) QCA Act.
Circumstances of the DBCT service make ex-ante price regulation appropriate	Numerous regulatory and economic bodies have recognised that the appropriate regulatory settings vary with the circumstances of the regulated service. The PwC report and User Group Initial Submission provide extensive examples of that analysis. The circumstances of the DBCT service exhibit basically all of the characteristics which favour ex-ante pricing regulation as the appropriate outcome, including that: • the service provider has market power; • there is high barriers to entry; • there are no substitute services; • users have no countervailing power; • the service provider has incentives to engage in monopoly pricing; • there will be information asymmetry in any negotiations (which will be greater for new access seekers); • the service is fundamentally the same for all users (such that a common reference tariff can be calculated); • there are multiple users of fundamentally the same service (such that there is no mutual dependence); and • it is not particularly complex to calculate the appropriate tariff. It is evident that relying on commercial negotiations to resolve pricing in those circumstances will either result in inefficient monopoly pricing or failures to reach commercial agreement. The avenue of arbitration does not make this model appropriate, as bi-lateral arbitrations in those circumstances will involve significantly more cost, delay and uncertainty than will exist in the typical QCA reference tariff setting process.

Existing users are not fully protected	As discussed in sections 8.2 and 8.3, existing users are not fully protected by the price review clauses in existing contracts. Those clauses lack certainty, require more costly arbitration, confine the appropriate QCA methodology to one out of a number of factors, and unlike reference tariffs are likely to result in inefficient price discrimination unrelated to the cost or risk of the service provided, but instead arising from the bargaining position and resources of individual users (some of which will settle rather than engage in protracted, expensive and uncertain arbitration).
Access seekers are even worse off	As discussed in sections 7 and 8.4, access seekers are even worse off under a negotiate/arbitrate model as they will typically: • suffer more from information asymmetry in access negotiations (due to not having previous experience with DBCT and not having a shareholding in the user owned operator); • typically have less resources, such that bringing costly arbitration is not a realistic avenue; and • have a worse bargaining position in commercial negotiations and are less likely to be able to rely on arbitration due to the need for timing and cost certainty that arises from contracting access typically occurring in parallel to seeking to make other project investment and contracting decisions for a greenfield development, and do not benefit for the existing contractual price review protections available to existing users. All those factors plainly demonstrate that DBCTM's claims that existing and future users will be equally treated is simply untrue.

Section 138(2) factors	Proper regard to the factors the QCA is required to have regard to in determining the appropriateness of the 2019 DAU confirm it does not create the appropriate balance. In particular, a negotiate/arbitrate model:
	
	• is inconsistent with the object of Part 5 of the QCA Act as it creates significant uncertainty which is likely to result in inefficient outcomes;
	
	• does not appropriately balance the legitimate interests of the operator, access seekers and access holders, due to:
	
	  ○ creating greater potential for monopoly pricing (because of issues noted above like DBCTM's market power, information asymmetry, bargaining positions and costs of arbitration) adverse to the interests of users and leading to DBCTM earning a commercial return well about that which is commensurate with the regulatory and commercial risks involved in providing the service;
	
	  ○ increasing negotiating and contracting costs for access seekers;
	
	  ○ reducing certainty of outcomes; and

	○ creating distortions in markets because of the competitive disadvantage created for future users relative to existing users; and • is inconsistent with the public interest due to how damaging it is to certainty (and the potential chilling effect that has on future development and investment decisions in dependent markets), the greater potential it creates for inefficiently high pricing (and resulting inefficient investment decisions in the terminal and dependent markets) and substantially increasing the contracting and negotiation costs; • is inconsistent with the pricing principles, by creating greater potential for DBCTM to earn a return well above that which is commensurate with the regulatory and commercial risks involved and blunting incentives to reduce cost and improve productivity; and • is inconsistent with other relevant factors including regulatory certainty (discussed in section 6 above), and consistency of treatment with other multi-user regulated coal services, which weigh heavily against the significant shift to a negotiate/arbitrate model.

(b) Specific issues with DBCTM's proposal that exacerbate the inappropriateness of negotiate/arbitrate

The problems noted in section 8.1(a) above will exist for any negotiate/arbitrate structure. They are beyond fixing, such that a negotiate/arbitrate model cannot be made appropriate through modifications.

However, for completeness, in addition to those issues there are clearly numerous additional inappropriate elements of the particular negotiate/arbitrate model that DBCTM has proposed which could theoretically be modified. Some of the most obvious examples include:

Issue	Summary
Factors to apply in determining TIC for varies between access holders and access seekers	The factors which the QCA would be required to have regard to in arbitrating the TIC for an access seeker (under the 2019 DAU) and access holders (under the existing user agreements) are different and will produce different results. In particular, it cannot be appropriate for existing access holder arbitrations to have regard to the QCA's methodology for comparable services (which is appropriate) while access seeker arbitrations have no regard to that and instead apply the completely different and inappropriate 'willing but not anxious test' (and refer to agreements that are reached between DBCTM and access seekers in the non arm's length environment that will exist and in other markets – as discussed in section 8.5).
Willing but not anxious test	As discussed in section 8.5, this test is completely inappropriate for valuation of a service, particularly in the circumstances of the DBCT service where there is no comparable transactions entered in a truly

	competitive and transparent market from which such a value could ever be properly estimated.
Geographic scope of willing but not anxious test	As discussed in section 8.5, DBCTM has exacerbated the inappropriateness of this factor by defining the range of buyers to have regard to in a way that includes buyers outside of what the QCA has assessed as the market in which acquisition of the DBCT service actually occurs in the declaration review process. Consequently, any price derived from this factor will be biased higher through the inclusion of buyers which are not participants in the actual market (such as a Blackwater or Newlands system mine that principally utilised WICET or Abbot Point Coal Terminal on rare occasions exporting through the Port of Hay Point due to a particular supply chain issue or marketing opportunity).
Differential pricing for minor variations in service	This creates significant uncertainty, complexity and information asymmetry – as there will be real difficulty in trying to determine the minor incremental cost or capacity differences involved in such variations. That is particularly the case because the capital equipment used is effectively the same for all users of the DBCT service (with or without these variations). It will basically be impossible to model up front given the changes in the volume of such variations utilised and that the cost or capacity outcomes would presumably vary depending on the timing of the request. In addition, the minor differences in capacity taken will change as expansions occur (which based on DBCTM's most recent Master Plan involve changes to components of the terminal relevant to many of these variations). It creates material risks of becoming simply a thin veneer of legitimacy for engaging in monopoly pricing and pricing discrimination against access seekers and smaller producers who will typically use these minor variations to a greater extent, and is not appropriate where the standard access agreement already provides a mechanism for highly disproportionate costs or capacity consumption impacts.
Contracts with unknown pricing	Another consequence of the removal of reference tariffs is that sections 5.4(j)-(k) (in relation to existing terminal capacity) and 5.4(l)(15) (in relation to expansion capacity) envisage access seekers being required to agree to a legally binding access agreement without any certainty of the pricing that will apply under it. That is evidently highly prejudicial, and particularly for future access seekers who are likely to be being asked to accept that uncertainty when it will directly impact on the margin of a project they are trying to make an investment decision on in parallel.
Inadequate information provision	As discussed in the Initial User Group Submission, referring to the information provision requirements in section 102 of the QCA Act is woefully inadequate given the high level nature of the information required by that section, and the manner in which a monopolist who benefits from information asymmetry in negotiations is likely to provide information under it.

For the avoidance of any doubt, the DBCT User Group strongly rejects any assertion that if these or other specific problems of the DBCTM model were corrected the 2019 DAU would somehow become appropriate.

The fundamental problem will always remain that a negotiate/arbitrate model relies on:

(i) the circumstances being such that the parties will be able to resolve appropriate pricing through commercial negotiations (which assumes there is limited or no market power held by the infrastructure service provider, information symmetry and countervailing power or substitute services which can be switched to - i.e. assumes circumstances exist which clearly do not exist for the DBCT service); and

(ii) the threat of arbitration being credible – which will not be the case for many access seekers who for reasons such as time, cost and need for certainty (as noted above) will not be in a position to utilise arbitration, such that it will not provide a credible threat and therefore constrain DBCTM's negotiations with such access seekers.

8.2 Interaction with existing user agreements

How will the proposed negotiate/arbitrate model interact with existing user agreements? Where the QCA is not setting a TIC as part of a DAU review process, how would a price reset process under an existing user agreement work? To what extent would existing users be protected from a potential exercise of market power by DBCT Management under their existing user agreements?

The DBCT User Group's understanding is that each of the existing user agreements reflect the relevant terms of clause 7 of the current standard access agreement in this regard.

Those provisions will continue to operate if the QCA (contrary to all submissions from access holders and access seekers) was to approve an undertaking which did not involve a QCA determined terminal infrastructure charge (***TIC***).

Under clause 7.2, charges (and the method of calculating, paying and reconciling them) and consequential changes in drafting are reviewed effective from each 'Agreement Revision Date', with the review to commence no later than 18 months prior.

Agreement Revision Date is relevantly defined to mean the date of commencement of each access undertaking for the terminal, so that theoretically the review for the proposed 2020 DAU term should commence no later than 1 January 2020.

There are obviously some practical difficulties with that process where:

(a) DBCTM and the users have not previously engaged in such a review (because DBCTM and the existing users have never been able to commercially agree a price and it would involve unnecessary and excessive costs for all parties to arbitrate a price when the QCA determines appropriate reference tariffs in a multi-lateral and transparent process);

(b) the review is permitted (and presumably intended) to have regard to:

(i) the terms of the access undertaking which will be effective from the relevant Agreement Revision Date; and

(ii) if relevant, differences in risk profile and costs to DBCTM (direct and indirect) between the terms and conditions of the agreement and the terms and conditions of the standard access agreement at the relevant Agreement Revision Date,

both of which won't be known at that point.

If the parties do not reach agreement by the date 6 months prior to the scheduled Agreement Revision Date (i.e. 1 January 2021), the parties would be required to refer the matter to the QCA for arbitration (assuming it was willing and able to act).

If the matter is referred to arbitration, then the arbitrator must have regard to the following matters:

(i)	*an appropriate asset valuation of the Terminal and the relevant Terminal Component;*
(ii)	*an appropriate rate of return for DBCT Management;*
(iii)	*the terms of this Agreement;*
(iv)	*the expected future tonnages of Coal anticipated to be Handed through the Terminal and the relevant Terminal Component;*
(v)	*any other matter agreed to by the User and DBCT Management and notified by them in writing to the arbitrator;*
(vi)	*any other matter agreed to by the User and DBCT Management and accepted by the arbitrator as being relevant; and*
(vii)	*the then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined it).*

As discussed in section 8.4 below, those factors are fundamentally different to those DBCTM proposes the QCA is required to have regard to in determining access charges for access seekers under the terms of the 2019 DAU.

During the declaration review process, the DBCT User Group acknowledged that they anticipated that an arbitration where the arbitrator was required to have regard particularly to the last of those factors, would be anticipated to provide *some* protection against DBCTM engaging in monopoly pricing. However, the existing users among the DBCT User Group strongly dispute the fact that that means they are fully protected.

In particular:

(a) even if it is assumed that a QCA determined arbitration would produce the same outcome as QCA approved reference tariffs, the cost to an individual user to obtain that outcome would be significantly more in respect of arbitration (that is particularly the case because DBCTM is evidently seeking the right to charge differentiated prices to different users – such that users cannot be assumed to have the common aligned interest which more typically characterises their position in an undertaking process). DBCTM will be in a position to divide and conquer;

(b) not all access holders are major mining houses with the resources to participate in costly arbitrations every 5 years, creating a significant risk that some access holders will practically be forced to settle for higher inefficient prices. The practical experience in respect of the last Abbot Point coal terminal price review is instructive, in that some users settled and others have arbitrated – being likely to result in differential pricing for reasons of bargaining power and willingness to assume the risks of arbitration rather than efficiency;

(c) there is evidently more uncertainty in an arbitration process, relative to the well understood QCA process where stakeholders (including stakeholders that would not be parties to a contractual arbitration of the type that would occur under the existing user

agreements) have greater opportunities to submit expert reports and engage in a transparent consultation and submissions process;

(d) there is a risk for existing users that, given that the intention to produce a 'similar to QCA' outcome is one of 7 factors, the QCA determines that it should depart from that approach based on other mandatory factors in the list. This is not an issue the QCA has ever been asked to rule on; and

(e) the DBCT User Group consider that in a negotiate/arbitrate regime, DBCTM (or the new owner following the proposed sale) will be even more aggressive than it has been to date in seeking to raise prices within the confines of the regulatory submissions process (as discussed in the PwC report), as there is a certain level of constraint that exists due to the transparency provided by the QCA's public submissions system that will not exist in confidential arbitrations.

8.3 Whether existing users are fully protected from DBCTM's exercise of market power

Do stakeholders have any further evidence to support or oppose:

- *DBCT Management's claim that existing users are fully protected by existing user agreements, including in the absence of a TIC?*
- *DBCT User Group's claim that existing users are not fully protected from DBCT Management's exercise of market power?*

It follows from the analysis in section 8.2 above, that existing users are not fully protected from DBCTM's exercise of market power by the price review provisions.

As the Draft Decision in the declaration review process accurately summarises:[18]

Existing users are insulated, to some extent from DBCT Management's ability to exert market power through the operation of existing access agreements.

A simple comparison of the three characteristics of the likely outcomes for existing users with reference tariffs and having to rely on the price review clauses in the existing user agreements demonstrates why the contractual protections are a poor shadow of those provided by QCA price regulation.

	Reference Tariffs	**Price Review Clause**
Certainty of appropriateness of outcome	High. While it may not be possible to determine the QCA determined reference tariff with absolute pin-point precision, the QCA methodology is well known and established across a series of decisions. Potential changes are foreshadowed and available for comment through consultation and draft decisions.	Lower. The QCA's methodology for comparable services is a factor (not the only factor) to be had regard to in determining the arbitrated outcome, the arbitration would not be publicly and transparently debated in the way the undertaking process operates and users have no experience with such arbitrations.
Cost to obtain outcome	Limited cost for individual users. While there is some cost of legal and economic advisers involved in the regulatory process, that cost is able	High. Arbitration will involve much greater costs than the regulatory process (a position that is reflected in some user's experience in relation to the Abbot Point Coal

[18] QCA, Draft Decision – Declaration Review, Part C, page 36.

	to be socialised among the DBCT User Group.	Terminal) and will need to be borne by the individual access holders.
Timeliness of outcome	The QCA process of providing an initial undertaking notice well ahead of the time for commencement of the new undertaking, together with the QCA Act provisions regarding timing for consideration of an undertaking, provide certainty of pricing in advance of the relevant period.	The price review provisions leave 6 months for an arbitration to occur, and then apply the outcome retrospectively if the arbitration is not determined prior to the new charges taking effect, creating a high potential for users to be utilising the service for a material period for an unknown charge.

8.4 Difference in levels of protection for existing and new users

Will new users have the same protection as existing users from a potential exercise of market power by DBCT Management? If not, how will the level of protection different between existing users and new users?

While both existing and new users would theoretically have access to a type of negotiate/arbitrate model under DBCTM's proposed regime, the levels of protection they have against monopoly pricing by DBCTM will, in practice, be materially different.

That is the case for numerous reasons including the different factors the QCA is required to have regard to in determining the TIC in such arbitrations and the very different bargaining positions and access to information that existing and future users will have.

(a) Different factors for determining the TIC

Existing users have the rights under the existing contractual price review arrangements discussed in sections 8.2 and 8.3 above. Those contractual provisions would therefore lead to any price being set in an arbitration having regard to the factors set out in clause 7.2 of the standard access agreement terms.

By contrast, when a future user seeks access, any arbitrated price would be determined by reference to the very different arrangements that would apply under the 2019 DAU (see proposed section 11.3(b) that requires the QCA determination to accord with section 11.4). In particular, the new users' TIC would be determined by the QCA with the QCA being required to have regard to the following matters:

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

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

(C) the expected capital expenditure requirements for the relevant Terminal Component during the relevant Pricing Period;

(D) the types of service to be provided to the Access Seeker;

(E) the obligation in the Port Services Agreement to rehabilitate the site on which the Services are provided;

(F) any other TIC agreed between DBCTM and a different Access Holder for a similar service level; and

(G) the factors in section 120(1) of the QCA Act.

That is a very different set of factors than exists under the existing access agreements.

The critical reference to the *'then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined)'* from existing agreements does not apply for new users. Neither do the references to appropriateness of asset valuations and rates of return.

In other words, new access seekers have no comfort that the outcomes of future arbitrations will have any resemblance to the existing QCA methodology for calculating charges or how existing users prices will be set in the future. Even the reference in paragraph (F) is to prices agreed, which will not capture QCA arbitration outcomes for existing users.

Rather, those factors are principally replaced with the highly inappropriate 'willing but not anxious threshold' based on a completely inappropriate geographic boundary that stretches beyond the economic boundaries of the market identified in the declaration review (as discussed in section 8.5 below).

(b) Negotiating position of future users

As the submissions from New Hope and Whitehaven clearly indicate, future users will be in a fundamentally different position to existing users in tariff negotiations.

In particular, they will typically be trying to develop new projects, and therefore seeking access to the terminal in parallel to seeking to make other major contracting and investment decisions.

That places them in a far more difficult position and weaker bargaining position for a commercial negotiation with DBCTM than existing users as the future user:

(i) is unlikely to be able to accommodate significant delays (because they will be trying to line up other contracting positions – some, like below rail, of which are dependent on obtaining 'exit capability' through port access) such that lengthy negotiations and arbitration are not likely to be a practical option (significantly worsening their bargaining position in negotiations with DBCTM);

(ii) will have much greater difficulty with uncertainty about the pricing outcome (as investment decisions are made much more difficult where charges could vary in a manner which materially impacts on the margin of the proposed project) – such that they cannot proceed with the project on the basis of contracts with unknown pricing or pending an arbitration to determine pricing; and

(iii) is less likely to be able to fund the very significant costs required for pre-contractual arbitration – partly due to limited funding and partly due to the difficultly of justifying incurring such costs in advance of an investment decision being made in respect of the underlying coal project for which access is being sought.

Accordingly, even if the factors the QCA was to have regard to in an arbitration in relation to the TIC for new access seekers were varied to be more appropriate, a negotiate/arbitrate model, by its very nature, discriminates against future access seekers (for reasons unrelated to costs, risks or efficiency).

That is not an appropriate position to include in any access undertaking, and is clearly not consistent with mandatory factors under section 138(2) including the object of Part 5 of the QCA Act, interests of access seekers and the public interest.

8.5 'Willing but not anxious standard'

Under a proposed negotiate/arbitrate model, how would the QCA apply the 'willing but not anxious' standard in an arbitration? What facts would the QCA require to effectively apply this standard?

As discussed in section 16.1 of the User Group Initial Submission, the 'willing but not anxious' test DBCTM has proposed is highly inappropriate in these circumstances as:

(a) it is not a test well suited to valuing a service (as it is designed for valuing assets or liabilities);

(b) it is intended to operate as part of a test for market value in a competitive, open and unrestricted market, for example the Australian Tax Office notes *'Business valuers in Australia typically define market value as: the price that would be negotiated in an open and unrestricted market between a knowledgeable, willing but not anxious buyer and a knowledgeable, willing but not anxious seller acting at arm's length'*[19]

(c) while theoretically the test might be thought to be able to be applied in the hypothetical, there is no market evidence of past transactions available of the type which is needed to properly apply this test for the DBCT service – noting that:

  (i) at the first review there will be no evidence of commercially agreed pricing for the DBCT service as DBCTM has indicated reference tariffs apply under all existing user agreements;

  (ii) in subsequent reviews there is still highly unlikely to be any evidence of prices agreed between willing but not anxious sellers as either:

    (A) prices will have been set by the QCA in arbitration (i.e. not agreed); or

    (B) prices will have been agreed by an access seeker in circumstances where they are effectively anxious (due to wanting to avoid the costs and uncertainty of arbitration and therefore reaching a commercial agreement in circumstances where DBCTM holds market power and the user holds no countervailing power and suffers from information asymmetry – such that the price is likely to be higher than an efficient cost-reflective price); and

  (iii) the findings in the Draft Decision in the declaration review are that there is no close substitute or comparable service – such that any comparators DBCTM seeks to rely on of prices provided for other coal handling services are clearly not appropriate comparisons (although that is exactly what the geographic dimension of the test proposed by DBCTM *'for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point'* is intended to do).

DBCTM's claims about this 'willing but not anxious test' being commonly used should also be closely scrutinised – because what DBCTM proposes is completely unlike how this test is commonly used in other contexts.

To understand why, it is worth starting with the leading judicial explanation of the 'willing but not anxious buyer and seller' test in the context of arriving at a 'market value', where Isaacs J in the High Court judgment in *Spencer v The Commonwealth of Australia*[20] stated:

[19] ATO website: https://www.ato.gov.au/General/Capital-gains-tax/In-detail/Market-valuations/Market-valuation-for-tax-purposes/?anchor=Meaningofmarketvalue#Meaningofmarketvalue <accessed 13 November 2019>
[20] (1907) 5 CLR 418 at 441

> *To arrive at the value of the land at that date, we have … to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser willing to trade, but neither of them so anxious to do so that he would overlook any ordinary business consideration. We must further suppose both to be perfectly acquainted with the land and cognisant of all circumstances which might affect its value, either advantageously or prejudicially, including its situation, character, quality, proximity to conveniences or inconveniences, its surrounding features, then then present demand for land, and the likelihood as then appearing to persons best capable of forming an opinion, of a rise or fall for what reasons so ever in the amount which one would otherwise be willing to fix as to the value of the property.*

In other words, when this test is applied at law it assumes equal bargaining position and perfect knowledge (i.e. no information asymmetry). Such an equal bargaining position implicitly assumes a competitive market in which substitutes exist for the buyer (for example in alternative pieces of land). Yet *none of those circumstances exist in relation to the DBCT service*.

That is why it is fundamentally inappropriate to the DBCT service.

The QCA also asks what facts it would require to effectively apply such a standard. The 'willing but not anxious buyer and seller' test is typically applied in relation to independent valuations of property or assets, where the valuer can refer to recent market transactions regarding the sale of comparable assets to assist in defining the value of the asset in question. That is the case for all the asset classes noted in DBCTM's submissions, such as real property, minerals joint venture interests and copyright licences. Where courts are asked to determine market value as part of litigation, it is typical for the litigating parties to brief expert valuers to provide evidence of their views on value which is based on such comparative transactions and other market data.

It is therefore evidence of such comparator sales from a liquid competitive market of numerous willing but not anxious buyers and sellers entering into actual transaction in that market that will inform the facts or particulars practically needed to apply this standard.

Of course, no such evidence exists in respect of the DBCT service for the reasons noted above. There are no substitute services for the DBCT service and there is no record of transactions of this nature for the DBCT service. There is no way for the test to actually be applied in the absence of any such transactions.

DBCTM simply ignores this problem, by expressly divorcing the test from its intended application by forcibly requiring the QCA to consider transactions in relation to non-substitutable services by use of the following wording:

of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point

This makes a mockery of the willing but not anxious test – because the QCA is being forced to consider (as if they are equivalents or substitutes) transactions occurring between willing but not anxious buyers in other markets. The QCA has very clearly found in the declaration review process that the market in which the DBCT service is sold does not extend beyond the Hay Point catchment. DBCTM's proposed wording is the equivalent of forcing the QCA to value houses based solely on apartment sales.

It is well known from the declaration review this will effectively force consideration of coal handling services in the Port of Gladstone (including both RG Tanna and the much higher cost WICET) and the Port of Abbot Point, which have different cost profiles, and different characteristics. To brazenly suggest that WICET pricing (currently more than a 400% increase relative to DBCT costs) is relevant to the determination of an appropriate price for accessing

DBCT, demonstrates both DBCTM's true intentions and the clear inappropriateness of their proposal.

Accordingly, any attempted application of the test as proposed by DBCTM will produce an inappropriately high and inefficient price for the DBCT service.

9 It is not appropriate to facilitate a future revocation

Given the analysis above it is very clear that a negotiate/arbitrate structure is not an appropriate form of regulation for the DBCT service.

However, the DBCT User Group also has a further concern that changing the undertaking in the way DBCTM proposes would be a critical step towards facilitating a future inappropriate revocation. It is no coincidence that DBCTM has suddenly proposed this following the initial rejection of its arguments in the declaration review.

An important part of the benefits of declaration found to exist in the declaration review are the constraints imposed on DBCTM's ability to engage in monopoly pricing by virtue of the existing reference tariff arrangements. In particular, the Draft Decision also recognises reference tariffs as something that provides transparency and predictability, reduces compliance costs, facilitates negotiation and reduces negotiating costs, and minimises the potential for disputes.

First, that once again confirms it is not appropriate to remove those clear and undisputable benefits which arise from a reference tariff.

Secondly, logically it would follow that if the constraints imposed under the existing undertaking were weakened in the way DBCTM proposed, it would become easier for DBCTM to argue that with and without declaration the extent of constraints was more similar, giving rise to a new argument for DBCTM as to why criterion (a) may not be satisfied.

It is inappropriate to facilitate a future revocation of the DBCT service in that way.

10 Conclusions

On the basis of the analysis in the Initial DBCT User Group Submission, the PwC Report and the analysis in this submission above, the DBCT User Group considers it is very clear that:

(a) the negotiate/arbitrate model is not appropriate in the context of the DBCT service; and

(b) that inappropriateness cannot be resolved by modification or variations to specific aspects of DBCTM's proposal without complete removal of the negotiate/arbitrate structure.

Whereas the reference tariff structure remains appropriate (as it has been determined to be in every previous DBCT access undertaking).

Accordingly, the DBCT User Group urges the QCA to issue a draft decision confirming the appropriateness of a reference tariff model, such that the specifics of that model can be considered in future submissions.