Dalrymple Bay Coal Terminal User Group

Submission in response to 2019 DBCT Draft Access Undertaking

23 September 2019

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1 Introduction

The provision of coal handling services at the Dalrymple Bay Coal Terminal (***DBCT***) is a declared service for the purposes of the *Queensland Competition Authority Act 1997* (Qld) (the ***QCA Act***).

On 1 July 2019, DBCT Management Pty Ltd (***DBCTM***) submitted its 2019 draft access undertaking in respect of access to the Dalrymple Bay Coal Terminal (the ***2019 DAU***).

The Queensland Competition Authority (***QCA***) has now requested submissions from stakeholders and published a series of staff questions on 23 August 2019 (***QCA Staff Questions***).

This submission in response to the 2019 DAU and QCA Staff Questions is made on behalf of the Dalrymple Bay Coal Terminal User Group (the ***DBCT User Group***), which for this process consists of every existing access holder, and a number of potential future users.

The submission sets out the views of the DBCT User Group, as access holders and access seekers, on how the 2019 DAU would need to be amended in order to be appropriate to approve under the QCA Act.

To make it easier to review, the submission has been separated into:

(a) Part A (sections 3 to 5) concerning the extent to which the declaration review process is relevant;

(b) Part B (sections 6 to 14) concerning why reference tariffs are clearly more appropriate than a negotiate/arbitrate regime in the context of the DBCT service;

(c) Part C (sections 16 to 18) concerning additional flaws in DBCTM's negotiate / arbitrate regime;

(d) Part D (section 20) concerning the non-pricing changes proposed in the 2019 DAU;

(e) Schedule 1, being an economic report prepared by PwC on the appropriate form of regulation for the DBCT service (the ***PwC Report***);

(f) Schedule 2, being a summary of the DBCT User Group's responses to the QCA Staff Questions (with detailed responses included throughout the submission); and

(g) Schedule 3, being a summary of the DBCT User Group's comments on the non-pricing changes proposed in the 2019 DAU.

As always, the DBCT User Group thanks the Queensland Competition Authority (***QCA***) for its opportunity to provide submissions.

2 Executive Summary

The DBCT User Group is strongly of the view that the 2019 DAU is not appropriate for the QCA to approve having regard to the factors set out in section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) (the ***QCA Act***).

That opposition principally arises from DBCTM's proposal to abolish reference tariffs in favour of a negotiate/arbitrate regime (with no indication for how they would propose calculating the Terminal Infrastructure Charge (***TIC***) for users under that regime). That is clearly an inappropriate form of regulation to adopt in the circumstances of the DBCT service.

2.1 Pricing Regulation

The DBCT User Group consider DBCTM's approach in relation to the pricing aspects of the 2019 DAU is incredibly disappointing when:

(a) the QCA's letter in relation to the initial undertaking notice specifically referred to providing DBCTM with the time to 'develop a well-supported proposal for the terminal infrastructure charge';[1] and

(b) a key reason for the development of an undertaking as required by an initial undertaking notice is to provide more certainty that the minimalist negotiate/arbitrate model that Part 5 of the QCA Act otherwise provides for declared services.

A review of previous regulatory and economic analysis of when determining pricing up-front is more appropriate than relying on a negotiate-arbitrate model, indicates that the circumstances of the DBCT service are far more suited to reference tariffs.

In addition, the removal of tariffs, at a time when new access will potentially be negotiated in connection with expansion capacity, will expose access seekers to monopoly pricing and impose higher costs through protracted negotiations and disputes and damage to investment from uncertainty, than it could ever save in lower upfront regulatory costs.

Further, DBCTM's claims supporting the removal of reference tariffs and replacement with a negotiate/arbitration regime rest on a number of deeply flawed assumptions and unsubstantiated assertions, as summarised below:

DBCTM's Key Assertions	Major flaws with that assertion
DBCTM's approach is 'tailored to' and 'proportionate to the extent or size of' the competition problem identified in the declaration review respect of criterion (a)	The test for consideration of an access undertaking is whether the terms are *appropriate* having regard to the factors in section 138(2) QCA Act Appropriateness is clearly not restricted to considering the competition outcomes in a dependent market that satisfied access criterion (a). As the QCA (and NCC) has recognised, the tests are entirely different, and the 2019 DAU must be considered on its merits based on the wider statutory criteria in section 138(2) QCA Act – which include impacts in the market for the service itself and wider public interest issues. As a result, it is appropriate for the undertaking to address other issues beyond competition in the Hay Point catchment coal exploration and development tenements market. The findings of the declaration review that DBCTM has market power, that there are no substitute services, that access seekers have no countervailing power and that it is profit maximising for DBCTM to engage in monopoly pricing, confirm that a negotiate / arbitrate regime is not appropriate.
DBCTM provides different services to different access seekers	The current services provided to all access seekers are principally the same coal handling service with minor variations, where the incremental costs or differences in capacity consumed for those small variations would be very difficult to measure, and do not warrant differential pricing (noting that no other Australian coal terminal applies differential pricing based on the extent of user's blending or co-shipping).

[1] QCA, Initial Undertaking Notice (covering letter), 12 October 2017

DBCTM's Key Assertions	Major flaws with that assertion
	The Standard Access Agreement terms already provide for differences where there are material differences – such that a negotiate/arbitrate approach is not an appropriate solution even if the cost or capacity consumption was materially different as DBCTM asserts.
Reference tariffs increase the risk of regulatory error creating a disincentive for investment	The QCA employs a robust approach to setting reference tariffs, and there is no basis to suggest that any 'error' would not even itself out over the long-term economic life of DBCT. In any case, a negotiate/arbitrate model, in the context of DBCTM's clear market power, creates significantly more risk of 'error' relative to the competitive and efficient market pricing that an undertaking should be seeking to estimate. A negotiate/arbitrate model also creates significantly greater uncertainty than reference tariffs, and creates potential for much greater delays, both of which will damage investment.
Primacy should be given to commercial negotiations	The DBCT User Group acknowledges that negotiate/arbitrate can be an appropriate form of regulation in some circumstances. However, the approaches DBCTM refers to in other industries (such as airports and wheat ports) apply in very different circumstances to those of the DBCT service. A proper review of the regulatory and economic analysis of when determining pricing up-front is more appropriate than relying on a negotiate-arbitrate model, clearly indicates that the circumstances of the terminal's coal handling service are far more suited to reference tariffs. In particular, DBCT has clear market power (with no countervailing power in users and no competitive substitute services), there are numerous customers, there is essentially a single service, there is significant information asymmetry, and the QCA's past processes have demonstrated the price for the service is reasonably calculable, but would clearly be difficult and contentious to negotiate – all of which are characteristics of services for which ex-ante or up-front pricing regulation is far more appropriate than negotiate/arbitrate regulation.
Approach is consistent with the statutory criteria in section 138 of the QCA Act	A negotiate/arbitrate approach for the DBCT service is clearly inconsistent with: • The object of Part 5 QCA Act – given that it will not promote competition in dependent markets and is likely to result in inefficiencies and additional costs and damage investment; • The interests of access seekers – given the increased pricing and reduced certainty access seekers will be faced with when seeking to make investment and contracting decisions;

DBCTM's Key Assertions	Major flaws with that assertion
	• The pricing principles in s 168A – given that it will blunt incentives to reduce costs, increase the prospects of inefficient pricing and result in DBCTM earning a return that is not commensurate with the regulatory and commercial risks involved in provision of the service; and • The public interest – given the damage to regulatory certainty, adverse impact on investment and high aggregate costs that will be incurred.

Sections 3 to 19 and Schedules 1-2 of this submission (including the economic analysis in the PwC Report) provide a detailed analysis of why it clearly remains appropriate for the QCA to set reference tariffs for DBCT's coal handling service.

2.2 Non-pricing Changes

While the DBCT User Group is fundamentally opposed to the inappropriate and drastic changes DBCTM is proposing to pricing regulation for the DBCT service (and related consequential wording changes), it recognises the reasonable nature of some of the non-pricing related changes to the drafting of the undertaking requested.

Accordingly, Section 20 and Schedule 3 of this submission provide additional commentary around the wording changes to the access undertaking and standard access agreement terms that are proposed in the 2019 DAU to assist the QCA in reaching a decision on the appropriateness of those wording amendments.

The merits of each of those changes should be assessed on an individual basis (as the DBCT User Group has assessed them), leading to a mix of support for changes, opposition to others, and conditional support for others subject to further refinements and amendments.

PART A: Relevance of the Declaration Review

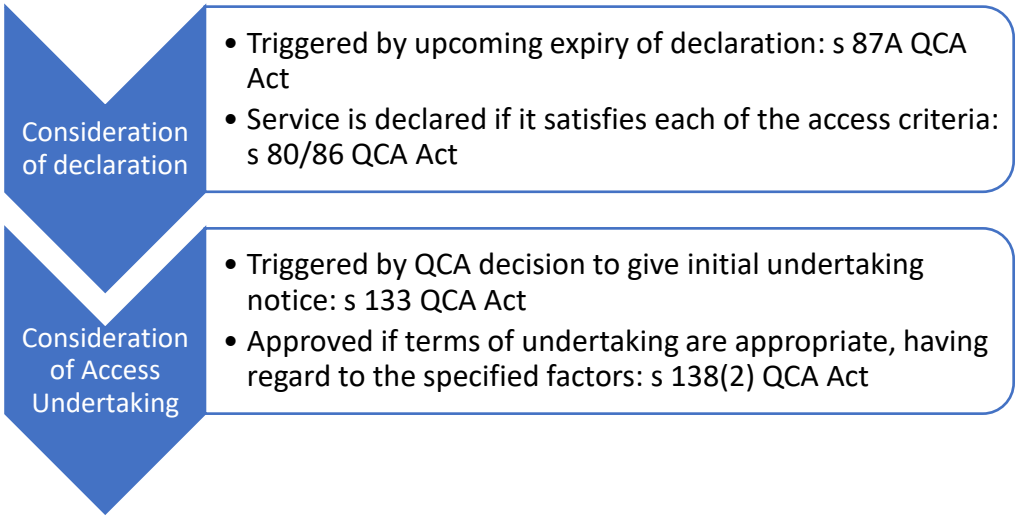
3 Relevance of the Declaration Review

3.1 QCA Act – The Separation of the Undertaking and Declaration Review Processes

The principal claim in DBCTM's submission is that the access undertaking should be confined to 'addressing the competition problem identified in the criterion (a) enquiry'.

DBCTM provide no legal basis for that proposition. Rather, it is a bare assertion that misrepresents the legal test the QCA is required to apply in considering a proposed access undertaking in accordance with its statutory responsibilities under Part 5 of the QCA Act.

The scheme of the QCA Act is very clear that there are two separate processes, as shown below.



The test for approval of an access undertaking is clearly set out in section 138(2) of the QCA Act as being one of whether the proposed access undertaking is *appropriate* having regard to the specific factors set out in that section.

There is no suggestion in the QCA Act, in Part 5 or elsewhere, that appropriateness must be considered solely by having reference to the conclusions the QCA has reached in a declaration review (let alone solely by reference to conclusions reached in relation to criterion (a)). In fact, it is plainly evident from the wording of section 138(2) of the QCA Act that the matters the QCA are to consider are substantially wider.

For example:

(a) while competition in markets is expressly referenced as being included as part of the public interest consideration in section 138(2)(d) QCA Act, it is evident from the use of inclusive language that the QCA is intended to take into account broader public interest factors;

(b) the object of Part 5 by addressing efficient operation, use of, and investment in, significant infrastructure is clearly also concerned with the market for the declared service – which is expressly excluded from consideration as part of criterion (a) which only focuses on dependent markets;

(c) the other factors (such as the interests of the operator, owner and access seekers and the pricing principles) clearly envisage a wider inquiry; and

(d) under section 138(2)(h) QCA Act, the QCA is expressly required to take into account 'any other issues the authority considers relevant'.

To put it simply, if the test for appropriateness was merely what would address the competition problem identified in criterion (a), then the legislature would have stated that, and would not have required the QCA to have regard to factors in section 138(2) QCA Act that clearly go beyond the matters address in criterion (a).

Declaration is a pre-condition to the Authority's right to provide an initial undertaking notice. However, once such a notice has been given, particular conclusions about an access criterion which underpin the declaration, do not somehow constrain the Authority's discretion in determining appropriateness of the draft access undertaking that is actually submitted.

The fact that the QCA Act operates in this manner has already been correctly identified and acknowledged by the QCA in its Statement of Regulatory Intent for this process, which stated:[2]

> *While there will be an overlap in timeframes between the investigation of DBCT Management's 2019 DAU and the declaration review,* ***the reviews are separate processes and subject to separate requirements (section 76 and section 138 of the QCA Act respectively).*** *Stakeholders should therefore be aware of the following:*
>
> ***Each review process has been (and will continue to be) undertaken separately, on its merits and in accordance with the relevant assessment criteria****.*

Consequently, it is clear that the access undertaking should not be confined in the manner suggested by DBCTM.

A proper consideration of the factors set out in section 138(2) QCA Act is included below in section 14 of this submission.

3.2 NCC Approach to relevance of Previous Coverage Decision

To the extent the QCA wanted confirmation of the correctness of this approach, the DBCT User Group notes that this exact issue has already been considered under the National Gas Laws (***NGL***), where the decision about coverage of the pipeline (the equivalent of a declaration decision) is made separately to the decision about whether to make a 'light regulation determination' (i.e. to make an exception to the usual requirement for an upfront approval of regulated access terms and to instead rely on negotiate/arbitrate).

In that context, the National Competition Council (***NCC***) has also clearly confirmed that it *does not* believe the findings in relation to coverage criteria should be taken into account in setting the form of regulation (in the way DBCTM now asserts):[3]

> *7.7 Clearly coverage criteria (c) and (d) raise considerations entirely separate from those required to be considered under the form of regulation factors. However, criteria (a) and (b) conceivably require the assessment of similar considerations to at least some of the form of regulation factors.* ***Both the coverage criteria and form of regulation factors are based on the economic concept of market power*** *which is both:*
>
> *(a) a threshold trigger for regulation to be applied at all (coverage), and*
>
> *(b) a key consideration in the choice of the form of regulation, whereby the degree of market power is relevant rather than a threshold presence.*
>
> ***7.8 This raises the question of the extent to which the Council is required to separately evaluate, for the purposes of assessing the most appropriate form of regulation, issues that may have already been considered during the process of determining coverage****.*

[2] QCA, Statement of Regulatory Intent – DBCT Management's 2019 Draft Access Undertaking, June 2019, page 3-4.
[3] NCC, Light Regulation of Covered Pipeline Services July 2011, page 40.

7.9 Where an application for light regulation is made for an already covered pipeline, ***the Council considers there are three main reasons why it is inappropriate for it to rely on assessments made at the coverage stage in relation to issues that may arise for consideration under the form of regulation factors****. Those reasons are that:*

(a) ***there are differences between the coverage criteria and the form of regulation factors***

(b) ***the coverage criteria and form of regulation factors address different purposes****, and*

(c) practical constraints arising, for example, from changes or developments occurring since coverage.

While the DBCT User Group appreciates there has not been a long passage of time between the declaration review and the assessment of the 2019 DAU, the first two key points raised by the NCC equally apply to the analogous decision that the QCA is now being asked by DBCTM to make in the context of considering the appropriate form of regulation to be reflected in the 2019 DAU.

3.3 Findings of relevance in the Declaration Review

It follows from the above, that the rationale for criterion (a) being satisfied does not also serve as a basis for confining the issues to be resolved in an access undertaking.

The declaration review findings do have relevance, but not in the conclusion as to whether a particular criterion are satisfied and exactly why that is – but rather, consistent with the NCC's analysis above, in identifying the extent of market power that DBCTM possesses.

The underlying issues which give rise to that market power then themselves may go to appropriateness of the terms of the undertaking.

For example, particular findings of fact that the DBCT User Group consider highly relevant are the QCA's clear identification of the following features of the market in which the declared service is provided:

(a) DBCTM's market power;

(b) The lack of close substitutes for the DBCT service provided by other coal terminals given substantial cost and important non-price differences (which is consistent with findings made by the QCA in consideration of the current undertaking[4]);

(c) The resulting lack of countervailing power of users;

(d) DBCTM's incentive to engage in monopoly pricing as a profit maximising strategy; and

(e) The effective constraint on monopoly pricing provided by the existing reference tariff based regulatory regime.[5]

In particular, the QCA has concluded that:[6]

DBCT Management's ability and incentive to exert market power in the absence of declaration will not be constrained by:

- *competition from other coal exports, as other coal export terminals would not provide an effective competitive constraint on DBCT Management's behaviour*
- *the countervailing power of users*

…

[4] QCA (2016) Final decision: DBCT Management's 2015 draft access undertaking , p. 10,
[5] QCA Draft Decision: Declaration Review, Part C, Section 3.
[6] QCA Draft Decision, Declaration Review, Part C, p 77-78.

Accordingly, ***the QCA's view is that, in the absence of declaration, DBCT Management would have the ability and incentive to exercise market power, for instance in the form of pricing above cost, without fear of losing customers to other coal export facilities****.*

The DBCT User Group appreciates this is a new regulatory process, the merits of which must be considered afresh. However, it is clearly open to the QCA to take these findings (and the findings from the previous consideration of the current access undertaking) and the facts they are based on into account as part of its powers under the QCA Act to inform itself as it considers appropriate.[7]

Given the recency of those findings and the evidence they are based on, including clear evidence from users of coal terminals as to how they make contracting decisions in relation to port capacity and economic modelling of costs, they represent an informative data point that should clearly be taken into account in determining appropriateness under section 138(2) QCA Act. However, the DBCT User Group would also be happy to provide further submissions on those issues directly in this process if that would assist.

4 Existing Users Are Not Fully Protected

4.1 Findings in the Declaration Review

DBCTM's submissions are also premised on the unjustified assertion that the declaration review has found (and the DBCT User Group have accepted) that existing access holders would be fully protected from the exercise of DBCTM's market power.

That is evidently a fundamental misrepresentation of both the DBCT User Group's submissions and the QCA's Draft Decision. The DBCT User Group strongly disagrees that existing users are 'fully protected' without the benefit of an access undertaking that contains provision for QCA determined reference tariffs and other non-price protections currently contained within the access undertaking.

As the QCA's Draft Decision expressly recognised there are limits to those protections:[8]

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

What the QCA actually found in the declaration review was that:

(a) the existing user agreements would not be frustrated and would therefore continue to operate and be binding on the parties in the event of the declaration ceasing (consistent with legal advice from Allens submitted by the DBCT User Group during the declaration review process);

(b) it would be profit maximising for DBCTM to engage in monopoly pricing, and DBCTM had the market power to do this subject to any constraints imposed by the existing user agreements and the QCA Act regulatory regime (including the terms of the approved access undertaking);

(c) the price review provisions in the existing user agreements provided *some* constraint on DBCTM's ability to engage in monopoly pricing against existing users (and then only to the extent of the volume already contracted with a renewal right); and

(d) future users would not have the benefit of any such constraint, such that they would be exposed to a greater extent to DBCTM's monopoly pricing.

[7] Section 173(1)(c) QCA Act.
[8] QCA Draft Decision: Declaration Review, Part C, p 36.

4.2 The Price Review Clauses in Existing Access Agreements are not 'Complete Protection'

The fact that the standard access agreement contains provision for arbitration that provide *some* protection against monopoly pricing clearly does not mean:

(a) existing access holders are 'fully protected' or in the same position as the existing regulatory environment involving QCA determined reference tariffs; or

(b) that the only problem that needs to be resolved in the access undertaking in order for it to be appropriate is bringing access seekers into an equivalent position.

In particular, a contractual negotiate/arbitration regime is clearly less favourable than regulatory reference tariffs as:

(a) it removes the certainty provided by up-front terminal infrastructure charges being determined by the QCA – which will have a detrimental impact on investment incentives for such coal users;

(b) it relies on more costly arbitration mechanisms and will result in numerous costly and protracted bi-lateral contractual negotiations – when, by contrast, reference tariffs and standard access agreement terms currently provide for very efficient negotiations and a single multi-lateral regulatory process which resolves matters for all stakeholders at once;

(c) the prospects of arbitration being called on appear extremely high given the differences between users and DBCTM's views of an appropriate WACC and efficient costs as evidenced in all previous undertaking processes – as discussed in detail in the PwC Report; and

(d) it is likely to result in inefficient price discrimination for reasons unrelated to cost or risk, as not all access seekers will have the resources to participate in costly arbitrations, and some will settle at pricing that is higher than efficient or appropriate levels due to the negotiating dynamics produced by DBCTM's market power.

The DBCTM submissions simply assume that the requirement for appropriateness is satisfied by access holders and access seekers being equally badly off.

Whereas the statutory test of appropriateness in the QCA Act clearly makes these adverse impacts on existing access holders highly relevant.

Consequently, the DBCT User Group reject the argument that the position under the existing user agreements in the absence of reference tariffs is appropriate or provides a baseline which makes the 2019 DAU appropriate if access seekers are merely provided the same limited protections.

4.3 The Purpose and Operation of the Price Review Provisions

Given some of DBCTM's submissions, it is important to appreciate the context of the price review provisions that are included in the SAA.

The DBCT User Group considers that these price review provisions were designed as a worst-case 'fall-back' in the event that an undertaking ceased to exist (a precaution which is entirely understandable given their long term nature and the right of access holders to 'evergreen' renewals). They were not intended to produce, as DBCTM asserts, a negotiate/arbitration regime which has been overridden by reference tariffs.

That DBCTM is wrong about that is clearly evidenced by:

(a) the fact that every single DBCT undertaking has provided reference tariffs, and no party (including DBCTM and its predecessors) has ever previously even suggested that that was contrary to the intention of these price review provisions which appeared in each

standard access agreement in each approved undertaking (whereas if the intention was truly as DBCTM suggests that, presumably, would have been raised in relation to the very first undertaking for the DBCT service);

(b) these price review provisions have been approved by the QCA as an appropriate part of the standard access agreement as part of multiple undertakings that contained reference tariffs on each occasion;

(c) the price review provisions expressly envisage reviews aligning with the timing of commencement of the undertaking – which would not be necessary if it was not envisaged that the undertaking could be a direct source of pricing; and

Contrary to DBCTM's submissions, the access agreements are operating in accordance with their terms. It is simply the case that parties are not spending time and money on a series of bilateral negotiations of price when it is more efficient to agree the price determined appropriate and efficient by the QCA in a multi-lateral, transparent regulatory process. That is an outcome that the existing access agreements both expressly envisage and facilitate.

5 DBCTM's Approach Does Not Appropriately Protect Access Seekers Either

5.1 Equivalent Poor Treatment Does Not Make the 2019 DAU Fit for Purpose

DBCTM's submission seeks to claim that the 2019 DAU is 'fit for purpose' due to protecting access seekers.

However, the DBCT User Group notes that it only provides protection for access seekers relative to the position without declaration. Again, the 2019 DAU is not appropriate simply because access holders and access seekers are equally disadvantaged under it, and equally exposed to DBCTM's market power in such negotiations.

What is proposed by DBCTM in the 2019 DAU is a material worsening of the position access seekers faced under the current access undertaking, and inappropriately so.

In particular, when:

(a) the Draft Decision in the declaration review included each of the findings noted in section 3.3 of these submissions above (DBCT having market power, no substitutes for the DBCT service, no countervailing power and DBCT having incentives to engage in monopoly pricing); and

(b) those findings are coupled with the evident information asymmetry that will exist between DBCTM and any potential access seeker (as discussed further in section 15 below),

[9] [redacted]

it is impossible to see those circumstances as being conducive to a negotiate / arbitrate model reaching appropriate and reasonable pricing.

In addition, as discussed in the PwC Report, even putting to one side the information asymmetry and market power, it is evident from the numerous points of contention in setting the Terminal Infrastructure Charge in previous DBCT processes, and the magnitude of the differences caused by those issues, that:

(a) there are very limited prospects of successful negotiations taking place; and

(b) there is highly like to be substantially more arbitrations for the QCA to determine as a consequence.

5.2 Access Seekers Remain Even More Poorly Treated

If anything, the difficulties described above would be anticipated to be substantially worse for access seekers as:

(a) the access negotiation will occur under time pressure where the access seeker will be pressured to reach agreement to increase their prospects of obtaining limited available access (through an expansion and notifying access seeker process);

(b) many access seekers are smaller companies with lesser resources or experience with DBCT than existing access holders (and unlikely to have any insight through being shareholders of the independent operator, Dalrymple Bay Coal Terminal Pty Ltd, in the way many existing access holders are); and

(c) access seekers are more likely to be making contracting decisions at the same time as they are making other project investment and contracting decisions as part of a greenfield project – such that uncertain costs of access, and uncertain timing for resolving whether access is able to be obtained are more challenging for them than existing access holders.

Consequently, it is absolutely clear from the declaration review process that a negotiate / arbitrate model is highly unlikely to result in a reasonable price being reached by commercial negotiation, and given the number of users involved and the costs of arbitration it will be substantially less costly to resolve pricing by up-front tariff setting rather than through a series of ad-hoc arbitrations.

PART B: Determining the Appropriate Form of Regulation

6 Productivity Commission Analysis

6.1 Productivity Commission's Report on the National Access Regime

DBCTM places a lot of emphasis on what it perceives as the Productivity Commission's support for the negotiate-arbitrate framework.

However, that support needs to be understood in the context in which it is made, namely:

(a) the national regulators in respect of the national access regime in Part IIIA of the CCA have no ability to require an access undertaking for declared services in the way the QCA Act empowers; and

(b) the form of regulation provided by the national access regime needs to be a general baseline that can apply for all nationally significant infrastructure which might fall within the scope of the regime – the Productivity Commission's commentary was clearly not a recommendation on the appropriateness of a negotiate-arbitrate for all facilities.

The DBCT regime, of course, is currently certified as an effective access regime, such that it is exactly the sort of facility specific regime that it was found appropriate to exclude from this baseline national regime.

However, it is worth noting the *actual* reasoning provided by the Productivity Commission in relation to recommending retention of negotiate-arbitrate as the model for the national access regime (not just cherry-picking quotes which in isolation might be perceived to support DBCTM's arguments as DBCTM's submissions do).

For example, in considering the negotiate-arbitrate regime, the Productivity Commission clearly understood the benefits of ex-ante price setting – but was also clearly mindful that its task was not recommending the regime that was appropriate for a particular facility – but recommending the 'default position' for a generally applicable regime:[10]

> *Some access regimes draw on direct regulatory intervention in setting access terms.*
>
> *…*
>
> *The ACCC (2009b) found that regulatory decision making can provide timely resolution of access disputes, reduce uncertainty and strengthen competition compared to negotiation and arbitration.*
>
> *…*
>
> ***Given the general nature of Part IIIA, there would be practical difficulties in setting regulated access terms and conditions on an ex ante basis for all the infrastructure services that the Regime could potentially cover****. In some cases, the setting of such terms could itself become a protracted process – the regulator's knowledge of the industry's operations and the conduct of the service provider and access seekers would influence both the timeliness and quality of the regulatory outcomes. The Commission therefore does not see sufficient benefit from imposing upfront regulatory arrangements to justify the cost of abandoning the established processes of negotiation and arbitration.*

That those comments should not be taken to support the proposition that negotiate-arbitrate is always the appropriate setting becomes even more abundantly clear given the Productivity Commission's express acknowledgement of that position:[11]

[10] Productivity Commission, National Access Regime Inquiry, 25 October 2013, p 123-124.
[11] Productivity Commission, National Access Regime Inquiry, 25 October 2013, p 127.

> ***That is not to suggest that negotiation and arbitration will be appropriate in every context.*** *The particular experiences of service providers, access seekers and regulators in some sectors — for example, telecommunications — have given rise to alternative approaches to access dispute resolution.* ***Measures such as upfront regulatory arrangements can be more effective than the generic access regime at resolving access disputes in the specific circumstances of individual industries.*** *As Dominic L'Huillier commented:*
>
> *In practice a mixture of the ex-ante and ex-post approaches is common — the challenge is striking the appropriate balance between the ex-ante (prescriptive) and ex-post (generic) regimes. (sub. 7, p. 22)*
>
> ***It is appropriate that industry-specific regimes remain open to alternative approaches, where there is a strong basis for deviating from a negotiate–arbitrate framework.***

In other words, reference to the Productivity Commission's reasoning in respect of the national access regime does not take one much further than to acknowledge that it is appropriate to ask what the appropriate regulatory framework is in the context of the specific circumstances of the DBCT service.

6.2 Productivity Commission's Report on Airport Regulation

DBCTM's submissions also refer heavily to the Productivity Commission's inquiry into the Economic Regulation of Airports. However, the DBCT User Group strongly considers that it is completely misconceived to draw from that report that a similar or 'light handed' regulatory regime would be appropriate in relation to the DBCT service.

Unsurprisingly the Productivity Commission's recommendations turned on the circumstances of the market in which airports provided services. Yet there are fundamental differences in the context and market circumstances which exist in relation to airport services compared to those which exist in relation to DBCTM's coal handling services.

To highlight the differences, it is particularly instructive to review some of the key reasons the Productivity Commission considered that the major airports were not exercising their marketing power.

First, the Commission found that airlines (i.e. the users) had significant countervailing power and there was a high degree of mutual dependence between airports and a very small number of airlines. That should be contrasted with the findings in the declaration review (discussed in section 3.3 above) that DBCT has clear market power, and users had no countervailing power due to the lack of close substitute services. Airlines were found to be able to manage their fleets/routes in terms of frequency and aircraft size (to vary their usage between airports) whereas coal users clearly cannot relocate their sunk investments in mining projects, and transporting their coal to alternative terminals involves significant cost differences that make such a switching decision uneconomic.

Second, the Productivity Commission found that airports offer a large range of services, including retail and parking, where the exercise of market power in one part of the operation could negatively affect another. This is not a case of minor variations of what is essentially the same service (as is the case for DBCTM's coal handling services) – but:

(a) fundamentally different and distinct services for a diverse range of customers (such as aeronautical infrastructure/terminal access, retail leasing, car parking and advertising) with a distinct demand for each; and

(b) where monopoly pricing for one has the potential to depress demand for the others (i.e. monopoly pricing against airlines in relation to aeronautical infrastructure / terminal

access has the potential to reduce volume of passengers through the terminal, which would have resulting negative outcomes for the airport's retail leasing, car parking and advertising revenue streams).

Consequently, the Productivity Commission findings were that monopoly pricing may well not be the profit maximising strategy for an airport monopolist. Whereas it clearly is (and was found by the QCA to be in the declaration review) for DBCTM.

In other words, the Productivity Commission found there were real constraints and incentives that, even in the absence of regulation, resulted in airports not having incentives to exercise market power by engaging in monopoly pricing, and real-life evidence that such monopoly pricing was not occurring. Given those finding it is completely unsurprising that the Productivity Commission indicated further regulation was not required, and price monitoring was appropriate so that it would become evident if that position ever changed.

However, it is also absolutely clear from those reasons that seeking to draw analogies from that to the fundamentally different circumstances of DBCTM's coal handling service is a fallacy that misrepresents the Productivity Commission's analysis and conclusions.

6.3 Productivity Commission's Report on Wheat Export Marketing Arrangements

DBCTM's submissions also make reference to the Productivity Commission's inquiry into Wheat Export Marketing Arrangements, and the negotiate/arbitrate regime provided by the *Port Terminal Access (Bulk Wheat) Code of Conduct*.

Again, the flaws in DBCTM's reasoning lie from seeking to draw analogies where wheat ports have fundamentally different characteristics to DBCT.

For example, in relation to whether it was appropriate to provide regulation beyond Part IIIA alone, the Productivity Commission noted:[12]

> *Importantly …* ***there are a number of factors that, although not eliminating any market power the port operators might have, certainly limited the extent or such market power or the ability of the operators to take advantage of it*** *… taken together, they suggest to the Commission that light handed regulation – particularly combined with the possibility of declaration under Part IIIA – would in the longer term be preferable to the current regulation arrangements (or, importantly, to a total absence of regulation).*

The Productivity Commission went on to summarise the factors which led it to conclude the lighter handed regulation was appropriate which, mostly relevantly by point of contrast to the circumstances of the DBCT service, included:[13]

- consumption of grain by the domestic market (as if the costs of exporting grain are too high, selling it domestically would be more attractive)
- competition from port terminals in other states
- the threat of new port terminals entrants
- competition from other methods of export (i.e. the container export market)
- countervailing power on the port of other major Australian exporters; and
- other regulation – such as legislative requirements under state legislation which limited the ability of a major operator to deny access to facilities.

[12] Productivity Commission, Wheat Export Marketing Arrangements Inquiry, 1 July 2010, p 201-202.
[13] Productivity Commission, Wheat Export Marketing Arrangements Inquiry, 1 July 2010, p 202.

The contrast between that and the findings in the declaration review in respect of the DBCT service (as discussed in section 3.3) are stark.

Consistent with that analysis, in the recent Wheat Port Code Review conducted by the Department of Agriculture and Water Resources it was stated:[14]

> *Wheat port terminals are essential infrastructure in the export supply chain, but* ***despite their size they do not have strong natural monopoly characteristics. New port terminals*** *at Brisbane, Newcastle, Port Kembla, Geelong, Adelaide and Bunbury* ***have been built since the deregulation of bulk wheat marketing in 2008. These terminals now compete with incumbent terminal operators****.*
>
> *…*
>
> *Since the introduction of the code in 2014, several operators have started using mobile ship loaders to export wheat and other grain. These facilities have lower construction costs than traditional grain export terminals, reducing barriers to entry.*
>
> *…* ***market forces, including the threat of new entry, may lead the operators of these terminals to provide access on fair and reasonable terms*** *…*

If anything, that demonstrates that it would be highly inappropriate to adopt a similar form of regulation for the DBCT service to that adopted in a market which is effectively recognised as being workably competitive.

7 The Energy Markets Experience

7.1 Expert Panel on Energy Access Pricing

The issue of the appropriate form of regulation, was also carefully considered in the Report of the Expert Panel on Energy Access Pricing (April 2006),[15] which informed the current approach to regulation of electricity networks and gas pipelines. In particular, the 'form of regulation' principles in the National Gas Laws (***NGL***) (as discussed further below) have their origin in the Expert Panel's recommendations.

The Expert Panel's analysis is useful, as it contains an express first principles analysis of the factors that should guide the form of regulation to adopt.

In particular, the Panel noted:[16]

> *the* ***regulatory response should be commensurate with the extent of market power that is involved and the cost and inefficiencies that can result from its exploitation***
>
> *…*
>
> *It is the potential for social loss from inefficiency that motivates the regulation of energy network services that exhibit substantial market power. As a general proposition,* ***the greater the market power and the greater potential efficiency loss from its use, the greater the likelihood that more intrusive forms of regulation (such as direct control of prices) will improve market outcomes****. Conversely, where market power is less substantial, and so the lower is the potential inefficiency loss, the stronger is the case for less intrusive forms of regulation …*
>
> *The reason is that economic regulation, while providing benefits, also involves costs …* ***In circumstances where actual or potential competition exists, the costs of seeking to***

[14] Department of Agriculture and Water Resources, Wheat Port Code Review Taskforce, *Review of the wheat port access code of conduct*, 2018, p v-vi.
[15] Page 45 http://www.competitiontribunal.gov.au/__data/assets/pdf_file/0004/28237/END.042.001.0004.pdf
[16] Report of the Expert Panel on Energy Access Pricing, p 41.

> ***improve on market outcomes through more intrusive forms of regulation may exceed any inefficiency benefits to be achieved****.*
>
> *In view of the trade-off between the extent of market power that is involved and the intrusiveness of the form of regulation that is appropriate to apply****, the challenge for policy and regulatory decision-makers is to determine the appropriate balance between the costs to efficiency from the exercise of market power (which may vary from case to case) and the costs of the form of regulation adopted to address it****.*

In other words, there is a spectrum of forms of regulation, and the greater the market power, the more appropriate greater regulation will be.

Viewed in that light, it becomes clear that the overriding question on the appropriate form of regulation for the DBCT service is *the extent of market power that DBCTM has*.

The Expert Panel supplemented those general comments, with a consistent more detailed discussion of the circumstances in which particular forms of regulation would be more effective.

In relation to direct reference tariff regulation, the Expert Panel noted:[17]

> *As noted in the previous section,* ***direct price or revenue controls will usually be the appropriate form of regulation for the service provider under conditions of natural monopoly or substantial market power****. While this market structure usually provides the lowest cost basis for service supply, it also involves the potential for resource allocation inefficiencies and distortions to competition in upstream and downstream markets through the exercise of the substantial market power it involves.* ***There is therefore likely to be the potential for substantial social cost savings through direct price or revenue regulation which provides incentives for efficient investment and operation while minimising the scope for monopoly behaviour****. The direct and indirect costs associated with this form of regulation are relatively high. The objective in applying this form of direct regulation should of course be to minimise the costs of regulatory intervention and the scope for regulatory error. However,* ***in view of the extent of the potential for significant social cost savings there is most likely to be a positive net social benefit from applying a more intrusive form of regulation when substantial market power is involved.***

And in relation to negotiate/arbitrate regulation, the Expert Panel noted:[18]

> ***This form of regulation 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. However, this form of regulation is likely to be inappropriate where access seekers are large in number, information asymmetry is substantial, and the transaction costs involved in negotiation and arbitration are likely to be prohibitive.***

The DBCT User Group consider that the implications for the appropriate form of regulation for the DBCT service could not be clearer.

Given the service provider has been found to have clear market power, with no competitive substitute services, no user countervailing power and multiple customers – the DBCT service is exactly the sort of service the Expert Panel was describing as most appropriate for direct price or revenue controls and inappropriate for a negotiate/arbitrate regime.

[17] Report of the Expert Panel on Energy Access Pricing, p 45
[18] Report of the Expert Panel on Energy Access Pricing, p 45

7.2 Factors that influence National Gas Laws light regulation determinations

The Expert Panel went on to recommend a specific list of factors which would assist in making an assessment of the extent of market power which exists in relation to a regulated service (i.e. when more intrusive forms of regulation are warranted)[19] – which are now enshrined as part of the NGL.

The NGL separates the decision on regulation from the decision on the form of regulation for gas pipelines. As a result, section 122 NGL contains provisions which expressly guide the making of 'light regulation determinations' for covered pipelines – which are effectively a decision between 'light regulation' (negotiate/arbitrate) and 'full regulation' (akin to an access undertaking with reference tariffs).

Section 122 NGL provides the following principles to guide the NCC in making that decision.

122—Principles governing the making or revoking of light regulation determinations

(1) In deciding whether to make a light regulation determination under Division 1 or to revoke a light regulation determination under Division 2, the NCC must consider—

(a) the likely effectiveness of the forms of regulation provided for under this Law and the Rules to regulate the provision of the pipeline services (the subject of the application) to promote access to pipeline services; and

(b) the effect of the forms of regulation provided for under this Law and the Rules on—

(i) the likely costs that may be incurred by an efficient service provider; and

(ii) the likely costs that may be incurred by efficient users and efficient prospective users; and

(iii) the likely costs of end users.

...

(2) In doing so, the NCC—

(a) must have regard to the national gas objective; and

(b) must have regard to the form of regulation factors; and

(c) may have regard to any other matters it considers relevant.

As is evident from section 122 NGL (extracted above) the focus in determining the appropriate form for regulatory oversight of access terms is on effectiveness and cost (consistent with the Expert Panel's analysis).

The 'form of regulation factors' (which are required to be referred to) then provide clear guidance as to the factors that will influence the anticipated effectiveness of the possible forms of regulation.

[19] Report of the Expert Panel on Energy Access Pricing, p 47

(a) the presence and extent of any barriers to entry in a market for pipeline services;

(b) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other natural gas service provided by the service provider;

(c) the presence and extent of any network externalities (that is, interdependencies) between a natural gas service provided by a service provider and any other service provided by the service provider in any other market;

(d) the extent to which any market power possessed by a service provider is, or is likely to be, mitigated by any countervailing market power possessed by a user or prospective user;

(e) the presence and extent of any substitute, and the elasticity of demand, in a market for a pipeline service in which a service provider provides that service;

(f) the presence and extent of any substitute for, and the elasticity of demand in a market for, electricity or gas (as the case may be);

(g) the extent to which there is information available to a prospective user or user, and whether that information is adequate, to enable the prospective user or user to negotiate on an informed basis with a service provider for the provision of a pipeline service to them by the service provider.

The DBCT User Group believes that those principles and factors are highly relevant to making the analogous decision in front of the QCA in respect of the 2019 DAU – as the same policy issue arises in determining the appropriate form of regulation of all infrastructure services – namely balancing the effectiveness in achieving the desired outcomes of efficient and reasonable pricing in the context of the extent of market power that exists against the costs incurred in doing so.

When one applies those principles to the specific characteristics of the DBCT service and the market in which it is provided, it is, again, very clear that they overwhelmingly favour the appropriateness of continued setting of reference tariffs:

Form of Regulation Factor	**Approach the factor suggests should be favoured for the DBCT service**	
	'Light' regulation (i.e. negotiate/arbitrate)	**'Full' regulation (i.e. reference tariffs)**
Barriers to entry	✗	✓ High barriers to entry for development of a competing coal terminal – due to high capital costs, economies of scale and difficulties of obtaining approvals for a greenfield coal terminal
Externalities / interdependencies with	✓ No evident externalities of this type	✗

other services provided by supplier		
Market power and countervailing power of users	✗	✓ DBCTM has clear market power and users have no countervailing power (due to lack of competing substitute services and the numerous customers of the terminal meaning DBCTM is not dependent on particular users)
Substitutes and elasticity of demand	✗	✓ No close substitutes for the DBCT coal handling service – due to both the significant cost differences for Goonyella users to access other terminal and non-price differences in the services provided (in terms of extent of opportunities for blending and co-shipping). As a result, demand is, and will continue to be, highly inelastic.
Information adequacy	✗	✓ There is material information asymmetry between DBCTM and access seekers, and significant disputes and uncertainty about major cost and rate of return components that will not be easy to resolve through negotiations (with the magnitude of the differences discussed in detail in the PwC Report).

8 Past Queensland Competition Authority Analysis

The DBCT User Group considers that the Productivity Commission's and Expert Panel's analysis – that up-front regulation of access terms can be appropriate for particular facilities (as outlined above) – is not a particularly surprising result.

The QCA itself has recognised as much itself in previous analysis and undertakings.

8.1 Statement of Regulatory Pricing Principles

For example, the QCA has itself previously expressly recognised in its Statement of Regulatory Pricing Principles[20] that the approach to regulation is not a 'one size fits all', given the circumstances of the services to be regulated will be different:

> *It should be noted that divergence in access or other regulatory regimes may often be 'warranted'. Ergas (2012) explains how harmonisation of regulatory regimes may retard jurisdictional innovation and impose 'one size fits all' requirements on diverse situations.*

[20] Queensland Competition Authority, *Statement of Regulatory Pricing Principles*, August 2013, page 5.

8.2 Dalrymple Bay Coal Terminal regulation

Every undertaking which has existed in respect of the DBCT service has provided reference tariffs.

While previous QCA decisions were not explicit in why that form of regulation was determined to be appropriate for DBCT, it is worth recalling the context in which the first undertaking process was conducted.

Following privatisation of the terminal, users and DBCTM sought to reach agreement on the commercial terms for access before the QCA delivered its decision on the first proposed undertaking. However, as discussed in the PwC Report, despite strong coal prices, the parties were unable to reach a commercial negotiated price due to substantially different views of an appropriate price.

Nothing has changed to suggest that a resolution would be any more likely today or in the future. From the DBCT User Group's perspective, regulatory submissions since have typically been characterised by DBCTM making ambit claims and the DBCT User Group seeking a price that is more aligned with QCA and other regulatory precedent, such that there is evidently a very wide gap in expectations. By way of example, for the 2016/17 TIC, the DBCTM proposed a TIC of $3.09/tonne compared to $2.10/tonne as proposed by the DBCT User Group (with the QCA ultimately determining $2.43/tonne was appropriate) – making the DBCTM price nearly 150% of what the DBCT User Group considered reasonable and 127% of what the independent regulator determined reasonable. Attempts by DBCTM and the DBCT User Group to reach agreed positions on pricing matters prior to submissions were quickly abandoned due to the magnitude of the differences.

The DBCT User Group acknowledges that in respect of the previous undertaking, the industry agreed to support a particular equity beta. However, it is important to understand that:

(a) the only part of the tariff that was agreed was the equity beta (i.e. not the actual price);

(b) that agreement was only able to be reached as part of a package of arrangements (including DBCTM proceeding with expansions); and

(c) critically, the users effectively had a high degree of countervailing power in such negotiations due to all parties' knowledge that, in the absence of agreement, the QCA would determine all terms of access including appropriate pricing (without the need for costly arbitrations and with greater certainty as to the approach the QCA would take than would exist in relation to any arbitration).

8.3 Rail network regulation

In addition, not applying a 'one size fits all' approach has been reflected in the QCA's actual practice in determining whether reference tariffs are appropriate for all services the subject of an undertaking provided under the QCA Act.

The best example of that is the regulation of Queensland's rail networks, where the QCA has determined that it is appropriate for:

(a) reference tariffs to apply in respect of the multi-user coal rail access services (central Queensland and West Moreton); but

(b) a negotiate/arbitrate regime to apply in respect of the remainder of Queensland's regional rail network (and non-coal services on the coal networks).

That position has remained in place since the 2001 access undertaking through to the current Queensland Rail and Aurizon Network access undertakings.

That clearly suggests that the QCA has determined, implicitly at least, that there are characteristics of the multi-user coal rail access services that make it appropriate to use reference tariffs, and that some or all of those characteristics do not exist in respect of other regional rail services.

Consistent with the factors referred to by Productivity Commission and the Expert Panel, the discussion in section 9 of these submissions below, and the analysis in the PwC Report, the DBCT User Group considers there clearly are substantial differences in characteristics between the coal and non-coal services on Queensland's rail networks which justify that different treatment.

For example, the DBCT User Group notes:

(a) the varying extent of market power of the infrastructure provider (given the lack of competition for rail transport provided by road in respect of coal services, and the competition from road that does exist for non-bulk/shorter distance rail services);

(b) the much higher extent of demand for the multi-user coal services;

(c) the much greater numbers of users from which that demand for the multi-user coal services arises (and therefore the greater extent of negotiation costs which can be saved by up-front negotiations);

(d) the similarity of coal rail access services relative to the wide variety of non-coal services (which impacts on the ability to determine appropriate standard terms); and

(e) at least for the central Queensland coal network, the ability to clearly identify coal specific infrastructure and costs in a way that is much more difficult in respect of allocation of multi-use infrastructure (which impacts on the ability to accurately estimate appropriate and efficient pricing and the regulatory costs involved in doing so).

It is obviously noticeable that those are all factors which the DBCT service has in common with the rail access services that the QCA has previously determined it was appropriate to apply reference tariffs to.

9 Comparisons to Other Regulatory Regimes

9.1 Regulatory arrangements for other facilities

In addition to the commentary of the Productivity Commission and Expert Panel, and the experience of the QCA's approach to undertakings, there is further practical evidence which can be drawn from the many regulatory decisions that are made by governments and regulators across Australia in relation to how various monopoly infrastructure services should be regulated.

As analysed in detail in the PwC Report, a survey of such regulatory experience confirms there is no universally accepted approach to the appropriate form of regulation for all monopoly infrastructure services.

Rather, as show in Table 1 in the PwC Report, whether regulators have opted for ex-ante pricing regulation or negotiate / arbitrate regimes has varied for different services. That is of course, entirely consistent with the commentary of the Productivity Commission and Expert Panel and the QCA's previous practice, as discussed above.

The below table provides a similar overview of the types of regulatory regimes that exist for different types of monopoly infrastructure assets:

	Negotiate / Arbitrate	Ex-ante Pricing Regulation
Rail 	• Other Queensland Rail rail networks • WA Rail Access Code railways	• Aurizon Network central Queensland coal region rail network (undertaking) • ARTC Hunter Valley rail network (undertaking) • Queensland Rail, West Moreton / Metropolitan network coal services (undertaking) • ARTC Interstate Rail Network (undertaking)
Gas Pipelines 	• 'Light Regulation' covered gas pipelines • Part 23 Regulated non-covered gas pipelines	• 'Full Regulation' covered gas pipelines (access arrangement)
Electricity Networks 		• NEM Transmission Networks (determination) • NEM Distribution Networks (determination) • Western Power's South West Interconnected Network
Telecommunications Networks 		• Telecommunications (Part XIC) • NBN Co Special Access Undertaking (undertaking)
Ports 	• Wheat Ports (Bulk Wheat Ports Access Code)	• Dalrymple Bay Coal Terminal (undertaking) • Port of Melbourne
Water 	• Water Industry Competition Act 2006 (NSW)	• Gladstone Area Water Board (pricing investigation) • SEQ Water (pricing investigation)

Again, this practical review supports the positions identified earlier in these submissions that:

(a) contrary to DBCTM's submissions, regulators do not have a view that primacy must be given to commercial negotiations in all circumstances or that negotiate/arbitrate regulation should be applied universally;

(b) reference tariffs or other forms of ex-ante pricing regulation are very commonly used in regulatory arrangements for numerous types of monopoly infrastructure assets; and

(c) the form of regulation that is considered appropriate to be adopted varies with the circumstances of each facility and service.

What is helpful, is to then 'drill down' into the features of the individual regulatory regimes or regulated services for which different forms of regulation have been adopted to determine what features it is that have guided the decision as to the form of regulation that is appropriate.

The analysis of the characteristics of the services for which the various forms of regulation are appropriate is considered in detail the PwC Report and discussed in the remainder of this section 9 of this submission.

However, even before getting to the characteristics of the regulated services, it is clearly notable that where a regulator or infrastructure provider has determined that it is justified that the terms of access should be prescribed in a undertaking or AER access arrangement (as the QCA already has here in respect of DBCT) or that a particular determination or investigation should occur in respect of a particular service – direct pricing ex-ante pricing regulation is typically determined to be the appropriate outcome. It is typically only where regulation occurs under a regime of general application that negotiate/arbitrate is commonly accepted (which it will be recalled is consistent with the reasoning of the Productivity Commission noted earlier in these submissions).

Again, that is consistent with reference tariffs being retained for the DBCT service.

9.2 Overview of factors that influence the decisions

As the PwC Report discusses, what can be clearly gleaned from the existing regulatory practices and decisions is that there is a common set of factors that clearly influence the type of regulatory regime which has been considered appropriate.

For example, an analysis of infrastructure services that are currently subjected to ex-ante regulation clearly demonstrates some characteristics they have in common:

	Market Power	Main similar service for all customers	High number of customers	Complexity of price / difficulty of negotiation	Capacity constrained	Regulation for specific facility
Central Qld / Hunter Valley Rail 	✓	✓	✓	✓	✓	✓
Full Regulation Gas Pipelines 	✓	✓	Varies	✓	Varies	✓
Electricity Networks 	✓	✓	✓	✓	Varies	✓
Telco Networks 	✓	✓	✓	✓	Varies	✓

Whereas, by contrast those factors are far less likely to be present in respect of those infrastructure services subjected to 'light handed' regulation.

	Market Power	Main similar service for all customers	High number of customers	Complexity of price / difficulty of negotiation	Capacity constrained	Regulation for specific facility
Qld Regional Rail 	Varies, but ✗ for short haul / non-bulk	✗	✗	✓	✗	✓
Light Regulation Gas Pipelines 	✗	✓	Varies – but typically ✗	Varies	Varies	✗
Wheat Ports 	Varies but typically ✗	✓	Varies	✗	✗	✗
Airports 	Varies, but incentives not to exercise	✗	✗	Varies	Varies	✗

From the DBCT User Group's perspective, what is clear is that the presence or absence of these factors drives the appropriate form of regulation. So, in summary:

Either lack of market power or incentives / constraints preventing exercise - lesser prospects of monopoly pricing	Market power - greater prospects of monopoly pricing
Highly varied service(s) – creating greater complexity / cost in establishing tariffs	Substantially similar base/reference service
Limited number of customers – which suggests mutual dependence (potentially providing countervailing powers and reducing the savings of transaction costs caused by ex-ante regulation)	Many customers

Simplicity of negotiation of price (such that commercial agreement more likely to be reached)	Complexity of negotiation of price (such that commercial resolution unlikely) – which might be derived from information asymmetry
Not capacity constrained (such that infrastructure provider has greater incentives to increase volume and reach agreement)	Capacity constrained (without expansion)
Regulation applies to an industry or type of infrastructure more generally (which makes it more difficult to determine that ex-ante regulation will be appropriate for all services that might be within the scope of the regime)	Regulation is of a specific facility or infrastructure service (where a regulator has determined that the service warrants more prescriptive regulation)

When one seeks to apply those factors, it is unsurprising to note that all of the regulated multi-user coal rail and port infrastructure utilises up-front tariff setting (i.e. Aurizon Network's central Queensland rail network, ARTC's Hunter Valley rail network, Queensland Rail's West Moreton/Metropolitan coal rail services and the Dalrymple Bay Coal Terminal coal handling service). Each of those services are characterised by the infrastructure provider have a high degree of market power, a substantially similar common service being provided, many customers (with the exception of QR's West Moreton services) complexity in the negotiation of price, capacity constraints and facility specific regulation.

Accordingly, the DBCT User Group suggests that as summarised in section 8.3 of these submissions, there are clear reasons for ex-ante pricing consistently being accepted as the appropriate setting for all multi-user coal services.

Accordingly, a review of the circumstances in which the alternative approaches are used, and a review of why different approaches are selected for different circumstances leads to the clear conclusion that reference tariffs remain appropriate in the context of the DBCT service.

10 PwC Report Analysis

The DBCT User Group requested that PwC provide expert economic advice on the factors which influence the form of access regulation applied, and the form of regulation such factors indicated would be appropriate in respect of the DBCT service.

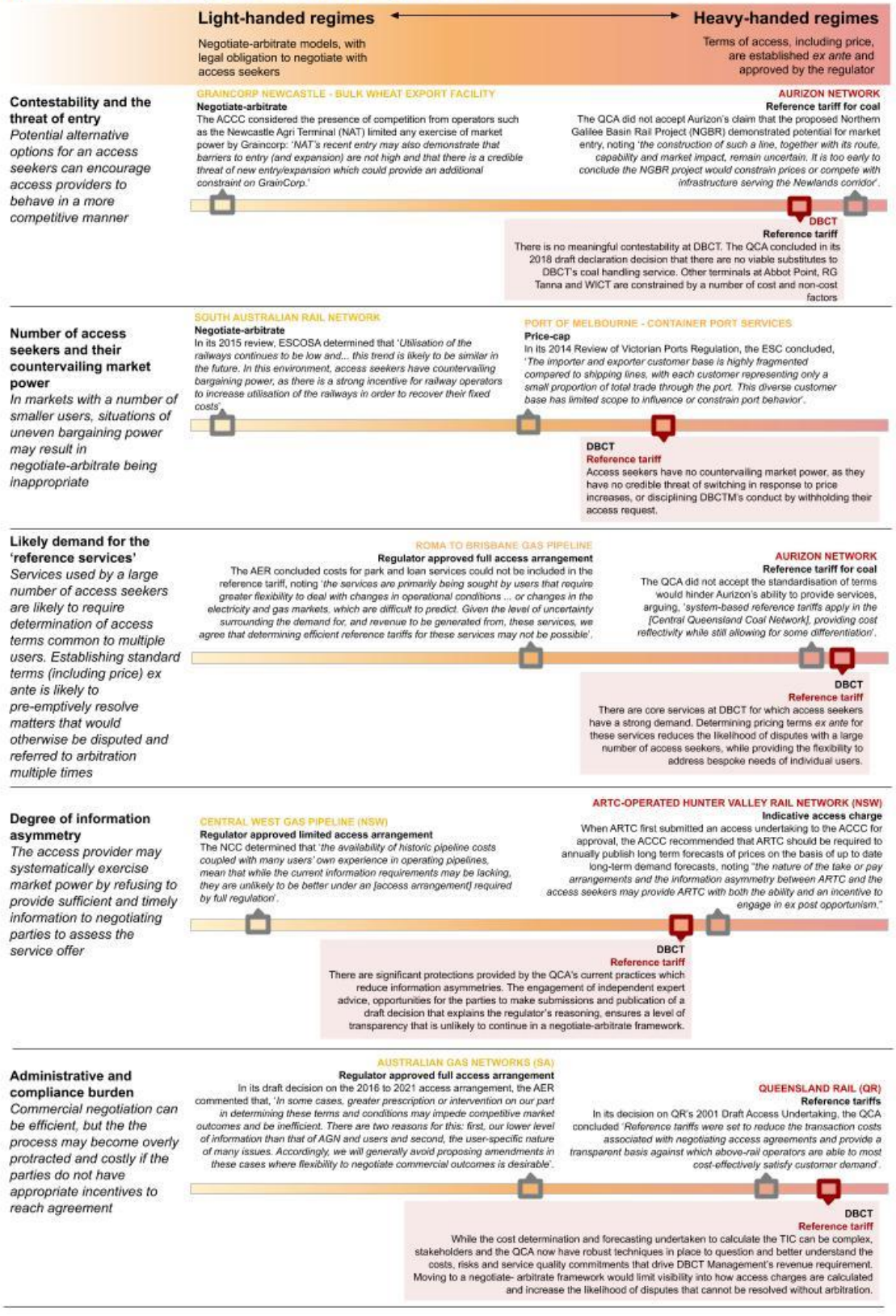
Having surveyed the various economic regulatory frameworks that exist in relation to Australian monopoly infrastructure, consistent with the analysis above, the PwC Report concluded that:

> *Economic regulation can be viewed as a continuum of possible forms of regulation, with 'light-handed' forms of regulation at one end of the continuum and more 'heavy-handed' forms of regulation at the other end.*
>
> *Unlike decisions on access cover – which are binary in nature and which turn on specific legislative tests regulators have regard to a number of factors when considering the form of regulation to be applied …*
>
> *Notwithstanding this lack of definitive and prescribed tests**, in making judgements as to the way in which access regulation should be deployed, we can observe that regulators typically have had regard to the following key factors:***
>
> - ***contestability and threat of market entry***
> - ***number of access seekers and their countervailing market power***
> - ***likely demand for the 'reference services'***

- ***degree of information asymmetry***
- ***administrative and compliance burden of difference access regimes***

The PwC Report then goes on to apply consideration of these factors to DBCT, as summarised below:

Figure 5: Factors affecting the form of access regulation at DBCT



As that summary suggests, the factors heavily favour 'heavy-handed' or ex-ante price regulation as being appropriate.

In particular the PwC Report notes:

Factor relevant to appropriate form of regulation	Factors favours ex-ante pricing regulation for the DBCT service
Contestability and the threat of entry	A defining economic characteristic of DBCT is the limited contestability evident in the market for DBCT's coal handling services. There are significant barriers to new entry for the provision of coal handling services, and limited scope for existing ports to be redeveloped, or new competing ports established, in order to provide direct competition to DBCT. … … the QCA concluded that neither the alternative multi-user terminals at Abbot Point, Wiggins Island or RG Tanna, nor the vertically integrated HPCT, provide strong substitution possibilities to DBCT. In its previous decision in relation not the 2017 DAU, the QCA drew particular attention to significant switching costs users would face: *We considered users attempting to switch significant tonnages from DBCT to other terminals would face significant costs (i.e. differences in port charges, below-rail costs and above-rail haulage costs), which meant switching is not likely to be a commercially viable option for many users.*
Number of access seekers and their countervailing market power	DBCT is a multi-user export terminal, with more than ten users of the Terminal, each with a long-term agreement underpinning access to DBCT and none with a dominant share of terminal capacity. … This implies very limited countervailing market power on the access holders' side of the market to balance DBCT Management's market power. Further, the long-term nature of take-or-pay commitments in the DBCT User Agreements further reduces the level of countervailing market power, as any re-contracting must align with the term of take or pay commitments in the upstream rail haulage and rail access markets. While the existing user agreements provide for regular reviews of the method of calculating charges based on negotiation between DBCT Management and the user, users are restrained in their ability to negotiate price terms as the threat of withdrawing services is not credible…. There is little evidence of countervailing market power that would act to constrain DBCT Management, in the absence of regulatory intervention, from dictating the terms of which access is granted, including price. The QCA came to a similar conclusion, as outlined in the declaration review findings: *[T]he QCA's view is that since other export terminals would not be a viable substitute for DBCT, both existing users – in so far as they require more capacity and are unable to obtain additional capacity through the transfer mechanism – and new entrants would have no effective*

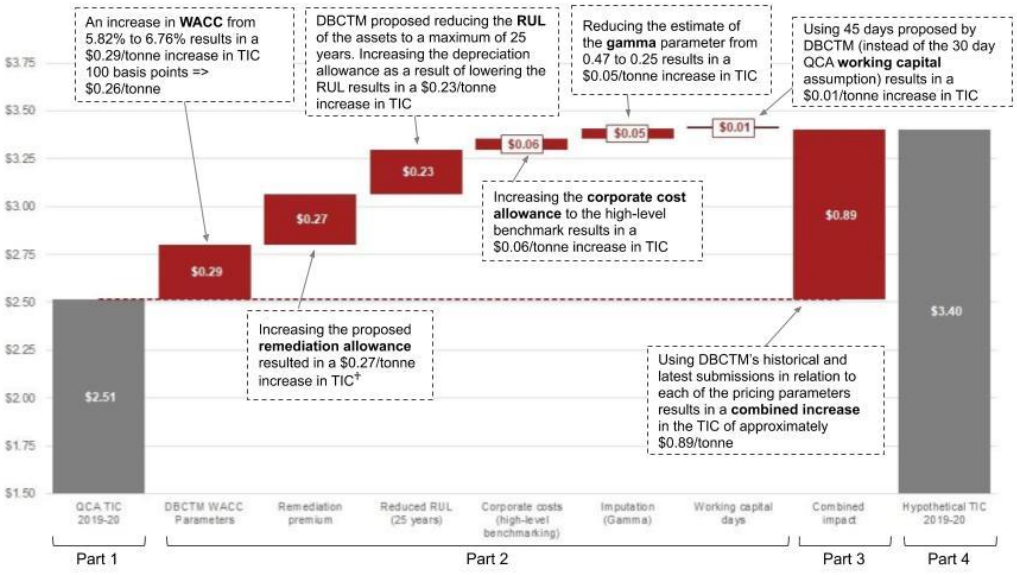
	countervailing power against DBCT Management in a future without declaration.
Likely demand for the 'reference services'	Access seekers have a strong demand for components of the coal handling service at DBCT … The QCA previously accepted that there was merit in approving a reference tariff and standard access agreement (SAA) in 2017 AU in order to provide greater certainty, rather than leaving common issues to negotiation and potential disagreement. The QCA observed that both DBCT Management and access holders were operators of long lived capital intensive assets, and as such there was merit in defining a 'reference service for a long term take or pay contract as it provides certainty for both DBCT Management and the access holder'.
Degree of Information Asymmetry	Under the negotiate-arbitrate model proposed by DBCT Management, a lack of information would put users at a significant disadvantage. The issue is particularly acute for users or access seekers whom are not shareholders in Dalrymple Bay Coal Terminal Pty Limited (DBCTPL), given the additional visibility afforded the operator as to certain Terminal management matters. However, even with the vantage point of DBCTPL, this is not the type of information that would enable a user to assess whether prices are consistent with the long-run marginal cost of service provision, or what an appropriate return on assets would be.
Administrative and compliance burden of different access regimes	In the case of DBCT, it is likely that the negotiate-arbitrate framework proposed by DBCT Management will result in protracted negotiations or a complex arbitration, recognising that • negotiations to date regarding expansions and other developments at the Terminal have not been resolved without the intervention of the QCA, and this situation is unlikely to improve • the costs of expansions and other developments are likely to be significant and contentious • to the extent that DBCT is fully contracted for existing capacity, current users and any third-party seeking access will be competitors for new or expanded capacity, which increases the risks of disputes arising … Applying pricing parameters previously and otherwise submitted by DBCT Management would imply a TIC of around $3.40 per tonne, or around 35% higher than the QCA-approved TIC of $2.51. This implies a significant difference in expectations as to an appropriate access charge, which in turn would make it less likely that that direct negotiation between the parties will successfully conclude in an agreement on access prices. A negotiate-arbitrate framework would not necessarily offer advantages in the form of reduced regulatory and compliance costs for parties, given the likelihood that negotiations fail to reach resolution and dispute resolution follows.

In addition, the PwC Report goes on to provide indicative modelling of the minimum TIC expectation that DBCTM would be assumed to be willing to agree to under a negotiate arbitrate model.

Even with PwC's conservative assumptions that DBCT's price expectation would only be reflective of previous regulatory submissions to the QCA, there is a very wide gap between that expectation and the appropriate price. In fact, however, DBCTM are likely be incentivised to seek even higher prices given it is not certain that the TIC they seek will receive regulatory scrutiny (when they always would as part of the current reference tariff setting process). Essentially, the DBCT User Group believes that DBCTM's previous submissions on the TIC can be assumed to have been crafted knowing that every claim would be analysed by the QCA – whereas a negotiate-arbitrate model allows DBCTM to seek things the QCA would never consider appropriate (even if they 'fall-back' to something more akin to their previously submitted position for the purposes of arbitrations).

The result is an estimate that DBCTM would be seeking at least $3.40 per tonne relative to the $2.51 per tonne that would be anticipated based on the existing QCA methodology as shown below:

Figure 7: QCA FY20 TIC compared to proxy DBCT Management pricing based on current and historical documented claims



†Note: the estimated TIC impact reflects the latest Rehabilitation Cost Estimate prepared by GHD. However, the increase DBCT Management would seek for the remediation allowance is likely to be understated as it does not reflect the tax treatment claimed by DBCT Management in the 2017 Modelling DAAU.

As the PwC Report notes:

> *Figure 7 illustrates the likely significant gap in expectations between DBCT Management and the DBCT Users and suggests that a 'negotiated' TIC acceptable to DBCT Management would be materially higher than the current regulator-determined rate. The User Group has argued against each of the historical claims under the existing AU processes, and importantly the QCA rejected these claims.*
>
> ***The apparent significant gap between DBCT Management and DBCT Users as to the appropriate and reasonable charge for access to the Terminal would be a significant***

challenge for any commercial negotiation, in which case the dispute is likely to proceed to arbitration. Thus, one of the claimed advantages of a negotiate-arbitrate approach – minimising the likelihood of direct regulator intervention – is unlikely to be realised…

Accordingly, the PwC Report provides clear independent analysis supporting that a reference tariff regime is appropriate to apply given the circumstances of the DBCT service.

11 Debunking Other DBCTM Arguments: Extent to which DBCT offers multiple Services

11.1 Relevance to the form of regulation

DBCTM asserts that it provides additional services to users above the standard service of handling coal, such that a single access charge is not 'fit for purpose'.

As a result, DBCTM appears to envisage that in access negotiations it would provide:

(a) a 'base tariff' for the standard service; and

(b) higher additional amounts for the varied services (which are currently already provided as part of the coal handling service).

In fact, the services that DBCTM references in its submissions (such as permitting co-shipping, blending, use of remnant stockpiles, and various stockpile management measures) are all minor parts of a coal handling service that is fundamentally the same for all users.

It is true that the extent of usage of these different minor variations of the coal handling service differs slightly between users, but all usages fall within the bounds already accounted for in assessing available terminal capacity.

However, DBCTM submissions grossly misrepresent the analysis in the declaration review in that regard. The point made by the DBCT User Group (and accepted by the QCA) in the declaration review process is that the ability for the DBCT coal handling service to accommodate these minor variations, provides a value that makes it distinct from other coal handling services (that do so to lesser degrees due to different operating modes and/or different quality coals being handled at such terminals). There is nothing in the declaration review that suggests these minor variations are such distinct services they should be treated as DBCTM proposed.

Further, as discussed below, the existence of these minor variations in the way the coal handling service is provided at DBCT does not lead to the automatic conclusions that either:

(a) differential pricing is appropriate (as DBCTM appears to suggest); or

(b) that differential pricing somehow favours a negotiate arbitrate model of regulation.

Plainly and simply, what DBCTM is seeking to do by overstating the nature of these minor variations in the coal handling service is to provide a veil of legitimacy for its attempts to seek a regulatory framework with a greater potential for it to engage in monopoly pricing.

11.2 Why minor variations do not make differential pricing appropriate

The DBCT User Group observes that, despite the fact that there is a degree of co-shipping and blending at other Australian coal terminals, there is no Australian coal terminal that applies differential pricing referable to minor variations of the coal handling service arising from co-shipping and blending activities.

Similarly, it is notable that, despite the fact that it is well known that not all users make use of these minor variations - that users, DBCTM or DBCTPL have never previously sought differential pricing.

The QCA should therefore scrutinise DBCTM's claims and ask why that is.

Based on their understanding developed through being users, shareholders and operators of coal terminals now or in the past, members of the DBCT User Group consider the reason differential pricing for the types of variations DBCTM refers to have never been considered appropriate (and is not appropriate here) is:

(a) the real difficulty in working out the minor cost or capacity differences that are actually involved; and

(b) the limited nature of those cost or capacity differences meaning that it is has been clearly determined by all stakeholders not to be a worthwhile exercise.

In particular, the incremental costs involved in some of these minor variations will be extremely hard to estimate because:

(a) the capital cost for the stacker/reclaimers, hoppers and other capital equipment utilised in blending and stockpile management are incurred and used in providing the simplest form of the coal handling service (i.e. there is no incremental capital investment that has been made to enable the variations being discussed – such that any difference is merely one of operating costs – which critically, in the context of the DBCT service, are not truly regulated in any case);

(b) rates of blending and co-shipping vary from year to year, and arise as a result of marketing opportunities through the year (both for individual users and in aggregate), such that even if costs could be determined, there is no non-arbitrary way of allocating such costs based on forecast or anticipated usage; and

(c) whether any incremental use of some minor amount of capacity is actually a use of capacity that would otherwise have been utilised will be highly dependent on fluid and dynamic issues like vessel arrivals, coal readiness of other users, rail scheduling and other matters.

This will not be able to be resolved with any meaningful level of confidence by Integrated Logistics Company (***ILCO***) or any other expert seeking to model the impacts on terminal efficiency resulting from specific user requests (as part of an arbitration) – because that will not be possible to do reasonably in advance.

In relation to ILCO in particular, it should be noted that ILCO was intended to be an independent industry body undertaking modelling and analysis for the supply chain. For ILCO to undertake detailed work for DBCTM which would (on DBCTM's view) be the basis for increasing charges to individual users, risks both the independence and integrity of ILCO and undermines the intention of an open and transparent organisation which was assisting in improving supply chain understanding and efficiency.

In any case, equally importantly is that if these minor variations did actually cause the issues DBCTM would have the QCA believe, there is already existing mechanisms for resolving those issues within the standard regulated terms.

In particular:

(a) to the extent that DBCTM is asserting that these services are materially different (in nature, extent or cost) to the services provided to other users (which the DBCT User Group strongly considers they are not) – they would be within the definition of Miscellaneous Services under the Standard Access Agreement – which clause 6.4 of the Standard Access Agreement then allows for charging for; and

(b) to the extent DBCTM is asserting that these minor variations in the service result in users disproportionately consuming capacity (which again the DBCT User Group highly doubts), clause 3.7 of the Standard Access Agreement provides a mechanism for resolving disproportionate consumption of capacity.

Finally the DBCT User Group note that access holders have made mine investment and infrastructure contracting decisions on the basis that the existing degree of these variations would continue to be part of the standard coal handling service provided at DBCT and charged at a uniform price (and DBCTM has itself made terminal expansion investments in a manner that assumes that will be the case). It is not appropriate to remove that regulatory certainty now after those decisions have been made, particularly when no evidence has been provided about how it will impact on particular users or mines.

Accordingly, for all the reasons noted above, the DBCT User Group strongly believe that differential pricing is not appropriate beyond the circumstances which the Standard Access Agreement terms already provide for.

If the QCA was for some reason determined to apply differential pricing – then the difficulty of determining the extent of cost or capacity variation involved and the clear information asymmetry that will exist for users (who have no real way of understanding or critiquing the veracity of any cost or capacity consumption modelling presented), is a factor clearly indicating that it would be more efficient to implement that through reference tariffs than through a negotiate/arbitrate regime in any case.

12 Debunking Other DBCTM Arguments: Extent of 'Errors' Arising from Different Forms of Regulation

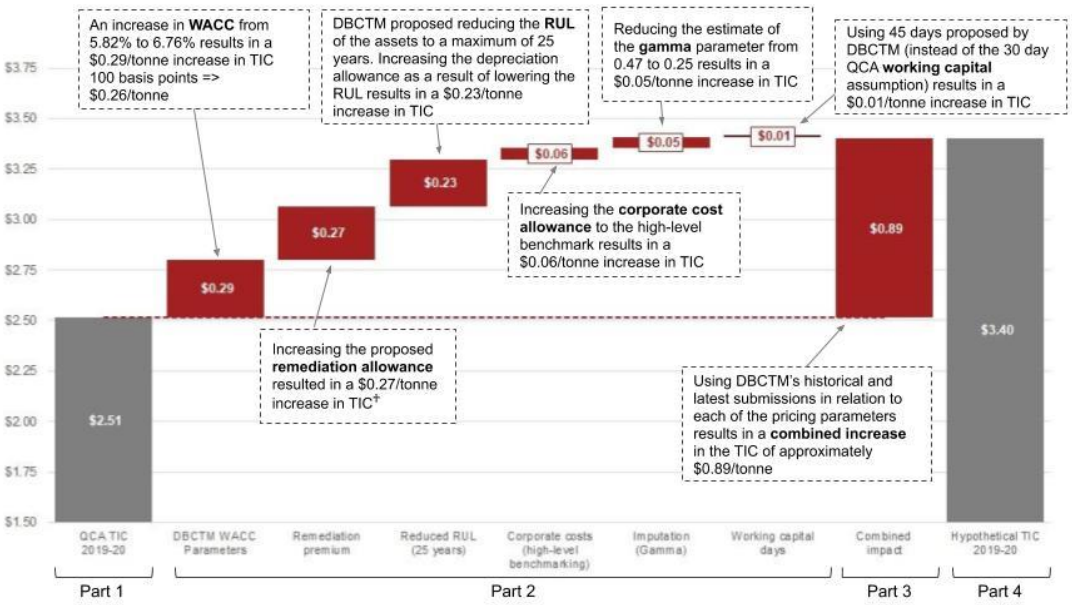
12.1 Negotiate / Arbitrate will produce more errors

The DBCT User Group does not contend that regulated price setting is preferable to pricing being set by supply and demand dynamics in a competitive market or that regulators will be able to determinate with absolute precision the efficient price that would apply in a hypothetical competitive market. However, the price for the service being set by supply and demand dynamics is clearly not a real alternative that would exist in the absence of the QCA setting a TIC for the DBCT service.

It is clear from the QCA's previous considerations in both the context of the last access undertaking approval and the declaration review, that DBCT is a natural monopoly, with no close competitors and therefore no countervailing power of customers – such that DBCTM has a very high degree of market power. Consequently, any commercial negotiation which would take place under DBCT's negotiate/arbitrate regime is not occurring in an environment of mutual dependence where both parties have the incentives to reach a reasonable price, and potential users have the ability to switch to close substitutes.

As demonstrated by the analysis in the PwC Report there is also a stark difference between the type of TIC DBCTM would be likely to seek (even in the knowledge of a potential QCA arbitration) and the type of TIC that the QCA has determined appropriate (even if it is assumed that DBCTM would only seek the type of price rises it has previously considered it can convince the QCA of in a regulatory process – which must be at the lower end of what they would ask for in the absence of ex-ante pricing).

Figure 7: QCA FY20 TIC compared to proxy DBCT Management pricing based on current and historical documented claims



+Note: the estimated TIC impact reflects the latest Rehabilitation Cost Estimate prepared by GHD. However, the increase DBCT Management would seek for the remediation allowance is likely to be understated as it does not reflect the tax treatment claimed by DBCT Management in the 2017 Modelling DAAU.

The actual alternative that the QCA is being presented with in the 2019 DAU is the occurrence of both:

(a) the 'errors' that would result from some access seekers and users agreeing to the higher monopoly pricing given the pressure of the uncertainty and costs involved in arbitration and the potential need to secure access immediately to preserve their coal project timeline; and

(b) the 'errors' that would result from regulatory setting of price in arbitrations (with there being no reason to suggest that these errors would be any less than those which would be experienced in setting tariffs up front – in fact, given the lesser time frames and information likely to be available to the QCA, the potential for errors in an arbitration would be anticipated to be higher than in ex-ante reference tariff setting).

In other words, adopting DBCTM's position actually just introduces new types of errors, and creates a new risk of asymmetric treatment of different access seekers for reason unjustified by efficiency. That risk is a material one where the users of DBCT vary significantly in terms of in-house legal, economic and supply chain capability and financial resources that they can apply to assess the appropriateness of pricing that DBCTM may propose and to engage in protracted negotiations and arbitration.

That is clearly not an efficient or appropriate outcome.

12.2 DBCTM overstates the potential for and outcomes of potential regulatory 'error'

In addition, the DBCT User Group strongly notes that it considers DBCTM materially overstates the scope and likelihood of regulatory error arising from setting reference tariffs.

In particular, it should be noted that:

(a) potential 'errors' caused by regulatory setting of price would not be anticipated to asymmetrically set prices below an efficient level – DBCTM has provided absolutely no credible evidence that there is a regulatory downwards bias in the QCA's setting of tariffs;

(b) consequently any potential 'errors' would be anticipated to balance out over the long term life of a natural monopoly infrastructure investment such that they should not adversely impact on investment incentives in a long life asset such as DBCT where investments are surely anticipated to be made based on long term return expectations rather than a rate of return that applies for a 5 year period;

(c) the QCA is clearly very alive to the fact that a purist approach to calculating a 'bottom-up' building blocks tariff has the potential to result in a tariff which the QCA may consider inappropriate and has the power, and has shown the willingness to, make adjustments where it considers it appropriate to do so. The DBCT User Group notes a key recent example of that in the QCA's decision to set the Aurizon Network WACC for its 'UT5' access undertaking at 5.7% despite a 'bottom-up' estimate calculated as 5.45%; and

(d) the normal reference tariff setting process as part of an undertaking allows significantly more time and evidence through submissions and economic reports than would occur in the context of an arbitration (in which only the actual parties to the dispute/arbitration could be involved) – such that the prospects and quantum of any potential 'error' are likely to be much smaller in setting tariffs up front than they are in a negotiate-arbitrate model; and

(e) the QCA is very thorough in its approach to estimation of an appropriate tariff and provides extensive opportunity for stakeholders to provide submissions as well as seeking its own independent economic analysis.

The DBCT User Group also believes the benefits of the consistent QCA approach to establishing the TIC, with a focus on the long-term nature of the infrastructure asset, have been aptly demonstrated by DBCTM's contradictory claims over time to justify constantly seeking higher prices. In particular, for the current undertaking DBCTM sought higher pricing on the basis of assertions of asset stranding risk, weakening coal demand and a number of access agreements reaching their scheduled expiry. Whereas, with all of those access agreements renewed, DBCTM is now seeking higher pricing on the basis of being full contracted and assuming risks of expansions.

Consequently, the DBCT User Group strongly believes that reference tariffs will involve a far closer estimate of reasonable and appropriate pricing than the negotiate / arbitrate model – given the circumstances in which negotiations in respect of the DBCT service would actually occur.

13 Abbot Point Coal Terminal – A clear case study of the failure of negotiate / arbitrate

The consistent and clear analysis of regulators and policy makers discussed above is also supported by practical experience where negotiate/arbitrate models operate in similar circumstances to DBCT.

In particular, the adverse outcomes of a negotiate / arbitrate model in respect of a multi-user Bowen Basin coal terminal have been clearly demonstrated through the outcomes at Abbot Point Coal Terminal since it was privatised by long term lease.

The User Agreements at Abbot Point involve a similar arrangement to what DBCTM is proposing – with a periodic price review with a commercial arbitration if the parties cannot agree the proposed charges.

However, ever since privatisation, each price review has resulted in a series of customers arbitrating due to a failure to reach commercially agreed resolutions. At times, including in the most recent price review, arbitrations have been commenced by some customers with other customers settling – such that there is believed to now be a disparity in pricing, for reasons of bargaining power and willingness to arbitrate, not efficiency or differences in cost or risk.

At each pricing review, users have engaged solicitors and economists (and for those users which proceed to arbitration, barristers).

That is not a product of the current owner's vertical integration – as Adani has not actually been a user of the terminal during the periods for which pricing has been arbitrated to date. Rather it is due to the economic incentives that negotiate / arbitrate creates for the owner of natural monopoly multi-user economic infrastructure of this nature – to seek to gain the maximum amount of possible price rise.

While users know that an arbitration can theoretically resolve blatantly clear monopolistic pricing, given the costs and risks involved in arbitration they are effectively incentivised to accept a worse position than would apply under QCA terminal infrastructure charges set up-front. That is, to accept an inefficiently high price, which would be anticipated to result in inefficient underinvestment in coal operations in the relevant catchment. That is clearly not an appropriate outcome.

There is no reason provided by DBCTM as to why it would logically be incentivised to act any differently from Adani Abbot Point Coal Terminal has in recent price reviews.

When there is a clear example of the adverse consequences of the model DBCTM proposes, that should clearly be taken into account in assessing the appropriateness of the 2019 DAU.

14 Debunking Other DBCTM Arguments: Applying the Section 138(2) Criteria

The DBCT User Group also strongly disagrees with DBCTM's submission that having regard to the criteria in section 138(2) QCA Act indicates that a mere negotiate/arbitrate model would be appropriate.

Section 138(2) QCA Act provides that:

(2) The authority may approve a draft access undertaking only if it considers it appropriate to do so having regard to each of the following –

- *(a) the object of this part;*
- *(b) the legitimate business interests of the owner or operator of the service;*
- *(c) if the owner and operator of the service are different entities – the legitimate business interests of the operator of the service are protected;*
- *(d) the public interest, including the public interest in having competition in markets (whether or not in Australia);*
- *(e) the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected;*
- *(f) the effect of excluding existing assets for pricing purposes;*
- *(g) the pricing principles mentioned in section 168A; and*
- *(h) any other issues the authority considers relevant.*

Each of these factors are described in more detail below.

However, in summary the DBCT User Group considers that DBCTM's analysis of these factors on pages 13-16 of the DBCTM submission is deeply flawed and consists of a shallow combination of listing products of the existing undertaking together with bare and unsubstantiated assertions about benefits that a negotiate/arbitrate model will bring that do not stand up to scrutiny (for the reasons discussed earlier in this submission).

14.1 Object of Part 5 QCA Act

The object of Part 5 QCA Act is (s 69E QCA Act):

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

As the QCA has previously stated:[21]

> *We consider economically efficient outcomes are facilitated, among other things, by an access framework that mitigates the potential exercise of market power by the owner of a facility with monopoly characteristics (such as those services which are declared under Part 5 of the QCA Act).*

As discussed in detail earlier in these submissions, a negotiate/arbitrate model of regulation in the circumstances of the DBCT coal handling service:

(a) increases the potential for 'error' in setting prices from that which currently exists – by increasing the prospects of DBCTM being able to engage in monopoly pricing (due to the cost and uncertainties of arbitration not resulting in potential reference to arbitration eliminating that risk, and arbitration itself being an imperfect way of setting prices);

(b) creates material uncertainty which damages investment incentives;

(c) creates greater potential for differential pricing between users that is not justified by differences in costs or risks of providing the services or the services acquired; and

(d) is likely to impose significant additional costs through more protracted negotiations and increased disputes (with significantly greater costs than would be incurred in the regulatory process to determine reference tariffs up-front for all users).

Contrary to the claims made by DBCTM, for the reasons described in detail earlier in this submission, the 2019 DAU and the negotiate/arbitrate model it contains:

(a) will not facilitate outcomes that would be expected to be achieved in a competitive market environment given the clear market power that DBCTM has, the difficulties and uncertainties of arbitration, and the lack of any countervailing power on the part of potential users;

(b) will not allow efficient pricing for different services – as DBCTM will not realistically be able to identify the additional efficient costs of the minor variations in service provided – such that this is simply a veil for trying to extract higher pricing;

(c) does not remove the risk of errors in setting prices– rather it exacerbates the risks of inefficiently high prices being agreed due to the uncertainties and costs or arbitration and information asymmetry surrounding material costs items, and increases the risks of regulatory errors where arbitration is required due to the lesser time and evidence available to the QCA relative to a number undertaking process;

[21] QCA, Final Decision – DBCT Management's 2015 draft access undertaking, November 2016 at 21.

(d) will not promote efficient investment in the terminal – as it will incentivise over-investment due to creating greater potential for excessive returns beyond those commensurate to the regulatory and commercial risks involved in providing the service; and

(e) will damage investment in dependent markets due to creating greater potential for inefficiently higher pricing of the terminal service.

Accordingly, it is inconsistent with the object of Part 5 of the QCA Act to change the form of pricing regulation to solely rely on a mere negotiate / arbitrate regime that is clearly inappropriate for the circumstances of the DBCT service.

14.2 Legitimate interests of the operator

We understand that for the purpose of this factor, the QCA regards DBCTM as the 'operator' for and DBCT Holdings (as the lessor of the terminal to DBCTM) as the 'owner'.[22]

The DBCT User Group does not dispute that it is in DBCTM's legitimate interest to earn a return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service. The DBCT User Group therefore supports a building blocks approach to setting the Terminal Infrastructure Charge which is designed to ensure that exactly that objective is achieved.

However, it is not in DBCTM's *legitimate* interests to increase the prices for the services to inefficient levels through a combination of their market power created bargaining position and the costs and uncertainty of the 'backstop' notionally provided by arbitration meaning that some users will settle for inefficiently high prices.

14.3 Legitimate interests of the owner

It is not consistent with the legitimate interests of DBCT Holdings (as the State lessor) that the State's interest in the economic contributions of the Goonyella coal supply chain may be disrupted by the uncertainty which would be created by DBCTM's proposal to remove QCA reference tariffs for the service.

DBCT Holdings does not gain any additional income from DBCTM increasing its terminal charges.

Even in the short term, the State suffers clear disadvantages from increases in terminal charges, as that results in a higher deduction from royalty calculations and therefore less coal royalties being payable to the State. In the longer term, the uncertainty caused by the negotiate/arbitrate model the 2019 DAU proposes has the potential to chill investment decisions in the Hay Point catchment coal industry relative to what would occur with the certainty of a QCA reference tariff.

The negotiate / arbitrate model proposed is also contrary to the requirements imposed on DBCTM by the State in the Port Services Agreement – with those requirements for a QCA determined price presumably providing clear evidence of the interests of the owner.

Consequently, the 2019 DAU is clearly inconsistent with the interests of the owner of the terminal.

14.4 The Public Interest

The DBCT User Group agree that the public interest is served by an access undertaking that promotes the sustainable and efficient development of the Queensland coal industry.

However, it is a complete mystery to the DBCT User Group as to how DBCTM has concluded that the 2019 DAU is consistent with that.

[22] QCA, Final Decision – DBCT Management's 2015 draft access undertaking, November 2016 at 24.

The QCA has also previously recognised that the provision of regulatory certainty is in the public interest. Yet it is absolutely clear that a negotiate/arbitrate regime destroys the certainty of access seekers as to the approach to pricing for the service that will apply.

The 2019 DAU and the negotiate/arbitrate approach to pricing it contains:

(a) are highly damaging to certainty – which has a chilling effect on future development and investment decisions;

(b) creates greater potential for inefficiently high pricing – which creates:

  (i) greater potential for resulting under-investment in dependent markets, including in the Hay Point catchment coal industry; and

  (ii) greater potential for resulting over-investment in the terminal itself;

(c) will substantially increase the costs of negotiations given that price (which will be highly contentious) will now have to be negotiated by every single access seeker, and with a high likelihood of multiple resulting arbitrations – this does not 'facilitate negotiations' – this is unnecessarily complicating negotiations and increasing the risks of negotiation breakdown and inefficient prices being agreed.

A negotiate / arbitrate model will clearly increase aggregate costs relative to a reference tariff model.

DBCTM seeks to make much of the interest to develop new capacity at a time of potential coal industry growth. However, that is one of the exact reasons that the retention of a refence tariff is critically important at this juncture. DBCTM is seeking to introduce a dramatic increase in uncertainty, and a significant increase in negotiation costs at a time when future coal investment is under consideration, some of which will be jeopardised by that greater uncertainty and negotiating cost.

For the reasons set out above, it is fundamentally inconsistent with the public interest to replace reference tariffs with negotiate / arbitration pricing.

14.5 Interests of Access Seekers

The negotiate/arbitrate model proposed by DBCTM is clearly inconsistent with the interests of access seekers.

In particular, as discussed in extensive detail above:

(a) it leaves them more exposed to monopoly pricing;

(b) it leaves them exposed to being at a competitive disadvantage relative to other users due to creating greater potential for differential pricing;

(c) it increases their likely negotiating costs and likely exposes them to the costs of arbitration; and

(d) it reduces the certainty they can have in the approach to regulation of pricing at the time of making investment decisions;

Fundamentally, despite DBCTM's claims to the contrary, it is not an advantage for access seekers to have to negotiate price. Not a single member of the DBCT User Group considers that will result in lower or more appropriate prices for access seekers.

Rather, the universal view of the DBCT User Group is that negotiations will not be likely to reach reasonable and appropriate pricing because:

(e) there is significant information asymmetry in a private negotiation between an access seeker and DBCTM (that does not exist where the QCA is determining pricing up-front as

it has investigation powers and the benefit of significant economic submissions from stakeholders, and that asymmetry is likely to be greater for access seekers which are not existing access holders);

(f) DBCTM has significant market power and the access seeker will have no countervailing power due to the lack of any close substitutes as alternatives; and

(g) while arbitration provides a notional backstop – it involves significant costs and uncertainties for individual access seekers relative to the upfront regulatory process for setting tariffs – which will result in some access seekers effectively being pressured to settle at inefficient prices (particularly for smaller users).

14.6 s 168A Pricing Principles

The section 168A QCA Act pricing principles relevantly provide that the price for access to a service should:

> *(a) generate expected revenue for the service that is at least enough to meet the efficiency costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved;*
>
> *…*
>
> *(d) provide incentives to reduce costs or otherwise improve productivity.*

First, in circumstances where DBCTM has clear market power, there is no close substitute services and users / potential users have no countervailing power, and there is information asymmetry, it is evident that the likely outcome of negotiate / arbitrate pricing is not to provide DBCTM with a return commensurate with the regulatory and commercial risks involved, but one that is excessive and ineffective for the risks involved.

As the QCA has previously recognised *'over-investment also has negative implications as it may lead to under-investment at other functional levels of the coal supply chain, including mine development*'.[23]

In addition, a clear result of removing up-front QCA oversight of cost allowances is to blunt incentives to reduce costs, increase efficiency and improve productivity (as by setting allowances, the QCA clearly restricts the costs which DBCTM will be able to recover, which results in DBCTM having clear incentives to keep costs within those efficient allowances, whereas in a negotiate/arbitrate model it will be able to seek to recover inefficient costs from a position of bargaining strength). That is obviously inconsistent with the pricing principles in section 168A QCA Act.

14.7 Other relevant issues

(a) The interests of access holders

The QCA has previously recognised that a relevant factor under s 138(2)(h) QCA Act is the interests of the Terminal's existing users.[24]

DBCTM's proposal for a negotiate / arbitrate model will also cause detriment to existing users – for the same reasons referred to in section 14.5 in relation to the interests of access seekers.

As discussed in detail in section 4.2, the existing pricing review clauses in the Standard Access Agreement provide a lesser level of protection against monopoly pricing relative to reference tariffs.

[23] QCA, Final Decision - Aurizon Network 2014 Draft Access Undertaking Volume IV – Maximum Allowable Revenue, 2016, at 205.
[24] QCA, Final Decision – DBCT Management's 2015 draft access undertaking, November 2016 at 29.

(b) Stability and predictability of the regulatory framework

In addition the DBCT User Group strongly supports the QCA's previous recognition (in the final decision regarding the current access undertaking) that stability and predictability of the regulatory framework for the coal handling service is a relevant factor under s 138(2)(h) QCA Act, with the QCA particularly noting:[25]

> *unless there is an appropriate case for change, providing stability and predictability in the regulatory framework [such as between relevant parts of the 2010 AU and the 2015 DAU] is likely to promote investment confidence. This also has the potential to reduce the administrative and compliance cost of unnecessarily changing requirements.*

Where:

(i) there have been multiple DBCT undertakings where it has been determined to be appropriate that reference tariffs are approved by the QCA; and

(ii) there has clearly been a substantial promotion of the coal industry in the Hay Point catchment relative to the catchments which do not benefit from a coal terminal with regulated tariffs,

that is a factor that weighs strongly in favour of continuing that approach.

(c) Consistency of treatment with similar multi-user QCA regulated coal services

The QCA has also recognised that consistency with the treatment of substantially similar services regulated by the QCA under Part 5 QCA Act is a relevant factor under s 138(2)(h) QCA Act.

In particular the QCA has acknowledged:[26]

We consider the public interest is promoted by us seeking to adopt a consistent and predictable approach to the regulatory oversight of declared services under Part 5 of the QCA Act, where issues raised in respect of different services are substantially and it is otherwise appropriate to do so, given the context.

Where, as discussed in detail early in this submission, it has previously been determined appropriate on multiple occasions for all QCA regulated multi-user coal infrastructure services to involve reference tariffs, that is a factor that weighs strongly in favour of continuing that approach in respect of DBCT.

15 Other Problems with DBCTM's Negotiate/Arbitrate Regime: Information Asymmetry

15.1 Why information asymmetry exists?

For the clear reasons set out above (particularly including DBCTM's market power), a negotiate/arbitrate regime is not appropriate even if access seekers did have sufficient information available to them in order to enter an informed commercial negotiation.

However, even putting to one side DBCTM's market power, the DBCT User Group strongly considers that information asymmetry will make it impossible for a negotiate/arbitrate regime to result in efficient and appropriate pricing for all users.

In that regard, the DBCT User Group note that:

[25] QCA, Final Decision – DBCT Management's 2015 draft access undertaking, November 2016 at 30.
[26] QCA, Final Decision – DBCT Management's 2015 draft access undertaking, November 2016 at 32.

(a) DBCTM will always be in a position of being far better informed (as the entity that is actually incurring the relevant costs, actually taking out relevant debt and making the investment in capital expenditure);

(b) there are likely to be significant differences between users in terms of the information they have access to – noting that not all access seekers (or users) are shareholders in the DBCT operator – such that it is likely that different users/potential users will have different levels of information available to them;

(c) many users will not have the resources or experience to be able to determine, for example:

(i) whether capital costs (including costs of expansions) are efficient or prudent;

(ii) whether the rate of return that DBCTM is request is appropriate, reasonable and commensurate with the regulatory and commercial risks involved in providing the service; and

(iii) whether remediation costs are prudent and efficient; and

(d) even just taking into account the differences in opinion raised by DBCTM during the course of the current undertaking, there is significant contention around modelling issues that access seekers will not be able to consider in an informed way without an ex-ante QCA process.

15.2 Why the 2019 DAU and section 101 QCA Act does not resolve this

Despite all of that, DBCTM submits that the 2019 DAU will provide access seekers with an appropriate level of information to enable to negotiate from an informed position. That assertion is seemingly on the basis of section 5.2(c)(2), which in turn provides that an access seeker may request from DBCTM the information set out in section 101(2) QCA Act.

However, a review of section 101(2) QCA Act reveals it to be extremely high level and clearly inadequate for enabling an informed negotiation. For example, section 101(2) QCA Act most relevantly provides for DBCTM to give an access seeker the following:

> *(a) information about the price at which the access provider provides the service, including the way in which the price is calculated;*
>
> *(b) information about the costs of providing the service, including the capital, operation and maintenance costs;*
>
> *(c) information about the value of the access provider's assets, including the way in which the value is calculated;*

At first glance that might feel helpful. However, such information is bound to be DBCTM's view about each of those items, without any scrutiny of the type that is applied where there is a review by the QCA (and often the engagement by the QCA of expert consultants).

The DBCT User Group's legal adviser has had experience of an access seeker exercising the right under this provision in relation to rail access to one of QR's non-reference tariff services, and has indicated that the information provided was wholly inadequate for allowing an informed negotiation of a tariff.

In particular there is no requirement:

(a) for the way in which the price is calculated to be in any way transparent or verifiable (so for example, there is no requirement for the price even to be calculated using a building blocks type revenue model);

(b) to justify any rate of return that DBCTM is effectively seeking; or

(c) for DBCTM to verify or substantiate the prudency or efficiency of any costs or asset valuations referred to.

There is no avenue provided under the QCA Act to challenge whether the information provided is actually sufficient to provide for an informed negotiation.

Consequently, the information provided under this section certainly cannot be relied upon to rectify the information asymmetry that will evidently exist.

16 Other problems with DBCTM's Proposed Arbitration Regime

16.1 The 'Willing but Not Anxious' Test

The 2019 DAU provides that in determining the Terminal Infrastructure Charge in an arbitration the QCA must have regard to the TIC that 'would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point'.

The DBCT User Group strongly considers that:

(a) the 'willing but not anxious' buyer and seller test is clearly not appropriate given the market circumstances which exist in relation to the DBCT service; and

(b) that inappropriateness is exacerbated by explicitly trying to extend the test to coal handling services provided by terminals that it has been found in the declaration review are not actually in the same market as the Goonyella users of the DBCT service (due to being materially higher cost).

The DBCT User Group accepts that that 'willing but not anxious' terminology is commonly applied in commercial contexts in relation to providing a test for independent market valuations of land or other assets. It is an appropriate test in those circumstances by making it clear that the valuers' task is to reach an objective independent valuation by clear reference to other transactions in the market for sales and acquisitions of comparable assets (which provides clear evidence of the values which willing but not anxious parties might transact at in a liquid and workably competitive market).

However, the DBCT User Group consider that the factors that make it appropriate for independent valuations or assets (or liabilities) are not present in relation to the DBCT coal handling service – such that it is highly inappropriate to include in the context in which it is sought to be utilised in the 2019 DAU. In particular:

(a) it is not commonly applied to valuing a service (noting the cases that DBCTM refers to concern valuation of assets and/or liabilities);

(b) the 'willing but not anxious' test is fundamentally flawed when applied to a market which is not already workably competitive – noting that in the market in which the DBCT service is provided:

  (i) there is no close substitute or comparable service (such that the prices DBCTM would presumably assert are comparable are clearly not a far basis for applying such a test);

  (ii) past transactions cannot provide a guide;

(iii) DBCTM has market power and users have no countervailing power – such that any theoretically agreed pricing will not represent an arm's length comparable transaction between truly willing but not anxious parties; and

(c) the appropriate issues for taking into account in an access dispute or determining an appropriate reference tariff in the context of an undertaking are already set out in section 120 QCA Act and section 138(2) QCA Act – such that there is an obvious question about what the willing but not anxious test is seeking to add to those existing factors.

Accordingly, it is clear that the 'willing but not anxious' formulation is highly inappropriate in these circumstances.

16.2 The types of services to be provided

The 2019 DAU provides that in determining the TIC in an arbitration the QCA must have regard to the types of services to be provided to the access seeker.

As discussed in more detail in section 11 of these submissions above, the DBCT User Group reject DBCTM's proposition that users are being provided with materially different services such that differential pricing is appropriate.

In fact, the services that DBCTM references in its submissions (such as permitting co-shipping, blending, use of remnant stockpile, and various stockpile management measures) are all minor parts of a coal handling service that is fundamentally the same.

As discussed in more detail in section 11 of these submissions above, the DBCT User Group does not consider it appropriate to price differentiate based on such minor variations where:

(a) other Australian coal terminals do not apply differential pricing based on the extent of blending or co-shipping;

(b) the extent of use of the different variations to the coal handling service will vary for the same user over time (based on both marketing opportunities and production outcomes) – such that it will not be possible to determine the 'type of services' being requested, or the extent to which any variations will be requested, with precision at the time of arbitration in any case;

(c) there will be real difficulty in working out the minor cost or capacity differences that are actually involved; and

(d) the limited nature of those cost or capacity differences means that determining such differences is not a worthwhile exercise.

The DBCT User Group does not consider that DBCTM's suggested solution of ILCO providing modelling will somehow make this appropriate.

Even if it is assumed that ILCO could somehow provide modelling of the additional cost or capacity that would be consumed by a particular variation (which the DBCT User Group highly doubts) – that determination will be dependent on a number of assumptions which will not prove true in practice – such that it is not reasonably possible to provide a reasonable estimate with any precision in advance.

For example, assumptions would need to be made about the extent to which variations to the service will be utilised by the user (which will be wrong as such usage will vary from year to year based on market opportunities), and about the value/alternative use of any additional capacity consumed (which again is likely to be wrong as whether that capacity could otherwise be used is dependent on not just contract levels, but practical ordering, scheduling, railing and stockpiling issues). It is not appropriate to make arbitrary adjustments of this nature when the adjustment is

likely to be small but there will be clear uncertainty as to whether that adjustment was even warranted.

As discussed in more detail in section 11 of these submissions above, there is separate provisions of the Standard Access Agreement to deal with variations that are materially different (in nature, extent or cost).

All of this just goes to demonstrate, that the coal handling service is not suitable for a negotiate/arbitrate regime.

16.3 Any other TIC agreed with other access holders

The 2019 DAU provides that in determining the TIC in an arbitration the QCA must have regard to any other TIC agreed between DBCTM and a different access holder for a similar level.

The DBCT User Group strongly disagrees with DBCTM's claim that this will facilitate the determination of a TIC that is reflective of prices that would prevail in a workably competitive market.

That most obviously follows from the fact that the market in which such prices would have been agreed is evidently not workably competitive.

In particular, under DBCTM's proposal regulatory arrangements, a TIC is being negotiated in the context of:

(a) DBCTM having market power;

(b) users having no close substitute services as alternatives and (largely as a result) no countervailing power;

(c) users suffering from information asymmetry and in many cases not having the expertise or resources to determine whether the price proposed by DBCTM is in any way reason, efficient or appropriate;

(d) the value to an individual access seeker potentially being materially different due to that particular user's circumstances including type and volume of coal production, access to other capacity – such that it does not provide an appropriate guide for all access seekers; and

(e) there being no way of resolving the price for the DBCT service other than through agreement or arbitration – which will be protracted and costly, with clear potential that a user will not be able to afford the time delay for their projects or the costs or uncertainty of arbitration, such that 'agreed' prices, will have a high potential to be the outcome of a user's unenviable bargaining position and lack of other options rather than being a market based outcome.

It follows from the circumstances in which such a TIC will have been negotiated that it is highly unlikely to be representative of a price that would apply in a workably competitive market – i.e. one which met the efficient and prudent costs of providing the service and provided a return that was commensurate with the risks undertaken.

In addition, as alluded to in Question 6 in the QCA Staff Questions, DBCTM's approach begs the question about:

(a) how this information would be provided to access seekers (which raises questions about the commercial sensitivity of different tariffs);

(b) whether this information would be broken down into distinct components such that an access seeker could consider its appropriateness on a bottom-up analysis basis);

(c) how the circumstances of the user who has previously agreed that TIC could be disclosed to an access seeker (so as to allow them to understand the context in which such a TIC was agreed) without disclosing commercially sensitive information about that existing user.

The DBCT User Group considers that the commercial sensitivities cannot realistically be overcome without limiting the details provided to the point that it simply produces a further point of information asymmetry.

Again, this goes to demonstrate the inherent difficulties in seeking to apply a negotiate/arbitrate form of regulation in these circumstances.

16.4 Incompatibility of socialised risk in relation to early termination and negotiate/arbitrate

The DBCT User Group also notes that existing undertaking provisions provide for socialisation among access holders to ensure that DBCTM does not incur revenue shortfalls where there is an early termination of a user agreement in certain circumstances (see paragraph (a) of the definition of Review Event and the related provisions regarding review of the TIC in Schedule C, Part B, item 3). Under the existing clear and transparent reference tariff regime, users accept that position as reasonable on the basis that they all receive benefits of a lower TIC through the introduction of volume from a new user.

However, where the TIC of each individual user is set through a negotiate/arbitrate model, such that users can have no comfort that additional volume from other users will result in a lower TIC it appears highly unreasonable for DBCTM to be able to look to users to underwrite subsequent early termination events in the manner still provided for in the 2019 DAU.

17 Appropriate Building Blocks Pricing

Given the time available, this submission focuses on responding to the 2019 DAU and explaining in detail why the proposed negotiate / arbitrate form of regulation proposed is not appropriate for the DBCT coal handling service, rather than providing detailed submissions on the appropriate reference tariff.

However, for the avoidance of doubt, the DBCT User Group considers that the most appropriate solution is for the QCA to assess a building blocks based Terminal Infrastructure Charge that compensates DBCTM for the efficient costs incurred and provides a rate of return that is commensurate with the regulatory and commercial risks involved in providing the service.

In that regard, the DBCT User Group:

(a) continues to generally support the QCA's existing methodology for determining a building blocks based price; and

(b) continues to reject all of the various draft amending access undertakings that DBCTM has submitted over the period of the current undertaking that have either been refused by the QCA or withdrawn by DBCTM.

The DBCT User Group's current intention is to provide more detailed submissions to assist the QCA in estimating an appropriate Terminal Infrastructure Charge in subsequent submissions.

18 Remediation Plan and Allowance

18.1 Need to review the DBCTM rehabilitation plan

As discussed earlier in this submission, the DBCT User Group considers that DBCTM's proposed negotiate/arbitration regime will be highly inappropriate for DBCT's coal handling service, and that

the only way in which the 2019 DAU will be appropriate is if pricing regulation continues to occur using a building blocks based reference tariff.

Part of that building blocks based reference tariff has been a remediation allowance, and the DBCT User Group envisages that is likely to be appropriate for that to continue. Consequently, it is appropriate for the QCA to determine:

(a) an estimate for the appropriate and efficient costs of rehabilitation;

(b) an estimated time for rehabilitation to occur; and

(c) as a consequence of the two matters above, the appropriate annual contribution, calculated as an annuity stream, to fund such costs through a remediation allowance component of the Terminal Infrastructure Charge.

That will require some degree of review of DBCTM's newly proposed rehabilitation plan, given the drastic change in the estimated total cost of rehabilitation DBCTM is proposing relative to the cost estimates which underpin the current remediation allowance.

However, the DBCT User Group considers that the QCA is not required to seek to determine or amend the appropriateness of every component of or passage of wording in DBCTM's rehabilitation plan – as that plan has no formal status within the regulatory regime.

18.2 The DBCTM rehabilitation plan is not a reasonable basis for calculating a remediation allowance

The DBCT User Group wants to clearly record its rejection of the GHD Rehabilitation Plan as a reasonable basis for the remediation allowance that should be provided in the QCA determined TIC.

The QCA has already very recently determined an appropriate remediation allowance for the purposes of calculating the TIC that applies under the current access undertaking.

That determination was based on independent expert advice for Turner & Townsend which estimated $432.69 million as the total rehabilitation cost. That is an estimate that the DBCT User Group continues to consider very generous.

There is no suggestion that DBCTM's legal remediation obligations have increased since that time, yet GHD and DBCTM are now suggesting a rehabilitation estimate of $1.22 billion (nearly triple the previously estimated amount).

That is not only well in excess of the independent Turner & Townsend and QCA estimate – but is approximately 50% higher than the Hatch 'full rehabilitation' estimate previously provided by DBCTM of $829.43 million.

Consequently, DBCTM drastically increasing claims only a few years later obviously requires a very high degree of scrutiny from the QCA for the purposes of estimating an appropriate remediation allowance.

In that regard, the DBCT User Group notes a few key points that are clearly identifiable:

(a) GHD's report expressly confirms that *'Although our Rehabilitation Plan and Cost Estimate is presented as final, it should not be relied upon as an indicator of actual future cost outcomes when DBCTM's rehabilitation obligations fall due'*[27] (despite the fact that that is exactly what DBCTM is now holding it out as);

[27] DBCT Rehabilitation Plan and Rehabilitation Cost Estimate, 7 June 2019, page 13.

(b) The GHD and Axiom reports relied on by DBCTM contain clear acknowledgements of the limitations of the estimates provided in supports of their near tripling of the ultimate rehabilitation cost. In particular:

(i) GHD's report is acknowledged as being based on information provided by DBCTM and others which has not been independently verified or checked beyond the agreed scope of work;

(ii) GHD disclaims all responsibility to persons other than DBCTM;

(iii) The cost estimates provide for a 20% contingency (without any detail as to why that level of contingency is appropriate);

(iv) The cost estimates are stated to be 'preliminary only (-20% + 35% accuracy); and

(v) The Axiom disclaimer also makes clear that the cost estimates provided are not appropriate other than for the sole purpose of understanding the 'order of magnitude costs' for the works detailed in the GHD study report and are based on numerous assumptions including a scope of works that was determined by GHD and DBCTM - the prudency and efficiency of which has *not* been scrutinised.

(c) The plan attempts to provide an estimate of rehabilitation in the complete absence of any evidence regarding the appropriate timing for that rehabilitation (other than it being noted that it 'will not fall due until after September 2051'[28] and that the cost has been escalated to the mid-point between 2051 and 2054[29]). The DBCT User Group continues to consider that it is clear that the terminal's useful life will extend well beyond the initial term of 2051; and

(d) GHD's estimate does not provide any allowance for the potential for:

(i) efficiency improvements or technological changes that result in a reduction of costs;

(ii) alternative uses;

(iii) DBCT Holdings exercising its rights under the Port Services Agreement to require rehabilitation to a different (lower) standard (as Turner & Townsend previously determined was a likely result); and

(iv) Hay Point Coal Terminal ceasing operations at a later time (such that assumptions made around common issues like the Tug Harbour are unlikely to hold true).

The DBCT User Group will provide further submissions on the appropriate remediation allowances in future submissions which address an appropriate building blocks based TIC.

18.3 The DBCTM rehabilitation plan could not reasonably inform negotiations either

The DBCT User Group also notes that DBCTM's self-serving claims in relation to the cost of remediation provide a further clear example of why negotiate/arbitrate pricing is so unworkable in the context of DBCTM's coal handling services.

The plan creates such uncertainty about the quantum of a material cost item that it substantially damages the prospects of commercial negotiations resulting in the resolution of appropriate pricing.

As demonstrated in Figure 7 of the PwC Report, the difference in views on the remediation allowance (comparing how it was calculated for the current TIC relative to how it would be

[28] DBCT Rehabilitation Plan and Rehabilitation Cost Estimate, 7 June 2019, page 2.
[29] DBCT Rehabilitation Plan and Rehabilitation Cost Estimate, page 5

calculated using the same methodology but DBCTM's inflated remediation cost estimate) alone constitutes nearly a 10% increase in the current TIC. That impact would be exacerbated even further if DBCTM continued to push for changes based on asserted different tax treatment issues (as per the draft amending access undertaking submitted on that issue).

Negotiate/arbitrate is also never going to operate as DBCTM asserts where there is such significant information asymmetry. The QCA should ask itself on what basis a coal access seeker (including smaller and even single-mine organisations) is realistically supposed to be able to critique the rehabilitation scope and costs for a coal terminal (in which they don't have experience) and then use that information to negotiate with a monopolist who has no incentive to accept any challenges or critique of these costs estimates.

18.4 Any raise in remediation allowance should come with greater protection for the funds

Finally, the DBCT User Group note their concerns about DBCTM continuing to seek greater remediation allowances without any evident protection of those funds so that they are actually available for remediation.

The money that has been contributed in the past via the remediation allowance has not, to the DBCT User Group's knowledge, ever been set aside anywhere – and certainly there is nothing in the undertaking that requires DBCTM to do so. In addition, unlike for mining operations, ports are not required to provide any security or bonding to the State. In other words, there appears to be no regulatory mechanism for ensuring this money is actually available for remediation.

To the extent that any increase in remediation allowance is provided for based on DBCTM's allegations that remediation is being underfunded, surely it must be appropriate for there to be scrutiny of how it can be ensured that all of this money is actually preserved for use in remediation rather than the State or coal industry being required to resolve this problem.

19 Conclusions on Pricing Changes

For the details reasons set out above, the DBCT User Group consider it is clear that, in the circumstances of the DBCT service, characterised by:

(a) clear market power of DBCTM;

(b) without any constraint from competitive service or countervailing power;

(c) information asymmetry makes informed negotiations difficult; and

(d) the number of customers and complexity of pricing making ex-ante regulatory determination lower cost that bilateral protracted negotiations and arbitration,

QCA determined reference tariffs are the only appropriate outcome.

PART D: Non-Pricing Changes

20 Analysis of Non-pricing Changes

20.1 Approach to Consideration of Non-Pricing Terms

The DBCT User Group agrees with DBCTM's submission that the assessment of whether the wording changes are appropriate is measured afresh in accordance with the criteria in section 138 of the QCA Act.

However, it is important to recognise that those very criteria refer to the public interest and the QCA has previously recognised that regulatory certainty is in the public interest and that:

unless there is an appropriate case for change, providing stability and predictability in the regulatory framework [such as between relevant parts of the 2010 AU and the 2015 DAU] is likely to promote investment confidence. This also has the potential to reduce the administrative and compliance cost of unnecessarily changing requirements.[30]

Consequently, while the wording of an undertaking should not be static, where there are changes proposed to an access undertaking in the absence of any change in circumstances since the QCA determined the existing wording of the current undertaking was appropriate that is clearly a relevant consideration.

20.2 Pricing related changes

For the avoidance of any doubt, the DBCT User Group strongly rejects all consequential changes which have been made by DBCTM as a result of the proposal to implement negotiate/arbitration as the model for resolving pricing for the service.

The best way of preventing auctioning off capacity is not trying to apply band-aid wording into the negotiating provisions – but to retain QCA determined reference tariffs as the clearly more appropriate manner of regulating the revenue earned by DBCTM for providing the service (as discussed in detail earlier in these submissions).

20.3 Notifying Access Seeker / Queuing Changes

The DBCT User Group note that they agree that the access application and access queue regime, and particularly the notifying access seeker provisions, should be carefully reviewed, as it became evident through the last notifying access seeker process that there was a lack of clarity as to how certain provisions would operate.

While the DBCT User Group have provided initial comments on those changes, which generally support the general principles, but often with some degree of amendment to the particular wording suggested, they intend to discuss those further with DBCTM during the collaborative submissions period.

In addition to the DBCT User Group's comments on DBCTM's proposed changes, the DBCT User Group considers that the access application and notifying access process could be materially improved by:

(a) a clear process flow chart/diagram showing how access applications are progressed in each of the 'normal' negotiation process for available capacity, the notifying access seeker process and in seeking expansion capacity (which is likely to assist in more clearly identifying to stakeholders unintended consequences of the current process);

[30] QCA, Final Decision – DBCT Management's 2015 draft access undertaking, November 2016 at 30.

(b) greater transparency of the information which is to be provided to access seekers at each stage.

20.4 Expansion Pricing and Conditional Access Agreements

It follows from the comments in sections 20.2 above, that the DBCT User Group is strongly opposed to all of the changes proposed to the process for entering into Conditional Access Agreements with Access Seekers.

As noted above, the best way of preventing auctioning off capacity is not trying to apply band-aid wording into the negotiating provisions – but to retain QCA determined reference tariffs as the clearly more appropriate manner of regulating the revenue earned by DBCTM for providing the service (as discussed in detail earlier in these submissions).

DBCTM's approach of proposing an "Expansion Pricing Approach" for individual expansions (or even signing conditional access agreements without any basis designated for how the Terminal Infrastructure Charge will be calculated) demonstrate the complete lack of certainty involved in a negotiate / arbitrate model. That is unworkable for coal producers who are seeking to make investment and long term take or pay based contracting decisions and need to understand the basis for the access charges they are likely to be paying.

It is also highly like to create 'inter-generational' differences and resulting inefficiencies through differences in treatment of access holders in respect of various expansions for reasons that are completely unrelated to cost (or service quality) – given the significant extent to which DBCTM would be able to vary the pricing approach proposed for various expansions.

DBCTM then doubles down on that by requiring parties to negotiate or bring disputes in relation to such issues in short time frames under the pressure of DBCTM's views about the limited amount of expansion capacity available. This only serves to exacerbate DBCTM's ability to engage in monopoly pricing.

Given the discretion DBCTM is seeking for themselves in relation to pricing matters, the principles to be taken into account in setting the price are also extremely broad.

The difficulties that can be envisaged in how this process would operate simply demonstrates the DBCT User Group's views about how difficult a negotiate / arbitrate regime would be.

In relation to the commentary that DBCTM will seek to improve the efficiency of the expansion process through a future draft amending access undertaking, the DBCT User Group would welcome that if (unlike the 2019 DAU), DBCTM focused on improving efficiency and timeline of the process not on finding ways to change the process to maximise the prospects of being able to engage in monopoly pricing.

20.5 Other Access Undertaking Changes proposed by DBCTM

In relation to the other changes DBCTM has proposed to the wording of the access undertaking, the DBCT User Group has provided comments in Schedule 2 of this submission.

20.6 Terminal Regulations changes

The undertaking and SAA contain wording in relation to the process for making changes to the terminal regulations. DBCTM has not proposed changes to that wording, however a number of users in the DBCT User Group have concerns in relation to the operation of the existing process.

In particular, some users feel it is very difficult to understand the likely outcomes of proposed terminal regulation changes that have been discussed during the term of the current access undertaking.

Accordingly, the DBCT User Group proposes that where changes are proposed that would be reasonably anticipated to impact on ordering, scheduling, planned or capacity, that those changes should only be able to be proposed where the operator has first obtained and provides to access holders and access seekers in the queue robust and independent modelling about how the changes would impact on users, terminal capacity and terminal efficiency.

This would allow for DBCTM (and in the event of there being objections to the amendments, the QCA) to properly consider the criteria in relation to changes, including that the amendments:

(a) operate equitably among access holders, access seekers, expansion parties and, where relevant, rail operators; and

(b) are reasonably necessary for the operation of the Terminal in accordance with applicable laws and regulatory standards, Good Operating and Maintenance Practice or any costs or obligations imposed are justified by the efficiency benefits arising from those costs or obligations.

20.7 Standard Access Agreement Changes

The DBCT User Group is comfortable with the proposed insertion of the new clause 15.7 requiring both parties to continue to perform their respective obligations under an Access Agreement during a dispute.

Schedule 1 – PwC Report

DBCT User Group

2019 Draft Access Undertaking

Review of form of access regulation

23 September 2019

pwc

www.pwc.com.au

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 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 prepare a report in response to the draft access undertaking (the 2019 DAU) lodged by Dalrymple Bay Coal Terminal (DBCT) Management with the Queensland Competition Authority (QCA) on 1 July 2019.[1] The draft access undertaking sets out the terms and conditions under which DBCT Management proposes to provide access to its terminal facilities.

DBCT Management's 2019 DAU proposes to replace the regulator-determined Terminal Infrastructure Charge (TIC), a key feature of 2017 Access Undertaking (and every previous access undertaking that has applied to DBCT), with a negotiate-arbitrate framework for determining terminal access charges.[2] DBCT Management's position is that an 'ex ante' form of regulation whereby the QCA determines revenue or prices, in advance, for the term of the undertaking is not appropriate because:

- *ex ante* regulation is not proportionate to the extent or size of the access problem; namely, that there is the potential for asymmetric terms of access between existing users and new users in the absence of declaration, and the impact those asymmetric terms may have on competition in the tenements market(s)
- DBCT offers different services to different access seekers above the base coal handling service, for which a negotiate-arbitrate model offers more flexibility to accommodate
- an *ex ante* approach increases the risk of regulatory error.

Approach

This report presents an economic analysis of the claims made by DBCT Management about the efficacy of a negotiate-arbitrate framework for the regulation of terminal access at DBCT. It assesses whether the proposed negotiate-arbitrate framework achieves the objectives of Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act); that is, whether a negotiate-arbitrate form of regulation promotes the economically efficient operation of, use of and investment in DBCT, with the effect of promoting effective competition in upstream and downstream markets.

To do this, we have:

- reviewed the history of the current access undertaking and the development of the forms of regulation for DBCT

[1] DBCT Management (2019) *2019 AU Submission*, available at: http://www.qca.org.au/getattachment/f381d591-bfc6-4974-9d58-a5f47e32d0e3/Part-C-Draft-recommendation-%E2%80%93-the-DBCT-service.aspx

[2] QCA (2019) *DBCT Management's 2019 DAU—QCA staff questions for stakeholders,* p. 1, available at: http://www.qca.org.au/getattachment/d416d20a-0ac6-4e26-b522-c1ee5ac20b24/QCA%E2%80%94Staff-questions-for-stakeholders.aspx

- examined the purpose and context to third party access regulation and summarised the access regimes in place across Australia
- considered factors that are significant in determining whether a 'light-handed' or more 'heavy-handed' approach to regulation is most suitable, and assessed the degree to which each of these factors is present at DBCT
- examined difficulties that are likely to arise in attempting to reach agreement under a negotiate-arbitrate framework, in view of the cost-based modelling parameters previously sought by DBCT Management

This report is intended to be provided as part of a wider submission to the QCA by the DBCT User Group. Although some of the arguments advanced in this report may be relevant to the QCA's parallel review of the existing declaration of DBCT,[3] our analysis is framed within the process for investigation and approval of a draft access undertaking under Part 5, Division 7 of the QCA Act.

Key findings

No single "one-size-fits-all" approach is most appropriate to facilitate access

Determining the form of regulation that will be most effective in limiting the exercise of market power by access providers is not straight-forward. To argue the primacy of commercial negotiation, and that a negotiate-arbitrate process should be the default approach for determining access prices in all circumstances, implicitly presumes that the parties would behave as if there were a degree of competitive discipline on each of them. It ignores that there are broader factors to consider in demonstrating the extent to which an access provider is constrained from exercising its market power.

Unlike decisions on access coverage – which are binary in nature and which turn on specific legislative tests – regulators have had regard to a number of factors when considering the form of regulation to be applied, and are less definitive in their reasoning as to why one particular regulatory mechanism is adopted over another.

The form of regulation chosen should have regard to the circumstances of the relevant market or infrastructure facility, with no single factor being determinative. Key factors include:

- the degree of contestability and threat of market entry
- the number of access seekers and their countervailing market power
- the likely demand for the 'reference services'
- the degree of information asymmetry
- the administrative and compliance burden created by regulation

Only after these factors are considered can the regulator form a view about the appropriate form of economic regulation. The degree to which each of the factors above is present and interacts with other factors will determine what type of intervention is most appropriate on the continuum of possible regulatory responses.

[3] QCA, *2020 Declaration Review* (23 August 2019) <http://www.qca.org.au/Other-Sectors/Access/To/Infrastructure/DeclarationReviews/In-Progress/2020-Declaration-Review>

DBCT Management's market power suggests the ex ante regulation provides stronger incentives for the efficient operation of, use of and investment in DBCT

Absent regulation, there are few constraints in the market in which DBCT Management operates to moderate its use of market power:

- A defining economic characteristic of DBCT is the limited contestability evident in the market for DBCT's coal handling services. There are significant barriers to new entry for the provision of coal handling services, and limited scope for existing ports to 'compete' in the relevant market, or for new competing ports to be established, in order to provide meaningful competition to DBCT.
- Users and access seekers have limited countervailing market power. There are more than ten users of the Terminal, each with a long-term agreement underpinning access to DBCT and none with a dominant share of terminal capacity.
- There are core services at DBCT for which access seekers have a demonstrable and forecastable demand. Determining pricing terms ex ante for these services reduces the likelihood of disputes with a large number of access seekers regarding essentially the same matters, while retaining flexibility to address bespoke needs of individual users and support investment in terminal capacity expansions, if and when they are required.
- Under the negotiate-arbitrate model proposed by DBCT Management, a lack of information will put users at a significant disadvantage, particularly those who are not shareholders in Dalrymple Bay Coal Terminal Pty Limited (DBCTPL).

Combined, these characteristics suggest a strong likelihood that DBCT Management, users and access seekers would not be able to successfully negotiate access terms, absent regulatory intervention. Under a negotiate-arbitrate framework, there is little to constrain use of market power by DBCT Management in its negotiations, increasing the prospect of unsuccessful negotiation leading to arbitration, increasing the costs involved in reaching an arbitrated outcome, and increasing the prospects of access seekers agreeing to monopoly pricing to avoid the resultant costs and delays from such an arbitration.

The application of an *ex ante* form of regulation to services provided at DBCT is consistent with the approach observed across other individual facilities made subject to access regulation. Where a specific regime has been introduced for a particular facility, over and above regulating 'significant infrastructure' or maintaining a general industry regime under Part IIIA, it is more likely that *ex ante* regulation in the form of direct price (or revenue) control will be applied. Put another way, where regulators have sought to define a framework for industry- or sector-level regulation - such as for multiple airports or multiple bulk wheat port terminal operators - we observe a preference for lighter-handed approaches. But where the regulator's focus is on a single facility, service or operator - such as the Aurizon's Central Queensland rail network - the predominant approach is towards a specific reference service/reference tariff approach.

Figure 1, below, outlines how the degree to which the presence of each of the factors discussed above contributes to a market structure from which either a light-handed or more heavy-handed form of regulation may be inferred. This analysis suggests that the continued application of a form of regulation whereby the QCA approves terms and conditions of access, including the terminal infrastructure charge, is appropriate for DBCT.

Figure 1: Factors affecting the form of access regulation at DBCT

Light-handed regimes ← → **Heavy-handed regimes**

Negotiate-arbitrate models, with legal obligation to negotiate with access seekers

Terms of access, including price, are established *ex ante* and approved by the regulator

Contestability and the threat of entry

Potential alternative options for an access seekers can encourage access providers to behave in a more competitive manner

GRAINCORP NEWCASTLE - BULK WHEAT EXPORT FACILITY
Negotiate-arbitrate
The ACCC considered the presence of competition from operators such as the Newcastle Agri Terminal (NAT) limited any exercise of market power by Graincorp: '*NAT's recent entry may also demonstrate that barriers to entry (and expansion) are not high and that there is a credible threat of new entry/expansion which could provide an additional constraint on GrainCorp.*'

AURIZON NETWORK
Reference tariff for coal
The QCA did not accept Aurizon's claim that the proposed Northern Galilee Basin Rail Project (NGBR) demonstrated potential for market entry, noting '*the construction of such a line, together with its route, capability and market impact, remain uncertain. It is too early to conclude the NGBR project would constrain prices or compete with infrastructure serving the Newlands corridor*'.

DBCT
Reference tariff
There is no meaningful contestability at DBCT. The QCA concluded in its 2018 draft declaration decision that there are no viable substitutes to DBCT's coal handling service. Other terminals at Abbot Point, RG Tanna and WICT are constrained by a number of cost and non-cost factors

Number of access seekers and their countervailing market power

In markets with a number of smaller users, situations of uneven bargaining power may result in negotiate-arbitrate being inappropriate

SOUTH AUSTRALIAN RAIL NETWORK
Negotiate-arbitrate
In its 2015 review, ESCOSA determined that '*Utilisation of the railways continues to be low and... this trend is likely to be similar in the future. In this environment, access seekers have countervailing bargaining power, as there is a strong incentive for railway operators to increase utilisation of the railways in order to recover their fixed costs*'.

PORT OF MELBOURNE - CONTAINER PORT SERVICES
Price-cap
In its 2014 Review of Victorian Ports Regulation, the ESC concluded, '*The importer and exporter customer base is highly fragmented compared to shipping lines, with each customer representing only a small proportion of total trade through the port. This diverse customer base has limited scope to influence or constrain port behavior*'.

DBCT
Reference tariff
Access seekers have no countervailing market power, as they have no credible threat of switching in response to price increases, or disciplining DBCTM's conduct by withholding their access request.

Likely demand for the 'reference services'

Services used by a large number of access seekers are likely to require determination of access terms common to multiple users. Establishing standard terms (including price) ex ante is likely to pre-emptively resolve matters that would otherwise be disputed and referred to arbitration multiple times

ROMA TO BRISBANE GAS PIPELINE
Regulator approved full access arrangement
The AER concluded costs for park and loan services could not be included in the reference tariff, noting '*the services are primarily being sought by users that require greater flexibility to deal with changes in operational conditions ... or changes in the electricity and gas markets, which are difficult to predict. Given the level of uncertainty surrounding the demand for, and revenue to be generated from, these services, we agree that determining efficient reference tariffs for these services may not be possible*'.

AURIZON NETWORK
Reference tariff for coal
The QCA did not accept the standardisation of terms would hinder Aurizon's ability to provide services, arguing, '*system-based reference tariffs apply in the [Central Queensland Coal Network], providing cost reflectivity while still allowing for some differentiation*'.

DBCT
Reference tariff
There are core services at DBCT for which access seekers have a strong demand. Determining pricing terms *ex ante* for these services reduces the likelihood of disputes with a large number of access seekers, while providing the flexibility to address bespoke needs of individual users.

Degree of information asymmetry

The access provider may systematically exercise market power by refusing to provide sufficient and timely information to negotiating parties to assess the service offer

CENTRAL WEST GAS PIPELINE (NSW)
Regulator approved limited access arrangement
The NCC determined that '*the availability of historic pipeline costs coupled with many users' own experience in operating pipelines, mean that while the current information requirements may be lacking, they are unlikely to be better under an [access arrangement] required by full regulation*'.

ARTC-OPERATED HUNTER VALLEY RAIL NETWORK (NSW)
Indicative access charge
When ARTC first submitted an access undertaking to the ACCC for approval, the ACCC recommended that ARTC should be required to annually publish long term forecasts of prices on the basis of up to date long-term demand forecasts, noting "*the nature of the take or pay arrangements and the information asymmetry between ARTC and the access seekers may provide ARTC with both the ability and an incentive to engage in ex post opportunism.*"

DBCT
Reference tariff
There are significant protections provided by the QCA's current practices which reduce information asymmetries. The engagement of independent expert advice, opportunities for the parties to make submissions and publication of a draft decision that explains the regulator's reasoning, ensures a level of transparency that is unlikely to continue in a negotiate-arbitrate framework.

Administrative and compliance burden

Commercial negotiation can be efficient, but the the process may become overly protracted and costly if the parties do not have appropriate incentives to reach agreement

AUSTRALIAN GAS NETWORKS (SA)
Regulator approved full access arrangement
In its draft decision on the 2016 to 2021 access arrangement, the AER commented that, '*In some cases, greater prescription or intervention on our part in determining these terms and conditions may impede competitive market outcomes and be inefficient. There are two reasons for this: first, our lower level of information than that of AGN and users and second, the user-specific nature of many issues. Accordingly, we will generally avoid proposing amendments in these cases where flexibility to negotiate commercial outcomes is desirable*'.

QUEENSLAND RAIL (QR)
Reference tariffs
In its decision on QR's 2001 Draft Access Undertaking, the QCA concluded '*Reference tariffs were set to reduce the transaction costs associated with negotiating access agreements and provide a transparent basis against which above-rail operators are able to most cost-effectively satisfy customer demand*'.

DBCT
Reference tariff
While the cost determination and forecasting undertaken to calculate the TIC can be complex, stakeholders and the QCA now have robust techniques in place to question and better understand the costs, risks and service quality commitments that drive DBCT Management's revenue requirement. Moving to a negotiate- arbitrate framework would limit visibility into how access charges are calculated and increase the likelihood of disputes that cannot be resolved without arbitration.

A 'negotiated' TIC acceptable to DBCT Management would be materially higher than the current regulator-determined rate

There is a high likelihood of a protracted negotiation and arbitration process stemming from the inability of DBCT Management and access seekers to reconcile vastly different expectations.

Although DBCT Management has not provided any indication of future terminal charges, considering the various claims made by DBCT Management in its current or historical submissions it is clear that DBCT Management's expectation is that a future access charge should be materially higher than the current, QCA-determined charge.

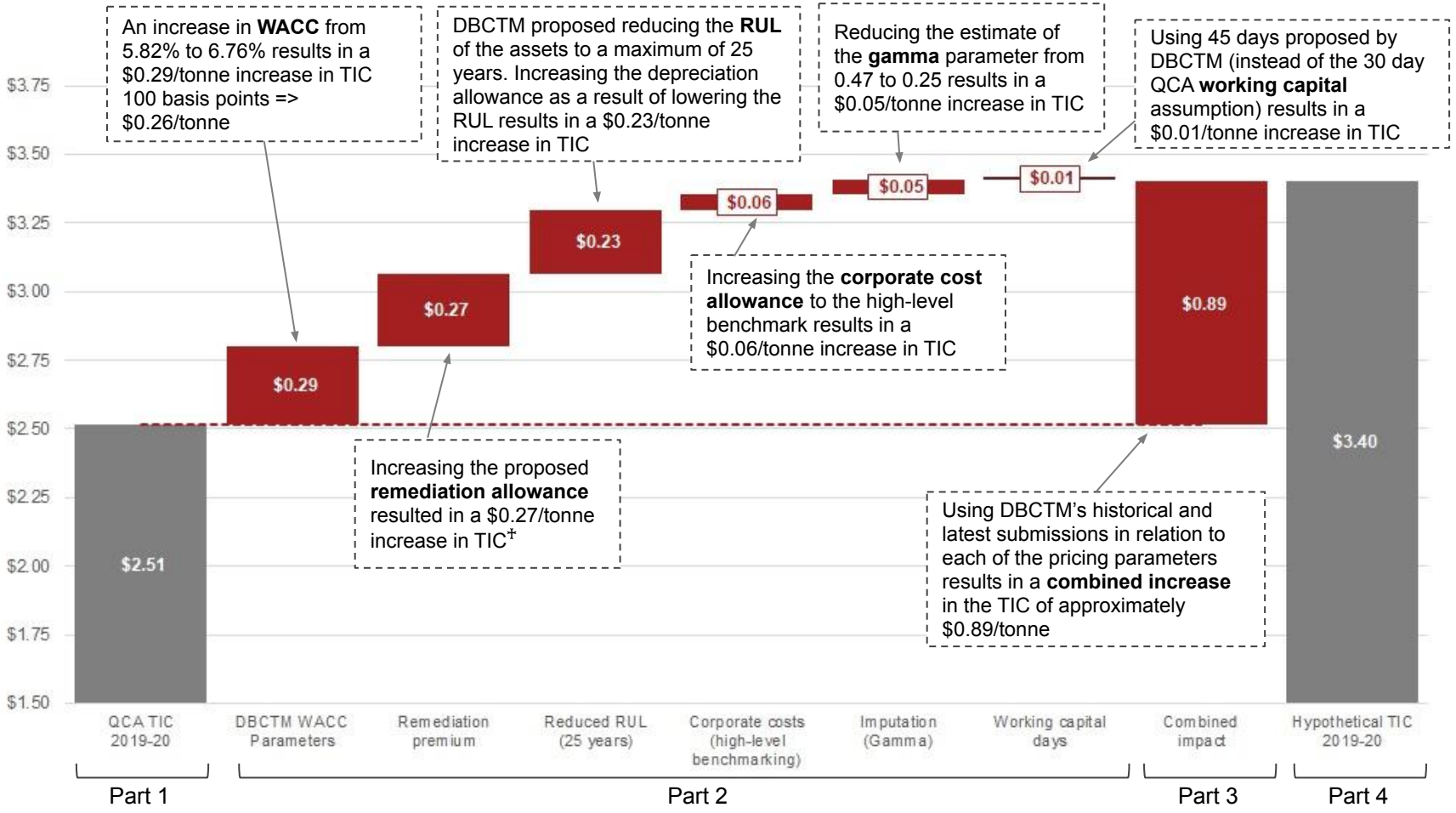
The QCA approved a TIC of $2.5127/tonne for the financial year commencing 1 July 2019[4] (the FY20 TIC). We have modelled a hypothetical value for the FY20 TIC using WACC and non-price parameters proposed by DBCT Management in its current or historical submissions.

As shown in Figure 2, the indicative impact of changing all modelling inputs simultaneously increases the FY20 TIC to $3.40/tonne; an increase of $0.89/tonne over the QCA-determined charge, or around 35%. Given DBCT Management's proposal in the parallel access declaration process that the TIC for new access seekers under its offered access framework would be as much as $3/tonne above what it determined would be the access charge the QCA otherwise would set, it is possible that DBCT Management's expectations of a negotiated access charge are materially higher than the $3.40/tonne figure we estimated.

The apparent significant gap in expectations between DBCT Management and DBCT Users as to the appropriate and reasonable charge for access to the Terminal would be a significant challenge for any commercial negotiation, in which case the dispute is likely to proceed to arbitration. Thus, one of the claimed advantages of a negotiate-arbitrate approach – minimising the likelihood of direct regulator intervention – is unlikely to be realised.

[4] QCA letter to DBCT Management, 20 June 2019, available at: http://www.qca.org.au/getattachment/3c7ed65f-2638-413d-b964-3c9e923a1fde/%E2%80%A2-QCA%E2%80%94Letter-to-DBCTM-on-2019%E2%80%9320-ARR,-reference-to.aspx

Figure 2: QCA FY20 TIC compared to proxy DBCT Management pricing based on current and historical documented claims



‡Note: the estimated TIC impact reflects the latest Rehabilitation Cost Estimate prepared by GHD. However, the increase DBCT Management would seek for the remediation allowance is likely to be understated as it does not reflect the tax treatment claimed by DBCT Management in the 2017 Modelling DAAU.

Table of contents

1. Introduction

1.1 Background

The Dalrymple Bay Coal Terminal (DBCT) is Queensland's largest export coal terminal, located at the Port of Hay Point south of Mackay. The Terminal is leased from the Queensland Government to DBCT Management.

Access to the Terminal has been regulated by the Queensland Competition Authority (QCA) since 1997, with access undertakings approved in 2006, 2010 and 2017. The current access undertaking came into effect on 16 February 2017 and will expire on 1 July 2021.

In October 2017, the QCA issued to DBCT Management an Initial Undertaking Notice (IUN) pursuant to section 133 of the *Queensland Competition Authority Act* (QCA Act), requiring a draft access undertaking (DAU) to be submitted by 1 July 2019.[5] Dalrymple Bay Coal Terminal (DBCT) Management lodged the 2019 DAU on 1 July 2019.[6]

The draft access undertaking sets out the terms and conditions under which DBCT Management proposes it would provide access to its terminal facilities. In a key departure from established precedent, DBCT Management has proposed that terminal access charges would be determined through a negotiate-arbitrate process, rather than by the regulator as part of the approval of the access undertaking.[7]

The DBCT User Group, representing coal companies presently holding Access Agreements at DBCT and exporting through the Terminal, has engaged PricewaterhouseCoopers Consulting (Australia) Pty Limited (PwC) to assist in preparing a submission to the QCA, in response to the 2019 DAU.

1.2 Structure of this report

The report is structured as follows:

- in section two, we recap the history of the current access undertaking and the development of the forms of regulation for DBCT, focussing on the role of the regulator-determined TIC
- in section three, we discuss the purpose and context to third party access regulation and provides a summary of the access regimes in place across Australia
- in section four, we discuss the factors influencing the form of access regulation and how these factors determine where DBCT is positioned on the continuum from light-handed to heavy-handed regulations

[5] QCA (2017), *Initial Undertaking Notice*, available at: http://www.qca.org.au/getattachment/f95245fb-a80f-4385-9420-57fd4902ab0e/QCA%E2%80%94Initial-undertaking-notice.aspx

[6] DBCT Management (2019), *2019 AU Submission*, available at: http://www.qca.org.au/getattachment/c7b28c19-c03e-4b15-a89a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

[7] DBCT Management (2019), *2019 DAU Submission*, available at: http://www.qca.org.au/getattachment/c7b28c19-c03e-4b15-a89a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

- in section five, we consider the implications of transitioning to a negotiate-arbitrate framework for the determination of an access price, having regard to cost-based modelling parameters previously sought by DBCT Management.

2. Regulating third party access at DBCT

2.1 Introduction

Prior to granting the lease to DBCT Management, the Queensland Government declared the coal handling service at the Terminal for third party access under Part 5 of the QCA Act. The effect of the declaration was to prevent the terminal manager from refusing access to the terminal by third-party exporters, and also allowed the QCA to receive (or in some circumstances require) from the terminal manager a draft access undertaking. Once approved, an access undertaking sets out the terms and conditions under which DBCT Management must provide access to coal handling services at the Terminal.[8]

The first access undertaking for the Terminal was approved by the QCA in June 2006 (the 2006 AU).[9] That undertaking was superseded by further access undertakings for the Terminal that were approved by the QCA in September 2010 (2010 AU) and February 2017 (2017 AU). The 2017 AU expires on 1 July 2021.[10]

2.2 Origin of the form of regulation and terminal pricing arrangements at DBCT

Both prior to, and after, the lodging of the first draft access undertaking in June 2003, Prime Infrastructure (the then owner of DBCT Management) and the DBCT User Group tried unsuccessfully to agree terms for accessing the Terminal.[11]

The QCA observed that during that negotiation and the process of settling the terms of access for the approved access undertaking, DBCT Management and the DBCT User Group 'advanced diametrically opposed views on most aspects of the terms of the undertaking'.[12] This included the principles governing how access prices would be structured and set, with the QCA noting that the 'area of probably the greatest difference in the views of DBCT Management and the DBCT User Group lies in the proposed reference tariff and the various elements used to calculate the reference tariff.'[13]

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[8] Coal handling services include unloading, stockpiling, coal blending, cargo assembly and out-loading handling services to the mines using the Terminal; s. 250(5) *Queensland Competition Authority Act 1997* (Qld).

[9] QCA (2016), *Secondary Undertaking Notice - Att - QCA Final Decision - Appendix A - mark-up to the 2015 DAU*, section 1.1, available at: http://www.qca.org.au/getattachment/5869e850-3e17-4174-a820-7f3c14f5c285/Secondary-Undertaking-Notice-%E2%80%94-Att-%E2%80%94-QCA-Final-Dec.aspx

[10] QCA (2019), *Statement of Regulatory Intent - DBCT Management's 2019 Draft Access Undertaking*, p. ii, available at: http://www.qca.org.au/getattachment/fa936719-06f7-494f-b069-7a1f32806a48/Statment-of-Regulatory-Intent-DBCT-Management-s.aspx

[11] QCA (2005), *2005 Decision re: DBCT Draft Access Undertaking*, p. v, available at: http://www.qca.org.au/getattachment/3781eb63-e342-4903-8b5f-3280d9f7b28f/2005-Decision-re-DBCT-Draft-Access-Undertaking.aspx

[12] Ibid.

[13] QCA (2004), *Draft decision: Dalrymple Bay Coal Terminal Draft Access Undertaking*, October, p.xi http://www.qca.org.au/getattachment/dd6f9368-3c28-44e5-9350-7549981b461e/2004-Draft-Decision-re-DBCT-Draft-Access-Undertaki.aspx

In the draft 2006 AU, DBCT Management proposed a hybrid price-revenue cap approach to apply at the Terminal.[14] The price-revenue cap would be used to calculate the access charge paid by users, referred to as the Terminal Infrastructure Charge (TIC). The TIC would be calculated by dividing DBCT Management's annual revenue requirement (ARR) by the total volume of contracted capacity. Access charges were already in use at the Terminal through access agreements that the DBCT Management had in place with existing access holders.

The DBCT User Group supported a revenue cap as the most appropriate form of access pricing to apply at the Terminal, but expressed concern that the hybrid price-revenue cap could create an environment where DBCT Management may be unwilling to expand due to strong incentives to ship as much throughput as possible from existing capacity.

In its draft decision, the QCA recommended a revenue cap apply at the Terminal, implemented as a common TIC applied to contracted, take-or-pay tonnage in each year.[15] The QCA concluded that a revenue cap was most likely to create the best incentives for the access provider in terms of contracting for throughput and managing terminal capacity in an optimal way.

2.2 Form of regulation in the 2017 AU

DBCT Management's revenue and pricing proposal for the 2016-21 period (as proposed in the 2015 DAU, and ultimately approved as the 2017 AU) argued that the operating and market environment had changed since the previous regulatory review, and the Terminal was now subject to 'real competition from a number of alternative ports, none of which are constrained by heavy handed regulation'.[16] It claimed that access regulation constrained DBCT Management's ability to compete with unregulated terminals 'by denying it the ability to flexibly respond to the changing demands of its dynamic market environment'.[17]

Despite indicating a preference for greater flexibility, DBCT Management retained largely unchanged the building block' approach to revenue and pricing adopted by the QCA in previous access undertaking periods, and put forward at TIC of $3.09 per tonne over the 2016–21 regulatory period.[18]

The QCA noted in its final decision that a number of matters had to be accounted for in order to ensure access seekers had confidence in the access undertaking and arbitration framework:

> *This asymmetry could result in negotiations unduly favouring DBCTM. For these reasons, we have considered how the 2015 DAU:*
>
> - *affects the role of customer engagement*
> - *affects the balance of negotiation strength*
> - *impacts on barriers to participation, whether real or perceived*

[14] Ibid, p. 99.
[15] Ibid, p. 100.
[16] DBCT Management (2016) *DBCT Management 2016 DAU submission*, p. 5, available at: http://www.qca.org.au/getattachment/5814e3ed-0665-4c80-b52d-63b9f5da5305/TEST-FILE.aspx
[17] Ibid, p. 9.
[18] Ibid, p. 59

- *affects the timely flow of information*
- *provides for effective and practicable dispute resolution processes, accountability and transparency.*[19]

The regulator did not direct significant attention to the form of regulation in its final decision, but retained the cost-based approach previously adopted to determine an average TIC of $2.43 per tonne.[20]

2.3 Proposed arrangements for access in the 2019 DAU

DBCT Management's 2019 DAU proposes to replace the prescribed TIC that is a key feature of 2017 AU (and every previous access undertaking that has applied to DBCT) with a negotiate-arbitrate framework for determining terminal access charges.[21]

DBCT Management described the approach proposed in its 2019 DAU as follows:

> *DBCTM's 2019 DAU includes substantially similar provisions to previous access undertakings in most respects, but does not include a prescriptive approach for determining the TIC that will apply to access seekers. Rather, the 2019 DAU leverages off the negotiation/arbitration framework set out in the QCA Act, in order that access seekers may negotiate the TIC with DBCTM, with recourse to QCA administered arbitration in the event that an agreement cannot be reached.*[22]

In support of the proposed negotiate-arbitrate framework, DBCT Management submitted:

> *DBCTM's 2019 DAU is designed to reflect the intent of the access regime provisions in the QCA Act and the executed Access Agreements, while ensuring any competition issue in respect of new entrants is addressed. This provides the opportunity for agreement to be reached through commercial processes, minimises the potential for regulatory error, and creates an environment for more economically efficient investment in the infrastructure by which the DBCT service is provided.* [23]

DBCTM's key arguments[24] are that:

- by the QCA setting the TIC *ex ante*, it denies the parties a 'meaningful opportunity' to negotiate outside of that reference tariff/reference service compact, notwithstanding there are different services provided to different access seekers
- a negotiate-arbitrate approach is the preferred basis for setting of access charges, reflecting that it is consistent with both Part 5 of the QCA Act and also existing Access Agreements

[19] QCA (2016) *DBCT Management's 2015 draft access undertaking: Final decision*, p. 32, available at: http://www.qca.org.au/getattachment/081401b3-903e-4aea-b9fd-9da8e544cf94/Secondary-Undertaking-Notice%E2%80%94Attachment%E2%80%94QCA-decisi.aspx

[20] Ibid, p. iv.

[21] QCA (2019) *DBCT Management's 2019 DAU—QCA staff questions for stakeholders,* p. 1, available at: http://www.qca.org.au/getattachment/d416d20a-0ac6-4e26-b522-c1ee5ac20b24/QCA%E2%80%94Staff-questions-for-stakeholders.aspx

[22] DBCT Management (2019) *2019 AU Submission*, page 12, para 47, available at: http://www.qca.org.au/getattachment/c7b28c19-c03e-4b15-a89a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

[23] Ibid, page 29, paragraph 117.

[24] DBCT Management (2019) *2019 AU Submission*, page 5, available at: http://www.qca.org.au/getattachment/c7b28c19-c03e-4b15-a89a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

- it would ensure the access undertaking is both fit-for-purpose and a proportionate response to the purported competition problem, without the ‘unintended consequences of regulatory overreach’ or ‘risk of regulatory error’.

3. Access regulation in Australia

3.1 Understanding the purpose and context to access regulation

Access regulation seeks to address problems faced by third parties requiring access to essential infrastructure facilities in order to compete in upstream or downstream markets.[25]

The regulation of facilities that exhibit natural monopoly characteristics aims to retain the productive efficiency benefits of a single facility operator, while preventing the allocative efficiency losses that would result from the monopolist's adverse application of its market power.[26] Consistent with this, access regulation seeks to provide a framework for establishing price- and non-price terms for access which encourage the efficient use of a regulated facility, and which support competitive outcomes in related markets.[27]

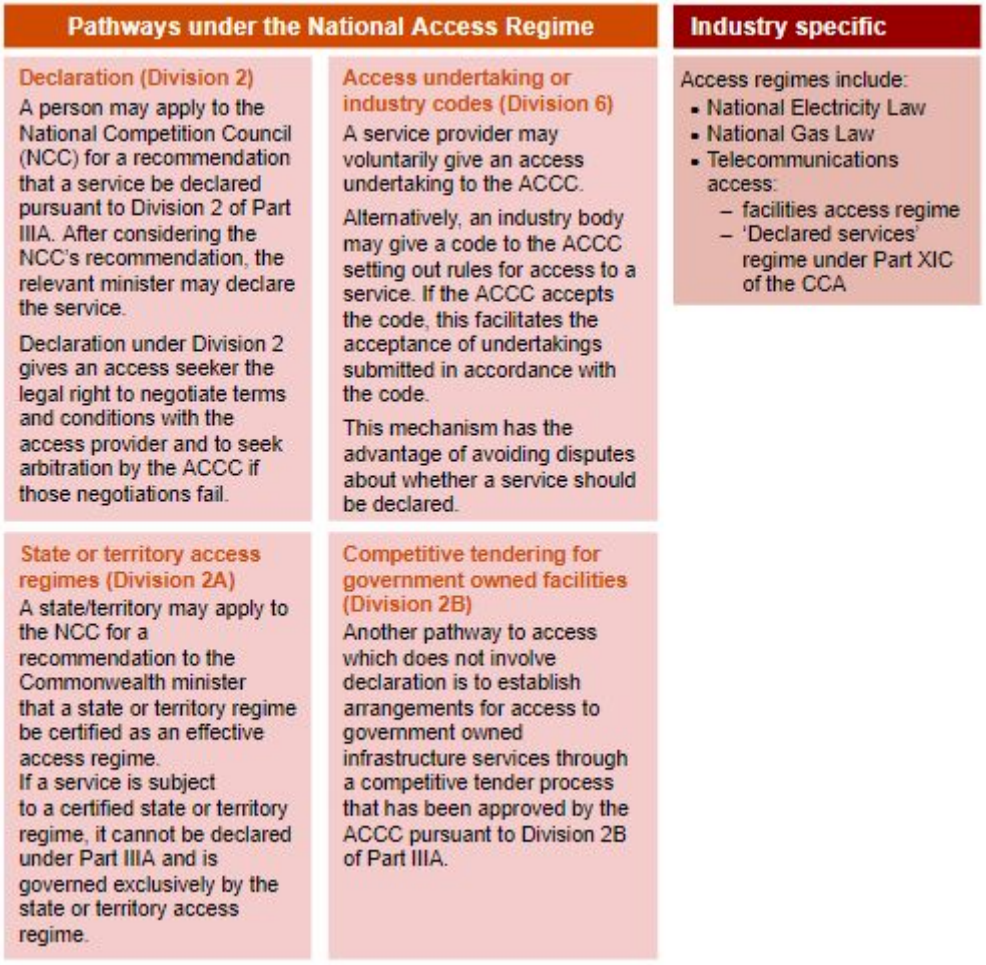
To achieve its objectives, access regulation typically:

- defines rules or criteria for determining whether a particular facility or service will be 'covered' by access regulation
- describes the way in which the terms and conditions of access should be determined, and
- establishes procedures to resolve access disputes.

There are a number of different ways in which access regulation can be implemented. Part IIIA of the *Competition and Consumer Act 2010* (Cth) establishes four 'pathways' to gain access to a service.[28] There are also industry specific access regimes, such as the *National Electricity Law* and the *National Gas Law*,[29] as well as other independent state-based regulatory authorities with functions relating to essential services. Figure 3 provides a summary of the access pathways across Australia:

[25] Productivity Commission (2013) *National Access Regime*, Inquiry Report no. 66, Canberra, p. 71, available at: https://www.pc.gov.au/inquiries/completed/access-regime/report/access-regime.pdf.
[26] Ibid.
[27] PwC (2018) *Review of rail access regimes*, page ii, available at: https://www.infrastructure.gov.au/rail/publications/files/Review-of-Rail-Access-Regimes.pdf
[28] National Competition Council (2013) *Declaration of Services: A guide to declaration of services under Part IIIA of the Competition and Consumer Act 2010 (Cth),* Melbourne, p. 10, available at: http://ncc.gov.au/images/uploads/Declaration_Guide_2013.pdf
[29] Coronos SG, *Competition Law in Australia* (6th ed, 2014), Lawbook Co., Sydney, p. 10.

Figure 3: Overview of access pathways



Each of these access pathways (which in circumstances suited to each pathway) provides a mechanism to address the significant risks that the market will not, by itself, provide essential services to market participants on terms that:

- are agreeable to both access providers and access seekers
- promote the economically efficient operation of, use of, or investment in the infrastructure by which essential services are provided.

The need for regulation to address these issues was evident at DBCT at the time the terminal originally was privatised.

Following privatisation, both DBCT and the adjacent export coal terminal, Hay Point Coal Terminal, proposed expansions to capitalise on the surge in global demand for coal.[30] As noted above, the leaseholder of DBCT (Prime) and third party coal producers attempted to reach commercial agreement on the terms and conditions of access before the QCA delivered a final decision, but were unable to do so.[31]

[30] BHP (2005) *Further Submission to the NCC: Application by Fortescue Metals Group Ltd for Declaration of Services*, 12 July 2005, Attachment D1 available at: http://ncc.gov.au/images/uploads/DERaFoSu-032.pdf
[31] Ibid.

This situation was acknowledged in a speech in 2005, where the ACCC Commissioner noted that even a strong coal export outlook was not sufficient to deliver a commercially negotiated outcome:

> *In the case of Dalrymple Bay Coal Terminal, while capacity constraints appear to have arisen mainly as a result of continuing unexpected high global demand for coal, it appears that capacity expansion is not proceeding because of a substantial difference between what users are willing to pay and the price the coal terminal owners are seeking before they undertake that expansion.*[32]

3.2 Overview of access frameworks across sectors and jurisdictions

A range of access frameworks have developed in order to address the challenges associated with large, long-lived sunk infrastructure investments and different market structures across Australia. Table 1, below, provides an overview of the different access frameworks.

Although there are commonalities in various regulatory mechanisms applied across and between the access frameworks, there is no obvious directional trend towards any particular form of regulation as universally best-suited to the competition problems of different services and markets.

[32] Ed Willett, 'Where the Australian energy sector is heading' (Speech delivered at the 2005 Energy Summit, Sydney 17 March 2005), available at: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id:%22media/pressrel/QJSF6%22;src1=sm1

Table 1: Summary of access regulations

Facility and Access Provider	Sector	State	Regulator	Form of regulation	How prices are determined	Date of most recent undertaking or access agreement
Dalrymple Bay Coal Terminal	Ports	Qld	Queensland Competition Authority	State access regime access undertaking	Reference tariff (terminal infrastructure charge) for coal handling services. A single access charge is determined using a conventional building-block approach.	2017 Access Undertaking
Bulk wheat export operations	Ports	National	Australian Competition and Consumer Commission	Mandatory industry code	Negotiate-arbitrate Compliance with the Code monitored by the ACCC.	*Competition and Consumer (Industry Code—Port Terminal Access (Bulk Wheat)) Regulation 2014* (Cth)
Port of Melbourne	Ports	Vic	Essential Services Commission	State legislative framework under the *Port Management Act 1995* (Vic)	Hybrid price-cap A published Reference Tariff Schedule outlines tariffs for prescribed services. The Reference Tariff Schedule is required to comply with a Pricing Order which sets a Revenue Requirement which cannot be exceeded and an annual cap on the extent to which charges can be increased.	2019-20 Reference Tariff Schedule (RTS)
Interstate Network (Australian Rail Track Corporation)	Rail	National	Australian Competition and Consumer Commission	Part IIIA undertaking	Negotiate-arbitrate	Extension of the 2008 Interstate Access Undertaking (to 30 June 2020)
Hunter Valley Coal Network (Australian Rail Track Corporation)	Rail	National	Australian Competition and Consumer Commission	Part IIIA undertaking	Indicative Access Charge (IAC) The IAC is published and available to access seekers wishing to access a reference 'indicative' service. Prices for the reference service are adjusted each year for changes in CPI	September 2018 variation of the 2011 Hunter Valley Access Undertaking

Facility and Access Provider	Sector	State	Regulator	Form of regulation	How prices are determined	Date of most recent undertaking or access agreement
Central Queensland Coal Network (Aurizon Network)	Rail	Qld	Queensland Competition Authority	State access regime access undertaking	Reference tariff for coal-carrying train service Access charges must be determined in a range bounded by a floor/ceiling, where the ceiling is set using a conventional building-block approach.	2017 Access Undertaking (UT5)
Intrastate Network (Queensland Rail)	Rail	Qld	Queensland Competition Authority	State access regime access undertaking	Reference tariff for coal services on the West Moreton System Negotiate-arbitrate framework for remainder of intrastate network. Access charges must be determined in a range bounded by a floor/ceiling, where the ceiling is set using a conventional building-block approach.	2016 Access Undertaking
Tasmanian Rail Network (TasRail)	Rail	Tas	Australian Competition and Consumer Commission	State legislative framework and the *Tasmanian Rail Access Framework Policy*	Access charge set by the Tasmanian Government for 2018-19. Charges for the financial years remaining in the five-year policy term will be indexed in accordance with CPI.	No third party access arrangements in place
Goldsworthy Railway (BHP Billiton)	Rail	WA	Australian Competition and Consumer Commission	Part IIIA declaration	Negotiate-arbitrate	No third party access arrangements in place

Facility and Access Provider	Sector	State	Regulator	Form of regulation	How prices are determined	Date of most recent undertaking or access agreement
The Pilbara Infrastructure (Pilbara Infrastructure)	Rail	WA	Economic Regulation Authority	WA Rail Access Regime	Negotiate-arbitrate Access charges must be determined in a range bounded by a floor/ceiling, where the ceiling is set with reference to a 'total cost' estimated using the Gross Replacement Value (GRV) method.	2013 Access Proposal by Brockman Iron Pty Ltd
Central West Gas Pipeline (APA Group through subsidiary APT Pipelines (NSW))	Gas	National	Australian Energy Regulator	Industry-specific (National Gas Law and National Gas Rules)	Light-regulation pipeline Access arrangement may be lodged with the regulator or published on the operator's website	Final Determination and Statement of Reasons,Light Regulation of the Central West Pipeline, 19 January 2010
Roma to Brisbane Gas Pipeline (Australian Gas Networks)	Gas	National	Australian Energy Regulator	Industry-specific (National Gas Law and National Gas Rules)	Full-regulation pipeline Access arrangement including price and non-price terms to be approved by the regulator	Access Arrangement 2017-22
Transgrid distribution network (TransGrid)	Electricity	National	Australian Energy Regulator	Industry-specific (the National Electricity Law and National Electricity Rules)	Ex ante determination of forms of controls over price. Control mechanisms may consist of a schedule of fixed prices, caps on the price of individual services, weighted average price caps, revenue caps, average revenue caps.	Transmission determination for the 2018-23 regulatory control period.

4. Factors influencing the form of access regulation

4.1 No universally-applied model for access regulation

A range of mechanisms for regulating access have evolved over time and which seek to effectively address the different access problems associated with a particular market or essential infrastructure service.

A review of the way that access regulation has developed and is applied in Australia demonstrates that the form of regulation is determined in the context of particular characteristics, as opposed to a single, 'one size fits all' approach. Relevant characteristics may relate to the nature of the infrastructure service, the past or anticipated conduct of the access provider, market structure, and the number and features of access seekers.

The way in which access regulation is applied can change with market and industry circumstances. However, changes to the form of regulation are not typically undertaken unless there is an event impacting (or likely to impact) on the current regime's effectiveness in addressing issues related to access (see Boxes 1 and 2, below).

Box 1: Impact of wheat export marketing arrangements

Between July 2008 and September 2014, wheat port access was regulated under the *Wheat Export Marketing Act 2008* (Cth). All accredited wheat exporters needed to satisfy an access test, which required exporters to have an access undertaking approved by the Australian Competition and Consumer Commission (ACCC) in place by 1 October 2009.[33] This form of regulation was chosen due to concerns vertically integrated grain bulk handling companies might seek to deny port terminal access to other exporters in the newly deregulated market.[34] However, the Productivity Commission in 2010 noted that the benefits of this form of regulation would be likely to diminish over time as a competitive environment became institutionalised among the market participants.[35]

Following the Commission's recommendations, from 1 October 2014 the access undertakings regime was replaced by the *Port Terminal Access (Bulk Wheat) Code of Conduct*, a mandatory code of conduct to facilitate third-party access. Despite growing competitive exposure and industry maturity in the four years since the Code was introduced, there is not a strong appetite to entirely deregulate. A review of the Code in 2018 concluded that it should be retained, with the ACCC noting the information publication obligations contained in the Code continue to provide necessary transparency about bulk export shipping stems that would not be available absent regulation.[36]

There is clear evidence of competing terminals at the same port and new entry into the export markets. The ACCC has recognised that the ports of Brisbane, Port Kembla, and Newcastle all have two bulk wheat export terminals that are operated by separate port terminal service providers (PTSPs) in close proximity.[37] In 2017, despite a fall in Australian grain production and lower bulk grain exports, Riordan Grain Services entered the port level of the supply chain at the Port of Geelong using a mobile ship loader.[38] This contrasts to the position at DBCT, where the QCA concluded that other coal export terminals cannot be regarded as close substitutes for DBCT[39] and, in the absence of declaration, efficient entry to the coal tenements market would be discouraged and there will be a material impact on competition in that market.[40] DBCT can exercise a greater degree of market power in the negotiation and provision of access to third parties than the PTSPs operating in the wheat export market.

[33] Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. iv, available at: https://www.pc.gov.au/inquiries/completed/wheat-export/report/wheat-export-report.pdf

[34] Department of Agriculture and Water Resources (2018) *Review of the wheat port access code of conduct*, Canberra.p. 3, available at: https://haveyoursay.agriculture.gov.au/30170/documents/90353

[35] Productivity Commission (2010) *Wheat Export Marketing Arrangements*, Report no. 51, Canberra, p. 143, available at: https://www.pc.gov.au/inquiries/completed/wheat-export/report/wheat-export-report.pdf

[36] ACCC (2017) *Submission to the Review of the wheat port access code of conduct*, p. 2.

[37] ACCC (2016) *Bulk wheat ports monitoring report 2015–16*, p. 17, available at: https://www.accc.gov.au/system/files/RAWP%20-%20Bulk%20wheat%20ports%20monitoring%20report%202015-16%20%5Bv2%5D.pdf

[38] ACCC (2018) *Bulk grain ports monitoring report 2017–18*, p. 24, available at: https://www.accc.gov.au/system/files/1466_Bulk%20grain%20ports_FA.pdf

[39] QCA (2018), *Draft recommendation: Part C: DBCT declaration review*, p.64, available at: https://www.qca.org.au/getattachment/f381d591-bfc6-4974-9d58-a5f47e32d0e3/Part-C-Draft-recommendation-%E2%80%93-the-DBCT-service.aspx

[40] Ibid, p.5.

Box 2: AEMC review of scope of economic regulation applied to covered pipelines

In October 2018, the COAG Energy Council directed the Australian Energy Market Commission (AEMC) to conduct a review into the scope of economic regulation applied to covered pipelines. The defining feature of the economic regulatory framework for full regulation pipelines under the NGL and NGR is a full access agreement underpinned by a 'reference service'. Tariff and non-tariff terms and conditions of access to services on full regulation pipelines are regulated by reference to reference services.

The AEMC reviewed the NGR and determined that the rules were not crafted sufficiently to guide the regulator in making a cost-benefit trade-off when determining the number and type of reference services. Of particular concern was the fact that the rules did not require a reference service for each type of service. For example, if pipeline services were defined as firm forward haul and park and loan, there was no corresponding requirement to define a reference service in relation to these service types.

Consequently, the AEMC recommended that the test for specifying pipeline services as reference services be amended. In making a decision, the AEMC recommended the regulator have regard to a number of factors, including actual and forecast demand for the service and the number of prospective users:

> *Services with historical or forecast high demand are likely to be useful to a larger number of users and prospective users. Consequently, the benefits of making such services reference services are likely to be relatively high.*[41]

The AEMC noted that establishing certain terms *ex ante*, including reference services and tariffs actually assisted negotiations:

> *A reference service acts as an aid to the negotiation process, by narrowing the points of contention and providing greater predictability of the outcomes of any arbitration. In turn, this should reduce the prospect of negotiation leading to arbitration, and reduce the cost of arbitration in the event that it is necessary.*[42]

The AEMC review identifies a range of factors which are instructive in considering the form and structure of regulation to be applied at DBCT. In particular, the review defines certain service and other characteristics which, if present, imply a stronger case for the application of a reference service / reference tariff approach.

[41] AEMC (2018) *Review into the scope of economic regulation applied to covered pipelines, Final report*, 3 July 2018, p. 85 , available at: https://www.aemc.gov.au/sites/default/files/2018-11/Review%20into%20the%20scope%20of%20economic%20regulation%20applied%20to%20covered%20pipelines%20-%20Final%20Report.PDF

[42] Ibid, p. 80.

4.2 Factors influencing the form of access regulation applied

Economic regulation can be viewed as a continuum of possible forms of regulation, with 'light-handed' forms of regulation at one end of the continuum and more 'heavy-handed' forms of regulation at the other end.

Unlike decisions on access coverage – which are binary in nature and which turn on specific legislative tests – regulators have had regard to a number of factors when considering the form of regulation to be applied, and are less definitive in their reasoning as to why one particularly regulatory mechanism is adopted over another.

Notwithstanding this lack of definitive and prescribed tests, in making judgements as to the way in which access regulation should be deployed, we observe that regulators typically have had regard to the following key factors:

- the degree of contestability and threat of market entry
- the number of access seekers and their countervailing market power
- likely demand for the 'reference services'
- degree of information asymmetry
- administrative and compliance burden created by regulation.

Figure 4 presents a comparative analysis of the several types of access regimes from different sectors and jurisdictions using the five factors discussed above.

Figure 4: Factors affecting the form of access regulation

Contestability and the threat of entry
Potential alternative options for an access seekers can encourage access providers to behave in a more competitive manner

GRAINCORP NEWCASTLE - BULK WHEAT EXPORT FACILITY
Negotiate-arbitrate
The ACCC considered the presence of competition from operators such as the Newcastle Agri Terminal (NAT) limited any exercise of market power by Graincorp: '*NAT's recent entry may also demonstrate that barriers to entry (and expansion) are not high and that there is a credible threat of new entry/expansion which could provide an additional constraint on GrainCorp.*'

AURIZON NETWORK
Reference tariff for coal
The QCA did not accept Aurizon's claim that the proposed Northern Galilee Basin Rail Project (NGBR) demonstrated potential for market entry, noting '*the construction of such a line, together with its route, capability and market impact, remain uncertain. It is too early to conclude the NGBR project would constrain prices or compete with infrastructure serving the Newlands corridor*'.

Number of access seekers and their countervailing market power
In markets with a number of smaller users, situations of uneven bargaining power may result in negotiate-arbitrate being inappropriate

SOUTH AUSTRALIAN RAIL NETWORK
Negotiate-arbitrate
In its 2015 review, ESCOSA determined that '*Utilisation of the railways continues to be low and... this trend is likely to be similar in the future. In this environment, access seekers have countervailing bargaining power, as there is a strong incentive for railway operators to increase utilisation of the railways in order to recover their fixed costs*'.

PORT OF MELBOURNE - CONTAINER PORT SERVICES
Price-cap
In its 2014 Review of Victorian Ports Regulation, the ESC concluded, '*The importer and exporter customer base is highly fragmented compared to shipping lines, with each customer representing only a small proportion of total trade through the port. This diverse customer base has limited scope to influence or constrain port behavior*'.

Likely demand for the 'reference services'
Services used by a large number of access seekers are likely to require determination of access terms common to multiple users. Establishing standard terms (including price) ex ante is likely to pre-emptively resolve matters that would otherwise be disputed and referred to arbitration multiple times

ROMA TO BRISBANE GAS PIPELINE
Regulator approved full access arrangement
The AER concluded costs for park and loan services could not be included in the reference tariff, noting '*the services are primarily being sought by users that require greater flexibility to deal with changes in operational conditions ... or changes in the electricity and gas markets, which are difficult to predict. Given the level of uncertainty surrounding the demand for, and revenue to be generated from, these services, we agree that determining efficient reference tariffs for these services may not be possible*'.

AURIZON NETWORK
Reference tariff for coal
The QCA did not accept the standardisation of terms would hinder Aurizon's ability to provide services, arguing, '*system-based reference tariffs apply in the [Central Queensland Coal Network], providing cost reflectivity while still allowing for some differentiation*'.

Degree of information asymmetry
The access provider may systematically exercise market power by refusing to provide sufficient and timely information to negotiating parties to assess the service offer

CENTRAL WEST GAS PIPELINE (NSW)
Regulator approved limited access arrangement
The NCC determined that '*the availability of historic pipeline costs coupled with many users' own experience in operating pipelines, mean that while the current information requirements may be lacking, they are unlikely to be better under an [access arrangement] required by full regulation*'.

ARTC-OPERATED HUNTER VALLEY RAIL NETWORK (NSW)
Indicative access charge
When ARTC first submitted an access undertaking to the ACCC for approval, the ACCC recommended that ARTC should be required to annually publish long term forecasts of prices on the basis of up to date long-term demand forecasts, noting "*the nature of the take or pay arrangements and the information asymmetry between ARTC and the access seekers may provide ARTC with both the ability and an incentive to engage in ex post opportunism.*"

Administrative and compliance burden
Commercial negotiation can be efficient, but the the process may become overly protracted and costly if the parties do not have appropriate incentives to reach agreement

AUSTRALIAN GAS NETWORKS (SA)
Regulator approved full access arrangement
In its draft decision on the 2016 to 2021 access arrangement, the AER commented that, '*In some cases, greater prescription or intervention on our part in determining these terms and conditions may impede competitive market outcomes and be inefficient. There are two reasons for this: first, our lower level of information than that of AGN and users and second, the user-specific nature of many issues. Accordingly, we will generally avoid proposing amendments in these cases where flexibility to negotiate commercial outcomes is desirable*'.

QUEENSLAND RAIL (QR)
Reference tariffs
In its decision on QR's 2001 Draft Access Undertaking, the QCA concluded '*Reference tariffs were set to reduce the transaction costs associated with negotiating access agreements and provide a transparent basis against which above-rail operators are able to most cost-effectively satisfy customer demand*'.

4.2.1 Contestability and the threat of entry

Markets with limited contestability are typically characterised by large sunk costs and weak threats of entry from prospective competitors that would otherwise put pressure on access providers to act efficiently.

Access declaration criteria seek to contain access regulation to where, in simple terms, an incumbent service provider holds sufficient market power such that it can satisfy all foreseeable demand in the market at least cost, and where without regulatory control there is a risk of adverse competitive impacts in another, dependant market. The coverage tests do not seek to identify only 'textbook' natural monopolies – degrees of lesser or greater contestability might be apparent, even where the threshold coverage tests are satisfied.

In markets where contestability is most limited, a greater level of regulatory intervention may be required in order to constrain the ability of access providers to earn supernormal profits through the misuse of market power.

For example, the QCA's review into Aurizon Network's rail transport infrastructure, collectively referred to as the Queensland Coal Network (CQCN), noted that there are no viable substitutes for the CQCN.[43] Stakeholders submitted that no other railway was capable of providing transportation by rail, and there was no alternative mode of transport given the distances involved.[44] Despite Aurizon Network drawing attention to future projects which it claimed could be substitutable for parts of the CQCN (e.g. the Northern Galilee Basin Rail (NGBR) project for users on the Newlands corridor), the QCA was not convinced that the threat of entry was realistic:

> *...the construction of such a line, together with its route, capability and market impact, remain uncertain. It is too early to conclude the NGBR project would constrain prices or compete with infrastructure serving the Newlands corridor.* [45]

In contrast, the ACCC concluded that the potential for competition in bulk wheat export operations at the Port of Newcastle from Newcastle Agri Terminal (NAT) created constraints on Graincorp's Carrington facility. The degree of competitive pressure was sufficient for the ACCC to grant Graincorp an exemption under the *Port Terminal Access (Bulk Wheat) Code of Conduct*, subjecting Graincorp to a lighter form of regulation. The ACCC stated:

> *NAT's recent entry may also demonstrate that barriers to entry (and expansion) are not high and that there is a credible threat of new entry/expansion which could provide an additional constraint on GrainCorp.*[46]

More light-handed regulatory approaches tend to be associated with services which, whilst meeting threshold tests for a level of economic regulation, exhibit a level of contestability which provides a meaningful alternative option for access seekers and

[43] QCA (2018) *Draft recommendation: Part A: Aurizon Network*, p. 5, available at: http://www.qca.org.au/getattachment/5c52b65c-076a-4e22-81de-75b37dead1ed/Part-A-Draft-recommendation-%E2%80%93-the-Aurizon-Network.aspx

[44] Ibid, p. 13.

[45] Ibid, p. 16.

[46] ACCC (2014), *ACCC Determination: Exemption in respect of GrainCorp's Carrington (Newcastle) Port Terminal Facility*, p.13, available at: https://www.accc.gov.au/system/files/ACCC%20determination%20-%20exemption%20for%20GrainCorp%27s%20Newcastle%20Port%20facility%2C%201%20Oct%2014_0.pdf

thus creates a balancing constraint on the incumbent access provider. Conversely, where contestability is absent or weak, regulators have tended towards more prescriptive regulatory strategies, including *ex ante* determination of the commercial terms under which access shall be provided.

4.2.2 Number of access seekers and their countervailing market power

Some regulators have identified that the presence or absence of countervailing market power of access seekers is a relevant consideration in making an assessment about whether the degree of market power is sufficient to warrant more intrusive regulation.

For example, prior to the introduction of the National Energy Law (NEL) and National Gas Law (NGL), a review into the form of regulation applied in the energy sector advised that the presence of sufficient countervailing power could contribute to the success of a negotiate-arbitrate approach:

> *This form of regulation 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.*[47]

The structure of the gas industry, including the number of prospective pipeline users, was one of the reasons the AEMC concluded in its most recent review of the sector that a negotiate-arbitrate framework was the appropriate economic regulatory framework for covered transmission and distribution natural gas pipelines:

> *…[T]he Commission considers that the benefits of a negotiate-arbitrate framework are particularly pertinent in the gas industry (compared to, for example, direct price or revenue controls applied to much of the electricity industry). Pipeline users and prospective users (producers, retailers and those industrial consumers that directly procure access from service providers) are relatively few in number. Some are relatively well resourced and well informed with regard to the negotiation process. Some may have a degree of countervailing market power, although the Commission recognises that this may not always be the case. These factors serve to constrain the extent of market power of pipeline service providers - although only to a degree - if these factors completely constrained market power in all cases there would be no need for economic regulation at all.*[48]

In the absence of competitive constraints associated with countervailing market power of users or access seekers, an *ex ante* form of access regulation is likely to be more effective in preventing opportunistic conduct by an access provider that has the effect of impacting upon investment and innovation along the supply chain. In contrast, a negotiate-arbitrate framework is more likely to succeed where a small number of users or access seekers enjoys a dominant position vis-à-vis the service provider, particularly where there is also a credible threat of switching to a competing service.

[47] Expert Panel on Energy Access Pricing (2006) *Report of the Expert Panel on Energy Access Pricing*, available at: http://www.competitiontribunal.gov.au/__data/assets/pdf_file/0004/28237/END.042.001.0004.pdf

[48] AEMC (2018) *Review into the scope of economic regulation applied to covered pipelines, Final report*, p. 32, available at https://www.aemc.gov.au/sites/default/files/2018-07/Final%20Report.PDF

4.2.3 Likely demand for the 'reference services'

Where a particular service is likely to represent a significant proportion of demand by access seekers, it is likely the parties will need to agree access terms common to multiple users. Having a regulator define a 'reference service' and other standard terms reduces the scope for disagreement and protracted negotiations between all or most parties, in relation to the same or substantially similar services. The parties and the regulator need not misdirect time and resources by repeatedly negotiating the same matters, individually rather than collectively on behalf of all.

Having a regulator-approved reference service assists access seekers and access providers by providing a framework for negotiations for any non-standard services which (some) some users may seek to procure. In the context of energy regulation, the AEMC recognised that in the case that a prospective pipeline user seeks a service that differs only slightly from the reference service, then the reference service can provide a good basis for the negotiation and arbitration processes.[49]

The concept of a 'reference service' was introduced into the NGL and National Gas Rules (NGR) for this reason. In 2018, the National Gas Rules were amended in response to stakeholder concerns that the former provisions did not effectively constrain a service provider using its monopoly power, as too narrow a set of services were specified as reference services. Consequently, the test was amended to give the regulators more discretion to consider whether specifying a reference service might assist in negotiations:[50]

> *By replacing services sought by a "significant part of the market" with a test of usefulness in supporting negotiations, regulators have discretion to consider whether the reference service will assist multiple users seeking similar or the same service on the pipeline.*[51]

In the case of Queensland Rail, the QCA-approved access undertaking includes a reference tariff for coal carrying services on the West Moreton system, yet supports a negotiate-arbitrate approach for other below-rail services on this same system (and otherwise on the remainder of Queensland Rail's intrastate network). This distinction appears to reflect a combination of:

- the more standardised nature of coal-carrying services, relative to the more variable characteristics of other traffic on that system
- a higher likelihood of an access dispute relating to coal services, such that up-front investment in setting a reference tariff was worthwhile relative to the future (direct and indirect) costs of negotiation and (ultimately most likely) arbitration.

Regulators have shown a preference for determining a reference service and tariff for services which are common to all or most access seekers, and where the parameters of the particular service (and its associated costs) can most readily be defined. Negotiate-arbitrate models, by contrast, tend to be adopted more where the dimensions

[49] AEMC (2018) *Review into the scope of economic regulation applied to covered pipelines, Final report*, 3 July 2018, p. 79, available at: https://www.aemc.gov.au/sites/default/files/2018-07/Final%20Report.PDF
[50] AEMC (2018) *Review into the scope of economic regulation applied to covered pipelines, Final report*, 3 July 2018, p. ii, available at: https://www.aemc.gov.au/sites/default/files/2018-07/Final%20Report.PDF
[51] Ibid, p.85.

of services sought by individual access seekers are more variable, or where demand for particular services is more contained or less able to be estimated with precision.

4.2.4 Degree of information asymmetry

Information asymmetry arises where one party knows more about key aspects of a transaction than the other. In the context of access regulation, it occurs when users and prospective users of the services have inadequate information to use as a basis for negotiation with access providers.

Where both negotiating parties have access to a common and comprehensive catalogue of information regarding the service – and key cost, demand and other parameters are reasonably well defined and known – then this can help ensure that expectations as to reasonable negotiating boundaries are aligned.

Regulators have recognised that substantial information asymmetries may be antecedents of opportunism on the part of service providers with substantial market power, which tends to support more heavy-handed forms of regulation. When ARTC first submitted an access undertaking to the ACCC for approval, the regulator recommended that ARTC should be required to annually publish long term forecasts of prices on the basis of up to date long-term demand forecasts. The regulator concluded that:

> *the nature of the take or pay arrangements and the information asymmetry between ARTC and the access seekers may provide ARTC with both the ability and an incentive to engage in ex post opportunism.*[52]

In contrast, where both parties are well-resourced and the access seeker has significant experience in dealing with an access provider, there may not be any advantage in applying a form of regulation with significant information disclosure requirements. For example, in approving a limited access arrangement for the Central West Gas Pipeline, the National Competition Council (NCC) determined that:

> *...the availability of historic pipeline costs coupled with many users' own experience in operating pipelines, mean that while the current information requirements may be lacking, they are unlikely to be better under an [access arrangement] required by full regulation.*[53]

4.2.5 Administrative and compliance burden

At the most basic level, the choice between a more light-handed negotiate-arbitrate approach, and *ex ante* determination of access charges, involves a trade-off between the (expected) costs and benefits of either pathway. As the AEMC observed in its 2005 review of regulatory models for covered gas pipelines:

> *… consideration should be given to what form of regulation is most appropriate, or fit for purpose, for a particular pipeline, balancing the relative direct and indirect costs of each form of regulation with the benefits they deliver in terms of constraining a service provider's use of market power.*[54]

[52] ACCC (2010) *Australian Rail Track Corporation Limited: Hunter Valley Coal Network Access Undertaking*, p. 667, available at: https://www.accc.gov.au/system/files/Draft%20Decision%205%20March%202010.pdf
[53] NCC (2009) *Application for a light regulation determination in respect of the Central West Pipeline, 3Draft Determination and Statement of Reasons*, 30 November 2009, p. 27, available at:
[54] https://www.aemc.gov.au/sites/default/files/2018-07/Final%20Report.PDF, p.12

One of the criticisms advanced against more heavy-handed regimes involving tariffs or price caps is the substantial costs of the regulatory process, which often includes detailed financial modelling to:

- provide a valuation of assets
- determine an appropriate rate of return
- develop forecasts of capital expenditure, operating expenditure and demand
- incorporate these financial parameters in order to calculate access prices[55]

However, due to the complexity of many essential infrastructure services, the effort involved in negotiating access under a negotiate-arbitrate framework may be just as resource-intensive as a more heavy-handed form of regulation, if not more so when factors such as the potential for the process to need to deal with multiple access seekers individually, rather than collectively.

Ultimately, the relevant test should be whether there is a material difference in the expected compliance and administration costs as between different forms of regulation, over the relevant period of the access control. This requires judgements as to both the likely costs to be incurred by service providers, access seekers and the regulatory agency, which in turn is affected by variables such as the prospect that negotiation will not be able to successfully conclude, and some level of arbitration will be required. To the extent the parties' expectations of reasonable and appropriate financial outcomes diverge, then it is less likely that negotiation will be successful.

Weighed against these 'costs' are benefits in the form of appropriate and efficiency-supporting terms of access. For instance, a review into the costs and benefits of upfront price controls by the UK's energy network regulator Ofgem noted the costs of developing price controls *ex ante* are relatively small in the context of multi-billion pound investments.[56] Moreover, the *ex ante* form of regulation (known as RPI-X) created additional value in the form of operating efficiencies:

> *Ex ante regulation provides strong incentives for firms to make operational savings, in part because prices are set to fall in line with the efficiency target and in part because firms retain a significant part of the savings achieved beyond the efficiency target. The evidence shows that there have been significant operating cost savings in all GB energy markets since the commencement of RPI-X regulation.*
>
> *[F]orms of ex post regulation provide strong efficiency incentives, in that they also allow the firm to retain operating cost savings over time. However, the efficiency gains under ex post regulation may not be passed through to consumers, which is clearly a disadvantage in relation to excessive pricing.*[57]

[55] ACCC (2013) *Submission to the Productivity Commission: Review of the National Access Regime: Issues Paper*, p. 35, available at: https://www.pc.gov.au/inquiries/completed/access-regime/submissions/submissions-test/submission-counter/sub016-access-regime.pdf

[56] LeCG Ltd (2009) *The case for ex post regulation of energy networks: Final report for Ofgem*, available at: https://www.ofgem.gov.uk/ofgem-publications/52031/final-report-ex-post-regulationpdf

[57] Ibid, p. 9.

4.3 Application to DBCT

The regulatory framework in place at DBCT is mature and well-developed, has supported the financing of both the ongoing management of the terminal and significant expansion initiatives, and accommodated changes over time in the distribution of terminal capacity between access seekers.

The composition and structure of the access undertaking has evolved over time, including through direct negotiation between users and DBCT Management. For instance, during the 2010 DAU process there were extensive negotiations between the users and DBCT Management which culminated in material changes to the access undertaking which was submitted to the QCA for approval, notwithstanding that the parties deferred to the QCA to resolve key pricing matters.

In the section below we overlay a consideration of the form of regulation factors introduced above, and discuss whether these suggest a preference ought to be given towards one form of access regulation over another. We acknowledge that the Authority's ultimate assessment needs to be guided by the matters as set out at section 138 of the QCA Act

Figure 5: Factors affecting the form of access regulation at DBCT

Contestability and the threat of entry
Potential alternative options for an access seekers can encourage access providers to behave in a more competitive manner

GRAINCORP NEWCASTLE - BULK WHEAT EXPORT FACILITY
Negotiate-arbitrate
The ACCC considered the presence of competition from operators such as the Newcastle Agri Terminal (NAT) limited any exercise of market power by Graincorp: '*NAT's recent entry may also demonstrate that barriers to entry (and expansion) are not high and that there is a credible threat of new entry/expansion which could provide an additional constraint on GrainCorp.*'

AURIZON NETWORK
Reference tariff for coal
The QCA did not accept Aurizon's claim that the proposed Northern Galilee Basin Rail Project (NGBR) demonstrated potential for market entry, noting '*the construction of such a line, together with its route, capability and market impact, remain uncertain. It is too early to conclude the NGBR project would constrain prices or compete with infrastructure serving the Newlands corridor*'.

DBCT
Reference tariff
There is no meaningful contestability at DBCT. The QCA concluded in its 2018 draft declaration decision that there are no viable substitutes to DBCT's coal handling service. Other terminals at Abbot Point, RG Tanna and WICT are constrained by a number of cost and non-cost factors

Number of access seekers and their countervailing market power
In markets with a number of smaller users, situations of uneven bargaining power may result in negotiate-arbitrate being inappropriate

SOUTH AUSTRALIAN RAIL NETWORK
Negotiate-arbitrate
In its 2015 review, ESCOSA determined that '*Utilisation of the railways continues to be low and... this trend is likely to be similar in the future. In this environment, access seekers have countervailing bargaining power, as there is a strong incentive for railway operators to increase utilisation of the railways in order to recover their fixed costs*'.

PORT OF MELBOURNE - CONTAINER PORT SERVICES
Price-cap
In its 2014 Review of Victorian Ports Regulation, the ESC concluded, '*The importer and exporter customer base is highly fragmented compared to shipping lines, with each customer representing only a small proportion of total trade through the port. This diverse customer base has limited scope to influence or constrain port behavior*'.

DBCT
Reference tariff
Access seekers have no countervailing market power, as they have no credible threat of switching in response to price increases, or disciplining DBCTM's conduct by withholding their access request.

Likely demand for the 'reference services'
Services used by a large number of access seekers are likely to require determination of access terms common to multiple users. Establishing standard terms (including price) ex ante is likely to pre-emptively resolve matters that would otherwise be disputed and referred to arbitration multiple times

ROMA TO BRISBANE GAS PIPELINE
Regulator approved full access arrangement
The AER concluded costs for park and loan services could not be included in the reference tariff, noting '*the services are primarily being sought by users that require greater flexibility to deal with changes in operational conditions ... or changes in the electricity and gas markets, which are difficult to predict. Given the level of uncertainty surrounding the demand for, and revenue to be generated from, these services, we agree that determining efficient reference tariffs for these services may not be possible*'.

AURIZON NETWORK
Reference tariff for coal
The QCA did not accept the standardisation of terms would hinder Aurizon's ability to provide services, arguing, '*system-based reference tariffs apply in the [Central Queensland Coal Network], providing cost reflectivity while still allowing for some differentiation*'.

DBCT
Reference tariff
There are core services at DBCT for which access seekers have a strong demand. Determining pricing terms *ex ante* for these services reduces the likelihood of disputes with a large number of access seekers, while providing the flexibility to address bespoke needs of individual users.

Degree of information asymmetry
The access provider may systematically exercise market power by refusing to provide sufficient and timely information to negotiating parties to assess the service offer

CENTRAL WEST GAS PIPELINE (NSW)
Regulator approved limited access arrangement
The NCC determined that '*the availability of historic pipeline costs coupled with many users' own experience in operating pipelines, mean that while the current information requirements may be lacking, they are unlikely to be better under an [access arrangement] required by full regulation*'.

ARTC-OPERATED HUNTER VALLEY RAIL NETWORK (NSW)
Indicative access charge
When ARTC first submitted an access undertaking to the ACCC for approval, the ACCC recommended that ARTC should be required to annually publish long term forecasts of prices on the basis of up to date long-term demand forecasts, noting "*the nature of the take or pay arrangements and the information asymmetry between ARTC and the access seekers may provide ARTC with both the ability and an incentive to engage in ex post opportunism.*"

DBCT
Reference tariff
There are significant protections provided by the QCA's current practices which reduce information asymmetries. The engagement of independent expert advice, opportunities for the parties to make submissions and publication of a draft decision that explains the regulator's reasoning, ensures a level of transparency that is unlikely to continue in a negotiate-arbitrate framework.

Administrative and compliance burden
Commercial negotiation can be efficient, but the the process may become overly protracted and costly if the parties do not have appropriate incentives to reach agreement

AUSTRALIAN GAS NETWORKS (SA)
Regulator approved full access arrangement
In its draft decision on the 2016 to 2021 access arrangement, the AER commented that, '*In some cases, greater prescription or intervention on our part in determining these terms and conditions may impede competitive market outcomes and be inefficient. There are two reasons for this: first, our lower level of information than that of AGN and users and second, the user-specific nature of many issues. Accordingly, we will generally avoid proposing amendments in these cases where flexibility to negotiate commercial outcomes is desirable*'.

QUEENSLAND RAIL (QR)
Reference tariffs
In its decision on QR's 2001 Draft Access Undertaking, the QCA concluded '*Reference tariffs were set to reduce the transaction costs associated with negotiating access agreements and provide a transparent basis against which above-rail operators are able to most cost-effectively satisfy customer demand*'.

DBCT
Reference tariff
While the cost determination and forecasting undertaken to calculate the TIC can be complex, stakeholders and the QCA now have robust techniques in place to question and better understand the costs, risks and service quality commitments that drive DBCT Management's revenue requirement. Moving to a negotiate- arbitrate framework would limit visibility into how access charges are calculated and increase the likelihood of disputes that cannot be resolved without arbitration.

4.3.1 Contestability and the threat of entry

A defining economic characteristic of DBCT is the limited contestability evident in the market for DBCT's coal handling services. There are significant barriers to new entry for the provision of coal handling services, and limited scope for existing ports to be redeveloped, or new competing ports established, in order to provide direct competition to DBCT.

Terminal capacity, the total cost of operations and underlying contractual arrangements constrain the viability of substitution between DBCT and alternative terminals. DBCT is one of two coal terminals that operate at the Port of Hay Point (the Port). DBCT is a common-user coal export terminal while the Hay Point Coal Terminal (HPCT) operates as a single-user terminal to service the export requirements of BHP Billiton Mitsubishi Alliance exclusively. HPCT is not a viable substitute for the coal handling services offered by DBCT. BHP/BMA have never made available HPCT capacity to any other user other than BMA, BHP Mitsui Coal or their predecessors and, for efficiency reasons, we understand BHP has advised that it would not make available capacity at HPCT to third parties.

The QCA has already expressed its initial views on the availability of viable substitutes in the market for DBCT's coal handling services in the Goonyella coal system. In its Draft Recommendation,[58] the QCA concluded that neither the alternative multi-user terminals at Abbot Point, Wiggins Island or RG Tanna, nor the vertically-integrated HPCT, provide strong substitution possibilities to DBCT.[59] In its previous decision in relation to the 2017 DAU, the QCA drew particular attention to significant switching costs users would face:

> *We considered users attempting to switch significant tonnages from DBCT to other terminals would face significant costs (i.e. differences in port charges, below-rail costs and above-rail haulage costs), which meant switching is not likely to be a commercially viable option for many users.*[60]

4.3.2 Number of access seekers and their countervailing market power

DBCT is a multi-user export terminal, with more than ten users of the Terminal, each with a long-term agreement underpinning access to DBCT and none with a dominant share of terminal capacity. Forecasts of throughput estimated by Wood Mackenzie[61] indicated that the largest single user (Anglo American) accounted for just under 28 per cent of the terminal's 74 million tonne operating throughput in the 2019 calendar year. This implies very limited countervailing market power on access holders' side of the market to balance DBCT Management's market power.

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[58] QCA (2018) *Draft recommendation: Part C: 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

[59] QCA (2018) *Draft recommendation: Part C: DBCT declaration review*, p. 30, available at: http://www.qca.org.au/getattachment/f381d591-bfc6-4974-9d58-a5f47e32d0e3/Part-C-Draft-recommendation-%E2%80%93-the-DBCT-service.aspx

[60] QCA (2016) *Final decision: DBCT Management's 2015 draft access undertaking*, p. 10, available at: https://www.qca.org.au/getattachment/081401b3-903e-4aea-b9fd-9da8e544cf94/Secondary-Undertaking-Notice%E2%80%94Attachment%E2%80%94QCA-decisi.aspx

[61] Wood Mackenzie, March 2019

Further, the long-term nature of take-or-pay commitments in the DBCT User Agreements further reduces the level of countervailing market power, as any re-contracting must align with the term of take-or-pay commitments in the upstream rail haulage and rail access markets. While the existing user agreements provide for regular reviews of the method of calculating charges based on negotiation between DBCT Management and the user, users are restrained in their ability to negotiate price terms as the threat of withdrawing services is not credible.

Finally, the long-term nature of the take-or-pay contracts in place at DBCT means that, even if a new entrant predicted strong demand for export volumes, that entrant cannot readily compete for capacity at the Terminal, particularly in the current environment where DBCT Management advises that the Terminal is already fully contracted for existing capacity.[62] While an *ex ante* form of regulation will not in and of itself create a credible threat of new entrants, the QCA's assessment of the efficient costs of providing the service (including an appropriate return on investment) provides a level of assurance to users and access seekers that DBCT Management will be incentivised to deliver capacity expansions over time.

There is little evidence of countervailing market power that would act to constrain DBCT Management, in the absence of regulatory intervention, from dictating the terms on which access is granted, including price. The QCA came to a similar conclusion, as outlined in the declaration review findings:

> *…[T]he QCA's view is that since other export terminals would not be a viable substitute for DBCT, both existing users—in so far as they require more capacity and are unable to obtain additional capacity through the transfer mechanism—and new entrants would have no effective countervailing power against DBCT Management in a future without declaration.*[63]

4.3.3 Likely demand for the 'reference services'

Access seekers have a strong demand for components of the coal handling service at DBCT. The components typically sought by third parties seeking access to DBCT facilities include:

- unloading
- stockpiling and cargo assembly
- coal blending
- out-loading

Determining pricing terms *ex ante* for these services reduces the likelihood of disputes with a large number of access seekers, while providing the flexibility to address bespoke needs of individual users and support investment in terminal capacity expansions, if and when they are required.

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[62] DBCT Management (2019) *2019 DAU Submission*, p. 12, available at: http://www.qca.org.au/getattachment/c7b2 8c19-c03e-4b15-a89a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

[63] QCA (2018) *Draft recommendation: Part C: DBCT declaration review*, p. 66, available at: http://www.qca.org.au/getattachment/f381d591-bfc6-4974-9d58-a5f47e32d0e3/Part-C-Draft-recommendation-%E2%80%93-the-DBCT-service.aspx

The QCA previously accepted that there was merit in approving a reference tariff and standard access agreement (SAA) in the 2017 AU in order to provide greater certainty, rather than leaving common issues to negotiation and potential disagreement. The QCA observed that both DBCT Management and access holders were operators of long lived capital intensive assets, and as such there was merit in defining a 'reference service for a long term take or pay contract as it provides certainty for both DBCT Management and the access holder'.[64]

4.3.4 Degree of information asymmetry

There are significant protections provided by the QCA's current practices which reduce information asymmetries. The engagement of independent expert advice, opportunities for the parties to make submissions and publication of a draft decision that explains the regulator's reasoning, ensures a level of transparency that is unlikely to continue in a negotiate-arbitrate framework.

Under the negotiate-arbitrate model proposed by DBCT Management, a lack of information would put users at a significant disadvantage. This issue is particularly acute for users or access seekers whom are not shareholders in Dalrymple Bay Coal Terminal Pty Limited (DBCTPL), given the additional visibility afforded the operator as to certain Terminal management matters. However, even with the vantage point of DBCTPL, this is not the type of information that would enable a user to assess whether prices are consistent with the long-run marginal cost of service provision, or what an appropriate return on assets would be.

An advantage of the current regulatory framework is that it balances regulatory complexity. It allows for disclosure of information to access seekers and users of the terminal that allows these stakeholders to form a view on value more easily, whilst preserving the ability for DBCTM to retain confidentiality over certain matters which it believes otherwise would commercially be disadvantageous (yet with the protection of regulatory validation of matters over which confidentiality is claimed).

Referring a dispute to the QCA for arbitration is not costless, but an arbitrated decision may appear more attractive where users and access seekers do not have any information upon which to assess the price and non-price terms proposed by DBCT Management.

4.3.5 Administrative and compliance burden

In the case of DBCT, it is likely that the negotiate-arbitrate framework proposed by DBCT Management will result in protracted negotiations or a complex arbitration, recognising that:

- negotiations to date regarding expansions and other developments at the Terminal have not been resolved without intervention, and this situation appears unlikely to improve

[64] QCA (2004) *Draft Decision: Dalrymple Bay Coal Terminal Draft Access Undertaking*, p. 76, available at: http://www.qca.org.au/getattachment/dd6f9368-3c28-44e5-9350-7549981b461e/2004-Draft-Decision-re-DBCT-Draft-Access-Undertaki.aspx

- the cost of expansions and other developments are likely to be significant and contentious, with users likely to prefer the protection of a regulator-determined framework for these initiatives
- to the extent that DBCT is fully contracted for existing capacity, current users and any third party seeking access will be competitors for new or expanded capacity, which increases the risks of disputes arising

The 2017 access undertaking approved by the QCA includes an allowance for the costs incurred by DBCT Management in complying with the regulatory regime.[65] The QCA notes, as is the case with the QCA levy, these costs are ultimately borne by users, not DBCT Management.[66]

Arbitration is more likely where the parties expectations diverge significantly

Looking at the 2019 DAU, although DBCT Management has not provided any indication of the TIC that it would expect to apply as part of the next access undertaking, DBCT Management's previous engagement with the QCA, including through previous DAU processes and the ongoing declaration review, implies that DBCT Management views the current TIC as too low. For instance, DBCT Management's 2019 DAU submission indicates that it considers previous access charges determined by the QCA do not provide a reasonable opportunity to recover efficient costs:

> *Heavily prescribed access charges in the form of a formulaic building blocks methodology and a published reference tariff, along with the other terms and conditions of access that DBCTM must offer access seekers (which are set out in the standard access agreement (SAA) that DBCTM must offer to access seekers), means that under the previous access undertakings DBCTM and access seekers have not had a real or meaningful opportunity to negotiate to reach a commercial access arrangement.*
>
> *In reality, access charges have been set by the QCA at the minimum possible level which is permissible under the pricing principles – the perceived efficient costs of providing the service.*[67]

Further, DBCT Management submitted that the current non-expansion capital works program (NECAP) at the Terminal supported a higher base tariff:

> *...to inform the base tariff, it is relevant to consider the investment requirements in infrastructure at the existing terminal over the regulatory period. In periods of low NECAP expenditure, it is possible that a lower base tariff (or incentive) may be sufficient to promote investment in the terminal. Likewise, in periods of high NECAP expenditure, a higher base tariff will meet the objective of promoting investment in the terminal...*
>
> *Appendix 5 contains extracts from the Operator's 5-year [Operation Maintenance and Capital Plan] which reveal that the NECAP requirements, being the "investment in infrastructure" contemplated by Part 5 of the QCA Act, are expected to be at record*

[65] QCA (2018) *Draft recommendation: Part C: DBCT declaration review*, p. 118-119, available at: http://www.qca.org.au/getattachment/f381d591-bfc6-4974-9d58-a5f47e32d0e3/Part-C-Draft-recommendation-%E2%80%93-the-DBCT-service.aspx

[66] Ibid.

[67] DBCT Management (2019) *2019 DAU Submission*, p. 11, paras [40]-[41], available at: http://www.qca.org.au/getattachment/c7b28c19-c03e-4b15-a89a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

highs over the upcoming Pricing Period. This should inform the base tariff for negotiations.[68]

Figure 6, below, provides an illustration of the expectations of each of DBCT Management and users as to appropriate terminal access charges:

- The first comparison reflects submissions on the 2016-17 TIC received as part of the 2015 DAU, including DBCT Management ($3.09/tonne), the User Group ($2.10/tonne) and the QCA-determined charge ($2.43/tonne).
- The second comparison shows the TIC approved by the QCA for FY20 ($2.51/tonne) and a calculation of an indicative FY20 TIC ($3.40/tonne) applying the conventional, QCA building block approach, but with parameters based on previous DBCTM submissions. To calculate this indicative TIC we overlaid each of the pricing claims made by DBCT Management in the 2015 DAU and subsequently, to understand the likely magnitude of these changes in pricing assumptions on an indicative TIC for FY20. Further information on the modelling approach is provided in section 5.

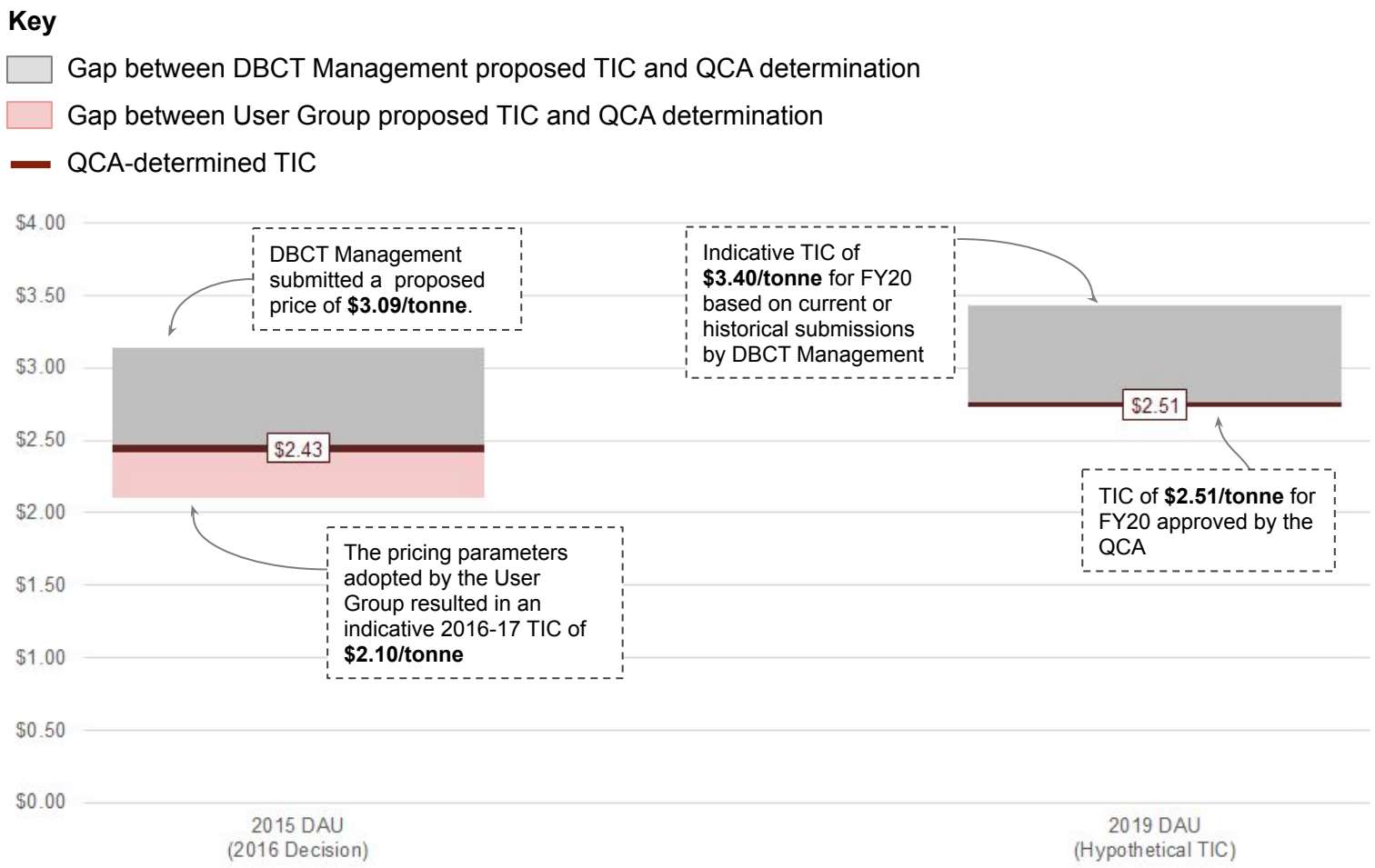
In 2015, DBCT Management's proposed TIC was around 27 per cent higher than that ultimately determined by the QCA, and around 47 per cent higher than the TIC implied using the pricing parameters submitted by the User Group.

Applying pricing parameters previously and otherwise submitted by DBCT Management would imply a TIC of around $3.40 per tonne, or around 35 per cent higher than the QCA-approved TIC of $2.51.

This implies a significant difference in expectations as to an appropriate access charge, which in turn would make it less likely that that direct negotiation between the parties will successfully conclude in an agreement on access prices. A negotiate-arbitrate framework would not necessarily offer advantages in the form of reduced regulatory and compliance costs for parties, given the likelihood that negotiations fail to progress and dispute resolution follows.

[68] DBCT Management (2019) *2019 DAU Submission*, p. 50, paras [236]-[239], available at: http://www.qca.org.au/getattachment/c7b28c19-c03e-4b15-a89a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

Figure 6: Comparison of proposed TICs, 2015 DAU and 2019 DAU



5. Indicative TIC modelling

5.1 Introduction

DBCT Management's 2019 DAU proposes to move away from an *ex ante* QCA-determined TIC. The TIC would instead be determined through negotiation with each customer, with recourse to arbitration if necessary.

Given the negotiate-arbitrate proposal, the DBCT User Group has sought to understand DBCT Management's expectation of a 'negotiated' TIC. The analysis in this section determines an indicative DBCTM TIC, based on the adoption of cost-based modelling parameters consistent with those claimed by DBCT Management in its current or historical submissions.

5.2 Modelling approach

To quantify the pricing claims made by DBCT Management in current or historical submissions, we developed a model which calculates the FY20 TIC applying the conventional, QCA building block approach. Using this model, we overlaid each of the pricing claims made by DBCT Management to understand the likely magnitude of these changes in pricing assumptions.

There are a number of elements to the QCA and DBCT Management's approach to modelling which are opaque (including the calculation of a tax allowance) or at least are not completely specified (such as asset-level information sufficient to perfectly recreate depreciation provisions, particularly for new capital investment). Notwithstanding these constraints, the model we have developed calibrates closely to the $2.51/tonne TIC determined by the QCA for FY20 and we believe therefore provides a reliable indicator of the order-of-magnitude impact of various pricing assumptions.

5.3 DBCT Management pricing assumptions

The pricing claims used in modelling the TIC are outlined in Table 2.

Table 2: Pricing assumptions applied in modelling

DBCTM Pricing Claims	Description
DBCT Management WACC parameters	DBCT Management adopted the following risk parameters in determining the nominal post-tax WACC applied in its 2016 DAU submission: ● a market risk premium (MRP) equal to 8.0%[69] ● an equity beta equal to 1.0[70] ● a gamma value equal to 0.25[71] Adopting these factors (and the QCA 2017 AU market parameters) results in a WACC of 6.76% (as compared to 5.82% applied in the 2017 AU).
Remediation premium	In its 2019 DAU, DBCT Management provides an updated estimate for terminal rehabilitation of $1.22 billion (in October 2018 terms).[72] This suggests an annual remediation allowance of around $28 million, relative to the current allowance of $7.02 million. However, the increase DBCT Management would seek for the remediation allowance is likely to be understated as it does not reflect the tax treatment claimed by DBCT Management in the 2017 Modelling DAAU.
Remaining useful life	In its 2016 DAU submission, DBCT Management submitted a capped economic life of 25 years[73] impacting the terminal depreciation profile and TIC. The following analysis adopts DBCT Management's 25 year maximum life assumption, applying from 1 July 2019
Corporate costs (high-level benchmarking)	DBCT Management provided a range of corporate cost estimates in the 2016 DAU. We have adopted the top of this range for this analysis, $11.6 million (2016-2017 terms).[74]
Imputation (Gamma)	DBCT Management submitted in the 2016 DAU that the appropriate estimate of the gamma parameter (which affects the tax cost allowance included in the post-tax revenue modelling) was 0.25. The QCA currently applies 0.47
Working capital days	In the 2016 DAU, DBCT Management claimed its actual average number working capital days was 45,[75] and on that basis required a higher working capital allowance in the RAB. The QCA currently applies 30 days.

[69] DBCT Management (2015) *2016 DAU submission*, p. 49, available at: http://www.qca.org.au/getattachment/5814e3ed-0665-4c80-b52d-63b9f5da5305/TEST-FILE.asp

[70] Ibid

[71] Ibid

[72] DBCT Management (2015) *2016 DAU submission*, p. 51, available at: http://www.qca.org.au/getattachment/5814e3ed-0665-4c80-b52d-63b9f5da5305/TEST-FILE.asp

[73] DBCT Management (2015) *2016 DAU submission*, p. 25, available at: http://www.qca.org.au/getattachment/5814e3ed-0665-4c80-b52d-63b9f5da5305/TEST-FILE.asp

[74] DBCT Management (2019) *2019 DAU submission* p. 53, available at: http://www.qca.org.au/getattachment/c7b28c19-c03e-4b15-a89 a-c04544eaf70c/DBCTM%E2%80%942019-DAU-submission.aspx

[75] DBCT Management (2015) *2016 DAU submission*, p. 57, available at: http://www.qca.org.au/getattachment/5814e3ed-0665-4c80-b52d-63b9f5da5305/TEST-FILE.asp

5.4 Indicative TIC modelling

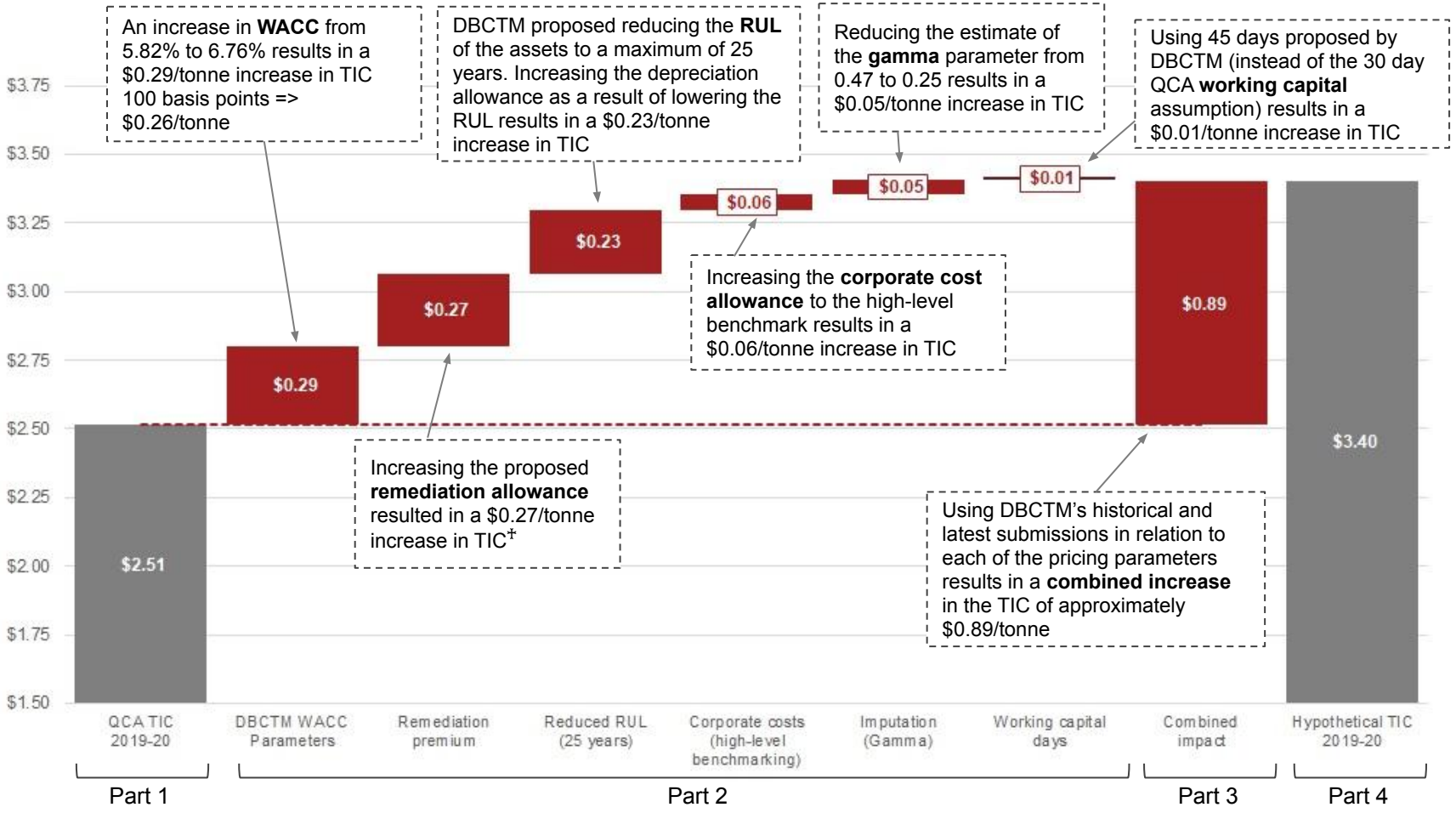
Figure 7 shows the impact of adopting DBCT Management's WACC and non-price parameters on the estimation a FY20 TIC. There are four parts to the calculation:

- **Part 1: Baseline** - the FY20 QCA-determined TIC of $2.51/tonne represents the baseline.
- **Part 2 : Impact of individual inputs** - the estimated impact on the TIC from changing a single modelling input. This analysis models the impact of changing a single parameter value while holding all other parameters fixed.
- **Part 3: Combined impact** - the estimated impact on the TIC from changing all modelling inputs simultaneously.
- **Part 4: Hypothetical TIC** - hypothetical value for the FY20 TIC calculated by adding the combined increase to the baseline

Figure 7 illustrates the likely significant gap in expectations between DBCT Management and the DBCT Users and suggests that a 'negotiated' TIC acceptable to DBCT Management would be materially higher than the current regulator-determined rate. The User Group has argued against each of the historical claims under the existing AU processes, and importantly the QCA has previously rejected these claims.

The apparent significant gap between DBCT Management and DBCT Users as to the appropriate and reasonable charge for access to the Terminal would be a significant challenge for any commercial negotiation, in which case the dispute is likely to proceed to arbitration. Thus, one of the claimed advantages of a negotiate-arbitrate approach – minimising the likelihood of direct regulator intervention – is unlikely to be realised.

Figure 7: QCA FY20 TIC compared to proxy DBCT Management pricing based on current and historical documented claims



‡Note: the estimated TIC impact reflects the latest Rehabilitation Cost Estimate prepared by GHD. However, the increase DBCT Management would seek for the remediation allowance is likely to be understated as it does not reflect the tax treatment claimed by DBCT Management in the 2017 Modelling DAAU.

Schedule 2 – Summary of Responses to QCA Staff Questions

	QCA Staff questions	DBCT User Group Response	Reference to DBCT User Group Submission
1.	DBCT Management submits that its 2019 DAU provides an undertaking that is 'fit-for-purpose and proportionate' to the competition problem that declaration of the DBCT service would address, as identified in the QCA's draft recommendation concerning review of the declared DBCT service (pursuant to section 87A of the QCA Act). Do stakeholders consider the scope of the competition problem identified in the declaration review as a relevant factor in assessing the 2019 DAU?	The findings of the declaration review in respect of criterion (a) do not determine the appropriate scope of the DBCT access undertaking. To be approved, the QCA must be satisfied that the access undertaking is appropriate having regard to the factors in section 138(2) QCA Act, which are significantly wider that the competition problem in a particular dependent market which led to criterion (a) being satisfied. What is relevant to the QCA's consideration is the findings in the declaration review that DBCT has market power, there are no close substitute services, users have no countervailing power, it is profit maximising for DBCTM to engage in monopoly pricing and they have the ability and incentive to do so other than due to the constraints imposed by the QCA regulatory regime.	Section 3
2.	DBCT Management's 2019 DAU replaces the prescribed terminal infrastructure charge (TIC) that is in the 2017 access undertaking with a negotiate/arbitrate framework for determining access charges. (a) Do stakeholders consider this framework will allow access seekers to obtain access in an effective and timely manner? (b) Would any additional features be needed to ensure that the negotiate/arbitrate framework could work effectively?	(a) A negotiate/arbitrate regime will not allow access seekers to obtain access in an effective and timely manner – as the extent of market power DBCTM has, the incentives it has to engage in monopoly pricing, the information asymmetry that exists are likely to make negotiations protracted and costly, with high potential for further costly arbitration. As discussed in the PwC Report, even on conservative assumptions about what DBCTM's price expectations might be in a negotiate/arbitrate model, the substantial difference in price expectations confirms the difficulty that will be encountered in commercial negotiations.	Sections 6 to 16

		(b) The negotiate / arbitrate regime is so inappropriate for the circumstances of the DBCT service that it cannot be altered to make it effective. The extent of DBCTM's market power and the inefficient and anti-competitive outcomes that will otherwise result, justify reference tariff regulation.	
3.	DBCT Management submits that the 2019 DAU would ensure that access seekers are provided with an appropriate level of information to enable them to negotiate from an informed position – the 2019 DAU (section 5.2(c)(2)) provides that an access seeker may request from DBCT Management the information set out in section 101(2) of the QCA Act. DBCT Management must provide the information within 10 business days of receiving a request. (a) Do stakeholders consider that provision of this information by DBCT Management will allow access seekers to negotiate for access from a sufficiently informed position? (b) If not, what additional information requirements may be needed to support effective negotiation?	One of the many reasons that lead to a negotiate / arbitrate form of regulation being inappropriate in relation to the DBCT service, is the difficult of resolving appropriate pricing through commercial negotiations. The information asymmetry access seekers will suffer under is part of that (but resolving it would not resolve the problems that arise from DBCTM's market power). DBCTM will always be in a position of being far better informed than an individual access seeker or holder about major cost components which impact on the efficient and appropriate price (as the entity that is actually incurring the relevant costs, actually taking out relevant debt, designing and developing expansions and making the investment in capital expenditure). The issues arising from information asymmetry are exacerbated here where there is significant contention, and therefore great uncertainty about what constitutes efficient costs for things like terminal expansions and remediation costs. Many users will simply not have the resources or experience to be able to determine whether costs are efficient and prudent or whether a rate of return requested by DBCTM Management is appropriate. Reference to the information provisions in section 101 of the QCA Act is not sufficient to resolve this information asymmetry given the limited high level nature of the information that section can require DBCTM to produce.	Section 15

4.	DBCT Management's 2019 DAU provides for disputes regarding access charges to be determined by arbitration by the QCA. In any such arbitration, DBCT Management submits that the QCA must have regard to 'the TIC that would be agreed between a willing but not anxious buyer and a willing but not anxious seller of coal handling services for mines within a geographic boundary drawn so as to include all mines that have acquired, currently acquire or may acquire coal handling services supplied at the Port of Hay Point. Do stakeholders consider that having regard to this 'willing but not anxious buyer and seller's concept is appropriate in an arbitration'?	As made clear in this submission, the DBCT User Group strongly consider that negotiate/arbitrate itself is inappropriate in relation to the DBCT service. In addition, stakeholders consider this proposed factor is inappropriate for two key reasons: 1) the concept of a 'willing but not anxious' buyer and seller is appropriate in relation to independent valuations where there are comparable sales of assets in a competitive market available – but not appropriate in relation to DBCT service where DBCTM's market power and the lack of alternatives, make this an entirely hypothetical and unworkable factor; and 2) the geographic boundary referred to is clearly intended to include in the test reference to other terminals – which have been found to be clearly not substitutes and some of which are materially higher cost – such that they are clearly an inappropriate reference point.	Section 16.1
5.	The 2019 DAU provides that, in an arbitration, the QCA must have regard to the types of services provided to the access seeker as a factor in determining the TIC. DBCT Management submits that the Integrated Logistics Company (ILC) has indicated its willingness to assist in modelling the impacts on terminal efficiency resulting from specific user service requests. Do stakeholders consider that the modelling resulting from specific user service requests and the engagement of ILC would be appropriate?	No – the DBCT User Group strongly considers that differential pricing for minor variations to the coal handling service are not appropriate – particularly where they would be unable to be determined with precision even with modelling. The minor differences in cost and capacity consumed do not warrant differential pricing, and given the varied extent to which they are used, and how that is impacted by numerous other factors, the DBCT User Group queries whether they are even capable of estimation with the type of precision such modelling would suggest. Even if it is assumed that ILC could somehow model this, the estimated differences will be highly dependent on a number of assumptions that will not be realised in practice. Arbitrary and difficult to verify adjustments are not warranted for such small amounts.	Sections 11.2 and 16.2

		The Standard Access Agreement already provides appropriate provision for materially different services (which these minor variations are not).	
6.	The 2019 DAU also provides that, in an arbitration, the QCA must have regard to 'any other TIC agreed between DBCT Management and a different Access Holder for a similar service level'. (a) Would an access seeker have sufficient information about the level and build-up of such 'other TIC' to be able to effectively negotiate access and/or participate in an arbitration process? If not, what other information would be required to enable them to do so? (b) Would there need to be specific processes for access seekers to gain access to this information? (c) Do stakeholders have any concerns regarding the provision of such information to access seekers, and if so, how might such concerns be addressed?	The DBCT User Group strongly disagrees with DBCTM's claim that making this a relevant factor will facilitate the determination of a TIC that is reflective of prices that would prevail in a workably competitive market, given that any such prices agreed with DBCTM would have been agreed in a market that is evidently not workably competitive. Under DBCTM's proposed regulatory arrangements, the TIC would have been negotiated in the context of DBCT having market power, there being no close substitutes, no countervailing power, information asymmetry, the service potentially have different values to individual access seekers, and the costs and delays or arbitration resulting in high potential for agreements to be reached at inefficiently high prices. In any case, the 2019 DAU provides no mechanism for how this information would be provided to access seekers (and doing so raises questions about the commercial sensitivity of different tariffs), whether this information would be broken down into distinct components such that an access seeker could consider its appropriateness on a bottom-up analysis basis, and how the circumstances of the user who has previously agreed that TIC could be disclosed to an access seeker (so as to allow them to understand the context in which such a TIC was agreed) without disclosing commercially sensitive information about that existing user. The DBCT User Group considers that the commercial sensitivities cannot realistically be overcome without limiting the details provided to the point that it simply produces another point of information asymmetry.	Section 16.3
7.	The negotiate/arbitrate framework contained in DBCT Management's 2019 DAU may have the potential to lead to an increase in the number of access disputes that the QCA needs to arbitrate. If such disputes are referred to	For the reasons provided in these submissions (and as summarised in response to a number of other of the QCA Staff Questions), the DBCT User Group:	

	the QCA for arbitration, the QCA will not be able to reach any determinations that are contrary to the provisions of an approved access undertaking. Do stakeholders consider that any provisions in the 2019 DAU would inhibit the QCA in making appropriate arbitration determinations?	• Strongly agrees that a negotiate / arbitrate regime will increase the number of access disputes that the QCA is required to arbitrate; • However, feels that the difficulties of the negotiate / arbitrate regime are so structural that there is no amount of amendments that could be made to the text of the 2019 DAU to make such an approach appropriate.	
8.	DBCT Management observed that the negotiate/arbitrate model for determining access prices is an accepted approach in access undertakings in Australia. In this context, DBCT Management referred to acceptance by the Australian Competition and Consumer Commission (ACCC) of access undertakings for wheat export terminals and to the form of 'light-handed' regulation applied to some covered pipelines under the National Gas Law. DBCT Management also referred to the Productivity Commission's draft report on the review of the economic regulation of Australian airports, and noted that the Commission has proposed to reject submissions from airlines and the ACCC that recommend the existing regime be replaced by a more interventionist approach. (a) Do stakeholders agree that the negotiate / arbitrate model for determining access prices is an accepted approach in access undertakings in Australia (b) Do stakeholders consider that acceptance and operation of these regulatory framework for wheat export terminals and some covered gas pipelines are relevant to the assessment of DBCT Management's 2019 DAU?	(a) The DBCT User Group acknowledge that negotiate/arbitrate regulation is utilised for some infrastructure services. However, reference tariffs or ex-ante pricing regulation are also a very common form of economic regulation. The Productivity Commission clearly recognises that there is no 'one size fits all' universally correct approach, and the appropriate form of regulation is determined by factors such as the extent of market power of the infrastructure provider, extent of competition or countervailing power of users, the number of customers, the extent of information asymmetry and the complexity of negotiation of price. Where there are undertakings or access arrangements that are specific to a particular facility or service rather than an industry or significant infrastructure more generally it is in far more common for reference tariffs to be applied. The critical issue is understanding the characteristics of the regulated service and the market in which it is provided. Given the characteristics of the DBCT service, it is clear that reference tariffs are the only appropriate form of regulation. (b) When the form of regulation factors in the NGL are considered it is clear that those pipelines for which light regulation determinations are made have very different characteristics to DBCT (i.e. they don't have market power or they are constrained by countervailing power of users or competition with other pipelines), and that any pipeline with similar	Sections 6 to 16

	(c) Do stakeholders consider that the regulatory regime for Australian airports (and the Productivity Commission's review) are relevant to the assessment of DBCT Management's 2019 DAU?	characteristics to DBCT would be subjected to full regulation (involving ex-ante price regulation). Similarly, the characteristics of the wheat ports are fundamentally different. In particular, they face actual competition from other wheat ports, different ways of exporting wheat (through containers), the ability to sell wheat domestically and the threat of new entry. Accordingly, it is not appropriate to draw analogies in the way DBCTM seeks to. (c) Analogies cannot be drawn as to the appropriate form of regulation for the DBCT service based on the regulatory regime for Australian airports and the Productivity Commission's review given the different position of airports (particularly in relation to the countervailing power of airlines and the incentives not to engage in monopoly pricing of aeronautical services that exist due to the damage that would do to the profitability of the airports' other businesses)	
9.	DBCT Management submits that when commencing negotiation with access seekers, it will offer a base tariff, plus tariffs for additional services. It clarified that it provides additional services to users about the standard service of handling coal, and that users require distinct combinations of services and value those combinations differently to each other. (a) Do stakeholders consider DBCTM Management's concept of a base tariff (that is, one that 'maximises throughput efficiency of the terminal') appropriate? (b) Do stakeholders consider DBCT Management's description of the base tariff (as described in paragraph 203 of its explanatory submission) appropriate?	All of the minor variations to the coal handling service referenced by DBCTM are, and should continue to be, considered part of the standard coal handling service. The DBCT User Group strongly considers that differential pricing on the basis of the minor variations to the coal handling service referred to by DBCTM (such as blending and co-shipping) are not appropriate. The minor differences in cost and capacity consumed do not warrant differential pricing, and given the varied extent to which they are used, and how that is impacted by numerous other factors, the DBCT User Group queries whether they are even capable of estimation with the type of precision such modelling would suggest. The Standard Access Agreement already provides appropriate provision for materially different services (which these minor variations are not). Accordingly:	Sections 11 and 16.2

	(c) Do stakeholders consider it commercially reasonable to identify additional services at DBCT, and value those services separately to the standard service of handling coal? (d) Should any of the additional services identified by DBCT Management (e.g. coal blending opportunities) be considered as part of the core coal handling service.	(a) a base tariff constructed in the way DBCTM suggests is inappropriate (b) the concept of the base tariff as proposed by DBCTM is flawed – such that its description by DBCTM is not appropriate (c) it is not commercially reasonable to classify these minor variations as different services with different values (d) all of the minor variations referred to by DBCTM are part of the core coal handling service.	
10.	DBCT Management submits that existing users are fully protected by existing user agreements, including in the absence of an access undertaking. Do stakeholders agree that existing users would be fully protected under the terms of user agreements alone?	No – the DBCT User Group strongly considers that existing users would not be 'fully protected' without an undertaking that provides reference tariffs. There is a material difference between it being found in the declaration review that the pricing review clauses provide some constraints on DBCTM's ability to engage in monopoly pricing (relative to access seekers who have no equivalent rights) and such existing users being fully protected. In particular, the price review provisions of the existing user agreement are limited to a contractual negotiate/arbitrate regime, which is clearly less favourable than regulatory reference tariffs as: • it removes the certainty provided by up-front terminal infrastructure charges being determined by the QCA – which will have a detrimental impact on investment incentives; • it relies on more costly arbitration mechanisms and will result in numerous costly and protracted contractual negotiations – when, by contrast, reference tariffs and standard access agreement terms currently provide for very efficient negotiations; • the prospects of arbitration being called on appear extremely high given the differences between users and DBCTM's views of an appropriate WACC and efficient costs as evidence in all	Section 4

		previous undertaking processes – as discussed in detail in the PwC Report; and • it is likely to result in inefficient price discrimination for reasons unrelated to cost or risk (as not all access seekers will have the resources to participate in costly arbitrations, and some will settle at pricing that reflects the negotiating dynamics produced by DBCTM's market power). In addition, the existing user agreements only provide that price review protection in relation to the existing contracted tonnage. For any additional tonnage an existing user seeks they are completely dependent on the access undertaking (as are all access seekers).	
11.	DBCT Management said that to facilitate negotiations during the 2019 DAU process and inform related discussions, its consultant GHD has developed a rehabilitation plan consistent with the requirements of the Port Services Agreement. DBCT Management said it does not propose a process or specific value for the remediation allowance, but considers the detailed rehabilitation plan should inform price negotiations and any arbitration of a dispute regarding price. (a) Should the QCA formally review the rehabilitation plan as part of its assessment of the 2019 DAU? (b) Do stakeholders consider DBCT Management's proposal for the rehabilitation plan to inform price negotiations and any arbitrations of disputes to be reasonable?	As discussed in detail in these submissions, the DBCT User Group considers that it is clearly appropriate to retain reference tariffs for the DBCT service. Consequently, the DBCT User Group anticipates that the QCA will need to determine an appropriate remediation allowance as part of determining the appropriate TIC. In order to do that, the QCA will need to review the rehabilitation plan – not least because DBCTM is seeking to assert that it justifies a near tripling of the estimated remediation cost on which the existing QCA approved remediation allowance is based. However, that review would be to determine an appropriate estimate for remediation costs rather than to provide detailed engineering commentary or changes that would be required to make the plan appropriate. The extremely wide range of remediation cost estimates and the extreme difficulty for an access seeker in being able to assess the reasonableness and prudency of the plan and related estimate, confirm the real difficulties inherent in DBCTM's proposed negotiate/arbitrate model.	Section 18

12.	DBCT Management indicated that the non-price terms in the 2019 DAU are similar to those in the 2017 access undertaking, but with some amendments. Do stakeholders consider that the non-price terms proposed by DBCT Management in the 2019 DAU are appropriate?	As set out in section 20 and Schedule 3, the DBCT User Group are supportive of some of the proposed amendments, have suggested amendments to others and considers others are inappropriate.	Section 20 and Schedule 3

Schedule 3 – Summary of Position on Access Undertaking Changes

Item	Provision of AU	DBCTM Comments	DBCT User Group Submissions
1.	1.6 - Amendments to current Access Undertaking during DAU process	It is DBCTM's intention that any amendments to the 2017 AU submitted for approval by way of draft amending access undertaking and approved by the QCA prior to the commencement of this new DAU will be captured in the DAU prior to its final approval by the QCA. DBCTM has made note of this intent in clause 1.6 of the 2019 DAU.	While the DBCT User Group appreciates that is DBCTM's intention (and the new clause 1.6(b) only records that intention) – without knowing what amendments DBCTM is proposing, the DBCT User Group is not comfortable that it is appropriate to record such an intention in the undertaking. The DBCT User Group notes the number of draft amending access undertakings that have been rejected by the QCA as not appropriate or withdrawn by DBCTM during the current undertaking.
2.	3.1(f) – remove "Trading SCB"	DBCTM will de-register the Trading SCB prior to the effective date of the 2019 DAU and has removed all references to the "Trading SCB".	DBCT User Group is willing to support this amendment provided the ultimately approved undertaking contains a clear commitment from DBCTM and its Related Bodies Corporate not to own Supply Chain Businesses (which in turn is defined widely enough to including an entity like the Trading SCB). It would be appropriate for DBCTM to be required to prove that it has deregistered the Trading SCB and ceased all of its operations before any changes of this nature are made (given that DBCTM promised this would occur in the declaration review processes but based on DBCTM's submission in this process it appears that that has still not occurred a long time after DBCTM first announced that intention).
3.	3.3 – OMC	Section 3.3 is removed in the 2019 DAU as it is not required in light of Section 3.2.	The DBCT User Group continues to consider the previous clause 3.3 is appropriate for the reasons set out in the QCA decisions and DBCT User Group submissions on the inclusion of clause 3.3 in the current access undertaking. In particular, the independent operator is critically important to Users in terms of transparency and operational involvement of users and underpins

			fundamental parts of the undertaking and access agreements including the approach to pass through of operational charges. The purpose and effect of clause 3.3 is also different to that of clause 3.2. Clause 3.3. requires DBCTM to maintain and comply with the Operation and Maintenance Contract and ensure that it remains consistent with the principles set out in the Schedule. This provides certainty for the Users regarding the operation and maintenance of the Terminal and the terms of the Operator's appointment (which go beyond the matters dealt with in clause 3.2). In any event, given DBCTM's acceptance that it will need to submit a draft amended access undertaking if it was to change the operator, the DBCT User Group does not understand how this section imposes any additional burden on DBCTM.
4.	5.3(f) - Expiry of Access Application	The 2019 DAU removes the transitional provisions around the expiration of access applications that existed at the commencement of the current Access Undertaking. The 2019 DAU provides that each Access Application will expire on the 31st August each year, regardless of when submitted.	The DBCT User Group is willing to support this change, provided that paragraph (b) of the definition of Access Application also extends to clause 5.3 (to make it clear that access applications submitted prior to commencement will be Access Applications for the purposes of clause 5.3). The DBCT User Group accepts that a single, uniform date will reduce administrative burden and provide greater certainty for all parties in the supply chain. Paragraph 5.3(f)(2) is not necessary where all applications must be renewed annually. The DBCT User Group proposes clause 5.3(f) is simplified as follows: "*Subject to an Access Application or Renewal Application (as applicable) lapsing or otherwise being rejected by DBCT Management in accordance with this Undertaking, any Access Application will expire on the next occurring 31 August, unless renewed under section 5.3A*."

5.	5.3(g) - Notice of Expiry	Under the 2019 DAU, DBCTM is not required to notify Access Seekers about the need to renew their Access Application.	The DBCT User Group does not support this change. The User Group considers that a notice should be given to all Access Seekers at least 60 days before expiry of the Access Applications to ensure that the automatic expiry date does not result in applications not being renewed simply due to administrative oversight by an Access Seeker. The User Group does not consider that this would create a burden on DBCTM particularly given the proposed alignment of the same date for all access applications expiring and the potential importance of these applications to Access Seekers.
6.	5.3A - Renewal	The criteria for a Renewal Application under the 2019 DAU ensure that the nominated start date for access is not a date in the past, and clarify a number of points in the renewal application form in Schedule A.	The DBCT User Group is willing to support the change to require the revised date of access to be a date in the future and agrees with DBCTM that that will assist with improving how the 'notifying access seeker' provisions function. The User Group suggests that the wording be clarified as the current wording may allow a date in the past provided that it is a different past date than the date previously nominated. The following is suggested to replace the proposed clause 5.3A(1): "*a revised date for commencement of Access which must be no earlier than 1 September following the date of the Renewal Application*" Further, the DBCT User Group notes that the term 'Renewal Application is having 'the meaning given in Section 5.3A'. However, a meaning is not expressly given to the term in that section. The DBCT User Group suggests that the definition should be as follows: "***Renewal Application*** *means an application to renew an Access Application made under section 5.3A*." In relation to the Renewal Form, the DBCT User Group queries the addition of a requirement to provide information in relation to the status of environmental approvals for the project. The DBCT User Group agrees that there is benefit in the queue being more representative of projects that may actually progress. However, the preceding item already requires a description of progress in obtaining 'necessary approvals'. The DBCT User Group therefore requests clarification from DBCTM as to what additional

			information it is hoping to receive, noting that in most cases it will not be possible to provide any information that is not already publicly available in relation to such approvals and is not willing to support this change until such clarification is provided.
7.	Short Term Available Capacity 5.4(d) – (i) – various	In order to promote the efficient allocation of short-term capacity which may become available from time to time, the 2019 DAU includes a Notifying Access Seeker process for 'Short-Term Available Capacity'. 'Short-Term Available Capacity' is defined as "Available System Capacity which is available commencing within the next 12 months and that is not able to be renewed".	The DBCT User Group is aligned with DBCTM on wanting to promote short term surplus capacity being utilised. However, the DBCT User Group considers that some more guidance should be set out in the DAU about what will constitute 'Short-Term Available Capacity' and how that Short-Term Available Capacity may be offered to the access seekers in the queue. The current definition (coupled with the terms of the Standard Access Agreement which only provided renewal rights if the term is longer than 10 years) suggest that 'Short-Term Available Capacity' is capacity with a term of anything less than 10 years. If that is the intention – it changes the nature of how 'Short-Term Available Capacity' should be dealt with in the undertaking – give that, for example, it is a major commitment to sign an access agreement for 9 years. The DBCT User Group is concerned that the limited criteria within the definition of Short-term Capacity may result in capacity that should be offered as long-term capacity instead being offered as Short-Term Capacity which does not have the same renewal rights and protections afforded to long-term Users. The DBCT User Group considers that only capacity that is available either due to a ramp-up period (which should only ever be available for up to 4 years given the changes proposed to the access application forms) or capacity that is available for a limited period between the expiry/termination of a contract and the known commencement of a new contract (which again should only ever be for a period of a few years) should be defined as Short-Term Available Capacity. At the termination/expiry of any current contract (that is not for Short-Term Capacity) that capacity should be

			offered as long-term capacity (except in the situation where it has been allocated to a User from a future date). However, under current drafting, the DBCT User Group is concerned that capacity could be offered as Short-Term Available Capacity at DBCTM's discretion (even if it was available as long-term renewable capacity). It is also not clear whether any Short-Term Available Capacity will be offered in a bundle, or if not, how DBCTM may choose to parcel it up. For example, in a situation where the capacity is available during a ramp up of a new access agreement, will the available capacity over the ramp up period be offered to the Queue as a single block (of decreasing capacity over the 4 year ramp up period) or offered as 4 x 1 year blocks. It there is 10MT of available capacity will that be offered as 10MT or two parcels of 5MT etc? The way that the capacity is packaged would impact upon a User's ability to use it and the User Group therefore requests clarity on this issue. The DBCT User Group is happy for the Short-Term Available Capacity to be offered to the Queue in a similar manner to other Available System Capacity but with shorter timeframes applying. However, rather than the 30 day timeframe proposed, the DBCT User Group submits that 60 days would be a more appropriate timeframe for Users to make a decision whether to take up the Short-Term Available Capacity and organise the relevant documents and security where the Short-term Capacity is for a term of 5 years or less and 90 days if it is for a period of over 5 years. The DBCT User Group agrees with DBCTM's acknowledgement that not all access seekers will want 'Short-Term Available Capacity', such that it is critically important if this process is included to include (i)(2) regarding a failure to submit an access agreement in respect of Short-Term Available Capacity not affecting an access seekers' position in the queue.
8.	5.4(e)(1) - Notifying Access	To promote the efficient allocation of Available Capacity to Access Seekers in	The DBCT User Group supports the concept that the Notifying Access Seeker does not need to nominate a date that is at least 6 months before

	Seeker date for commencement of Access	the Queue, the 2019 DAU has removed the requirement for a Notifying Access Seeker to seek Access at a date which 6 months earlier than that of the Access Seeker who is first in the Queue. A Notifying Access Seeker need only seek Access from a date that is earlier than that of the Access Seeker who is first in the Queue.	the access seeker which is then first in the queue – but considers that it should be made clear that the notifying access seeker: • cannot nominate a date in the past (given that to obtain access, other access seekers in the queue have to match the commencement date sought); and • will be deemed to have sought access from a date earlier than that of the first access seeker if it seeks access commencing within 3 months of giving the notice that triggers the notifying access seeker process if for any reason the access seeker that is first in the queue has a date for commencing access that is already in the past
9.	5.4(e)(4) - Notifying Access Seekers and the Queue	The 2019 DAU provides that all Access Seekers in the Queue are to be notified when a Notifying Access Seeker requests Access. This will mean that all Access Seekers in the Queue (and not just those higher in the Queue) will be 'Notified Access Seekers'.	The DBCT User Group supports the principle that all access seekers in the queue should be notified. However, the DBCT User Group submits that: • DBCTM's amendments appear to unintentionally mean that all access seekers in the queue (who by this amendment are Notified Access Seekers) would have priority over the Notifying Access Seeker – which should not be the case if the Notifying Access Seeker is already in the queue (unless they are actually last in the queue). Priority should be based on order in the queue – which means that the Notifying Access Seeker should have priority over those access seekers who are behind them in the queue (if any). This would require some consequential amendments. • DBCTM's proposed Security requirements should be included in the notice to permit interested Users to consider these obligations in connection of its assessment whether to take up the offered capacity and obtain any required Security within the relevant timeframes.
10.	5.4(f)(3) –Start date for access in NAS process	Section 5.4(f)(3) provides that if the NAS notification period of three months spans two financial years, the earliest possible	The DBCT User Group supports this amendment and agrees with the practicalities of calculation that DBCTM has raised.

		commencement date for Access for both the Notifying Access Seeker and all Notified Access Seekers will be deemed to be the first day of the new Financial Year. DBCTM considers this a reasonable outcome in circumstances where the relevant Notified or Notifying Access Seeker has not actually received access during the relevant Financial Year. Practically, because of the annual true up mechanisms for Access charges under the Standard Access Agreements, it is not possible for DBCTM to later enter into a contract that has a commencement date in the previous Financial Year, as this would impact the charges paid by all Access Holders.	
11.	5.4(f) – grounds to cease negotiations with Notified or Notifying Access Seeker	The 2019 DAU clarifies that DBCTM should not be obliged to enter into an Access Agreement with a Notified Access Seeker in circumstances where, had the normal Indicative Access Proposal process been followed in accordance with Sections 5.6-5.8, DBCTM would be entitled to cease negotiations under Section 5.8.	In principle, the DBCT User Group supports this amendment, because as a matter of principle the ability to cease negotiations should be equal between these circumstances. However, as set out below, the DBCT User Group is not supportive of all of DBCTM's proposed amendments to section 5.8 which go further than the issues described here. As mentioned above in item 9, in order for required Security to be obtained within the required timeframe under clause 5.4(f)(2) DBCT should be obliged to notify its Security requirements to each Notified Access Seeker at the time of issue of the Notice under clause 5.4(e)(4).
12.	5.4(g) - Issues with provision of Security	To promote the timely negotiation and conclusion of Access Agreements if an Access Seeker has an issue with the Security requested by DBCTM, the Access Seeker should raise the dispute within 14	The DBCT User Group supports this amendment but prefers that the timeframe be specified as 10 Business Days rather than 14 days (in case this process is triggered at a time of year when there are numerous public holidays and the timeframe is effectively less working days than anticipated).

		days of receiving notice of such Security requirement.	
13.	5.4(h) – time period for acceptance of offer by Notifying Access Seeker	The 2019 DAU includes a time period for a Notifying Access Seeker to accept an offer and enter into an Access Agreement for Capacity remaining at the end of the NAS process.	The DBCT User Group supports this change, subject to the Notifying Access Seeker being afforded the same rights to dispute the required Security and additional timeframe to obtain Security as afforded to Notified Access Seekers under clause 5.4(g).
14.	5.4(i)(1) - Position in Queue may be lost by not executing Access Agreement	To promote the efficient operation of the Queue and the efficient allocation of capacity, the 2019 DAU provides that Notified Access Seekers: 1 with a commencement date that is within 2 years of the Notifying Access Seeker's nominated start date; 2 who do not respond with a signed Access Agreement within the 3-month notification period, may be removed from the Queue. The ability to remove Access Seekers from the Queue does not apply where an Access Seeker has not accepted an offer of Short-Term Available Capacity.	The DBCT User Group supports efforts to provide clearer and more objective rules (and therefore greater certainty to all participants) as to which access seekers would be removed from the queue in these circumstances. The DBCT User Group also supports the ability to remove a Notified Access Seeker from the Queue if they do not take up capacity with a commencement date within only a short timeframe in advance of their proposed access commencement date. However, the DBCT User Group considers that 12 months, rather than 2 years, is a more appropriate timeframe in this situation as an additional 2 years of charges is so significant a cost that refusal to take on that obligation should not result in removal from the queue. The requirement that a dispute be 'bona fide' should be removed from this clause. Any dispute (whether or not in DBCTM's view it is bona fide) should have to be resolved before an Access Seeker is removed from the queue. The DBCT User Group requests that a clarification should be included to confirm that if a Notified Access Seeker responds with a signed Access Agreement in respect of a lower Tonnage, or shorter term than their Access Application, they will retain their place in the Queue in respect of the remaining Tonnage or term applied for. In addition, the DBCT User Group is concerned that when clause 5.4(i)(1) refers to execution of an access agreement it does not confine that to one

			that has a start date sufficient to give the Notified Access Seeker priority under clause 5.4(f) (which is presumably what was intended).
15.	5.4(i)(5) - Access Seeker may accept lesser tonnage if insufficient capacity for tonnage applied for	The 2019 DAU includes a time period for an Access Seeker to accept an offer and enter into an Access Agreement for capacity if the available Capacity is less than that required in the Access Seeker's Access Application.	The DBCT User Group supports the introduction of a timeframe for accepting offers of lesser capacity. However, The DBCT User Group does not consider it appropriate for DBCTM to be able to remove an Access Seeker from the Queue if they do not take up an offer for a lesser amount than sought in an Access Application as proposed in clause 5,4(i)(6). It may be, for example, that access for the full amount is necessary to support a greenfield mine development or mine expansion and the lesser amount is not sufficient and is therefore not accepted (even though the access seeker remains genuinely interested in the greater volume of capacity applied for). Such a right may be appropriate only if the tonnage offered was not materially lesser than the tonnage sought and DBCTM was obliged to act reasonably and provide the Access Seeker with an opportunity to justify why it should not be removed from the queue.
15a			The DBCT User Group notes the insertion of the new clauses 5.4(j) and (k) and (l)(15) but has not commented on those clauses in this submission given the DBCT User Group's submission that the TIC should clearly remain regulated by reference tariffs (which would make these provisions unnecessary). If anything, these provisions demonstrate the real practical difficulties created by the removal of reference tariffs – as they involve parties being forced to sign up to long term take or pay agreements without knowing the price at which they are doing so. That evidently supports the DBCT User Group's submission that the TIC should remain regulated by reference tariffs.
16.	5.4(w) - Dispute in relation to	The 2019 DAU requires that any dispute in relation to the re-ordering of a queue (in respect of Socialised and Differentiated	The DBCT User Group supports this amendment.

	reordering of a queue	queues) be raised by an Access Seeker within 15 Business Days after receiving notice of the re-ordering. This will allow any Dispute to be raised and resolved in a timely manner which is to the benefit of all Access Seekers.	
17.	5.6(a) - Response to IAP for Short-Term Available Capacity	The 2019 DAU includes a requirement for Access Seekers to notify DBCTM of any intention to progress an Access Application for Short-Term Available Capacity within 14 days after receiving the Indicative Access Proposal (IAP).	The DBCT User Group supports this amendment but prefers that the timeframe be specified as 10 Business Days rather than 14 days (in case this process is triggered at a time of year when there are numerous public holidays and the timeframe is effectively less working days than anticipated).
18.	5.7(a) - Parties to negotiate if Access Seeker wishes to enter Access Agreement	The 2019 DAU requires Access Seekers to commence negotiations within 14 days of indicating an intention to progress an Access Application on the basis of an Indicative Access Proposal (whether for Short Term Available Capacity or longer-term tonnage).	The DBCT User Group supports this amendment but prefers that the timeframe be specified as 10 Business Days rather than 14 days (in case this process is triggered at a time of year when there are numerous public holidays and the timeframe is effectively less working days than anticipated).
19.	5.8 Negotiation Cessation Notice	In order to promote efficient negotiation with Access Seekers, the 2019 DAU allows for additional grounds to cease negotiation with those Access Seekers who do not have the ability to utilise the capacity sought from the nominated commencement date or who are not willing to provide the necessary Security required by DBCTM. The 2019 DAU includes the broader definition of “Related Entity”.	While the User Group understands the intention behind these amendments, the wording should recognise that many factors may impact upon the date of commencement of shipping and a User's position in relation to financing over the period that an Access Seeker is negotiating access. The following wording is proposed: 5.8(a)(3) amend proposed wording as follows "or within a reasonable period after ~~from~~ the nominated commencement date for Access;" 5.8(a)(4) amend proposed wording as follows: "or that the Access Seeker is not willing or able to provide security reasonably requested by DBCT Management in accordance with Section 5.9 *by the time that Security is required to be provided in accordance with an Access Agreement"*

20.	5.13 – Access Transfers	The 2019 DAU's criteria in Section 5.13(a)(1) and (2) are drafted as alternatives, and not cumulative, criteria. DBCTM considers this was the intended operation of the section in the current access undertaking	While the previous drafting did not include either an 'and' or an 'or' between the subsections, the DBCT User Group agrees the intent was for these to be alternatives, and accepts that it is appropriate that DBCTM is not required to consent to an access transfer where either the assignor is in material breach of their access agreement *or* one of the matters in subsection (2) about financial standing, capability to perform or matching of below rail entitlements applies.
21.	8.4 - Reporting of aggregated information	In order to promote the efficient operation of the rail network and capacity at DBCT, the 2019 DAU provides DBCTM the ability to provide the rail network provider with notice when an Access Holder does not renew its Annual Contract Tonnage in whole or in part (noting that exercise of options to extend generally occur 1 year out from the expiry date).	The DBCT User Group is willing to support provision of aggregated information to the rail network provider but not information on individual Users who do not extend or renew in whole or part. While, the DBCT User Group understand the intention of trying to produce greater alignment – the terminal regulatory framework already has measures which seek to address that (by making rail capability part of the access application process and having the capacity available for contracting based on system capacity for example). The appropriate place for managing the misalignment is the Aurizon Network access undertaking where port capacity should be being demonstrated before rail capacity is contracted.
22.	9 – Ring Fencing	DBCTM will de-register the Trading SCB prior to the effective date of the 2019 DAU and has removed all references to the Trading SCB, including the consequential amendments to Section 9.	The DBCT User Group is willing to support this amendment provided the ultimate undertaking contains a clear commitment from DBCTM and its Related Bodies Corporate not to own Supply Chain Businesses (which in turn is defined widely enough to include an entity like the Trading SCB). It would be appropriate for DBCTM to be required to prove that it has deregistered the Trading SCB and ceased all of its operations before any changes of this nature are made (given that DBCTM promised this would occur in the declaration review processes but based on DBCTM's submission in this process it appears that it may not yet have occurred despite a long time having passed since DBCTM announced this intention).
23.	12.1(h) - Independent expert to consult	Given the make-up of the ILC, if the ILC is the independent expert in respect of a capacity estimation, DBCTM considers it	The User Group opposes this change. The Integrated Logistics Company (**ILC**) is intended to be an independent supply chain body. It cannot be assumed that all entities that are members

		reasonable to assume that the membership of the ILC will be have been consulted as necessary for any ILC determination.	will have been consulted when the ILC is engaged by DBCTM to provide capacity estimates. The DBCT User Group also notes that the membership of the ILC can change (noting some users have withdrawn from their membership of the ILC in recent years). Given consultation can occur with the User Group in capacity forums together – it is not clear how DBCTM's position would reduce the time and process involved in consultation in any case.
24.	12.1(i) - Objection to estimation by independent expert	To promote certainty and to ensure there are no unnecessary challenges to the independent expert's decision, the 2019 DAU provides that the only grounds of objection to the capacity assessment undertaken by an independent expert should be that it is made in breach of the AU or an Access Agreement or in manifest error.	The User Group opposes this change. No justification of any merit has been provided as to why determinations made in bad faith should not be able to be disputed (which is one of the outcomes of DBCTM's changes). In addition, the DBCT User Group continues to consider that it is appropriate that where a material volume of Users (by tonnage) object on similar grounds – as was the case under the previous drafting of clause 12.1(i) – that there is an ability to dispute the estimate. Manifest error is too high and unclear a standard for these purposes. All of the changes to this provision should therefore be rejected.
25.	Schedule A	The 2019 DAU updates the form of the Access Application and Renewal Application contained in Schedule A.	The DBCT User Group accepts that for the most part these updates are simply clarifications or consequential changes and does not object to them except as set out in Item 6 above.