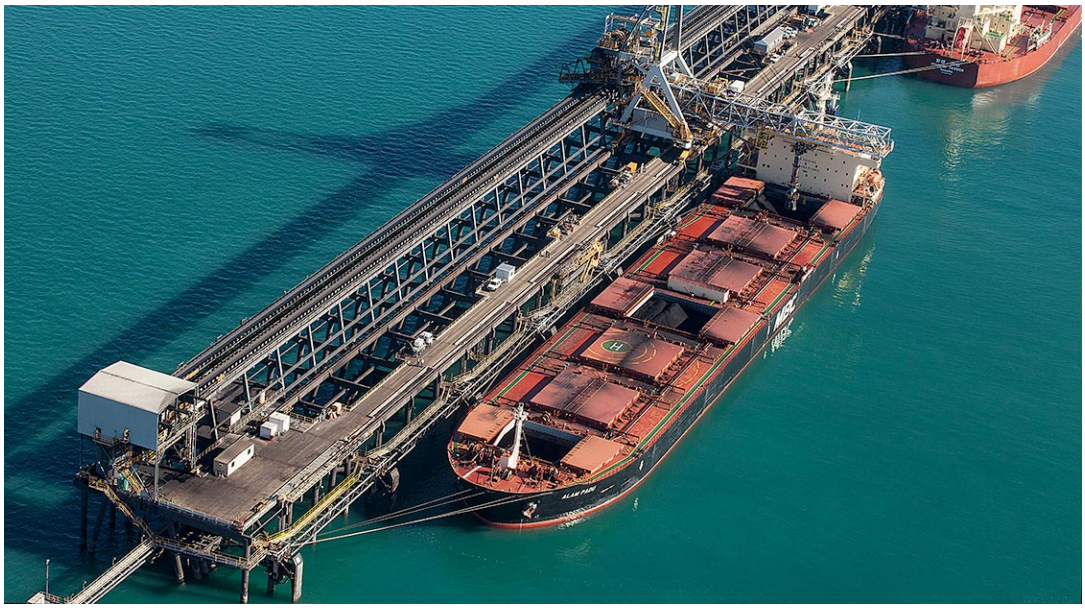
New Hope Group

Submission in Response to 2019 DBCT Draft Access Undertaking

23 September 2019



1 Introduction

This submission has been prepared by New Hope Group (**New Hope**). New Hope thanks the Queensland Competition Authority (**QCA**) for the opportunity to provide comments on the draft access undertaking prepared by Dalrymple Bay Coal Terminal Management (**DBCT Management**) for the regulatory period beginning 1 July 2021 (**Draft DAU**).

This submission sets out the views of New Hope on the Draft DAU, and its responses to the staff questions published by the QCA on 23 August 2019 (**QCA Staff Questions**).

New Hope is eager to assist the QCA in its consideration of the Draft DAU, and would be willing to meet with the QCA or other stakeholders to discuss any of the matters set out in this submission.

2 Executive summary

In summary, New Hope is of the view that the QCA should not approve the Draft DAU. In particular, New Hope considers that the draft DAU is inappropriate having regard to the factors set out in section 138(2) of the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) because:

(1) The proposed negotiate/arbitrate model is fundamentally inappropriate and will not result in improved efficiencies at the Terminal;

(2) Pricing should be determined by the QCA using a building blocks based reference tariff methodology; and

(3) The non-price terms of the 2019 DAU are inappropriate and create inequities between users.

New Hope is particularly concerned that the proposed negotiate/arbitrate model unfairly differentiates between larger and smaller users of the Terminal – particularly where access seekers who are developing new projects tend to be smaller scale users. As this submission demonstrates, this unfair differentiation occurs:

(1) in the proposed build up of the 'base tariff' along with the additional tariffs, as the 'additional tariffs' are attributable to coal handling methodologies that are more commonly required by smaller users of the Terminal and less commonly used by the largest users of the Terminal – and therefore smaller users are likely to pay higher tariffs;

(2) in the significant informational asymmetry access seekers will encounter when negotiating terms of access and tariffs; and

(3) in the heightened impact that the costs of protracted bilateral negotiations and arbitrations will have on smaller users and access seekers who are developing projects (and are unlikely to have the same economic resources available as larger users).

New Hope considers that each of these harms are specifically created by the proposed negotiate/arbitrate model and do not exist under the existing regulatory regime adopted by the QCA in which the QCA determines a reference tariff. As such, New Hope considers that the 2019 DAU as proposed by DBCT Management is inappropriate and should not be approved by the QCA.

3 New Hope

New Hope Corporation Limited is a majority Australian owned and operated diversified energy company which has been based in South East Queensland for more than 60 years. A subsidiary of New Hope is New Lenton Coal Pty Ltd which is a participant in the Lenton Joint Venture (**LJV**). The Lenton joint venture participants are New Lenton Coal Pty Ltd (90%) and MPC Lenton Pty Ltd (10%) (**MPC**) which is a Formosa Plastics Group (**FPG**) subsidiary. The LJV is seeking to develop an open cut coal resource located within the northern part of the Bowen Basin. The project consists for the most part of the Rangal coal measures, namely the Leichhardt and Vermont seams. There is an existing mining lease on the project, ML70337, which was granted in 2008, with three additional exploration permits for coal extending beyond the mining lease boundary. The Environmental Authority associated with ML70337, allows for mining of up to 2.0 million tonnes per annum (Mtpa) of coal.

[redacted]).

4 Responses to QCA questions

4.1 *QCA Question 1*

Do stakeholders consider the scope of the competition problem identified in the declaration review as a relevant factor in assessing the 2019 DAU?

New Hope submits that the QCA clearly differentiates between the process for declaring a service pursuant to the QCA Act, and the process for developing an undertaking. There is nothing in the QCA Act which supports DBCT Management's assertion that regulation should be 'proportional' to the competition problem identified through the declaration review process.

Further, New Hope notes that:

(1) The declaration review process for the service at the Terminal has not been finalised, such that it is inappropriate to be determining the scope of regulation under the Draft DAU by reference to a process that is not yet finalised and in which the QCA has not made a final decision.

(2) DBCT Management's assertion that 'the asymmetry in access terms is the only competitive concern identified by the QCA'[1] is not representative of the overall position of competition harm created by the removal of declaration of the Terminal. For example, an assessment of criterion (a) under the QCA Act expressly excludes consideration of the impact that the removal of declaration would have on the market for the service itself. Additionally, there are competitive harms that may arise – but have not been prosecuted fully in the context of the declaration review process as the onus is only to demonstrate that declaration would result in a material increase in competition in one dependent market. As such, it is not correct to declare the findings to date in the declaration review process to be a definitive and exhaustive consideration of all of the competitive impacts that would occur if the service was not declared. Instead, it is a thorough consideration of the application of very specific declaration criteria to the service.

[1] DBCT Management 2019 DAU Submission, [61.4].

(3) There is nothing express in the QCA Act which suggests that the terms of an access undertaking are required to be proportional to any competitive harm identified through declaration – which is obviously correct given the service at DBCT, the service provided by Aurizon Network and the service provided by Queensland Rail were initially declared by regulation without such consideration.

(4) As an access seeker (and therefore a 'new user' to use the language adopted by DBCT Management in its submission[2]), New Hope considers that level of competitive harm that it would suffer as an access seeker attempting to enter the market for Terminal capacity and related rail services is significant. DBCT Management is dismissive of the real competitive harm that access seekers would suffer, and DBCT Management's desire to maximise commercial returns should not form the basis of a lessened form of regulation.

(5) The language of 'new users' is somewhat disingenuous as existing users of the Terminal may require additional access – the protections of the existing user agreements would only extend to existing contracted tonnage. This means that any expanding user who currently holds capacity would become a 'new user' and not have the protection of the existing arrangements.

(6) To the extent that the QCA's approach to the regulation of the service takes into account the proportionality principle, [3] that proportionality principle has always been expressed as customers in similar circumstances should be treated equally (horizontal equity) and individuals in different circumstances should be treated in proportion to their differences (vertical equity).[4] DBCT Management asserting that this principle is intended to take into account competitive harm under a declaration review process does not appear to have any real basis.

4.2 ***QCA Question 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.

(1) ***Do stakeholders consider this framework will allow access seekers to obtain access in an effective and timely manner?***

(2) ***Would any additional features be needed to ensure that the negotiate/arbitrate framework could work effectively?***

New Hope strongly considers that the replacement of the prescribed TIC with a negotiate/arbitrate framework for determining access charges will hinder access seekers' in obtaining access in an effective and timely manner.

New Hope notes that DBCT Management's assertions that the QCA Act 'envisaged that an access undertaking would set out the broad terms and conditions upon which access would be provided … that is it was not envisaged that an undertaking would have to be prescriptive as to all the terms and conditions of access'[5] is inconsistent with other parts of the Act. While it is true that the QCA Act does not prescribe the extent of regulation required under an undertaking, section 137(2) of the QCA Act states that an access undertaking for a service may include details of the following:

(a) how charges for access to the service are to be calculated;

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2 DBCT Management 2019 DAU Submission, [64].
3 DBCT Management 2019 DAU Submission, [79].
4 See for example SEQ Long Term Regulatory Framework – Pricing Principles, p 4.
5 DBCT Management 2019 DAU Submission, [127].

(b) information to be given to access seekers;

(c) information to be given to the authority or another person;

(d) an obligation on the owner or operator to comply with decisions of the authority or another person about disputes about matters stated in the undertaking;

(e) information to be given to the authority about compliance with the undertaking and performance indicators stated in the undertaking;

(f) time frames for giving information in the conduct of negotiations about access to the service;

(g) how the spare capacity of the service is to be worked out;

(h) arrangements for the transfer of all or part of the interest of a user of the service under an access agreement;

(i) accounting requirements to be satisfied by the owner or operator and a user in relation to the service or separate parts of the service;

(j) arrangements to be made by the owner or operator to separate the owner's, or operator's, operations concerning the service from other operations of the owner or operator concerning another commercial activity;

(k) the provision of the service to users otherwise than by the owner or operator to whom the undertaking relates;

(l) terms relating to extending the facility;

(m) requirements for the safe operation of the facility;

(n) how contributions by users to the cost of establishing or maintaining the facility will be taken into account in calculating charges for access to the service;

(o) provisions to be included in access agreements in relation to the service; and

(p) the review of the undertaking.

While this list is not intended to set out a list of requirements, it clearly indicates that it is within the ambit of the QCA to consider each of those matters in its consideration of an undertaking and that the QCA is not intended to be constrained to a 'negotiate/arbitrate model' when considering undertakings.

New Hope considers that a negotiate/arbitrate model would result in increased difficulty for new or smaller users in securing access at the Terminal. This is because negotiate/arbitrate models tend to favour larger firms with the capacity to engage in protracted arbitration and dispute processes where negotiations fail. DBCT Management has extensive resources available to it and is likely to be able to sustain disputes arising out of such a model.

DBCT Management has asserted that this model would be appropriate because it would allow different users to negotiate different prices based on the value of the services to that

user.[6] New Hope considers that the service provided at the Terminal is largely uniform – even if different blending requirements are requested by various users. The differences in the use of the service are not substantial enough to warrant different pricing structures – which is why the QCA has historically and appropriately set a standard TIC. While it is true that the Terminal offers both blending and co-shipping, DBCT Management does not demonstrate in its submission why those methods of coal handling are not part of the broader 'coal handling' service provided at the Terminal. In New Hope's view, facilitating co-shipping and blending are part of providing a coal handling service – and not additional 'services' provided over and above the declared service at the Terminal. In addition, the submission does not demonstrate that provision of the additional coal handling methods incurs substantially different costs (such that a differentiated cost would be required) or how any differentiated pricing could be determined. DBCT Management has taken no steps to demonstrate how, on the Agreement Revision Date, the parties to an access agreement would be in a position to determine appropriate differentiated pricing based on different coal handling methods. This is particularly the case given the profile of shipping by a specific user is likely to vary within a pricing period – for example, a user may ramp up or ramp down production and therefore require additional blending or co-shipping opportunities within a pricing period that are not clearly identifiable at the Agreement Revision Date. Additionally, marketing decisions are made in response to market conditions – and where there is demand for a particular blend of coal, a user may require additional blending in response to those market forces that were not and could not have been anticipated at the beginning of a pricing period.

Given the deep concerns held about the appropriateness of a negotiate/arbitrate model, New Hope does not consider that there are any additional features of a negotiate/arbitrate models that could resolve the concerns or make such a model appropriate from New Hope's perspective.

4.3 **QCA Question 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?

As noted above, New Hope does not consider that a negotiation/arbitrate model is appropriate and as such should not be approved by the QCA.

However, in response to this QCA question New Hope notes that:

(1) The information provided for in section 5.2(c) is limited, and non-specific. For example, it refers to 'reasonably available preliminary information' – which is non specific, does not define 'preliminary information' and clearly infers a discretion on DBCT Management to determine what constitutes 'reasonably available'. Where this provision is notionally intended to correct an informational asymmetry between a service provider and an access seeker, it is difficult to see how this would meaningfully close that gap give the vagaries in the information proposed to be provided.

[6] See section 4.4, DBCT Management 2019 DAU Submission.

(2) In the absence of guidance regarding what a 'reasonable time' to facilitate meetings for the purpose of discussing an access application are, it is difficult to understand what 'reasonable' would mean in these circumstances or how this information would be sufficient to assist access seekers.

(3) There is no obligation to provide information regarding actual pricing that may have been negotiated (which New Hope assumes would be de-identified so as to provide an indicative range without causing competitive harm). This information would still be devoid of the circumstances in which those prices were negotiated, and therefore is limited in its usefulness – but in the absence of any range of pricing it is impossible for an access seeker to understand whether the 'starting point' of any negotiation is reasonable or comparative to other users. Access seekers (who do not currently hold contracts with DBCT Management) do not have the benefit of ownership of the operator of the Terminal, and the associated insights into the Terminal that provides. For example, it means that access seekers do not understand the cost profile, maintenance costs and schedules, capacity for expansion and the costs associated with such expansion or number of users at the Terminal. All of these factors impact on the ability of an access seekers to understand what pricing might be reasonable for capacity at the Terminal – and in the absence of any meaningful information in relation to those factors, it is difficult to understand how access seekers would be able to remedy this informational asymmetry. Moreover, where there is no revenue cap under a negotiate/arbitrate model, there are no incentives for DBCT Management to provide any of this information. Rather, the incentives of DBCT Management would clearly be to negotiate the highest possible price for access without reference to the QCA Act's pricing principles, costs of operating the Terminal or a reasonable rate of return on the asset.

New access seekers at the Terminal would suffer a significant informational asymmetry when negotiating access agreements, and, by virtue of being new access seekers rather than users with existing contracts, are likely to be unable to negotiate pricing as effectively as existing users. Existing users have a range of historical information and an awareness of matters such as operational performance, forecast maintenance and insight into proposed and planned expansion pathways. Existing users also have access to the board of the operator at the Terminal, which gives greater insight into the operations of the Terminal and the approach of DBCT Management to the management of the Terminal. This information necessarily lends itself to existing users being better positioned to negotiate with DBCT Management than access seekers – such that while the informational asymmetry impacts all users who need to negotiate with DBCT Management under a negotiate/arbitrate model, access seekers who have not previously contracted at the Terminal are particularly impacted.

4.4 *QCA Question 4*

Do stakeholders consider that having regard to this 'willing but not anxious buyer and seller' concept is appropriate in an arbitration?

New Hope does not consider that a negotiate/arbitrate model is appropriate. However, even if the QCA was minded to approve the 2019 DAU with the negotiation/arbitrate model, the 'willing but not anxious buyer and seller' concept is not an appropriate concept to reference in an arbitration relating to the declared service.

While New Hope acknowledges that this is a standard used in commercial contexts, New Hope strongly disputes that it is appropriate in this commercial context. In fact, the International Valuation Standards Council definition of market value used by DBCT Management in its submission to support its position expressly refers to assets and liabilities. The declared service at the Terminal is neither an asset nor liability – and it is commercially unusual to value a service using a 'willing but not anxious' standard.

New Hope submits that where this standard has been used by other regulators (such as the ACCC in relation to the Copyright Guidelines), it has not been used in the context of a market that is clearly not workably competitive and where one firm holds clear and unequivocal market power (as in the case with DBCT Management). The ACCC Copyright Guidelines contemplate markets where owners of copyright and collecting societies (in the plural) may hold market power – which is distinct from the situation under the undertaking where there is only one provider of the relevant service.

It is unclear to New Hope how the application of such a standard could practically work, as given there are no alternatives to the service at the Terminal. The geographic boundary proposed by DBCT Management in respect of the proposed test is inappropriate as where it includes other terminals, those terminals have not been found or demonstrated to be substitutes for the service at the Terminal. As such, unlike where this standard is used to value an asset or a liability and there are other points of market data available in determining that value, the standard would not provide meaningful practical guidance for the purpose of an arbitration.

4.5 **QCA Question 5**

Do stakeholders consider that the modelling resulting from specific user service requests and the engagement of ILC would be appropriate?

New Hope does not consider that it is practical to model specific user requests in advance – as user requests will vary across the pricing period such that it is impossible to know at the point of negotiation/arbitration what impact such demands will have.

For example, while New Hope rejects that blending is an 'additional service', it notes that blending requirements are dynamic and change in response to market forces. These cannot be predicted. Engaging any third party to model the impact of undetermined blending requests by a user is impractical and will not result in useful or reliable modelling or data.

4.6 ***QCA Question 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.'

(1) *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?*

(2) *Would there need to be specific processes for access seekers to gain access to this information?*

(3) *Do stakeholders have any concerns regarding the provision of such information to access seekers, and if so, how might such concerns be addressed?*

New Hope considers that no access seekers would have sufficient insight into the level and build-up of such 'other TIC' as contemplated by DBCT Management. New Hope considers that access seekers will suffer from an informational asymmetry in that they will not have the same information that DBCT Management holds as to what TICs have been negotiated by other access seekers, and they will also not have the same information as existing users as to what TICs have been historically negotiated or the context of such negotiations (including matters such as counterparty creditworthiness, the necessity to meet specific project timeframes, prevailing market circumstances and so on).

New Hope considers that this information would need to be provided to all access seekers prior to the commencement of negotiations, to create transparency. However, even where that information is provided, it is still difficult for access seekers to understand the commercial contexts in which those TICs were negotiated or what other circumstances may have arisen in those negotiations.

Further, and as discussed elsewhere in this decision, New Hope rejects that there are differing service levels provided at the Terminal. The inclusion of the reference to 'similar service levels' means that small users would not get the benefit of insight into de-identified large users' negotiated TICs, as it is clear from the 2019 DAU Submission that DBCT Management would assert that those users receive different service levels. As such, it appears that very limited information would be available to an arbitrator or to access seekers.

4.7 **QCA Question 7**

Do stakeholders consider that any provisions in the 2019 DAU would inhibit the QCA in making appropriate arbitration determinations?

New Hope considers that the negotiate/arbitrate model is fundamentally inappropriate and should not be adopted by the QCA.

Given the extensive concerns held by New Hope in relation to the proposed model, New Hope has focussed its submissions on the inappropriateness of the negotiate/arbitrate model.

New Hope notes that even if the QCA is able to make appropriate arbitration decisions, the arbitration process itself will act a barrier to access seekers seeking access at the Terminal. Arbitration is likely to be costly, and significantly more expensive for access seekers and users than the existing regulatory model. Access seekers are unlikely to be willing to engage in costly bilateral negotiations, and the proposed model is likely to act as a significant barrier to entry for new access seekers.

4.8 **QCA Question 8**:

(1) ***Do stakeholders agree that the negotiate/arbitrate model for determining access prices is an accepted approach in access undertakings in Australia?***

(2) ***Do stakeholders consider that the acceptance and operation of these regulatory frameworks for wheat export terminals and some covered gas pipelines are relevant to the assessment of DBCT Management's 2019 DAU?***

(3) ***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?***

New Hope acknowledges that the negotiate/arbitrate model for determining prices is used in some access undertakings in Australia.

However, New Hope does not consider that use of the negotiate/arbitrate model in other instances in Australia means that it is appropriate for regulating the service provided by DBCT Management at the Terminal.

Specifically, New Hope notes that:

(1) Negotiate/arbitrate models are generally inappropriate where the service provider has a high degree of market power, and no countervailing market forces. This is clearly the case at the Terminal, particularly given the findings in the recent

Declaration Review process that the Terminal has market power and there are not substitutable services.

(2) The examples used by DBCT Management of services using a negotiate/arbitrate are:

(a) in the case of airports, services which have been found to have less market power than the Terminal (due to the countervailing power of airlines);

(b) in the case of bulk wheat ports, bulk wheat ports offered standardised prices and acknowledge that the service is a single service (unlike the proposal by DBCT Management), and have a statutory obligation to deal with each other in good faith (which DBCT Management does not have);

(c) in the case of the covered gas pipelines, the types of pipelines covered by the negotiate arbitrate model are ones with low barriers to entry (unlike the Terminal), some degree of market power (unlike the Terminal which has clear market power and is a monopoly service provider), substitutes (unlike the Terminal) and information adequacy (unlike the Terminal), as discussed in the rest of this submission.

As such, while New Hope accepts that while some access undertakings are regulated using the negotiate/arbitrate model, there are no equivalent services that have that level of light-handed regulation. Indeed, many other monopoly services (such as electricity networks, gas pipelines with monopoly power, telecommunications networks and the NBN) all have ex-ante pricing regulation of the type that the QCA has historically used for the Terminal and which New Hope continues to consider appropriate.

4.9 ***QCA Question 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 above the standard service of handling coal and that users require distinct combinations of services and value those combinations differently to each other.

(1) ***Do stakeholders consider DBCT Management's concept of a base tariff (that is, one that 'maximises throughput efficiency of the terminal appropriate?***

(2) ***Do stakeholders consider DBCT Management's description of the base tariff (as described in paragraph 203 of its explanatory submission) appropriate?***

(3) ***Do stakeholders consider it commercially reasonable to identify additional services at DBCT, and value those services separately to the standard service of handling coal?***

(4) ***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 at DBCT?***

As noted above, New Hope considers that the service provided at the Terminal is largely uniform – even if different blending requirements are requested by various users. The differences in the use of the service is not substantial enough to warrant different pricing structures – which is why the QCA has historically and appropriately set a standard TIC.

While it is true that the Terminal offers both blending and co-shipping, DBCT Management does not demonstrate in its submission why those methods of coal handling are not part of the broader 'coal handling' service provided at the Terminal. In New Hope's view,

facilitating co-shipping and blending are part of providing a coal handling service – and not additional 'services' provided over and above the declared service at the Terminal.

Additionally, New Hope notes that the proposed 'base tariff plus tariff for additional services' methodology proposed by DBCT Management will result in smaller users and new entrants to the market paying higher tariffs than larger users. This is likely to result in a dampening of competition as smaller producers become less competitive against larger users. The inclusion of co-shipping in the additional 'services' claimed by DBCT Management makes this very clear, as it is predominantly smaller producers (who cannot fill an entire ship themselves) who require co-shipping services to take their product to market. This point is underlined by the fact that the base tariff referred to by DBCT Management will be informed by its view of the 'most efficient user' of the Terminal.

New Hope emphatically rejects that the additional 'services' identified by DBCT Management are 'services' in their own right – and submits that these methods of coal handling are clearly part of the broader declared service at the Terminal. New Hope also rejects that this type of tariff determination meets the criteria in the QCA Act[7] or that the multi-part pricing and price discrimination against smaller users would aid efficiency or promote the economically efficient use of the Terminal. Each of the 'services' alleged to create inefficiencies are the Terminal – including blending, co-shipping and accommodating different types of vessels – are clearly part of the core services of coal handling at the Terminal. All evidence cited by DBCT Management that users see value in those coal-handling methodologies indicate that there is value in the declared service to those users – not that DBCT Management should be permitted to price discriminate between users to build a larger tariff by breaking down different methods used in the handling of coal at the Terminal.

New Hope also notes that DBCT Management has provided little evidence in respect of the alleged inefficiencies created by some of the additional 'services' it alleges it supplies – including offering no substantiation of its assertion that DBCT Management's promotion of the ease of trade of metallurgical coal between users affects the efficiency of the Terminal. Similarly, it has provided no evidence that product sampling, different vessels and other tasks performed by DBCT Management as part of Good Operating and Maintenance Practice meaningfully impact efficiency at the Terminal.

It is clear from the 2019 DAU Submission that DBCT Management wishes to extract the highest possible tariff from users in future price negotiations – and the breakdown of its base service into different parts for the purpose of price negotiations is clearly an attempt to increase the tariff that users pay.

New Hope also submits that users will not have any meaningful way of verifying the calculation of the base tariff – such that an informational asymmetry will always exist as users cannot verify the base tariff. Similarly, it is entirely unclear from the 2019 DAU Submission how DBCT Management would calculate any additional tariffs. Given it is unclear how DBCT Management would calculate additional tariffs, it is almost an absurdity to suggest that users (who do not have access to the information DBCT Management has access to) would ever meaningfully be able to verify the appropriateness of proposed tariffs for the purpose of negotiations.

It is clear that a negotiate/arbitrate model will create material uncertainty in relation to the terms of access at the Terminal including cost. This, in turn, will damage investment incentives and have a chilling effect on dependent markets to the Terminal, including the market for exploration tenements in the Hay Point catchment. Given there are no alternative services to the Terminal for metallurgical coal mines in the Hay Point catchment, uncertainty as to terms (and how terms are set) has the potential to result in under-investment in dependent markets. New Hope acknowledges that there is no price certainty for access seekers where the QCA sets a reference tariff – but considers that:

[7] See section 168A(b).

(1) an independent regulator setting reference tariffs;

(2) those references tariffs having a transparent building block methodology and being determined in accordance with regulatory precedent; and

(3) that regulator offering an opportunity to access seekers to comment on the proposed terms of access,

creates far greater certainty for investors in mining projects than the proposed negotiate/arbitrate model.

New Hope strongly urges the QCA to retain a reference tariff model calculated using a building block methodology for the 2019 DAU. Such a method mitigates the harm caused by the informational asymmetry; gives users confidence in the calculation of the tariffs paid for the service at the Terminal and ensures that DBCT Management receives tariffs that are, in all the circumstances, considered appropriate.

4.10 ***QCA Question 10***

(1) ***Do stakeholders agree that existing users would be fully protected under the terms of existing user agreements alone?***

As New Hope is not a current access holder, it has not specifically considered whether existing users would be protected under the terms of existing user agreements alone as any such protections – if they do exist – do not currently extend to New Hope.

4.11 ***QCA Question 11***

(1) ***Should the QCA formally review the rehabilitation plan as part of its assessment of the 2019 DAU?***

(2) ***Do stakeholders consider DBCT Management's proposal for the rehabilitation plan to inform price negotiations and any arbitrations of disputes to be reasonable?***

New Hope considers that a negotiate/arbitrate model is fundamentally inappropriate and that the 2019 DAU should only be approved with a QCA determined TIC determined using a building blocks basis.

New Hope understands that historically the building blocks based reference tariff has included a remediation allowance, and considers that this is an appropriate mechanism to take into account remediation obligations of DBCT Management at the Terminal.

It is unclear how the rehabilitation plan could meaningfully inform any negotiations or arbitrations given it has been developed at the request of DBCT Management (and therefore lacks independence), does not purport to offer a determinative view of rehabilitation costs at the Terminal into the future and the cost estimates are stated to be preliminary only.

Additionally, New Hope notes that the rehabilitation plan is representative of the broader issue of informational asymmetry between access seekers and DBCT Management. It is very difficult to envisage how an individual user could meaningfully challenge DBCT Management's assertions regarding the cost of rehabilitation given the asymmetrical information available to those parties in a negotiation. The 2019 DAU provides no method of fixing this asymmetry, and New Hope considers that this is clearly a problem created through a negotiate/arbitrate model that does not exist where the QCA determines a reference tariffs using a building blocks methodology that takes into account a remediation allowance.

New Hope considers that some review of the rehabilitation plan would be appropriate for the purpose of the QCA determining:

(1) an estimate of the appropriate costs of rehabilitation;

(2) an estimate of the time period over which rehabilitation should occur; and

(3) an appropriate annual contribution calculated as an annuity stream to fund such costs through a remediation allowance of the TIC.

It is appropriate for the QCA to determine as part of its consideration of the building block methodology what an appropriate remediation allowance is for the Terminal. The rehabilitation plan is not an appropriate mechanism for informing any negotiations or arbitration in relation to a negotiated TIC under a negotiation/arbitration model.

New Hope shares the DBCT User Group's concerns about DBCT Management seeking remediation allowances without any evidence of protection of the funds made available to DBCT Management by those allowances. New Hope queries why there is no obligation on DBCT Management to demonstrate that it holds those funds in a manner that ensures that they are available for rehabilitation purposes. It would be appropriate, in New Hope's view, for DBCT Management to be required to demonstrate that rehabilitation funds are held for the intended purpose – as this would ensure that any ultimate rehabilitation liability is appropriately funded and does not fall to the State or users of the Terminal to fund the costs.

4.12 ***QCA Question 12***

Do stakeholders consider that the non-price terms proposed by DBCT Management in the 2019 DAU are appropriate?

(1) ***Treatment of the queue***

[redacted]

In the recent notifying access seeker process, the issue of start dates for access was clearly the cause of some confusion when determining how to allocate capacity to notified access seekers. Specifically, where access seekers had applications in the queue that had start dates that had already passed, it was unclear how the provisions could practically operate. As such, New Hope is supportive of DBCT Management's proposed change to require the revised date of access to be a date in the future (rather than the past).

In relation to the updated renewal form contained at Schedule A of the Draft DAU, it appears to New Hope that a number of the updates are consequential changes or for clarification purposes. New Hope supports the inclusion of the additional information required for the purpose of putting in a renewal application included in the revised renewal form. New Hope agrees that requiring access seekers to demonstrate the 'readiness' of their projects when submitting applications to the queue is an important mechanism for ensuring that the queue reflects the needs of genuine access seekers and their projects.

New Hope notes that DBCT Management has amended the access application procedure so that there is a uniform date that all access applications in the queue will expire (being 31 August 2019), and have removed the obligation for DBCT Management to remind users in the queue of the expiry date.

New Hope notes that it does not seem to be an unreasonable burden on DBCT Management to issue a reminder to all access seekers in the queue, especially if DBCT Management is permitted to move to a uniform date of expiry. New Hope submits that if a uniform date for expiry is accepted, DBCT Management should be required to issue a reminder of that expiry to all access seekers in the queue.

(2) ***Notifying access seeker process***

DBCT Management have sought to amend the notifying access seeker process, presumably to address concerns that arose during the recent notifying access seeker process.

DBCT Management have proposed the removal of the requirement for an access seeker to seek the capacity 6 months earlier than the earliest date in the queue. New Hope agrees with this proposal and considers that it should be accepted by the QCA.

New Hope notes that the 2019 DAU proposes that if a notifying access seeker initiates the notifying access seeker process, every access seeker in the queue would be given notice under section 5.4(e). This would then make each access seeker in the queue – including those behind the notifying access seeker in the queue – a notified access seeker.

Each notified access seeker – including those who were initially behind the notifying access seeker in the queue – would then be entitled to:

(1) amend the start date on their access application to an earlier date (provided it was not before the notice date of the notifying access seeker notification); and

(2) deliver signed access agreements requesting access for a shorter term, lower tonnage or earlier date than in their access applications.

While New Hope understands that policy rationale for allowing access seekers ahead of a notifying access seeker in the queue to obtain capacity, it strongly disagrees with the proposal that access seekers behind the notifying access seeker in the queue should be entitled to capacity before the notifying access seeker. Access seekers at the back of the queue are entitled to become a notifying access seeker – such that it is unclear to New Hope why those before a notifying access seeker in the queue would be preferenced when unallocated capacity at the Terminal was being contracted during a notifying access seeker process.

Additionally, New Hope has concerns about the provisions of the DAU that permit a notified access seeker to update the date for commencement of access upon receiving notice that a notifying access seeker has commenced that process. The provisions essentially allow each other user in the queue to update their applications to 'leap frog' the notifying access seeker. Under the proposal in the DAU where each access seeker would have their application terminate on a uniform date (with renewal occurring on 31 August each year), access seekers will have a clear date by which to update the start dates in their access applications. Where access seekers:

(1) have the right to update their start date upon renewal and at other times outside of the notifying access seeker proposal; and

(2) have the right to become a notifying access seeker under the DAU,

it seems adverse to any notifying access seekers that notified access seekers also are given an opportunity to update their start date to be before the notifying access seeker (where the notifying access seeker cannot match that position). This position is obviously compounded where all access seekers in the queue have the right to do so and receive capacity ahead of the notifying access seeker – not just those who are ahead of the notifying access seeker in the queue.

As such, New Hope considers that the 2019 DAU should be amended:

(a) to remove the ability of access seekers in the queue to amend the start date for their access application during a notifying access seeker process (as the onus should be on access seekers to have up to date applications through the annual renewal process); and

(b) to ensure that only notified access seekers ahead of the notifying access seeker in the queue are granted the opportunity to submit access applications for available capacity in advance of the notifying access seeker.

(3) ***Cleansing the queue***

New Hope does not agree with DBCT Management's proposal in the 2019 DAU that DBCT Management be permitted to remove Notified Access Seekers from the queue where the Notified Access Seeker:

(a) has a commencement date that is within 2 years of the Notifying Access Seeker's nominated start date;

(b) does not respond with a signed Access Agreement within the 3-month notification period.

New Hope considers that the 2-year period is unreasonable. Access seekers who are developing projects will not necessarily have the financial resources to bear such an extended period of take or pay liability for port capacity that they cannot use and this require removes that option for access seekers to vary their date (by pushing it back later in accordance with the renewal process) if their project development timelines slip. Access seekers who have advised of their anticipated start date should not be removed from the queue because they are still ready for access as at their anticipated start date, and not earlier. New Hope does not consider that this proposal promotes efficient allocation of capacity at the Terminal, and instead arbitrarily punishes access seekers for remaining committed to their submitted access application timelines. As such, New Hope considers that this proposal is inappropriate and should be rejected by the QCA.