

## Dalrymple Bay Coal Terminal User Group

2017 Access Undertaking – Modification DAAU

Submission to the Queensland Competition Authority

20 October 2017



## 1 Background

On 15 September 2017, DBCT Management Pty Ltd (**DBCTM**) lodged a draft amending access undertaking (the **Modification DAAU**) to amend parts of its 2017 Access Undertaking (the **2017 AU**).

This submission is lodged on behalf of the DBCT User Group in response to the Queensland Competition Authority's (**QCA**) request for submissions on the Modification DAAU.

## 2 Regulatory certainty

The DBCT User Group does not agree with DBCTM's characterisation<sup>1</sup> that none of the proposed amendments are contentious.

However, it acknowledges that many of them are not, such that this submission principally focuses on the amendments of concern.

For those amendments which the DBCT User Group has concerns with, this submission sets out the key issues with the proposals made by DBCTM.

However, as an overriding concern, the DBCT User Group considers that the acceptance of any contentious changes proposed in the Modification DAAU would undermine regulatory certainty.

The DBCT User Group acknowledges that DBCTM may apply under the *Queensland Competition Authority Act 1997* (Qld) (**QCA Act**) to seek to amend the 2017 AU. However, an attempt to seek amendment of contentious issues, not because of a change in circumstances, but merely to improve DBCTM's position, is an inappropriate use of that process.

In this case, amendments are being proposed only 7 ½ months after the final decision to approve the 2017 AU was made.

The DBCT User Group has always maintained that regulatory certainty is a positive attribute that promotes efficient investment. It is not consistent with the object of Part 5 of the QCA Act, the interests of access seekers or access holders or the public interest to allow a regulated entity to reopen elements of an approved DAAU following the conclusion of the regulatory process because it objects to elements of the outcome. As such, the DBCT User Group is opposed both on a principled and practical level to the use of the DAAU process to amend the 2017 AU to benefit DBCTM under the guise of a range 'administrative' changes (that – coincidentally - solely benefit DBCTM rather than users). The DBCT User Group firmly believes that such changes should be rejected.

As noted above, this concern is not raised in respect of all of the proposed amendments as many of the amendments are genuine typographical errors or other 'tidy up' amendments that do not change the underlying operation of the 2017 AU. However, where the amendments do not fall into this category, the DBCT User Group strongly urges the QCA to preference the preservation of regulatory certainty, and the positive outcomes that creates, over the interests of DBCTM as asserted in the Modification DAAU.

## 3 Operator and the OMC

The DBCT User Group considers the proposed changes to sections 3.2 and 3.3 are unnecessary, and do not alter the substantive application of those sections 3 in any way.

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<sup>1</sup> DBCT Management submission, 15 September at 1

Effectively all provisions of the undertaking apply 'during the term of undertaking'. The rationale given for the proposed amendment begs the question about why DBCTM considers it is appropriate to insert those words in front of these sections but not every other provision in the 2017 AU.

Consistent with numerous submissions made during the consideration process for the 2017 AU, the DBCT User Group continues to consider:

- (a) it is critically important that the terminal be operated by Dalrymple Bay Coal Terminal Pty Ltd (**DBCTPL**), as a user-owned operator that is independent of DBCTM; and
- (b) the 2017 AU is reliant on that independence and alignment of interests with users in numerous respects, such that the 2017 AU would require significant changes to continue to be appropriate if DBCTPL ceased to be the operator.

There is no evident issue with the existing wording, and retaining the existing wording does not prevent DBCTM from submitting a subsequent draft access undertaking or draft amending access undertaking if it wishes to change the positions mandated by those clauses – with the QCA then having a proper opportunity to assess whether such a change is actually appropriate at the time when a change is actually proposed.

Irrespective of the QCA's decision on these amendments, the DBCT User Group considers it is important for the QCA's decision to make absolutely clear that it has not accepted that it would cease to be appropriate for DBCTPL to remain the operator or the Operations and Maintenance Contract (**OMC**) beyond the term of the 2017 AU.

#### **4 Removal from queue where indicative access proposal not accepted**

As a general comment, the DBCT User Group do not consider that the current queuing arrangements are deficient or that further amendments (beyond those recently made in the 2017 AU) are required or appropriate at this time.

While the DBCT User Group accepts that DBCTM appears to be seeking to 'optimise' the process, any concerns about the efficiency or operation of the process held by DBCTM are not shared by the DBCT User Group and do not warrant amendments to the 2017 AU at this time. No examples have been given of where the existing queuing provisions have produced an adverse outcome.

With respect to the particular proposed amendments, the DBCT User Group is concerned with the extent of discretion given to DBCTM in the proposed amendments to section 5.6(a) in relation to the decision to remove an access seeker from the queue where they do not respond to an indicative access proposal by the expiry date.

That level of discretion has the potential to result in an inequitable application of the queuing mechanism with the first access seeker in the queue being able to remain in that position when subsequent bona fide applicants should be given an opportunity to progress their application. It thereby appears to undermine the certainty and transparency of the process for seeking access that the queuing provisions are designed to deliver.

As such, the DBCT User Group support leaving the drafting of the 2017 AU unamended with respect to this issue.

#### **5 Interaction between notifying access seeker process and any negotiations on foot**

The DBCT User Group supports the amendments to section 5.7(a)(6) as clarifying how the process in section 5.4(e) and (f) should interact with the normal course process of negotiating in order of the queue under section 5.7.

## **6 Section 5.12: Expansion price ruling**

The DBCT User Group supports the proposed amendment to clarify that DBCTM is only obliged to proceed to a FEL 3 Feasibility Study where the FEL 2 Feasibility Study supports proceeding (either conditional on a particular pricing treatment of the expansion capacity or generally), so that costs are not wasted on a FEL 3 Feasibility Study for expansion projects that are not found to be feasible by a FEL 2 Feasibility Study.

## **7 Section 9.1: Supply chain businesses**

Similar to the changes proposed in respect of sections 3.2 and 3.3, the proposed changes to section 9.1(a) are unnecessary, and do not alter the substantive application of the section.

All provisions of the 2017 AU effectively continue to apply until a draft amending access undertaking has been approved by the QCA to amend them.

The rationale given for the proposed amendment begs the question about why DBCTM considers it is appropriate to insert the references to draft amending access undertakings in this section but not every other provision in the 2017 AU.

The DBCT User Group is not supportive of there being any implication that this section (and the manner in which it regulates future vertical integration) has been pre-emptively determined to be more appropriate to be altered at some point in the future. In particular, depending on the Supply Chain Business, the DBCT User Group considers it is possible that there are no changes to the draft amending access undertaking which would resolve the issues arising from the vertical integration involved.

The DBCT User Group also does not support the related amendments to the definition of Supply Chain Business, which the DBCT User Group is concerned narrow the definition inappropriately.

It is important the definition of Supply Chain Business is defined more broadly than those businesses that may ultimately cause competition issues or required changes to the 2017 AU.

To the extent that a new Supply Chain Business is acquired which is not problematic, that will result in an swift draft amending access undertaking process which will not be objected to by stakeholders and will be easy for the QCA to consider and approve quickly, such that the risk of a broader definition is a minor administrative process cost.

Whereas if the definition becomes unduly narrow (and for example a Supply Chain Business is acquired by DBCTM that does not currently operate in the coal supply chain but then commences to do so post acquisition in a substantial way) there will be no way to amend the 2017 AU to resolve the problems which arise from that vertical integration.

## **8 Section 12.5(h): 60/60 tonnage exclusion**

The DBCT User Group does not support this proposed amendment.

The existing exclusion ensures that the existing access holder vote is not influenced by those who have a vested interest in the expansion proceeding due to also being expansion access seekers (or related to such access seekers). That is important given that the 60/60 vote is intended to provide a methodology for measuring the support among two different groups of users which may have different interests – existing users and expansion users.

Given that the impact of the amendment is to remove the current exclusion of certain existing access holders from voting on the 60/60 test, the DBCT User Group is concerned about the appropriateness of the removal of this 'check and balance' on the existing expansion procedures.

DBCTM's submission indicates that it considers the current exclusion 'prejudicial' to those access holders which are excluded. However, the removal of the exclusion is clearly prejudicial to the existing access holders who are independent of the proposed expansion access seekers.

Further, the DBCT User Group notes that there is no short or medium term expansion planned for the Terminal. As such, it is queried why it is necessary to amend workable and clear provisions in the 2017 AU given no access holders have raised concerns about the operation of the provisions, and these provisions were only very recently determined to be appropriate by the QCA in its consideration of the 2017 AU.

## **9 Fees for QCA regulatory services**

The DBCT User Group does not support the proposed amendment to Schedule C, Part A 4(a)(3) and (h). In particular, the DBCT User Group is concerned that the ability to recover all QCA fees in these circumstances creates skewed incentives for DBCTM, by effectively allowing DBCTM to recover costs incurred by it seeking a ruling that favours it (which socialisation typically will) even if under section 11.13 of the 2017 AU it is clear that the expansion should be differentially priced.

For example, the proposed amendment could allow for DBCTM to campaign for an expansion to be socialised, when the views of users is that such an expansion should be differentially priced and the relevant factors in section 11.13(c) clearly point to differential pricing being appropriate, knowing that even if it fails, DBCTM will get to pass the fees imposed by the QCA back to users.

At any rate, the DBCT User Group considers that this amendment does not clarify any inconsistencies, implement an anticipated change or address a typographical error. Further, it does not reduce any uncertainty in the 2017 AU. Rather, such an amendment would change the outcome of the 2017 AU by amending the allocation of costs as it was determined to be appropriate in that decision in a way that favours DBCTM. As such, the DBCT User Group considers that this amendment is not non-contentious, nor administrative in nature. Given the stated purpose of the Modification DAAU is to 'avoid uncertainty regarding the terms and legal effect of the 2017 AU', rather than to reopen issues that have already been determined by the QCA, the DBCT User Group does not consider that this change is necessary or prudent, and therefore it should be rejected.

## **10 Streamlined NECAP approvals**

The DBCT User Group does not support this proposed amendment.

The DBCT User Group does not consider that the current process regarding NECAP approvals is inappropriate, inefficient or has caused any adverse outcomes. The DBCT User Group notes that the QCA only recently determined that the existing drafting was appropriate in its consideration of the 2017 AU, and that DBCTM has not provided any clear imperative as to why the QCA's decision in that instance was inappropriate or requires amendment at this time.

Further, even if the proposed amendment may create some minor efficiencies, the DBCT User Group considers that if a NECAP proposal is uncontroversial and supported by all stakeholders, the requirement to go through the DAAU process is not a significant administrative burden on DBCTM or the QCA, but provides beneficial transparency.

That is particularly the case given that section 12.10(b) of the 2017 AU applies not just where users have unanimously approved the capital expenditure, but also where there is a lack of objection – leading to the potential for it to apply through oversight by an access holder that wished to object.

In fact, the only time that the DAAU process would require material resources or time would be when the DAAU was controversial for any reason (which is, of course, precisely the reason that

such a process exists). As such, the DBCT User Group does not consider that any material efficiencies would be created by the proposed amendments, and does not accept that the proposed amendments correct any confusion or lack of clarity in the 2017 AU.

## 11 Schedule C, Part A Section 2: ETS

The DBCT User Group does not support this amendment. We note that this issue was only very recently considered and settled by the QCA in its decision relating the 2017 AU.

The DBCT User Group considers that allowing the proposed qualifications on the deduction to be made from the revenue cap, removes or blunts DBCTM's incentives to call on the security it holds as soon as that is possible.

The whole point of DBCTM presumably having required security to be provided by an access holder is to be able to call on it prior to termination. Consequently, if early termination occurs without DBCTM having called on security to recover any of its pre-termination losses it should not be able to then make itself immune from that failure to call on the security so as to mitigate those losses by the revenue cap only being reduced by part of the value of the security held.

The DBCT User Group do not consider that DBCTM have appropriately justified the proposed amendment, and do not consider that it is consistent with the QCA's final decision (which of course included the required drafting, which this substantively changes).

## 12 Schedule I: Summary of OMC terms

The DBCT User Group considers the proposed clarifications to the OMC terms are accurate and can be accepted in their entirety.

## 13 'Typographical' changes

Most of the amendments summarised in Schedule 2 of the DBCTM submission as 'typographical' changes are not contentious.

A summary of the DBCT User Group's responses on those items set out below – with changes for which the DBCT User Group does not consider appropriate or are only appropriate if further changes are made being specifically highlighted. The DBCT User Group considers these issues are likely to be oversights by DBCTM rather than actually being contentious.

The item numbering reflects that used in Schedule 2 of DBCTM's submission.

Item	2017 AU Section	DBCT User Group responses
1	1.1 (Operator)	Accepted as an accurate clarification
2	1.1 (Previous access undertakings)	Accepted as an accurate clarification
3	1.1 (Background to this Undertaking)	Accepted as correct insertion of date of DBCTM submission of initial draft access undertaking in response to initial undertaking notice
4	1.1 (Approval of this Undertaking)	Accepted as correct insertion of date of final approval of 2017 AU
5	3.1(f), 3.1(f)	Accepted as amendment that reflects the defined term. <b>Suggested further change:</b> The same change of 'Related Party' to 'Related Body Corporate' should be made in section 5.8(c)(2)

		and 17.3(b)(3).
6	5.4(d)	Accepted as amendment that reflects the defined term.
7	5.4(n)	<b>Not appropriate:</b> the defined term 'Tonnage' refers to the volume of Access supplied under an Access Agreement. The reference to 'tonnage' in section 5.4(n) refers to the tonnage the subject of access applications, such that the change is not appropriate.
8	5.4(o)	Accepted as a non-substantive change in terminology
9	5.10(o)(3)	Accepted as correction in terminology
10	5.10(q)(3)	<b>Not appropriate:</b> the reference was intended to be to a Proposed Standing Funding/Underwriting Agreement have to be 'reasonable in all of <u>the</u> circumstances'. Consequently, the word 'the' should be added after the word 'of' rather than deleting 'of'.
10	5.10(q)(9)(B)	Accepted as correction of a typographical error
11	5.10(r)	Accepted as deletion of a now redundant section regarding the Incremental Expansion Study DAAU
12	5.12(2)(D)	<b>Not appropriate:</b> Paragraphs (A)-(C) of section 5.12(2) are the matters that DBCTM must apply to the QCA for a ruling in relation to. The further paragraph (that DBCTM is proposing becomes (D)) was intended to the margin in the 2017 AU as it was intended as a stand-alone obligation on DBCTM that if Different Terms are approved by the QCA, those Different Terms will be included in any Access Agreement that applies to the Price Ruling. It is not a matter for which a ruling should be sought, such that the amendment is not appropriate.
13	5.13(a)	Accepted as appropriate corrections to achieve the intention of the 2017 AU in respect of this section
14	6	Accepted as formatting improvement
15	6.1(c) and (d)	Accepted that Approvals are an appropriate part of the consideration of amendments to the Terminal Regulations, provided that an independent user owned operator remains responsible for proposing any amendments to the Terminal Regulations (as is proposed to be retained unchanged in the Modification DAAU).
16	6.2(g)(1)	Accepted as an appropriate correction to achieve the intention of the 2017 AU in respect of this section
17	7	Accepted as recognition of statutory confidentiality regime (which may apply irrespective of whether it is referenced in the 2017 AU).
18	9.1(c)	Accepted as appropriate cross-referencing correction
19	10.2(i)	Accepted that it is appropriate for DBCTM reporting of complaints to be confined to written complaints
20	12.5(j)	Accepted as an appropriate correction to achieve the intention of the 2017 AU in respect of this section

21	12.5(o)	Accepted as correction of a typographical error
22	12.5(p)	Accepted as amendment that reflects the defined term.
23	13.1(f)	Accepted as amendment that reflects the defined term.
24	Schedule A	Accepted as non-substantive formatting changes
25	Schedule C Part A s. 4(a)(1)	Accepted as correct insertion of date of final approval of 2017 AU
26	Schedule C Part A s.4(a)(1)	<p><b>Not appropriate:</b> The inclusion of the reference to section 150L of the QCA Act, provides for additional costs to be recovered from users that are not currently able to be recovered.</p> <p>The ability to recover these costs from users will create perverse incentives for DBCT Management to make extensive submissions on cost rulings that make the process protracted, knowing that users will be required to pay for both costs of their own advisers and the costs of the QCA.</p> <p>To the extent DBCT Management is seeking to have an expansion socialised that increases the TIC (which is adverse to the interests of the existing users), it is not reasonable for existing users to be required to pay the QCA costs caused by DBCT Management prosecuting that position.</p>
27	Schedule C Part A s.4(e) (to become 4(d))	Accepted as non-substantive amendment.
28	Schedule C Part A s.4(e)(1)	Accepted as appropriate clarification to remove the confusion about whether s.4(e)(1) or (2) applies to paragraph (c) Review Events
29	Schedule C Part A s.4(g)	Accepted as appropriate cross-referencing corrections
30	Schedule D	Accepted as correct insertion of date of final approval of 2017 AU
31	Schedule E s.1	Accepted as amendment that reflects the defined term.
32	Schedule G	<p>Amendments relating to Incremental Expansion Study DAAU accepted as deletions of redundant sections.</p> <p>Amendment of DBCTM is accepted as an amendment that reflects the defined term.</p>
32	Schedule G	<p><b>Not appropriate:</b> Amendments to definition of 'Review Event' are not merely a typographical amendment. The deletion of the 20% cap on cost recovery for Feasibility Studies is not perfectly reflected in the wording of section 5.10(o) such that the DBCT User Group is concerned its deletion may change the application of the cap. In particular, the reference to 'Feasibility Study' is broader than the references in section 5.10(o)(2).</p>
33	Schedule H s.4.1(c)	Accepted as amendments that reflect the defined term and correctly insert the date of final approval of 2017 AU

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34	Schedule J	Accepted as deletion of a now redundant section regarding the Incremental Expansion Study DAAU
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As always please do not hesitate to contact Mark Smith of Peabody Energy (as chairperson of the DBCT User Group) or John Hedge of Allens (as legal adviser to the DBCT User Group) if you have any queries.