Dalrymple Bay Coal Terminal User Group

4th Submission

DBCT 2019 Draft Access Undertaking

5 June 2020

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1 Introduction

This submission in respect of DBCT Management Pty Ltd's (***DBCTM***) 2019 draft access undertaking (the ***2019 DAU***) is made on behalf of the Dalrymple Bay Coal Terminal User Group (the ***DBCT User Group***).

This submission is in addition to those previously provided by the DBCT User Group on:

(a) 23 September 2019 (***1st User Group Submission***);

(b) 22 November 2019 (***2nd User Group Submission***); and

(c) 24 April 2020 (***3rd User Group Submission***),

and should be read in conjunction with them.

The DBCT User Group thanks the Queensland Competition Authority (***QCA***) for its earlier Interim Draft Decision of February 2020 (the ***Interim Draft Decision***) and an opportunity to provide a further submission, given the fundamental changes DBCTM continues to seek to the pricing model for the DBCT coal handling service.

2 Relevance of Declaration Decision

The DBCT User Group welcomes the Minister's decision to declare the DBCT coal handling service for another 10 years.[1]

However, the DBCT User Group readily acknowledges that, consistent with their previous submissions, the access criteria (as the threshold for declaration) and the requirement of appropriateness (as the threshold for approval of an undertaking) are different tests. Accordingly, the outcome of the declaration review does not automatically lead to a particular conclusion on the appropriate pricing model for the DBCT access undertaking.

What is relevant, is the factual findings that have consistently been made by the QCA (and now Minister) in relation to DBCT during the declaration process, namely:[2]

(a) DBCTM has market power;

(b) there are no competitive or close substitute services provided by other coal terminals;

(c) DBCTM's market power is not constrained by competition from other coal terminals or countervailing power of users (or other matters); and

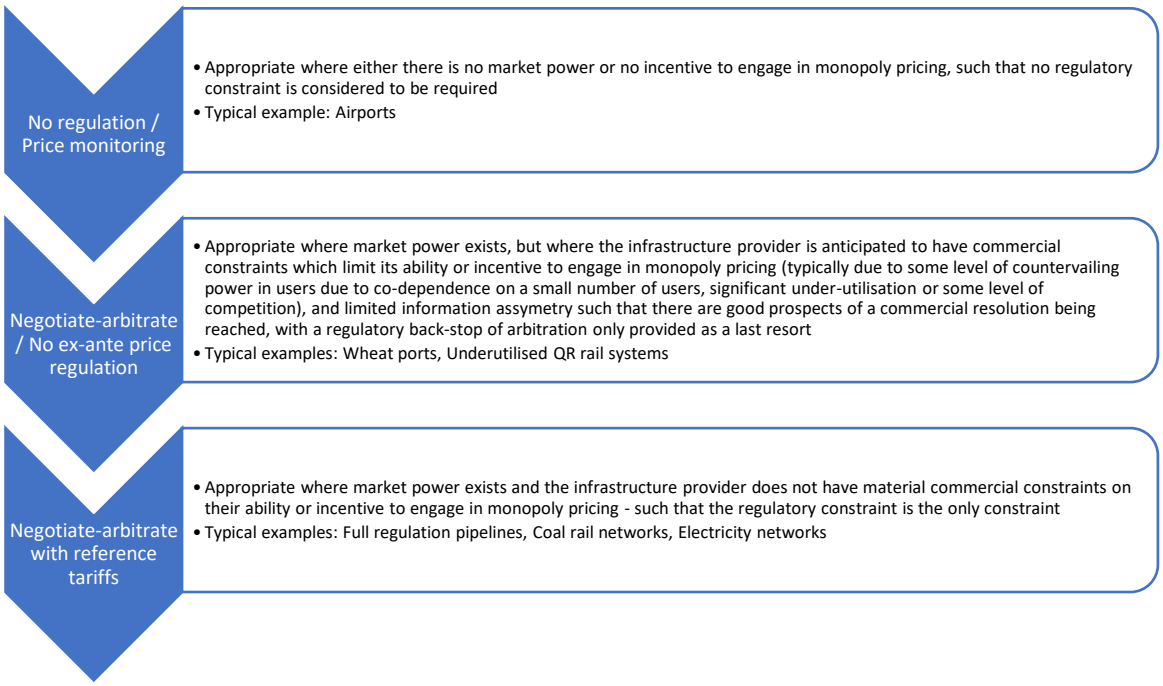
(d) DBCTM has incentives as a profit maximising monopolist to engage in monopoly pricing.

An appropriate undertaking is one that reflects those circumstances, and provides a regulatory pricing model that will definitely constrain DBCTM's ability to engage in market pricing – because there has been conclusively found to be no commercial constraints on their ability or incentives to do so.

That justifies greater regulation than is the case for some other infrastructure services for which commercial constraints do exist.

As shown in the diagram below and explained in previous DBCT User Group submissions and the related PwC Report, in those circumstances a reference tariff pricing model is the only appropriate outcome.

[1] Extraordinary Gazette, 1 June 2020
[2] Extraordinary Gazette, 1 June 2020, 271, 277-279 (and parts of the QCA Final Decision referred to therein).



3 Limited opportunity for collaboration

The DBCT User Group acknowledges that the QCA called for collaborative submissions.

However, subsequent discussions with representatives of DBCTM confirmed that DBCTM was not willing to collaborate on any pricing approach that was not based on their proposed negotiate-arbitrate model.

Given the polar opposite views held in relation to DBCTM's pricing model, and the extent to which non-pricing provisions like queuing and expansion framework are intertwined with that pricing model, that has disappointingly provided limited scope for collaboration.

The DBCT User Group did consider the amendments proposed in DBCTM's latest submission of 24 April 2020 (***Latest DBCTM Submission***), with the intention of determining whether there were any non-pricing issues on which collaboration would be productive. However, that review revealed that those changes nearly all relate to pricing issues, and did not address the views on non-pricing issues that the DBCT User Group has previously provided (particularly in the 1st and 3rd User Group Submissions, discussed again in section 13 of this submission).

Accordingly, this submission principally focuses on correcting and responding to arguments made in the Latest DBCTM Submission regarding the pricing model for the DBCT service.

However, the DBCT User Group acknowledges that there has been some communications between the DBCT User Group and DBCTM to investigate the potential for collaboration, namely that:

(a) on 21 May 2020, DBCTM sent the DBCT User Group's legal adviser an email indicating that DBCTM was seeking to understand the potential for collaboration on non-pricing issues;

(b) the DBCT User Group responded on the same day confirming it was willing to consider proposals on non-pricing issues, and referred to the DBCT User Group's previous submissions on non-pricing issues which DBCTM had not responded to;

(c) on 2 June 2020 (3 days before submission date), DBCTM provided a range of responses on non-pricing issues (which the DBCT User Group understands is to be a schedule to the DBCTM submission).

The DBCT User Group has not in the remaining time available (particularly give the multiple parties who make up the group) had an opportunity to properly consider the DBCTM responses. However, the DBCT User Group acknowledges that it appears from that response that DBCTM is willing to accept a number of the non-contentious non-pricing related proposals previously raised by the DBCT User Group, such that some progress has been made.

The DBCT User Group is willing to engage in a discussion with DBCTM about drafting issues of this nature (noting that DBCTM's response also suggests further discussion is needed about some issues) after this submission.

However, the DBCT User Group does note that some provisions of the 2019 DAU regarding 'non-pricing' issues such as queuing and expansions are so intertwined with DBCTM's pricing model that the problems with them are principally an outcome of DBCTM's pricing model rather than something that can be resolved in isolation. As such, they may be more readily resolved following the QCA's Draft Decision (at which point it is anticipated the pricing model the QCA considers appropriate will be clear).

4 Executive Summary

The DBCT User Group strongly submits that the 2019 DAU remains inappropriate due to being based on an inappropriate pricing model.

4.1 DBCTM's position does meet the draft conditions for appropriateness

Even taking into account the Latest DBCTM Submission, the 2019 DAU continues to fall short of the minimum conditions the Interim Draft Decision suggested were required for a negotiate-arbitrate model to potentially be appropriate.

In particular, DBCTM:

(a) rejects the QCA requirement of QCA guidelines describing the methodology the QCA would utilise in determining pricing in an arbitration, undermining a key mitigation against the uncertainty arising from DBCTM's model;

(b) has proposed information disclosure requirements that leave vast areas of uncertainty such that access seekers will be required to engaged in access negotiations suffering under substantial information asymmetry; and

(c) has made express submissions regarding its right to engage in monopoly pricing and asserts that the arbitration criteria it proposes permit that outcome – making clear that the theoretical right to resort arbitration will not provide the certainty of approach required to constrain DBCTM's market power.

Accordingly, based on the QCA's preliminary analysis in the Interim Draft Decision, DBCTM's pricing model and the 2019 remain inappropriate and should not be approved.

4.2 A reference tariff model is required to be appropriate

However, the DBCT User Group also strongly emphasises that making the 2019 DAU appropriate is not something that can occur by tinkering with the negotiate-arbitration model in any case.

DBCTM's pricing model would not be appropriate even if it *was* compliant with the proposals in the Interim Draft Decision.

That remains the case because DBCTM's market power cannot be sufficiently constrained by a negotiate-arbitrate pricing model.

While it is possible to continue to increase information disclosures and seek to improve the arbitration regime proposed, it is unavoidable that such measures will:

(a) not actually be as effective as a reference tariff in constraining DBCTM's market power and will heighten the prospects of monopoly pricing;

(b) materially increase costs through bilateral negotiations and arbitrations rather than a single QCA tariff assessment (and impose those costs disproportionately on individual access seekers);

(c) always leave individual access seekers at an information and bargaining disadvantage relative to DBCTM which will be across all negotiations and arbitrations;

(d) result in charges above QCA estimated efficient levels occurring on an ad-hoc basis based on information asymmetry, negotiating position, asymmetric timing pressures and limitations on the resources of individual access seekers, rather than a conscious QCA decision to do so to account for perceived risks of regulatory error or incentivising expansion; and

(e) with each further attempt that is made to rectify the defects of the negotiate-arbitrate model, introduce the very aspects of the reference tariff model that are perceived to be disadvantages without achieving the certainty, efficiency and transparency outcomes that a reference tariff model brings.

In addition, removing reference tariffs:

(f) creates significant uncertainties in existing long term user agreements which were agreed on the clear presumption of tariffs continuing;

(g) makes existing features of the DBCT regulatory arrangements (such as socialisation and the existing queuing regime) inappropriate;

(h) damages regulatory certainty; and

(i) is not something that can be fixed in a later regulatory period, as evergreen user agreements entered during this regulatory period will 'lock in' the adverse outcomes and the damage to investment and regulatory certainty will not be able to be instantly reversed.

Consequently, it remains clear that to be appropriate the 2019 DAU must be amended to include a reference tariff pricing model.

5 Appropriateness is not measured by the minimum set of amendments

The DBCT User Group acknowledges that DBCTM's latest submission contains 'amendments' to the drafting it initially proposed, and that it is possible DBCTM will continue to propose further iterative 'amendments' in this or future rounds of submissions.

However, the actual 2019 DAU that the QCA is required to assess under section 138(2) QCA Act remains the 2019 DAU that was submitted by DBCTM in response to the initial undertaking notice (without the latest indicated amendments).

That distinction is important because, as discussed in detail in the 3rd User Group Submission, once the QCA has determined that the original 2019 DAU is not appropriate to approve, the QCA is then required to consider how it is appropriate for it to require the 2019 DAU to be amended in its secondary undertaking notice.

As the QCA recognised in the Interim Draft Decision, the QCA's role is to determine an appropriate set of amendments – which is *not* limited to proposing only a minimum set of amendments.[3] There is no special status given to the Latest DBCTM Submission which somehow makes it the starting point for the assessment or requires the QCA to approve it when there are clearly more appropriate alternatives available.

Accordingly, where the QCA considers a reference tariff pricing model is the most appropriate outcome, and is an improvement on attempting to amend DBCTM's negotiate-arbitrate model, as previously recognised in the Interim Draft Decision,[4] the QCA Act requires a reference tariff model be called for as part of the QCA's secondary undertaking notice.

6 Appropriate pricing does not involve extracting monopoly rents

6.1 DBCTM's rationale

The purpose for DBCTM seeking a negotiate-arbitrate model has been clearly revealed in section 4 of the Latest DBCTM Submission.

DBCTM openly submits that:

(a) it should be entitled to extract available monopoly rents between the efficient cost of supplying the service (including a return on investment commensurate with the regulatory and commercial risks involved) and the value attributed by existing and potential users; and

(b) the arbitration criteria it proposes should lead to that outcome.

6.2 Pricing at the efficient cost of supply does not allocate economic rent to users

There is no doubt that such 'economic space' (to use DBCTM's terminology) exists in relation to the DBCT coal handling services.

There are no close substitutes for the service, as clearly recognised again by both the Minister and QCA in the recent declaration decision[5] and final recommendation.[6]

As there are no close substitutes there will in fact be a very significant gap between the efficient price for the DBCT service and the 'value to the user' (i.e. the monopoly price) which would reflect:

(a) the much higher costs of another coal terminal with available capacity (i.e. WICET); and

(b) all of the additional above rail, below rail and mine site infrastructure costs of accessing that terminal;

(c) any loss of revenue arising from lower blending and co-shipping opportunities at the other terminal.

However, DBCTM's assertion that setting pricing at the efficient cost of supply (including a return on investment commensurate with the regulatory and commercial risks involved) is inappropriate or somehow allocates economic rent to users is misconceived.

In a competitive market providing efficient outcomes, no such economic space exists, because attempts to charge above the efficient costs of supply (including a return on investment commensurate with the regulatory and commercial risks involved) result in customers/users switching to substitute services.

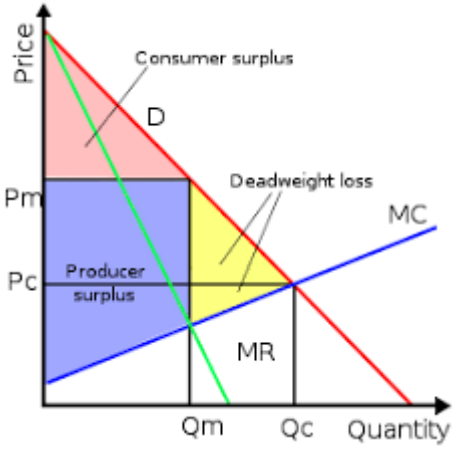
[3] Interim Draft Decision, 21.
[4] Interim Draft Decision, 57-60.
[5] Extraordinary Gazette, 1 June 2020 at 271-272.
[6] Final Recommendation, Part C: DBCT declaration review, March 2020 at 13-37.

Setting the price at the efficient cost of supply is not an allocation of rent to users (or to anyone). It is simply the efficient outcome, and the appropriate outcome of regulation in trying to replicate the position that would occur with competition.

Given the coal users are price takers in the coal markets into which they sell their products, they will not be able to recover any increased costs above the efficient price for the DBCT service they face, such that prices above the efficient costs of supply will necessarily translate into inefficient investment decisions by coal access seekers and users in other dependent markets (including deciding not to invest).

6.3 Extracting 'economic space' above the efficient cost of supply is monopoly pricing

Monopoly pricing is, by definition, a pricing strategy under which a monopoly supplier is able to raise prices above the efficient cost of supply that would prevail in a competitive market (as shown in the diagram below) to the point at which it extracts value to the point approaching where buyers will cease acquiring the service.



It is simple economics, that while the producer surplus is maximised in that way, it is not the efficient outcome and causes a deadweight loss to society.

The 'economic space' that DBCTM claims it should be entitled to claim (up to the user's willingness to pay) is:

(a) the very definition of monopoly rent;

(b) necessarily inefficient; and

(c) inconsistent with the very object of Part 5 of the QCA Act (involving the efficient operation of, use of and investment in significant infrastructure).

As a result, a regulator's role in setting or determining the appropriate pricing model (whether in a reference tariff or arbitration) has always been to determine an efficient price based on the efficient cost of supply (including a return on investment commensurate with the regulatory and commercial risks involved).

That is not 'an extreme outcome' as DBCTM asserts. Rather it is the only appropriate outcome. Uplifts which regulators have allowed above their point estimate for the efficient cost of supply are simply a recognition that there may be difficulties in determining that efficient price to an absolutely precise point estimate, rather than a view that prices should be set above efficient levels.

The QCA itself has long recognised this. In the QCA's current Statement of Regulatory Pricing Principles, the QCA stated[7] :

The primary consideration in evaluating whether a specific pricing proposal or structure is justified from a public policy perspective is whether it is clearly consistent with increasing overall economic efficiency (comprehensively defined). If this is not the case, there would have to be well justified non-efficiency based reasons as to why that policy would be supported.

DBCTM has not provided any such well justified non-efficiency based reasons.

Truly competitive markets produce economic efficiency as prices reflect efficient costs (including a return on investment commensurate with the regulatory and commercial risks involved). Whereas natural monopolies typically require regulatory intervention to achieve that outcome, to prevent inefficient outcomes.

If section 120 QCA Act operates in the manner that DBCTM considers it does, where it permits a determining of pricing at a level that extracts monopoly rent, then it is absolutely clear that it does not provide a sufficient constraint on the exercise of market power, and any negotiate-arbitrate model that relies on it as the constraint is not appropriate under section 138 QCA Act.

Even if the QCA considers that section 120 QCA Act does not operate in that manner, it should now be evident that DBCTM's dominant purpose for a negotiate-arbitrate model is to increase prices above efficient levels – and any model that facilities that or even creates the clear potential for that cannot be economically appropriate within the meaning of section 138 QCA Act.

6.4 The reference tariff model more appropriate address the 'efficiency rationales'

DBCTM refers to the potential for asymmetric risk and asymmetric consequences of regulatory error as supporting its approach, which it asserts are justifications for pricing above efficient levels.

However, that mischaracterises those issues and appropriate regulatory responses to them.

First, none of the reasoning or regulatory thinking referred to in the Latest DBCTM Submission suggests that a regulator should set costs at above the level of efficient costs.

Rather, they reflect the view what where there is considered to be a risk of both:

(a) regulatory error; and

(b) potential greater downsides of an under-estimate of the efficient cost,

that there can be merit in taking a conservative approach to the regulatory setting of rate of return by setting pricing at slightly above what would otherwise be the point estimate of the efficient price. In other words, it is tending towards slightly over-estimating the efficient costs of supply, but still trying to set the price at the efficient cost of supply. That much is clearly evident where the regulatory decisions that DBCTM refers to talk of setting the cost of capital at higher than the 50th percentile within 'the distribution of estimates of the true cost of capital'.

In addition, as clearly detailed in the 3rd User Group Submission, the reference tariff model utilised by the QCA already contains the flexibility to achieve exactly that, through providing the QCA with the ability to:

(c) not set reference tariffs solely by reference to a mechanistic bottom-up analysis, including providing an uplift beyond any point estimate derived from such a bottom-up analysis; and

[7] QCA, Statement of Regulatory Pricing Principles, August 2013 at iv.

(d) utilise estimates of WACC parameters at above what the QCA considers the most accurate point estimate or mid-point of the reasonable range of estimates.

This is not just theoretical flexibility, but, as detailed in the 3rd User Group Submission, the QCA has adopted such approaches in both the latest Aurizon Network and DBCT undertaking decisions in relation to reference tariffs. These are not factors that justifying changing the pricing model, but factors to consider, within the scope of the reference tariff model, as to how the tariffs should be set.

The DBCT User Group strongly considers that these factors actually favour a reference tariff. If pricing is going to be set potentially above efficient levels, then it is surely important that is done knowingly, having carefully weighed the costs and benefits of doing so, and having actually determined that there is in fact asymmetric consequence of any regulatory error and any over-estimate/uplift is sufficiently modest to not adversely impact on investment and competition outcomes in dependent markets.

By contrast, in a negotiate-arbitrate model, uplifts above the estimated efficient cost of supply will occur in an ad-hoc way that will instead be reflective of differences in information, negotiating position, asymmetric time pressures and limits on resources of individual access seekers, without any science or rigour in relation to how that will impact on investment and competition generally.

In other words, DBCTM's asserted flaws with the reference tariff model are, in fact, a clear strength, and these efficiency arguments strongly favour a reference tariff being the appropriate pricing model.

The DBCT User Group also note the findings that declaration will promote investment in DBCT and regulatory error is unlikely to have a material negative impact on investment incentives.[8]

7 Relevance of the Regulatory Period

7.1 Overview of DBCTM's argument

The Latest DBCTM Submission seeks to defend its pricing model by arguing that:

(a) the QCA's role is to assess whether the 2019 DAU is appropriate for the regulatory period to which it relates (such that future regulatory periods are irrelevant); and

(b) where existing capacity is fully contracted, the interests of existing users are irrelevant and reference tariffs do not create certainty for access seekers.

The DBCT User Group strongly disagrees with every aspect of this argument, and exposes below why that analysis is neither accurate or appropriate.

7.2 Relevance of the 'opportunity to revisit', long term impacts and regulatory certainty

DBCTM argues that:

(a) the fact that the QCA can revisit the effectiveness of the pricing model adopted at the end of the regulatory period means that issues arising will not endure long term; and

(b) that the inability to lock in enduring outcomes together with the threat of tariff reinstatement provides an incentive for DBCTM to act reasonably in negotiations.

The simplest of analysis demonstrates the flaws in that reasoning.

First, even assuming the outcomes of it could be completely unwound in 5 years' time, the 2019 DAU is not made appropriate by virtue of the fact that its flaws might only apply for 5 years. On the basis of that misconceived logic, any undertaking terms can be appropriate.

[8] Extraordinary Gazette, 1 June, 300 (and QCA Final Decision findings referred to therein).

Second, the outcomes of a negotiate-arbitrate model will clearly not be limited to the term of the 2019 DAU. User agreements reached or determined in arbitration (without any reference to reference tariffs) are likely to have terms of at least 10 years, and with the existence of renewal rights, and the longer mine lives of the underlying projects these agreements relate to, the outcomes of this regulatory period would be anticipated to apply for substantially longer. Most user agreements from the time of DBCT's privatisation (in 2001) remain on foot today. Yet, under DBCTM's model the user agreements from the 2019 DAU term will contain no contractual rights to take up a reference tariff if one was to suddenly become part of an undertaking again at some point in the future. Accordingly, monopoly pricing issues arising during the 2019 DAU will become 'locked in' by contract and endure long term.

Third, because this regulatory period will provide the clear opportunity for DBCTM to lock in long term monopoly profits in that manner, the DBCT User Group strongly disagree that DBCTM will not have incentives to engage in monopoly pricing during that period. DBCTM's intentions in relation to pricing are made very clear in section 4 of the Latest DBCTM Submission where a substantial portion of its submission is devoted to trying to justify its view that engaging in monopoly pricing by charging above efficient levels is 'appropriate'.

Fourth, it is not appropriate to engage in dramatic changes to the regulatory regime merely because there is a future option to limit the damage by making a further dramatic change to reverse it. As the QCA correctly noted in the Interim Decision:[9]

providing stability and predictability in the regulatory framework, is likely to promote investment confidence, and reduce administrative and compliance costs.

When there is an existing system that operates as intended, and is considered appropriate in accordance with section 138 QCA Act, it is not appropriate to gamble on the uncertain outcomes of a negotiate-arbitrate model.

Regulatory certainty, and the benefits it provides, are not something that can be confined by reference to a single regulatory period. Drastic changes now damage regulatory certainty, in a way that has a damaging impact on potential future access seekers even if they are not likely to seek or obtain capacity during the next regulatory period, because it creates real uncertainty about what the regulatory regime will be like when they do seek to obtain capacity. The theoretical ability to switch back to a reference tariff will not restore that certainty once it is broken. In the mining industry, where entities make long term investments in acquiring tenements, exploration, development and seeking approvals prior to contracting capacity it is that continuing and ongoing nature of regulatory certainty that is critical to efficient investment.

Fifth, the changes that DBCTM is seeking to make to clause 7.2 of the standard access agreement, will result in it being likely that a contractual pricing review will reset the price before there is an opportunity under the next undertaking to determine a reference tariff in any case, such that even existing access agreements may take at least two regulatory periods of reference tariffs being mandated for pricing to revert to efficient levels.

7.3 Access over the Regulatory Period

DBCTM asserts that all access seekers during the regulatory period will be seeking access to expansion capacity.

The DBCT User Group considers that is an over-simplification.

First, and most obviously, DBCTM is specifically proposing the 2019 DAU include processes for contracting short-term available capacity (which is capacity in the existing terminal which has not

[9] Interim Draft Decision, 19

yet been contracted, as some of the existing longer term contracts have either not commenced or not fully ramped up).

In addition, while it may not be likely, it is not as certain as DBCTM would have the QCA believe that no other existing terminal capacity will become available.

For example:

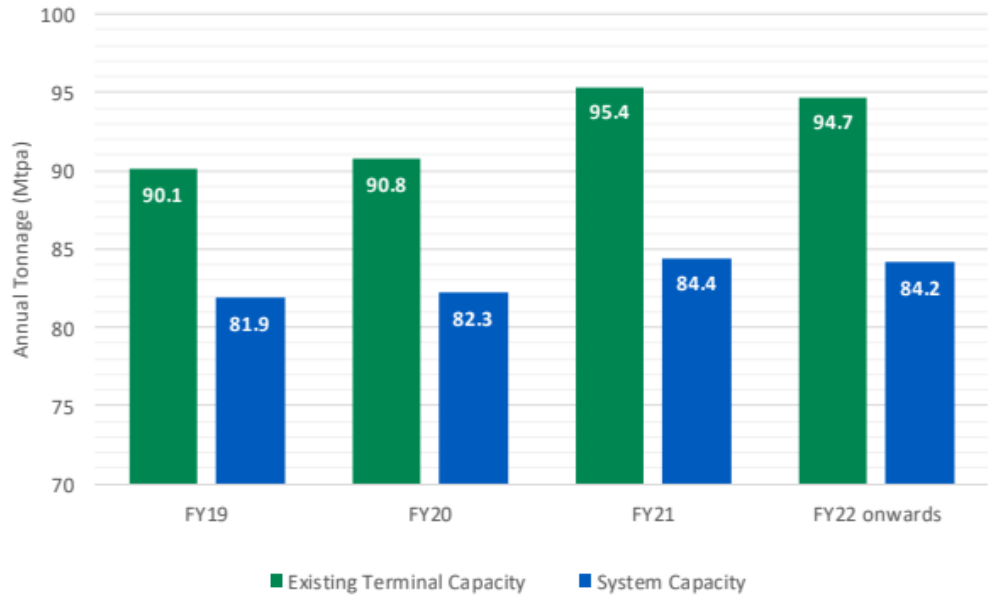
(a) access seekers would also generally approach existing users to see whether they hold surplus capacity that can be assigned, which may provide a pathway to existing capacity for an entity that would otherwise be an access seeker;

(b) existing users agreements could be terminated for default or insolvency type events, which would release existing capacity;

(c) the user agreements contain provisions which can result in a user's contracted capacity being reduced where it is not being utilised to prevent hoarding of capacity (see clause 11.3); and

(d) to the best of the User Group's knowledge, the capacity of the terminal remains in excess of system capacity such that if the rail system's capacity was increased (say as an outcome of the independent expert assessment occurring under the Aurizon Network undertaking), additional latent capacity in the existing terminal would be released. For example, the ILC's assessment showed a terminal capacity of 94.7 mtpa from FY22 onwards, relative to a system capacity of 84.2 mtpa as shown below:

Figure 1 Capacity Estimates over assessment period



For the purposes of the 2019 Master Plan, DBCTM did not have ILC undertake any terminal capacity modelling – and only modelled system capacity – such that there is no evidence to suggest that terminal capacity is still not materially greater than system capacity.

7.4 Incentives to expand

The DBCT User Group acknowledges that an appropriate price will provide sufficient incentives for DBCTM to invest in efficient expansions.

However, as the Latest DBCTM Submission itself expressly recognises, the QCA has already recognised that position in previous decisions in the context of setting reference tariffs in previous access undertakings.

That is entirely consistent with the detailed discussion in the 3rd User Group Submission in relation to how the reference tariff model has more than enough flexibility to address this issue.

The pricing which is required to provide appropriate incentives to expand is presumably a matter of the level of the price – not the model by which it was derived. That is, this is clearly an argument for a higher rate of return (through the QCA adopting a more generous estimate of the cost of capital) in calculating a reference tariff, not an argument for removal of the reference tariff pricing model.

Surely it is better for any such up-lift to be a consciously adopted one set at a uniform level designed to incentivise DBCTM without causing adverse impact on future coal investment, competition in dependent markets and other public interest factors – rather than facilitating DBCTM to extract significantly higher prices out of some access seekers in less favourable bargaining positions or with lesser resources where the impact on investment incentives, competition and the public interest will be far less clear.

In addition, it is notable that DBCTM has contracted expansion capacity for 8X and entered underwriting agreement for funding feasibility studies for it, without any certainty that it will achieve its negotiate-arbitrate pricing model. DBCTM own actions confirm what the DBCT User Group has submitted on numerous occasions, that despite DBCTM submissions to the contrary, the reference tariff pricing model has and can provide sufficient incentives to expand.

That of course, mirrors the practical experience that the development of major expansions having occurred since tariff regulation was introduced.

The DBCT User Group also notes its scepticism of DBCTM's assertion that they will negotiate a 'mutually acceptable outcome' and they will have alignment with access seekers in needing to agree pricing which incentives expansion.

First, that would mark a complete shift from DBCTM's current behaviour. DBCTM submitted the 2019 DAU without any consultation with the DBCT User Group about their pricing model. They have subsequently steadfastly refused to engage in any collaborative discussion regarding a reference tariff at which they would expand. It is not clear to the DBCT User Group how the QCA can be confident that DBCTM would be reasonable in individual pricing negotiations where they have not been in the context of a QCA overseen regulatory process.

Second, the expansion and queuing process proposed by DBCTM results in access seekers having contracted capacity without knowing the price, and having no mechanism to simply terminate their conditional access agreements if they do not like the price offered. As a result, unlike the situation a negotiate-arbitrate regime assumes where the infrastructure provider has an incentive to offer a price which will result in the capacity being contracted – under DBCTM's model, access seekers have an extremely weak bargaining position, resulting in extremely limited prospects of being able to achieve a mutual acceptable price.

Finally, the DBCT User Group submits that the QCA should be measured in the weight given to this factor, noting that DBCTM has legal obligations to progress expansions where there is sufficient demand under both the undertaking and Port Services Agreement, such that the undertaking will continue to have non-pricing frameworks for facilitating and incentivising expansions.

7.5 Reference tariffs *do* provide certainty

DBCTM suggests that reference tariffs will not provide any certainty for access seekers, and that the certainty access seekers are provided under the 2019 DAU is the same as under the current access undertaking.

Again, that is not true, and highly misleading.

Certainty and predictability of approach is absolutely critical to investment and contracting decisions by coal users and access seekers. That can be achieved even where perfect certainty of a fixed price is not achievable. The Latest DBCTM Submission fails to acknowledge that very important distinction.

The DBCT User Group acknowledges that under any pricing approach there will not be absolute certainty of the fixed dollar price which will be charged for expansion capacity.

However, with a negotiate-arbitrate model there will be no certainty even as to the approach which will be applied.

Whereas, under a reference tariff model, the approach the QCA will take to determining price will be absolutely clear. In particular, in relation to expansions, users and access seekers are familiar with the QCA's:

(a) utilisation of a building blocks methodology for determining the tariff;

(b) approach to setting each of the underlying WACC parameters and building blocks;

(c) approach to assessing prudency of cost; and

(d) principles regarding application of differential pricing and socialisation in respect of cost sensitive expansions due to its consideration in the previous access undertaking and other QCA regulatory decisions and papers.

Each of those matters have been made transparent through QCA decision documents (both in respect of DBCT and other infrastructure services) and provisions of the undertaking itself.

That familiarity, certainty and predictability, enhanced over 16 years of QCA decisions in respect of the DBCT service, allows access seekers to make investment decisions, even if they do not have perfect certainty as to the exact tariff, because they can predict the range of likely outcomes with a reasonably high degree of accuracy.

DBCTM principally rests its assertions about uncertainty of the reference tariff on the price ruling (as to whether expansion capacity would be socialised or differentially priced). However, the DBCT User Group reject the assertion that creates significant uncertainty because:

(e) the principles on which that decision will be made are clearly set out in the undertaking and explained in the QCA decisions in relation to the 2017AU when there were inserted;

(f) in relation to the expansions that may occur in the foreseeable future (i.e. 8X or components of it), access seekers have information in relation to estimate cost and scope to inform their views about whether it will be socialised or differentially priced under those principles;

(g) public submissions were made during the declaration review by the DBCT User Group confirming their view that these expansions would be socialised on the basis of those pricing ruling principles;[10] and

(h) DBCTM has expressed the view to a number of access seekers privately that it believes the 8X expansions will be socialised and that it will not proceed with the expansion if that is not the case.

Accordingly, the DBCT User Group considers it is clear that reference tariffs do provide, and will continue to provide, a high degree of certainty for access seekers (and a much higher degree of certainty than DBCTM's pricing model).

[10] DBCT User Group, Submission in response to Queensland Competition Authority Consultation Paper, 28 October 2019, 23-27.

7.6 The interests of existing users are critical

The DBCT User Group strongly agrees with the assessment in the Interim Draft Decision[11] that the interests of existing users are relevant to its consideration of an undertaking within the factors to be considered under section 138 QCA Act. Those interests clearly favour the continuation of a reference tariff model.

It may be trite, but entities that are currently access seekers will become existing users during the regulation period in question. That alone reveals the oddity of DBCTM's artificial distinction and argument that the interests of existing users are not relevant.

In addition, even if it is assumed that all of the 8X expansion is developed during the next regulatory period – the current users would still have contracted at least 86% of the terminal[12]. It is obviously non-sensical to simply ignore the interests of the largest group impacted by DBCTM's proposed pricing changes. Given that user agreements are not tied to source mines and contain evergreen renewal rights, those very users will make significant investment decisions on new mining developments in dependent markets based on the attractiveness of continuing to utilise those agreements into the future.

Each of the reasons given by DBCTM for ignoring the interests of providing existing users with certainty do not stand up to critical analysis.

In particular:

(a) regulating access appropriately can, and often does, require regulating price of access – in particular:

  (i) that is evident from the sections of the QCA Act that expressly envisage reference tariffs as an inclusion in undertakings[13])

  (ii) monopoly pricing will always be the key issue requiring regulation for monopolists which are providing access (where the problem is monopoly pricing not refusal of access); and

(b) regulating price is clearly appropriate in respect of the DBCT service where existing users are parties to long term evergreen agreements that envisaged prices being set through reference tariffs and a QCA set annual revenue requirement (and as discussed below have numerous provisions which have no evident fall-back for circumstances where such tariffs and QCA set annual revenue requirements don't exist);

(c) as recognised in the Interim Draft Decision,[14] the interests of access holders are relevant to considering the section 138(2) factors, including because they generally coincide with the interests of access seekers;

(d) certainty of price for access holders does clearly impact on competition in upstream and downstream markets because access holders have continuing investment decisions to make in those market – particularly due to the evergreen nature of these agreements enabling their use for future greenfield projects and brownfield mine life extensions that existing access holders invest in;

(e) contrary to DBCTM's submissions it is highly unlikely to be the case that the interests of access holders and users will become misaligned over the next regulatory period – existing users have already signalled in their submissions under the declaration review that they expect any expansions of the terminal which might occur during the regulatory

[11] Interim Draft Decision, 18.
[12] Based on 84.2 Mtpa of contract capacity and the projected 13.3 Mtpa of 8X expansion capacity
[13] Section 101(4), 101(7) and 137(2)(a) QCA Act.
[14] Interim Draft Decision, 18.

period (components of 8X) to be socialised, and there is obviously likely to be some existing users who are also access seekers; and

(f) DBCTM once again has mischaracterised what has been said by the QCA about the arbitration regime in the user agreements – there has been a recognition that existing users have some contractual protections (which access seekers do not have) – but they are clearly not fully protected by that regime.

Accordingly the interests of existing users are highly relevant. They strongly favour adoption of a reference tariff model for the same reasons access seekers do, an effective constraint on DBCTM's market power that provides greater certainty, efficient pricing and lower negotiating and contracting costs.

7.7 The operation of existing user agreements

A significant portion of Queensland's current and anticipated future metallurgical coal industry is reliant on the access that is contracted under the existing DBCT user agreements, such that how they will operate under different pricing models is clearly relevant to assessing the appropriateness of those proposed pricing models.

These user agreements were signed with all parties envisaging that pricing under them would always be determined by a reference tariff. The other arrangements in clause 7 are clearly a last resort backstop merely included for completeness to deal with a situation the parties did not envisage ever occurring so the agreements were not at risk of termination for frustration. That much is evident from the numerous linkages to tariffs, annual revenue requirements and QCA decisions interwoven throughout the entirety of the agreements.

If these access arrangements are not continued due to DBCTM seeking to engage in monopoly pricing at the next price review occurring under them, it is possible that existing terminal capacity will be released after expansions have been committed, which would clearly be an inefficient outcome. As such, the interests of existing access holder are not just relevant, but critical.

As discussed in the 3rd User Group submissions, it is also highly relevant that the removal of a reference tariff and QCA approved annual revenue requirement creates significant uncertainty in relation to how existing User Agreements will operate. The DBCT User Group submits that it cannot be appropriate to suddenly create such uncertainty about how a series of payment and pricing related provisions in existing User Agreements operate, thereby upsetting such longstanding arrangements on the back of which users have already made significant long term investment and contracting decisions.

This is also not something that DBCTM can remedy by further amending the DBCTM pricing model – because existing user agreements are not amended by the existing undertaking or changes made to the new standard access agreement.

In particular, provisions regarding each of the following depend on QCA decisions that would no longer form part of DBCTM's pricing model:

(a) excess charges;

(b) year-end adjustments;

(c) provisional increments and provisional increment repayments;

(d) the distinction between 'Reference Tonnage' and 'Non-Reference Tonnage';

(e) annual roll-forward arrangements; and

(f) Review Events.

DBCTM's deletion of them from the standard access agreement (in recognition they are not compatible with what DBCTM proposes) obviously doesn't resolve the contractual position under existing User Agreements.

Where DBCTM has entered agreements that envisage those provisions continuing to operate for the economic life of the terminal (through the exercise of the evergreen renewal options in clause 20), the DBCT User Group strongly submits that it is inappropriate to simply abolish from the undertaking pricing model the positions they rely on.

7.8 Timing of arbitrations

DBCTM seeks to down play the costs and administrative burden which will be involved in multiple arbitrations by suggesting that they will always be concurrent.

As noted in section 7.3 above, short term capacity is intended to be available for contracting and it is possible that longer term existing terminal capacity will become available for contracting. Where either of those events happen that would trigger arbitrations at a different time period.

It is also not currently clear, given that studies are only just commencing and that the 8X access agreements are highly conditional, that the 8X expansion will be developed as a whole, rather than advanced in progressive tranches, creating the potential for multiple separate arbitrations for each tranche of expansion capacity.

Consequently, it is far from clear that all arbitration will be concurrent as DBCTM claims.

Even if arbitrations were mostly concurrent and involved limited duplication from DBCTM's perspective that does not resolve the inherently costly and unbalanced nature of how such bi-lateral arbitrations would occur, where individual access seekers are required to incur significant

If one assumes that all arbitrations were to occur at the same time, it is still simply not the case that that will mean that the QCA only needs to review information only once, or that this will not involve multiple bi-lateral arbitrations with substantial costs imposed on the individual arbitrating access seekers.

DBCTM's stated premise for a negotiate-arbitrate regime is that it wishes to be able to negotiate (and presumably have determined in arbitration) different pricing depending on the alleged differences in individual circumstances of access seekers and existing users. It can only be assumed that DBCTM will therefore attempt to lead evidence at arbitrations of such individual circumstances which will not be common among users.

DBCTM will of course have the benefit of being a party to all arbitrations and will definitely benefit in terms of cost efficiencies and being able to refine its arguments across all arbitrating access seekers. That will, however, not be the position for access seekers. DBCTM's proposal to publish the outcomes of arbitrations does not resolve this – as during these arbitrations the proceedings will presumably be confidential.

This issue in fact demonstrates an important part of why arbitration is not a sufficient constraint or threat to incentivise DBCTM to reach agreement, as:

(a) the potential costs to DBCTM of not reaching agreement are significantly less than for each individual access seeker (as the incremental costs to DBCTM of another arbitration are limited);

(b) yet the potential gain to DBCTM of higher pricing is multiplied across the access seekers whereas each individual access seeker can only benefit to the extent they mitigate their own changes.

In other words, many access seekers will face very significant cost and time disincentives from pursuing arbitration (even in the event of inefficiently high prices being offered by DBCTM), at a

pre-production stage of their project when cash is likely to be tight, such that arbitration will not be a credible threat that is capable of constraining DBCTM's engaging in monopoly pricing against such access seekers.

7.9 Lack of competition with other terminals

This issue has been considered extensively in relation to the 2017 DAU, the 2019 DAU and the declaration review.

While, DBCTM has never accepted it, the QCA has now found on multiple occasions based on clear economic evidence that:

(a) there is no close substitute services for the DBCT coal handling service; and

(b) as a result, users and access seekers cannot credibly threaten to take business elsewhere and have no countervailing power.

For example, in the Interim Draft Decision the QCA found:[15]

DBCTM exhibits a high degree of market power as there is limited contestability due to a lack of close substitutes for the DBCT service. Further, there is limited threat of competition entering the market, given the stringent legislative requirements around port development.

Given a lack of close substitutes for the DBCT service, we also consider that access seekers will have limited countervailing power, as they cannot credibly threaten to take their business elsewhere.

In the final declaration review recommendation, the QCA found:[16]

The QCA considers there are no close substitutes to DBCT's coal handling service for mines in this market. Rather, it is evident that DBCT is overwhelmingly the dominant coal handling facility in this market.

The QCA has reached this view based on the following:

- *The majority of DBCT Management's demand for contracted capacity comes from mines on the Goonyella coal chain.*
- *Mines in the Goonyella coal chain are unlikely to seek coal handling services from terminals outside the Goonyella coal chain in response to price or quality incentives (i.e. other terminals do not provide a close substitute to DBCT).*

Consistent findings were also made in the last undertaking process.

There is also no practical evidence of DBCTM's asserted competition for expansion capacity.

The clearest indication of that is that no other Bowen Basin coal terminals are proposing to expand to offer an alternative to the DBCTM's proposed 8X expansion. In particular, there is no evidence of DBCTM's alleged competitors, RG Tanna or Abbot Point being interested in expanding or trying to compete to 'lure' access seekers away from DBCT's 8X expansion. The very fact that access seekers have signed conditional access agreements in respect of DBCT rather than engaging with WICET (for existing surplus capacity) or other terminal providers (for expansion capacity) – demonstrates the lack of competition.

All of that makes it fanciful to suggest other coal terminals will be competing with DBCTM to provide access, even leaving aside the stark economic relativities and non-cost differences found to exist between the terminals for Hay Point catchment coal users

[15] Interim Draft Decision, 9.
[16] Final Recommendation, Part C: DBCT declaration review, March 2020 at 36-37.

In addition, as has been previously submitted in the declaration review, the GHD assessment that DBCTM again seeks to rely on is deeply flawed for a range of reasons. Most obviously those flaws include:

(a) an assumption of existing space capacity at RG Tanna (which does not exist and would be contrary to all discussions that mining companies have had with Gladstone Ports Corporation about whether capacity exists which can be contracted at RG Tanna); and

(b) an assumption of differential pricing at DBCT for 8X (which is highly unlikely to apply in respect of accessing DBCTM, as noted in the DBCT User Group's earlier submissions, given the high degree of physical integration involved in the 8X expansion components).

In relation to the references DBCTM makes to reports and environmental impact statements of potential access seekers, the DBCT User Group simply notes that project proponents are incentivised to note the widest theoretical possibilities for export pathways for their projects in these documents. Documents of that nature serve a number of purposes – both to promote the relevant project and to ensure that all theoretical possibilities are disclosed as part of environmental assessments. They are in no way representative of a terminal being listed as a potential export avenue being equally efficient or competitive with DBCT, and for DBCTM to suggest otherwise is disingenuous.

With the DBCT User Group having disproved this argument repeatedly, and with the QCA having conclusively determined on multiple occasions that DBCTM faces no competition for its coal handling service, this cannot be a factor which supports a change in the pricing model for DBCT.

8 Other issues raised by DBCTM

8.1 Nature of Access Seekers

DBCTM argues that the nature of the majority of access means that they are capable of assessing information in order to effectively negotiate with DBCTM.

There are a number of issues with that proposition, namely:

(a) even if it is accepted that is true for some access seekers, it cannot be appropriate to implement a negotiate-arbitrate system where some access seekers are effectively acknowledged as not having the capacity to adequately understand the information provided – as that it is not something that can be overcome by improving the levels of information disclosure, and it cannot be appropriate for efficient access seekers to be discriminated against on that basis;

(b) just because an access seeker is sophisticated in relation to investment in and operation of mining projects, does not mean it is able to easily assess information in relation to coal terminal costs and returns or effectively negotiate terminal prices. It is rare for access seekers to own or operate a coal terminal themselves (with BHP/BMA providing the only real current exception) and they are typically 'price takers' when it comes to coal supply chain infrastructure (with prices for the Aurizon Network and ARTC rail systems, PWCS, NCIG, RG Tanna and, at least until now, DBCT being set by regulators on a well understood and consistently applied methodology);

(c) the practical experience of coal users at the Abbot Point Coal Terminal (where a commercial negotiate-arbitrate regime applies) is that the terminal owner has significantly more information, that there is no avenue to obtain further information in a timely way, and that it is very difficult even with expert economic and legal advice to fully understand the reasonableness (or otherwise) of terminal owner proposals;

(d) DBCTM has itself presented wildly varying information about remediation costs, expansion costs (with variances of hundreds of millions of dollars in both cases) and the capacity which can be created through expansions in the last few years – leading one to the inescapable conclusions that either:

(i) it is extremely difficult to understand the actual level of these costs (and therefore will be for access seekers); and/or

(ii) DBCTM is willing to make, and seek to justify, extreme ambit claims about cost and return issues (and would therefore be anticipated to do so in the context of any negotiate-arbitrate based pricing model);

(e) the DBCT User Group considers that DBCTM's submission that an access seeker will be able to seek advice or direction from the QCA is highly unlikely to hold true, given the QCA will necessarily be very mindful of not prejudging matters prior to any arbitration; and

(f) DBCTM's submission that the QCA's arbitration guidelines will assist, needs to be read in the context of DBCTM's own submissions that they consider that QCA guidelines providing any indication of the methodology to be applied in an arbitration would inappropriate.

The DBCT User Group also notes that it considers part of the reason that some access seekers (potentially including New Hope) did not seek to sign a conditional access agreement is the uncertainty created about the price of such access, given that it would potentially be subjected to DBCTM's new pricing model.

In addition, even DBCTM accepts in its submissions that information provision alone does not resolve the difficulties arising from the negotiate-arbitrate framework, where (as discussed in section 11 of this submission) arbitration does not present a credible threat.

8.2 Common features of 2017 AU and 2019 DAU

DBCTM seeks to argue that the common features of the existing access undertaking and the 2019 DAU mean that the 'predictability and stability afforded to the following processes remains unchanged'.

However, that deeply understates the impact of the drastic changes arising from the proposed change of pricing model.

As the QCA has correctly identified, *'unless there is an appropriate case for change, providing stability and predictability in the regulatory framework, is likely to promote investment confidence and reduce administration and compliance costs'*.[17]

The DBCT User Group fully acknowledges that there is a degree of commonality between the existing access undertaking and the 2019 DAU. Yet, it is an immense and flawed leap in logic to suggest (as DBCTM does) that many of the non-pricing elements remaining the same, somehow makes an inappropriate price model appropriate.

To put it simply:

(a) in the case of natural monopolies where access is being provided, there is no more important term of access than pricing – an inappropriate pricing model necessarily makes the 2019 DAU inappropriate;

(b) by making the price uncertain and facilitating pricing being set a monopoly levels, the 2019 DAU materially undermines benefits that would otherwise automatically flow from

[17] Interim Draft Decision, 19.

other non-pricing protections which on their face have been retained (such as otherwise standardised terms and queueing arrangements);

(c) the pricing changes have fundamentally changed how the queuing and expansion process operates, particularly in relation to access seekers, which will now be forced to sign access agreements without understanding the approach to pricing and the likelihood of significantly more disputes arising in this process; and

(d) the pricing model in the 2019 DAU does not become appropriate merely because many of the non-pricing elements are appropriate (or would be, except for how they are impacted by that pricing model).

In addition, as addressed further in in the 1st User Group Submission and section 13 of this submission, there are some non-pricing issues in relation to the 2019 DAU.

9 Comparison to pipeline regimes

9.1 Appropriate comparators for DBCTM

The Latest DBCTM Submission proposes that the information disclosure requirements applicable to 'non-scheme' pipelines under Part 23 of the National Gas Rules (i.e. unregulated pipelines) are sufficient. On that basis, DBCTM has sought to provide a materially less extensive information disclosure regime with no prescription around future pricing components, at odds with the clear indications in the Interim Draft Decision that the QCA considered light regulation pipelines to be the closest case study.

As a result, DBCTM's proposal clearly falls short of appropriately informing access seekers in the manner the Interim Draft Decision considered was required.

In particular, DBCTM is opposed to any prescription around its rate of return, or the QCA providing any guidelines in relation to that – presumably because that is inconsistent with its stated intention in section 4 of its submission to expropriate monopoly rents from terminal users.

However, before further considering the details of the DBCTM proposal, it is important to confirm why non-scheme pipelines are a very poor and inappropriate analogy for the DBCT service.

As a starting point, for a pipeline to be a non-scheme pipeline it would need to have not met the coverage test – which is the equivalent of the declaration criteria. Whereas, following the declaration decision of the Minister,[18] the 2019 DAU necessarily falls to be considered in the context of the DBCT coal handling service continuing to be declared.

Where the DBCT service continues to be declared, the services which have the most similar characteristics would clearly be anticipated to be pipelines that have satisfied the very similar coverage criteria (i.e. light regulation and full regulation pipelines). It is unsurprising that an entity that does not meet the criteria for regulation, is administered in a different way, which does not even involve a regulator in any arbitration. Yet that provides no credible evidence as to the appropriate treatment of the completely different DBCT service.

DBCTM's assertion that non-scheme pipeline are an appropriate comparison does not reflect the distinct differences between those infrastructure services.

As discussed in detail in the 1st and 3rd User Group Submissions,[19] an analysis of the characteristics of various types of gas pipelines confirms that the appropriate comparator is in fact full regulation pipelines.

[18] Extraordinary Gazette, 1 June 2020
[19] See particularly 1st User Group Submission, 18-22.

However, for completeness an appropriate comparison of the characteristics of the various services is again set out below:

	DBCT service	Full regulation pipeline	Light regulation pipeline	Non-scheme pipeline
Satisfied declaration / coverage test	✓	✓	✓	✗
Market power	✓	✓	Varies	Varies
Barriers to entry	✓	✓	Varies	✗ (or at least not to the same extent)
Countervailing power	✗	✗	Varies – but often no	Varies – but often yes

It is evident from that comparison alone, that:

(a) the DBCT service has limited aspects in common with the non-scheme pipelines DBCTM asserts are similar; yet

(b) there is a very high degree of alignment between the characteristics of 'full-regulation' pipelines and DBCT (even more so that the light regulation pipelines to which the Interim Draft Decision refers).

The key characteristics of the DBCT coal handling service are (as recognised in the Interim Draft Decision)[20]:

(c) a lack of close substitutes for the service;

(d) very high barriers to entry – due to high capital costs, economies of scale and, as the Interim Draft Decision puts it, 'limited threat of competition entering the market, given the stringent legislative requirements around port development'; and

(e) as a result – a high degree of market power held by DBCTM and limited countervailing power because access seekers cannot credibly threaten to take their business elsewhere.

In particular, DBCT lacks any equivalent of the 'field on field' rivalry that creates competitive tension for some light-regulation and non-scheme pipelines. It also does not reflect the very small number of users, and the resulting mutual dependence and countervailing power that creates for users, of typical light-regulation and non-scheme pipelines.

Consequently, the DBCT User Group submits that a comparison to pipeline services strongly suggests that the appropriate outcome is a reference tariff pricing model akin to that applied to full regulation pipelines.

9.2 Recognised difficulties with the negotiate-arbitrate model for gas pipelines

As discussed in the 3rd User Group Submission, there has been a clear recognition in recent times that the negotiate-arbitrate model is not acting as a constraint on monopoly pricing in relation to gas pipelines.

DBCTM has not acknowledged this issue in its submissions to date, let alone presented any solutions to it.

[20] Interim Draft Decision, 9.

Rather DBCTM is now arguing for a regulatory regime that is materially less rigorous than that which has been found by the ACCC to be susceptible to allowing monopoly pricing to occur in the case of gas pipelines.

Where the QCA, rightly, considers there needs to be a compelling case to move away from the current appropriate model, the evident risks of facilitating monopoly pricing, and the fact that such monopoly pricing could be locked in long term beyond the regulatory period, confirms that no such compelling case exists.

10 Information Disclosure

10.1 DBCTM's proposed amendments

The DBCT User Group acknowledges that DBCTM has proposed additional information disclosures.

While the DBCT User Group submits that no amount of information disclosure can make a non-reference tariff model appropriate in the context of the DBCT service, it also wishes to address arguments that DBCTM has raised to seek to justify the extent of its proposed information disclosure requirements.

It is acknowledged that DBCTM's newly proposed disclosure requirements go further than simply referring to the requirements of section 101 QCA Act (as the initially submitted 2019 DAU did), which the QCA has rightly recognised as a 'broadly-written' requirement that is 'not sufficiently detailed in itself'.[21]

However, DBCTM's proposal provides a façade of giving additional information while largely just drawing on information that is already public from previous regulatory decisions in any case. Consequently, it provides very limited additional information to access seekers. As a result, it clearly does not meet the criteria described in the Interim Draft Decision of the information that would allow negotiations from an appropriately informed position.[22]

In addition, what DBCTM has now proposed clearly demonstrates a number of the points that the DBCT User Group have made in previously positions.

In particular:

(a) the degree of disclosure being provided is far less than would be provided in the typical submissions process in relation to the appropriate Terminal Infrastructure Charge where DBCTM would be required to justify its position in the face of a transparent and well-resourced QCA inquiry into the appropriateness of that position (such that an access seeker negotiating under DBCTM's pricing model will have much less information than a user negotiating a price for non-reference tonnage under the current undertaking);

(b) DBCTM's proposal indicates how even with these requirements there will be substantial uncertainties facing access seekers that DBCTM's proposals go no way towards resolving including, for example:

  (i) there being no methodology prescribed for how DBCTM will set the Terminal Infrastructure Charge (whether by a building blocks methodology or otherwise – such that all of the other information to be provided is relatively meaningless);

  (ii) even assuming that a building blocks methodology was being utilised, there being no methodology provided for any number of parameters, including how the weighted average cost of capital or its underlying components will be calculated –

[21] Interim Draft Decision, 29.
[22] Interim Draft Decision, 36.

such that DBCTM will be free to simply set these to achieve substantially higher than efficient prices;

(iii) there being no scrutiny applied to issues like DBCTM's nearly tripled estimate for remediation costs; and

(iv) there being no protections in relation to the prudency of future expansion costs; and

(c) disclosure of past QCA approaches will not make negotiations efficient where, as plainly and openly expressed in its own submissions, DBCTM clearly intends to propose prices set above those levels to extract monopoly rents above the likely QCA set price (and DBCTM further submits that that is an appropriate outcome under the arbitration criteria it proposes).

It should also be noted that DBCTM has proposed an approach that creates the potential for DBCTM to provide different 'current and forecast information' to each access seeker. DBCTM's methodology (and refusal to make public disclosure as specifically provided for in the Interim Draft Decision) will allow DBCTM, behind the cover of confidentiality, to increase its cost and revenue claims when dealing with more vulnerable access seekers. This simple example demonstrates the complete lack of rigour that remains in the system DBCTM has proposed, and illustrates how DBCTM has pushed back against even the lightest constraints that the QCA has proposed while DBCTM claims compliance.

Only providing information to access seekers at the indicative access proposal stage also makes a completely mockery of the theoretical ability to dispute non-compliances with the information disclosure requirements – because at that stage of the access application process, access seekers will face asymmetrical time pressures to proceed and will have strong incentives not to bring such disputes so as to not jeopardise their prospects of obtaining access in the negotiating timeframes provided for.

Accordingly, the DBCT User Group considers it remains clear that the information disclosure requirements proposed by DBCTM are inappropriate.

10.2 DBCTM's misrepresentation of the Vertigan Report

DBCTM asserts that:

(a) information disclosure serves a different purpose to arbitration; and

(b) the value of information disclosure is not to require DBCTM to justify its proposed prices by reference to cost but to allow users to establish whether these prices are 'reasonable' by reference to various benchmarks.

DBCTM suggests that this is something borne out of the Vertigan Report which recommended the introduction of what has become the 'Part 23' regime which applies to non-scheme (i.e. non-regulated) pipelines.

The DBCT User Group strongly disagrees with DBCTM's apparent interpretation of the Vertigan Report. There is no sections of the Vertigan Report which discuss this asserted distinction in the way the Latest DBCTM Submission suggests. Rather, DBCTM's has cherry-picked selected quotes from a wide-ranging review conducted in a very different context.

Most importantly, DBCTM fails to acknowledge a number of critical issues in respect of the Vertigan review, namely:

(a) that the recommendations in the Vertigan review were clearly in the context of:

(i) considering a framework to apply to pipelines with entirely different characteristics to DBCT as discussed above (including typically lesser or no market power being held by the pipeline operator and much greater countervailing power of user);

(ii) seeking to find a lowest common denominator set of rules that could improve outcomes for a wide variety of non-scheme pipelines, each with different characteristics (as opposed to a single service with well-known characteristics); and

(iii) an understanding that a greater level of regulation would be applied if the characteristics were more aligned to those of DBCT – with the Vertigan Report expressly noting that full regulation would continue to be appropriate where the benefits associated with regulation are likely to outweigh the costs[23]; and

(b) even more critically, that users of non-scheme pipelines were not actually seeking direct regulation of pricing[24] (in contrast to DBCT users) – suggesting non-scheme pipeline users held a significantly different view about their ability to negotiate an efficient price merely through information asymmetry being resolved.

As a result, the recommendations and findings of the Vertigan Report are not appropriate to simplistically try to apply to the DBCT service (even leaving aside how DBCTM has interpreted that report).

10.3 The purpose of information disclosure

At its heart, DBCTM's premise is that information disclosure obligations should merely involve publishing DBCTM's pricing proposals and it should not be required to justify its proposed prices by reference to efficient cost.

That appears to be DBCTM's position because it considers:

(a) it is legitimate to extract monopoly rents above the efficient cost of supply (including a return commensurate to the commercial and regulatory risks it bears) – which is clearly inappropriate as discussed in section 6 of this submission; and

(b) it should not have to provide information disclosures justifying its' price because access seekers have reference to arbitration.

The DBCT User Group actually agrees with DBCTM that information disclosure cannot resolve an inequality of bargaining position.

However, this line of argument needs to be understood for what it is, an implicit acknowledgement by DBCTM that no amount of information disclosure will actually constrain its market power in negotiations.

Which means that, irrespective of how much the information disclosure amendments that DBCTM has proposed are improved, the pricing model proposed by DBCTM is ultimately entirely reliant on the arbitration mechanism to constrain DBCTM's market power (and effectively acknowledged by DBCTM as such).

11 Arbitration is not a sufficient constraint

11.1 The prerequisites for arbitration actually providing a sufficient constraint

It follows from the above that DBCTM's pricing model requires that arbitration alone will provide a sufficient constraint on DBCTM's behaviour.

[23] Vertigan M, *Examination of the current test for the regulation of gas pipelines*, 14 December 2016, 92.
[24] Vertigan M, *Examination of the current test for the regulation of gas pipelines*, 14 December 2016, 78.

However, the DBCT User Group strongly disagrees with DBCTM's assertion that arbitration can be relied on to *'assure'* shippers that the price provided by DBCTM is reasonable.

Assure means to 'make sure or certain'. Arbitration does not, and cannot, achieve that in relation to pricing of the DBCT service. As DBCMT admits elsewhere in its submissions, 'Dispute processes by their nature are uncertain for parties involved in a dispute'.

For arbitration to provide a sufficient constraint on DBCTM's behaviour in negotiations prior to arbitration, at a minimum:

(a) arbitration would need to be guaranteed to provide an appropriate outcome; and

(b) the costs, timeframes, uncertainties and other disadvantages of arbitration would need to be so low as to not act as material disincentives to access seekers and/or access holders utilising arbitration, such that it does not actually provide a credible threat.

11.2 Why arbitration is not assured of producing an appropriate outcome

It is evident from the Interim Draft Decision that the QCA is rightly concerned with the outcomes of the arbitration process proposed by DBCTM, with the key recommendations designed to create more certainty of outcome being:

(a) arbitration criteria that would constraint DBCTM's market power, be consistent with the pricing principles in the QCA Act and provide certainty to the QCA's approach;[25]

(b) arbitration criteria that do not impede competition, requiring the access holder and access seekers operate on 'equal footing' where neither party is exposed to monopoly pricing;[26] and

(c) the QCA publishing guidelines that indicate the methodologies the QCA would intend to adopt in an arbitration – including the overall building blocks methodology, how the RAB would be set, how depreciation would be calculated, calculation of the WACC and underlying parameters, the remediation allowance and the proper treatment of other build blocks costs.[27]

Yet DBCTM's proposal clearly does not meet all the requirements the QCA indicated would be necessary for it to be appropriate.

The DBCT User Group acknowledges that the Latest DBCTM Submission does take up the QCA's proposal that the arbitration criteria should reflect the requirements of section 120 of the QCA Act. However, it noticeably does so while stridently asserting that the QCA is incorrect about section 120 operates.

The Interim Draft Decision explains that QCA proposed the section 120 arbitration criteria because:[28]

We consider that the arbitration factors outlined in section 120 of the QCA Act provide the QCA with the flexibility to adopt, among other things, its current building blocks methodology and current approach to the rate of return. As a consequence a QCA-arbitrated price would in all likelihood be reflective of the efficient costs of supply, including a return on investment commensurate with the regulatory and commercial risks involved, which we consider will appropriate constrain DBCTM from exercising market power.

Whereas, DBCTM has accepted those criteria because they believe they will have a starkly different outcome as noted in these passages of their submission:

[25] Interim Draft Decision, 36.
[26] Interim Draft Decision, 36.
[27] Interim Draft Decision, 42.
[28] Interim Draft Decision, 42.

DBCTM is concerned, however, that the QCA Interim Draft's proposed approach to arbitrations appears to focus excessively, if not exclusively, on calculating an access charge on the basis of efficient cost, without having regard to the other section 120 factors. In accordance with the Act, the QCA must have regard to all of the section 120 factors in determining any future arbitrations, and should not predetermine the approach to setting access charges through any arbitration process.

and

DBCTM considers that the QCA's Interim Decision focuses too heavily on calculating an access charge on the basis of the efficient cost of providing the service (applying a building block model) and this anticipated approach may not have proper regard to the other section 120 factors.

…

The QCA's intended approach risks conflating efficient cost with efficient price. An efficient price would lie between efficient cost and value to users. The QCA's interpretation results in any available rent being allocated exclusively to the user, which is an extreme outcome in light of the section 120 factors. The QCA has not provided a consideration of the other section 120 factors, nor any justification for why it considers this approach appropriate.

That difference in interpretation demonstrates, in no uncertain terms, why the proposed approach does not guarantee or provide sufficient certainty that arbitration will produce an appropriate result. There is clearly not a common understanding of the application of the arbitration criteria proposed.

DBCTM, in fact, wishes to make absolutely sure that there is no common understanding prior to such arbitrations by also rejecting the QCA's proposal for publishing guidelines on the methodology to be applied (as discussed further in section 12 below).

In addition, if the QCA perceives that there is any risk of regulatory error in setting reference tariffs, that same risk must surely apply in setting pricing in an arbitration. The DBCT User Group considers that the risks of an inappropriate result will actually be significantly exacerbated in an arbitration because:

(a) the arbitration will occur in a bilateral setting without the opportunity for public submissions which allow testing of DBCTM's claims by other stakeholders who have a legitimate interest in the outcome (including users subjected to socialisation, and potential future access seekers for which the arbitration outcome will be likely to create a quasi-precedent for future outcomes);

(b) individual users will have less resources to scrutinise DBCTM's arguments than they do in a reference tariff setting process where they can work (and engage expert legal and economic advisers) collectively;

(c) by contract, DBCTM will be will placed to 'throw the kitchen sink' at individual users in such bilateral arbitration – as it will prepare common materials, engage common experts and spread its costs across each arbitration process (such that the cost of the arbitration will be significantly less for DBCTM);

(d) the QCA is likely to have to make the arbitral decision in a much shorter time frame than would be allowed in the undertaking consideration process (creating the potential for issues and arguments to simply be missed or not raised that would be brought to light when considering reference tariffs in an undertaking); and

(e) the outcome will only bind the DBCTM and the individual access holder or access seeker that is a party to the arbitration – such that the QCA is actually prevented from making uniform adjustments to address matters like incentives to expand, perceived risk of

regulatory error or imprecision in WACC parameter estimates or alternative WACC parameter methodologies, and cannot deal with issues like socialisation that impact on other users.

Accordingly, the DBCT User Group submits that there is serious uncertainty in relation to whether an arbitration will produce an appropriate outcome.

11.3 Disincentives mean arbitration is not a credible threat

The fact that access seekers and holders cannot rely on arbitration producing an appropriate outcome of itself means it fails to provide a credible threat.

However, even if it was assumed that arbitration would theoretically produce an appropriate pricing outcome (a proposition which the DBCT User Group strongly disagrees with as noted above), that would only be an effective constraint if access holders and access seekers utilised arbitration and, just as importantly, DBCTM perceived they were likely to do so – such that there was a credible threat of arbitration that impacted on negotiated outcomes.

However, it is clear that the 'threat of arbitration' will not provide a credible or sufficient constraint on DBCTM's market power in negotiations because:

(a) as discussed above, the actual outcome of arbitration is uncertain – and what has now been made absolutely clear is that DBCTM is committed to strongly arguing in any arbitration that it is appropriate under the arbitration criteria it proposed to engage in monopoly pricing;

(b) the costs of arbitration will be very significant for individual access seekers– particularly for an access seeker who cannot easily fund that from revenue from existing production (the DBCT User Group expectation is the costs would be in the order of up to $500,000 per access seeker), whereas the incremental cost to DBCTM of multiple arbitration will be far less material as it will face common issues across arbitrations;

(c) the 'gain' to an access seeker (being the hoped for reduction in the monopoly pricing that DBCTM offers) will be a reduction in costs for their individual tonnes relating to that access request, whereas the 'gain' for DBCTM in defending a monopoly price in arbitration is setting a potential quasi-precedent which they will use to justify increased prices across all tonnes at the terminal – such that DBCTM will be highly economically incentivised to apply very significant resources to the arbitration (whereas users with small tonnages or only seeking incremental tonnages will have greatly diminished incentives to seek arbitration); and

(d) as recognised by the QCA in the Interim Draft Decision, there are real timing sensitivities for access seekers due to the difficulties of trying to align contracting of DBCT capacity with other contracting and investment decisions, such that the timing issues of an arbitration are a real disincentive – whereas DBCTM faces no such issues.

DBCTM argues that the queuing arrangements and QCA Act provide timeframes for referral to and resolution or arbitration that mean access seekers do not face asymmetric time pressures, citing the QCA Act obligation for the QCA to use best endeavours to make an arbitration determining within 6 months of referral, which is dismissed as 'inconsequential'.

That shows an outstanding lack of understanding about the timing of contracting and investment decisions access seekers need to make in parallel to contracting DBCT capacity. It is of course true that 6 months is only part of the multi-year time frame for mine development. However, given the below rail capacity constraints which exist on the Goonyella system where access seekers are already having difficulty obtaining rail access to align with capacity being offered at DBCT – this timeframe (noting that it only comes after a period of initial negotiation) will mean that access

seekers will face extreme pressure to try to obtain certainty of pricing and access to both DBCT and below rail at the same time, and in a timeframe that aligns with project approval pathways.

What is evident from the above, is that the 'threat' posed by arbitration will be minimal for DBCTM, while access seekers will have real reservations about pursuing arbitration except in the event of the most extreme monopoly pricing by DBCTM due to the high uncertainties of outcome, cost and timing that will be encountered.

11.4 Access and pricing not being negotiated at the same time

The DBCT User Group notes that DBCTM has submitted that access seekers do not face such asymmetric time pressures, citing that DBCTM's queuing arrangements provide for access to be contracted without pricing being set.

As has been made clear earlier in this submission, it is not just that pricing is not certain, but there would not even be any certainty as to the approach to be applied to determining such pricing.

That argument makes evident a completely different problem raised by the DBCT User Group in its earlier submissions, namely that efficient access seekers will be deterred from contracting capacity at all because of the uncertainty. This is a problem that the changes to the drafting, process and criteria for the arbitration regime will not resolve.

This will be particularly problematic for access seekers which are seeking access for a new project (as opposed to those seeking some incremental additional capacity for an existing project or existing users seeking an incremental additional to capacity utilised on a portfolio of mines basis) as the uncertainty of pricing will be extremely challenging where they impact on the entirety of a project's production and a multi-million dollar investment decision needs to be made on project development. That practical discrimination against a particular type of efficient access seeker is not an efficient or appropriate outcome, yet is the unavoidable outcome of DBCTM's model.

It also demonstrates another key reason why a negotiate-arbitrate model would require far more fundamental changes to the undertaking to be appropriate. A key underlying premise of a negotiate-arbitrate model is that the infrastructure provider has an incentive to negotiate on price to secure contracting of the capacity and thereby generate revenue. However, DBCTM's model involves DBCTM receiving assurance of capacity being contracted without having to make any concession on pricing. As a result, the incentive for DBCTM to negotiate is largely removed, and DBCTM is perfectly placed to extract a monopoly price.

The negotiate-arbitrate model cannot be appropriate in these circumstances.

12 QCA Guidelines

12.1 QCA Proposal

Given the substantial uncertainty that is involved in an arbitration, the Interim Draft Decision proposed the QCA publishing guidelines regarding both the process the QCA would follow in arbitrations *and* the methodologies they would adopt in such an arbitration, including important topics such as:

(a) the overall methodology the QCA intends to use, which is likely to be the building blocks approach;

(b) the method the QCA would intend to use to establish the RAB;

(c) the way in which depreciation would be calculated;

(d) the method or methods for calculating the WACC;

(e) consideration of how an appropriate remediation allowance would be determined; and

(f) the proposed treatment of other costs (including capex, maintenance and corporate overhead).[29]

The QCA specifically note that such guidance:[30]

would provide greater assurance that arbitrated prices would be likely reflective of the efficient costs of supply, including a return on investment commensurate with the regulatory and commercial risks involved, and as a result, provide a credible threat to constrain DBCTM from exercising its market power in a negotiation.

The QCA also foreshadows consideration of whether the proposed methodologies should be included in the undertaking itself,[31] which they clearly should be if they are incorporated such that DBCTM is required to comply with them in the commercial terms it offers (rather their application only occurring at the point of arbitration).

Despite all of that, in the Latest DBCTM Submission DBCTM insists that the pricing methodology should only be determined at the time of the arbitration and that the guidelines should only deal with process matters.

Based on large portion of section 4 of the Latest DBCTM Submission devoted to justifying extracting monopoly rent above such an appropriate price it is clear why – DBCTM wants the maximum possible degree of uncertainty in order to maximise the monopoly rents it envisages it can extract from a negotiate-arbitrate model. The Productivity Commission commentary that DBCTM quotes relates to the completely different context of airports which (as discussed in earlier submissions) face airlines with countervailing power and incentives derived from non-aeronautical activities which constrain their incentives to engage in monopoly pricing. Uncertainty of outcome in that context is far less of a problem, than in relation to DBCT, where DBCTM has consistently been found to have incentives to engage in monopoly pricing.

While certainty around process is necessary – the greatest reason that DBCTM's pricing model is not appropriate is that it fails to constrain DBCTM's monopoly pricing. QCA guidelines limited to process do not go anywhere near far enough to resolve that problem.

The DBCT User Group considers that QCA guidelines prescriptively determining the methodology for pricing that would apply during an arbitration are absolutely necessary to combat the information asymmetry that exists, and create a higher certainty of outcome – thereby trying to make arbitration a more credible threat and trying to make negotiations more efficient.

Far from harming incentives to negotiate (as DBCTM suggests), clear QCA guidance on methodology should incentivise a more streamlined and efficient negotiation by providing parties with greater certainty about the appropriate outcome.

Without them it is absolutely clear that:

(a) a negotiate-arbitrate regime will not result in appropriate pricing; and

(b) the outcome of an arbitration will be so uncertain that:

  (i) it will not present a sufficiently credible threat so as to incentivise DBCTM to provide an efficient price in negotiations;

  (ii) both negotiations and arbitrations will be much more expensive because of the extremely wide range of pricing that could be argued to be an appropriate outcome (against noting DBCTM's submissions in section 4 that it considers the

[29] Interim Draft Decision, 42.
[30] Interim Draft Decision 42.
[31] Interim Draft Decision 42.

range to be between the efficient cost of supply and the maximum value to users in the context where there is a massive cost different for users to any alternative).

Having said that, as discussed in section 12.3 of these submissions below, while prescriptive QCA guidelines are required to make a negotiate-arbitrate model as appropriate as it will ever be – the DBCT User Group strongly consider that when a negotiate-arbitrate model mitigated by QCA methodology guidelines is compared to a reference tariff pricing model – it is clear that a reference tariff pricing model is more appropriate.

12.2 Regulatory precedent for QCA approach and 'fitness for purpose'

As discussed above in relation to the regulation of light regulation pipelines, there is absolutely clear precedent for the approach the QCA has suggested, of prescribing detailed pricing methodologies.

As the Interim Draft Decision recognises, the AER's *Light Regulation – Financial Reporting Guideline* does exactly that.

As do other instruments like the ACCC's *Pricing principles for price approvals and determinations under the Water Charge (Infrastructure) Rules 2010*.

DBCTM submissions on this issue, suggesting that this is not the practice of other regulators, are therefore highly misleading and disingenuous.

The approach of regulators on this issue is, unsurprisingly, related to the scope of the relevant regime. The other arbitration guidelines the Latest DBCTM Submission refers to are not made in analogous circumstances. They are general guidelines under Part IIIA and the telecommunications regime. It is completely unsurprising that regimes that are designed to apply to a potential very wide variety of infrastructure services do not seek to be as prescriptive, given the need to deal with individual circumstances of the varied services such guidelines may be applied to.

However, the DBCT User Group cannot emphasise enough that is not the position here. The QCA is suggesting a guideline for pricing for a single coal handling service – where there are no 'individual circumstances' for users of the service (as consistent with the Interim Draft Decision[32] they are all using the same coal handling service which is provided using the same terminal infrastructure), there is a high degree of market power and limited (if any) countervailing power.

DBCTM's attempts to suggest the guidelines cannot be 'fit for purpose' to 'individual circumstances' assumes that there is a wide variety of different circumstances that will apply to individual access seekers. No evidence has ever been provided to suggest that is the case, and it is contrary to all users' experience of the terminal as a common user coal terminal.

12.3 A reference tariff remains more appropriate

However, the bigger issue than all of the above from the DBCT User Group's perspective is that, even if it DBCTM was to concede that up-front QCA guidelines on pricing methodology were required (or the QCA was to simply impose that), it raises the question about why that is more appropriate than simply including a reference tariff.

As the QCA has already recognised, it is not required to accept the minimum amendments – but is obliged by the QCA Act to determine the appropriate outcome.

As discussed in the 3rd User Group Submission:

a simple comparison clearly indicates that even if it was theoretically possible to revise a negotiate-arbitrate model to such an extent that it could appropriately constrain DBCTM's market

[32] Interim Draft Decision, 10 and 61.

power, the additional costs and prescription involved in doing so would mean that the only appropriate approach would be to require a reference tariff model instead.

In other words, the changes required to try to get a negotiate-arbitrate model to be effective in constraining DBCTM's market power will bring this 'light handed' form of regulation, so close to what DBCTM derides as 'heavy handed' regulation – that the whole rationale for adopting it in the first place is substantially diminished, if not removed.

DBCTM's submissions themselves recognise this issue – suggesting QCA guidelines 'fundamentally undermines the negotiate-arbitrate framework'.

Yet this is a catch-22 situation which DBCTM can resolve – as without the guidelines, there is basically no certainty as to pricing approach or outcomes, making arbitration not a credible threat, and giving rise to a raft of inefficient outcomes with access seekers and access holders left exposed to DBCTM's market power and ability to engage in monopoly pricing.

It is not appropriate to try to use QCA guidelines as a band-aid to the problems negotiate-arbitrate creates, when a reference tariff simply avoids those problems while effectively involving nearly identical considerations and decisions to those which would arise in determining the QCA guidelines.

13 Non-Pricing issues raised in Stakeholder notice

In inviting collaborative submissions, the QCA specifically encouraged responses in relation to three additional matters.

A summary of the DBCT User Group's position on those matters is set out below.

However, the DBCT User Group notes that it does have some concerns regarding:

(a) the difficulties in commenting on these matters in the absence of the pricing model being settled, given how intertwined these issues are with the pricing model (as demonstrated by the extent of changes DBCTM has made in the 2019 DAU in relation to these issues as a consequence of their pricing changes); and

(b) that given the significant adverse consequences that will arise from DBCTM's pricing model that has necessarily been the focus, such that some of these non-pricing changes may not have received the attention they deserve.

13.2 Notifying access seeker, queuing mechanism and short term available capacity

The DBCT User Group finds these provisions extremely difficult to comment on when DBCTM's changes to them are so intertwined with their proposed pricing model. The DBCT User Group considers that all related changes need to be completely rejected as they form part of an inappropriate model that cannot be made appropriate in the circumstances of the DBCT service simply by drafting changes.

However, as indicated in the 1st User Group Submission, the DBCT User Group is supportive in principle of short term capacity being made available (with shorter timeframe to respond at the various stages) and considers that is an efficient outcome.

However, it considers that the negotiate-arbitrate pricing model actually makes it very difficult to appropriately include such a principle as:

(a) a negotiate-arbitrate regime will leave access seekers taking up short-term capacity highly exposed to monopoly pricing (due to the incentives to seek arbitration being far less for such short term and likely lesser volumes of capacity, such that arbitration clearly will not provide a credible threat); and

(b) it is not evident how existing users with negotiated or arbitrated prices will effectively benefit from any revenue earned from such short term capacity – such that where DBCTM is recovering all of its costs from existing long term users it will clearly be over-recovering.

Accordingly, the DBCT User Gorup submits that the appropriate outcome is actually a short term capacity model being included in the 2019 DAU in conjunction with a reference tariff, which achieves the efficiency benefits of maximising the prospects of short term capacity being utilised without the problems noted above.

The 1st User Group Submission (see pages 69-70) also provides proposals in relation to the treatment of short term capacity which it continues to believe remain appropriate.

13.3 Expansions and Conditional Access Agreements

The DBCT User Group consider that the current regime, which DBCTM interprets as permitting it to:

(a) require access seekers to sign up to a conditional access agreement without any indication of the expansion it relates to (i.e. whether it is all of 8X or particular components of it);

(b) issue conditional access agreements that do not include the conditions precedents which access seekers are entitled to require inclusion of under clause 5.4(j)(3) of the undertaking; and

(c) require access seekers to sign up to underwriting access agreements without committing to a particular expansion to study; and

(d) retain a complete discretion as to whether it proceeds with the studies and expansion,

is clearly not appropriate.

This position is exacerbated under DBCTM's pricing model as access seekers are forced to sign conditional access agreements without having any idea of the pricing regime they are effectively committing to. DBCTM's model therefore ensures that users have an extremely weak bargaining position at the time of the negotiate-arbitrate regime applying – as they are already committed to a long term take or pay contract (so they cannot exit the arrangements if they do not consider the price is reasonable), yet DBCTM has the ability to simply not proceed with the expansion if it does not achieve the pricing outcome it desires.

This aptly demonstrates the difficulties of a negotiate-arbitrate regime in the circumstances of the DBCT service (compared to infrastructure for which there is significant available capacity).

Where access holders are being required to commit to long term take or pay commitments it is appropriate they have far greater certainty as to what they are signing up to.

In relation to other aspects of that process, DBCTM considers each of the following should not be accepted:

Clause	Issue
Cl 5.4(l)(3)	These changes make it entirely DBCTM's discretion as to whether access seekers can include condition precedents about the time and cost of the expansion being developed, necessary below rail expansions proceeding and matching below rail entitlements being able to contracted. That is completely unreasonable as it can result in access seekers having contracted material take or pay capacity where they cannot obtain matching rail rights or the

	expansion capacity is delivered at significantly different costs or timeframes than what they need for their relevant mining project.
Cl 5.4(l)(15) and related clauses	The difficulties experienced by access seekers in the current 8X expansion process, have suggested that the current timing of the price ruling may not be appropriate – as it places access seekers in the unenviable position of seeking to contract capacity with some degree of uncertainty as to whether socialisation or differential pricing will apply. While access seekers can form their own view about this, and with a reference tariff model have some certainty about how this will be determined, this has become more of a problem than anticipated in respect of 8X due to: • DBCTM's failure to commit to the scope of the expansion for which it is seeking contracting (i.e. access seekers are signing conditional access agreements for an unknown expansion); • The significant changes in cost estimates and capacity to be created that DBCTM has provided in respect of the 8X expansion components over the last 2 years; • DBCTM saying privately to access seekers that they anticipate the 8X expansion components will be socialised, while making inconsistent and ever-more strident regulatory submissions to the QCA claiming it will definitely be differentially priced. If the pricing ruling is retained at the same time period, the DBCT User Group considers that at a minimum, DBCTM should be required to: • Set out the expansion that an expansion notice relates to at the time of issue; and • Provide its indicative view as to whether the expansion will be differentially price and socialised, and the basis for that view (with any subsequent application to the QCA for a price ruling requesting a different result also needing to justify DBCTM's change in view).
5.12(b)(3)	This amendment makes clear that DBCTM is seeking the right to contract on non-standard terms without those terms needed to be economically and operationally prudent and even where they result in DBCTM achieving a return that exceeds that commensurate with the cost and risks involved in the expansion. That is not an efficient or appropriate result.

13.4 Other Non-pricing related terms

Access Undertaking

The DBCT User Group notes that it has provided comments on numerous non-pricing provisions in the 1st User Group Submission (see Schedule 3, pages 66-77).

Despite DBCTM proposing some changes in the Latest DBCTM Submission, those appear to have been principally about offering partial concessions to the QCA to seek to achieve its pricing model.

The DBCT User Group acknowledges that on 2 June 2020, DBCTM provided responses, and while the DBCT User Group is not in a position to comment, it appears likely that many of the non-contentious and non-pricing related issues raised by the DBCT User Group have either now been accepted or could be resolved with further discussion.

The DBCT User Group also notes the following additional issues with what DBCTM is proposing:

Clause	Issue
Cl 5.4(e)(5)	These changes appear to undermine the Standard Access Agreement by allowing DBCTM to 'require' agreement to different terms. The whole purpose of the Standard Access Agreement is to provide certainty as the terms which DBCTM can require (without the access seeker agreeing to variations).

Standard Access Agreement

While DBCTM has made significant adverse changes to the Standard Access Agreement, with the exception of matters previously commented on, they all appear to be solely related to the inappropriate pricing model proposed by DBCTM.

However, the DBCT User Group encourages the QCA to consider:

(a) the full extent of changes that have been required to the standard access agreement, particularly in relation to calculation of charges, to understand just how drastically DBCTM is seeking to change the basis upon which access is contracted; and

(b) the inappropriateness of DBCTM's position on socialisation – that seeks to make it completely immune from volume risk while requiring

14 Conclusions

For the reasons set out above, the DBCT User Group continues to consider the 2019 DAU remains clearly inappropriate.

In particular, the DBCT User Group has demonstrated:

(a) DBCTM's proposals have clearly fallen short of the amendments the Interim Draft Decision considered were needed in order for a negotiate-arbitrate to potentially be appropriate;

(b) no amount of tinkering with information disclosure or the arbitration regime will solve the fundamental problems which prevent a negotiate-arbitrate regime constraining DBCTM's market power; and

(c) in order to actually 'fix' the negotiate-arbitrate regime, one needs to effectively introduce the very parts of the reference tariff model perceived to be problematic, without actually achieving the certainty, predictability and efficiency that a reference tariff model provides - such that it is clearly preferable to simply adopt a reference tariff pricing model.

Accordingly, the DBCT User Group urges the QCA to confirm in its forthcoming Draft Decision its findings that a reference tariff pricing model is more appropriate than seeking to amend DBCTM's negotiate-arbitrate model, and ultimately issue a secondary undertaking notice to DBCTM requiring resubmission of the 2019 including a reference tariff pricing model.