DBCT MANAGEMENT

4 December 2020

Professor Flavio Menezes
Chair
Queensland Competition Authority

**DBCTM Cross Submission on the QCA Draft Decision on the 2019 DAU**

Dear Professor Menezes

DBCTM welcomes the opportunity to provide its cross submission on the QCA's Draft Decision on the 2019 Draft Access Undertaking (**2019 DAU**).

DBCTM considers that the QCA's task is straightforward. It must consider if the 2019 DAU is appropriate for approval having regard to the factors in section 138(2) of the QCA Act. If the QCA refuses to approve the 2019 DAU it must ask DBCTM to make amendments to the 2019 DAU that it considers appropriate.

The negotiate-arbitrate pricing model in the 2019 DAU has been refined over the 18 months since it was initially submitted by DBCTM. It has been thoroughly stress tested through the QCA's extensive consultation processes. DBCTM has committed to ensuring that the 2019 DAU is appropriate for approval, by proposing various amendments designed to improve the efficiency and effectiveness of the negotiate-arbitrate model. As a result, the 2019 DAU will deliver an opportunity for meaningful negotiations and will provide for an effective arbitration process where a negotiated outcome is not possible. Consistent with DBCTM's commitment to the effectiveness of the 2019 DAU, this submission also proposes for the QCA's consideration a few additional measures which could potentially improve the 2019 DAU even further.

Arbitration under the 2019 DAU clearly offers an avenue for access seekers to have access charges determined by the QCA where a negotiated outcome is not possible. DBCTM is confident that the QCA will determine appropriate prices for the service in any arbitration, having regard to arbitration criteria approved by Parliament and set out in the QCA Act.

Importantly, the amended 2019 DAU thoroughly addresses the narrow competition problem identified by the Treasurer, which was the basis for DBCTM's declaration.

DBCTM looks forward to your consideration of its proposed amendments to the 2019 DAU, and is available to answer any queries that arise.

Yours sincerely

Anthony Timbrell
Chief Executive Officer
**DBCT Management**

Attachment 1: DBCTM December 2020 Submission

DBCT MANAGEMENT

# DBCT 2021 Access Undertaking

## DBCT Management further submission on QCA Draft Decision

## December 2020

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# 1 Introduction and overview

1 DBCTM welcomes the opportunity to provide a further submission on the QCA's Draft Decision (**Draft Decision**) on DBCTM's 2019 Draft Access Undertaking (**2019 DAU**).

2 This submission provides further information in response to the issues raised by the QCA at the forums it hosted on the 18th November 2020 (the **Forum**). It also sets out DBCTM's response to a number of the User Group's assertions in its October 2020 Submission and at the Forum.

3 DBCTM has sought hard to ensure that the 2019 DAU will deliver meaningful negotiations and an effective arbitration process where required. DBCTM considers that the negotiate-arbitrate regime set out in the 2019 DAU, together with DBCTM's proposed amendments to refine the process which have been developed over the past 18 months and thoroughly stress tested by the QCA and User Group, is appropriate for approval by the QCA under section 138(2) of the *Queensland Competition Authority Act 1997* (**QCA Act**).

4 DBCTM remains committed to ensuring the 2019 DAU functions efficiently and effectively. To this end, this submission sets out four further measures for the QCA's consideration, which could potentially further improve the effectiveness of the negotiation and arbitration processes. DBCTM would be supportive of amendments to the 2019 DAU to implement these changes, if the QCA determines that they would improve the effectiveness of the negotiate-arbitrate pricing model.

5 One such measure would be the introduction of an evidentiary limit that would unequivocally address any remaining concerns regarding information asymmetry. The mechanism, which has been used effectively in other regimes, would require DBCTM and access seekers to provide *all* of the information the parties seek to rely on *before* the matter could be referred to arbitration. This would address any suggestion that DBCTM could withhold information relevant to an access seeker's assessment of DBCTM's access offer. This measure would also ensure that matters are not unnecessarily referred to arbitration, where a negotiated outcome would have been possible if there was greater transparency. Section 4 of this submission discusses further the measures that may improve the negotiate-arbitrate process, for the QCA's consideration.

6 While the User Group continues to assert commercially negotiated outcomes are impossible, DBCTM is confident that the 2019 DAU will enable a meaningful opportunity for negotiated outcomes. This optimism stems from DBCTM's initial conversations with individual users and its willingness to offer a range of tailored contract options that are expected to have genuine appeal to access seekers and users.

7 The User Group appears to now argue that the statutory arbitration criteria are not fit for purpose, and that the QCA would set inappropriately high monopoly prices for the DBCT Service if it were to apply the criteria under the QCA Act. This is a blatantly misleading representation of section 120 of the QCA Act, and a fanciful suggestion of how the QCA would apply those criteria. DBCTM is acutely aware that the QCA would not set prices at unreasonable levels.

8 This submission is structured as follows:

- 8.1 Section 2 sets out the key context for the QCA's assessment of the 2019 DAU;
- 8.2 Section 3 deals briefly with the role of the QCA and the statutory task for the QCA, and why the 2019 DAU and DBCTM's proposed amendments are appropriate for approval having regard to the factors set out in section 138(2) of the QCA Act;
- 8.3 Section 4 sets out further measures the QCA could consider using to improve the effectiveness of the negotiate-arbitrate model; and
- 8.4 Section 5 addresses issues raised by the User Group in its October 2020 submission, with a focus on the User Group's general arguments for full price regulation, the negotiation process and the arbitration process.

9 DBCTM's key points are briefly summarised in the table below.

**Figure 1: Summary of DBCTM's December 2020 Submission**

| Section | DBCTM Key Points |
|---|---|
| **Key context for the QCA's decision** | The competition problem identified in the declaration review is a narrow one. An appropriate Access Undertaking must include a regulatory response that is proportionate to the identified competition problem.<br>The declaration review has clearly established that existing users are protected under their existing user agreements. The role of the access undertaking should be focussed on the provision of access to DBCT for *access seekers*. |
| **The task and role of the QCA** | The QCA's task is straightforward and does not require complex legal analysis. Where the QCA refuses to approve an Access Undertaking it must require DBCTM to 'amend the draft access undertaking in the way the authority considers appropriate'. This requires the QCA to consider why the 2019 DAU as submitted was inappropriate for approval having regard to the factors in section 138(2) and require DBCTM to make amendments to rectify those issues.<br>DBCTM considers that the amendments to the 2019 DAU it has proposed throughout this process in response to QCA and stakeholder comments are appropriate, and the QCA should require DBCTM to make these amendments. |
| **Further measures to ensure effective negotiation and arbitration processes** | DBCTM proposes for the QCA's consideration four additional measures that could be implemented to improve the efficiency and effectiveness of the negotiate-arbitrate model:<br>• The introduction of an evidentiary limit, which will require parties to 'put their cards on the table' prior to referring a matter to arbitration;<br>• The ability for the QCA to terminate vexatious arbitrations;<br>• The use of the QCA's powers to award costs in arbitral proceedings; and<br>• The provision by DBCTM of a cost of service model to further assist access seekers to assess the efficient costs of providing the service and to assist in considering the reasonableness of DBCTM's access offer. |
| **General arguments for full price regulation** | The User Group makes the error of focussing on whether DBCTM would be constrained *without* regulation, and in doing so fails to engage with the constraints under the 2019 DAU which ensure that access seekers have countervailing power in negotiations.<br>The User Group's suggestion that the QCA should require a reference tariff in addition to the negotiate-arbitrate model is a repackaging of its argument for full price regulation of DBCT. As previously explained in detail by DBCTM, the inclusion of a reference tariff would stifle the opportunity for meaningful commercial negotiations. |
| **Negotiation process** | Following conversations with existing users, DBCTM is confident that there are good prospects of commercially negotiated outcomes under the 2019 DAU. There is a wide range of ways in which DBCTM can tailor its offering to individual access seekers, and the recourse to arbitration means that both DBCTM and access seekers have strong incentives to reach negotiated outcomes. |
| **Arbitration process** | The User Group's assertions that the QCA would determine inappropriately high monopoly prices under the legislative arbitration criteria are completely without foundation.<br>The legislative arbitration criteria provide a solid and balanced basis for the QCA to determine appropriate access charges, and provide sufficient discretion such that the QCA would not determine inappropriate pricing for the DBCT Service. |

# 2 Context for the QCA's decision

10 This section briefly sets out the key contextual considerations for the QCA's assessment of the 2019 DAU.

## 2.1 The narrow and hypothetical competition problem to be addressed by the 2019 DAU

11 The purpose of the 2019 DAU is to address the competition problem justifying declaration of the DBCT service. The QCA must, in determining if the 2019 DAU is appropriate for the purposes of section 138(2) of the QCA Act, have regard to the nature, scope and likelihood of the competition problem which justified the Treasurer's decision to declare the DBCT service.

12 The QCA and Queensland Treasury did not recommend that the DBCT service be declared. However, the Treasurer found that declaration would promote a material increase in competition in one narrow dependent market. Fundamentally, it is the competition problem in that one narrow dependent market which the 2019 DAU should therefore address.

13 The Treasurer's ultimate conclusion was that declaration would promote a material increase in competition in the Development Stage Tenements Market, because it would reduce the risk of hold-up for new acquirers of tenements in that market. The Treasurer did not determine declaration was required to protect existing users.

14 Implicit in the Treasurer's reasoning was the assumption that there will be available capacity at DBCT in the period 2020 to 2030 to accommodate the demands of new access seekers who would be new acquirers in the Development Stage Tenements Market.

15 This was implicit in the reasoning because the risk of hold-up the Treasurer identified was the risk that new access seekers gaining access to the DBCT Service, in the period 2020 to 2030, would face uncertain and higher prices for that service after the expiry of the Access Framework in 2030. That risk could only operate in respect of users who gained access to the DBCT Service prior to 2030 because the relevant risk was that their prices would increase after they gained access.

16 It follows that the Treasurer's reasoning depended upon his assumption that a new access seeker who acquired a new development stage tenement in the period 2020 to 2030 would be able gain access to the DBCT service. DBCTM submits that, on the current evidence, it is not possible for a new access seeker to gain access to the DBCTM service in the period 2020 to 2030 as all capacity - including expansion capacity - is fully contracted. Therefore the competition problem to be addressed by the 2019 DAU is highly unlikely to eventuate.

### DBCTM is fully contracted for the regulatory period

17 The Treasurer and the QCA have accepted that there is no available capacity at DBCT at present.[1]

18 All capacity subject to the 8X expansion is now fully contracted. That is, access holders have executed binding conditional access agreements for the entirety of the 8X expansion. Therefore access seekers currently in the queue at DBCT will not initially be able to gain access to 8X expansion capacity.

19 It is highly unlikely that any expansion beyond the 8X expansion will occur prior to 2030, and not possible for any expansion beyond 8X to occur during the next regulatory period.[2]

[1] Queensland Treasurer *Statement of Reasons Concerning the Declaration of the Handling of Coal at Dalrymple Bay Coal Terminal by the Terminal Operator* 1 Just 2020 (**Treasurer's Decision**), at [4.7.12(a)]; QCA *Declaration Reviews: Final Recommendation – Part C: DBCT service* March 2020 (**Final Recommendation**), p. 51.

[2] See for example DBCTM's March 2018 submission on the Declaration Review, Appendix 18

### No Available Capacity for New Users

20 The consequence of there being no capacity (including expansion capacity) available in the next regulatory period (and very little prospect before 2030) is that, for any potential acquirer considering acquiring a tenement in the Development Stage Tenements Market in the period 2020 to 2030, there is little prospect that access to the DBCT Service could be obtained in respect of coal tonnages from that tenement at any time before 2030. Even if such an access seeker joined the queue immediately, there is little to no likelihood that there would be available capacity at DBCT to meet that demand.

21 As a result, any risk of hold up is unlikely to materially affect investment decisions in the Development Stage Tenements Market, or competition in that market, given that there was little prospect of new access seekers gaining access to the DBCT Service in respect of new development stage tenements prior to 2030 in any event.

## 2.2 Existing Users are adequately protected by existing user agreements

22 The QCA must seriously question the bona fides of existing users' participation in the 2019 DAU approval process and the submissions that they make (including as members of the User Group).

23 As is clear from the competition problem justifying declaration, existing users have a competitive advantage over new access seekers. This advantage is perceived by the User Group to be reduced by the 2019 DAU. Accordingly, it is not in the interests of existing users to ensure new access seekers are adequately protected by the 2019 DAU, unless an existing user is going to seek expansion capacity in the period 2020 to 2030.

24 However, the User Group is seeking to use the 2019 DAU to indirectly benefit existing users in the negotiations of charges under their respective existing user agreements for the reasons set out below.

25 The QCA, Treasury and the Treasurer have all found existing users are adequately protected by the terms of the existing user agreements containing evergreen renewal rights.[3] There is no need for any regulatory intervention to protect existing users. The User Group made this same point in its submissions, stating:

> In that scenario we consider it very difficult to see how the lack of an AU can be argued to make performance or calculation of pricing impossible[4] and
>
> … it is now a commonly agreed position that existing users would continue to enjoy the benefit of their user agreements (**including how they deal with pricing in the absence of an access undertaking**) …[5]

26 The User Group further stated: [6]

> Consistent with the DBCT User Group's previous submissions on this issue (and the legal advice from Allens included in the DBCT User Group's initial submission), the DBCT User Group agrees with the QCA that for existing users the combination of:
>
> (a) the 'evergreen' renewal rights allowing 5 year extensions …; and
>
> (b) the price review and arbitration provisions of those existing user agreements…
>
> **results in existing users having an ability to constrain DBCTM**, but only in relation to their currently contracted capacity. (emphasis added)

[3] Treasurer's decision, at paras [4.6.5], [4.6.10] and [4.7.54]; Final Recommendation, p. 107
[4] DBCT User Group – declaration review submission 30 May 2018, Schedule 1 – Allens Advice, p.4
[5] DBCT User Group – declaration review submission 19 July 2018, p.71
[6] DBCT User Group – declaration review submission 11 March 2019, p.64

27 All existing user agreements unequivocally set out a negotiate-arbitrate regime for the determination of charges under the user agreement.[7]

28 Further, as the QCA has clearly and correctly identified in its August 2020 draft arbitration guideline for disputes under the DBCT 2021 Access Undertaking (**Draft Arbitration Guide**):

28.1 a dispute, including as to price, under an existing user agreement would need to be resolved according the terms of the relevant user agreement;[8] and

28.2 any new obligations from the the 2021 access undertaking would not be automatically incorporated into an existing user agreement unless agreed by the parties.[9]

29 Accordingly, prima facie the 2019 DAU cannot directly impact the arbitration of a dispute under an existing user agreement. Therefore to overcome this restriction existing users are advocating for a public reference tariff, amongst other changes, so as to circumvent any meaningful negotiation of pricing as required under clause 7.2 of existing user agreements.

[7] Clause 7.2 of the existing user agreements.
[8] Draft Arbitration Guide, at section 2.2
[9] Draft Arbitration Guide, at section 2.2.10

# 3 The QCA's role, task and process

## 3.1 Summary

30 The User Group's October 2020 Submission raised the question of the QCA's role in assessing the 2019 DAU. This section:

30.1 briefly discusses the role of the QCA and its task in assessing the 2019 DAU;

30.2 addresses the QCA's process, including the need for substantiation and why the User Group's proposal that the QCA should request confidential internal documents from DBCTM regarding pricing is inappropriate; and

30.3 briefly outlines why the 2019 DAU as amended is appropriate for approval having regard to the factors in section 138(2) of the QCA Act.

## 3.2 The task for the QCA

### The QCA Act

31 The QCA's task in assessing a draft access undertaking is straightforward.

32 Section 134(1) of the QCA Act requires the QCA to consider the DAU given to it in response to an initial undertaking notice and either approve, or refuse to approve, the DAU.

33 Section 138(2) provides that the authority may approve a DAU only if it considers it appropriate to do so having regard to each of the factors set out in that provision, which are familiar to those involved in this process.

34 The QCA Act provides that the QCA may not refuse to approve an access undertaking where the QCA considers only a minor or inconsequential amendment is needed. Sections 138(5) and (6) provide:

> (5) The authority may not refuse to approve a draft access undertaking only because the authority considers a minor and inconsequential amendment should be made to a particular part of the undertaking.
>
> (6) In this section—
>
> minor and inconsequential amendment, in relation to part of a draft access undertaking, means an amendment that, if made, would have no real effect or consequence in relation to that part of the undertaking and the undertaking as a whole.

35 In circumstances where the QCA refuses to approve a DAU, the legislation is unambiguous as to the process that must occur. Section 134(2) provides:

> If the authority refuses to approve the draft access undertaking, it must give the owner or operator a written notice (a secondary undertaking notice) stating the reasons for the refusal and asking the owner or operator to—
>
> (a) **amend the draft access undertaking** in the way the authority considers appropriate; and
>
> (b) give the authority a copy of the amended draft access undertaking within—
>
> (i) 60 days of receiving the notice; or
>
> (ii) if the period is extended under subsection (2A)—the extended period.
>
> (emphasis added)

36 A complex legal analysis is not necessary to determine how these provisions should be applied. If the QCA refuses to approve the 2019 DAU it must provide DBCTM with a notice stating the reasons for the refusal and asking DBCTM to amend the 2019 DAU in the way the QCA considers appropriate. The provisions do not require the QCA to start afresh and determine a new access undertaking to apply to DBCTM. Rather, the QCA must ask DBCTM to make amendments that the QCA considers appropriate to the DAU submitted by DBCTM.

37 It is implicit that in considering 'appropriate' amendments to the DAU that the QCA must contemplate the reasons it did not consider it appropriate to approve the DAU, having regard to the section 138(2) factors – in effect a problem definition. Amendments will then be 'appropriate' under section 134(2) where they address the problem identified in the first step, having regard to the same factors.

## The User Group's arguments

38 The User Group argues that it is an error of law for the QCA to 'start with' the 2019 DAU:[10]

> The foundation for the QCA's approach to determining amendments in 'the way the authority considers appropriate' under section 134(2) QCA Act is that it must 'start with' the 2019 DAU as submitted and is not required to consider whether other alternatives are preferable or more appropriate

39 However, as discussed above, section 134(2) *does* require the QCA to 'start with' the DAU and ask the owner or operator to amend it in a way it considers appropriate. As explained in DBCTM's June 2020 submission, the QCA must assess the undertaking provided to it as appropriate.[11] The starting point for the QCA's task is the DAU as submitted. This is clear from sections 134(1) and 138(2) and also section 134(2), which explicitly requires the QCA to ask the owner or operator to 'amend' the DAU (being the DAU as submitted by the owner or operator in response to the initial undertaking notice).

40 The User Group argues further:[12]

> It is at this stage that the DBCT User Group considers that the QCA is committing a serious error of law by determining that:
>
> > 'In undertaking this exercise … we are not required to consider whether the amendments proposed by DBCTM are the 'most' appropriate … Similarly, it is not necessary for us to consider what hypothetical alternative might otherwise have been adopted or might be preferable'
>
> In stating that 'this exercise' under the QCA Act merely requires a consideration of what has been proposed – the QCA is conflating the two statutory steps in the consideration process – which the QCA Act clearly defines as distinct. As a result, the QCA has failed to truly conduct the second step required by the QCA Act.
>
> …
>
> Rather, where there are distinctly different ways of the undertaking operating (here reference tariff based pricing or negotiate-arbitrate based pricing), in determining how it is appropriate to amend the 2019 DAU it is an error of law to adopt one as the 'appropriate' starting point because it formed part of the draft access undertaking that was initially submitted.

41 This argument is plainly absurd and has already been addressed in DBCTM's June 2020 submission.[13] Section 134(2)(a), which deals exclusively with the second step of the process (as characterised by the User Group) clearly requires the QCA to "amend the draft access undertaking in the way the authority considers

[10] User Group October 2020 Submission, p. 5
[11] DBCTM June 2020 Submission, pp. 24-34. See also, QCA Draft Decision, pp. 16-17.
[12] User Group October 2020 Submission, p. 13
[13] DBCTM June 2020 Submission, pp. 24-34. See also, QCA Draft Decision, pp. 16-17.

appropriate". It does not contemplate a process where the QCA starts from scratch and considers a hypothetical 'most appropriate' access undertaking for the service. Rather, having found that a draft access undertaking is not appropriate for approval, the QCA is then required to consider *amendments to that DAU.*

42 As the QCA states in its Draft Decision:[14]

> If, having regard to the section 138(2) criteria, we consider that it is not appropriate to approve the 2019 DAU, then we must refuse to approve the 2019 DAU and give DBCTM a secondary undertaking notice stating the reasons for the refusal, and asking DBCTM to amend the DAU in 'the way the QCA considers appropriate'.
>
> In undertaking this exercise and determining whether the 2019 DAU appropriately balances the various considerations set out in section 138(2), we are not required to consider whether the amendments proposed by DBCTM are the 'most' appropriate, if that was indeed possible. Similarly, it is not necessary for us to consider what hypothetical alternatives might otherwise have been adopted or might be preferable. Rather, the QCA Act requires us to undertake a practical and straightforward task of considering whether what has been proposed relevantly and appropriately balances the statutory factors in section 138(2).

43 The User Group submission reveals the true nature of the User Group's issue when it argues that "narrowly confining the QCA's consideration of the process in that way, particularly to the exclusion of a reference tariff model, is an error of law".[15] This demonstrates that the User Group does not raise a bona fide issue as to the QCA's application of the legislative test, but rather the *outcome* of that application.

### Access Undertakings must relate to access

44 The factors that the QCA must have regard to in section 138(2) are broad, but they do not expressly include the interests of existing users. DBCTM appreciates that the QCA may have regard to the interests of existing users if it considers it relevant as per section 138(2)(h).

45 But before doing so, the QCA must ask: relevant to what?

46 The role of an access undertaking, and Part 5 more generally, is to govern the provision of *access* to *access seekers*. It is not concerned with interference with the terms of existing user agreements. This much is clear from section 122 of the QCA Act which deals with access disputes. Section 112(1)(b) provides that section 112 only applies where there is no access agreement between the access provider and access seeker relating to the service.

47 The QCA has previously indicated that it may be relevant to have regard to the interests of existing users to the extent that their interests are aligned with access seekers. However, DBCTM has explained that this is not the case in circumstances where DBCTM requires an expansion to service additional access seekers.[16]

## 3.3 The QCA's process

### Use of information gathering powers

48 The User Group has suggested that the QCA exercise its powers to compel the provision of information under the QCA Act to request modelling and other documents held by DBCTM that could relate to possible pricing outcomes under the 2019 DAU.

[14] QCA Draft Decision, p. 17.
[15] User Group October 2020 Submission, p. 5
[16] DBCTM April 2020 Submission, at para [23.4]

> As discussed in section 3.1, given the proposed major and unprecedented shift in regulatory settings, it is surely essential for the QCA to understand as much as possible about what the likely outcomes of that shift are. This is too important a matter to be left to mere speculation about potential benefits that 'may' arise.
>
> Accordingly, the DBCT User Group submits that the QCA's compulsory information production powers should be exercised such that the QCA can obtain a more accurate picture of DBCTM's future pricing intentions under its proposed regulatory model.

49 DBCTM expects that the reasons why this is not an appropriate approach will be clear to the QCA. But for the avoidance of doubt, the key reasons are set out below.

50 In particular, DBCTM notes that if the QCA were to request this information it could prejudice DBCTM's position in any future access disputes that are arbitrated by the QCA. If the QCA were aware of DBCTM's pricing expectations it could not be expected to arbitrate the dispute solely on the merits. This would undermine the arbitration process and the ability of the QCA to impartially arbitrate the dispute (or at least a perception that the QCA could not impartially arbitrate the dispute) and would deny DBCTM procedural fairness.

51 More generally though, the User Group's suggestion illustrates a more fundamental misunderstanding of the QCA's role in the approval of access undertakings.

51.1 The access undertaking process should be focussed on the broad framework for access to the service. It is not intended to be a price setting process (notwithstanding that it has functioned like that in the past). As explained in the explanatory note to the Queensland Competition Authority Bill 1997:[17]

> the QCA has the power to require the owners of declared services… to provide it with an undertaking, which would set out **the broad terms and conditions** upon which access is to be provided to third parties. (emphasis added)

51.2 The information that the User Group suggests the QCA should ask for is irrelevant to the broad terms of access and whether the 2019 DAU is appropriate for approval under the QCA Act. Rather it is concerned with the outcomes that might arise under that undertaking.

51.3 It is not necessary for the QCA to predict the specific pricing outcomes under the 2019 DAU. Rather, it is sufficient that the 2019 DAU ensures that any market power on the part of DBCTM is appropriately constrained, as any access dispute can be referred to the QCA for arbitration. It can be expected that the QCA would not allow for inappropriately high pricing, and this expectation will flow through to how the parties negotiate.

52 Finally, even if it were appropriate, the information that the User Group suggests that the QCA should request would not be helpful in determining pricing outcomes under the 2019 DAU. DBCTM's pricing expectations only form one part of the negotiation. The QCA is the ultimate arbiter of pricing under the 2019 DAU, so it is best placed to understand how it would price under the arbitration criteria – presumably in a way that will constrain DBCTM's market power.

## 3.4 Section 138(2) factors support DBCTM's proposed amendments

53 As explained in earlier submissions, while DBCTM maintains that the 2019 DAU as initially submitted was appropriate for approval, if the QCA refuses to approve the 2019 DAU as submitted, DBCTM considers the amendments proposed by DBCTM throughout this process are appropriate and address the issues raised by the QCA, having regard to the factors in section 138(2) of the QCA Act.

[17] Queensland Competition Authority Bill 1997 – Explanatory Notes, p. 6

54 The table below briefly summarises the reasons why the amended 2019 DAU is appropriate for approval, having regard to the factors set out in section 138(2) of the QCA Act.

**Figure 2: Overview of 2019 DAU consistency with section 138(2) of the QCA Act**

| QCA Act section | Description | 2019 DAU consistent with statutory criteria |
|---|---|---|
| 138(2)(a) | the object of Part 5 of the QCA Act is 'to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, with the effect of promoting effective competition in upstream and downstream markets.' | The 2019 DAU accords with the object of Part 5 of the QCA Act as it:<br>• addresses the narrow competition problem identified by the Treasurer in the declaration review (discussed further below).<br>• ensures the economically efficient operation of DBCT by retaining DBCT Pty Ltd as the majority user-owned Operator. This provides the users with transparency and operational involvement as the operator is an independent service provider owned by a majority of the existing users of the Terminal;<br>• promotes the economically efficient use of DBCT by:<br>○ giving users the opportunity to agree prices that are reflective of competitive market outcomes;<br>○ including access queuing provisions which require DBCTM to allocate any access rights according to the queue;<br>○ including a Standard Access Agreement containing standard provisions for use of DBCT;<br>○ requiring DBCTM, DBCT Pty Ltd and access holders to comply with the Terminal Regulations;<br>• promotes the economically efficient investment in DBCT by facilitating pricing that generates expected revenue for the DBCT service that is at least enough to meet the efficient costs of providing access to the service and includes a return on investment commensurate with the regulatory and commercial risks involved;<br>• allows for prices to be set on a negotiate-arbitrate basis which allows for commercial negotiation where both parties have some negotiating leverage (given that users have recourse to arbitration where negotiations fail) and facilitates outcomes that would be expected to be achieved in a competitive market environment;<br>• enables the varied combinations of contractual arrangements and service offerings, above the standard set out in the SAA, to be taken into account in setting price, thus facilitating efficient use of and investment in DBCT;<br>• removes the risk of regulatory error in setting prices (where DBCTM and users are able to agree price) and promotes investment in the terminal at a time where DBCT is in an expansionary phase;<br>• addresses the competition concern in the development stage tenements market identified in the declaration review process;<br>• provides appropriate protections of the interests of access seekers and access holders, including in respect of confidentiality, disputes and access rights;<br>• prevents DBCTM from engaging in conduct for the purpose of preventing or hindering an access holder's or access seeker's access; or unfairly differentiating between access seekers, access holders, or rail operators;<br>• prevents DBCTM and its related bodies corporate from owning or operating a supply chain business in any market that is related to, or uses, DBCT. |

| QCA Act section | Description | 2019 DAU consistent with statutory criteria |
|---|---|---|
| 138(2)(b) | the legitimate business interests of the owner or operator of the service | The 2019 DAU is consistent with DBCTM's legitimate business interests as it enables DBCTM and access seekers to negotiate access charges that provide DBCTM with an opportunity to recover the efficient costs for providing the DBCT service and to earn a commercial return on investment commensurate with the regulatory and commercial risks involved in supplying the declared service.<br>The 2019 DAU also:<br>• promotes incentives to maintain, improve and invest in DBCT and the efficient provision of the declared services;<br>• enables DBCTM to meet its contractual obligations to existing users;<br>• enables DBCTM to attract and contract for additional tonnage from new and existing coal producers within the relevant region; and<br>• enables DBCTM to ensure the Terminal is maintained and operating to meet legal requirements, including providing for its safe operation. |
| 138(2)(c) | if the owner and operator of the service are different entities–the legitimate business interests of the operator of the service are protected | The QCA has previously found that DBCT Holdings is the owner of the service and DBCTM is the operator of the service.[18] The 2019 DAU protects the legitimate business interests of DBCTM as set out above. |
| 138(2)(d) | the public interest, including the public interest in having competition in markets (whether or not in Australia) | The 2019 DAU serves the public interest as it promotes the sustainable and efficient development of the Queensland coal industry, which in turn provides a stimulus to the Queensland economy and local employment.[19]<br>The QCA has noted that when the coal market is experiencing a period of growth, it may be that the public interest requires particular attention be paid to facilitating efficient investment in new or expanded capacity.[20]<br>The market environment for this DAU is an expansionary environment where it is critical to facilitate efficient investment in new or expanded capacity. Further, the ageing infrastructure of DBCT is at the point where large replacement/refurbishment decisions are required on significant assets. The investment in large-scale capex is one that must be balanced against increasing maintenance costs.<br>The 2019 DAU promotes the public interest by providing for the terms and conditions on which access seekers can seek access to DBCT and by facilitating the negotiation between DBCTM and access seekers of access prices. The ability for DBCTM and access seekers to reach commercial agreement as to price removes the risk of regulatory error in setting prices, and promotes economically efficient investment in the terminal at a time where DBCT is in an expansionary phase and requires significant capital expenditure on existing assets to continue operating the terminal at high utilisation rates in a period of high demand. |
| 138(2)(e) | the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights | The 2019 DAU is consistent with the interests of access seekers as it:<br>• facilitates the provision of access on reasonable commercial terms. The DAU includes provisions relating to access negotiations and queuing (to ensure access is provided fairly to access seekers) and incorporates a Standard Access Agreement; |

[18] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, p. 24
[19] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, p. 25
[20] QCA, Final Decision, DBCT Management's 2015 draft access undertaking, November 2016, p. 25

| QCA Act section | Description | 2019 DAU consistent with statutory criteria |
|---|---|---|
| | of users of the service are adversely affected | • allows new access seekers to negotiate access prices with DBCTM, with recourse to QCA arbitration where negotiations fail. This is consistent with the mechanism for price reviews available to existing access holders under their existing user agreements;<br>• enables prices to be agreed based on the contractual arrangements and service acquired by the access seeker and taking into account the value to the access seeker of the particular services;<br>• protects existing contractual entitlements as to capacity;<br>• contains a fair and non-discriminatory process for obtaining access to terminal capacity (i.e. the access queue);<br>• contains a non-discrimination provision preventing DBCTM from engaging in conduct for the purpose of preventing or hindering an access holder's or access seeker's access; or unfairly differentiating between access seekers, access holders, or rail operators;<br>• facilitates the provision of clear and transparent information about access to and use of the declared service to support a principled negotiation framework and an effective dispute resolution process;<br>• includes a clear framework for capacity expansion decision-making;<br>• provides for the reasonable protection of access seekers' confidential information;<br>• retains DBCT Pty Ltd as the majority user-owned Operator. This provides the users with transparency and operational involvement as the operator is an independent service provider owned by a majority of the existing users of the Terminal.[21]<br>DBCTM also provides substantial amendments to the 2019 DAU which will go even further to protect the interests of access seekers. For example:<br>• DBCTM is required to provide extensive and prescriptive information about the terminal and the costs of providing the service, to enable access seekers to efficiently assess the reasonableness of DBCTM's offered access charges and reduce information asymmetry;<br>• DBCTM is required to provide detailed methodology information for key inputs into its access offer;<br>• DBCTM and expanding access seekers must agree an expansion pricing approach (or have it determined by arbitration), providing additional certainty for expanding access seekers;<br>• DBCTM must allow expanding access seekers to terminate their conditional access agreements once an expansion pricing approach has been determined;<br>• DBCTM has adopted the changes to the timeframes proposed by the User Group. |
| 138(2)(f) | the effect of excluding existing assets for pricing purposes | DBCTM does not consider that the QCA should give this factor weight in deciding whether to approve the 2019 DAU, given the 2019 DAU adopts a negotiate-arbitrate approach to pricing. |
| 138(2)(g) and 168A | The pricing principles in s168A being:<br>- generate expected revenue for the service that is at least enough to meet | The negotiate-arbitrate framework in the DAU will enable prices to be set that generate expected revenue for the DBCT service that is at least enough to meet the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved. The risk of regulatory error leading to prices set below this |

[21] Access seekers have the right to become part-owners of the operator DBCT Pty Ltd upon becoming an access holder

| QCA Act section | Description | 2019 DAU consistent with statutory criteria |
|---|---|---|
| | the efficient costs of providing access to the service and include a return on investment commensurate with the regulatory and commercial risks involved; and<br>- allow for multi-part pricing and price discrimination when it aids efficiency; and<br>- not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider…; and<br>- provide incentives to reduce costs or otherwise improve productivity | level is reduced by providing an opportunity for negotiated outcomes in the first instance. This is particularly important given DBCTM is currently in an expansionary phase.<br>The negotiation framework will allow DBCTM to take into account the contractual arrangements sought and the types of services provided to the individual access seekers, as well as the overall efficiency impacts of those services. This may allow for multi-part pricing and/or price discrimination in some circumstances where it aids efficiency.<br>The 2019 DAU provides that DBCTM and its Related Bodies Corporate will not own or operate a Supply Chain Business in any market that is related to, or uses, the Terminal. Accordingly, it does not allow a related access provider to set terms and conditions that discriminate in favour of the downstream operations of the access provider or a related body corporate of the access provider.<br>The negotiation framework will include a consideration of incentives to reduce costs or otherwise improve productivity. |

## The object of Part 5 is a key consideration for the QCA

55 Crucial to the QCA's assessment of the appropriateness of the 2019 DAU and any required amendments is the Object of Part 5 of the QCA Act. The Object of Part 5 provides:[22]

> The object of this part is to promote the economically efficient operation of, use of and investment in, significant infrastructure by which services are provided, **with the effect of promoting effective competition in upstream and downstream markets**. (emphasis added)

56 The object elucidates that the outcome that Part 5 is designed to achieve is the promotion of effective competition in dependent markets – an issue expressly considered by the QCA and Treasurer in the declaration review process. Criterion (a) requires that to declare a service, access (or increased access) to the service, on reasonable terms and conditions, as a result of a declaration of the service *would promote a material increase in competition in at least 1 dependent market*.[23]

57 Thus, in having regard the object of the Part under section 138(2)(a), the outcomes of the declaration review are relevant to the QCA's assessment of the appropriateness of the 2019 DAU. There are two key points from the declaration review that should be front of mind for the QCA:

57.1 First, both the QCA and Treasurer found that existing users were sufficiently protected under their existing user agreements, such that the removal of declaration would not cause an adverse competition impact due to terms of access for existing users.[24]

57.2 Secondly, the QCA and Treasury department both recommended that the Treasurer not declare services at DBCT as declaration would not promote a material increase in competition in any relevant market. However, the Treasurer found that declaration would promote a material increase in the development stage tenements markets, due to the uncertainty as to how pricing at DBCT would apply to access seekers beyond 2030. Therefore, the competition problem being addressed by the 2019 DAU is in relation to (a subset of) new access seekers.

[22] QCA Act, section 69E.
[23] QCA Act, section 76(2)(a)
[24] Treasurer's decision, at paras [4.6.5], [4.6.10] and [4.7.54] , Final Recommendation, p. 107

# 4 Further measures to improve negotiation and arbitration processes

## 4.1 Summary

58 While DBCTM considers the 2019 DAU (including the amendments previously proposed by DBCTM) is appropriate for approval, DBCTM has continued to consider potential ways that the negotiate-arbitrate model could be further improved. This section sets out four further measures which the QCA could consider using to ensure the efficiency and effectiveness of the negotiate-arbitrate process.

58.1 The first two would require changes to the 2019 DAU, which DBCTM would support if the QCA was minded to adopt them.

58.2 The third relies on the QCA's ability to award costs under the QCA Act – though changes could be made to the 2019 DAU to expressly recognise this.

58.3 Finally, DBCTM proposes to provide a cost of service model to access seekers in order to assist in their assessment of DBCTM's offer.

59 Each of these measures are briefly summarised in the table below.

**Figure 3: Further measures to potentially improve effectiveness of negotiate-arbitrate regime**

| Measure | Impact on effectiveness of arbitration and negotiation |
|---|---|
| **Evidentiary limit**<br>Introduction of an evidentiary limit which would require parties to produce all material they propose to rely on in an arbitration, before they can refer a matter to arbitration. | An evidentiary limit ensures that all parties must 'put their cards on the table' before the matter can be referred to arbitration. This addresses any potential remaining information asymmetry concerns (noting the extensive information that DBCTM is already required to provide). If DBCTM does not provide information before the matter is referred to arbitration, it will not be able to rely on it. This ensures that access seekers are fully informed, and can make an assessment of the reasonableness of DBCTM's offer *prior* to the matter being referred to arbitration. This improves the effectiveness of negotiations, as well as the efficiency of arbitrations – as there are 'no surprises' when it comes to arbitration. |
| **Termination of vexatious matters**<br>Introduction of the ability for the QCA to terminate an arbitration in certain circumstances. | This will enable the QCA to terminate arbitrations where:[25]<br>• it considers the party that referred the matter to arbitration did so vexatiously;<br>• the subject matter of the dispute is trivial, misconceived or lacking substance; or<br>• the party referring the matter to arbitration has not engaged in negotiations in good faith (such as not providing reasonably requested information or delaying in responding to offers or not substantiating positions).<br>This will ensure that parties are incentivised to undertake meaningful negotiations and will not rely on arbitration by default. |
| **Awarding costs**<br>The QCA could consider the publication of guidance around how it would exercise its ability in the QCA Act to award costs. It could also introduce express provisions to the 2019 DAU dealing with the award of costs. | The QCA already has the power to award costs under section 208 of the QCA Act. This power provides a strong incentive for parties to act reasonably in negotiations, and only to refer the matter to arbitration where they have a reasonable case. It also ensures that there is no disincentive for access seekers to pursue their case before the QCA, in circumstances where DBCTM makes an unreasonable offer or does not appropriately substantiate its offer. In such cases, access seekers can seek to recover their costs of arbitrating the matter from DBCTM. |

[25] Consistent with section 122 of the QCA Act

| Measure | Impact on effectiveness of arbitration and negotiation |
|---|---|
| **Provision of model**<br>Provision of cost of service model along with other information | To assist access seekers in the assessment of an appropriate TIC, DBCTM proposes to provide a cost of service model that can be populated using the information provided by DBCTM, or the access seeker's own information, in order to estimate the efficient costs of providing the service. This will help ensure that access seekers can effectively and efficiently assess the reasonableness of DBCTM's access offer. |

## 4.2 Evidentiary limit

60 DBCTM considers the introduction of an evidentiary limit could assist to ensure that the parties engage in meaningful negotiations prior to referring a dispute to arbitration. It would also unequivocally address any remaining concerns regarding information asymmetry.

61 An evidentiary limit would require a party to provide *all* the information it seeks to rely on to the other party *before* it could refer the matter to arbitration.

62 This would prevent any perception that DBCTM would withhold information relevant to the access seeker's assessment of DBCTM's access offer. If DBCTM were to withhold information from an access seeker, it would then be unable to rely on that information in any arbitration, except in exceptional circumstances with the leave of the arbitrator.

63 Evidentiary limits have been used effectively in other negotiate-arbitrate regimes, such as that under Part 23 of the National Gas Rules.[26]

64 At the Forum some users expressed concerns that the evidentiary limit would require an access seeker to prepare all the information that it sought to rely on, *prior* to entering into negotiations. However, this is not the case. Evidentiary limits typically have a trigger that can be exercised by either of the parties. Once exercised, the other party is provided a *reasonable period of time* to produce all information that it seeks to rely on in an arbitration. For example, under Part 23 of the National Gas Rules, a party is given 15 business days to provide all material it seeks to rely on in arbitration. This period can be extended with the agreement of the parties. The other party is unable to refer the matter to arbitration until the 15 business days have passed.[27] This provides an opportunity for the access seeker to prepare the material it seeks to rely on in arbitration at a late stage in negotiations. Of course the default timeframe could be extended, if the QCA were to determine that the timeframe under the National Gas Rules was insufficient.

65 Further, in exceptional circumstances, the 2019 DAU could provide an opportunity to seek leave of the QCA to introduce new information that was not provided to the other party prior to being referred to arbitration.[28]

66 An evidentiary limit ensures that all parties must 'put their cards on the table' before the matter can be referred to arbitration. This has the following benefits:

[26] See rule 562 of the National Gas Rules. Under rule 562(5)(b) a party to negotiations may request another party to the negotiations to provide all access negotiation information of the other party. Rule 549 of defines access negotiation information to mean, inter alia, any information that the party may seek to rely on for the determination of an access dispute in relation to the subject matter of the negotiations. Rule 562(6) provides that a party must issue a request for access negotiation information under rule 562(5)(b) *before* it issues an access dispute notice (in essence, referring the matter to arbitration) and that it must not issue an access dispute notice earlier than 15 business days after issuing a request for access negotiation information. Rule 568(1) provides that a party to an access dispute must seek leave of the arbitrator to submit and rely on access negotiation information it did not provide to the other party before the access dispute notice was given.

[27] See rule 562 discussed in the footnote above.

[28] As is the case under rule 568(1) of the National Gas Rules.

66.1 First, it unequivocally addresses any remaining information asymmetry concerns (noting that the 2019 DAU already requires DBCTM to provide an extensive suite of information). If DBCTM withholds information from an access seeker before the matter is referred to arbitration, it will not be able to rely on it in any arbitral proceedings. Hence, DBCTM has a strong incentive to fully disclose any information it considers could assist it in arbitration. This ensures that access seekers are fully informed, and can make an assessment of the reasonableness of DBCTM's offer and an informed decision on whether to refer the matter to arbitration.

66.2 Secondly, it will ensure that disputes that could have been settled through negotiations are not unnecessarily referred to arbitration. It does this by enabling the parties to fully understand each other's position prior to the matter being referred to arbitration. This no-surprises approach avoids the scenario where information is divulged in an arbitration, which had it been known to the other party prior to the arbitration, may have enabled it to reach a negotiated outcome.

66.3 Thirdly, it will improve the efficiency of the arbitration process. From a practical perspective, a set evidentiary limit will provide for a simpler arbitration process.

## 4.3 Ability to terminate arbitration

67 The ability to terminate an arbitration in certain circumstances could help ensure that the parties are incentivised to undertake meaningful commercial negotiations, and do not refer matters to arbitration unnecessarily.

68 DBCTM proposes that the QCA consider amendments to the 2019 DAU that would allow the QCA to terminate an arbitration where:[29]

68.1 the QCA considers the referral is vexatious or frivolous;

68.2 the subject matter of the dispute is trivial, misconceived or lacking substance; or

68.3 the party raising the dispute has not engaged in negotiations in good faith (such as not providing reasonably requested information or delaying in responding to offers or not substantiating positions)

69 At the Forum, DBCTM raised its concerns that members of the User Group may not negotiate in good faith so as to force everything to arbitration in an attempt to convince the QCA that the 2021 AU is ineffective, thereby seeking to justify a change in the 2026 AU.

70 The ability to terminate in the circumstances outlined above will ensure that both DBCTM and access seekers are incentivised to undertake meaningful negotiations and will not rely on arbitration by default.

## 4.4 Discretion to awards costs

71 The QCA is empowered to award costs under the QCA Act. The QCA Act relevantly provides:[30]

> (1) In an arbitration, the authority may make any order it considers appropriate about—
>
> (a) the payment by a party (the designated party) of the costs, or part of the costs, incurred by another party in the conduct of the arbitration; or
>
> (b) the payment by a party (also the designated party) of the costs, or part of the costs, incurred by the authority in conducting the arbitration.

[29] Consistent with section 122 of the QCA Act
[30] QCA Act, section 208

(2) The costs ordered to be paid by a designated party to another party or the authority may be recovered by the other party or authority as a debt owing to the other party or authority by the designated party.

(3) If, in an arbitration, the dispute notice is withdrawn before the authority makes a determination, a reference in this section to the costs incurred by a party in the conduct of the arbitration, or to the costs incurred by the authority in conducting the arbitration, includes a reference to the costs incurred by the party or authority in relation to the arbitration before the notice is withdrawn.

(4) This section applies despite section 115(5)

72 The ability to award costs has two key impacts on the negotiate-arbitrate process:

72.1 First, it deters parties from bringing unreasonable cases before the QCA. For example, if DBCTM adopted a clearly untenable position and referred a matter to arbitration, it could be expected that it would have costs awarded against it.

72.2 On the other hand, it ensures that parties *are not* deterred from bringing reasonable cases. For example, a party would not have a financial disincentive to refer the matter to arbitration in circumstances where DBCTM adopted an unreasonable or unsupported position in negotiations.

73 While the ability to award costs is already a feature of the 2019 DAU as it is incorporated from the legislation, DBCTM considers that the QCA may wish to consider amendments to the 2019 DAU to expressly refer to this ability.

74 DBCTM considers that the QCA should consider the exercise of this power to ensure that the arbitration process is used effectively, and parties are not deterred from referring a matter to arbitration where they have a reasonable case.

## 4.5 Provision of cost of service model

75 To assist access seekers in the assessment of an appropriate TIC, DBCTM proposes to provide a simplified cost of service model that can be populated using the information provided by DBCTM, or the access seeker's own information, in order to estimate the efficient costs of providing the service.[31]

76 This, along with the extensive information provision requirements already proposed, will help ensure that access seekers can effectively and efficiently assess the reasonableness of DBCTM's offered TIC, with minimal cost. The model provided would be user-friendly and enable access seekers to easily calculate the effects of various inputs on the estimated cost of providing the service, as well as run different scenarios.

[31] DBCTM does not consider it necessary for the AU to specify the requirement to provide a model. DBCTM will do this to facilitate negotiations in any event

# 5 Response to User Group Submissions

## 5.1 Summary

77 This section responds to the arguments set out in the User Group's October 2020 Submission.

77.1 The first part of this section deals with the User Group's general arguments that negotiate-arbitrate is not appropriate for DBCT and that it should be subject to 'full regulation'. It also deals with the User Group's suggestion that if the QCA maintains the negotiate-arbitrate regime then it should set a reference tariff as a backstop.

77.2 The second part of this section discusses the negotiation process and refutes a key plank in the User Group's argument against the 2019 DAU pricing model – that DBCTM will have no incentive to negotiate, so there will be no likelihood that negotiated outcomes will occur, and therefore the benefits of negotiated outcomes will not arise.

77.3 The third part of this section looks at the arbitration process, and in particular the arbitration criteria, and the User Group's assertion that the QCA would set inappropriately high monopoly prices under the legislative arbitration criteria.

77.4 The final part of this section deals with various other issues raised by the User Group, including its submissions regarding depreciation and remediations costs.

78 A summary of DBCTM's key points is set out in the table below.

**Figure 4: Summary of DBCTM's response to the User Group**

| User Group position | DBCTM response |
|---|---|
| **General arguments for full price regulation**<br>DBCTM is a natural monopoly with no competition so should be subject to 'full regulation'<br>Negotiate-arbitrate regulation is liable to being gamed | The User Group makes the error of focussing on whether DBCTM would be constrained *without* regulation, and in doing so, fails to engage with the constraints under the 2019 DAU which ensure that access seekers have countervailing power in negotiations.<br>The User Group provides no valid basis for its argument that negotiate-arbitrate regulation is easily gamed. The one example it refers to of an *access agreement* being gamed by Adani Abbott Point Terminal was not determined under a negotiate-arbitrate model.<br>The User Group's suggestion that the QCA should provide for a reference tariff in addition to the negotiate-arbitrate model would practically mean that DBCTM would be subject to full price regulation as it would remove incentives to negotiate. |
| **Negotiation process**<br>DBCTM has no incentive to reach negotiated outcomes<br>There is no scope for tailored access agreements | DBCTM considers there is a very good prospect of reaching a number of negotiated, mutually beneficial outcomes with access seekers and existing users, that avoids the need for arbitration. Indeed, this is the reason DBCTM has pursued a negotiate-arbitrate model as part of the 2019 DAU.<br>There is ample room to tailor access agreements to individual access seeker needs, and scope to vary existing user agreements in negotiations as well.<br>While the User Group has made bold claims that negotiations are impossible, it overlooks the actual incentives in place on DBCTM and access seekers, when both parties can refer the matter to be determined by the QCA through arbitration. DBCTM's discussions with existing users have demonstrated as much.<br>While DBCTM has some concerns that some users may, in bad faith, attempt to refer their pricing review straight to arbitration in order to undermine the 2019 DAU, DBCTM considers that the measures set out in section 3 above could effectively reduce this risk and ensure all parties are incentivised to engage in meaningful negotiations. |

| User Group position | DBCTM response |
|---|---|
| **Arbitration process**<br>Prices set by the QCA under the statutory arbitration criteria would be set at monopoly levels<br>The arbitration criteria are inappropriate<br>The guidelines are not sufficiently prescriptive<br>The AU should provide for collective arbitrations | There is no basis for the User Group's contention that the QCA would set prices at inappropriately high levels. The statutory arbitration criteria would not permit this.<br>The legislative arbitration criteria are fit for purpose and will operate to constrain any market power held by DBCTM.<br>The arbitration guidelines are appropriate and consistent with the approach taken by other regulators.<br>Collective arbitrations are inappropriate and could potentially harm incentives for access seekers to engage in meaningful negotiations with DBCTM. |
| **Remediation costs**<br>The rehabilitation estimate is not prudent or efficient<br>Access seekers do not have the resources to negotiate a rehabilitation estimate<br>The QCA should determine the inputs to the calculation of the remediation allowance<br>Natural justice has not been served as SLR did not have access to the DBCT site, or to the same information as Advisian | The QCA will conduct a review of the rehabilitation estimate to ensure it is prudent and efficient. Consequently, the rehabilitation estimate need not be individually negotiated by access seekers, and need not be subject to arbitration. Therefore access seekers may negotiate the remediation allowance on the same basis.<br>QCA-determined inputs would result in a fixed remediation allowance, which does not provide DBCTM or access seekers with any ability to negotiate.<br>Despite the GHD Estimate being available since July 2019, the User Group did not engage SLR until September 2020. DBCTM supplied all information requested by the User Group, to the extent it was available. The User Group did not request a visit to the DBCT site for SLR. |

## 5.2 General arguments for full price regulation

79 The User Group continues to make general arguments that the negotiate-arbitrate model is unsuitable for DBCTM and that it should be subject to full price regulation, without having regard to the constraints of the 2019 DAU. While the User Group's most recent submission does not appear to offer new arguments, DBCTM briefly addresses these arguments below.

80 The primary purpose of the 2019 DAU should be to address the competition problem justifying declaration of the DBCT service. The QCA must, in determining if the 2019 DAU is appropriate for the purposes of section 138(2) have regard to the nature, scope and likelihood of the competition problem which justified the Treasurer's decision to declare the DBCTM service.

81 As set out in section 2.1 above, the competition problem to be addressed by the 2019 is narrow and largely hypothetical.

### Nature of the Service

82 The User Group continues to make the argument that because the QCA has found that DBCTM has an ability to exercise some market power *without regulation* a negotiate-arbitrate pricing model is inappropriate for DBCT:[32]

> The DBCT User Group strongly considers that seeking to apply that principle in the circumstances of the DBCT service on the basis that there 'may' be benefits is a flawed approach that fails to take account of:

[32] User Group October 2020 Submission, pp. 5-6

> (i) the circumstances of the DBCT service (including DBCTM's market power, users' lack of countervailing power and the costs and risk of inefficient pricing and arbitration) and the implications they have for the potential for efficient and appropriate negotiated outcomes;

83 The User Group elaborates in section 6.1:[33]

> It has been acknowledged through the 2019 DAU process and declaration review, that DBCTM has clear and significant market power, and the lack of competition results in users and access seekers having no countervailing power.
>
> Yet, **outside the undertaking and access agreements**, there is no evident constraint that the QCA has found to exist in any of those processes on DBCTM's ability and incentive to engage in monopoly pricing. In particular, the QCA acknowledges that DBCTM has no competitors, users have no countervailing power and DBCTM has no businesses in dependent markets that provide incentives not to engage in monopoly pricing (emphasis added)

84 The User Group also refers to the QCA's comments:[34]

> the characteristics of DBCT and the relevant market suggest there is limited constraint on the exercise of market power (**in the absence of appropriate regulation**) (emphasis added)

85 These arguments are not new and all labour under the same fundamental premise. The User Group argues that the establishment of market power on the part of DBCTM *without regulation* means that a negotiate-arbitrate regime is not suitable. The User Group points to the findings of the QCA that DBCTM is a natural monopoly and that it has no competitors in the market and has market power *without regulation,* without considering the constraints of the 2019 DAU.

86 The relevant question is not whether, unconstrained, DBCTM would act in a profit maximising way. The question is whether the 2019 DAU appropriately constrains any market power possessed by DBCTM.

87 Indeed, under a proper analysis of the 2019 DAU it becomes clear that access seekers will have significant countervailing power in negotiations such that DBCTM could not exercise market power. While this countervailing power does not stem from the threat of switching as it may in an effectively competitive market, it still exists, stemming from the ability of access seekers to refer disputes to the QCA for determination in circumstances where DBCTM does not offer access to the service on reasonable terms.

88 To impose heavy handed full price regulation on the sole basis that DBCTM may have market power *without regulation* would be erroneous. The task for the QCA is to consider whether the 2019 DAU is appropriate and, in this context, whether it provides an adequate constraint on DBCTM.

89 As discussed below, this error in the User Group's reasoning pervades throughout its submissions. For example, it renders erroneous the User Group's analysis of the incentives that DBCTM has to negotiate.

## Potential for gaming

90 The User Group's October 2020 Submission makes unsubstantiated claims that negotiate-arbitrate regimes are easily gamed:[35]

> However, the recent decision of Adani Abbot Point Terminal Pty Ltd v Lake Vermont Resources Pty Ltd, in the Queensland Supreme Court demonstrates the potential for a building blocks based negotiate/arbitrate regime of this nature to be easily gamed.

[33] User Group October 2020 Submission, p. 28
[34] User Group October 2020 Submission, p. 28
[35] User Group October 2020 Submission, p. 30

91 The User Group does not set out the mechanism by which negotiate-arbitrate regimes, much less the negotiate-arbitrate regime set out in the 2019 DAU, could be gamed. Rather, the User Group relies solely on the example of the Adani Abbott Point Terminal (**AAPT**), an example that has no relevance to the regulation of DBCT.

*Adani Abbott Point Terminal proceedings*

92 The example of the recent decision in *Adani Abbott Point Terminal Pty Ltd v Lake Vermont Resources Pty Ltd,* does nothing to further the User Group's point. As explained by the User Group, in that case the service provider relied on technicalities in its access arrangements with users to game key building blocks and essentially 'double-dip' on the recovery of some costs.

93 However, the circumstances applying at AAPT could not be more different to those at DBCTM.

93.1 Perhaps most importantly, the terminal is not, and never has been, subject to economic regulation.

93.2 The access agreements (which included the building block pricing framework which was gamed) did not arise under a negotiate-arbitrate regime. Rather, those agreements were entered into freely by users at a time when the terminal was owned by the state.

93.3 The subsequent privatisation of the terminal resulted in an owner of the terminal with significantly different incentives. The access agreements were novated to Adani via legislation. The service provider then sought to exploit the technicality in the access agreements to extract additional profits (a risk not contemplated by the users given the original agreement was with the state).

93.4 Adani Abbot Point is vertically integrated and as such has both the ability and incentive to foreclose on its rival coal miners.

94 This is in stark contrast to the circumstances at DBCT where:

94.1 DBCTM is declared and as a result is subject to economic regulation under the QCA Act;

94.2 specifically, in the upcoming regulatory period DBCTM will be subject to the 2019 DAU, which substantially constrains any ability to exercise any market power, by enabling access seekers to have access disputes arbitrated by the QCA;

94.3 the arbitration criteria provide the QCA sufficient discretion that it is highly unlikely that either party could rely on a technicality to require the QCA to determine unreasonable pricing outcomes;

94.4 access seekers are fully aware that DBCTM is a private commercial entity with commercial incentives and act accordingly to protect their interests; and

94.5 DBCTM is not vertically integrated and has no incentive to foreclose rival miners.

95 Given these differences, the example provides no support for the User Group's position that negotiate-arbitrate regimes are subject to gaming. If anything, it contradicts it. It shows that a rigid building blocks framework (which the User Group has advocated for under a reference tariff model), can lead to error and perverse outcomes.

96 The User Group's assertion that 'the exact same arrangements could be forced onto DBCT users based on the model the Draft Decision seems inclined to accept, where the same conduct would also result in automatic socialisation via increases in charges of other users and the same level of 'double-dipping''[36] is without basis as discussed below in section 5.6.

[36] User Group October 2020 Submission, p. 30

97 Finally, it is worth pointing out that the User Group's argument that negotiate-arbitrate regimes are easily gamed is irreconcilable with their wide-spread use throughout Australia. Negotiate-arbitrate regimes are a feature of many regulatory regimes including the National Access Regime, the National Gas Rules and the QCA Act itself.

### Refence tariff negotiation model

98 The User Group has suggested that the QCA should approve an 'alternate negotiate-arbitrate model' with a reference tariff as the backstop.[37]

99 These arguments are essentially a repackaging of the User Group's previous proposition that DBCTM should be subject to a reference tariff. DBCTM's previous submissions have detailed why a reference tariff will stifle commercial negotiations and the benefits of a negotiate-arbitrate model.[38]

## 5.3 Negotiation process

100 The User Group October 2020 Submission focuses on the argument that the benefits that flow from negotiated outcomes will not arise because there is no realistic prospect of negotiated outcomes.

101 It makes a number of arguments as to why this is the case, focussing on three key assertions:

- 101.1 the parties, and in particular DBCTM, do not have incentives to reach negotiated outcomes;
- 101.2 there is no scope for tailored negotiation outcomes other than a higher price;[39] and
- 101.3 access seekers will still face significant information asymmetry.

102 This section explains why the User Group's comments are unfounded.

### Incentives to reach negotiated outcomes

103 The User Group's October 2020 Submission purports to examine in detail the incentives faced by parties to negotiations under the 2019 DAU.

104 DBCTM agrees with the User Group that understanding the parties' economic incentives is critical to understanding the likely outcomes under the 2019 DAU. However, DBCTM considers that the User Group's assessment of those incentives is fundamentally flawed and is based on a number of leaps in logic, without a proper consideration of the economic incentives faced by the parties and the role that the 2019 DAU plays in affecting the parties' incentives.

*Incentives on both parties to reach compromise*

105 The User Group argues that the parties are not incentivised to compromise and agree to prices that depart from their expectations as to their best case scenario under arbitration.

105.1 For example it argues that DBCTM would not agree to a TIC unless it was higher than what could be achieved in arbitration:[40]

> Where DBCTM acts as a rational profit maximising monopolist, it will not accept any negotiated price unless it is higher than its expectation of the charges which would be determined by an arbitrator.

[37] User Group October 2020 Submission, p. 7
[38] See, for example: DBCTM July 2019 Submission, at section 4; DBCTM November 2019 Submission, at section 2
[39] User Group October 2020 Submission, pp. 21-22
[40] User Group October 2020 Submission, p. 24

105.2 And, that DBCTM would only agree to prices at the highest level achievable in an arbitration:[41]

> …DBCTM's economic incentives are to push for the greatest extent of monopoly pricing that can be achieved in negotiations, and DBCTM has no incentive to reach agreement on an appropriate or efficient price below the highest level they consider is achievable in an arbitration

105.3 Similarly, the User Group argues that access holders or seekers would not accept prices where they are higher than their expected arbitration charges:[42]

> If the access holder or seeker acts rationally, it will not accept any price unless it is lower than its expectation of the charges which would be determined by an arbitrator

106 However, in practice, the incentives faced by the parties are much more nuanced than this.

107 The access charges that the parties will be willing to agree to will naturally be informed by their expectations regarding arbitration outcomes. However, in circumstances where there is not absolute certainty as to pricing outcomes it can be expected that the parties will not have a single view on the charges that would be determined by the QCA. Rather, they will expect a range of possible outcomes. For example, there may be a range of possible positions that the QCA could take on the efficient costs of providing the service. This creates scope for compromise.

108 Given that there is no absolute certainty as to the exact outcomes of arbitration, it can be expected that a commercial entity would likely seek to minimise its exposure to a less favourable arbitration outcome by offering reasonable compromise. That is, it may accept a compromise between its reasonable expectations of the best and worst case outcomes under arbitration.

109 While there may be some divergence in the internally held expectations of the parties, the information provided by DBCTM will ensure that the parties are privy to substantially the same information in order to assess the likely arbitration outcomes. This means that the internal expectations of the range of possible arbitration outcomes is unlikely to be materially different. If the QCA is minded to adopt the evidentiary limit measure discussed in this submission, it may further narrow the range of expected outcomes for the parties as all information that can be relied on by ***either*** party will be on the table during the negotiation phase.

110 It is also worth noting that the User Group's suggestion that DBCTM or access seekers would expect that the QCA would determine inappropriately high prices is completely without merit (as discussed further below). DBCTM does not anticipate the QCA would ever determine unreasonable prices and would certainly never determine a TIC in the '10s of dollars', as suggested at the Forum. DBCTM does not consider it plausible that an access seeker that has considered the 2019 DAU in any level of detail could expect prices of that magnitude. [43]

*DBCTM's incentives*

111 Turning now to the incentives faced by the individual parties – DBCTM has strong incentives to reach negotiated outcomes.

111.1 DBCTM's chief executive explained at the Forum that the negotiate-arbitrate model has no value to DBCTM if all disputes are referred to arbitration. DBCTM is pursuing a negotiate-arbitrate model because it genuinely considers there to be scope for agreement, compromise, and mutual benefits.

[41] User Group October 2020 Submission, p. 10
[42] User Group October 2020 Submission, p. 24
[43] Even in the case the access seeker has not considered the 2019 DAU in full, DBCTM is required under the amended 2019 DAU to furnish the access seeker with historical information on pricing at DBCTM

111.2 DBCTM is abundantly aware that if it does not act reasonably in negotiations, the matter is likely to be referred to the QCA for arbitration. If DBCTM acts unreasonably in negotiations this is likely to be viewed unfavourably by the QCA .

111.3 Further if DBCTM acts unreasonably, it is likely to reduce the prospects of the QCA approving a negotiate-arbitrate regime in future undertakings.

111.4 On the other hand, if DBCTM acts reasonably in negotiations and offers a reasonable TIC this will maximise the prospects of efficient and successful negotiations to the satisfaction of both parties.

111.5 There are currently 11 users of DBCT. It is not in DBCTM's interests to face the time and costs of conducting 11 simultaneous arbitrations. The burden upon DBCTM of 11 arbitrations would be material and provides an incentive for DBCTM to act reasonably.

112 The User Group's analysis of the incentives, however, suffers from a number of flaws in reasoning. Specifically, the User Group:

112.1 places undue weight on the incentives that DBCTM would face without regulation;

112.2 equates an incentive to maximise profits with an incentive to act unreasonably without justification;

112.3 incorrectly assumes that DBCTM would expect the QCA would determine inappropriately high monopoly prices;

112.4 incorrectly assumes that the incremental cost to DBCTM of additional arbitrations would be a trivial consideration for DBCTM.

*The User Group places undue weight on the incentives that DBCTM would face without regulation*

113 The User Group makes much of the point that "DBCT is a natural monopoly that faces no competitors such that DBCTM faces no risk of existing users switching to other providers" and the fact that existing users' mines are sunk investments so DBCTM has no incentive to offer reasonable pricing.[44]

114 However these arguments rely on the same flawed premise discussed in paragraphs [82] – [89] above.

115 The prospect that DBCTM has no competitors and access seekers do not possess countervailing power *without regulation* is irrelevant to the assessment of DBCTM's incentives *with an access undertaking in place.* Under the 2019 DAU the primary source of access seekers' countervailing power is not the competitive process (i.e. the threat of switching to a competitor) but the recourse to arbitration by the QCA and the other various protections set out in the 2019 DAU.

*The User Group equates an incentive to maximise profits with an incentive to act unreasonably*

116 The User Group also argues that that DBCTM is not incentivised to reach a negotiated outcome on the basis that it is as a commercial entity and has an incentive to maximise profits,[45] referring to the famous Adam Smith quote 'it is not from the benevolence of the butcher, the brewer or the baker that we expect our dinner, but from their regard to their own self-interest.'

117 DBCTM does not dispute that as a rational commercial entity it seeks to maximise its profit. As do the miners that use DBCTM's service. However, this in and of itself does not mean that DBCTM has incentives to act unreasonably, or not to reach a negotiated outcomes.

[44] User Group October 2020 Submission, p. 10
[45] User Group October 2020 Submission, p. 1

118 The User Group fails to properly analyse what profit maximising behaviour would look like for DBCTM in a world where it is constrained by the 2019 DAU.

118.1 In an unregulated world, with no threat of regulation or other Access Framework in place, DBCTM may have the ability and incentive to offer unreasonably high prices for access to the service in order to maximise its profits.

118.2 However, in a regulated world under the 2019 DAU:

118.2.1 if DBCTM offers unreasonably high prices to access seekers, the access seeker will refer the matter to arbitration by the QCA, which will likely view DBCTM's behaviour unfavourably, determine the reasonable prices for the service, and require DBCTM to pay the access seeker's costs of bringing the arbitration.

118.2.2 On the other hand, if DBCTM acts reasonably and makes compromises to offer the access seeker an access agreement that has value to the access seeker, DBCTM can potentially avoid the costs of arbitration and agree to a mutually beneficial commercially negotiated outcome.

118.2.3 It will be profit maximising for DBCTM to avoid arbitration, reach mutually acceptable terms with all of its customers, and reduce the regulation impost on its business as a whole. This extends to future regulatory resets and DBCTM's desire to remain subject only to light-handed regulation.

*The User Group incorrectly assumes DBCTM would expect the QCA would determine monopoly prices*

119 Another fundamental flaw in the User Group's analysis of DBCTM's incentives to negotiate, is the assumption that DBCTM would expect the QCA to determine inefficient 'monopoly prices':[46]

> Where the QCA has expressly indicated in the Draft Decision that efficient cost is only one factor, and 'value to the user' must also be taken into account, DBCTM will envisage the potential for a much higher price than the efficient price

120 As discussed above, and in greater detail below in section 5.4 this assumption is completely without merit. DBCTM does not anticipate the QCA would ever determine inappropriately high prices as this would be inconsistent with the arbitration criteria and the object of Part 5.

*The User Group incorrectly assumes that the incremental cost to DBCTM of multiple arbitrations would be a trivial consideration for DBCTM*

121 The User Group argues that DBCTM will be incentivised to proceed to arbitration because the incremental costs of running additional arbitrations is trivial:[47]

> In the context of the charges for the services, the costs for DBCTM in proceeding to an arbitration process are trivial, especially as these costs can effectively be spread across the multiple arbitrations that DBCTM is likely to conduct as the same information and materials is likely to be relevant in each case.

122 The User Group provides no evidence to substantiate these assertions which do not align with the practical reality of running multiple arbitrations.

123 DBCTM agrees that some of the costs of developing a reasonable access offer and justification for that access offer and the substantial amount of information that DBCTM will provide to access seekers, can be spread across multiple negotiations.

[46] User Group October 2020 Submission, p. 24
[47] User Group October 2020 Submission, p. 24

124 However, the key cost drivers for arbitration will be procedural costs that must be incurred for each arbitration and costs involved in responding to the individual access seeker's circumstances and position on appropriate terms. These stand-alone costs will not be recoverable across multiple arbitrations.

125 Further, if for example all existing users refer their price reviews to arbitration, DBCTM could face diseconomies of scale, as it attempts to juggle many simultaneous arbitrations, which would place strain on DBCTM's internal resources.

126 In any event, DBCTM has a preference that any costs of arbitration should be avoided where a negotiated outcome is reasonably possible.

*Access seeker and existing user incentives*

127 The User Group's assessment of the incentives of access seekers and existing users suffers from many of the same errors as its assessment of DBCTM's incentives.

128 The focus of the User Group's argument is on the assertion that there is no scope for negotiation between the parties, which is discussed further below.

## Scope for tailored access

129 The next argument prosecuted by the User Group is that the DBCT service is, in essence, a single dimensional service and there is not scope for tailored access agreements depending on the needs of individual users.

130 This is simply not the case. As explained by DBCTM's chief executive at the Forum, there is considerable scope for tailored outcomes. Some examples of aspects of access arrangements that can be tailored and have been discussed with existing users to date include the following:

- 130.1 Variations to the frequency of the standard five year access charge review under the existing user agreements (i.e. the term of the pricing arrangements, not the term of the contract as argued by the User Group and discussed further below). For example, the parties could decide to take advantage of the prevailing low interest rates to lock in access charges for a period of ten years, rather than the standard five.
- 130.2 Payment of access charges in foreign currency.
- 130.3 Linking charges to prevailing coal prices, such that DBCTM could share some exposure to market volatility.
- 130.4 Incentives for efficient operational behaviours, which could lead to more efficient operation of the terminal.
- 130.5 Simple matters of convenience, such as the form of notice requirements.

131 These are just some of the many aspects which are able to be negotiated between the parties and demonstrate that there is a meaningful opportunity to tailor access agreements.

*Existing users*

132 The User Group argues there is no scope for negotiation of non-price terms with existing users because the parties have already agreed to these terms:[48]

> As the QCA acknowledges, existing users have 'evergreen' agreements, which provide a 5 yearly price review under clause 7.2.

[48] User Group October 2020 Submission, p. 24-25

> This places existing users in a position where there is no actual negotiation of non-price access terms that occurs at the time of the periodic pricing reviews. There is no real potential to negotiate tailored individual outcomes, because all of the non-pricing terms of the user agreement are already agreed.

133 Even if there was no real potential to renegotiate non-price terms, DBCTM considers that the pricing terms alone offer significant scope for negotiation and tailoring to the individual needs of existing users, as discussed above.

134 However, there is still significant scope for renegotiation of existing non-price terms. To the extent not inconsistent with the access undertaking, it is open for the parties to mutually agree to vary the non-price terms of the existing user agreements, whether it be to make a mutually beneficial change to a term, or to make a change in consideration for a price concession by one of the parties (for example if DBCTM offered a pricing incentive for more efficient utilisation of the terminal).

135 DBCTM considers that the removal of the reference tariff will bring existing users to the table to negotiate the pricing terms of their existing user agreements, in accordance with clause 7.2 of the agreements. This will offer an opportunity that has not previously been available for the parties to consider variations to the non-price terms of the existing user agreements.

136 DBCTM notes that in initial conversations with individual existing users, users have expressed a willingness to engage constructively and negotiate in good faith and have showed interest in some of the options available for negotiation. The User Group's apparent position that negotiations with existing users are not possible is inconsistent with feedback from some of its individual members.

*Expanding access seekers*

137 The User Group also argues that there is no scope for negotiation for expanding access seekers who have signed a conditional access agreement:[49]

> The 8X CAAs provide, subject to satisfaction of the conditions, an access agreement on the then current standard access terms.
>
> Again, it places the parties to the 8X CAAs in a position where the non-price terms are locked in and they cannot negotiate anything other than price.
>
> Again, that means the key benefit that the Draft Decision attributes to the proposed negotiate arbitrate model is therefore completely inaccessible to the conditional access agreement holders.

138 As with existing users, there is significant scope for negotiation with expanding access seekers, on price and non-price terms.

139 The User Group is correct in identifying that access seekers who have signed conditional access agreements for the 8X expansion have already agreed that the non-price terms will be those set out in the standard access agreement (**SAA**) in place at the effective date (with any subsequent change to the SAA after the effective date, but prior to the shipping commencement date being deemed to automatically amend the users access agreement).

140 However, rather the preventing negotiation of these terms, this provides an increased incentive for these access seekers to revisit these non-price terms. As the non-price terms are simply those in place under the SAA at the time of the effective date (i.e. it is not clear at this stage what those terms will be), it can be expected that the conditional access seekers may want to negotiate variations from the SAA non-price terms to better suit their individual circumstances.

[49] User Group October 2020 Submission, p. 25

## Information asymmetry

### *Previously addressed concerns regarding information asymmetry*

141 The User Group continues to argue that access seekers do not have sufficient information to form a view on the reasonableness of DBCTM's access offer and that the information provisions proposed by DBCTM and the QCA are 'broadly written'.[50]

142 DBCTM has dealt with this issue extensively in previous submissions and does not propose to repeat those submissions in full again. It suffices to say that the comprehensive and prescriptive information requirements that DBCTM has agreed to introduce will thoroughly address any concerns regarding information asymmetry. The Information Schedules in the 2019 DAU show that DBCTM will not be required to provide broad information. Rather it will be required to provide specific and detailed information on a wide range of relevant points.

143 In section 3, DBCTM suggests two further measures that the QCA could consider to remove any possible question of inappropriate information asymmetry – the introduction of an evidentiary limit and DBCTM's provision of a cost of service model to enable access seekers to effectively assess the reasonableness of DBCTM's access offer.[51] DBCTM considers that these will comprehensively address any remaining, bona fide concerns regarding information asymmetry.

### *The User Group's proposed amendments*

144 The User Group's October 2020 Submission proposes for the first time a number of further amendments to the 2019 DAU, which seek to significantly shift the operation of the AU towards an ex ante assessment of a building block reference tariff. These include amendments to, for example:[52]

144.1 require the TIC to be calculated using a building blocks formula;

144.2 require DBCTM to provide its financial model used to derive its offer TIC;

144.3 require DBCTM to provide actual tax information; and

144.4 require the QCA to determine discount rate to be applied to remediation costs and remaining useful life.

145 These suggestions are another attempt by the User Group to get the QCA to determine a de-facto reference tariff. As discussed above and previously submitted by DBCTM, this could frustrate meaningful negotiations and would undermine the operation of the negotiate-arbitrate pricing model.

### *Information for existing users*

146 The User Group argues that the QCA should make amendments to the 2019 DAU to require DBCTM to provide the same information that is provided to access seekers, to existing users.[53]

147 As discussed above, DBCTM's access undertaking should be focussed on the provision of access to access seekers – not existing users. DBCTM's relationship with existing users should be governed under the contractual terms of their existing user agreements. These being the same agreements that the QCA and Treasurer have found to protect existing users – even in the absence of any regulation.

[50] User Group October 2020 Submission, at section 9

[51] DBCTM does not consider it necessary for the AU to specify the requirement to provide a model. DBCTM will do this to facilitate negotiations in any event

[52] User Group October 2020 Submission, at sections 9.2 and 9.3

[53] User Group October 2020 Submission, p. 57

148 This being said, as previously explained, while DBCTM does not consider such a requirement appropriate for the purposes of an access undertaking, DBCTM has offered to provide substantively similar information to existing users in order to facilitate effective negotiations under the existing user agreements. This is because DBCTM has every incentive to reach mutually acceptable terms with its customers.

### Conclusion on negotiation process

149 DBCTM considers there is a very good prospect of reaching a number of negotiated, mutually beneficial outcomes with access seekers and existing users, that avoids the need for arbitration. Indeed, this is the reason DBCTM has pursued a negotiate-arbitrate model as part of the 2019 DAU.

150 DBCTM considers that there is ample room to tailor access agreements to individual access seekers' needs, and scope to vary existing user agreements in negotiations as well.

151 While the User Group has made bold claims that negotiations are impossible, it overlooks the actual incentives in place on DBCTM and access seekers, when both parties can refer the matter to be determined by the QCA through arbitration.

152 While DBCTM has some concerns that some users may, in bad faith, attempt to refer their pricing review straight to arbitration in order to undermine the 2019 DAU, DBCTM considers that measures such as those set out in section 4 above could effectively reduce this risk, and ensure all parties are incentivised to engage in meaningful negotiations.

## 5.4 Arbitration process

153 The User Group's October 2020 Submission makes some astounding claims regarding the operation of the arbitration process and how the QCA would determine access disputes. This section responds to those claims, focussing on:

153.1 The arbitration criteria and the expected outcomes under the arbitration criteria;

153.2 The arbitration guidelines; and

153.3 The User Group's request for collective arbitrations.

### Arbitration criteria and outcomes of a QCA determined arbitration

*Allegations that the QCA would determine monopoly prices are without any basis*

154 Throughout its October 2020 Submission and at the Forum, the User Group has repeatedly suggested that the QCA, in applying the legislative arbitration criteria, would 'accept a degree of monopoly pricing'[54] and that this would result in access seekers accepting an 'inefficiently high price because arbitration does not provide a credible constraint'.[55]

155 The User Group's assertions are without any basis.

156 First, it is highly unlikely that having regard to the arbitration criteria it would be permissible for the QCA to set pricing at inefficient or inappropriately high levels. For example, the criteria require the QCA to have regard to:

156.1 the object of the Part as it would not promote the economically efficient operation of, use of and investment in, significant infrastructure (sections 120(1)(a), 69E);

[54] User Group October 2020 Submission, p. 48
[55] User Group October 2020 Submission, p. 11

156.2 the legitimate business interests of persons who have, or may acquire, rights to use the service (section 120(c));

156.3 the public interest (section 120 (d)); and

156.4 the economically efficient operation of the facility (section 120(j)).

157 Secondly, even if it were permissible, the suggestion that the QCA would exercise its discretion in undertaking its statutory role under Part 5 of the QCA Act (the object of which is to promote the economically efficient operation of, use of and investment in significant infrastructure) to set inappropriately high prices is completely unreasonable.

158 The User Group uses the term 'monopoly pricing' loosely and pejoratively without any proper consideration of the economic meaning of the term or the levels of pricing that would be efficient and appropriate for DBCT. For this reason the alarmist allegations of 'monopoly pricing' should be given little regard by the QCA. Under the 2019 DAU the QCA will have the ability to determine the appropriate price for the service, having regard to the legislative arbitration criteria.

### *The statutory arbitration criteria are fit for purpose*

159 In response to feedback from the QCA and the User Group, DBCTM proposed arbitration criteria for the 2019 DAU that mirror the arbitration criteria that the QCA must apply under section 120 of the QCA Act. Accordingly if the arbitration criteria do not provide sufficient certainty then it logically follows that nor does section 120 of the QCA Act.

160 The QCA Act has been certified as part of an effective access regime under the *Competition and Consumer Act 2010* (Cth) and accordingly there is no credible basis to assertions that Part 5 does not sufficiently constrain the ability to engage in monopoly pricing nor provide sufficient certainty.

161 Notwithstanding this, and the User Group's previous comments that it 'fully acknowledge that the factors in section 120 [of the] QCA Act present an improved and more balanced set of criteria than DBCTM's existing proposal',[56] the User Group take the position that the legislative arbitration criteria are not suitable.[57]

### *Value of the service*

162 In particular, the User Group has taken issue with the requirement to have regard to 'the value of the service', arguing that:

162.1 the measure of value is uncertain as no definition is provided for what 'value; represents or how it is measured';[58] and

162.2 DBCTM will be entitled to extract high prices at times of higher coal prices without DBCTM taking any coal price or volume risk.

163 The User Group's first argument appears to be that the determination of value of the service is extremely difficult, and that the QCA should in essence put this task in the "too hard basket".

164 This contradicts the commonly accepted economic principles for ascertaining the value of a service. The value of the service to a user can be measured as the benefit that the user would enjoy by using the service relative to its next best alternative. In practice, this means that:

[56] User Group April 2020 Submission, p. 23
[57] User Group October 2020 Submission, at section 10
[58] User Group October 2020 Submission, p. 41

164.1 if the user has no alternative means by which it can economically ship coal, then the value of the service is the economic profit that would be enabled through use of the service, calculated as the price received by the user for coal shipped at the terminal, less the economic costs of producing and transporting that coal (with the exception of terminal costs); and

164.2 if the user has alternative means by which it can economically ship coal, then the value of the service are the costs that the user would be able to avoid through use of the service, calculated as the cost of accessing an alternative terminal plus the difference in costs to transport coal to that alternative terminal.

165 The determination of the value of the service was also discussed in HoustonKemp's expert reports provided as part of the declaration review.[59]

166 The User Group seems to suggest that the QCA's comments regarding the value of the service should be ascribed to DBCTM 'seemingly suggesting that DBCTM will be entitled to extract high prices at times of higher coal prices'. However, the User Group takes great leaps to make this point, which is not reflected in the QCA's comments.

167 The QCA's comments merely discuss the value of the service to the access seeker as a relevant consideration for it in any arbitration. This is not to say that such a value would be determinative of the price for access to the service. It is simply a relevant consideration that the arbitrator must have regard to. And, for good reason.

*What is monopoly pricing?*

168 In its October 2020 Submission and at the Forum, the User Group made many comments to the effect that arbitration under the 2019 DAU would result in monopoly pricing. When tested, the User Group provided little specificity as to what it meant by monopoly pricing.

169 However, the expected pricing behaviours of an unconstrained monopolist are not controversial in the economic literature. At its simplest, a monopolist will seek to restrict output of a service in order to increase prices.

170 With this is mind, the value of the service is clearly relevant to the consideration of whether a price is a 'monopoly price'. An economically rational access seeker will still use the service where it is priced up to the value of the service to that user. Any price between the efficient costs of providing the service and the value of the service can therefore be said to be allocatively efficient as it does not result in any reduction in the quantity of the service demanded. As miners are price takers in the global coal market, prices above the efficient costs of the service, but below the value of the service to the user, will simply result in a transfer of rents between the service provider and the user, with no decrease in allocative efficiency.

171 As explained by the QCA in its Final Recommendation as part of the declaration review:[60]

> a higher TIC may represent a redistribution of the economic surplus generated within a supply chain

172 The QCA Act expressly contemplates that an appropriate price for a service may be above the efficient costs of providing that service. Section 168A(a) clearly states that the price of access should generate expected revenue for the service that is ***at least*** enough to meet the efficient costs of providing access to the service. This further supports established economic principle that efficient prices lie between the efficient costs of providing the service and the value of the service to the user. As explained in DBCTM's April 2020

[59] See HoustonKemp Report on Criterion (a) provided as an annex to DBCTM's March 2019 Declaration Review Submission, at section 3.5 HoustonKemp illustrates how it calculates willingness to pay (or value of the service to the user) for the purposes of calculating the ceiling TIC under the Access Framework.

[60] Final Recommendation, p. 145

Submission, there are efficiency rationales for prices that are above cost – such as the asymmetric risk and asymmetric welfare consequences of regulatory error.[61]

173 Accordingly, prices below the value of the service will not restrict output and it is important that the value of the service is taken into account so the arbitrator has visibility of the point at which pricing would lead to monopoly outcomes.

174 That being said, DBCTM reiterates that while prices up to the value of the service may be efficient and would not restrict output at DBCT, this does not mean that an arbitrator would determine pricing up to this level to be appropriate. It is simply one of twelve considerations that the arbitrator must have regard to in determining prices. DBCTM considers the suggestion made by the User Group at the Forum that having regard to the value of the service the TIC could reasonably be expected to be in the '10s of dollars' is completely implausible.

### *QCA approach to pricing comparable services*

175 The User Group's October 2020 Submission raises for the first time the suggestion that the arbitration criteria should include a requirement for the QCA to have regard to the QCA's pricing approach to comparable services.[62]

176 The User Group advocates for this change on the basis that clause 7.2(e) of the existing user agreements requires a commercial arbitrator determining a price review to have regard to 'the then current approach of the QCA in respect of appropriate charges for services comparable to the Services (with the intent that the arbitration should produce an outcome similar to that which might have been expected had the QCA determined it)'.

177 When clause 7.2(e) is considered in its entirety, it seems that it would be unnecessary in the context where the QCA is the arbitrator. The stated purpose of the clause is that the commercial arbitration should produce outcomes similar to what might have been expected had the QCA determined it. This is clearly redundant in circumstances where the QCA *is* the arbitrator.

178 That is not to say that the QCA cannot take into account the same considerations it did in determining the prices of comparable services, to the extent that they are relevant to the arbitration criteria. However, the QCA's focus should be on the merits of the particular case in the specific circumstances, rather than a blunt comparison of the pricing outcomes.

## Arbitration Guidelines

179 DBCTM considers that the content of the QCA's proposed arbitration guideline is appropriate and is consistent with the approaches of other regulators.

180 Further prescription of how the QCA will apply the section 120 arbitration criteria under the QCA Act will only serve to minimise the incentives of the parties to engage in meaningful negotiations and could result in the QCA predetermining outcomes under the 2019 DAU.

181 As noted above, the arbitration criteria in the amended 2019 DAU are based on the legislative arbitration criteria, which Parliament deemed appropriate to apply in arbitrations. If greater methodological specificity was needed then there is no reason why Parliament would not have prescribed this.

[61] DBCTM April 2020 Submission, pp. 34-37

[62] User Group October 2020 Submission, section 10.3

*Absolute certainty is unnecessary*

182 The reality is that absolute certainty is not needed for access seekers to operate in the commercial environment.

182.1 DBCTM's declaration review submissions showed that charges at DBCT currently make up at tiny fraction, less than 3%, of a miner's total costs,[63] and less than 1% of the then current spot price for metallurgical coal.[64]

182.2 Further, coal mining is by its very nature a speculative business, and the sophisticated mining companies that are customers at DBCT are experts at managing much greater uncertainty (such as fluctuating coal prices, feasibility risks , moving environmental policy) on a day-to-day basis.

183 This being said, the 2019 DAU already provides significant certainty, without prescriptive arbitration guidelines. It clearly sets out the factors that will be taken into account by the QCA, and the process that it will follow to determine an arbitration. Ultimately, while access seekers may not have absolute certainty they do have an assurance that if DBCTM acts unreasonably they can have their case heard by the QCA and can rely on the fact that the QCA would not determine unreasonable access charges.

*Certainty for expanding access seekers*

184 At the Forum the QCA queried whether the 2019 DAU, as amended, provides sufficient pricing certainty for access seekers entering into binding agreements.

185 The User Group states: [65]

> A major concern raised by the DBCT User Group remains that under DBCTM's proposal there is a strong likelihood of access seekers being required to commit to capacity with little to no way of assessing the likely price they are committing to (or even some of the methodology for calculating it), without any ability to terminate an access agreement if the price applicable ceases to be commercially viable.
>
> In particular, as recognised by the Draft Decision, that can happen where an access seeker is entering a conditional access agreement for expansion capacity or as part of the notifying access seeker process. Even though, the 2019 DAU retain the concept of pricing rulings for expansion – because there is still a negotiation or arbitration to occur in respect of an individual user's price after such a ruling – the ruling does not provide the certainty of approach that it would have in previous undertakings.

186 Expanding access seekers have never had absolute certainty as to the prices they would pay for expansion capacity. The TIC for expansion capacity at the Terminal has ***always*** been determined following the expansion. However, this has not proved an impediment to the expansion of DBCT or access seekers entering into conditional access agreements for the expanded capacity.

187 Over the course of 2020, DBCTM has agreed and executed 5 conditional access agreements with access seekers for the full capacity of its upcoming expansion. The fact that these agreements ***did not*** provide absolute certainty as to the pricing, cost and timing of the expansion, was not an impediment to the execution of these agreements. This clearly evidences that access seekers don't need ***absolute certainty***, to enter into binding access agreements.

188 The proposed processes for expansions under the 2019 DAU are substantively identical to the current processes in place, which have been approved by the QCA. The negotiate-arbitrate component of the regime has been designed to integrate with these existing processes, preserving the checks and balances that were in place under the 2017 AU.

[63] DBCTM April 2019 Declaration Review Submission, at paras [119 – 122], [130.2]
[64] DBCTM April 2019 Declaration Review Submission, at para [130.1]
[65] User Group October 2020 Submission, p. 65

189 The 2019 DAU also introduced a new process where a high level 'expansion pricing approach' would be determined prior to the expansion. This mechanism was designed explicitly to provide expanding access seekers with greater certainty as to how an expansion would be priced.

190 Finally, in DBCTM's October 2020 Submission, DBCTM proposed two changes to the 2019 DAU to provide access seekers with even greater comfort when entering into conditional access agreements.

190.1 First, a requirement to provide information on the expansion pricing approach that DBCTM would seek. This enables access seekers to understand the approach to pricing that DBCTM would seek prior to entering into an agreement.

190.2 Secondly, a requirement to allow access seekers to terminate their conditional access agreement following the determination of the expansion pricing approach. This removes any disincentive to enter into a conditional access agreement on the basis that the expansion approach is uncertain.

191 Given these changes, DBCTM considers that expanding access seekers may in fact have greater pricing certainty than they have had under previous undertakings.

## Collective arbitrations

192 The User Group submits that the access undertaking should make provision for collective arbitrations:[66]

> The DBCT User Group submits that if a negotiate/arbitrate regime is going to be imposed by the QCA that it is critically important that the undertaking expressly provide a right for:
>
> (d) existing users under substantially the same access terms (i.e. the past and current standard agreement access terms) being able to collectively arbitrate; and
>
> (e) users in the same expansion being able to collectively arbitrate.

193 Collective arbitrations could materially reduce the likelihood of negotiated outcomes, and increase the likelihood that access seekers would proceed directly to arbitration, a risk that the User Group has repeatedly raised as an issue. DBCTM has very real concerns that existing users would seek to engage in collective arbitrations, without meaningfully engaging in commercial negotiations, with a view to producing an arbitration outcome that would, in effect, become a de facto reference tariff. The mere prospect of collective arbitration will significantly dampen any incentive for otherwise willing individual users to engage in meaningful negotiations.

194 Further, as discussed above in section 3, the arbitration of existing users' five yearly price reviews should be determined consistent with the terms of the existing user agreements. It is not appropriate for the access undertaking to set out how this process should operate in circumstances where it is dealt with clause 7.2 of the existing user agreements.

195 The User Group's arguments that collective arbitrations should be available to access seekers are on the basis that:

> (a) for single project access seekers – the uncertainty of the price outcome and the cost of an arbitration may well be too great for them to commence an arbitration;
>
> (b) for any smaller access seeker or access holder – the cost of an arbitration will be too great for them to commence an arbitration; and
>
> (c) where an access seeker needs immediate certainty (say in order to make investment decisions or obtain financing) – the cost profile uncertainty caused by arbitration may well be too great for them to commence an arbitration.

[66] User Group October 2020 Submission, p. 44

196 DBCTM disputes that single project access seekers could not make a reasonable assessment of the likely pricing outcomes. Even DBCTM's smallest customers are far from being 'mum and dad' consumers. As shown in DBCTM's April 2020 submission, they are relatively large, sophisticated, mining companies who deal with significant uncertainty on a day-to-day basis.[67] Any additional costs involved in assessing the reasonableness of the TIC is a completely standard cost of doing business and would be in keeping with other (unregulated) negotiations that miners face on a day-to-day basis. With regard to existing users, many have negotiated charges at other unregulated terminals, and most have a very long history at DBCT and are familiar with the regime.

197 Further DBCTM will provide a significant amount of information and will be required to substantiate its access offer, which will provide significant assistance in assessing the reasonableness of DBCTM's offer. The QCA can also be asked for guidance as well if required.

198 If the QCA is of the view that any information asymmetry remains, the additional measures set out in section 3 of this submission will see that smaller access seekers are not deterred from referring a matter to arbitration where DBCTM proposes an unreasonable access offer. The evidentiary limit will require DBCTM to, in essence, set out the key aspects of its case in the negotiation phase. In circumstances where this case is unmeritorious, the access seeker can then proceed to refer the matter to arbitration, in the knowledge that DBCTM can be directed by the QCA to pay the costs of the arbitration.

199 Finally, DBCTM expects that the QCA will conduct arbitrations in an efficient and pragmatic way. This may include having regard to the size of the individual access seeker. For example, for particularly small access seekers it may be appropriate for the QCA to adopt a more inquisitorial role, to ensure that the access seeker's interests are adequately protected (and had regard to as per the arbitration criteria). This principle could be included in the arbitration guidelines if the QCA considers it will give small access seekers greater confidence that arbitrations will be a viable backstop.

## 5.5 Remediation costs

200 This section provides a brief overview of DBCTM's response to the QCA's questions at the Forum regarding remediation costs, which are explained in more detail in GHD's expert report titled *GHD's response to SLR Report on DBCT rehabilitation plan and to further queries from the QCA* (**GHD Response**).

### QCA Technical Forum on Remediation

201 Following its consideration of stakeholder responses to the Draft Decision, the QCA hosted a technical forum on remediation, to facilitate informal and open discussion on a number of issues.

202 The aim of the Forum was to determine if specific material differences between the remediation cost estimates developed by Advisian, GHD and SLR could be resolved among stakeholders and relevant experts, in a manner consistent with the criteria for prudency and efficiency outlined in the Draft Decision.

203 In addition, the DBCT User Group's response to the Draft Decision included an estimate of the Rehabilitation Cost by its consultant SLR (**SLR Report**). This contained a number of matters which were not addressed in the Forum, but which are addressed in this submission for the QCA's consideration.

### DBCTM Response

204 DBCTM engaged GHD to address the material differences noted by the QCA for discussion in the Forum, and to review the SLR Report. GHD has formally responded to these various matters in the GHD Response. The GHD Response is provided in Appendix 1.

[67] DBCTM April 2020 Submission, at Appendix 2 – Information on the scale of access seekers' operations

205 The GHD Response maintains that the Advisian and SLR estimates materially understate the rehabilitation costs. DBCTM is satisfied that the GHD Response is appropriate, and that the GHD Estimate remains consistent with the QCA's requirements for prudency and efficiency.

206 This section provides DBCTM's views on the matters covered in the Forum, and other issues concerning the SLR Report. DBCTM notes that the DBCT User Group and SLR did not engage with DBCTM or GHD during the development of the SLR Report. Consequently, some incorrect assumptions were included in the SLR Report, which are addressed by the GHD Response.

207 The following table summarises DBCTM's view on each matter. In all cases, DBCTM maintains its most recent position as reflected in its response to the Draft Decision.

**Figure 5: Summary of DBCTM's positions regarding remediation costs**

| Item | Issue | DBCTM position |
|---|---|---|
| **Specific issues in Technical Forum on Remediation** | | |
| 1(a) | Waste disposal facility – capacity | The capacity of waste disposal facilities proposed in the GHD Estimate remain appropriate |
| 1(b) | Waste disposal facility – expansion costs | If expansion of the waste disposal facilities is required, it is prudent to include the related costs in the rehabilitation estimate to the extent of the DBCT volumes. |
| 1(c) | Waste disposal facility – closer location | The location of waste disposal facilities proposed in the GHD Estimate remain appropriate |
| 2 | Contaminated soil & substrate removal | The soil depths calculated in GHD Estimate are prudent. The related costs for disposal of contaminated material remain appropriate. |
| 3 | Offshore pile removal | DBCTM accepts that the 'natural state' standard includes complete removal of offshore piles. The GHD estimate for offshore piles remains appropriate |
| 4 | Indirect labour and project management costs | DBCTM does not accept that it is prudent to outsource project delivery to a Tier 1 Contractor and PMO. The GHD Estimate remains appropriate |
| 5 | Risk and contingency allowance | DBCTM considers that Advisian and SLR have overstated the level of project definition. The contingency levels in the GHD Estimate remain appropriate. |
| **Additional issues identified** | | |
| 6 | Third party assets (in SLR Report) | No third party agreements for rehabilitation are in force, and DBCTM remains responsible for all rehabilitation. The GHD Estimate remains appropriate. |
| 7 | Tug Harbour costs (in SLR Report) | The cost reductions proposed by SLR are arbitrary and not enforceable. The GHD Estimate remains appropriate. |
| 8 | Remediation date | Australian Accounting Standard *AASB 16 Leases* supports 2051 as the relevant date for rehabilitation. |

## Specific issues in Technical Forum on Remediation

### *Waste disposal – capacity at Roma facility*

208 The Forum question was:

> Is the commercial facility at Roma already able to accommodate the expected volumes of contaminated waste and thus, would not need to be expanded in the future?

209 The GHD Response provides evidence that the Roma facility is already able to accommodate the expected volume of heavily contaminated waste. The size of the Roma facility and its efficient approach to processing waste indicates that it may not need to be expanded in the future (for DBCT volumes alone).

### *Waste disposal – expansion costs*

210 The Forum question was:

> Would the cost of expanding a waste facility be solely borne by DBCTM in an environment where other remediation and waste disposal activities are occurring? If so, what are the estimated costs of expansions?

211 The GHD Response provided evidence of the potential cost of expanding waste disposal facilities. GHD assumed that DBCTM would bear the costs for expansion of any waste disposal facilities to the extent required to accommodate waste from DBCT alone. However GHD could not speculate on any cost sharing arrangements with other organisations. DBCTM agrees with this prudent approach.

*Waste disposal – closer locations*

212 The Forum question was:

> Are there other existing options for waste disposal in closer landforms that could be considered for disposal?

213 The GHD Response identified the known locations of other waste disposal facilities, however none are closer to DBCT than Roma for heavily contaminated waste, or Hogan's Pocket in Mackay for medium contaminated waste. DBCTM agrees with this assessment and further notes that it is not prudent to assume any contaminated waste may be backloaded by rail from DBCT to any mine site in the Bowen Basin for disposal.

*Contaminated soil and substrate removal*

214 The Forum question was:

> Based on all available information and noting future contamination studies will be conducted to determine the actual depths of contaminated material for removal, what are the appropriate assumptions for depths of removal of contaminated material at each of the three areas discussed?

215 The GHD Response provides evidence supporting its original assessment of depths of contaminated material, which DBCTM accepts is more compelling than the assessments made by Advisian and SLR.

216 DBCTM further notes that in a typical mine closure plan, such as that for Whitehaven's Narrabri mine[68] (prepared by SLR), SLR recommended that 500mm is an appropriate depth for stripping a stockpile. "*The carbonaceous material and coal stockpile areas will be stripped to a depth of at least 0.5m (or until it is cut back to original surface) and disposed of in the box-cut. The area will then be reshaped, trimmed and rock raked before 150 mm of topsoil is placed on the site*". This evidence tends to support the 400mm recommended in the GHD Estimate as being prudent. This is also significant in relation to the assumption by Advisian and SLR that bedding coal at DBCT will be removed and sold. Potential buyers of bedding coal would regard it as contaminated coal, regardless of the actual quality. At the time of rehabilitation, it is possible that the bedding coal will remain in place and unsold, representing a risk of increased volumes for disposal.

*Offshore pile removal*

217 The Forum question was:

> Recognising the uncertainty and lack of clear standards that define the 'natural state' standard, which method for offshore pile removal (full or partial) best reflects DBCTM's obligations for remediation?

218 The GHD Response identifies that full removal of the offshore piles best reflects DBCTM's obligations for remediation. The GHD Response demonstrates that the vibratory hammer technique is feasible and

[68] Whitehaven Coal Narrabri Coal Mine – Revised Conceptual Mine Closure by SLR Consulting September 2016, p. 25

effective for removal of offshore piles, and also provides evidence that the process is environmentally sound.

219 NQBP is the relevant authority in regard to the removal of offshore piles, and is also a party to the PSA. DBCTM sought to establish NQBP's preference for the method for offshore pile removal in a recent published document, that may be considered to reflect the 'natural state' standard. One such document identified was the *Development Approval Package for Demolition Works ... at the Port of Mackay* published in May 2017. This document included an NQBP-approved Development Approval and related materials to support the tendering process for the demolition of various jetties, wharfs and associated facilities including steel piles.[69]

220 In the same document (page 13 of 26), the Queensland Department of Infrastructure, Local Government and Planning applied the relevant conditions associated with the demolition:

> All piles and/or structures to be demolished, both above and below the waterline must cut off to a depth of at least 1 metre below seabed level or completely extracted/removed where possible.

221 This indicates that NQBP preferred full removal of the piles. The approved demolition methodology (page 21 of 26) indicates that NQBP also supports the vibrating hammer technique (such as that proposed by GHD). Additionally, NQBP specified that cutting of the piles below seabed level should only occur in exceptional circumstances. This is clearly noted in this extract of the demolition methodology:

> Remove the piles and piers. Most piles are located in sub-tidal water with a water depth generally >6m. The method used for their removal will depend on the pile type, depth and ease of access but may be either by:
>
> a) clamping the top of the pile and vibrating out using a vibro-hammer; or
>
> b) sleeving the pile with a larger hollow pile and 'jetting' using an air/water sparge ring enabling easier extraction.
>
> It is expected that a mix of excavators and a crane will be used, with a long-arm excavator operating from either the nearest embankment or from a 'dumb' barge. It is expected that for a limited number of piles, which in order to be removed have to be clamped at a level that is around the existing bed level, moving material around would be required in order to sufficiently expose the pile for removal.
>
> In exceptional circumstances, cutting the piles may be required at a level that is at or below the seabed level, using special underwater cutting equipment as required.

222 On the basis of this compelling evidence, DBCTM accepts that the 'natural state' standard implies an obligation to completely remove all infrastructure, including offshore piles, to the extent it is feasible to do so or unless exceptional circumstances apply (for example, the Tug Harbour). DBCTM does not expect any exceptional circumstances to apply to the offshore piles at DBCT. DBCTM considers that an amendment to the PSA would be required for DBCTM to relax this interpretation of the 'natural state' standard, before partial removal of offshore piles could be prudently included in its rehabilitation estimate. Consequently, DBCTM accepts that the GHD Estimate remains prudent and efficient in regard to offshore pile removal.

*Indirect labour and project management costs*

223 The Forum question was:

> Is it prudent and efficient to assume that DBCTM would have a significant project management role in the rehabilitation of DBCT to warrant the estimate project management costs in GHD's cost estimate?

[69] NQBP Development Approval Package for Demolition Works ... at the Port of Mackay 12 May 2017

224 The GHD Response provides evidence in support of the project management strategy originally proposed. DBCTM endorses this approach as prudent and efficient. DBCTM has successfully managed project delivery in this manner for many years, and the related costs have been accepted as prudent and efficient by terminal Users, independent experts, the QCA's engineering consultant (Flagstaff), and approved by the QCA.

225 DBCTM does not support outsourcing to a Tier 1 contractor or establishment of a Project Management Office (**PMO**). DBCTM notes that a Tier 1 contractor and PMO is no guarantee that any project will be managed prudently and efficiently, or in the public interest. A recent example is the TasWater Capital Delivery Office[70] – functionally the same as a PMO – requiring contract terms which are onerous for small contracts and tend to exclude local contractors.

*Risk and contingency allowance*

226 The Forum question was:

> What is the prudent and efficient approach for estimation of risk and contingency allowances for the remediation cost estimate?

227 The GHD Response provides evidence that the contingencies included in the GHD Estimate are prudent in consideration of the level of definition of the project and industry standards. DBCTM accepts that the contingencies in the GHD Estimate are reasonable and within the expected range for such a project, and should not be considered as conservative. DBCTM notes that SLR did not agree with Advisian's estimate of contingency, and that neither Advisian or SLR applied industry standards or supplied any benchmarking or evidence from any projects.

228 In its response to the Draft Decision, DBCTM noted that the Phase 2/3 of 7X project included a contingency in the order of 25%, which was accepted by the QCA as prudent. DBCTM notes that Phase 1 of the 7X project was under construction at the time. The project costs subsequently overran by another 16%, which was approved by the QCA after comprehensive reviews by its engineering consultant (Flagstaff).

229 In view of this evidence and experience at DBCT, DBCTM considers that Advisian and SLR have overstated the level of definition of the Rehabilitation Project, and consequently their estimates of contingency are understated and therefore not prudent.

## Additional issues identified

*Third party assets*

230 The SLR Report assessed that third parties would be responsible for rehabilitation of their assets in the Rail Loop domain.

231 However, as reported in the GHD Response, no agreements exist between DBCTM and any third parties in relation to rehabilitation of their assets, and DBCTM is responsible for the rehabilitation of all assets in the domain.

232 DBCTM further notes that typical mine closure plans, such as that for Whitehaven's Narrabri mine[71] (prepared by SLR), includes removal of the rail loop as part of the rehabilitation, together with all associated equipment including third party power supply. There is no mention of rehabilitation by any third party despite rail and power being supplied by third parties.

[70] AFR 01-Dec-20 CIMIC accused of unethical contracts in Tasmania

[71] Whitehaven Coal Narrabri Coal Mine – Revised Conceptual Mine Closure by SLR Consulting September 2016

233 Given this evidence, there remains no basis for SLR's related cost reduction of the Rail Loop domain.

234 DBCTM concludes that GHD's original approach in regard to the Rail Loop domain remains the most prudent and efficient for the purposes of rehabilitation in accordance with the PSA.

*Tug Harbour costs*

235 SLR agreed with GHD's original approach to Tug Harbour costs, however applied an arbitrary reduction of those costs, determining that the contractor margin was too high and that HPCT should share in the costs.

236 The GHD Response outlines the issues, and provides evidence to the effect that its original estimate was prudent and efficient. The GHD Response demonstrates that the contractor margin was in fact lower than elsewhere in the GHD Estimate, and that HPCT is not legally required to share in any costs in accordance with the *CQCA Agreement Act*.

237 Given this evidence, SLR's related cost reductions are not appropriate.

238 DBCTM maintains that GHD's original approach in regard to the Tug Harbour costs is prudent and efficient.

*The relevant date for rehabilitation – additional support*

239 DBCTM notes that SLR Report referenced the Australian Accounting Standards Board (**AASB**) standards as a benchmark for good industry practice. DBCTM accepts this approach to the extent the standards are correctly applied.

240 DBCTM further notes that SLR did not apply the highly relevant *AASB 16 Leases*[72] standard, which specifies the treatment of leased assets for depreciation purposes:

> "…the lessee shall depreciate the right-of-use asset from the commencement date to the earlier of the end of the useful life of the right-of-use asset or the end of the lease term."

241 In specifying that assets should be depreciated over the term of the lease, the standard also indicates the appropriate period over which DBCTM may include consideration of the rehabilitation cost in the TIC is also the term of the lease. Therefore the standard supports 2051 as the relevant date for rehabilitation.

242 Rather than apply the AASB standards in this case, SLR appeared to indicate that the economic life of the Bowen Basin could extend to 2100.[73] Estimates of the economic life of the Bowen Basin may increase or decrease due to various factors completely outside DBCTM's control, and may not necessarily relate to the expected production life of any mine in the Bowen Basin. DBCTM proposed a number of potential scenarios may lead to the end of the economic life of the Bowen Basin.[74] DBCTM has simply based its estimates on the realities of the situation, being that:

242.1 the rehabilitation obligations are only triggered at the end of the lease

242.2 DBCTM may only collect revenue over the lease period

242.3 the current lease expires in 2051

242.4 it is not prudent for any estimates to rely on the presumption that DBCTM will renew the lease for a further period.

[72] Australian Accounting Standard AASB 16 Leases February 2016 para 32

[73] SLR Review section 4.3 *"The central Queensland mine [Olive Downs] will have a production life of 80 years…" (Zillman, 2020).*

[74] As noted in DBCTM's response to the Draft Decision, at para [146]

243 Consequently, DBCTM strongly recommends the end of the initial lease in 2051 be accepted as the relevant date for rehabilitation, as this is prudent and efficient in consideration of good industry practice as reflected in the Australian Accounting Standards.

## 5.6 Other issues

244 This part sets out DBCTM's response to the User Group's position on:

244.1 the approach to socialisation in the 2019 DAU; and

244.2 the appropriate approach to calculating depreciation for the purposes of providing information to access seekers.

### Socialisation

245 At the Forum, DBCTM sought to lay out some of the areas where it saw potential to tailor access agreements for individual access seekers. DBCTM discussed that it would consider offering contracts that lock in *access charges* for different terms. This would have the effect of increasing certainty for access seekers who would be able to lock in a price for a longer period of time.

246 The User Group seized on a mischaracterisation of this example to argue that socialisation is inappropriate under a negotiate-arbitrate regime. That is, the User Group took DBCTM's comments to mean that it would seek to negotiate on the term of the access agreement – rather the term of the pricing arrangements under that agreement. It argued that DBCTM would offer shorter term contracts (i.e. the actual contract not the pricing term) in exchange for higher prices. The User Group argued that this would allow DBCTM to transfer the risk associated with short term contracts to users – when these short term contracts lapse, socialisation would require the other users to pay for the shortfall.

247 This is an obvious mischaracterisation of what DBCTM was referring to, and shows a lack of real engagement with the 2019 DAU.

247.1 First, the 2019 DAU does not give DBCTM the ability to pick and choose the length of supply contracts. DBCTM is required to offer access for the term requested to the first access seeker in the queue. This is not a bargaining chip that DBCTM has discretion over.

247.2 Further, it seems unlikely that an expanding access seeker would want a short term contract. As has been pointed out by the User Group, miners undertake large, long-term, sunk investments for a mine to reach operating stage. It is unlikely therefore that miners that go to the cost of underwriting an expansion of the terminal would seek a short term contract at DBCT.

247.3 It is not commercially feasible for DBCTM to underwrite or indeed obtain financing for an expansion if it is underpinned only by shorter term contracts.

247.4 The access undertaking acknowledges the duration of contractual commitments as critical to the QCA's approval of an expansion, requiring at least 60% of the expansion to be supported by access agreements 'for a period of at least 10 years'[75]

248 The User Group's October 2020 submission sought to provide a range of examples where socialisation may be problematic in a negotiate-arbitrate pricing model. DBCTM disagrees with the examples cited, noting they include a range of impermissible outcomes under the 2019 DAU and go so far as to allege DBCTM could attempt to engage in unconscionable conduct by 'double dipping' on termination payments. While DBCTM does not view the 2019 DAU as being required to contemplate any and all hypothetical situations, including those involving egregious conduct, DBCTM is happy for the AU to clarify this is impermissible.

[75] Section 12.5(a)(6) of the 2017 AU; Section 12.5(a)(6) of the 2019 DAU

249 The examples ignore the fact that any socialisation adjustment is able to be disputed. They also ignore the fact the terminal is fully contracted for the regulatory period (for both existing capacity and expansion capacity), and has an access queue. This means that in the unprecedented event of a user default, the most likely scenario is that a new user will contract the available capacity. Any risk of users bearing a share of DBCTM's revenue greater than their current proportion of the Terminal's capacity is almost entirely hypothetical.

250 As explained in DBCTM's previous submissions, the socialisation provisions are the starting point for negotiations. DBCTM considers these to be a reasonable starting point on the basis that they have been used effectively at DCBTM in the past and are consistent with provisions commonly used at other coal terminals.

### TIC review event mechanisms

251 In the Forum, the QCA asked whether 'the application of universal arrangements for reviewing the TIC is appropriate, should users have common access terms to a common service but for which they may pay different prices.'

252 Again, the review event mechanisms in the 2019 DAU provide a relevant and reasonable basis for negotiations, but can be subject to negotiation as well. DBCTM notes that the 'universal' mechanisms are simply mechanisms applying to individual prices. The prices agreed relate to individual circumstances. It is important not to conflate price adjustment mechanisms with pricing itself. For example, across the economy contracts have basic CPI adjustment mechanisms. This is despite the contracts covering a range of industries and circumstances. It remains appropriate because the base prices have been individually negotiated or set

### Depreciation

253 DBCTM's proposed approach to calculating depreciation for the purposes of providing information to access seekers,[76] was designed to simplify the depreciation calculation while ensuring the outputs remain materially similar to existing depreciation amounts.

254 DBCTM's proposed approach was designed to directly respond to the QCA's legitimate concern that the current calculation of depreciation involves hundreds of inputs, and as a result added unnecessary complexity and potentially time and cost to negotiations.

255 DBCTM's proposal seeks to preserve the conceptual framework of the previous approach, while reducing the myriad of inputs to allow access seekers to quickly understand DBCTM's depreciation profile and undertake analysis of relevant scenarios.

256 DBCTM will also furnish access seekers with modelling of new assets that calculates inflation and depreciation.

257 The User Group's preference appears to be that the calculation should remain complex and opaque.

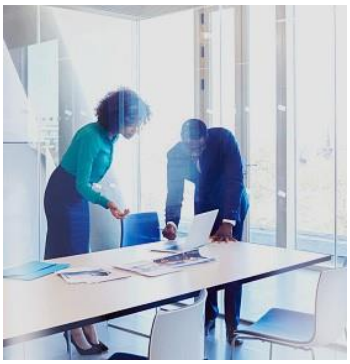
258 The simplified approach is transparent. As a result, any dispute (which is unlikely under the proposed method) can be efficiently assessed by the QCA

259 It's worth noting that under Section 10 of the 2017 AU, on an annual basis DBCTM provides Users and the QCA with a detailed breakdown of assets added to the asset base – including their effective lives, values, inflation, depreciation etc. Section 10 of the current AU and its reporting requirements are materially preserved in the 2019 DAU.

[76] DBCTM October 2020 Submission, at Section 4.2

# Appendix 1 GHD Response

GHD Advisory



# GHD's response to SLR Report on DBCT rehabilitation plan and further queries from the QCA

DBCT Management

4 December 2020

# Contents

# Tables

# 1. Executive summary

DBCT Management (**DBCTM**) engaged GHD Advisory (**GHD**) to prepare a report that responds to:

- the questions that the QCA raised at a technical forum (**Forum**) regarding five aspects of the Dalrymple Bay Coal Terminal (**DBCT**) rehabilitation plan and cost estimate, based on the varying opinions of GHD, Advisian and SLR Consulting (**SLR**); and
- technical elements of the DBCT User Group's comments on the DBCT rehabilitation plan and cost estimate, contained in SLR's advice to the DBCT User Group (the **SLR Report**).

GHD's approach for preparing the DBCT rehabilitation plan, including the information subsequently provided in response to the Forum, is principally based on:

- evidence-based decision making; and
- a recognition that DBCTM ultimately bears the financial risk that the actual cost of rehabilitation will be higher than the estimated cost.

Following a review of the SLR Report and a further review of the Advisian Report, GHD has maintained its position on key aspects of the DBCT rehabilitation and cost estimate. These include that:

- The most appropriate location for the disposal of heavily contaminated soils (which include hydrocarbons) is at a commercial waste facility located near Roma.
- The GHD-proposed contaminated soil depths for: bedding coal and soil (400 mm); road substrates (500 mm); and substrate under substations (1,000 mm), are appropriate in light of the evidence that GHD has provided.
- Full pile removal of offshore infrastructure is required under the Port Services Agreement (**PSA**) and publicly available information indicates this method of disposal is feasible and been undertaken in practice.
- DBCTM having a key project management (**PM**) role in the rehabilitation of DBCT reflects efficient outcomes, in comparison with Advisian's approach of using a Tier 1 Contractor would control the site under the direction of a Project Management Office (**PMO**) established by DBCTM (as the Owner). This is evidenced by User and QCA approvals for the costs of NECAP projects, for which PM costs were included.
- A contingency allowance of 20-25% reflects prudent and efficient decision making, based on publicly available industry benchmarks.

In addition, GHD considers that it is prudent and efficient for DBCTM to:

- account for the full cost of decommissioning, demolishing, disposing, remediating and rehabilitating the third party assets within the battery limits pertaining to the DBCT rehabilitation plan; and
- assume that it will cover the full cost associated with the Tug Harbour Domain.

**Disclaimer**

This report has been prepared by GHD for DBCT Management and may only be used and relied on by DBCT Management for the purpose agreed between GHD and the DBCT Management as set out in section 2.2 of this report.

GHD otherwise disclaims responsibility to any person other than DBCT Management arising in connection with this report. GHD also excludes implied warranties and conditions, to the extent legally permissible.

The services undertaken by GHD in connection with preparing this report were limited to those specifically detailed in the report and are subject to the scope limitations set out in the report.

The opinions, conclusions and any recommendations in this report are based on conditions encountered and information reviewed at the date of preparation of the report. GHD has no responsibility or obligation to update this report to account for events or changes occurring subsequent to the date that the report was prepared.

The opinions, conclusions and any recommendations in this report are based on assumptions made by GHD described in this report. GHD disclaims liability arising from any of the assumptions being incorrect.

GHD has prepared this report on the basis of information provided by DBCT Management and others who provided information to GHD (including government authorities), which GHD has not independently verified or checked beyond the agreed scope of work. GHD does not accept liability in connection with such unverified information, including errors and omissions in the report which were caused by errors or omissions in that information.

# 2. Background

As part of its 2019 Draft Access Undertaking (**2019 DAU**) submission to the Queensland Competition Authority (**QCA**), DBCT Management (**DBCTM**) engaged GHD Advisory (**GHD**) to prepare a comprehensive rehabilitation plan that would satisfy the requirements of the Port Services Agreement (**PSA**).

Part of the rehabilitation plan included an estimation of an associated rehabilitation cost estimate. GHD's rehabilitation plan for DBCT (the **GHD Report**) determined the rehabilitation cost estimate (including direct, indirect and contingency costs) to be $1.22b ($ October 2018) (the **GHD Estimate**).

In assessing the 2019 DAU, the QCA engaged Advisian to:

- review the prudency and efficiency of the rehabilitation plan and costs that GHD developed; and
- determine an independent rehabilitation-cost estimate.[1]

Advisian's advice to the QCA (the **Advisian Report**) was published as part of the QCA's Draft Decision on the 2019 DAU (the **Draft Decision**). Advisian's rehabilitation cost estimate (the **Advisian Estimate**) was $814m ($ March 2020), approximately 30% lower than GHD's Estimate of $1.22b ($ October 2018).[2]

### 2.1.1 DBCT User Group response to the Draft Decision

In response to the Draft Decision, the DBCT User Group engaged SLR Consulting Australia (**SLR**) to provide a review of the GHD Estimate and Advisian Estimate, to provide comments to the QCA on a DBCT rehabilitation cost estimate for the 2019 DAU. SLR's approach for undertaking its review (**SLR Report**) is as follows:

> *A high-level rehabilitation cost estimate was developed by SLR with modifications made by exception (i.e. where SLR's opinion is different from the Advisian estimate, the costs are modified for that relevant aspect) assuming rehabilitation of the current DBCT site based on the terminal as it exists in 2020 (at the time of the Advisian report) without any expansions or modifications since then.*[3]

Based on this approach, SLR estimated the rehabilitation cost to be $736m (**SLR Estimate**), approximately 10% lower than the Advisian Estimate and 40% lower than the GHD Estimate.

### 2.1.2 QCA technical forum on rehabilitation

Following its initial consideration of submissions on the Draft Decision, the QCA hosted a technical forum (the **Forum**) on 18 November 2020 to discuss differing opinions on five aspects rehabilitation planning at DBCT. The aspects related to: waste disposal; contaminated soil and substrate removal; offshore pile removal; indirect labour and project management costs; and risk and contingency allowances.

[1] QCA Draft Decision on 2019 DAU, p. 89

[2] If the GHD Estimate was expressed in $ March 2020 terms instead of $ October 2018 terms, the gap between the GHD Estimate and Advisian Estimate would have been wider. This is because producer prices have increased over that period (by just over 2.5%, if using the A83737106J index (inputs to coal mining industry) from the Australian Bureau of Statistics (**ABS**).

[3] SLR Report, p. 4

## 2.2 GHD response to Forum questions and SLR Report

DBCTM has engaged GHD to provide a report that responds to:

- the questions that the QCA raised at the Forum (section 3); and
- key elements of the SLR Report that differ from the Advisian and GHD approaches (section 4).

## 2.3 GHD approach

GHD's approach for preparing the GHD Report, including the information subsequently provided in response to the Draft Decision and the Forum, is principally based on:

- evidence-based decision making (e.g. the rationale for DBCTM funding 100% of costs for the Tug Harbour approach)
- a recognition that DBCTM ultimately bears the financial risk that the actual cost of rehabilitation will be higher than the estimated cost
- DBCTM's historical and current experience of at the Terminal, in the form of cost-related benchmarking, regulatory decisions and other relevant evidence
- the QCA's requirements that the approaches and costs set out in the rehabilitation plan and cost estimate reflect prudent and efficient decision making.

GHD's responses to the issues in section 2.2 are often addressed in the context described above.

# 3. GHD response to Forum questions

GHD has structured its response to the questions that the QCA raised at the Forum as follows:

- Section 3.1 – waste disposal
- Section 3.2 – contaminated soil and substrate removal;
- Section 3.3 – offshore pile removal;
- Section 3.4 – indirect labour and project management (**PM**) costs; and
- Section 3.5 – risk and contingency allowances.

## 3.1 Waste disposal

### 3.1.1 QCA questions

One of the key divergences between the Advisian Report and GHD Report was whether some contaminated soils from the rehabilitation process would need to go a commercial waste facility in Roma, about 750 km from DBCT. The QCA raised three questions about this, relating to whether:

- the commercial facility at Roma was already able to accommodate the expected volumes of contaminated waste and, thus, would not need to be expanded in the future
- the cost of expanding a waste facility would be solely borne by DBCTM in an environment where other rehabilitation are occurring and, if so, what the estimated costs of expansions would be
- any other existing options for waste disposal in closer landforms, compared with the Roma facility, could be considered for disposal.

### 3.1.2 Advisian and SLR approaches

Advisian said:

> *It must be recogni[s]ed that the approach adopted by GHD assumes heavy contamination across significant parts of the site which cannot be the case as any environmental incidents would have been addressed as part of coal terminal operations and procedures.*[4]

Given this statement, it is inferred that Advisian's approach does not assume that any of the soil waste at site would be heavily contaminated at the time of disposal. Advisian therefore appears to assume that there will no hydrocarbons in the soil when rehabilitation needs to occur.

The SLR Report does not appear to explicitly address the assumptions around the extent of soil contamination, hence GHD has limited its analysis to Advisian's approach alone.

[4] Advisian Report, p. 53

### 3.1.3 GHD position

#### 3.1.3.1 Approach for heavily contaminated waste

The GHD Report estimated there would be 580,000 tonnes of contaminated soil waste[5] that needs to be disposed. This comprises 451,000 tonnes of medium contaminated soils, which was anticipated to go to a project-specific landfill within 30 km of DBCT (similar to the Hogan's Pocket facility, but nearer to DBCT) and 129,000 tonnes of heavy contaminated (with hydrocarbon) soils, which would go to the commercial waste facility, owned by WestRex Services (**WestRex**), near Roma. Hence, 22% of soil waste would go to WestRex's Facility; the rest would go to facilities in DBCT's vicinity. Given this, Advisian's position that heavy contamination occurs across large parts of the DBCT site is inaccurate – only a fifth of the contaminated soil waste is assumed to transported to WestRex.

GHD notes that the Hogan's Pocket Facility cannot accept with waste with hydrocarbons in it. GHD, based on Axiom's analysis, assumed that heavily contaminated waste to go to the WestRex facility, which can accept waste with Category 2 hydrocarbons. Axiom contacted WestRex about current capacity levels. WestRex said that it *currently* has sufficient capacity to accommodate 129,000 tonnes of heavily contaminated soils. In doing so, WestRex said its waste-processing approach involves treating and, where possible, on-selling the waste; which is how WestRex currently manages any capacity constraints on its facility.

#### 3.1.3.2 Funding of expansion costs for waste facilities

DBCTM is responsible for ensuring it has sufficient funds to cover the cost of rehabilitating the terminal in accordance with the PSA and has to determine the most prudent approach to meeting its obligations. The DBCT rehabilitation plan focuses on, among other things, enabling DBCTM to best manage financial risks that it has limited control over. There is an expectation that Bowen Basin coal mines and supporting port facilities will be rehabilitating at the same time as DBCT. However, in GHD's view, it is not prudent for DBCTM to assume what a waste facility's cost-recovery arrangements for the expansion would be – how a waste facility chooses to interact with other organisations undertaking rehabilitation is beyond DBCTM's control.

In this context, it reasonable to recognise that there is a possibility that any expansion costs for waste facilities would need to be funded fully by DBCTM as the sole proponent. Publicly available information indicates that the capital cost of expanding the Hogan's Pocket facility (Cell 3) by 4 hectares (**ha**), which includes the construction of leachate collection systems and groundwater relief systems, was $5m. [6] This equates to $1.25m per hectare. No publicly available information for WestRex expansion costs was located and, as an illustrative exercise GHD has estimated, using the Hogan's Pocket data, what the incremental cost of expanding the 400 ha WestRex facility by 10% would be. Such an expansion would cost approximately $50m (i.e. 400 x 0.10 x $1.25m = $50m).

#### 3.1.3.3 Other facilities able to handle heavily contaminated waste

The only other facilities in the DBCT vicinity that can accept heavily contaminated waste are based in Wacol (near Ipswich), which is more than 900 km from DBCT. The WestRex facility near Roma is about 750 km from DBCT. Based on distance from the Terminal, the WestRex facility would be most efficient location to dispose of the heavily contaminated waste.

[5] GHD Report, Appendix A, p. 27: the sum of heavily contaminated (hydrocarbon) soils and medium contaminated soils is 579,601 tonnes.

[6] See http://www.statedevelopment.qld.gov.au/index.php/component/mtree/R4R-R3-community-infrastructure/906-hogan-s-pocket-regional-landfill-development Note: this page was archived and replaced by 2020-21 budget initiatives

## 3.2 Contaminated soil and substrate removal

### 3.2.1 QCA question

The GHD Report had assumptions regarding depths of contaminated material for bedding coal & soil, road substrates and substrate under substations. Based on all available information and noting further contamination studies will be conducted to determine the actual depths of contaminated material for removal, the QCA asked what the appropriate assumptions for depths of removal of contaminated material for these three areas would be.

### 3.2.2 Advisian and SLR approaches

Advisian and GHD had differing opinions on the assumed contamination depths, as set out in **Table 1**.

***Table 1: GHD and Advisian soil contamination depth assumptions***

| Assumed depth | GHD | Advisian |
|---|---|---|
| Bedding coal and contaminated soil | 400mm | 250mm |
| Contaminated road substrate | 500mm | 250mm |
| Contaminated substrate under substations | 1,000mm | 250mm |

SLR concurred with Advisian's assumed depths of contaminated soil, saying it agreed with: 250 mm under the running pavement as road substrate removal depths assumed by Advisian; and Advisian's proposed 250 mm of contamination to be removed from relevant areas. In doing so, SLR stated:

> *SLR experience with rehabilitation cost estimation considers a similar depth to that adopted by Advisian for removal of road substrate for other facilities*.
>
> *Advisian proposed 250 mm on relevant areas considering spill management (ISO14001 environmental management system, etc.), experience with Tier 1 hydrocarbon client contamination, and assuming material for constructing earthen pads was free of contaminates. SLR considers the Advisian proposal to be a reasonable assumption.*[7]

It is noted that, as part of its Draft Decision response, DBCTM proposed using the mid-points of the GHD and Advisian assumptions for depths of the relevant contaminated materials. DBCTM also said that it anticipates having more relevant evidence from the Terminal in future updates of the rehabilitation estimate, which should better inform the appropriate depths to use.[8]

[7] SLR Report, pp. 6, 18, 23

[8] DBCTM Response to Draft Decision. P. 38

### 3.2.3 GHD position

DBCTM must make prudent and evidence-based decisions about the depths to be assumed for contaminated material. As part of GHD's response to Draft Decision, principles-based reasoning and a range of evidence for assumptions on the depth of contaminated material were provided. This included detailed commentary on coal pressure in the stockyards, Queensland Department of Transport and Main Roads (**DTMR**) drawings and a preliminary pavement design for road substrates, and GHD's experience with a NSW coal-fired power-station client regarding substrates under substations.[9]

By comparison, GHD notes Advisian's 250 mm depth assumptions are based in large part on its recent rehabilitation experience for *one* client that is *not in the coal sector*. In addition, SLR has not provided any substantive evidence or analysis to indicate why 250 mm depths would be appropriate; it has just made statements on this.

## 3.3 Offshore pile removal

### 3.3.1 QCA question

The QCA asked, in recognising the uncertainty and lack of clear standards that define the 'natural state' standard, which method for offshore pile removal (full or partial) best reflects DBCTM's obligations for remediation.

### 3.3.2 Advisian and SLR approaches

SLR said partial, instead of full, removal of offshore piles was appropriate in light of the environmental risks and available technology. In particular, SLR considered that full extraction of the piles will be difficult given the size of the piles and the geotechnical conditions and the alternative proposed method does not guarantee full extraction.[10]

GHD notes that SLR's position on the definition of the natural state to meet the requirements of the PSA has been defined, agreeing with GHD's understanding, namely:

> *SLR has also considered the principal objective of rehabilitating the DBCT site to a pre-construction, natural condition that is self-sustaining, compatible with surrounding land, and minimises potential for future environmental harm.*[11]

And

> *The QCA draft decision 2016 found that the rehabilitation requirement to return the DBCT site to its natural state and condition as existed prior to development was the identified standard for determining a remediation allowance even if exceeding standard industry practice.*[12]

[9] DBCTM Response to Draft Decision, Appendix 2, GHD's response to QCA's draft decision on 2019 DAU (DBCT Rehabilitation Plan and Cost Estimate), pp. 20-24

[10] SLR Report, p. 6

[11] SLR Report, p. 13

[12] SLR Report, p. 14

### 3.3.3 GHD position

In GHD's view, the environmental risks associated with the full removal of offshore piles would be substantially less than any of the ongoing maintenance dredging work that has occurred at the Port of Hay Point. GHD provided an explanation of this in DBCTM's response to the Draft Decision.[13]

GHD notes that the PSA states that DBCT Management must rehabilitate the "Onshore and Offshore Land to its natural state and condition *as existed prior to any development or construction activity occurring*". There were no piles in the Offshore Land prior to DBCT being constructed. Accordingly, the obligation under the PSA is clear that DBCTM is required to remove the piles fully.

GHD considered it prudent to price the full-extraction approach to comply with the PSA. GHD did also caveat that this approach would be difficult, given the size of piles and geotechnical conditions; it was for this reason, among others, that GHD had suggested two approaches (i.e. full or partial removal (one metre below seabed) should be considered.[14]

GHD notes that recent publicly available evidence indicates that full pile removal has been achieved in some offshore settings, notably four piles supporting an offshore wind turbine platform that was decommissioned in the Netherlands. [15] Importantly, North Queensland Bulk Ports Corporation (**NQBP**), the relevant authority for DBCT closure, has specified that full removal of piles in a recent development approval package for the Port of Mackay is required.[16] Accordingly, planning and costing for full pile removal in the GHD Report and GHD Estimate are appropriate.

As noted in GHD's response to the Draft Decision and in the GHD Report, the long-term environmental impacts are far more favourable from full pile removal compared with partial pile removal because it:

> *… will enable the natural coastal processes and sand flows to provide a great long-term environmental benefit. This will also create a better long-term ecosystem for species endemic to the region and benthic communities.[17]*

In addition, GHD has noted that the Great Barrier Reef Marine Park Authority (**GBRMPA**), the party responsible for managing the Great Barrier Reef Marine Park (**GBRMP**), is obliged to 'provide for the long term protection and conservation of the environment, biodiversity and heritage values of the Great Barrier Reef Region'.[18] Accordingly, there is need to consider long-term environmental benefit against short-term environmental impacts. GHD's approach is consistent with the principles that GBRMPA is guided by in safeguarding the GBRMP. As concluded earlier, planning and costing for full pile removal in the GHD Report and GHD Estimate are therefore appropriate.

[13] DBCTM Response to Draft Decision, Appendix 2, GHD's response to QCA's draft decision on 2019 DAU (DBCT Rehabilitation Plan and Cost Estimate), p. 26

[14] GHD Report, p. 79

[15] See LinkedIn July 2019 Offshore decommissioning: how vibratory pile extraction reduces time and costs

[16] Refer NQBP 2017 Port of Mackay – Development Approval Package for Wharf Demolition

[17] GHD Report, p. 79

[18] Great Barrier Reef Marine Park Act 1975, cl. 2A(1)

## 3.4 Indirect labour and PM costs

### 3.4.1 QCA question

The QCA asked whether it is prudent and efficient to assume that DBCTM would have a significant project management role in the rehabilitation of DBCT, to warrant the estimated project management cost in the GHD Estimate.

### 3.4.2 Advisian and SLR approaches

SLR said the Owner's PM cost should reflect 8% of direct costs, instead of the 10% that Advisian had proposed.[19]

### 3.4.3 GHD position

GHD considers that an 8% allowance for PM costs would likely be significantly understated based on recent evidence of *actual* PM costs incurred by DBCTM for various projects. The actual PM costs that DBCTM incurred for the past four years of NECAP[20] and the 7X expansion have been higher than 8% of direct costs. Details for this were provided in DBCTM's response to the Draft Decision, showing that PM costs were often at least 10%.[21] GHD has also been advised by DBCTM that independent User-owned terminal operator, DBCT Pty Ltd (the **Operator**) charges a [redacted]% fee as compensation for actual PM costs for NECAP works undertaken by the Operator, regardless of the value of the works. Similarly, NQBP, a party to the PSA, also charges a [redacted]% management fee.

The NECAP costs were recommended by DBCT P/L, the user-owned operator and then approved by Users. The QCA has approved all these costs for addition to the regulated asset base. Similarly, the QCA approved the 7X expansion costs, including the associated PM costs. Importantly, the GHD PM cost estimate of 10% of base costs is aligned with what the QCA has historically approved for DBCTM. In this context, DBCTM having an involved PM role in rehabilitating DBCT is consistent with prudent and efficient decision making.

In addition, GHD considers that the QCA's question appears to suggest that GHD's estimated PM costs are higher than industry norms because of the proposed significant PM role for DBCTM in overseeing the rehabilitation of DBCT. GHD considers this inaccurate. GHD, based on Axiom's advice, considers that DBCTM having a significant PM role in rehabilitating DBCT means that the PM cost estimate would be lower than if a Tier 1 Contractor would control the site under the direction of a Project Management Office (**PMO**) established by DBCTM (as the Owner).

A Tier 1 contractor may not be as familiar with DBCTM's infrastructure. The Tier 1 contractor would incur familiarisation-related costs (costs that would be compounded because DBCTM would need to assist the Tier 1 contractor with the familiarisation process), and the Tier 1 contractor's costs would include a profit margin. In GHD's view, the Tier-1 contractor approach would be inefficient in light of the above consideration. This was reflected in Axiom's Basis of Estimate in the GHD Report[22], which stated that should an external PMO be engaged, then a further cost of 5% to 8% of the project management value could be expected.

[19] SLR Report, p. 8

[20] And approved by the QCA for addition to the regulated asset base

[21] DBCTM Response to Draft Decision, Appendix 2, GHD's response to QCA's draft decision on 2019 DAU (DBCT Rehabilitation Plan and Cost Estimate), p. 29

[22] GHD Report, Appendix A, Axiom's Basis of Estimate, p. 10

In summary, DBCTM having a significant PM role in rehabilitating DBCT is consistent with efficient decision making. The PMO arrangement, as proposed by Advisian and SLR, would not lead to efficient outcomes.

## 3.5 Risk and contingency allowance

### 3.5.1 QCA question

The QCA asked what the prudent and efficient approach for the estimation of contingency allowances for the rehabilitation cost estimate is.

### 3.5.2 Advisian and SLR approaches

SLR generally agreed with Advisian's views on the components contributing to overall contingency (e.g. quantity/definition risk, contract risk) but stated that contingency allowances could be lower compared with Advisian's proposed figures:

> *Considering contract risk coverage including the General unallocated contingency ($15 M of which $5 M is for asbestos) and $30 M client contingency and contract risk, schedule risk analysis time ($12.8 M and more). SLR proposes a reduction of the contingency amount to 10-15% of the direct/base estimate (calculates to approximately 11% of the new total based on range of contingencies).*[23]

> *Based on the level of detail undertaken for the costing and planning [adopted by GHD], a lower contingency is likely to be more reflective of the costs. The following forms part of the overall contingency: quantity/definition risk (quantity); schedule risk analysis (time); general unallocated contingency; Client Contingency Includes Contract Risk Total; and client schedule risk and ground conditions (including Extension of Time (**EOT**) claims). This totals $80.5 million in contingencies and risk (approximately 16.5% of base).*[24]

GHD understands that Advisian's contingency approach partially relied on a project-specific risk analysis, which '…defined and assigned risk allowance where it is most likely to be managed in both the Contractor's price and the Owner's costs … based upon a clearer understanding of the potential project risk'.[25] In applying this approach, Advisian said during its examination of the relevant documentation and its site visit to DBCT, it assessed the quality of information provided and collected. Advisian stated that this assessment was quantified into a certainty factor and was a risk value attributed to each of the eight Domains' components[26].

### 3.5.3 GHD position

In GHD's view, SLR's proposed contingency and risk allowances of 16.5% of base cost is low, given publicly available benchmarks for the project definition accompanying the DBCT rehabilitation plan.

As noted in DBCTM's response to the Draft Decision, publicly available benchmarks for transport-related projects that are comparable with the project definition associated with the GHD Report indicate a

[23] SLR Report, p. 22

[24] SLR Report, p. 27

[25] Advisian Report, p. 126

[26] All Domains except for the Tug Harbour

contingency allowance range of 32%-70%.[27] The lower-bound figure of 32% was provided by the Department of Infrastructure, Transport, Cities and Regional Development[28] for a P50 rail construction project cost estimate, in its *Guidance Note 3B for Deterministic Contingency Estimation*. GHD observes that the Department's advice for the Guidance Note in question was informed, in part, by Advisian's previous work. [29]

In addition, we note that GHD, SLR and other consultants were consulted by ARTC on the cost verification process for the Inland Rail project. For that project, the contingency allowance was:

- At a P50[30] level, 26% of the base cost; and
- At a P90 level, 36% of the base cost (P90).[31]

Hence, both Advisian and SLR have been involved in contingency-allowance work that is publicly available, suggesting that contingency levels of at least 26% are reasonable for projects that are, to some degree, comparable with the project scope for the rehabilitation of DBCT.

There was debate at the Forum around the perception that the scope of work for the rehabilitation plan is *known*, in the context that the facility has already been constructed. GHD observes that the vast bulk of the existing quantities is *unknown* at this point in time, with a significant amount assumed or estimated in the course of preparing the GHD Report. The sentiments of this observation were echoed by some Forum participants who acknowledged the uncertainty of quantities of, for example, structural steel, concrete, buildings and buried services at DBCT. Indeed, GHD notes neither the Advisian Report nor the SLR Report disagree with the uncertainty associated with the quantities.

In GHD's view, these quantity-related unknowns can only be overcome with detailed review and assessment of existing infrastructure to test all assumptions and correct any previous estimates to actual amounts, coupled with scientific testing (for example, soil testing for contaminants) and associated analysis. That is, a higher level of project-planning and engineering effort needs to be expended to understand and define the project, its quantities of material and a known execution (demolition and rehabilitation) strategy that is *specific* for the project at hand.

As noted above, part of Advisian's contingency approach relies on determining certainty factors and risk values for the documentation it received and the observations from its site visit. Consistent with some of the views raised during the Forum, the approach of determining certainty factors and risk values has an element of subjectivity. In addition, GHD notes that criticisms have been levied against the certainty-factor approach being *ad hoc* in nature and lacking formal foundation.[32] It is in this context that using publicly available industry benchmarks overcomes variances of professional opinion, supporting a prudent and efficient outcome that stakeholders can validate.

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[27] DBCTM Response to Draft Decision, Appendix 2, GHD's response to QCA's draft decision on 2019 DAU (DBCT Rehabilitation Plan and Cost Estimate), pp. 31-32. Lower bound of 32% is from the Department of Infrastructure, Regional Development and Cities' P50 contingency level for rail construction projects, and the upper bound of 70% of is the upper bound from DTMR's publicly available Project Cost Estimating Manual.

[28] Previously the Department of Infrastructure, Regional Development and Cities

[29] See page 11 of Guidance Note 3B for Deterministic Contingency Estimation

[30] The P50 value indicates a 50% probability that the cost will not be exceeded. The P90 value reflects a 90% probability the cost will not be exceeded. GHD understands that NECAP projects at DBCT use P95 values as part of the User and Board approval process. This is because the level of project definition is relatively low.

[31] See page 19 of the Inland Rail Business Case

[32] Blockley, D. I. And Baldwin, J.F., Uncertain Inference in Knowledge-Based Systems. ASCE, Journal of Engineering Mechanics, 1987, VII(3)

In addition, GHD considers that conducting a project-specific risk analysis as a basis of calculating a contingency allowance at this early phase will not be reliable, especially if DBCTM's experienced project managers are excluded. This will then result in a figure that will underestimate the contingency, due to the level of uncertainty regarding quantities of material that the rehabilitation process will generate. Good project-risk identification only comes with in-depth knowledge of the project scope and execution planning, which is typical of a project with a much higher level of project definition maturity. Given the level of project definition, GHD considers the most prudent approach to assessing a contingency allowance is to assess the underlying quality of the base estimate inputs, and to then verify the result against appropriate industry accepted benchmark norms.

In the case of the GHD Report, GHD assigned a percentage factor to each estimate element that reflected the quality/maturity of the scope basis (quantities) and the pricing basis. For the Axiom component of the GHD Estimate (i.e. disposal, remediation and rehabilitation), this resulted in an overall contingency allowance of 20%. For the GHD component (i.e. decommissioning and demolition), the contingency allowance was 25%, to reflect that GHD's cost estimating approach was less accurate than Axiom's due to the lower quality of the scope quantification.

Based on Axiom's experience, the 20-25% range is consistent with the contingencies expected of a Class 4 AACE estimates for projects in the mining and mineral processing sectors. GHD also understands the level of project definition underpinning the Axiom component of the GHD Estimate as comparable with a FEL 1 Study in accordance with the DBCT 2017 Access Undertaking; a 25% contingency would be prudent for such a level of definition.

Finally, GHD observes that closure in NSW mining sector has been affected by contingency amounts being too low based on actual project experience. The NSW Auditor-General audited mine rehabilitation security deposits in 2017, and found that the NSW Government's Rehabilitation Cost Calculation tool did not account for an appropriate level of contingency:

> *The tool adopts a standard default ten per cent contingency to cover uncertainty, regardless of the complexity and risks associated with the site. Further, if an open-cut mine site closes prematurely, the agreed final land use may not be achievable and the final landform will probably not be achieved.* ***Guidance we obtained from a range of sources indicates contingencies should range from 25 per cent to as much as 50 per cent in the worst cases, especially in the absence of a detailed plan to achieve closure****.*
>
> ***Where there is high uncertainty of costs, but government wants a high level of certainty that costs will be covered fully, the contingency needs to be very high****.* (emphasis added) [33]

GHD considers that a contingency allowance of 20-25% is prudent, given the stage of project definition, using accepted industry standards. Reducing these figures would not be prudent, given the project level maturity, the quantities of material currently established, the exact locations of disposal sites and the expected date of the project commencing, some 30 years away. In GHD's view, the figures should be revisited only when the technical understanding, engineering and maturity of the quantities and work scopes all improve, as the associated risks and opportunities all become better defined and known.

[33] See pages 19-20 of NSW Auditor General's Report May 2017 Performance Audit - Mining Rehabilitation Security Deposits

# 4. GHD assessment of the SLR Report

GHD has assessed the principal reasons for the SLR Estimate ($736m) being 10% lower than the Advisian Estimate ($814m), which relate to SLR's assumptions around:

1 Disposal and demolition costs for third party assets owned by Aurizon Network, Queensland Rail and Ergon;

2 Tug Harbour related costs being lower because of assumptions regarding contractor margins and whether the BHP Mitsubishi Alliance (**BMA**), the Hay Point Coal Terminal (**HPCT**) owner, would share in the costs;

3 Contingency approach; and

4 Owner's PM costs.

Section 3 of this report has already addressed the issues regarding the contingency approach and Owner's PM costs (i.e. issues 3 and 4 in the list above). Hence, section 4 deals with issues 1 and 2 only.

## 4.1 Disposal and demolition costs for third party assets

### 4.1.1 SLR approach

SLR considered that DBCTM would be only partially responsible for rehabilitating the third party assets within the rehabilitation plan's battery limits, the relevant assets being the:

- rail loop that Aurizon Network owns;
- substation that Queensland Rail owns; and
- substation that Energy Queensland (previously Ergon) owns.[34]

In particular, SLR said its assumption that:

> *It is likely that responsibility for rehabilitation for these assets themselves is held by the third party and responsibility for rehabilitation of underlying disturbance is likely required by DBCTM.*[35]

Based on this assumption, SLR determined that the Advisian Estimate could be reduced by $53.4m.

### 4.1.2 GHD response

In preparing the GHD Report, GHD supplied a Battery Limits Memorandum (**Limits**) to DBCTM on 14 November 2018.

[34] SLR Report, p. 8

[35] SLR Report, p. 4

The Limits stated that:

> *Where assets are owned by a third party and are within the Battery Limits, these assets should be included in the Battery Limit[s]. We anticipate these assets will include, for example, power lines owned by Ergon that supply electricity to the Terminal. …*
>
> *Where there are assets that provide essential services to DBCT that are not within the boundaries of the relevant leases, such as the Ergon substations, but these assets have been constructed exclusively for DBCTM's (and DBCT P/L's use), these assets should be included.*
>
> *Where assets are owned by a government agency, such as North Queensland Bulk Ports Corporation or Mackay Regional Council, and shared by DBCT and HPCT (such as the tug harbour), these assets should be included. Other cases might be more complex.*
>
> *For example, the rail balloon loop is Aurizon Network's property but was constructed to support the provision of coal-handling services at the Terminal, and should be included within the Battery Limits.*

The Limits considered that any third party assets[36] constructed exclusively for DBCT's use should be accounted for in full in the GHD Estimate.

As part of preparing the GHD Report (and in forming this response), GHD sought confirmation from DBCTM on whether contracts existed between Aurizon Network, Queensland Rail, Energy Queensland and itself regarding rehabilitation obligations of the assets identified above. DBCTM advised there are no such agreements in place. In addition, DBCTM advised that it was not privy to any agreements in place between the three entities and the Queensland Government regarding responsibility for the rehabilitation activities and associated costs. Hence, there is no certainty for DBCTM that the costs in question will be covered by other parties.

GHD therefore considers it prudent for DBCTM to account for these costs in its rehabilitation planning. The third party assets in question fall within the lease boundaries of the site, and therefore the PSA rehabilitation obligations apply. As there is no documentation or evidence to show the costs will be covered by other parties, it is prudent for DBCTM to assume it will be responsible for covering those costs. Conversely, it is not prudent to assume that such costs will be covered by any other entity.

The approach set out in the GHD Report is consistent with experience in other jurisdictions. An example relates to NSW power stations for which GHD has completed closure studies.[37] These particular entities have third party assets similar to the DBCT context, in that their thermal coal loading rail loops are owned by the State or by another third party. In this instance, inclusion of such dedicated third party assets was deemed acceptable and expected by the relevant authorities as part of closure planning and costing.

The SLR Report, however, states that the decommissioning, demolition and disposal costs of the third party assets would be borne by the relevant third parties.[38] SLR has not provided any evidence to substantiate this position. In GHD's view, it is important to acknowledge that the party ultimately bearing the financial risk of third parties not funding the decommissioning, demolition and disposal costs is DBCTM. Accordingly, GHD maintains its position that the full cost of rehabilitating the third party assets should be retained in the rehabilitation cost estimate.

[36] Other third party assets may not have been identified in the GHD Report (e.g. underground telecoms or water infrastructure)

[37] These studies are confidential.

[38] SLR Report, p. 32

## 4.2 Tug Harbour costs

### 4.2.1 SLR approach

SLR said:

> *…due to the public use benefit derived from the tug harbour and associated breakwater structure, it would be inappropriate for DBCTM to rehabilitate this structure. It is also considered reasonable that, in lieu of rehabilitation, a one-off payment would be made for maintenance of the facility to North Queensland Bulk Ports (NQBP) or Queensland Government. SLR agrees with the inclusions within the Tug Harbour cost estimate and the use of a 30 year time frame.* ***However, the 20% contractor's margin applied is considered high and was replaced by 10%****.* (emphasis added)[39]

In doing so, SLR said 80% of the Tug Harbour Domain costs would be borne by DBCTM and 20% by BMA (as owner of HPCT). SLR reasoned that:

> *Given that the Tug Harbour is used for recreation etc. and is an already constructed asset maintained by NQBP via DBCT and HPCT levies[,] it is not reasonable to have DBCTM cover the full maintenance costs for 30 years.*

This contrasts with GHD's position, which was that 100% of the costs would be covered by DBCTM.[40]

### 4.2.2 GHD response

The GHD Report noted the following regarding the Tug Harbour Domain:

> *Our cost estimate of $1.2 m per annum incorporates a 40 per cent allowance over and above direct costs. The allowance comprises: 20 per cent for indirects and overheads; and 20 per cent for contractor margins.* ***We note the 40 per cent is lower than what we have allowed for Domains where demolition is required; in those instances, the figure is closer to 60 per cent****…* (emphasis added).[41]

Given GHD's responses on indirect costs and PM allowances in section 3.2, GHD maintains its position that its proposed contractor margins for the Tug Harbour Domain are appropriate.

Regarding BMA sharing the cost of the Tug Harbour Domain, the GHD Report noted:

> *The deterioration of the infrastructure contained within the Tug Harbour Domain is time-based, as opposed to utilisation-based. Therefore, we initially considered a 50/50 split of the costs between DBCT and HPCT to be appropriate. However, the Central Queensland Coal Associates Agreement Act 1918 (Qld), No. 558 provides that where the harbour/harbour works (i.e. Tug Harbour) need to be extended to meet the needs of the community, but not those of BMA (then owned as part of the Utah Development Company), then BMA (as the owner of HPCT) should not be charged for the operating, management and maintenance costs of that extension. Given this, it would be reasonable for DBCTM to consider having to bear the full costs of the Tug Harbour disposition as a*

[39] SLR Report, p. 5

[40] SLR Report, p. 25

[41] GHD Report, p. 102

*default position. Hence, we have assumed that DBCTM will incur all costs associated with the Tug Harbour disposition.*[42]

Hence, GHD's initial position was that a 50-50 cost split between DBCTM and BMA would be appropriate. However, the agreement struck between BMA and the Queensland Government makes it clear that making such an assumption would be inappropriate. A prudent terminal owner would recognise that there is a strong likelihood that 100% of the costs would have to be funded by it, in light of the aforementioned agreement.

By contrast, SLR's advice for this is not related to time, tonnage or other evidence-based reasoning. As GHD's position is evidence based and clearly relates to agreements in place between BMA and the Queensland Government, GHD considers its position should be retained.

[42] GHD Report, p. 102

# Table of Abbreviations

| Abbreviations | Descriptions |
|---|---|
| ABS | Australian Bureau of Statistics |
| AU | Access Undertaking |
| AUD of A$ | Australian Dollars |
| BMA | BHP Mitsubishi Alliance |
| DAU | Draft Access Undertaking |
| DBCT | Dalrymple Bay Coal Terminal or the Terminal |
| DBCTH | DBCT Holdings |
| DBCTM | DBCT Management |
| DBCT P/L | The terminal operator of DBCT, also known as the Operator |
| DTMR | Department of Transport and Main Roads (QLD) |
| EOT | Extension of Time |
| GBRMP | Great Barrier Reef Marine Park |
| GBRMPA | Great Barrier Reef Marine Park Authority |
| HPCT | Hay Point Coal Terminal |
| NECAP | Non Expansionary Capital Expenditure |
| NQBP | North Queensland Bulk Ports Corporation |
| PM | Project Management |
| PMO | Project Management Office |
| PSA | Port Services Agreement |
| QCA | Queensland Competition Authority |
| User | DBCT user or access holder |

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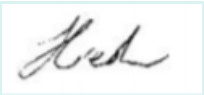
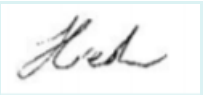
| Draft | G Finsen<br>M Kiejda<br>H Devaser | H Devaser |  | H Devaser |  | 4 Dec 2020 |

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