Decision

Dalrymple Bay Coal Terminal

2006 Draft Access Undertaking

June 2006

Queensland Competition Authority

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Level 19, 12 Creek Street Brisbane Qld 4000
GPO Box 2257 Brisbane Qld 4001
general.enquiries@qca.org.au
www.qca.org.au

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PREAMBLE

Decision

The Authority has approved the Dalrymple Bay Coal Terminal (DBCT) access undertaking submitted by BBI (DBCT) Management Pty Ltd on 4 January 2006, on the basis and for the reasons outlined in this decision.

2006 DBCT Access Undertaking

DBCT Management prepared the 2006 access undertaking in response to the Authority's April 2005 decision, following detailed discussions between DBCT Management and the terminal's users.

The 2006 access undertaking provides for an average revenue requirement of $86.8 million for 2004-05, which is based on:

- Weighted Average Cost of Capital – 9.02%;
- Return on Equity – 11.84% – 600 basis points above the risk-free rate; and
- Asset Value – $850 million, as at 1 July 2004.

These parameters are entirely consistent with the Authority's April 2005 decision.

The 2006 access undertaking also provides for:

- terminal capacity to be allocated among access seekers based on the dates on which they made binding commitments for additional capacity;
- the Authority to assess capacity expansions during the regulatory period to reduce concerns regarding regulatory risk;
- measures to allow DBCT Management to manage creditworthiness risk;
- protections to the rights of terminal users in the event of changes to terminal regulations;
- a detailed standard access agreement to provide DBCT Management and access seekers with greater certainty about their rights and obligations; and
- public reporting of indicators on the terminal's operations and service quality.

While in some instances the proposed arrangements diverge from the April 2005 decision, the Authority has taken the view that, to the extent the undertaking reflects a negotiated position between DBCT Management and users, the 2006 access undertaking is in the interests of these parties. Furthermore, the proposed arrangements are consistent with the principles underlying the April 2005 decision. The Authority has also had regard to the interests of future access seekers that were not involved in the negotiations leading up to the submission of the 2006 access undertaking.

The 2006 access undertaking was generally supported by the terminal's users. However, some users opposed aspects of the process for allocating the terminal's expansion capacity, certain aspects of the methodology employed to calculate the revenue requirement and penalties for over-shipment (see sections 2.1, 4.1 and 4.2 of this decision).

Capacity Allocation

The key area of disagreement among stakeholders related to DBCT Management's process for allocating requests for capacity made prior to the commencement of the undertaking. Specifically, DBCT Management has sought to allocate expanded terminal capacity on the basis of the dates on which binding applications for capacity were made, in other words, a first to commit basis.

The Authority notes that many users supported DBCT Management's proposal. In contrast, other users opposed this proposal on the basis that DBCT Management's process for allocating capacity to date was unclear and suggested that an alternative mechanism to allocate expansion capacity be included in the undertaking.

The Authority has examined the undertaking's queue management arrangements in detail. For the reasons set out in section 2.1 of this decision, the Authority has accepted the arrangements as proposed.

GLOSSARY

ARR	Annual Revenue Requirement
Authority	Queensland Competition Authority
DBCT Management	BBI (DBCT) Management Pty Ltd
Holdings	DBCT Holdings Pty Ltd
IAP	Indicative Access Proposal
KPI	Key Performance Indicator
Mtpa	Million Tonnes Per Annum
OMC	Operation and Maintenance Contract
PCQ	Ports Corporation of Queensland
PSA	Port Services Agreement
QCA Act	Queensland Competition Authority Act 1997
QR	Queensland Rail
RAB	Regulated Asset Base
SAA	Standard Access Agreement
DBCT, Terminal	Dalrymple Bay Coal Terminal
TIC	Terminal Infrastructure Charge
TPA	Trade Practices Act 1974
WACC	Weighted Average Cost of Capital

1. INTRODUCTION

1.1 Background

The Dalrymple Bay Coal Terminal (DBCT) is a coal export terminal located in central Queensland 40 kilometres south of Mackay.

The terminal opened in 1983 as a common user coal export terminal, servicing mines in the Goonyella system of the Bowen Basin coal fields. The terminal has been expanded from time to time to service the growth in demand for coal. A 'short term gain' expansion program is due to be completed in June 2006 which will increase terminal capacity from 54.5 mtpa to 59 mtpa. A further 1 mtpa is expected to be realised from the Ports Corporation of Queensland's (PCQ's) Hay Point departure path dredging programme by September 2006.[1]

The Queensland Government owns DBCT through a wholly Government owned entity, DBCT Holdings Pty Ltd (Holdings). In September 2001, a group led by international investment bank Babcock and Brown acquired a lease of the terminal for 50 years, with an option to extend this by a further 49 years. The leasehold interest in the terminal was transferred to Prime Infrastructure (DBCT) Management Pty Limited (now BBI (DBCT) Management Pty Limited), upon its listing on the Australian Stock Exchange in June 2002.

1.2 Declaration of Third Party Access

The service of the *handling of coal at DBCT by the terminal operator* has been declared under Part 5 of the *Queensland Competition Authority Act 1997* (QCA Act) for the purposes of third party access. The effect of declaration under Part 5 of the QCA Act is that:

- statutory duties arise for an access provider[2], including an obligation on the access provider to negotiate with and provide information to access seekers, and prohibiting it from hindering or preventing access;
- an access seeker gains recourse to compulsory dispute resolution procedures;
- the owner or operator of a facility may submit an access undertaking to the Authority; and
- the Authority may request an undertaking be prepared by the owner or operator if one has not been voluntarily submitted and the Authority considers it appropriate that an undertaking be in place. In certain circumstances, the Authority can draft and approve its own access undertaking.

The obligations placed on the access provider apply from the date of declaration, irrespective of whether the Authority has or has not approved an access undertaking.

The access regime established by Part 5 of the QCA Act is a negotiate/arbitrate model. That is, the prime responsibility is on the access provider and the access seeker to negotiate on price and non-price terms, with the Authority becoming involved only where provided for under the QCA Act - for example, where agreement cannot be reached and either party has lodged a dispute notice with the Authority.

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1 The next expansion (Phase 1) will increase terminal capacity from 60 mtpa to an estimated 65-68 mtpa by September 2007. Planning approvals have been secured for this expansion. A subsequent expansion (Phase 2) is proposed to increase terminal capacity from 68 mtpa to an estimated 75-80 mtpa by September 2008. An option to build Berth 4 (Phase 3) would realise a further 5 mtpa above Phase 2 and be completed by October 2008.

2 An access provider may be either the owner or operator of the facility. It depends on which party gives another party access to the services of that facility under an access agreement which, in the case of DBCT, is DBCT Management.

Role of an Approved Undertaking

Part 5 of the QCA Act imposes broad obligations on an access provider. An undertaking for a service sets out in more detail the terms and conditions on which an access provider undertakes to provide access to the service. Those terms and conditions necessarily must deal with price and non-price matters relevant to access. In effect, Part 5 of the QCA Act and the access undertaking establish the negotiation framework, with recourse to mediation or arbitration in the event of a dispute. Ultimately, the terms and conditions for access will be embodied in an access agreement between the access provider and the access holder i.e. the user of the declared service.

Among other things, an undertaking is designed to assist the access negotiation process, to reduce the scope for disputes between access seekers and the access provider, and to provide certainty about how the Authority will deal with access disputes. The parties to an access agreement may agree to terms and conditions of access that are inconsistent with an approved undertaking. However, an approved undertaking provides greater certainty to both access seekers and the access provider, as any access determination made by the Authority in the event of a dispute during the negotiation process must be consistent with the approved access undertaking. In the event of a dispute once an access agreement has been signed, that dispute is resolved in accordance with the terms of that agreement.

An approved undertaking also provides a 'safe harbour' for an access provider in that any conduct in accordance with an approved undertaking will not breach the preventing and hindering access provisions of the QCA Act.

1.3 Authority's Assessment Process

Under the provisions of s.136 of the QCA Act, the Authority must either approve, or refuse to approve, a draft access undertaking submitted to it.

In making its decision whether to approve, or refuse to approve, the draft access undertaking, the QCA Act provides that the Authority must consider the following[3]:

- the legitimate business interests of the owner or operator of the service;
- if the owner and operator of the service are different entities, that the legitimate business interests of the operator of the service are protected;
- the public interest, including the public interest in having competition in markets (whether or not in Australia);
- the interests of persons who may seek access to the service, including whether adequate provision has been made for compensation if the rights of users of the service are adversely affected; and
- any other issues the Authority considers relevant.

If the Authority refuses to approve a draft access undertaking, it must give the party who submitted the undertaking a written notice stating the reasons for the refusal and the way in which the Authority considers it is appropriate to amend the draft access undertaking.

[3] QCA Act s.138(2).

1.4 DBCT Draft Access Undertaking

On 20 April 2005, the Authority published its decision to refuse to approve a draft access undertaking submitted by DBCT Management. That decision set out the reasons for refusing to approve the draft access undertaking and outlined how it had to be amended in order to be approved by the Authority.

Following the release of the Authority's decision, DBCT Management and the users of the facility, represented by the DBCT User Group, entered into discussions to resolve all outstanding matters in relation to the draft access undertaking and an associated standard access agreement.

Because of concerns about the time being taken to finalise the discussions, on 21 October 2005 the Authority issued DBCT Management with an initial undertaking notice in accordance with s.133 of the QCA Act. This notice required DBCT Management to submit a revised draft access undertaking which was consistent with the Authority's decision by 19 January 2006. On 4 January 2006, DBCT Management submitted a draft access undertaking (DAU) in accordance with the initial undertaking notice, as well as an associated standard access agreement (SAA).

On 9 January 2006, the Authority sought submissions from interested parties on the DAU. Submissions were received from the DBCT User Group, Macarthur Coal, Rio Tinto Coal Australia, Anglo Coal and Peabody Pacific.

Submissions were generally supportive of the DAU, although Anglo Coal and Peabody Pacific raised objections regarding the DAU's treatment of requests for additional capacity and of revenue modelling. Peabody Pacific also raised concerns regarding penalties for over-shipment.

Given the comprehensive consultation process undertaken prior to the Authority issuing its decision on 20 April 2005, the Authority chose not to issue a draft decision in respect of the 2006 DAU.

However, on 3 March 2006, Anglo Coal and Peabody Pacific were invited to make further submissions regarding their particular objections.

On 22 March 2006, both parties made supplementary submissions on the DAU's treatment of requests for additional capacity.

On 13 April 2006, the Authority sought stakeholder comments on the impact on access seekers' legal rights if the Authority approved the DAU as submitted or if the Authority required the DAU be resubmitted to incorporate the pro-rata approach to capacity allocation proposed by Anglo Coal and Peabody Pacific in their supplementary submissions.

Context of the Assessment

On other than a small number of issues, the DAU submitted by DBCT Management was supported by the DBCT User Group representing all current users of the terminal. This had a significant impact on the extent and focus of the Authority's investigations into the DAU and SAA. To the extent that both documents reflect a negotiated agreement between DBCT Management and all users, the Authority is prepared to accept that the DAU and SAA are in the interests of those parties.

However, a small number of issues have not been agreed and have been raised by existing users. Moreover, the Authority must also have regard to the public interest and the interests of future access seekers who are not members of the DBCT User Group.[4]

The Authority's investigations therefore have focussed on these issues. The Authority has also examined the DAU and SAA in detail for consistency with the Authority's April 2005 decision. While the Authority has considered all of these matters, this decision particularly focuses on:

- *queuing of access applications* – including whether the undertaking should incorporate the queue for terminal capacity formed prior to the commencement of the undertaking;
- *creditworthiness* – the reasonableness of the requirements relating to the provision of security;
- *capacity issues* – the process for regulatory approval of capacity expansions;
- *pricing arrangements* – the pricing methodology in relation to the terminal;
- *other issues relevant to the undertaking* – including DBCT Management's lodgement of the undertaking in its own right rather than jointly with Holdings and the process for making changes to terminal regulations; and
- *the standard access agreement* – including whether the principles contained in the Authority's April 2005 decision for the development of an SAA are adequately reflected in the proposed SAA.

[4] QCA Act s.138(2)(c) and (d).

2. NEGOTIATION FRAMEWORK

In its April 2005 decision, the Authority proposed a series of amendments to the negotiation framework to provide greater certainty for both DBCT Management and access seekers about their respective rights and obligations. This included specifying the information to be provided by access seekers in their applications, processes for DBCT Management's handling of access applications and the related provision of Indicative Access Proposals (IAPs).

The resubmitted DAU is broadly consistent with the Authority's April 2005 decision and reflects agreement between DBCT Management and users on most aspects of the negotiation framework. Therefore, this chapter focuses on those areas where there is not universal agreement on the proposed arrangements or where there is a substantive departure from the negotiation arrangements proposed in the April 2005 decision. Section 2.1 focuses on queuing of access applications and section 2.2 considers creditworthiness requirements.

2.1 Queuing of Access Applications

Capacity requests made prior to the commencement of the Undertaking

The Authority's April 2005 decision considered it appropriate that there be a transparent and equitable mechanism in place to deal with a situation in which there is insufficient capacity to meet all access applications. The Authority proposed a queuing mechanism whereby access seekers would be placed in a queue according to the dates on which their access applications were made.

The Authority also proposed that, where an access seeker notifies DBCT Management of its willingness to execute an access agreement, DBCT Management should be obliged to notify all access seekers ahead of that access seeker in the queue. These access seekers would then be given 20 business days to finalise their respective access negotiations. If any notified access seekers wished to conclude agreements, DBCT Management would be required to give priority to them according to their positions in the queue. If, at the end of the 20 day period, notified access seekers have not delivered to DBCT Management signed access agreements that exhaust the available capacity, DBCT Management may then conclude an access agreement with the notifying access seeker who had already indicated its willingness to execute an access agreement.

The DAU broadly adopts the Authority's April 2005 position in relation to queuing. In particular, the DAU provides that, if at any time DBCT Management has before it more than one access application and there is insufficient capacity to accommodate those access applications, a queue will be formed.

In general, an earlier access application has priority in the queue over any later access applications. The DAU also contains notice provisions similar to those envisaged by the April 2005 decision. Among other things, these provisions retain the ability for an access seeker lower in the queue to finalise an access agreement if access seekers above it in the queue are not also willing to do so. The notice provisions also provide flexibility for an access seeker to give notice that it is prepared to enter into an access agreement for a lower tonnage or shorter term than originally requested.

The queuing arrangements have also been extended beyond the Authority's April 2005 decision in two key ways.

First, DBCT Management has proposed to recognise binding requests for capacity that were made prior to the DAU coming into force, in the order in which they were made. For ease of

reference, this is referred to as the 'pre-existing queue' in this document. DBCT Management has proposed to recognise the pre-existing queue by incorporating it into the queue created in the DAU. In practice, therefore, the DAU will 'grandfather' the pre-existing queue and access seekers who seek additional capacity after the commencement of the DAU will be added to the pre-existing queue.

Second, the DAU provides an option for access holders to extend the terms of their agreements (under certain circumstances). For the purposes of determining positions in the queue, those options will be deemed to have been exercised immediately prior to the formation of the queue. However, DBCT Management has the right to seek to have this option exercised or waived.

Stakeholder comments

In reviewing DBCT Management's proposal to incorporate the pre-existing queue into the DAU, the Authority engaged in a comprehensive consultation process. This included the Authority requesting comments on the DAU as part of its investigation as well as seeking supplementary submissions specifically on the treatment of the pre-existing queue, particularly focussing on the alternative pro-rata queuing proposal made by Anglo Coal and Peabody Pacific and on the potential impact of the alternative queuing proposals on the legal rights of parties.

Through these processes, the Authority has received a wide range of submissions. In contrast to its comments on other aspects of the DAU, the DBCT User Group's submission did not comment on the proposed treatment of requests for capacity that were made prior to the DAU coming into force. This reflected the divergent views of members of the DBCT User Group on this issue. In particular, the submissions from individual users of the terminal either supported the queuing arrangements proposed in the DAU or rejected that approach and supported the alternative, pro-rata approach to capacity allocation.

The submissions on this matter were made in the knowledge that requests for additional capacity would in all likelihood exceed the capacity that would be made available by the proposed expansion. Consequently, the treatment of requests for capacity is a substantive matter.

Submissions opposing the process of allocating capacity in the DAU

Peabody Pacific and Anglo Coal opposed the process for allocating capacity in the DAU for a number of key reasons, as outlined below.

First, Peabody Pacific and Anglo Coal submitted that the process for allocating capacity by DBCT Management had not been made clear.

Anglo Coal submitted that "the basis on which the pre-existing queue was established has … at the very least has been vague and uncertain" (Anglo Coal, sub. no. 3: 1). In particular, Anglo Coal noted that correspondence from DBCT Management on 11 June 2004 referred to an allocation process based on a 'first to commit' method, though there was no definition nor explanation as to what that term meant (Anglo Coal, sub. no. 3: 1).

In addition, Anglo Coal indicated that, when DBCT Management wrote on 2 July 2004 enquiring whether, among other things, Anglo Coal required additional entitlements, the letter did not clearly advise that responses to that letter would be used as the basis for establishing a queue for expanded terminal capacity. In any event, Anglo Coal noted that on 30 July 2004 it advised DBCT Management of its additional capacity requirement, which was, *inter alia*, subject to Board approval.

Both Anglo Coal (Anglo Coal, sub. no: 3: 2) and Peabody Pacific (Peabody Pacific, sub. no. 13: 6-7) also referred to DBCT Management's letter of 19 April 2005 in which DBCT Management advised that it:

> *…is contemplating allocating scarce capacity to Users based on the order that it received Binding Indications…* (Prime Infrastructure 2005a: 1).

Peabody Pacific (Peabody Pacific, sub. no. 13: 7) also cited a subsequent letter of 3 June 2005 in which DBCT Management indicated that it was:

> *… currently in the process of determining the additional entitlements that it is able to offer individual Users, based on the methodology outlined in [the 19 April 2005 letter]* (Prime Infrastructure 2005b: 1).

Anglo Coal argued that the 19 April 2005 letter demonstrated that DBCT Management had not settled on a method for allocating scarce capacity at that point in time. They also noted that they responded to the 19 April 2005 letter on 21 April 2005 (Anglo Coal, sub. no. 3: 2).

Similarly, Peabody Pacific stated that, once the process for allocating capacity had become clearer, they responded on 15 June 2005 to DBCT Management's letters of 19 April 2005 and 3 June 2005, with a request for expansion capacity (Peabody Pacific, sub. no. 13: 7). As such, Peabody Pacific contended that it requested expansion capacity within a reasonable time of DBCT Management indicating its intention to allocate capacity on the basis of a chronological receipt of binding indications.

Second, both Anglo Coal and Peabody Pacific indicated they have made significant investments in their mining operations in anticipation that adequate port capacity would be available. Anglo Coal noted that it has made significant investments in expanding its Lake Lindsay mine (Anglo Coal, sub. no. 3: 3). Similarly, Peabody Pacific noted that it has undertaken significant expenditures, including on its North Goonyella mine, in reliance on its expectation that it would receive an equitable allocation of the expanded capacity (Peabody Pacific, sub. no. 13: 9).

Third, Peabody Pacific advised that DBCT Management had allocated expansion capacity in accordance with queuing rules and protocols that DBCT Management had formulated and not in accordance with an approved undertaking. This was in contrast to Peabody Pacific's understanding that the terms and conditions of access to expanded capacity would be governed by an access undertaking that was accepted by the Authority. Therefore, Peabody Pacific considered that the approval by the Authority of DBCT Management's rules and protocols for allocating capacity by approving the 2006 DAU would have a retrospective effect. Peabody Pacific submitted that this would be neither fair nor reasonable (Peabody Pacific, sub. no. 13: 11).

Given their objections, Peabody Pacific, and initially Anglo Coal, proposed that the existing queue be set aside and reconstituted by allocating capacity on a pro-rata basis. This queue would apply to all existing access seekers and any new access seekers that are seeking additional capacity. These access seekers would be required to notify DBCT Management of their capacity requirements within 20 days following the commencement of the undertaking. All access seekers would receive a pro-rata allocation of capacity that becomes available until those requests for access are satisfied (Peabody Pacific, sub. no. 12: 2, Anglo Coal, sub. no. 2: 2).

In response to a subsequent request for comment by the Authority, Peabody Pacific advised that it was not in a position to comment on the potential impact on the legal rights of various parties of the Authority accepting either the DAU as submitted or its proposed pro-rata approach to capacity allocation.

While Peabody Pacific continues to support a pro-rata approach to capacity allocation, Anglo Coal subsequently submitted that the delay that would arise as a result of re-allocating capacity on a pro-rata basis under an approved undertaking would lead to further delays in commissioning new capacity at the terminal. On this basis, Anglo Coal concluded that it "is prepared to allow the current method of allocating capacity by BBI but reserves its position in the event that this does not deliver a fair outcome…" (Anglo Coal, sub. no. 3: 3).

Submissions supporting the process of allocating capacity in the DAU

In contrast to the views of Peabody Pacific and Anglo Coal, DBCT Management, Foxleigh Mining, Xstrata Coal, Rio Tinto Coal Australia, AMCI and Macarthur Coal supported the allocation of capacity on the basis of the pre-existing queue and the grandfathering of this queue into the DAU.

First, a number of stakeholders argued that the process undertaken by DBCT Management for allocating expansion capacity was transparent, clear and equitable.

In this regard, DBCT Management submitted that it provided all users with the same communications in relation to its intentions to allocate capacity on a 'first to commit' basis and that all users had the same opportunity to query the process if they were uncertain. DBCT Management also contended that it treated all applications fairly and equally in considering whether any correspondence from parties represented a bona fide offer to enter an unconditional contract for a term that justified expansion, or was merely an inquiry or foreshadowed expectation of future requirements that was nevertheless subject to certain conditions or approvals being obtained (DBCT Management, sub. no. 7: 1).

In support of DBCT Management's position, Foxleigh Mining submitted that the queuing system to allocate capacity was communicated in a transparent, timely and proper manner to users and added that:

> *Peabody was given an equal opportunity with all other users to request additional capacity...* (Foxleigh Mining, sub. no. 9: 2).

Similarly, both Rio Tinto Coal Australia and Macarthur Coal submitted that, on a series of occasions, DBCT Management indicated the methodology that it would use to allocate capacity. In particular, Rio Tinto Coal Australia advised that:

> *DBCT Management made it clear in correspondence to* ***all*** *Users as early as 17 December 2002 and 11 June 2004 that it would continue to allocate capacity on a "first in, first served" basis or "first to commit" basis. The fact that DBCT Management had consistently communicated this message over a long period was explicitly confirmed in the circular letter of 13 October 2005* (Rio Tinto, sub. no. 15: 3).

AMCI submitted a similar view, noting that:

> *[a]ll users were informed of the proposed method of allocating surplus capacity in correspondence from DBCT Management… [and that] DBCT Management allocated capacity in accordance with the process advised in advance by them in writing in June 2004* (AMCI, sub. no. 3: 2).

Second, some stakeholders also contended that it was reasonable to allocate capacity on a first to commit basis.

In particular, DBCT Management argued that:

> *…expansion is an evolutionary process ultimately triggered by an appropriate level of real demand, underwritten by binding offers to take up expansion capacity* (DBCT Management, sub. no. 7: 2).

DBCT Management therefore considered that it is fair and reasonable that those users who were first willing to contract, and whose willingness to contract was responsible for the decision to expand, be given priority.

This position was also broadly supported by Rio Tinto Coal Australia and Macarthur Coal. In particular, Macarthur Coal noted that DBCT Management made it clear to terminal users that it would not expand the terminal without binding offers from access seekers and that the rationale for this was to have sufficient revenue certainty to undertake expenditure on expansion works (Macarthur Coal, sub. no. 11: 2).

Third, a number of stakeholders, including AMCI, Foxleigh Mining and Rio Tinto Coal Australia, advised that they have undertaken substantial investments on the understanding that they would receive expansion capacity. For instance, Rio Tinto Coal Australia submitted that it committed to expenditure to expand its Hail Creek mine, but only after careful consideration of, *inter alia*, whether it would be in any queue for expansion capacity. In this regard, Rio Tinto Coal Australia advised that it recognised that early commitment would significantly increase the probability of tonnages being available (Rio Tinto, sub. no. 15: 5).

Fourth, while Peabody Pacific argued that the Authority's approval of the DAU would have a retrospective effect, some supporters of the DAU noted that failure to approve the DAU would also have retrospective effects. In particular, Macarthur Coal stated that:

> *[t]o amend Section 5 [the queuing provisions in the DAU] to retrospectively take away the priority that BBI has given to those users will only serve to penalise those users who were prepared to back the expansion in order to receive additional tonnes in the most timely manner* (Macarthur Coal, sub. no. 11: 2).

AMCI made a similar argument, noting that:

> *[s]hould an access seeker make a bona fide offer, as has been the case in the recent allocation process, it should not be capable of being overturned by another access seeker who may subsequently decide to lodge an offer to enter an access agreement* (AMCI, sub. no. 1: 3).

Rio Tinto Coal Australia also separately noted that:

> *… RTCA has not only lodged binding offers with DBCT Management, but it has also provided additional valuable consideration to DBCT Management by underwriting significant expenditures by DBCT Management on the basis that it has a guaranteed position in the "queue". Several other users have done the same* (Rio Tinto Coal Australia, sub. no. 15: 5).

Accordingly, Rio Tinto Coal Australia submitted that each of the parties who have underwritten expenditure by DBCT Management may have their legal rights interfered with if the alternative proposal for allocation submitted by Peabody Pacific, and initially Anglo Coal, were accepted.

Finally, in addition to supporting DBCT Management's proposed process for capacity allocation, several stakeholders argued that there were shortcomings with the pro-rata approach to capacity allocation.

For instance, Xstrata Coal argued that a pro-rata mechanism at this stage would create greater uncertainty, inefficiency and potential gaming (Xstrata Coal, sub. no. 16: 1). These views are consistent with those of Macarthur Coal who submitted that the pro-rata proposal was unworkable and likely to lead to arbitrary allocations of capacity that may not be sufficient for the purpose for which users seek additional capacity. Macarthur Coal argued that these factors would lead to gaming by access seekers to ensure, as far as possible, that they receive their desired additional capacity (Macarthur Coal, sub. no. 11: 3).

Authority's Analysis

The Authority has considered in detail the proposed queuing mechanisms at DBCT, following the divergent views of stakeholders on this issue. In doing so, the Authority has had regard to the views of stakeholders and undertaken its own assessment of the facts available to it. In addition, the Authority has necessarily had regard to the assessment criteria set out in s.138(2) of the QCA Act.

The Authority's analysis is in two parts. First, the Authority has examined the substance of the claims placed before it. Second, the Authority has analysed the various options open to it in terms of the treatment of requests for capacity made prior to the DAU coming into force.

Consideration of stakeholders' claims

First, the Authority notes that a number of users consider that DBCT Management's approach to allocating capacity was well known. These users also consider that it was reasonable for DBCT Management to allocate capacity in the order in which current and potential users offered to acquire it from DBCT Management. These users note that they responded in a timely manner with binding offers and, as a result, have a good chance of being allocated all of their capacity requests under the first to commit basis of allocation.

Conversely, both Anglo Coal and Peabody Pacific consider that DBCT Management's capacity allocation process was unclear and not communicated in a timely manner until at least mid-2005. Further, Peabody Pacific considers that, as a result, it will not receive an equitable allocation of expansion capacity.

In addition to the submissions presented, the Authority reviewed DBCT Management's records relating to its administration of the process for allocating expanded terminal capacity. This review indicated that requests for additional capacity exceed the capacity that will become available through the planned expansion.

The review also indicated that DBCT Management had written in similar terms to all users regarding its process for allocating capacity at the terminal. In particular, Peabody Pacific and Anglo Coal were afforded the same opportunity as other parties to seek capacity.

With the benefit of hindsight, it is arguable that DBCT Management's queuing process could have been clearer. At the same time, if Peabody Pacific and Anglo Coal were uncertain about DBCT Management's intentions, they had sufficient opportunity to seek clarification from DBCT Management. The material available to the Authority indicates that they did not do so. Indeed, the opposite conclusion could be drawn from Peabody Pacific's letter of 15 June 2005, where Peabody Pacific indicated for the first time that it was seeking increased annual capacity (Peabody Pacific 2005).

Second, the Authority accepts that a first to commit basis for allocating capacity is reasonable and is a well established practice. Even Peabody Pacific and Anglo Coal did not argue against it as a general principle for allocating capacity.[5] In addition, everything else being equal, it results in those parties who first made binding offers, and who thus provided the revenue certainty to promote the expansion, being given priority in terms of expanded capacity.

Third, the Authority notes that parties from both sides of this issue have provided information detailing substantial investments made in anticipation of receiving additional capacity. These parties will be disadvantaged by any capacity allocation process that provides them with less capacity than anticipated. By itself, this is not a reason to set aside the allocation approach proposed by DBCT Management. However, whether the interests of those access seekers were

[5] Their concern relates to its application on this occasion.

affected because of the manner in which DBCT Management conducted the allocation process is a relevant issue.

Fourth, parties have made competing arguments that the Authority's decision on the DAU will have a retrospective impact. Peabody Pacific argued that the Authority's approval of DBCT Management's queuing process would be retrospective as it would give effect to DBCT Management's pre-existing process. In contrast, supporters of grandfathering the pre-existing queue argued that accepting a pro-rata approach to capacity allocation would be retrospective as it would overturn the capacity allocation process that had been put in place by DBCT Management.

It is not clear to the Authority that acknowledging now a process that has occurred in the past is a retrospective act. This is because the Authority's approval of the DAU merely recognises DBCT Management's actions to date. In contrast, if the Authority were to support a pro-rata approach, this would clearly entail a retrospective re-ordering or altering of entitlements granted under the capacity allocation process adopted by DBCT Management.

Consideration of alternative queuing mechanisms

Notwithstanding the absence of an approved access undertaking, DBCT Management has been dealing with access holders and access seekers regarding the allocation of expansion capacity. As such, the respective parties may have accrued certain rights at law. Access holders and access seekers may have rights to seek redress from DBCT Management for damages or compensation in the event that their requested capacity allocations are not met as a result of an act or omission on the part of DBCT Management. Parties may also be able to seek legal redress to have the queue reordered in such cases.

The Authority has considered the potential availability of such rights in assessing the interests of access seekers, in the context of a range of options available to it with respect to the capacity allocation process at DBCT. Of these, the Authority considered the following three key options in some detail:

- *accepting a pro-rata approach to capacity allocation* – as advocated by Peabody Pacific, and initially by Anglo Coal;
- *accepting the provisions in the DAU relating to the pre-existing queue* – as supported by DBCT Management and the majority of the users; and
- *requiring that the DAU be resubmitted to reflect a queuing mechanism for capacity allocation that commences and takes effect at commencement of the undertaking* – as per the Authority's April 2005 decision.

Pro-rata approach to capacity allocation

If the Authority were to accept the pro-rata approach to capacity allocation, those access seekers currently at the head of the pre-existing queuing would, in all likelihood, have their capacity allocations reduced. Similarly, even though those at the end of the queue would now receive allocations of capacity, they would be unlikely to gain all of their requested capacity.

According to the advice of Senior Counsel, it is unlikely that any of these access seekers could successfully seek any remedy against DBCT Management if the pro-rata option was adopted by the Authority. This is because these access seekers, if they were to commence legal proceedings against DBCT Management, would have to prove that their losses resulted from the actions of DBCT Management. However, any losses suffered by these access seekers would in

all probability be considered to be attributable to the Authority requiring DBCT Management to include the pro-rata arrangement in the undertaking, with DBCT Management then being legally required to comply with that undertaking.[6]

In this regard, Senior Counsel's advice was:

> *BBI can legitimately say that the loss suffered by an access seeker, being loss of a place or priority in the queue established by BBI, is attributable only to the Authority's rejection of the DAU incorporating that queue, and is not attributable to any conduct of BBI. BBI's conduct in establishing the queue and pressing for its incorporation in an approved access undertaking has not caused any loss to an access seeker in the queue if access on a pro-rata approach is adopted* (Hinson 2006: 4).

Accepting the 2006 DAU as submitted

If the Authority were to approve the 2006 DAU as submitted, those access seekers at the head of the queue would be likely to receive their full requested capacity allocations.

However, access seekers towards the bottom of the queue might not receive all (or any) of their desired capacity allocations. If these access seekers believed that this outcome arose because of, *inter alia*, an act or omission of DBCT Management, they might wish to pursue a remedy against DBCT Management.

Unlike the case of approval of the pro-rata approach to capacity allocation, Senior Counsel's advice is that approval of the DAU by the Authority would not impact on the legal rights of aggrieved parties to claim damages. As Senior Counsel has advised the Authority:

> *While approval by the Authority of the DAU binds BBI to act in accordance with the approved access undertaking, it was always BBI's intention to give effect to the existing queue. The Authority's approval of the DAU is conduct which is consistent with BBI's intended course of conduct which is to give effect to the existing queue. In my opinion, there is no break in the chain of causation between BBI's conduct and any loss suffered by Anglo or Peabody simply because BBI is bound, by s.150A of the Act, to give effect to an approved undertaking, when it was always BBI's intention to give effect to the existing queue and BBI sought approval of the DAU which gives effect to the existing queue* (Hinson 2006: 3).

The Authority's approval of the 2006 DAU as submitted could however impact on the potential ability of an access seeker to seek a court order directing DBCT Management to reorder the queue or adopt a different approach to allocating capacity. However, in this regard, the Authority notes advice from Senior Counsel that "[i]n short, there is no real prospect of such an order being made, and at best Anglo or Peabody would be entitled if successful to an award of damages" (Hinson 2006: 3).

Queue formed after date of commencement

No submissions were submitted to the Authority arguing that the undertaking should focus only on the future management of a queue and be silent on the formation of the queue prior to the undertaking's commencement date. Such an approach, however, would be consistent with the Authority's April 2005 decision.

Approving an undertaking which reflected this option would have similar impacts on the interests of access seekers as would approving the 2006 DAU as submitted.

However, such an approach would leave unresolved the issue of the pre-existing queue and the entitlements of access seekers in that queue. This could reduce the certainty that DBCT Management has in progressing its current expansion plans as it has previously indicated to

[6] QCA Act s. 150A.

users that "it was only prepared to undertake an expansion of DBCT if it could secure a sufficient level of revenue certainty to support an expansion" (DBCT Management 2006a: 1).

If this were to occur, it could have an adverse impact not only on the interests of access seekers but also on the legitimate business interests of DBCT Management, and on the public interest if economic development in central Queensland were set back.

The Authority's approach to the allocation of expansion capacity

In considering this matter, it is relevant that stakeholders accept, and the Authority's own review confirms, that existing requests for expansion capacity at DBCT are in excess of the current plans for expansion. As a result, some access seekers' interests will be adversely affected, irrespective of the capacity allocation mechanism that is adopted. By itself, this is not a reason to set aside the allocation approach proposed by DBCT Management. However, whether the interests of those access seekers were affected because of the manner in which DBCT Management conducted the allocation process is a relevant issue.

The Authority accepts that a first to commit principle is a reasonable basis upon which to form a queue for the allocation of expanded capacity. As indicated earlier, it is a well established practice that even Peabody Pacific and Anglo Coal did not argue against as a general principle for allocating capacity.[7] In addition, everything else being equal, it results in those parties who first made binding offers, and who thus provided the revenue certainty to promote the expansion, being given priority in terms of expanded capacity.

It is also the approach proposed by the operator of the facility.

Consequently, the Authority would not seek to reject such an approach unless it had been demonstrated that the queue had not been formed in an appropriate manner and that it was in the interests of access seekers or in the public interest to reorder the queue.

Based on the material before it, the Authority has formed the view that DBCT Management treated all potential access seekers in a consistent manner and that it has not been demonstrated that the queue was formed in an inappropriate manner.

The Authority does not consider that it would be in the interests of access seekers generally, or in the public interest, to reconstitute that queue based on a pro-rata allocation of capacity as proposed by Peabody Pacific and initially by Anglo Coal. An important factor in this regard is that, under the pro-rata approach, any adversely affected access seekers could not seek damages or compensation from DBCT Management for their losses.

In contrast, under either of the other two options, an adversely affected access seeker could seek damages from DBCT Management if they were of the view that they could establish that their legal rights had been adversely affected as a result of an act or omission of DBCT Management.

Moreover, the Authority accepts that it is in the interests of access seekers and DBCT Management, and in the public interest, that the access undertaking should clearly address the issue of the pre-existing queue, thus rendering inappropriate the option of a queue that only looked forward.

Therefore, the Authority accepts the queuing provisions in the 2006 DAU.

[7] Their concern relates to its application on this occasion.

Rights of existing access holders under the queuing provisions

The resubmitted DAU provides for an incumbent user to extend the term, but not capacity allocation, of their agreement in a limited set of defined circumstances. Moreover, it proposes that, in doing so, an incumbent user does not have to enter the queue and compete with new users for the capacity over the extended term. In other words, an incumbent user may receive priority over access applications by prospective new users. The DAU states that the two sets of circumstances in which this can occur are:

- within 40 days of the Authority's approval of the DAU, an existing user can seek to transfer to a new access agreement and, in doing so, can seek to extend the term of that new agreement (clause 5.4(h)(2)); and

- any user on an access agreement (as distinct from an existing user agreement) can seek to extend the term of that agreement in accordance with a bona fide re-estimation of mine life (clause 5.4(h)(3)).

Authority's Analysis

The Authority understands that the purpose of these two clauses is to limit the possibility of stranding the assets of an existing mine where it might otherwise face premature closure because it does not have a sufficiently long contract with the terminal.

This arrangement will have little effect when there is spare or developable capacity to meet the future requirements of all access seekers and holders.

However, when capacity is constrained and there are limited expansion options, the effect of this arrangement will be to push new access seekers further down the queue and defer the development of their new mines or mine expansions. This possible outcome has its own costs that need to be balanced against those of stranding the assets of incumbent users.

The Authority can understand why incumbent users would agree to such a proposal as it gives them an option that new access seekers do not possess. As a result, the Authority is not prepared to accept these clauses simply because they are part of a negotiated arrangement between the members of the DBCT User Group and DBCT Management.

Submissions did not comment on this aspect of the DAU. Consequently, the Authority has not sought to speculate on the likely arguments for or against providing incumbents with a degree of priority over new access seekers.

Rather, in considering this matter, the Authority has placed considerable weight on the narrowly defined set of circumstances in which an incumbent user/access holder can extend the term of an existing agreement.

Clause 5.4(h)(2) provides a 40 day window in which an existing user can seek to extend the term of their user/access agreement. As the undertaking proposes no limit on the term of an extended agreement, this potentially confers a very significant right on to incumbent users. In this regard, the Authority makes two observations.

First, this application period expires in the very short term. Therefore, the Authority would expect that, if any new user was going to be significantly adversely affected by this provision, it would have made its views known to the Authority. The Authority has received no such submissions.

Second, most of the existing contracts expire in the medium term and well beyond the capacity requirements of access seekers in the current queue. To this extent, the Authority does not believe that clause 5.4(h)(2) will provide an existing user with any additional rights over and above what it might acquire by simply lodging a new access application now to take effect upon the expiry of its existing access agreement.

Clause 5.4(h)(3) allows an access agreement to be extended where there is a re-estimation of mine life. While there may be many factors that could lead to a re-estimation of mine life, some of which may be in control of the mine owner, this clause requires that any re-assessment must be bona fide.

Consequently, the Authority considers that the adverse impact on new access seekers is likely to be less than the benefits of additional certainty, including the reduction in asset stranding risks, it provides to existing access holders.

2.2 Creditworthiness and Provision of Security

The Authority's April 2005 decision included measures that allowed DBCT Management to address and manage creditworthiness risk. In particular, DBCT Management could cease negotiations if it considered that the access seeker is unlikely to comply with the material terms and conditions of an access agreement or if the access seeker, or its guarantor, is not of good financial standing.

Further, the SAA principles included the ability of either party to request a guarantee based on an assessment of the creditworthiness of the other party. However, in requesting any guarantee or security, the SAA principles also provide that the 'requesting party' must act reasonably and in good faith.

The resubmitted DAU includes a range of provisions in relation to creditworthiness that were not included in the Authority's April 2005 decision. In particular, the DAU provides that:

- DBCT Management will not be required to enter into an access agreement or proceed with an access application with an access seeker which is, or has become, insolvent or which fails to establish its creditworthiness;

- where an access seeker/guarantor is unable to establish its solvency and creditworthiness, the access seeker/guarantor may establish creditworthiness by providing security or guarantees as required by DBCT Management; and

- to confirm the solvency and creditworthiness of an access seeker or provider of a security, the access seeker will provide such information as may be reasonably requested by DBCT Management to establish that solvency and creditworthiness.

Authority's Analysis

The Authority accepts the need for creditworthiness obligations in the undertaking. The Authority also accepts that creditworthiness requirements impose an additional cost on access seekers and may hinder access for certain prospective users of the terminal. It may also disadvantage smaller access seekers for whom the provision of security may be more costly.

Nevertheless, the Authority believes creditworthiness requirements are reasonable as DBCT Management, and indeed other access holders, may be exposed to considerable risk if DBCT Management contracts with parties who do not have significant assets in their own right or do not have a demonstrable ability to pay. In this regard, the Authority notes that the resubmitted DAU provides for DBCT Management to bear the risk of an insolvent user until the earlier of

either the date at which: the current undertaking expires; the terminated agreement would have expired; or that tonnage under the terminated agreement is replaced (subject to any new tonnage being first allocated to any uncontracted spare capacity before it replaces tonnage under a terminated agreement).

While there are good reasons to include creditworthiness requirements in the undertaking, the Authority notes that this requirement is balanced with the rights of access seekers. In particular, DBCT Management does not have unlimited discretion in determining the manner in which access seekers must demonstrate creditworthiness and in determining the amount of security required. For instance, the DAU requires DBCT Management to act reasonably when assessing creditworthiness and requesting security. In this regard, the Authority notes that the DAU provides guidance on the manner in which creditworthiness will be established, including through the provision of letters of credit and guarantees or securities from entities with a relevant Standard and Poors or Moodys rating.

In any event, the DAU explicitly provides for either party to dispute, and for the Authority to determine, any such dispute in relation to the provision of a security (refer to Clause 5.4(d), Clause 5.4(g)(2) of the DAU) and for broader dispute resolution provisions (refer to Clause 5.10(d) and Clause 15.6 of the DAU and SAA respectively).

Given these factors, the Authority considers that the DAU provides an appropriate balance between the interests of DBCT Management, access holders and access seekers in relation to creditworthiness.

3. CAPACITY

3.1 Determining Capacity

In its April 2005 decision, the Authority noted that determining terminal capacity is a complex issue. As a result, the Authority sought to include in the access undertaking a transparent process so that all current and potential users could understand how terminal capacity is determined.

The decision required DBCT Management both to disclose its decision making process for determining terminal capacity and to consult with access holders not less than twice per year on issues relating to terminal capacity. The Authority also required DBCT Management to reassess terminal capacity upon the completion of each capacity expansion or, in the absence of an expansion, at least once a year to take account of the various factors that can affect terminal capacity in any given year.

In addition to complying with these requirements, DBCT Management's resubmitted DAU also states that, when DBCT Management determines terminal capacity, it must have regard to factors such as:

- the historical and reasonably estimated rates of utilisation of the terminal's capacity and reasonably foreseeable future changes;
- an objective of maximum reasonably achievable throughput capacity for the terminal without unduly escalating demurrage costs;
- rail and vessel interfaces with the terminal; and
- the estimated additional capacity which it is anticipated will become available in a relevant financial year as a result of any proposed capacity expansion.

The resubmitted DAU also includes provisions preventing DBCT Management from entering into any new access agreements that would have the effect of exceeding terminal capacity. In addition, the resubmitted DAU exempts DBCT Management from liability for any delay due to aggregate annual contract tonnage exceeding terminal capacity for any reason external to the terminal (for example rail or shipping) or because any one or more factors related to capacity utilisation subsequently change (for example, changes in service levels required, the nature of coal handled or vessel mix) (DBCT Management, sub. no. 5: 23-24).

Authority's Analysis

The Authority considers that the resubmitted DAU builds upon the Authority's April 2005 decision requirements to create a transparent capacity determination framework. In particular, the Authority believes that the additional factors DBCT Management must have regard for when determining terminal capacity will further strengthen the transparency and, in turn, the likely robustness of capacity determinations.

The Authority also considers it is reasonable that DBCT Management not enter into any new access arrangements that would have the effect of exceeding terminal capacity, unless required to do so by capacity expansion provisions of the access undertaking or Port Services Agreement (PSA).

Finally, the Authority recognises that, in operating a port, there are a number of factors outside the control of DBCT Management, such as train and ship arrivals, changes in vessel mixes etc.

To this extent, the Authority considers it reasonable that DBCT Management not be held liable for delays where aggregate annual contract tonnage exceeds terminal capacity due to reasons external to the terminal or changes in factors relating to capacity utilisation of the terminal.

3.2 Capacity Expansion Approval Process

The approach adopted by the Authority and other Australian regulators for approving capital expenditure generally reflects a two stage process. First, the regulator conducts an upfront assessment of the reasonableness of the proposed capital expenditure program for tariff setting purposes. Second, at the end of the regulatory or undertaking period, the regulator assesses the prudency and efficiency of actual capital expenditure undertaken for inclusion into the asset base.

In the case of DBCT, DBCT Management did not submit a forecast capital expenditure program to underpin future capacity expansions at the terminal. Rather, DBCT Management sought to expand the terminal as and when required and on the basis of the capacity expansion triggers in the PSA. That is, DBCT Management proposed to expand the terminal on receipt of a bona fide offer from a creditworthy access seeker where the proposed new tonnages would result in a material and sustained increase in demurrage or rail transport costs.

Authority's April 2005 Decision

In its April 2005 decision, the Authority expressed concern as to whether the proposed expansion triggers (increased demurrage or rail transport costs) could be effectively activated to ensure that expansions occurred and delay costs were reduced.

As a result, the decision set out a framework to facilitate and approve capital expenditure associated with capacity expansions. The purpose of the framework was to not only encourage and facilitate capacity expansions at the terminal but to also provide regulatory certainty as to how capacity expansion costs would be assessed.

The framework involved the Authority 'automatically' approving the scope of a proposed expansion provided that three principles were met:

- DBCT Management secures from access seekers firm contracts for at least 60% of the proposed terminal capacity increment;
- 60% of existing access holders (i.e. users) do not oppose the expansion (this requirement and the one above are known as the 60/60 requirement); and
- the proposed expansion path is consistent with an approved DBCT Master Plan.

The first two principles were premised on the basis that terminal users and future access seekers are in the best place to assist DBCT Management and the regulator to assess the demand for future capacity requirements. The third principle was included as DBCT Management has a legal obligation under the PSA to expand the terminal in accordance with a Master Plan approved by Holdings, the terminal's owner.

The Authority believed these principles would assist the regulatory approval of capital expenditure by bringing users and access seekers into the regulatory decision making process.

The Authority's decision also sought to facilitate the regulatory approval of expansion costs by providing for the Authority to approve, upfront, a tender process for expansion works and to accept the costs which are the result of an approved tender process into the regulated asset base.

The aim of this tender process is to generate efficient expansion costs while at the same time introducing more certainty into a streamlined regulatory approval process for capital expenditure.

Expansion Approval Process

Following the release of the Authority's decision, DBCT Management indicated that, while it supported the Authority's proposed approval framework, it was concerned that the proposal lacked detail and may not be consistent with its own expansion plans and procedures.

As a result, the Authority worked with DBCT Management on an informal basis to further develop the detail and processes for approving capacity expansions at the terminal.

A copy of the more detailed expansion approval process was provided to DBCT Management and the DBCT User Group for consideration prior to the resubmission of the DAU. The resultant expansion approval process is reflected in clause 12.5 of the DAU (DBCT Management, sub. no. 5: 26-35).

Clause 12.5 of the DAU focuses on two key aspects of the Authority's assessment of capital expenditure, namely:

- approval of the scope and standard of a capacity expansion; and
- approval of the costs of a capacity expansion.

Approval of the Scope and Standard

Consistent with the Authority's April 2005 decision, clause 12.5 proposes that the Authority accept the scope of the proposed capacity expansion if it is satisfied that the scope is consistent with the current approved Master Plan and the 60/60 requirement is met. In the event that DBCT Management is unable to meet the 60/60 requirement, clause 12.5 requires DBCT Management to justify to the Authority why the terminal should be expanded (DBCT Management, sub. no. 5: 29).

Clause 12.5 also provides for the Authority to assess the standard and specifications of the proposed works and all relevant contract terms to ensure that they do not involve any unnecessary works or contain design standards that exceed those necessary to comply with the construction standards of the terminal, as outlined in clause 12.1 of the PSA (DBCT Management, sub. no. 5: 28).

Approval of Expansion Costs

DBCT Management proposes two ways to seek the Authority's regulatory approval of capital expenditure.

First, and consistent with standard regulatory practice, DBCT Management may submit to the Authority for assessment a forecast capital expenditure program and budget that underpins proposed expansions at the terminal. Under this option, the Authority assesses the reasonableness of the forecast capital expenditure for tariff setting purposes for the impending regulatory period. At the end of the regulatory period, the Authority reviews actual capital expenditure undertaken and adjusts the regulated asset base such that only prudent capital expenditure is included. Clause 12.5 of the DAU details the criteria the Authority is to use to assess the prudency of capital expenditure (DBCT Management, sub. no. 5: 27-28).

Second, DBCT Management may seek to determine its expansion costs via a tender process. Under this option, DBCT Management is required to submit, for the Authority's approval, a proposed process for tendering and managing contracts for expansion works. In approving the tender process, the Authority must be satisfied that it:

- is in accordance with good industry practice;
- will generate an efficient and competitive outcome;
- will avoid conflict of interest or collusion amongst tenderers;
- is prudent in the circumstances of the capacity expansion project; and
- will avoid unreasonable exposure to contract variation claims.

Provided that tenderers are selected and contracts are awarded in accordance with the approved tender process, the Authority will accept the awarded contract amounts into the regulated asset base.

Recognising that costs can still escalate after a contract has been awarded, clause 12.5 provides controls against excessive and unreasonable exposure to contract variations and cost escalations post-award of a contract. In particular, the expansion approval process requires that, before the Authority approves any costs associated with contract variations into the asset base, the Authority must have regard to the following factors:

- whether adequate consideration was given to properly managing the risk of contract variations and/or escalations or allocation of potential risks during the awarding and management of the contract;
- whether the contract has been appropriately managed;
- whether the contract variations and/or escalations are appropriately justified; and
- whether the contract has been managed with a regard to a prudent balance between such matters as cost and minimising disruption to operating capacity during construction.

As a further control, DBCT Management must appoint, subject to the Authority's approval, an independent external auditor to certify that DBCT Management complies with the tender process. The auditor must also advise the Authority as to whether the contract variations and/or escalations have been handled in accordance with contract provisions.

Clause 12.5 also provides for the Authority to assess the prudency of those costs not subject to a tender process in accordance with standard regulatory practice; that is, after they have been incurred. However, in order to provide some certainty to DBCT Management as to how these costs will be treated, the Authority will, if requested by DBCT Management, undertake a preliminary assessment of the reasonableness of the categories of these costs (DBCT Management, sub. no. 5: 33-35).

Authority's Analysis

The Authority notes that the expansion approval process, as set out in clause 12.5 of the DAU, is supported by both DBCT Management and the DBCT User Group.

The Authority also notes that a key feature of the expansion approval process is that it provides DBCT Management with a significant degree of certainty as to how capital expenditure will be

assessed by the Authority. In particular, the expansion approval process provides for the Authority to accept into the regulated asset base, capital expenditure associated with a capacity expansion if DBCT Management can demonstrate, and the Authority is satisfied of, the following elements:

- the scope of the proposed expansion works is consistent with the current Master Plan (and any variations to the Master Plan approved by Holdings) and applicable laws;
- the 60/60 requirement has been complied with or the Authority accepts that the terminal should be expanded in accordance with the proposed works;
- the expansion works are tendered and managed in accordance with an approved tender and contract management process; and
- the standard and specifications of the expansion works do not involve any unnecessary works or design standards that exceed those necessary to comply with clause 12.1 of the PSA.

At the same time, however, the expansion approval process includes controls to ensure that only efficient and prudent expenditure is incurred in expanding the terminal.

The Authority believes that the expansion approval process provides an environment of regulatory certainty for current users and future access seekers. It also provides sufficient incentive for DBCT Management to invest and removes any regulatory impediment to expanding the terminal to meet user demand.

3.3 Unreasonable and Uneconomic Expansions

The PSA obliges DBCT Management to expand the terminal under certain circumstances. As a balance to this obligation, the PSA contains a number of clauses providing DBCT Management with the option of writing to Holdings to seek a delay or modification to an expansion if, after having regard to a number of factors, DBCT Management considers a capacity expansion to be unreasonable and uneconomic.

In addition to including these clauses from the PSA within its 2003 draft access undertaking, DBCT Management went further and sought to define the terms ‘unreasonable’ and ‘uneconomic’. These particular definitions, however, did not appear within the PSA.

A number of stakeholders objected to including these additional definitions in the undertaking. As a result, in its April 2005 decision, the Authority required these definitions be deleted from the undertaking.

In its resubmitted DAU, DBCT Management has removed these definitions but has retained the PSA clauses relating to unreasonable and uneconomic expansions (DBCT Management, sub. no. 5: 36).

Submissions on the DAU did not specifically address this issue.

Authority’s Analysis

The Authority understands that DBCT Management sought to define the terms unreasonable and uneconomic in its 2003 DAU to address uncertainty surrounding how capacity expansion costs would be approved by the Authority and included in the regulated asset base. Given there is now a clear process for approving capacity expansions, the Authority agrees with DBCT Management’s decision not to include these definitions within the DAU.

In relation to the unreasonable and uneconomic clauses more broadly, the Authority notes that these provisions are similar to those contained in the PSA. The Authority also notes that these provisions do not alter or impose any additional obligations on DBCT Management or Holdings beyond what is contained in the PSA. Moreover, these provisions do not impose obligations on third parties and do not seek to involve the Authority exercising any relevant statutory power. Consequently, the Authority does not believe it is necessary for the undertaking to include these clauses as they simply re-state existing contractual obligations.

4. REVENUE AND PRICES

The form of regulation, pricing structure and associated incentive mechanism should ideally promote economic efficiency, revenue adequacy and the public interest. In addition, they should also ensure that risks are allocated to those parties best able to manage them. In making its April 2005 decision, the Authority recognised that the principal risks in the case of DBCT are volume risk and capacity expansion risk associated with increasing demand.

The Authority sought to address these risks by adopting a revenue cap form of regulation that provided DBCT Management with revenue certainty regardless of actual volumes and users with increased certainty in regard to capacity expansions. The pricing structure for the terminal then simply sought to allocate volume risk amongst the users and, in doing so, sought to encourage users to contract at levels close to their future requirements and avoid systematic over- or under-contracting at the terminal.

During the course of the Authority's investigation into the 2003 DAU, there was considerable disagreement between all stakeholders on almost every aspect of the proposed pricing arrangements. As a result, the Authority's decisions, in particular the draft decision, were contentious.

Even by the time the Authority made its April 2005 decision, considerable uncertainty remained as to whether the Authority's proposed pricing arrangements could be implemented. In that decision, the Authority proposed a form of average cost pricing which required, by mutual consent, adjustments to all existing access agreements.

Despite this, in the period since the Authority's April 2005 decision, DBCT Management and the DBCT User Group have been able to agree, with only limited exceptions, on the future pricing arrangements to apply at the terminal. The pricing arrangements included in the DAU are substantially the same as set out in chapters 7 and 10 of the Authority's April 2005 decision.

As a result, this chapter focuses on those areas where there is not universal agreement on the proposed arrangements and where there is a significant departure from the pricing proposals in the April 2005 decision. Section 4.1 focuses on the Annual Revenue Requirement (ARR) while section 4.2 focuses on the pricing arrangements based on the ARR.

4.1 Annual Revenue Requirement

In its April 2005 decision, the Authority proposed an ARR based on:

- an opening asset value of $850 million (as at 1 July 2004);
- a return on equity of 11.84%;
- capital expenditure of around $30 million to increase the terminal's capacity to 59 mtpa;
- corporate overheads of around $6 million per annum;
- a pass-through of operating and maintenance costs; and
- a sharing of certain tax benefits between DBCT Management and the terminal's users.

Based on these components, the Authority's April 2005 decision reported an ARR for each year of the regulatory cycle based on both raw (i.e. actual) and smoothed revenue profiles (see Table 4.1).

Table 4.1: Authority's Annual Revenue Requirement

	2004-05 ($'000)	2005-06 ($'000)	2006-07 ($'000)	2007-08 ($'000)	2008-09 ($'000)	to 31 Dec 09 ($'000)
Return on Capital	77,271	78,242	79,585	79,391	79,045	38,470
less Inflationary Gain	21,249	21,514	21,882	21,824	21,723	10,735
plus Return of Capital	23,228	24,131	25,187	25,842	26,488	13,409
plus Corporate Overheads	5,809	5,930	6,055	6,182	6,313	3,196
plus Net Tax Allowance	3,421	3,618	3,809	4,122	4,479	2,327
Raw ARR	88,480	90,408	92,754	93,713	94,602	46,666
Smoothed ARR	87,310	89,493	91,730	94,024	96,374	48,786

Source: *Dalrymple Bay Coal Terminal Draft Access Undertaking: Final Decision (April 2005)*, p. 165.

In its revised DAU, DBCT Management accepted the ARR proposed by the Authority with two exceptions, which are discussed below.

Raw versus Smooth Revenue Profile

DBCT Management's revised DAU proposes an ARR based on the raw, rather than the smoothed, revenue profile. The DBCT User Group supported this approach, as significant capital works are expected to be undertaken during the term of the current undertaking, and the timing of these works cannot be accurately predicted (DBCT Management, sub. no. 5: Schedule C) (DBCT User Group, sub. no. 8: 2).

In conjunction with this approach, DBCT Management also proposed that the capital expenditure for the 'short gain' expansion of the terminal's capacity (54.5 mtpa to 59 mtpa) be excluded from the ARR and that the 'short gain' expansion be treated in the same manner as the capital expenditure for the remaining expansion stages; that is, the actual cost of the expansion would be included in the regulated asset base when the expansion was commissioned, and the ARR adjusted to reflect the increased asset value as at that date (DBCT Management, sub. no. 5: Schedule C).

Authority's Analysis

The Authority has no in principle concerns with the revised approach to determining the reference tariff on the basis of a raw revenue requirement. Indeed, the Authority accepts that it will be easier to recalculate a revenue cap based on the raw ARR when new works are commissioned.

Moreover, the Authority has no in principle concerns with treating the 'short gain' expansion in the same manner as other future expansions; that is, with the prudent cost of the expansion being incorporated into the regulatory asset base upon the commissioning of the expansion works.

Therefore, given that the proposals also have user support, the Authority accepts the proposed changes.

Revenue Timing

The Authority's April 2005 decision provided for a revenue cap based on an ARR which was calculated as an end-of-year amount.

Following the release of that decision, the DBCT User Group observed that the Authority's revenue modelling approach resulted in DBCT Management over-recovering its allowed revenues and claimed this amount to be in the order of $3 million to $4 million per annum, as the net present value of the actual revenues received progressively throughout the year would be larger than the end-of-year ARR determined by the Authority.

In the context of the revised undertaking, DBCT Management submitted that it does not agree with the DBCT User Group's position on this matter. Nevertheless, DBCT Management advised that a compromise position has been agreed, whereby DBCT Management and the users would split the claimed $3.32 million difference (DBCT Management, sub. no. 4: 2). However, the proposed compromise would only apply with respect to the current asset base and for the term of the current undertaking. This compromise is reflected in the revised undertaking, where the ARR has been adjusted downward by about $1.66 million per annum (i.e. $86.82 million for 2004-05) (DBCT Management, sub. no. 5: Schedule C).

Stakeholder Comments

With the exception of two of its members, the DBCT User Group supported this compromise position. In addition, the DBCT User Group requested that the Authority assess the impact of the timing of revenue payments in determining the ARR in the context of any expansion works or after the expiry of the current undertaking (DBCT User Group, sub. no. 8: 3).

Peabody Pacific and Anglo Coal did not support this compromise and submitted that the Authority should adjust the ARR by the full amount the users believe to be applicable (Anglo Coal, sub. no. 2: 3; Peabody Pacific, sub. no. 12: 2). When Peabody Pacific and Anglo Coal were given the opportunity to comment on the Authority's likely decision to reject their proposal, both declined to do so.

Authority's Analysis

The Authority acknowledges that its April 2005 decision did not take into account the timing benefit of the stream of cash flows over the course of a year. To do so could include either recalibrating the ARR to a point closer to the middle of the year or adjusting the working capital allowance. The precise nature of the adjustment may ultimately depend on the significance of any countervailing factors such as the timing of other cash flows, for example the pass-through of the operating and maintenance costs. There is, therefore, uncertainty as to the value of the revenue timing benefit.

Given this uncertainty, the Authority is prepared on this occasion to accept the compromise position between DBCT Management and the majority of users to reduce the ARR by $1.66 million to reflect the impact of the benefits associated with the timing of the payments of the terminal infrastructure charge.

At the same time, as the proposed compromise was for the current asset base/revenue and for the term of the 2006 access undertaking, the Authority's decision on this matter should not be seen as setting a precedent for its consideration of the issue of the appropriate treatment of other timing benefits.

4.2 Pricing Structure

While the revenue cap provides DBCT Management with certainty with respect to its cash flows on a year to year basis, the pricing proposals included in the Authority's April 2005 decision sought to provide incentives for DBCT Management to improve the efficient operation of the terminal and to allocate volume risks to the users, who are often the ones in the best position to manage those risks.

In doing so, the Authority either accepted the proposals of stakeholders or developed its own proposals in response to comments from stakeholders. In this regard, the April 2005 decision provided for a:

- *modified revenue cap* – provides DBCT Management with revenue certainty over volume outcomes and includes an incentive mechanism that allows DBCT Management to earn, and permanently retain, up to 2% above the revenue cap in a given year for initiatives demonstrated to improve capital productivity at the terminal;

- *take-or-pay model* – provides an incentive for users to adopt contractual commitments that more accurately reflect their expected usage patterns, with penalties applying to users that under- or over-ship with respect to contracted tonnage. For instance, a surcharge of 25% to incremental tonnes above 110% of contracted tonnage and an additional 25% to the incremental tonnes above 125% of contracted tonnage;

- *settlements mechanism* – balances any net under- or over- recovery of revenue by DBCT Management relative to the revenue cap at end-of-year. For instance, to the extent that excess charges result in an over-recovery of revenue, that excess revenue is returned to users in proportion to their contracted tonnage, subject to the operation of the 2% incentive threshold;

- *default risk* – DBCT Management assumes full responsibility for, and non-defaulting users are not penalised for, outstanding access revenue of a defaulting user; and

- *reference tariff review event* – triggers a reassessment of the reference tariff such that there is flexibility to deal with aspects of the undertaking that are subject to change (e.g. aggregate reference tonnage).

As an access undertaking sets out the framework for negotiating future access agreements, it does not seek to rewrite existing access agreements. Consequently, the pricing proposals in the Authority's April 2005 decision would not automatically apply uniformly across all users of the terminal. To do so would require the mutual consent of DBCT Management and all users of the terminal. Consequently, the Authority's April 2005 decision also outlined a fall back position in the event that some or all current agreements were not modified.

DBCT Management's revised DAU aligns closely with the approach set out in the April 2005 decision. For instance, the revised DAU retains a modified revenue cap, a penalty structure for over-shipments and defined triggers for reference tariff reviews.

While the fundamental principles underpinning the Authority's approach remain unchanged, the undertaking modifies certain aspects of the approach, principally to provide greater clarity and ease of implementation. For instance, DBCT Management still bears responsibility for the default risk but rather than this being set out in a complex pricing formula, the DAU now addresses this issue primarily through the definitions.

In its April 2005 decision, the Authority proposed a form of average cost pricing whereby all users would pay a common terminal infrastructure charge based on reference tonnage reflected

in both existing and new user agreements. This proposal effectively meant that DBCT Management and existing users would need to agree to alter the terms and conditions of existing contracts to reflect the revised pricing structure, if existing users were to participate in this common pricing.

The resubmitted undertaking is broadly consistent with the Authority's April 2005 decision, as it provides for:

- existing users and DBCT Management to agree (but not be obliged) to move to new agreements following the Authority's approval of an undertaking;
- a revenue cap that encompasses reference tonnages; that is, existing user agreements modified to align with the approved pricing structure and new contracts reflecting the provisions of the SAA; and
- where a user has opted not to modify the terms of its existing agreement to align with the DAU, that user's tonnages would fall outside the revenue cap. In these circumstances, that user's charge would be determined separately.

The Authority understands that DBCT Management and existing users are likely to agree to migrate to access agreements reflecting the pricing structure proposed in the undertaking.

The principal change from the Authority's April 2005 decision relates to the take-or-pay element of the pricing structure. Specifically, the revised model provides that each user makes constant monthly payments to DBCT Management (at the rate of the terminal infrastructure charge) equal to one-twelfth of that user's annual reference tonnage regardless of the volume of coal actually shipped in each month. Users, therefore, pay their take-or-pay liabilities to DBCT Management on a monthly 'pay-as-you-go' basis such that, by the end of the financial year, DBCT Management has fully recovered its revenue.

As this change allows DBCT Management to recover its revenue progressively throughout the year:

- the take-or-pay penalties for under-shipment of tonnage are unnecessary and have been removed from the revised take-or-pay arrangements;
- the settlements mechanism has been modified to be consistent with this approach; and
- the provision for interest (at the WACC rate) on any 'unders and overs' has been removed.

These modifications are primarily reflected in a number of changes to the definitions and formulas applied for pricing purposes in Schedule C.

Stakeholder Comments

The DBCT User Group generally supported the revised pricing structure and considered that, on balance, the changes to the take-or-pay model and settlements mechanism reflect a fair and simple structure that is easy to understand and administer (DBCT User Group, sub. no. 8: 3).

While supportive of other aspects of these arrangements, Peabody Pacific noted that the penalties for over-shipments are a disincentive to those users who can quickly make shipments to meet shortfalls by other users that are unable to meet their commitments (Peabody Pacific, sub. no. 12: 3). When Peabody Pacific was given the opportunity to comment on the Authority's likely decision to reject their proposal, it declined to do so.

Authority's Analysis

The Authority's April 2005 decision set out a pricing structure based on a number of principles. While the revised DAU proposes changes to that pricing structure, the Authority considers that these changes are consistent with the principles in that decision. Moreover, the Authority notes that the proposed changes are principally for the purpose of improving the transparency and administration of the preferred arrangements.

While Peabody Pacific argued that the proposed penalty structure for over-shipments acts as a disincentive to those users who over-ship, the Authority notes that periodic over-shipment is unlikely to incur penalties, as the excess tonnages are unlikely to exceed 110% of contracted tonnage. In the case of consistent over-shipments, however, the Authority considers that these should occur either on a contractual basis with DBCT Management or through secondary trading with other users. To do otherwise is inconsistent with the broadly agreed principle that users should seek to align their contractual commitments with expected actual usage. Indeed, this principle is the basis of the take-or-pay model, and any penalties incurred for over-shipment reflect this incentive-based approach.

On this basis, the Authority sees no reason to alter the proposed penalty structure and accepts the revised pricing arrangements, as they reflect the principles in the Authority's April 2005 decision.

5. OTHER ISSUES RELEVANT TO THE UNDERTAKING

5.1 Lodgement and Enforcement of the Undertaking

The Authority's April 2005 decision identified deficiencies in the QCA Act in enforcing a breach of an approved access undertaking. This was because, while most access obligations in the DAU were held by DBCT Management, the QCA Act only allowed an undertaking to be enforced against the owner of the terminal (i.e. Holdings).

Following the release of the April 2005 decision, on 23 September 2005, the QCA Act was amended, including a revision to the definition of responsible person to reflect 'the person to whom the undertaking applies as an owner or operator of the relevant service'. This amendment provided for an undertaking to be submitted by either the owner (Holdings) or the operator (DBCT Management) of the facility.

On 21 October 2005, the Authority issued an initial undertaking notice requiring DBCT Management to provide the Authority with a DAU relating to DBCT by 19 January 2006. DBCT Management subsequently submitted the DAU in its own right as the operator under the QCA Act. This follows Holdings' consent to relieve DBCT Trustee (the primary lessee of the terminal) and DBCT Management (the secondary lessee of the terminal) of their obligations under the PSA to lodge the undertaking on behalf of Holdings.

Stakeholder Comments

The DBCT User Group considers Holdings should be a joint party so that it is bound by the access undertaking together with DBCT Trustee and DBCT Management.

Conversely, Holdings has indicated that it was inappropriate for Holdings to lodge its own undertaking (Holdings 2005). Holdings considers the government's intention was that, by virtue of the structure of the PSA, DBCT Management as the lessee and 'access provider' be regulated by the Authority under the QCA Act, rather than by prescriptive contractual provisions. Holdings also submitted that, in a practical sense, it does not provide access to the services of DBCT and that it is merely a landlord of DBCT Management.

In addition, Holdings is of the view that it does not have the power to direct DBCT Management on the manner in which it operates the terminal or provides access to it, other than its limited rights under the PSA relating to, among other things:

- enforcing expansion of the facility to meet demand and observance of certain 'access principles'; and
- a general obligation on DBCT Management to 'optimise the efficiency of the coal chain'.

On this basis, Holdings does not consider it appropriate that it be a party to any resubmitted DAU.

Authority's Analysis

The Authority notes that the QCA Act amendments expand the definition of 'responsible person' to include both the owner and operator of the terminal. This enables the undertaking to be enforced directly against DBCT Management as the access provider and the party that holds the access obligations in the DAU.

However, the Authority also considers that Holdings' obligations and responsibilities in relation to DBCT are not entirely passive in nature. In particular, the Authority notes that there is a range of provisions in the PSA through which Holdings can impact on the operation of an approved undertaking, including:

- *Clause 7.1* – provides that the Operation and Maintenance Contract (OMC) for the terminal cannot be amended without Holdings' approval;
- *Clause 11.4* – provides that if DBCT Trustee fails to expand the terminal in accordance with clauses 11.1 and 11.2 of the PSA, Holdings may undertake an expansion;
- *Clause 11.8* – provides Holdings with the power to temporarily delay the expansion or development of DBCT on the grounds that strictly complying with Clause 11 of the PSA would be unreasonable and uneconomic;
- *Clause 13.4* – provides that Holdings must approve the Master Plan for DBCT;
- *Clauses 14.4/14.6* – provide that Holdings must approve any environmental strategy for DBCT; and
- *Clauses 17.1/17.2/17.4* – provide Holdings a power of entry and step-in in an emergency. Under these circumstances, Holdings would take on some of DBCT Management's obligations and this could potentially include discharging the obligations under the undertaking.

It is therefore evident that Holdings can have a significant influence on the availability and terms and conditions of access to the terminal.

In this context, the Authority understands that, in the event of a breach, the undertaking is enforceable against both DBCT Management and Holdings, depending on which party is in breach. Despite this, joint submission of the DAU by DBCT Management and Holdings would have put the matter of enforceability against either or both parties beyond doubt. However, the Authority is not prepared to reject the DAU simply because it is submitted by DBCT Management in its own right.

5.2 Terminal Regulations

Terminal regulations are an important element of the access regime as they set out, in an operational sense, the terms and conditions of access to the terminal. If applied in a discriminatory manner, the potential exists for the terminal regulations to form a barrier to entry to the declared service.

The Authority's April 2005 decision therefore sought to protect the interests of current and potential users by providing balanced obligations for proposed changes to terminal regulations. The Authority's amendments included:

- imposing an obligation on DBCT Management to comply with the terminal regulations;
- imposing an obligation on DBCT Management to use its best endeavors to ensure that DBCT Pty Ltd complies with the terminal regulations, subject to the OMC[8];

[8] The OMC defines the contractual arrangements between DBCT Management and DBCT Pty Ltd in relation to the day-to-day operation and maintenance of the terminal.

- requiring DBCT Management to consult with access seekers and holders prior to implementing or consenting to any proposed changes to terminal regulations;

- allowing access seekers and holders to notify DBCT Management of a dispute in relation to any proposed changes to the terminal regulations;

- preventing DBCT Management from implementing a proposed amendment until the outcome of any dispute has been determined. However, DBCT Management could implement, on an interim basis and pending the resolution of a dispute, an amendment reasonably necessary to deal with an emergency or force majeure event;

- obliging DBCT Management to use its best endeavours to ensure that DBCT Pty Ltd applies the terminal regulations in a manner that does not prevent or hinder a user's access to the terminal; and

- requiring DBCT Management to acknowledge that a failure to comply with the above obligation will amount to conduct which itself constitutes preventing or hindering of a user's access to the terminal for the purpose of ss.104 and 125 of the QCA Act.

The Authority considered these latter two provisions to be necessary as, if DBCT Pty Ltd applies the terminal regulations in a discriminatory manner, no action may be available under ss.104 and 125 because these provisions only relate to the conduct of the access provider (i.e. DBCT Management).

DBCT Management's resubmitted DAU accepts some aspects of the Authority's April 2005 decision. In particular, the consultation provisions prior to implementing or consenting to a proposed amendment are broadly retained as is the obligation on DBCT Management to use its best endeavours to ensure that DBCT Pty Ltd complies with the terminal regulations. However, the resubmitted DAU also seeks to amend the outcomes of the Authority's April 2005 decision, including by:

- making DBCT Management's obligation to comply with the terminal regulations subject to the OMC;

- limiting review of the terminal regulations to circumstances where an amendment to the terminal regulations has been made and is awaiting DBCT Management's consent;

- introducing a requirement that access holders or access seekers must reasonably consider that an amendment will not operate equitably before being entitled to object to that amendment;

- allowing DBCT Management to consent to any terminal regulations that are in dispute, not merely interim amendments reasonably necessary to deal with an emergency or force majeure, though any such amendment will subsequently lapse if the Authority determines it will not operate equitably;

- limiting an access holder's or access seeker's rights to request a review of a decision by the Authority to circumstances where the relevant access holder or access seeker has first made a request to DBCT Management not to consent to the amendment; and

- removing DBCT Management's obligation to use its reasonable endeavours to ensure that DBCT Pty Ltd does not apply the terminal regulations in a manner that constitutes conduct for the purpose of preventing or hindering access seekers' access to the terminal.

Under the resubmitted DAU, the Authority would also not be in a position to take action against DBCT Management if DBCT Pty Ltd was to apply the terminal regulations in a discriminatory manner unless this involved DBCT Management:

- acting in bad faith in consenting to an amendment to the terminal regulations; or
- consenting to an amendment to the terminal regulations where it is of the opinion that these would operate inequitably.

Authority's Analysis

The Authority accepts that the effective operation of terminal regulations is put at risk if a particular user uses the dispute process to frustrate a change that is in the interests of overall terminal efficiency. The Authority's April 2005 decision therefore sought to address this risk by providing for DBCT Management to implement, on an interim basis, pending the resolution of the dispute, an amendment to the terminal regulations that is reasonably necessary to deal with an emergency or force majeure event.

The Authority notes that the resubmitted DAU builds on this provision and provides DBCT Management with additional flexibility to implement changes to terminal regulations. The Authority accepts that these provisions further reduce the potential for a minority of users to frustrate a change to terminal regulations that are in the interests of all users. However, it is apparent that the provisions also restrict the scope for users to lodge bona fide objections in respect of terminal regulations. As such, the DAU moves away from the terminal regulation framework proposed by the Authority in its April 2005 decision.

The Authority notes that, to some extent, the DAU seeks to balance the additional flexibility provided to DBCT Management with controls to ensure that amendments to terminal regulations are not applied in a discriminatory manner. In particular, the DAU provides that DBCT Management may be liable to the Authority for changes to terminal regulations where it was acting in bad faith or where it consented to an amendment to terminal regulations where it is of the opinion that these may operate inequitably.

While these amendments do not provide the same level of controls against the discriminatory operation of terminal regulations, the Authority accepts that, in a broader sense, terminal regulations operate across all users. Therefore, they are unlikely to be applied in a discriminatory fashion against existing or potential new users.

Moreover, to the extent that they would be applied in a discriminatory manner, the terminal's operations will remain subject to Part IV of the *Trade Practices Act 1974* (TPA). The requirements of the TPA will apply to all parties and are not limited simply to the access provider as is the case in terms of Part 5 of the QCA Act. It is also evident that all parties are aware of these requirements given the recent authorisation of the ship queuing arrangements by the Australian Competition and Consumer Commission.

Given these circumstances, and the fact that the changes are supported by the users, the Authority does not object to the proposed terminal regulation framework in the resubmitted DAU.

5.3 Reporting by DBCT Management

The Authority's April 2005 decision required DBCT Management to report certain financial information to the Authority on an annual basis. In addition, the decision set out DBCT Management's public reporting requirements, both in terms of its compliance with its undertaking and the terminal's operational and service quality performance; that is, key

performance indicators (KPIs) of the terminal. The KPIs proposed by the Authority in its decision were largely based on those developed and proposed by DBCT Management in consultation with users.

Clause 10.1 of the resubmitted DAU is consistent with the April 2005 decision as it obliges DBCT Management to report specific financial information so the Authority can monitor matters such as revenue and capital expenditure. Similarly, clause 10.2 of the resubmitted DAU is also consistent with the decision to the extent that it obliges DBCT Management to publicly report on various compliance indicators (e.g. the timeliness of providing an IAP and the average length of the access negotiation period).

However, in terms of operational and service quality reporting, the resubmitted DAU does not include specific KPIs. Rather, both DBCT Management and the DBCT User Group indicated they wished to revise the April 2005 decision's proposed set of KPIs to improve their practicality and relevance for DBCT. To this extent, the resubmitted DAU includes a clear obligation (clause 10.3) on DBCT to publicly report on service quality KPIs for the terminal as agreed between DBCT Management, access holders and the Authority from time to time.

Subsequent to the lodgement of the 2006 DAU, DBCT Management advised the Authority it had reached agreement with DBCT Pty Ltd and representatives of the DBCT User Group on the performance dimensions and associated KPIs to be reported. In particular, DBCT Management proposes to report quarterly on nine performance dimensions, including inloading, stockyard, outloading, blending, vessel queues and utilisation of terminal capacity. A number of proposed KPIs are associated with each performance dimension (DBCT Management 2006b).

The Authority understands that these performance dimensions and associated KPIs were jointly developed and agreed to by DBCT Management, DBCT Pty Ltd and users of the terminal. On this basis, the Authority accepts the proposed KPIs, subject to DBCT Management providing, to the Authority's satisfaction, further information on the definitions and methodology behind each KPI.

6. STANDARD ACCESS AGREEMENT

DBCT Management included a SAA as part of its resubmitted DAU for DBCT. An approved SAA will form part of the undertaking.

The purpose of the SAA is to provide greater certainty for both DBCT Management and access seekers by setting out in detail the various rights and obligations of contracting parties. Its aim is to provide a template or a starting point for parties to negotiate access. It should also be noted that an access seeker and DBCT Management are free to agree to terms and conditions that differ from those contained in a SAA. However, in the event of a dispute, the terms of the SAA would limit the scope of any dispute and the Authority's decision in resolving a dispute. This is because the QCA Act requires that the Authority must not make a decision that is inconsistent with the terms of an approved undertaking.

The Authority's April 2005 decision included a set of principles to guide the development of a SAA. The Authority has examined the submitted SAA and has formed the view that it broadly embodies the principles outlined in the Authority's April 2005 decision. Further, as the SAA has been agreed with the DBCT User Group, the Authority accepts the impact on these parties where the SAA diverges from the key principles outlined in the Authority's April 2005 decision.

In particular, the Authority notes the SAA is broadly consistent with the principles set out in the Authority's April 2005 decision, including in relation to:

- *recording of tonnage* – sets out the obligations of access holders for the recording of coal tonnage handled. While the SAA does not include some specific requirements in relation to disputed accounts, the dispute resolution processes in the DAU provide a forum to resolve such issues;

- *the shipping of coal (other than in relation to terminal regulations)* – provides the general framework for handling users' annual contracted tonnage through the terminal. The Authority notes the removal of the requirement for access holders' annual reference tonnage to be no less than 80% of annual contract tonnage. However, the Authority does not oppose this change, as this provision was originally included as a risk management mechanism for DBCT Management and parties have subsequently accepted its exclusion from the SAA;

- *payment of charges and rebates* – provides for access charges, including the terminal infrastructure charge, additional charges for excess tonnage and end-of-year adjustments;

- *operation and maintenance charges* – provides principles for assessing operation and maintenance charges, comprising fixed and variable handling charges and a miscellaneous services charge. While the proposed SAA does not include the principle that DBCT Management and the relevant user must agree on reasonable charges for additional miscellaneous services, the SAA provides for DBCT Pty Ltd to determine such reasonable costs. As DBCT Pty Ltd, is owned by a subset of users, and all users have a right to become owners, the Authority does not oppose this change;

- *review of charges* – provides for the amendment of access charges in line with changes to approved reference tariffs and for such amendments to apply retrospectively;

- *assignment* – provides for an access holder to assign all, or part, of its rights and entitlements under its agreement, as well as to permit a third party to ship coal through the terminal, with the consent of DBCT Management which is not to be unreasonably withheld;

- *dispute resolution* – provides for compulsory negotiation and conciliation, followed by optional arbitration;
- *guarantees* – provides for DBCT Management to request guarantees from an access holder to secure the obligations of an access holder to DBCT Management and provides for a review, if requested, of such guarantees;
- *expansion of terminal* – provides for DBCT Management to consult with access holders prior to expanding the terminal and to expand the terminal with minimal interference. The resubmitted SAA complies with these requirements;
- *access holder committee* – provides that the DBCT Management and the access holder will agree to participate in an access holder committee to discuss matters relating to the terminal. The submitted SAA provides for a "User Committee and Improvement Program" which provides a forum for consultation among all participants on matters relating to the terminal;
- *warranties* – provides that DBCT Management will maintain, at a minimum, terminal components to their rated design capacity; and
- *changes to Annual Contract Tonnage* – provides for an access holder to reduce its reference tonnage providing it gives DBCT Management five year's notice of the extent and period of the required reduction.

The Authority notes that some aspects of the SAA, such as terminal regulations and creditworthiness, have broader public interest implications and, as a result, gave particular attention to these aspects of the SAA as part of its broader assessment of the DAU.

The following discussion therefore focuses on the two issues that were of more concern to users, namely minimum term of access agreements and remedies.

6.1 Minimum Term of Access Agreements

The Authority's April 2005 decision provided that one of the 'reference terms' in the SAA principles was that the minimum term of an access agreement is 10 years. This was because the Authority recognised that long term access contracts provide DBCT Management with considerable revenue certainty and were consistent with past practice at the terminal.

However, the Authority's April 2005 decision also provided that it was open for the parties to negotiate a divergence from the reference terms.

The resubmitted DAU proposes that an access agreement, which necessitates a capacity expansion, be for a period of 10 years. In addition, it specifies that an access agreement for an existing mine may be for any term but:

- if it is less than 5 years, that term and the relevant tonnages must correspond with the expected remaining life of that mine; and
- no option to extend the term may be granted under the access agreement if the term is for less than 10 years.

The resubmitted DAU also provides that, for a new mine, an access agreement may be for any term, but there is no option to extend the term of the access agreement if it is less than 10 years. Moreover, where the term for a new mine is less than 5 years, DBCT Management will have the right to terminate it on not less than 12 months notice if:

- during that term, DBCT Management executes an access agreement for a period in excess of 5 years; and

- DBCT Management would have been unable to execute the new access agreement without a capacity expansion of the terminal, if the access agreement for the shorter period had not been terminated.

Authority's Analysis

The Authority supports DBCT Management's changes to the revised undertaking in respect of the minimum term of access agreements. This is because, while the changes provide for access agreements to be for 10 years, they provide flexibility for agreements to be for a lesser period, subject to some limitations.

In respect of existing mines with varying remaining lives, the resubmitted DAU provides access holders with the flexibility to contract for terms less than 10 years. This will help avoid asset stranding as the duration of an access agreement for an existing mine can be tailored to match the expected life of an existing mine.

In respect of new mines, the resubmitted DAU also provides access seekers the flexibility to contract for terms less than 5 years. While such an agreement can be terminated by DBCT Management in particular circumstances, the Authority considers that this provision provides a reasonable trade-off between risk and flexibility for an access seeker. It also does not preclude an access seeker in respect of a new mine seeking to contract for a term greater than 5 years.

6.2 Remedies

DBCT Management's 2003 draft access undertaking provided a series of remedies for access holders and DBCT Management where a delay is caused by either party. That is, what amounts an access holder can recover and what amounts DBCT Management can charge in the event of a delay on the part of the other party.

In its 2003 DAU submission, DBCT Management argued that the remedies proposed reflected those that are contained within the current user agreements. In particular, the principles proposed that an access holder may only recover amounts which DBCT Management recovers from its insurers, DBCT Pty Ltd and third persons (or their insurers).

In its April 2005 decision, the Authority expressed reservations as to whether these principles were commercially balanced and appropriate. That is, they appeared to have the effect of significantly limiting DBCT Management's liability even in circumstances where DBCT Management failed to deliver on its contractual commitments to provide access.

While the Authority did not seek to amend the remedies principles proposed by DBCT Management, in the interests of facilitating the development of a SAA, the Authority suggested that any future SAA should:

- include provisions setting out liabilities in the event of a delay or failure to provide access;

- set out the obligations and liabilities of the parties in the case of a force majeure event;

- provide for insurances to be effected by the parties to appropriately provide for the relevant insurable risks; and

- include provisions setting out the indemnities and liabilities of the parties with respect to product risk at the terminal; liability for breach, negligence or intentionally wrongful act or omission; and liability arising from inaccurate scheduling information.

Extent of Liability

The submitted SAA provides that users' remedies against DBCT Management relate to circumstances of permissible delays, force majeure and wilful default. In addition, the SAA also provides remedies in other circumstances where, subject to dispute resolution, users are required to continue to pay all relevant access charges until dispute resolution determines responsibility for the delay, in which case DBCT Management's liability is limited to:

- the amount recoverable from third parties, including DBCT Pty Ltd or an insurer; plus
- in relation to any shortfall, the user's direct loss in respect of the delay, subject to capping, where it is determined that DBCT Management was at least 66% responsible for the delay.

Moreover, where a delay is caused by wilful default by DBCT Management, users will be relieved of their payment obligations and may terminate their access agreements with DBCT Management and sue DBCT Management for damages due to breach of contract.

In relation to DBCT Management's remedies, the submitted SAA provides that, to the extent that a user is responsible for a delay, DBCT Management's remedies will be limited to its entitlement to payment of the charges under the access agreement.

The SAA also provides that, where loss, damage or destruction occurs in respect of the terminal, DBCT Management must, *inter alia*, promptly claim and apply all relevant insurance proceeds towards reinstatement of the damaged property subject to a number of factors.

Long Term Delays

In the event of long term delays, where terminal capacity, on a sustained basis, is less than 95% of aggregate annual contract tonnage, the submitted SAA provides for DBCT Management to, *inter alia*, undertake an expansion sufficient to eliminate the shortfall.

Moreover, the submitted SAA provides that a user may terminate its access agreement if the capacity of the terminal on a sustained ongoing basis is reduced to 10% or less of the aggregate annual contract tonnage and the reduction is not attributable to a user and DBCT Management does not (within a reasonable time) proceed with works necessary to reinstate terminal capacity.

Force Majeure

In its 2003 DAU submission, DBCT Management submitted that the principle of force majeure should be treated in the same way as in current user agreements. That is, if an access holder fails to offer its tonnage due to 'force majeure' circumstances, the current users' agreements provide for the access holder to be liable to pay take or pay charges.

Where, however, a force majeure event affects the terminal or facilities provided by DBCT Management, the Authority noted this was not an event of force majeure affecting the access holder. Rather, it was an event of force majeure affecting DBCT Management because it is preventing DBCT Management from providing the services which it has contractually undertaken to provide. As a result, the Authority questioned whether DBCT Management should be entitled to take or pay charges for force majeure events unless it has acted prudently.

DBCT Management submitted that, to the extent the Authority envisages DBCT Management retaining some liability for force majeure, it should be compensated in the cash flows as this risk is asymmetric in nature – either through an imputed insurance premium, actual insurance

premium or actual cost of the event should it not be feasible or consistent with good management practice to insure against such an event.

In the interests of facilitating future discussion in the context of developing the SAA, the Authority requested stakeholders to consider whether an alternative treatment of force majeure, including an alternative allocation of risks, would be more appropriate for future access agreements.

Following negotiations between DBCT Management and users, the submitted SAA provides that, if DBCT Management is affected by a force majeure event, DBCT Management's affected obligations under the Agreement will be suspended only to the extent that it uses all reasonable efforts including the reasonable expenditure to mitigate the effect of the force majeure event and keeps the users informed of the steps being taken to mitigate the effect. However, users' obligations to pay the charges in Clause 4 will not abate.

Authority's Analysis

The Authority's April 2005 decision sought to ensure that any submitted SAA for DBCT provided clarity in relation to remedies. In this respect, the Authority notes that two of the four matters raised by the Authority have been explicitly included in the SAA.

In particular, the submitted SAA includes provisions setting out liabilities in the event of a delay or failure to provide access. It also sets out the liabilities of the parties in the case of a force majeure event.

However, the SAA does not provide for insurances to be effected by parties to provide for relevant insurable risks, nor does it set out broader provisions in relation to indemnities or liabilities of the parties.

The Authority notes that the provisions in relation to delays and long term delays represent an improvement on existing user agreements. The Authority also believes the inclusion of provisions allowing users to terminate their access agreements where long term delays are not rectified or where delays are caused by wilful default by DBCT Management result in a more commercially balanced SAA.

The submitted SAA is also an improvement on the existing access agreements in that it sets out provisions relating to force majeure. The SAA provides that, in relation to force majeure, DBCT Management's obligations under the SAA shall only be suspended (without it being in default) to the extent that DBCT Management uses all reasonable efforts to mitigate the effect of the force majeure upon its performance and keeps the users informed of the steps being taken to mitigate the effect upon terminal performance.

The SAA does not provide for insurances to be effected by the parties to appropriately provide for the relevant insurable risks. DBCT Management advised that they did not consider it necessary for users to take out insurance as the majority of the risk at the terminal lies with DBCT Pty Ltd who is already obliged to take out insurance under the OMC.

Users agree with DBCT Management that most risks relate to operational risks and note that DBCT Pty Ltd is required to take out insurance under the OMC. Users also did not support DBCT Management insuring against the possibility of a force majeure event at the terminal. In this regard, users noted that they will bear these costs in any event – either through delays at the terminal due to a force majeure event or through an adjustment to access charges to reflect the cost of DBCT Management's insurance premiums. As a result, users preferred to 'self-insure' for such circumstances by continuing to pay the access charges if and when a force majeure

event occurs. The users considered this latter approach preferable given the complexities and uncertainties in making an insurance claim.

Finally, in relation to the Authority's recommendations relating to provisions setting out indemnities and liabilities of the parties with respect to a range of risks, the Authority accepts the decision of DBCT Management and the users to rely on the operation of normal common law remedies unless the contrary was stated.

The Authority accepts that the remedy provisions contained within the SAA are well reasoned and have been negotiated, and agreed to, by DBCT Management and the DBCT User Group and do not appear to operate in a discriminatory manner against potential new users of the terminal. On this basis, the Authority does not oppose their inclusion in the SAA.

LIST OF SUBMISSIONS

Organisation	*Submission Number*
AMCI	1
Anglo Coal	2, 3
DBCT Management	4, 5, 6, 7
DBCT User Group	8
Foxleigh Mining Pty Ltd	9
MacArthur Coal Pty Ltd	10, 11
Peabody Pacific	12, 13
Rio Tinto Coal Australia	14, 15
Xstrata Coal	16

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— 3 January 2006. ***User Agreement*** (*submission no.6*).

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